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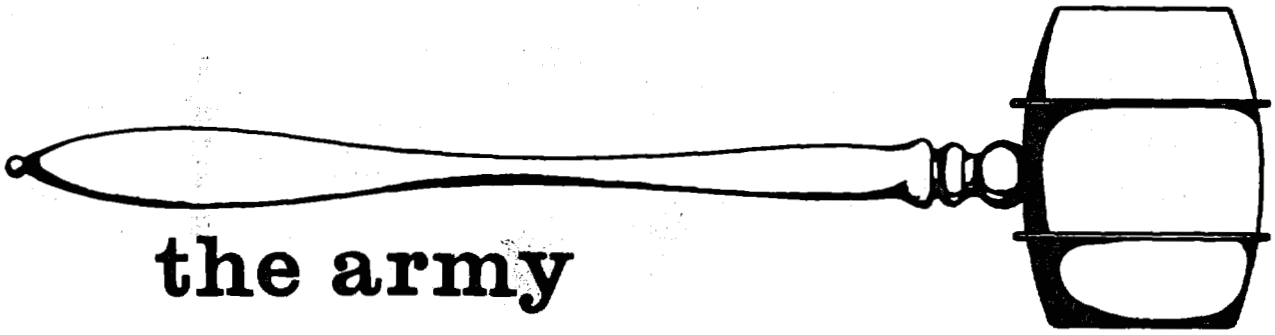

the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-122

February 1983

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Annual Compilation of Policy Letters of The Judge Advocate General 1982

In November 1981, The Judge Advocate General initiated a system of policy letters through which guidance was transmitted to members of the Judge Advocate General's Corps in the field. In 1982, seven such policy letters were issued. For the benefit of attorneys who have come on active duty in the JAGC since the initiation of the policy letter system, and as a handy reference for others, the seven 1982 policy letters, including two not heretofore published in *The Army Lawyer*, are reprinted in this issue. Those policy letters are:

Policy Letter 82-1 .... The "LEAN" Program
Policy Letter 82-2 .... Army Claims Program
Policy Letter 82-3 .... Processing Medical Malpractice Claims
Policy Letter 82-4 .... Trial Counsel Assistance Program (TCAP)
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Policy Letter 82-7 .... Medical Care Recovery Program

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

REPLY TO ATTENTION OF

DAJA-ZX

5 February 1982

SUBJECT: The "LEAN" Program - Policy Letter 82-1

ALL JUDGE ADVOCATES

1. The "LEAN" (Lose Excess Avoirdupois Now) Program implements my basic policy on physical fitness and weight control as expressed in Policy Letter 81-2.

2. SJA's/supervisors will insure that overweight JAGC personnel are enrolled in a medically supervised weight control program with definite interim goals designed to achieve AR 600-9 standards within a reasonable period of time. Overweight individuals will report their progress to their SJA/supervisor on the first workday of each week. On the first workday of each month, beginning 1 April 1982, overweight individuals will submit a written report on their progress to their SJA/supervisor, with an explanation of any failure to meet interim goals of their weight reduction program. The SJA/supervisor will indorse these letters through technical channels to the Executive, OTJAG. The indorsement will include corrective measures taken by the SJA/supervisor where the weight reduction progress is unsatisfactory.

3. All JAGC personnel will parricipate in a regular PT program. Individuals with physical limitations will consult a physician and initiate a PT program compatible with those limitations and medical advice. In addition, all medically qualified JAGC personnel will participate in semi-annual PT tests as required by AR 600-9. SJA's/supervisors will report the names of personnel who fail to pass the test, with a description of that individual's remedial PT program, through technical channels to the OTJAG Executive. Individuals age 40 and over will be medically cleared in compliance with AR 40-501 prior to participating in any physical fitness program or testing.

4. For the most part, the physical condition and appearance of our JAGC personnel are outstanding. I fully expect that the few individuals who do not meet these standards will make significant strides toward achieving them. My goal is for a Corps of "LEAN," physically fit officers.

5. This management information requirement is exempt from control under paragraph 7-2aa, AR 335-15.

6. The "LEAN" program will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen
HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

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

REPLY TO ATTENTION OF

JACS-Z

26 FEB 1982

SUBJECT: Army Claims Program - Policy Letter 82-2

ALL JUDGE ADVOCATES

1. The Army claims program is increasing in size and complexity. Judge advocates at all levels of command must devote sufficient time and personnel resources to insure that the program continues to be responsive to the Army's needs. The proper selection, training and supervision of claims personnel are critical to a successful program.

2. The investigation and processing of serious tort-type incidents require serious attention. Unless those incidents are handled with professional skill, and in accordance with the regulatory requirements (e.g., paragraph 2-4d, AR 27-20), significant financial interests of the Government may be neglected. It is particularly important that the required investigation be conducted personally by an attorney when the claim is in the amount of $5,000 or more.

3. Another important function of any judge advocate office is the payment of claims of service members. Like legal assistance, it is a program where we can have a real impact on the quality of life of the good soldier. We must make certain that personnel claims are settled in a fair and prompt manner. Full use of the small claims procedure will expedite settlement of such claims. Closely related to the settlement of personnel claims is the Government carrier recovery program. This program is essential in that it saves Government funds and it provides an incentive to the carrier industry to exercise care in Government moves.

4. I expect each of you to devote the time and effort required to implement your claims program successfully. Your program will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

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

REPLY TO ATTENTION OF
JACS-GC

APR 16 1982

SUBJECT: Processing Medical Malpractice Claims - Policy Letter 82-3

ALL JUDGE ADVOCATES

1. Records of the U.S. Army Claims Service disclose that medical malpractice claims have increased substantially. Significant efforts have been directed towards the development of effective procedures controlling the investigation and processing of incidents that generate these type claims. Total compliance with those procedures is vitally important to the success of the Army Claims program.

2. The informed disposition of medical malpractice claims, with the required protection of the Government's financial interest, can best be accomplished by implementation of an intelligent, practical risk management program. Experience has shown that the most successful programs are those where the local staff judge advocate becomes personally involved; expresses his support for the program to the medical commander; insures prompt and complete investigation of incidents, whether or not a claim has been filed; and reviews, on a continuing basis, important claims incidents as they occur. The responsibility for handling complex, serious medical malpractice claims and evaluating these situations requires competent, experienced attorneys to conduct the investigation and process the claim. I wish to emphasize that such assignment should receive priority treatment. I am advised that this is not being complied with in many instances.

3. The Surgeon General of the Army has expressed his deep interest and continued support in effecting all practical improvements and efforts to develop the best possible solution to our mutual problem.

4. Your medical malpractice claims program will be an item of interest during Article 6, UCMJ, inspections.

Hugh R. Overholt

HUCH R. OVERHOLT
Major General, USA
Acting The Judge Advocate General

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

REPLY TO ATTENTION OF

DAJA-ZX

JUN 0 9 1982

SUBJECT: Trial Counsel Assistance Program (TCAP) - Policy Letter 82-4

ALL JUDGE ADVOCATES

1. On 1 August 1982 the Trial Counsel Assistance Program will begin operating under the aegis of Government Appellate Division. Its purpose is to provide advice to and training for trial counsel, thereby improving the quality of advocacy on behalf of the Government.

2. TCAP will provide numerous services for trial counsel. First, TCAP will present biannual regional seminars within CONUS to enhance the advocacy skills of trial counsel. Second, TCAP will review records of trial and furnish critiques of trial counsel performance to designated personnel of your office. Third, TCAP will furnish monthly updates designed to keep trial counsel current in military criminal law and to address specific problem areas. Fourth, TCAP personnel will answer questions from trial counsel. Depending upon the complexity of the problem, these answers may be telephonic or in the form of previously submitted briefs or original position papers. To accurately assess the impact of TCAP on Army trials, it is imperative that TCAP be the primary source, outside the judge advocate office, of advice to trial counsel. Fifth, at the request of the Staff/Command Judge Advocate, TCAP personnel are available for technical assistance visits within CONUS to help in particularly convoluted cases or offer advice with respect to administrative problems.

3. In summary, TCAP is a group of criminal law specialists who are devoted to assisting you. They will not usurp your prerogatives or interfere with the actions of trial counsel. Although the bulk of assistance rendered will be based upon your requests, you can expect calls from TCAP to determine whether problems exist.

4. I am convinced that TCAP fulfills a need. With your cooperation, it can make the best system of justice even better.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

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

REPLY TO ATTENTION OF

DAJA-ZX

01 JUL 1982

SUBJECT: The Labor Counselor - Policy Letter 82-5

ALL JUDGE ADVOCATES

1. The Labor Counselor Program provides judge advocates and civilian personnel officers a means for understanding and resolving civilian personnel and labor relations law problems and, of course, those arising from employment discrimination.

2. Each statutory administrative agency which deals with Federal labor/civilian personnel problems has its own special rules and regulations. Labor counselors must be cognizant of these differences when they represent management before the Merit Systems Protection Board, the Federal Labor Relations Authority, the Equal Employment Opportunity Commission, and other third party proceedings. Labor counselors must also be familiar with industrial labor relations laws and regulations so that they can effectively advise contracting officers regarding contractor labor disputes which affect government operations.

3. In view of the complex area of law with which the labor counselor must be familiar, I expect each Staff Judge Advocate to give renewed emphasis to the program. The need for an effective, well-trained labor counselor at every installation or activity is apparent. Sufficient library resources must be available to enable labor counselors to provide competent legal services.

4. The Labor Counselor Program will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

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

REPLY TO ATTENTION OF
DAJA-ZA

9 September 1982

SUBJECT: DA Mandated Training for JAGC Personnel - Policy Letter 82-6

ALL COMMAND AND STAFF JUDGE ADVOCATES

1. It is my policy that all members of the Judge Advocate General's Corps comply with Department of the Army mandated training and testing.

2. For most judge advocate activities, meeting training requirements is relatively easy. However, members of the Trial Defense Service and the Trial Judiciary face unique problems because of the nature of their attachment to installations and organizations. Whenever possible, military judges and defense counsel should participate with the local Staff Judge Advocate office in military training and testing. I particularly encourage joint training and testing for physical training, weapons qualification, and NBC training.

3. Staff Judge Advocates should insure that judges and defense counsel receive sufficient advance notice of training dates so that dockets and travel can be planned to permit maximum participation in the training. Additionally, Staff Judge Advocates should, when needed, assist these officers in obtaining equipment required for the training.

4. The primary responsibility for satisfying training requirements rests with the individual. However, I expect Staff Judge Advocates to assist all JAGC personnel assigned to and satellited on their offices in meeting these requirements. It remains the responsibility of the chain of command of the Trial Defense Service and Trial Judiciary to monitor compliance with training requirements for their personnel, while the Staff Judge Advocates are responsible for their assigned personnel.

5. Satisfaction of training requirements will be an item of interest during Article 6, UCMJ inspections.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

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

REPLY TO ATTENTION OF

DAJA-LTT

02 DEC 1982

SUBJECT: Medical Care Recovery Program - Policy Letter 82-7

ALL STAFF JUDGE ADVOCATES

1. Recent GAO reports indicate some staff judge advocates may not be placing sufficient emphasis on their medical care recovery programs, resulting in many claims being improperly processed, or never even asserted. Continued emphasis on the budget and the national debt mandates the expenditure of maximum effort under the Medical Care Recovery Act (42 U.S.C. 2651-3) and the Claims Collection Act (31 U.S.C. 951-53).

2. You are reminded that AR 27-40 designates many of you as Recovery Judge Advocates. This designation makes you responsible for the medical care recovery program.

3. It is imperative that you actively supervise the medical care recovery program in your jurisdiction. Indeed, under certain circumstances, this function may require a full-time judge advocate. In no case will the responsibility of the Recovery Judge Advocate be neglected or treated as a matter of secondary importance.

4. Your recovery program will be periodically inspected by representatives of the Litigation Division, OTJAG. It will also be an item of interest during Article 6, UCMJ, inspections.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

In Camera Hearings and the Informant Identity Privilege Under Military Rule of Evidence 507

Major Joseph A. Wellington, USMC
Piedmont Judicial Circuit, Quantico, Virginia

Introduction

Rule 507 of the Military Rules of Evidence grants to the United States the privilege to refuse to disclose the identity of its informants. The privilege, however, is not without exception. Military Rule 507(c)(2) provides that the privilege may be defeated when the accused moves for disclosure of the identity of a government informant on the ground that his testimony is necessary on the issue of guilt or innocence and the government claims its privilege. Once the claim of privilege has been made, the military judge must determine whether the disclosure is necessary to the accused's defense on the issue of guilt or innocence.[1] If it appears from the evidence or from a showing by a party that an informant may be able to give testimony necessary to an accused's defense on the specific issue of guilt or innocence, the military judge may make any order required by the interest of justice.[2]

Neither Military Rule 507 nor the drafter's analysis thereto provides any guidance to assist the military judge in arriving at an informed decision other than listing the substantive factors which should be considered. Both Military Rule 507 and the analysis are silent concerning the procedure by which the military judge is to gather sufficient evidence to assist him or her in resolving the disclosure issue. The absence of procedural guidance is particularly troublesome where there is insufficient evidence to made an informed ruling concerning disclosure of the informant's identity without hearing the testimony of the informant and where the showings of the parties are also inadequate.

This article advocates the use of an in camera hearing by a military judge as the appropriate procedural mechanism for resolving those situations where the accused seeks to obtain the identity of a government informant under Military Rule 507(c)(2) and the military judge requires more information than the parties can provide in open court in order to make an informed decision.

I. "In Camera" Defined

An "in camera" hearing is a proceeding conducted either in the judge's chambers or in a private location.[3] According to *Black's Law Diction-*

[1]Military R. Evid. 507(c)(2) [hereinafter cited as MRE].

[2]MRE 507(c)(2).

[3]Black's Law Dictionary 684 (5th ed. 1979).

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ary, a case is said to be heard in camera "either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom."[4]

Where an accused seeks access to classified information or government information other than classified information, the Military Rules of Evidence provide for "in camera" proceedings under Rules 505(i) and 506(i) respectively. Under these provisions an "in camera" proceeding is defined as "a session under Article 39(a) from which the public is excluded"[5] and as "a closed session under Article 39(a)."[6] The drafters expressly stated that neither the accused nor the defense counsel may be excluded from in camera proceedings conducted under Military Rules 505(i) or 506(i).[7]

When the term "in camera" has been used in federal appellate decisions concerning the disclosure of the identity of a government informant, it has generally been described as a private hearing out of the presence of the accused and his counsel.[8] The rationale for excluding these parties from the hearing has been the recognition of the government's interest in maintaining the anonymity of its informant's identity.[9] Some federal decisions, however, expressly provide for the presence of counsel at in camera hearings.[10]

The Supreme Court envisioned the use of in camera proceedings to resolve issues of informant identity disclosure when it promulgated Proposed Federal Rule of Evidence 510(c)(2). Proposed Federal Rule 510(c)(2) provides that all counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision *except a showing in camera, at which no counsel or party shall be permitted to be present.*[11]

The Supreme Court also provided for in camera proceedings when the accused has sought access to state secrets and other official information through Proposed Federal Rule of Evidence 509(c):

> The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, *may permit the government to make the required showing in the above form in camera.* . . . In the case of privilege claimed for official information the court *may require examination in camera of the information itself.*[12]

This article proposes an in camera hearing as set out in Proposed Federal Rule 510. An in camera procedure under Military Rule of Evidence 507 would be a closed session conducted by the military judge in private and out of the presence of the accused, the defense counsel, and the trial counsel. The proposed in camera procedure under Military Rule 507 might better be described as an "in chambers" hearing, recognizing that it might be conducted at some location outside the courtroom and not necessarily in the space provided the military judge for his chambers. If the accused or his counsel could readily observe the persons entering the military judge's chambers, it would be necessary for the judge to conduct the hearing at some location where the identity of the informant would not be subject to compromise.

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[4] *Id.*

[5] MRE 505(i)(1).

[6] *Id.* at 506(i)(1).

[7] Analysis to Mil. R. Evid. 506, *reprinted in* Manual for Courts-Martial, United States, 1969, (Rev. ed.) app. 18 (C.4 1981) [hereinafter cited as Analysis].

[8] United States v. Freund, 525 F.2d 873, 877, *decision on remand*, 532 F.2d 501 (5th Cir.), *cert. denied*, 426 U.S. 923 (1976).

[9] *Id See also* United States v. Moore, 522 F.2d 1068, 1073 (9th Cir.), *cert. denied*, 423 U.S. 1049 (1975).

[10] *In re* United States, 565 F.2d 19, 23 (2d Cir.), *cert. denied*, 436 U.S. 962 (1977) ("[I]t is by now well established that a district judge in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of in camera proceedings under a pledge of secrecy."); United States v. Long, 533 F.2d 505, 507 (9th Cir.), *cert. denied*, 429 U.S. 829 (1976) ("The Court offered both counsel the opportunity to participate [in the in camera hearing]."); United States v. Anderson, 509 F.2d 724, 729 (9th Cir.), *cert. denied*, 420 U.S. 910 (1974) ("The defense counsel could . . . be permitted to participate in the in camera proceedings and to cross-examine the in camera witness or witnesses."). *See also* Levine, *The Use of In Camera hearings in ruling on the Informer Privilege*, 8 U.M.J.L. Ref. 151, 152 n.8 (1974), [hereinafter cited as 8 U.M.J.L.R.], wherein the term "in camera proceeding" referred to "a closed, secret hearing attended only by the trial judge, the prosecuting attorney and usually the informer."

[11] Proposed Fed. R. Evid. 510(c)(2).

[12] Id. at 509(c).

II. The In Camera Proceeding as Developed in the Federal Court System

A. The Supreme Court

The U.S. Supreme Court first recognized the government's interest in protecting the identity of informants in 1884.[13] Although the Court addressed the issue on several occasions thereafter, it was not until 1957 that the leading case of *Rovario v. United States*[14] was decided. *Rovario* clearly delineated the privilege,[15] the underlying rationale for the privilege,[16] the exceptions to the privilege[17] and the minimum showing which the defense must make when the disclosure of an informant's identity is sought).[18]

Several years following its decision in *Rovario*, the Supreme Court sought to codify the government's informant identity privilege through Proposed Federal Rule of Evidence 510. The Proposed Federal Rules of Evidence were transmitted to Congress in 1972. Before the Rules could become effective in 1973, as had been the intention of the Supreme Court, Congress intervened by deferring the effective date until each rule had been individually reviewed and expressly approved. Those rules pertaining to privileges were contained in Part V of the Proposed Federal Rules. Part V proved to be highly controversial when reviewed by Congress, and debate over the privilege section delayed enactment of the Rules for nearly two years.[19]

In 1975 Congress finally enacted the Rules into law without Proposed Federal Rule 510 and twelve other proposed rules pertaining to privilege. In deleting Proposed Federal Rule 510, Congress stated its intention that the informant identity privilege be developed through case law in the federal courts.[20] As a result of the deletion of Proposed Federal Rule 510 from the Federal Rules of Evidence, *Rovario* and its progeny serve as the principal source of authority in any examination of the government's informer identity privilege as it has developed in the federal courts.

B. Rovario v. United States *and the Informant Identity Privilege*

The Supreme Court recognized the government's informant identity privilege in *Rovario* by holding that the government could "withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law."[21] The purpose of the privilege was stated to be the "furtherance and protection of the public interest in effective law enforcement (through preserving the flow of information concerning violations of crimes by citizens encouraged by the knowledge that their identity will be safeguarded)."[22]

The Court limited the privilege in several material aspects. The principal limitation was based upon the "fundamental requirements of fairness."[23] The *Ravario* Court held: "Where the disclosure of an informer's identity, or the contents of his communications, is relevant and helpful to the defense of an accused, the privilege must give way."[24]

---

[13]Vogel v. Gruaz, 110 U.S. 311, 328 (1884).

[14]353 U.S. 53 (1957).

[15]*Id.* at 59 ("What is usually referred to as the informer's privilege is in reality the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.").

[16]*Id.* ("The privilege recognizes the obligations of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.").

[17]*Id.* at 60 ("The scope of the privilege is limited by its underlying purpose. Thus where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of an informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness.").

[18]*Id* at 60-61 ("Where the disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.").

[19]J. Weinstein & M. Berger, Weinstein's Evidence 501-12 (1980).

[20]Fed. R. Evid. 501.

[21]353 U.S. at 59.

[22]*Id.*

[23]*Id.* at 60.

[24]*Id.* at 60-61.

The Court then declined to set any fixed rule which would indicate when disclosure is justified.[25] Rather, the *Rovario* Court required that any analysis of a claim for disclosure must result in a balancing of "the public interest in the flow of information against the individual's right to prepare his defense."[26] To assist lower courts in striking the balance between the opposing interests, three specific factors were delineated: the crime charged, the possible defenses, and the possible significance of the informer's testimony.[27]

Albert Rovario's conviction for the sale of heroin was reversed because he had been thwarted in raising his intended defense of entrapment.[28] The informant was the sole participant in the sale with the accused and was determined to be the only witness who could amplify or contradict the testimony of other government witnesses concerning the issue of entrapment.[29] The Supreme Court held that the trial court had committed prejudicial error by permitting the government to withhold the identity of its informant in the face of repeated demands by Rovario for the disclosure of the informant's identity.[30]

Since *Rovario* was decided in 1957, the federal courts have addressed the various aspects of the government's informant identity privilege on numerous occasions. The use of an in camera hearing in the resolution of an informant identity issue was first addressed in a concurring opinion to a Third Circuit decision approximately ten years following *Rovario*.[31]

C. The Use of In Camera Hearings by Lower Federal Courts

All of the Circuit Courts of Appeal except the Sixth Circuit, the Seventh Circuit, and the District of Columbia Circuit have rendered opinions which have addressed the use of an in camera hearing by the trial judge for the purpose of determining whether the identity of a government informant was required to be disclosed.[32] Of those circuits which have addressed the in camera hearing, one-half have expressly approved of the in camera hearing procedure[33] while the remaining half have impliedly approved of the procedure.[34] No circuit court has either expressly or impliedly disapproved of the use of an in camera proceeding as a means to strike the *Rovario* balance.

The consensus to be gained from the various decisions addressing the in camera procedure is that:

> (1) "The real dilemma engendered by the informer [identity] problem lies in the practical incapacitation of the trial judge to look beyond a mere statement of facts and evaluate the interests concerned."[35]
>
> (2) "A trial judge is not privy to the activities or cognition of an informer and unless the court is aided by evidence from collateral sources it must indulge in a judicial guessing game and rule in favor of one interest at the possible expense of the other."[36]

---

[25] *Id.* at 62.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 64-65.

[29] *Id.*

[30] *Id.* at 65.

[31] United States v. Day, 384 F.2d 464, 470 (3d Cir. 1967) (McLaughlin, J., concurring).

[32] United States v. Santarpio, 560 F.2d 448, 453 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977); Sandoval v. Aaron, 562 F.2d 13, 14 (10th Cir. 1977); *In re* United States, 565 F.2d 19, 23 (2d Cir.), *cert. denied*, 436 U.S. 962 (1977); United States v. Jackson, 384 F.2d 825, 827 (3d Cir. 1977), *cert. denied*, 392 U.S. 932 (1978); United States v. Freund, 525 F.2d 873, 877, *decision on remand*, 532 F.2d 501 (5th Cir.), *cert. denied*, 426 U.S. 923 (1976); United States v. Rawlinson, 487 F.2d 5, 7 (9th Cir.), *cert.* denied, 415 U.S. 984 (1973; McLaughlin v. North Carolina, 484 F.2d 1, 5 n.13 (4th Cir. 1973); United States v. Hurse, 453 F.2d 128, 130 (8th Cir. 1972), *cert. denied*, 414 U.S. 908 (1973).

[33] In re United States, 565 F.2d 19 (2d Cir.), *cert denied*, 434 U.S. 984 (1977); United States v. Freund, 525 F.2d 873, *decision on remand*, 532 F.2d 501 (5th Cir.), *cert. denied*, 426 U.S. 923 (1976); United States v. Rawlinson, 487 F.2d 5, 7 (9th Cir.), *cert. denied*, 415 U.S. 984 (1973); United States v. Hurse, 453 F.2d 128 (8th Cir. 1972), *cert. denied*, 414 U.S. 908 (1973).

[34] United States v. Santarpio, 560 F.2d 448 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977); Sandoval v. Aaron, 562 F.2d 13 (10th Cir. 1977); United States v. Jackson, 384 F.2d 825 (3d Cir. 1977), *cert. denied*, 392 U.S. 932 (1978); McLaughlin v. North Carolina, 484 F.2d 1 (4th Cir. 1973).

[35] United States v. Day, 384 F.2d 464, 469 (3d Cir. 1967) (McLaughlin, J., concurring).

[36] *Id.* at 470.

(3) "If a court is to impartially balance the competing interests, it becomes quite evident that to do so requires some knowledge on the part of the judge as to what relevant information the informant actually possesses."[37]

(4) "The value of an in camera testimony [is] as a method of protecting the identity of a government informant while permitting an evaluation of his testimony."[38]

(5) "The advantage of the procedure is that it enables the Court to view with a keener perspective the factual circumstances upon which it must rule and attaches to the court a more abiding sense of fairness than could otherwise have been realized."[39]

(6) "The Trial Judge is not required to hold an in camera hearing whenever the identity of an informant is requested nor is the court required to sua sponte order such a hearing."[40]

While the Supreme Court has not directly addressed the use of in camera hearings to resolve an informant identity issue in its appellate capacity, it "has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege."[41] In its supervisory capacity, the Supreme Court expressly endorsed the use of in camera proceedings where the accused seeks the identity or testimony of a government confidential informant on the issue of guilt or innocence when it proposed Federal Rule of Evidence 510(c)(2). That proposed rule provided:

> *Testimony on merits.* If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. All counsel and parties shall be permitted to be present at every state of proceedings under this subdivision except a showing *in camera* at which no counsel or party whall be permitted to be present.[42]

The drafters analysis to Proposed Federal Rule 510(c)(2) provided in pertinent part:

> Once the [informer] privilege is invoked[,] a procedure is provided for determining whether the informer can in fact supply testimony of such a nature as to require disclosure of his identity, thus avoiding a "judicial guessing game" on the question.[43]

Several of the Circuit Courts of Appeal have looked to Proposed Federal Rule 510(c)(2) as authority for the use of in camera hearings where the disclosure of an informant's identity is in issue.[44]

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[37] *Id.*

[38] United States v. Cortese, 614 F.2d 914, 921 (3d Cir. 1980).

[39] 384 F.2d at 827.

[40] United States v. Alexander, 559 F.2d 1344, *reh'g denied*, 565 F.2d 163 (5th Cir.), *cert. denied*, 434 U.S. 1078 (1977).

[41] Kerr v. United States District Court, 426 U.S. 394, 406 (1976).

[42] Proposed Fed. R. Evid. 510(c)(2).

[43] Analysis to Proposed Fed. R. Evid. 510(c)(2), *reprinted in* Federal Rules of Evidence for United States District Courts and Magistrates 218 (1975).

[44] *See* United States v. Freund, 525 F.2d 873, 878 n.6, *decision on remand*, 532 F.2d 501 (5th Cir.), *cert. denied*, 426 U.S. 923

III. The Constitutionality of In Camera Hearings Conducted Out of the Presence of the Accused and His Counsel

Few rights are more fundamental than those of an accused to confront witnesses against him and to call witnesses in his own behalf.[45] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."[46] Implicit in the right of confrontation is the right of cross-examination which helps assure the "accuracy of the truth in determining process."[47] In *Maddox v. United States*[48] the Supreme Court noted:

> The primary object of the [confrontation clause] was to prevent depositions or ex parte affidavits . . . [from] being used against the [accused] in lieu of a personal examination and cross-examination of a witness, in which the accused has an opportunity not only of testing the recollection and shifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge his demeanor upon the stand and the manner in which he gives testimony.[49]

At first blush, the taking of informant testimony in camera, under oath, and out of the presence of the accused, counsel, and the finder of fact would appear to violate the accused's constitutional right to confront and cross-examine the informant. Such a procedure would also appear to deprive the accused of the assistance of counsel and of the ability to compel the presence of the informant at trial. Where such deprivations also effectively preclude the accused from presenting a defense, there would arguably be a denial of the Fifth Amendment right to due process.[50]

When it decided *Rovario*, the Supreme Court recognized that the scope of the government's privilege to protect the identity of its informants is limited by the fundamental requirements of fairness. The *Rovario* Court held that "where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused . . . the privilege must give way.[51] By negative implication, that holding provides that the government's privilege would stand and the accused could constitutionally be denied the right to confront and cross-examine the informant where the disclosure of the informant's identity is not relevant or helpful,[52] or would affirmatively be harmful to the defense of the accused.[53] By establishing the government's informant identity privilege in *Rovario*, the Supreme Court has implicitly provided that, in certain situations, an attack on that privilege solely on the general ground that it deprives the accused of Fifth and Sixth Amendment rights is devoid of merit.

The Supreme Court has twice upheld the application of state informant identity privileges in the face of Sixth Amendment attacks. In *Cooper v. California*[54] the accused contended that he was unconstitutionally deprived of his right to confront a

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(1976); United States v. Rawlinson, 487 F.2d 5, 7 n.2 (9th Cir.), *cert. denied*, 415 U.S. 984 (1973); United States v. Alvarez, 472 F.2d 111, 113 (9th Cir. 1973); United States v. Hurse, 453 F.2d 128, 130 (8th Cir. 1972), *cert. denied*, 414 U.S. 908 (1973).

[45]Faretta v. California, 422 U.S. 806 (1975); Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

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

[47]Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[48]156 U.S. 237 (1895).

[49]*Id.* at 242-243.

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

[51]353 U.S. at 61.

[52]United States v. Worthington, 544 F.2d 1275, 1281, *reh'g denied*, 548 F.2d 356 (5th Cir.), *cert. denied*, 434 U.S. 817 (1977). *See also* United States v. Jackson, 384 F.2d 825, 827 (3d Cir. 1977), *cert. denied*, 392 U.S. 932 (1978) (informant's testimony and identity not relevant or helpful to defense).

[53]*See* United States v. Hernandez-Berceda, 572 F.2d 680, 682 (9th Cir.), *cert. denied*, 436 U.S. 949 (1978) (disclosure denied where informant's testimony would be harmful to the defendant); United States v. Long, 533 F.2d 505, 508 (9th Cir.), *cert. denied*, 429 U.S. 829 (1976) (disclosure of informant's identity denied where testimony of informant would be adverse to accused); United States v. Freund, 532 F.2d 501, 501 (5th Cir.) (on remand), *cert. denied*, 426 U.S. 923 (1976) (disclosure denied where informant's testimony would be extremely harmful and in no way helpful to defendant's claim).

[54]386 U.S. 58, *reh'g & modification denied*, *id.* at 988 (1967).

witness against him because the state failed to produce an informant.[55] The contention was held to be baseless.[56] In *McCray v. Illinois*,[57] the accused apparently make a bald assertion that his Sixth Amendment right to confront and cross-examine an informant had been violated by Illinois' recognition of its informant identity privilege in his case.[58] The Supreme Court held that if the substance of the accused's claim was that the state had violated the Sixth Amendment by not producing the informant to testify against him pursuant to a claim of privilege, then the claim was "absolutely devoid of merit."[59] From the foregoing, it is apparent that an attack on the informant identity privilege cannot be sustained *solely* on assertions that an accused's Fifth or Sixth Amendment rights have been violated. The accused must show that the privilege as applied in his or her individual case has violated the principle of fundamental fairness.[60]

In *Chambers v. Mississippi*, the Supreme Court held that "the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[61] The holding in *Rovario* requires the trial judge to balance the conflicting interests of the parties.[62] A limited disclosure of the informant's identity to the trial judge and the opportunity for the trial judge to examine the informant in camera recognizes the government's interest in maintaining the anonymity of its informant while at the same time insuring that the accused's interest in developing the testimony of every witness who might possess information relevant to the issue of guilt and innocence is also protected.[63]

As in the case of attacks against the government's privilege, the mere unsupported assertion that in camera proceedings violate an accused's constitutional rights under the Fifth and Sixth Amendments should fall on deaf ears. Absent a showing that the in camera hearing violates the principle of fundamental fairness, the procedure should also withstand all generalized attacks which are grounded upon purported constitutional deprivations.

The in camera hearing is not a substitute for an evidentiary hearing to which an accused is entitled. Rather, it is an inquiry to assist the trial judge in the first instance and the appellate courts in the second instance with their respective determinations of whether the accused is entitled to the identity of the informant.[64] The informant does not testify as a witness during the in camera hearing and his testimony will not be presented to the finder of fact. The procedure is utilized solely to assist the judge in making an evidentiary ruling and not to obtain evidence on the ultimate issues of guilt or innocence.[65] In those cases in which the judge is the finder of fact, the testimony of the informant taken in camera would presumptively be disregarded for any purpose other than to determine if the informant's identity should be disclosed even where it pertained to the issue of guilt or innocence. Where the testimony would be "relevant and helpful" to the defense on the issue of the accused's guilt or innocence, the trial judge should use the information gathered in camera solely as the ground for compelling the government to disclose the informant's identity and for no other purpose.

Finally, it has been asserted that the trial judge is ill-equipped to determine whether the testimony of the informant would be "relevant and helpful" to the defense and is thereby unable to protect the

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[55] 386 U.S. at 62 n.2.

[56] *Id.*

[57] 386 U.S. 300, *reh'g denied*, *id.* at 1042 (1967).

[58] 386 U.S. at 313.

[59] *Id.* at 313-14.

[60] *See also* Sandoval v. Aaron, 562 F.2d 13, 14-15 (10th Cir. 1977); United States v. Doe, 525 F.2d 878, 880 (5th Cir. 1976); United States v. Anderson, 509 F.2d 724, 730 (9th Cir.), *cert. denied*, 420 U.S. 910 (1974).

[61] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[62] *See* United States v. Soles, 482 F.2d 105, 109 n.5 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973).

[63] United States v. Freund, 525 F.2d 873, 877, *decision on remand*, 532 F.2d 501 (5th Cir.), *cert. denied*, 426 U.S. 923 (1976).

[64] United States v. Moore, 522 F.2d 1068, 1073 ((th Cir.), *cert. denied*, 423 U.S. 1049 (1975).

[65] 8 U.M.J.L.R., *supra* note 10, at 170.

accused's constitutional rights. Indeed, an *Alderman v. United States*,[66] the Supreme Court reasoned that only the accused could make the determination of whether the informant's testimony would be helpful to his defense because of his familiarity with his case.[67] On the facts of that case, the Supreme Court ruled that an in camera hearing to edit evidence acquired by the government by illegal wiretaps was inadequate.[68] The Court stressed the complexity of the task faced by the trial judge who might be required to review voluminous and complex records in wiretap cases.[69] The Supreme Court was further concerned that a trial judge might frequently fail to discover material which would be significant to the defense when viewed by the accused.[70] In dicta, however, the *Alderman* Court indicated that it might well be proper to conduct in camera interviews in some situations, citing *Rovario* as an example where in camera proceedings "have been found acceptable to some extent."[71]

The task confronting a trial judge in an informant situation will normally not be complex.[72] The court will simply be required to determine the extent of the informant's knowledge of and involvement in the case and whether the informant's testimony supports one of two conflicting versions of the facts.[73] Since the trial judge's task will be neither burdensome nor complex, the likelihood that relevant testimony will be overlooked is greatly reduced.[74] The likelihood of an oversight by the judge could be reduced to an absolute minimum where both parties were required: to state their respective theories concerning the disclosure of the informant's identity, and to provide the trial judge with either precise questions or topical areas of inquiry to assist the court in a thorough examination of the informant.

In his dissent to the majority's opinion in *Rovario*, Justice Clark opined that:

> [A] casual reading of the record paints a picture of one vainly engaging in trial tactics rather than searching for real defenses—shadow boxing with the prosecution in a baseless attempt to get a name that he already had but in reality hoping to get reversible error that was nowhere else in sight. We should not encourage such tactics.[75]

The proposed in camera hearing procedure under Military Rule 507 would protect the accused's constitutional rights by insuring informed decisions by the trial and appellate courts where the testimony of an informant is sought and when the government asserts its privilege. It would also discourage the conversion of certain protections afforded the accused by the Fifth and Sixth Amendments from their intended function as substantive shields to those of procedural swords in the hands of the defense as was the express concern of Justice Clark.

IV. The Use of In Camera Hearings in Courts-Martial

A. Authority Supporting Use of In Camera Hearings

Military Rule of Evidence 101(b) provides that where a rule is not otherwise prescribed in the Manual for Courts-Martial and where the rule is not inconsistent with or contrary to the Uniform Code of Military Justice, a court-martial shall apply the rules of evidence generally recognized in the trial of criminal cases in the United States district courts insofar as practicable.[76] The use of in camera hearings where the accused seeks the identity and testimony of an informant has been widely recognized in the trial of criminal cases in Unit-

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[66]394 U.S. 165 (1968).

[67]*Id.* at 182, 184.

[68]*Id.* at 185-86.

[69]*Id.* at 182-84.

[70]*Id.*

[71]*Id.* at 182 n.14 ("In both the volume of the material to be examined and the complexity and difficulties of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where in camera procedures have been found acceptable.").

[72]United States v. Rawlinson, 487 F.2d 5, 8 (9th Cir.), *cert. denied*, 415 U.S. 984 (1973).

[73]*Id.*

[74]*Id.*

[75]353 U.S. at 70 (Clark, J., dissenting).

[76]MRE 101(b).

ed States district courts."[77] While there is no statutory nor regulatory rule of evidence concerning the use of in camera hearings in federal district courts with regard to informant identity issues, the numerous decisions positively addressing its use establishes the procedure's standing in the federal common law.[78]

Under Military Rule 507(c)(2), the military judge is tasked with striking the *Rovario* balance whenever the issue of the disclosure of an informant's identity is adequately raised.[79] Rule 507(c)(2) thereafter concerns itself with the substantive factors to be considered in resolving the issue.[80] Both Rule 507 and the drafters' analysis thereto are silent as to the procedure the military judge may use in resolving the issue. Considering that the Military Rules of Evidence are silent with regard to the use of in camera hearings to resolve informant identity issues under Rule 507(c)(2), the use of in camera hearings is not inconsistent with or contrary to the Uniform Code of Military Justice, and the use of in camera procedures to resolve informant identity disclosure issues is widely recognized in the trial of criminal cases in United States district courts, the military judge may conduct in camera hearings to assist in fashioning the order required by the "interests of justice" pursuant to Military Rule 101(b)(1).[81]

Three years prior to the promulgation of the Military Rules, the Army Court of Military Review in *United States v. Bennett*[82] stated in dicta that "[w]hat has sometimes been called a judicial guessing game concerning the informant's possible testimony might be avoided by an in camera interview."[83] Hence, there is military case authority, albeit limited, which supports the proposition that the in camera procedure may be used in courts-martial where the disclosure of the identity of an informant is in issue.

B. A Proposed Procedure for Conducting In Camera Hearings in Conjunction With Military Rule of Evidence 507

1. Raising the Issue

Military Rule 507(c)(2) provides that the military judge shall determine whether the disclosure of the informant's identity is necessary to the defense on the issue of guilt or innocence *upon motion of the accused* and following a claim of the privilege.[84] Both parties should be allowed to present evidence and make a showing in support of their respective positions. The evidence might take the form of affidavits,[85] testimony of witnesses, stipulations of expected testimony or offer of proof.

2. The Defense Burden

The military judge need not conduct an in

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[77] *See* cases cited in note 32 *supra*.

[78] *See* cases cited in notes 32-35 *supra*.

[79] MRE 507(c)(2).

[80] *Id.*

[81] MRE 101(b)(1). The Supreme Court had proposed in camera hearings which would be closed to the accused and counsel. *See* Proposed Fed. R. Evid. 509(c) (disclosure of state secrets); 510(c)(2) (identity of informant). The drafters of the Military Rules of Evidence expressly rejected the use of in camera out of the presence of the accused and his counsel to resolve disclosure issues concerning classified information and government information other than classified information. *See* Analysis to MRE 505(i); 506(i). The military drafters were silent with regard to the use of in camera hearing to resolve issues of informant identity disclosure. Since the military drafters expressly rejected federal precedent under Proposed Federal Rule 509(c) when they drafted Military Rules of Evidence 505(i) and 506(i), they should have expressly rejected the federal precedent under Proposed Federal Rule 510(c)(2) when they drafted Military Rule of Evidence 507(c)(2) if that was their intent. The silence of the military drafters with respect to counselless in camera hearings outside the presence of the accused to resolve informant identity issues should not be interpreted as an implicit rejection of such proceedings.

See also S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 258 (1981), wherein the authors state: "Although not required, or even recommended by Rule 507, [the in camera hearing procedure] is commendable. In addressing in camera hearings in this area the Advisory Committee on the Proposed Federal Rule [510] states that:

> The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCroy v. Illinois, 386 U.S. 300 (1967) and the decisions there discussed.

That rationale seems equally applicable under the Military Rule."

[82] 3 M.J. 903 (A.C.M.R. 1977).

[83] *Id.* at 906 n.2.

[84] MRE 507(c)(2).

[85] *See* Proposed Fed. R. Evid. 510(c)(2).

camera hearing just because the accused requests the identity of an informant.[86] The burden of establishing a need for disclosure rests with the defense.[87] The defense's burden is not met by mere speculation that the informant might be of some assistance, the defense's desire to go on a fishing expedition, or the defense's desire to gratify curiosity or vengence.[88] If the defense is able to show that the testimony of the informant is relevant and helpful to the defense of entrapment,[89] mistake of fact, lack of knowledge,[90] lack of intent or misidentification,[91] then disclosure might be appropriate. If the defense fails to meet its burden, the military judge is not required sua sponte to order an in camera hearing.[92]

3. The In Camera Hearing

The only parties present during an in camera examination of an informant should be the informant, a reporter, and the military judge. Care should be taken to avoid the inadvertant disclosure of the informant's identity by conducting the in camera hearing where the accused or his counsel might observe the arrival or departure of the informant. Counsel should be required to present the military judge with their respective theories concerning the issue of disclosure. Counsel should be encouraged to present topical areas and precise questions to be addressed by the military judge in the examination of the informant. The informant should be placed under oath and the testimony recorded verbatim.

4. Striking the "*Rovario* Balance"

Military Rule of Evidence 507(c)(2) provides that:

> Whether [the disclosure of the informant's identity is necessary to the accused's defense on the issue of guilt or innocence] will depend upon the particular circumstances of each case taking into consideration the offense charged, the possible defenses, the possible significance of the informant's testimony and other relevant factors.[93]

Various tests have been developed to assist the trial court in striking this "*Rovario* balance". The tests include the participant test,[94] the "mere in-

[86]United States v. Hansen, 569 F.2d 406, 411 (5th Cir. 1978) (trial court denied accused's request for the disclosure of the informant's identity where the defendant failed to make a showing of how disclosure would be helpful to the defense); United States v. Gonzalez, 555 F.2d 308, 313 (8th Cir. 1977) (trial court did not err in refusing to conduct an in camera hearing to disclose the informant's identity or establish the informant's reliability at a suppression hearing); United States v. Alexander, 559 F.2d 1344, 1344, *reh'g denied*, 565 F.2d 163 (5th Cir.), *cert denied*, 434 U.S. 1078 (1977) (district court is not required to hold an in camera hearing whenever the identity of an informant is requested); United States v. Worthington, 544 F.2d 1275, 1281, *reh'g denied*, 548 F.2d 356 (5th Cir.), *cert. denied*, 434 U.S. 817 (1977) (accused's motion for an in camera hearing denied where there was no basis for even a supposition that the informer possessed facts either relevant or helpful to the accused's defense, where evidence indicates that the informer played no part in the offense charged, and where informer was not present at time of arrest); United States v. Santarpio, 560 F.2d 448, 453 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977) (in camera hearing not required where informant only provided information amounting to probable cause for wiretap and government agents testified); United States v. Marshall, 526 F.2d 1349, 1359 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976) (court did not abuse its discretion in denying accused's motion for in camera hearing in which defense might question informant as to possession of information favorable to the defense); United States v. Carneglia, 468 F.2d 1084, 1089 (2d Cir.), *cert. denied*, 410 U.S. 945 (1972) (where government agents were able to corroborate certain critical details of informant's story, refusal by court to question informant in camera was not error).

[87]*In re* United States, 565 F.2d 19, 23 (2d Cir,), *cert. denied*, 436 U.S. 962 (1977); United States v. Adolph, 13 M.J. 775 (A.C.M.R. 1982).

[88]*In re* United States, 565 F.2d 19 (2d Cir.), *cert denied*, 436 U.S. 962 (1977). *See also* United States v. McLaughlin, 525 F.2d 517, 519 (9th Cir. 1973), *cert. denied*, 427 U.S. 904 (1975) (there was only speculation that the testimony of the informant would be exculpatory where the accused had made no showing that a necessary and useful purpose would be served by disclosure of the informant's identity; informant had been neither a participant nor a "precipient" witness).

[89]Roviaro v. United States, 353 U.S. 53, 64 (1957).

[90]*Id.*

[91]*Id. See also* United States v. Freund, 525 F.2d 873, 878, *decision on remand*, 532 F.2d 501 (5th Cir.), cert. denied, 426 U.S. 923 (1976) (in camera interview of informant disclosed that the informant could positively identify the accused as the seller of heroin).

[92]United States v. Alexander, 559 F.2d 1344, *reh'g denied*, 565 F.2d 163 (5th Cir.), *cert. denied*, 434 U.S. 1078 (1977).

[93]MRE 507(c)(2).

[94]8 U.M.J.L.R., *supra* note 10, at 157 (where informant is an actual participant in the crimes, disclosure is usually required).

former" rule,[95] the materiality test,[96] the essential, necessary and critical test,[97] the "mere witness" test,[98] and the "go-between" test.[99]

Following the examination of the informant in camera, the military judge should set out in writing those findings of fact and those conclusions of law upon which the court's decision is based. The findings of fact and conclusions of law should be sealed together with the verbatim record of the in camera examination and retained by the military judge in the event that the case is reviewed by an appellate court.

In *United States v. Bennett*, the Army Court of Military Review held that disclosure of the informant's identity was not required since the informant was neither an active participant in or witness to the crime charged. The *Bennett* informant was a mere tipster.[100] The court in *Bennett* applied both the participant test and the mere informer rule to the facts and circumstances of the case in resolving the accused's right to the identity of the government's informant.

5. The Record of the In Camera Hearing

The record of the in camera hearing should be sealed and forwarded together with the record of trial to the appropriate appellate court. The in camera record should not be attached to the record of trial retained by the command nor placed on file with that record.[101] If the case is not to be reviewed by an appellate court, the sealed record of the in camera hearing, together with the military judge's findings of fact and conclusions of law, should be destroyed in a manner similar to that used to destroy classified material.

6. Appellate Review

Only when the military judge has declined to conduct an in camera hearing and the appellate court would be required to engage in a "judicial guessing game" to resolve an informant identity disclosure issue should a court of review remand the case and direct that the military judge conduct an in camera hearing.[102] The military judge's determination to conduct or refrain from conducting the hearing should be reversed only if the deter-

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[95] *Id.* at 159 (where informant did not participate in crime, but merely cooperated with police, disclosure is usually denied).

[96] *Id.* at 160. ("The California courts require the prosecution to disclose an informant's identity whenever there is a reasonable probability that the informer can offer testimony material to an issue bearing on guilt or innocence.").

[97] *Id.* at 62. ("Some cases have held that no disclosure of informant's identity is required unless the information is essential, necessary, or critical to the defense.").

[98] Rissler, *The Informant's Identity at Trial*, 44 FBI Law Enforcement Bull. 21, 22 (1975) [hereinafter cited as FBI Bull.] (presence at the scene of a crime is only one factor to consider, and where the informer merely witnessed the alleged illegal act, his identity normally will be protected). *See also* Miller v. United States, 273 F.2d 279 (5th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960).

[99] FBI Bull., *supra* note 98, at 23 ("The cases are divided when the informant participated but only to the extent of introducing the defendant to the officer to set the stage for the criminal transaction. Often the theory of the defense is determinative as to disclosure and can compel contrary holdings in cases with apparently identical fact patterns."). *Compare* United States v. Martinez, 487 F.2d 973, 975-976 (10th Cir. 1973), (informant was go-between and witness to drug transaction; disclosure was required) *with* United States v. Davis, 487 F.2d 1249, 1250-1251 (5th Cir. 1973), (informant was go-between and witness to drug transaction; disclosure was *not* required).

[100] 3 M.J. at 906.

[101] Proposed Fed. R. Evid. 510(c)(2) provided:

> Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

[102] *See* United States v. Freund, 525 F.2d 873, 877, *decision on remand*, 532 F.2d 501 (5th Cir.), *cert. denied*, 426 U.S. 923 (1976) (case remanded to district court with an order to conduct an in camera hearing on the rationale that "to properly balance the interests in this case, it is necessary to know the substance of the information possessed by the informant-witness"); United States v. Fischer, 531 F.2d 283, 788 (5th Cir. 1976) (the court was "unable to conclude from [the] record that the informer's participation was such that fairness to the defendant would require disclosure and production regardless of any showing the government could make in opposition"; "the record [was] silent about the interests which the government may have in resisting disclosure and production"; the court could only guess as to the substance of the testimony which [the] informer would give"; the Fifth Circuit Court of Appeals felt that an in camera hearing would best "accommodate the competing governmental and individual interests in [the] case" and remanded the case with the direction that the district judge should question the informer in camera to ascertain whether the informer's testimony "might be helpful to the defense"); United States v. Hurse, 453 F. 2d 128, 131 (8th Cir. 1972, *cert. denied*, 414 U.S. 908 (1973) (case remanded for an in camera hearing with the direction that the identity of the informant should be made known to the trial judge and that the court should the satify itself on the issue of probable cause).

mination constitutes an abuse of discretion or constitutional error.[103]

Conclusion

Where an accused seeks the identity of a government informant under Military Rule of Evidence 507(c)(2) and the government asserts its privilege under Military Rule 507(a), the military judge may conduct an in camera hearing to examine the informant or other evidence concerning the informant. The in camera hearing should be conducted only where the accused has shown that the identity would be "relevant and helpful" to defense in light of the offense charged, possible defenses, and the significance of the informant's testimony, there is insufficient evidence to serve as a basis for a decision without the informant's testimony, and the parties' showings are inadequate to support a decision by the judge.

Since the in camera hearing is an evidentiary procedure widely recognized in the trial of criminal charges in federal district courts and the procedure is not contrary to the Uniform Code of Military Justice or any Military Rule of Evidence, Military Rules 101(b)(1) and 101(b)(2) provide that a courts-martial shall apply the procedure to informant identity issues arising under Military Rule 507(a).

The in camera hearing should follow the model established by the Surpeme Court in Proposed Rule of Evidence 510(c)(2) in that the presence of all counsel and the accused at the hearing should be forbidden. Although the hearing would be in essence a private hearing in the judge's chambers, caution should be exercised to insure that the identity of the informant is not compromised by conducting the hearing where the accused or his counsel might view the arrival, the presence, or the departure of the informant.

The accused's constitutional rights under the Fifth and Sixth Amendments are protected by the procedure of in camera hearings where the hearing is conducted to resolve disclosure issues arising under Military Rule 507(c)(2). While the private nature of the in camera hearing recognizes the government's interest in maintaining the anonymity of its informant, the hearing also insures that the accused's interest in fully developing the testimony of *every* witness who might possess evidence relevant to the issue of guilt or innocence is established including those witnesses whose identity is privileged under Military Rule 507.

Finally, the in camera hearing discourages the conversion of certain protections afforded the accused by the Fifth and Sixth amendments from their intended function as substantive shields of the accused to those of procedural swords in the hands of the defense.

[103]United States v. Anderson, 509 F.2d 724, 730 (9th Cir.), *cert. denied*, 420 U.S. 910 (1974).

Trottier and the War Against Drugs: An Update

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Fort Ord Field Office

Introduction

In *United States v. Trottier*,[1] the Court of Military Appeals declared war on drug use in the military and ruled "that almost every involvement of service personnel with the commerce in drugs is 'service connected'."[2] This was a marked change in the court's approach to determining jurisdiction over drug offenses. As yet, the full extent of *Trottier* is not known. Although the court stated that the military would have jurisdiction over "almost every" drug offense, little guidance was given concerning under what circumstances the military would *lack* jurisdiction over drug offenses. In footnote 28 of the decision, the court opined:

> Only under unusual circumstances, then, can it be concluded that drug abuse by a service-

[1]9 M.J. 337 (C.M.A. 1980).

[2]*Id.* at 350 (footnote omitted).

person would not have a major and direct untoward impact on the military. For instance, it would not appear that use of marijuana by a service-person on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under *O'Callahan*. Similarly, the interest of the military in the sale of a small amount of a contraband substance by a military person to a civilian for the latter's personal use seems attenuated.[3]

The above-quoted footnote is the only limitation which the court placed on its opinion. Based upon this limited discourse, it would appear that simple possession of a small amount of drugs, presumably for sale to a civilian for the civilian's personal use, would not trigger court-martial jurisdiction. Since the simple off-post possession of a small amount of drugs is extremely unlikely to be discovered or prosecuted, however, the real question is what limits are placed on court-martial jurisdiction over a servicemember's off-post, off-duty *use* of drugs. This article will argue that essentially there are *no* such limits. In *Trottier*, the court denied that it was "returning fully"[4] to the *per se* rule of court-martial jurisdiction over all drug offenses announced in *United States v. Beeker*.[5] The actions of the court in cases subsequent to *Trottier*, however, appears to indicate that, for all practical purposes, the state of the law concerning court-martial jurisdiction over drug offenses has indeed reverted to the rule announced in *Beeker*.[6]

The History of Court-Martial Jurisdiction Over Drug Offenses

Since the decision of the United States Supreme Court in *O'Callahan v. Parker*,[7] the test for court-martial subject-matter jurisdiction has been whether the offense was "service connected."[8] The first case involving a drug offense decided by the Court of Military Appeals subsequent to *O'Callahan* was *United States v. Beeker*.[9] In *Beeker*, the court held: "Like wrongful use, wrongful possession of marijuana and narcotics on or off base has singular military significance which carries the act outside the limitation on military jurisdiction set

[3] *Id.* at n.28 (citing United States v. Morley, 20 C.M.A. 179, 43 C.M.R. 19 (1970)).

[4] 9 M.J. at 352 n.34.

[5] 18 C.M.A. 563, 40 C.M.R. 275 (1969).

[6] This was Judge Fletcher's opinion when *Trottier* was announced. In concurring in the result, Judge Fletcher stated: "The majority states in the last sentence of their last footnote that 'we do not today return fully to the *Beeker* holding,' but I suggest the majority opinion is a homograft of *Beeker*." 9 M.J. at 353 (Fletcher, J., concurring in the result).

[7] 395 U.S. 258 (1969).

[8] *Id.* at 272. The Court of Military Appeals, in its first case interpreting *O'Callahan*, summarized *O'Callahan* as follows:

> O'Callahan was a soldier stationed in Hawaii. While on pass in Honolulu and while dressed in civilian clothing, he broke into a hotel room and attempted to rape a young girl. Apprehended by a hotel security officer and turned over to city police, he was subsequently released to military authorities. Thereafter, he was brought to trial before a general court-martial upon charges of attempted rape, housebreaking, and assault with intent to commit rape, in violation of Uniform Code of Military Justice, Articles 80, 130 and 134, 10 U.S.C. §§ 880, 930, 934. He was ultimately convicted, sentenced, and exhausted his appellate remedies. Thereafter, he sought release by habeas corpus upon the contention the court-martial had no jurisdiction to try him upon the charges before it. The District Court denied relief; the Circuit Court of Appeals affirmed; and the Supreme Court granted certiorari upon the issue whether a court-martial had jurisdiction to try an accused charged with " 'commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by grand jury and trial by petit jury in a civilian court.' " . . . The Court determined that such offenses were not triable by court-martial unless military-connected, rejecting the argument of the Government that one's military status was a sufficient predicate to establish jurisdiction to try misconduct of a civil nature. . . . .
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> In finding no service-connection to O'Callahan's sexual assault and attendant housebreaking, the Court pointed out that they were not committed on a military post; nor did his victim have any military duties; nor was the situs of the crime "an armed camp under military control, as are some of our farflung outposts." Finally, it adverted to the fact Hawaii's courts were open, the crimes committed in our territorial limits, and that there was no flouting of military authority, breach of military security, or violation of the integrity of military property . . . In short, the offenses were not "service-connected."

United States v. Borys, 18 C.M.A. 547, 548-49, 40 C.M.R. 259, 260-61 (1969).

[9] 18 C.M.A. 563, 40 C.M.R. 275 (1969).

out in the *O'Callahan* case."[10] This decision continued to govern the resolution of subject-matter jurisdiction over drug cases for the next several years.

Meanwhile, the Supreme Court attempted to provide some guidelines for determining when an offense was "service connected." In *Relford v. Commandant*,[11] the Court, in a unanimous opinion, set forth twelve factors for resolving the service connection question. These twelve factors, known as the *Relford* factors, are as follows:

1. The serviceman's proper absence from the base.

2. The crime's commission away from the base.

3. Its commission at a place not under military control.

4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

6. The absence of any connection between the defendant's military duties and the crime.

7. The victim's not being engaged in the performance of any duty relating to the military.

8. The presence and availability of a civilian court in which the case can be prosecuted.

9. The absence of any flouting of military authority.

10. The absence of any threat to a military post.

11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense's being among those traditionally prosecuted in civilian courts.[12]

Five years after *Relford*, the Court of Military Appeals rendered its first decision interpreting *Relford*. In a case involving conspiracy to commit larceny in which the conspirators' scheme was devised and implemented off-post, the court, in *United States v. Moore*,[13] stated:

> What *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.[14]

Shortly after *Moore*, the Court decided *United States v. McCarthy*,[15] in which the accused challenged the jurisdiction of the court-martial which found him guilty of wrongfully transferring marijuana to a fellow soldier "just outside" the gate to Fort Campbell, Kentucky. The court, in affirming the conviction, reiterated that *Relford* required a detailed and thorough application of its jurisdictional criteria to the issue of service connection.[16]

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[10] *Id.* at 565, 40 C.M.R. at 277.

[11] 401 U.S. 355 (1971).

[12] *Id.* at 365. The Court also listed nine other "considerations." *Id.* at 367-68.

[13] 1 M.J. 448 (C.M.A. 1976).

[14] *Id.* at 450.

[15] 2 M.J. 26 (C.M.A. 1976).

[16] In practicing what it preached, the court stated:

> Examination of the *Relford* criteria leads us to conclude that the four factors weighing in favor of military jurisdiction in this instance were sufficient to vest the court-martial with jurisdiction over the marijuana transfer offense. These factors include:
>
> 1. The formation of criminal intent for the offense on post.
>
> 2. The substantial connection between the defendant's military duties and the crime.
>
> 3. The transferee's being engaged in the performance of military duties, known to the defendant, at the time the agreement to transfer was reached.
>
> 4. The threat posed to military personnel, and hence the military community itself, by the transfer of a substantial quantity of marijuana who was a known drug dealer.
>
> The military interest in this offense is pervasive. The

In concluding, the court ruled: "To the extent that [*Beeker*] suggests a different approach in resolving drug offense jurisdictional questions, it no longer should be considered a viable precedent of this Court."[17]

The effect of *McCarthy* was to overrule the *per se* jurisdictional rule concerning drug offenses set forth in *Beeker*. This gave hope for a successful challenge to court-martial jurisdiction over off-post drug offenses. Indeed, shortly after *McCarthy*, the court ruled, in *United States v. Williams*,[18] that where "the evidence of record supports but one conclusion, that the appellant purchased the hashish in the civilian community for his personnel off-post, off-duty use,"[19] the application of the *Relford* factors "reveals none supportive of court-martial jurisdiction."[20]

The court continued to apply strictly the *Relford* jurisdictional criteria to determine service connection and, in *United States v. Alef*,[21] the court went so far as to make it mandatory "for the government affirmatively to demonstrate through sworn charges/indictment, the jurisdictional basis for trial of the accused and his offenses."[22] This "slavish" application of the *Relford* criteria remained the mandate of the court until three years later when the court announced its sweeping decision in *United States v. Trottier*.[23]

United States v. Trottier

In *Trottier*, the Court of Military Appeals revised its approach to determining whether a court-martial had jurisdiction over off-post drug offenses. Instead of applying *Relford* on an *ad hoc* basis, the court determined that, with regard to drug offenses occurring off-post, lines could appropriately and meaningfully be drawn in determining the existence of jurisdiction.[24] This conclusion by the court is the cornerstone for its broad statement that "almost every involvement of service personnel with the commerce in drugs is 'service connected.' "[25]

The court began its search for this cornerstone by asking whether the Supreme Court intended that "each individual case be dealt with separately and that no classes of cases be recognized in which military jurisdiction exists?"[26] The court then proceeded to answer this question by first extensively detailing the threat of drugs to the armed forces.[27] The court then discussed, also at some length, the interrelationship between the Commerce Clause, the War Powers Clause, and the Supreme Court's opinion in *Relford*.[28] Finally, in announcing the answer to its question, the court stated:

> In short, when we reflect on the broad scope of the war powers, the realistic manner in which the Supreme Court has allowed Congress to exercise power over commerce, and the flexibility which the Supreme Court intended for the concept of service connection so that, with the aid of experience, there could be a suitable response to changing conditions that affect the military society, we come to the conclusion that almost every

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entire criminal venture was developed by soldiers who had associated in their military unit and both of whom knew that the next most likely recipient of their contraband would be fellow soldiers on post. Under such circumstances, the military community certainly had the overriding, if not exclusive, interest in prosecuting this offense.

Id. at 28 (footnote omitted).

[17] *Id.* at 29.

[18] 2 M.J. 81 (C.M.A. 1976).

[19] *Id.* at 82.

[20] *Id.*

[21] 3 M.J. 414 (C.M.A. 1977). In *Alef*, the accused was convicted of the simultaneous sale and possession of cocaine. The offenses occurred off-post and, in applying *Relford*, the court held that the court-martial lacked subject matter jurisdiction. *Id.* at 416.

[22] *Id.* at 419. The court in *Trottier* stated that its opinion did affect the pleading requirements of *Alef*, but "what factors are sufficient to do so may now have changed by virtue of this opinion." 9 M.J. at 351 n.30. For a commentary on *Trottier's* affect on *Alef*, *see* Cooper, *Turning Over a New Alef: A Modest Proposal*, The Army Lawyer, Mar. 1982, at 8.

[23] 9 M.J. 337 (C.M.A. 1980).

[24] *See id.* at 345.

[25] *Id.* at 350.

[26] *Id.* at 345.

[27] *Id.* at 345-48.

[28] *Id.* at 348-50.

involvement of service personnel with the commerce in drugs is "service connected."[29]

Notwithstanding this detailed analysis, the court still gave deference to *Relford* by discussing some of the *Relford* factors as they applied to "the vast majority of drug offenses."[30] In essence, the court decided that some of the factors were more important than others and that some of these more important *Relford* factors militated in favor of jurisdiction such that certain lines could be drawn in determining jurisdiction. Specifically, the court discussed the fifth, sixth, eighth, and tenth *Relford* factors,[31] concentrating on the fifth factor which relates to authority stemming from the war power. After this analysis, the court was "entirely persuaded" that courts-martial could properly exercise jurisdiction over most drug offenses pursuant to the war powers clause.[32]

It is difficult to state precisely the exact grounds upon which the court's decision rests. A number of considerations were important, particularly the perceived effect of drugs on the military and the broad scope of the war powers. Nevertheless, the court is clear in its desire to broadly expand the scope of court-martial jurisdiction over drug offenses. The outer limits of the court's decision, however, were not defined. In footnote 28 of *Trottier*, the court indicated that, in some circumstances involving drugs, court-martial jurisdiction would not exist.[33]

Judge Fletcher, in concurring in the result, suggested that the court has returned to the *Beeker* holding and that "the rationale, excluding the references to drugs, is viable as to any crime where both parties are members of the military."[34]

It is suggested that, based upon subsequent actions by the court and certain recent remarks of Chief Judge Everett, the state of the law concerning drug offenses is as stated in *Beeker*.

The State of Affairs After *Trottier*

On the same day that *Trottier* was decided, the court handed down two other decisions involving off-post drug transactions. In *United States v. Norman*,[35] the appellant had been convicted of selling drugs to a fellow serviceman off-post. In holding that court-martial jurisdiction existed, the court stated: "Even if the drugs were to be limited to off-post use by the buyers themselves, that alone under these facts is so at odds with efficient operation of the military that such conduct may be reached for prosecution and punishment by the military justice system. *United States v. Trottier*."[36] Similarly, in *United States v. Smith*,[37] the appellant had been convicted of conspiracy to sell and possession of marijuana. The marijuana had been purchased off-post and appellant had intended to resell it to members of his unit. The court found such conduct "inimical to the efficient operation of the military" and, based on the rationale of *Trottier*, subject to prosecution and punishment by the military.[38]

Norman and *Smith* offer no insight in determining the outer limits, if any, of *Trottier*, and the court has not subsequently interpreted *Trottier*. It is also unlikely that such an opinion will be rendered in the near future since apparently there are no drug cases involving a jurisdictional question currently scheduled for decision by the court. Nevertheless, the court has denied petitions for review of two Air Force Court of Military Review cases which have invoked *Trottier* as authority, thus arguably agreeing with their interpretations of *Trottier*.

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[29] *Id.* at 350 (footnote omitted).

[30] *Id.* at 351-52.

[31] *See* text accompanying notes 7-12 *supra*.

[32] 9 M.J. at 352.

[33] *See* text accompanying note 3 *supra*.

[34] 9 M.J. at 353 (Fletcher, J., concurring in the result). Whether the rationale of *Trottier* applies to any crime both parties to which are members of the military is beyond the scope of this article. Judge Fletcher's point, however, is well made. With *Trottier*, the court has changed its view of *Relford* and nothing in the court's opinion limits this new interpretation of *Relford* to drug cases. Although the Court of Military Appeals has not applied *Trottier* to a non-drug case, the Air Force Court of Military Review has done so. *See* United States v. Chitwood, 12 M.J. 535 (A.F.C.M.R. 1981); United States v. Lockwood, 11 M.J. 818 (A.F.C.M.R. 1981); United States v. Wierzba, 11 M.J. 742 (A.F.C.M.R. 1981).

[35] 9 M.J. 355 (C.M.A. 1980).

[36] *Id.* at 356 (citation omitted).

[37] *Id.* at 359.

[38] *Id.* at 360.

In *United States v. Brace*,[39] the Air Force Court of Military Review, in a *per curiam* decision, addressed the issue of court-martial jurisdiction over off-post use of marijuana. The use occurred while the accused was on a six day leave, some 275 miles from Laughlin Air Force Base, Texas his place of duty. Citing *Trottier*, the court held that court-martial jurisdiction existed. The court stated that it could "find no reason under the facts of this case to apply any exception to [the broad general principle] that almost every involvement of armed forces personnel with drugs is 'service connected.' "[40] Judge Kastl dissented and argued that, based on footnote 28 of *Trottier*, there should be no court-martial jurisdiction over the use offense. Judge Kastl quoted the relevant portions of footnote 28 of *Trottier* and stated: "It is hard to imagine any situation more within that caveat than the present case."[41]

Shortly after *Brace*, a different panel of the Air Force Court of Military Review decided its companion case, *United States v. Lange*.[42] In *Lange*, the court also addressed the issue of court-martial jurisdiction over off-post use of marijuana. Unlike *Brace*, however, the court in *Lange* directly confronted the issue raised by footnote 28 of *Trottier*. After quoting the footnote, the court stated: "At first blush, the accused's use of marijuana on a six-day authorized absence in the wilds of Big Bend National Park would appear to fit squarely within the exception described by Chief Judge Everett."[43] However, also unlike *Brace*, the trial counsel in *Lange* had taken Judge Fletcher's suggestion, expounded in his separate opinion in *Trottier*,[44] and introduced evidence at trial of the adverse impact on the military due to the accused's drug use.[45]

The Court of Military Appeals denied petitions for review in both *Brace* and *Lange*.[46] Although denials of review do not carry precedential value, common sense would dictate that the Court of Military Appeals, would not leave untouched an erroneously decided Court of Review case involving an issue which it considers to be extremely important.[47] Assuming, then, that the court intended to send a message regarding the interpretation of the limits of *Trottier*, what as the message? One possibility is that the court in *Lange* was correct in basing its holding on the existence of evidence indicating the adverse impact of drugs on the military. This solution is unlikely, however, as the *Trottier* court did not adopt this requirement[48] and because there was no such evidence in *Brace*. More likely is that the court in *Brace* correctly interpreted *Trottier* and that the result in *Lange* was correct although the court did more than was required. If this is the case, then one must ask if there are any circumstances in which the involvement of a servicemember with drugs will not be "service-connected." Based upon the inferences which may be drawn from certain remarks of

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[39]11 M.J. 794 (A.F.C.M.R.), *petition denied*, 12 M.J. 109 (C.M.A. 1981).

[40]11 M.J. at 795.

[41]*Id.* (Kastl, J., dissenting).

[42]11 M.J. 884 (A.F.C.M.R.), *petition denied*, 12 M.J. 318 (C.M.A. 1981).

[43]11 M.J. at 885.

[44]In his separate opinion in *Trottier*, Judge Fletcher expressed concern that the court's opinion lessened "the requirement that the Government fulfill its obligation under the law to meet the letter of the law." 9 M.J. at 353 (Fletcher, J., concurring in the result). Judge Fletcher disagreed with the majority's assumed effect of drugs on the military and would require

> the calling of one additional witness, either the accused's immediate commanding officer or the victim's, and tendering to that person these two questions: "Do you have an opinion as to whether the acts charged here had an effect on the efficiency of your unit?" If the answer is yes, then, "Please state what that effect is?"

Id.

[45]In *Lange*, the government established that the accused was a military air traffic control radar repairman whose maintenance of navigational aids could have a " 'life or death' significance." 11 M.J. at 885.

[46]*See* notes 37 & 40 *supra*.

[47]It must be noted here that the Court of Military Appeals denied a petition for review of a Coast Guard Court of Military Review case in which that court had held that there was no court-martial jurisdiction over an accused's off-base, off-duty *possession* of drugs. United States v. Barton, 11 M.J. 621, 625 (C.G.C.M.R.), *petition denied*, 11 M.J. 461 (C.M.A. 1981). This action is not inconsistent with the court's denial of petitions for review in *Brace* and *Lange*. Again, the important issue is what limits exist on court-martial jurisdiction over off-post drug *use*.

[48]In fact, Judge Fletcher argued for this requirement in his separate opinion in *Trottier*. *See* note 42 *supra*. The majority opinion implicitly rejected such a requirement.

Chief Judge Everett, it would appear that there may be no such circumstances.

On 3 August 1982, Chief Judge Everett toured the Fort Ord area confinement facility. After the tour, he made a few remarks and invited questions from the military attorneys in attendance. When asked about the scope of *Trottier* with regard to off-post drug-use offenses and particularly any limits placed on that scope by footnote 28, Chief Judge Everett gave an illustration which he thought might fit within that footnote: If an officer who is attending law school on the excess leave or funded program goes to a party and smokes marijuana and the officer is far removed from any military installation and has no contact with the military for many months, then the use of marijuana would probably not be service connected. As to the scope of footnote 28, Chief Judge Everett pointed to the decisions of the Air Force appellate court in *Brace* and *Lange* and noted that the Court of Military Appeals had denied review of those cases.[49]

It is hard to argue that the court has not "fully returned" to *Beeker*. The substance of *Trottier*, in light of the court's actions in *Brace* and *Lange*, is the same as that of *Beeker*. In fact, one can easily imagine how the use of marijuana by an officer attending law school *would* be "service connected." If the military is paying for the schooling and drug use adversely affects a person's ability to study, then drug use by a servicemember would deny the military the benefit of its bargain in sending the servicemember to school because the servicemember would not be learning all that a student should.[50]

[49]Remarks of Chief Judge Robinson O. Everett, Chief Judge of the United States Court of Military Appeals, at Fort Ord, California (3 Aug. 1982).

[50]Indeed, in subsequent correspondence, Chief Judge Everett has indicated that the illustration proffered at Fort Ord was intended only to be one especially comprehensible and relevant to the military lawyers in attendance and one with which his court would hopefully never have to deal. Chief Judge Everett conceded that, even in his illustration, arguments in support of jurisdiction, such as those made in this article, might prove persuasive to the court in a given case. Nor did he intend to imply that an individual had to be as far removed from the military as his hypothetical officer to be beyond military jurisdiction. Letter from Chief Judge Robinson O. Everett to Captain Stephen J. Kaczynski (1 Nov. 1982).

The Effect of a Broad Interpretation of *Trottier*

If *Trottier* is interpreted to be coextensive with *Beeker*, then its effect is obvious; "any" involvement of a servicemember with drugs will be deemed service connected. Even if the court in *Trottier* did not return fully to *Beeker*, the instances in which involvement in drugs by a servicemember will not be service connected are so difficult to imagine—excluding instances of simple possession of a small amount of drugs that they become of no consequence.

One particularly important area that will be affected by a broad interpretation of *Trottier* is that of prosecutions for drug use based on probable cause urinalysis.[51] These drug tests cannot pinpoint when a particular drug was used. Apparently there is lingering residual biochemical evidence associated with certain drug use.[52] Thus, a servicemember could use marijuana on the first day of a two week leave and, on his first day of return to duty, affect a positive reaction on a urinalysis. It was thought that in such cases defense counsel could make a jurisdiction argument based on footnote 28 of *Trottier*. *Brace*, *Lange*, and a limited view of the applicability of footnote 28, however, appear to indicate that such an argument might be doomed to be stillborn.

Conclusion

Any hope that defense counsel had in prevailing in an argument that the first part of footnote 28 of *Trottier* expected certain off-post drug use offenses from court-martial jurisdiction is now gone. The court's actions in *Brace* and *Lange* have driven home the point made in *Trottier*. The court's war against drugs rages on.

[51]For the current status of the drug abuse exemption policy, *see* Army Reg. No. 600-85, Alcohol and Drug Abuse Prevention Program (IC 101, 27 Apr. 1982).

[52]For a discussion of the chemistry involved in the detection of marijuana use by urinanalysis, *see* Perez-Reyes, Guiseppi, Davis. Schindler, & Cook, *Comparison of Effects of Marijuana Cigarettes of Three Different Potencies*, 31 Clinical Pharmacology & Therapeutics 617 (1982); Whiting & Manders, *Confirmation of Tetrahydrocannabinol Metabolite in Urine by Gas Chromotography*, 6 J. Analytical Toxicology 49 (1982).

Effective Date of Forfeitures Adjudged In Capital Cases: Receiving Pay on Death Row

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Introduction

In *United States v. Matthews*,[1] the United States Court of Military Review affirmed the findings of guilty of premeditated murder and rape and the approved sentence to, *inter alia*, death and total forfeitures. After conducting an extensive analysis of the U.S. Supreme Court's decision in *Furman v. Georgia*[2] and its progeny, the court concluded that the military capital sentencing system safisfied the Eighth Amendment concerns which the Supreme Court had identified.[3] In the final part of the *Matthews* majority opinion, however, the Army court held that the convening authority had erred in ordering the approved forfeitures to apply to pay and allowances becoming due on and after the date of his action because appellant was not serving a sentence to confinement, but rather was being confined as a result of trial.[4]

This article is intended to demonstrate that a capital accused's approved forfeitures should apply to pay and allowances becoming due on or after the date of the convening authority's action because confinement is a necessary incident to a death sentence imposed by a court-martial and because such a rule is required to effect the congressional purpose underlying the Uniform Code of Military Justice.

The Punishment Scheme

The convening authority may apply approved forfeitures to pay and allowances becoming due on or after the date of his or her action "[w]henever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended or deferred."[5] A court-martial may sentence as accused convicted of premeditated murder "to death *or* imprisonment for life."[6] A sentence to imprisonment for life, however, is a lesser included punishment of a sentence to death.[7] Moreover, confinement from the date of sentencing until the date of execution is a necessary incident of an adjudged death penalty.[8]

Consequently, the approved forfeitures for a capital accused may be applied from the date of the convening authority's action in accordance

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[1]13 M.J. 501 (A.C.M.R.) (en banc), *mandatory appeal docketed*, 13 M.J. 236 (C.M.A. 1982).

[2]408 U.S. 238 (1972).

[3]The *Matthews* decision was the first military appellate decision since *Furman* to review the constitutionality of the military capital sentencing system. In a related matter, the Air Force Court of Military Review had ruled that the Supreme Court's decision in Coker v. Georgia, 423 U.S. 584 (1974), effectively invalidated that portion of Article 20, Uniform Code of Military Justice, 10 U.S.C. § 820 (1976) [hereinafter cited as U.C.M.J.], which authorizes the death penalty for the offense of rape. *See* United States v. McReynolds, 9 M.J. 881 (A.F.C.M.R. 1980).

[4]*See* Article 13, U.C.M.J.. Of the twelve judges who presided in the *Matthews* case, eight voted to affirm the constitutionality of the military capital sentencing system. One member of the majority wrote separately, however, to express his dissent from that part of the majority opinion which refused to apply forfeitures as of the date of the convening authority's action. United States v. Matthews, 13 M.J. at 534-35 (Mitchell, S.J., concurring in part and dissenting in part). Similarly, three of the four judges who believed that the military capital sentencing system was unconstitutional nonetheless believed that the forfeitures should be applied from the date of the convening authority's action. *Id.* at 543 n.27 (Jones, S.J., and Hanft, J., dissenting); *id.* at 551 (Garn, J., dissenting).

[5]Article 57(a), U.C.M.J.; Manual for Courts-Martial, United States, 1969 (rev. ed.) paras. 88*d*(3), 126*h*(5)[hereinafter cited as MCM].

[6]Article 118, U.C.M.J. (emphasis added).

[7]*See* United States v. Henderson, 11 C.M.A. 556, 29 C.M.R. 372 (1960); United States v. Russo, 11 C.M.A. 352, 29 C.M.R. 168 (1960); United States v. Bigger, 2 C.M.A. 297, 8 C.M.R. 97 (1953).

[8]*See* McGinn v. State, 46 Neb. 427, 65 N.W. 46 (1895).

with the terms of that action because the approved sentence necessarily "includes . . . confinement not suspended or deferred."[9] Although the Code directs a court-martial to adjudge "death *or* life imprisonment"[10] after an accused is found guilty of premeditated murder, a sentence to death necessarily includes a sentence to confinement for life or for a lesser term.[11] Indeed, in *Matthews*, the convening authority's action directed, in accordance with prevailing practice,[12] that the accused be confined at the United States Disciplinary Barracks pending the completion of appellate review of his case.[13]

Moreover, while the *Matthews* court correctly stated that "criminal statutes must be strictly construed,"[14] the court failed to apply the rule that such statutes should not be construed in a manner which produces absurd results.[15] The court's interpretation of the Code provision concerning confinement and forfeitures in capital cases[16] causes an accused for whom the death penalty and forfeitures have been adjudged and approved to continue to receive his or her pay and allowances while confined and awaiting completion of appellate review. On the other hand, an accused who receives an approved sentence to confinement for life and forfeitures and who, therefore, is presumably less heinous an offender than the capital accused, will forfeit "pay and allowances becoming due on or after the date the sentence is approved by the convening authority."[17] This is the type of curious result upon which the Supreme Court has frowned.[18]

Finally, because the *Matthews* court's interpretation of the unambiguous words of the Code produces such an anomolous result in capital cases, it is necessary to apply those codal provisions consistently with the underlying congressional intent.[19] With the enactment of Article 57(a) of the Code, Congress intended that, where an accused is confined pursuant to an approved sentence which includes forfeitures, "the forfeiture[s] should reach all pay [and allowances] becoming due while the accused is in confinement awaiting final approval of the sentence."[20] Thus, the statutory interpretation which permitted Matthews to receive his pay and allowances while confined awaiting execution of his sentence[21] con-

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[9]Article 57(a), U.C.M.J.; para 88*d*(3), 126(h)(5), MCM.

[10]Article 118, U.C.M.J. (emphasis added).

[11]*See* cases cited in note 7 *supra*. *Cf.* United States v. Washington, 11 C.M.R. 388 (A.B.R. 1953); para 126*a*, MCM (sentence to death necessarily implies sentence to dishonorable discharge). The decision in *Washington* is not contrary to the authors' position than an adjudged sentence, *inter alia*, death and total forfeitures necessarily implies confinement and therefore permits forfeitures to be applied from the date of the convening authority's action. In *Washington*, the adjudged sentence "was simply 'to be put to death' ", 11 C.M.R. at 196, and the board of review exercised its broad sentencing powers to reduce the sentence to a dishonorable discharge and confinement for life. *See* Article 66(c), U.C.M.J.. The board refused to affirm a sentence which included forfeitures, however, because "pay cannot be forfeited by implication." 11 C.M.R. at 196. *See* W. Winthrop, Military Law and Precedents 428 (2d ed. 1920). The court-martial in *Matthews*, on the other hand, explicitly adjudged forfeitures. 13 M.J. at 506. Thus, the decision in *Washington* is not relevant to capital cases in which the court-martial adjudges and the convening authority approves a sentence which includes both death and total forfeitures.

[12]*See, e.g.*, McGinn v. State, 46 Neb. 427, 65 N.W. 46 (1895); 21 Am. Jur. 2d *Criminal Law* § 606 (1981).

[13]Gen. Court-Martial Order No. 139, HQ, VII Corps, 14 Dec. 1979.

[14]13 M.J. at 533.

[15]*See* United States v. Turkette, 452 U.S. 576 (1981).

[16]Article 118, U.C.M.J..

[17]Article 57(a), U.C.M.J.; para. 126*h*(5), MCM.

[18]*See* United States v. Turkette, 452 U.S. 576 (1981).

[19]*See* United States v. American Trucking Ass'n, 310 U.S. 534 (1940); Armstrong v. Maple Leaf Apartments, Ltd., 436 F. Supp. 1125 (N.D. Okla 1977). *See generally* E. Crawford, Statutory Interpretation § 174 (1940).

[20]S. Rep. No. 482, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 2222, 2249.

[21]The correlative to Article 57(a), U.C.M.J., is the policy that any sentence imposed on an enlisted person that exceeds forfeitures of two-thirds pay per month for 6 months should be remitted by the convening authority unless the sentence includes, and the convening authority approves, a punitive discharge or confinement, unsuspended, for the period of such forfeitures.
Army Reg. No. 190-47, Military Police - United States Army Correctional System, para. 6-19*f*(1) (1 Oct. 1978). This policy recognizes that "[t]o require an enlisted man to perform full duty . . . at reduced pay over an extended period of time would reduce his incentive to perform well and lessen the probability of his rehabilitation." Criminal Law Division, OTJAG, *Criminal Law Section*, The Army Lawyer, May 1978, at 35, 37. *See* United States v. Stroud, 44 C.M.R. 480, 481 n.2 (A.C.M.R.

travenes the congressional purposes behind the statute.

1971); United States v. Bumgarner, 43 C.M.R. 559 (A.C.M.R. 1970). Because the penological goal of rehabilitation is necessarily rejected when a death sentence is adjudged and approved, *see* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), this policy is not relevant to the application of approved forfeitures to the pay and allowances of a prisoner awaiting capital punishment.

Conclusion

In sum, common sense, logic, and the traditional principles of statutory interpretation appear to support the view that a confined prisoner awaiting capital punishment ought not receive pay and allowances. The *Matthews* case is currently before the Court of Military Appeals. It is hoped that, when faced with the issue, the court will adopt a position consistent with the intent of Article 57(a).

Legal Assistance Items

Major Joseph C. Fowler, Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Captain Timothy J. Grendell
Administrative and Civil Law Division, TJAGSA

1. Time to Convert

It has often been stated that the law is ever-changing. Proof of the truth of that statement is evident. The law is changing—at least in size. Legal size (11″ x 14″) documents, briefs, submissions, etc., are out and 8½″ x 11″ replacements are in. Now is the time to convert forms and formats programmed into your word processing equipment from the larger to the smaller size.

2. State Bar Pamphlets

Most, if not all, state bar associations publish and distribute client information pamphlets. These pamphlets cover legal facts about such areas as rights in traffic court, lawyer's fees, small claims court, probate, and many others.

The state bar associations are usually more than ready either to supply your office with quantities of these client information pamphlets or to give you their approval to reproduce them. The pamphlets can be a valuable addition to your legal assistance office waiting room. You might even consider overstamping these types of legal information pamphlets with a rubber stamp informing others that they were "distributed" by your office. Offices not already taking advantage of this excellent preventive law measure should consider doing so.

3. Variable Housing Allowance (VHA)

VHA is *not* income to the soldier recipient; it *is* excludable from income. Legal assistance officers should be aware that the Volunteer Income Tax Assistance (VITA) Program text is in error in that it indicates VHA is income to the recipient. Broad dissemination at installation level of the true nontaxable character of VHA is encouraged.

Regulatory Law Item

Regulatory Law Office, USALSA

Reports to Regulatory Law Office.

In accordance with AR 27-40, all judge advocates and legal advisors are reminded to continue to report to Regulatory Law Office (JALS-RL) the existence of any action or proceeding involving communications, transportation, or utility services and environmental matters which affect the Army. The address for the Regulatory Law Office is USALSA, ATTN: JALS-RL, Falls Church, VA 22041. The current commercial telephone number is area code 202-756-2015, AUTOVON 289-2015.

Criminal Law News

Criminal Law Division, OTJAG

Forfeiture

A soldier who sold one ounce of marijuana recently forfeited his 1980 Triumph TR-7 automobile to the United States. The car had been used to transport the soldier and the one ounce of marijuana he allegedly sold. The automobile was initially seized by CID agents as evidence of the alleged crime. Later, the car was turned over to local Drug Enforcement Administration officials who initiated the summary forfeiture and the car became property of the United States.

Section 881 of Title 21, United States Code, provides for the forfeiture of vehicles that are used or are intended for use to transport or otherwise facilitate the transportation, sale, receipt, or concealment of controlled substances. The section also provides for the forfeiture of moneys or things of value furnished in exchange for controlled substances and all proceeds traceable to a controlled substance exchange. The forfeiture provisions have no effect outside the United States unless there is intent to import the controlled substance to the United States. Where military officials have, in accordance with Military Rule of Evidence 416, properly seized money, other proceeds, or vehicles in connection with drug trafficking, coordination should be made with local DEA officials. DEA policy may permit its officials to adopt seizures made by officials outside DEA. Installation commanders, after advice from their staff judge advocates may, in appropriate cases, authorize coordination with local DEA officials regarding the seizure of property.

Seizures by military law enforcement agents must be for legitimate investigative, evidentiary, or safety purposes and not solely for DEA forfeiture action (see MRE 416). In cases where property may be subject to forfeiture under Section 881 and such property may not be seized by military law enforcement agents, DEA officials should be promptly notified so that DEA officials may take appropriate action.

Automatic Reduction UP Article 58a, UCMJ

In a recent application under the provisions of Article 69, UCMJ, TJAG granted relief in a summary court-martial where the summary court officer who sentenced the accused to hard labor without confinement did not intend that the accused also be reduced to PVT (E-1) by operation of Article 58a, UCMJ. By affidavit submitted after trial, the summary court officer stated that when he announced the sentence he was not aware that the accused would be reduced to PVT (E-1) and, had he known of the administrative reduction provision of Article 58a, he probably would not have adjudged hard labor without confinement. In several other petitions, TJAG has granted relief in cases where summary court officers were unfamiliar with the sentencing authority of summary courts-martial. To avoid similar errors in the future, staff judge advocates should insure that each non-JAGC officer appointed as a summary court-martial is fully briefed on his or her duties and understands the provisions of Article 58a, UCMJ.

Staff judge advocates should also insure that, where sentences include confinement at hard labor or hard labor without confinement and reduction to an intermediate pay grade, the judge advocates conducting supervisory reviews under Article 65(c), UCMJ, determine if at the time of sentencing the summary court officer knew about the effect of Article 58a. Appropriate relief should be granted in cases where, despite prior briefings, summary court officers impose confinement at hard labor or hard labor without confinement without intending or realizing that the accused would be administratively reduced to PVT (E-1) upon approval of such punishment by the convening authority. These errors should be corrected at the initial review stage rather than being forwarded to TJAG for appropriate action under Article 69, UCMJ.

Requests for Deferment

In two recent cases, one panel of the Army Court of Military Review noted that requests for deferment of the confinement portion of the sentences were disapproved by the convening authority without comment. In each case, the court cited United States v. Brownd, 6 M.J. 338 (C.M.A.

1979), and suggested that it is a good practice for staff judge advocates to explain to convening authorities that decisions denying requested deferment are subject to review. The panel further noted that convening authorities should document their reasons for denying a request for deferment as these decisions are subject to review for abuse of discretion.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Officer Record Brief—Update

The officer record brief (ORB) is used by personnel management officers (PMO) at the Reserve Components Personnel and Administration Center (RCPAC) in the career management and development of their respective branch personnel. ORBs are consulted in MOB DES assignments, troop program unit vacancies, special projects, and for promotion criteria. If you have not updated your ORB recently, or recently completed one, call Major William O. Gentry, JAGC PMO, RCPAC, at toll free 1-800-325-4916; commercial (314) 263-7698 or autovon 693-7698.

2. MOB DES Training

In FY 82, several MOB DES judge advocates did not perform annual training because of lack of funds. The request for orders reached RCPAC after the funding deadline. MOB DES officers should insure that their proponent agencies submit the request for orders for the training tour to RCPAC prior to 31 March 1983 to insure funding. Requests submitted after that date may not be honored—so, coordinate with your MOB DES agency now.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Year End Review. From all accounts, it appears that 1982 was a very prosperous year for legal clerks and court-reporters. Improvements have been made in many areas and the Corps appears to be getting stronger. A large portion of the credit for these welcome developments goes to the ongoing training programs, continuing education plans and courses, and better lines of communication between all levels of staff and the field, and most of all, the individuals who are concerned about the Corps. Our SQT test scores are among the best in the Army and are getting better each year. The enlisted ranks of the JAG Corps has come a long way. However, there are still areas in which improvement is needed. Working with the available resources and accepting assignments and reassignments is one such area. One of SFCs Sture and Black's biggest problems at the assignment branch at DA is receiving unpleasant comments regarding DA MILPERCEN assignment policies and personnel shortages, i.e., not enough personnel to fill all slots at different installations. All personnel should be familiar with the assignment procedures and why all installations are not always at 100% strength. Much has been written in this column concerning this issue. Finally, work is needed on our reception program in CONUS and oversea areas. There is still not full communication between duty stations. Improvement in these areas will render the Corps much stronger.

2. Reserve and National Guard Legal Clerks and Court Reporters. The US Army Reserve and National Guard are expending valuable time and money to recruit and train qualified legal clerks and court reporters. At the same time, the active Army is losing several hundred trained and experienced court reporters and legal clerks each year. Senior legal clerks will be doing their personnel and the total Army a favor by informing departing legal clerks and court reporters of the benefits offered by USAR/NG units. These units can use the

expertise lost by the active Army and offer benefits in education, assignments (hometown), and promotions. If the nation ever needed to activate the reserves, these experienced troops would serve at a higher rank as legal clerks or court reporters. Prior to an individual's ETS and departure from active duty, the chief legal clerk should contact one of the following sergeants major who know unit vacancies throughout the nation: SGM John Purnell, Fifth USA Army, AV 471-2208/4515 or Commercial (512) 221-4329/3542; SGM Mike Yznaga, Sixth US Army, AV 586-3131; or SGM Ken Underwood, First US Army, AV 923-2327 or Commercial (301) 677-2327.

3. Court Reporting Equipment, AN/TNH-23. For the last three years, TJAG has been working to obtain new court reporting equipment for our offices. He desires that all court reporters in JAGC offices work with the same type equipment. Two hundred ninety-two Sony Recorder-Reproducer sets (AN/TNH-23) have been delivered to Army depots. Therefore, each office should now begin requesting the equipment through their appropriate supply channel. Any specific inquiries concerning the court reporting equipment should be directed to HQDA (DAJA-PT) WASH DC 20310. Telephone: Autovon-225-1353 or Commercial 202-697-1353.

4. Elimination of Legal-Sized Files. HQDA Letter 340-82-2, subject: Programmed Elimination of Legal-Sized Files, dated 10 December 1982, has been disseminated to the field. This letter directs records management officials within the Army to immediately:

a. plan for an orderly transition to letter-size, making every effort to use up existing stocks of legal-size stationery, writing pads, carbon sets, file folders, etc.

b. plan to convert existing information storage and retrieval systems using legal-size files to the new letter-size standard. No new legal-size file systems should be requisitioned.

c. Purchase no additional legal-size filing cabinets, shelving, safes, etc. If additional legal-size equipment is needed to expand existing filing systems before conversion, obtain the equipment from the excess inventories maintained by the Federal Property Resources Service (GSA).

Effective 1 January 1983, all forms used throughout the federal judicial system must be no larger than letter-size paper (8½ × 11 inches). Legal-size forms not used in the judicial system should also be considered for reduction in size when supplies are exhausted and redesigned to the 8½ × 11 inch size when it it feasible to do so. Automated forms are excluded from this reduction in size.

Although no immediate effect upon the business of our legal offices is anticipated, paper size will be a prime consideration when creating or reprinting local or command forms.

CLE News

1. 16th Fiscal Law Course

The 16th Fiscal Law Course, 5F-F12, has been changed from a 3½ day course to a 4½ day course. The course will now commence on Monday, 9 May 1983.

2. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Minnesota	1 March every third anniversary of admission
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February every third year
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1983 issue of The Army Lawyer.

3. 8th Annual Homer Ferguson Conference (18-19 May 1983)

The 8th Annual Homer Ferguson Conference will be held at the George Washington University's Marvin Center on 18 and 19 May 1983. Those interested in details of the Conference should contact Robert Miele, U.S. Court of Military Appeals, 450 E. Street, N.W., Washington, D.C. 20442; telephone (202) 693-7106.

4. 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. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

5. TJAGSA CLE Course Schedule

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23d Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 10-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

May 16-27: 96th Contract Attorneys (5F-F10).

May 16-20: 12th Methods of Instruction.

June 6-10: 71st Senior Officer Legal Orientation (5F-F1).

June 13-17: Claims Training Seminar (U.S. Army Claims Service).

June 20-July 1: JAGSO Team Training.

June 20-July 1: BOAC: Phase II.

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 13-15: Chief Legal Clerk Workshop.

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 97th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 15-May 19, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

6. Civilian Sponsored CLE Courses

May

5-6: SLF, Institute on Wills & Probate, Dallas, TX

6: NKUCCL, Corporate Counsel Problems, Highland Hts., KY

6: MCLNEL, Divorce Taxation, Boston, MA

6: GICLE, Estate Planning & Will Drafting, Savannah, GA

7: MCLNEL, Evidence—Witnesses, Opinions & Experts, Cambridge, MA

12-14: ATLA, Trial & Appellate Advocacy, Little Rock, AR

13: WSBA, Administrative Law, Spokane, WA

13: GICLE, Estate Planning & Will Drafting, Atlanta, GA

13-14: KCLE, Civil Practice & Procedure, Lexington, KY

18-20: FJC, Seminar for Bankruptcy Judges, New Cumberland, PA

19-20: GICLE, Civil Trial Advocacy, Macon, GA

19-21: ATLA, Discovery & Investigation, Lexington, KY

20: WSBA, Administrative Law, Seattle, WA

22-29: ATLA, Basic Trial Advocacy, Washington, DC

22-6/3: NCCD, Trial Practice I, Houston, TX

26-27: GICLE, Civil Trial Advocacy, Savannah, GA

27-28: ATLA, Settlement & Plea Bargaining, Atlantic City, NJ

30-6/8: KCLE, Trial Advocacy, Lexington, KY

The complete directory of civilian organizations which sponsor CLE courses appears in the January 1983 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials or by requests to the MACOM SJA's who receive "camera ready" copies for the purpose of reproduction. However, the School still 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. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. 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 Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative indices are provided users. Commencing in 1983, however, these indices will be classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the let-

ters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B063185	Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-81-1
AD B063186	Criminal Law, Procedure, Trial/JAGS-ADC-81-2
AD B063187	Criminal Law, Procedure, Posttrial/JAGS-ADC-81-3
AD B063188	Criminal Law, Crimes & Defenses/JAGS-ADC-81-4
AD B063189	Criminal Law, Evidence/ JAGS-ADC-81-5
AD B063190	Criminal Law, Constitutional Evidence/JAGS-ADC-81-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

2. Regulations

Number	*Title*	*Change*	*Date*
AR 135-178	Separation of Enlisted Personnel	I05	1 Dec 82
AR 230-65	Nonappropriated Funds-Accounting Policy and Reporting Procedures		1 Dec 82
AR 600-20	Army Command Policy and Procedures	I02	29 Nov 82
AR 635-100	Officer Personnel	I01	2 Dec 82

3. Articles

Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility—A View from the Jaundiced Eye of One Appellate Judge*, 11 Cap. U.L. Rev. 445 (1982).

Allen & Sheahan, *Deterrents to Voluntary Referral to the Army's Alcohol and Drug Abuse Prevention and Control Program*, J. Pol. & Mil. Soc., Spring 1982, at 29.

Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 Int'l Law. 425 (1982).

Blair, *Trial Lawyer Incompetency: What Studies Suggest About Causes and the Cure*, 11 Cap. U.L. Rev. 419 (1982).

Bruinooge, *Mobilization for a European War: The Impact of Habeas Corpus*, 22 A.F.L. Rev. 205 (1980-81).

Calamari, *The Aftermath of* Gonzalez *and* Horne *on the Administrative Debarment and Suspension of Government Contractors*, 17 New Eng. L. Rev. 1137 (1981-82).

Crowe, *MRE 804(b)(5): The Residual Hearsay Exception*, The Reporter, Oct. 1982, at 129.

Eberlin, *The Identification of Medical Aircraft in Periods of Armed Conflict*, Int'l Rev. of Red Cross, July-August 1982, at 202.

Ewald, *Medical Decision Making for Children: An Analysis of Competing Interests*, 25 St. Louis U.L.J. 689 (1982).

Greig & Althoff, *Medical Malpractice in the United States Military: The Feres Doctrine Revisited*, Judicature, Summary 1982, at 35.

Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule after* Stone v. Powell, 82 Column. L. Rev. 1 (1982).

Hermann & Wilcox, *An Economic Analysis of Incest: Prohibition, Behavior, and Punishment*, 25 St. Louis U.L.J. 735 (1982).

Kelly, *Judicial Review of Agency Decisions Under the Environmental Policy Act of 1969*—Stryker's Bay Neighborhood Council, Inc. v. Karlen, 10 B.C. Envtl. Aff. L. Rev. 79 (1982).

Mascolo, *Arresting a Suspect in the Home of a Third Party: The Issue of Standing or Legitimate Expectation of Privacy*, 4 W. New Eng. L. Rev. 381 (1982).

McC. Mathias, *The Exclusionary Rule Revisited*, 28 Loy. L. Rev. 1 (1982).

Moldave, *The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds*, 70 Calif. L. Rev. 1263 (1982).

Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 Int'l Law. 425 (1982).

Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199 (1982).

Sampson, *Interstate Spouses, Interstate Property, and Divorce*, 13 Tex. Tech. L. Rev. 1285 (1982).

Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 Am. J. Comp. L. 217 (1982).

Casenote, *Stipulation Cannot Make Polygraph Results Admissible*, 47 Mo. L. Rev. 586 (1982).

Comment, *The Nuremberg Principles of Individual Responsibility as Applied in United States Courts*, 25 St. Louis U.L.J. 891 (1982).

Miscellaneous, *States Party to the Geneva Conventions of 12 August 1949*, Int'l Rev. of Red Cross, July-August 1982, at 240.

Note, *Constitutional Limitations on Body Searches in Prisons*, 82 Colum. L. Rev. 1033 (1982).

Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 Colum. L. Rev. 363 (1982).

Note, *Inconsistencies in the Federal Circuit Courts' Application of the Coconspirator Exception*, 34 Wash. & Lee L. Rev. 125 (1982).

Recent Development, Schweiker v. Hansen: *Equitable Estoppel Against the Government*, 67 Cornell L. Rev. 609 (1982).

4. Articles for *The Army Lawyer*

Frequently, attorneys in the field may encounter an interesting legal issue, whether in preparing for trial, drafting pretrial advices or posttrial reviews, or writing legal memoranda or opinions, which may be of interest to other military attorneys who may face the same issue. These attorneys are encouraged to prepare the fruits of their research for publication in *The Army Lawyer*. Within just the past six months, *The Army Lawyer* has published such articles originating at Fort Huachuca, Fort Ord, Fort Sheridan, Fort Leavenworth, and the Government and Defense Appellate Divisions. Such articles are of great benefit to fellow attorneys and will be given prompt attention upon submission.

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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