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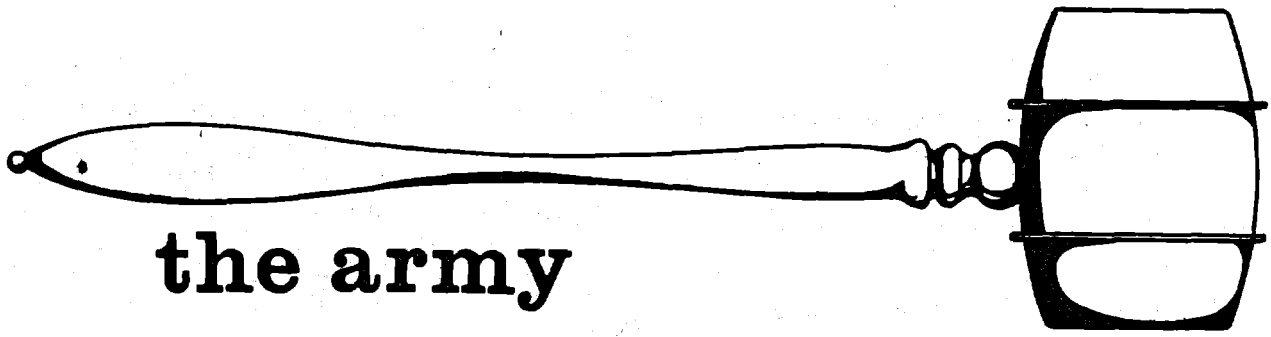

the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-125

May 1983

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Previous Acquittals, Res Judicata, and Other Crimes Evidence Under Military Rule of Evidence 404(b)

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Introduction

One of the most provocative Military Rules of Evidence is 404(b). It provides that evidence of other crimes, wrongs, and acts may not be used against an individual to show that the individual acted in conformity with those acts, but may be received to show motive, plan, opportunity, or for other relevant purposes. Extrinsic offense evidence is controversial because of the great danger of prejudice—that the finders of fact will convict because they think the accused is a bad person.[1]

The application of the rule has raised many interesting questions. The question this article will address is whether Rule 404(b) evidence is admissible against an accused if it was previously the subject of an acquittal.[2] Federal practice in this

[1]Because of the danger of prejudice, it had been required prior to the adoption of the Military Rules of Evidence that, for extrinsic crimes evidence to be admissible on the merits, it have substantial probative value. Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 138g. [hereinafter cited as MCM, 1969]; United States v. Janis, 1 M.J. 395 (C.M.A. 1976); United States v. Gambini, 13 M.J. 423 (C.M.A. 1982). Under the Military Rules of Evidence, however, the balancing test is stated differently. Under MRE 403 relevant evidence is admissible unless substantially outweighed by the danger of unfair prejudice.

[2]The term "previous acquittals" or "prior acquittals" as used hereinafter refers not to the record of acquittal but to the evidence from those prior crimes of which the accused has been acquitted.

area will be examined and compared with military rules,[3] particularly the Manual for Courts-Martial rule of res judicata.[4]

How does this problem arise? Here is an example:

You are prosecuting Private Jackson who is charged with possession of hashish with intent to distribute. In a situation analogous to a gate search, Jackson was the driver of a car carrying concealed hashish which was stopped at an international border. Based on Jackson's statement given to customs MP's you anticipate his defense will be that he was paid fifty deutsche marks by a German named Johann to drive Johann's auto from Amsterdam to Frankfurt. Jackson had no idea the auto was rented or that there were ten kilograms of hashish hidden in the car doors. Jackson was shocked and felt betrayed when the drug detection dog alerted at the Dutch-German border crossing point.

You have the summarized record and allied papers of an eight month old general court-martial in which Jackson was acquitted at Fort Bliss, Texas of smuggling marijuana from Mexico into Texas. The charge was possession with intent to distribute. He testified at that trial that a Mexican named Juan paid him $25 to drive Juan's van from Juarez to El Paso. Jackson claimed he had no idea there was twenty-five pounds of marijuana concealed under the van's panels.

Will Military Rule of Evidence (MRE) 404(b) allow you to use the facts from Jackson's Fort Bliss acquittal in the coming trial?

Federal Practice

To approach this subject more effectively, some historical background is helpful. Prior to the 1970s, the weight of civil authority was that the acquittal of an accused of an offense did not render proof of the facts of the offense inadmissible at a later trial for the purposes now enumerated in MRE 404(b).[5]

For some federal circuits, the applecart was upset by the United States Supreme Court in 1970. In *Ashe v. Swenson*,[6] the Court created a rule of constitutional collateral estoppel which it found

[3]The rules of evidence generally recognized in the United States district courts shall be applied so far as practicable to courts-martial. Uniform Code of Military Justice, Art. 36, 10 U.S.C. § 836 (Supp. III 1979) [hereinafter cited as UCMJ]; MRE 101(b)(1).

[4]MCM, 1969, para. 71b. Unlike the related doctrine of former jeopardy, UCMJ, art. 44, res judicata is a result of executive order and not statute.

[5]*See generally* Annot., 86 A.L.R. 2d 1132, 1135 (1962); Wharton's Criminal Evidence § 262 (C. Torcia 13th ed. 1972).

[6]397 U.S. 436 (1970).

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The Army Lawyer (ISSN 0364-1287)

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embodied in the Fifth Amendment[7] guarantee against double jeopardy. Collateral estoppel was defined by the Court as "when an issue of *ultimate fact* has once been determined by a valid and final judgment that issue cannot again be litigated between the same parties in any future lawsuit."[8]

The facts in *Ashe* were egregious. Six men engaged in a card game were robbed by three or four men. Ashe was tried and acquitted of robbing one of the six card players. The prosecution then refined its case and tried Ashe six weeks later for the robbery of a different card player. This time Ashe was convicted. In reversing the conviction, the Court found that the sole issue and an ultimate fact in the first trial was the identity of Ashe as one of the robbers.[9] That issue and ultimate fact having been decided in Ashe's favor by the acquittal, the Court held that constitutional collateral estoppel thereafter barred Ashe's trial for robbery of the remaining five card players, where his identity as a robber of the card players would again be an ultimate fact.

In a much quoted passage, the Court described how the doctrine of collateral estoppel should be aplied:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment as based upon a general verdict of acquittal.[10]

Ashe's importance lay in its extension of double jeopardy beyond a technical application of the "same offense" language of the Fifth Amendment[11] and beyond the "same evidence" test then prevailing.[12] Double jeopardy now bars retrial if an essential element (ultimate fact) in the second trial was an essential element (ultimate fact) in the first trial which was necessarily decided in the accused's favor by an acquittal.

The extension of *Ashe*'s collateral estoppel of ultimate facts to include mere *evidentiary* use of other crimes evidence which is not an ultimate fact in a subsequent trial has split the circuits. The Second Circuit in *United States v. Mespoulade*[13] used *Ashe*'s constitutional collateral estoppel and general notions of equity to prevent introduction of other crimes evidence of which the accused was acquitted in a retrial of a multicount indictment. In the first trial, Mespoulade was charged with

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[7]U.S. Const. amend. V. The double jeopardy clause is enforceable against the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1968). Constitutional Collateral Estoppel has been applied in military courts. United States v. Hairston, ____ M.J. ____ (A.C.M.R. 30 Mar. 1983).

[8]397 U.S. at 443. (emphasis added). Collateral estoppel only applies to issues of fact or law necessary to a court's judgment. Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 147, 153 (1979). *See generally* Restatement (Second) of Judgments §§ 27, comment b, 28(4) (1982). Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law since United States v. Oppenheimer, 242 U.S. 85(1916). Ultimate facts have been defined as those facts essential to the right of action or the defense. Black's Law Dictionary 1365 (5th ed. 1979). Evidentiary facts can be defined as those facts necessary for determination of ultimate facts. They are the premises upon which the ultimate facts are based. *Id.* at 500.

[9]397 U.S. at 445.

[10]*Id.* at 443, 444 (citations and footnotes omitted).

[11]The double jeopardy clause provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. *See generally* Tigar, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 140-148 (1970).

[12]Ashe could have been reprosecuted under the "same evidence" test as there was some difference in the evidence necessary for conviction as to the two separate victims. *See generally* Note, Ashe v. Swenson: *Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 Colum. L. Rev. 321, 324 (1971).

[13]597 F.2d 329 (2d Cir. 1979).

conspiracy to distribute and possession of the same cocaine. Mespoulade's defense was that he was at most a knowing bystander.[14] A jury acquitted him of possession and a mistrial was declared as to the conspiracy charge. After retrial and conviction on the conspiracy charge, the Second Circuit on appeal held that the particular possession transaction that was the subject of the acquittal could not be used as evidence in the conspiracy charge in the retrial.

The Second Circuit decision clearly went beyond *Ashe*. In *Ashe*, the fact to be relitigated at the second trial was essential to the conviction at the first trial, *i.e.* the identity of Ashe as a robber. *Ashe* limited itself to ultimate facts.[14] Identity was the ultimate fact in both trials as proof of the identity of Ashe as a robber was essential to both convictions. In *Mespoulade*, the possession of cocaine was an ultimate fact in the possession charge at the first trial but only an evidentiary fact in the second conspiracy trial; possession in the second trial was merely evidence of the conspiracy. Thus, the Second Circuit has gone beyond *Ashe* in barring the evidentiary use of crimes for which the accused was previously acquitted. Indeed, the Second Circuit has ruled that collateral estoppel applies even if the issue decided in the first trial was not essential for conviction, *i.e.* is not an ultimate fact.[16]

The issues are better highlighted in cases where the offenses at the first trial are distinct from the second. In *Wingate v. Wainright*,[17] another robbery trial, the prosecution introduced evidence of four prior robberies, for two of which the accused had been previously acquitted. Without discussing the relevance of the facts of the prior acquittals, the Fifth Circuit read *Ashe*'s constitutional collateral estoppel as barring subsequent mere evidentiary use of the facts.

The Court stated:

> We do not perceive any meaningful difference in the quality of "jeopardy" to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of "ultimate" fact or merely an "evidentiary" fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial.[18]

The contrary view is illustrated in *United States v. Castro*[19] and *United States v. Rocha*.[20] In each case on drug smuggling facts similar to the hypothetical *United States v. Jackson* described above, the Ninth Circuit found the evidence of prior smuggling of which the accused had been previously acquitted admissible under a Federal Rule of Evidence 404(b) rationale to show knowledge and intent. The Tenth Circuit has similarly held.[21]

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[14] *Id.* at 332.

[15] *See* note 8 & accompanying text *supra*.

[16] 597 F.2d at 334; United States v. Kramer, 289 F.2d 909, 915, 916 (2d Cir. 1961). For further discussion of collateral estoppel when successive prosecutions arise from the same facts, *see generally* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 970-74 (1980).

[17] 464 F.2d 209 (5th Cir. 1972).

[18] *Id.* at 213, 214. For an extended discussion of *Wingate*, *see* Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 Fla. St. U.L. Rev 511 (1974). In addition to the Second and Fifth Circuits, the Third, Sixth, and District of Columbia Circuits have similarly extended *Ashe*. United States v. Johnson, 697 F.2d 735 (6th Cir. 1983) (collateral estoppel bars intent evidence under Fed. R. Evid. 404(b) where accused was previously acquitted); United States v. Keller, 624 F.2d 1154 (3d Cir. 1980) (collateral estoppel bars evidentiary use of a drug offense of which accused was acquitted to rebut entrapment); United States v. Day, 591 F.2d 861 (D.C. Cir. 1978) (acquittal of charges in first trial barred evidentiary use in second trial on different charges).

[19] 464 F.2d 336 (9th Cir. 1970) *cert. denied*, 410 U.S. 916 (1972).

[20] 553 F.2d 615 (9th Cir. 1977).

[21] *See, e.g.*, United States v. Van Cleane, 599 F.2d 954 (10th Cir. 1979) (acquittal on charge of concealment of a stolen vehicle and interstate transportation of a tractor truck in March and April 1975 did not preclude introduction of evidence of these offenses at a subsequent trial for interstate transportation of a different vehicle in April 1975); Holt v. United States, 404 F.2d 914 (10th Cir. 1968), *cert. denied*, 393 U.S. 1086, *reh'g denied*,

In summary, the circuits are split over whether collateral estoppel extends to having an acquittal bar the prosecution's use of that offense as other crimes evidence in a subsequent trial. The extention of *Ashe* to mere evidentiary use has been criticized as illogical because acquittals arguably establish "only that either the jury is not convinced beyond a reasonable doubt that the material propositions of fact have been established or that the jury is exercising its inherent mercy dispensing power.[82] Commentators and the Ninth and Tenth Circuits would limit *Ashe* to its holding and only allow ultimate facts decided in the accused's favor in the first trial to bar retrial on the same ultimate facts.[83]

Res Judicata and the Evidentiary Use of Prior Acquittals in Military Practice

The evidentiary use of prior acquittals under MRE 404(b) or its predecessor[84] has not been directly addressed in reported Court of Military Appeals or Court of Military Review decisions.[85] Similarly, the question of whether the Manual rule of res judicata applies to MRE 404(b) is not addressed by the Drafter's Analysis, the Manual, or by commentators.

Res judicata was first recognized in military law[86] in the World War II case of *United States v. Lawton*.[87] In a fact situation similar to *Ashe*, Lawton was initially charged with murder perpetrated during a riot in England. He defended on alibi-that he was not present at the riot at all-and was acquitted. He was later convicted for felonious assault allegedly committed during the same riot. Although he pled former jeopardy at trial, the board of review recharacterized his defense as res judicata[88] and reversed his conviction. The board reasoned that the issue of Lawton's presence at the riot had been litigated and decided in his favor and relitigation of it was barred.

So it was as a defense complementary to former jeopardy[89] that res judicata entered military law. Res judicata was characterized as a defense in the 1949[90] and 1951 Manuals.[91] In these two early versions, the doctrine was broadly defined: "The defense of res judicata is based on the rule that any issue of law or fact put in issue and finally determined by a court of competent jurisdiction cannot be disputed by the same parties in a subsequent

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394 U.S. 967 (1969) (can use evidence on which a directed verdict of not guilty previously granted to show the accused had previously passed similar counterfeit notes).

[82]J. Weinstein & M. Burger, Weinstein's Evidence ¶¶404[10], 803(22)[01] (1979). *See generally* Restatement (Second) of Judgments § 28(4) (1982) (issue preclusion, a new term for collateral estoppel, should not apply when the party against whom the preclusion is sought had a significantly heavier burden of persuasion in the initial action).

[83]*Id. See generally* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 129 (3d ed. 1982).

[84]MCM, 1969, para. 138g. *See* note 1 *supra*. The drafters of MRE 404(b) characterize the Rule as "substantially similar" to para. 138g. MCM, 1969, App. 18 (Analysis of the 1980 Amendments to the Manual for Courts-Martial).

[85]*See, e.g.*, United States v. Rubenstein, 19 C.M.R. 709 (A.B.R. 1953) (evidence admitted on charges for which the accused was acquitted or of which findings of guilty were later disapproved by the convening authority could be considered by the board of review in measuring the sufficiency of evidence as to remaining charges).

[86]Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, 89 [hereinafter cited as Legal and Legislative Basis, MCM, 1951].

[87]28 B.R. (ETO) 293 (A.B.R. 1945).

[88]*Id.* at 299.

[89]Res judicata is broader than former jeopardy. Legal and Legislative Basis, MCM, 1951, 89, 90 described the differences as follows:

> Res judicata differs from former jeopardy in these important respects:
> *a.* Jeopardy applies only to the same offense, its lesser included offenses, and some (but not all) offenses in which the offense charged is included. Res judicata on the other hand, is a defense to any issue or element of an offense previously adjudicated between the same parties.
> *b.* Jeopardy might attach before a sentence is final—but res judicata requires a final determination.
> *c.* Jeopardy applies to either a conviction or any acquittal—but res judicata in military law is applicable only to an acquittal.

See generally U.S. Dep't. of Army, Pamphlet No. 27-173, Military Justice: Trial Procedure para. 15-10 (1978).

[90]Manual for Courts-Martial, United States, 1949, para. 72b.

[91]Manual for Courts-Martial, United States, 1951, para. 72b.

trial even if the second trial is for another offense."[32]

Even though expressly a defense, the Court of Military Appeals in *United States v. Smith*[33] expanded res judicata from a mere defense to a rule of evidence. The facts in *Smith* are informative. Private Smith confessed to stealing two letters and one package from the mail. The thefts of the letters and the package were at separate times. He was initially tried for larceny of the letters. At trial, his confession was excluded for improper rights warnings and Smith was acquitted upon a motion for a finding of not guilty based on insufficient evidence.[34] At a second trial for larceny of the package, the previously excluded confession was admitted and Smith was convicted.

In reversing the conviction for admitting the previously excluded confession, the court in sweeping language extended res judicata far beyond the ultimate fact analysis the Supreme Court was later to enunciate in *Ashe v. Swenson*.[35] The court first defined res judicata broadly as including the concepts of former jeopardy, bar, merger, direct estoppel and collateral estoppel.[36] The court further interpreted res judicata as embracing "any issue of fact or law in issue and finally determined; *[it] makes no distinction as to issues directly involved or collaterally involved*; [and] it does not limit its application to issues arising out of one transaction."[37] Finally, the court stated that in applying res judicata it is immaterial whether the issue was rightly or wrongly decided in the first trial.[38]

Smith became the basis for the drastic revision of res judicata in the 1969 Manual. Relying expressly on *Smith*, the drafters revised res judicata to be both a defense *and a rule of evidence* applicable even when it does not amount to a complete defense in bar of trial.[39] Res judicata now applies, as in *Smith*, whether the issue was rightly or wrongly decided, and to *"any matter"* not amounting to an abstract principle of law.[40] Relitigation of the matter is precluded if there has been a previous judgment or ruling whether or not the previous proceeding culminated in an acquittal, conviction, or otherwise.[41] Lastly, res judicata may now be asserted by motion or by objection to evidence.[42]

The Effect of Res Judicata on MRE 404(b)

The net effect of res judicata under the current manual on the evidentiary use of extrinsic offense evidence under MRE 404(b) of which the accused has been previously acquitted would be to exclude the evidence if the previous adjudication was between the same parties, if the matter was pre-

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[32] *See* notes 30 & 31 *supra*. The defense was to be raised as a motion, normally after the prosecution rested its case.

[33] 15 C.M.R. 369 (C.M.A. 1954).

[34] *Id.* at 371.

[35] *See* note 8 & accompanying text *supra*. *See also* text accompanying note 12 *infra*.

[36] 15 C.M.R. at 371. The court overlooked the distinctions between res judicata and collateral estoppel. *See generally* 1B J. Moore, Moore's Federal Practice ¶ 0.441[1] (2d ed. 1980). Generally, under civil law, res judicata means a final judgment on the merits of an action which precludes the parties from relitigating issues that were or could have been raised in that cause of action. Collateral estoppel means that once a court has decided an issue of law or fact necessary to its judgment, that decision will preclude relitigation in a different cause of action. Allen v. McCurry, 449 U.S. 90, 94-95 (1980); Montana v. United States, 440 U.S. 147, 153 (1979). *See generally* 1B J. Moore, Moore's Federal Practice ¶¶ .405[1], [3], .441[1] (2d ed. 1980); 46 Am. Jur. 2d, *Judgments* §§ 394, 397 (1969); Restatement (Second) of Judgments § 27, comment b (1982).

[37] 15 C.M.R. at 374 (emphasis added).

[38] Indeed, the court concluded that the confession had been improperly excluded in the first trial. *Id.* at 375.

[39] U.S. Dep't. of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, at 12-5, 12-6 (Jul. 1970) [hereinafter cited as Analysis, MCM, 1969].

[40] MCM, 1969, para. 71b.

[41] *Id.*

[42] *Id.* Generally, res judicata may not be asserted by the government. United States v. Cazatt, 11 C.M.A. 705, 29 C.M.R. 521 (1960); United States v. Vasquez, 9 M.J. 517 (A.F.C.M.R. 1980); United States v. Condon, 1 M.J. 984 (N.C.M.R. 1976); United States v. Tobias, 46 C.M.R. 590 (A.C.M.R. 1972). *But see* MCM, 1969, para. 68b(2).

viously put in issue and finally decided,[43] and if the court had jurisdiction.[44]

Whether or not the same party is involved on the government side has presented few issues in military case law.[45] The Manual rule is that res judicata applies if the United States or any governmental unit deriving its authority from the United States was a party. Thus, acquittals by state courts do not invoke res judicata at a court-martial.[46] If the United States is a party, the previous trial need not be a criminal proceeding.[47]

Whether the same party is involved on the accused's side is more troublesome.[48] The general rule is that "same parties" is not limited to the same accused, but also to other co-actors in a crime requiring concurrence of intent or action between two persons even if only one essential party was previously tried. Thus, res judicata bars trial of one for subornation of perjury where the actual alleged perjurer was acquitted.[49] Similarly, acquittal of a co-conspirator precludes prosecution of the other co-conspirator,[50] though acquittal of the actual perpetrator does not bar prosecution of an aider and abetter because the concurrence of two people is not required for one to aid and abet.[51]

In analyzing whether the matter was previously put in issue and finally determined,[52] the Court of Military Appeals has generally adopted the rule of *Ashe*[53] to examine the pleadings, evidence, and other relevant information[54] to see if a rational judge or jury could have grounded its ruling or verdict on an issue other than that which the accused seeks to exclude.[55]

An additional problem is whether res judicata ought to apply to summary courts-martial. After

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[43]Res Judicata only applies to final judgments. United States v. Saulter, 5 M.J. 281 (C.M.A. 1978) (res judicata not applicable to U.S. District Court decision not yet final). *See* UCMJ, Art. 76. Post-trial determinations by the convening authority are also covered by res judicata. United States v. Guzman, 3 M.J. 740 (N.C.M.R.), *petition denied*, 3 M.J. 479 (C.M.A.), *rev'd per curiam*, 4 M.J. 115 (C.M.A 1977). *See also* United States v. Washington, 5 M.J. 736 (N.C.M.R. 1978), *rev'd per curiam*, 7 M.J. 78 (C.M.A. 1979) (court of review bound by final judgment of military judge on jurisdiction issue even though that court-martial was initiated subsequently to court-martial pending before it). *See generally* Restatement (Second) of Judgments § 13 (1982).

[44]United States v. Culver, 46 C.M.R. 141 (C.M.A. 1973) (retrial prohibited after an acquittal even where the first court lacked jurisdiction). *See generally* Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 *J. Crim. L. & Criminology* 74 (1982); U.S. Dep't. of Army, Pamphlet No. 27-174, Military Justice: Jurisdiction of Courts-Martial (1980).

[45]*See* United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978) (res judicata applies to U.S. Magistrates' Court).

[46]United States v. Borys, 39 C.M.R. 608 (A.C.M.R. 1968), *rev'd on other grounds*, 40 C.M.R. 259 (C.M.A. 1969).

[47]*See* United States v. Swanson, 26 C.M.R. 491 (C.M.A. 1958) (bankruptcy proceeding).

[48]The "same parties" rule in criminal cases has been criticized because it allows inconsistent verdicts and can give the appearance of substantial injustice. *See generally* United States v. Guerra, 13 C.M.A. 463, 32 C.M.R. 463 (1963); United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978); Note, *Collateral Estoppel in Criminal Cases: Time to Abandon the Identity of Parties Rule*, 46 S. Cal. L. Rev. 922 (1973).

[49]United States v. Doughty, 14 C.M.A. 540, 34 C.M.R. 320 (1964). Although *Doughty* predates the 1969 Manual revision, the drafters thought *Doughty*'s impact was too unsettled to draft into the new paragraph 71(b). Analysis, 1969, MCM at 12-6, 12-7.

[50]United States v. Kidd, 13 C.M.A. 184, 32 C.M.R. 184 (1962); *see* United States v. Doughty, 14 C.M.A. 540, 34 C.M.R. 320 (1964).

[51]United States v. Schwarz, 45 C.M.R. 852 (N.C.M.R. 1971) (government must show only that someone committed the offense). *See also* Standefer v. United States, 446 U.S. 10 (1980).

[52] Note that "finally determined" may mean acquittal or merely a ruling on a motion. MCM, 1969, para. 71b. *See* United States v. Smith, 1 C.M.A. 369, 15 C.M.R. 369 (1964) (admissibility of confession cannot be relitigated). "Put in issue and finally decided" would not include, for example, acquittals based on the statute of limitations.

[53]*See* note 10 accompanying text *supra*. The Court of Military Appeals had previously adopted a similar rule in United States v. Hooten, 12 C.M.A. 339, 30 C.M.R. 339 (1961). *See generally* United States v. Warble, 30 C.M.R. 839 (A.F.B.R. 1960).

[54]The search for relevant evidence does not extend to the deliberations of the court-members. United States v. Underwood, 15 C.M.R. 487 (A.B.R. 1954). *See generally* Dean, *The Deliberative Privilege under M.R.E. 509*, The Army Lawyer, Nov. 1981, at 1.

[55]United States v. Marks, 21 C.M.A. 281, 45 C.M.R. 55 (1972). While the use of special findings would assist in determining on which facts a military judge grounded his verdict, the Manual makes special findings optional if there is an acquittal or conviction of a lesser included offense. MCM, 1969, para. 74i. *See generally* Schinasi, *Special Findings: Their Use at Trial and on Appeal*, 87 Mil. L. Rev. 73 (1980). For problems with the "ra-

Middendorf v. Henry,[56] the summary court-martial appears to be a court in name only. In *Middendorf*, the Supreme Court characterized summary courts as informal disciplinary hearings rather than adversary criminal proceedings for which the right to counsel attached under the Sixth or Fifth Amendments.[57] Even though MRE 609(a) expressly authorizes the use of summary courts-martial convictions to impeach, the Court of Military Appeals has in a pre-Rules case prohibited the use of an uncounseled summary court-martial conviction to impeach an accused because of its inaccuracy as a fact-finding process.[58] In addition to problems as to the status of the summary court-martial as a court and its reliability in finding facts, varying service practices exist as to whether a summarized record will be produced.[59] Without even a summarized record, the problem of determining what matter was put in issue and finally determined will be exacerbated. It is apparent that the application of res judicata to summary courts-martial is impractical. These practical difficulties of determining what issues were put in issue and finally determined, particularly in a recordless and uncounseled summary court-martial, will prevent wide application of res judicata to summary court-martial acquittals.

Conclusion

In summary, the attempt to use evidence of other crimes under MRE 404(b) of which an accused has previously been acquitted has produced the same result in the Second, Third, Fifth, Sixth, and District of Columbia Circuits[60] and in the military but for different reasons. Those circuits which disallow use do so through an extention of constitutional collateral estoppel and by notions of equity. The military result is grounded in the broad Manual rule of res judicata.

Careful analysis is required, however, to resolve res judicata issues. The hypothetical drug smuggling case posed at the beginning of the article illustrates the difficulties. Assuming the first court-martial had jurisdiction, there is no issue but that the same parties—Jackson and the United States—were involved. The problem of what was put in issue and finally determined is more problematic and requires an examination of the pleadings and record.[61] The charge was possession with intent to distribute. From the summarized testimony of the accused and the remainder of the record, it is apparent that the only issue was knowing possession,[62] *i.e.* whether Jackson knew the marijuana was hidden in the van's panels. The fact that marijuana was concealed in the van and that Jackson was this driver were not contested. The acquittal has finally determined the issue of guilty knowledge at the first court-martial in Jackson's favor and res judicata bars relitigation of that issue. But does it bar relitigation of the other, uncontroverted facts? Certainly, the government would want to prove the uncontroverted facts of the first trial even without attempting to prove guilty knowledge to show the unlikelihood that

tional jury" and the general verdict, *see generally* Ashe v. Swenson, 397 U.S. 436, 466-468 (1970) (Burger, C.J., dissenting); Note, *Ex Parte* Green—New Limits on Collateral Estoppel in Criminal Trials, 3 Nat'l. J. Crim. Def. 303 (1977). If the military judge is ruling on certain constitutional issues, the requirements in the Military Rules of Evidence for essential findings of fact will aid subsequent res judicata determinations. *See* MREs 304(d)(4) (confessions); 311(d)(4) (search and seizure); 321(f) (eyewitness identification).

[56]425 U.S. 25 (1976).

[57]*Id.* at 40-48. U.S. Const. amends. VI, V.

[58]United States v. Cofield, 11 M.J. 422, 432 (C.M.A. 1981). Summary court-martial convictions may, if the accused was aware of or afforded his right to consult with counsel, be used to determine an appropriate sentence. United States v. Kuehl, 11 M.J. 126 (C.M.A. 1981); United States v. Taylor, 12 M.J. 561 (A.C.M.R. 1981).

[59]The Manual states that evidence at a summary court-martial will be summarized only if directed by the convening or higher authority. MCM, 1969, para. 79e. Service implementation is varied. The Army and Air Force do not require summarized records by regulation, so records are done, if at all, at the convening authority's direction. *See* Army Reg. No. 27-10, Legal Services—Military Justice, para. 5-29 (1 Sept. 1982); U.S. Dep't of Air Force, Manual No. 111-1, Military Justice Guide, paras. 6-4, 6-19 (C5 24 Nov. 1980). The Navy requires a summarized record of the evidence on the merits in a summary court-martial if a not guilty plea is entered and a finding of guilty results. JAGMAN 0120d.

[60]*See* notes 11-18 and accompanying text *supra*.

[61]*See* notes 10, 53, 54 and accompanying text *supra*. *See e.g.*, United States v. Hairston—M.J.—(A.C.M.R. 30 Mar. 1983).

[62]*See* MCM, 1969, paras. 213g(2), (3). *See also* United States v. Griffin, 8 M.J. 66 (C.M.A. 1979); United States v. Wilson, 7 M.J. 290 (C.M.A. 1979). *Cf.* United States v. Newman, 14 M.J. 474 (C.M.A. 1983).

Jackson would be an innocent dupe the second time. Res judicata is not a bar to these facts because, being uncontroverted, they were not "put in issue" as required by the manual and were never "finally determined."[63]

Now that the res judicata hurdle is past, analysis under MREs 404(b) and 403 can begin.[64]

As the hypothetical case illustrates, such evidence can be devastating. Military counsel must be aware of the relationship between MRE 404(b) and res judicata to protect the client and to avoid error.[62] If the facts were previously litigated in another court, their admissibility must be scrutinized under the Manual even before the MRE 404(b) issues are considered.

For those dissatisfied with the effect of res judicata on MRE 404(b), is there a way out? As noted above, the law has been silent on the relationship between the two rules. Neither the Manual nor case law provides an exception or any authority for MRE 404(b) to override res judicata. Only limitations on the generous scope of the Manual version of res judicata can change the result.[66]

[62]*See generally* United States v. Marks, 21 C.M.A. 281, 45 C.M.R. 55 (1972); 46 Am. Jur. 2d *Judgments* § 418 (1969).

[63]*See* note 1 *supra*. It is preferable to analyze the res judicata issues first to know exactly what evidence can be offered before testing that evidence under MRE 404(b). *See generally* United States v. Janis, 1 M.J. 395 (C.M.A. 1976) (extrinisic offense evidence must be clear, plain, and conclusive and connected with the charged offense in point in time, place, and circumstances); United States v. Dicupe, 14 M.J. 915 (A.F.C.M.R. 1982).

[64]Because of the danger of prejudice, a failure to object may not always result in waiver. *See* UCMJ, Art 59(a); MRE 103(d).

[66]Proposed Rule for Courts-Martial 905(g) (9 Dec. 1981 draft) would modify the present res judicata rule by excepting from its coverage previously adjudicated determinations of law and the application of law to the facts that did not arise from the same transaction. The draft analysis to the proposed rule indicates that this provision was intended to overturn United States v. Smith, 15 C.M.R. 369 (C.M.A. 1954). Thus, the admissibility of one confession to separate crimes, *i.e.* larcenies on different days, could be litigated at each court-martial if the offenses were tried separately. The provision apparently aims at allowing relitigation of questions of law. *See generally* Restatement (Second) of Judgments §§ 28(2), 28(2) comment (1982) (discussion of problems of distinguishing questions of law and fact). By precluding relitigation of facts that meet the test of the rule, the proposed rule provides no direct authority to admit, under Mil. R. Evid. 404(b), evidence of other crimes of which the accused had been acquitted. But even if the Manual res judicata was modified to change the result, military courts would then have to resolve the issue that has split the circuits: whether the constitutional collateral estoppel of Ashe v. Swenson, 397 U.S. 436 (1970), requires the exclusion of the evidence. *See generally* United States v. Hairston, ___ M.J. ___ (A.C.M.R. 30 Mar. 1983) (applies constitutional collateral estoppel).

Russo Revitalized

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> No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment as a result. That policy makes a mockery of the military justice system in the eyes of those who serve in the military services.[1]

In *United States v. McDonagh*,[2] the Court of Military Appeals stated that an examination of congressional intent was required to determine the effect of 1979 amendments to Article 2 of the Uniform Code of Military Justice (UCMJ).[3] The

[1]Department of Defense Authorization Act (1980), P.L. 96-107, 96th Cong., 1st Sess, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1827.

[2]14 M.J. 415 (C.M.A. 1983).

[3]*Id.* at 417. The amendments to Article 10 of the Uniform Code of Military Justice, 10 U.S.C. 802 (1976) [hereinafter cited as VCMJ], added the following subsections:

> 2(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> 2(c) Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) Submitted voluntarily to military authority;
>
> (2) Met the mental competence and minimum age

above-quoted language expresses that intent. Congress was trying to overrule a judicial holding from the case of *United States v. Russo*[4] which became known as the *"Russo* defense." Remarks made during congressional hearings on the proposed amendments made it clear that Congress was trying to end a situation that had severely undermined discipline and command authority.[5]

In spite of clear signals from Congress, however, the Court of Military Appeals has breathed new life into this condemned "defense." The process of rebirth has been so subtle that it has gone unnoticed by the judge on the court who has been the most vocal critic of the *Russo* defense.[6] This article will examine the *Russo* defense, the rebirth of the defense, and the practical effects of this rebirth.

The *Russo* Defense

United States v. Russo[7] was the third case in a series of public policy pronouncements by the Court of Military Appeals.[8] These policy statements evidenced the court's battle against fraudulent recruiting practices.[9] When *Russo* was decided in 1975, recruiters were under pressure to fill the ranks of the volunteer armed forces. Recruiting abuses took place. Potential service members who suffered from dyslexia,[10] were illiterate,[11] or were otherwise disqualified were aided by recruiters in concealing their disqualifications. In *Russo*, the Court of Military Appeals condemned such recruiting abuses.

After *Russo*, the issue of fraudulent enlistment often came to light at a service member's courtmartial for violations of the UCMJ. Testimony by the accused or by family members present during the enlistment process raised the issue, causing the government to produce the recruiter to rebut the defense version of the enlistment.[12] In some cases, this was impossible; other cases involved recruiters who were unable to respond to the accused's allegations.[13] If the accused was proven to have had a disqualification at the time of enlistment, no military status was thereupon created. Because of unclean hands on the part of the recruiter, the government could not base jurisdiction upon the equitable doctrine of constructive enlistment.[14] Trial judges frequently ruled in favor of the accused and courtmartial charges were dis-

qualifications of section 504 and 505 of this title at the time of voluntary submission to military authority;
(3) Received military pay or allowances; and
(4) Performed military duties;
is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

[4]1 M.J. 134 (C.M.A. 1975).

[5]*See* text accompanying note 1 *supra*.

[6]Judge Cook, concurring in part in *McDonagh*, stated: *"Russo* has been rejected by Congress and discredited by the lead opinion here." 14 M.J. at 424 (Cook, J., concurring in part).

[7]1 M.J. 134 (C.M.A. 1975).

[8]The other two cases are United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (the court declared enlistments of forced volunteers void where recruits are faced with the choice between jail or the armed forces); and United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974) (the court prevented the government from establishing jurisdiction based on constructive enlistment when government agents know about defects in qualifications for enlistment).

[9]"The result we reach will have the salutary effect of encouraging recruiters to observe applicable recruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices." United States v. Russo, 1 M.J. 134, 136 (C.M.A. 1975).

[10]Russo suffered from dyslexia, a mental disorder that impaired his ability to read. His recruiter supplies him with numbers and letters to put on the Armed Forces Qualification Test to assure his eligibility for enlistment.

[11]United States v. Little, 1 M.J. 476 (C.M.A. 1976). After finding out that Little was illiterate, his recruiter explained the questions on the Armed Forced Qualification Test to him.

[12]United States v. Barrett, 1 M.J. 74 (C.M.A. 1975). Once the enlistment issue is raised, the government had an affirmative obligation to establish jurisdiction over the accused.

[13]The first hurdle for the government was to locate the recruiter. Depending on the time lapse, some recruiters had left the service or were otherwise unavailable. If located, some recruiters had difficulty recalling events from one of the many recruits they brought into the service. Recruiter misconduct is arguably effecting an unlawful enlistment in violation of Article 84, UCMJ. *See* United States v. Hightower, 5 M.J. 717 (A.C.M.R. 1978).

[14]A constructive enlistment may exist when an accused receives pay and performs duties. When an agent of the government is involved in a fraudulent enlistment, "fairness prevents the government from resting on a constructive enlistment as a jurisdictional base." United States v. Brown, 23 C.M.A. 162, 165, 48 C.M.R. 778, 781 (1974); *See also* Sterritt, *In Personam Jurisdiction: Recruiter Misconduct Sufficient to Preclude a Constructive Enlistment*, 30 Jag J. 105 (1978).

missed. Accused service members returned to their units to await administrative separation, free from criminal sanctions.[15]

The "*Russo* defense" became a powerful defense weapon. Defense counsel directed their attention to their client's enlistment. In some cases, to the dismay of prosecutors, this issue became more important than the facts of the case. Meanwhile, the *Russo* defense was being refined by the Court of Military Appeals.[16] After the effective date of the amendments to Article 2, the court limited *Russo* to cases involving nonwaivable defects.[17] By this time, Congress had expressed its intent on the *Russo* defense. The question then became one of interpretation; how would the court react to the amendments? Although all judges on the court testified before Congress at hearings into the proposed amendments,[18] the issue of retroactivity of the amendments was first dealt with directly by the court in *McDonagh*.[19]

Rebirth of *Russo*

Before dealing with the issue of the retroactivity of the amendments, the Court of Military Appeals decided *United States v. Laws*.[20] In *Laws*, the court was concerned with the propriety of a trial judge submitting the issue of personal jurisdiction to court members. A majority of the court apparently endorsed the holding in *United States v. Ornelas*,[21] which indicated that, where military status is an element of the offense, a disputed issue of status must be resolved by the fact-finder.[22] Each judge on the court had a different view regarding the procedure of court members determining personal jurisdiction beyond reasonable doubt. Comparing these views foretells the rebirth of the *Russo* defense.

The *Laws* opinion first recognized the action of Congress in amending Article 2.[23] Judge Cook, in the lead opinion, expressed reservations about submitting jurisdictional issues to the court members. He viewed this as a confusing procedure, but acquiesed in his fellow judges' adherence to *Ornelas*. Judge Cook stated that this procedure was an unwarranted exception to the general rule that jurisdiction is a question of law for the judge.[24] Judge Fletcher, the author of *Russo*, reaffirmed the *Ornelas* procedure, while adding that in personam jurisdiction may be raised irrespective of the offense charged.[25] Chief Judge Everett endorsed *Ornelas* and its codification in paragraph 57b of the Manual for Courts-Martial. But, although the

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[15]An accused who committed an offense commonly prosecuted by the civilian community might be subject to criminal sanctions, provided there was concurrent jurisdiction over the location where the offense took place. Civilian interest in such prosecutions is decreased by the fact that the offender might soon be leaving the state.

[16]United States v. Valadez, 5 M.J. 470 (C.M.A. 1978) (simple negligence on the part of a recruiter will not void an enlistment contract); United States v. Harrison, 5 M.J. 476 (C.M.A. 1978) (an apparent inadvertent mistake on the part of a recruiter will not prevent the government from basing jurisdiction on a constructive enlistment). *See also* Schlueter, *Wagner, Valadez, and Harrison: A Definitive Enlistment Trilogy?*, The Army Lawyer, Jan. 1979, at 4.

[17]United States v. Stone, 8 M.J. 140 (C.M.A. 1979) (the court refused to extend *Russo* to situations involving waivable regulatory defects in an accused's enlistment. The *Stone* decision was published on 26 December 1979; the amendments to Article 2, UCMJ went into effect on 9 November 1979.

[18]Schleuter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. Crim. L. & Criminology 1, 81 (1982).

[19]*See* Schleuter, *Personal Jurisdiction Under Article 2, U.C.M.J., Whither Russo, Catlow and Brown?*, The Army Lawyer, Dec. 1979 at 3.

[20]11 M.J. 475 (C.M.A. 1981).

[21]2 C.M.A. 96, 6 C.M.R. 96 (1952).

[22]As noted in Chief Judge Everett's concurring opinion in *Laws*, the *Ornelas* holding was the basis for paragraph 57b of the Manual for Courts-Martial, United States, 1969 (Rev. Ed.) [hereinafter cited as MCM], which states, in part:

> For example, if during a trial for desertion the accused makes a motion to dismiss for lack of jurisdiction and presents evidence tending to show that he is not a member of an armed force, his status as a military person reaches the ultimate question of guilt or innocence, and, if the motion is denied, the disputed facts must be resolved by each member of the court in connection with his deliberation upon the finding.

[23]11 M.J. at 475 n.1 (referring to a modification of the *Russo* doctrine).

[24]*Id.* at 476.

[25]*Id.* at 478 (Fletcher, J., concurring in the result). This last comment seems unnecessary, since the issue in *Laws* was who decides the personal jurisdiction issue rather than when the issue can be raised.

Manual for Courts-Martial uses a desertion case as an example of when this procedure should be used,[26] the Chief Judge stated that it was doubtful that the unauthorized absences in the *Laws* case were suited for this procedure. The *Ornelas* procedure would be more useful in circumstances that would avoid a lengthy trial.[27]

The *Laws* decision foretells the rebirth of the *Russo* defense because of Chief Judge Everett's extension of the *Ornelas* procedure to cases more complicated than unauthorized absences. Despite the misgivings of Judge Cook, personal jurisdiction is now to be submitted to court members for resolution. The government burden in cases involving military offenses is to prove status beyond reasonable doubt. *Laws* was the conception that brought new life to the *Russo* defense.

After a gestation period of sixteen months, the *Russo* defense was reborn in *United States v. McDonagh*.[28] In *McDonagh*, the Court of Military Appeals, dealt with the issue of the retroactivity of the amendments to Article 2. The court was faced with a division between the Army and Navy-Marine Corps courts of review on this issue. The Army court had held that the amendments were not violative of the *ex post facto* clause of the Constitution when applied to offenses taking place before the amendments.[29] This represented the more traditional view that the accused's acts were illegal before the amendments and therefore the accused was on notice about potential prosecution.[30] The Navy-Marine Corps position as that the amendments violate the *ex post facto* clause when applied to offenses occurring before the effective date of the amendments.[31] This view focused on the effect upon the accused; he or she could now be prosecuted, while prior to the amendments prosecution was barred.

To remedy this situation, the Court of Military Appeals went one up on King Solomon; it cut the baby in half to satisfy all parties.[32] As in biblical times, such a solution is not satisfactory. The court in *McDonagh* divided offenses into two categories: those that are purely military and those that are not peculiarly military.[33] Since Specialist McDonagh had been charged with drug offenses which were not "peculiarly military," the amendments to Article 2 were deemed only procedural and not violative of *ex post facto*.[34] Conversely, if the accused had been charged with a preamendment military offense, there would apparently have been a constitutional violation. Writing for the court, Chief Judge Everett referred to purely military offenses as offenses where military status must be decided by the trier of fact as part of the determination of guilt or innocence.[35] Later in his opinion, Chief Judge Everett categorized unauthorized absence and disrespect to a superior officer as military offenses.[36] Nonwithstanding that the military status of the accused was no more an element of disrespect than it was an element of the drug offenses with which Specialist McDonagh was charged. Yet, all offenses peculiar to the military were considered together and for these "military" offenses, personal jurisdiction must be proven beyond reasonable doubt. Contrary to

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[26] *See* note 22 *supra*.

[27] 11 M.J. at 478 (Everett, C.J., concurring in the result).

[28] 14 M.J. 415 (C.M.A. 1983).

[29] United States v. McDonagh, 10 M.J. 698 (A.C.M.R. 1981), *aff'd*, 14 M.J. 415 (C.M.A. 1983).

[30] Article I, section 9, clause 3 of the United States Constitution states: "No Bill of Attainder or ex post facto law shall be passed." This has been interpreted to prohibit laws that make acts criminal which were innocent when done, or increase punishments, or change the rules of evidence to make it easier to convict. Cummings v. Missouri, 71 U.S. (4 Wall.) 177 (1867).

[31] United States v. Marsh, 11 M.J. 698 (N.M.C.M.R. 1981). This holding was based in part on the U.S. Supreme Court decision in Weaver v. Graham, 450 U.S. 24 (1981), which post-dated the *McDonagh* decision.

[32] 1 Kings 3:25-27.

[33] 14 M.J. at 422.

[34] Chief Judge Everett's conclusions that McDonagh's drug offenses were not peculiarly military can be disputed. McDonagh's sale and transfer of cocaine were charged as violations of Article 134, UCMJ. Article 134 requires proof that the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[35] 14 M.J. at 422.

[36] *Id.* at 423.

Judge Cook's concurring opinion, *United States v. Russo* is not discredited by the lead opinion in *McDonagh*.[37] The *Russo* defense has been given new life.

Practical Effects

Chief Judge Everett has returned the issue of recruiter misconduct to defense counsel in the military; in fact, he referred to the issue as the "defense" of recruiter misconduct.[38] Congress had intended to eliminate this defense. The Court of Military Appeals, beginning with *Laws* and ending with *McDonagh*, has brought *Russo* back from the dead.

A defense counsel representing an accused charged with military offenses should not investigate the enlistment for potential recruiter misconduct.[39] If evidence of misconduct is found, counsel may have two bites at the apple by first litigating the issue in front of the trial judge. After an adverse ruling, the defense can relitigate the issue at trial, where the burden on the prosecution is proof beyond reasonable doubt. Since jurisdiction is never waived,[40] the defense may elect to raise the issue initially on the merits. The advantage to this course of action is tactical surprise and disruption to the government's case. Whether litigating the issue once or twice, the prosecution must rebut the *Russo* defense with the same effort and likelihood of success that existed in the mid-1970s. Additional problems of instructional error and confusion to court members have been predicted by Judge Cook.[41]

Conclusion

Raising *Russo* from the dead directly opposes the intent of Congress. The prosecution should not be forced to prove personal jurisdiction beyond a reasonable doubt in front of the court members. Jurisdiction can be treated in the same manner as venue in federal practice and procedure. Like venue, personal jurisdiction is an aspect of a criminal case that must be demonstrated by the prosecution. In federal practice, venue is established by merely reading the indictment in court.[42] Personal jurisdiction should be distinguished, however, from the essential substantive elements of an offense that must be proven beyond reasonable doubt. An even better solution comes from Judge Cook in *United States v. McDonagh*;[43] *Russo* should be overruled.

[37] *Id.* at 425 (Cook, J., concurring).

[38] *Id.* at 422.

[39] Recruiter misconduct should occur less frequently in an economy that makes military service more attractive.

[40] Para. 68b, MCM.

[41] *See* 11 M.J. at 476.

[42] *See* United States v. White, 611 F.2d 531 (5th Cir. 1980).

[43] *See* 14 M.J. at 425 (Cook, J., concurring).

Discovery—Foundation for Due Process

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Discovery is an important right afforded an accused in a criminal trial. Since many accused do not have sufficient funds to conduct an independent investigation, discovery of exculpatory and inculpatory information held by the government can be vital to a fair trial. The soldier-accused is especially fortunate because of the broad range of discovery rights recognized by courts-martial. As an aid for trial and defense counsel, this article consolidates these rights and outlines their basic protections. The sources of discovery rights are constitutional, statutory, executive orders, and ethical.

Mililtary Law

Military accused enjoy discovery that is probably unequaled in any other system of justice. In fact, trial counsel traditionally employ an "open file" policy toward the defense. This policy of fair play is mandated by the Manual for Courts-Martial (MCM).[1] Paragraph 44*h* imposes several specific requirements on the trial counsel. Trial counsel must "permit the defense to examine . . . any paper accompanying the charges, including the re-

[1] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM].

port of investigation . . . . Before trial, trial counsel should advise the defense of the probable witnesses to be called by the prosecution".[2]

The Uniform Code of Military Justice (UCMJ)[3] and the MCM contain numerous provisions requiring governmental release of evidence. The UCMJ generally provides that "[t]he trial counsel [and] the defense counsel . . . shall have equal opportunity to obtain witnesses and other evidence".[4] The Manual reinforces this right.[5] Further, the Manual requires the trial counsel, upon reasonable request, to allow defense examination of documents and other evidentiary materials in the custody and control of the government and to produce the item for use in evidence.[6]

Section III of the Military Rules of Evidence[7] contains three important disclosure rules. A defense request is not necessary to trigger this disclosure and the disclosure must be made before arraignment. First, all *relevant* statements, oral or written, made by the accused must be disclosed.[8] Second, evidence seized from the accused's person or property or believed owned by the accused that the government *intends to offer* into evidence must be disclosed.[9] Finally, evidence of a prior identification of the accused at a lineup or other identification process that the government *intends to offer* into evidence against the accused must be disclosed.[10] Notice that all relevant statements made by the accused must be disclosed. However, seized evidence and evidence of prior identifications must be disclosed only if the government intends to offer such evidence. Importantly for the defense, these releases include inculpatory evidence. With this type release, the defense can effectively prepare its trial strategy.

Certain presentencing evidence must also be disclosed upon defense request. The prosecutor shall disclose prior to arraignment "copies of such written material as will be presented by the prosecution on sentencing, along with a list of prosecution witnesses, if any."[11] While this evidence may not be as crucial as Section III matters, the disclosure does allow the defense an opportunity to know what matters must be overcome or explained during the presentencing hearing.

Constitutional

The U.S. Supreme Court has construed the Constitution to require governmental disclosure in some instances. The lead case is *Brady v. Maryland*.[12] In *Brady*, the accused requested that the government release all relevant statements made by a co-accused. The government complied in part but failed to release the co-accused's admission that he was the active perpetrator of the charged murder. After trial, the defense discovered the government's omission and sought relief even though Brady pled guilty. The defense contended that the statement was relevant to sentencing. Because Brady had been sentenced to death by the court, the defense argued that the omitted statement might have influenced the sentencing body to adjudge a life sentence instead.

The Supreme Court agreed with Brady. The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[13] The *Brady* principle requires only the dis-

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[2]MCM, para. 44*h*.

[3]Uniform Code of Military Justice, Arts. 1-140, 10 U.S.C. §§ 801-940 (1976) [hereinafter cited as UCMJ].

[4]UCMJ, art. 46.

[5]"The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." MCM, para. 115*a*. However, Section V of the Military Rules of Evidence exempts certain evidence from release, *e.g.* classified information. Mil. R. Evid. 505.

[6]MCM, para. 115c.

[7]The text of the Military Rules of Evidence may be found in Appendix 18 to the Manual for Courts-Martial, added by Change 3, dated 1 September 1980. The Military Rules of Evidence became law effective September 1, 1980, as a result of Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

[8]Mil. R. Evid. 304(d)(1).

[9]Mil. R. Evid. 311(d)(1).

[10]Mil. R. Evid. 321(d)(1).

[11]MCM, para. 75*b*(5).

[12]373 U.S. 83 (1963).

[13]*Id.* at 87.

closure of favorable information,[14] not the disclosure of all evidence.[15]

What if the defense makes no disclosure request or makes only a very general request for "all favorable information"? Does this trigger any constitutional requirement to disclose? In *United States v. Agurs*,[16] the Supreme Court answered these questions.

Linda Agurs was charged with murder. Though she did not testify at trial, her defense was self-defense. The defense support for this position was that the victim was carrying two knives shortly before the stabbing and that one witness, who responded to accused's screams, saw the victim sitting on the accused trying to force one of the knives into the accused's chest.

Even with this, the government's evidence of guilt was compelling. The prosecution apparently established that Linda Agurs attacked the deceased to rob him shortly after sexual intercourse. This motive, coupled with the deceased's numerous wounds and the lack of wounds to the accused, cemented Linda Agur's conviction.

After trial, the defense learned that Sewell, the victim, had two prior convictions—one for assault and carrying a deadly weapon and another for carrying a deadly weapon. The defense argued that these convictions should have been disclosed, even absent request, because the convictions supported the self-defense theory.

The Supreme Court in *United States v. Agurs* first distinguished *Brady* because Agurs did not make a specific request for disclosure. Under these circumstances, the Court felt that a different standard must apply. The Court found no constitutional obligation for the prosecutor to "routinely deliver his entire file to the defense counsel".[17] If the defense makes "no request . . ., or asks for 'all *Brady* material' or 'anything exculpatory',"[18] what is the government's obligation?

> If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of the evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.[19]

Then, "[t]he mere possibility than an item might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense."[20] In these cases, materiality means something different; "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt."[21] Therefore,

> If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[22]

Using this standard, the defense was not entitled to relief.

Military courts have applied the *Brady* rule. For example, in *United States v. Brickey*,[23] the Army Court of Review determined that the government must "disclose evidence affecting credibility of a Government witness, . . . when material to either

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[14]United States v. Horsey, 6 M.J. 112 (C.M.A. 1979); United States v. Alford, 8 M.J. 516 (A.C.M.R. 1979).

[15]United States v. Brickey, 8 M.J. 757 (A.C.M.R. 1980).

[16]427 U.S. 97 (1976).

[17]*Id.* at 111.

[18]*Id.* at 106.

[19]*Id.* at 107.

[20]*Id.* at 109-110.

[21]*Id.* at 112.

[22]*Id.* at 112-113 (citations omitted).

[23]8 M.J. 757 (A.C.M.R. 1980).

guilt or punishment".[24] Thus, the drug overdose and mental condition of the government's primary witness had to be disclosed to the defense. Similarly, *United States v. Brakefield*[25] found a duty to disclose a psychiatric report concerning a government witness. In *United States v. Webster*,[26] the Court of Military Appeals established a rule requiring that a grant of immunity to a key government witness should be disclosed to the defense prior to the time the witness testifies *even absent* a defense request.

At least one military case has apparently expanded the materiality standard under *Brady*. In *United States v. Mougenel*,[27] the accused requested, *inter alia*, the results of two polygraphs of the government informant. The defense theorized that the informant possibly failed both tests, and the defense sought the results to impeach the credibility of the informant and to use in interviewing the polygraph operator. The court recognized that: "Although not admissible in courts-martial, the results of polygraph tests indicating the informant was untruthful could be of *great benefit* to the accused in preparing for trial."[28] Even though the results of the test were not known, dismissal of the affected charge was required because

> there is a distinct likelihood that the results may have been effectively utilized in preparing the cross-examination of the informant, or by leading to evidence regarding the informant's reliability, thereby affecting the court's findings as to the specification in question.[29]

Whether *Mougenel* is an aberration or an expansion of the accused's right under *Brady*, the lesson for trial counsel is clear. As the Supreme Court stated in *Agurs:*

> Because we are dealing with an imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.[30]

Statutory

The Jencks Act[31] requires the government release to the defense certain statements made by government witnesses. In relevant part, the Act provides that:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it delivered directly to the defendant for his examination and use.[32]

The crucial points are that Jencks Act statements must be produced only after a witness called by the government has testified on direct and then only if defense requests the statement. Jencks Act production is available at courts-martial.[33]

Much of the military litigation about the Jencks Act has surrounded the meaning of term "statement." This is surprising because the Act defines "statement" in broad terms. A statement is:

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[24] *Id.* at 760.

[25] 43 C.M.R. 828 (A.C.M.R.), *petition denied*, 43 C.M.R. 413 (C.M.A. 1971).

[26] 1 M.J. 216 (C.M.A. 1975). *Webster* is now substantially incorporated in M.R.E. 301(c)(2) which provides that:

> When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies.

[27] 6 M.J. 589 (A.F.C.M.R. 1978).

[28] *Id.* at 592 (emphasis added).

[29] *Id.*

[30] 427 U.S. at 108.

[31] 18 U.S.C. 3500 (1976) was enacted primarily as a result of the U.S. Supreme Court decision in Jencks v. United States, 353 U.S. 657 (1975).

[32] 18 U.S.C. 3500 (b) (1976).

[33] United States v. Heinel, 9 C.M.A. 259, 26 C.M.R. 39 (1958).

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.[34]

Applying this broad standard, a tape recording of what was said to the accused during a pretrial interrogation by an investigating agent who testified at trial is a producible statement.[35] Similarly, the notes of a government agent are "statements" if the agent testifies at trial.[36] Even where the government produces an accurate agent's report, the summary used to prepare the report must generally be produced.[37]

Often, notes taken by an informant will qualify as statements and must be produced.[38] Counsel must also be aware that other items which relate to the informant's testimony can qualify as statements. Specifically, written notes by a government agent summarizing an informant's oral statement are producible statements under the Jencks Act where the agent and the informant establish that the informant verified the notes as accurate and correct. The verification is sufficient to transform the agent's notes into the informant's statement for purposes of the Jencks Act.[39]

Ethical

American Bar Association rules impose several disclosure requirements which are binding on the trial counsel.[40] The Model Code of Professional Responsibility requires the prosecutor to "make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor . . ., that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.".[41] Similarly the ABA Standards for Criminal Justice state that:

> It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.[42]

Standard 11-2.1 places very specific requirements for disclosure upon the trial counsel. To obtain this evidence, the defense need only make a request. Then, the trial counsel shall disclose, *inter alia*: the names of the witnesses and their written or recorded statements, written or recorded statements and the substance of oral statements by the accused or a co-accused, reports or statements made by experts in connection with the particular case, including the results of physical or mental

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[34]18 U.S.C. 3500(e)(1)-(3) (1976).

[35]United States v. Walbert, 14 C.M.A. 34, 33 C.M.R. 246 (1963).

[36]United States v. Albo, 22 C.M.A. 30, 46 C.M.R. 30 (1972).

[37]United States v. Dixon, 8 M.J. 149 (C.M.A. 1979).

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

[39]United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978).

[40]Army Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 Nov. 1982) provides: "The Code of Judicial Conduct and Model Code of Professional Responsibility of the American Bar Association are applicable to judges and lawyers involved in court-martial proceedings in the Army . . . Unless they are clearly inconsistent with the UCMJ, the MCM, and applicable departmental regulations, the American Bar Association Standards for Criminal Justice also apply to military judges, counsel, and clerical support personnel of Army courts-martial."

[41]Model Code of Professional Responsibility DR 7-103(B) (1979).

[42]ABA Standards for Criminal Justice, The Prosecution Function, Standard 3-3.11 (1980). Standard 3-3.11 provides that:

> (a) It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.
>
> (b) The prosecutor should comply in good faith with discovery procedures under the applicable law.
>
> (c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

examinations or scientific tests, experiments, or comparisons, items which the prosecutor intends to use at the hearing or trial that were obtained from or belong to the accused, and records of prior criminal convictions of the accused or any co-accused. Also, the trial counsel shall inform the defense counsel if the government "intends to conduct scientific tests or experiments which may consume or destroy the subject of the test, or intends to dispose of relevant physical objects."[43]

[43]ABA Standards for Criminal Justice, Discovery and Procedure Before Trial, Standard 11-2.1 (1980). Standard 11-1.1 provides that:

(a) Upon request of the defense, the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control including but not limited to:

(i) the names and addresses of witnesses, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant;

(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses;

(iv) any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, tangible objects, buildings, or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions of the defendant or of any codefendant.

(b) When the information is within the prosecutor's possession or control, the prosecuting attorney shall inform defense counsel:

(i) if relevant recorded grand jury testimony has not been transcribed;

(ii) if the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping);

(iii) if the prosecutor intends to conduct scientific tests, experiments, or comparisons which may consume or destroy the subject of the test, or intends to dispose of relevant physical objects; and

(iv) if the prosecutor intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other offenses.

(c) The prosecuting attorney shall disclose to defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

(d) The prosecuting attorney's obligations under this standard extend to material and information in the possession or control of members of the prosecutor's staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to the prosecutor's office.

Conclusion

This article has catalogued the significant disclosure requirements available to the soldier-accused. The innovative defense counsel will be able to zealously assert these rights to insure the maximum protection of the client. Similarly, the prudent trial counsel will disclose to the defense the appropriate evidence. In the long run, if these guides are followed, the military system will continue to be a model of fairness, and accused soldiers will truly have "their day in court."

Quality Assurance in the Military Hospital
The Revised Risk Management Program

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Over the past few years, U.S. Army Claims Service has experienced a dramatic increase in the number of medical malpractice claims resulting from the care rendered in Army medical facilities.[1] Not only has the number of claims increased to a high annual level, but the damages demanded have increased as well. An extreme example of the amount of money involved is a 11.7 million dollar judgment in a recent case decided in a federal court in Tacoma, Washington.[2] The increasing cost

[1]Statistics of U.S. Army Claims Service reveal that 45 medical malpractice claims were filed against the Department of the Army in fiscal year 1970. Since fiscal year 1980, an average of over 250 claims have been presented annually. The claims are filed pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1976).

[2]Army Times, 28 Mar. 1983, at 4, col. 1. The case involved the failure of Army physicians to timely perform an emergency caesarian-section delivery upon signs of fetal distress. The child

of medical malpractice claims has necessarily generated high-level interest in improving the quality of care in military hospitals.[4] The combination of the need to reduce medical malpractice costs and the sincere desire within the military medical community to provide high quality care has resulted in various new programs to minimize the occurrence of malpractice incidents and to assess liability in those cases where mistakes are made.[4]

The medical malpractice crisis is not unique to the military medical community.[5] During the past decade, various legal means have been attempted to solve the civilian malpractice crisis. Examples of these efforts are self-insurance programs and state statutes designed to limit jury awards or require submission of claims to medical mediation panels prior to initiation of litigation.[6] Additionally, the duty of the hospital to both carefully select its medical staff and supervise the care provided by that staff has generated the growth of risk management and quality assurance programs.[7] In 1981, the Joint Commission for Accreditation of Hospitals implemented a quality assurance standard which requires a "well-defined, organized program designed to enhance patient care through the on-going objective assessment of important aspects of patient care and correction of identified problems."[8]

The purpose of the article is to provide an overview of the quality assurance program in Army hospitals and specifically discuss the operation of the risk management program. The role of the judge advocate in the implementation and operation of effective quality assurance and risk management programs will be highlighted.

The Quality Assurance Program

The Quality Assurance Program (QAP) is a hospital-wide program that attempts to assure high quality medical care within available resources by continually assessing the appropriateness of patient care.[10] The four components of the QAP are patient care assessment, credentialling, utilization review, and risk management. A recent regulatory change also requires each military treatment facility to have a written hospital-wide QAP plan as well as a Quality Assurance Committee.[12] Much of the hospital's quality assurance business is conducted through the use of hospital-wide committees or departmental committees. The Quality Assurance Committee is an example of a hospital-wide committee.[13] Departmental committees are used to conduct patient care assessment and utilization review activities.

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suffered severe birth defects, including blindness and mental retardation. The damages awarded in this case were exceptionally high. During fiscal year 1982, the dollar figure for claims administratively settled by U.S. Army Claims Service averaged $68,500. Shaw v. United States, No. C82-126T (W.D. Wash. 22 Feb. 1983).

[3]The Department of Defense is considering a proposal to place peacetime control of military hospitals under a single Defense Health Agency. Army Times, 28 Mar. 1983, at 4, col. 1.

[4]*See generally* U.S. Dep't of Army Reg. No. 40-66, Medical Services—Medical Record and Quality Assurance Administration (C2, 1 Nov. 1982). [hereinafter cited as AR 40-66].

[5]*See* Note, *Medical Malpractice Screening Panels: A Judicial Evaluation of Their Practical Effect*, 42 U. Pitt. L. Rev. 939 (1981).

[6]*Id.* at 943.

[7]The first case to hold a hospital liable for the negligent acts of staff physicians was Darling v. Charleston Community Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

[8]Joint Committee on Accreditation of Hospitals, Accreditation Manual for Hospitals, 1981, at 151 (1980). Army Reg. No. 40-2, Medical Services—Army Medical Treatment Facilities—General Administration, ch. 5 (3 Mar. 1978), provides for the accreditation of Army hospitals located in the United States.

[9]Army TJAG Letter, subject: Processing Medical Malpractice Claims—Policy Letter 82-3 (16 Apr. 1982) *reprinted in* The Army Lawyer, May 1982, at 2, makes the medical malpractice claims program an item of interest during general officer inspections.

[10]AR 40-66, para. 9-1.

[11]*Id.* at para. 9-1*a*.

[12]*Id.* at para. 9-1, 9-2*b*.

[13]Other hospital-wide committees are the Executive Committee, Credentials Committee, Infection Committee, Nursing Quality Assurance Activities Committee, and Therapeutic Agents Board. *Id.* at para. 9-2.

The first component of QAP, patient care assessment requires the review of medical records and other informational sources to evaluate the quality of patient care.[14] It includes the establishment of standards for use in evaluating patient care, the identification of problems related to patient care, and the implementation of corrective actions to avoid recurrence of problems.[15] Patient Care Assessment Committees must also review certain incidents that occur in the department, such as deaths, adverse outcomes from improper diagnosis or treatment, and other treatment-related incidents.[16] The Patient Care Assessment Committee minutes are used by the Risk Manager and the members of the Quality Assurance Committee in discharging their quality assurance responsibilities.[17]

The second facet of the QAP is utilization review. Utilization review is a continuing assessment of health resources management. Its purpose is to contain operating costs by evaluating the appropriateness of patient admissions and the duration of patient hospitalization.[18] Normally, this function is accomplished by the departmental Patient Care Assessment Committee.[19]

The third aspect of QAP involves the requirement that every health care provider apply for staff privileges. This process, called credentialling, is the extension of clinical privileges by the hospital commander to all health care practitioners who provide direct medical care to patients.[20] All practitioners must request staff privileges upon completion of training or arrival at a new station.[21] Applications are submitted to a hospital-wide Credentials Committee, which makes recommendations to the hospital commander. This committee is required to review the staff privileges of all assigned health care providers annually.[22]

The hospital commander also has the authority to restrict, suspend, or terminate staff privileges when it is determined that the practitioner's lack of competence may be detrimental to patient health or safety.[23] Practitioners facing such actions receive extensive procedural protections, to include the right to request a hearing.[24] All practitioners whose privileges are suspended, limited, or withdrawn must be considered by the command for separation from military service.[25] The Department of Defense recently required that professional regulatory authorities, such as state medical boards, be notified of the identity of medical officers who are separated or retired from the service while their clinnical privileges are suspended, limited, or withdrawn.[26]

The Risk Management Program

The fourth component of the QAP is the Risk Management Program. The dual purpose of this program is to prevent injuries by correcting risk situations and to control financial liability by immediately investigating potentially compensable incidents.[27] Experience in reviewing medical malpractice claims has indicated that incidents which are not immediately investigated are very difficult

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[14] *Id.* at para. 9-6. Patient care assessment is normally accomplished at department level; however, in small, nondepartmentalized military treatment facilities, hospital-wide assessments may be conducted.

[15] *Id.* at paras. 9-6*a*, *d*.

[16] *Id.* at paras. 9-6*c*, *d*. Treatment related cases mandating review include the patient who is readmitted to the hospital within thirty days of discharge, returned to the operating room on the same admission, or returned for emergency care within forty-eight hours of emergency or out patient treatment.

[17] *See* text accompanying notes 34-37 *infra* for a discussion of the relationship of generic screening in the risk management program to departmental patient care assessment activities.

[18] AR 40-66, para. 9-7*a*.

[19] *Id.* at para. 9-7*b*.

[20] *Id.* at para. 9-9.

[21] *Id.* at para. 9-10.

[22] *Id.* at para. 9-12.

[23] *Id.* at para. 9-12.2.

[24] *Id.* at para. 9-12.2*d*.

[25] *Id.* at para. 9-12.1*a*. U.S. Dep't of Army Reg. No. 635-100, Personnel Separations—Officer Personnel, para. 5-12 (C27, 1 Aug. 1982) provides for the separation of officers on the basis of moral or professional dereliction.

[26] U.S. Dep't of Defense Directive No. 6000.7, Dissemination of Information on Medical Officers (29 July 1982).

[27] AR 40-66, para. 9-8*a*.

to defend.[28] Accordingly, an effective risk management program should result in reduction of potential risk situations and immediate investigation of potentially compensable incidents in order to fully develop the facts surrounding the incident and preserve physical and documentary evidence.

Each military treatment facility must establish a Risk Management Program and review the effectiveness of the program quarterly.[29] The hospital commander must appoint a Risk Manager and may also establish a Risk Management Committee.[30] The key to a successful risk management program is the identification and reporting by all hospital personnel of incidents or unusual occurrences when they arise.

Identification and Reporting

When an incident occurs, the person in charge of the activity involved must prepare a DA Form 4106 (Report of Unusual Occurrence).[31] An incident is defined as "any accident or event not consistent with normal patient care that either did, or could result in an injury to a patient."[32] The report is sent through the department chief to the Risk Manager. If the Risk Manager determines that the report identifies a potentially compensable incident, the incident must be discussed with the Medical Claims Judge Advocate.[33] The regulation does not define a potentially compensable incident; however, a potentially compensable incident would seem to be an incident that did result in injury to a patient or visitor.

It is unrealistic to believe that any reporting system that relies totally on hospital employees admitting mistakes will work perfectly.[34] Therefore, another reporting system, commonly called generic screening, is suggested in the new regulation. The Risk Manager is required to review internal hospital data sources, such as medical records, patient care assessment activities, patient complaints, to identify potential risk circumstances.[35] For example, the return of a patient to the operating room on the same admission indicates that a potentially compensable incident may have occurred during the first operating room session.[36] The screening of hospital records against established criteria will facilitate the identification and evaluation of potentially compensable incidents even when those incidents are not reported on a DA Form 4106.[37]

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[28]The general practice has been to investigate claims incidents after a claim is received. Under the Federal Tort Claims Act, a claimant has two years from the accrual of his claim to file with the appropriate federal agency. When the claims judge advocate initiates an investigation of a medical malpractice claim toward the end of this two year period, he frequently discovers that records and physical evidence are not available and that key witnesses have been separated or reassigned. It should be noted that U.S. Dep't of Army Reg. No. 27-20, Legal Services—Claims, para. 2-4*d* (C16, 15 Sep. 1980) requires an investigation by a judge advocate or DA civilian attorney of incidents involving potential tort claims in the amount of $5000 or more.

[29]AR 40-66, para. 9-8*a*.

[30]*Id.* at para. 9-8*b*. There is no requirement that the risk manager be a physician. If he is not a physician, he is required to coordinate his activities with a physician. Most military hospitals make a Medical Service Corps Officer the Risk Manager.

[31]*Id.* at para. 9-8*c*. The regulation does not define "person in charge of activity." In order for the program to be effective, any person with first-hand knowledge of an incident should initiate a report.

[32]*Id.* at para. 9-8*c*.

[33]*Id.* Although the judge advocate is not required to review all DA Forms 4106, it would be good practice for him to do so. *Id.* at para. 9-8*d*. requires a review by the Medical Claims Judge Advocate of the following potentially compensable incidents: Emergency Service incidents, Operating room/anesthesia/surgical incidents, injury from drugs or biologics, injury from medical devices, and adverse outcome from improper treatment or diagnosis.

[34]A sampling of DA Forms 4106 (Report of Unusual Occurrence) indicates that the general practice is to report only such events as safety incidents, slip and fall cases, and improper handling of medications. The improper treatment and diagnosis cases have not normally been reported. It should be noted that the revised Risk Management Program has been implemented for less than a year.

[35]AR 40-66, para. 9-8*b*(3).

[36]*See* text accompanying notes 14-17 *supra* for a discussion of patient care assessment activities.

[37]AR 40-66, para. 9-6 lists events which mandate review by the departmental Patient Care Assessment Committees. This list can be amplified by specifically delineating in hospital regulations events which must be processed under the Risk Management Program. Examples of generic criteria are patients transferred from a general care unit to a special care unit and patients who have heart attacks within 48 hours of surgical procedures.

Investigation

One of the most important aspects of the Risk Management Program is the investigation of potentially compensable incidents that occur in the hospital. The investigation should be conducted immediately and informally. Witness statements need not be prepared unless specifically requested by the Medical Claims Judge Advocate or U.S. Army Claims Service.[38] In conducting and reviewing incident investigations, the Medical Claims Judge Advocate should insure:

(1) That the names, social security account numbers, PCS/ETS dates, permanent home addresses of all health care personnel involved in the incident are recorded;

(2) That all documentary evidence (relevant hospital and medical records) is located and safeguarded;[39]

(3) That all physical evidence, such as x-rays and slides containing specimens, is located and secured;[40] and

(4) That, in cases involving death, an autopsy is considered to determine the connection between hospital acts or omissions and the known disease process in causing the patient's death and to assess life expectancy by investigating other potential causes of death.

[38] *See U.S. Army Claims Service Bulletin 1-79* for discussion of the investigation of a medical malpractice incident. *See also* Spencer, *The Hospital Incident Report: Asset or Liability?*, 20 A.F.L. Rev. 148 (1980), for a discussion of the admissibility of risk management documents in litigation against the United States.

[39] Medical records are released in accordance with U.S. Dep't of Army Reg. No. 340-1, Office Management—Release of Information and Records from Army Files, para. 1-202*d* (1 Oct. 1982) and U.S. Dep't of Army Reg. No. 27-20 Legal Services—Claims, para. 1-6*b* (C14, 15 Aug. 1981). The releasing authority is U.S. Army Claims Service for both potential claims and actual claims over $5000.

[40] In those situations in which the United States may have a third party products liability action against a manufacturer or distributor, medical equipment, medications, and other devices, including purchase records for those items, should be located and safeguarded.

Corrective Action

After notification and investigation of incidents identified through incident reporting or generic screening, the Risk Manager is required to summarize risk management activities and identify problem trends in a periodic report to the hospital-wide Quality Assurance Committee.[41] The Quality Assurance Committee has the authority to implement corrective action after reviewing risk management or other quality assurance activities.[42] Corrective action may range from performance counseling to recommendations for facility modifications or initiation of action by the Credentials Committee to suspend, restrict, or withdraw a practitioner's staff privileges.[43] In reviewing corrective actions, the Medical Claims Judge Advocate should insure that someone is identified to implement the action within a specified time period.

Role of the Judge Advocate

There are many key personnel in the implementation of effective quality assurance and risk management programs. The total support of the hospital commander is an absolute necessity. Likewise, the active participation of the Risk Manager and all hospital personnel is essential. One of the most important participants is the judge advocate. In order to become involved in the hospital's quality assurance activities, the judge advocate should:

(1) Become familiar with the organization and operation of the hospital. Ask physicians and nurses to explain what is involved when medical procedures are performed. Learn how to read a medical record. A sincere interest by the judge advocate in hospital activities will lead to effective communications with all hospital personnel.

(2) Get involved in the hospital's QAP education program. Conduct seminars on subjects of recurring concern to all hospital

[41] *Id.* at para. 9-8*a*.

[42] *Id.* at para. 9-2*b*.

[43] *Id.* at para. 9-8*a*. *See* text accompanying notes 20-26 *supra* for a discussion of credentialling activities.

personnel. Such subjects include the right of patients to refuse treatment, the handling of suspected child abuse cases, and the treatment of the terminally ill patient.

(3) Thoroughly conduct and review investigations of potentially compensable incidents. Make physicians aware that one of the reasons incidents are investigated is to facilitate the successful defense of frivilous malpractice claims. Keep physicians informed of the outcome of pending claims.

(4) Participate in the formulation and implementation of quality assurance and risk management policies. Serve as a member of or advisor to the hospital quality assurance and risk management committees. Attend all committee meetings.

Conclusion

The Army's Quality Assurance and Risk Management Programs are in the early stages of their implementation. These programs are of vital importance to the Army community. Not only will effective programs result in the first-rate medical care Army personnel deserve, but they will also reduce financial liability as a result of malpractice claims. For both reasons, judge advocate participation is essential. In the final analysis, all Army personnel have a vested interest in improving the quality of the medical care provided in Army hospitals.

Service of Process on Government Officials Made Easy: Recent Changes to the Federal Rules of Civil Procedure

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Recent amendments to Rule 4 of the Federal Rules of Civil Procedure[1] have made much easier the service of process on military officials. The amendments raise several important concerns for Army attorneys advising military officials who are sued in their individual capacities for acts done within the scope of their duties. This article briefly examines the amendments and suggests some solutions to the potential problems they raise.

The Old Rule

Although Rule 4 provides for service of process[2] on several categories of defendants, Army lawyers need only be concerned with service on federal officers,[3] federal agencies, and the United States itself.

Under the former Rule 4, service on the United States was effected by personal sevice on the office of the local United States attorney and mail service on the Attorney General.[4] When an officer was sued in his or her official capacity or an agency was the named defendant, service was effected by personal service on the officer or

[1]Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983) [hereinafter cited as Fed. R. Civ. P. Amend. Act].

[2]Process consists of a summons and complaint. Fed. R. Civ. P. 4(d). The summons informs the defendant when he must respond and that failure to respond in the required time will result in a default judgment. Fed. R. Civ. P. 4(b). What should be contained in the complaint is explained in Fed. R. Civ. P. 8(a). A defect in the form of the summons or a failure to serve both summons and complaint constitutes insufficiency of process, which is a ground for dismissal under Fed. R. Civ. P. 12(b)(4), as well as insufficiency of service. Nevertheless, courts are willing to overlook minor defects in process. *E.g.*, Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980); Smith v. Boyer, 442 F. Supp. 62 (S.D.N.Y. 1977); Vega Matta v. Alvarez, 440 F. Supp. 246 (D.P.R. 1977), *aff'd*, 577 F.2d 722 (1st Cir. 1978).

[3]"Officer" as used in Rule 4 refers to any employee of the United States or member of the armed forces.

[4]Fed. R. Civ. P. 4(d)(4), *amended by* Fed. R. Civ. P. Amend. Act. The Rule referred to "delivery" of process which meant personal service. *See* Jordan v. United States, 694 F.2d 833, 835 (D.C. Cir. 1982).

agency.[5] Routinely, there has never been any great difficulty in serving officers sued officially.[6]

Where money damages are sought from an officer in his or her individual capacity, service on an officer sued individually could be effected under the previous version of Rule 4 by personal service on the defendant,[7] personal service on a person of suitable age and discretion at the defendant's home,[8] personal service on an agent authorized to accept service on behalf of the defendant,[9] or any manner prescribed by a more specific federal statute or by the law of the state in which the action was brought.[10] Service was limited to the state in which the district court was located unless a federal or state statute or state court rule provided for extraterritorial service.[11] If there were such a statute or rule, service was made as specified by the predicate statute or rule or, if not specified there, as specified by Rule 4.[12]

The New Rule

The congressional amendments to Rule 4,[13] which became effective 17 February 1983,[14] are intended to provide an alternative to personal serv-

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[5]Fed. R. Civ. P. 4(d)(5), *amended by* Fed. R. Civ. P. Amend. Act.

[6]It is Army policy for Army officials to accept service of process when sued in their official capacity. U.S. Dep't of Army Reg. No. 27-40, Legal Services-Litigation, para. 1-5b(2) (15 June 1973) provides:

> Commanders and other Army officials will not prevent or evade the service of process in legal actions brought against the United States or themselves concerning their official duties. If acceptance of service of process would interfere with the performance of his military duties, a commander or other official may designate a representative to accept service in his stead.

The provision that service should not be evaded when sued for "official acts" can be misleading. An overly broad reading would suggest that an official is required by regulation to accept service for any suit arising out of official acts, which would include a suit against the official in his or her individual capacity based on some act performed in connection with his or her position. However, government officials sued individually are to be treated in the same way as a private citizen in connection with service of process. *E.g.*, Stafford v. Briggs, 444 U.S. 527 (1980). Consequently, when sued in his or her individual capacity, a military defendant has the same right as any other defendant to avoid service of process by lawful means. It is often difficult to determine in which capacity the official is being sued; complaints seldom specifically identify whether a suit is brought in one or the other capacity. The advising lawyer should look to the nature of the relief sought. Where a plaintiff is seeking money damages from the defendant, the suit is clearly against the defendant in his or her individual capacity. Where the plaintiff only asks that the defendant perform some official act allegedly owed the plaintiff, the suit is against the defendant in his or her official capacity. Frequently, there may remain substantial doubt about the nature of the suit. *See, e.g.*, Jackson v. Hayakawa, 682 F.2d 1344, 1348-49 (9th Cir. 1982) (deciding based on unclear pleadings that defendants were sued in official capacities—in the case of one defendant where *inter alia* he did not appear in proceedings, did not authorize a personal lawyer to represent him in his individual capacity, and where a special appearance was filed objecting to personal jurisdiction in defendant's individual capacity). Where there is some doubt about the nature of the suit, the advising attorney should treat it as a suit against the defendant in his or her individual capacity. This is particularly important because of the change to Rule 4, which requires the defendant to pay the cost of personal service where he or she fails to acknowledge mail service when sued in his or her individual capacity but does not require acknowledgment—and, accordingly, payment of service costs upon a failure to acknowledge—when sued only in an official capacity.

[7]Fed. R. Civ. P. 4(d)(1), *amended by* Fed. R. Civ. P. Amend. Act.

[8]*Id.* Army lawyers should urge a narrow construction of this provision when representing individual defendants. *See, e.g.*, Franklin America, Inc. v. Franklin Cast Products, Inc., No. 81-3924 (E.D. Mich. June 24, 1982) (service on part-time housekeeper at defendant's home was not service on person "then residing" therein).

[9]Fed. R. Civ. P. 4(d)(1), *amended by* Fed. R. Civ. P. Amend. Act. Army policy permits authorizing representatives to accept service on behalf of Army official defendants. *See* note 6 *supra*. *See also* DOD Directive 5530.1, Service of Process in the Department of Defense (20 Sept. 1970) (delegating authority to accept service on behalf of the service secretaries and the Secretary of Defense).

[10]Fed. R. Civ. P. 4(d)(7), *amended by* Fed. R. Civ. P. Amend. Act.

[11]Fed. R. Civ. P. 4(e), 4(f), *amended by* Fed. R. Civ. P. Amend. Act.

[12]Fed R. Civ. P. 4(e), *amended by* Fed. R. Civ. P. Amend. Act.

[13]The Supreme Court approved substantially different amendments to Fed. R. Civ. P. 4 in April, 1982. 93 F.R.D. 255-58 (1982). Congress prevented the Supreme Court amendments from taking effect because of perceived ambiguities in the new mail service provisions. Act of Aug. 2, 1982, Pub. L. No. 97-227, (96 Stat. 246 (1982). *See* 1982 U.S. Code Cong. & Ad. News 597. The Fed. R. Civ. P. Amend. Act replaces the originally proposed amendments. Fed. R. Civ. P. Amend. Act § 5.

[14]The Act became effective forty-five days after enactment. Fed. R. Civ. P. Amend. § 4. The President signed the Act into law on 12 January 1983.

ice and to alleviate the burden on United States marshals who, under the old rule, routinely served process on behalf of plaintiffs.[15] The amendments relieve United States marshals of their responsibility for service except in certain defined circumstances[16] and shift this responsibility in most circumstances to the plaintiffs and their attorneys.[17] The plaintiff may effect service by first-class mail or by personal service through any person over eighteen years old.[18]

The amendment to Rule 4 leaves the procedures for serving the United States unchanged. The plaintiff must still personally serve the office of the United States attorney and mail a copy of the process to the Attorney General.[19] Process in suits against agencies and officers in their official capacity, however, may now be served by mail rather than by delivering the process to the defendant agency or officer.[20]

The new rule also makes it substantially easier to serve individual defendants. In addition to the methods of service formerly allowed,[21] Rule 4 now provides for first-class mail service of the summons and complaint on the defendant with two copies of a notice and acknowledgement and a prepaid return envelope.[22] The notice requires the defendant to acknowledge service within twenty days and states that failure to do so may result in assessment of any expenses incurred in serving the process by other permissible means.[23] The acknowledgment, signed by the defendant under penalty of perjury,[24] completes the service. If there is no acknowledgment received from the defendant the plaintiff must resort to personal service in accordance with the other provisions of Rule 4.[25] Rule 4 requires assessment of costs against the defendant who fails to acknowledge receipt of process unless there is "good cause . . . for not doing so."[26]

Implications For Army Lawyers

The amendments to Rule 4 regarding service by first-class mail raise several questions for the Army lawyer advising a military official. May the attorney provide advice on whether an individually-sued official should acknowledge service[27] prior to approval of the official's request for representation? Should the official acknowledge service by first-class mail? If not, how can officials be protected from an award of costs? Some guidance on these questions is available from the Civil Division of the Department of Justice,[28] and the Litigation

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[15]Fed. R. Civ. P. 4(e), *amended by* Fed. R. Civ. P. Amend. Act.

[16]Fed. R. Civ. P. Amend. Act § 2(2), Fed. R. Civ. P. 4(c)(2)(B). Marshals are only required to serve process on behalf of a party proceeding *in forma pauperis* or a seaman where the suit arises out of his or her employment, on behalf of the United States or officer or agency of the government, or upon a court order.

[17]Fed. R. Civ. P. Amend. Act § 2(1), Fed. R. Civ. P. 4(a).

[18]Fed. R. Civ. P. Amend. Act § 2(2), Fed. R. Civ. P. 4(c)(2)(A) and (C).

[19]Fed. R. Civ. P. 4(d)(4). A failure to deliver the summons and complaint to the United States attorney may not be grounds for dismissal, at least where the Attorney General has been served and the government has actual notice of the action. *See* Jordan v. United States, 694 F.2d 833 (D.C. Cir. 1982). *Cf.* Lawrence v. Acree, 74 F.R.D. 669 (D.D.C. 1978).

[20]Fed. R. Civ. P. Amend. Act § 2(4), Fed. R. Civ. P. 4(d)(5).

[21]Fed. R. Civ. P. 4(d)(1) is unchanged. The provision for service according to state law, formerly Fed. R. Civ. P. 4(d)(7), is now Fed. R. Civ. P. 4(c)(2)(C)(i). Fed. R. Civ. P. Amend. Act § 2(2). The new provision eliminates service in accordance with other federal statutes, apparently because no federal statute provides for a manner of service not already enumerated in Rule 4 as amended. *See, e.g.*, 28 U.S.C. § 1391(e) (providing for nationwide service by mail on official defendants).

[22]Fed. R. Civ. P. Amend. Act § 2(2), Fed. R. Civ. P. 4(c)(2)(C)(ii).

[23]Fed. R. Civ. P. Amend. Act § 3, Fed. R. Civ. P. 4(c)(2)(C)(ii), app. Form 18-A.

[24]Requiring a declaration under penalty of perjury rather than a sworn acknowledgment is consistent with 28 U.S.C. § 1746 (1976) which replaced affidavits with declarations for all purposes under the Fed. R. Civ. P.

[25]Fed. R. Civ. P. Amend. Act § 2(2), Fed. R. Civ. P. 4(c)(2)(C)(ii).

[26]Fed. R. Civ. P. Amend. Act § 2(2), Fed. R. Civ. P. 4(c)(2)(D). The rule provides:

> Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

[27]Fed. R. Civ. P. Amend. Act. §§ 2(2)-(3), Fed. R. Civ. P. 4(c)(2)(C)(ii), app. Form 18-A.

[28]Memorandum from J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Dep't of Justice, to all United States Attorneys, General Counsel, Heads of Bureaus and Divisions (Feb. 17, 1983) [hereinafter cited as McGrath memorandum]. Within the Civil Division, the Torts Branch has responsibility for monitoring developments concerning the amendments. *Id.* at 5.

Division of the Office of The Judge Advocate General.[29]

Representation

Military officials sued personally for acts done within the scope of their duties must request representation by the Department of Justice and generally have that request approved in Washington before Department of Justice attorneys will advise them.[30] Nevertheless, United States attorneys have been authorized to advise individually-sued officials on whether and how to respond to service of process by first-class mail before the representation decision is made.[31] They may also seek an extension of time for the defendant to answer the complaint. Before advising individual defendants concerning these matters, Army attorneys should contact Litigation Division or the local United States attorney for assistance.

Nature of Advice

In advising military officials sued individually whether to acknowledge receipt of service by first class mail, the attorney must analyze the potential effect that acknowledgment may have on potential defenses relating to personal jurisdiction, venue, and sufficiency of service.

Rule 4, both in its current and former versions, provides that service is effective only when made within the state in which the action is brought unless extraterritorial service is permitted by a federal statute "or by these rules."[32] The latter refers to that part of Rule 4 that permits service on parties outside the state only when specifically authorized by state statute or court rule.[33] Consequently, the new mail service provisions should do no more than provide a method for effecting service additional to personal service and should not expand the jurisdiction of the court.[34] Mail service outside the state that is not authorized by other state or federal law should be insufficient service of process. Nevertheless, a plaintiff might argue that acknowledgment of service by a defendant in compliance with Rule 4 amounts to waiver of insufficiency of service and consent to the jurisdiction and venue of the court. Accordingly, it may be better not to acknowledge receipt of service by first class mail when sufficiency of service, personal jurisdiction, or venue are in issue. However, the attorney should alert the official of the possibility of having the costs of any subsequent service of

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[29]U.S. Dep't of the Army Message 081704Z Mar 83, subject: New Rules Governing Service of Process on Federal Officials Sued In Their Individual Capacities. Within Litigation Division, the Military Personnel Branch has responsibility for monitoring developments concerning the amendments and providing advice to the field about them. The message, which previously appeared in The Army Lawyer, Apr. 1983, at 31, provides in pertinent part:

> 1. Rule 4 of Federal Rules of Civil Procedure was amended by Pub. Law 97-462. The New Rule, effective 26 Feb 83, provides that an individual defendant may be served by first-class mail. Such service is to include a form for acknowledging the service. If it is acknowledged by the defendant, service is deemed complete. If acknowledgment is not returned within 20 days of the mailing of the summons and complaint, the defendant must be personally served in the manner provided under the current rule 4. However, if personal service is required and perfected, the court may order the defendant to pay the cost of such service.
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> 2. The full effect of the rule is unknown. Department of Justice advises that the new rule does not provide a new and independent means of obtaining personal jurisdiction and venue over federal officials sued in their individual capacities for acts arising in the performance of official duties. Accordingly, you should alert commanders and supervisors in your jurisdiction to bring the receipt of any summons and complaint, however served, to your immediate attention . . . .

[30]The Department of Justice will represent official defendants when the conduct that is the subject of suit reasonably appears to have been performed within the scope of employment and is not the subject of a federal criminal proceeding, and when representation is generally in the interests of the government. 28 C.F.R. § 50.15(a) (1982). Representation is contingent upon submission of a written request for representation by the defendant, a statement from the command or the Department of the Army indicating that the defendant was acting within the scope of employment at the time, and a favorable recommendation for representation from the Department of the Army. Emergency representation may be obtained by telephone. *See also* U.S. Dep't of Army Reg. No. 27-40, Legal Services—Litigation, paras. 3-1b, 3-2a (15 June 1973).

[31]McGrath Memorandum, *supra* note 28, at 2.

[32]Fed. R. Civ. P. 4(f).

[33]Fed. R. Civ. P. 4(e).

[34]This is the Department of Justice position. *See* McGrath memorandum, *supra* note 28, at 2.

process assessed against him if he fails to acknowledge receipt.

Additionally, the Federal Rules of Civil Procedure provide that certain defenses are waived if not raised in "a responsive pleading" or in a motion permitted by the rules to be made prior to responding to the complaint.[35] Although the rules appear to make clear that something in the form of the acknowledgment now required by Rule 4 does not constitute a "pleading,"[36] plaintiffs may argue that the acknowledgment could be construed as a responsive pleading and defenses based on personal jurisdiction, venue, insufficiency of process, or insufficiency of service of process could be considered waived by failure to make reference to them in the acknowledgment.

Thus, even in cases where acknowledgment of receipt seems prudent, the attorney should advise the official to include, as a precautionary measure, a caveat that no defenses under Rule 12(b) are waived by the acknowledgment but rather are specifically reserved. The Department of Justice suggests use of the following language:

> This acknowledgment is returned solely in order to comply with Rule 4 of the Federal Rules of Civil Procedure. In doing so, the defendant does not admit or concede that the form or substance of service of process in this case is proper or sufficient or that the court has personal jurisdiction over the defendant. The defendant does not waive any defenses including those provided by Rule 12 of the Federal Rules of Civil Procedure. Rather, all defenses are specifically preserved.[37]

Award of Costs

Any attorney naturally should attempt to avoid having costs of service of process assessed for not acknowledging service by first class mail within the time established by Rule 4. One important aspect of this is to provide timely legal advice to military officials served with process by first class mail. This entails both promoting client awareness of the need for immediate coordination and providing expeditious advice. Attorneys in the field can best insure client awareness through an aggressive command information program that stresses the need for immediate coordination with the command's legal advisor whenever a military official is served with process for a suit involving acts done within the scope of military duties. Also, when acknowledgment of service is appropriate, legal advice must be given quickly so acknowledgment can be given within the twenty day limit imposed by Rule 4 and the issue of costs thus avoided.

If acknowledgment of service is not in the client's interest or otherwise is not made within twenty days, the attorney should attempt to resist award of costs against the client by showing cause why costs should not be assessed. Possible grounds for cause suggested by the Department of Justice include service, venue, or personal jurisdiction did not appear proper, the defendant did not receive the service in time, *e.g.*, it was delayed by the mailroom, response was delayed by the bureaucratic process, the response was delayed in the mail, counsel advised against acknowledgment, or Federal Rule of Civil Procedure 12(a) allows sixty days for a federal defendant to answer a complaint and the drafters of the amendments to Rule 4 did not intend a shorter time for federal officials to have to acknowledge service of process.[38] This list is not exclusive.

Should costs be awarded against a defendant military official, the issue then becomes whether the defendant must bear the costs personally or whether they may be paid out of appropriated funds. Neither the Department of Justice nor the Department of the Army have issued official guidance on this question. While the Department of Justice pays judgments against the United States out of funds appropriated for its use,[39] it cannot fund judgments against government personnel who are successfully sued in their individual ca-

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[35]Fed. R. Civ. P. 12(h).

[36]Fed. R. Civ. P. 7(a), entitled "(p)leadings," refers to a complaint, answer, and reply. Other papers fall outside the definition.

[37]McGrath memorandum, *supra* note 28.

[38]*Id.*

[39]28 U.S.C. § 2414 (1976 & Supp. IV 1980).

pacities.[40] Nevertheless, the Department of Justice does pay other expenses related to litigation regardless of the capacity in which the defendant is sued.[41] Whether an assessment of costs under Rule 4 will be considered an expense of litigation by either the Department of Justice or the Comptroller General is uncertain at this time. The alternative to payment by the Department of Justice is funding by the Army. Although several Comptroller General opinions suggest that this course is a possibility,[42] the availability of this alternative is uncertain as well. Consequently, defendants must assume that failure to acknowledge service will, for now, result in their personal liability for payment.

[40]*See* Berman, *Integrating Governmental and Official Tort Liability*, 77 Colum. L. Rev. 1175, 1192, n.103 (1977).

[41]*See* Act of Sept. 13, 1982, Pub. L. No. 97-528, § 2g(1)(B-D), 96 Stat. 1060 (to be codified as 28 U.S.C. § 524(b)).

[42]*See, e.g.*, 57 Comp. Gen. 476 (1978); 53 Comp. Gen. 782 (1974). *See also* 28 U.S.C. § 2408 (1976).

Pleading and Proof of Foreign Law Before the Armed Services Board of Contract Appeals

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One consequence of the worldwide stationing of American armed forces has been an increase in the number of contracts between the United States government and foreign contractors. Although these international contracts are relatively precise in the mechanics of dispute resolution,[1] they are often silent as to the law to be applied in deciding the controversy. Should the dispute reach the Armed Services Board of Contract Appeals (ASBCA),[2] the issue of what law is to govern the transaction may be confronted. Therefore, the purpose of this article is to examine how these questions are resolved under current ASBCA conflict of law rules and practices.

[1]*See* Contract Disputes Act of 1978, Pub. L. No. 95-563, §§ 2-13, 92 Stat. 2583 (codified at 41 U.S.C. §§ 601-12 (Supp. III 1979)), *amended by* Federal Court Improvement Act, Pub. L. No. 97-164, §§ 156 & 160(a)(15), 96 Stat. 47 (1982); Defense Acquisition Reg. § 7-103.12 (1980).

[2]The Armed Services Board of Contract Appeals, which sits in Alexandria, Virginia, is the reviewing authority for appeals by contractors from unfavorable decisions of contracting officers. It was established in 1949 to relieve government department heads from personally reviewing the complaints of contractors. In cases involving disputes arising out of direct procurement by U.S. forces overseas, the ASBCA's jurisdiction is governed by the individual Status of Forces Agreement entered into between the host country and the U.S. *See* U.S. Dep't of Army Pamphlet No. 27-153, Procurement Law, para. 1-6(c) (15 Mar. 1983). For example, Article 44 of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany of August 3, 1959 (which is also known as the Supplementary Agreement for Germany), 14 U.S.T. 574-75, T.I.A.S. No. 5351, provides:

> 6. (a) Disputes arising from direct procurement by the authorities of a force or of a civilian component of goods and services in the Federal territory shall be settled by German courts or by an independent arbitration tribunal. Where the German courts are to decide the dispute, the plaint shall be lodged against the Federal Republic, which shall conduct the case in its own name in the interest of the sending State. Paragraphs 2, 4 and 5 of this Article shall apply mutatis mutandis as regards relations between the Federal Republic and the Sending State.
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> (b) Agreements between the Federal Republic and a sending State shall, however, take precedence over the provisions of subparagraph (a) of this paragraph.

Paragraph 6(b) of the Supplementary Agreement was given effect in the Agreement Between the Federal Republic of Germany and the United States of America on the Settlement of Disputes Arising Out of Direct Procurement, *signed*, 3 August 1959, 14 U.S.T. 691-92, T.I.A.S. No. 5352. Article 3 states:

> Disputes shall be settled in accordance with the provisions specified in the contract signed by the contracting parties. Where the contract contains no provisions to this effect, plaints, except in the case of the German Federal Railways and the German Federal Post for which separate arrangements may be agreed, shall be lodged with the German courts against the Federal Republic which shall conduct the case in its own name in the interest of the United States; paragraphs 2, 4 and 5

Determining the Applicable National Law

Express Intent of the Parties

When faced with a contract dispute arising from an international transaction, the initial question to ask is which nation's law applies under the circumstances of this case. The general rule is to look first for the intent of the parties.[3] If the contract contains a provision stating the law of one of the parties is to apply, then that law would probably govern the transaction.[3] It should be noted foreign civil statutes,[4] non-contract law matters, and issues of unconscionability[5] may render the express clause inapplicable.

The Most Significant Relationship Test

In the absence of any clear intent as to the choice of law in settling disputes between the U.S. government and a foreign contractor, the ASBCA's prior practice was to apply the law of the place where the contract was performed (*lex loci solutionis*) when performance was at issue.[6] This approach was subsequently replaced by the "center of gravity" or "most significant connection" test[7] in *Gourmet Enterprises, Ltd.*[8] In that case, the foreign contractor was a corporation domiciled in Hong Kong, which is subject to British law. The contractor had sold approximately 700 travel alarm radios to a U.S. military base in Vietnam. The officer who had approved the purchase, however, did not have the authority to do so. When the U.S. government refused to pay for the radios, the contractor sued for the purchase price. To resolve the dispute, the ASBCA had to decide whether the law of Hong Kong, Vietnam, or the United States governed the contract. The board dismissed outright any arguments that Vietnamese law applied since the contract's connection with the country was merely the "fortuitous circumstance that the buyer, Da Nang NCO Open Mess, was located there."[9] The board then found British law inapplicable; its only connection with the contract was the fact the contractor was domiciled there. The ASBCA justified the application of American law because the purchase orders had been sent from the U.S. base in Da Nang and the radios were to be delivered to the NCO Open Mess, the buyer's place of business.[10]

Another case illustrating the "most significant relationship" test was *Gesellschaft Fuer Fertigungstechnik u. Maschinebau AG (GFM).*[11] The contractor, Gesellschaft, an Austrian corporation, had built a high technology forging machine for the U.S. Army. When the final payment became due, the Army issued a check to Gesellschaft. Several days later, however, the Army requested the contractor to return the check because there had been insufficient funds to cover it. The contractor did so, but with the belief that another check would be forwarded within a reasonable time. Unfortunately, the payment was not made until six months later and Gesellschaft was forced to pay interest on obligations it had incurred because of the delay. Gesellschaft sought to recover the interest from the U.S. government in accordance with Austrian law. The government argued in favor of applying American law, which would not permit the contractor to recover the interest. The government claimed that, since the contract was not to be exclusively performed in any single juris-

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of Article 44 of the Supplementary Agreement shall supply mutatis mutandis."

See also Jakob Rossner, ASBCA No. 24880, 81-1 BCA para. 14,944.

Since USAREUR contracts typically contain a standard disputes clause permitting appeals of contracting officer decisions to the ASBCA, the Board will acquire jurisdiction of the dispute. *Id.* at 73,970.

[3]Gourmet Enterprises, Ltd., ASBCA No. 16543, 73-2 BCA para. 10,064, at 47,206.

[4]*See* E. Rabel, The Conflict of Laws 368-70 (1947).

[5]Roberts, *Private and Public International Law Aspects of Governmental Contracts*, 36 Mil. L. Rev. 1 (1967). *See generally*, Pasley, *Offshore Procurement*, 18 Mil. L. Rev. 55 (1962).

[6]Marubeni-Jida, Co., ASBCA No. 16937, 72-1 BCA para. 9,408; Juan Gonzalas Villalba, ASBCA No. 11942, 68-1 BCA para. 6,855; Fuji Motors Corp., ASBCA No. 2117, 58-1 BCA para. 1.817; Vonks Handelmaatschappij, ASBCA No. 621 (1950). In matters concerning the validity of a contract, the traditional lex loci was the place of execution.

[7]*See* Restatement (Second) of Conflict of Laws § 188 (1971).

[8]ASBCA No. 16543, 73-2 BCA para. 10,064.

[9]*Id.* at 47,207.

[10]It is interesting to note that the board looked at British law anyway and found the result would have been no different. *Id.*

[11]ASBCA No. 24816, 81-1 BCA para. 24,924.

diction, the law of the country where final performance was made, the United States, should govern. The ASBCA rejected this notion and held Austrian law to apply as it had the "most significant connection" to the contract. Although the contract required the machine to be shipped to and installed in the United States, most of the costs incurred in manufacturing the machine and the time spent in performing the contract occurred in Austria made Austria's relationship to the transaction paramount.[12]

Section 188 of the Restatement (Second) of Conflicts of Laws[13] established criteria to examine in determining the country which has the most significant relationship to the transaction. These are:

(a) the place of contracting;

(b) the place of contract negotiations;

(c) the place of performance;

(d) the location of the subject matter of the contract; and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.[14]

The Restatement rule adds that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue."[15] Thus, in *Gesellschaft*, where performance was at issue, the board attached the most significance to the place of performance and the fact most of this performance, *i.e.*, the construction of the forging machine, occurred in Austria. In *Gourmet Enterprises*, the ASBCA felt that not only the place of performance, but also the place of contracting carried weight for purposes of determining the most significant connection.[16]

By far, the clearest example of the ASBCA's application of the most significant relationship test occurred in *Nedlloyd Ri Jn-En Binnenvaart*.[17] Nedlloyd, a Dutch transportation firm, and the U.S. Army Transportation Command, had entered into a contract whereby the Dutch firm was to transport several tanks via barge to Rotterdam. The company was unable to unload the tanks on the prescribed day because the barge had been overstowed with commercial goods. The following day, the wildcat dock strike was in effect and Nedlloyd could still not unload the tanks. The company subsequently ordered the barge to another Dutch harbor and the tanks were unloaded, albeit several days late. Nedlloyd sought to charge the Army for demurrage fees and the costs of loading, unloading, and carriage. The contracting officer refused to pay. The ASBCA, however, partially reversed the decision. The conflict of law question was whether the contractor was entitled to interest and costs of appeal. Nedlloyd argued for the application of Dutch substantive law while the Army claimed that German law applied.

The board began its analysis of the governing law issue by discussing the general conflict of law rules as applied to transportation contracts. The rule adopted by the ASBCA was the "most significant relationship" test. While Germany was found to have the most contacts in number,[18] the Netherlands possessed the more qualitatively significant contacts. First, the contract involved the U.S. military forces in Germany, not a German national or company. Second, the activity which spawned the dispute—the unloading of the tanks—occurred in the Netherlands. Third, since the appellant was a Dutch firm, the Netherlands had "a very deep, close and significant interest in the contract."[19] Finally, the board noted that the Netherlands had a statute requiring Dutch law to apply if unloading took place there, another indication of Holland's significant interest in the transaction.

To be sure, the most significant relationship test is not a panacea for solving conflict of law prob-

[12]It took one and a half years and over $5 million to manufacture the machine in Austria.

[13]*See also* Commercial Ins. Co. of Newark, New Jersey v. Pacific-Peru Constr. Corp., 558 F.2d 948 (9th Cir. 1977).

[14]Restatement (Second) of Conflict of Laws § 188(2) (1971).

[15]*Id.*

[16]The board equated the place of the sending of the purchase order by the contracting officer with the place of contracting.

[17]ASBCA No. 24819, 81-1 BCA para. 15,019.

[18]*Id.* at 73,321.

[19]*Id.* at 74,322.

lems. The quality versus quantity of contacts analysis has not brought definition to this area of the law. Counsel for both sides now have more room to argue the rule to their advantage. Although the *lex loci* rule contained a risk of injustice by its rigid application to any particular set of facts, that rule at least permitted counsel to predict with greater certainty what law would apply and prepare accordingly.

Determining the Pertinent Conflict of Law Rules

Once it is decided a particular nation's law should govern the transaction, the next question involves whether the whole law of that nation applies, including its conflict of law rules.[20] American courts have uniformly treated the conflict of law issue as a procedural matter to be decided under the forum's own rules. The ASBCA also adheres to this practice.[21] This approach tends to lend certainty to the result of the litigation and is easier to apply since the forum is naturally more familiar with its own rules.[22] Moreover, it avoids the problem known as *renvoi*. Under this doctrine, a court applying a foreign conflict of law rule may find that it refers the issue of the case back to the conflicts law of the forum. The forum conflicts rule, in turn, might refer the issue to the law of the foreign country. Consequently, the court may find itself immersed in a circular dilemma.[23]

[20]*See* R. Leflar, American Conflicts of Law § 7 (1977).

[21]Gesellschaft Fuer Fertigunstecknik u. Maschinenebau AG (GFM), ASBCA No. 24816, 81-1 BCA para. 24,924.

[22]Restatement (Second) of Conflict of Laws § 186, comment b (1971).

[23]*See* R. Leflar, *supra* note 20. By ignoring the foreign conflict of law rules, decisions are reached which may be at odds from that which the foreign forum would have decided. Therefore, a better approach has been hinted at in the Restatement (Second) of Conflict of Laws (1971). In comment b to section 186, the American Law Institute stated that the forum will consult the foreign conflict of law rules "for whatever light these rules may shed upon the extent of the other state's interest in the application of its substantive law. The comment adds that

> the forum should concern itself with the question whether the courts of that state would have applied this [substantive] rule in the decision of the case. The fact that these courts would have applied this rule may indicate that an important interest of that state would be served if the rules were applied by the forum. Conversely, the fact that these courts would not have applied this rule may indicate that no important interest of that state would be infringed if the rule were not applied by the forum.

Ascertaining the Applicable Substantive Foreign Law—Federal Rule of Civil Procedure 44.1

When the law of a particular foreign country is held to govern the contract, the next and probably most difficult step is to ascertain what exactly is the substantive law of that nation. At one time, this problem was treated as a question of fact with the burden of proving the substantive law on the proponent of the law.[24] Today, however, with the ASBCA's adoption of Federal Rule of Civil Proce-

[24]Roberts, *Private and Public International Law Aspects of Government Contracts*, 36 Mil. L. Rev. 1, 53-58 (1967). If counsel failed to prove the substantive law in federal court, the case was subject to a variety of consequences. By far, the harshest result was for the case to be dismissed for failure to state a cause of action. Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). The rationale behind this practice was popularly known as the "vested rights" theory. Among its advocates was Justice Oliver Wendell Holmes who described the theory in the *Cuba R.R. case*:

> [T]he only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the "plaintiff's" case, and if there is a reason for doubt he must allege and prove it.

Id. at 479. To avoid this dismissal, other courts merely applied the law of the forum by default or adopted presumptions as to the foreign law. The former approach was called, for obvious reasons, the "Local Law" theory. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 Cornell L. Rev. 1, 5 (1973). Under the latter approach, courts would employ essentially three presumptions as to the foreign law. The first was that the court would presume, in the name of inherent justice, that the basic principles of law necessary to support the claim exist in all civilized nations. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 Nw. U.L. Rev. 602, 609 (1975). The second method employed by some courts was to presume the foreign law was the same as the law of the forum when the foreign country had a common law tradition. *See, e.g.*, Seguros Tepeyac, S.A. Compania Mexicana De Seguros Generalas v. Bostram, 347 F.2d 168 (5th Cir. 1965); Philp v. Macri, 261 F.2d 945 (9th Cir. 1958). The final approach was where the court would simply presume the foreign law to be the same as the forum's regardless of the foreign country's legal history. Alexander, *supra*.

dure 44.1[25] in *Mai-To-Nghiem, d/b/a Hang T.S.C. V.N.*,[26] the foreign law issue is to be resolved as a question of law. Rule 44.1 reads:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.[27]

The Notice Requirement of Rule 44.1

Rule 44.1 initially demands that the proponent of the applicability of foreign law give notice of such law either in his pleadings or in some other reasonable written form. The purpose is to avoid unfair surprise to the opponent.[28] Further, the notice can be given by a medium "outside of and later than the pleadings, provided the notice is reasonable."[29] However, the Rule does not prescribe the form the notice is to take.

Rule 44.1 intentionally establishes no definite time limit for furnishing notice of a foreign law issue except that the timing of the notice ought to have been reasonable. In determining what is a reasonable time to give notice, the Advisory Committee recommended that the court examine the circumstances under which the notice was given. Among the factors to be considered are the stage which the trial has reached at the time of providing notice, the party's reasons for not giving earlier notice, and the importance of the foreign law issue to the trial as a whole.[30]

ASBCA cases are devoid of litigation over the notice problem. In view of the uncertainty in this area, the written notice of the foreign law issue should be furnished at the earliest possible time in the board proceeding.[31]

Provision for Independent Judicial Inquiry

The second sentence of Rule 44.1 opens up the door to permit the board to conduct its own independent inquiry into the substantive foreign law.[32] The use of the word "may" in the language of the Rule is noteworthy. The independent inquiry is a

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[25]39 F.R.D. 117 (1966). The rule was adopted in 1966 "to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country." Advisory Committee's Notes, 39 F.R.D. 117 (1966).

[26]ASBCA No. 16813, 73-2 BCA para. 10,347.

[27]39 F.R.D. 117 (1966).

[28]*Id.*

[29]*Id.* at 118. The Advisory Committee on the Federal Rules of Civil Procedure justified this flexible approach for the following reasons:

> In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possibly wasteful investigation.

Id.

[30]*Id.*

[31]ASBCA decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit. *See* Contract Disputes Act of 1978, *supra* note 1. Whether failure to provide notice of a foreign law issue during the board proceeding would preclude raising the matter on appeal is unclear. However, according to one federal circuit, notice of a foreign law issue must be raised at the trial level or else it cannot be raised on appeal. In Ruff v. St. Paul Mercury Ins. Co., 393 F.2d 500 (2d Cir. 1968), the Second Circuit ruled that the language of the first sentence unmistakably requires written notice of the foreign law question to be submitted at the trial level and hence, the party's failure to do so precluded his raising the issue of foreign law on appeal.

The Ninth Circuit has appeared more permissive than the Second Circuit. In Commercial Ins. Co. of Newark v. Pacific-Peru Constr. Corp., 558 F.2d 948 (9th Cir. 1977), although the court noted that it was possible for Peruvian law to apply in the case, the appropriate forum law was applied since neither party had raised the issue at the trial or appellate level. This case appears to suggest the appellate court may exercise its discretion whether or not to recognize a foreign law issue beyond the trial level. *See also* Restatement (Second) of Conflict of Laws § 136, comment h (1971).

[32]*See generally* Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 615 (1967); Schlesinger, supra note 22.

discretionary matter with the board. Thus, a litigant, out of pure self-interest, should strive to fully inform the ASBCA of the governing substantive law.

In *William Golangco Construction Co.*,[33] the contractor had been awarded a contract by the U.S. Navy to build a certain number of family housing units at Subic Bay for a fixed price of approximately $4 million. After completing the project, the contractor sought additional funds from the Navy for " 'extraordinary, unprecedented, and inflationary' price increases caused by the worldwide energy crisis and the enactment of various Philippine labor laws and decrees."[34] At issue was who had assumed the risk of the cost increases. In finding for the Navy, the board relied in part on a portion of the Philippine Civil Code that directly supported the U.S. government's position, but which neither party had cited.

Another case involving this matter of independent inquiry by the ASBCA was *Peter Schad Gmb H & Co.*[35] In *Peter Schad*, although German law was the applicable law, the contractor failed to furnish the board with any specific provisions of German law which would cause it to conclude the U.S. government was obligated to compensate the contractor for the extra costs he incurred in performing the contract.[36] Since the contractor did make a general allegation that he should have been dealt with in good faith by the government, the board took it upon itself to investigate the subject of "good faith dealings" in German law. Their study revealed that a particular section of the German Civil Code was most likely the applicable section. The ASBCA went further and examined the code section in light of a prior U.S. Army Europe Board of Contract Appeals decision which discussed the interpretation of the same section.[37] Despite the fact the language of the European Board case was dicta, the ASBCA quoted it at length and relied on it to deny the contractor the extra payments.

These two cases illustrate two of the principal problems with the independent judicial inquiry into foreign law matters. The first is it may be unfair to the parties if the ASBCA has neglected to inform them of its intent to conduct and rely on the board's own research.[38] Second, the judges may not have the time or the inclination to extensively research the foreign law on their own. Thus, the outcome of the case may be determined by an incomplete study of the law.[39]

In the event the board decides not to exercise its discretion to investigate the foreign law and the parties fail to prove the substantive foreign law, there are several possible actions the board could take. Although extremely unlikely, the ASBCA could dismiss the case for not stating a cause of action. A more workable approach would be for the board to demand more proof from the parties on the grounds it would aid in the disposition of the action.[40] Another method was employed in *Schiffahrt und Kohlen-Agentier*.[41] In this case, a German contractor sought reimbursement for additional costs incurred in performing a service contract for the Army. The appellant presented an affidavit interpreting the applicable German law as it applied to the facts at issue. This affidavit, however, was rendered less reliable because of the gov-

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[33] ASBCA No. 22423, 78-2, BCA para. 13,308.

[34] *Id.* at 63,085.

[35] ASBCA No. 24790, 81-1 BCA para. 15,111.

[36] The contractor, a German trash hauling company, had entered into a contract with the U.S. Army in Europe to collect and dispose of garbage from several designated areas for a firm fixed price of DM 148,156.20 a year. As a consequence of the local German authorities closing down their nearby refuse dump, the contractor was forced to incur greater costs by having to haul the garbage a greater distance to another refuse dump. The contractor absorbed the costs initially, but then requested an increase in the contract price to cover the remaining five months of the agreement. The contracting officer denied the request and the contractor appealed the decision to the ASBCA.

[37] The cited case was Hoffmeyer and Huss, USAREUR BCA No. 342 (19 Aug. 1971).

[38] Alexander, *supra* note 24, at 616. *See also* 39 F.R.D. 69, 118-19 (1966).

[39] *Id. See generally* Pollack, *Proof of Foreign Law*, 26 Am. J. Comp. L. 470 (1978).

[40] *Id.* at 472. *See, e.g.*, Fed. R. Civ. P. 16. For instance, in Nedlloyd Ri Jn-En Binnenvaart, ASBCA No. 24819, 81-1 BCA para. 15,019, the presiding administrative judge ordered the parties to brief the issue of applicable law.

[41] ASBCA No. 10219, 65-2 BCA para. 5,038.

ernment's showing of conflicting interpretations. Since the U.S. law coincidentally led to a result "not significantly different" from what the contractor desired, the U.S. law was applied.[43] A fourth approach was employed in *Impresa Construzioni Geom. Luigi Salvi & C.*[44] Here, the ASBCA ruled that in the absence of a strong exposition of the applicable substantive foreign law by the appellant, the board would merely apply the law of the forum.[44]

Sources of Foreign Law

With the adoption of Rule 44.1 by the ASBCA, the parties are hampered by fewer evidentiary problems in proving what the law of a particular foreign country is. The second sentence of the Rule opens the way to a wide variety of materials. The Advisory Committee stated:

> In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43.[45]

In comments to Federal Rule of Evidence 201, the Advisory Committee on Evidence specifically removed the matter of proving foreign law from being subject to the rules. The Committee said that Rule 44.1 was

> founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.[46]

Despite the flexibility of this Rule, a party relying on foreign law continues to face a special challenge in order to satisfy the board as to the correctness of its interpretation. To meet this burden, counsel may have to call on experts in the foreign law to testify before the board or resort to translated literature covering the foreign law.

The use of legal experts is among the more popular methods of proving foreign law.[47] In federal court, the litigants will normally put either a native foreign lawyer or a local American expert in the foreign law on the stand to prove the foreign law.[48] Once the expert is on the stand, he or she may even render a personal opinion as to how the court should apply the law to the given set of facts;[49] such an opinion is not essential, however, for the court to arrive at a legal conclusion.[50]

The use of experts to prove the foreign law also has its drawbacks. Since the witness is subject to cross-examination, the expert's testimony may

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[43]*Id.* at 23,734.

[44]ASBCA No. 16594, 74-1 BCA para. 20,388.

[45]This rule is consistent with Restatement (Second) of Conflicts of Law § 136, comment h (1971). *See also* Commercial Ins. Co. of Newark, New Jersey v. Pacific-Peru Constr. Corp., 558 F.2d 948 (9th Cir. 1977).

[46]39 F.R.D. 117, 118 (1966).

[46]46 F.R.D. 195, 205-06 (1969).

[47]Its popularity is derived from Justice Holmes' comments pertaining to the difficulties of interpreting Puerto Rican laws:

> When we contemplate such a system from the outside, it seems like a wall of stone, every part even with all the others, except so far as our own legal education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never have got from books.

Diaz v. Gonzalez, 261 U.S. 102, 106 (1922).

[48]*See* Diaz v. Southeastern Drilling Co. of Argentina, S.A., 324 F. Supp. 1 (N.D. Tex. 1969), *aff'd*, 449 F.2d 258 (5th Cir. 1971); Annot., 75 A.L.R.3d 177, 197 (1977).

[49]Diaz v. Southeastern Drilling Co. of Argentina, S.A., 261 U.S. 102 (1922); Burnett v. Trans World Airlines, 368 F. Supp. 1152 (D.N.M. 1973).

[50]*See, e.g., In Re* Estate of Danz, 444 Pa. 411, 283 A.2d 282 (1971).

lose its effectiveness in the course of the "semantic wrangling" between the witness and opposing counsel.[51] Thus, a party intent on educating the board as to the substantive foreign law would be wise to brief and argue that law in the same fashion a matter of domestic law would be briefed and argued.[52]

Under the language of Rule 44.1, the board may look at any relevant material. This includes treatises, statutory materials, advisory opinions,[53] and foreign language dictionaries.[54] The broad scope of Rule 44.1 would even permit the board to examine unauthenticated copies of foreign law.[55] However, a mere citation to written legal materials is not enough; the material must be translated and a copy thereof furnished to the board.

Significance of Determining Foreign Law as a Question of Law

Rule 44.1 explicitly provides that the foreign law issue is to be treated as a question of law.[56] This approach subjects the board's ruling on the foreign law issue to appellate review.[57] There is a distinction, however, between the determination by the ASBCA of foreign law as a question of law and domestic law as a question of law. When a case involves domestic law, the board must always ascertain the domestic law. Determining the applicable foreign law, on the other hand, is discretionary.[58]

Conclusion

By rejecting the rigid *lex loci* rule and replacing it with the flexible analysis of the "most significant relationship" test, the ASBCA will be hearing an increasing number of contract disputes involving foreign law issues. Furthermore, the board's adoption of Rule 44.1 has significantly eased the problems in proving the law of another nation. The liberal notice requirements, the broad scope of materials that may be submitted to the board, and the treating of the foreign law issue as a question of law are all factors which greatly facilitate determining the substance of the foreign law.

[51]Pollack, *supra* note 42, at 474.

[52]Id. *See also* Curtis v. Beatrice Foods, Co., 481 F. Supp. 1275 (S.D.N.Y.), *aff'd*, 633 F.2d 203 (2d Cir. 1980).

[53]*See* Elektro-Industrie Montage Ingenieur Rudolf H. Winter, ASBCA No. 20509, 77-1 BCA para. 12,386.

[54]*See e.g.*, Burnett v. Trans World Airlines, *supra*. note 49.

[55]Ramirez v. Autobuses Blancos Flecha Roja, S.A. De C.V., 486 F.2d 493 (5th Cir. 1973).

[56]Cuneo, *Some Practical Applications of International Law to Government Contracts*, 50 Notre Dame Law. 843 (1975); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 Harv. L. Rev. 591, 613-17 (1968).

[57]Schlesinger, *supra* note 24. Another purpose for treating the foreign law issue as a question of law is to make it clear that the foreign law issue is decided by the judge and not the jury.

[58]*Id.*

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

New Chief Judge, U.S. Army Legal Services Agency (MOB DES)

Colonel Daniel W. Fouts of Greensboro, North Carolina, has been nominated to succeed Brigadier General William H. Gibbes as Chief Judge, U.S. Army Legal Services Agency (MOB DES). Colonel Fouts currently is the Commander, 12th Military Law Center, Columbia, South Carolina. He will assume his new duties on 1 May 1983.

Colonel Fouts began his military career as an enlisted man and served on active duty with the 2nd and 7th Infantry Divisions in Korea from 1953 to 1955. He obtained his LL.B., *cum laude*, from Wake Forest Law School in 1958 and received a direct commission in the U.S. Army Reserve, JAGC, in 1959. He has served as a Civil Affairs Legal Officer, a USAR school instructor, senior defense counsel, chief of military justice, and Staff Judge Advocate, 120th ARCOM. He has completed the Judge Advocate Officer Advanced Course, Command and General Staff College, Industrial College of the Armed Forces (National Security Management), and has been accepted for

the United States Army War College Corresponding Studies Course. His decorations include the Meritorious Service Medal (2d award).

Since 1959 he has been a member of the law firm of Adams, Kleemeier, Hagan, Hannah & Fouts in Greensboro, North Carolina. Colonel Fouts is a member of the North Carolina Bar and is admitted to practice before all courts of North Carolina, the three federal district courts in North Carolina, the Fourth Circuit Court of Appeals and the U.S. Supreme Court. He is a part president of the 18th Judicial District Bar, past chairman of the Military Law Committee of the North Carolina Bar Association, and past president of the Greensboro Chapter of the Reserve Officers Association.

American Bar Association/Young Lawyers Division Military Service Lawyers Committee Meeting

Captain Bruce E. Kasold
ABA/YLD Delegate
Tort Branch, Litigation Division, OTJAG

Although many of the invitees could not attend, several very active committees did send representatives. The information they provided about their committees should prove useful to most of the other committees.

The Honorable Robinson O. Everett, Chief Judge of the U.S. Court of Military Appeals, reported for the Special Committee on Military Personnel, North Carolina State Bar, chaired by Mark E. Sullivan. This committee is extremely active and provides excellent support to the military attorney. It has established an "Operation Standby" program, apparently patterned after the program implemented in Florida, in which local attorneys have agreed to be available for consultation with the military attorney. This program can greatly enhance the ability of the military attorney, who is often not a member of the host state bar, to provide legal assistance to the military client. At a minimum, the local attorney can direct the military attorney to proper statutes or texts which might prove helpful, thereby saving time in research. Chief Judge Everett reported that the program has been successful in garnering participation by local attorneys. Surprisingly, the vast majority of those participating have had no connection with the military, whether as reserve or active duty judge advocate.

Another major project of this committee is to facilitate representation of soldiers in civil court by the military attorney. The committee has already proposed and secured passage of a statute permitting such representation. It is recommending that initial representation be done by attorneys in uniform who are also members of the state bar. Thereafter, once the program has established itself, other military attorneys could appear in court. The current law requires that the military attorney appear under supervision of a state-licensed attorney. It is envisioned that such supervision would be minimal, often only an initial introduction at first appearance.

The third major project of this committee is the sponsoring of conferences or CLE on local law. These conferences are held at the various installations and address the laws applicable to general legal assistance. Coordination is performed by the committee and some funding is provided for materials, but the instructors are volunteers. To date, these seminars have been eagerly attended with participation by approximately fifty attorneys.

Lieutenant Colonel Frances P. Rice reported for the ABA Standing Committee on Lawyers in the Armed Forces (LAF), chaired by the Honorable John D. Fauntleroy. LTC Rice provided material which amply depicts the many activities of this committee. Briefly, LAF is considering support of a recent proposal that the Federal Tort Claims Act be amended to provide protection from malpractice to legal assistance officers. It also supports making military law a specialty and having CLE credit given for the military courses attended by judge advocates. Finally, this committee is reviewing the possibility of professional pay for the military attorney as well as problems associated with state bar dues and other fees.

Neil B. Kabatchnick, Chairman of the Military Law Committee, reported that his committee is currently supporting a liberal application of the three year limitations period applicable to matters brought before the Board for Correction of Military Records. The committee is attempting to secure support from the ABA Standing Committee on Military Law. The committee meets on a monthly basis and will be implementing an "Operation Standby" in the near future.

The ABA Standing Committee on Military Law, chaired by Ernest H. Fremont, is currently reviewing proposed amendments to the Uniform Code of Military Justice and hopes to develop specific recommendations. It is also discussing the possibility of utilizing military attorneys to act as law clerks for the Court of Military Appeals. While many have expressed support for this proposition, it was noted that there may be some inherent conflicts, at least in perception, in having military attorneys assist this court which is designed to provide civilian oversight for military legal procedures. The committee agreed to seek ABA support for a resolution recommending that CMA opinions be more fully integrated into the West Digest system. These decisions would continue to be published in the *Military Law Reporter*, but selected opinions would also be reported in the Federal Reporter system as is done with the Circuit Courts of Appeal decisions. Finally, the committee is reviewing the Board for Correction of Military Records application of the three year limitations period.

The ABA Standing Committee on Legal Assistance to Military Personnel (LAMP) Chaired by F. Dore Hunter, is attempting to secure passage of legislation which would provide a statutory basis for the current legal assistance programs implemented by the military services. LAMP also publishes a newsletter, entitled *Legal Assistance Newsletter*, which is sent to state and local bar presidents, state bar military committees, numerous law schools, deans, and various other committees and interested persons, as well as the legal assistance offices of the military services. This committee also actively encourages the sponsorship of legal seminars by state and local bar associations. In addition, it has encouraged production of video tapes by the various state bars to welcome military attorneys to their new assignments in their state. LAMP is currently planning a video of its own. Finally, LAMP is also reviewing the possibility of legislation to protect military attorneys from malpractice.

The Military Service Lawyers Committee (MSLC) of the Young Lawyers Division is preparing a guide to the ABA for the military attorney. This pamphlet will list all military related committees within the ABA as well as affiliated military-related committees. A short summary of the activities of each committee will be provided. MSLC is also working on a proposal to eliminate ABA dues for the military attorney's first year. Experience of other associations and sections has shown that a significant number of those who join will retain their membership even when dues begin. This committee is also studying the possibility of making video tapes used by the military available to the YLD affiliates who sponsor CLE. These tapes cover a variety of topics from administrative law to litigation.

As can be discerned from the above, the committees are actively involved in issues and projects affecting the military attorney. Hopefully, at the next "coordination meeting" there will be greater state bar participation.

Legal Assistance Items

Major Joseph C. Fowler, Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Captain Timothy J. Grendell

ABA Legal Assistance Award

The Fort Bliss, Texas Legal Assistance Office has been recognized by the American Bar Association's Legal Assistance for Military Personnel Committee for the outstanding legal services provided by the office to military and retired personnel in the El Paso, Texas area. This is only the second time that an Army Legal Assistance Office has achieved this distinction.

For the past two years the Fort Bliss Legal Assistance Office has been the focal point of the staff judge advocate's attention. As a result, this office has instituted several innovations into its legal assistance operations. These innovations include a 24-hour hotline, publication of preventive law articles in the post newspaper, advertising posters, and increased client services. Legal assistance officers should consider the use of these measures in their legal assistance programs.

Captain David Popper of the Fort Bliss office has submitted the following summary of the award-winning Fort Bliss program:

The Fort Bliss Legal Assistance Office has concentrated on improving legal services in two major areas: preventive law and actual client counseling.

1. Preventive Law

a. Unit Briefings: Part of the legal assistance mission is to insure that servicemembers at Fort Bliss maintain their legal affairs. This will insure that minimal legal problems will arise for the troops during POR/EDRE exercises or actual deployment.

Each battalion-level adjutant is contacted and is offered the opportunity to have legal briefings provided at the company/troop/battery level.

Briefings cover wills, powers of attorney, and the Soldiers' and Sailors' Civil Relief Act. If time permits, consumer law, landlord/tenant laws, and other items of interest will be explained. Upon completion of the briefing, servicemembers desiring wills and powers of attorney are given the opportunity to complete the necessary questionnaires. Wills and powers of attorney are then prepared and returned to the unit as soon as possible.

b. Advertising: The office has made a sustained effort to reach servicemembers before their legal problems intensify. To accomplish this, the office has taken advantage of the various media of communication available on post. For example, the office advertises its hours in the post daily bulletin and post newspaper. Posters are placed in vital areas such as the Finance, Transportation, and Housing Offices. Furthermore, the office has coordinated with the audio visual offices of Walter Beaumont Army Medical Center to televise the legal assistance tapes at the hospital and on post TV programming.

c. Hot Line: A hot line service has been implemented utilizing a 24-hour telephone answering service. Off duty members with legal questions of an immediate nature are able to call this hot line and leave his or her name and phone number and describe the nature of his problem. The legal assistance duty officer then monitors the calls every two hours and responds to the problem.

d. Explanation Forms: Explanation forms which give the service-member basic information and facts about wills, powers of attorney, divorce, and other recurring problems are being developed in an effort to educate the service-member.

e. Newspaper Articles: The office is a frequent contributor of articles to the post newspaper. The articles usually feature one type of problem such as landlord/tenant problems or car purchases. In addition, the office features a question and answer column in which servicemembers may pose a particular question and receive a written answer in the paper.

f. Posters: Posters advertising the hot line and other legal assistance services are being placed in strategic areas around post. For example, the posters may currently be viewed in the Housing,

Transportation, Finance, and Central Inprocessing Offices.

Posters were acquired with both office and installation funds. Installation funds were obtained through the Public Affairs Office, which maintains certain general funds which may be used to benefit staff organizations when the need exists.

2. Actual Client Counseling

a. Letter File: The legal assistance officer at Fort Bliss spends a large amount of time addressing a few recurring problems such as nonsupport, divorce, or consumer protection. Much of the time spent on these actions is in the drafting and redrafting of letters which are intended to accomplish similar or identical purposes. This often takes time that could be better spent by the attorney in creatively trying to solve these problems or in attacking the new problems that arise everyday.

To alleviate many of the routine aspects of the job, the office has developed a letter file which contains standard letters addressing these recurring problems. Each letter must be adapted to the individual facts of each case, but such a file reduces the necessity to "recreate the wheel" everyday.

Each attorney and each word processor operator has a copy of the file. The file is organized by type of problem; for example we have nonsupport letters—forms I, II, etc.

The attorney merely designates the form letter to be used and notes the necessary modifications to be employed. The word processor selects the appropriate disc and makes the necessary modifications. This process saves many attorney and word processing hours each month and greatly increases output, while maintaining the same quality, of our work product.

b. Questionnaires: In an effort to educate the client and to identify the relevant facts for the attorney, questionnaires are being developed in areas such as nonsupport, divorce, and reports of survey.

The client completes these questionnaires while in the waiting area. Thus, upon meeting the attorney, the client has developed an understanding of the relevant issues and much valuable time has been saved.

c. Pro Se Representation: This office has contacted various members of the legal community to include the Legal Aid Office, the Probate County Clerk, and private attorneys in an effort to expand the legal activities that servicemembers may perform without the aid of a civilian attorney. As an aid to the servicemember, legal assistance officers draft complaints and answers, Chapters 13 and 7 Bankruptcy petitions, numerous probate documents, such as Small Estate Affidavits, Muniments of Title, documents for persons filing under Intestacy Statutes, petitions for name changes, and divorce documents such as petitions, waivers of citations, and final divorce decrees.

d. Office Appearance: The appearance of the legal assistance office has dramatically changed. The offices and waiting areas are fully carpeted and draped; the rooms are climate controlled and filled with educational reading material. New furniture and new covers for existing furniture is on order. Two Video Screens LTE 3D and Problem Word Processing Systems with trained operators are in use.

Alimony-Deductibility

Alimony, also known as spousal support, is deductible by the payor and includable as income to the recipient. Property settlements or payments and child support payments are neither deductible by the payor nor includable as income to the recipient. These tax consequences are usually governed by the terms of the separation agreement between the parties. The Internal Revenue Service has issued Revenue Proc. 82-53, which provides nine clauses that guarantee the treatment of marital payments as alimony. Use of one of these nine provisions assures the payor of the alimony deduction under Section 215 of the Internal Revenue Code and requires the inclusion of the amount received as income to the recipient under Section 7(a)(1).

Legal assistance offices should consider including one of the following "safe-harbor" clauses when drafting separation agreements calling for periodic payments which are intended by the parties to be treated as alimony for tax purposes. Note that examples (3), (4), (5), and (9) would re-

main enforceable obligations even if the recipient remarries. However, remarriage could result in a reduced obligation under examples (6), (7), (8), and (9).

Example (1): The following clause provides for definite sums to be paid on a monthly basis. The payments will continue until the death of either party or the remarriage of the recipient. "The husband shall pay the wife, as and for her support, the sum of ____($____) each and every month commencing the first full month following the entry of a judgment in the pending action. Each monthly amount shall be due and payable on the ____ day of each month, but the husband's obligation under this paragraph shall terminate in the event of the death of either party of the wife's remarriage."

Example (2): The following clause provides for sums that are computed as a percentage of the payor's compensation. The payments will continue until the death of either party or the remarriage of the recipient. "The wife shall pay the husband, as and for his support, on the ____ day of each and every month commencing the first full month following the entry of a judgment in the pending action, a sum equal to ____ percent (____%) of her total compensation income, such as wages, salaries, fees, or similar receipts during the preceding month. However, the wife's obligation under this paragraph shall terminate in the event of the death of either party or the husband's remarriage."

Example (3): The following clause provides for installment payments on a monthly basis for a period in excess of ten years. "The husband shall pay the wife, as and for her support, the sum of ____($____) each and every month commencing the first full month following the entry of a judgment in the pending action, and continuing for one hundred twenty (120) subsequent months (for a total of one hundred twenty-one (121) monthly payments). The monthly amount due hereunder shall be payable on the ____ day of each month during the foregoing period; and the husband's obligation for the total amount due the wife hereunder (i.e., ____($____)) shall be payable to her (or to her executor, trustee, or other successor) in all events irrespective of whether she remarries. In the event of the husband's death, his remaining obligation hereunder shall constitute an obligation of his executor, trustee, or other successor."

Example (4): The following clause provides for installment payments on a monthly basis for a period in excess of 10 years. The monthly payments will decrease over time. "The wife shall pay the husband, as and for his support, a specific monthly amount each and every month for one hundred twenty-one (121) months, pursuant to the following schedule:

"A. Commencing the first full month following the entry of a judgment in the pending action, and continuing for twenty-three (23) subsequent months the monthly amount shall be two thousand dollars ($2,000) (for a total of twenty-four (24) such monthly payments, aggregating forty-eight thousand dollars ($48,000);

"B. Commencing the twenty-fifth full month following the entry of such judgment, and continuing for thirty-five (35) subsequent months, the monthly amount shall be one thousand dollars ($1,000) (for a total of thirty-six (36) such monthly payments, aggregating thirty-six thousand dollars ($36,000); and

"C. Commencing the sixty-first full month following the entry of such judgment, and continuing for sixty (60) subsequent months, the monthly amount shall be five hundred dollars ($500) (for a total of sixty-one (61) such monthly payments, aggregating thirty thousand five hundred dollars ($30,500).

"The requisite monthly amount shall be due and payable on the ____ day of each month during the foregoing period; and the wife's obligation for the total amount due the husband hereunder (i.e., one hundred fourteen thousand five hundred dollars ($114,500) shall be due and payable to him. In the event of the wife's death, her remaining obligation hereunder shall constitute an obligation of her executor, or other successor. In the event of the husband's death, any remaining obligation hereunder shall terminate."

Example (5): The following clause provides for unallocated, *i.e.* no specific amount for child support, periodic payments, payable as a set sum on a monthly basis and continuing until certain stated events occur. Because the payments are unallo-

cated, the full payment is deductible by the payor and includible in income by the payee. "The husband shall pay the wife, as and for her support and the support of John and Mary (the minor children of the parties), the sum of ____($____) each and every month commencing with ____, 19____. Each monthly amount shall be due and payable on the ____ day of each month, but the husband's obligation for support under this paragraph shall terminate in the event of the death of either party or the wife's remarriage."

Example (6): The following clause provides for unallocated periodic payments on a monthly basis, which are to be reduced upon the occurrence of certain events relative to the children, such as their death, marriage, or graduation. A portion of the original monthly payments will continue after the payee's remarriage. "The wife shall pay the husband, as and for his support and support of John and Mary (the minor children of the parties), the sum of ____($____) each and every month commencing with ____, 19____. Upon the earliest to occur of the death, marriage, graduation from high school, or attainment of age ____(____) of each of the minor children, the monthly amount otherwise due hereunder shall be reduced by twenty percent (20%) of the original monthly amount. In the event of the husband's remarriage, the monthly amount otherwise due hereunder shall be reduced by sixty percent (60%) of the original monthly amount. Each monthly amount shall be due and payable on the ____ day of each month, but the wife's obligation for support under this paragraph shall terminate in the event of the death of either party."

Example (7): The following clause provides for unallocated periodic payments on a monthly basis, subject to reduction in the original monthly amount upon the occurrence of certain events relative to the children. In addition, the clause provides for delayed reduction in the monthly amount because of the payee's remarriage. "The husband shall pay the wife, as and for her support and the support of John and Mary (the minor children of the parties), the sum of ____($____) each and every month commencing with ____, 19____. Upon the earliest to occur of the death, marriage, graduation from high school, or attainment of age ____(____) of each of the minor children, the monthly amount otherwise due hereunder shall be reduced by twenty percent (20%) of the original monthly amount. In the event of the wife's remarriage, the monthly amount otherwise due hereunder shall be reduced by sixty percent (60%) of the original monthly amount, effective as of the month following the month in which the remarriage occurs; except, if the remarriage occurs during the first ____(____) months for which payments under this paragraph are payable, the foregoing sixty percent (60%) reduction on the wife's remarriage shall be effective as of the first month following the foregoing ____(____) month period. Each monthly amount shall be due and payable on the ____ day of each month, but the husband's obligation for support under this paragraph shall terminate in the event of the death of either party."

Example (8): The following clause provides for the same type of unallocated periodic payments as shown in Example (g), except that the payments are subject to an annual inflation adjustment. "The husband shall pay the wife, as and for her support and the support of John and Mary (the minor children of the parties), the sum of ____ ($____) each and every month commencing with ____, 19____. The foregoing amount shall be subject to certain adjustments from time to time, as provided in subparagraphs A-C, below, and each monthly amount hereunder shall be due and payable on the ____ day of each month.

"A. With respect to inflation or deflation, the monthly amount otherwise due hereunder shall be adjusted annually, as of January 1st of each year. Each such adjustment shall equal the amount determined by multiplying the sum described in subparagraph (1), below, by the percentage determined under subparagraph (2), below:

"(1) The original monthly amount of ____ ($____), decreased to account for any adjustments previously carried out under subparagraphs B and/or C, below.

"(2) The percentage rise or decline in prices as of the relevant January 1st, over the preceding twelve (12) months, as reflected in the index prepared by ____ known as ____.

"B. Upon the earliest to occur of the death, mar-

riage, graduation from high school, or attainment of age ____(____) of each of the minor children, the monthly amount thereafter due the wife under this paragraph shall be reduced by the result of multiplying the original monthly amount of ____($____), increased or decreased to account for any adjustments previously carried out under subparagraph A, above, by twenty percent (20%).

"C. In the event of the wife's remarriage, the monthly amount thereafter due to her under this paragraph shall be reduced by the result of multiplying the original monthly amount of ____($____), increased or decreased to account for any adjustments previously carried out under subparagraph A, above, by sixty percent (60%). However, if the remarriage occurs during the first ____(____) months for which payments under this paragraph are due, the foregoing sixty percent (60%) reduction shall be effective as of the first month following the close of the ____(____) month period.

"D. In the event of the death of either party, the husband's obligation for support under this paragraph shall terminate."

Example (9): The following clause provides for the payment of life insurance premiums that qualify as periodic payments. "The wife agrees that, in the event of the entry of a judgment in the pending action, she shall cooperate with the husband in his purchase of a whole life insurance policy on her life in the face amount of ____($____), that designates the husband as the irrevocable primary beneficiary and the parties' children (or their representatives) as irrevocable contingent beneficiaries, and that entails the following additional terms: (insert specific terms of contemplated policy). The wife agrees that she shall submit to any required medical examination, provide such information as required by the proposed insurance carrier, and pay the annual premiums respecting such policy. Her obligation to pay such premiums, however, shall terminate in the event of the occurrence of any of the events specified in paragraph ____, above, at which time her obligation for the monthly support payments to the husband, described in the aforesaid paragraph, shall also terminate. The husband shall be the sole owner of the policy he purchases pursuant to the terms of this paragraph."

Legal Forms—Size

Captain James D. Schultz, Jr. of the 3d Brigade, 3d Infantry Division has suggested that legal assistance officers convert all documents to 11 inch paper. Several state, as well as the federal, courts are working to eliminate the use of "legal" size paper (14 inch and longer). At least one court in Illinois will not accept pleadings and other documents on paper longer than 11 inches. For these reasons, legal assistance officers should become familiar with judicial paper size requirements and conform accordingly.

California—Statutory "Fill In The Blank" Will

The state of California recently adopted a statutory will which allows the use of a preprinted will form. The testator must fill in the blanks on the form in his or her own handwriting. The form, printed in Section 56.7 of the California Probate Code, is reprinted in its entirety following this section. The concept of a statutory will is also being studied by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. National adoption of this will form would provide a workable solution to the problem of mass will preparation for deploying servicemembers.

56.7. The following is the California Statutory Will Form:

CALIFORNIA STATUTORY WILL

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY WILL HAS SERIOUS LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.

2. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

3. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

4. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA STATUTORY WILL. YOU MAY REVOKE THIS CALIFORNIA STATUTORY WILL AND YOU MAY AMEND IT BY CODICIL.

5. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

6. THE FULL TEXT OF THIS CALIFORNIA STATUTORY WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

7. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL.

8. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

9. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

10. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

11. IF YOU HAVE CHILDREN UNDER 21 YEARS OF AGE, YOU MAY WISH TO USE THE CALIFORNIA STATUTORY WILL WITH TRUST OR ANOTHER TYPE OF WILL.

[A printed form for a California statutory will shall set forth the above notice in 10-point bold face type.]

CALIFORNIA STATUTORY WILL OF

_____

(Insert Your Name)

Article 1. Declaration

This is my will and I revoke any prior wills and codicils.

Article 2. Disposition of My Property

2.1. PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, personal automobiles and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2. CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

FULL NAME OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).	AMOUNT OF GIFT $ _____ AMOUNT WRITTEN OUT _____ Dollars
_____	_____ Signature of Testator

2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will go under Property Disposition Clause (c) and I realize that means the property will be distributed as if I did not make a will.

PROPERTY DISPOSITION CLAUSES (Select one.)

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. ☐

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING. ☐

(c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL. ☐

Article 3. Nominations of Executor and Guardian

3.1. EXECUTOR (Name at least one.) I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR. _____ ☐

SECOND EXECUTOR. _____ ☐

THIRD EXECUTOR. _____ ☐

3.2. GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then the others shall serve in the order I list them in the other boxes.

FIRST GUARDIAN OF THE PERSON. _____ ☐

FIRST GUARDIAN OF THE PROPERTY. _____ ☐

SECOND GUARDIAN OF THE PERSON. _____ ☐

SECOND GUARDIAN OF THE PROPERTY. _____ ☐

THIRD GUARDIAN OF THE PERSON. _____ ☐

THIRD GUARDIAN OF THE PROPERTY. _____ ☐

3.3. BOND My signature in this box means that a bond is not required for any individual executor or guardian named in this will. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code. ☐

I sign my name to this California Statutory Will on _____
Date

at _____, _____
City State

_____
Signature of Testator

STATEMENT OF WITNESSES (You must use two adult witnesses and three would be preferable.)

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory will in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature _____ Residence Address: _____
Print Name
Here: _____ _____

Signature _____ Residence Address: _____
Print Name
Here: _____ _____

Signature _____ Residence Address: _____
Print Name
Here: _____ _____

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Overseas Legal Clerk Replacements.

The largest concentration of overseas legal clerks is located in USAREUR. One of the key problems discussed at the 1982 USAREUR Judge Advocate Conference was the "no show" rate of legal clerks placed on assignment instructions to Europe.

This problem is not unique to Europe, but is true for all overseas areas. There are a number of variables that account for these "no shows", such as diversions because of marriage, deferments because of pregnancy or military exigencies, declination to extend or reenlist to fulfill tour obligation, or retirements. Overseas chief legal clerks (CLC) should, therefore, not count on replacements as soon as they are identified. MSG Giddens, Office of The Judge Advocate, HQ USAREUR, coordinates the confirmation of replacements with MILPERCEN and 1st PERSCOM. Generally, if there has not been notification of a change in status of the replacement within sixty days, a change in the assignment instructions is unlikely. Of course, there are always exceptions. In order to facilitate planning for overseas SJA operations, The overseas CLC should call or write the appropriate CONUS CLC if there is any question about the arrival of a CONUS legal clerk. If the overseas CLC writes directly to the CONUS replacement legal clerk, a courtesy copy of the letter should be sent to the appropriate CONUS CLC. This action will alert the CONUS CLC that the replacement legal clerk is an expected overseas arrival. The CONUS CLC may then advise the gaining CLC if the service member is in fact not proceeding on assignment orders. All CONUS CLCs should take immediate action to respond to any inquiry received from overseas CLCs regarding replacement personnel. In turn, the overseas CLCs should respond just as quickly to inquiries from CONUS CLCs.

2. Proposed MOS 71D and 71E Changes.

The Judge Advocate General recently approved for study and staffing a proposed change to AR 611-201 concerning MOS 71D and 71E. Some of the more significant proposed changes are outlined below:

a. Legal Clerk (71D10-71D30) changed to Legal Specialist. Senior Legal Clerk (71D40) changed to Senior Legal NCO. Chief Legal Clerk (71D50) changed to Chief Legal NCO.

b. Qualifications:

(1) Physical profile changed from PULHES of 323222 to PULHES of 222121;

(2) ST score of 100 and 12th grade level of English comprehension and composition;

(3) The OJT option eliminated;

(4) No record of Article 15 punishment or conviction by court-martial;

(5) No record of civil conviction for an offense punishable under the UCMJ by confinement at hard labor for one year or punitive discharge;

(6) No more than fifteen days lost time;

(7) No pattern of undesirable behavior as evidenced by military or civilian record; and

(8) E-5 battalion position to be downgraded to E-4; brigade senior legal clerk position to be elevated to E-7.

Space does not permit a detailed description of all the proposed changes or an explanation thereof. It should not be assumed that all the proposed changes will be adopted and implemented. These are only proposals. Implementation, if any, is probably a year away.

3. Justice Clerk and Court Reporter Refresher Training Course.

The Justice Clerk and Court Reporter Refresher Training Course held at Fort Monroe, Virginia from 13-19 March 1983 was a great success. Approximately three hundred individuals were in attendance.

DA Message—New JAGC Senior Staff NCO

214900Z Mar 83
DAJA-ZA
FOR JA/SJA
SUBJECT: Selection of JAGC Senior Staff NCO

1. SGM Walter T. Cybert has been selected to replace SGM John Nolan as the Senior Staff Noncommissioned Officer for The Judge Advocate General's Corps. SGM Nolan will retire this fall. The date SGM Cybert will assume his new position will be announced later.

2. SGM Cybert is currently serving in the SJA Office, HQ, USA Field Artillery Center & Fort Sill, Fort Sill, OK.

CLE News

1. Law Office Management (7A-713A): Change in Purpose and Prerequisites

(7A-713A)

Length: 4-½ days.

Purpose: To provide a working knowledge of the administrative operations of any Army Staff Judge Advocate Office and to provide basic concepts of effective law office management to warrant officers and senior enlisted personnel.

Prerequisites: Active duty or reserve component Army warrant officers and senior noncommissioned officers in the grade of E6 and above with a MOS of either 71D or 71E. Persons who have completed this course within the last 3 years are ineligible to attend. Persons who have completed this course more than 3 years ago are eligible to attend but priority will be given to first time students. Security clearance required: None.

Substantive Content: Management theory and practice including leadership, leadership styles, motivation, and organizational design. Law office management techniques including management of military and civilian personnel, equipment, law library, office actions and procedures, budget management and control, and manpower.

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. 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 agency 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 (Tele-

phone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

4. TJAGSA CLE Course Schedule

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 11-13: Professional Recruiting Training Seminar.

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

July 13-15: Chief Legal Clerk Workshop (1983).

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

July 18-29: 96th Contract Attorneys (5F-F10).

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

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

August 1-May 18, 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).

October 17-21: 6th Claims (5F-F26).

October 24-28: 10th Criminal Trial Advocacy (5F-F32).

October 31-November 4: 13th Legal Assistance (5F-F23).

November 7-9: 5th Legal Aspects of Terrorism (5F-F43).

November 14-18: 1st Advanced Federal Litigation (5F-F29).

November 14-18: 17th Fiscal Law (5F-F12).

November 28-December 2: 6th Administrative Law for Military Installations (5F-F24).

December 5-9: 24th Law of War Workshop (5F-42).

December 5-16: 97th Contract Attorneys (5F-F10).

January 9-13: 1984 Government Contract Law Symposium (5F-F11).

January 16-20: 73d Senior Officer Legal Orientation (5F-F1).

January 23-27: 24th Federal Labor Relations (5F-F22).

January 23-March 30: 103d Basic Course (5-27-C20).

February 6-10: 11th Criminal Trial Advocacy (5F-F32).

February 27-March 9: 98th Contract Attorneys (5F-F10).

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop.

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training.

June 18-29: BOAC: Phase III.

July 9-13: 13th Law Office Management (7A-713A).

July 11-13: Chief Legal Clerk Workshop (1984).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-20: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-22: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference.

October 15-December 14: 105th Basic Course (5-27-C20).

5. Civilian Sponsored CLE Courses

August

7-12: NJC, Family Court Proceedings—Specialty, Reno, NV.

7-12: NJC, Toxic Injury Litigation—Specialty, Reno, NV.

7-12: NJC, Search and Seizure—Specialty, Reno, NV.

7-16: MCLNEL, Trial Advocacy Institute, Cambridge, MA.

8-12: SBT, Advanced Taxation Course, Dallas, TX.

8-12: TOURO, The Skills of Contract Administration, Las Vegas, NV.

8-12: AAJE, Fact Finding, Decision Making, Communication, Time Management, Stress and Judicial Performance, UVA, Charlottesville, VA.

12: WSBA, Advanced Criminal Defense, Seattle, WA.

15-19: AAJE, Law of Evidence, Palo Alto, CA.

18-19: NCLE, Agricultural Law, Kearney, NE.

19-21: NCCD, Forensic Science, Chicago, IL.

19-21: WSBA, Negotiation, Seattle, WA.

21-26: ATLA, Advanced & Specialized Courses in Trial Advocacy, Reno, NV.

22-26: SBT, Advanced Family Law Course, San Antonio, TX.

22-26: AAJE, Constitutional Criminal Procedure, Durham, NH.

29-31: NYULS, Bankruptcy & Business Reorganization, New York, NY.

The addresses of the organizations sponsoring these CLE courses appear in the April 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 SJAs 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.

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AD B071086	Criminal Law, Crimes & Defenses/JAGS-ADC-83-4
AD B071087	Criminal Law, Evidence/ JAGS-ADC-83-5
AD B071088	Criminal Law, Constitutional Evidence/JAGS-ADC-83-6
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AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

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2. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 140-1	Mission, Organization, and Training		1 Mar 83
AR 190-47	United States Army Correctional System	I03	30 Mar 83
AR 623-105	Officer Evaluation Reporting System	1	1 Mar 83
AR 623-205	Enlisted Evaluation Reporting System	1	1 Mar 83
AR 635-40	Physical Evaluation for Retention, Retirement, or Separation	I02	15 Mar 83

Number	*Title*	*Change*	*Date*
DA Pam 27-153	Procurement Law		15 Mar 83
DA Pam 600-5	Handbook on Retirement Services for Army Personnel and Their Families		Aug 82

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Ackley, *Plain Talk About Plea Bargaining*, 10 Pepperdine L. Rev. 39 (1982).

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* U.S. GOVERNMENT PRINTING OFFICE: 1983-381-815:9