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Editor

Captain David R. Getz

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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform*

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

REPLY TO
ATTENTION OF

DAJA-ZA

8 April 1987

SUBJECT: The Judge Advocate General's Award for Excellence in Legal Assistance

COMMAND AND STAFF JUDGE ADVOCATES

1. The 1986 competition for The Judge Advocate General's Award for Excellence in Legal Assistance showed proactive commands commit more assets to legal assistance in pursuit of new and innovative programs to benefit soldiers and their families. Six small offices and 16 large offices entered the competition, which XVIII Airborne Corps and SETAF won. All had programs that serve as examples for the rest of the Army and are to be commended.

2. Notable accomplishments of the competitors include:

- An in-court representation program (Ft Bragg).
- An alternative disputes resolution program for disputes in family housing areas (Ft Hood).
- A Legal Assistance Council with area Legal Assistance Offices (Ft Bragg).
- A "legal sponsor" program for incoming families (Ft Stewart).
- Programs to provide premobilization assistance to United States Army Reserve and National Guard units (Fts Detrick, Knox, Leonard Wood, Ritchie, Rucker).
- A pro se program in foreign courts (Japan, Berlin).
- A legal assistance pamphlet addressing local problems (SETAF, 21st SUPCOM).
- A one-stop will service (82d Abn Div).

3. In the near future, the legal assistance section of The Army Lawyer will publish more information concerning these and other successful programs.

4. I applaud the progress made so far and encourage all command and staff judge advocates to look for more ways to improve our services in this important area. Next year, I would like to see a much greater number of applicants for the legal assistance award.

Hugh Overholt

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

Teaching the Law of War

W. Hays Parks*

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Ethics and morality have been in the news of late,¹ and it is difficult to resist the temptation to discuss some of the current issues and their potential application to the military. Similarly, as a lawyer, there are any number of topics I would like to explore with you—such as defining the moral and legal concept of proportionality—that must await another time and place.

The opportunity to participate in this important conference was afforded me by the following paragraph in this year's Call for Papers:

One of our members has expressed concern about a recently published view that little or no instruction is provided in any of the services on the law of war. . . . If any of our members is able to provide an empirically-based paper on the present state of teaching the law of war, that would be an important contribution.

Given that the armed forces of the United States enjoy an international reputation for having one of the best law of war programs; that military officers from other nations annually examine the U.S. military law of war program with a hope for replicating it within their armed forces; and that U.S. military personnel traditionally exercise leadership at international conferences on law of war training because of their considerable experience, I must express concern regarding the critic's sources, knowledge of the program as it exists today, and his possible motives. The facts recently reported to the International Committee of the Red Cross (ICRC) are clearly to the contrary.² In elaborating on the report to the ICRC, I intend to address the traditional who, what, where, when, why, and how of law of war training in the United States military, as it directly pertains to the topic selected for JSCOPE IX. My emphasis on the law of war programs of the Army and Marine Corps is not intended to slight the excellent programs of the Navy and Air Force,

but rather to focus on those programs with which I have the greatest experience.

The law of war³ as we know it today probably had its origins in the post-World War II trials of Germany and Japanese war criminals. While substantial elements of the modern law of war existed prior to World War II, the massive suffering of total war provided the impetus for clarification and codification of the law. The war crimes trials at Nuremberg, Tokyo, and other sites established clearly the individual criminal responsibility of military men who violate the law of war. The four 1949 Geneva Conventions for the Protection of War Victims⁴ expanded the codified law of war beyond protection just for wounded and captured soldiers to military personnel wounded or shipwrecked at sea, and to certain segments of the civilian population.

Ethics, morality, and the law often are described as strange bedfellows, perhaps incongruous if not contradictory; some also suggest that "law of war" is a contradiction in terms. I disagree with both propositions.

Nuremberg was based on ethical standards transposed to positive legal norms; the tribunals frequently used "moral," "ethical," and "legal" interchangeably, although there are distinctions. The law of war is the vehicle by which nations have taken ethical concepts and applied them in concrete terms in the most demanding environment—mortal combat. Much of the law of war is based on the Just War tradition. Some parts remain elusive of definition or codification, while other parts have been expressly rejected. Thus there remains no agreed international definition for the concept of proportionality, while the four 1949 Geneva Conventions require application of their terms regardless of the justness of one's cause.⁵

The law of war reflects an attempt by nations to establish certain minimum standards of conduct by parties to armed

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¹ See, e.g., William J. Bennett, *A Cry for Sound Moral Education*, *Insight*, Dec. 29, 1986, at 61; Kilborn, *Insider Scandal Stirs Ethics Debate*, *N.Y. Times*, Nov. 28, 1986, at D1; Lamm, *From Ivy-Covered Walls, Ethical Illiterates*, *International Herald-Tribune*, Oct. 25, 1986, at 5.

² XXV International Conference of the Red Cross, *Respect for International Humanitarian Law: Dissemination of International Humanitarian Law and the Principles and Ideals of the Red Cross (C.1/2.4/3)* 179-81 (Geneva, Oct. 1986). A copy of this report is at Appendix A.

³ The Department of Defense, Joint Chiefs of Staff, Army, and Marine Corps utilize the traditional term "law of war"; the Navy and Air Force prefer the "law of armed conflict." The terms are regarded as synonymous, and are defined as "that part of international law that regulates the conduct of armed hostilities." Joint Chiefs of Staff Publication 1, *Dictionary of Military and Associated Terms* (Jan. 1, 1986).

⁴ The 1949 treaties are the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 6 U.S.T. 3219, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3517, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The Conventions are reprinted in Dep't of Army, Pam. No. 27-1, *Treaties Governing Land Warfare* (7 Dec. 1956).

⁵ Common article 1 to the four 1949 Geneva Conventions states that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." At the 1974-1977 Diplomatic Conference that negotiated the two 1977 Protocols Additional to the Geneva Conventions of 1949, the Socialist bloc adamantly refused to accept any codification of the concept of proportionality. Although a standard was adopted that resembles the concept (without identifying it as such), it is fundamentally flawed and would be constitutionally void for vagueness in its present form. Its negotiation illustrates the difficulty of applying general moral concepts to specific combat situations under all circumstances. Because of this and other substantial military, political, and humanitarian concerns with the highly-politicized language of Additional Protocol I, the decision has been made to forward only Additional Protocol II to the United States Senate for its advice and consent to ratification. For a discussion of the interrelationship between ethics and the law of war, see G. Best, *Humanity in Warfare* (1980); W. O'Brien, *The Conduct of Just and Limited War* (1981).

conflict that will ameliorate the suffering of the innocent. As with all law, it is highly dependent on good faith by all concerned; at its best, it will not prevent all suffering. As Clausewitz warned, there is no way that war can be made "nice."⁶ We have learned at considerable expense that when a nation endeavors to make war "nice," or accepts limitations on the use of force beyond those required by law of war treaties, it does so at its peril. A less-moral nation will take advantage of its opponent's constraint, often to the detriment of the civilian population in the battle zone (as well as the military of the nation fighting with restraint). We were made painfully aware of this in the Vietnam War.⁷ At the same time, failure to have a viable law of war program can be seen as a direct cause of incidents such as the My Lai massacre.⁸

After the Vietnam War, the U.S. military revised its law of war program. A Department of Defense (DOD) directive was promulgated, which provides that each individual will receive law of war training "commensurate with his or her duties and responsibilities."⁹ This program is based on our treaty obligations¹⁰ and the constitutional premise that these treaties are part of the law of the land.¹¹ Each member of the United States military takes an oath upon entering the armed forces to discharge his or her duties in accordance with the laws of the United States, including the law of war.

But no program can survive simply because "it's the law," and the Vietnam-era law of war programs suffered

demonstrably because they endeavored to stand solely on the basis that certain conduct was expected on the battlefield "because the law says so." In 1968, the Chief of Staff of the Army wrote the Commander, Military Assistance Command, Vietnam (MACV), noting his displeasure regarding recurring reports of mistreatment of prisoners of war. In response, the deputy commander, MACV, suggested that one reason was that judge advocate-taught instruction in the law of war "has tended to be abstract and academic, rather than concrete and practical."¹²

Today's law of war programs emphasize the military and political reasons for respect for the law of war. Four basic assumptions form the foundation for the U.S. military program: discipline in combat is essential; violations of the law of war detract from a commander's accomplishment of his mission; violations of the law of war frequently lead to a loss of public support (domestic and international) for the war effort; and violations of the law of war may arouse an enemy to greater resistance, leading to increased friendly casualties.

Similarly, the law of war is viewed as one of a number of control measures used by the battlefield commander to assist him in the efficient employment of his forces.¹³ In comparing the definition of the law of war concept of military necessity, which authorizes "such destruction, and only such destruction, as is necessary, relevant, and proportionate to the prompt realization of legitimate military

⁶ Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed; war is such a dangerous business that the mistakes which come from kindness are the very worst.

Carl von Clausewitz, *On War* 75 (M. Howard & P. Paret 1976).

⁷ During the 1965-1968 Rolling Thunder air campaign over North Vietnam, Secretary of Defense Robert S. McNamara elected to deny the military the authority to attack legitimate targets in populated areas, and authorized the attack of other targets only where collateral civilian casualties could be held to an absolute minimum. In some cases he directed attack parameters that placed U.S. aircraft and aircrews at greater risk in order to hold down collateral civilian casualties. The North Vietnamese responded by placing all war materials and military units and positions within populated areas and arming the civilian population to create small arms barrages to defeat low-flying U.S. aircraft. Exploitation of the civilian population was so substantial that the ICRC warned the North Vietnamese government that such continued action could subject the entire population of North Vietnam to legitimate attack. For a law of war analysis of the bombing of North Vietnam, see Parks, *Linebacker and the Law of War*, Air U. Rev., Jan.-Feb. 1983, at 2; Parks, *Rolling Thunder and the Law of War*, Air U. Rev., Jan.-Feb. 1982, at 2.

⁸ See G. Lewy, *American in Vietnam*, 366-69 (1978); U.S. Dep't of Army, Report on the Department of the Army Review of the Preliminary Investigations Into the My Lai Incident (1970). Failure of law and war training was a common factor in most Vietnam-era incidents. See Parks, *Crimes in Hostilities* (pts. 1 and 2), *Marine Corps Gazette*, Aug. 1976, at 16, *Marine Corps Gazette*, Sept. 1976, at 33.

⁹ Dep't of Defense Directive No. 5100.7, DOD Law of War Program (July 10, 1979). Service directives implementing the DOD directive are: Dep't of Army, Reg. No. 350-216 (7 Mar. 1975); Dep't of Air Force, Reg. No. 110-32 (2 Aug. 1976); Secretary of the Navy Instruction 3300.1A (2 May 1980); OPNAVINST 3300.52 (18 Mar. 1983); and Marine Corps Order 3300.3 (2 Aug. 1984). In a related program, Dep't of Defense Instruction No. 5500.15, Review of Weapons for Legality Under International Law (Oct. 16, 1972) requires the review of all new weapons to ensure U.S. compliance with its law of war obligations. This directive was the first of its type anywhere in the world.

¹⁰ Article 1 of Hague Convention IV of 1907 provides that "The Contracting Parties shall issue instructions to their armed forces which shall be in conformity with the regulations respecting the laws and customs of war on land." The four Geneva Conventions of 1949 each contain a common article stating that The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present convention[s] as widely as possible in their countries and, in particular, to include the study thereof in their programs of military instruction and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to their entire population.

While there has been law of war instruction in the United States military for most of this century, no instruction is offered in the civilian sector, although other nations (such as Australia and Canada) have such programs. The responsible agency, the American National Red Cross, has been less than enthusiastic in its support of a program for civilian dissemination. This creates a problem in that the first and only exposure the average citizen has to the law of war is in the military service. Changing views on the relevance of ethics or morality on the battlefield in a brief lecture on the law of war is challenging, at the least.

¹¹ U.S. Const. art. VI.

¹² G. Lewy, *supra* note 8, at 367.

¹³ Others include the principles of war, military doctrine, rules of engagement, commander's instructions, leadership principles, target acquisition methods, communications procedures, and fire support coordination methods. Although this presentation concentrates on the law of war program, military ethics is also discussed in various leadership classes or courses taught within the military.

objectives,"¹⁴ to a definition of the principle of war of economy of force,¹⁵ their common goal is clear: the efficient, discriminate use of force against legitimate targets. Each also coincides with the less-specific concepts of Just War and/or contemporary military ethics.

Each military service has developed its law of war training program in accordance with its mission, and the realities of training time, of which there is never enough for the myriad demands upon a unit's or individual's time. The previously-stated DOD standard ("commensurate with . . . duties and responsibilities") is one of relevancy. A sailor "shoveling steam" in the engine room of a ship needs to know far less of the law of war than a rifleman of equivalent grade in the Army or Marine Corps; that rifleman needs to know far less than his battalion commander; a division or wing commander can look to his special staff (including his staff judge advocate) for expertise on law of war matters. In the competition for training time, law of war training is not keyed to *nice to know*, but to *need to know* in order to meet the DOD standard.

The Marine Corps Law of War Program establishes three levels of training. The Army also recognizes these and gears training to them.

Level A. The minimum level of understanding of the law of war required of all Marines and soldiers to be received principally during accession training.

Level B. The levels of understanding necessary for personnel whose military specialty or assignment involves tactical planning or direct confrontation with the enemy, commensurate with their grade and responsibility.

Level C. The level of understanding necessary for judge advocates whose military assignment entails advisory responsibility to tactical commands.

At the lowest level, every individual entering the Marine Corps and the Army (enlisted and officer) receives instruction on the law of war. The Marine Corps' instruction centers on nine basic principles.¹⁶ There is a draft program moving towards adoption of these principles in the Army as well. The principles are:

1. Fight only enemy combatants.
2. Do not harm enemy soldiers who surrender. Disarm them and turn them over to your superior.

3. Do not kill or torture prisoners.
4. Collect and care for the wounded, whether friend or foe.
5. Do not attack medical personnel, facilities, or equipment.
6. Destroy no more than the mission requires.
7. Treat all civilians humanely.
8. Do not steal. Respect private property and possessions.
9. Do your best to prevent violation of the law of war. Report all violations of the law of war to your superior.

There are sound military reasons behind each of these principles in addition to any moral or legal obligation and, like it or not, there is greater likelihood for respect for these principles if they are explained in military terms rather than solely from a moral or legal standpoint. For example, in instructing the individual soldier or Marine not to kill or torture prisoners of war, recognition of their intelligence potential carries greater weight than moral or legal values, which often are viewed as abstract and of questionable relevancy in the heat of battle. (It must be emphasized that tactical rationale is being used to support legal principles; our service men and women are taught that these principles are absolute and may not be waived when convenient.) Similarly, a lack of humane treatment may induce an enemy to fight to the death rather than surrender, thereby leading to increased friendly casualties. The instruction is candid, however, in admitting that humane treatment of enemy prisoners of war will not guarantee equal treatment for our captured servicemen, as we learned in World War II, Korea, and Vietnam; but it is emphasized that inhumane treatment will most assuredly lead to equivalent actions by the enemy.¹⁷

Likewise, the admonition to "treat all civilians humanely" recognizes the need for a disciplined military force on the battlefield; a crime against a civilian on the battlefield is as much (and perhaps more) a detriment to unit discipline and integrity as one committed in Fayetteville, North Carolina, or Oceanside, California, by a member of the military. Mistreatment can alienate the civilian population.¹⁸ Abuses have a negative effect on public opinion, as evidenced by

¹⁴ M. MacDougal & F. Feliciano, *Law and Minimum World Public Order* 72 (1961).

¹⁵ Air Force Manual 1-1, *Functions and Basic Doctrine of the United States Air Force*, at 5-5 (1979), defines "economy of force" to mean that "no more—or less—effort should be devoted to a task than is necessary to achieve the objective. . . . This phrase implies the correct selection and use of weapon systems, maximum productivity from available flying effort, and careful balance in the allocation of tasks." While this is neither the traditional nor current definition of "economy of force," its emphasis on the judicious use of limited assets in the target-rich atmosphere of the modern battlefield shows the consistency with law of war principles urging discrimination in the use of firepower.

¹⁶ Headquarters, U.S. Marine Corps, *The U.S. Marine—Essential Subjects*, at 1-27 (Marine Corps Order P1550.14D, 1983). This publication is distributed to every recruit upon entry into the Marine Corps, and is the foundation for his or her formal education as a Marine.

¹⁷ Such inhuman treatment happened in the brief flurry of shackling and countershackling of Canadian and German prisoners of war following the Dieppe raid. In contrast, German treatment of U.S. and British Commonwealth prisoners of war in World War II, while usually harsh and often brutal, was far better than that of Soviet soldiers for this reason.

¹⁸ Nazi abuse made the Soviet population, previously friendly and receptive, hostile. See A. Dallin, *German Rule in Russia, 1941-1945: A Study of Occupation Politics* (1957). Here, however, is where a distinction must be made between a moral democracy and an amoral totalitarian state. While Mao Tse-Tung emphasized the need to respect the civilian population, it was clear that what could not be gained through kindness would be achieved through intimidation. The Viet Cong assassination policy in South Vietnam, Soviet attacks on the civilian population in Afghanistan, the recent program by the Marxist People's Revolutionary Army factions of the Farabundo Marti National Liberation Front in El Salvador of assassinating democratically-elected mayors, and a similar assassination policy by the Maoist Shining Path guerrilla movement in Peru, indicate clearly that not all men accept the same moral/legal standards.

public reaction to the My Lai massacre.¹⁹ But the instruction is given a common sense perspective in that it is acknowledged that civilians assume a certain degree of risk if they remain on the battlefield, or in proximity to legitimate military targets, or participate in activities that directly support the war effort of the enemy.

To reach personnel at intermediate levels, the Army and Marine Corps provide law of war instruction at noncommissioned officer advanced courses, officer advanced courses, and senior staff colleges. Special courses are also offered. The Marine Corps Law of War Course is a five-day course taught four to five times annually worldwide to company and field grade officers; the "mix" sought in each course is one-third each of judge advocates, ground officers (primarily combat arms), and aviators (fixed and rotary-wing). Its emphasis is on the practical rather than theoretical. Three days are spent on "Geneva" law relating to the protection of war victims, including prosecution of violations thereof; one day is devoted to "Hague" law, relating to means and methods of warfare; and the final day addresses the law affecting peacetime military operations (including *jus ad bellum*) and the law relating to low-intensity conflict, including counterterrorism. In addition to Marine attendees, there have been students from the other U.S. services, Canada, the American National Red Cross, the League of Red Cross and Red Crescent Societies, and the International Committee of the Red Cross (ICRC). A member of the ICRC addresses each class on the role of the ICRC in peacetime and armed conflict.

The Marine Corps Law of War Course has been very successful. The key to its success lies in the knowledge of its instructors—all reservists, many with command experience in combat—of the law of war and the business of the client; the subject cannot be taught in the abstract. There are several manifestations of the success of the course. It comes first through applications to attend, which vastly exceed available billets. Student reaction also is significant. On the first day, even though they have applied to take the course, the members of the class generally are reserved as the students get to know one another and are exposed to the law of war in greater depth than previously. On the second and third days, lectures are interspersed with seminars in which students must address contemporary, "real world" problems; the officers warm to the subject, becoming more animated in their discussion and support for the law of war as wholly consistent with their doctrine, tactics, experience,

common sense, and individual moral underpinnings. By the end of the course (despite an examination), they are avid enthusiasts for the law of war. One regimental commander described the course as the "best taught and most important course" he had attended in his entire career—stark contrast to the criticism of law of war training reported earlier, and to the dilemma posed by the topic for JSCOPE IX. A final manifestation of success was the recent award of a Meritorious Unit Commendation by the Secretary of the Navy to the Marine Corps Reserve unit responsible for conduct of the course.²⁰

Other courses are offered by the other services. For example, while continuing to utilize the Marine Corps Law of War Course, the Navy offered its first law of war course at the Naval Justice School in Newport, Rhode Island, in 1985. The Army is also extensively involved in law of war training and has provided comprehensive instruction in this area for over twelve years. The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, offers three law of war workshops annually. Also, selected members of the U.S. military annually attend the twelve-day law of war course taught by the International Institute of Humanitarian Law in San Remo, Italy.

At a higher level, The Judge Advocate General of the Army has sponsored an annual Military Operations and Law Symposium since 1982, the fifth of which was conducted at Headquarters, U.S. Central Command, in November, 1986. This symposium is attended by active duty personnel by invitation only. Invitees are senior operations planners for major U.S. commands worldwide and their staff judge advocates.²¹ There also is limited allied participation. Representatives from the United Kingdom, Canada, Australia and New Zealand attended the 1984 symposium, for example, and spent the week preceding the symposium discussing common law of war issues.

The symposium brings together key personnel to discuss contemporary operational-legal issues in a classified environment. Previous topics have included rules of engagement, navigation and overflight rights, peacekeeping operations, the 1981 Gulf of Sidra incident, the 1982 Falklands War (a British presentation), the 1983 Grenada rescue operation, and operations against Libya in 1986. In an effort to keep the law abreast of technology, subjects such as beyond-visual-range targeting and over-the-horizon

¹⁹ The effect again is uneven. Despite widespread abuse of the civilian population in Afghanistan by Soviet occupation forces, as reported in the February 1985 report of the United Nations Economic and Social Council, Report on the Situation of Human Rights in Afghanistan (E/CN.4/1985/21, Feb. 19, 1985), and two reports by Helsinki Watch, Tears, Blood, and Cries (Dec. 1984), and To Die in Afghanistan (Dec. 1985), the Soviet Union has ignored international public opinion and, by controlling the flow of information within its own borders, avoided even the most remote possibility of domestic moral anguish. Even within the United States, the standards regarding morality have been applied unevenly. Critics of U.S. support for the democratically-elected government of El Salvador have been quick to focus on any shortcoming of that government, actual, alleged, or, in some cases, contrived, but quicker to turn a blind eye to atrocities committed by the rebels, excusing them in the name of "liberation theology." To paraphrase a recent expression, "liberation theology" is neither."

²⁰ The unit is Headquarters, Marine Corps Training Division Reserve Augmentation Unit (Law of War). After two dozen courses, there is a mathematical probability of 1 in 40 that the commander of a deploying Marine Amphibious Unit (MAU) will be a course graduate; 1 in 20 that one of his three element commanders will be a course graduate; better than 1 in 2 that his judge advocate will have attended the course; and a statistical certainty that one of the MAU's 40 officers will have graduated from the course.

As part of the Marine Corps Law of War Course, the unit has published a deskbook used in conjunction with course lectures, prepared written seminar problems and solutions, and published a comprehensive reference book of sources and materials on the law of war. Separately, the unit is preparing a correspondence course on the law of war for enlisted Marines, and a handbook for commanders similar to the Air Force's excellent AFP 110-34 (25 July 1980). The unit prepared a series of law of war articles that appeared in base newspapers and other service news sources such as the *Air Force Times*. Unit members are frequent contributors of law of war articles to professional journals such as the *Marine Corps Gazette* and the *U.S. Naval Institute Proceedings*. See, e.g., Colonel James H. Jeffries III, USMCR, *Marines are Marines are Marines*, *Naval Institute Proceedings*, Jan. 1987, at 117.

²¹ Representatives of the Office of the Secretary of Defense, the Joint Chiefs of Staff, service staffs, and the war colleges also attend.

targeting—both tied to the moral/legal concept of discrimination of combatants from noncombatants—also have been addressed. Each symposium has been an unqualified success.

Other blocks of instruction are tailored to the audience. A class on "Medical Personnel and the Law of War" is given at the Uniformed Services University for the Health Sciences (Bethesda), to prospective commanding officers of Naval medical facilities (also at Bethesda), and in the U.S. Army Academy of the Health Sciences Advanced Combat Casualty Care Course (Fort Sam Houston). Targeting and the law of war is taught at the Air Command and Staff College (Maxwell Air Force Base) and the Air Force Target Intelligence Course (Lowry Air Force Base). "The Law Affecting Special Operations" is a classified presentation given special operations personnel who attend the Joint Special Operations Planning Workshop at the U.S. Air Force Special Operations School (Hurlburt Field). Less specialized but tailored blocks are offered at other service schools, such as the Army War College, Armed Forces Staff College, and the U.S. Navy Chaplain's School. This list is not all-inclusive, but merely representative of the wide variety of courses in which the law of war is discussed, studied, and taught. Overall, the amount of law of war instruction offered within the U.S. military is at least double that of any other nation.

One reason for the breadth and depth of U.S. law of war instruction is that we are a nation dedicated to the rule of law. Another is to make the future commander aware of the complexities of today's law while advising him of his responsibilities under that law. Recognizing the importance of compliance with the law of war in the conduct of U.S. military operations, the Joint Chiefs of Staff (JCS) in 1979 promulgated a requirement that all operations plans, contingency plans, and rules of engagement undergo a legal review as part of the JCS operational review process. That directive was expanded and repromulgated in 1983. Its pertinent parts provide:

Conduct of Operations. Legal advisors should be immediately available to provide advice concerning law of war compliance during joint and combined operations. Such advice on law of war compliance shall be provided in the context of the broader relationships of international and U.S. and allied domestic law to military operations and, among other matters, shall address not only legal restraints upon operations but also legal rights to employ force.

Review of Joint Documents. All plans, rules of engagement, policies and directives shall be consistent with the DOD Law of War Program, domestic and international law, and shall include, as necessary, provisions for (1) the conduct of military operations and exercises in accordance with laws affecting such operations, including the law of war, and (2) the reporting and investigation of alleged law of war violations, whether committed by or against U.S. or allied military or civilians or their property. Such joint documents should be

reviewed by the joint command legal advisor at each stage of preparation.²²

The "proof of the pudding," however, does not rest solely on formal instruction and review of plans. Because of the competition for training time, as well as the need for realistic, hands-on training, an increased number of law of war problems are being built into field (and fleet) exercises at all levels. For example, the greatest reinforcement for classroom instruction on the handling of a prisoner of war has proved to be actual handling and processing of an "enemy" prisoner of war from the point of capture to turnover to appropriate authority. Other reinforcement measures have been instituted. The Judge Advocate General of the Army includes law of war issues as part of the special interest items for Article 6, UCMJ,²³ inspections; the Air Force includes law of war questions in Operational Readiness Inspections; while the Center for Naval War Gaming at the Naval War College routinely incorporates law of war issues into its war games. These approaches have proved far more effective than forcing troops into a classroom to watch the same outdated movie, as previously was the case, while reaching all levels of command.

This approach to law of war training paid dividends during the planning of last year's operations against Libya, both in the early freedom-of-navigation exercises and the subsequent airstrikes against terrorist-related targets. Law of war experts at the U.S. European Command, service, and JCS level assisted mission planners with promulgation of rules of engagement, selection of targets, and anticipation and consideration of other possible law of war issues. A close, working relationship was one of the many factors that led to successful conclusion of each mission.²⁴

Conclusion

The topic for JSCOPE IX is "How Shall We Incorporate Ethics Instruction in Military Education at All Levels?" I have endeavored to summarize current law of war training efforts within the U.S. military to explain one approach that is being taken in one aspect of ethics instruction. I do not wish to suggest that current service programs are perfect. There are shortfalls, and it is a continuous effort to identify and correct them. In the review of U.S. operations in Grenada, it was discovered that one unit had conducted no law of war training in the year preceding that rescue operation. That no offenses occurred is testimony to the quality of the leadership within the unit and to the consistency of the law of war with common sense and military doctrine. But it reminded us that a program is dependent on individuals and their interest in or support for the law of war. It has served as an impetus for reviewing law of war training to establish methods for ensuring that law of war training is conducted within units. Other improvements will be made where needed.

Law of war training has made great strides in all of the services over the past decade. Whereas previously the subject was received with passive resistance or in some cases outright skepticism, today it is greeted with active interest

²² MJCS 59-83, subject: Implementation of the DOD Law of War Program (1983). A law of war checklist for review of operations plans was prepared by the Marine Corps Reserve law of war unit, *supra* note 20. The checklist is in use by all major commands and all services.

²³ Uniform Code of Military Justice art. 6, 10 U.S.C. § 806 (1982).

²⁴ For discussion of the law of war factors considered in the planning and execution of the U.S. missions against Libya, see Parks, *Crossing the Line*, Naval Institute Proceedings, Nov. 1986, at 40.

if not vigorous enthusiasm—provided it is presented properly. I would like to close by offering some lessons learned from developing these law of war programs.

1. Have faith in the student. The men and women of today's military are intelligent, dedicated professionals, with a greater sense for what is moral or legal than we give them credit for having. They do not believe in Rambo any more than they believe in Jane Fonda. The historical emphasis of this nation on the citizen-soldier means that our military is a cross-section of our society with its Judeo-Christian heritage. More often than not, we are preaching to the choir.

2. Be positive in your instruction. Past law of war instruction has suffered many sins, not the least of which was a heavy dose of negativism; instructors tended to emphasize that which was prohibited, and were reluctant to acknowledge that anything was permitted. In fact, the law of war permits more than it prohibits, and instruction today emphasizes rights as well as responsibilities.

3. Ascertain what is relevant to your audience, and teach your trade in the vocabulary of the audience. Several years ago, I attended a law of war conference at the Naval War College; in those days the entire student body of the college sat in the large auditorium for three days while law of war experts engaged in a highly-esoteric "lovefest" in which they praised one another while talking about subjects of interest only to themselves and of relevance to no one. One particular scholar read a paper on the various ways in which you classify an individual captured in battle a prisoner of war that was totally irrelevant to the more than 600 officers in the audience, and in legalistic terms that few understood (including the other professors). He did serious damage to the credibility to the law of war. Several students observed that the professor's presentation confirmed their suspicions that the law of war was totally irrelevant to the modern battlefield.

Like ethics, the law of war can be a very esoteric subject. But it also involves common sense, and instruction offered in terms of the student's work and in the vocabulary of his profession will go far towards convincing him or her of the importance of our subjects to his or her work.

4. Pose the right questions. One of the most controversial law of war scenarios with which to deal concerns a four-man reconnaissance team being pursued by enemy forces deep in hostile territory that stumbles upon an enemy soldier clearly within minutes of death from a fatal wound. If the team leaves the soldier alone, he may be found by its pursuers before he dies, endangering their survival. If the soldiers stay with the soldier until he dies from his wound, they probably will be detected. Yet to hasten his inevitable death through another violent act would constitute a violation of the law of war.

The odds against this situation occurring to any particular individual are greater than the national debt. Yet some law of war instructors insist on self-destruction by starting with this scenario, thereby losing the students for the balance of their presentation.

My point is that there are hypotheticals with answers, and others that can be debated until the cows come home

without reaching an acceptable answer. Gaining credibility for your subject is achieved by going from easy to difficult though, of course, you must be prepared to address the tough questions when they are raised. Similarly, while we should encourage reasoning, thinking, and questioning, we should not select an approach that does little more than cast doubt. Many students enter a classroom environment with a suspicion that many of the things they might be asked to do are illegal or immoral—but knowing that they will do them anyway. The myths regarding prohibited acts abound in the realm of the law of war. By correcting those myths and reassuring students that their doctrine and tactics are in accordance with the law of war, and explaining to them the consistency of the law of war with these things, the students gain confidence in what they are doing—and understand better the need for the prohibitions that do exist.

5. Understand history. Neither ethics nor the law of war can be taught in a vacuum. A keen sense of history is essential to teaching ethical or legal concepts. Otherwise these concepts appear to stand in stark contrast with what students believe in history. For example, frequently I am asked to reconcile the law of war with the strategic air offensive against Germany or, more specifically, the bombing of Dresden. There are rational political, military, legal, and ethical reasons to support the decisions that led to each, but these were identified only after a great deal of research. An individual teaching either ethics or the law of war must have a natural inquisitiveness about history in order to place his or her topic in perspective.²⁵

6. Recognize the importance of your subject. The concerns of the American people for morality and legality are regarded by the enemies of the United States as a highly vulnerable center of gravity that must be exploited at every opportunity. Our loss in Vietnam in large measure occurred through the success of North Vietnam repeatedly casting all U.S. operations in terms of their alleged illegality, or the immorality of the war in general. The bombing campaigns over North Vietnam saw the greatest restraint ever offered by a warring nation to minimize collateral civilian casualties. The North Vietnamese responded by alleging massive civilian casualties while using their own civilian population to shield legitimate targets from attack. In the Rolling Thunder campaign, the Johnson Administration responded to the North Vietnamese charges by increasing the constraints on U.S. forces or denying authorization to attack legitimate targets in or adjacent to populated areas. The North Vietnamese were able to set the terms of reference for the war, and our national leadership was incapable of responding to or changing those terms of reference.

Today, opponents of U.S. assistance to the democratically-elected government in El Salvador and to support for the democratic resistance in Nicaragua couch their opposition in terms of the morality or legality of U.S. efforts. Following the air strikes in Libya last year, Libyan officials attempted a similar disinformation effort, asserting massive civilian casualties while denying damage to the terrorist-related targets that were the object of attack. Recently it was disclosed that the alleged death of Moammar Gadhafi's stepdaughter in the air strike by U.S. Air Force F-111F

²⁵ For excellent example of the study of history from the point of view of ethics, see R. Schaffer, *Wings of Judgment: American Bombing in World War II* (1985).

aircraft on Aziziyah Barracks was a Libyan fabrication. Its purpose was clear: to influence public opinion in the United States and the western world to forestall further attacks.

Ethics and the law are not always synonymous, but they are compatible in many respects. Not the least of these is their value as a foreign policy tool. Each is extremely important in today's world in assuring the American people of the correctness of a strategic or tactical decision, and leaders at all levels ignore this fact at their peril. We have taken a proactive approach to teaching the law of war by emphasizing this point. The same can be done in teaching other fields of ethics.

Appendix A

Report of the United States on Law of War Training to the International Committee of the Red Cross, Geneva, October 1986

Dissemination of the Geneva Conventions in the United States Armed Forces

By directive of the Secretary of Defense, training in the law of war, including the Geneva Conventions, is the responsibility of the three military Departments (Army, Navy and Air Force). Within these Departments, responsibility has been assigned to The Judge Advocates General of the Army, Navy and Air Force, as the chief uniformed legal professionals in the armed forces. In addition, the United States Army has been designated the executive agent for investigating allegations of violations committed against United States personnel. The Army is also primarily responsible, within the United States military establishment, for the administration of prisoner of war camps and the military government of occupied territory, and hence has a special role in ensuring that the Third and Fourth Conventions are complied with.

Each of four armed services (Army, Navy, Marine Corps and Air Force) maintains a special office under the appropriate Judge Advocate General, staffed by experts in international law, including the Conventions. These International Law or International Affairs Divisions are responsible for drafting manuals and regulations implementing the Conventions, including the dissemination requirement. Air Force Regulation 110-32, for example, assigns specific responsibilities for training in the law of armed conflict to ensure that all Air Force personnel are familiar with it to the extent required by their responsibilities and duties. Similar directives have been issued in the Army (AR 350-216 and AR 190-8), the Navy (OPNAVINST 3300.52) and the Marine Corps (Marine Corps Order 3300.3). The texts of the 1949 Conventions are also disseminated to the field units of the armed forces (see, e.g., Air Force Pamphlet 110-20, Selected International Agreements), along with training materials and manuals incorporating and commenting on their provisions (Army Field Manual 27-10, The Law of Land Warfare; NWIP 10-2, The Law of Naval Warfare; and Air Force Pamphlet 110-31, International Law—The Law of Armed Conflict and Air Operations).

Military personnel who are also licensed, university educated lawyers are assigned to every American military base, Army or Marine Corps division, and large naval units. These personnel are responsible for providing advice to their commanding officers on problems involving the law of war, including the Geneva Conventions, in accordance with the texts and directives issued by their service headquarters. Each service provides specialized training in the Conventions to the officers who staff these positions. The Army Judge Advocate General's School at Charlottesville, Virginia, for example, provides a basic course which all Army military lawyers are required to complete in residence. Twenty-one hours of this course are devoted to the law of war. After approximately five years of active duty,

selected Army lawyers are sent to a nine-month graduate level course at Charlottesville, 29 hours of which are devoted to the law of war. Electives in international law are also offered during this course. The Naval Justice School at Newport, Rhode Island (for Navy and Marine Corps lawyers), and the Air Force Judge Advocate General's School at Maxwell Air Force Base, Alabama, similarly provide instruction on the Conventions to lawyers entering those services.

In addition to these specialized courses for military lawyers, the armed forces also provide extensive training to the rest of their officer and enlisted membership. The philosophy underlying these training programs is to ensure that all members receive at least some orientation in the provisions of the Conventions, and that more detailed training be tailored to the individual's military duties. The Navy, for example, divides law of armed conflict training into three levels, vis: (1) a minimum level of understanding required for all members of the Navy; (2) a higher level for personnel whose speciality or assignment involves participation in combat operations, or whose military speciality or level of rank requires additional training and (3) the highest level, for personnel whose military job speciality or assignment involves participation in the direction of combat operations.

All services require that all personnel entering, either as officer or enlisted, receive at least a minimum orientation in the Conventions and the law of war. The United States Military Academy, the United States Naval Academy and the United States Air Force Academy all include this subject in required courses for their cadets and midshipmen. Similar training is provided in other officer accession programs and enlisted basic training. The nature of this training varies from service to service, due to inherent differences in the roles and missions of the armed forces. In the Air Force, for example, most combatant personnel will be officers, and the majority of the enlisted force will never be directly involved in the firing of weapons in combat. In other services, such as the Marine Corps, it is assumed that all or most active personnel must be prepared for direct participation in combat. It should be noted that the Marines have therefore elected to build their Law of War Program around nine basic principles patterned after the "Soldier's Rules" drafted at the 1977 European Red Cross seminar.

Advanced training is routinely furnished to military personnel requiring it. Intelligence officers of the Air Force and Navy are, for example, given special training in the international law applicable to air targeting. Medical personnel are of course given special instruction in the First and Second Conventions, while Army military police and Air Force security police are trained in the requirements of the Third Convention. All the services include law of war training in their advanced courses for senior officers. The Army War College, the Air War College and the Naval Post-graduate School either require such courses of their students or offer them as electives. In addition, the Army Judge Advocate General's School offers a "Senior Officer Legal Orientation" course, for line officers, attended by about 360 colonels and lieutenant colonels per year. A portion of this course involves the practical application of the Geneva Conventions and the law of war. The Marine Corps offers a one-week graduate-level law of war course for commanders and staff officers five times per year. The United States also regularly participates in the International Course on the Law of Armed Conflict for officers, held annually in San Remo, Italy.

In recent years, the United States armed forces have increased their emphasis on including law of war problems in exercises and other military evaluations in order to disseminate the Conventions and to test the effectiveness of previous dissemination. In particular, the Marine Corps has recently included law of war tasks and information in its Combat Readiness Evaluation System for infantry battalions, and is currently working on similar standards for other combat organizations. Another recent example is Exercise Team Spirit 86, in March of 1986, where a naval task force commander, assisted by two Navy lawyers, promulgated law of armed conflict scenarios to ships and naval units participating in the exercise. Thus, for the United States armed forces, military exercises have become a means of strengthening the dissemination of international humanitarian law, in addition to their role in maintaining national and collective self-defense.

Taking the Offensive With the Procurement Fraud Division

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Introduction

Expensive toilet seats, ash trays, and hammers have caught the attention of the American public. Taxpayers are now asking how the government could have allowed itself to become so careless. Of equal concern is the apparent lapse by segments of industry into a serious lack of integrity. Lest you make the mistake of believing Uncle Sam has just recently allowed himself to become a victim of industrial pirates, read on. The False Claims Act¹ "was intended to protect the Treasury against the hungry and unscrupulous host that encompassed it on every side."²

The False Claims Act was originally promulgated as the Act of March 2, 1863. In other words, there is little doubt that the likes of Brevet Major General Joseph Holt, the Judge Advocate General from 1862 to 1875, found his Army set upon by industry's false claims, cost mischarging, and defective pricing. While there is no comfort in knowing that the Army has been dealt with in a less than honorable fashion for at least 100 years and that General Grant may well have had some overpriced toilet seats, ash trays, and hammers, we have reached a time in the Army's history where it is willing to put substantial effort into stopping procurement fraud.

The vast majority of contractors perform their responsibilities in an excellent manner. There were close to sixteen million contract actions during Fiscal Year (FY) 86, and the Army is tracking only about 450 allegations of fraud. More than one of these allegations, however, involves over \$75 million of taxpayer money that purportedly was paid to a contractor under fraudulent conditions. While the number of contractors who actually set out to defraud the government is relatively small, the amount lost by the treasury can be substantial.

In January 1986, the Secretary of the Army created the Army Task Force on Fraud, Waste and Abuse.³ It was to review and monitor all allegations of fraud, waste, or abuse affecting the Department of the Army. This organization was given the authority to take all action necessary to assure prompt and thorough investigation of allegations and ensure the initiation of appropriate proceedings.

By November 1986, the Task Force had a number of significant achievements, including the development of an organization that would be responsible for combating procurement, pay, and entitlements fraud. The Chairman of the Task Force, Dr. Jay R. Sculley (the Assistant Secretary of the Army for Research, Development and Acquisition), proposed this organization to the Secretary of the Army on November 4, 1986. Within the reorganization was the design for a new division to be created at the United States Army Legal Services Agency. In early January 1987, the Contract Fraud Branch of the Litigation Division evolved into the Fraud Abatement Division. The Division was later

renamed the Procurement Fraud Division (PFD) and by August of 1987 will be well on the way to full staffing of eighteen members serving in three different branches. These branches will be the Suspension and Debarment Branch (S&D Branch), the Remedies Branch (REM Branch), and the Litigation Branch (LIT Branch). Current plans call for a staffing of three civilian attorneys, seven military attorneys, three paralegals, one legal technician, a contract specialist, and three secretaries.

Need for a New Division

At the time of Dr. Sculley's proposal, there were a number of excellent reasons for the creation of such a division. The most significant, however, was the need to organize and coordinate all remedies available to the government in fraud cases. While a number of legal and administrative tools designed to deal with fraud have been available to the Army for many years, the Army has never been able to maximize their use. For example, the Army has not had the assets necessary to assist the Department of Justice (DOJ) in the handling of procurement fraud cases, and that department has not been able to handle the vast amounts of litigation arising from procurement fraud. DOJ has always taken the Army's procurement fraud problems seriously, but, like the Army, must prioritize its efforts. This has led to the loss of a number of smaller cases that could have resulted in monetary recoveries for the Army or the elimination of unscrupulous contractors. Some of these small cases would undoubtedly have grown into larger cases as investigations were conducted in preparation for litigation.

In 1983, the General Litigation Branch of the Litigation Division, Office of The Judge Advocate General, had attorneys on a part-time basis preparing the paper work necessary to propose contractors accused or convicted of procurement fraud for suspension and debarment. At the same time, the United States Army Criminal Investigation Command began increasing its efforts in the area of economic crimes, and cases of fraud began mounting. To alleviate some of the pressure, a new branch was created within the Litigation Division, named the Contract Fraud Branch, and was staffed with six individuals whose primary mission was to prepare cases for the Army Suspension and Debarment Official.

In calendar year 1983, there were twenty-seven suspensions and forty-one debarments. In addition, \$750 thousand was recovered from settlements reached with contractors. In calendar year 1985, the efforts of the Criminal Investigation Command's expanded economic crimes section and the newly-created Contract Fraud Branch began to show results. Suspensions were up to sixty-six, and there were 116 debarments. The branch also collected approximately \$3.5 million. Calendar year 1986 showed an even more dramatic

¹ 31 U.S.C. §§ 3729-3731 (1982).

² *United States v. Griswold*, 24 F. 361 (D. Or. 1885).

³ Charter of the Army Task Force on Fraud, Waste and Abuse, 7 Jan. 1986, reprinted in *The Army Lawyer*, Mar. 1986, at 4.

increase. Suspensions rose to 216, debarments dropped slightly to 101, but recoveries topped \$7 million, and the work was still piling up faster than the branch could handle it.

The Task Force, recognizing the potential of the Contract Fraud Branch, determined that it should be staffed in an adequate fashion to handle the burgeoning case load and become a separate division. The vision of the Task Force stretched beyond the desire simply to meet increased work in the area of suspension and debarment. The Task Force perceived a need for coordination of remedies and better handling of litigation matters. For that reason, the organization they designed was fashioned to provide continuity as well as a consolidated front in all areas of remedies available to the Army.

Remedies Available

There are four types of remedies available to the Army when it has been the victim of procurement fraud.

Contract Remedies

The area of contract remedies was never intended to be a function of the PFD but plays a significant part in the operations of that division. While contract remedies remain with the contracting officer, and cannot be implemented by the PFD, these remedies must be known to the division in order to effectively utilize the other three categories of remedies. For example, if a contracting officer has rendered a final decision, has made a claim against the contractor, and is currently offsetting progress payments against the amount owed the government, the PFD must take this into consideration in formulating other remedies that will be in the best interests of the government. The PFD will not be instrumental in bringing about contract remedies, but it must be fully informed of all such efforts to assist in the performance of its mission.

Suspension and Debarment

The second area of remedies concerns administrative remedies provided for in the Federal Acquisition Regulation,⁴ Defense Federal Acquisition Regulation Supplement,⁵ and the Army Federal Acquisition Regulation Supplement.⁶ These regulations primarily concern the ability of agencies to suspend and/or debar firms and individuals from doing business with the government.

The Army Suspending and Debarring Official has the power to suspend a contractor from doing business with all agencies within the government's executive branch when he determines that immediate action is necessary to protect the government's interest. He must base his decision on adequate evidence that there has been a: commission of fraud

or a criminal offense by a contractor in conjunction with a government contract or subcontract; violation of federal or state antitrust statutes; theft, forgery, bribery, falsification or destruction of records, the making of false statements, or receiving of stolen property; or commission of any other offense that indicates a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.⁷ Adequate evidence exists in every case where there has been an indictment for any of the above offenses.⁸ The Suspending and Debarring Official may also suspend a contractor upon adequate evidence of "any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."⁹

Suspensions can last for twelve months with a possible extension of six months. They are intended to be temporary in nature and protect the government while investigations are being completed and legal proceedings are initiated. In no event may a suspension extend beyond eighteen months if legal proceedings are not initiated.¹⁰

Debarments generally do not exceed three years. Debarments require a "preponderance of evidence" that indicates that: there has been a "[v]iolation of the terms of a Government contract or subcontract so serious as to justify debarment, such as" willful failure to perform, or a history of unsatisfactory performance;¹¹ or there is some other cause that is of "so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."¹² Conviction or civil judgment for such offenses as fraud in relation to a government contract, violation of antitrust statutes, or the commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statement, or receiving stolen property is cause for a debarment.

Litigation Remedies

Civil and criminal prosecution, the third and fourth remedies available to the Army, are the primary responsibility of DOJ. Litigation of fraud-related cases is most commonly handled by United States Attorneys and Assistant United States Attorneys, generally in the district where the contractor is located. The Army may take an active role in such activity, however. The Litigation Division of the Office of The Judge Advocate General is deeply involved in civil litigation and provides DOJ the help it must have to successfully litigate many complex military-related issues. That division regularly provides lead counsel on cases. The PFD will eventually provide that same degree of assistance to DOJ in cases involving contract fraud when it becomes fully operational. It will be primarily concerned with

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

⁵ Defense Federal Acquisition Reg. Supplement (1 Apr. 1984).

⁶ Army Federal Acquisition Reg. Supplement. (1 Dec. 1984).

⁷ FAR § 9.407-2(a).

⁸ FAR § 9.407-2(b).

⁹ FAR § 9.407-2(c).

¹⁰ FAR § 9.407-4(b).

¹¹ FAR § 9.406-2(b).

¹² FAR § 9.406-2(c).

affirmative litigation to collect amounts due the government.

Organization

The REM Branch, S&D Branch, and the LIT Branch will each provide a unique service in the fight against procurement fraud. The REM Branch will perform the most innovative services. It will filter all new information received by PFD. The REM Branch will then determine what the first step should be. If it determines that suspension is appropriate, the information received will be forwarded to the S&D Branch for consideration. If, on the other hand, litigation has been initiated and another agency has suspended the contractor, the case will be sent to the LIT Branch. While these are only examples of what can occur, it can readily be seen that the REM Branch will exercise authority over the flow of cases within the office.

After the Army has been alerted to a possible procurement fraud, the most complex job will be that of the REM Branch's coordination of remedies. It will be responsible for answering such questions as:

1. Should suspension be based on the facts of a case or should the PFD wait until after indictment to submit the contractor's case to the Suspension and Debarment Official?
2. Have all the contract remedies performed thus far solved the problem or is there a need to provide additional preventive action to protect the government?
3. How much evidence can be obtained and provided to the Civil Division of DOJ to help them begin to prepare a civil recovery action?
4. Will the pursuit of a civil recovery action at this time be beneficial or should the contractor be debarred first?
5. What are the best interests of the government in relation to the need to continue contracting with this entity?

The S&D Branch will prepare the files for the Suspending and Debarment Official and represent PFD in administrative proceedings conducted before that official. In addition, it will coordinate with other agencies when debarment and/or suspension appears appropriate. This branch will arrange fact-finding hearings when these are deemed necessary and will be responsible for monitoring settlement agreements. The names of debarred firms and individuals will then be sent to other suspension and debarment activities as well as the General Services Administration. The suspension and debarment remedy is often the quickest and most effective method of protecting government interests.

The LIT Branch will monitor ongoing litigation and assist DOJ as well as United States Attorneys and Assistant

United States Attorneys. It will take as active a role in cases as schedules permit and as DOJ attorneys will allow. In addition, this branch will work closely with attorneys assigned full-time outside the Washington, D.C., area on particularly complex criminal and civil cases. In the past, cases that involved approximately \$250 thousand or less were sent to United States Attorneys offices. They were not monitored by either DOJ or the Department of Defense (DOD). The LIT Branch will be responsible for locating these cases and making sure that they receive appropriate attention.

The LIT Branch will also inherit new responsibilities should DOD delegate authority to the Army under the new Program Fraud Civil Remedies Act of 1986.¹³ That Act provides an administrative remedy for cases concerning false claims and false statements that involve \$150 thousand or less. The Act provides for a number of functions that could easily be delegated to the Army by DOD. Should that happen, the need for hearings and case preparation will follow the delegation. The PFD will be the logical recipient of those functions.

The new division's biggest problems will involve timing and assuring the adequate pursuit of all available remedies. The overriding concern will always be protecting the government's best interests.

Commands will become more involved in combating fraud by appointing attorneys at their installations who will be responsible for establishing procurement fraud programs. At the major commands, they will be known as Procurement Fraud and Irregularities Coordinators. At the major subordinate command level, these attorneys will be known as Procurement Fraud Advisors. Their responsibilities will include coordinating with the PFD and providing assistance to that division in cases involving their command.

Conclusion

Fraud is certainly not a new problem to the Army. The government has been the target of unscrupulous contractors for over a hundred years. What is new is the attempt by the Department of the Army to aggressively combat procurement fraud with every remedy available. The new Procurement Fraud Division does not provide a solution to fraud, but it is part of an organized effort to alert industry that the Army will not tolerate inappropriate activities with taxpayer money. Further information about the PFD can be obtained by calling AUTOVON 225-1678 or commercial (202) 695-1678 or by writing HQDA, DAJA-PF, Washington, D.C. 20310-2217.

¹³ Pub. L. No. 99-509, 100 Stat. 1185 (1986).

Implementing a Procurement Fraud Program: Keeping the Contractors Honest

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It is almost axiomatic that the public has a negative perception of the military procurement process. This perception has been fueled by media reports of procurement "horror stories" and derisive editorial comments. Although this media attention often tends toward sensationalism and usually fails to identify any underlying causes for such "horror stories," the public perception it has prompted is not entirely unfounded.

Public attitudes in this area have translated into congressional interest, prompting a response by the Department of Defense (DOD) that included DOD Directive 7050.5.¹ Pursuant to that directive, DOD components were tasked with ensuring coordination and pursuit of all criminal, civil, administrative and contractual remedies for each incident of fraudulent or corrupt conduct related to DOD procurement.

On 7 January 1986, the Department of the Army (DA) chartered the Task Force on Fraud, Waste and Abuse, charged with ensuring that all allegations of fraud within DA are promptly and thoroughly pursued.²

As of this writing, DA is considering a revision of Army Regulation 27-21³ that would make Army procedures in this area somewhat similar to those implemented by the Department of the Air Force.⁴ Assuming that such a revision is adopted, then installation commanders can expect to be given the following responsibilities: establishing an active fraud prevention program and ensuring that personnel are cognizant of its existence; and appointing a focal point to administer the program, receive reports of irregularities, and coordinate remedies.⁵

At the majority of installations, particularly outside the Army Materiel Command (AMC), these responsibilities may bring the local staff judge advocate office into uncharted waters. The following is offered as a blueprint for establishing a fraud prevention program, in accordance with the aforementioned DOD directive and Army regulation.

The measures outlined in this article have been implemented at U.S. Army Communications-Electronics Command (CECOM). The primary mission of CECOM is the acquisition of communications-related equipment, expending a multi-billion dollar annual procurement budget in the process. Accordingly, the focus on procurement fraud is greatly heightened at CECOM and many of the measures utilized there may not be practical at commands where contracting is limited to base operation activities.

Many of the fundamental aspects of the program will generally apply, however, and the overall program may be scaled down or altered to suit varying situations. Considering the aforementioned DOD directive, it is highly likely that implementing some procurement fraud program will be advisable, if not mandatory in the foreseeable future, even at commands where procurement is not the primary mission.

Designation of a Procurement Fraud Counsel

CECOM has designated an attorney as the procurement fraud counsel. That attorney is responsible not only for participating in the program but also for keeping the program active. By and large, government employees still view procurement fraud initiatives as "extra duty" and inertia will almost definitely set in, unless the fraud counsel aggressively pursues the program. Counsel cannot sit back and allow the system to work. At this stage, it needs to be pushed in order to yield results.

One of the problems experienced at CECOM prior to implementation of the program was the fragmented manner in which procurement fraud was pursued. Allegations of fraud may potentially be investigated by the Army Criminal Investigation Division (CID), the Defense Criminal Investigation Service (a component of the DOD Inspector General (DODIG)), the FBI, or any combination thereof. The Defense Contract Audit Agency or Army Audit Agency may also be involved, not to mention any of the various Inspector Generals. Without one central point of contact for all cases of fraud, there may be duplication of efforts. The command could be "blind-sided" by an investigation that has been in full swing for some time. Certain government remedies, which require prompt activity, could be compromised by inaction. Worse yet, fraudulent conduct by contractors could potentially "fall through the cracks" entirely.

The designation of a procurement fraud counsel as the central point of contact for all cases of fraud eliminates those problems to a large extent, and ensures proper coordination and timely pursuit of all government remedies. Training in coordination of remedies is provided regularly at various locations by DODIG.⁶ The American Bar Association also conducts seminars, although the perspective there is generally contractor-oriented. If formal training is unavailable, materials may be obtained from DODIG.

The Procurement Fraud Program

The program itself involves three major areas, all of which require the active involvement of the procurement fraud counsel.

¹ Dep't of Defense Directive No. 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities (June 28, 1985) [hereinafter DOD Dir. 7070.5].

² Charter of the Army Task Force on Fraud, Waste and Abuse, 7 Jan. 1986, reprinted in *The Army Lawyer*, Mar. 1986, at 4.

³ Dep't of Army, Reg. No. 27-21, Legal Services—Remedies in Procurement Fraud and Corruption (15 July 1986).

⁴ Dep't of Air Force, Reg. No. 123-2, Air Force Fraud, Waste, & Abuse (FW&A) Prevention and Detection (Jan. 1986) [hereinafter AF Reg. 123-2].

⁵ AF Reg. 123-2, para. 6.

⁶ For information about this training, contact Mr. Howard Cox, Deputy Assistant DODIG, AUTOVON 224-1232, or commercial (703) 694-1232.

Awareness Measures

Personnel involved in the procurement process are the government's "front line" in dealing with civilian contractors, and are therefore in the best position to detect and report potentially fraudulent conduct. A fraud program will only function well when these personnel are sensitive to indicators of procurement fraud and understand the need to surface such cases. There is a commonly held misperception among such personnel, however, that detecting fraud is not their responsibility. Their job is, of course, to procure items for the Army and, generally speaking, their performance standards are tailored along those lines. Depending on how important an item is, there can be tremendous pressure to get it procured and in the field. Accordingly, it is not surprising that the first inclination of such personnel may be to not surface an indication of misconduct. It is usually easier to rationalize away such an incident than to "stop the train" and risk being viewed as an obstructionist to the mission by reporting the problem. Measures must be directed toward these personnel aimed at increasing their awareness of what constitutes fraud and at eliminating traditionally held misperceptions of their role.

CECOM personnel receive mandatory annual instruction on fraud indicators from either DODIG representatives or a CID economic crimes expert.⁷ Annual instruction is also provided to CECOM procurement personnel on the anti-trust aspects of fraud by the Department of Justice (DOJ) Anti-Trust Division.⁸ The procurement fraud counsel should introduce each speaker and take the opportunity to emphasize reporting obligations and publicize his or her role in the process. The more familiar people are with the procurement fraud counsel, the more inclined they will be to make reports.

This training is supplemented by monthly articles published in the post newspaper dealing with various aspects of procurement fraud, again emphasizing reporting requirements. Posters can also help to keep awareness levels high.

On a less general level, all contracting officers receive a monthly list of CECOM contractors under investigation, requesting that they report any problems experienced in dealing with those contractors to the procurement fraud counsel.⁹ Information relevant to an ongoing investigation can then be gathered and forwarded to the investigating agency. Moreover, counsel will have a greater feeling for a contractor's overall performance. This may affect any possible suspension or debarment of a contractor, as a recommendation on whether to suspend or debar a contractor will be influenced by the contractor's performance generally. For example, an investigation involving progress payment fraud may more readily serve as the basis for suspension if the contractor is chronically delinquent on all its government contracts. Additionally, a history of failure to perform may in itself provide the basis for a debarment action.¹⁰

CECOM contracting officers are issued a copy of the DODIG pamphlet entitled *Indicators of Fraud in Department of Defense Procurement*¹¹ upon receipt of their warrants. This publication gives an overview of procurement fraud issues to personnel who may not have any legal training. It leaves aside most case law and legal theories and deals primarily with examples of fraudulent conduct and available government remedies. Admittedly, there is no guarantee of the pamphlet being read and heavily referred to by procurement personnel. Distributing it with the contracting officer's warrant, however, implicitly conveys the importance placed on this area by the command. When personnel make reports of potential fraud, it may be advisable to issue to them, through their supervisory chain, a letter of commendation from the legal office as positive reinforcement.

The installation can assist in implementing a fraud program by establishing and utilizing a procurement fraud committee. The CECOM committee is composed of representatives from CID, procurement, the Army Audit Agency (AAA), product assurance, spare parts, internal review and control, the provost marshal, the comptroller, the CECOM IG, and the security office. The committee participates in awareness-raising activities such as training efforts and the publication of newspaper articles. It also considers potential new initiatives.¹² Establishing such a committee also provides a ready point of contact in each command element when cases affect their respective offices.

All these measures are designed to direct cases through the procurement fraud counsel. It is possible for an investigation to begin without the counsel's knowledge. For instance, an anonymous DODIG Hotline report may be referred to an investigating office far from the purchasing activity. The investigators will eventually interview some of your personnel; if those personnel are familiar with the local procurement fraud counsel, they will tell counsel about the investigation in short order.

It may also be advisable for counsel to establish close contacts with those attorneys who review contractual problems generally, particularly those occurring in the post-award stage. Such problems often involve potential fraud that is only revealed upon close scrutiny. When such a case is uncovered, those attorneys should routinely contact the procurement fraud counsel. At CECOM, one such matter involving defective pricing practices by a division of Litton Systems, Incorporated was referred to the legal office as a purely contractual matter necessitating a contracting officer's final decision. The amount in controversy was less than \$100,000. Upon closer review of both the audit report and the contractor's response to that report, it was determined that criminal investigation was warranted. The corporation and two corporate officials were indicted and convicted. The government recovered \$15,000,000 in civil fines and criminal penalties.

⁷ Each subordinate command within AMC now has a resident CID economic crimes unit that can provide such training. Other major Army commands (MACOMs) can arrange CID training through CID regional headquarters.

⁸ Such training can be arranged through regional offices of DOJ or the main office in Washington at (202) 633-2425.

⁹ Within AMC, the MACOM fraud counsel obtains information from the Defense Logistics Agency.

¹⁰ Federal Acquisition Reg. § 9.406-2 (1 Apr. 1984) [hereinafter FAR].

¹¹ Dep't of Defense, Misc. Pub. No. 20-1, *Indicators of Fraud in Department of Defense Procurement* (1 June 1985).

¹² The CECOM committee is currently considering the advisability of amending certain personnel performance standards to include a provision regarding support of procurement fraud initiatives.

Evaluation, Referral and Action

The foregoing measures should develop a pool of cases for the procurement fraud attorney. The second major area of the program involves what to do after cases develop. A suggested method of evaluating these cases was outlined in an earlier issue of *The Army Lawyer*.¹³ The following is a description of some of the practical aspects experienced at CECOM in applying such a method.

Upon receipt of a reported irregularity, the first action generally taken is to evaluate the case for potential criminality.¹⁴ This will most often involve an initial interview with whoever reported the matter, followed by researching the applicable criminal statutes and evaluating which investigating agencies should be involved if criminal conduct may have occurred. As a general rule, any criminality directed against the Army should involve CID, and any other referral should be coordinated with the local CID office. Matters involving defective cost and pricing data or cost mischarging will often be assumed by the Defense Criminal Investigation Service (DCIS). Matters involving more than one department within DOD may also require DCIS involvement. Bribery cases will generally involve the FBI. A good working relationship with these investigative agencies is essential.

A plan should be developed with the investigating agency addressing such issues as which command components should be involved and the potential need for strict confidentiality. There may be a need to obtain the support of other agencies, such as AAA or the Defense Contract Audit Agency. If the allegations involve defective or substandard items supplied to the government, the plan may involve segregating those items in the depot and arranging for them to be tested by engineering personnel. Often this will necessitate the establishment of what is essentially a case task force of engineering and material management personnel.

Counsel should be prepared to act as the command point of contact for the investigating agencies and provide assistance as needed regarding evidentiary or procedural questions. Investigation of these cases generally requires some understanding of the procurement process, and counsel will often need to provide the investigators with support in these areas. Support may also be necessary in "selling" a case to an already overburdened federal prosecutor. One of the principal criminal statutes involved in the procurement fraud area is 18 U.S.C. § 1001 (false statements). Prosecutors need to be made aware of the reliance the government places on the integrity of the contractor. Throughout the procurement process, the contractor is called upon to certify to one representation or another, and if the government cannot rely on the contractor's veracity, the entire system is degraded. Accordingly, although false statement prosecutions may not have as much jury appeal as those

prosecutions for crimes involving violence or narcotics, failure to pursue them consistently will undercut the government procurement system. The gravity of this seemingly minor violation must be brought home to the prosecutor as forcefully as possible. Moreover, the federal prosecutor's background in procurement fraud may be limited, requiring the procurement fraud counsel to continue to work closely with the prosecutor after the case is accepted for prosecution.

Simultaneously, a parallel evaluation of these cases should be conducted to determine if civil recovery under statutory or common law theories is appropriate.¹⁵ To refer cases for civil prosecution, CECOM prepares a civil recovery report outlining background facts, theories of recovery, potential statute of limitation problems, and a statement of damages. It should also include a draft complaint and copies of any pertinent documentary evidence. The report is forwarded through AMC to the DA Procurement Fraud Division, where it is again evaluated and forwarded to DOJ. Once the case is assigned to a DOJ attorney, the procurement fraud counsel should provide whatever assistance is necessary throughout the litigation, particularly in the area of discovery.

Evidence relevant to a civil action should be developed as early as possible where a parallel criminal action is in progress, in order to avoid any potential problems if the criminal matter enters a grand jury stage. Once it does, evidence obtained by the grand jury will be unavailable for use in a civil or administrative proceeding.¹⁶ Once an indictment is obtained, it may be advisable to consider filing a civil suit and requesting that the court hold the action in abeyance pending the conclusion of the criminal action. The elements of a civil false claims suit will often be the same as those that comprise a criminal action. Should the criminal action result in a conviction, the civil action will be established and the government need only prove damages.¹⁷ An excellent reference for civil recovery cases is the *Civil Fraud Manual*.¹⁸

The third level of evaluation is in the area of contractor suspension or debarment. Once an investigation has progressed beyond the preliminary stage, there is generally sufficient cause to generate a report relevant to suspension or debarment.¹⁹ This report should be prepared by the contracting officer and should include the contractor's identity, contracts involved, a statement of relevant facts, and a recommendation as to whether suspension or debarment should be imposed. Needless to say, procurement personnel do not always greet the opportunity to prepare such reports with as much enthusiasm as one might hope. To make the preparation more palatable, CECOM uses as outline of all information necessary to complete the report.²⁰ Distributing the outline to procurement personnel generally ensures a higher degree of uniformity in reports and saves these employees from the extra burden of ferreting out all necessary

¹³ Post & Mason, *Attacking Fraud, Waste, and Abuse at the Installation Level: A Model*, *The Army Lawyer*, Oct. 1986, at 18.

¹⁴ For a listing of the most commonly utilized criminal statutes, see *id.* at 20 n.8.

¹⁵ A list of the primary statutes utilized for civil recovery is at enclosure 1 to DOD Dir. 7070.5.

¹⁶ Fed. R. Crim. P. 6(e).

¹⁷ *United States v. Thomas*, 709 F.2d 968 (5th Cir. 1983).

¹⁸ Department of Justice Civil Division, *Civil Fraud Manual* (June 1982).

¹⁹ Defense FAR Supp. § 9.472 (1 Apr. 1984).

²⁰ A copy of the CECOM outline is at Appendix A.

information from the Federal Acquisition Regulation, the Defense FAR Supplement, and the Army FAR Supplement. The procurement fraud counsel should be available to provide guidance in the preparation of the report and in the formulation of the contracting officer's recommendation on suspension or debarment. It is a commonly held misperception that a contractor may only be suspended upon indictment. This is not the case. A contractor may be suspended upon adequate evidence (i.e., information sufficient to support a reasonable belief that a particular act has occurred) of the commission of any act indicating a lack of business integrity, seriously affecting that contractor's present responsibility.²¹

The suspension or debarment report is forwarded through the MACOM to the DA Procurement Fraud Division for evaluation. A decision on whether to suspend or debar is made within DA by the Assistant Judge Advocate General for Military Law.

Monitoring and Reporting Requirements

The status of all pending cases should be updated regularly and reported to the local commander and to the MACOM fraud counsel. Not only does this practice serve to keep the chain of command apprised of potentially volatile incidents, it also minimizes the risk of cases falling victim to the "black hole" syndrome, i.e., withering away through neglect at some stage of the process.

²¹FAR § 9.407-2.

Conclusion

In order to effectively curtail procurement fraud, a number of misperceptions need to be corrected: the belief among many government contracting personnel that pursuing fraud is someone else's job; the belief held by criminal investigators and prosecutors that procurement fraud cases are not worth their efforts absent huge monetary loss to the government; and finally the belief held by many DOD contractors that the government is either too inept or too apathetic to effectively police their conduct. The existence of a fraud program involving an active procurement fraud counsel will help to change those attitudes. Close contact with procurement personnel investigators, auditors, and prosecutors will result in acceptance of the procurement fraud attorney's role, and eventually he or she will be viewed as a valuable and necessary resource.

It will be up to the individual procurement fraud attorneys to see that a fraud program becomes institutionalized at their respective commands. The firm establishment of such programs throughout DOD will hopefully serve to change the negative public perceptions of military procurement, save on acquisition costs, and ultimately get DOD procurement out of the headlines.

Appendix A

Report Pursuant to DOD FAR Supplement § 9.472

1. Name and address of contractor.
 2. Names of principal contractor officers, partners, owner or managers.
 3. All known contractor affiliates, subsidiaries, or parent firms, and the nature of their affiliation.
 4. Description of contracts concerned (include contract number, office I.D. symbols, amount, degree of completion, percentage of work to be completed, the amount paid to contractor, and the amount still due in the contract).
 5. The status of outstanding vouchers (if any).
 6. State whether the contract has been assigned. If so, state the name and address of the assignee.
 7. State whether there are any other contracts outstanding with the contractor, or any of the affiliates identified in section "3" above. If so, state the amount of such contracts, what amounts have been paid, or are due, and whether any have been assigned.
 8. Provide a complete summary of all pertinent evidence upon which the suspicion of impropriety is based.
 9. Provide a recommendation as to the continuation of all current contract with the subject contractor, with an explanation of the reason for such recommendation.
 10. Provide an estimate of damages, if any, caused by the conduct of the contractor, including an explanation of the method used to arrive at that estimate (include applicable costs incurred in repair or reprourement if feasible).
 11. Provide your comments and recommendations as to suspension or debarment of the subject contractor regarding:
 - a. Whether to suspend or debar;
 - b. Any appropriate limitations upon such action; and
 - c. The period of any such action.
- (Note: The recommendation may be based upon any reliable information regarding the contractor that has been brought to the attention of the contracting officer. Absolute debarment or suspension need not be recommended, if the totality of the circumstances would make such a recommendation unwarranted. A contracting officer may recommend suspension of a certain contractor, with an exception for those items that the contractor provides as a sole source, where a secondary source cannot readily be worked up, and the interests of national defense so require.
- If for any reason a recommendation cannot be made, state the reasons why, and when it will be provided.)

12. State the names of any investigative agencies pursuing the matter.

13. Provide an index to the attached enclosures. The enclosures should include a copy of the contract or contracts (or pertinent parts thereof, where providing the whole contract would be infeasible), appropriate exhibits, copies of assignments, if any, witness statements if available, and

investigative reports or other related documents. (Certified copies on any indictments or judgments rendered against the contractor in the matter must be annexed.) Also, attach a credit and financial report, such as a Dunn & Bradstreet report.

Changes in Army Policy on Financial Nonsupport and Parental Kidnapping

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Introduction

Army Regulation 608-99¹ was completely rewritten and published in November 1985. Many of the changes incorporated at that time were in response to suggestions and comments made by Army legal assistance officers.² While this regulation has been well received,³ our experience over the past one and one-half years has uncovered several areas that need to be strengthened.

A newly-published change to AR 608-99,⁴ adds a section concerning geographically separated families and makes other minor revisions throughout the regulation. This article will discuss these modifications.

Geographically Separated Families

The new paragraph on geographically separated families⁵ responds to Department of Army Inspector General

(DAIG) concerns about the perennial problem of trying to obtain financial support for family members living in the United States from soldiers stationed overseas.⁶ Installation IGs found that they were spending an increasing amount of time trying to help geographically separated families. The DAIG found that existing procedures were inadequate to meet the needs of such families. Although Army Community Service (ACS)⁷ or Army Emergency Relief⁸ could help with a loan of furniture or money, there was no established command structure or staff section to assist families in obtaining money from the soldier responsible for their

¹ Dep't of Army, Reg. No. 608-99, Personal Affairs—Family Support, Child Custody, and Paternity (4 Nov. 1986) [hereinafter AR 608-99].

² See Arquilla, *Family Support, Child Custody, and Paternity*, 112 Mil. L. Rev. 17 (1986) for a discussion of the background and contents of this Army regulation.

³ Officials within the Department of Defense (DOD) have been trying to develop a uniform approach among the services on handling the problems of non-support of family members and parental kidnapping. The Army is the only service that makes a failure to provide adequate financial support to family members a violation of a lawful general regulation, and hence punishable under Uniform Code of Military Justice art. 92, 10 U.S.C. § 892 (1982) [hereinafter UCMJ]. It is also the only service to prohibit parental kidnapping by regulation. The Army approach to these problems has been proposed to the other services as a model, but this solution has met with resistance. The Air Force, for example, expects each Air Force member to provide regular and adequate support based on the needs of family members being supported and the ability of the service member to pay. (See Dep't of Air Force, Reg. No. 35-18, Financial Responsibility (1 July 1977)). But the Air Force takes the position that it does not have the legal authority to order a service member to support his or her family members. In 1986, DOD proposed in a draft revision of DOD Directive No. 6400.1, Family Advocacy Program, May 19, 1981, to include parental kidnapping and financial nonsupport of family members (including even a threat of nonsupport) within the definition of spouse and child abuse. Based in part on the recommendations of the author, this approach at achieving uniformity among the services was abandoned in favor of issuing a separate directive on these problems. Presently, a draft DOD Directive, entitled "Return of DOD Members, Employees, and Dependents to the United States to Comply with Court Orders," is being circulated for comment within DOD. If implemented, the DOD Directive would require all the services to cooperate with courts and state and local officials in enforcing court orders relating to DOD members and employees stationed outside the United States who have been charged with, or convicted of, a felony in a court for failure to obey the court's order, or have been ordered to show cause why they should not be held in contempt for failing to obey the court's order.

A military member could be ordered to return to the jurisdiction of the court that issued the order, and a DOD employee could be subject to adverse action, including removal, for failure to respond to a court order. A failure to respond to a court order could also be a basis for withdrawing the command sponsorship of any family member or DOD employee. There are some practical, if not legal, problems with this draft DOD Directive. It is clear, however, that a directive along these lines would go a long way in attacking the problems of nonsupport and parental kidnapping by soldiers stationed overseas.

⁴ AR 608-99 is part of the UPDATE system. Because of funding and other problems, the publication of the first change to AR 608-99, AR 608-99 (C1, 22 May 1987) [hereinafter AR 608-99 (C1, 1987)], was delayed about seven months. The change was effective on 22 June 1987. The next annual UPDATE will be in June 1988.

⁵ AR 608-99, para. 2-13 (C1, 1987).

⁶ AR 608-99 glossary, section II, terms (C1, 1987), defines "geographically separated families" as "[a] situation in which a soldier is assigned at an installation other than the installation at which one of his or her family members is attempting to obtain assistance under this regulation."

⁷ Dep't of Army, Reg. No. 608-1, Personal Affairs—Army Community Service Program (15 June 1983) [hereinafter AR 608-1].

⁸ Dep't of Army, Reg. No. 930-4, Service Organizations—Army Emergency Relief (1 Apr. 1985).

support.⁹ The soldier's commander would eventually receive the complaint of financial nonsupport, but no staff section tracked these complaints to ensure that they were resolved in a timely and responsive manner.

Because nonsupport is also a legal problem, family members often sought help from an installation legal assistance office. The staff judge advocate office, however, was not responsible for enforcing the regulation.¹⁰ Moreover, while the legal assistance attorney could write to the soldier's commander on the family's behalf, this did not always produce a timely response or the desired financial support. The legal assistance officer did not act on behalf of the command; his or her letter contained an explicit disclaimer of command involvement.¹¹ Such letters gave the impression that nonsupport was a legal problem rather than a command problem, and solving the problem therefore received a lower priority.

Thus, installation IGs became increasingly involved in assisting these families.¹² Legal assistance offices and ACS both referred families to the installation IG, occasionally as a last resort after other avenues of obtaining support from the soldier had been exhausted.¹³ Once the IG referred a complaint, the responsible soldier usually started to provide the required support required under the regulation, because the IG complaint was a command problem. Finding a solution became a high priority.

To streamline this procedure, paragraph 2-13 now allows a legal assistance lawyer to initiate a command message (with the general approval of the installation commander, the specific approval of the SJA or his or her designee, and appropriate waivers from the client) to the commander of a soldier who is financially responsible for the support of his

or her family.¹⁴ The change also provides suggested formats for the initial message and the comprehensive reply.¹⁵

This new procedure is a reflection of the Army policy that soldiers must provide financial support to their family members and that commanders are required to enforce this policy.¹⁶ There should be no need to pass a family back and forth between the legal assistance and IG offices; a message initiated by a legal assistance officer on behalf of an installation commander in the United States should be just as effective in obtaining timely financial support from a soldier overseas as a message from an installation IG. It should also eliminate the need to send follow-up letters in many of these cases, thereby allowing legal assistance attorneys to devote their time and energy to other legal assistance cases.

If this new procedure does not improve the situation for family members, paragraph 2-13 authorizes installation commanders in the United States and overseas to designate staff officers (other than the SJA) to monitor compliance with the regulation and to send messages on behalf of such families.¹⁷ This is a compromise solution to the DAIG request that the regulation designate a specific section to handle all nonsupport complaints.¹⁸ The general consensus was that there was no need to add another step to the procedure if the message initiated by the legal assistance officer was successful.¹⁹

The regulation also requires installation commanders to establish procedures to inform soldiers of their legal obligations under AR 608-99 during the processing for preparation for replacements (POR) for overseas movement and during permanent change of station (PCS) briefings.²⁰ Soldiers are to be fully advised of their obligation to provide financial support (preferably by allotment) to family members remaining behind and of the provisions of the

⁹ Compare this, for example, to a spouse or child abuse complaint. Pursuant to AR 608-1, chapter 7, installation family advocacy programs are responsible for assisting family members in spouse and child abuse cases regardless of where the soldier is stationed. With regard to AR 608-99, however, the Army has no formal program at the installation level to address the problem of financial nonsupport of family members. Hence, unlike other programs, the Army has no method of compiling statistics on the number of nonsupport complaints, paternity claims, or parental kidnapping cases throughout the Army. There is also no program at the installation level charged with handling these cases, or with enforcing the regulation.

¹⁰ Efforts to make routine enforcement of AR 608-99 a responsibility of the military police were unsuccessful. Nevertheless, a soldier presumably could be apprehended for a violation of one of the punitive provisions AR 608-99 if a family member made a complaint to the military police.

¹¹ Dep't of Army, Reg. No. 27-3 Legal Services—Legal Assistance, para. 2-3a(2) (1 Apr. 1984), states that a letter written by a legal assistance attorney must contain a warning to the reader that the letter is written on behalf of the client, reflects the judgment of only the attorney writing the letter, and that "[i]t is not to be construed as an official view of the United States Army." Although there is good reason for this precaution, it only serves to lessen the priority that the commander might give to solving the nonsupport problem raised by the letter.

¹² The IG is responsible for investigating any instance where a commander has not responded in a satisfactory manner to a nonsupport complaint, but it was never intended that the IG assume primary responsibility for enforcing AR 608-99. See AR 608-99, para. 2-11b and Dep't of Army, Reg. No. 20-1, Assistance, Inspections, Investigations, and Followup—Inspector General Activities and Procedures, para. 4-9 (6 June 1985).

¹³ A representative of the DAIG Office mentioned one example where an officer of an installation IG office felt so sorry for the near destitute situation of one family that he took the family home with him so that they could be fed a meal.

¹⁴ A letter "For the Commander" can be substituted where the urgency is not great or where there is a limitation on message traffic.

¹⁵ AR 608-99, figures 1-1 and 1-2 (C1, 1987), respectively.

¹⁶ AR 608-99, paras. 1-5 and 1-4e (C1, 1987).

¹⁷ AR 608-99, para. 2-13b (C1, 1987). The installation commander is not required to designate a staff section to do this.

¹⁸ An alternative request was to have the U.S. Army Community and Family Support Center—Personal Affairs Branch be the initial point of contact for resolving all financial nonsupport complaints in the Army. This ten-person office does not have the ability to handle all such complaints throughout the Army. Generally, this office only handles nonsupport complaints that are referred by Members of Congress and others in the government to the Department of the Army for resolution. The Personal Affairs Branch will take collect calls from family members, however, and will assist them with their efforts in obtaining financial support from the soldiers responsible for their support. The commercial number is (202) 325-8951 and the AUTOVON number is 221-8951. The Personal Affairs Branch is no longer under the Commanding General, U.S. Army Community and Family Support Center. As a result of a reorganization within the Office of the Deputy Chief of Staff for Personnel in March 1987, the Personal Affairs Branch now comes under the Commanding General, U.S. Army Military Personnel Center (MILPERCEN).

¹⁹ Whatever procedures are established on Army installations in the United States, these procedures will hopefully not impose an additional unnecessary step for families seeking financial support from soldiers stationed overseas. The authority to monitor compliance with this regulation is hopefully a procedure that will be utilized by many Army installations overseas.

²⁰ AR 608-99, para. 1-4c(1) (C1, 1987).

regulation prohibiting parental kidnapping and denial of child visitation rights.²¹

Finally, the regulation makes it clear that a soldier's "continued violation of an existing state court order or this regulation" is a factor the commander should consider before approving a request for, or an extension of, an overseas assignment.²² The regulation, as originally worded,²³ was directed at soldiers whose pending overseas assignment, or extension of an overseas assignment, might adversely affect the legal rights of family members trying to obtain child custody or financial support. The quoted provision has been added to address the situation where a soldier-parent kidnaps his or her children in the United States and, upon arriving overseas, obtains a court order from a foreign court granting the soldier custody. Although legal action against the soldier for violating the state court order may not be possible because of the conflict between the state and foreign court orders,²⁴ the added provision makes it clear that such soldiers should not be allowed to extend their overseas tours so as to allow them to continue to interpose the foreign court order as a defense to the alleged violation of the state court order.

Lawful Orders

Questions have been raised regarding whether a commander could issue a lawful order to enforce those provisions in AR 608-99 that were not specifically indicated as being punitive in nature.²⁵ The answer to this question seemed apparent. Why, for example, have a paragraph in the regulation authorizing a commander to order additional support²⁶ if a commander could not punish a violation of that order under the UCMJ? The intent, after all, in making certain provisions of AR 608-99 punitive was to make it clear that soldiers could be punished for violating a lawful general regulation under Article 92 for not providing financial support to family members or for parental kidnapping, even if they had never been counseled that such conduct was wrongful. The goal was to eliminate delaying tactics and to obtain prompt compliance with court orders and this regulation.

Two changes in the regulation now make it very clear that commanders can issue lawful orders to soldiers to enforce various provisions of the regulation in addition to those provisions that are already separately punishable as violations of a lawful general regulation.²⁷ The changes make

specific reference to the provisions of AR 608-99 on arrearages and additional support as examples of the type of matters that can be the basis for a lawful order by a superior commissioned or noncommissioned officer.²⁸

Parental Kidnapping of Step-Children

A small amendment to the regulation²⁹ makes it clear that soldiers can be held accountable for parental kidnapping of step-children as well as their own children. As originally worded,³⁰ the regulation did not prohibit a soldier from aiding and abetting his or her spouse in kidnapping the spouse's children born as a result of a prior marriage. The amendment adds "step-parent" to the definition of "soldier relative." This change makes parental kidnapping of step-children a violation of the punitive provisions of the regulation.

Child Support

There have been a number of inquiries about the regulation with regard to what constitutes a "silent court order" (that is, a court order without a financial support provision) under the regulation. The regulation requires that soldiers provide financial support to family members in accordance with the existing orders. Some divorce decrees make no mention of alimony or child support, however. A divorce decree that makes no mention of alimony is no problem because the regulation does not require support to former spouses in the absence of a court order.³¹ Child support is another matter as the regulation clearly provides for their continued financial support after a divorce in instances where the court did not have jurisdiction to order child support.³²

As before, AR 608-99 requires a soldier to provide financial support to minor children even when a court order contains no financial support provision.³³ There are now, however, two enumerated instances where this requirement does not apply. The first is where the soldier is the plaintiff in the court action for divorce and the defendant spouse "was properly served with judicial process in person or at the place of residence," and the second is where the soldier is the defendant in the court action for divorce and the court "had personal jurisdiction over the soldier to order child support." In either instance, the soldier would still be required to provide child support if he or she was "receiving BAQ [basic allowance for quarters] at the 'with dependents' rate based solely on the support of the minor

²¹ *Id.*

²² AR 608-99, para. 1-5*d* (C1, 1987).

²³ AR 608-99, para. 1-5*d*.

²⁴ See AR 608-99, para. 2-5*d*(1).

²⁵ "Failure to comply with the minimum support requirements (para 2-4) or the child custody provisions (para 2-5) of this regulation may be charged as violations of Article 92, UCMJ." AR 608-99, para. 1-4*e*(8).

²⁶ AR 608-99, para. 2-10.

²⁷ AR 608-99, paras. 1-4*e*(8) and 1-7 (C1, 1987).

²⁸ AR 608-99, para. 1-4*e*(8) (C1, 1987).

²⁹ AR 608-99, para. 2-5*c* (C1, 1987).

³⁰ AR 608-99, para. 2-5*c*.

³¹ AR 608-99, para. 2-6*b*(2)(a) (C1, 1987). Soldiers are only required to support "family members" as defined in the regulation. The definition of "family member" in the glossary, section II, terms, does not include a former spouse for whom the soldier is not required to provide financial support by virtue of a court order.

³² AR 608-99, para. 2-6*b*(1) and (2)(c) (C1, 1987).

³³ AR 608-99, para. 2-6*b*(2)(c) (C1, 1987).

children in question.”³⁴ This clarification was added because the old provision did not clearly address the situation where the soldier was the plaintiff in the court proceeding.³⁵

The intent of these provisions is to prevent a soldier from being required by regulation to pay child support in a situation where a court clearly considered the issue, and, for whatever reason, determined that child support was not required. At the same time, the regulation does require child support when this was clearly the intent of a court. If the court was not precise as to the amount of support required, then the regulation requires an amount equal to the interim minimum financial support requirements of the regulation.³⁶ Likewise, the same amount of child support is required in situations where the court could not order child support because it did not have sufficient personal jurisdiction over the soldier.³⁷

Spousal Support

Change 1 to AR 608-99 contains a new provision³⁸ on spousal support when one or the other spouse has already initiated divorce proceedings. Similar to the child support provision, this change is intended to prevent a soldier from being required by regulation to pay spousal support in a situation where a court has considered, or has had the opportunity to consider, the issue of spousal support, and, for whatever reason, has not ordered the soldier to pay it. If the court does not order spousal support in such a situation, there is little reason for the Army to do so by regulation.

³⁴ A “court order without a financial support provision” was not previously defined in the regulation. AR 608-99, para. 2-6b(1) (C1, 1987), now defines the so-called “silent court order” as follows:

A court order without a financial support provision is one that contains no language directing or suggesting that a soldier provide financial support on a periodic or other continuing basis. Orders that direct only nominal financial support to family members on a periodic or other basis are not silent. Orders that direct financial on a periodic or other continuing basis, but do not mention an amount are not silent (e.g., “John Jones will provide financial support to his children, Mary and James.”). Where an amount is not indicated, financial support will be in accordance with an existing support agreement or, in the absence of one, then in accordance with paragraph 2-4b.

This new provision reflects the interpretation of the regulation that has been consistently provided whenever questions have arisen in this area.

³⁵ AR 608-99, para. 2-6b(2)(b)1.

³⁶ AR 608-99, para. 2-4b (C1, 1987).

³⁷ Sometimes, the imprecision of a court order on the amount of required child support is directly related to the lack of jurisdiction that the court had to order child support. In any event, the same amount of child support is required in a case where the court order states an obligation to provide child support, but does not state an amount, as would be due if the divorce decree contains nothing at all about child support because the court lacked jurisdiction to order support.

³⁸ AR 608-99, para. 2-6b(2)(b) (C1, 1987).

³⁹ *Id.*

⁴⁰ One change suggested at a recent conference at Fort Bragg will be in the June 1988 UPDATE, because it was received too late to insert it into the UPDATE just printed. This change will clarify that a soldier who has one or more children living with him or her does not have to provide the full amount of BAQ at the “with dependents” rate to a spouse (or spouse and child[ren]) residing elsewhere (not in government housing). The change will add the provisions and definitions below and make it clear that the same proration formula of BAQ at the “with dependents” rate that is used with regard to multiple-family units in para. 2-4b(2) will be applied to single-family units living apart. This change reflects the position of the proponent regarding interpretation of the regulation. Para. 2-4b(1)(c) will be added as follows:

(c) Part of the family living with the soldier. When one or more family members are living with the soldier and one or more family members are living elsewhere, then each of the family members who are not living with the soldier will receive a pro-rata share of an amount equal to the BAQ at the with-dependents rate if they are not living in Government family quarters. This share will be determined by dividing an amount equal to BAQ at the with-dependents rate for the soldier's rank by the total number of all supported family members (excluding former spouses). If the family members who are not residing with the soldier are living in Government family quarters, then, as a group, and without proration, they will receive an amount equal to the difference between BAQ at the with- and without- dependents rate unless paragraph 2-4b(4)(a)2 applies.

The following two terms will be added to the glossary:

Single-family units.

One set of family members, whether living together or apart from each other, all of whom the soldier is required to support as the result of a single legal obligation (e.g., marriage, a paternity judgment).

Multiple-family units.

Different sets of family members that arise from multiple legal relationships (e.g., children from a prior and current marriage).

For a discussion of these definitions, see Arquilla, *supra* note 2, at 42. Footnote 74 of that article also contains an interpretation on how child custody affects the obligation to provide financial support under AR 608-99. This material will also likely be incorporated in the 1988 UPDATE of AR 608-99.

This new provision provides that a soldier has no obligation under AR 608-99 to support a spouse if divorce proceedings have been initiated by either spouse and one or more interlocutory orders have been issued, none of which requires spousal support. The soldier, however, cannot be receiving BAQ at the “with dependents” rate based solely on the support of the spouse. If that is the case, then the soldier must provide spousal support. Spousal support must also be provided if the court did not have personal jurisdiction over the defendant-soldier to order spousal support, or, where the soldier is the plaintiff in the divorce proceeding, the defendant-spouse was not properly served with judicial process, either in person or at his or her place of residence.³⁹

Conclusion

As was true with the 1985 revision of AR 608-99, the modifications that have been made by Change 1 to AR 608-99 reflect the input from legal assistance attorneys who handle financial support, child custody, and paternity cases on a day-to-day basis. Their comments have come in the form of letters, telephone calls, and discussions at conferences and seminars on the subjects addressed by the regulation.⁴⁰ Our goal is to make the regulation as workable and as fair as possible so that commanders and lawyers can devote their time to the many other matters that require their attention.

USALSA Report

United States Army Legal Services Agency

Trial Counsel Forum

Trial Counsel Assistance Program

Workshopping the Jencks Act

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Commissioner, United States Army Court of Military Review

Introduction

Despite the importance of the Jencks Act¹ in civilian federal practice, its impact on trials by court-martial is somewhat limited.² Military pretrial practice provides for broad discovery by the defense of the government's evidence.³ The discovery process may also be regulated by the trial judge.⁴ This state of affairs may explain the paucity of military decisions concerning the Jencks Act over the last thirty years. It has long been settled, however, that the Jencks Act applies to trials by court-martial.⁵ Due to the potential, albeit limited, of drastic trial sanctions for failing to comply with the terms of the Jencks Act, it is necessary for the trial counsel to develop a precise methodology for resolving Jencks Act issues.⁶

Since its inception, the Jencks Act has been the source of considerable anguish for the unwary trial counsel. Compliance with the Jencks Act is often problematic for several reasons. The word "statement" is unquestionably a term of art in the Jencks Act. The trial counsel must have a good working knowledge of this important term. Even when a "statement" is requested, the Jencks Act may not require its production. Additionally, the inability to provide a "produced statement" to the defense is not necessarily a disaster. Despite the rather specific language of the Jencks Act,⁷ trial sanctions are not mandatory.⁸

This article will provide the basic tools needed for anticipating some potential Jencks Act problems. A working

knowledge of what constitutes a "statement," a "produced statement," and some tactical suggestions concerning compliance with the Jencks Act should ease the anxiety commonly experienced when a motion for production arises during the trial. Understanding the purpose of the Jencks Act should permit the trial counsel to comply with its intent through alternative means in appropriate cases. This collective knowledge will help eliminate lengthy trial motions that detract from the orderly and coherent presentation of the government's case-in-chief.

The Jencks Act came into being for a very pragmatic reason. Congress was concerned that the decision of the Supreme Court in *Jencks v. United States*⁹ would open the door to indiscriminate rummaging of the government's files by defense lawyers. As a result of this concern, the Act limits defense access to specific categories of documents that are relevant to the testimony of a government witness and further provides that disclosure is only required after the witness has testified on direct examination.¹⁰ This manifests the clear intent of Congress to limit discovery to documents useful for impeachment purposes. Therefore, the Jencks Act is an inappropriate mechanism for pretrial discovery.¹¹

Section e(3)

The Jencks Act defines three categories of "statements." Because it is the most easily understood, the third category will be discussed first. It concerns "a statement, however taken or recorded, or a transcription thereof, if any, made

¹ 18 U.S.C. § 3500 (1982).

² For a somewhat esoteric discussion of the implicit repeal of the Jencks Act, see Lederer, *Now You See It; Now You Don't—Implicit Repeal of the Jencks Act*, 14 *The Advocate* 94 (1982). Even if the premise of that article is correct, court-martial practice will be unaffected. See *infra* note 6.

³ See *Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 701 [hereinafter R.C.M.]*.

⁴ See R.C.M. 701(g).

⁵ *United States v. Heinel*, 9 C.M.A. 259, 26 C.M.R. 39 (1958).

⁶ The methodology applied to the Jencks Act will be useful in the application of its military counterpart, R.C.M. 914. A significant distinction between the two is that the military rule incorporates Fed. R. Crim. P. 26.2 and *United States v. Nobles*, 422 U.S. 225 (1975), which makes the discovery requirements applicable to defense witnesses except for the accused.

⁷ Section (b) of the Act provides, in pertinent part: "If the United States elects not to comply . . . the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

⁸ *Killian v. United States*, 368 U.S. 237 (1961); *United States v. Albo*, 46 C.M.R. 30 (C.M.A. 1972). For a novel application of traditional negligence theory to Jencks Act violations, see Hoffman & Lucaitis, *The Jencks Act "Good Faith" Exception: A Need For Limitation and Adherence*, *The Army Lawyer*, Sept. 1986, at 30.

⁹ 353 U.S. 657 (1957).

¹⁰ 18 U.S.C. § 3500 (b) (1982).

¹¹ *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977); *United States v. Peterson*, 524 F.2d 167, 175 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Ogden v. United States*, 303 F.2d 724, 734 (9th Cir. 1962), *cert. denied*, 376 U.S. 973 (1964).

by said witness to a grand jury." Despite the numerous differences between a grand jury proceeding and an Article 32¹² hearing, section e(3) applies to the statements of government witnesses at either proceeding. The courts of military review have uniformly held that the testimony of a government witness at an Article 32 hearing is available to the defense for cross-examination of that witness at trial.¹³ The Court of Military Appeals has recently placed its imprimatur on this interpretation of the Jencks Act.¹⁴ While the UCMJ has not been interpreted to require a verbatim transcript of Article 32 testimony, it is apparent that an accused has access to the Article 32 tapes pursuant to the language and judicial interpretations of section e(3) of the Jencks Act.

Section e(1)

The first category of "statement" specified in the Jencks Act is deceptively simple. Section e(1) defines a "statement" as "a written statement made by said witness and signed or otherwise adopted or approved by him." Problems seldom arise from motions for the production of a written statement signed by a government witness. The only legitimate question in such cases is whether the written statement relates to the trial testimony of the witness.¹⁵ To make this determination, the trial judge is required to view the statement, *in camera*,¹⁶ and may excise those portions that do not relate to the direct testimony of the witness.¹⁷

Litigation does arise from the "or otherwise adopted or approved by him" language. This is because adoption or approval may be accomplished even if the witness did not write the document. The most obvious method of adopting something that is written by another is to affix your signature to it.¹⁸ The act of signing is not required, however, if the witness orally verifies the accuracy of the investigator's notes.¹⁹ For example, if an investigator interviews an eyewitness to a crime and takes notes on what the eyewitness related, the eyewitness may adopt or approve the notes within the meaning of the Jencks Act. It is not necessary that the witness even read the notes; they may be read to the witness for oral verification of their accuracy.²⁰ The

notes may, therefore, become the "statement" of the eyewitness. It would seem entirely possible, pursuant to the judicial interpretations of the Jencks Act, to have an illiterate witness render an "e(1)" form of statement.

*United States v. Jarrie*²¹ demonstrates the deceptive simplicity of section e(1). In *Jarrie*, an informant telephonically related specific observations to his controlling agent. The agent took notes. Some time later, the agent telephonically verified the accuracy of the notes with the informant. As a result, the agent's notes were "adopted or otherwise approved" by the informant through the act of oral verification of their contents and accuracy. At trial, the agent testified about the facts contained in the notes that were included in the agent's signed report. The agent's reliance on the information gleaned from the informant, which was reflected in the notes and included in the report, led the court to conclude that the agent had also "adopted or otherwise approved" the notes. Accordingly, the notes were a "statement" of the agent within the meaning of section e(1).

The critical problem in *Jarrie* was that by the time of the trial, the informant and the agent had forgotten the name of an eyewitness to the transaction in issue. The agent felt that the identity of the eyewitness was extraneous and excluded it from his final report. As *Jarrie* teaches, anticipation of Jencks Act issues requires an analysis that is fully cognizant of the manner in which the case-in-chief will be presented, as well as the specific issues that will be addressed by each witness the trial counsel intends to call. Probable cause is a good example of an issue that warrants close scrutiny for potential Jencks Act problems regarding the adoption of information that may create a producible statement.

Notes or interim draft's prepared by law enforcement agents have been the subject of considerable litigation. While some early Jencks Act cases found that these documents were generally subject to being produced at trial,²² the majority rule at present is to the contrary.²³ The current general view is that an agent's rough interim notes or "jottings" lack the degree of finality and completeness implicit in the term "statement." The final report through

¹² Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

¹³ *United States v. Strand*, 17 M.J. 839, 841 (N.M.C.M.R. 1984); *United States v. Patterson*, 10 M.J. 599, 601 (A.F.C.M.R. 1980); *United States v. Thomas*, 7 M.J. 655, 658-59 & n.12 (A.C.M.R. 1979), *aff'd*, 11 M.J. 135 (C.M.A. 1981).

¹⁴ *United States v. Marsh*, 21 M.J. 445, 451 (C.M.A.), *cert. denied*, 107 S. Ct. 666 (1986). *Marsh* held that tapes of an Article 32 investigation must be produced even if the accused and counsel were present at the investigation.

¹⁵ See, e.g., *Rosenberg v. United States*, 360 U.S. 367 (1959); *United States v. Pacelli*, 491 F.2d 1108, 1118-19 (2d Cir.) ("relates" refers to the subject matter of the direct testimony), *cert. denied*, 419 U.S. 826 (1974); *Williamson v. United States*, 365 F.2d 12, 15-16 (5th Cir. 1966). *Accord United States v. Dixon*, 7 M.J. 551 (A.C.M.R.), *aff'd*, 8 M.J. 149 (C.M.A. 1979). A "statement" concerning interest or bias of the witness has been held to "relate" to the direct testimony of the witness. *United States v. Boreli*, 336 F.2d 376, 392-93 (2d Cir. 1964).

¹⁶ See, e.g., *United States v. Loyd*, 743 F.2d 1555, 1566 (11th Cir. 1984); *United States v. Albo*, 46 C.M.R. 30 (C.M.A. 1972).

¹⁷ *Ogden v. United States*, 303 F.2d at 735.

¹⁸ *Clancy v. United States*, 365 U.S. 312 (1961).

¹⁹ *Campbell v. United States*, 373 U.S. 487 (1963); *United States v. Griffin*, 659 F.2d 932 (9th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *United States v. Pacheco*, 489 F.2d 554, 556 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975); *United States v. Wolfson*, 322 F. Supp. (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972).

²⁰ See, e.g., *United States v. Roberts*, 455 F.2d 930 (5th Cir. 1971), *cert. denied*, 405 U.S. 1050 (1972).

²¹ 5 M.J. 193 (C.M.A. 1978).

²² See, e.g., *United States v. Vella*, 562 F.2d 275 (3rd Cir. 1977); *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States v. Harrison*, 534 F.2d 421, 425-26 (D.C. Cir. 1975). It appears that these cases were not predicated solely on the Jencks Act, but also relied on *Brady v. Maryland*, 373 U.S. 83 (1963).

²³ See, e.g., *United States v. Hinton*, 719 F.2d 711 (7th Cir. 1983); *United States v. Bastanipour*, 697 F.2d 170, 174-75 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983); *United States v. Kuykendall*, 633 F.2d 118, 119 (8th Cir. 1980); *United States v. Shovea*, 580 F.2d 1382, 1389-90 (10th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *United States v. Martin*, 565 F.2d 362, 363-64 (5th Cir. 1978); *United States v. Mase*, 556 F.2d 671, 676 (2nd Cir. 1977), *cert. denied*, 435 U.S. 916 (1978); *United States v. Carrasco*, 537 F.2d 372, 377 (9th Cir. 1976).

which the agent intends to communicate facts to others is, however, a statement.²⁴ Therefore, unless there are circumstances indicating some degree of finality intended by the agent who made the notes, they will normally not be a "statement" of the agent.²⁵

Section e(2)

This section of the Jencks Act more frequently raises the question of whether the notes of an investigator constitute the "statement" of another. This provision embraces a variety of methods of memorializing another's words. Section e(2) defines a "statement" as "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

It should be apparent that any method of accurately memorializing an oral statement will suffice for this category. Audio or video tapes or any one of the widely used methods of dictating statements²⁶ will produce a verbatim or substantially verbatim record of what one says orally. Unless there is some technical problem with the device, or it is shown that portions of the oral recitation have been edited in the transcription, statements recorded by any of these commonly employed methods will constitute "a substantially verbatim recital of an oral statement made by said witness." There is certainly nothing unfair in impeaching a government witness with the very words the witness has uttered on a previous occasion. The use of something less than the witness' own words is another matter altogether, however. "[I]t was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not be fairly said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations."²⁷

Even when an agent's notes contain some verbatim portions, they do not constitute a "statement" unless they are found to be a "substantially verbatim" memorialization of the relevant oral statement.²⁸ Accordingly, an agent's 600-word summary of a three and one-half hour interview was not found to be a "statement" even though it contained some exact quotations from the speaker. As the Supreme Court explained: "The legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation."²⁹

The judicial concern in this matter is apparently because of the selectivity implicit in investigative interview notes. The investigator will focus his or her attention on the matters deemed important to the subject of the investigation. What is important during the preliminary stages of an investigation may not embrace matters that become significant at the trial. That investigative interview notes fail to reflect important trial matters is not necessarily reflective of the knowledge of the person interviewed. The negative inference of ignorance by omission is particularly dangerous to the search for the truth in situations where the prior statement does not reflect the remarks of the declarant fully and without distortion.

Tactical Considerations

Knowledge is often commensurate with responsibility. Therefore, it is important for the trial counsel to frame an opening argument that is cognizant of potentially adverse Jencks Act rulings. In addition to the ethical considerations involved,³⁰ it is tactically unwise to promise the court something you do not eventually deliver. Moreover, the essential obstacle of the burden of proof must incorporate the probability, where appropriate, that particular testimony may be stricken pursuant to a Jencks Act motion.

It is seldom, if ever, the case that a critical item of evidence is exclusively within the knowledge of one witness only. Suppose a particular government witness has knowledge of facts A through E and has made a "producible statement" as to facts A and B. If the "statement" is lost or unavailable for any reason, it would be the safest course of action to limit the testimony of the witness to facts C, D, and E. A motion for the "statement" containing facts A and B then could be successfully rebuffed as not "relat[ing]" to the subject matter as to which the witness has testified." Of course, it becomes necessary to secure another witness with knowledge of facts A and B. While this may occasionally pose a problem, early identification of the facts concerned will normally permit securing an alternative source.

The point is simply that forewarned is forearmed. Questions designed to surface potential Jencks Act issues need to be asked of every witness the trial counsel intends to call. A simple checklist of the elements of the charged offenses can be matched with the pretrial statements and Article 32 testimony to determine what facts are known by more than one witness. Should an unanticipated problem arise during the trial, such a list could prove invaluable. This rather simplistic process needs only be helpful in one trial to be worth the effort.

²⁴ While the agent's notes based on his personal observations need not be produced, when the notes memorialize the personal observations of another, the danger of distortion in the transfer to final form is much greater. See, e.g., *United States v. Sanchez*, 635 F.2d 47, 64-66 & n.20 (2nd Cir. 1980); *United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978). See also *United States v. Sink*, 586 F.2d 1041, 1050 (5th Cir. 1978), cert. denied, 443 U.S. 912 (1979).

²⁵ But see *United States v. Walden*, 578 F.2d 966 (3rd Cir. 1978) (transmitting draft to superior for approval indicated agent's satisfaction with its contents and was ample indication of finality).

²⁶ See, e.g., *United States v. Lonardo*, 350 F.2d 523 (6th Cir. 1965).

²⁷ *Palermo v. United States*, 360 U.S. 343, 350 (1959).

²⁸ See, e.g., *United States v. Loyd*, 743 F.2d at 1567; *United States v. Griffin*, 659 F.2d at 936-37; *United States v. Cuesta*, 597 F.2d 903, 914 (5th Cir.), cert. denied, 444 U.S. 964 (1979); *United States v. Hodges*, 556 F.2d 366, 368 (5th Cir.), cert. denied, 434 U.S. 1016 (1979); *Wilke v. United States*, 422 F.2d 1298, 1299 (9th Cir. 1970).

²⁹ *Palermo*, 360 U.S. at 352-53.

³⁰ "[A] lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence." Model Code of Professional Responsibility EC 7-25 (1980).

As the government representative, the trial counsel has the obligation, for lack of a more distinguished euphemism, to protect the record. With regard to the Jencks Act, such protection requires ensuring in camera viewings and specific factual findings by the military judge where appropriate. It is apparent from the decisional law that these factors support a reasoned exercise of the broad discretion vested in the trial judge.

Some cases comment critically on the absence from the record of statements that were unsuccessfully requested pursuant to the Jencks Act. Ensuring that such items are properly attached to the record is unquestionably a responsibility that belongs to the trial counsel.³¹ While there may be legitimate tactical reasons for keeping certain documents from the defense at the time of the trial,³² the reasons often dissipate by the time the record is to be authenticated by the trial judge. In any event, the judge may excise portions of a document that do not relate to the testimony of the witness before the defense is provided a particular document. This will invariably protect any legitimate government interest involved.

In some instances, the appellate courts have insisted on a specific objection by the defense in order to invoke the provisions of the Jencks Act and preserve the issue for appeal.³³ While the Military Rules of Evidence and the Manual for Courts-Martial embrace a strict concept of waiver, the trial counsel should not rely entirely on his or

her subjective determination that a Jencks Act issue has not been properly raised. It is always the better practice to initiate specific dialogue on the record as to whether the defense is attempting to invoke the Jencks Act. The line between requiring strict procedural compliance and elevating form over substance is often difficult to define clearly, particularly in the middle of a trial. An appellate court will have a more objective view of the matter.

One other tactical consideration the trial counsel must bear in mind is that there is no "work product" exception to the Jencks Act.³⁴ It is, therefore, entirely possible for pretrial witness interviews conducted by the trial counsel to result in the creation of "produced statements." In this regard, it is worthwhile to recognize that the principles applicable to agents' interview notes are similarly applicable to the interview notes made by the trial counsel.

Conclusion

This article has discussed the often confusing definitions of a "statement" provided in the Jencks Act and has suggested some possible methods of avoiding Jencks Act problems at trial. The only way the trial counsel will become instinctively familiar with these definitions is to review the cases in detail and develop a working methodology for surfacing potential issues well in advance of the trial. This advance preparation will surely eliminate crises management during the trial.³⁵

³¹ R.C.M. 1103(b)(1).

³² For example, a "statement" may contain the names of vital informants or may reference several ongoing investigations.

³³ See, e.g., *United States v. Mims*, 332 F.2d 944, 948-49 (10th Cir.), cert. denied, 379 U.S. 888 (1964); *Ogden v. United States*, 303 F.2d at 733; *United States v. White*, SPCM 22259 (A.C.M.R. 24 Mar. 1987).

³⁴ *United States v. Goldberg*, 425 U.S. 94 (1976); *United States v. Traylor*, 656 F.2d 1326, 1336 (9th Cir. 1981). While it is also likely that the Jencks Act applies to a hostile defense witness (*United States v. Natale*, 526 F.2d 1160, 1171 & n.15 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976)), it does not appear that the Act applies to a witness called by the court. See *United States v. Hutul*, 416 F.2d 607, 623-24 (7th Cir. 1968), cert. denied, 396 U.S. 1012 (1970).

³⁵ While this article has not attempted to discuss the remedies for violations of the Jencks Act and the various applications of harmless error to such violations, these matters are amply discussed in the cases cited in the article.

The Advocate for Military Defense Counsel

Evidence of Rehabilitative Potential and Evidence in Aggravation: Misused and Abused

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Defense Appellate Division

Trial defense counsel must be vigilant in objecting to uncharged misconduct being elicited as evidence of "rehabilitative potential" and "duty performance." The importance of ensuring that only admissible evidence is before the court on sentencing cannot be overstated; after all, the accused should be sentenced just for the offenses he or she committed. The Manual for Courts-Martial,¹ sets up guidelines as to what evidence is admissible on sentencing. This article will discuss the types of testimony admissible on the

rehabilitation issue and those admissible in aggravation, and recent case law developments in this area.²

Rehabilitation

[T]he action or process of rehabilitating or of being rehabilitated: . . . the process of restoring an individual (as a convict, mental patient, or disaster victim) to a useful and constructive place in society through some

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001 [hereinafter R.C.M.].

² For a discussion of the entire sentencing process, see Gaydos, *A Prosecutorial Guide to Court-Martial Sentencing*, 114 Mil. L. Rev. 1 (1986). For a discussion of aggravation evidence under R.C.M. 1001(b)(4), see Gilligan, *Character Evidence*, 109 Mil. L. Rev. 83, 121-27 (1985).

form of vocational, correctional, or therapeutic retraining or through relief, financial aid, or other reconstructive measure.³

This view of rehabilitation, expressed by the United States Court of Military Appeals in *United States v. Horner*, reemphasizes the importance of evidence of rehabilitative potential as a factor in sentencing. This is significant given some recent questions about the viability of such evidence.⁴ The court reiterated the view it had set out in *United States v. Lania*⁵ that the character of the accused is part of sentencing considerations and the sentence must be tailored to fit the offender.⁶ The concept of rehabilitative potential can embrace "both a return to a particular status and a return to society in general."⁷ Additionally, rehabilitation of a soldier convicted at court-martial is a facet of a soldier's life while he or she is in confinement. Both the United States Disciplinary Barracks at Fort Leavenworth, Kansas, and the United States Army Correctional Activity at Fort Riley, Kansas, count rehabilitation as one of their prime goals.⁸

Despite questioning in some quarters about rehabilitation as a sentencing philosophy, the President, in the 1984 Manual for Courts-Martial, expressly authorized consideration of evidence of a convicted soldier's rehabilitation potential R.C.M. 1001(b)(5) provides in pertinent part that: "Trial counsel may present . . . evidence, in the form of opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation."⁹ Inquiry into specific instances of conduct forming the basis for the opinion is prohibited on direct examination; only on cross-examination is such inquiry permitted.¹⁰

R.C.M. 1001(b)(5) is often misinterpreted. To begin with, many counsel apparently share the misconception that during sentencing the rules of evidence are so relaxed that objections are somehow out of place. This misconception

may have arisen from language in opinions such as *United States v. Mack*, in which the United States Court of Military Appeals declared that "we recall that restrictions on admissibility of evidence have generally been relaxed for purposes of sentencing after a finding of guilt has been returned."¹¹ The Court of Military Appeals later elaborated on the "relaxed" rules of sentencing in *United States v. McGill*.¹² In *McGill*, the court rejected the admission of a defective record of nonjudicial punishment brought in during rebuttal in the sentencing portion of a court-martial. The court opined that the provision for rebuttal evidence was not an open door through which inadmissible evidence could enter: "In our opinion, the rules of evidence are not so relaxed at a court-martial proceeding on sentence as to eliminate the requirement that the Government demonstrate that its evidence is in some way reliable."¹³ Since publication of the 1984 Manual, the Court of Military Appeals has again used the term "relaxed rules for sentencing," but has never interpreted sentencing as a "no rules" proceeding.¹⁴ To the contrary, the Court of Military Appeals and the courts of review have demonstrated a willingness to impose clear limits on the type of evidence that is admissible on the question of rehabilitation.

The Court of Military Appeals' recent decision in *United States v. Horner*¹⁵ focused on the impropriety of admitting an opinion of rehabilitative potential that was based solely on the severity of the offenses committed. Later, in *United States v. Walker*,¹⁶ the court cited *Horner* and held that the military judge erred by allowing the company commander to testify that appellant should not be retained in the service, when that opinion was "based solely on the seriousness of the offenses of which [appellant] had been convicted."¹⁷ The court reversed the decision of the Army Court of Military Review, and remanded the case to the lower court for it to determine whether sentence relief was

³ *United States v. Horner*, 22 M.J. 294, 295-96 (C.M.A. 1986) (quoting Webster's Third New International Dictionary, Unabridged 1914 (1981)).

⁴ See, e.g., Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 Mil. L. Rev., 87, 95. (1986). See also *id.* at 168-174 and U.S. Sentencing Commission Guidelines Revised Draft, 40 Crim. L. Rep. (BNA) 3204, 3207 (1987) for a comparison of evidence admissible on sentencing in federal cases.

⁵ 9 M.J. 100 (C.M.A. 1980).

⁶ *Horner*, 22 M.J. at 295.

⁷ *Id.* at 296.

⁸ See generally Phillips, *The Army's Clemency and Parole Program in the Correctional Environment: A Procedural Guide and Analysis*, The Army Lawyer, July, 1986, at 18.

⁹ R.C.M. 1001(b)(5) (emphasis added). Case law has not been particularly illuminating as to what may constitute a proper foundational basis for opinion testimony. The analysis to R.C.M. 1001(b)(5) cites *United States v. Broughton*, 16 M.J. 649 (A.F.C.M.R. 1983) for the premise that a commander may base his opinion on what he has learned from his subordinates. Logically, then, a witness' opinion may be based on hearsay, but the particularities of the hearsay are prevented from being recited per R.C.M. 1001(b)(5).

¹⁰ R.C.M. 1001(b)(5); R.C.M. 1001 analysis.

¹¹ 9 M.J. 300, 316 (C.M.A. 1980).

¹² 15 M.J. 242 (C.M.A. 1983).

¹³ *Id.* at 245. See also Judge Everett's concurrence, where he disagreed with the majority that the record of nonjudicial punishment was not proper rebuttal evidence; however, inadequate foundation was laid to establish the witness' knowledge of the record that was admitted. *Id.* at 247.

¹⁴ *United States v. Martin*, 20 M.J. 227, 230 n.5 (C.M.A. 1985). See also R.C.M. 1001(c)(3), which only allows rules to be relaxed on extenuation and mitigation—not during aggravation. Trial counsel must still comply with the Military Rules of Evidence; they are relaxed for trial counsel only on rebuttal if first relaxed for trial defense counsel. R.C.M. 1001(d).

¹⁵ 22 M.J. 294 (C.M.A. 1986).

¹⁶ 23 M.J. 429 (C.M.A. 1987) (summary disposition).

¹⁷ *Id.*

required.¹⁸ The Army Court of Military Review has followed *Horner's* holding concerning improper bases for opinions.¹⁹

In *United States v. Lawrence*,²⁰ the Army Court of Military Review found error where the trial counsel introduced a prior sworn statement of the accused as evidence of his rehabilitative potential. Not surprisingly, the statement was not in the form of opinion evidence. The court stated that it could not construe R.C.M. 1001(b)(5) "as contemplating more than introduction of opinion evidence, either by third party testimony or by deposition, relative to an accused's duty performance and potential for rehabilitation."²¹ The court found the error harmless, however, because of a "lack of a timely defense objection on the merits" to part of the contents of the statement, and then found alternative grounds for admitting the rest of the statement.²²

The Air Force Court of Military Review, in *United States v. Berger*,²³ discussed at length the problem of determining what evidence may properly be admitted during the sentencing portion of the court-martial under the provisions of R.C.M. 1001. *Berger* was convicted of two "instances" of indecent liberties with an eight-year old girl and of committing an indecent act upon her body.²⁴ After findings, and over defense objection, the military judge admitted the deposition of one of the accused's stepdaughters; no evidence from his stepdaughters had been admitted on the merits.²⁵ The deposition, even with portions redacted, contained a virtual Pandora's Box of sexual misconduct the accused had allegedly committed with his stepdaughter while she was under the age of sixteen.²⁶ The redacted deposition was read to the members on sentencing.

The Air Force court noted first that R.C.M. 1001 "generally governs the presentencing procedure and the receipt of evidence during the procedure."²⁷ The court examined every provision under R.C.M. 1001 and found that the stepdaughter's deposition was not admissible under any portion of the rule.²⁸ The court did say that the trial judge

may have had R.C.M. 1001(b)(5) in mind when he admitted the deposition because he instructed the members that "the evidence was admitted to assist the court . . . in light of such factors as rehabilitation. . . ."²⁹ The Air Force court rejected this basis for admitting the evidence, stating that R.C.M. 1001(b)(5) "only permits opinion evidence, not evidence of specific instances of uncharged misconduct" on direct examination, and that "[i]ndeed, the drafters of the Manual have said as much."³⁰

The R.C.M. 1001(b)(4) Confusion

Evidence bearing on rehabilitative potential is sometimes viewed improperly as aggravation evidence admissible under R.C.M. 1001(b)(4). The two subsections of R.C.M. 1001 serve two different purposes, and what is admissible under one is not necessarily admissible under the other.³¹

Under some circumstances, evidence of uncharged misconduct is admissible in aggravation. In *United States v. Pooler*,³² the Army Court of Military Review permitted evidence of misconduct to be admitted in aggravation where the uncharged misconduct consisted of an expression of willingness to engage in a drug transaction in the future, made contemporaneously with the distribution for which the accused was convicted. The court stated that evidence of a soldier's "attitude toward *similar* offenses, past or future, is reliable circumstantial evidence, and often the only available evidence, on this issue."³³ That the evidence must be similar in nature to the charged offenses was the express intent of the drafters of the 1984 Manual.³⁴ R.C.M. 1001(b)(4) allows evidence to be admitted concerning aggravating circumstances surrounding an offense, but "does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances *directly* relating to or resulting from an offense of which the accused has been found guilty."³⁵ Even if the evidence is admissible under R.C.M. 1001(b)(4), however, it cannot be admitted if it does not meet the balancing test of Military Rule of Evidence 403.³⁶

¹⁸ *Id.*

¹⁹ The Army Court of Military Review has not decided a case concerning an issue based on R.C.M. 1001(b)(5)'s prohibitions of eliciting instances of specific conduct on direct examination. See, e.g., *United States v. McGruder*, ACMR 8600217 (A.C.M.R. 13 Mar. 1987); *United States v. Smith*, 23 M.J. 714 (A.C.M.R. 1986); *United States v. Smith*, CM 449088 (A.C.M.R. 12 Nov. 1986); *United States v. Primus*, CM 448975 (A.C.M.R. 26 Sep. 1986), *petition filed*, 23 M.J. 254 (C.M.A. 1986).

²⁰ 22 M.J. 846 (A.C.M.R. 1986).

²¹ *Id.* at 848.

²² *Id.* But see *United States v. Rappaport*, 22 M.J. 445 (C.M.A. 1986) (the government should not be permitted to rely on alternative theories for admissibility not offered at trial).

²³ 23 M.J. 612 (A.F.C.M.R. 1986).

²⁴ *Id.* at 612-14.

²⁵ *Id.* at 613.

²⁶ *Id.* at 614.

²⁷ *Id.* at 613.

²⁸ *Id.* at 615.

²⁹ *Id.*

³⁰ *Id.*

³¹ See R.C.M. 1001 analysis.

³² 18 M.J. 832 (A.C.M.R. 1984).

³³ *Id.* at 833 (emphasis added).

³⁴ R.C.M. 1001(b)(4) analysis.

³⁵ *Id.* (emphasis added).

³⁶ *Pooler*, 18 M.J. at 833.

In *United States v. Harrod*,³⁷ extensive evidence of the appellant's habitual drug use that would have been admissible on the merits pursuant to Mil. R. Evid. 404(b) to demonstrate the accused's knowledge concerning the use of drug paraphernalia in his possession, the opportunity to use such paraphernalia, and the motive for its possession, was admissible as aggravation evidence on sentencing. The Army Court of Military Review has also held in *United States v. Wright*³⁸ that where an accused was found guilty of distribution and attempted distribution of cocaine, testimony was admissible from a prior general court-martial in which the accused was convicted of sale and use of marijuana and wrongful introduction of marijuana onto a military installation. The evidence from the prior court-martial was admissible because in the first trial the accused had stated his remorse for his marijuana offenses and had asked for a "second chance." Because the prior offenses were "markedly similar to the ones at issue," the evidence directly related to the accused's attitude toward his offenses.³⁹ The court went on to state that "[w]e do not suggest that sentencing authorities may consider information similar to the type at issue from a trial involving a different and unrelated offense. . . . [W]e have doubts about the propriety of admitting such evidence."⁴⁰

In a case where the appellant was convicted of wrongful distribution of cocaine, evidence of uncharged misconduct that the appellant admitted he had a private selling drugs for him for two months before the offense charged was admissible on sentencing. The evidence "revealed the true character of the [appellant's] misconduct" and had "a direct bearing upon appellant's rehabilitative potential."⁴¹ The court determined, though, that the uncharged misconduct was evidence of a plan to distribute drugs and was thus an aggravating circumstance of the offense; the court did not decide the case under R.C.M. 1001(b)(5) despite its "rehabilitative potential" language.⁴²

The R.C.M. 1001(b)(4) cases above all have a unifying theme: the uncharged misconduct is directly related to or of a similar nature to the charged offenses. Under no circumstances should the government be permitted to introduce evidence of misconduct unrelated or dissimilar under

R.C.M. 1001(b)(5) by arguing that such evidence is relevant to the question of rehabilitative potential. It is not opinion testimony and is in direct contravention to the rule's prohibition against eliciting specific instances of conduct on direct examination.

Conclusion

By paying strict attention to not only *what* evidence the trial counsel tries to introduce during sentencing, but *how* it is offered, a trial defense counsel may be able to prevent the court from considering much prejudicial information. First, make sure the trial counsel states a basis for offering the evidence.⁴³ It offered as evidence of rehabilitative potential, cite R.C.M. 1001(b)(5) and object to any questions about specific instances of conduct. In this way the government witnesses can be kept from spewing forth unsavory information not limited to an opinion. When cross-examining government witnesses, keep *Horner* in mind and test the basis for any negative opinions about retention or rehabilitative potential to determine whether the witness based his or her opinion solely on the nature of the offenses. Such probing can only be undertaken after careful pretrial preparation, of course, as it carries the risk that the witness' negative opinion is based on specific instances of misconduct that were inadmissible on direct examination. Finally, if the trial counsel offers evidence of uncharged misconduct in aggravation, ensure that the incidents are tied to the charged offenses or are very similar to them.

The ultimate sentencing goal of presenting the client in the most favorable light possible should not be sabotaged by a trial counsel going beyond the permissible bounds, nor by a trial defense counsel mistakenly failing to object because of an overly-expansive view of the "relaxed rules for sentencing." State *specific* bases for objections and make the government counsel state the relevance and admissibility of each item of evidence. By vigorously maintaining the distinction between evidence admissible only in aggravation and opinion testimony about rehabilitation potential, unfavorable information that does nothing more than make the accused look like a bad person can normally be excluded.

³⁷ 20 M.J. 777 (A.C.M.R. 1985). See also *United States v. Pooler*.

³⁸ 20 M.J. 518 (A.C.M.R. 1985).

³⁹ *Id.* at 519-21.

⁴⁰ *Id.* at 521.

⁴¹ *United States v. Arceneaux*, 21 M.J. 571, 573 (A.C.M.R. 1985).

⁴² *Id.* at 572-73. Counsel cannot limit admission of uncharged misconduct by a plea of guilty. If the evidence would be admissible on the merits of a contested case, then it is admissible in aggravation following a guilty plea, subject only to the R.C.M. 403 balancing test. See *United States v. Green*, 21 M.J. 633, 635 (A.C.M.R. 1985); see also *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985). The uncharged misconduct admitted in *United States v. Green* involved specifications that had been withdrawn against the appellant concerning false and fraudulent travel vouchers, similar to offenses for which the appellant was convicted.

⁴³ The Court of Military Appeals has stated that "a trial becomes unfair if evidence accepted for one purpose may be used by an appellate court as though admitted for a different purpose, unavoids and unsuspected." *United States v. Resner*, 17 C.M.A. 65, 70, 37 C.M.R. 329, 334 (1967). See also *United States v. Rappaport*, 22 M.J. 445 (C.M.A. 1986) (the government should not be permitted to rely on alternative theories for admissibility not offered at trial).

Forensic Laboratory Reports Are Not Admissible Per Se

In *United States v. Broadnax*,¹ the Court of Military Appeals found prejudicial error where the military judge admitted, over defense objection, a laboratory report of a handwriting analysis without requiring the presence of the laboratory analyst. Judge Sullivan, writing for the majority, analyzed Military Rules of Evidence 803(8) and 803(6), and concluded that, although the laboratory reports were included within the hearsay exceptions, they were not admissible per se because they come from a laboratory. According to the court, before admitting a specific report, the military judge must consider the "type of information in the report, the method of its acquisition, and the manner in which it is presented."² Because the government has the burden to show the admissibility of its evidence, it will often be unable to meet its burden without calling the laboratory analyst as a witness at trial. If the analyst does not testify, and the report is subjective like the handwriting analysis in *Broadnax*, the report will be inadmissible.

This case also clarifies the rule in *United States v. Vietor*,³ which the government relied upon for the admissibility of all forensic laboratory reports without calling the analyst as a government witness. *Broadnax* distinguished *Vietor* and earlier decisions in *United States v. Miller*,⁴ *United States v. Evans*,⁵ and *United States v. Strangstalien*,⁶ as those cases involved laboratory reports of chemical analysis. The court stated:

[t]he laboratory report in this case set forth the documents examiner's opinion that the appellant 'authored the comparable questioned entries' on the forged check. We cannot equate what substantially amounts to an opinion of guilt with the factual type of result concerning the identity of an unknown substance which is produced by chemical analysis.⁷

The Court held on constitutional and evidentiary grounds that the judge erred in admitting the handwriting analysis without requiring the live testimony of the documents examiner.⁸

Judge Cox, in a concurring opinion, analyzed the issue strictly on a constitutional basis.⁹ According to Judge Cox,

notwithstanding the evidentiary rules, the accused was entitled to confront the witnesses against him. Recognizing that the right of confrontation was not absolute where there was a "firmly rooted" hearsay exception, Judge Cox noted that the hearsay exceptions at issue in this case were not "firmly rooted."¹⁰ He found that the laboratory report was inadmissible because it did not bear "indicia of reliability," as it was more subjective than many other scientific tests, and because the government did not show that the witness was unavailable to testify.¹¹

Judge Cox recognized that the Court of Military Appeals took a more "pragmatic approach" when dealing with laboratory reports of chemical analysis. In his opinion, however, hand-writing analysis and other subjective tests did not warrant this "special treatment."¹²

In clarifying the rule in *Vietor*, the Court of Military Appeals has established a new rule for "opinion testimony contained in a report . . . which is more subjective in nature."¹³ The government must notify the defense of its intention to introduce the evidence, and secure the presence of the expert at trial if requested by the defense. Failure to request the witness can be construed as a waiver of the witness' presence.¹⁴

Trial defense counsel must be vigilant in requesting the presence of the laboratory analyst so as not to waive the accused's right of confrontation; but also remember that without the analyst's presence, the government will have a difficult time establishing the admissibility of its evidence. *Broadnax* places the burden squarely on the government to show the admissibility of forensic laboratory reports and not on the defense to show their inadmissibility. Trial defense counsel should be prepared to argue about the subjective nature of purported scientific tests and oppose their admissibility under Military Rules of Evidence 803(8) or 803(6). Remember, "a report is not per se inadmissible simply because it emanates from a forensic laboratory."¹⁵ Captain Pamela G. Montgomery.

An Oldie but Goodie in the Multiplicity Morass

Often, we concentrate so heavily on presenting the most recent case law that we forget to explore the precedential

¹ 23 M.J. 389 (C.M.A. 1987).

² *Id.* at 392-93. See also Mil. R. Evid. 803(6).

³ 10 M.J. 69 (C.M.A. 1980).

⁴ 49 C.M.R. 380 (C.M.A. 1970).

⁵ 21 C.M.A. 579, 581-82, 45 C.M.R. 353, 355-56 (1972).

⁶ 7 M.J. 225 (C.M.A. 1979).

⁷ 23 M.J. at 393.

⁸ *Id.*

⁹ *Id.* at 395-97 (Cox, J., concurring).

¹⁰ Military Rules of Evidence 803(6) and 803(8) are broader than the traditional hearsay exceptions and Federal Rules of Evidence 803 (8).

¹¹ 23 M.J. at 396 (Cox, J., concurring). Judge Cox relied on the two prong test established in *Ohio v. Roberts*, 448 U.S. 56 (1980). The test provides that before hearsay is admissible, the government must produce the declarant or demonstrate that the declarant is unavailable. Once unavailability is shown, the hearsay is admissible if it is reliable. *Id.* at 66. See also *United States v. Hines*, 23 M.J. 125, 130 (C.M.A. 1986).

¹² *Id.*

¹³ *Id.* at 394.

¹⁴ *Id.*

¹⁵ 23 M.J. at 392.

value of cases published long ago in the "red books."¹⁶ A recent oral argument before the Army Court of Military Review highlighted this predictable tendency on the part of counsel for both the defense and the prosecution.¹⁷ It also indicated a fertile area of trial procedure for defense counsel to pursue where the question of multiplicity arises.

At issue is whether the common practice of holding separate specifications to be multiplicitious for sentencing is an adequate remedy when separate findings of guilty are allowed to stand. For example, a person is charged with the assault and battery of an individual along with communication of a threat to the same victim occurring at the same time. Under these circumstances, the offenses have been held to be multiplicitious for sentencing but not for findings.¹⁸ Nonetheless, there exists a very real danger that an accused will still be punished separately for each individual finding of guilty. This danger substantially increases when the military judge erroneously fails to advise court members of his or her ruling on sentence multiplicity, fails to explain what such a ruling means, or discusses only the maximum sentence for all offenses. The problem is further compounded when the staff judge advocate fails to advise the convening authority of the fact and effect of the ruling on sentence multiplicity before action on sentence approval.

Appellate defense counsel have previously attempted to convince the appellate courts to adopt the rationale expressed in the Supreme Court decision of *Ball v. United States*.¹⁹ The language of the decision, that "Congress does not create criminal offenses having no sentence component,"²⁰ was cited to support the proposition that offenses that are not separately punishable should not be separately chargeable once the exigencies of proof have been resolved. In other words, if two offenses are held to be multiplicitious for sentencing, then the military judge should require the government to elect which offense should be dismissed when findings of guilty are returned on both offenses. Although this interpretation of *Ball* was never specifically rejected, it was never adopted for the proposition urged by the defense.²¹

The decision in *United States v. Williams*²² has offered, without notable fanfare, a procedural solution to the problem of potential sentencing prejudice since its announcement by the Court of Military Appeals in 1968. This decision involved a finding by the law officer that the charged offenses were multiplicitious for sentencing. His remedy was to limit the maximum sentence to the more serious specification.²³ Nonetheless, the court held that procedurally multiplicitious offenses were allowable only to enable the government to meet the exigencies of proof. Once this necessity no longer exists, then the findings of guilty may be disapproved before sentence, "so as to guarantee that the offense is not reflected in the final punishment imposed upon the accused."²⁴ This holding of *Williams* has never been reversed. Moreover, in specifically interpreting the legal basis of its opinion in *United States v. Baker*, the Court of Military Appeals not only reaffirmed the holding but also termed it a "guiding principle."²⁵

From the defense perspective, trial defense counsel should use each ruling of sentence multiplicity by the military judge as a basis to move for dismissal after findings are returned.²⁶ If successful, the government would then be required to elect which multiplicitious specifications should be dismissed. Similarly, defense counsel should request the convening authority to disapprove any multiplicitious specifications that remain after trial.²⁷ Failure to request such relief before sentencing or action on the sentence will probably constitute waiver.²⁸ Major Marion E. Winter.

The "Exculpatory No" Doctrine

The "exculpatory no" doctrine protects a suspect from conviction for making a false official statement under Article 107²⁹ resulting from a simple denial of involvement in a crime,³⁰ when an affirmative answer would have been self-incriminating. The issue of whether this defense also applies

¹⁶ Court-Martial Reports, vols. 1-50 (1951-1975).

¹⁷ *United States v. Laws*, CM 448941 (A.C.M.R. 10 Apr. 1987). Senior Judge DeFord raised the subject-matter of this note through questions of government appellate counsel in oral argument. Although the ultimate decision of the court was based on other matters, the ensuing discussion underlined the viability of the procedures outlined herein.

¹⁸ *Id.* (citing *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983)); *but cf.* *United States v. Silva*, 17 M.J. 428 (C.M.A. 1984) (summary disposition); *United States v. McKinnie*, 15 M.J. 176 (C.M.A. 1983) (summary disposition).

¹⁹ 470 U.S. 856 (1985).

²⁰ *Id.*, at 861.

²¹ In *United States v. Jones*, 23 M.J. 301, 303 (C.M.A. 1986), the decision in *Ball* was cited with approval as correctly interpreting the legal basis of the court's decision in *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983).

²² 18 C.M.A. 78, 39 C.M.R. 78 (1968).

²³ *Id.* at 80, 39 C.M.R. at 80.

²⁴ *Id.* at 81, 39 C.M.R. at 81.

²⁵ *United States v. Doss*, 15 M.J. 409, 412 n.4 (C.M.A. 1983).

²⁶ Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 907(b)(3)(B) [hereinafter R.C.M.]. R.C.M. 907(b)(3)(B) provides for dismissal if "[t]he specification is multiplicitious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice."

²⁷ R.C.M. 1105(b) and 1106(f)(4).

²⁸ In its decision reprimanding the Navy-Marine Corps Court of Military Review for not following *United States v. Baker*, the Court of Military Appeals also made it known that it would more actively pursue the doctrine of waiver in the area of multiplicity. *United States v. Jones*, 23 M.J. at 303. Waiver is clearly consistent with the rationale behind *United States v. Williams*—dismissal is appropriate before sentencing to avoid any possibility of prejudice. Similarly, R.C.M. 907(b)(3) requires a "timely motion by the accused" to dismiss a multiplicitious specification.

²⁹ Uniform Code of Military Justice art. 107, 10 U.S.C. § 907 (1982) [hereinafter UCMJ].

³⁰ *United States v. Aronson*, 8 C.M.A. 525, 25 C.M.R. 29 (1957).

to charges of false swearing in Article 134 was recently argued before the Court of Military Appeals³¹ and has been the subject of strongly stated opinions by the Army Court of Military Review.

In *United States v. Harrison*, the Army court argued that the application of the "exculpatory no" doctrine to false swearing under Article 134 would allow suspects to "lightly regard the sanctity of a solemn oath," and would be an open invitation to active falsification and deceit.³² In rejecting the doctrine, the court concluded, "There is a special need in the military to maintain the highest standards of honor and integrity."³³ In *United States v. Castillo*,³⁴ the court stated:

Our years of military experience have indelibly imprinted upon us the caveat that *integrity is one of the select cornerstones supporting our profession at arms* which must be preserved at all costs, and that a marked failure to maintain the high standards of integrity currently found in our armed forces ultimately will translate itself into a form of professional decay.³⁵

In discussing the protections of Article 31 of the UCMJ, the court also noted, "There is no disgrace in a soldier exercising his or her rights—the same cannot be said for breaches of integrity."³⁶

The Army court's concern that the "exculpatory no" doctrine will undermine the integrity of the armed forces is misplaced and obscures discussion of the central legal issue. As legal analysis, the mandate to preserve integrity at all costs lacks content. Such broad policy statements could be made about any military justice question. Practitioners should not let discussion of integrity divert a military judge's attention from the fact that prosecution of exculpatory denials undermines the right to remain silent.

The use of false sworn statement charges to augment an offense is another example of unfair multiplication of charges. It is also a none too subtle attack on an accused's assertion of rights under Article 31 and the fifth amendment. Where appropriate, practitioners should continue to resist the prosecution of such charges through the assertion of the "exculpatory no" doctrine.

The *Castillo* discussion of Article 31 overlooks the genuine threat to Article 31 and fifth amendment protections posed by the prosecution of exculpatory denials of wrongdoing.³⁷ Concern for fifth amendment values caused one court to reject the argument that a suspect is limited to either remaining silent or answering questions honestly.³⁸ In contrast, the *Castillo* court assumes that the right to remain silent in the face of criminal accusations will always be understood, and will not result in any inculpatory inferences. This assumption is contrary to human nature, which is why the right to remain silent must be defended zealously.³⁹ In fact, when confronted by an accusation, the human tendency is to deny involvement. An equally natural tendency is to regard silence as an admission of guilt. One court of military review has recently confirmed that an admission through silence can be used to incriminate if the accusation is made by a private party.⁴⁰

An exculpatory denial should be protected to the same extent as is a decision to remain silent. The decision to remain silent is not limited to speech. Courts have interpreted other acts as the constructive equivalent. Consequently, the surrender of a shopping bag has been held to be a privileged act, as has the response to an order to empty one's pockets.⁴¹ Article 31 and the fifth amendment need to be flexible in order to adequately protect a suspect from self-incrimination. The mere denial of wrongdoing is equivalent to remaining silent.

The Army court's concern that this doctrine will invite falsification and destroy the sanctity of oath-taking is without foundation. The application of the "exculpatory no" doctrine is very limited, and does not reduce the value of sworn statements any more than the assertion of silence itself. This is the first important limitation on the application of the doctrine. *A fortiori*, it applies only when a suspect is exposed to the substantial and real hazard of self-incrimination.⁴² Secondly, the doctrine does not prohibit taking sworn statements in the investigation of crimes. It prohibits conviction for an exculpatory denial, the simple protestation of innocence.⁴³ Finally, the most important limitation on protection of an exculpatory denial is that it does not extend to other affirmative misstatements.⁴⁴

³¹ *United States v. Gay*, CM 447441 (A.C.M.R. 30 Jan. 1986), petition granted, 22 M.J. 371 (C.M.A. 1986) (argued 24 Feb. 1987). The issue granted was whether a plea of guilty to making a false sworn statement was provident, "where appellant merely gave a negative response to a law enforcement agent denying his guilt of a criminal offense."

³² 20 M.J. 710, 712 (citations omitted)

³³ *Id.*

³⁴ ACMR 8600581 (A.C.M.R. 10 Mar. 1987).

³⁵ *Id.*, slip opinion at 2.

³⁶ *Id.*

³⁷ Courts have noted that prosecution of exculpatory denials comes "uncomfortably close to the Fifth Amendment." *United States v. Lambert*, 501 F.2d 943, 946 n.4 (5th Cir. 1974).

³⁸ *United States v. Payne*, 750 F.2d 844, 862-63 (11th Cir. 1985).

³⁹ See *Washington Post*, Feb. 17, Feb. 21, and Mar. 7, 1987, "Op Ed" and "Free for All" sections for the heated debate between former Supreme Court Justice Arthur Goldberg and other commentators over compelling the testimony of Admiral Poindexter and Lieutenant Colonel North.

⁴⁰ *United States v. Wynn*, 23 M.J. 726, 729 (A.F.C.M.R. 1986). In *Wynn*, the appellant was stopped by a base exchange store detective and accused of shoplifting. He remained silent in the face of the accusation. Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook, para. 7-12 (1 May 1982), also recognizes that silence can carry an inculpatory inference.

⁴¹ *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978); *United States v. Kinane*, 1 M.J. 309, 311 n.1 (C.M.A. 1976).

⁴² *United States v. Payne*, 750 F.2d 844, 863 (11th Cir. 1985)

⁴³ *United States v. \$18,350*, 758 F.2d 553, 555 (11th Cir. 1985)

⁴⁴ *United States v. Jackson*, 22 M.J. 643, 646 (A.C.M.R. 1986), identifies a knowing falsehood that goes beyond mere denial of involvement as unprotected. See also *United States v. Collier*, 48 C.M.R. 112 (A.C.M.R. 1973), for another example of falsification unprotected by the doctrine.

The doctrine does not apply to an "affirmative, discursive falsehood."⁴⁵ The reason for this limitation is that a suspect should not be entitled to actively mislead the government, causing the loss of time and resources in pointless investigation of false leads.⁴⁶ At trial, defense advocates should emphasize that the "exculpatory no" doctrine does not burden the government's investigation and prosecution of crimes any more than the assertion of the right to silence. Exculpatory denials and the right to remain silent both serve to protect an accused's constitutional rights. Both deserve to be protected.

Practitioners should stress the limited nature of this doctrine, and argue that it is little more than a practical application of a traditional fifth amendment freedom. Military judges should be reminded that the government's attempt to multiply charges poses a genuine threat to that freedom. Captain Alfred H. Novotne.

Self Authentication Requires a Custodian

The Army Court of Military Review will hold the government to the requirement of certifying a record from the accused's personnel files. In *United States v. Woodworth*,⁴⁷ the court found that six documents had been improperly admitted at trial because of flawed custodial certificates.⁴⁸

The exhibits proffered by the government in *Woodworth* were not self-authenticating. To be self-authenticating under Military Rule of Evidence 902, documents must be accompanied by the attesting certificate of the documents custodian. This attesting certificate verifies that the writing taken from the file is a true copy and that the custodian of the file is acting in an official capacity.⁴⁹

In *Woodworth*, the words "Asst Mil Pers Off" alone were insufficient to connote that the signer was the custodian of the file.⁵⁰ Although the certificate may be signed by an assistant or deputy to the custodian, the certificate must

reflect that he or she is acting in that official capacity.⁵¹ The court also noted that error will be found where a certificate is signed "for" the custodian by an individual whose relationship to the document is not ascertainable from the certificate.⁵²

The method in which the government transcribed the certificate compounded the error. The words professing the authenticity of the copy were not on a separate paper customarily affixed to the exhibit. Instead, they were stamped on the document itself. Because the stamp assuring the truth of the copy and the separate stamp for the signature block were juxtapositioned on the documents so as not to interfere with the contents of the document, they had no apparent relationship one to the other. The court noted this practice with disfavor.⁵³

The court was not asked to decide, nor did it address, who is the proper custodian. The Military Rules of Evidence anticipate one custodian and a deputy or an assistant.⁵⁴ Some government counsel may attempt to introduce records maintained in the same file under the attesting signature of different individuals, each professing to be the official custodian. Also, junior enlisted personnel, whose custodial relationship to the record may be suspect, have been known to sign as the official custodian. This is the next question for the court to answer, upon preservation of the error in court-martial proceedings.

In *Woodworth*, the military judge admitted the government documents over the objection of trial defense counsel.⁵⁵ The objection preserved the military judge's error for decision by the appellate court. The Army Court of Military Review, in its turn, has bound the government to the obligation to properly attest to government records it seeks to admit before court-martial. Captain Kathleen A. Vanderboom.

⁴⁵ *United States v. Davenport*, 9 M.J. 364, 370 (C.M.A. 1980). Note that these circumstances may be unique to the military, because disclosure of one's name in civilian life is generally regarded as a neutral act. *California v. Byers*, 402 U.S. 424, 432 (1971). This acknowledged distinction certainly addresses the Army court's concern in *Harrison and Castillo* that the unique demands of military discipline will be overlooked by extending protection to exculpatory denial.

⁴⁶ *United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986); *United States v. Jackson*, 22 M.J. 643 (A.C.M.R. 1986).

⁴⁷ *United States v. Woodworth*, 24 M.J. 544 (A.C.M.R. 1987).

⁴⁸ The six documents the government sought to admit included three records of punishment under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815 (1982), a letter to disqualify the accused for the Good Conduct Medal, documents disqualifying the accused from the Personnel Reliability Program, and a bar to reenlistment. *Id.* at 545.

⁴⁹ Mil. R. Evid. 902(4a).

⁵⁰ *Woodworth*, 24 M.J. at 546.

⁵¹ Mil. R. Evid. 902.

⁵² *Woodworth*, 24 M.J. at 546 n.2.

⁵³ *Id.* at 546.

⁵⁴ Mil. R. Evid. 902(4a) analysis.

⁵⁵ *Woodworth*, 24 M.J. at 545.

Military Rule of Evidence 801(d)(1)(B): In Search of a Little Consistency

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On its face, the Rule seems fairly simple. A statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."¹ But the analysis of the Military Rules of Evidence highlights the problem:

On its face, the Rule does not require that the consistent statements offered have been made prior to the time the improper influence or motive arose or prior to the alleged recent fabrication. Notwithstanding this, at least two circuits have read such a requirement into the rule. *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978); *United States v. Scholle*, 553 F.2d 1109 (8th Cir. 1977). See also *United States v. Dominguez*, 604 F.2d 304 (4th Cir. 1979).²

The division among the circuits described in the analysis still exists, although it has been refined to achieve a greater degree of confusion. The positions taken are that: the statement is inadmissible unless it preceded the motive to falsify; the statement is admissible without regard for when the motive to falsify arose; and the statement is admissible for rehabilitative purposes regardless of when motive arose but perhaps not as substantive evidence. Federal authority supports the third position.³ The third position is based on the rule of completeness and the fact that the evidence is admissible not as substantive evidence but as rehabilitative evidence.⁴ Fed. R. Evid. 106 is regarded as the Rule of Completeness, and implies that where the witness has been questioned about a number of inconsistencies in a prior statement, the whole statement should be admissible to rebut the charge of inconsistency.⁵

What is the military's position on the proper interpretation of the rule? The analysis takes no position. In *United States v. Meyers*,⁶ the Court of Military Appeals did not decide the issue, but it is evident from the dissenting opinion

that Chief Judge Everett favors the more restrictive interpretation enunciated in *United States v. Quinto*.⁷ The authors of the *Military Rules of Evidence Manual* also favor the *Quinto* rationale.⁸ In *United States v. Browder*,⁹ the Air Force Court of Military Review considered a variant of the problem in deciding that mere contradiction by another witness was not enough to justify evidence of a prior consistent statement. The court's citation of authorities in *Browder* strongly implies that it would follow Chief Judge Everett's view on the question of the timing of the statement.¹⁰ In *United States v. Cottriel*,¹¹ the court noted that there was no requirement in the rule that the statement precede the motive but found that, under the facts presented, the statement did precede the tainting influence. The weight of authority in the military then seems to be with the first position, that is, requiring that the statement precede the motive to lie.¹²

Where are the supporters of the second position? The Fifth Circuit is one—and I am another. The Fifth Circuit's position, concisely stated, seems to be: There is no requirement in the Rule that the prior statement precede the fabrication, improper influence, or notice to lie.¹³

All of the cases and commentators who favor the first position, which is the more restrictive view of Rule 801(d)(1)(B), emphasize the lack of probative value in mere repetition of statements. It seems to me that that argument has been somewhat overstated. The circumstances under which statements are made may add probative significance to the statements. For instance, assume that the defense position, clearly raised by the evidence, is that a female trainee claimed she had sex with her drill sergeant in order to impress the other trainees and achieve some notoriety. Is it not relevant that prior to her first description of the incident to a fellow trainee, she swore that trainee to secrecy and then told the same story she gave on the witness stand?

¹ Mil. R. Evid. 801(d)(1)(B).

² Mil. R. Evid. 801(d)(1)(B) analysis.

³ See *United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983); *United States v. Rubin*, 609 F.2d 51 (2d Cir. 1979) (Friendly, J., concurring).

⁴ See *Parodi*, 703 F.2d at 784.

⁵ Fed. R. Evid. 106. Mil. R. Evid. 106 is identical to the Federal Rule.

⁶ 18 M.J. 347 (C.M.A. 1984).

⁷ *Id.* at 354 (Everett, C.J., dissenting). *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978) required that the consistent statement be made prior to the time the improper influence or motive to fabricate arose. Judge Everett favors the more restrictive view of *Quinto* because a statement admitted as a prior consistent statement is admitted as substantive evidence, commentators have adopted the restrictive view, logic dictates this view, and the restrictive view is consistent with the common law approach. 18 M.J. at 354.

⁸ S. Saltzburg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual* 614 (2d ed. 1986) [hereinafter Saltzburg].

⁹ 19 M.J. 988 (A.F.C.M.R. 1985).

¹⁰ *Id.* at 990; see also *United States v. Nelson*, 21 M.J. 711 (A.F.C.M.R. 1985).

¹¹ 21 M.J. 535 (N.M.C.M.R. 1985).

¹² Saltzburg, *supra* note 8, at 614.

¹³ See, e.g., *United States v. Parry*, 649 F.2d 292 (5th Cir. 1981).

And what about cases where the defense establishes a motive to fabricate, but the time when the motive arose is uncertain? Should that not go to the factfinder?

The decision in *United States v. Parodi*¹⁴ and Judge Friendly's concurring opinion in *United States v. Rubin*,¹⁵ in support of position three, establish quite persuasively that there are a variety of instances when prior consistent statements have rehabilitative value and where the policies behind other Rules, such as Fed. R. Evid. 106, dictate admission. The biggest problem with adopting the third position is the implied requirement in cases involving members to give a confusing and foolish-sounding instruction from the bench. If the evidence is received for a limited purpose, then a limiting instruction should be given. But in a prior consistent statement situation, the statement is the same as the witness' testimony. The military judge would

thus be in the position of instructing the members that they can only consider the statement for a limited purpose, but the testimony to the same facts is not subject to that limitation.

There is one other point in favor of a more expansive view of the rule. The prejudicial impact of such statements is normally quite low because they merely repeat witness' testimony. Panel members are, it seems to me, as capable as lawyers of appreciating the fact that mere repetition of a statement does not increase its believability.

Military Rule of Evidence 801(d)(1)(B) should be applied as written, without the *Quinto* gloss. The evidence can still be tested for relevance and prejudice under Military Rules of Evidence 402 and 403.

¹⁴ 703 F.2d 768 (4th Cir. 1983).

¹⁵ 609 F.2d 51 (2d Cir. 1979) (Friendly, J., concurring).

Trial Defense Service Notes

A Defense Counsel's Guide to Fines

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Introduction

Of all the punishments authorized by the Uniform Code of Military Justice¹ and the *Manual for Court-Martial*,² the least understood by defense counsel and clients alike is probably the *fine*. Because the typical punishment in a military court includes confinement, forfeitures, reduction, and a punitive discharge, defense counsel may tend to overlook a discussion of fines during pretrial counseling with their clients. This oversight could result in a claim of ineffective assistance of counsel.³ This article attempts to answer some of the most frequently asked questions about fines.

What is a Fine?

Unlike a forfeiture, which deprives the accused of an amount of expressly stated pay and allowances each month for a specified period, and is collected from the accused's

military pay as it accrues,⁴ a fine, "is in the nature of a judgement."⁵ A fine creates a debt owed to the government for the entire amount of money specified in the sentence.⁶ The accused is immediately liable to the United States after the fine is ordered executed.⁷ A fine is not contingent on the accused's receipt of pay, and a fine may be collected from sources other than the accused's pay.⁸

For What Offenses Is a Fine an Appropriate Punishment?

Prior to the enactment of the UCMJ, military law specifically authorized fines as punishment for violations of certain specified offenses such as frauds against the government and improper dealing with captured material.⁹ Today, the UCMJ does not provide for a fine as punishment for any specific criminal offense. Instead, the punitive articles generally authorize punishment "as a court-martial may direct,"¹⁰ and leaves to the President the power to set

¹ Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

² Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003 [hereinafter MCM, 1984, and R.C.M., respectively].

³ "[I]t is fair to assume that prior to permitting a defendant to enter a plea of guilty, a qualified defense counsel would have discussed all aspects of possible punishment [including fines] with his client." *United States v. Williams*, 18 M.J. 186, 189 (C.M.A. 1984) (quoting *United States v. Martinez*, 2 M.J. 1123, 1125 (C.G.C.M.R. 1976) (Lynch, J., dissenting)).

⁴ R.C.M. 1003(b)(2) discussion.

⁵ R.C.M. 1003(b)(3) discussion.

⁶ Dep't of Defense, Military Pay and Entitlements Manual, para. 70501b (1 Jan. 1967) (C72, 4 Mar. 1983) [hereinafter DOD Pay Manual].

⁷ R.C.M. 1003(b)(3) discussion.

⁸ *United States v. Cuen*, 9 C.M.A. 332, 336, 26 C.M.R. 112, 116 (1958).

⁹ Articles of War 80 and 94 (1920); see *United States v. Papenhagen*, 29 C.M.R. 890 (A.F.B.R. 1960).

¹⁰ UCMJ arts. 77-134.

punishment limits through the Manual.¹¹ Fines are specifically authorized, however, for refusal of a civilian witness to appear or testify at a court-martial¹² and contempt of court.¹³

"A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted."¹⁴ At first blush, this language in the discussion to the Rules for Courts-Martial appears to limit fines to offenses where a member of the armed forces has been unjustly enriched, such as larceny, graft, or frauds against the United States. While this advice is generally followed, the appellate courts have consistently held this language to be directory rather than mandatory.¹⁵ Adjudged fines have been approved by military appellate courts for such diverse offenses as absence without leave,¹⁶ indecent assault and conduct unbecoming an officer,¹⁷ disobedience of an order to provide a urine sample,¹⁸ drunk driving and fleeing the scene of an accident,¹⁹ use, possession, and transfer of marijuana,²⁰ and negligent homicide.²¹ A review of these cases makes clear that a fine may be a possible punishment for any offense.

Who Can Be Punished With a Fine?

The Manual for Courts-Martial, United States, 1951, limited the imposition of a fine on enlisted persons to cases in which a punitive discharge was also adjudged;²² however, in 1964 the Court of Military Appeals found this to be an improper limitation on the sentencing powers of courts-martial;²³ it was deleted from subsequent versions of the Manual. Today, a fine can be adjudged at any level of court²⁴ against any person subject to the UCMJ, to include civilians subject to military law,²⁵ and instead of or in addition to a punitive discharge.²⁶

What Limits Are There on the Amount of Fine That May Be Imposed?

The UCMJ limits fines for contempt of court to \$100.00,²⁷ and for refusal of a civilian to appear at or to testify in a court-martial to \$500.00.²⁸ None of the punitive articles expressly limit the amount of fine that may be imposed for a specific offense.

Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures that legally could be adjudged.²⁹ For example, under the current pay scales, a soldier who has been reduced to private E-1 with a base pay of \$658.00 per month could be fined up to \$438.00 at a summary court-martial,³⁰ and up to \$2628.00 at a special court-martial,³¹ if no forfeitures were adjudged. It follows then that if the offense charged at a special court-martial carries a maximum permissible punishment of forfeitures for less than six months, the maximum amount of a fine that could be imposed would be correspondingly reduced.

The MCM, 1984 provides, "Any court-martial may adjudge a fine *instead of* forfeitures. General courts-martial may also adjudge a fine *in addition to* forfeitures."³² A cursory reading of this provision might imply that an "either/or" situation has been created for inferior courts—if forfeitures are adjudged, then a fine may not also be adjudged in the same sentence. This interpretation has been rejected by the Court of Military Appeals.³³ This provision merely creates, for inferior courts, what amounts to a set-off situation whereby the amount of forfeitures adjudged limits the amount of fine that can also be adjudged. For example, if an accused were sentenced to forfeit two-thirds pay per month for six months (the maximum forfeiture at a special court-martial), then that accused could not also be lawfully fined in the same case. On the other hand, a private E-1 sentenced to forfeit \$100.00 pay per month for six months (for a total forfeiture of \$600.00) could also be fined up to \$2028.00. The sentence is within legal limits at a special or

¹¹ UCMJ art. 56.

¹² UCMJ art. 47.

¹³ UCMJ art. 48.

¹⁴ R.C.M. 1003(b)(3) discussion.

¹⁵ *Cuen*, 9 C.M.A. at 337 n.5, 26 C.M.R. at 117 n.5.

¹⁶ *United States v. Finlay*, 6 M.J. 727 (A.C.M.R. 1978).

¹⁷ *United States v. Parini*, 12 M.J. 679 (A.C.M.R. 1981).

¹⁸ *United States v. Ashley*, 48 C.M.R. 102 (A.F.C.M.R. 1973).

¹⁹ *United States v. Galvan*, 9 C.M.R. 156 (A.B.R. 1952).

²⁰ *United States v. Kehrli*, 44 C.M.R. 582 (A.F.C.M.R. 1971).

²¹ *United States v. Schultz*, 1 C.M.A. 512, 4 C.M.R. 104 (1952).

²² Manual for Courts-Martial, United States, 1951, para. 127c, sect. B.

²³ *United States v. Landry*, 14 C.M.A. 553, 34 C.M.R. 333 (1964).

²⁴ R.C.M. 1003(b)(3).

²⁵ R.C.M. 1003(b)(3) discussion.

²⁶ R.C.M. 1003(c)(1)(A)(ii).

²⁷ UCMJ art. 48.

²⁸ UCMJ art. 47.

²⁹ R.C.M. 1003(b)(3); see *United States v. Sears*, 18 M.J. 190 (C.M.A. 1984).

³⁰ R.C.M. 1301(d).

³¹ R.C.M. 201(f)(2)(B)(i).

³² R.C.M. 1003(b)(3) (emphasis added).

³³ *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985).

summary court-martial as long as the total dollar amount of the forfeitures adjudged plus the amount of the fine adjudged does not exceed the total amount of the forfeitures that *could* be adjudged by the court.³⁴

A general court-martial may adjudge a fine in addition to total forfeitures.³⁵ There is no express limitation on the amount of fine that may be adjudged in a general court-martial.³⁶ The lack of a limitation at a general court-martial appears to have been tied originally to concerns about allowing courts to recoup unjust enrichment acquired by the accused through his criminal pursuits.³⁷ A fine will not be excessive at a general court-martial if the amount of the fine is reasonably related to the amount of the unjust enrichment.³⁸

Attacks on the power of a general court-martial to impose an unlimited fine have thus far proven unsuccessful. The Army Court of Military Review has rejected arguments that such a practice violates the fifth amendment prohibition against deprivation of property without due process of law, and that it constitutes cruel and unusual punishment in violation of Article 55, UCMJ.³⁹ The key issue is not whether unlimited discretion with regard to fines at a general court-martial is lawful, but whether the specific fine imposed is excessive and in violation of the eighth amendment to the United States Constitution.⁴⁰ The test adopted by the Army Court of Military Review is that a "fine must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."⁴¹

A fine may also be deemed excessive or inappropriate where the sentencing authority bases the amount of the fine on a collateral matter, such as the cost to the government of the accused's education, training, or experience.⁴² Defense counsel should object to any evidence offered by the prosecutor pertaining to the value of collateral matters unrelated to the offense charged, and should object to any argument that urges the sentencing authority to consider these matters in determining an appropriate fine.

Recently, another issue has arisen regarding the imposition of fines in guilty plea general court-martial cases where

total forfeitures are also adjudged. The Court of Military Appeals' concern has been whether an accused is denied due process where he was not specifically advised of the possibility of a fine as part of the providence inquiry.⁴³ In *United States v. Williams*, the court held that

unless the pretrial agreement specifically mentioned the possibility of a fine or there is other evidence that the accused was aware that a fine could be imposed, a general court-martial may not include a fine in addition to total forfeitures in a guilty plea case unless the possibility of a fine has been made known to the accused during the providence inquiry.⁴⁴

A clause in the pretrial agreement in *Williams* that permitted the convening authority to approve any other lawful sentence adjudged was not deemed sufficient for this purpose.⁴⁵ In *United States v. Shirley*,⁴⁶ the pretrial agreement specifically provided that "the convening authority would approve no fine exceeding the amount of \$5000.00,"⁴⁷ and the sentence, which included a fine in that amount, was upheld on appeal notwithstanding that the military judge failed to discuss the possibility of a fine with the accused.⁴⁸ In *United States v. Edwards*,⁴⁹ the military judge specifically advised the accused that a fine might be adjudged as part of the sentence; the pretrial agreement, however, not only failed to mention a fine, but also negated the impact of the judge's advice by purporting to encompass every element of the maximum sentence that the convening authority could approve. Under the circumstances of that case, the court perceived a danger that the accused, "might reasonably have inferred that the convening authority could not approve a sentence which included forfeitures *and* a fine."⁵⁰ Clearly, defense counsel should be creative in negotiating and drafting pretrial agreements to assist clients in avoiding a fine in guilty plea cases at a general court-martial.

How Can a Fine Be Enforced?

The Manual provides that

"[i]n order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event that the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further

³⁴ *Id.*

³⁵ R.C.M. 1003(b)(3); see *United States v. McElroy*, 3 C.M.A. 606, 14 C.M.R. 24 (1954); *United States v. DeAngelis*, 3 C.M.A. 298, 12 C.M.R. 54 (1953).

³⁶ "Other than the proscriptions of Article 55 UCMJ, 10 U.S.C. § 855, there are no limits on the amount of a fine which may be imposed by a general court-martial." *United States v. Williams*, 18 M.J. 186, 187 (1984).

³⁷ W. Winthrop, *Military Law and Precedents* 398 (2d ed. reprint 1920).

³⁸ "The amount of the fine was determined by the loss occasioned to the Government. This is an acceptable method of determining the amount to be imposed." *United States v. McElroy*, 3 C.M.A. at 613, 14 C.M.R. at 31.

³⁹ *United States v. Parini*, 12 M.J. 679 (A.C.M.R. 1981).

⁴⁰ *Id.*

⁴¹ *Id.* at 685.

⁴² *United States v. Finlay*, 6 M.J. 727 (A.C.M.R. 1978).

⁴³ *Williams*, 18 M.J. at 187.

⁴⁴ *Id.* at 189.

⁴⁵ *Id.* at 187.

⁴⁶ 18 M.J. 212 (C.M.A. 1984).

⁴⁷ *Id.* at 213.

⁴⁸ *Id.*

⁴⁹ 20 M.J. 439 (C.M.A. 1985).

⁵⁰ *Id.* at 440.

confined until a fixed period considered an equivalent punishment to the fine has expired.”⁵¹

If the accused has the resources to pay the fine but fails to do so, then after serving the adjudged confinement the accused will serve the additional confinement to enforce the fine until such time as the fine is paid or the equivalent confinement is served.

The Manual further provides that “[t]he total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.”⁵² Thus, at a special court-martial, the confinement adjudged plus the confinement to enforce the fine may not exceed six months. Likewise, at a general court-martial it would appear that one should look to the maximum confinement that may be adjudged for the offense to determine the punitive jurisdictional limitations of the court. This may not be true, however. In an older case decided under the Manual for Courts-Martial, U.S. Army, 1949, the Court of Military Appeals held that an accused sentenced to five years confinement for larceny (the punitive jurisdictional limit for that offense) could also be required to serve an additional two years confinement in the event the accused failed to pay the imposed fine.⁵³ The theory of the court was that the additional confinement was not made as punishment for the offense, but merely as a means of coercing the collection of the fine imposed. The court noted that the accused “carries the keys of his prison in his own pocket.”⁵⁴ This theory was followed in a later case⁵⁵ based on language in the Manual for Courts-Martial, United States, 1969, that was substantially the same as in the MCM, 1984. Defense counsel should alert their clients to the possibility of increased limits of confinement in the event the sentence includes a fine and confinement to enforce the fine.

Military law now allows fines to be executed, and thus collected, after the initial action of the convening authority.⁵⁶ Additional confinement, however, “may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency.”⁵⁷ This provision provides fertile ground for a defense counsel to exercise his or her advocacy skills. From the presentencing stage of the trial through post trial submissions, the defense should create

a record showing the financial condition of the accused, particularly if the accused has limited financial resources. Such a showing may not only deter the sentencing authority from imposing a fine, but may also help induce the convening authority, the appellate courts, or a clemency board to remit the fine or the confinement to enforce a fine. If indigency and a good faith effort to pay are shown, the confinement to enforce a fine may not be imposed unless the convening authority determines, “after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government’s interest in appropriate punishment.”⁵⁸

How and When Will a Fine Be Collected?

A fine is due and owing when ordered executed.⁵⁹ Accordingly, an accused with adequate financial resources may be required to pay the fine soon after the initial action. The DOD Pay Manual authorizes fines to be paid in cash by the service member.⁶⁰ If voluntary payment is not forthcoming, there are several ways to collect the fine involuntarily. Fines can be collected from any pay that may accrue to an enlisted accused (similar to collection of forfeitures),⁶¹ and from final settlement of pay at the time of an enlisted accused’s discharge.⁶² Federal law changed in 1984 and now allows collection of fines from the current pay of officers as well as enlisted soldiers;⁶³ collection is also authorized from retired pay.⁶⁴ The Debt Collection Act of 1982⁶⁵ allows collection by set-off from federal payments due to the accused, such as income tax refunds, civilian pay as a federal employee, and payments for damage to household goods. Discharged soldiers who are not receiving federal funds may find collection of their fines pursued under the Federal Claims Collection Act.⁶⁶ Clients should be advised that because a fine is a debt to the government, they may expect to encounter the full range of debt collection actions.⁶⁷

Conclusion

The broad interpretation the military courts have historically applied to the language pertaining to fines in the Manual for Courts-Martial has removed many seemingly apparent restrictions on the imposition of fines. A thorough familiarity with the applicable cases is needed to ensure that

⁵¹ R.C.M. 1003(b)(3).

⁵² *Id.*

⁵³ *United States v. DeAngelis*, 3 C.M.A. 298, 12 C.M.R. 54 (1953).

⁵⁴ *Id.* at 306, 12 C.M.R. at 62.

⁵⁵ *United States v. Larson*, 45 C.M.R. 894 (N.C.M.R. 1972).

⁵⁶ UCMJ art. 57(c).

⁵⁷ R.C.M. 1113(d)(3); see *Tata v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

⁵⁸ R.C.M. 1113(d)(3).

⁵⁹ R.C.M. 1003(b)(3) discussion.

⁶⁰ DOD Pay Manual, para. 70501b(1).

⁶¹ *Id.* at para. 70501b(2); see also para. 70507b(1), which provides that fines may not be collected from the current pay if prior deductions exceed two-thirds of the members’ pay for any month.

⁶² *Id.* at para. 70501b(3).

⁶³ 37 U.S.C. § 1007(c) (Supp. III 1985).

⁶⁴ 5 U.S.C. § 5514 (1982).

⁶⁵ 31 U.S.C. §§ 3701–3719 (1982).

⁶⁶ 31 U.S.C. § 3711 (1982).

⁶⁷ “In order to satisfy this debt [a fine], the Government may bring suit in the same manner as it would to collect any other debt due and owing the United States.” *United States v. Cuen*, 9 C.M.A. 332, 336, 26 C.M.R. 112, 116 (1958).

defense counsel will not misinterpret the language in the Manual to the detriment of their clients. All defense counsel should become familiar with the legal and administrative consequences of fines and should ensure that their clients are fully apprised of the possibility that a fine and additional confinement to enforce payment of the fine

may be imposed as part of the sentence in a court-martial. If a client lacks the financial resources to pay a fine, defense counsel should strive to build the record showing the client's financial inability to pay a fine in order to increase the likelihood that a fine will not be adjudged or later will be remitted.

What Is the Army's Policy on Drugs?

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Defense counsel routinely represent soldiers in administrative elimination boards authorized by Army Regulation 635-200.¹ A common ground for separation is chapter 14, Separation For Misconduct; specifically, paragraph 14-12d for abuse of illegal drugs.²

The Army's general policy on the use of drugs is clear: the use of illegal drugs is incompatible with military service and their abuse cannot be tolerated.³ Effective analysis by defense counsel must go further than this simplistic conclusion, however. Upon further inquiry, the Army's policy on drugs is not so crystal clear. Combining the policy embodied in AR 600-85, AR 635-200, and Department of Defense Directive No. 1010.1,⁴ it is clear that the Army has adopted a discretionary case-by-case approach rather than a standard platform. Defense counsel must take an active role in educating commanders and members who sit on administrative separation boards, for their interpretation of the relevant regulatory factors is of vital importance to the decision to separate or retain the soldier.

A good starting point is AR 635-200, paragraph 14-12, which governs separation for misconduct and sets forth the basic policy on separation for drugs. The most common cases for administrative separation under Chapter 14 are simple possession of marijuana or those based upon positive urinalysis tests.⁵ The reason for this is both common sense disposition of offenses, and the exclusionary language that prefaces AR 635-200, paragraph 14-12d. Common sense

dictates that the more serious drug offenses, *i.e.*, distribution, possession of large amounts of drugs, or offenses involving drugs other than marijuana, may be handled by courts-martial. Also, the prefatory language of paragraph 14-12d excludes drug cases that will be handled by courts-martial, civilian courts, or administrative separation under AR 635-200, chapter 9 for rehabilitative failure. Practically speaking, this excludes all cases except detection of use by urinalysis and simple possession of small amounts of drugs.

Paragraph 14-12d states that soldiers in grades E-5 to E-9 will be "processed for separation" upon discovery of one drug offense, and soldiers in all grades must be "processed for separation" after discovery of a second offense.⁶ Often, commanders and the board members express an inflexible view on separation once a soldier falls within one of the above-listed categories. Typically, board members and commanders believe Army policy, which they must support, mandates separation of the soldier. Such a view ignores the express language of the regulation. "Processed for separation" requires that "separation action will be initiated and processed through the chain of command to the separation authority for appropriate action."⁷ This gives the separation authority wide discretion to dispose of cases by alternate means other than by an administrative separation board.⁸ The separation authority is not locked into convening a board,⁹ nor must every soldier be automatically discharged after two drug offenses or E-5s to E-9s after one drug offense. If such were the

¹ Dep't of Army, Reg. No. 635-200, Personnel Separation—Enlisted Personnel (5 July 1984) [hereinafter AR 635-200 (C8 1987)].

² AR 635-200, paragraph 14-12d deals specifically with abuse of illegal drugs, and states that the reason for all separations authorized by paragraph 14-12d will be "misconduct-abuse of illegal drugs." The separation action will be processed under paragraph 14-12a, b, or c, although normally it will be based upon commission of a serious offense.

³ Dep't of Army Reg. No. 600-85, Personnel-General—Alcohol and Drug Abuse Prevention and Control Program, para.1-9a (3 Nov. 1986) [hereinafter AR 600-85].

⁴ Dep't of Defense Directive No. 1010.1, Drug Abuse Testing Program (Dec. 26, 1984) [hereinafter DOD Dir. 1010.1].

⁵ Fort Ord Trial Defense Service records for FY 86 reveal a total of 64 chapter 14 boards, of which 51 boards were premised on drug offenses under Article 112a of the Uniform Code of Military Justice, 10 U.S.C. § 112a (1982) [hereinafter UCMJ]. Statistics for FY 85 show a total of 136 chapter 14 boards at Fort Ord, of which 111 involved drug offenses under Art 112a. The overwhelming majority of drug cases were based on drug use detected by urinalysis.

⁶ AR 635-200, para. 14-12d.

⁷ *Id.*

⁸ The separation authority's options are set out in paragraph 14-17. The separation authority may direct reassignment of the soldier, or return the case to its originator for disposition by other means, or refer the case to the appropriate separation authority to determine whether the soldier should be separated for another reason, or direct retention of the soldier, or approve a suspended discharge.

⁹ There are situations where the soldier has a right to an administrative board. For example, a soldier with a total of six years active and/or reserve service is entitled to a board pursuant to AR 635-200, paragraph 2-2d. Irrespective of time in service, a soldier is entitled to a board pursuant to AR 635-200, paragraph 3-7c(4) if he or she has been notified that the least favorable characterization of service he or she could receive is under other than honorable conditions. In either of these cases, the soldier could request a board and the separation authority would have to convene a board of officers. If the separation authority decided to retain the soldier instead of convening a board, it is assumed the soldier would not protest the decision.

Army's policy, the regulation would expressly state so without allowing discretion. Instead, the separation authority may initially make alternate disposition,¹⁰ or convene a board of officers to obtain the recommendation of a board before taking final action. If the separation authority convenes a board of officers, he or she cannot subsequently impose a more severe action than that recommended by the board.¹¹

In order to determine the impact of the general policy on separation for involvement with drugs, a distinction must be made between drug "use" and "abuse." Paragraph 14-12d prescribes separation based on "abuse of illegal drugs." Defense counsel should argue the distinction between use and abuse involves rehabilitation potential. This is recognized not only in AR 635-200, but in the broad Army policy concerning use of drugs embodied AR 600-85 and the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP).¹²

Paragraph 14-2, entitled "policy," specifically emphasizes the importance of rehabilitation potential in separations for misconduct. It states that a soldier should not be separated for misconduct unless it is "clearly established" that rehabilitation is impracticable, the soldier is not amenable to rehabilitation, or despite attempts at rehabilitation, further efforts are unlikely to succeed.¹³ Although the general standard of proof is by a preponderance of evidence¹⁴ defense counsel should argue that the government must meet a higher standard (clearly established), similar to clear and convincing evidence, with respect to rehabilitation under chapter 14.¹⁵

Paragraph 1-17 provides guidance applicable to all administrative separations under AR 635-200. Rehabilitative potential is repeatedly emphasized, and should be considered both before initiation of separation proceedings¹⁶ and during processing.¹⁷ This requirement is independent of and in addition to the counseling and rehabilitative requirements of paragraph 1-18, which are applicable for only a limited number of reasons for separation.¹⁸ Thus, the immediate commander should consider rehabilitation before

initiating separation and in forwarding his or her recommendation; the intermediate commanders should consider rehabilitation when forwarding their recommendation; the separation authority should consider rehabilitation when convening a board; the board members should consider rehabilitation when making their recommendation; and the separation authority should consider rehabilitation when taking final action.

Many commanders have coined language¹⁹ for recommendations that they use in all cases, making the administrative forwarding of chapter 14s a "rubber stamp" exercise. Many immediate commanders interpret the "process for separation" language as mandating that they forward a personal recommendation for separation. Sometimes these same commanders then testify for the soldier at the administrative board hearing and recommend retention due to the soldier's overall exceptional prior duty performance and military service, and potential for rehabilitation. Not only is this uneconomical and inefficient, but it also ignores the provisions of AR 635-200 designed to prevent this situation from occurring. The immediate commander is required to forward a report to be considered by intermediate commanders and the separation authority.²⁰ Included in this report is, *inter alia*, the determination by the immediate commander whether separation of the soldier is in the best interest of the Army, a description of rehabilitative attempts, and a statement indicating why the commander does not consider it feasible or appropriate to dispose of the matter by alternate means. Paragraph 14-12d requires only that the soldier be processed for separation; it does not mandate separation or recommendations of separation by commanders and intermediate commanders. If the immediate commander believes that the soldier has rehabilitative potential or that separation is not in the best interests of the Army, the commander should so indicate by recommending retention²¹ and then forwarding his or her recommendation so that the soldier can complete the separation process. This will provide adequate information for the intermediate commanders to consider in making their recommendations, which in turn will assist the separation

¹⁰ See *supra* note 8.

¹¹ AR 635-200, paras. 2-4, 2-6d.

¹² AR 635-200, paragraphs 1-17 and 14-2 specifically emphasize the importance of considering rehabilitation. AR 600-85, paragraphs 1-6, 1-7, 1-9, 3-7d, 4-5, 4-11, and 4-26 also recognize the importance of rehabilitation and specifically set forth various points in time where rehabilitation is to be considered in the separation process.

¹³ AR 635-200, para. 14-2.

¹⁴ *Id.* at para. 2-12a.

¹⁵ See also AR 635-200, para. 2-1b(1).

¹⁶ *Id.* at para. 1-17a and c.

¹⁷ *Id.* at para. 1-17b and d(5).

¹⁸ Paragraph 1-18a by its own terms is mandatory for separations based on one of the following reasons: inability to perform prescribed duties due to parenthood (para. 5-8); personality disorder (para. 5-13); entry level performance and conduct (chapter 11); unsatisfactory performance (chapter 13); and minor disciplinary infractions or a pattern of misconduct (para. 14-12a and b).

¹⁹ For example:

"I recommend that X be eliminated from the service under the provisions set forth in Chapter 14-12c, AR 635-200, for use of illegal drugs."

"Request that any further counseling or rehabilitation requirements be waived."

"Forwarded for review."

²⁰ AR 635-200, para. 14-15. This paragraph then refers the commander to AR 635-200, para. 13-7 for guidance.

²¹ This can be inserted in the immediate commander's report; more typically it is included as part of the transmittal forwarded to superior commanders. Immediate and intermediate commanders are now permitted by paragraph 14-12d to make a recommendation as to characterization of discharge. Previously, commanders could only recommend separation or retention, and were prohibited from making a further recommendation as to type of discharge. This may be helpful in avoiding an other than honorable discharge in cases where the commander is unwilling to recommend retention, but does not believe the soldier deserves a discharge under other than honorable conditions. In such a case, a commander could recommend discharge under honorable conditions or an honorable discharge.

authority in disposing of the case based upon an accurate picture of the respondent. All Army decision-making processes are designed to provide the commander with accurate information upon which to make a decision. This process is no different. The forwarding recommendations must be accurate or they are counter-productive and the subordinate commander providing them is misleading his or her superiors. There may well be cases that are processed through the chain of command with one or more recommendations for retention, and the separation authority may determine it unnecessary to convene an administrative elimination board. Defense counsel should educate commanders in order to derail future cases before the separation train gets out of control and results in an unjust or unintended result. Why discharge a soldier contrary to the best interests of the Army?

Some commanders may be reluctant to recommend retention for fear that the unit may perceive that the soldier is going unpunished. Because in most cases the soldier has already received non-judicial punishment or other adverse administrative action, it is persuasive to emphasize this and suggest that subsequent administrative separation is in effect double punishment of the soldier.

Corroborating the importance of rehabilitation in interpreting the Army's general stance on drug use is ADAPCP, embodied in AR 600-85. One of the main policy objectives of the drug urinalysis testing program is early identification of drug users to provide for rehabilitation, counseling, or medical treatment.²² The other main purpose is to assist commanders in maintaining security, good order, and discipline. These two main policy objectives must be balanced against each other. The objectives are not mutually exclusive, but rather, complementary. Early identification and treatment assist in maintaining security. Punitive action in response to identification not only maintains good order and discipline, but provides specific deterrence and assists in rehabilitating the individual.²³ The goal of rehabilitation is to achieve the earliest return to full effective duty.²⁴ Rehabilitation efforts are generally short term and conducted in the military environment to which the soldier must

adapt.²⁵ If the soldier fails to adapt, he or she is processed for separation.²⁶

When a soldier has a positive urinalysis test result, he or she must be referred to ADAPCP.²⁷ It is only after the initial screening at ADAPCP that the commander should consider administrative separation, and then only if the soldier either does not desire to be rehabilitated, or, based on his or her overall record, does not have the potential for further service.²⁸ If the commander believes the soldier warrants retention notwithstanding the positive test result, the soldier will be afforded an opportunity for rehabilitation.²⁹ ADAPCP consists of three tracks, the most serious and comprehensive of which is residential treatment. There also exists a limited use policy,³⁰ which restricts the use of certain evidence of drug use, the objective of which is to facilitate identification, treatment, and rehabilitation. The Army would not develop and maintain such programs if it harbored a policy of automatically separating soldiers when they have either one or two positive tests. The enormous monetary cost of raising and maintaining an Army of volunteers precludes such a policy. Rather, persons in leadership positions must take a long, hard look at their units in an effort to reduce non-ETS losses by only separating those soldiers who demonstrate no potential for rehabilitation.³¹

Often the most difficult cases involve noncommissioned officers in the grades E-5 to E-9. AR 635-200 requires these soldiers to be processed for separation upon discovery of a single drug offense. The legitimate policy basis for their more stringent treatment is that by virtue of using drugs, these soldiers have "violated the special trust and confidence the Army has placed in them" as leaders.³² It is these same soldiers who generally have excellent service records extending over a number of years, however, and who are most amenable to rehabilitation. These are soldiers in whom the Army has made a substantial investment, and they are not as easily replaced as junior enlisted soldiers with minimal prior periods of service. If indeed an isolated incident has "little probative value in determining whether administrative separation should be effected,"³³ these are soldiers who deserve a second opportunity. Are these

²² AR 600-85, paragraph 10-2 lists seven purposes of biochemical testing for controlled substances: to determine a soldier's fitness for duty and the need for counseling, rehabilitation, or other medical treatment; to determine the presence of controlled substances in a soldier's urine or blood content during participation in the ADAPCP; to gather evidence to be used in actions under the UCMJ; to gather evidence to be used in administrative actions; to determine the presence of controlled substance in a soldier's urine or blood content for a valid medical purpose; to determine the presence of controlled substance in the urine (of) soldiers or the blood alcohol content during inspections; and to serve as a safeguard at social gatherings where alcoholic beverages are served to individuals who might otherwise not realize how much alcohol they have consumed. AR 600-85, paragraph 1-8 lists eight objectives of ADAPCP: to prevent alcohol and other drug abuse; to identify alcohol and other drug abuses as early as possible; to restore both military and civilian employee alcohol and other drug abusers as early as possible; to provide for program evaluation and research; to ensure that effective alcohol and drug abuse prevention education is provided at all levels. This education must be included in all three tracks of rehabilitation as a necessary part of ADAPCP and as required of DOD; to ensure that adequate resources and facilities are provided to successfully and effectively accomplish the ADAPCP mission; to ensure that all military and civilian personnel assigned to ADAPCP staffs are appropriately trained and experienced to effectively accomplish their mission; and to achieve maximum productivity, reduced absenteeism and attrition among DA civilian employees by preventing and controlling abuse of alcohol and other drugs.

²³ AR 600-85, para. 1-9h.

²⁴ *Id.* para. 4-5a.

²⁵ *Id.* para. 1-9i.

²⁶ *Id.* paras. 4-2a and 4-2b.

²⁷ *Id.* para. 3-7b.

²⁸ *Id.* paras. 1-9a, 3-7d, 4-26.

²⁹ *Id.* para. 1-9a.

³⁰ *Id.* chapter 6, section II.

³¹ Dep't of Army Letter, Chief of Staff, subject: Leadership Applied to Manning the Army, 16 Feb. 1985.

³² AR 600-85, para. 1-11c.

³³ AR 635-200, para. 1-17d(6)(e).

soldiers drug "abusers" or just one-time drug "users"? Commanders should take a long, hard look at these soldiers' overall records and potential for rehabilitation, and then evaluate this in light of the Army's policy against the abuse of drugs.

The use of illegal drugs in the military environment presents an unique problem. Obviously, abuse of drugs is incompatible with military service. Raising, training and maintaining an all-volunteer Army is expensive in terms of both time and money, however. For this reason, the Army does not maintain a policy of automatically discharging a soldier who simply uses drugs on a one or two time basis. Rather, the Army has opted for a discretionary approach after consideration of a number of factors. This discretionary approach is always subject to individual interpretation. ADAPCP appears theoretically in conflict with the policy

embodied in AR 635-200, chapter 14, concerning administrative separation of drug abusers. Not only are ADAPCP and Chapter 14 conflicting, but portions of AR 635-200, chapter 1 are inconsistent with chapter 14 regarding separation/retention of drug users. In practice, commanders faced with these apparent conflicts interpret the policy on their own or just establish their own personal policy. Absent a clear indication to the contrary from the Department of the Army, this often results in a hard-line, universal, automatic separation regardless of the soldier's prior record and potential for rehabilitation. Defense counsel must be familiar with the regulations and be prepared to educate and persuade commanders to adopt this discretionary, case-by-case approach to administrative separations based on abuse of drugs.

Clerk of Court Note

Court-Martial and Nonjudicial Punishment Rates Per Thousand

First Quarter Fiscal Year 1987; October-December 1986

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.50	(1.99)	0.41	(1.63)	0.70	(2.80)	0.65	(2.59)	0.33	(1.31)
BCDSPCM	0.38	(1.50)	0.34	(1.34)	0.51	(2.03)	0.31	(1.26)	0.46	(1.84)
SPCM	0.08	(0.32)	0.09	(0.35)	0.08	(0.32)	0.02	(0.07)	0.00	(0.00)
SCM	0.30	(1.20)	0.29	(1.17)	0.39	(1.56)	0.09	(0.37)	0.20	(0.79)
NJP	26.92	(107.66)	26.72	(106.88)	29.34	(117.36)	26.86	(107.45)	18.14	(72.58)

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

Regulatory Law Office Note

In a recent case, *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665 (8th Cir. 1987), the U.S. Court of Appeals for the Eighth Circuit affirmed a memorandum opinion of the U.S. District Court for the District of South Dakota, Civ. 85-5031 (D.S.D. Oct. 16, 1985). The court relied in part on the supremacy clause in noting that contracting officers have some leeway in obtaining utility services vis-a-vis franchised utility companies. The decision further amplifies and explains supremacy considerations previously considered in various contexts.

Federal supremacy has long been recognized in other federal procurement areas such as: transportation, *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); building construction, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956); and milk regulated as to price by a state, *Paul v. United States*, 371 U.S. 245 (1963). These cases have special relevance today and must be considered in utility procurements.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Contract Law Note

Proposed Changes to GAO's Bid Protest Regulations

The General Accounting Office (GAO) has proposed amendments to its bid protest regulations. While only a proposal at this time, the changes are worth noting because the final rules are likely to closely resemble this proposal. The amendments "refine the regulations following more

than 22 months experienced by the General Accounting Office under the Competition in Contracting Act of 1984 (31 U.S.C. 3551-3556)." 52 Fed. Reg. 9964 (1987) (to be codified at 4 C.F.R. Part 21) (proposed March 26, 1987). In fact, the proposed rule changes help to make GAO a more attractive forum for award protests disappointed bidders or offerors. A few of the more significant changes follow.

Section 21.1(f) [all references are to 4 C.F.R.] will be amended to limit the circumstances under which GAO will dismiss a protest for a protestor's failure to furnish a copy of the protest to the contracting officer (or designated location) within one day of filing. Under the amended rules, the protest will not be dismissed if the contracting officer has actual knowledge of the basis of the protest or the agency is not otherwise prejudiced by the protestor's noncompliance. The present rule allows dismissal for any failure by the protestor to comply with the requirement without references to any harm suffered by the government. It should be noted that GAO has not been strictly enforcing the current rule in any event, so this change would conform the rule to actual practice.

Section 21.3 is amended to expand the scope of discovery available to protesters. It will permit a protester, within five days of filing the protest, to make a written request for documents it regards as relevant to the protest issues raised (§ 21.3(c)). The agency must then provide copies, unless releasing the documents would give the protester a competitive advantage or the protester would not otherwise be authorized by law to receive the documents (§ 21.3(d)). If GAO determines documents to be wrongfully withheld, it may itself provide the documents (to the extent of GAO's authority to do so) or may draw an inference regarding the content of the withheld document unfavorable to the contracting agency (§ 21.3(h)).

A new section 21.5 is added to provide a different, more formal conference designed to resolve factual disputes. A fact finding conference may be held, at the sole discretion of GAO, when necessary to resolve a specific factual dispute that GAO cannot otherwise resolve on the written record. At the conference, witnesses will testify under oath and each party will have the opportunity to question opposing witnesses. A record of the proceedings will be made and the parties will have the opportunity to comment on matters raised in the conference. Findings of fact will be a part of the protest decision. If a party refuses to attend a conference or a witness fails to answer a question, GAO may draw an inference unfavorable to that party or witness.

Finally, section 21.3(e), which set a very rigid standard for awarding the protester the costs of pursuing the protest or bid preparation costs, will be deleted. Such costs have been allowed only when the agency had unreasonably excluded the successful protester from the procurement. Under the proposed rules, that standard will no longer be applied and whether to award such costs will be decided on a case-by-case basis.

As noted above, the overall effect of these changes is to make GAO a more attractive forum for unsuccessful offerors. Protesters no longer face automatic dismissal for failing to comply with the one day notice rule. They have a greater opportunity for discovery and will have an easier time meeting their burden of proof when given the opportunity for a fact finding hearing. Also, if they prevail, they are presented with a greater chance of obtaining bid preparation costs and the costs of pursuing the protest as a remedy.

While the effect of these proposed amendments will be advantageous for the protester, the converse is true for government counsel. The requirement to respond to the requests for documents and the need to prepare for an appeal at the conferences adds to the burden of defending GAO protests. The overall impact will not be known for

some time, but we must certainly be prepared to dedicate more time to defending protests once these rules become final. Watch this space for a follow-up report on the final rules and their anticipated impact. Major Post.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, Army, JAGS-ADA-LA, Charlottesville, VA 22903-1781, for possible publication in *The Army Lawyer*.

Consumer Law Notes

Wyoming Covers Telephonic Solicitation Within "Home Sales"

Effective 22 May 1987, the Wyoming Consumer Protection Act will be amended to include telephonic solicitations within the definition of "home solicitation sales" regulated by Wyo. Stat. § 40-12-104. Although legal assistance officers will not often see clients who have made recent "home" purchases in Wyoming, a review of the Wyoming "home sales" provision indicates the possible distinctions between state and federal law to which legal assistance officers should remain alert.

Under the revised Wyoming statute, "home solicitation sales" will include:

[T]he sale or lease of merchandise, other than farm equipment, for cash when the cash sales price, whether under a single sale or multiple sales, exceeds twenty-five (\$25) and in which the seller or a person acting for him engages in a personal solicitation of the sale at the residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. A personal solicitation of a sale at the residence of the buyer includes contact with the buyer in person or by telephone.

Buyers covered by this provision may cancel the home sale until midnight of the third business day after the day on which the buyer signs the agreement or offer to purchase, but the seller may retain as a cancellation fee up to five percent of the cash price not to exceed the amount of any required cash down payment (the buyer is not obligated to pay a cancellation fee if the seller fails to comply with an obligation imposed by this provision or if the sale is voided on a basis independent of this right to cancel). Private remedies, including actual damages and attorneys' fees, are available to plaintiffs who prevail in court actions alleging "uncured unlawful deceptive trades practices" (including violations of the "home sales" provision) under Wyo. Stat. § 40-12-108.

The protections and remedies available under the Wyoming "home solicitation" statute differ significantly from those provided by the federal trade practices rule that provides a "cooling-off period for door-to-door sales" (16 C.F.R. Part 429). Similar to the Wyoming statute, the federal rule permits rescission of a "home sale" contract up to midnight of the third business day following the day of the

sale with respect to goods or services with a purchase price of \$25 or more.

In addition to the protections provided by the Wyoming statute, however, the federal rule protects the buyer: even if the payment was not made in cash (the Wyoming statute requires that the payment be in cash); if the transaction occurred "at a place other than the place of business of the seller" (the Wyoming statute protects the buyer only if the transaction occurs at the buyer's residence); and against any penalty for cancellation regardless of the buyer's reason for cancellation (the Wyoming statute permits the seller to charge a cancellation fee under some circumstances).

The Wyoming statute is, however, more protective than the federal rule in the following respects: it covers telephonic solicitations, which are not covered by the federal rule; and it provides private remedies as well as enforcement by the Wyoming attorney general.

While most state statutes do not currently include telephonic solicitations within the definition of "home solicitations," there appears to be a trend toward such coverage (see, e.g., *The Army Lawyer*, Aug. 1986, at 77, discussing coverage of telephonic solicitations in the Virginia Home Solicitations Act). In addition, there may also be a trend toward more effective enforcement schemes. Virginia, for example, recently added "teeth" to the state "home solicitations" provision by adding a clause that renders any violation of the home sales rule a prohibited practice subject to the enforcement provisions of the state's consumer protection act. See Va. Code Ann. § 59.1-21.7:1, approved 26 March 1987, effective 1 July 1987.

In light of the substantial differences between state and federal law and the apparent trend toward greater coverage and increased penalties for violations of state home sales provisions, legal assistance officers who encounter problems in this dynamic area should analyze the client's coverage and remedies under state consumer protection statutes as well as under federal and state home sales provisions. Major Hayn.

Regulation of Credit Services

State legislatures are responding to the increasing number of "credit repair" and "credit procurement" companies that promise to "repair" poor credit ratings or obtain credit for those who would otherwise be unable to do so. (Such a "credit procurement" company was recently subjected to a temporary restraining order in Oregon. See *Army Lawyer*, March 1987, at 52).

Effective 1 July 1987, operation of a credit repair service will be a misdemeanor under the Georgia statute relating to fraud. Under that provision, a credit repair services organization is a person or organization that,

with respect to an extension of credit to a buyer by others, sells, provides, or performs, or represents that he can or will sell, provide, or perform, in return for the payment of money or other valuable consideration any of the following services: (a) improving a buyer's credit record, history, or rating; (b) obtaining an extension of credit for a buyer; or (c) providing advice or assistance to a buyer with regard to either of the above.

Arkansas has also regulated this conduct, enacting the Credit Services Organization Act, effective 20 July 1987,

which prohibits credit services organizations from charging or receiving any consideration or money prior to full and complete performance of the services offered unless the organization has obtained a surety bond of \$10,000 and established a trust account at a federally insured bank or savings and loan association located in the state. In addition, the Act provides that such organizations may not charge or receive any money solely for referral of the buyer to a retail seller who will or may extend credit to the buyer if the credit is upon substantially the same terms as available to the general public. Violation of this Act constitutes a Class A misdemeanor and buyers who prove violations of the Act may recover actual damages, punitive damages, court costs, and reasonable attorneys' fees. Major Hayn.

"Bloomy's" Boo-Boo

Bloomington's department store has entered into a settlement agreement with the Montgomery County Office of Consumer Affairs in Maryland regarding the store's advertising of sale items that allegedly did not represent genuine price reductions. Under the terms of the agreement, Bloomington's advertisements will not compare the current price of an item with a former price unless there were substantial sales of the item at the former price or the item was offered for sale at the former price for a reasonably substantial period of time. In addition, the store has agreed to have on hand a sufficient quantity of advertised sale merchandise to meet reasonably anticipated demand. Pursuant to the agreement, Bloomington's has paid \$2,500 to Montgomery County.

Weight Loss Centers and Health Clubs . . . Again

The Montgomery County Office of Consumer Affairs in Maryland and the Physician's Weight Loss Center have entered an agreement that requires the Center to modify its advertisements to delete the term "physician" unless it discloses that Physician Weight Loss Centers are not owned or operated by physicians. The Center also agreed not to describe the program as quick, easy, or fast, and to avoid the use of testimonials in its ads unless they are accompanied by a statement that weight loss varies with individuals. Pursuant to the agreement, the Center will pay \$4,000 to Montgomery County for consumer education.

The New Mexico attorney general has recently obtained a 32-count indictment against William Richard Smith, Randy Gantt, and Johnny Cassady, who are charged with defrauding consumers into purchasing Spa Lady memberships for a club that opened in February 1986 and closed in early April 1986, after the easily portable equipment had been removed from the business. Smith has also been linked to Spa Lady health clubs in Abilene, Houston, and Conroe, Texas, and in Georgia.

Estate Planning Note

The following article was prepared by Captain Peter J. Barbaro, Legal Assistance Officer, Fort Bliss, Texas.

Practical Tips on Wills and Estate Administration

El Paso, Texas has a sizeable retired military population, resulting in a potential client pool for the Legal Assistance

Office at Fort Bliss of about 100,000 people. As a consequence, it does extensive work in the area of wills and estates.

As part of the initial will interview and during the will execution session, attorneys give advice concerning the proper care and review of the will. Often, however, the client takes the executed will and sets it aside as business completed without giving it a second thought.

At the Fort Bliss Legal Assistance Office we have drafted a handout as part of the complete will package. The form discusses the following topics:

1. how to handle and safeguard the newly-executed will to maximize chances of subsequent admission to probate;
2. what to do with a revoked will;
3. the various important functions served by letters of instruction to fiduciaries; and
4. when to have a will reviewed.

The form is not offered as a substitute for complete and professional counsel on matters of wills and estate administration, but is intended to serve as a reference and memory device for the client. The form appears below.

Practical Tips Concerning Wills and Estate Administration

1. Handling the Executed Will

Do not mark, write on, unstaple, staple documents to, tear, or do anything that can be looked upon as tampering with your new will. Such actions can act to void the will and be grounds for denial of admission to probate (proof upon your death that the document is your true and valid Last Will and Testament).

When making photocopies of your will, carefully and neatly fold back each page, copy the page, and continue on through completion.

2. Safeguarding the Executed Will

Upon receipt of the newly-executed Will, safeguard it in a fireproof box or container, either at your living quarters or in a safe deposit box at a financial institution. Generally, destruction of a will by fire or otherwise raises the issues of whether the will was intentionally revoked or whether it existed at all in the first place.

3. Keep the Old, Revoked Will

If you have executed a will in the past, your execution of a new will automatically revokes the prior will. You can tear up or otherwise destroy the old, revoked will, but the better practice is to:

a. In black ink, draw a diagonal line from top to bottom across the front page of the revoked will, and, along that line, write "REVOKED BY MY NEW WILL DATED (write the date on which your new will was executed)," and

b. Keep the old, revoked will in the same fireproof container in which you safeguard your newly-executed will. Remember, do not staple the old will to the new will.

Preserving the whole series of your old, revoked wills along with your Last Will and Testament should help remove any doubt or uncertainty in the eyes of the probate court raised by the existence of copies of previously-revoked wills. The court, viewing each will in the series, should have little difficulty determining which was the last unrevoked will expressing your intentions as of the date of your death.

4. The Letter of Instruction

a. Notice to Fiduciaries

If you have not done so prior to execution of your will, the letter of instruction (abbreviated LOI), currently dated and signed, can serve to notify the appropriate individuals or institutions of the fact that you have named them as your executors or guardians, or substitutes thereof. Whether you include a copy of your will in the LOI is a matter of personal taste, and is often required by corporate fiduciaries.

b. Funeral Arrangements

Generally, as soon as your executor is notified of your death, he will be asked what funeral arrangements have been made. Because time is of the essence, leaving instructions in his hands for ready reference makes this

task much easier, reducing guesswork, delay, and needless anxiety at this emotion-laden time.

So, you can send a copy of a LOI to each named executor stating clearly and simply any preferred mode of funeral arrangements, for example:

1. burial versus cremation;
2. burial or disposal of cremains at a certain place or in a certain manner;
3. use of a certain funeral director or home;
4. type of funeral ceremony and monument; and
5. enclose copy of cemetery deed, if any, and describe where original is safeguarded.

Although the LOI is not legally binding upon the executor, most testators trust their executors to follow the testator's desires. You should consider this upon naming an executor.

c. Location of Your Will

To give your will the maximum effect, you want to ensure that your executor can bring your original, executed Last Will and Testament to the probate court. So, state in the LOI precisely where you safeguarded your will; include full address, name of financial institution, and safe deposit box number, if applicable.

d. Division of Property Subject to Class Gift

To specifically mention in your will each and every item of property you currently own is both a lengthy and tedious process. Such an approach also raises legal issues concerning who is to receive property acquired or disposed of after the date you execute that will.

To avoid such problems, many wills provide for gifts of property to groups (called classes) of people equally. Common examples of class gifts include gifts to "all my children," "all my grandchildren," or "all my brothers and sisters."

As a general rule, wills are drawn granting broad power and discretion in the executor to take the steps needed to settle the testator's estate. One common area involving exercise of this discretion is the decision by the executor as to how to equally divide the pool of property that is subject of a class gift.

The executor has several options:

1. Liquidation: To sell the property, converting the property into cash, and divide the cash equally amongst the class members.
2. Distribution In Kind: Divide the actual tangible property as equally as possible. This involves a determination by the executor as to relative values of the property to be divided. This might involve the need for professional appraisal in certain cases, for example, land, jewelry, and collectibles.
3. Distribution Part In Cash and Part In Kind: A combination of the first two options.

If your will provides for a class gift, then you might consider instructing your executor in the LOI as to what you feel is a fair and equitable division of the property made subject of that class gift.

By listing and specifically describing what property you wish to go to which beneficiary, you can make the difficult task of property distribution as easy and anxiety-free as possible for the executor. Of course, the LOI is not legally binding and, in most cases, the ultimate discretion resides in the executor. The intention here is that the LOI is offered as a helpful guide to assist the executor in the decision-making process described above.

Also, as described above, you can make specific gifts of specific property in your will. To change such gifts would require changing those specific gift provisions, for example, by executing a codicil or new will or by invalidating your old will. On the other hand, if you decide that the "class gift-LOI" approach is appropriate in your case, a change in the distribution described in your LOI can easily be reflected by sending a new LOI to your executors without the need for changing your class gift provision in your will. Thus, the LOI offers the testator an element of flexibility and convenience. Remember, however, that the executor may be free to act contrary to your wishes if you use this approach.

If property distribution is mentioned in your LOI, be as specific as possible when describing property; include make, model, color, serial or manufacturer's numbers, and any other distinguishing features.

e. Changes in Your Intentions

If you change your mind on any of the details contained in a LOI, merely send a followup LOI, currently dated and signed, describing clearly and specifically your new intentions.

5. When to Have Your Will Reviewed

Contact an attorney, either at a legal assistance office or otherwise, to review your current will when you desire changes in it (such as new or different beneficiaries or fiduciaries), or when any significant changes occur in your personal affairs, such as: marriage; divorce; birth of child; adoption; death of anyone named in your current will; or significant increase or decrease in your income.

Paternity

A recent decision by the District of Columbia Court of Appeals (not the U.S. Court of Appeals for the District of Columbia Circuit) put teeth into the trial court's authority to order defendants to submit to a Human Leukocyte Antigen (HLA) test when paternity is in issue. The sanction upheld in *District of Columbia v. J.R.M.*, 521 A.2d 1152 (D.C. 1987), was a default judgment against the defendant, even though a provision of D.C. law would otherwise prohibit a paternity ruling by default.

The defendant duly filed an answer to a paternity petition, but he thereafter refused to comply with a court order directing him to submit to an HLA test. This subjected him to punishment "by contempt or by other sanctions that the court considers appropriate." D.C. Code Ann. § 16-2343.2 (1986 Supp.). The trial court responded to his recalcitrance by striking his answer to the petition.

Under relevant provisions of D.C. law, the case at this point would normally continue in an *ex parte* manner, as if the defendant had failed to file a pleading. The plaintiff presents her case to establish paternity, and a judgment would be rendered based on the evidence available. This "trial" is required because D.C. law impliedly prohibits default paternity judgments. In *J.R.M.*, the plaintiff (here, the District of Columbia acting on behalf of the mother) failed to adduce sufficient evidence to persuade the trial judge of the defendant's paternity, and the petition was denied. In part, the plaintiff's case collapsed because the defendant had prevented the introduction of crucial evidence—the results of an HLA test.

The District appealed, arguing that the striking of *J.R.M.*'s answer to the petition should have resulted in a default judgment of paternity against the defendant. In effect, the default judgment itself becomes the sanction for failing to submit to the required test. Under this theory, because the trial court has broad discretion to fashion appropriate sanctions, the implicit prohibition against default paternity determinations is irrelevant.

The appellate court upheld the District's position, ruling that a trial court may in a proper case enter a default judgment against a putative father who unreasonably refuses to take an HLA test. It cautioned, however, that the law is better served by accurate adjudication of paternity, and therefore such a sanction should be reserved for situations where other measures, such as contempt, have been unavailing in effecting the putative father's cooperation. The case was remanded to the trial court for a ruling whether that court intended to impose the "ultimate sanction" (*i.e.*, a default judgment).

The message for putative fathers is pretty clear—requests for submission to HLA tests from courts that have personal jurisdiction cannot be ignored.

Retroactive Modifications of Support Orders

Commentators have long decried the effects of retroactive modification of child support orders. When an obligor has an opportunity to persuade a court that arrearages should be erased, the custodial parent can never know how much support money to anticipate. Moreover, the data transmitted through interstate child support clearinghouses becomes

suspect. Worse, the prospect of retroactive modification serves as a disincentive for an obligee who might otherwise pursue enforcement procedures, and the excusal of support arrearages rewards the obligor who has employed "self-help" by unilaterally reducing or terminating support payments.

Congress has said, "Enough." The Omnibus Budget Reconciliation Act of 1986 (Pub. L. No. 99-509, § 9102 (1986)) provided that to continue receiving federal funds for the Aid to Families With Dependent Children program, each state must adopt procedures that: make each child support payment a judgment by operation of law, effective on the date the payment is due; entitle such judgments to full faith and credit; and, with one exception, prohibit retroactive modification of support obligations.

This new statute requires at least eleven states to amend their laws. By mid-1986 Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Wisconsin explicitly allowed retroactive changes. Eight other states had no statute or appellate decision on point, while the rest of the jurisdictions prohibited the practice, either by statutory provisions or by caselaw.

The pending changes are significant for our clients, especially obligors. Suppose a civilian is under an order to pay \$500 per month in child support, based on his income of \$20,000 per year as a steel worker. He is subsequently laid off, and after being unemployed for six months enlists in the Army. Several months later, his former wife seeks enforcement through a state court for arrearages of \$500 per month that he ceased paying since he was laid off. In at least the above eleven states, the defendant previously could ask the court to retroactively reduce his support obligation back to the date of his layoff, based on his drastically changed financial circumstances. This defense will no longer be available in any state, however. Henceforth, an obligor who suffers financial setbacks must immediately seek a modification of support through judicial proceedings. Delay in raising the issue until an enforcement proceeding is pending will result in a denial of any relief.

Litigating changes in child support obligations can take time, however, especially because procedural delays usually work to one or the other party's advantage. The one exception to the bar on retroactive modification is designed to counter the incentive to stall. State law may allow support obligations to be changed with the effective date reverting to the date the opposing party was served with notice of the modification proceedings. Suppose, for example, a petition to modify support (either increasing or decreasing the amount) is filed on January 10 and the other party is served on January 15. The judgment may not be issued until June 30, but it can make any change effective back to January 15, retroactively altering the amounts due during the period of January 15 through June 30. The federal provision merely allows states to incorporate this limited degree of retroactivity into their laws; however, it does not mandate such a result.

This new approach to retroactive changes is important, and a discussion of the issue should be considered for inclusion in preventive law briefings. The greatest impact may fall on new recruits, and they should be advised of its implications as soon after arrival at the reception station as possible. It is also essential to keep the possibility of limited

retroactivity in mind when counselling clients who are considering petitioning for modification and those who have received notice of a pending modification proceeding. In most cases, delay will not help, and it may hurt, either by forfeiture of money otherwise available or by amassing a painful arrearage. Major Guilford.

Calculating Disability Retired Pay

The Family Law Note in the January 1987 issue of *The Army Lawyer*, at pages 43-45, incorrectly stated the procedure for calculating the nontaxable amount of disability retired pay. The following discussion accurately describes the process and illustrates how it meshes with the recent change in the the Uniform Services' Former Spouses' Protection Act (the Act).

Military disability retired pay is governed by title 10, United States Code, chapter 61. The actual amount of money the retiree receives is the higher result from two separate formulae. For purposes of illustration, consider a soldier on active duty for sixteen years, with an active duty base pay of \$2,000 per month, who is medically retired due to a 35% disability.

The first formula requires multiplying the number of years of active duty service by 2.5%. Here, $16 \times 2.5\% = 40\%$. The 40% figure is then multiplied by the active duty base pay (here, \$2,000) to yield a monthly retirement sum of \$800.

The second formula involves multiplying the active duty base pay by the percentage of disability. Here, $35\% \times \$2,000 = \700 .

The retiree receives the higher of these two figures, so the disability retired pay would be \$800 in the example. There is a ceiling of 75% of active duty base pay, however. A soldier who is more than 75% disabled or who is retired due to a disability after more than 30 years' service would receive 75% of base pay, notwithstanding the results of the formulae.

An important aspect of disability retired pay is its special tax treatment. For federal tax purposes, all longevity retired pay is taxable, but a portion of disability retired pay is not. There is only one formula to calculate the nontaxable amount, and it is as follows: (percentage of disability) \times (active duty base pay). In the example above, the nontaxable amount would be $35\% \times \$2,000$, or \$700. Thus, the retiree receives \$800, and only \$100 of this sum is taxable. The Note in January incorrectly stated that the nontaxable amount is calculated by multiplying the percentage of disability by the amount of *retired pay* rather than the active duty base pay amount.

A curious result of using the active base pay to calculate the nontaxable portion of disability retired pay is that all the retired pay may be tax-free even if the retiree is not 100% disabled. Let us change the example to see how this can occur. Suppose the retiree is 45% disabled instead of

35%. The amount of disability retired pay is the higher of $2.5\% \times 16$ years (which equals 40%) or 45% (the new percentage of disability). As 45% is higher, this figure is multiplied by the active duty base pay (i.e., $45\% \times \$2,000$), which yields \$900 per month in disability retired pay. The formula for calculating the nontaxable portion is (the percentage disability) \times (active duty base pay), or $45\% \times \$2,000$, which yields \$900. This sum, of course, happens to be the full amount of the monthly disability retired pay. Thus, although the retiree is "only" 45% disabled, all the disability retired pay would be tax-free.

What happens when these provisions are plugged into the Act? As amended, 10 U.S.C. § 1408(a)(4) defines disposable retired pay as all retired pay "less amounts which... are equal to the amount of [disability retired pay] computed using the percentage of the member's disability." The National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 644 (1986) (the January Note incorrectly cited this Act as Pub. L. No. 99-500). Returning to the first set of facts used above, the total retired pay is \$800, but disposable retired pay would be calculated by subtracting from that figure (the percentage of disability) \times (active duty base pay) because this is the formula for "comput[ing] disability retired pay] using the percentage of the member's disability." Thus, disposable retired pay would be \$800 minus ($35\% \times \$2,000$), or $\$800 - \700 , which yields only \$100.

What is the significance of this \$100 figure? First, any direct payments to a former spouse that may be required by a court order are limited to 50% of disposable retired pay, so here the direct payment cap would be \$50. This is the maximum the former spouse could receive from Army finance regardless of the amount awarded by a court.

Even more importantly, the wording of the Act suggests that states have authority to divide only disposable retired pay. See 10 U.S.C. § 1408(c)(1). Most courts that have reviewed the matter, however, have refused to read into this language a limitation of their authority. They have instead presumed to divide gross retired pay, not just disposable retired pay. California has a state supreme court decision on point, rejecting the notion that its courts can divide only disposable pay, while one intermediate Texas appellate court has ruled to the contrary, holding that only disposable pay can be divided.

Both Texas and California have in the past felt free to divide disability pay however they chose, including dividing all of it in "appropriate" cases (usually cases where the retiree was at or near the point that he or she could retire based on longevity notwithstanding the disability). The question is whether these two states, and others, will now view their previously unfettered authority to divide disability pay as preempted by the amendment to the Act, or whether they will continue to discount the import of the explicit language used by Congress. Only time will tell. Major Guilford.

Claims Report

United States Army Claims Service

Claims Automation

Lieutenant Colonel Steven P. Gibb
Automation Management Officer

How We Got Here

Over fifteen years ago, well before the advent of the inexpensive personal computer, the processing of claims data in the Army Claims System was "automated." The automated claims system adopted at that time is still in use today. In Army field claims offices around the world, claims personnel record on pieces of paper called "DA Form 3s" every significant action affecting a claim from opening the claim to final retirement of the claim record. As each action is recorded, these hundreds of thousands of pieces of paper are sent through the mail to the United States Army Claims Service (USARCS) where clerks keypunch the data onto magnetic tape. The reel of magnetic tape is carried to the Fort Meade Installation data processing center, which processes it once each month on a large main frame computer. This processing generates printouts and reports that are broken down at USARCS and mailed back to the field. Upon finally receiving the reports, the local claims office attempts to reconcile differences between the claims management status described in the computer printout and the real situation at that time.

At the time it was adopted, the current system was a genuine improvement over the previous system of attempting to keep track of Army claims management data entirely by manual methods. It has been clear for some time, however, that this method is seriously outdated when viewed in the light of increasingly inexpensive computer technologies that are available today. The current system generates data and reports that are intended to help manage the Army's claims administration. The information generated is not timely and is often inaccurate, however. It is debatable whether the present system is a net gain or loss when viewed from the perspective of effective management for the local claims office.

The introduction and marketing of the IBM PC a little over three years ago triggered the revolution that led to the pervasive use of microcomputers in business and government. The changes occurring since then have been so fast and numerous that it seems much longer ago. The several brands of inexpensive desktop personal computers (\$6,000 and less) utilizing the Intel 80386 microprocessor chip have as much computing power as the IBM 370-186 main frame computer that was first marketed by IBM in 1975 for \$3.4 million. The rate of change associated with recent automation technological advances greatly outstrips our ability to absorb the potential benefits as fast as they become available. In the Army, to make changes and improve our

systems, we must complete a long decision and implementation cycle involving planning, funding, procurement, training of personnel, revising guidance documents, and installing new systems. Unfortunately, the completion of this cycle in a rapidly evolving technological environment means that we will always appear to be playing a catchup game in the automation arena.

Recent Events

During recent years, USARCS has been heavily involved in planning a modern, fully integrated data automation system to improve Army claims data management. Recently, USARCS has purchased hardware, trained personnel, and developed software for this new system. A large minicomputer, capable of storing and processing data associated with the approximately two hundred thousand claims that are filed annually, was purchased and delivered to USARCS. The computer, a CCI Power 6/32, has a UNIX operating system and several standard software packages that will provide modern standard legal office automation support (word processing, electronic mail, calendar, etc.) to all members of the USARCS staff. The specialized UNIX based software for handling field claims data is being written by the U.S. Army Software Development Center in Atlanta, Georgia. USARCS has been working hard to get its building properly wired by the summer of 1987 so that the computer can be installed and begin operating. Many other computer peripheral devices are on order; about half of the orders have been delivered.

The USARCS staff has also been developing software packages that will manage claims administration for the field claims office. This software will be demonstrated in July at the annual claims training workshop in Charlottesville. The software, and accompanying user documentation, will be provided at no cost to all field offices, although field offices will need a personal computer and printer. On 13 March 1987, the USARCS Commander sent a letter, subject: Claims Data Automation, to field claims offices advising them that we would soon be converting to a new system and that claims judge advocates should ensure that their offices will obtain the equipment needed to use the new system.*

The new system will replace the current system of using the claims journal and a file of DA 3s to manage claims. All data will be entered into a data base maintained in the field office. Periodically, a copy of data base files will be provided to USARCS, either through a modem or by mailing a floppy disk. The software to be provided to the field will also be

*This letter was followed by a 17 April 1987 letter with the same subject line. Offices that have not received these letters should contact the author at AUTOVON 923-3229, commercial (301) 677-3229.

capable of analyzing claims data and generating reports for the local office, making it no longer dependent upon USARCS for claims statistics. The information will be immediately available at each office and should be more accurate because it will be much easier to verify the data.

The new system will include three separate programs that will manage personnel, tort, and affirmative claims. The personnel claims program will store claim records data in three separate data bases containing unsettled, pending post settlement field office action, and retired claims records. The other two programs will each have two associated data bases for open records and closed records. The user will control all of these programs and associated data bases by making simple screen displayed menu selections. Field office personnel do not need to become computer experts in order to effectively use this system; however, they should learn how to accomplish simple operations on an MS-DOS operating system, such as using floppy disks, using hard disks and directories, and copying and deleting files.

Adoption of the new system will involve several changes designed to take advantage of the potential benefits of a highly automated system. For example, claims will be assigned a number with nine characters in the format of "87-E01-0001." The first two characters represent the fiscal year the claim is opened. The next three characters are the office code of the office opening the claim. For offices in the continental United States, the first two characters of the office code will indicate the claims area; for overseas offices, the first character will indicate the geographic theater. The third or second and third character respectively will indicate a subdivision or sub office. All offices will be assigned a new three character code by USARCS. The last four characters are the claim sequence number of the particular claim for that office in the current fiscal year.

Once a claim is filed, it will retain the same claim number, even if the claim is transferred to another office, or closed and reopened. This will facilitate retrieving the claim record from an electronic database and, along with a planned new microfilming procedure for retired records, will make location of stored records much faster and easier. Eventually, USARCS plans to be able, quickly and easily, to retrieve the claims history of an individual claimant that can help to resolve difficult cases. At present this can be done only with great effort and considerable delay.

New claim category codes will be adopted that will enable us to determine which carriers are providing good

service to the soldier and which are not. It will allow us to make cost benefit analyses that compare transportation alternatives. It will also allow USARCS to give timely and accurate responses to the numerous inquiries received from Department of Defense elements and the legislative branch. Presently, information useful for these kinds of activities, if it can be obtained at all, is very difficult to gather and is wasteful of scarce employee resources.

Other changes will be thoroughly explained in the documentation accompanying the software distributed to the field offices. The data bases generated by the software to be distributed to the field are dBASE III compatible. Thus, the data base files may be used by knowledgeable users in conjunction with the commercially available software program, although there will ordinarily be no need to do so.

The precise date for converting to the new system and the frequency and exact methodology for transmitting copies of field office data base files has not been announced, but this decision is not far off.

Future Events

It is a mistake to think that converting to a new automated system is like trading in your old car for a new one. When your new car is delivered, you can turn on the ignition and it is ready to go. Installing a new automation system is more like installing a new, large, complex, manually operated paper system. There will be conversion problems that are not anticipated. There will be training problems. The system will be revised and refined as more is learned about its strengths and weaknesses. Moreover, we can be sure that the technology will change again and again. There is no way to stop hardware or software advancements that may make our planned improvements obsolete in a few years.

Our eventual goal is a system that will allow the field office direct and interactive access to a central data base containing all Army claims records and comprehensive claims research materials. The achievement of that type of system depends in part on the Army's success in upgrading the worldwide telecommunications network. Although present Army telecommunication capability will not support a direct access system, the trends in improving telecommunication systems will make our goal achievable within a few years.

1986 Carrier/Warehouse, Medical Care, and Property Damage Recovery Report

In 1986, the U.S. Army Claims Service (USARCS) and field claims offices collected \$8.4 million from carriers and warehouse firms for loss and damage to property during permanent change of station and other moves. This recovery effort was notable for an increase over prior year efforts in the percentage of collections compared to paid claims.

Field claims offices complete recovery action when the liability is under \$100. Where the liability is over \$100,

completed files are forwarded to USARCS for collection action. The present method of monitoring the success in recovery is the ADP Report R16 that shows the amounts paid, the amounts collected by field offices, and the amounts collected by USARCS on files prepared in field offices. The respective claims office percentages are then calculated by adding local and USARCS recovery figures and dividing that figure by the total amount paid.

The 1986 rankings are for continental United States (CONUS) and outside CONUS (OCONUS) claims offices; they are further divided into offices paying over \$200,000 in claims and offices paying between \$60,000 and \$200,000 in claims. An additional category is for the best recovery rate among offices paying more than \$1,000,000 in claims.

Newly designed Certificates of Excellence have been signed by The Judge Advocate General and forwarded to appropriate commanders to recognize the claims offices listed below:

CONUS—Over \$200,000
I Corps and Fort Lewis
6th Infantry Division (Light), Fort Wainwright
USA Combined Arms Center and Fort Leavenworth

OCONUS—Over \$200,000
USA Western Command Claims Service
8th Infantry Division, (Baumholder Branch)
U.S. Armed Forces Claims Service, Korea

CONUS—Under \$200,000
Fitzsimons Army Medical Center
6th Infantry Division (Light), Fort Greely
U.S. Military Academy

OCONUS—Under \$200,000
1st Armored Division, (Grafenwoehr Law Center)
3d Armored Division
2d Infantry Division

Greater Than \$1,000,000
III Corps and Fort Hood

A four percent increase in 1986 affirmative claims recoveries was due to the tremendous efforts of over eighty field claims offices worldwide. The Judge Advocate General has also recognized the top twenty CONUS claims offices with the highest medical care or property damage recoveries of the \$10.6 million collected in 1986. Certificates of Excellence have been forwarded to the appropriate commanders of the claims offices listed below:

Medical Care Recovery:
Brooke Army Medical Center
U.S. Army Armor Center and Fort Knox
7th Infantry Division and Fort Ord
4th Infantry Division (MECH) and Fort Carson
III Corps and Fort Hood
XVIII Airborne Corps and Fort Bragg
U.S. Army Soldier Support Center
U.S. Army Air Defense Center and Fort Bliss
101st Airborne Division (ASLT) and Fort Campbell
1st Infantry Division (MECH) and Fort Riley

Property Damage Recovery:
XVIII Airborne Corps and Fort Bragg
Military District of Washington
I Corps and Fort Lewis
7th Infantry Division and Fort Ord
Fort George G. Meade
5th Infantry Division (MECH) and Fort Polk
U.S. Army Armor Center and Fort Knox
U.S. Army Training Center and Fort Jackson
6th Infantry Division (Light)
U.S. Army Infantry Center and Fort Benning

While all of these offices are to be congratulated for their outstanding 1986 achievements, the total recovery effort depends on the dedication of every claims office, large and small, throughout the Army. To each of you who dedicated yourself to serving the Army and its soldiers in this Army-wide effort, we send our thanks for a job well done!

Updating the Claims Manual

Since its initial publication in July 1985, the Claims Manual has received the following changes:

Change No. 1, 1 October 1985—

Chapter 1, Bulletin 85 added.
Chapter 6, pp. A-1 and A-2 updated.
Chapter 8, instructions given re inserting current "accounting classifications" letter.

Change No. 2, 1 December 1985—

Chapter 4, Bulletin 1 added.
Chapter 5, Bulletin 8 added.

Change No. 3, 1 January 1986—

Chapter 1, Bulletin 14 updated.
Bulletins 86, 87, 88, 89 added.
Annex A, pen-and-ink changes prescribed.
Annex B, pen-and-ink change prescribed.

Change No. 4, 26 June 1986—

Chapter 1, Bulletin 58 updated.
Bulletins 90, 91, 92, 93 added.
Chapter 2, Bulletin 5 added.
Chapter 4, Bulletin 2 added.
Chapter 7, Bulletin 2 added.

Claims offices that are missing any of the above changes are invited to request them by contacting the U.S. Army Claims Service, Management and Budget Division (AUTOVON 923-7009/4345).

Personnel Claims and Recovery Notes

Report Shipment Damage Promptly

This special note is designed to be published in local command information publications in CONUS including Alaska, as part of a command preventive law program.

Effective 1 April 1987 for intrastate moves, and 1 May 1987 for interstate moves, the released valuation of CONUS shipments increased from \$.60 per pound per item liability to the actual depreciated value of the items damaged or

lost, with certain limitations. In most instances, this will be identical to the Army's payment to the claimant. All the military services believe this new released valuation will be of significant benefit to both the individual military member and to the military services. The higher rate should encourage better packing, more careful moves, less damage, and thus, fewer claims.

With this new increased released valuation, the possibility arises that the claimant could suffer a severe reduction in

the amount allowed to paid if the claimant fails to note damage or loss at delivery on DD Form 1840 or to submit a completed DD Form 1840R to the claims office within seventy days of delivery. This is due to the fact that the Army loses carrier recovery in most cases if exceptions were not taken at delivery on DD Form 1840 or if a completed DD Form 1840R is not dispatched to the carrier within seventy-five days of delivery. Army Regulation 27-20 requires potential carrier recovery to be deducted, absent good cause, from the amount paid to the claimant in cases where the claimant's inaction precludes carrier recovery.

Under the old \$.60 released valuation, the deduction for failure to comply with the requirements for timely carrier notification was relatively small. Under the new increased released valuation program, the military services have established a rule under which, absent good cause, a claimant could lose half of the payment due for any items not indicated on DD Forms 1840 and 1840R. Good cause is generally accepted to be officially recognized absence from duty such as TDY or hospitalization that results in absence for a significant portion of the seventy day notice period. If substantiated, good cause might also be misinformation given to the claimant by government personnel concerning notice requirements. Any other requests for waiver of this deduction may be granted only by the Commander of the U.S. Army Claim Service or his or her designee.

Therefore, potential claimants must be fully aware that failure to fully inspect their goods at delivery and record all damage or loss on DD Form 1840 or to submit a completed DD Form 1840R to the claims office within seventy days of delivery, can result in loss of money. Prompt submission of a properly completed DD Form 1840R is imperative. See your local claims office for help and information.

Correction to March Personnel Claims Note

Paragraphs 2 and 3 of the March 1987 Personnel Claims Note, at 57, were inaccurate and should have read as follows:

2. When you arrive, again consult the transportation office without delay. Watch the movers unpack and take exceptions on the DD Form 1840. If damage is discovered later, complete the DD Form 1840R within seventy days and take it to the claims office.

3. Consult the claims office nearest you. They will answer all your questions. That is what they are there for. Most importantly, carefully read the "Instructions to Claimant" on the claims form, DD Form 1842. It contains everything you need to know.

Automation Note

Information Management Office, OTJAG

The PC Connection

CW2 Robert J. Carcelli

Legal Administrator, Aberdeen Proving Ground

The systems referred to in this article do not fully conform to the current JAGC standards. They are representative of systems that were procured by many offices before the current standards were promulgated, however, and show how LAAWS standard computers may be integrated into an already existing network.

Today, within the Judge Advocate General's Corps, the computer rage is on. These systems range from small Tandy 1000 stand-alone microcomputers to "dumb" terminals that are serviced by a large host computer located somewhere on the installation.

These systems truly benefit many offices and users. Too often, however, they are only "islands" of automation. Many systems have been acquired for a particular use by a single employee and all the applications and databases the employee creates are used exclusively by him or her. Information sharing is done through the use of the office copier. This lack of effective communication frequently leads to duplication of effort and can hamper efficient management.

In March of 1986, the Office of the Staff Judge Advocate, Test and Evaluation Command (TECOM), acquired an Intel, S/CONFIG VI 310 Twelve User Computer System with eight terminals and three printers. Once all of the bugs

were worked out of the system and we began to realize its capabilities and power, this equipment significantly contributed to and enhanced our work environment.

The Intel system was intended to automate our legal assistance, claims, and criminal law divisions. These divisions were housed in a separate building from our chief counsel office, administrative division, and procurement and administrative law division. As we had allocated two Wyse PCs (included in our Intel acquisition) to support our procurement and administrative law mission, and an IBM PC system was already on line in support of our administrative division, establishing a means to share information between the Intel and the PCs seemed to be the obvious the next step. The major problem was that the buildings housing our two separate office areas were located approximately 500 feet apart. With the close cooperation of our information management personnel and those of the Office of the Director for Information Management, TECOM, the problem was solved.

First, we ran two 9600 baud data communication lines between the two buildings. Then we placed two RJ11 junction boxes at the Intel 310 CPU location, and two more junction boxes in the other offices at the personal computers.

Second, we installed two MICOM Instamux 470 Local Multiplexors Model M478. One multiplexor was located at the host computer (the Intel 310) and the other at the remote location (the IBM PC located in the administrative

office). These multiplexors were asynchronous eight channel devices that can support transfer speeds of up to 19.2 bits per second (bps) per channel with a composite rate of 819.6 kilobits per second (kbps) and a maximum range of 9,000 feet over 22 AWG Exchange applications. Because the telephone switching office at Aberdeen was located between our office buildings, we decided to use this facility instead of acquiring and running direct line (hard-wire) between the two office locations. The typical configuration as used in this application allows for the connection of up to eight PCs via RS 232 with DB25 male connectors utilizing pins 1, 2, 3, 4, 5, 6, 7, 8, and 20. The Host Connection is also via RS 232 utilizing the same pin configuration. The only exception is that pins 2 and 3 must be crossed if the Host serial ports are configured as DCE (Data Communications Equipment).

Third, because the software that would provide inter-operation between the PCs and the Intel 310 was ordered with the system, we were able to complete our connection of the two systems by simply loading the proper configurations of iPC on the two systems and we were off and running. The PC connection was complete.

Your information management staff may have other ideas with respect to exactly how your systems should be made to communicate. In our case, the necessary equipment to make this connection a reality was on hand prior to the delivery of the Intel system, so we were able to complement these two systems' capabilities without having to expend additional funds from our own resources.

Bicentennial of the Constitution

Bicentennial Update: The Constitutional Convention—July 1787

This is one of a series of articles tracing the important events that led to the adoption and ratification of the Constitution. Prior Bicentennial Updates appeared in the January, April, and May, 1987, issues of The Army Lawyer.

The small states had not been able to gain approval of either the New Jersey Plan or the Connecticut Compromise before the Convention recessed for the Fourth of July holiday. Nevertheless, the Grand Committee, appointed by the Convention to resolve the representation problem, was favorable to the small states' interests. The committee representation (one member from each state) benefitted the small states; moreover, the most militant members from the large states were not appointed to the committee. While the majority of the delegates celebrated the Fourth of July holiday, the Grand Committee struggled to reach an acceptable compromise of the representation issue. On July 5, the Committee reported its solution. Each state would have equal representation in the Senate, as proposed in the Connecticut Compromise. To soften the blow for the large states, however, the Senate would have little fiscal authority. The House of Representatives, where the large states would enjoy proportional representation, would originate all tax and spending bills, and the Senate would have no authority to change them (the convention later decided to allow the Senate to modify tax and spending bills).

For the next ten days, the convention debated the committee report. On July 6, it quickly adopted the proposal to grant the House of Representatives the sole power to originate all bills raising or appropriating money; the debate over representation continued. On July 10, the two delegates from New York, John Lansing, Jr., and Robert Yates, left the Convention, complaining that it had exceeded its authority. This left only ten states represented (Rhode Island had refused to send a delegation, and the New Hampshire delegates did not arrive until July 23 because of a lack of funds).

Nevertheless, on July 12, the Convention voted to have proportional representation in the House of Representatives. The same day, the Convention agreed to the "3/5ths Clause." This clause included slaves in the population count to determine proportional representation. The North had not wanted to include slaves because many considered them as mere property, and because including them gave the South greater proportional representation; conversely, the South wished to benefit from slave counts and increase its number of representatives. The 3/5ths compromise provided that slaves would be tallied in the representation figures, but each five slaves would only count as much as three free persons.

July 16 brought the key vote on Senate representation. Five states voted for equal representation, four states voted against, and the Massachusetts delegates split evenly. By this paper-thin margin, the proposal carried.

The next task on the agenda for July 16 was defining the extent of legislative authority. The large states, however, were not prepared to go on. The strong federal government they had proposed in the Virginia Plan rested on the assumption that there would be proportional representation in both houses of the legislature. The Convention adjourned for the day. The next day, delegates from the large states met to discuss the impact of the July 16 vote. There was vague talk of the large states abandoning the Convention and confederating separately. No specific proposal emerged, however, and the Convention continued.

To define legislative authority, the Convention turned to the Virginia Plan. Many delegates objected to its broad, vague grants of legislative authority (under the Virginia Plan, the National legislature would have had the authority to pass laws the states were "incompetent" to pass, to strike down acts of the state legislatures, and to use the national armed force against the states to force them to comply with the laws). They felt that such a sweeping grant of authority would place no limits on the power of the national government and make the Constitution unacceptable to the states. At first, the delegates attempted to improve the language of the Virginia Plan, but they found no acceptable way of amending it. The Convention decided instead to

simply list the powers it wished the Congress to have. To give Congress the flexibility it would need to carry out the enumerated powers, the delegates also included a final clause—the “Necessary and Proper” clause—granting Congress the power to make laws that were “necessary and proper” for carrying out the specified powers. (The August proceeding of the Convention will appear in the July issue of *The Army Lawyer*).

The Northwest Ordinance

On July 13, the day after the Constitutional Convention approved the “ $\frac{3}{5}$ Clause,” the Continental Congress passed the Northwest Ordinance, which resolved the competing claims of the several states to the Northwest Territory. The Ordinance dealt with the territory that now forms the states of Ohio, Indiana, Michigan, Illinois, and Wisconsin, and opened this vast territory for survey and sale. Under the Ordinance, the areas enjoyed self-government, a bill of rights, a prohibition of slavery, and eventual statehood. The Ordinance marked the beginning of America’s expansion West and sowed the “Manifest Destiny” doctrine.

Bicentennial Celebrations

Nine military installations have now become “Designated Defense Bicentennial Communities”: Fort Belvoir, Virginia;

Fort Eustis, Virginia; Fort Meade, Maryland; Fort Huachuca, Arizona; Fort Monroe, Virginia; Fort Sill, Oklahoma; Vint Hill Farms Station, Warrenton, Virginia; The U.S. Military Academy, West Point, New York; and the Judge Advocate General’s School, Charlottesville, Virginia. Information about Bicentennial Community designation appeared in the May issue of *The Army Lawyer*, and is now part of the Bicentennial packet announced in *The Army Lawyer*, Dec. 1986, at 66.

The Staff Judge Advocate’s office at Fort Leavenworth recently introduced a Bicentennial flavor to their dining-out. In keeping with the Army’s 1987 theme, the Constitution, the JAG officers retook their oath of office, swearing anew to “support and defend the Constitution of the United States.” Officers and their spouses from the Fort Leavenworth SJA and TDS offices, the Command and General Staff College, Combined Arms and Services Staff School (CAS³), and area Reserve and Retired officers attended the event.

If your office is celebrating the Constitution and would like to share your ideas, write and let us know. We will use this column as a forum for exchanging contributions. The address is Editor, *The Army Lawyer*, The Judge Advocate General’s School, Charlottesville, Virginia 22903-1781.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Management of Your IMAs

*Lieutenant Colonel William O. Gentry, USAR
Special Assistant to the Commandant for Reserve Affairs, TJAGSA*

Individual Mobilization Augmentees (IMAs) are assigned to most mobilization tables of distribution and allowances (MOBTDA). These IMA positions provide JAG offices with the expanded resources they will need should mobilization occur. Your particular MOBTDA may reflect other reserve assets on mobilization in addition to IMAs. These other reserve resources, however, may not be pretrained. The IMA program provides pretrained officers ready to assume responsibility immediately upon mobilization. The importance of preparing of your assigned IMAs is obvious. Preparing them well includes appropriate training in all practical modes, maintaining their morale, keeping them informed, and establishing a rapport that will assist your activity in functioning as a cohesive entity as quickly as possible after mobilization.

The IMA Positions on the MOBTDA

Commanders of Army commands have proponentcy for The Army Authorization Documents System (TAADS) documents and must request or establish the IMA positions they contain. The Army Reserve Personnel Center

(ARPERCEN) does not request or establish IMA positions. The proponents do. Specific guidelines for creation of positions and changes to positions are contained in Army Regulations (AR) 140-145 and 310-49.

As the head of your activity, you will need to coordinate with the force structure element of your command to ensure the proper configuration to adequately perform your mission in time of war or other national emergency. Your command may submit changes for TAADS documents (including IMA positions) to HQDA only during the periods of January-March and July-September. These periods are referred to as the management of change (MOC) windows.

The MOBTDA must be reviewed annually. Changes will necessitate coordination between you and your command force structure element. The MOBTDA should reflect a structure compatible with your mobilization mission requirement. Not all mobilization “plus up” positions need be IMA, but only those so critical as to require pretrained officers with experience in the position. The importance of a well-planned MOBTDA is critical to your mobilization mission.

Mobilization Training

Mobilization training is intended to prepare your IMAs to go to war with little or no notice. Training may take the form of active duty in your activity (annual training), resident schools, correspondence courses, and projects on or off active duty periods. It is important that you encourage and assist your IMAs to maximize learning of their IMA jobs even during peacetime training.

The most important form of training to you IMA is his or her period of annual training (AT). It provides IMAs with an opportunity to learn their wartime jobs first hand. It is important for you to know and comply with the procedures required for getting your IMA on orders and from their homes to your activity to perform the training. A streamlined operation will avoid rescheduling of tours and frustration for everyone concerned—especially the IMA.

Contacting your IMA early in the fiscal year to schedule AT is essential. Many IMA organizations mail letters to each of their IMAs in the September preceding the FY requesting the IMA to call them to coordinate training dates. If there is no response, the IMA organization should follow up with a phone call. Once a date is agreed upon, the IMA organization must complete and forward a DA Form 2446 (Request For Orders) in sufficient time for it to be received by ARPERCEN no later than sixty days prior to the beginning of the tour. Additionally, all requests for orders on other than newly assigned IMAs must be forwarded prior to 31 March each year. For IMAs assigned after 31 March, you should contact and schedule AT as soon after the assignment as possible. Failure to comply with time requirements often results in rescheduling, which results in inconvenience to both the IMA and the organization. Your early requests allow time for resolving administrative problems, such as outdated physical examinations. The Director of Reserve Components (DRC) for your command should be kept advised of your requests for AT orders as he or she has certain responsibilities with regard to a reservist's presence on your installation. DRCs are a valuable source of information for you in all matters affecting the administration of JA reserves on your installation, be they IMAs or unit reservists. Requests for orders on IMAs assigned to OTJAG and the FOAs (USALSA, USACS, and TJAGSA) are forwarded through TJAGSA, ATTN: JAGS-GRA, rather than directly to ARPERCEN.

When the AT has been coordinated, a letter of welcome to the IMA should be prepared by a designated sponsor to provide assistance in support of AT and inform the IMA of training/work planned for the AT. During the tour, it is important that IMAs be provided training that is directly related to the wartime mission and that they understand the training objectives for the period of active duty. The welcome letter and the DA Form 67-8-1, Officer Evaluation Report Support Form, should be used to accomplish this.

Inactive Duty Training

AT is performed during a twelve day period. Active Duty Training (ADT) is active duty in addition to AT. Subject to funding constraints at ARPERCEN, your IMA may be able to train on ADT more than the twelve-day AT period. Availability of funds for such tours should be addressed to the JAGC Personnel Management Officer at ARPERCEN. Although AT and ADT are the most concentrated training,

the IMA may train in an inactive duty for training (IDT) status. IDT does not provide pay for IMAs, but it does enable them to earn retirement points that may be of great value. IDT includes the following:

1. Correspondence Courses. The IMA will receive one retirement point for each three credit hours of course work completed.

2. USAR School Enrollment. USAR Schools offer several courses of instruction for which retirement points will be awarded.

3. Attachment. IMAs who reside within a reasonable distance (fifty miles) may be attached to an Active or Reserve Component unit. Attachment may be to the IMA organization or other organization authorized by ARPERCEN. Attached status authorizes the IMA to perform IDT for the organization for retirement points. Attachment will also generate an additional IMA Officer Evaluation Report prepared by the organization to which attached.

4. Home Projects. Supervisors of IMAs should encourage their IMAs to perform special assigned projects at home. In addition to providing an opportunity for retirement points, they can serve to keep the skills of the IMA "fine tuned." Discussion of home projects with the IMA supervisors should be an item included on the Officer Evaluation Support Form.

Tailoring Your Program

A good training program not only leads to higher morale and better trained IMAs, but can also result in a valuable work product for the IMA organization. The best IMA program is flexible enough to allow a tailored arrangement with each IMA. Projects good for one IMA may not be workable with another due to individual qualifications, time availability, or inclinations of the IMA.

One primary concern for all IMAs is earning a sufficient number of retirement points each year to entitle them to a creditable retirement year. To earn a creditable retirement year, a reservist must earn fifty retirement points by the "retirement year-end date," which is not the same for each officer. Because of mandatory removal dates, failure to earn a creditable year can jeopardize an IMA's opportunity to earn the twenty creditable years that are necessary for retirement benefits.

Unit reservists have no difficulty finding ways to earn the minimum fifty retirement points required. They routinely earn substantially more than the minimum points with normal participation in the unit. For IMAs, earning the minimum retirement points is not as structured as for unit officers and often requires innovation on their part.

IMAs in the lower officer grades, through major, are normally enrolled in correspondence courses. While they last, these courses are a good source of points. After the officer has completed Command & General Staff College, however, enrollment in correspondence courses is not so easy. The number of IMAs selected for senior service schools is limited. To properly serve the need of your IMAs, you must make home projects available to provide them a reasonable means of earning points during the year. The following are suggestions and examples of such projects for your consideration. Most of these would be home projects, unless the IMA resides near the IMA organization.

1. Research/writing assignments (issues pertaining to all areas of the law).

2. Review of investigations or other matters (reports of survey, line of duty determinations, etc.).

3. Professional readings (office standard operating procedures (SOP), relevant court opinions, memorandums, policy letters, mobilization material, *The Army Lawyer*, the *Military Law Review*, other military journals, etc.).

4. Consultations (Many SJAs and legal assistance officers have found the expertise of their IMAs make them valuable consultants, especially in the area of legal assistance.).

5. Preparation of mobilization plans and procedures for your office.

6. Recruiting (IMAs may be encouraged to recruit qualified attorneys in their communities for appointment into the JAGC Reserves and to fill your vacant IMA positions.).

DA Form 1380 (Record of Individual Performance of Reserve Duty Training) is used to record training for retirement points. For guidance on preparation of DA Form 1380, see paragraph 3-3, AR 140-185. That regulation also contains rules for award of points. Completed DA Form 1380s are forwarded to: Commander, ARPERCEN, ATTN: DARP-PAR-PD (Data Capture Section), 9700 Page Boulevard, St. Louis, Missouri 63132-5260.

Highlights From Exceptional JA IMA Programs

Considerable effort is required to set up effective guidelines and procedures for your IMA program. Several JA activities have done so. The U.S. Army Trial Judiciary and the Contract Appeals Division have developed excellent IMA programs. At the heart of each program is an SOP setting forth a brief explanation of the IMA program, a list of often used references, designation of responsibilities within their activity pertaining to all aspects of their IMA program, and samples of correspondence routinely used in administering their IMA program. Some of the excellent aspects of the programs developed by these organizations are highlighted here and recommended to you:

1. An IMA control officer should be appointed. The IMA control officer should be a responsible senior judge advocate. The control officer's responsibilities may include the following:

(a) Preparation of a detailed SOP for administration of the IMA program.

(b) Ensuring appropriate references are on hand, including AR 140-1, AR 140-145, and AR 140-185.

(c) Maintaining a current listing of IMA positions and incumbents assigned to the positions.

(d) Establishing and maintaining a training file for each assigned IMA.

(e) Upon receipt of orders assigning the officer as an IMA, ensuring that a welcome letter is prepared, and enclosing a copy of the IMA's assignment orders, the organization's IMA SOP, and other appropriate guidance to include procedures and time requirements for requesting AT orders, opportunities to earn retirement points by performing projects during the year, and other matters deemed appropriate by the IMA control officer. The letter may provide a suggested scheme

whereby the IMA may earn the minimum required retirement points to earn a creditable retirement year (fifty points), e.g.,

—Membership points automatically awarded for being in the Active Reserve 15

—Annual Training (one point for each day of Active Duty) 12

—Correspondence Course Work (one point for three credit hours) 15

—IDT Home Projects (See AR 140-185, table 2-1, rule 16: one point for each two hours or greater period in one day. Award of a second point in the same day requires a minimum of eight hours) 10

Total points 52

(f) Coordinating an AT date with each IMA, complying with the sixty-day rule and the 31 March requirement. The SOP should require the IMA control officer to contact the IMA by letter by 30 September of each year for the purpose of setting a date for the IMAs AT for the upcoming fiscal year.

(g) Requesting AT orders once an AT period is agreed upon between the IMA and the IMA control officer.

(h) Ensuring that the IMA has received orders and will be able to report as directed by the orders. The IMA control officer contacts the IMA at least thirty days prior to the reporting date to confirm the training.

(i) Awarding points on the DA Form 1380 for IDT.

(j) Reviewing and providing recommended changes to the MOBTDA to ensure that an appropriate number of IMAs are listed for mobilization needs.

2. A "training partner" may be appointed for each IMA. A training partner is a sponsor and working partner to be the primary point of contact for each IMA. The training partner is responsible for providing meaningful projects and training for the IMA. Together they design a workable training program that can mutually benefit both. For example, an IMA could earn retirement points by performing research projects needed by the training partner. The IMA could work on one large case or on many small ones. The nature of the training or assistance is agreed upon by the partner and the IMA.

Conclusion

An IMA program is meaningful if it accomplishes the goal of preparing the IMA to successfully assume the responsibilities of the assigned position immediately upon mobilization. To accomplish this requires a program of well-designed procedures to assure efficient action to bring IMAs on their AT tours, to plan and execute meaningful training during AT, and to make available to the IMAs IDT projects from which they may earn retirement points sufficient for them to earn creditable retirement years. Keep your IMAs informed with office policy letters, newsletters, installation newspapers, and other items of interest related to your activity. It is of utmost importance that you maintain contact with your IMAs throughout the year—not just during AT. The key to a successful reserve program is having someone responsible for it. The resulting rapport will be invaluable to your office now and especially on mobilization.

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

- July 6-10: US Army Claims Service Training Seminar.
- July 13-17: Professional Recruiting Training Seminar.
- July 13-17: 16th Law Office Management Course (7A-713A).
- July 20-31: 112th Contract Attorneys Course (5F-F10).
- July 20-September 25: 113th Basic Course (5-27-C20).
- August 3-May 21, 1988: 36th Graduate Course (5-27-C22).
- August 10-14: 36th Law of War Workshop (5F-F42).
- August 17-21: 11th Criminal Law New Developments Course (5F-F35).
- August 24-28: 90th Senior Officers Legal Orientation Course (5F-F1).
- September 14-25: 113th Contract Attorneys Course (5F-F10).
- September 21-25: 9th Legal Aspects of Terrorism Course (5F-F43).
- October 6-9: 1987 JAG Conference.
- October 19-23: 7th Commercial Activities Program Course (5F-F16).
- October 19-23: 6th Federal Litigation Course (5F-F29).
- October 19-December 18: 114th Basic Course (5-27-C20).
- October 26-30: 19th Criminal Trial Advocacy Course (5F-F32).
- November 2-6: 91st Senior Officers Legal Orientation Course (5F-F1).
- November 16-20: 37th Law of War Workshop (5F-F42).
- November 16-20: 21st Legal Assistance Course (5F-F23).
- November 30-December 4: 25th Fiscal Law Course (5F-F12).
- December 7-11: 3d Judge Advocate and Military Operations Seminar (5F-F47).
- December 14-18: 32d Federal Labor Relations Course (5F-F22).

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- January 11-15: 1988 Government Contract Law Symposium (5F-F11).
- January 19-March 25: 115th Basic Course (5-27-C20).
- January 25-29: 92nd Senior Officers Legal Orientation Course (5F-F1).
- February 1-5: 1st Program Managers' Attorneys Course (5F-F19).
- February 8-12: 20th Criminal Trial Advocacy Course (5F-F32).
- February 16-19: 2nd Alternate Dispute Resolution Course (5F-F25).
- February 22-March 4: 114th Contract Attorneys Course (5F-F10).
- March 7-11: 12th Administrative Law for Military Installations Course (5F-F24).
- March 14-18: 38th Law of War Workshop (5F-F42).
- March 21-25: 22nd Legal Assistance Course (5F-F23).
- March 28-April 1: 93rd Senior Officers Legal Orientation Course (5F-F1).
- April 4-8: 3rd Advanced Acquisition Course (5F-F17).
- April 12-15: JA Reserve Component Workshop.
- April 18-22: Law for Legal Noncommissioned Officers (512-71D/20/30).
- April 18-22: 26th Fiscal Law Course (5F-F12).
- April 25-29: 4th SJA Spouses' Course.
- April 25-29: 18th Staff Judge Advocate Course (5F-F52).
- May 2-13: 115th Contract Attorneys Course (5F-F10).
- May 16-20: 33rd Federal Labor Relations Course (5F-F22).
- May 23-27: 1st Advanced Installation Contracting Course (5F-F18).
- May 23-June 10: 31st Military Judge Course (5F-F33).
- June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).
- June 13-24: JATT Team Training.
- June 13-24: JAOAC (Phase VI).
- June 27-July 1: U.S. Army Claims Service Training Seminar.
- July 11-15: 39th Law of War Workshop (5F-F42).
- July 11-13: Professional Recruiting Training Seminar.
- July 12-15: Legal Administrators Workshop (512-71D/71E/40/50).
- July 18-29: 116th Contract Attorneys Course (5F-F10).
- July 18-22: Law Office Management Course (7A-713A).
- July 25-September 30: 116th Basic Course (5-27-C20).
- August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).
- August 1-May 20, 1989: 37th Graduate Course (5-27-C22).
- August 15-19: 12th Criminal Law New Developments Course (5F-F35).
- September 19-23: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

September 1987

- 1: PBI, Estate Planning for the Elderly, Stroudsburg, PA.
- 2: MBC, Medical Malpractice, Kansas City, MO.
- 9: PBI, Witness & Discovery in Family Law (Video), State College, PA.
- 10-11: FPI, Franchising, Washington, D.C.
- 10-11: LSU, Recent Developments in Legislation and Jurisprudence, Shreveport, LA.
- 11: UMC, Administrative Law, Columbia, MO.
- 11: UMKC, Bankruptcy Institute, Kansas City, MO.
- 11: SBNM, Criminal Law Update, Albuquerque, NM.
- 11-12: BNA, Constitutional Law, Washington, D.C.
- 12-18: PLI, Patent Bar Review Course, New York, NY.
- 16-18: FPI, Construction Course for Owners, Washington, D.C.
- 17: SBN, Family Law Seminar, Reno, NV.
- 17-18: PLI, The Commerce Department Speaks, Washington, D.C.
- 18: FPI, "At Will" Termination in Illinois, Chicago, IL.
- 18: SBN, Family Law Seminar, Las Vegas, NV.
- 18-19: LSU, Recent Developments in Legislation and Jurisprudence, Baton Rouge, LA.
- 18-19: NCLE, Real Estate, Lincoln, NE.
- 20-25: NJC, Managing the Complex Case, Reno, NV.
- 20-10/9: NJC, General Jurisdiction, Reno, NV.
- 21-22: BNA, Equal Employment Opportunity, Washington, D.C.
- 21-23: FPI, Claims and the Construction Owner, Washington, D.C.
- 21-24: FPI, Pension Law Today, Washington, D.C.
- 24: MBC: Sources of Proof, St. Louis, MO.
- 24-25: ABA, Valuing a Small Business, Boston, MA.
- 25: MBC, Sources of Proof, Kansas City, MO.
- 25-26: LSU, Estate Planning Seminar, Baton Rouge, LA.
- 27-10/2: NJC, Evaluating Medical and Scientific Evidence, Reno, NV.
- 28-29: PLI, Banking Law Institute, New York, NY.
- 28-29: PLI, Securities Litigation, San Francisco, CA.
- 28-29: PLI, Secured Creditors & Lessors Under Bankruptcy Reform Act, San Francisco, CA.
- 28-30: FPI, Proving Construction Contract Damages, Washington, DC.
- 28-30: FPI, Practical Construction Law, Las Vegas, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1987 issue of *The Army Lawyer*.

4. Update on Mandatory Continuing Legal Education

The following information concerning mandatory continuing legal education updates the list found on pages 51 to 53 of the January 1987 issue of *The Army Lawyer*. The reporting date for compliance with the Tennessee MCLE rules is 31 January. The address for the local official is as follows: Commission on Continuing Legal Education, Supreme Court of Tennessee, 3622-A West End Avenue, Nashville, TN 37205. The telephone number is (615) 385-2543.

Wisconsin now requires active attorneys to complete 30 hours of approved CLE every two years. The reporting date

is 31 December of even or odd years depending on the year of Wisconsin admission. The address of the local official has changed to the Supreme Court of Wisconsin Board of Attorneys Professional Competence, 119 Martin Luther King, Jr. Boulevard, Room 405, Madison, WI 53703-3355. The telephone number is (608) 266-9760.

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	1 March annually
Wyoming	31 December in even or odd years depending on admission

For addresses and detailed information, see the January 1987 issue of *The Army Lawyer*.

6. Army-Sponsored Continuing Legal Education Calendar (June-December 1987)

The following is a schedule of Army-sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (202) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: MAJ Butler, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972-6342.

Training	Location	Date			
			TJAGSA On-Site	St. Louis, MO	10-11 Oct. 1987
			USAREUR Criminal Law Workshops and Advocacy Course	Garmisch, Germany	12-23 Oct. 1987
TCAP Seminar	Fort Monore, VA	13-14 Jul. 1987			
TCAP Seminar	Atlanta, GA	17-18 Aug. 1987			
USAREUR Legal Assistance CLE Conference	Garmisch, Germany	1-4 Sept. 1987	TJAGSA On-Site	Boston, MA	24-25 Oct. 1987
5th Circuit Judicial Conference	Garmisch, Germany	13-18 Sept. 1987	TDS Regional Workshop (Region III & VI)	Region VI—Seoul Region III—TBA	Oct. 1987
TCAP Seminar	Kansas City, MO	14-15 Sept. 1987	TJAGSA On-Site	Honolulu, HI	Oct. 1987
TDS Regional Workshop (Region V)	Fort Lewis, WA	Sept. 1987	TJAGSA On-Site	Philadelphia, PA	7-8 Nov. 1987
USAREUR Claims Attorney's Conference	Mannheim, Germany	14-18 Sept. 1987	TJAGSA On-Site	Detroit, MI	14-15 Nov. 1987
TDS Regional Workshop (Region II)	Fort Stewart, GA	Sept. 1987	TJAGSA On-Site	Indianapolis, IN	14-15 Nov. 1987
PACOM CLE	Elmendorf A.F.B., Alaska	7-10 Sept. 1987	TCAP Seminar	Fort Hood, TX	16-17 Nov. 1987
	Seoul, Korea	11-15 Sept. 1987	USAREUR JA Workshop	Berchtesgaden, Germany	23-25 Nov. 1987
	Tokyo, Japan	16-19 Sept. 1987	TDS Regional Workshop (Region I)	Fort Meade, MD	Nov. 1987
	Camp Butler, Okinawa	20-23 Sept. 1987	1st/2d Circuit Judicial Conference	TBA	Nov. 1987
	Clark A.F.B., Philippines	24-26 Sept. 1987	TJAGSA On-Site	New York, NY	5-6 Dec. 1987
	N.A.S., Guam	27-30 Sept. 1987	TCAP Seminar	San Diego, CA	7-8 Dec. 1987
	Honolulu, Hawaii	1-7 Oct. 1987	USAREUR International Affairs CLE Conference	TBA	Dec. 1987
TJAGSA On-Site	Minneapolis, MN	3-4 Oct. 1987	3d/4th Circuit Judicial Conference	TBA	Dec. 1987

Current Material of Interest

1. TJAG Policy Letters

Judge advocates are reminded that TJAG Policy Letters are now disseminated through *The Army Lawyer* (see *The Army Lawyer*, Nov. 1986, at 3). This method is more cost-effective than other means of distribution.

2. National Security Course At Harvard University

Each year, Harvard University conducts the Harvard/DOD Program for Senior Officials in National Security, an eight week course designed to promote understanding of the political environment in which national security policies and programs are formulated and executed. The course is for personnel at the GS/GM-15 and O-6 levels who are selected based on supervisor nominations. This year, Mr. Samuel S. Horn, Attorney Advisor (Labor) in the Labor and Civilian Personnel Law Office, OTJAG, was selected to attend. DA's announcement of the next session, with instructions on how to submit nominations, will be disseminated in January, 1988.

3. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways

an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

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

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. The newly-added Preventive Law Series contains reproducible pamphlets on many consumer and family law topics.

Contract Law

- AD B090375 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-85-1 (200 pgs).
- AD B090376 Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-85-2 (175 pgs).
- AD B100234 Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD A174509 All States Consumer Law Guide/JAGS-ADA-86-11 (451 pgs).
- AD B100236 Federal Income Tax Supplement/JAGS-ADA-86-8 (183 pgs).
- AD B100233 Model Tax Assistance Program/JAGS-ADA-86-7 (65 pgs).
- AD B100252 All States Will Guide/JAGS-ADA-86-3 (276 pgs).
- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B093771 All States Law Summary, Vol I/JAGS-ADA-85-7 (355 pgs).
- AD B094235 All States Law Summary, Vol II/JAGS-ADA-85-8 (329 pgs).
- AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
- AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
- AD B110134 Preventive Law Series/JAGS-ADA-87-4 (196 pgs).

Claims

- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).

- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

- AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).
- AD B088204 Uniform System of Military Citation/JAGS-DD-84-2 (38 pgs).

Criminal Law

- AD B107951 Criminal Law: Evidence I/JAGS-ADC-87-1 (228 pgs).
- AD B107975 Criminal Law: Evidence II/JAGS-ADC-87-2 (144 pgs).
- AD B107976 Criminal Law: Evidence III (Fourth Amendment)/JAGS-ADC-87-3 (211 pgs).
- AD B107977 Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS-ADC-87-4 (313 pgs).
- AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

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

4. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 12-12	Processing Discrepancy Reports		1 Oct 86
AR 350-20	Management of the Defense Foreign Language Program		15 Mar 87
AR 381-20	U.S. Army Counterintelligence Activities		17 Apr 87
AR 600-100	Army Leadership		22 May 87
AR 601-1	Assignment of Enlisted Personnel to the U.S. Army Recruiting Command		22 Apr 87
AR 612-201	Processing, Control, and Distribution at U.S. Army Reception Battalions and Training Centers		24 Apr 87
AR 700-9	Policies of the Army Logistics System		5 May 87
DA Pam 25-30	Index of Army Publications and Blank Forms		31 Mar 87
DA Pam 710-5	Unit Commander's Supply Handbook		15 Apr 87
UPDATE 10	Officer Ranks Personnel		15 Apr 87
UPDATE 12	Morale, Welfare & Recreation		8 Apr 87

5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Almond, *The Military Activities Case: New Perspectives on the International Court of Justice and Global Public Order*, 21 *Int'l Law* 195 (1987).

Closen, Connor, Kaufman & Wojcik, *AIDS: Testing Democracy—Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 *J. Marshall L. Rev.* 835 (1986).

Developments in Alternative Dispute Resolution, 37 *J. Legal Educ.* 26 (1987).

Goldman, *The Strategic Defense Initiative: Star Wars and Star Laws*, 9 *Hous. J. Int'l L.* 111 (1986).

Hight, *Evidence, the Court, and the Nicaragua Case*, 81 *Am. J. Int'l L.* 1 (1987).

Moring, *Regulation of Free Speech in Arlington National Cemetery: An Analysis of the Visitors' Rules* (pts. 1 & 2), 34 *Fed. B. News & J.* 85 (1987), 34 *Fed. B. News & J.* 136 (1987).

Mueller & Sterritt, *Article III Status for the U.S. Court of Military Appeals—The Evolution Continues*, 34 *Fed. B. News & J.* 132 (1987).

Perras & Hunter, *Handicap Discrimination in Employment: The Employer Defense of Future Safety Risk*, 6 *J. L. & Com.* 337 (1986).

Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence*, 7 *Computer L.J.* 23 (1986).

Oliphant, *Sixth Amendment Rights for Defendants Accused of State Crimes in Federal Magistrate Courts: A Call for Reform*, 20 *U.S.F. L. Rev.* 313 (1986).

Reed, *How to Write an Article*, *Legal Econ.*, March 1987, at 66.

Thompson, *The Use of Modern Technology to Present Evidence in Child Sex Abuse Prosecutions: A Sixth Amendment Analysis and Perspective*, 18 *U. West L.A. L. Rev.* 1 (1986).

Thornhill, *Federal and State Remedies to Clean up Hazardous Waste Sites*, 20 *U. Rich. L. Rev.* 379 (1986).

Comment, *The Clergy-Pentitent Privilege and the Child Abuse Reporting Statute: Is the Secret Scared?*, 19 *J. Marshall L. Rev.* 1053 (1986).

Note, *Protecting Nuclear Materials in the Terrorist Age: The International Challenge*, 12 *Brooklyn J. Int'l* 305 (1986).

Note, *Removal Provisions of the Philippine-United States Military Bases Agreement: Can the United States Take It All?*, 20 *Loy. L.A.L. Rev.* 421 (1987).

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