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Use of Compelled Testimony in Military Administrative Proceedings

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Introduction

Does the right against self-incrimination afforded by Article 31 of the Uniform Code of Military Justice (UCMJ)[1] and by the fifth amendment to the United States Constitution[2] prohibit the use of compelled testimony in military administrative proceedings, particularly administrative discharge proceedings? It certainly does if the testimony can be used in a future criminal case.[3] But what if an individual is immunized from any future criminal consequences of the compelled testimony so that the only adverse consequences that can result are administrative or civil? Or, what if an individual seeks to exclude statements from military administrative proceedings because they were obtained in violation of Article 31 or the fifth amendment?[4]

[1] 10 U.S.C. § 831 (1976).

[2] U.S. Const. amend. V. The fifth amendment's self-incrimination clause provides, "No person . . . shall be compelled in any criminal case to be a witness against himself."

[3] *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).

[4] Currently, there is a limited regulatory basis in Army Regulation (AR) 15-6 for exclusion of certain involuntary admissions from Army administrative investigations and boards. *See* U.S. Dep't of Army, Reg. No. 15-6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of

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

REPLY TO
ATTENTION OF

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8 JUN

SUBJECT: Medical Care Recovery Program - Policy Letter 83-1

ALL JUDGE ADVOCATES

1. The Army collected a record-breaking $7.5 million in medical care costs in 1982. This is an increase of $1.2 million over 1981, representing the largest annual increase in recoveries for all Government agencies involved in this program.

2. Naturally, I am proud of our accomplishments. I wish to reemphasize, however, that our efforts in this area must remain strong. The medical care recovery program, an important and significant part of the Army's fiscal policy, is a matter of personal interest to me.

3. I expect all staff judge advocates to insure their recovery programs are properly manned with experienced personnel. All potential recoveries will be identified, asserted, and processed in a timely fashion.

Hugh J Clausen

HUGH J CLAUSEN
Major General, USA
The Judge Advocate General

Do Article 31 or the fifth amendment prevent use of compelled testimony in these circumstances?

The answers to these questions have significant implications for the military practitioner. If the right against self-incrimination precludes the use of compelled testimony in administrative proceedings even when there is no possibility of its use in a criminal prosecution, then a service member could lawfully refuse an order to testify at a court-martial if the grant of immunity accompanying it did not include protection from adverse administrative consequences.[5] Similarly, a service member could refuse to provide testimonial evidence at an adverse administrative proceeding even if given immunity from its use at any criminal trial. Additionally, any statements by a service member obtained in violation of Article 31 or the fifth amendment would have to be excluded from administrative proceedings. If, however, the right against self-incrimination does not preclude the use of compelled testimony in administrative proceedings when there is no possibility of its use in a criminal prosecution, then service members could be forced, through grants of immunity from courts-martial, to provide testimony that could result in adverse administrative consequences to them, including stigmatizing discharges;[6] there would be no basis under Article 31 or the fifth amendment for excluding such compelled statements from administrative proceedings.[7]

The law in this area is very confusing for the military practitioner. On one hand, there is case law resulting from the military's drug urinalysis program, notably *United States v. Ruiz*[8] and *Giles v. Secretary of the Army*,[9] that indicates that Article 31 and the fifth amendment prevent use of compelled testimony in administrative proceedings even when there is no possibility of its use in a criminal trial. On the other hand, there is a signifi-

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Officers, para. 3-7c(6) (24 Aug. 1977). This provision does not require exclusion of statements obtained in violation of Article 31(b).

[5]An order to testify pursuant to a grant of immunity is constitutional only if it affords protection commensurate with that inherent in the fifth amendment right against self-incrimination. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

[6]In this article, the term "stigmatizing discharge" means an administrative discharge characterization of general or other than honorable.

[7]One might argue that an exclusionary rule based on the fifth amendment right against self-incrimination should be applied to civil proceedings as well as criminal proceedings as a deterrent. However, this argument ignores the literal language of the fifth amendment and Article 31, particularly the fact that the exclusionary rule established under Article 31(d) is limited to courts-martial. It also ignores the recent trend to narrow the exclusionary rule rather than broaden it.

[8]23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974).

[9]475 F. Supp. 595 (D.D.C. 1979), *modified in part*, 637 F.2d 554 (D.C. Cir. 1980).

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cant body of Supreme Court[10] and lower court precedent[11] indicating that the right against self-incrimination does not protect against possible adverse civil consequences of compelled testimony except in very narrow circumstances. Surprisingly, the military urinalysis cases, *Ruiz* and *Giles*, did not consider this substantial body of precedent. In fact, in the holdings, the courts relied entirely on a Supreme Court case that was irrelevant to the question posed.

The purpose of this article is to analyze whether Article 31 or the fifth amendment prohibit use of a service member's compelled testimony in adverse military administrative proceedings when the service member has been immunized from its use in future criminal prosecutions. The article first examines the military urinalysis cases, *United States v. Ruiz* and *Giles v. Secretary of the Army* and compares the rationale in *Ruiz* and *Giles* with the analysis that current Supreme Court and lower court precedent indicate is applicable to the question. Finally, it evaluates military administrative proceedings, particularly administrative discharge proceedings, in light of the applicable precedent.

The Military Urinalysis Cases—*Ruiz* and *Giles*

United States v. Ruiz[12] and *Giles v. Secretary of the Army*[13] are the most recent military-related cases that have squarely addressed the question of whether Article 31 or the fifth amendment prohibit use of an individual's compelled testimony against him in an adverse administrative proceeding even when it cannot be used in a future criminal trial.[14]

Both cases deal with the Department of Defense (DOD) compulsory urinalysis program in effect from 1971 to 1975. Under the program, service members were compelled to provide urine samples to determine if they were drug abusers. The program provided that evidence obtained as the result of such compelled urinalysis could not be used in a court-martial or to support an administrative discharge characterized as other than honorable. However, such evidence could be used to support an administrative discharge characterized as general or honorable.[15]

In *Ruiz*, the Court of Military Appeals (COMA) held that, under these circumstances, an order to a service member to furnish a urine specimen for urinalysis was unlawful since it compelled the service member to incriminate himself in violation of Article 31, UCMJ. *Ruiz*'s holding had two bases, both of which were absolutely essential to support it. First, the *Ruiz* court reasoned that Article 31 "has a broader sweep than the Fifth Amendment to the United States Constitution" in its definition of an incriminating statement. Thus, it prohibits compelling a service member to furnish bodily fluids such as urine.[16] Second, the *Ruiz* court reasoned that Article 31(a), being at least coextensive with the fifth amendment prohibition against self-incrimination regarding the kind of proceedings to which it applied, prohibited the use of compelled testimony in administrative proceedings as well as courts-martial. The court noted:

> Moreover, while the purpose of the order was concededly not to obtain evidence

[10] *See, e.g.*, United States v. Ward, 448 U.S. 242 (1980); Ullman v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896).

[11] *See, e.g., In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977); Patrick v. United States, 524 F.2d 1109, (7th Cir. 1975); Napolitano v. Ward, 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037 (1972); Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976); United States v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976).

[12] 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974).

[13] 475 F. Supp. 595 (D.D.C. 1979), *modified in part*, 637 F.2d 554 (D.C. Cir. 1980).

[14] In an earlier case, *Grant v. United States*, 162 Ct. Cl. 600, 608 (1963), the Court of Claims found the right against self-incrimination inapplicable to administrative discharge proceedings. Neither *Ruiz* nor *Giles* mention *Grant*. The related issue of whether Article 31 and the fifth amendment require exclusion of evidence in a military administrative proceeding was considered recently in Phillips v. Marsh, 687 F.2d 620, 622 (2d Cir. 1982) (Winter, J., concurring). The case involved use in a West Point cadet disciplinary board of a statement allegedly obtained in violation of Article 31 and the fifth amendment.

[15] *See* United States v. Ruiz, 23 U.S.C.M.A. 181, 183 n.2, 48 C.M.R. 797, 799 n.2 (1974); Giles v. Secretary of the Army, 475 F. Supp. 595, 597-98 (1979).

[16] 23 U.S.C.M.A. at 182, 48 C.M.R. at 798 (1974). COMA has subsequently rejected this aspect of *Ruiz*, thereby making the present DOD urinalysis program possible. *See* United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

against the accused for use at a court martial, [the accused's commander] . . . envisioned the use of the test results in an administrative proceeding at which the accused could be subjected to a general discharge [footnote deleted]. *The constitutional prohibition against self-incrimination applies to administrative as well as criminal proceedings.* Spevack v. Klein, 385 U.S. 511 (1967). We believe that Article 31(a) has at least equal applicability, for it forbids all persons subject to the Code from compelling a person to incriminate himself. None of its terms indicate that Congress intended to permit forced self-incrimination in board proceedings anymore than in courts-martial. Hence, in light of [the accused's commander's] . . . conceded desire to utilize the urinalysis against the accused in an administrative discharge proceeding, his order for this reason was also in violation of Article 31 and unlawful.[17]

COMA has never had occasion to reexamine this aspect of *Ruiz*'s holding or to decide whether its rationale not only made an order to furnish evidence for use at an administrative proceeding illegal but also required exclusion of compelled evidence from the proceeding. This latter question finally arose in the case of *Giles v. Secretary of the Army*.[18] In *Giles*, the court held that use of evidence obtained as the result of compelled urinalysis to discharge a service member administratively with a general discharge violated Article 31, UCMJ. The court thus ordered upgrading of the service member's discharge to honorable.[19] The *Giles* court essentially accepted and reaffirmed *Ruiz*'s holding that Article 31 precluded use of compelled testimony in an administrative proceeding even when there is no possibility of its use in a criminal trial.[20]

If one were to accept at face value the proposition set forth in *Ruiz* and *Giles* that Article 31 and the fifth amendment preclude use of compelled testimony in administrative proceedings even when there is no possibility of its use in a criminal trial, the implications for the military would be quite startling. There are a wide range of adverse administrative proceedings in the military context such as administrative discharge proceedings, reports of survey, revocations of security clearances, revocations of flight status, and suspension or revocation of various military privileges, to which the right against self-incrimination would potentially apply. Strict application of such a self-incrimination right to all these proceedings would substantially burden the military's ability to take any adverse administrative actions.[21] Even if one attempted to explain *Ruiz* and *Giles* as limited to the specific context where award of a general discharge is involved, strict application of such a self-incrimination right to all these proceedings would significantly burden the administrative discharge system.[22] Further, it is difficult to see how the rationale of the *Ruiz* and *Giles* opinions can be limited to the context of a general discharge when these opinions did not distinguish between this context and other administrative proceedings and when the potential adverse consequences involved may well be greater in other military administrative proceedings than in the case of a general discharge.[23]

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[17]23 U.S.C.M.A. at 183, 48 C.M.R. at 799 (1974) (emphasis added).

[18]475 F. Supp. 595 (D.D.C. 1979), *modified in part*, 637 F.2d 554 (D.D.C. 1980).

[19]*Id.* Subsequently, the court broadened its order to include an estimated class of about 10,000 former Army members discharged between 1971-74. *See* Giles v. Secretary of the Army, 84 F.R.D. 374 (D.D.C. 1979).

[20]475 F. Supp. at 601.

[21]Article 31 requires any person acting in an official capacity to give Article 31(b) warnings, *see* United States v. Duga, 10 M.J. 206 (C.M.A. 1981), and almost any conduct that is subject to a potential adverse administrative action in the military is also potentially a violation of the UCMJ given the broad scope of Articles 92 and 134. *See* 10 U.S.C. §§ 892, 934 (1976).

[22]Such a requirement might preclude use of most evidence derived from counseling about substandard performance since substandard performance also could amount to dereliction of duty under Article 92, UCMJ, 10 U.S.C. § 892 (1976).

[23]A general discharge involves no loss of property rights and the limited stigma involved in having one's military record labeled as "satisfactory but not sufficiently meritorious to warrant an honorable discharge." *See* U.S. Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Separations, para.

Fortunately for the military, it is very unlikely that courts will accept the literal rationale of *Ruiz* and *Giles* in future cases and extend the right against self-incrimination to preclude use of compelled testimony in military administrative proceedings generally. This is so because the *Ruiz* and *Giles* courts apparently misunderstood the issue before them and used an analysis that is inconsistent with applicable Supreme Court and lower court precedent.

Ruiz and *Giles* Versus Other Authority

Mistaken Analysis in Ruiz *and* Giles

Both *Ruiz* and *Giles* relied on a single Supreme Court case, *Spevack v. Klein*,[24] to support their broad assertion that the fifth amendment right, and, thus, the Article 31 right, against self-incrimination "applies to administrative as well as criminal proceedings."[25] Yet *Spevack* did not concern an individual who had been immunized from future criminal prosecution. Instead, the case dealt with an individual who had refused to testify at an administrative proceedings, a bar disciplinary hearing, because of the fear that his nonimmunized testimony could subsequently be used against him in a criminal proceeding.[26] Had the individual in *Spevack* been immunized from future criminal prosecution, as had the individuals in *Ruiz* and *Giles*, it appears that he could have had an adverse administrative action, such as debarment, taken against him based either on his silence or on compelled testimony.[27]

The Supreme Court's decision in a relatively recent case, *United States v. Ward*,[28] illustrates this point and the fundamental flaw in the analysis in *Ruiz* and *Giles*. *Ward* involved a self-incrimination challenge to the self-reporting and civil penalty provisions of the Federal Water Pollution Control Act (FWPCA). These provisions require any person in charge of a vessel or facility to report discharges of oil or hazardous substances into navigable waters to the U.S. government. The statute immunizes self-reporting dischargers from criminal penalties, but exposes them to a civil penalty of up to $5,000 for each occurrence.[29] An oil company that reported its own discharge of oil and paid a civil penalty to the government challenged this statutory scheme as violating its fifth amendment right against self-incrimination. The Supreme Court held that, because of the immunity against criminal prosecution given by the FWPCA and the civil nature of the penalty, the right against self-incrimination did not apply.[30]

The *Ward* Court thus considered a situation almost identical to that presented in *Ruiz* and *Giles* and found no violation of the right against self-incrimination. In *Ward*, immunity against use in criminal prosecution effectively abrogated any right against giving compelled testimony even if the compelled testimony could still result in adverse civil consequences. *Ward* is certainly no anamoly. With the notable exception of *Ruiz* and *Giles*, the courts have consistently recognized that the right against self-incrimination only protects against adverse criminal consequences resulting from compelled testimony and not adverse civil consequences.[31]

This body of precedent is the necessary result of both the language and history of the fifth amendment. The fifth amendment by its own terms applies only to criminal cases. The history of the adoption of the fifth amendment shows that this specific limitation was quite intentional. When James Madison originally proposed language providing that "no person shall be compelled to be a witness against himself," another delegate persuaded Congress to change the language to its present form, arguing that the privilege "ought to be confined to criminal cases."[32]

3-7b (1 Oct. 1982). In contrast, other administrative proceedings may involve loss of property and significant stigma.

[24] 385 U.S. 511 (1967).

[25] United States v. Ruiz, 23 U.S.C.M.A. 181, 183, 48 C.M.R. 797, 799 (1974); Giles v. Secretary of the Army, 475 F. Supp. 595, 601 (D.D.C. 1979).

[26] *See* Spevack v. Klein, 385 U.S. 511 (1967).

[27] *Compare id. with In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).

[28] 448 U.S. 242 (1980).

[29] *See id.* at 244-45.

[30] *Id.* at 248, 254-55.

[31] *See, e.g.*, cases cited in notes 10 & 11 *supra*.

[32] *See* 1 Annals of Congress 782 (J. Gales ed. 1834).

Ruiz and *Giles* were incorrect in concluding that the fifth amendment right against self-incrimination "applies to administrative as well as criminal proceedings." *Spevack v. Klein* did not support this conclusion in the context of *Ruiz* and *Giles*, since in these cases, unlike in *Spevack*, there was immunity from use of compelled testimony in any criminal prosecution. Rather, the assertion in *Ruiz* and *Giles* that the privilege against self-incrimination "applies to administrative as well as criminal proceedings" contravened the language and history of the fifth amendment as well as established precedent holding that the right only protects against adverse criminal consequences resulting from compelled testimony in criminal cases and not in civil cases.

The Correct Analysis

Although *Ruiz* and *Giles* were completely wrong in their rationale for concluding that the protections of the fifth amendment and Article 31 apply to administrative proceedings, there is a line of authority that at least arguably might have supported this proposition as far as some administrative discharge proceedings are concerned. This line of authority holds that some proceedings, while nominally civil, are essentially criminal in nature, so that criminal procedures, such as the fifth amendment privilege against self-incrimination, must be applied to them. This line of precedent appears aimed at preventing circumvention of criminal protections through creation of nominally civil proceedings to accomplish essentially the same purposes as a criminal trial. Case law regarding applicability of the right against self-incrimination to nominally civil proceedings stretches from the Supreme Court's first application of the right to a civil forfeiture proceeding in an 1886 case, *United States v. Boyd*,[33] to the Supreme Court's recent consideration of the issue in 1980 in *United States v. Ward*.[34] Courts using this line of authority have considered the applicability of the right against self-incrimination in a number of allegedly quasi-criminal proceedings, including forfeiture proceedings, civil fines, attorney disciplinary proceedings, deportation proceedings, and civil commitment proceedings.[35]

Recently, *in United States v. Ward*, The Supreme Court stated the following test to be used in determining whether a nominally civil proceeding should be considered criminal for purposes of the fifth amendment privilege against self-incrimination:

> [T]he question of whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction. . . . Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another . . . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.[36]

After the Court determined that Congress intended the statutorily-defined penalty at issue in *Ward* to be civil, it inquired whether the scheme "was so punitive . . . as to negate that intention."[37] To do this, the Court first looked at seven nonexclusive considerations that some of its previous decisions, particularly *Kennedy v. Mendoza-Martinez*,[38] indicated might make criminal protections apply even to a nominally civil proceeding that imposed penalties. These seven factors were whether the sanction involves an affirmative disability or restraint, whether the sanction has historically been regarded as a punishment, whether it comes into play only after a finding of scienter, whether its operation will promote the traditional aims of punishment, retribution and deterrence, whether

[33] 116 U.S. 616 (1886).

[34] 448 U.S. 242 (1980).

[35] *See, e.g.*, United States v. Ward, 448 U.S. 242 (1980) (civil fine); United States v. United States Coin & Currency (1971) (forfeiture proceeding); Lees v. United States, 150 U.S. 476 (1893) (civil fine); *In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977) (attorney disciplinary proceeding).

[36] 448 U.S. at 248-49.

[37] *Id.* at 249-51.

[38] 372 U.S. 144, 168-69 (1963).

the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[39] The Court only recognized one of these seven factors as being present in *Ward*, i.e., that the same conduct covered by the civil penalty provision at issue was also covered by a criminal statute. The Court found that this fact and other matters offered as to the allegedly punitive nature of the statutory provisions were insufficient to negate Congress' intent that the provisions be civil.[40]

The Court's inquiry did not end, however, with evaluation of the seven *Mendoza-Martinez* considerations. The Court pointed out that, even if a civil proceeding involving a penalty were not sufficiently criminal in nature to trigger other criminal procedural guarantees, it could still be "quasi-criminal" so as to trigger the somewhat broader scope of the application of the fifth amendment privilege against self-incrimination under *Boyd v. United States* and its progeny.[41] The test employed by the Court in this regard is less clear, although it involved comparison of the penalty assessed in *Ward* with that assessed in *Boyd* to determine whether it was more akin to a criminal fine or civil damages, whether the civil and criminal penalties were part of the same or different statutory schemes, and whether the statutory scheme posed a danger of prejudice in later criminal proceedings.[42] However, the Court viewed as its most important consideration the "overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect."[43]

Use of Compelled Testimony in Military Administrative Discharge Proceedings

As indicated above, contrary to *Ruiz* and *Giles*, the right against self-incrimination does not ordinarily prohibit use of compelled testimony in administrative proceedings when there is no possibility of criminal prosecution. Instead, in this context, the right against self-incrimination extends only to a narrow group of proceedings that, while nominally civil, are really criminal in nature. To determine if the right against self-incrimination prevents use of compelled testimony in a military administrative proceeding when there is no possibility of criminal prosecution first requires application of the test recently explained by the Supreme Court in *United States v. Ward* to determine if the proceeding is quasi-criminal in nature. Further, with military administrative proceedings, consideration also should be given to whether military needs dictate a different application of the right against self-incrimination to military administrative proceedings than to civilian proceedings.[44]

Naturally, it would be impossible in an article of this length to evaluate fully under *Ward* the diverse kinds of administrative proceedings that exist in the military context to determine if they are quasi-criminal and then further evaluate whether, even if quasi-criminal under *Ward*, factors peculiar to the military argue against application of a self-incrimination right to them. Also, such an evaluation is unnecessary because it seems evident that most military administrative proceedings do not fall within the narrow class of cases that, while nominally civil, are essentially criminal in nature. However, one category of military administrative proceedings, the administrative discharge, merits at least brief examination under *Ward* for two reasons. First, critics have frequently charged that aspects of the administrative discharge are essentially punitive.[45] Second, given

[39] *Id.* at 168-69.

[40] 448 U.S. at 249-51.

[41] *Id.* at 251-54.

[42] *Id.* at 253-54.

[43] *Id.* at 254.

[44] *Cf.* Parker v. Levy, 417 U.S. 733, 758 (1974) ("while members of the military are not excluded from the protection granted by the first amendment, the different character of the military community and of the military mission require a different application of these protections").

[45] *See, e.g.*, Comments, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 Harv. C.R.-C.L.L. Rev. 227 (1974). Nonetheless, the majority of courts considering the issue have found the administrative discharge to be nonpunitive. *See, e.g.*, Pickell v. Reed, 326 F. Supp. 1086, 1090 (N.D. Cal.), *aff'd*, 446 F.2d 898 (9th Cir.), *cert. denied*, 404 U.S. 946 (1971);

that the *Ruiz* and *Giles* decisions rest on a grossly incorrect analysis of the law, it is important to see if application of the correct analysis would lead to any different result.

Application of the Ward *Test to Administrative Discharge Proceedings*

1. *First level—A Civil Label*

The first level of the *Ward* test asks "whether Congress in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."[46] The administrative discharge proceeding easily meets the test for being civil under this first level of *Ward*. Congress, in a civil statute, has authorized the military departments to discharge service members.[47] Pursuant to this authority, the Department of Defense and the military departments have developed procedures for administrative discharges that are specifically differentiated from punitive discharges or dismissals under the Uniform Code of Military Justice.[48] Administrative discharge proceedings clearly then have a "civil label" and thus are civil under the first level of *Ward*.

2. *Second level—Sufficiently Punitive to Negate Civil Label*

The second level of *Ward*'s test is determination of "whether the statutory scheme . . . [is] so punitive either in purpose or effect as to negate" the civil label.[49] This second level involves evaluation of the seven *Mendoza-Martinez* considerations. Such an evaluation of the administrative discharge is difficult because of the many bases for administrative discharge,[50] the three characterizations of discharges possible with their varying effects,[51] and the need to evaluate the seven considerations examined in *Ward* and *Mendoza-Martinez* without any guidance as to what weight should be given to each factor. With these difficulties in mind, it still is worthwhile to look briefly at how the second level of the *Ward* test might apply to administrative discharge proceedings.

The first of the seven *Mendoza-Martinez* considerations is whether the proceeding imposes the same kind of affirmative disability as involved in a criminal penalty. An administrative discharge proceeding does not appear to involve imposition of the same kind of affirmative disability or restraint as a criminal proceeding such as a court-martial. Unlike a court-martial, an administrative discharge proceeding cannot impose forfeitures of pay, fines, confinement, or a punitive discharge. Certainly, the loss of employment involved in ending military status is not an affirmative disability or restraint. The closest the administrative discharge proceeding comes to imposing an affirmative disability is the stigma involved with characterization of a discharge as general or other than honorable and possible loss of eligibility for veterans benefits involved with an other than honorable discharge.[52]

Yet, the stigma involved does not equate to the affirmative disability resulting from a criminal conviction. The stigma caused by a general discharge is different because it only denotes that a former service member had a military record that was "satisfactory but not sufficiently meritorious to warrant an honorable discharge."[53] Arguably, this stigma is little different than that involved in

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Grant v. United States, 162 Ct. Cl. 600, 608-09 (1963). *Cf.* United States v. Kingsly, 138 U.S. 87 (1891) (characterization in administrative discharge of "unfit for service, character bad" not "punishment for an offense"). *But see* Stapp v. Resor, 314 F. Supp. 475, 478 n.1 (S.D.N.Y. 1970).

[46]448 U.S. at 248-49.

[47]10 U.S.C. § 1169 (1976).

[48]*Compare* Department of Defense, Directive No. 1332.14, Administrative Discharges (28 Jan. 1982), *with* Manual for Courts-Martial, United States, 1969 (Rev. ed.), paras. 76(a)(3), (4), 127c (punitive discharges).

[49]448 U.S. at 249-50.

[50]*See* Department of Defense, Directive No. 1332.14, Administrative Discharges, encl. 3, pt. I (28 Jan. 1982) [hereinafter cited as DOD Dir. 1332.14].

[51]The three types of characterizations possible in an administrative discharge proceeding are honorable, general, and other than honorable. *See id.* at pt. 2C. An other than honorable discharge may result in loss of eligibility for veteran's benefits. *See* 38 U.S.C. § 3103 (1976).

[52]*See id.*

[53]*See* U.S. Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Separations, para. 3-7b (1 Oct. 1982).

an employer rating an employee's performance as mediocre. Even the stigma involved when a service member is discharged administratively with an other than honorable discharge arguably does not involve an affirmative disability. It certainly is not any greater than the stigma involved in bar disciplinary proceedings in which an attorney is declared unfit to practice law because of criminal conduct involving moral turpitude. Such bar disciplinary proceedings have been recognized as civil.[54] Further, the Privacy Act[55] and regulations pertaining to issuance and release of discharge certificates lessen the effect of any stigma since they prevent disclosure of the characterization of a former service member's discharge and the reasons for his or her discharge to the general public. Finally, the very fact that administrative discharges are expressly differentiated from punitive discharges given pursuant to criminal convictions and are based on consideration of the service member's entire military record[57] makes any stigma involved with an administrative discharge of a different sort than a criminal conviction.

Possible loss of veteran's benefits for persons receiving other than honorable discharges does not appear to be the same kind of affirmative disability that is involved with a criminal conviction. Loss of potential benefits, unlike a forfeiture or fine, does not involve loss of any vested right. Veterans benefits are not a right for everyone who enters military service, but rather are a form of legislative largesse conditioned on a service member who has completed at least a certain length of service while meeting minimum standards of conduct and performance.

The second *Mendoza-Martinez* consideration is whether the nominally civil penalty has historically been regarded as a punishment. This consideration seems debatable in the context of the administrative discharge. Certainly, the administrative discharge has not been regarded as a punishment in the same sense as punishments under the Uniform Code of Military Justice, or under its predecessor, the Articles of War. Both DOD directives and Army regulations have emphasized the use of the administrative discharge as a means of terminating service in appropriate cases and as an incentive toward acceptable performance and conduct during a person's military service rather than as a punitive measure. Also, administrative discharges have a number of bases, most of which are in no way related to punishment for certain conduct.[58] On the other hand, over the years, a number of commentators have argued that characterization of an administrative discharge, especially as other than honorable, is essentially a punishment. There has been a tradition in the military, continued in the present system of awarding punitive discharges, of giving stigmatizing characterizations of military service as part of punishments.[59]

The third *Mendoza-Martinez* consideration is whether the civil penalty comes into play only after a finding of scienter. This would not appear to be the case with most administrative discharge proceedings. In most cases, the reasons for administrative separation and characterization involve a pattern of performance or conduct that relates to the ability of the service member to meet the demands of military service, rather than particular acts that involve any guilty state of mind. One exception involves provisions allowing for separation of service-members for a single serious criminal offense.[60] These provisions necessarily require scienter in order to establish commission of the offense.

The fourth *Mendoza-Martinez* consideration is whether operation of the civil penalty will promote the traditional aims of punishment, retribution and deterence. Certainly, the administrative

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[54]*See In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).

[55]5 U.S.C. § 552a (1976).

[56]U.S. Dep't of Army, Reg. No. 635-5, Personnel Separations—Separation Documents, paras. 2-1, 2-6 (15 Aug. 1979).

[57]*See* DOD Dir. 1332.14, encl. 3, pt. 2C.

[58]*See generally id.* at pt. 1 (*e.g.*, early release to further education, dependency or hardship, pregnancy, conscientious objection, medical grounds, minority, defective enlistment agreement).

[59]*See* Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 Mil. L. Rev. 1, 4 (1978).

[60]DOD Dir. 1332.14, encl. 3, pt. 1K1a(3).

discharge system, particularly the system of characterization of discharges, seeks to provide incentives for satisfactory military service.[61] In this sense, it tends to promote the goals of deterence and retribution. Nonetheless, the same can be said of any civil penalty, including the one considered in *Ward*. Yet, the Supreme Court did not believe this factor to be implicated in *Ward*. It is difficult to see how the administrative discharge system does any more than the civil fine in *Ward* to promote deterence and retribution. In fact, since the administrative discharge system requires focusing on performance and conduct throughout the period of a person's military service, rather than solely on a single isolated act, it seems to promote the aim of punishment even less than the civil penalty considered in *Ward*. Thus, viewed in light of *Ward*, the fourth *Mendoza-Martinez* consideration would not appear present in the context of the administrative discharge system.

The fifth *Mendoza-Martinez* consideration is whether the behavior to which the civil penalty applies is already a crime. In the case of administrative discharge proceedings, some grounds for separation, including substandard performance, may be crimes by virtue of Articles 92 and 134 of the UCMJ.[62] Yet, in most cases, discharge and characterization are not aimed at a particular instance of behavior that is a criminal act, but rather at a pattern of performance or conduct that indicates lack of capability to meet required military standards. Viewed in this light, the fifth *Mendoza-Martinez* consideration would only appear to apply to administrative discharge proceedings based on a single serious act of misconduct.

The sixth *Mendoza-Martinez* consideration is whether there is an alternative nonpunitive purpose assignable to the civil penalty that is rationally connected to it. In the case of the administrative discharge system, there are nonpunitive purposes both for separation and for characterization of discharges that appear rationally connected to them. In particular, the Department of Defense Directive concerning enlisted administrative separations indicates that the purpose of the administrative discharge system is to promote military readiness by, *inter alia*, insuring that the services "are served by individuals capable of meeting required standards of duty performance and discipline," and by maintaining "standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service."[63]

The seventh and final *Mendoza-Martinez* consideration is whether the civil penalty appears excessive in relation to the alternative nonpunitive purpose assigned to it. Given the importance of the purpose behind the administrative discharge system, promoting military readiness by insuring that service members meet required standards of duty performance and discipline, the "penalty" involved with award of a general discharge or even an other than honorable discharge does not appear excessive.

This brief examination of the administrative discharge process suggests that only one of the seven *Mendoza-Martinez* considerations likely applies to most administrative discharges. The separation of a service member with a stigmatizing discharge may historically have been regarded as a punishment, although this conclusion is debatable with regard to the administrative discharge. Two other *Mendoza-Martinez* considerations apply to administrative discharges for single serious criminal acts, the requirement of scienter and the fact that the behavior that forms the basis for discharge is already a crime. Whether the presence of these factors means that an administrative discharge proceeding based on a single serious criminal act and possibly resulting in an other than honorable discharge would be considered criminal in nature is unclear since neither *Ward* nor *Mendoza-Martinez* indicate how the seven *Mendoza-Martinez* considerations are to be balanced. There apparently are no reported cases applying these considerations to administrative discharge proceedings.[64] However, there is one close analogy that suggests

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[61] *Id.* at pt. D.

[62] 10 U.S.C. §§ 892, 934 (1976).

[63] DOD Dir. 1332.14, pt. D.

[64] However, Pickell v. Reed, 326 F. Supp. 1086, 1090 (N.D. Cal.), *aff'd*, 446 F.2d 898 (9th Cir.), *cert. denied*, 404 U.S. 946 (1971), while not applying the *Mendoza-Martinez* considerations, rejected the contention that an undesirable discharge, the

that even administrative discharge proceedings based on a single serious criminal act would not be considered criminal in nature. This analogy is the bar disciplinary proceeding, which, like certain administrative discharge proceedings, can be based on a single serious act of criminal misconduct and can result in significant stigma and loss of employment. Such proceedings have been recognized as civil rather than criminal in nature.[65]

3. *Comparison with Penalty in Boyd and Its Progeny*

The last step of the inquiry required by *Ward* is to determine whether, even if not sufficiently criminal in nature to trigger other criminal procedural guarantees, the civil proceeding is still quasi-criminal so as to trigger the somewhat broader scope of application of the fifth amendment privilege against self-incrimination under *Boyd v. United States* and its progeny. This involves examination of the administrative discharge proceeding in light of *Boyd* and *Ward* to determine whether the "penalty" involved in the administrative discharge is more like a criminal or civil one, whether the "penalty" is part of the same or a different statutory scheme than the criminal statute dealing with the same behavior, and whether the proceeding poses a danger of prejudice in later criminal proceedings.

The administrative discharge proceeding seems more like the civil penalty scheme considered in *Ward* than the quasi-criminal scheme considered in *Boyd* under all three of these factors. First, the administrative discharge characterization, although somewhat similar to the punitive discharge when a stigmatizing characterization is made, is also similar to the practice of any employer in rating a former employee's period of employment. In fact, stigmatizing characterizations are just a part of an overall scheme under which all former service members have their period of military service characterized. Also, unlike a criminal conviction, the characterization is not disseminated to the general public. Thus, it appears more civil than criminal. Second, as in *Ward*, the administrative discharge system is part of a different statutory scheme than criminal statutes covering the same behavior. The administrative discharge system comes from the statutory authority of the secretaries of the military departments to separate service members. Any criminal provisions covering the same behavior are in a separate statutory scheme, the Uniform Code of Military Justice. Third, since any testimony compelled for use in a military administrative proceeding necessarily could not be used in a court-martial, there is no danger of prejudice in later criminal proceedings, just as there was no danger of prejudice in *Ward* due to statutory immunity. Thus, the administrative discharge proceeding would not appear to trigger application of the right against self-incrimination since it deals with penalties that are more civil, like the penalty involved in *Ward*, than quasi-criminal, like the penalty involved in *Boyd*.

Application of a Different Test in the Military Context?

An additional point to consider is whether a different test than *Ward*'s should apply in the military context. This point cuts two ways. On one hand, Article 31 may confer a broader right than the fifth amendment does under *Ward*. On the other hand, the special needs of the military community and the military mission might point to a narrower right in the military context than that established by *Ward*'s test.

Regarding the first point, Article 31 does not appear to confer a broader right in this area than the fifth amendment does under *Ward*. An examination of the language and legislative history of Article 31 suggests that its scope as to the kinds of proceedings to which it applies is no broader than that of the fifth amendment. Article 31(a) refers to compelling a person "to *incriminate* himself," and Article 31(d) speaks of excluding evidence obtained in violation of Article 31 or through use of coercion "in a *trial by court-martial*." As in the case of the fifth amendment, use by Congress of the terms "incriminate" and "trial by court-martial" in Article 31 seems to indicate a clear intent that Article 31 was to protect only against use of compelled testimony in criminal cases. Indeed, the

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then-existing equivalent of an other than honorable discharge, for a single criminal act was punitive.

[65] *See, e.g., In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).

fact that the literal language of Article 31(d) creates an exclusionary rule only as to courts-martial suggests that the term "self-incrimination" in Article 31 is intended to be limited to courts-martial rather than to extend to any civil proceedings. This conclusion is bolstered by the fact that the protection of Article 31(c) against compelling persons to make degrading statements explicitly applies to all military tribunals rather than just courts-martial. Also, nothing in the legislative history of Article 31 suggests that its privilege against self-incrimination was to apply to any different types of proceedings than was the fifth amendment privilege.[66]

On the other hand, an argument can be made that, as regards the kind of proceedings to which the right against self-incrimination applies, the right should be narrower in the military context than in the civilian context. This is so because, while courts in recent years have found that the protections of the Bill of Rights apply to service members,[67] they have also recognized that "the different character of the military community and of the military mission require a different application of these protections."[68] Thus, the right against self-incrimination might not apply to some military administrative proceedings even if they arguably would appear quasi-criminal under the *Ward* test because of military need arising from "the different character of the military community and of the military mission."

Conclusions

An examination of the applicable precedent indicates that, contrary to the discussion in *United States v. Ruiz* and *Giles v. Secretary of the Army*, the right against self-incrimination does not ordinarily prohibit use of compelled testimony in administrative proceedings when there is no possibility of criminal prosecution. Instead, in this context the right against self-incrimination extends only to a narrow group of proceedings that, while nominally civil, are really criminal in nature.

The Supreme Court recently stated the test for determining whether a proceeding falls into this category in *United States v. Ward*. The *Ward* test has three aspects. First, it requires an analysis of whether the proceeding and any penalty it can set have a civil label. Second, it requires an analysis, using the seven *Mendoza-Martinez* considerations, of whether, despite a civil label, the proceeding and penalty are so punitive in purpose or effect as to overcome the label. Third, it requires comparison of the penalty with those involved in *United States v. Boyd* and in *Ward* to determine whether the penalty is more like a civil or criminal one, whether the penalty is part of the same or a different statutory scheme, and whether the proceeding poses a danger of prejudice in later criminal proceedings.

Application of the *Ward* test to military administrative discharge proceedings seems to indicate that they are essentially civil in nature, and, thus, that the right against self-incrimination would not prevent use in them of compelled testimony when there is no possibility of its use in a criminal prosecution. A possible exception is an administrative discharge proceeding based on a single criminal act and potentially resulting in an other than honorable discharge. Yet, under *Ward* it is debatable whether even such a proceeding is quasi-criminal. Further, consideration must be given to whether the "different nature of the military community and of the military mission" call for a different application of this aspect of the right against self-incrimination in the military context than *Ward* would require in the civilian context.

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[66] *See generally Index and Legislative History, Uniform Code of Military Justice, Hearings Before a Subcomm. of the Comm. on Armed Services, House of Representatives*, 81st Cong., 1st Sess. 712, 984-88 (1949).

[67] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974); United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

[68] Parker v. Levy, 417 U.S. 733, 758 (1974).

The SJA as the Commander's Lawyer: A Realistic Proposal

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SJA: "Sir, I will be replacing LTC X as your Staff Judge Advocate."

CG: "I have just one question. Whose lawyer are you—mine or the Army's?"

SJA: "Sir, in the broad sense we all serve the Army first, but my specific duty is to serve you and this command."

CG: "What I want to know is where your loyalties lie. Do I have your undivided loyalty and confidentiality?"

SJA: "Up to a point, sir. The attorney-client privilege affords some protection to our communications as an evidentiary matter. Ethically, I am bound to preserve the confidentiality of some of our communications. I should tell you, however, that other communications I *may* ethically disclose, and some I may be ethically *required* to disclose. Of course I also have the authority to communicate directly with the Corps SJA and The Judge Advocate General regarding matters which concern them or when I need their advice. Finally, as is true with all public servants, I have a professional duty to act in the best interests of the public and the U.S. Army."

CG: "Very well. Nice to have met you. If we have any legal problems I am sure that the Chief of Staff will contact you. Until then I look forward to seeing you and your wife at Division social functions."

Introduction

"The role of the lawyer in an organizational context" has been the subject of considerable debate and controversy since the enactment of the ABA Model Code of Professional Responsibility (Model Code) in 1970.[1] Recently this issue was addressed by the United States Supreme Court in *Upjohn Co. v. United States*[2] and was the source of intense disagreement in the ABA House of Delegates debate over the proposed Model Rules of Professional Conduct (Model Rules).[3]

While most of the publicized debate concerns lawyers in a corporate context, the issues involved are equally applicable to lawyers in the military.[4] The same debate in the military context can be framed: "Is the staff judge advocate the commander's lawyer or the command's lawyer?" As the hypothetical scenario outlined above suggests, the question is one which can have a significant impact on the willingness of the commander to seek advice from his or her staff judge advocate

[1]The Model Code of Professional Responsibility [hereinafter cited as Model Code] was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and became effective on January 1, 1970.
See generally Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61 (1978); Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974); Comment, *The Scope of the Attorney-Client Privilege After Upjohn Co. v. United States: A Practical Approach*, 25 St. Louis U.L.J. 821 (1982); Note *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Government*, 62 B.U.L. Rev. 1003 (1982); Note, *Attorney-Client Privilege to Corporate Clients: The Control Group Test*, 84 Harv. L. Rev. 424 (1970).

[2]449 U.S. 383 (1981).

[3]*See* Gest, *Guilty Secrets Are Still Safe With Lawyers*, U.S. News & World Rep. (Feb. 21, 1983); Report, *ABA Moves Closer to Adoption of New Model Rules of Conduct*, 32 Crim. L. Rep. (BNA) 2431 (Feb. 23, 1983).

[4]The comments to Model Rule of Professional Conduct 1.13 (Final Draft 1981) indicate that lawyers in government agencies are covered by the same ethical duties as lawyers in business organizations. The same analogy is generally made in cases discussing the attorney-client privilege. *See generally* Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U.L. Rev. 1003 (1982).

(SJA). As the scenario also suggests, it is more than a theoretical issue and actually involves a complex analysis of conflicting duties and obligations relating primarily to the disclosure of information. When must the SJA disclose information in his possession; when must the SJA keep information confidential and when does the SJA have the option to disclose information? If disclosure is within the SJA's discretion, what criteria should he use in deciding whether or not to reveal the information?

The purpose of this article is to discuss the current role of the staff judge advocate, as defined by applicable evidentiary, ethical, and regulatory authority, and to propose a modification of these authorities such that clear standards would make the SJA "the commander's lawyer."

The Current Parameters of the SJA-Commander Relationship

Any attempt to define the parameters of the SJA's relationship with the commander is necessarily complicated by the fact that both parties to the relationship perform a wide variety of duties. The SJA's multifaceted role includes being the advisor to the commander on legal matters ranging from environmental law to military justice, performing administrative functions in the supervision of justice within the command, performing judicial functions in the review of court-martial matters, performing regular staff functions as a member of the special staff, and perhaps providing personal legal advice on legal assistance matters.[5] While some commentators view the issue as "who is the client of the government attorney,"[6] framing the question in those terms fails to consider the diversified nature of the SJA's practice and fails to take into account that the SJA has a subordinate-superior relationship with others in the military system, to include the Chief of Staff, the Corps SJA, and The Judge Advocate General. As Robert Lawry correctly identifies, the questions for the government lawyer include:

> "Whose directions shall I take? On what subjects?
>
> Whose confidences shall I respect? With whom may I further discuss confidences?
>
> What role does my own judgment play in determining what I ought to do?"[7]

Although to some extent these questions are answered in the military by the obligation to obey the lawful orders of superiors, defining "who is the SJA's client" is at best a partial answer. There are three aspects to the relationship between the SJA and the commander. First, as an *evidentiary* matter, the attorney-client privilege protects some of their conversations from compelled disclosure at court. Even within this first area of attorney-client privilege, there are different standards applied in courts-martial than in federal district courts. The federal law of attorney-client privilege also serves to define the scope of exempted material

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[5] In United States v. Albright, 9 C.M.A. 628, 26 C.M.R. 408 (1958), the role of the SJA was described as follows:

> By law and by regulation he is cast in a role which requires military, judicial, and administrative functions . . . In connection with his military duties, he is *advisor* to his commander on legal matters, including those dealing with military justice . . . As to his *administrative functions*, he is chief spokesman for the commanding officer on all legal matters, and it is his duty to supervise the administration of justice within the command . . . He is the *legal conduit* between the commander and other officers and men of the organization . . . A staff judge advocate wears his *judicial robes* when he reviews charges before trial by general court-martial, reviews records of special court-martial . . .

Id. at 634, 26 C.M.R. at 414 (Latimer, J., concurring in part and dissenting in part) (emphasis added).

But see United States v. Morrison, 3 M.J. 408, 410 (C.M.A. 1977), where Fletcher, C.J. states in the concurring opinion:

> The staff judge advocate, notwithstanding his title, is not a judicial officer. . . . [H]e is instead, for all practical purposes, the chief counsel for the given command among whose various functions include the responsibilities of being the chief prosecutor.

See also U.S. Dept of Army, Reg. No. 27-1, Legal Services—Judge Advocate Legal Service, para. 14 (20 Apr. 1976) [hereinafter cited as AR 27-1].

[6] *See, e.g.*, Federal Bar Assoc. Professional Ethics Comm., Opinions, No. 73-1 (1973) ("The Government Client and Confidentiality," *reprinted in* 32 Fed. B.J. 71 (1973) [hereinafter cited as Opinion 73-1].

[7] Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61 (1978).

under the Freedom of Information Act.[8] Second, as an *ethical* matter, some aspects of the relationship constitute confidences and secrets which the lawyer must preserve or disclose in accordance with applicable professional responsibility standards. Finally, as an *institutional* matter, the organization through its directives, regulations, and policies helps to define the SJA's loyalties and duties. When matters are not covered by professional responsibility standards, or the standards make disclosure discretionary, the SJA's actions should be guided by these organizational duties and loyalties.

The Attorney-Client Privilege

In federal courts, the attorney-client privilege is generally covered by Federal Rule of Evidence 501, which, in turn, defers application of the privilege to a case-by-case interpretation of the common law.[9] Although there have been many articulations of the scope of this privilege in the corporate attorney context, no one test has been universally adopted.[10] The Supreme Court in *Upjohn* specifically declined to define the scope of the corporate attorney-client privilege, but did give explicit support to a broad application of the privilege by holding that it could cover information given to the attorney by low level employees of the corporation.[11] Despite the uncertainty that exists regarding who within the organization is covered by the attorney-client privilege, under any of the prevailing tests, communications between the SJA and the commander are covered to the extent that they are made for the purpose of securing legal advice, the subject matter is within the scope of the commander's military duties and the communication is not disseminated beyond those persons within the command who need to know its contents.[12] It is important to note that the privilege does *not* apply to communications made to secure other than legal advice, *e.g.*, tactical advice, economic advice, or management advice. The privilege also does not address the extent to which disclosure of information should be made to other people *within* the organization. No test has been adopted for making the distinction between legal and nonlegal advice, nor for dealing with disclosure to organizational administrative bodies not bound by rules of evidence. For the SJA charged with rendering advice in a multitude of contexts, this lack of certainty serves to substantially undermine the basic purposes of the privilege in encouraging full and frank communications.[13]

Within military practice, the attorney-client privilege has been codified in Military Rule of Evidence (MRE) 502.[14] Under MRE 502, communications between an SJA and commander fit within

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[8]*See, e.g.*, Mead Data Cent., Inc. v. Dept. of Air Force, 566 F.2d 242 (D.C. Cir. 1977).

[9]Fed. R. Evid. 501 provides in part that "the privilege of a witness, person, government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

Proposed Fed. R. Evid. 503, which was not enacted, would have codified the lawyer-client privilege.

[10]At least three "tests" defining the scope of the corporate attorney-client relationship have been used by the federal courts: the "control group test," City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962); the "scope of employment" test, Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970); and the "subject matter" test. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978).

The "control group" test was rejected by the Supreme Court as being too narrow and restrictive. Upjohn Co. v. United States, 449 U.S. 383 (1981).

[11]*Id.*

[12]This test would satisfy both the "scope of employment" test and the "subject matter" test. *See* text accompanying note 9 *supra*.

[13]In *Upjohn Co.*, the Supreme Court discussed the purpose of the attorney-client privilege.

> Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

449 U.S. at 389.

[14]The text of the Military Rules of Evidence accompanied by the Drafter's Analysis is contained in the Manual for Courts-Martial, United States, 1969 (Rev. ed), App. 18 (C.3, 1 Sept. 1980). The Military Rules of Evidence [hereinafter cited as Mil. R. Evid.] became law effective September 1, 1980, as a result of Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

the broad definitions of "lawyer" and "client"[15] and are protected from compelled disclosure in a courts-martial to the extent that the communications are confidential and are made for the purpose of facilitating the rendition of professional legal services.[16] Specifically excluded from coverage are communications which clearly contemplate the future commission of a fraud or crime and communications which the client used to commit or plan a past crime or fraud.[17] Given the broad range of conduct which may technically constitute a "crime or fraud" within the military, this exception has a significant potential application to commander's discussions with the SJA. The MRE's overly broad definition of "client" to include both individuals *and* entities, and the same legal-nonlegal distinction present in the federal privilege, make MRE 502 no more certain in its application than the federal common law rule of privilege. Accordingly, the MREs provide little assistance in defining the duties of the staff judge advocate.

Although the attorney-client evidentiary privilege is important, its application is not as pervasive as the ethical standards relating to the preservation of confidences and secrets of a client.

The Ethical Standards

Canon 4 of the Model Code of Professional Responsibility provides that a "lawyer should preserve the confidences and secrets of a client." Under the Model Code, this general provision is subject to a number of qualifications and exceptions based on competing policy interests. For the SJA, like all attorneys, these limitations provide a degree of uncertainty and confusion, but the bigger problem conceptually is whether Canon 4 applies at all to communications from the commander. The application of the ethics standards depends on the identity of the SJA's client.

The Model Code indicates that "a lawyer employed by a corporation or similar entity owes his allegiance to the entity and not to an . . . officer . . . or other person connected with the entity."[18] Little or no other guidance is provided in the Model Code to assist the government attorney in determining who the "client" is. All of the duties and responsibilities in the Model Code which impact upon the attorney are defined in terms of "the client". These include the duty to represent a client zealously within the bounds of the law,[19] the duty to preserve the confidences and secrets of a client,[20] and the duty to discontinue employment if the interests of another client may impair the independent professional judgment of the lawyer.[21]

A strict reading of the Model Code leads to the conclusion that "the client" is the entity and not the commander. As such, the commander's communications and other information which the SJA gains in the course of representing the commander can be freely disclosed within the organization when the attorney feels that disclosure is in the best interest of the organization. Since disclosure to higher commanders in the military is tantamount to disclosure to the District Attorney, the ethical standards give the SJA-commander relationship less protection than does the attorney-client privilege.[22] Ethical Consideration 4-4 closes this loop to some extent by providing that a lawyer "should endeavor to act in a manner which preserves the evidentiary privilege, for example, he should avoid professional discussions in the pres-

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[15]Mil. R. Evid. 502(b)(2) defines "lawyer" as "a person authorized, or reasonably believed by the client to be authorized, to practice law." Mil. R. Evid. 502(b)(1) defines "client" very broadly to include "a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer."

[16]Mil. R. Evid. 502(a). Note that the military rule is limited to "legal" advice.

[17]Mil. R. Evid. 502(d).

[18]Model Code of Professional Responsibility EC 5-18 (1980).

[19]*Id.*, at Canon 7.

[20]*Id.* at Canon 4.

[21]*Id.* at DR 5-105(a).

[22]Most references which discuss the relationship between the attorney-client privilege and the ethical obligation to guard confidences and secrets state categorically that the attorney-client privilege is more limited in scope. *See, e.g., id.* at EC 4-4. This refers to the fact that the privilege only covers "confidences" *i.e.*, communications between the attorney and client while the ethical obligations extend to "secrets." *See id.* at DR 4-101(A).

ence of persons to whom the privilege does not extend."[23]

If *both* the commander and the Army are viewed as "clients" within the purview of the Model Code, the SJA cannot represent the commander in his or her individual capacity if to do so would involve the representation of differing interests.[24] However, the SJA would also be obligated not to use the confidences and secrets of the commander to his commander's disadvantage. This includes the obligation not to disclose the confidences of one client to another client.[25]

Staff judge advocates should recognize that, even if the commander is viewed as a client, either alone or in conjunction with the Army, the Model Code does place limitations on the ethical obligation to preserve client confidences. Arguably, the SJA is *ethically required* to disclose even the confidences of the client if the facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed.[26] He or she *may disclose* confidences when required by law or court order[27] and *may disclose* the intention of his client to commit a crime, along with the information necessary to prevent the crime.[28]

The Federal Bar Association, in an effort to clarify the ethical duties of government attorneys, promulgated a set of Federal Ethical Considerations (FECs)[29] and issued Opinion 73-1 dealing with "The Government Client and Confidentiality."[30] The FECs make it clear that the agency is the client except in cases where the military lawyer is designated to act as defense counsel or legal assistance officer.[31] As such, the federal legal advisor of a department, agency, or other entity has a "responsibility to disclose to his or her supervisor or other appropriate departmental or agency official"[32] any information which "appears to involve illegal or unethical conduct or is violative of department or agency rules and regulations which would be pertinent to that department's or agency's consideration of disciplinary action."[33]

Opinion 73-1 also makes the agency the "client" and states that the federal lawyer's obligation is to carry out "the public interest sought to be served by the governmental organization."[34] The opinion divided "disclosable conduct" into four categories: corrupt (for personal gain), illegal (willful and knowing), illegal (but subject to a reasonable difference of opinion), and grossly negligent[35]

The first two categories may be disclosed within the agency or directly to the Office of The Attorney General and, in limited situations, may be disclosed to authorities outside the government.[36] The second two categories ordinarily should not be disclosed outside the agency.[37] The Federal Bar Association, in effect, made the government lawyer the "agency watchdog."

At best, it can be said that the ethical parameters of the SJA-commander relationship are ill-defined. Part of the problem lies in the lack of a definitive articulation of who is the client." But even if "the client" is identified as the agency, or the public interest in general, that tells the government lawyer very little about where his or her loyalties must lie in a specific fact situation. Making disclosure discretionary, without providing any guidance on how to exercise that discretion, places the attorney in an untenable position.

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[23] *Id.* at EC 4-4.

[24] *Id.* at EC 5-18.

[25] *Id.* at EC 4-5.

[26] ABA Comm. on Professional Ethics and Grievances Formal Op. 314 (1965).

[27] Model Code of Professional Responsibility DR 4-101(c)(2) (1980).

[28] *Id.* at DR 4-101(c)(3) (1980).

[29] Federal Ethical Considerations (FBA 1973), *reprinted in* Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974) [hereinafter cited as FECs].

[30] Opinion 73-1, *supra* note 5.

[31] FECs 4-1, 4-2, *supra* note 27.

[32] FEC 4-3, *supra* note 27.

[33] FEC 4-3, *supra* note 27.

[34] Opinion 73-1, *supra* note 5, at 72.

[35] *Id.*

[36] Opinion 73-1, *supra* note 5, at 73.

[37] Opinion 73-1, *supra* note 5, at 74.

Institutional Guidance

Although a great deal of information exists to tell the SJA what his or her various duties are, the SJA receives little institutional guidance on how to perform those duties. What guidance there is regarding his or her loyalties directly contradicts the position taken by the ethical authorities outlined above.

Army Regulation 27-1 defines the SJA's loyalties as follows:

> While the staff judge advocate . . . is authorized to communicate directly with the staff judge advocate . . . of a superior command or with The Judge Advocate General . . . he is primarily a staff officer on the staff of his own commander, is responsible only to him, and is fully subject to his command just as any other member of the command. Technical guidance through technical channels is designed *only* to assist the judge advocate to be a more effective staff officer to his commander.[38]

This view of strict loyalty to the commander was to a lesser extent promoted in the former Staff Judge Advocate Handbook, which provided:

> First, the staff judge advocate of a command is a staff officer and, as such, has the duty to assist the commander to command effectively and to accomplish the assigned mission. Second, as a judge advocate he is the military legal advisor to the commander. In his legal role he has a responsibility to staff judge advocates of superior commands and to The Judge Advocate General in the technical and professional sense.[39]

As the Handbook correctly identified, a "commander expects full cooperation from his staff judge advocate and will expect his support of all decisions, even though another course of action or solution was recommended . . . [he] does want a legal advisor whose loyalty is unquestioned."[40]

[38]AR 27-1, para. 14(a).

[39]U.S. Dep't of Army, Pamphlet No. 27-5, Staff Judge Advocate Handbook, para. 19*b* (July 1963) (rescinded Sept. 1979) [hereinafter cited as DA Pam 27-5].

[40]*Id.* at para. 47.

The Interrelation of Current Standards

As the foregoing discussion of the evidentiary, ethical, and institutional standards indicates, the combination of the various standards is susceptible neither to understanding nor rational application. Any confidence must be disclosed under court order unless it is covered by the attorney-client privilege, but the attorney-client relationship is a concept not yet developed in the government attorney context. Ironically, the SJA, as a matter of discretion, *may* ethically disclose within the organization confidences which even the court may not order disclosed. Ethically, the attorney's primary loyalty is to the organization and the public interest—almost to the point of being a "watchdog", but, institutionally, the SJA's primary loyalty is to the commander and the accomplishment of the commander's mission. In short, the current standards are hopelessly confusing and contradictory.

The Proposed Change

To remedy the current deficiency, all applicable standards should be changed to make it clear that the SJA is the commander's lawyer. All conversations between the SJA and the commander should fall within the scope of the attorney-client privilege; the commander alone should be the SJA's client for the purpose of applying the Model Code's ethical standards. Institutionally, the SJA should be required to give the commander undivided loyalty. In essence, the current evidentiary and ethical standards would be brought in line with the institutional definition of the SJA's duties contained in AR 27-1.

This proposed change can be accomplished for the most part by amending MRE 502, AR 27-1, and AR 27-10. The federal law concerning the attorney-client privilege is the only aspect of the SJA-commander relationship not readily susceptible to change from within the executive branch. The President has the authority to promulgate rules and procedures for courts-martial and, as such, has the authority to define evidentiary privileges in the Military Rules of Evidence.[41] Ethical

[41]Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1976).

standards are "jurisdictional" in the sense that "Model Codes" are applicable to the military only to the extent that they are adopted by departmental regulation. Although AR 27-10 currently adopts the Model Code for court-martial practice,[42] there is nothing to preclude each military service from tailoring, supplementing, or otherwise modifying the ethical standards applied in their practice.

The net effect of the proposed change should be to have mandatory disclosure when the SJA is convinced beyond a reasonable doubt that a crime or fraud will be committed. "Crime or fraud" should be narrowly defined to include only crimes likely to result in personal injury or substantial property damage, and only frauds perpetrated on a judicial or quasi-judicial tribunal. All other communications and information gained through the SJA-commander relationship, both legal and nonlegal, should be fully protected from disclosure as confidential information.

Discussion: Criticism and Merits

There are three primary rationales underlying the philosophy of giving only limited protection to the SJA-commander relationship.[43] The limited protection is said to promote the public interest by placing the organization in a position superior to individual interests. It may foster the detection and exposure of injustices, ethical improprieties, and violations of law, regulation, or agency policy. Finally, it may preserve the public's image of the legal profession's integrity.

Each of these necessarily stands as a criticism of the proposed system of primary loyalty to the commander, but a careful analysis behind the "rhetoric" shows that the public interest is actually better served by the proposed system and demonstrates that the other two criticisms are unjustified.

The Public Interest

The Federal Bar Association and commentators who have defined the government attorney's loyalty in terms of the public interest have concluded that primary loyalty to the organization best serves "the public interest."[44] The supporting rationale seems to be that the lawyer and the commander are public servants hired by the public to uphold the public trust. For the lawyer to elevate the "interests of the commander" above the "interests of the organization in serving the public interest" somehow undermines the philosophical foundation of the system. The problem with this analysis is that the term "public interest" is not susceptible to useful definition and that the lawyer's judgment of "the public interest" is supplanting that of the commander.

For example, taken on its face, adherence to lawful Army regulations is "in the public interest." But if adherence to a regulation will result in the needless loss of life, then adherence is clearly not "in the public interest." But what if adherence is not cost effective in a particular instance, or will make the unit less combat ready, or will cause adverse community relations, or will cause hardship to military families? Compliance with regulations often involves judgment calls. The commander is given the title, position, and authority to make these types of judgments. The legal aspect of the decision is a necessary input, but it is not necessarily dispositive of what is "in the public interest."

The entire concept of command presupposes that the commander bears full responsibility for the decisions he or she makes and for the consequences of those decisions. The SJA is but a part of the supporting cast. The SJA's judgment of the public interest should not be elevated above that of the commander.

A system of "full disclosure," even if disclosures stay within the organization, may further the narrow public interest of avoiding the consequences of one or more specific bad decisions by the commander. "Public interest" should be viewed in a broader context. The "public interest" is also served by having commanders exercise their judgment and make their decisions after full and frank discussion with their legal advisors and other staff members. The more informed the decision, the

[42]U.S. Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 Sept. 1982).

[43]*See generally* references cited in note 1 *supra*.

[44]Opinion 73-1, *supra* note 5.

more likely it is to be "in the public interest." Unlike the criminal justice system, which is heavily weighted with safeguards to avoid any mistake as to guilt, the command concept must be premised on the freedom to make mistakes in order that command initiative and authority are not destroyed. There are many levels of "public interest" and each is amenable to personal intepretation. The question is not what is in the public interest, but rather who are we entrusting to make that determination. The answer within any military organization must be the commander. The corollary to the premise that commanders make the determination of what is in the public interest is that they must be able to have full and open input from their staff, including their legal advisors.

If this system of full and open discussion with the legal advisor is to occur, there must be a reasonable degree of certainty about where the SJA's loyalties lie and what communications are protected from disclosure. This certainty must clearly reflect primary loyalty to the commander. No purpose is served by creating broad categories of discretionary disclosure or by distinguishing between legal and nonlegal advice. This scheme would merely provide a means for attributing blame to the SJA in instances where public attention is drawn to a bad command decision, but provide no meaningful guidance beforehand on what is actually expected.

The proposed change provides the necessary certainty and atmosphere of primary loyalty to the commander to promote full and open legal advice. It also places the decision making responsibility where it belongs—with the commander. In the long term, this approach will better serve the public interest.

The Detection and Exposure of Injustice and Impropriety

The second criticism is that injustice and impropriety within the system must be exposed. The answers to this criticism are that there are other checks and balances within the system, that even under the proposed change the client confidentiality is *not* absolute and that there is no empirical evidence the SJA currently plays a major role in the exposure of command improprieties.

Matters dealing with the judicial functions of the convening authority and the SJA are covered by a wide variety of statutory, regulatory, and constitutional protections. If SJA-commander communications constitute essential evidence in a case, the convening authority, as "the client", can waive the attorney-client privilege or risk abatement of the proceedings. In such a case, the balancing of competing interests falls upon the one person most intimately connected to those interests, the commander. The duty of detecting and exposing injustices falls primarily upon the defense counsel and, secondarily, upon the military judge.

For other than judicial matters, there also exist a number of independent agencies specifically charged with detecting and exposing improprieties, including the Criminal Investigation Command, the Army Audit Agency, and The Inspector General. In addition, any individual member of a command can file an Article 138 complaint against the commander,[45] write his or her congressman, or make an anonymous phone call on the Fraud, Waste, Abuse hotline. In most cases, the SJA is not the sole source available for the detection and exposure of an impropriety. Even when the SJA is the sole source for exposure, he or she would, under the proposed change, be obligated to disclose enough information to prevent serious future harms, such as physical injury, substantial property damage, or fraud upon a tribunal. The proposed change would have no adverse effect on overall crime prevention.

The Integrity of the Profession

The last reason cited for requiring disclosure, or at least making disclosure discretionary, is to enhance and preserve the public's image of the integrity of the legal profession. Lawyers should not be used to create "zones of silence" about illegal or improper conduct. This argument is based on a rather cynical image of the commander, departs from the clear trend established in the proposed Model Rules supporting increased corporate confi-

[45] *See generally* U.S. Dep't of Army, Reg. No. 27-14, Legal Services—Complaints Under Article 138, UCMJ (1 Feb. 1979) for a discussion of the relevant procedures.

dentiality, and ignores the realities of the current SJA-commander relationship.

When primacy is given to confidentiality of communications, the potential does exist for abuse. Organized crime and corrupt business enterprises may be able to create so called "zones of silence" about improper conduct by funneling information through the organization attorney. The same potential for abuse does not exist in the military context because of the systemic controls over individual integrity and because of the relative openness of military activities. As discussed above, the military system contains numerous independent agencies that serve as a "check" in detecting and exposing improprieties. In addition, military officers become commanders of large units only after progressing through a promotion system based on integrity, dedication to duty, and loyalty to country. This is in stark contrast to the way that "leaders" emerge in many business organizations where the profit motive is controlling.

Even in the corporate area, the trend of the participating bar, as expressed in the ABA House of Delegates, is to reinforce the principles of confidentiality because of the public interest in promoting full and open legal advice.[46] This rationale applies with even greater force to the military, which has the organizational objective of public service rather than private gain. Although the Model Rules encourage disclosure *within* the corporate organization, stricter confidentiality in the military is justified by the fact that the military organization *includes* the criminal justice system and in many instances internal disclosures are tantamount to full disclosure outside the organization.

Finally, there is no empirical evidence that the public currently holds the legal profession in higher esteem because they believe that lawyers must disclose improprieties which come to their attention. In fact, the empirical evidence actually supports the conclusion that commanders currently believe that the SJA must not disclose their communications.[47]

The proposed change would not diminish the integrity, or perceived integrity, of the legal profession but would only reflect what are now the realities of how the system is perceived.

Conclusion

The one thing that is clear from reading the Model Code of Professional Responsibility, the Military Rules of Evidence, the debate over the Model Rules of Professional Conduct, and Army Regulation 27-1 is that there *must be* a clarification of the existing standards defining the SJA's relationship with the commander. The proposed changes, giving clear priority to the confidentiality of that relationship, provide more certainty in the system, reflect the realities of current practice and expectations, complement the current trends of the practicing civilian bar, and, most importantly, protect the long term interests of the American public. Despite the post-Watergate paranoia about government secrecy and lawyer involvement in the abuses of power, there is no real evidence that protecting the SJA-commander relationship will impair justice, promote illegality, or undermine the image of the legal profession.

CG: "I have just one question. Whose lawyer are you—mine or the Army's?"

SJA: "Sir, I'm your lawyer, for better or for worse. You have my undivided loyalty."

CG: "Welcome aboard judge. Since you're here let me ask you what you think about . . ."

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[46] *See* note 2 *supra*.

[47] While a student at the Army War College, Colonel Barney L. Brannen conducted a poll concerning the role of the SJA. When fifty-five general court-martial convening authorities were asked the question: "Do you consider your conversations with your SJA confidential and privileged," *all* responded "Yes."

Debriefing of Offerors Not Selected for Award

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Once a negotiated contract has been awarded, an unsuccessful offeror may be entitled to a debriefing. Debriefing is the procedure used by contracting personnel to provide the unsuccessful offeror with an explanation of the evaluation process and an assessment of his or her proposal. This article will examine the purposes of a debriefing, when a debriefing is required, what effect a debriefing has on bid protests, and how the Freedom of Information Act affects a debriefing. Finally, guidelines pertaining to the conduct of a debriefing will be discussed.

The reason an unsuccessful offeror is provided a debriefing is set forth in the Defense Acquisition Regulation (DAR).[1] A substantial amount of time and effort is spent by an offeror in the preparation of his or her proposal. An unsuccessful offeror has a serious interest in knowing why the proposal was not selected for contract award. In a debriefing, contracting officials furnish an unsuccessful offeror with the government's evaluation of the deficiencies and weaknesses contained in the proposal. The purpose of the debriefing is to provide the offeror with information that will enable him or her to submit improved future proposals; this process also benefits the government. The debriefing can also confirm that the evaluation and selection have been conducted fairly and in compliance with regulations and the terms of the solicitation.

Under the DAR, an unsuccessful offeror is entitled to a debriefing when the contract is awarded on a basis other than price.[2] In order to obtain a debriefing, the unsuccessful offeror must submit a written request.[3] Even if the unsuccessful offeror has requested information pursuant to the Freedom of Information Act (FOIA), The Comptroller General has upheld the Army's right to refuse to provide a debriefing without a written request.[4] The offeror must specifically request a debriefing, because The Comptroller General does not equate a FOIA request to a request for a debriefing.

The Timing of the Debriefing

Once the unsuccessful offeror has submitted a written request, he or she is to receive the debriefing "at the earliest possible time after contract award."[5] The Comptroller General has held that "an offeror whose proposal has been determined to be outside the competitive range is entitled, before award, only to the general explanation of the basis for the competitive range determination, and not a full debriefing."[6] Although the agency should proceed with a debriefing as soon as possible after award, some delays may be excused. The Comptroller General has stated that "agency failure to debrief an unsuccessful offeror until one month after the request for debriefing is not improper where the regulation specifies no time frame for debriefing and delay is attributable to the unavailability of agency personnel."[7] In this case, the unsuccessful offeror was unable to show any deliberate delay. An offeror may prevail in a protest if able to establish deliberate delay by the government, and especially if it can be shown that harm resulted from the delay. An offeror who does not receive a timely debriefing and is adversely affected in submitting subsequent proposals may be able to establish the requisite harm. At least one unsuccessful offeror, EDMAC Associates, Inc.,[8] has made this argument. EDMAC's proposal was

[1]Defense Acquisition Reg. § 3-508.4 (1 July 1976) [hereinafter cited as DAR].

[2]*Id.* at § 3-508.4(b).

[3]*Id.*; Comp. Gen. Dec. B-200839 (19 May 1981), 81-1 CPD para. 382; Comp. Gen. Dec. B-184194 (26 May 1978), 78-2 CPD para. 401.

[4]Comp. Gen. Dec. B-184913 (22 Jan. 1976), 76-1 CPD para. 37.

[5]DAR § 3-508.4(b); Comp. Gen. Dec. B-204602.2 (19 Jan. 1982), 82-1 CPD para. 42.

[6]Comp. Gen. Dec. B-205961 (4 March 1982), 82-1 CPD para. 201.

[7]Comp. Gen. Dec. B-196010 (11 June 1980), 80-1 CPD para. 404.

[8]Comp. Gen. Dec. B-182613 (4 Apr. 1975), 75-1 CPD para. 206.

rejected on 5 March 1974, and a contract had not been awarded by the time EDMAC protested in November 1974. EDMAC alleged that, if it had been provided with a timely debriefing, it would have been able to provide improved proposals on subsequent solicitations. The Comptroller General denied the protest because EDMAC was not entitled to a debriefing, since no contract had been awarded. Given the basis of the decision, the issue of adverse effect on subsequent proposals caused by a delay in providing a debriefing is yet to be determined. Therefore, the government must be diligent in providing debriefings and, when a delay is required, the contract file should be properly documented to establish the reasons for the delay.

The timeliness of an unsuccessful offeror's protest of contract award may be affected by the debriefing, since this may be the first time the unsuccessful offeror obtains information which would form the basis for his protest. Based upon information obtained at a debriefing, a protest by the unsuccessful offeror against the rejection of his proposal must be filed within the time limit set by the General Accounting Office (GAO).[9] To be timely, the protest must be filed within ten working days of the date the basis for protest is known.[10] Even though a protest is filed within ten days of the debriefing, the protest may be deemed to be untimely where the basis for the protest was known prior to the debriefing and the protest was filed more than ten days after those grounds became known.[11] However, The Comptroller General, in *Lambda Corporation*,[12] ruled that a protest filed within ten working days of a debriefing is timely under 4 C.F.R. 20.2(b)(2), notwithstanding that the protester knew the basis for protest prior to the debriefing. Lambda, the unsuccessful offeror, received a copy of the winning proposal on 21 May 1974 and noted the deficiencies in that proposal prior to the debriefing, which was conducted on 28 May. Lamda filed its protest three days after the debriefing but more than five working days after the basis for the protest was known.[13] The Comptroller General held that the protest was filed within the time limits because the agency had scheduled the debriefing for 28 May and the protest was filed within five working days of the debriefing. The Comptroller General further stated that 4 C.F.R. 20.2(a) urges protesters to seek resolution of their complaints with the contracting agency and does not require the unsuccessful offeror to file his protest until the agency has explained its position at a debriefing. In *Metropolitan Contract Services, Inc.*,[14] The Comptroller General determined that a protest filed within ten working days of a debriefing was timely, even though the unsuccessful offeror had the source selection statement several weeks before the debriefing, because the statement did not advise the protester of the reasons for the action taken by the agency. In order to initiate the ten day period, the government should be as specific as possible when informing an unsuccessful offeror of his deficiencies in accordance with the notification requirements in DAR 3-508.2 and 3-508.3. The Comptroller General, in *American Indian Health Systems, Inc.*,[15] decided that, when the agency informs the offeror that his or her proposal is unacceptable and a reasonably specific list of deficiencies found in the proposal is provided, the offeror cannot wait until after a debriefing has been conducted before protesting the evaluation findings. In conclusion, The Comptroller General will usually require the protest to be filed within ten working days of the date that the basis for protest is known. Where, however, The Comptroller General feels that it is reasonable to wait until a debriefing has been conducted, the ten days may

[9]Comp. Gen. Dec. B-184922 (4 Sept. 1975), 75-1 CPD para. 202; Comp. Gen. Dec. B-180186 (13 May 1974), 74-1 CPD para. 248.

[10]4 C.F.R. § 20.2(b)(2) (1982).

[11]Comp. Gen. Dec. B-188564 (18 Apr. 1977), 77-1 CPD para. 272; Comp. Gen. Dec. B-186164 (9 May 1977), 77-1 CPD para. 327; Comp. Gen. Dec. B-189666 (14 Dec. 1977), 77-2 CPD para. 461.

[12]Comp. Gen. Dec. B-181411 (5 Dec. 1974), 74-2 CPD para. 312.

[13]In 1974, the GAO interim regulations on bid protests provided a protest period of five days. The present regulation, 4 C.F.R. § 20.2(b) (1982), sets forth a ten working day period in which to protest.

[14]Comp. Gen. Dec. B-191162 (14 June 1978), 78-1 CPD para. 435.

[15]Comp. Gen. Dec. B-206218 (12 July 1982), 82-2 CPD para. 38.

not start until the date of the debriefing, even though the basis for protest was known well before the debriefing.

In addition to complying with the GAO's ten day limit, the offeror must exercise due diligence in obtaining a debriefing in order to preserve a timely protest. In *Mitek Systems, Inc.*,[16] The Comptroller General ruled that a protest will be dismissed as untimely when the unsuccessful offeror has failed to diligently seek information that would provide the basis of a protest. In this case, Mitek did not request a debriefing until one month after the announcement of contract award; because of this delay, the protest was dismissed as untimely. In *R.H. Ritchey*,[17] The Comptroller General again determined that the protester must exercise due diligence in seeking information that would provide grounds for a protest. In this case, however, he found the protest to be timely, stating: "Where the protester has no knowledge of a possible basis for protest until he receives a debriefing which the agency delayed until nine months after the contract award, the contractor cannot be faulted for not filing its protest prior to the debriefing." It can be concluded that, even though a debriefing is conducted some time after the contract has been awarded, the contractor can preserve a timely protest if he or she has been diligent in requesting a debriefing. It is, therefore, in the best interests of both the government and the offeror that a debriefing be conducted as soon as possible after contract award.

Who Conducts the Debriefing?

Although the DAR does not specifically identify who should conduct the debriefing for the government, it does state that a debriefing "shall be conducted by purchasing office officials familiar with the rationale for the selection decision and contract award."[18] The only requirement specified in the DAR is that the debriefer must have knowledge of the facts and circumstances of the particular solicitation and evaluation. Because the contracting officer is the official who normally makes the final decision for award and signs the contract on behalf of the government, he or she should conduct the debriefing. For example, the policy of the U.S. Army Material Development and Readiness Command (DARCOM) is that "all debriefings should be conducted by or under the direction of the contracting officer and the Program Manager."[19] Although the contracting officer will usually be the government representative who conducts the debriefing, he or she must rely upon the other members of the team to provide the necessary data and background. At a minimum, the contracting officer must rely on pricing, technical, and legal personnel, as well as his or her own contracting specialists. The contracting officer and team should meet prior to the debriefing to review the solicitations and evaluation process and the award decision, in order to insure that the most accurate information is provided to the offeror. This review will enable the contracting officer to concentrate on key points and establish a clear, concise, and succinct presentation of relevant information. During this session, questions that may be raised by the unsuccessful offeror should be anticipated so that the government may provide adequate and timely answers. The key to a successful debriefing is thorough preparation and a complete knowledge of the subject matter to be discussed.

How is a Debriefing Conducted?

How a debriefing is to be conducted will be determined by the facts and circumstances of each particular case, but some guidelines are provided. The DAR states that debriefings should be "conducted in a scrupulously fair, objective, and impartial manner."[20] DARCOM policy is that a "debriefing should be done informally."[21] Some debriefings, because of the nature of the action or possibly even the personalities involved, will be more formal. How open and informal the debriefing ses-

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[16]Comp. Gen. Dec. B-203387.2 (21 Sept. 1982), 82-2 CPD para. 247, *reconsidered at* Comp. Gen. Dec. B-208786.2 (3 Nov. 1982), 82-2 CPD para. 405.

[17]Comp. Gen. Dec. 205602 (7 July 1982), 82-2 CPD para. 28.

[18]DAR § 3-508.4(b).

[19]Darcom Pamphlet No. 715-3, Proposal Evaluation and Source Selection, at 3-33 (1980) [hereinafter cited as DARCOM Pam.].

[20]DAR § 3-508.4(c).

[21]DARCOM Pam., at 3-32.

sion will be depends upon each contracting officer and his or her view of the facts and circumstances surrounding the particular acquisition and the contractor involved. However, in a relaxed atmosphere, the offeror will be more receptive to information which could help in the drafting of subsequent proposals.

The information disseminated to an unsuccessful offeror at a debriefing must be factual and provide a true, clear, and concise picture of the evaluation of the proposal.[22] The debriefing should be as informative as possible, but is not to be used by the unsuccessful offeror as a forum to debate the evaluation of the proposal or the evaluation process as a whole. The information provided by the government must not contain comparisons with proposals of other offerors.[23] The Comptroller General, in *Powers Regulator Co.*, denied an unsuccessful offeror the right to review his competitor's proposal. The offeror had argued he had a right to review his competitor's proposal in order to maintain the integrity of the procurement system. The Comptroller General rejected this argument saying: "It [GAO] reviews proposals submitted in negotiated and two-step procurements to determine the propriety of the evaluation process."[24]

The discussion should instead be limited to the strengths and weaknesses of the unsuccessful offeror in relation to the requirements of the solicitation.[25] During the discussion, the offeror will be informed of all the weaknesses and deficiencies in the proposal and the determining factors which caused the proposal to be unsuccessful. This discussion must be handled tactfully and in a positive manner in order to show the offeror how subsequent proposals may be improved. A good approach is to be sensitive to the merits of the unsuccessful offeror's proposal and to inform the offeror of the strengths in the proposal. Often, the unsuccessful offeror has written a good proposal, but a competitor may have submitted one that is only slightly better. The offeror should be informed of the positive aspects of the proposal only in general terms, since the government must avoid divulging the actual scores or discussing a comparison of proposals.

The government may find it necessary or beneficial to explain the evaluation process in order to provide a clear understanding of that process, and "to insure the unsuccessful offeror that his proposal was treated fairly, impartially, and objectively."[26] However, specific criteria weights or scores may not be disclosed. For example, an offeror may believe that, because he or she was in the competitive range and submitted the proposal with the lowest cost, he or she should be awarded the contract. Where cost is of secondary importance to the technical factors, however, it is possible to award the contract to an offeror who has a higher cost proposal. In such a case, an explanation may prevent a protest. Once a contractor understands the evaluation process, he or she may be more willing to submit subsequent proposals and not feel that he or she was "cheated" out of a contract award.

After the government's prepared presentation listing the strengths and weaknesses of the unsuccessful offeror's proposal and an explanation of the evaluation process, the offeror should have the opportunity to ask questions. During the debriefing, the government should have only one spokesperson, the contracting officer, but if he or she requires any assistance, he or she may direct that a response be given by one of the team members. A team member, however, should not respond until so directed by the contracting officer. This will permit the contracting officer to control the situation and will avoid confusion by insuring a single government response. If the contracting officer does not have sufficient information to answer a question or is uncertain of the answer, he or she should refrain from responding, as the reply may provide the offeror with potentially inaccurate or incomplete information. After the offeror is informed that, at the present time, an accurate answer cannot be given, the question should be written down and the offeror informed that the pertinent information will be obtained and provided as soon as possible after the debriefing.

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[22]DAR § 3-508.4(c).

[23]DARCOM Pam., at 3-32.

[24]Comp. Gen. Dec. B-181251 (14 Aug. 1974), 74-2 CPD para. 98.

[25]DARCOM Pam., at 3-32, 3-33.

[26]*Id.* at 3-33.

Nonreleasable Information

During the course of a debriefing, an offeror may ask a question or request information that the government is not permitted to divulge. The DAR states:

> Debriefings shall not reveal (i) trade secrets; (ii) privileged or confidential manufacturing processes and techniques; (iii) commercial financial information which is privileged or confidential, including cost breakdowns, profit, overhead rates, and similar information; (iv) or the relative merits of technical standing of competitors or the evaluation scoring.

The items listed above parallel exemption four of the Freedom of Information Act (FOIA),[27] which applies to trade secrets and financial information. Although FOIA does not define a "trade secret," some courts have adopted the definition contained in the Restatement of Torts,[28] which says: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors, who do not know or use it . . ."[29] The Restatement also sets forth these factors which may be used to determine whether particular information is a trade secret:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could properly be acquired and duplicated by others.[30]

However, a recent ruling by the District of Columbia Circuit has rejected the definition in the Restatement of Torts and has defined the term "trade secrets" narrowly. The court stated that "the broad definition of a trade secret set forth in the Restatement of Torts is ill-suited for the public law context in which FOIA determinations must be made." Additionally, "the term trade secrets in Exemption 4 should be defined in its narrower common law sense, which incorporates a direct relationship between the information at issue and the productive process."[31] For other information to come within exemption four, the government must establish that the data is commercial or financial, and obtained from a person, and privileged or confidential.[32] For the purposes of this exemption, commercial or financial matter is confidential if disclosure of the information is likely to impair the government's ability to obtain necessary information in the future, or to cause substantial harm to the competitive position of the supplier of the information.[33]

All members of the government debriefing team must be cognizant of whether the information they possess is a trade secret or commercial or other financial information in order to avoid an inadvertent breach of confidentiality. If the unsuccessful offeror requests nonreleasable information, he or she should be politely informed that this information cannot be released. If it is unclear whether the information being requested is exempted or if the offeror continues to press for this information, he or she should be asked to submit his request in writing for the agency's FOIA personnel review. Because the Trade Secrets Act[34] provides criminal sanctions against government personnel for the release of trade secrets or confidential information, the government must be very careful not to violate this act. The government may not even make a discretionary release of ex-

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[27] 5 U.S.C. § 552(b)(4) (1976).

[28] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474 (1974). Martin Marietta Corp. v. Federal Trade Comm'n, 475 F. Supp. 338, 342 (D.D.C. 1979). Ashland Oil, Inc. v. Federal Trade Comm'n, 409 F. Supp. 297, 303 (D.D.C. 1976).

[29] 4 Restatement of Torts § 757, at 5 (1939).

[30] *Id.*, comment b, at 6.

[31] Public Citizen Health Research Group v. Food and Drug Admin., No. 82-1745 (D.C. Cir. 15 Apr. 1983).

[32] National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974).

[33] *Id.* at 766.

[34] 18 U.S.C. § 1905 (1976).

empt commercial information.[35] Additionally, an offeror expends substantial resources in developing its trade secrets and confidential information. Consequently, the government should avoid any disclosures which would cause the contractor competitive harm. Future procurement of confidential information will be difficult if contractors believe that their information will not be protected by the government.

An unsuccessful offeror may request information which comes under exemption five of the FOIA[36] which exempts from mandatory disclosure matters over which the government has traditionally asserted discovery privileges. The attorney-client and attorney-work product privileges exist to insure open and frank discussions between an attorney and the client.[37] The deliberative process privilege, which allows the decision maker to obtain full and frank advice from his or her staff also falls under exemption five. Subordinates may be reluctant to be candid and frank if their advice or opinions are divulged. Although facts are not normally deliberative and therefore not protected,[38] facts may not have to be disclosed where the factual portions of a record are so intertwined with the deliberative process that they cannot be segregated.[39] The privilege extends to memoranda and advice provided prior to the time a decision is made; final decisions or post-decisional memoranda are not protected.[40]

It is important that all members of the government team who attend the debriefing have some knowledge of the FOIA exemptions discussed above. The Departments of Defense and the Army have taken the position that, because the FOIA exemptions permit, but do not compel, withholding information, the requested information will be released unless a legitimate purpose exists for withholding it.[41] The government has no discretion, however, to release exempt trade secrets and commercial information. Because technical personnel are concerned that their opinions and advice be protected, there is a legitimate reason for withholding certain internal agency memoranda. Without this protection, it will be difficult for the source selection official to obtain frank and candid opinions from government personnel who may be reluctant to have their advice and evaluations scrutinized by contractors. The contracting officer and his or her team must remember that the FOIA affects the debriefing process and that the government's legitimate interests must be protected.

Conclusion

The debriefing, if properly used, is one of the tools a contracting officer has available to assist in the performance of his or her job. The debriefing can work against the government, however, if the contracting officer does not plan adequately for conducting it. Finally, there is no formula or methodology to insure a good debriefing. There is, however, one thing that the contracting officer and team can do to increase the probability that the debriefing will be a success: Be Prepared!

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[35]Burroughs Corp. v. Brown, 501 F. Supp. 375, 382 (E.D. Va. 1980).

[36]5 U.S.C. § 552(b)(5) (1976).

[37]Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 244 (D.C. Cir. 1977).

[38]EPA v. Mink, 410 U.S. 73, 90 (1973); Playboy Enter., Inc. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982).

[39]Montrose Chemical Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974).

[40]Pies v. Internal Revenue Serv., 688 F.2d 63, 71 (D.C. Cir. 1981).

[41]Dep't of Defense, Reg. No. 5400.7, DoD Freedom of Information Act Policy, para. 3-101 (Dec. 1980); U.S. Dep't of Army, Reg. No. 340-17, Office Management—Release of Information and Records from Army Files (1 Oct. 1982).

Tort Liability of Military Officers: An Initial Examination of *Chappell*

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On 13 June, the United States Supreme Court handed down two major decisions that substantially limited the monetary liability of federal officials for allegedly tortious conduct. A unanimous Court in *Chappell v. Wallace*[1] held "that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."[2] Similarly, *Bush v. Lucas*[3] forbade a federal civil servant from pursuing a constitutional tort action against his superiors arising out of job disciplinary action. Both opinions narrow the availability to plaintiffs of the constitutional tort remedy first recognized a decade ago in the Supreme Court's landmark *Bivens* decisions.[4] This article examines the *Chappell* decision and discusses both its impact and its scope.

Chappell: The Recognition of Command Immunity

In *Chappell v. Wallace* five black sailors from the U.S.S. Decatur sued individually their commanding officer, four lieutenants and three noncommissioned officers claiming that their superiors had assigned them to undesirable duties, gave them poor performance evaluations, and imposed stiffer punishments because of their race.[5] The plaintiffs sought $10 million in compensatory and punitive damages from the defendants, as well as declaratory and injunctive relief. The monetary claim was based on constitutional tort theory and on an alleged violation of the civil rights statute, section 1985(3) of Title 42, U.S. Code.[6] The district court dismissed the action, holding the issues nonreviewable, the individual defendants immune from liability, and the suit untimely.[7]

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[1]51 U.S.L.W. 4733 (U.S. June 13, 1983).

[2]*Id.* at 4736.

[3]51 U.S.L.W. 4752 (U.S. June 13, 1983). In *Bush*, the plaintiff alleged that his whistleblowing complaints about his job and the waste of taxpayers' dollars led to an attempt by his superiors to fire him. Bush appealed through the review processes of the Civil Service System and was eventually returned to his position with an award of back pay. While the appeal was pending, he also brought suit for defamation and violation of First Amendment rights in federal court.

The Supreme Court assumed for purposes of decision that a violation of Bush's First Amendment rights had occurred and that it would not be fully corrected through the Civil Service review process. In the absence of evidence that congress has meant a statutory remedy to be exclusive, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." In Bush's situation, the Court found that Congress had neither denied judicial relief nor provided an "equally effective substitute." Congress had, however, created "an elaborate, comprehensive scheme" to redress improper actions taken against federal civil servants. The congressional scheme had "been constructed step by step with careful attention to conflicting policy considerations" including the impact on supervisory efficiency. Under the circumstances, the Court declined to create an additional remedy "because . . . Congress is in a better position to decide whether or not the public interest would be served by creating it." Accordingly, civilian supervisors, like their military counterparts after *Chappell*, are now protected from constitutinal tort law suits.

[4]Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[5]The *Chappell* facts are detailed in Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981). It should be noted that several black servicemen on board the Decatur, including the ship's EEO officer, not only did not join plaintiffs in this suit but filed affidavits in support of the military officials. *See* documents filed in the court of appeals at 40-45.

[6]42 U.S.C. § 1985(3)(1976) provides in pertinent part:

> If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . if one or more persons engaged therein do . . . any act in furtherance of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[7]Wallace v. Chappell, 661 F.2d at 731.

The United States Court of Appeals for the Ninth Circuit reversed. The court stated the question of "reviewability" would "arise regardless of the identity of the defendant, *i.e.,* whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of non-monetary relief."[8] The court acknowledged that "[l]itigation is potentially disruptive to military operations," that "[p]ermitting litigation can make it difficult to maintain discipline," and that courts may "lack the competence to weigh the factors that might enter into a military decision."[9] Nevertheless, the court held this impact not to be compelling, concluding that "once a claim has been found reviewable, allowing a damages remedy [will] not exacerbate . . . the disruption."[10] Applying the factors articulated by the Fifth Circuit Court of Appeals in *Mindes v. Seaman*, the court found a potential constitutional violation and remanded the case to the district court to determine if all the *Mindes* reviewability factors were met.[11] The court also concluded that "except in unusual circumstances" military officials sued individually would enjoy only qualified, not absolute, immunity from monetary liability.[12] Ironically, this holding was announced the same day that the Third Circuit decided *Jaffee v. United States*.[13] In *Jaffee*, the court refused to allow a constitutional tort action against military and civilian officials by a former service member who had alleged that he had been used as a human guinea pig in nuclear tests. The Ninth Circuit's decision in *Chappell*, which sent shock waves throughout the military community, substantially narrowed the *Feres* doctrine[14] and threatened a new wave of litigation by service members against their commanders.

The Supreme Court, after granting certiorari in *Chappell* but denying it in *Jaffee*, made an exceptionally strong affirmation of the needs of military authority and discipline. Chief Justice Berger wrote that Congress had created "two systems of justice . . . one for civilians and one for military personnel," and military personnel must look to the military justice system and not civilian courts for assistance.[15] Speaking for a unanimous court, the Chief Justice clearly and forcefully acted to protect military officials from suits by their subordinates.

At the outset, the opinion noted the landmark constitutional tort case, *Bivens v. Six Unknown Named Agents* of the Federal Bureau of Narcotics.[16] Chief Justice Burger drew from *Bivens* the warning that a constitutional cause of action might not be appropriate when "special factors counselling hesitation are present." It is these "special factors" which have served as the basis for

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[8]*Id.*

[9]*Id.* at 732.

[10]*Id.* at 736 n.9.

[11]The balancing test of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), provides that once administrative remedies are exhausted, constitutional claims may be reviewed only after the following factors are balanced: (1) the nature and strength of the claim, (2) the potential injury to plaintiff if review is refused, (3) the extent of interference with military functions, and (4) the extent to which military discretion or expertise is involved. The lower court decisions in *Chappell* are unique in their application of reviewability doctrine to a constitutional tort suit brought against individual defendents. *Mindes*, however, concerned a suit against the government, rather than a damage suit against individuals.

[12]Wallace v. Chappell, 661 F.2d 729 at 731-37.

[13]Jaffee v. United States, 663 F.2d 1226 (3d Cir.), *cert. denied*, 456 U.S. 972(1980).

[14]The *Feres* doctrine bars recovery by service members against the government under the Federal Tort Claims Act (FTCA) for injuries arising incident to military service. The doctrine is derived from a trilogy of cases: Brooks v. United States, 337 U.S. 49(1949); Feres v. United States, 340 U.S. 135(1950); and United States v. Brown, 348 U.S. 110 (1954). In *Brooks*, the Court considered an FTCA action involving two soldiers injured while they were off-post and on furlough. The Court allowed the action but implied in dicta that the result would be different if the injury had occurred incident to service. The following year in *Feres* the Court considered three companion cases seeking recovery under the FTCA for injuries suffered incident to service. Two of the cases involved medical malpractice, while the third involved a service member killed in a barracks fire. The Court held that the government was not liable because the claims arose out of an activity incident to military service. Finally, in *Brown*, the Court allowed recovery by a veteran for post discharge medical malpractice by doctors of the Veterans Administration.

[15]51 U.S.L.W. at 4735 (citing Burns v. Wilson, 346 U.S. 137, 140(1953).

[16]*Bivens*, 403 U.S. at 396.

immunizing certain groups such as judges,[17] prosecutors,[18] legislators[19] from the allegations of unconstitutional actions.

The opinion then examined the distinctive nature of military society first articulated in *Feres*, giving special emphasis to the superior-subordinate relationship which "is the heart of the necessarily unique structure of the military establishment . . . . The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command."[20] In addition, the Court noted that Congress has provided a variety of remedies for the types of wrongdoing alleged by the plaintiffs, specifically mentioning complaints pursuant to Article 138 of the Uniform Code of Military Justice and boards for the correction of military records.[21] Further, since Congress never created a cause of action for damages against military officers, the court believed that "judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field."[22] In conclusion, the Court determined the combination of "the unique disciplinary structure . . . and Congress' activity in the field" provided the "special factors counselling hesitation" to oppose the creation of a constitutional remedy.[23]

It is impossible to understand the significance of *Chappell* without mentioning the tortuous path of personal liability and official immunity. The liability of government officials in tort has been a frustrating topic for both federal officials and their lawyers. The law governing the subject has been inconsistent and often poorly articulated. Further, it has been drawn from a number of sources. Two questions are pertinent in any attempt to sue government official for damages in tort. First, what law gives rise to the injured party's cause of action against the government official? Second, are government defendants entitled to any special protection in the suit because of their official status?[24]

Source of Government Employee Tort Law

Tort suits against government officials have been based on common law, statutory violations, and constitutional deprivations. The common law cause of action, typically for assault, battery, false imprisonment, or defamation, against government employees, including military officers, traces back to the English common law.[25] It was tangentially addressed by the Supreme Court in the *Dinsman v. Wilkes* litigation over 130 years ago.[26] There, Private Dinsman, who alleged he had been beaten and confined twice by his ship's captain, was granted relief for this wrongdoing at the direction of the Court.

The statutory tort cause of action has been refined most prominently in the thousands of actions brought under section 1983 of Title 42, U.S. Code, the provision of the Civil Rights Act allowing a cause of action for damages and other relief for deprivations of constitutional rights taken under color of state law. Congress, however, has never passed a similar statute giving rise to liability for constitutional deprivations under color of *federal law*. The lack of such a statutory cause of action prompted the Supreme Court to create a direct action under the Constitution in 1971 in the *Bivens* case. Though the *Bivens* holding dealt only

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[17]*See* Stump v. Sparkman, 435 U.S. 349(1978); Pierson v. Ray, 386 U.S. 547(1967).

[18]*See* Imbler v. Pachtman, 424 U.S. 408(1976) (absolute immunity extends only to the traditional prosecutorial functions).

[19]*See* Tenney v. Branhove, 341 U.S. 367(1951).

[20]51 U.S.L.W. at 4734.

[21]*Id.*

[22]51 U.S.L.W. at 4736.

[23]*Id.*

[24]Related to the cause of action question are the questions of whether a separate tort action is possible against a government entity, such as the United States, the State of New Jersey, or the South Siwash School District, and what remedies other than money damages can be obtained such as injunctive relief, habeas corpus, or mandamus. These topics are not considered in this article.

[25]*See* Zillman, Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort, 60 N.C.L. Rev. 489, 492-99(1982), which traces the English military precedents.

[26]Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849). *See also* Dinsman v. Wilkes, 53 U.S. (12 How.) 390(1851).

with violations of the Fourth Amendment, subsequent Supreme Court cases have extended the *Bivens* rationale to violations of other provisions of the Constitution.[27] Thus, the plaintiff seeking redress from individual government officials was free to allege not only fairly clear common law and statutory violations, but the far more nebulous constitutional tort as well.

Official Immunity: Absolute or Qualified?

Like the law allowing suits against government officials, cases creating some form of the immunity have also evolved in an unpredictable fashion. Early English litigation and cases such as *Dinsman* appeared to provide military superiors with only a qualified immunity, even for acts that involved the performance of important and distinctly military duties.[28] In the late 1950s, a majority of the Supreme Court announced the doctrine of absolute immunity for all federal officials. The companion cases of *Barr v. Matteo*[29] and *Howard v. Lyons*[30] established the rule that government officials were absolutely immune from suits when they were exercising discretion and acting within the outer perimeter of their authority. The *Howard* litigation involved a military defendant sued by a civilian union representative at his shipyard.

For years *Barr* and *Howard* effectively blocked most litigation against federal officials. The growth of civil rights litigation in the 1960s, however, began to undercut the absolute immunity protection. Litigation against state and local officials for violation of constitutional rights under section 1983 provided the framework for many immunity decisions. A landmark case was *Scheuer v. Rhodes*,[31] the suit for the death and injury of student in the 1970 shootings by the Ohio National Guard at the Kent State University campus. Included in the list of state defendants were the Governor of Ohio, the Adjutant General of Ohio, and the President of Kent State University. Despite a strong plea for absolute immunity, the Court, in a unanimous opinion written by Chief Justice Burger, allowed only qualified immunity, thereby setting the stage for similar treatment of federal officials.

Four years after the Kent State decision stripped state officials of absolute immunity, the Supreme Court applied the same standards to federal officials in *Butz v. Economou*.[32] Plaintiff brought suit against the Secretary of Agriculture and lesser officials relying in part on constitutional tort causes of action. Secretary Butz claimed absolute immunity relying on *Barr v. Matteo*. The Supreme Court distinguished *Barr* as applying to common law as opposed to constitutional torts, and granted Secretary Butz only qualified immunity. Secretary Butz was thus placed in the same posture as Governor of Ohio. Later, the Court afforded only qualified immunity to intimate presidential advisors[33] even though the President himself had received absolute immunity.[34] The Court did note that "aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy" might be entitled to absolute immunity "to protect the unhesitating performance of functions vital to the national interest."[35]

Notwithstanding cases like *Butz*, the Supreme Court had not specifically commented on the availability of immunity in suits against military officers by military subordinates prior to *Chappell*. In that case, the government sought absolute immunity arguing by analogy from the Federal Tort Claims Act "incident to service" cases, notably *Feres v. United States*[36] and *United States*

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[27]*See* Davis v. Passman, 442 U.S. 228(1979) (violation of due process for sex discrimination); Carlson v. Green, 446 U.S. 14 (1980) (cruel and unusual punishment violation in provision of intentionally bad medical treatment).

[28]*See* Zillman, note 18, *supra*, at 492-501.

[29]360 U.S. 564(1959).

[30]360 U.S. 593(1959).

[31]416 U.S. 232(1974).

[32]438 U.S. 478(1978).

[33]Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396(1982).

[34]Nixon v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 349(1982).

[35]Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396, 406 (1982).

[36]340 U.S. 135(1950).

v. Brown.[37] The government contended that the *Feres* line of cases stood for the proposition that suits for damages by members of the military against one another were disruptive of discipline and should be forbidden. Lower court decisions have adopted this *Feres* logic and have forbidden suits by service members against other service members.[38] *Chappell* forced the Court to decide whether a special exception from the emerging rule that even high officials of the executive branch were entitled to only qualified immunity should be created in cases where a military superior is sued by a subordinate.

A Critique of *Chappell*

Chappell, in fact, did create a unique exception from the qualified immunity doctrine. The Court could have easily applied the *Harlow* "objective" qualified immunity standard, holding that military officials were entitled to no greater protection than other high federal officials. This is not to say, however, that *Chappell* ends all possibility of a military commander being sued. This section explores areas of the law either not covered by *Chappell* or left vague in dicta. While *Chappell* is destined to become one of the most frequently cited military opinions for its sweeping language in dicta, Chief Justice Burger's opinion for a unanimous Court is narrow and disposed of the immunity issue by not addressing it at all; instead the court decided that there can be no constitutional tort remedy for service members suing their superiors. Applying the limiting language which was first articulated in *Bivens*, the Court found special factors in the military environment which counselled against the creation of a constitutional tort remedy in the intramilitary context. Service members would not be permitted to pursue a constitutional cause of action against their superiors. The decision permits military commanders to escape liability whereas federal officials, at least those sued by persons outside government, will have to show that their duties somehow require an absolute immunity.

The holding is sound and reflects legitimate needs of the military.[39] It is, without question, among the most significant military decisions of the Burger Court and will have a substantial impact on all federal cases involving military personnel. *Chappell*, is not, however, a panacea for future wrongdoers nor does it answer all litigation related questions. At one point, the opinion stated: "It is clear that the Constitution contemplated for instance, that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment . . .". The statement may prove vexing in later disputes over the power of the President as Commander-in-Chief and the role of constitutional protections for service protections for service persons. Several pages later the Court observed: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."[40] The Court offered no more. This suggests that lower courts should continue to determine the justiciability and reviewability of claims against the military on a case by case basis.

The limited analysis of the military tort issue is particularly vexing for its failure to provide a framework for considering all tort litigation against a military defendant. It would, of course, have been better if the Court had taken the opportunity to resolve all issues subsumed within the *Chappell* litigation. Instead, some important issues were left open. Some of these questions are discussed below.

Can soldiers recover against their commanders under 42 U.S.C. § 1985?

In footnote 3, the Court remanded to the Court of Appeals the issue of "whether . . . damages

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[37]348 U.S. 110(1954). The *Brown* case, allowing a veteran to sue under the Federal Tort Claims Act, first presented the disruption of military discipline as a basis for the incident to service rule.

[38]*See E.g.* Martinez v. Schrock, 537 F.2d 765 (3rd Cir. 1976); Tirrill v. McNamara, 451 F.2d 579 (9th Cir. 1971); Bailey v. VanBuskirk, 345 F.2d 298 (9th Cir. 1965).

[39]The author has suggested a justification for intramilitary tort immunities, *supra*, note 25 at 513-17.

[40]Two of the three cases cited, Brown v. Glines, 444 U.S. 348 (1980), and Parker v. Levy, 417 U.S. 677 (1974), denied relief to the service member.

flowing from an alleged conspiracy among the petitioners in violation of 42 U.S.C. § 1985(3) can be maintained."[41] The Court found the statutory theory of action was not adequately addressed in the lower court opinion or in brief and argument before the Supreme Court.

Courts have recognized that, unlike section 1983 of Title 42, which applies only to tortfeasors acting under color of *state* law, *federal* defendants can be sued under section 1985.[42] The Ninth Circuit has defined the elements of the section 1985(3) cause of action to be:

> (1) a conspiracy, (2) to deprive any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States.[43]

Clearly, a considerable number of intramilitary grievances can be covered within this language. Several section 1985 cases have already involved military defendants. Among the allegations voiced in these suits have been the failure to correct military records and restore the plaintiff to active duty,[44] disqualification from a National Guard technicians position,[45] racial discrimination,[46] failure to provide better health care for Vietnam veterans exposed to herbicides,[47] detention of civilian protestors on a military installation,[48] sex discrimination,[49] and unfairness in identifying the plaintiff as a person engaging in discriminatory acts.[50]

While the equal protection provision of section 1985 may be the most attractive of the civil rights provisions under which to sue a military defendant, other subsections of section 1985 and other provisions of civil rights statutes can also be used.[51] In short, allowing military personnel to pursue a cause of action under the civil rights statutes would expose commanders to a variety of claims that might otherwise have been pleaded as torts, especially in suits for racial or sexual discrimination and certain types of actions for interference with political rights. Such allegations have been seen frequently over the last decade in military litigation.[52] Of course, even if civil rights action can lie against military superiors, the superior would be entitled to at least a qualified immunity.

Logically, the Supreme Court's concern about harm to "the unique disciplinary structure of the military establishment" would apply to statutory causes of action as well as constitutional ones. The issue on which the Court chose to focus in *Chappell* was whether a constitutional tort remedy existed. Having found none, there was no need to discuss military immunity against clearly recognized remedies. That the civil rights remedy exists

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[41]51 U.S.L.W. at 4736.

[42]Although Justice Jackson mentioned Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851), in a footnote in Feres v. United States, 340 U.S. 135, 141-42, n.10 (1950), it was not until 1981 that the case received substantial comment as one reason why military officials should be liable for torts. *See* Jaffee v. United States, 663 F.2d 1226, 1257-59 (3d Cir. 1981) (Gibbons, J., dissenting). Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980); Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977).

[43]Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980).

[44]Boruski v. Stewart, 381 F. Supp. 529 (S.D.N.Y. 1974).

[45]Rowe v. Tennessee, 431 F. Supp. 1257 (E.D. Tenn. 1977).

[46]Alvarez v. Wilson, 431 F. Supp. 136 (N.D. Ill. 1977); Revis v. Laird, 391 F. Supp. 1133 (E.D. Cal. 1975).

[47]Ryan v. Cleland, 531 F. Supp. 724 (E.D.N.Y. 1982).

[48]Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973).

[49]Tufts v. Bishop, 551 F. Supp. 1048 (D. Kan. 1982).

[50]Mason v. Claytor, 459 F. Supp. 174 (D.D.C. 1978).

[51]42 U.S.C. § 1981(1976) (equal rights in contracting, bringing suit, giving evidence); 42 U.S.C. § 1982(1976) (equal rights to property); 42 U.S.C. § 1985(1)(1976) (conspiracy to prevent holding or discharge of duties of federal office); 42 U.S.C. § 1985(2)(1976) (conspiracy to interfere with federal court proceedings); 42 U.S.C. § 1985(3)(1976) (conspiracy against voting or political advocacy).

[52]A significant defense for the military commander and one used successfully in several of the section 1985(3) cases is the requirement of a class based discriminatory intent. The requirement is drawn from Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court's leading interpretation of section 1985(3). The Court held that purely private conspiracies were actionable under the statute but that there "must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' actions." *Id.* at 102. *See* note 6 *supra*.

and that it is available to soldiers is without doubt. What is uncertain is whether a military superior sued on that ground should have absolute immunity. The logic of *Chappell* suggests that he or she should. Failing to dispose of this immunity issue and remanding it for further proceedings suggests either that the Chief Justice was parsimonious in his—and the Court's—judging of this case *or* that military officials are really entitled to no more than a qualified immunity when sued for a statutory violation.

Realistically, the various civil rights statutes can hardly be called an express recognition of the right of military subordinates to sue their commanders for damages. The statutes are a century old and were clearly focused on the problems of the freed blacks in the post-Civil War south.[53] It would be ironic to use a statute originally designed in part to assert federal military control in the South in order to protect black rights to undercut the disciplinary relationship in those armed forces today.[54] The civil rights statutes as they have evolved have been used to control more than racial discrimination. Nevertheless, for purposes of determining the immunity of military commanders in subordinate suits they can hardly be viewed as evidence of an express congressional choice to allow sailors to sue their commanding officer for tort damages. It should also be remembered that Congress' failure to put an immunity in the statutory language of section 1983 has not prevented the Supreme Court from implying one.[55] If anything, Congress' activity in the field argues for absolute immunity despite the lesser immunity customarily afforded other officials. In any event, the statutory remedies cited in *Chappell* can also provide relief in lieu of the Civil Rights Act remedies. If Congress is dissatisfied with these remedies, it can act.

Does the decision extend to other than military subordinate-superior suits?

A second aspect of intramilitary suits left unresolved by *Chappell* is the suit by military members not involving a superior-subordinate relationship. This might involve parties of equal ranks or suits by a superior officer against a subordinate. As an example, a racial or sexual discrimination charge could involve allegations against members of equal rank. Legal or other nonmedical professional malpractice suits may pit a superior officer plaintiff against a junior officer defendant. *Chappell* focuses on the disruption of the superior-subordinate relationship by a tort suit. The cited statutory provisions also look towards the superior-subordinate relationship. Article 138 of the Uniform Code of Military Justice is specific to wrongs by "commanding officers." The boards for correction of military records typically address the alleged error of superiors. The *Chappell* rationale thus does not answer the question. The Court's failure to articulate the objectionable features of the military lawsuit may force other courts to discern them and balance them against the benefits to the plaintiffs and society in allowing the suit or allowing less than an absolute immunity for the defendant.

Can soldiers recover for common law torts?

Footnote 2 in *Chappell* leaves the issue unresolved. The lower courts have uniformly held that there is an absolute intramilitary immunity for common law torts whether negligent or intentional. Whether the Supreme Court would agree is thrown into doubt by its distinction of the intentional tort case of *Wilkes v. Dinsman* as "inapposite because it involved a well-recognized common law cause of action . . . and did not ask the Court to imply a new kind of cause of action. Also, since the time of *Wilkes*, significant changes have been made in establishing a comprehensive system of military justice." If the Court means to say that it would allow common low tort actions, then the curious possibility exists that a military subordinate may be able to bring a tort action arising from the common law against his or her military superior, but not one based on the Constitution. This would reverse the recent pattern by which plaintiffs' attorneys have attempted to translate common law wrongs into constitutional torts to survive government official immunity defenses. It would also call into question the Supreme Court's holding in *Butz* that a constitutionally based claim was of greater significance than a common law

[53] *See* Griffin v. Breckenridge, 403 U.S. 88 (1971).

[54] *Griffin*, 403 U.S. at 99 points out that section 3 of the 1871 Act, the predecessor of 42 U.S.C. § 1985(3)(1976) "provided for military action at the command of the President should massive private lawlessness" make is necessary.

[55] Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

defamation claim. If, however, the Court is serious about the disruption of the military command relationship caused by a law suit, common law torts should be barred as well. The *Wilkes-Dinsman* cases, only recently resurrected after a century's undistinguished repose among the Court's precedents, are no longer good law. Rather than a cryptic note about "significant changes . . . in . . . military justice" since *Wilkes*, the Court should have overruled the qualified immunity portions of the *Wilkes* holdings if not the cases themselves. It is very unlikely that the footnote comment signals a departure from the substantial lower court precedent immunizing service personnel from suit.

What Does *Chappell* Do to Tort Suits by Civilians Against Military Defendants?

The Courts' lack of analysis of the benefits and dangers of the suit against the military defendant also leaves uncertain the future of constitutional tort suits by civilians against members of the military. The probability is that lower courts will find the "special factors counselling hesitation" absent where suit is brought by a civilian. Military officials will therefore still be exposed to constitutional tort suits by the civilian businessment protesting the military's decision to put his business off-limits, the civilian physically abused by military security personnel, the civilian seeking to exercise First Amendment rights on a military installation of the civilian victim of ordinary negligence how chooses to sue the individual military employee not immunized by statute.[56]

Chappell focused on the impact on military discipline and the action of Congress. These factors would weigh differently or be entirely absent in the suit by a civilian. Many civilian suits will clearly not harm discipline in the sense of willing and efficient obedience of the lawful orders of a superior by a subordinate member of the military. Civilians are not in a disciplinary relationship with military commanders. However, it is not hard to imagine litigation in which the civilian plaintiff has been harmed along with military personnel. Racial discrimination may harm both the service member and a spouse or dependent. The military arrest or search and seizure may include both the soldier and a civilian companion. A restriction on speech activities may concern both service persons and their civilian compatriots. In these cases, the award of damages, or even the possibility of suit against the military defendant, may have an impact on the same military disciplinary values that the Court sought to protect. Even if there is no disciplinary impact, courts may wish to consider the impact of litigation generally on the operation of the military. Does litigation divert time from activities that genuinely involve the national security? Does a less than absolute immunity deter military commanders from taking vigorous action to advance their mission?

Congressional actions also argue against a blanket extension of *Chappell* to the civilian-military suit. Remedies under the Uniform Code of Military Justice and the service boards for correction of military records will likely be inapplicable to the civilian plaintiff. Statutory exemptions to the Federal Tort Claims Act may prevent a suit for damages against the United States.[57] In many of the civilian suits the remedy must be damages from the wrongdoer or nothing.

Any decision on the immunity from civilian tort suits must take account of the Supreme Court holding in *Scheuer v. Rhodes* that only a qualified immunity protected the Governor of Ohio and the Commander and subordinates of the Ohio National Guard in litigation directly related to the primary function of a military unit.[58] Unless the Court is willing to set different rules for the United States armed forces and the state military forces, the Court must deal with *Scheuer*.

Lastly, any resolution of the civilian-military issue must remember that the Supreme Court has been unsympathetic to military efforts to intrude on the civilian community. Many civilian tort suits

[56]Two of the significant immunities for government officers and employees created by statute protect vehicle drivers, 28 U.S.C. § 2679 (1976), and military medical personnel, 10 U.S.C. § 1089 (1976). Legislation granting an individual tort immunity for all federal employees for their line of duty torts has been proposed but not passed.

[57]Sec. 28 U.S.C. §§ 2680(a) (discretionary functions); (h) (certain causes of action); (j) (combatant activities); (k) (foreign country claims) (1976).

[58]416 U.S. 232 (1974).

involve just such allegations of military overreaching.

Conclusion

Chappell has resolved the important issue, the enlisted member's right to sue a superior for constitutional torts with clarity and strength. Although issues remain that the Court did not reach, the unanimity of the *Chappell* holding suggests counsel wishing to explore the niches in the Court's holding plays a distinctive long-shot. Nonetheless, it is likely that gamblers will be found to litigate the remaining contours of the intramilitary tort action. The civilian versus miitary constitutional tort suit likely survives. Nonetheless, the recent decisions of the Supreme Court provide the military attorney with several lines of defense. If an attempt to extend *Chappell* to suits by civilians fails, the military defendant should attempt to prove that the specific factual situation is one requiring absolute immunity. *Harlow's* mention of "special functions" involving foreign policy or national defense factors should be cited.[59] A third approach to the same result, expeditious dismissal in favor of the military officer, would be to assert that the matter is nonreviewable by the courts.

The Supreme Court has not ended litigation against military commanders. The Court has, however, reduced some of the impact of tort litigation on the military by upholding the unique nature of the military and its importance in contemporary society.

[59]Tigue v. Swaim, 585 F.2d 909 (8th Cir. 1978), provided an absolute immunity for matters dealing with the evaluation of personnel involved in the nuclear weapons program.

Professional Responsibility Opinion: Cases 82-3, 82-4

*The Judge Advocate General's Professional Responsibility Advisory Committee**

There have been referred to The Judge Advocate General's Advisory Committee on Professional Responsibility separate reports of investigation concerning the trial counsel and the defense counsel in the general court-martial case of *United States v. Logan*.[1] The general problem considered by the court and this committee concerns the actions to be taken by counsel when a principal prosecution witness admits to the trial counsel during the trial that some of the witness' material testimony on cross-examination by the defense counsel was untrue. The trial facts involved here are set forth in the first six paragraphs of the opinion of the Court of Military Review. The committee adopts that statement of facts.[2]

In addition to the facts stated by the court, the committee notes that, on the day following the trial, the trial counsel prepared a memorandum, accurately setting forth what had transpired, to be

*Editorial revision not affecting the substance of the opinion has been made.

[1]14 M.J. 637 (A.C.M.R. 1982).

[2]The court stated the facts as follows:

> The appellant was convicted by a military judge of wrongfully being in an off-limits area, housebreaking, assault with intent to commit rape, and indecent exposure, in violation of Articles 92, 130 and 134, Uniform Code of Military Justice. He pled guilty to the first offense and not guilty to the remainder. He was sentenced to a dishonorable discharge, confinement at hard labor for fourteen months, total forfeitures, and reduction to Private E-1.
>
> The appellant's defense at trial was that the victim had consented to sexual intercourse, but they were interrupted by the return of the victim's roommate. He also testified that they had smoked marijuana together in her room before starting to have sex. On the other hand, the victim, Specialist Hills, testified that the appellant had forcibly entered her room and sexually assaulted her. She also denied smoking marijuana with the appellant and testified that she had never smoked marijuana. The victim's roommate, Private First Class Kell, testified during defense cross-examination that Hills smoked marijuana "quite often" and had smoked it in their room on the evening in question.
>
> Concerned with this inconsistency, the trial counsel discussed it with the victim during a recess during the presentation of the defense case. She admitted to him that she had smoked marijuana but not with the appellant. The trial counsel did nothing to rectify her false testimony. In fact, he perpetuated the false testimony by asking Private Corbett, another roommate, on cross-

considered by his staff judge advocate and the convening authority in their post-trial review and action on the record, respectively. The defense counsel requested that the convening authority order a rehearing. The staff judge advocate advised the convening authority that, in his opinion, the trial counsel was not guilty of a breach of ethics and that a rehearing was not warranted because the question whether the complaining witness had smoked marihuana after the alleged attack—the only question to which it was believed that her perjury pertained was a collateral issue not bearing directly on the question whether the accused had assaulted her, there already was affirmative testimony from an eyewitness that the complainant had smoked marijuana in her room before the incident, and the trial defense counsel evidently had not attached any significance to the matter for he had not sought relief when advised of the perjury during the trial. Evidently acting on this advice, the convening authority did not order a rehearing, and instead approved the findings of guilty and the sentence.

With two judges finding that the complaining witness' perjury was material in view of the posture of evidence in the case,[3] the Court of Military Review set aside the findings and sentence and authorized a rehearing. The third judge disagreed as to the materiality and effect of the false testimony, but concurred in the result reached by the majority because he considered that the trial counsel had exploited the false testimony. For the purposes of this opinion concerning the ethical requirements involved, the committee adopts the view expressed by the panel majority. That is, in a case in which the outcome depended greatly on the relative credibility of the accused and the complaining witness, and the accused contended that they smoked marihuana together in her room before engaging in consensual sexual activity, her admission to counsel that her testimony that she never smoked marihuana in the room at all was false could have an important bearing on the question of credibility.

As for the trial counsel's conduct, three Disciplinary Rules (DR) of the American Bar Association Model Code of Professional Responsibility apply to the situation in which he found himself.[4] The first is DR 7-102(A)(4), which provides that, "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence." Undeniably, the trial counsel did not anticipate his witness' perjury, much less induce it. Nevertheless, he in effect took advantage of it, for, after learning that the witness had lied when she denied smoking marihuana in her room at all, the trial counsel cross-examined one of her roommates testifying as a defense witness, and drew from this roommate testimony that she had never seen the complainant smoke marihuana.

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examination after he knew of the falsehood, whether she had ever seen the victim use marijuana. The answer was "no."

During argument on findings, the defense highlighted the inconsistency regarding the victim's marijuana use by stating:

> Their entire case rests upon the testimony of Specialist Hills. Specialist Hills has come before the court and given testimony that in many ways is questionable. It appears that she has committed perjury on the witness stand as to smoking marihuana. She was asked whether she smoked marihuana and she says no. According to the testimony of PFC Kell, who appears to be quite a creditable [sic] witness, she smoked marihuana just about right after it happened.

The trial counsel argued in support of the testimony of the victim on the point:

> The evidence—the defense has said that Specialist Hills may have committed perjury. The government maintains that it's logical for a person even under oath not to incriminate themself when they're not warned of their rights. *However, you also have the testimony of Private Corbett who says that she's her roommate [and] she's never noticed Specialist Hills indulge in any type of marihuana.* Even if Private Corbett saw her with marihuana after the incident, that would explain maybe why she was calm after the incident. (Emphasis added.)

It was not until the military judge had closed the court for deliberation that the trial counsel informed the defense counsel of Specialist Hill's false testimony. Neither counsel brought it to the attention of the military judge. *Id.* at 638.

[3] *Id.* at 638-39.

[4] The ABA Model Code and certain of the ABA Standards for Criminal Justice have been made applicable to lawyers involved in Army courts-martial proceedings. *See* U.S. Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 Sept. 1982) (a similar provision existed in the 1973 version of the regulation).

That answer, although it may have been entirely truthful, tended to reinforce the testimony counsel already knew was untruthful. In his argument to the trier of fact—military judge in this case), the trial counsel commented on this testimony, but then, possibly attempting to mitigate the effect of the contrary testimony that the complainant had in fact smoked marihuana after the incident, argued that this could explain why she appeared calm after the attack, as several witnesses had observed.

In addition to the duty to refrain from using perjurious testimony, affirmative disclosure obligations were placed upon the prosecutor. Disciplinary Rule 7-103(B) provides:

> A public prosecutor or other government lawyer in criminal litigation shall make *timely* disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Similarly, American Bar Association Standards for Criminal Justice provide that "[i]t is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of evidence which tends to negate the guilt of the accused . . . ."[5]

These rules parallel the disclosure requirements of *Brady v. Maryland*.[6] Evidence that must be disclosed includes evidence affecting the credibility of an important prosecution witness.[7] A defense request for discovery is not necessary to trigger the obligation to disclose.[8]

As previously stated, the present case is one of those in which the estimate of the truthfulness and reliability of the complaining witness may well have determined the issue as to guilt or innocence of the accused.[9] Accordingly, prompt disclosure of the principal government witness' admission that she had testified falsely was required by DR 7-103(B).

The third Disciplinary Rule involved is DR 7-102(B)(2), which provides that a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. This clearly includes perjurious testimony. Similarly, Standard for Criminal Justice 3-5.6 provides that it is unprofessional conduct for a prosecutor to fail to seek withdrawal of testimony once he has learned of its falsity. This, too, includes false evidence bearing on the credibility of a witness.[11]

We conclude that the trial counsel was required to inform both the defense and the military judge of its falsity.

The duty of the defense counsel in the situation presented here is less apparent. Undoubtedly, DR 7-102(B)(2), requiring prompt disclosure of a "fraud upon a tribunal," applies to defense counsel as well as to prosecutors, but uncertainty may stem from the fact that the fraud was that of a prosecution witness and was known to the trial counsel.

Holding that a defense counsel acted properly and did not jeopardize his client's interests by impliedly consenting to another trial upon declaration of a mistrial, one court, without citing DR 7-102(B)(2), has observed:

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[5] ABA Standards for Criminal Justice 3-3.11(a) (2d ed. 1980).

[6] 373 U.S. 83 (1963). *See also* American Bar Foundation, Annotated Code of Professional Responsibility 330-31; ABA Standards for Criminal Justice 3-3.11, commentary at 3.62 (1979).

[7] United States v. Webster, 1 M.J. 216, 219 (C.M.A. 1975); United States v. Brickey, 8 M.J. 757, 760 (A.C.M.R.), *petition granted*, 9 M.J. 394 (C.M.A. 1980).

[8] *Brickey*, 8 M.J. at 760. *Cf.* American Bar Foundation, Annotated Code of Professional Responsibility 330-31 (1979) (even if *Brady* construed narrowly, ethical duty under DR 7-103(B) is broader).

[9] United States v. Logan, 14 M.J. 637, 639 (A.C.M.R. 1982). *See* Calley v. Callaway, 519 F.2d 184, 222 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

[10] *Cf.* DR 7-102(A)(3) (in representation of client, lawyer shall not knowingly fail to disclose that which he or she is required by law to reveal).

[11] ABA Standards for Criminal Justice 3-5.6, commentary at 3.82 (2d ed. 1980) (citing Napue v. Illinois, 360 U.S. 264 (1959)).

> As an officer of the court and lawyer for the defendant, . . . [the defense counsel] had the affirmative duty to notify the trial judge that a witness had recanted his sworn testimony. Probable perjurious testimony must, of course, be immediately reported to the presiding judge in the interests of justice and to preserve the integrity of the judicial process.[12]

This was a case in which a government witness, claiming to have been coerced by the prosecutor, had come first to the defense counsel and recanted his testimony; the prosecutor was unaware of the recantation. Even so, we believe the principle to be applicable here.

Not until the staff judge advocate's review had been prepared and a copy served upon him as required by current law did the defense counsel seek relief for his client from the false testimony given by the complaining witness.[13] He then asked for a rehearing. He asserts that this delay was in the best interests of his client. Regarding it as unlikely that the military judge would have declared a mistrial or reached different findings of guilt, the defense counsel contends that his client's best chance for relief was to seek a rehearing ordered by the convening authority, in which case the sentence, should a conviction again result, would be limited to that imposed at the first trial.[14]

As did the court, cited above, the committee considers that the interests of justice are best served when a known fraud is brought immediately to light so that the court may have an opportunity to take remedial measures in the interest of preserving the integrity of the judicial process. Otherwise, even in a military system that prides itself on the fact-determining powers of its reviewing agencies, an accused's fate might rest too heavily on those who did not see and hear the witnesses or sense the effect of particular testimony. The trial judge must be given the opportunity to conduct a fair trial.[15] Even so, the committee will not presume to substitute its tactical judgment for that of counsel, and we do not overlook the fact that a court-martial's findings are largely inchoate until acted upon by the convening authority, so that the obligation to make a disclosure to the "tribunal" might in some circumstances be satisfied by disclosure to the convening authority. Accordingly, a majority of the committee concludes that the trial defense counsel did not act improperly.

In view of the foregoing, the committee recommends that the trial counsel be reprimanded for making use of the false evidence in violation of DR 7-102(A)(4) rather than disclosing it promptly as required by DR 7-103(B) and DR 7-102(B)(2). Considering all of the circumstances, the committee recommends that this action be taken in a manner analogous to the private reprimand issued by civilian bar disciplinary agencies, for we do not believe the fitness of the trial counsel to practice law is open to question nor should his military standing be jeopardized.

The foregoing opinion has been concurred in by each member of the committee, except that one member believed the trial defense counsel also violated DR 7-102(B)(2) by failing to disclose the perjury to the military judge, and would recommend that the counsel be admonished that purely tactical considerations do not excuse noncompliance.

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[12]United States v. Grosso, 413 F. Supp. 166, 171 (D. Conn. 1976), *vacated and remanded on other grounds*, 552 F. 2d 46 (2d Cir. 1977), *vacated and remanded on other grounds*, 438 U.S. 901 (1978).

[13]*See* United States v. Goode, 1 M.J. 3, 6 (C.M.A. 1975).

[14]Uniform Code of Military Justice, art. 63(b), 10 U.S.C. § 863(b) (1976).

[15]*Cf.* United States v. Parker, 29 C.M.R. 608, 611 (A.B.R. 1960).

HQDA Message—JAGC Officers as Special Assistant U.S. Attorneys

141743Z Jun 83
HQDA/DAJA-LT
For SJA/JA/Legal Counsel
Subject: Effect of Dual Office Act Restrictions

1. On 17 May 1983 the Office of Legal Counsel Department of Justice, advised that the Dual Office Act, 10 U.S.C. 973(B), prohibits regular officers from accepting appointments to or performing the functions of the office of Special Assistant United States Attorney. Since representing the United States in both criminal and civil matters in the U.S. district courts, including the prosecution of minor offenses before U.S. magistrates, is the function of that office, regular officers may not accept appointments to or perform the function of Special Assistant United States Attorney in the future. The Office of Legal Counsel opinion will be applied prospectively only, so the regular commissions of Special Assistant United States Attorneys are not jeopardized. In a 27 May 1983 memorandum the Office of Legal Counsel clarified the 17 May opinion by allowing regular officers presently holding Special Assistant United States Attorney positions to continue to exercise the functions of that office if necessary to prevent substantial harm to the government's interests during a transition period ending on 1 September 1983.

2. Army activities will implement the opinions as follows:

A. Regular Army officers will neither seek nor accept appointments as Special Assistant United States Attorneys.

B. Regular Army officers not presently responsible for Magistrate's Court duties will not be assigned such duties.

C. Magistrate's Court duties and other duties of Regular Army officers which may involve representation of the United States, the Army, or Army officials before U.S. district court judges or magistrates will immediately be transferred to non-regular officers unless transfer will so disrupt the Magistrate Court process that substantial harm to the government's interests would occur. In that event duties should be transferred as soon as possible, but in no case later than 1 September 1983.

D. NLT 24 June 1983, staff judge advocates will provide to HQDA (DAJA-LTD) the names of Regular Army officers who must continue to perform the duties described in para 4 beyond 30 June 1983 to avoid substantial harm to the government's interests. HQDA will take action to terminate the Special Assistant United States Attorney appointments of all other Regular Army officers effective 1 July 1983.

E. Staff judge advocates who supervise Regular Army officers who are performing litigation functions other than prosecution of minor offenses before U.S. magistrates will submit the following to the local United States Attorney concerned:

"In accordance with the memoranda from the Office of Legal Counsel concerning 10 U.S.C. 973(B), dated May 17 and 27, 1983, I request that (name of the officer) be relieved of (his or her) responsibilities in the following cases, subject to a reasonable period of transition to prevent substantial harm to the government's interests in pending litigation. Such a transition should be completed not later than September 1, 1983. In addition, (he or she) may not be assigned any new cases. This will not affect (his or her) availability in pending or future litigation to perform an advisory or 'of counsel' role in pending litigation similar to the customary function of attorneys employed by other agencies who assist the Department of Justice in trial or appellate litigation."

Administrative and Civil Law News

Administrative and Civil Law Division, TJAGSA

Adverse Actions Against Civilian Employees Based Upon Misconduct

Civilian personnel law at installation level continues to become more complex and sophisticated whether or not there is labor union involvement. It is one of the few areas in the military practice of law where the agency enjoys no "in-house review" or buffer, between the action taken at the installation and immediate review of that action by a non-DOD federal agency. The Merit Systems Protection Board (MSPB) is the independent Executive Branch agency designated as appellate authority for serious adverse actions which management may be required to take against its civilian employees.

Although the employee is not afforded a hearing prior to the Army effecting a penalty, there is an immediate right of appeal to the MSPB. This appeal most often is in the form of an adversarial hearing before a Presiding Official of the MSPB in a neutral location designated by the Board. It is during this hearing that management officials, including the deciding official, must verbally support with testimony both the action and the severity of the penalty. Informed lay involvement is indispensable if the management decision is to withstand the appellate process.

In the vast majority of cases, lawyers are not principally involved, nor are they usually the deciding officials. The lay supervisor many times is correctly convinced as to what the ultimate outcome of a given case should be. Occasionally, however, even under the most defensible circumstances, that conviction will not result in successful defense of the case on appeal. It is for the above reasons that supervisors, when making decisions involving loss of civilian time, pay, or position, must remain keenly aware of the issues they must consider and the thought processes involved.

The following information paper was prepared by Ms. Sharon D. Hill, Labor Counselor, III Corps, Fort Hood, Texas. Its purpose is to provide a model for Deciding Officials when taking actions for misconduct against civilian employees. The deliberative process contained in paragraph 4 describes how the Deciding Official's thought process should flow. Supervisory familiarity with this process should greatly assist the labor counselor when called upon to present management's case before the Presiding Official. It is recommended that this information paper be made available to management officials during the adverse action process in order to develop a more defensible record on appeal.

A bibliography on nexus is attached for use by the labor counselor in developing a case on appeal.

Information Paper

1. *Purpose:* To advise Deciding Officials on the legal requirements and procedures used when taking serious adverse actions against civilian employees based on misconduct.

2. *Background:* Discipline of civilian employees may be based on either on-duty or off-duty conduct in certain instances. This discipline may range from an oral admonishment to removal from the federal service. In civilian personnel parlance, a serious adverse action is defined as any punishment in excess of a suspension for fourteen days. When a supervisor has proposed a serious adverse action against a civilian employee, that employee is entitled by statute and regulation to an agency form of administrative due process that includes the right to have the decision in his or her case made by an independent and neutral deciding official and the right to certain procedural processes. This paper is for supervisors and those agency officials who have been designated as deciding officials in proposed actions which involve on or off-duty misconduct.

3. *Procedure:* As a deciding official, you will receive a letter from the Civilian Personnel Officer (CPO) explaining procedural considerations and designating an Employee Relations Specialist to assist you with procedural matters. Additionally, the Employee Relations Specialist will assist you in preparing a memorandum for record of the employee's oral reply when appropriate. Essentially,

the employee has the right to a specified notice period, an oral and written reply to the deciding official, to submit affidavits in support of that reply, and to a written agency decision. The employee is also entitled to be represented during this process by an attorney or other representative of his or her choosing. The employee is not entitled to call witnesses during the oral reply to the deciding official since the employee will later be entitled to a full-scale adversarial hearing on the merits of the adverse action. An employee may elect to waive making any reply or may request an extension of time in which to make the reply. If a reply is waived or is not made prior to the designated suspense, you should proceed to make your decision based upon the written record. If the employee requests an extension of time in which to reply, you as deciding official have the authority to grant or deny the request. You should evaluate the request to determine if there has been a showing of good cause for the delay or if it appears that the employee is merely seeking to buy time. In any case, your decision must be reasonable. Both the CPO and the SJA office can advise you regarding the appropriateness of granting a delay. In the event your decision is to impose a sanction of a fifteen day suspension or more, the employee will be entitled to appeal the decision to a federal administrative agency, the Merit Systems Protection Board. The Board will review the case in terms of harmful procedural error, whether the agency's reasons for the action are supported by a preponderance (greater weight) of the evidence and whether the deciding official followed the appropriate reasoning process in reaching the ultimate decision.

4. *Legal Considerations:* The following information is provided to assist you in making a decision that will be upheld by the Merit Systems Protection Board. As Deciding Official, you may expect to be called as a witness to testify at the Board hearing regarding your decision-making process. Your decisions will be scrutinized by a Presiding Official, who is an attorney, in several areas: are the charges supported by a preponderance of the evidence; is there a rational connection between the charged misconduct and the efficiency of the service; is the penalty imposed appropriate; and does the penalty imposed promote the efficiency of the federal service.

a. *Are the charges supported by a preponderance of the evidence?*

1) What are the specific charges against the employee?

2) Does the record presented to you contain sufficient evidence regarding the charged misconduct? Do you need to make additional inquiries based on the employee's reply?

3) Does the preponderance (greater weight) of all the evidence before you (both in the written record and in the information you may have obtained in addition to the record) indicate that the employee committed the charged acts?

If the greater weight of the evidence indicates that the employee did not commit the act as charged, you should make a finding that the charge is not sustained. You may also make a finding that the charge as specified is not sustained but that a lesser included charge is sustained. You must make a specific finding regarding each charge. In the event that none of the charges are sustained, you would advise the employee of that determination and indicate that your decision is to impose no punishment. If all or some of the charges are sustained, you must make a specific finding that the charge(s) is sustained and then proceed to determine whether the conduct relates to the efficiency of the service.

b. *Is there a rational connection?*

In cases of on-duty misconduct the rational connection between the conduct and the efficiency of the service is usually obvious, as in a case of failure to obey an order. In cases of off-duty misconduct, the rational connection is sometimes not clear. In discussing this rational connection (nexus) the Merit Systems Protection Board has held: "A nexus determination must be based on evidence linking the employee's off-duty efficiency of the service, or in 'certain egregious circumstances,' on a presumption of nexus which may arise from the nature and gravity of the misconduct. In the latter situation, the presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus."

Specific cases have held that there is an automatic presumption of nexus in cases that involve: murder, attempted murder, aggravated assault, threatening another where there is a danger of future violent conduct, shooting and wounding another person, endangering the welfare of a child, child molestation, sexual abuse of a child,* grand theft, serious possession of illegal drugs, a fraudulent claim for educational benefits, failure to pay taxes, conviction for making a false statement in connection with a social security claim, welfare fraud, falsifying government documents, and commission of a notorious misdemeanor.

Your decision regarding the nexus determination should flow essentially as follows:

1) Does the nature and gravity of the charged misconduct raise a presumption of nexus?

2) Is there evidence (in the employee's answer) showing an absence of an adverse effect on service efficiency?

3) If so, is there affirmative evidence in the agency file proving by the greater weight of the evidence that there is a deleterious effect on the efficiency of the service? This effect may be in terms of danger to the public or the workforce, a destruction of the supervisor's trust and confidence in the integrity of the employee, or an undermining of public confidence in the Army or the installation because of the conduct.

If you determine that there is either an unrebutted presumption of nexus or an affirmative showing of nexus in the agency record, there is then sufficient cause to impose discipline against the employee, and as deciding official you move on to determining an appropriate penalty.

c. *Appropriateness of the Penalty.*

As a general proposition, the penalty imposed should be the least onerous penalty that will maintain employee discipline and the efficiency of the agency. Fundamental to this decision are questions such as: Will this penalty correct the conduct? Would any lesser penalty suffice or on the other hand, is the penalty proposed the only viable option available to the agency? In making the decision as to penalty, you should consider factors presented by the agency in aggravation, or those raised by the employee or included in his personnel file that would tend to mitigate the penalty. The Merit Systems Protection Board has held that relevant factors in determining an appropriate penalty include:

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

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

3) The employee's past disciplinary record;

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

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

6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses (CPO will provide data);

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

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

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

10) Potential for the employee's rehabilitation;

11) Mitigating circumstances surrounding the

*In the series of cases involving sexual acts with a minor child MSPB supports a presumption of nexus. However, U.S. Fifth and Ninth Circuit Courts of Appeal have held that the presumption is tenuous and management must affirmatively show that the conduct by the employee undermines public confidence in the agency.

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

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

Once you have weighed these factors and reached a determination as to what penalty is appropriate, the only remaining determination is whether the sanction will promote the efficiency of the service. You must make an affirmative finding that the penalty to be imposed will promote the efficiency of the service.

d. *Notice of Decision:*

The final role of the deciding official is to advise the employee, in writing, of the decision. In order to do this, you should submit a DF to the CPO outlining each of the steps in your decisionmaking process (*i.e.*, which charges are sustained and why, whether there is nexus, what penalty you have decided to impose and why, what factors you considered in determining the penalty and that the penalty is necessary to promote the efficiency of the service. The CPO will then incorporate this information along with an explanation of appeal rights into a letter for your signature to the employee. Both the CPO and SJA offices are available to provide technical advice or to assist you in documenting your decision.

Bibliography

(1) For discussion on nexus see *Merritt v. Department of Justice*, 6 MSPB 493, 509 (1981).

(2) Partial listing of cases upholding a presumption of nexus is as follows:

Byrd v. U.S. Postal Service, MSPB Docket No. NY07528110314 (23 Aug. 82) (attempted murder, aggravated assault, endangering welfare of a child).

Walthen v. United States, 527 F.2d 1191 (Ct. Cl. 1975) (murder).

Backus v. Office of Personnel Management, MSPB Docket Nos. AT07528210868 and AT07528211176 (14 Feb. 83) (aggravated assault, shooting another).

Jones v. Government Printing Office, MSPB Docket No. DC07528110681 (27 Sept. 82) (murder of common law husband).

Abrams v. Department of the Navy, MSPB Docket No. PH07528110312 (21 July 82) (shooting and wounding another).

Broadnax v. U.S. Postal Service, MSPB Docket No. SF75299050 (9 Feb. 82) (threat with danger of future violent conduct).

Johnson v. United States, 628 F.2d 187 (D.C. Cir. 1980) (conduct resulting in loss of or clear danger to human life).

Parrish v. U.S. Postal Service, MSPB Docket No. AT07528110055 (16 July 82) (grand theft).

Gordon v. Government Printing Office, MSPB Docket No. DC075209027 (4 Jan. 82) (fraudulent claim for educational benefits).

Davis v. Department of the Treasury, MSPB Docket No. NY075209075 (2 Oct. 81) (failure to pay taxes).

Gallagher v. U.S. Postal Service, MSPB Docket No. 6 MSPB 482 (1981) (conviction for making false statement in connection with social security claim).

Gamble v. U.S. Postal Service, MSPB Docket No. 6 MSPB 487 (1981) (welfare fraud, falsification of government documents).

Yaccavone v. Bolger, No. 79-1043 (D.C. Cir. 29 Feb. 1981) (notorious misdemeanor).

Stalens v. National Security Agency, 678 F.2d 482 (4th Cir. 1982); *Doe v. National Security Agency*, MSPB Docket No. PH075209076 (8 June 1981) (sexual acts with a minor child).

Bonet v. U.S. Postal Service, 661 F.2d 1071 (5th Cir. 1981) (sexual acts with minor child) NOTE: This case held that presumption of nexus is not enough; the agency must prove that the conduct undermines public confidence in the agency. Several recent cases in other circuits disagree with this decision. Whether the new Federal Circuit will uphold *Bonet* is debatable,

but for the moment it still controls within the Fifth Circuit.

D.E., Petitioner v. Department of the Navy, No. 82-7332 (9th Cir. 7 June 1983); 21 G.E.R.R. 1377, 27 Jun. 1983. This case seems to agree with *Bonet* in that management was required to support nexus with facts and not depend on a presumption.

Cooper v. United States, 639 F.2d 727 (Ct. Cl. 1980) (sexual abuse).

Evans v. Department of the Navy, MSPB Docket No. SF0752801001 (11 May 82) (child molestation).

Borsari v. Federal Aviation Administration, MSPB Docket No. NY 075209163 (24 Jan. 82) (possession of illegal drugs) NOTE: nexus hinged on employee's position.

(3) The leading case on appropriateness of penalty is *Douglas v. Veteran's Administration*, MSPB Docket No. AT075299006 (10 Apr. 81).

Legal Assistance Items

Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Major Charles W. Hemingway
Administrative and Civil Law Division, TJAGSA

Nonsupport

The following item was submitted by Captain Danny R. Ross of the Office of the Staff Judge Advocate, Fort Sam Houston, Texas concerning the local implementation of the new federal nonsupport legislation:

Legal assistance offices throughout the world have encountered constant problems in dealing with nonsupport cases. On 1 October 1982, new federal support legislation became effective (42 USC § 663 (1982)). It establishes an involuntary allotment from the pay of active duty service members for the collection of child and spousal support when the service member is two or more months in arrears. This statute will act as positive incentive for service members to honor their support obligations. However, the problem arrives when the new law is sought to be locally implemented.

At Fort Sam Houston, the legal assistance office, Texas Department of Human Resources, and district court judges initiated a streamlined process whereby military nonsupport cases could be walked through to local Bexar County child enforcement and district court offices. In cases where military dependents were receiving state aid, the Texas Department of Human Resources would issue a notice to U.S. Army Finance and Accounting Center to recover any amounts owed as child or child and spousal support (figure 1). However, in cases where no state aid has been received, a more direct method would apply.

The Bexar County Child Support Office maintains the records of all support payments finalized in its jurisdiction. Upon receipt of forms maintained at the staff judge advocate office, the complaining parent would seek verification of the delinquency from the Child Support Office (*see* figure 2). At this point, they would obtain a certified copy of their divorce decree. After obtaining these documents, they proceed to the presiding district court judge and are issued an involuntary support request (*see* figure 2). Lastly, as a final inclosure, the request for payments to the specifically named custodian is addressed to the Commander, USAFAC, for processing.

In a number of cases, there have not been support payments through a state support agency. This particular situation requires an affidavit from the custodian of the children. The verification of this affidavit through court documents would be essential to establishing delinquency of the service member.

This process can be accomplished with little difficulty and no cost to the dependents of the service member. Hopefully, the inclosed forms will assist legal assistance officers prepare forms to help their clients.

Texas Department of Human Resources

P. O. Box 37120 San Antonio, Texas 78237

COMMISSIONER
Marlin W. Johnston

BOARD MEMBERS
FREDERICK C. REHFELDT, M.D.
Chairman, Millsap
RAUL JIMENEZ
San Antonio
JAMES C. CONNER
Marshall

Re: Non Support of Dependents

Service Member
SSN:

To:

Dear Sir:

The Texas Department of Human Resources, Child Support Enforcement Division, the agency designated as the Child Support Enforcement Agency for the State of Texas under IV-D of the Social Security Act, requests that you initiate an involuntary support allotment against the above named Service Member.

The above named Service Member is currently more that two months behind on his/her court ordered child support payments.

The amount of arrears owed is $

The Court Order (a copy of which is attached) requires the above named Service Member to pay $ per month in child support and to pay $ per month on arrearages owed.

We request that this amount be paid to the Texas Department of Human Resources, through the Bexar County Child Support Office, P. O. Box 7546, San Antonio, Texas 78285, through your involuntary allotment program pursuant to P.L. 97-248.

Your prompt reply will be appreciated.

Sincerely,

_____

Attorney for
Texas Department of Human Resources

enclosures

Figure 1

An Equal Opportunity Employer

NOTICE OF DELINQUENCY AND REQUEST

FOR INVOLUNTARY ALLOTMENT

PART A

I _____, an official of the Bexar County Child Support Office, do hereby certify that _____ SSN _____, is more than the equivalent of two months behind in his/her court ordered child support payments and that in accordance with the records of the Child Support Office the arrearages owed as of this date are $_____.

_____ _____

Date Bexar County Child Support Division

PART B

I _____, Presiding Civil District Judge for Bexar County, Texas, do hereby certify that the above named Service Member is more than the two months behind in his/her court ordered child support payments.

The Court Order for support (a copy of which is attached) requires the above named Service Member to pay $_____ per _____ in child support and to pay $_____ per _____ on arrearages of $_____.

I hereby request that this amount and a payment for the arrears be paid to _____ through the Bexar County Child Support Division, P.O. Box 7546, San Antonio, Texas 78285, through your involuntary allotment program.

_____ _____

Date Presiding Civil District Judge

Figure 2

Re: Non Support of Dependents

_____

_____

Service Member _____

SSN _____

TO:

Dear Sir:

I _____, the mother (or Managing Conservator) of the above named children, request that you initiate an involuntary support allotment against the above named Service Member. The above named Service Member is more than two months behind on his/her child support payments.

Enclosed is a copy of the underlying Support Order, any Order stating arrears (if applicable) and a statement from the Bexar County Child Support Office and the Presiding Judge, Bexar County Civil District Courts requesting such action.

Your help is appreciated.

Sincerely,

Name _____

Address _____

City _____ State _____, Zip Code _____

Figure 3

"Office" Memberships in State and Local Bar Associations

Staff judge advocates and chiefs of legal assistance offices at CONUS installations should be aware of a provision in the Army Community Relations Regulation, AR 360-61, which permits the use of appropriated funds to purchase "agency" memberships in professional organizations such as state and local bar associations.

Although 5 U.S.C. § 5946 (1976) prohibits the use of appropriated funds to pay for individual memberships in such organizations, paragraph 5-2d, AR 360-61, points out that this prohibition does not apply to memberships in professional organizations in the name of the agency. The conditions are that the membership must directly benefit the agency and be necessary for mission accomplishment. Membership in the local bar is particularly desirable for legal assistance attorneys since they are routinely called upon to counsel military clients on legal matters peculiar to the local jurisdiction, particularly in areas relating to landlord-tenant law, marriage and divorce, adoption, and consumer law. Further, such memberships would insure that the legal assistance office is apprised of continuing legal education course, practice skills courses, and current development courses in these and other areas of law.

Even if local bar membership cannot be accomplished, all legal assistance attorneys are encouraged to attend local bar meetings and continuing legal education courses. These courses are often less expensive than commercial continuing legal education courses, involve less time out of the office for legal assistance attorneys, are generally of great topical interest to the day-to-day practice of a military legal assistance attorney, and complement the legal assistance courses offered at The Judge Advocate General's School. Additionally, some state bar associations offer practice manuals, form books, deskbooks, and other publications which can be purchased to develop an effective local legal assistance library.

A request for appropriated funds for a state or local bar association membership should indicate that the membership is for the benefit of the office rather than any particular individual, state why the membership is necessary to carry out the legal assistance mission, and contain an administrative approval signed by the installation commander. This will insure that the request meets guidelines established by the Comptroller General for use of appropriated funds for such purposes. These guidelines are discussed in In the Matter of: Payment of Agency's Membership Fees in Private Organization, 61 Comp. Gen. 542 (1982).

The particular state or local bar association should also be consulted to determine if such a membership is possible. Some states, such as Oklahoma, have integrated bar associations in which only individuals qualify for membership.

An "office" membership in a state or local bar association can be an effective method for increasing the liaison between military attorneys and local civilian practitioners and the effectiveness of legal assistance officers.

Judiciary Notes

US Army Legal Services Agency

Trial Counsel Assistance Program

To improve the performance of trial counsel in courts-martial, The Judge Advocate General authorized establishment of the Trial Counsel Assistance Program (TCAP) in August 1982. The program has now been in existence for a year. Since its establishment, TCAP has held regional seminars for trial counsel at Forts Hood, Belvoir, Gordon, Ord, Leavenworth, and Bragg, as well as in Korea and Hawaii. Seminars are scheduled for Fort Meade (17-18 August) and Fort Lewis (22-23 September), and for Korea and USAREUR during the remainder of FY 1983. Thirteen seminars are being planned for FY 1984. A monthly newsletter, the *Trial Counsel Forum*, provides the latest law, lessons learned, and successful advocacy techniques to all Army trial counsel. Records of trial are being reviewed by TCAP for lessons to be learned and shared. A telephone assistance sys-

tem, averaging over one-hundred calls per month, enables trial counsel worldwide to seek the advice of TCAP's five experienced criminal lawyers and one senior NCO. Through this telephone assistance service, TCAP deals with the day-to-day problems encountered by trial counsel and is able to provide quick advice, research, copies of new cases, and case citations in response to these problems. The autovon number for this service is 289-1804.

The program has been well-received. Based on results of an initial survey, TCAP is providing a valuable service by enhancing the skill and efficiency of Army prosecutors.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

National Guard Judge Advocates in the Reserve Judge Advocate Legal Assistance Advisory Committee

National Guard judge advocates are eligible to participate in the Reserve Judge Advocate Legal Assistance Advisory Committee. While National Guard judge advocates cannot earn retirement points under the program, these officers have made important contributions to legal assistance in the past and their advice and input in implementing the program is welcome.

In Memorium—Major General Charles L. Decker

Major General Charles L. Decker, former The Judge Advocate General of the Army and Commandant of The Judge Advocate General's School, died of a heart ailment at Georgetown University Hospital on 8 June 1983.

Born in Kansas in 1906, General Decker attended the University of Kansas and received his commission from the United States Military Academy in 1931. He attained his law degree in 1942 from Georgetown University and subsequently received advanced degrees from St. Edward's University and the John Marshall Law School.

General Decker served as a judge advocate at all levels of command. He was the Staff Judge Advocate of XIII Corps throughout its campaigns in the European Theater. General Decker was instrumental in founding The Judge Advocate General's School in Charlottesville, Virginia and served there as its first Commandant from 1951 to 1955. As Commandant, General Decker established a separate teaching division for administrative and civil law subjects. In his honor, the School in 1977 established the Charles L. Decker Chair of Administrative and Civil Law.

General Decker served as the Assistant Judge Advocate General for Military Justice and, from 1961 to his retirement from active duty in 1963, as The Judge Advocate General of the Army.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major Walt Cybart

1. The officers and enlisted members of the Judge Advocate General's Corps owe a great debt of gratitude to Sergeant Major John Nolan, who passed on the reins of OTJAG Senior Staff NCO to myself on 15 June 1983. During his tenure in the position, Sergeant Major Nolan's insight, dedication, and hard work enhanced the mutual respect and understanding between all members of the Corps. The Corps wishes him continued success in the future.

2. The announcement of my selection was

published in the May 1983 issue of *The Army Lawyer*. Since then, numerous requests have been received from the field for background data. The following information is therefore provided: I entered active duty in June 1957 and served in the Infantry, Ordinance, and Air Defense Artillery branches before earning a 71D in July 1969. My duty stations have included Korea, Germany, Vietnam, Hawaii, Fort Bragg, Fort Lewis, Fort Bliss, and Fort Sill.

3. As Sergeant Major Nolan's replacement, I, too, am dedicated to the betterment of the Corps and the Army. Suggestions concerning the best way to achieve the goal of a stronger JAGC are solicited.

CLE News

1. 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.

2. Resident Course Quotas

Attendance at resident CLE courses conducted in 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 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286, FTS: 938-1304).

3. TJAGSA CLE Course Schedule

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-F42).

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 Course.

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).

4. Civilian Sponsored CLE Courses

November

11/83: NCDA, Investigation and Prosecution—The Prosecutor's Dual Role, San Francisco, CA.

11/83: NCDA, Trial Advocacy for Prosecutors, West Palm Beach, FL.

3-4: PLI, Estate Planning Institute, Chicago, IL.

4: UMCCLE, A Circuit Court Trial, Columbia, MO.

4-5: CLEW, 1983 CLEW Tax Workshop, Madison, WI.

4-5: ABA, Employee Dishonesty, New Orleans, LA.

6-18: NJC, Non-Lawyer Judge—General, Reno, NV.

6-18: NJC, Special Court Jurisdiction—General, Reno, NV.

6-11: NJC, Admin. Law: Fair Hearing—General, Reno, NV.

6-11: NJC, Alcohol and Drugs—Specialty, Reno, NV.

7-11: UDCL, Government Contracts, Washington, DC.

7-11: AAJE, Law & Psychiatry, Alexandria, VA.

8-11: IED, Advanced Contracts, Denver, CO.

10-11: PLI, Institute on International Taxation, New York, NY.

10-12: PLI, Institute on Securities Regulation, New York, NY.

11-13: NCCD, Advanced Cross-Exam, Miami, FL.

11-12: CLEW, 1983 CLEW Tax Workshop, Green Bay, WI.

11-12: NCLE, Banking Law, Lincoln, NE.

13-18: NJC, Court Management—Managing Delay—Specialty, Reno, NV.

14-15: PLI, Title Insurance, Chicago, IL.

15-18: TOURO, Fundamentals of Government Contracting, Washington, DC.

17-18: PLI, Communications Law 1983, New York, NY.

17-18: PLI, Computer Law Institute, New York, NY.

17-18: PLI, Copyright Infringement, New York, NY.

17-18: PLI, Federal Civil Practice—1983, San Francisco, CA.

18-19: LSU, Recent Developments in Legislation & Jurisprudence, New Orleans, LA.

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 of 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.

Biweekly and cumulative indices are provided users. Commencing in 1983, however, these in-

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

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B071083	Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-83-1
AD B071084	Criminal Law, Procedure, Trial/JAGS-ADC-83-2
AD B071085	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-3
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
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

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

Current Material of Interest

2. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 55-46	Travel and Transportation: Travel of Dependents and Accompanied Military and Civilian Personnel to, from, or Between Overseas Areas (OCONDS to CONUS)	104	4 May 83
AR 135-18	Army National Guard and Army Reserve—Active Duty in Support of the Army National Guard of the U.S. and The United States Army Reserve.		15 May 83
AR 135-178	Separation of Enlisted Personnel	1	1 May 83
AR 140-10	Army Reserve (Assignments, Attachments, Details and Transfers)		1 May 83
AR 210-51	Installations Army Housing Referral Service Program. AR 210-51 S/S AR 600-18, 1 Jan 79 (Equal Opportunity in Off-Post Housing)		1 Jun 83
AR 340-21-1	Army Privacy Program—System Notices and Exemption Rules for Office Housekeeping Functions.		83
AR 340-21-4	Army Privacy Program—System Notices and Exemption Rules for Legal and Information Functions.		83
AR 601-208	Personnel Procurement: Recruiting/Reenlistment Advertising Program (AR 601-208, 15 May 83 S/S AR 601-208 15 May 73).		15 May 83

AR 608-1	Personnel Affairs: Army Community Service Program (AR 608-1, 15 May 83 S/S AR 608-1, 1 Oct 78, and AR 608-17, 31 Mar 77).		15 May 83
AR 735-11	Accounting for Lost, Damaged, or Destroyed Property	103	15 Apr 83
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