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Don't Panic!¹ Rehearings and *DuBays*² Are Not the End of the World

Major Grace M. W. Gallagher³

Major (MAJ) Harriet J. Potter, after reviewing numerous charge sheets and mentoring her talented but very green trial counsel, finally has a free moment to attack the paperwork piled on her desk. She has been the Chief of Military Justice (CMJ) for the Division for nine months and she believes that she has encountered every odd military justice issue imaginable. As she is sorting through her inbox, she finds near the top a letter, from the Army Court of Criminal Appeals (ACCA), with a copy of the opinion, ordering a rehearing⁴ in *United States v. Smythe*. *Smythe*? What is this? Unaware of the *Smythe* case, MAJ Potter has a hollow feeling in her stomach. A rehearing in a case she has never heard of? What is she supposed to do? Suddenly her uneasiness turns to panic. How can she get up to speed on this case? Where was the case tried? Where is the record of trial? Where is the trial counsel's file and do law enforcement investigators have the evidence? The Staff Judge Advocate (SJA) has put MAJ Potter on his calendar for 1530, only three hours from now, to update him on military justice issues, she now needs to brief him on how to handle this rehearing. How does she get this case to trial? Who can help her?⁵ Why does the Court hate her? Where can she turn to for solace?

A rehearing presents unique challenges. A rehearing usually arrives in a military justice (MJ) office with little or no previous coordination with the appellate court or Government Appellate Division (GAD) and often triggers some degree of panic. The appellate court's directive, stated in the order⁶ or opinion,⁷ is to fix the problem. But how is that to be done? Most of the MJ office personnel often have little or no knowledge of the case and little or no experience in appellate litigation. Further complicating the task faced by the MJ office is the fact that records of trial in rehearing cases are usually large, and the records must be thoroughly reviewed and the cases reinvestigated. Additionally, neither the witnesses nor the evidence is readily available. Despite these challenges, the MJ office must focus on preparing for trial immediately because the 120-day speedy trial clock has been triggered by the receipt of the record of trial and the opinion authorizing or directing the rehearing and the clock is already ticking.⁸

¹ DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 20, in THE ULTIMATE HITCHHIKER'S GUIDE (Wings Books 1996). In the book, the phrase "don't panic" appears on the cover of the alien Ford Prefect's book, *The Hitchhiker's Guide to the Galaxy*. *Id.*

² *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

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⁴ The term "rehearing" is used generally to refer to a retrial on the merits, a sentence rehearing or a combined rehearing. "Retrial" is used generally to refer to a case returned by the appellate court to be retried on the merits, in whole or in part. "Resentencing" is used generally to refer to a case returned by the appellate court for a rehearing as to sentence. A *DuBay* hearing is a limited evidentiary hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

⁵ The U.S. Army Legal Services Agency (USALSA) established the Trial Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) to assist counsel. In rehearsals counsel should contact these organizations for substantive, if not procedural, assistance on legal questions.

⁶ ARMY COURT OF CRIMINAL APPEALS, POST-TRIAL HANDBOOK paras. 7-1, 7-12 (2008) [hereinafter ACCA POST-TRIAL HANDBOOK] (This document is available from the ACCA Clerk of Court's Office but will shortly be published by the Office of The Judge Advocate General, Criminal Law Division). Order—sometimes referred to as the court's "mandate." When mandate is used as a non-technical term it is interpreted as a "command issued by the court to [The Judge Advocate General] TJAG or to a convening authority." *Id.* para. 7-12(a). This command may come in the form of an order or opinion. The Court of Appeal for the Armed Forces (CAAF) uses a technical definition of the term mandate, which refers to the court "order issued ten days after an opinion has been published placing the decision in effect." *Id.* para. 7-12(b). "The [Army Court of Criminal Appeals] ACCA does not issue a separate mandate. Its decisions become effective upon promulgation by TJAG to a [General Court-Martial] GCM authority exercising jurisdiction over the accused or responsible for some further action in the case." *Id.*

⁷ Opinion—The statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based. BLACK'S LAW DICTIONARY 1092 (8th ed. 2004).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(b)(3)(D) (2008) [hereinafter MCM].

This article focuses on the Army MJ office, and provides practical guidance on how to process cases from receipt of the record of trial, through trial preparation, the trial itself, and the post-trial process.⁹ The framework presented in this article will help counsel avoid wasting time and effort, maximize efficiencies, and, most importantly justify the advice: DON'T PANIC!

I. Introduction

Much academic research has focused on the substance of the military appellate courts' decisions. The subject of the procedure of actually conducting an appellate rehearing, however, has been neglected.¹⁰ Between 1999 and June 2009 the Court of Appeals for the Armed Forces (CAAF) and the ACCA have remanded approximately 96 cases for rehearing, approximately 46 cases for a *DuBay* hearing, and approximately 190 cases back to Army convening authorities for a new review and action.¹¹

How does an appellate court decide where to send the case back for a rehearing? The choice is generally between sending it back to: (1) the General Court-Martial Convening Authority (GCMCA) that originally tried the case; or (2) the GCMCA where the accused¹² or appellant is currently incarcerated or the Personnel Control Facility (PCF) where he is currently assigned¹³ if the accused has already served his confinement. After the GCMCA has been selected, the record of trial will then be sent to the MJ office where the case must then be processed, and possibly tried.

II. Overview

In the Army, the rehearing process is governed by the *Manual for Courts-Martial (MCM)*, Article 63 the Uniform Code of Military Justice (UCMJ),¹⁴ and the Rules for Courts-Martial (RCM) 810¹⁵ and 1107(e).¹⁶ Chapter 13 of Army Regulation (AR) 27-10, *Military Justice*,¹⁷ and Appendices D and K of Department of the Army Pamphlet (DA Pam) 27-7, *Military Judges' Benchbook*,¹⁸ set out the regulatory rules for rehearings. In addition, the *Army Court of Criminal Appeals' Post-Trial Handbook*¹⁹ provides some assistance. These limited resources are all that is available to assist the CMJ or the counsel in preparing for and conducting a rehearing and they do not fully address the practical issues associated with rehearings.

A rehearing can neither be treated like an original jurisdiction court-martial nor placed on the back burner because the MJ office is too busy. Unlike original jurisdiction cases, the trial counsel has no control over the case's investigative stage, which was completed before the original trial, nor the 120-day speedy trial clock.²⁰ The accused must be located immediately and the defense counsel served with a copy of the record of trial. The entire record of trial, including the appellate matters, must be thoroughly read and understood by both the paralegal and the trial counsel. This enables the paralegal to search for the victim and witnesses, and to obtain the evidence necessary to try the case. The trial counsel must

⁹ This article does not deal in any depth with the complexity of conducting a rehearing in a death penalty case and its related issues because "death is different." *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (quoting *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002)).

¹⁰ Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., Dec. 1991, at 9. To date this is the only article written specifically on the subject of rehearings.

¹¹ Statistics of cases remanded by the ACCA and CAAF between 1999 and June 17, 2009. E-mail from Homan Barzmehri, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (June 17, 2009, 12:07 EST) (on file with author).

¹² The term "accused" is used generally to apply to the accused Soldier whose case has been returned for a complete retrial on the merits. "Appellant" is used to refer to a Soldier whose case is progressing through the appeals process.

¹³ U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 9-3(b) (15 June 2006) [hereinafter AR 190-47].

¹⁴ UCMJ art. 63 (2008).

¹⁵ MCM, *supra* note 8, R.C.M. 810.

¹⁶ *Id.* R.C.M. 1107(e) (Action by convening authority). Rrehearings, other trials or sentence reassessments ordered by a convening authority are outside the scope of this article.

¹⁷ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 13 (16 Nov. 2005) [hereinafter AR 27-10].

¹⁸ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK apps. D, K (1 Apr. 2001) (C1 and C2, 1 July 2003).

¹⁹ ACCA POST-TRIAL HANDBOOK, *supra* note 6.

²⁰ MCM, *supra* note 8, R.C.M. 707(b)(3)(D).

ensure that every effort is made to bring the case to trial within the 120 days specified by RCM 707.²¹ Any delays must be justified and well documented because the defense will almost certainly litigate a speedy trial motion, using both the 120-day clock²² and Article 10, UCMJ.²³ If the defense prevails in the motion, the military judge could dismiss the charges with prejudice, and the accused will not only be released from confinement but subsequent prosecution could be barred.²⁴ These additional rehearing steps should not distract counsel from the fundamental fact that this is a trial. As in every trial, counsel's careful preparation and attention to detail²⁵ to the basics of procedure and evidence are essential to success.

III. Appellate Court Ordered Actions²⁶

In a simple case, the appellate court often returns the following, relatively straightforward issues to the original convening authority for the completion of a certificate of correction,²⁷ or a corrected action substituting for a defective action.²⁸ If the issues are more complex, the appellate court usually sends the case to the convening authority currently exercising jurisdiction over the case, and may order one or more of the following: (1) a new review and action;²⁹ (2) a sanity board;³⁰ (3) a limited evidentiary hearing, known as a *DuBay* hearing; (4) a retrial or rehearing on some or all of the charges;³¹ (5) a sentence rehearing alone;³² (6) an "other trial";³³ or (7) a sentence reassessment.³⁴

A. Completing a Certificate of Correction³⁵

Incomplete or defectively authenticated records of trial may be returned to the convening authority for correction.³⁶ This process cannot be used to cure legal defects in the case. A Certificate of Correction is used to ensure that the record of trial corresponds with the events that occurred in the actual proceedings, for example, to correct typographical errors where text was inadvertently omitted or documents were unintentionally left out of the record.

B. Correction of the Action³⁷

²¹ *Id.* R.C.M. 707.

²² *Id.*

²³ UCMJ art. 10 (2008).

²⁴ *United States v. McFarlin*, 24 M.J. 631, 635 (A.C.M.R. 1987) (holding since the accused was tried on the 121st day after notification to the convening authority, R.C.M. 707(e) mandated dismissal). *United States v. Rivera-Berrios*, 24 M.J. 679 (A.C.M.R. 1987) (noting the retrial was heard on day 136, in the absence of R.C.M. 707 delays, the findings and sentence were set aside and the charge and its specification was dismissed).

²⁵ Attention to detail includes enclosing all the necessary jurisdictional and procedural orders and documents in the record of trial. The appellate court stated: "We urge those responsible for the administration of military justice to include such written orders [terminating excess leave or returning to active duty] in the allied papers of the record of trial if the order has not been marked as an exhibit at trial." *McFarlin*, 24 M.J. at 633 n.2; *see also* *United States v. Burris*, 21 M.J. 140, 145 (C.M.A. 1985) ("The Government failed to establish a proper record, and it is not for appellate courts to launch a rescue mission.").

²⁶ Unless stated otherwise, this article generally discusses appellate court ordered actions, not convening authority ordered rehearings or "other trials." MCM, *supra* note 8, R.C.M. 1107(e).

²⁷ *Id.* R.C.M. 1104(d)(1); ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-2.

²⁸ MCM, *supra* note 8, R.C.M. 1107(f)(2); ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-3.

²⁹ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4.

³⁰ *Id.* para. 7-5.

³¹ *Id.* para. 7-7(a).

³² *Id.* para. 7-7(b).

³³ MCM, *supra* note 8, R.C.M. 810(e) (defining the term "other trial" as "another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense."). The technical term "new trial" is defined in Article 73, UCMJ. UCMJ art. 73 (2008). "At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court." *Id.*

³⁴ MCM, *supra* note 8, R.C.M. 1107(e)(1)(b)(iv).

³⁵ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-2.

³⁶ MCM, *supra* note 8, R.C.M. 1104(d). The military judge shall give notice of the proposed correction to all parties, allow them to examine and respond to the proposed correction prior to authenticating the certificate of correction. *Id.* Depending on the circumstances, the record of trial may not necessarily be returned because the Office of the Staff Judge Advocate can use its own copy of the record of trial. ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-2(b)(1).

³⁷ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-3.

A convening authority, on his own motion, is authorized to recall and modify an action prior to notification of the accused.³⁸ He may also recall and correct an “illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under RCM 1112.”³⁹ This correction cannot result in action less favorable to the accused than the initial action. A higher reviewing authority,⁴⁰ The Judge Advocate General (TJAG),⁴¹ or authorities under Articles 64, 66, 67, or 69 of the UCMJ,⁴² can also direct the convening authority to modify, withdraw or correct an action.

C. New Review and Action⁴³

When a case is returned for a new review and action the entire RCM 1105, 1106, and 1107 process must be completed again. If the original defense counsel is not available, a new trial defense counsel will be detailed to assist the accused in submitting his new clemency matters.⁴⁴ The new action and promulgating order must be given to the accused. The new action must cite that the original action and promulgating order were set aside (not withdrawn) by the appellate court.⁴⁵ Since the original promulgating order was neither revoked nor amended, a new promulgating order must be issued.⁴⁶

New reviews and actions can be more complex than may appear at first glance. In *United States v. Ayeni*, the accused was court-martialed twice for separate instances of misconduct. Private Ayeni’s second court-martial⁴⁷ arose after charges were severed from his first trial.⁴⁸ The convening authority agreed to defer some of the adjudged forfeitures until he took action in the first court-martial on 1 July 2004.⁴⁹ At the second court-martial, the panel recommended “that six months of base pay will go towards the family.”⁵⁰ The staff judge advocate’s post-trial recommendation (SJAR) failed to bring the panel’s clemency recommendation to the attention of the convening authority.⁵¹ The ACCA found this to be plain error.⁵² However, because of the passage of time, the convening authority could no longer waive or defer forfeitures when he took action on the second court-martial.⁵³ The ACCA noted the convening authority originally had the ability to recall and modify the action under RCM 1107(f)(2), if he had been timely informed of the panel’s clemency recommendation.⁵⁴ The court

³⁸ MCM, *supra* note 8, RCM 1107(f)(2). If the accused has been notified, but prior to the record of trial being forwarded, the convening authority may recall and modify the action provided the modification is not less favorable to the accused than the previous action. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* A higher reviewing authority or TJAG can direct the convening authority to modify “any incomplete, ambiguous, void, or inaccurate action.” *Id.*

⁴¹ *Id.*

⁴² *Id.* R.C.M. 1107(g). Authorities under Article 64 (Review by a judge advocate), Article 66 (Review by Court of Criminal Appeal), Article 67 (Review by the Court of Appeal for the Armed Forces), or Article 69 (Review in the office of the Judge Advocate General), are permitted to instruct a convening authority to withdraw the original action if it is “incomplete, ambiguous, or contains a clerical error” and substitute a corrected action. *Id.*

⁴³ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4.

⁴⁴ MCM, *supra* note 8, R.C.M. 1105; *see also* *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998) (“It has long been asserted that an accused’s best chance for post-trial clemency is the convening authority.”); U.S. ARMY TRIAL DEFENSE SERVICE, STANDARD OPERATING PROCEDURES paras. 3-9b, 3-17 (n.d.) [hereinafter TDS SOP].

⁴⁵ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4(c); MCM, *supra* note 8, R.C.M. 1114.

⁴⁶ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4(c).

⁴⁷ No. 20030328, 2006 CCA LEXIS 374 (A. Ct. Crim. App. Sept. 29, 2006) (unpublished).

⁴⁸ *United States v. Ayeni*, No. 20030169 (A. Ct. Crim. App. Aug. 31, 2006) (unpublished) (affirming the findings and sentence).

⁴⁹ *Id.*

⁵⁰ *Ayeni*, 2006 CCA LEXIS 374, at *3.

⁵¹ *Id.* (noting the recommendations of a panel, that six months base pay go to the family, “must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence” (quoting *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999))).

⁵² *Ayeni*, No. 20030328, at *2 (memorandum opinion) (failing to bring court-martial panel recommendations to the convening authority’s attention here amounted to plain error); *see* *United States v. Paz-Medina*, 56 M.J. 501, 504–05 (A. Ct. Crim. App. 2001).

⁵³ *Ayeni*, 2006 CCA LEXIS 374, at *4.

⁵⁴ *Id.*

It is important to note, however, that the convening authority had the ability “to recall and modify his action at any time prior to forwarding the record for review, as long as the modification [did] not result in action less favorable to the accused than the earlier action.” R.C.M. 1107(f)(2). Our records indicate that the record of trial from appellant’s first court-martial did not reach our court for review until 27 July 2004, twelve days after the convening authority’s action on appellant’s second court-martial on 15 July 2006. Thus, it appears that had the convening authority been informed by his SJA that appellant’s second court-martial had recommended

returned the case to the accused's current convening authority for a new review and action. The appellate court stated in a footnote: "Although the same or a new convening authority will no longer have the option of recalling and modifying the action on appellant's first court-martial, the convening authority will have the ability to fashion an alternative form of clemency should it be deemed warranted."⁵⁵ The current convening authority in *Ayeni* was placed in the difficult position of attempting to craft a form of clemency that fulfilled the panel's intention of trying to benefit the accused's family or simply granting an alternative form of clemency. In *Ayeni*'s case the current convening authority granted clemency in the form of a sentence reduction, although this did not directly assist the accused's family as the panel desired.⁵⁶ The convening authority's new action was still subject to the appellate court's review.⁵⁷

D. Sanity Board⁵⁸

The appellate court may order a sanity board to provide an opinion about the accused's mental responsibility at: (1) the time of the offense; (2) the time of the trial; (3) the current time; or (4) all three of these times.⁵⁹ The Office of the Staff Judge Advocate (OSJA) will be required to: arrange for the appointment of mental health professionals to the board; provide a copy of the record of trial⁶⁰ and other relevant documents to the board;⁶¹ ensure that the board complies with the court order; and arrange for the accused's presence. The MJ office should ensure that the report is completed within the specified time or seek an extension if necessary, and return both the record of trial and the board's report to the Clerk of Court. Additionally, if a sanity board is necessary as part of the rehearing process, the trial counsel should ensure that the convening authority excludes this time from the 120-day speedy trial clock⁶² under RCM 707(c).⁶³

E. Limited Evidentiary or *DuBay*⁶⁴ Hearing⁶⁵

*United States v. DuBay*⁶⁶ established the limited evidentiary hearing, even though the *MCM* contains no specific provision for this type of proceeding. A *DuBay* hearing arises when the appellate court remands the case to the appropriate convening authority who, upon the SJA's advice, refers⁶⁷ it to the same type of court-martial as the original trial. The

that he provide even more assistance to appellant's family, the convening authority may have been able to have recalled and modified his action on appellant's first court-martial . . . to give him the ability to effectuate the panel's request in his action on the second court-martial. Moreover, even without recalling his first action, the convening authority could have granted appellant some alternative form of clemency in his action on the second court-martial. As such, we find that the error was not waived by the trial defense counsel's failure to object to the omission of the panel's recommendation in the SJAR.

Id.

⁵⁵ *Id.* at *6 n.2; see *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006).

⁵⁶ Memorandum from the Staff Judge Advocate to GCMCA, subject: Post-Trial Recommendation of the Staff Judge Advocate in the General Court-Martial Case of *United States v. Specialist Friday O. Ayeni* and Action (28 June 2007). The accused originally received a ten year sentence at his court-martial. *Ayeni*, 2006 CCA LEXIS 374, at *2. The GCMCA granted three months clemency after the new review and action. Action of Convening Authority, *United States v. Ayeni*, No. 20030328 (28 June 2007).

⁵⁷ *Ayeni*, 2006 CCA LEXIS 374 (A. Ct. Crim. App. Oct. 26, 2007) (unpublished) (affirmed the findings and sentence after a new review and action), *petition denied*, USCA Misc. Dkt. No. 08-0226/AR Jun. 11, 2008, *petition for reconsideration denied*, Oct. 3, 2008.

⁵⁸ MCM, *supra* note 8, R.C.M. 706; ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-5.

⁵⁹ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-5a.

⁶⁰ The MJ office should make a complete copy of the record of trial for the board to avoid problems with accountability of documents later.

⁶¹ Examples of which may include, the case file from Criminal Investigation Division (CID), the correctional treatment file (CTF), medical or other law enforcement files.

⁶² MCM, *supra* note 8, R.C.M. 707(b)(3)(D).

⁶³ *Id.* R.C.M. 707(c) discussion.

⁶⁴ 37 C.M.R. 411 (C.M.A. 1967).

⁶⁵ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-6; *United States v. Parker*, 36 M.J. 269, 271-72 (C.M.A. 1993); see also *United States v. Thomas*, 22 M.J. 388, 392 (C.M.A. 1986).

⁶⁶ *DuBay*, 37 C.M.R. 411.

⁶⁷ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-6(b) (directing that the charge sheet shall be "flapped"); see *id.* para. 7-8(a)(2) (overlying ("flapping") the new referral on top of the original referral).

military judge must answer questions specified by the service court. Very complex and difficult issues can arise at *DuBay*⁶⁸ hearings and those issues will often be vigorously litigated. After hearing the evidence, the military judge must make findings of fact and conclusions of law, but those findings and conclusions are not binding on the appellate court which ordered the hearing. *DuBay* hearings often take on all the trappings of a fully contested trial, and trial counsel must prepare accordingly and expeditiously. The outcome of *DuBay* hearings has a great impact on the appellate court's ultimate decision in this case, including whether the case should be overturned on appeal, and the importance of such hearings cannot be overstated.⁶⁹

A *DuBay* hearing can be further complicated if the appellate court does not clearly articulate its questions and the exact nature of the information it is seeking. If the appellate court orders a *DuBay* hearing based on broad or vague questions, it greatly adds to the burdens placed on the military judge and counsel to anticipate and answer potential additional questions required to answer the ultimate issue presented by the appellate court. Similarly, if a *DuBay* hearing is ordered too early in the appellate process, prior to the exact determination of the actual issues in dispute being fully articulated, the military judge and counsel at the *DuBay* must try to anticipate the potential appellate issues, and provide as much evidence as they believe the appellate court may require. This proactive approach, in most cases, will prevent the return of the case for a second *DuBay* hearing.⁷⁰

F. Retrial⁷¹ of All or Some of the Charges⁷²

A full rehearing begins the process of trying all the charges from the original court-martial again. The MJ office can be faced with a rehearing where the appellate court has affirmed some findings, but set aside others. The MJ office will have to conduct a rehearing on the merits on the charges the appellate court set aside and a resentencing hearing on the affirmed charges. This is known as a combined rehearing. Generally, the charges originally investigated pursuant to Article 32, UCMJ, do not require reinvestigation in rehearsals.⁷³ However, the SJA must still provide the convening authority with a detailed pretrial advice prior to the case being referred to court-martial, including an explanation of why the case has been returned for a rehearing.⁷⁴ In combined rehearsals, the affirmed charges must not be considered prior to the sentencing phase and must not be disclosed to the court-martial panel members prior to sentencing.⁷⁵ Additionally, the parties' elections at the original court-martial are not frozen in place at the rehearing. The accused may change his forum selection⁷⁶ or plea,⁷⁷ to the

⁶⁸ In *DuBay* the U.S. Court of Military Appeals was dissatisfied with the parties' use of ex parte affidavits, in a complex case alleging command interference with judicial bodies. 37 C.M.R. 411. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), further sets out the courts requirements before it will order a limited evidentiary (or *DuBay*) hearing. See *Parker*, 36 M.J. at 271-72; see also *Thomas*, 22 M.J. at 392.

⁶⁹ Generally, the convening authority does not take any action in a *DuBay* hearing other than to return the record of the hearing (along with all copies of the original record of trial) to the appellate court after it has been authenticated by the military judge. There may be some circumstances that require the convening authority to take action. ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-6(c)(2). Some cases require the convening authority to take personal action based on the military judge's findings. *Id.* Examples of these actions include: setting aside findings of guilt and the sentence and ordering a rehearing; and setting aside the sentence only and ordering a sentence rehearing. *Id.* If the convening authority is required to take either of these actions, the SJA's advice will be treated like a post-trial recommendation. *Id.* The defense counsel would also be entitled to submit matters. *Id.* The convening authority may also be required to issue a supplementary promulgating order, in these cases. *Id.* If the convening authority determines a *DuBay* hearing is impracticable, the Clerk of Court should be informed and will assist in resolving the matter.

⁷⁰ *United States v. Andreozzi*, 60 M.J. 727, 729 (A. Ct. of Crim. App. 2004) (showing case sent back for two separate *DuBay* hearings); *United States v. Murphy*, No. 8702873 (A. Ct. Crim. App. Nov. 20, 2001) (Opinion of the Court on Remand) (unpublished); *United States v. Murphy*, No. 8702873 (A. Ct. Crim. App. Apr. 27, 2004) (Order) (unpublished). *Murphy* is a death penalty case, it has been returned by the appellate courts twice for *DuBay* hearings and is currently returned to the trial court level for a sentence rehearing. *United States v. Murphy*, No. 19872873 (A. Ct. Crim. App. June 27, 2008) (Opinion of the Court on Remand).

⁷¹ MCM, *supra* note 8, R.C.M. 810.

⁷² ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-7(a).

⁷³ *Id.* para. 7-8(a). A new Article 32, UCMJ investigation is not required if the court orders a "new trial" or "other trial." *Id.* However, if the Government prefers additional charges to be tried in the appellate case, those charges would be subject to an Article 32, UCMJ investigation.

⁷⁴ *Id.* para. 7-8. The pretrial advice should include a detailed history of the case, specific instructions from the TJAG's letter or instruction or the appellate court, the convening authority's options and the SJA's recommendations. Some of these cases are complex and the SJA should try to account for each charge on the original charge sheet, including whether it was dismissed during the original trial or at the appellate court. The SJA should address the options available to the convening authority, including a discussion on whether a rehearing is practical.

⁷⁵ MCM, *supra* note 8, R.C.M. 810(d)(1) discussion.

⁷⁶ *Id.* R.C.M. 810(b)(3).

⁷⁷ *Id.* R.C.M. 810(a)(3). If the accused originally pled guilty pursuant to a pretrial agreement at his original court-martial and fails to enter a guilty plea at the rehearing, his sentence may include any lawful punishment not in excess of or more serious than the lawfully judged sentence adjudged at the earlier court-martial. *Id.* R.C.M. 810(d)(2).

set aside charges, in the rehearing on the merits. The Government may also try additional charges arising out of misconduct that was unknown at the original trial; however these new charges are subject to sentence limitation rules⁷⁸ (and possibly a new investigation under Article 32, UCMJ). These sentence limitation rules, generally, require that the offenses for which a sentence in a rehearing, new trial, or other trial is ordered shall not be the basis for an approved sentence in excess of the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, even if the accused fails to comply with the first Pretrial Agreement (PTA).⁷⁹

G. Sentence Rehearing⁸⁰

A sentence rehearing occurs when the appellate court returns a case to resentencing the accused based on the affirmed findings of guilt. The accused cannot withdraw his original plea,⁸¹ but he may change his forum selection.⁸² The court-martial panel cannot know the original sentence;⁸³ however, the approved sentence is subject to sentence limitations rules.⁸⁴ The defense counsel should be aware that it is possible for the accused to “bust providence”⁸⁵ at a sentence rehearing. If the accused is no longer provident according to the terms of his original pre-trial agreement, he may no longer have the benefit of RCM 810(d) sentence limitation rules.⁸⁶ This is something the parties at a rehearing must be aware of in every sentence rehearing.

H. “Other Trial”⁸⁷

“Other trials” arise when the original proceedings are “declared invalid because of lack of jurisdiction or a failure of a charge to state an offense.”⁸⁸ “Other trials” are retrials, and not “new trials” under Article 73, UCMJ.⁸⁹

In *United States v. Reid*,⁹⁰ the accused pleaded guilty to fraudulent separation and several other charges. The ACCA held the trial court only had jurisdiction⁹¹ over the fraudulent discharge.⁹² The court authorized an “other trial” after declaring all other findings void, and a sentence rehearing on the fraudulent discharge.⁹³ The Judge Advocate General of the Army certified the case to CAAF who affirmed ACCA’s decision ordering an “other trial.”⁹⁴ “Other trials” occur rarely.

I. Sentence Reassessments

⁷⁸ *Id.* R.C.M. 810(d), R.C.M. 1003.

⁷⁹ *Id.* R.C.M. 810(d). This rule does contemplate a more severe sentence if there is a mandatory sentence prescribed for the offense.

⁸⁰ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-7(b).

⁸¹ MCM, *supra* note 8, R.C.M. 810(a)(2)(B).

⁸² *Id.* R.C.M. 810(b)(3).

⁸³ *Id.* R.C.M. 810(d)(1) discussion.

⁸⁴ *Id.* R.C.M. 810(d)(1). The convening authority is bound by the sentence limitation rules which generally means the sentence cannot be in excess of or more severe than the sentence ultimately approved by the convening authority at the original trial. *Id.*

⁸⁵ An accused “busts providence” when he is unable to articulate clearly that his acts or omissions constituted the offense to which he is pleading guilty, or he presents a defense to the charge or evidence which is inconsistent with his plea of guilty before sentence is announced. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). If this occurs the military judge must reopen the providence inquiry to resolve the inconsistency, if the accused cannot resolve the issue the military judge cannot accept the accused’s plea of guilty.

⁸⁶ MCM, *supra* note 8, R.C.M. 810(d).

⁸⁷ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-1.

⁸⁸ MCM, *supra* note 8, R.C.M. 810(e). The same speedy trial rules under RCM 707 apply to “other trials.” See *United States v. Moreno*, 24 M.J. 752, 753 (A.C.M.R. 1987).

⁸⁹ UCMJ art. 73 (2008); MCM, *supra* note 8, R.C.M. 1210.

⁹⁰ 46 M.J. 236 (C.A.A.F. 1997), *aff’d* 43 M.J. 906 (A. Ct. Crim. App. 1996).

⁹¹ UCMJ art. 3(b) (1995). This issue had to be decided prior to the Government proceeding in a second court-martial of the other charges.

⁹² *Reid*, 46 M.J. at 237 (citing *Reid*, 43 M.J. at 908).

⁹³ *Id.*

⁹⁴ *Id.* at 240.

Sentence reassessments⁹⁵ can occur if an appellate court approves some of the findings, and authorizes a rehearing on the other offenses and sentence but the convening authority decides it is impractical to conduct a rehearing.⁹⁶ Unless prohibited by the court, the convening authority may reassess the sentence under RCM 1107(e)(1)(B)(iv),⁹⁷ without conducting a sentence rehearing. The convening authority will dismiss the remaining charges and reassess the sentence on the approved charges.⁹⁸ In *United States v. Reid*, the court lauded the convening authority for attempting to cure an error before Sergeant First Class Reid's case reached the appellate court, but held that the convening authority must be assured that the accused is placed "in the position he would have occupied if an error had not occurred."⁹⁹ In *Reid*, the Court of Military Appeals found that the SJA failed to distinguish clearly between curing any effect a trial error may have on the sentencing authority and determining the appropriateness of the adjudged sentence, or indeed give any guidance at all as to how the convening authority should rationally cure the prejudice.¹⁰⁰

More frequently, the appellate court itself may reassess a sentence rather than returning the case for a rehearing. The appellate court may do so if it is "convinced that even if no error had occurred at trial, the accused's sentence would have been at least of a certain magnitude. Under those circumstances the [appellate court] need not order a rehearing on sentence, but instead may itself reassess the sentence."¹⁰¹

IV. The Rehearing

A. Initial Administrative Matters

The Clerk of Court, ACCA, often sends particularly complex cases to the Army GCMCA currently exercising jurisdiction over the accused¹⁰² especially if the accused is still incarcerated¹⁰³ at: the United States Disciplinary Barracks (USDB) (Fort Leavenworth); the Army Regional Corrections Facilities (RCF);¹⁰⁴ or an another Department of Defense (DoD) facility.¹⁰⁵ The accused's chain of command, while in confinement, can be the Correctional Holding Detachment (CHD) or the PCF.¹⁰⁶

When the appellate court orders a rehearing, the Clerk of Court, ACCA, will forward: the appellate court's order or opinion; the record of trial; and the TJAG's letter of instruction, or remand letter, to the GCMCA through the OSJA.¹⁰⁷ Upon receipt of these documents, the CMJ should immediately determine what further proceeding or remedial action the appellate court has directed the GCMCA to perform.¹⁰⁸ The military judge and the U.S. Trial Defense Service (TDS) must also immediately be notified of the case.

⁹⁵ *United States v. Sales*, 22 M.J. 305 (C.M.A. 1988); *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006).

⁹⁶ *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006). The CAAF returned this case for a sentence rehearing. *Id.* at 480. Ultimately the convening authority decided that it was impractical to conduct a rehearing on the remaining charges and approved a sentence of no punishment. *United States v. Buber*, 2006 CCA LEXIS 520, at *2 (A. Ct. Crim. App. 2006). In such cases the convening authority may choose to administratively separate the accused under Chapter 14, AR 635-200 based on the affirmed charge. U.S. DEP'T OF ARMY, REG. 600-8-104, MILITARY PERSONNEL INFORMATION MANAGEMENT/RECORDS ch. 14 (22 June 2004) [hereinafter AR 600-8-104].

⁹⁷ MCM, *supra* note 8, R.C.M. 1107(e)(1)(B)(iv).

⁹⁸ *Id.* R.C.M. 1112(f)(2).

⁹⁹ 33 M.J. 98, 99-100 (C.M.A. 1991) (citing *Sales*, 22 M.J. at 308).

¹⁰⁰ *Id.* at 100.

¹⁰¹ *Sales*, 22 M.J. at 307 (citing *United States v. Bullington*, 13 M.J. 184 (C.M.A. 1982)); *United States v. Moffeit*, 63 M.J. 40, 43 (C.A.A.F. 2006) (Baker, J. concurring) (listing a non-exhaustive list of factors relevant to the Court of Criminal Appeals review of reassessments).

¹⁰² AR 190-47, *supra* note 13, para. 9-3; Memorandum of Agreement Between Assistant Secretary of the Army (Manpower and Reserve Affairs) and Assistant Secretary of the Navy (Manpower and Reserve Affairs) (24 Mar. 2000) (transferring responsibility for female Army prisoners to Miramar Naval Brig).

¹⁰³ ACCA POST-TRIAL HANDBOOK, *supra* note 6, ch. 7.

¹⁰⁴ Army regional confinement facilities are located at Fort Knox and Fort Sill.

¹⁰⁵ U.S. DEP'T OF ARMY REG. 600-62, UNITED STATES ARMY PERSONNEL CONTROL FACILITIES AND PROCEDURES FOR ADMINISTERING ASSIGNED AND ATTACHED PERSONNEL paras. 3-11, 3-12 (17 Nov. 2004) (generally post-trial Soldiers in confinement or on excess leave will be administratively transferred to the nearest PCF).

¹⁰⁶ AR 190-47, *supra* note 13, para. 9-3(b).

¹⁰⁷ ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-1.

¹⁰⁸ *Id.* ch. 7.

The accused's status shapes many of the initial decisions in a rehearing. If the accused is incarcerated at a military confinement facility, he must be located immediately and either released from confinement, because he usually no longer has a sentence of confinement, or the trial counsel must prepare for, and conduct, a pretrial confinement (PTC) review.¹⁰⁹ Sometimes, the accused may decide to waive his presence at the PTC review and his objection to continued PTC because the additional time he spends in confinement will be credited toward his ultimate sentence of confinement.¹¹⁰

The confinement facility will not release an inmate without a written "mandate"¹¹¹ from the appellate court.¹¹² The record of trial usually takes a few days to arrive from the appellate court. This is an opportunity for the trial counsel to coordinate with the confinement facility to ensure he has access to all relevant records, particularly the Confinement Treatment File (CTF),¹¹³ and learn whether the accused attended any Disciplinary and Adjustment (D&A) Boards.¹¹⁴ The record of trial should also be reviewed for this hearing, particularly documents from a previous PTC review. The same rules apply to PTC reviews in rehearings as every other PTC review. The military magistrate¹¹⁵ will apply the standard and require the trial counsel to establish that "confinement is necessary"¹¹⁶ and "less severe forms of restraint are inadequate."¹¹⁷ The CTF and D&A Boards are an invaluable source of evidence for the trial counsel for the PTC reviews.

The importance of the PTC review cannot be overstated. If the accused is released from confinement, either because the Government chose not to conduct a PTC review, or because the military magistrate released the accused, he becomes the responsibility of a local unit on post. The accused will usually be attached to the local unit for logistical support while remaining assigned to the PCF. The accused must also be placed into his pre-conviction status for personnel and finance purposes, because he is not the subject of any adjudged sentence.¹¹⁸ This means that he now wears his pre-conviction rank and is paid at that rank, because he is no longer under an adjudged or approved sentence.¹¹⁹ The unit is also responsible for providing the immediate housing, meals and uniforms of the accused, and assigning the accused useful duties as appropriate.¹²⁰ These are not simple issues because the accused usually does not have funds to pay for these necessities until he begins to get paid. Unfortunately, there is no special fund allotted for these expenses and so they must be paid out of unit funds.¹²¹ Additionally, the accused may be a registered sex-offender, or may need to register as a sex-offender upon release, because of the original conviction.¹²² The registration requirement is not automatically revoked as a result of the Court Order and the unit must maintain accountability of the accused, and ensure that his lodging and work arrangements do not cause him to violate state laws.

¹⁰⁹ MCM, *supra* note 8, R.C.M. 305.

¹¹⁰ *Id.* R.C.M. 305(j)(2), (k).

¹¹¹ The Clerk of Court, ACCA, issues an order (sometimes referred to as a "mandate" pursuant to AR 27-10, para. 13-8) to the USDB to release an inmate. Memorandum from The Judge Advocate General to The Clerk of Court, U.S. Army Court of Criminal Appeals, subject: Authority to Order the Release of Post-Trial Prisoners (28 Apr. 2009).

¹¹² AR 190-47, *supra* note 13, para. 10-19(f)(3). Prisoners will be notified immediately of a modification in legal status or court-martial sentence by a proper authority. *Id.* This notification may be made telephonically. *Id.* Prisoners will only be released after verification of notification. *Id.*

¹¹³ *Id.* para. 10-5(a). A correctional treatment file is established and maintained for each prisoner. It contains, at a minimum, prisoner's records as outlined in AR 190-47, para. 10-5b; required counseling; special training; employment needs; and or personal problems that may affect treatment. *Id.* The commander of the facility may determine additional required documents. *Id.*

¹¹⁴ Disciplinary and Adjustment Board "evaluates the facts and circumstances surrounding alleged violations of institutional rules." U.S. DISCIPLINARY BARRACKS, REG. 600-1, MANUAL FOR THE GUIDANCE OF INMATES para. 4-2 (1 Jan. 2005); AR 190-47, *supra* note 13, ch. 12. The Government should investigate the accused's behavior while in post-trial and pretrial confinement disciplinary infractions or D&A Boards that may be admissible against the accused at trial or at a PTC review. See also AR 27-10, *supra* note 17, para. 5-29a(11).

¹¹⁵ AR 27-10, *supra* note 17, ch. 9.

¹¹⁶ MCM, *supra* note 8, R.C.M. 305(i)(2)(B)(iii).

¹¹⁷ *Id.* R.C.M. 305(i)(2)(B)(iv).

¹¹⁸ *Id.* R.C.M. 1002 ("[T]he sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial . . . may adjudge a sentence of no punishment.").

¹¹⁹ UCMJ art. 57 (2008) (any forfeiture of pay or allowance or reduction of grade included in a court-martial sentence takes effect on the earlier of: (1) 14 days after the date on which the sentence is adjudged; or (2) the date on which the convening authority approves the sentence).

¹²⁰ Ideally, the MJ office should coordinate a meeting between all the relevant agencies to work through these issues before an actual rehearing is sent to the jurisdiction. Some prior planning can help avoid serious issues for both the accused and the unit.

¹²¹ This is an issue that is outside the scope of this article but causes real problems for the local unit who is responsible for the accused.

¹²² Each state has its own requirements regarding mandatory sex-offender registration. The accused, defense counsel, and the trial counsel should ensure that they are aware of these requirements so as not to fall afoul of the state statutes.

If the accused is placed into PTC there are other logistical issues presented to the command. For example, if the accused is confined at Fort Leavenworth he cannot remain at the USDB as a pretrial confinee.¹²³ The accused must be confined at either a RCF or local civilian facility, (provided there is a contract¹²⁴ between the military and local civilian facilities¹²⁵). The unit should develop a relationship with the civilian confinement facility and ensure that the defense counsel have adequate access to the accused. The trial counsel should monitor the accused's behavior or misconduct, as well as the treatment he receives at the facility. Such monitoring can be labor intensive, but ultimately the command is responsible for the accused's uniform¹²⁶ and grooming, as well as prohibited pretrial punishment.¹²⁷ The trial counsel should keep in mind, however, that if the accused commits misconduct this can be used against him in the sentencing phase of the trial.

If the accused has been released from confinement¹²⁸ or is on excess leave,¹²⁹ he must be brought back onto active duty. This involves coordination with the Office of The Judge Advocate General (OTJAG) and Human Resources Command (HRC).¹³⁰ The MJ office should also contact the U.S. Army Criminal Investigation Division Command (CID) and investigate the accused's activities since his release, particularly whether he had any other problems with civilian law enforcement. The accused must be assigned to a company. On smaller installations the government must carefully consider which company to assign the accused because enlisted personnel who are from the same company sized unit as the accused generally cannot serve on the accused's court-martial panel.¹³¹

Consideration should be given to minimizing the disruption of the accused's post-release life. The trial and defense counsel can coordinate with the personnel office processing the accused's orders, so that the accused will only be placed on active duty for a short period around the rehearing and permitted to return to civilian life as soon as possible. Generally, the accused will not serve any additional confinement.¹³²

B. Preparing for Trial

If possible, two trial counsel should be assigned to a complicated rehearing. The CMJ should also designate one or more paralegals to work on the case and maintain continuity of this trial team. The effective use of paralegals is imperative in the rehearing process. Additionally, the court reporter should be notified of the rehearing early to minimize any issues with accountability of the records of trial and exhibits, to include jurisdictional and procedural orders related to the accused.¹³³ Once the record of trial arrives in the office the assigned paralegal should immediately begin to read the entire record of trial and create a detailed spread sheet of witnesses and evidence. He should locate witnesses and evidence, which is often a slow and difficult process that consumes many man-hours. The paralegal should also begin a chronology to annotate his efforts for possible future speedy trial motions. The paralegals should also order the Official Military Personnel File (OMPF)¹³⁴ and

¹²³ AR 190-47, *supra* note 13, para. 3-2(c).

¹²⁴ *Id.* para 3-2. The unit or installation may have to use its own funds to pay for the housing of the accused in a civilian facility. These contracts usually charge a daily rate, for example the rates at Fort Hood and Fort Leavenworth as of March 2008 were between \$50-\$55, per day.

¹²⁵ The Government is responsible for maintaining situational awareness and ensuring the accused is treated according to the same standards regardless of whether the accused is held in PTC in a military or civilian facility. AR 190-47, *supra* note 13, para. 11-1(b)(1) ("Pretrial prisoners will be segregated from other prisoners in employment and recreation areas. Pretrial prisoners will be billeted separately from posttrial prisoners.").

¹²⁶ MCM, *supra* note 8, R.C.M. 804(e)(1).

¹²⁷ UCMJ art. 13 (2008).

¹²⁸ MCM, *supra* note 8, R.C.M. 304(g) discussion. Pretrial restraint is an option if the appellate court orders a rehearing or "other" trial.

¹²⁹ U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 5-15a (15 Feb. 2006) ("Excess leave is a nonchargeable absence granted for emergencies or unusual circumstances or as otherwise specified in this regulation."). The GCM authority may direct the use of involuntary excess leave awaiting punitive discharge. *Id.* para. 5-19a(1).

¹³⁰ Reserve and National Guard personnel who are no longer in confinement pose component specific requirements, which are beyond the scope of this article. The trial counsel should contact the Reserve or National Guard personnel offices for guidance in these cases.

¹³¹ UCMJ art. 25(c); MCM, *supra* note 8, R.C.M. 912(f)(1)(A).

¹³² If the accused is tried for new charges he may face additional confinement. MCM, *supra* note 8, R.C.M. 810(d). If the accused receives a sentence at the rehearing that is less than the confinement time he has already served he may receive compensation. U.S. DEP'T OF ARMY, REG. 37-104-4, MILITARY PAY AND ALLOWANCES POLICY para. 21-3 (8 June 2005) [hereinafter AR 37-104-4].

¹³³ *United States v. McFarlin*, 24 M.J. 631, 633 (A.C.M.R. 1987); *see also United States v. Burris*, 21 M.J. 140, 145 (C.M.A. 1985).

¹³⁴ AR 600-8-104, *supra* note 96.

locate the evidence, evidence custodian, original court-martial MJ office¹³⁵ and trial counsel (including the trial counsel notes, if any) and the original defense counsel. The retrial process is truly a team effort and the paralegal's work provides the foundation for the successful prosecution of the case.

The trial counsel must read the entire record of trial. Initially, it may appear that the record of trial will make the rehearing process easier, but relying too heavily on the record of trial is ill-advised. The appellate court's opinion or order usually dictates how useful the record will be. In a complete rehearing on the merits, the counsel may not be able to rely on the record at all, other than for impeachment and stipulation purposes, based on issues arising from the Confrontation Clause¹³⁶ and the military judge's rulings on motions. Trial counsel should always be prepared to litigate motions in any type of rehearing. In fact, the trial counsel should expect the defense to use the rehearing as an opportunity to perfect the original case (i.e., litigate both the motions in which the original defense counsel failed to prevail, and those that were never raised in the original trial).¹³⁷ Trial counsel should also carefully consider whether there are any defense motions that the government should not oppose or potential judicial rulings that may cause further appellate problems in the case. Additionally, the trial counsel should be prepared to litigate government motions in limine.¹³⁸ In a sentence rehearing, the counsel may be able to rely on testimony on the merits but will not be able to benefit from the opening statement or closing arguments.¹³⁹ Defense may also seek to limit and redact previously admitted testimony.¹⁴⁰ Blindly relying on the original government theory of the case or assuming that the defense strategy will not change at the rehearing is a mistake. Rather than be all and end all of the case, the record of trial serves as a starting point from which counsel can map the subsequent direction.

The trial counsel must prepare for a rehearing as if the case will be fully contested and there will be no PTA. Unlike an original jurisdiction case, the Government is often in a weaker bargaining position at a rehearing because it has all the responsibility of retrying the case, but has lost leverage over the accused because the potential punishment usually cannot exceed the approved sentence at the initial trial.¹⁴¹ Additionally, the trial counsel has the difficult tasks of: locating the evidence; finding the victim; and producing the witnesses,¹⁴² who may very well be uncooperative and no longer affiliated with the military. As in all other cases, the trial counsel will be held accountable for the actions of the "Government."¹⁴³ Even though a myriad of bureaucratic issues are outside the control of the trial counsel in a rehearing, it is imperative to anticipate such issues, and inform the military judge and defense counsel of the difficulties immediately. Doing so may not save the trial counsel from blame when things go wrong, but it may ameliorate the wrath of the military judge, and assure all the parties that the government is acting responsibly.

The defense is often in a much stronger position at a retrial because the accused has nothing to lose, the punishment is usually capped at the previously approved sentence.¹⁴⁴ Often, the accused continues to earn credit towards the final sentence while in PTC.¹⁴⁵ Additionally, the accused can use evidence of good behavior in confinement as mitigation evidence. Some of the charges may have been overturned or dismissed, greatly enhancing the chances that a lesser sentence will be

¹³⁵ The MJ office should do all it can to obtain not only the evidence from law enforcement but also the original trial counsel notes as early as possible. Additionally, the original MJ office and trial counsel should be contacted as soon as possible to discuss the case. Infrequently, there are cases where the original MJ office no longer has a sense of attachment to the case and provides little, if any, assistance to the pretrial preparation, and may be defensive about the issues that caused the retrial. It may be advisable for the current GCMCA to write to the original GCMCA to ensure that the proper attention and cooperation is devoted to the case by the original MJ office.

¹³⁶ U.S. CONST. amend. VI.

¹³⁷ Defense counsel should be extremely aware of the consequences of the terms of a pretrial agreement (PTA). It is possible for the defense counsel to waive hard fought appellate issues, for example, if the military judge refused to allow him to relitigate motions but he then later agreed to waive all motions as part of the terms in the PTA.

¹³⁸ A Government offensive motion would be appropriate if a necessary witness has died since the original trial but his testimony was preserved in the original record of trial. Additionally, the Government may want to litigate a motion to admit evidence of disciplinary action while in confinement or criminal conduct if the accused was released from confinement.

¹³⁹ MCM, *supra* note 8, R.C.M. 810(a)(2)(A) (permitting only properly admitted evidence, opening statements and argument are not evidence).

¹⁴⁰ *Id.* RCM 810(a). The military judge will not allow the panel to take a copy of the redacted testimony with them into deliberations. *Id.* R.C.M. 810(c).

¹⁴¹ *Id.* R.C.M. 810(d)(1).

¹⁴² *Id.* R.C.M. 703(e)(2) (authorizing the presence of civilian witnesses to be obtained by subpoena). Service is usually served by a U.S. marshal. *Id.* R.C.M. 703(e)(2)(D). The issuance of a warrant of attachment if the witness neglects or refuses to appear is found in RCM 703(e)(2)(G). *Id.* R.C.M. 703(e)(2)(G).

¹⁴³ The trial counsel may be asked to account for the actions of both state and federal government agencies during the trial.

¹⁴⁴ MCM, *supra* note 8, R.C.M. 810(d)(1).

¹⁴⁵ *Id.* R.C.M. 305(j)(2), (k).

imposed.¹⁴⁶ Additionally, time has passed, memories have faded, witnesses have moved, and victims do not want to endure another trial. The defense also has the benefit of knowing that the government must take the case to trial within 120 days.¹⁴⁷ Thus, the defense has formidable factors in its favor in negotiating a plea agreement.

As previously mentioned, the MJ office must find and contact the victim and witnesses.¹⁴⁸ Dealing with the victim and the victim's family can be a very delicate process. It is essential that the trial counsel build a good relationship with the victim. The use of the Victim Witness Liaison (VWL)¹⁴⁹ and the Victim Advocate (VA)¹⁵⁰ can be of immense value assisting the trial counsel help the victim through the rehearing process. As in all cases, the trial counsel must treat the victims and witnesses with respect, but this becomes even more important in rehearsals because the victim can be hostile towards the system and can focus that hostility on the trial counsel. Victims may be upset because important charges may have been dismissed or the maximum possible sentence may be greatly reduced. For these reasons it is probably better to rely on the VWL and VA to provide the emotional support to the victim, thereby enabling the trial counsel to maintain the emotional distance required to satisfactorily complete the rehearing. Trial counsel must help victims manage their expectations. It is extremely difficult to prosecute a case successfully if the victim refuses to cooperate.

Additionally, the VWL and VA can serve another important purpose: as the historical reference point for the case being reheard. Because they usually are civilian employees, many VWLs and VAs are not subject to the vagaries of assignments. They may be actually familiar with the case being retried, know the victims and remember the original hearing. As such, they can be invaluable reference points, and both the CMJ and trial counsel should immediately discuss the case with the VWL and VA upon receiving a rehearing notice.

The relationships between trial and defense counsel are often complicated. The rehearing process only increases the complexity of these relationships because there is a different dynamic in a rehearing. As was previously discussed, the bargaining power of the government is considerably weaker than it was in the original trial. It behooves the trial counsel to cooperate and agree upon uncontested matters early. Examples of issues that can be stipulated to include: the admissibility of evidence; and stipulations of fact and expected testimony. The defense counsel needs as much access to the accused as possible. Facilitating this communication is in the government's interest. The trial counsel needs to understand that the defense counsel's relationship with the accused in a rehearing is probably more complex than with other clients. Sometimes, the accused may request individual military counsel (IMC)¹⁵¹ or have a civilian defense counsel (CDC). The trial counsel should confirm that the CDC has actually been retained by the accused before discussing the case with him. This can usually be done through the TDS counsel and obtaining a letter of representation from the CDC for the record.

The Government's procedural decisions should be deliberate and include a risk assessment of its strategy and tactics. The Government should generally not refer a case before they are ready to go to trial, based merely on defense assertions without a signed PTA. Any government action should follow the Government's own trial strategy and it should do everything possible to perfect its case prior to referral. Once the case is referred, the Government no longer has control of the timing of the case and the military judge will docket the case and require the Government to satisfy him that its reasons for requesting a delay are satisfactory. (There could certainly be circumstances when arraignment the accused early will mitigate the government's exposure to speedy trial motions.) Front loading the search for evidence and witnesses will make the process less painful. The Government should not assume that the accused will accept its offer of a "good deal," for example a Chapter 10 (discharge in lieu of trial by court-martial)¹⁵² or a limitation on confinement. Sometimes the accused will refuse to enter an agreement despite the trial counsel's or defense counsel's belief that the accused has been offered a "good deal."

¹⁴⁶ If the sentence he receives in the second court-martial is less than the confinement he has actually already served, he may be entitled to compensation. AR 37-104-4, *supra* note 132, para. 21-3; U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG. 7000.14-R, vol. 7A, ch. 48 (Oct. 2006); *see also* Captain Joel A. Novak, *Forfeitures, Recommendations, and Actions; Discretion to Insure Justice and Clemency Warranted by the Circumstances and Appropriate for the Accused*, ARMY LAW., Mar. 2000, at 16; Major Jan E. Aldykiewicz, *Recent Developments in Post-Trial Processing: Collazo Relief is Here to Stay!*, ARMY LAW., Apr./May 2003, at 83; United States v. Emminizer, 56 M.J. 441 (C.A.A.F. 2002).

¹⁴⁷ MCM, *supra* note 8, R.C.M. 707.

¹⁴⁸ *Id.* R.C.M. 703(e)(2) (authorizing the presence of civilian witnesses to be obtained by subpoena). A subpoena is usually served by a U.S. marshal. *Id.* R.C.M. 703(e)(2)(D). A warrant of attachment may be issued if the witness neglects or refuses to appear. *Id.* R.C.M. 703(e)(2)(G).

¹⁴⁹ AR 27-10, *supra* note 17, ch. 18 (Victim/Witness Assistance).

¹⁵⁰ U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM ch. 3 (30 Oct. 2007).

¹⁵¹ AR 27-10, *supra* note 17, para. 5-7. If the approval process for the IMC request takes a significant amount of time, this may be an appropriate excludable delay. MCM, *supra* note 8, R.C.M. 707(c).

¹⁵² U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 10 (Discharge in Lieu of Trial by Court-Martial) (6 June 2005) [hereinafter AR 635-200].

The trial counsel must not allow actions by the accused to place the trial counsel at a disadvantage because he has not diligently prepared for the rehearing, or the accused does not agree with the government's perception of what the case is "worth."

Additionally, if the Government is supporting a PTA, or an offer to plead guilty (OPG),¹⁵³ the trial counsel must feel assured that the accused will be provident to the charges.¹⁵⁴ This may require detailed discussion with defense counsel. Simple assurances that the accused will be provident are not enough. The government is in a stronger bargaining position prior to referral or the approval of a PTA or OPG. Here the trial counsel should ensure the defense counsel has actually spoken to the accused by demanding a written stipulation of fact prior to taking any action. This is good trial practice in every case and will ensure all parties are on the same page when the case is referred.

The trial counsel should listen to defense warnings that the accused cannot be provident to a charge. A "busted" providence inquiry is bad for everyone (both trial and defense counsel must realize that providence can also be "busted" at a sentence rehearing if there is evidence presented inconsistent with the plea).¹⁵⁵ If the defense believes that the accused cannot be provident to a charge, despite the fact that the accused wants to make a deal, it is better to work through this problem, and possibly prepare for a contested trial, than to go to trial without a satisfactory solution. The military judge (and, if not the military judge, certainly appellate defense counsel on appeal) will identify the issue, and not allow the accused to continue with the plea.¹⁵⁶ Sometimes a little imagination and cooperation between counsel can resolve the issue to the satisfaction of all the parties. In appropriate cases, the accused may be provident to a lesser included offense or he may be willing to waive his objection to resurrecting charges that have been dismissed earlier either by the trial court or by the appellate court¹⁵⁷ in order to secure a PTA.

The trial counsel must plan for every contingency, from the possibility that the accused will submit an OPG to a fully contested court-martial. This will enable the trial counsel to assess the value of the case, and, more specifically, what sentence the OSJA will support to the GCMCA in a PTA. The trial counsel's main considerations are the appellate decision, the remaining charges and the maximum punishment. The trial counsel should also consider the accused's behavior both during and after confinement and other aggravating or mitigating information about the accused.¹⁵⁸

The trial counsel must objectively assess the case and its weaknesses in light of the appellate decision. Trial counsel memoranda are extremely important in evaluating the case and deciding whether to support the defense OPGs. Evidentiary issues will also factor heavily into the decision making process. If evidence has been lost or destroyed,¹⁵⁹ the Government may be forced to consider an administrative separation.¹⁶⁰ Additionally, if the only charges that survived the appeal are

¹⁵³ Generally an Offer to Plead Guilty (OPG) is a PTA that is generated by the accused whereby he offers to plead guilty in return for some specified action of the convening authority. For the purposes of this article the term PTA is used for all agreements between the accused and the convening authority unless otherwise stated.

¹⁵⁴ *USALSA Report: The Advocate for Military Defense Counsel: DAD Notes*, ARMY LAW., July 1986, at 52, 54. ("An accused must be counseled against getting cold feet in the course of the providence inquiry. Any hesitation or waiver on an accused's part could potentially generate additional inquiry that could lead to disclosure of damaging information."). This information could cause the military judge to reject the accused's plea.

¹⁵⁵ MCM, *supra* note 8, R.C.M. 810(a)(2)B ("[I]f such a plea is found to be improvident, the rehearing shall be suspended and the matter reported to the authority ordering the rehearing."); see *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

¹⁵⁶ MCM, *supra* note 8, R.C.M. 910.

¹⁵⁷ *United States v. Rios*, No. 20020123, 2006 CCA LEXIS 433, at *1 (A. Ct. Crim. App. 2006) (memorandum opinion); Promulgating Order, *Rios*, No. 20020123 (July 25, 2003). The accused was originally convicted of premeditated murder. *Id.* A second charge of accessory after the fact of the same premeditated murder was dismissed at the original trial. Transcript of Record at 986; Promulgating Order, *Rios*, No. 20020123 (July 25, 2003). At the retrial the accused plead guilty to the previously dismissed charge of accessory after the fact. Promulgating Order, *Rios*, No. 20020123 (Fort Leavenworth June 19, 2007). The military judge wrote an Order "The Specification of Charge II" (29 Jan. 2007), to ensure that all the understandings between the parties were clearly described for the appellate courts. *Rios*, No. 20020123 (A. Ct. Crim. App. 14 Feb. 2008) (unpublished) (affirming findings and sentence at the rehearing).

¹⁵⁸ *United States v. Currenton*, No. 20020848, 2005 CCA LEXIS 474 (A. Ct. Crim. App. 2005) (memorandum opinion). The accused's misconduct in confinement at the USDB resulted in over twenty D&A Boards where he lost almost all the good time credit he had already earned from his fifteen-year sentence. Transcript of Record at Appellate Exhibit XI, *Currenton*, No. 20020848 (Fort Leavenworth 25 Nov. 2005). For this reason the Government was unwilling to support the accused's OPG which sought a substantial reduction of his sentence. *Currenton*, No. 20020848 (A. Ct. Crim. App. 29 Nov. 2006) (unpublished) (affirming the sentence at the sentence rehearing).

¹⁵⁹ *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008) (granting the government interlocutory appeal under UCMJ art. 62(a)(1) of trial judge's dismissal of the case because of the destruction of evidence prior to the CAAF remanding the case for a rehearing pursuant to *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007)).

¹⁶⁰ U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES ch. 3 (12 Apr. 2006); AR 635-200, *supra* note 152, chs. 10 (Discharge in Lieu of Trial by Court-Martial), 14 (Separation for Misconduct).

minor and would not warrant confinement, the government should also consider disapproving any punishment, and commencing an administrative separation.¹⁶¹ The accused's personnel records are important in this decision because based on the length of his service in the military he may be entitled to a separation board.¹⁶² However, time spent in confinement is generally considered "time lost," for the purpose of a separation board.¹⁶³ All of this may factor into the trial counsel's assessment which may be something neither the victim nor the GCMCA want to hear. Regardless of this fact, the case rests on the evidence and it is the trial counsel's responsibility to evaluate the case honestly.

Rehearings also provide unique challenges for defense counsel. Defense counsel should read the order or opinion, the record of trial, and talk to the accused before discussing a PTA with the Government. This statement may be obvious, but it must be emphasized. Reputation and credibility are a defense counsel's greatest assets. The defense counsel must understand why the case came back for rehearing, and must not make offers that are inconsistent with the facts or the appellate court's order. Defense counsel must know the accused and research the accused's confinement history. Defense counsel's efforts will help define the issues and build trust in the negotiation process. Facilitating this relationship is also in the government's interest because it not only promotes judicial economy, but can shorten the accused's appellate process.

Although it may add to the pressure of the case initially, a well drafted pretrial or docketing order¹⁶⁴ from the military judge can simplify matters once the case is referred. Both sides should request as many RCM 802¹⁶⁵ conferences (usually telephonic) with the military judge as necessary to ensure the smooth running of the trial. Unexpected issues inevitably arise on the day of trial, but there is no need to complicate things by failing to anticipate and agree upon matters that can be stipulated before trial.

C. Conducting the Rehearing

The general rule of rehearings is that an accused should not suffer a greater punishment because he was successful on appeal.¹⁶⁶ (An exception to this rule may be found when new charges are brought against the accused¹⁶⁷ that were not preferred under the original charge sheet.) Generally, this means that the maximum punishment that the accused can serve upon rehearing shall not exceed the approved sentence in the original trial.¹⁶⁸ However, occasionally an accused's maximum punishment was based on a PTA and guilty plea but the accused then failed to comply with his original PTA by changing his plea at the rehearing. What is the maximum sentence in these circumstances? The rule is that the approved sentence at rehearing may not exceed the lawfully adjudged sentence at the earlier court-martial.¹⁶⁹ This rule seems to be straightforward but it is still the subject of interpretation and challenge.¹⁷⁰

United States v. Mitchell, involved a contested case where there was no PTA, but it illustrates the challenge of determining the maximum sentence.¹⁷¹ In *Mitchell*, the accused was originally sentenced to a bad-conduct discharge and ten years confinement.¹⁷² The case was remanded for a rehearing on sentence and the accused received a dishonorable discharge

¹⁶¹ *United States v. Buber*, 62 M.J. 476, 476 (C.A.A.F. 2006). The accused was convicted of false official statement, unpremeditated murder, and assault upon a child. *Id.* The ACCA set aside the findings of guilty of unpremeditated murder and assault upon a child. *Id.* The lower court reassessed the sentence. *Id.* The CAAF affirmed the remaining findings and set aside the sentence, returning it to TJAG for a sentence rehearing. *Id.* at 480. The convening authority approved no punishment for the affirmed findings, and dismissed the remainder of the charges. *United States v. Buber*, 2006 CCA LEXIS 520, at *2 (A. Ct. Crim. App. 2006). The accused was then separated from the military under chapter 14, AR 635-200. AR 635-200, *supra* note 152, ch. 14.

¹⁶² AR 635-200, *supra* note 152, ch. 14.

¹⁶³ *Id.* para. 1-21 (time lost must be made good at the end of the enlistment).

¹⁶⁴ U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 1(a) and app. B (1 May 2004).

¹⁶⁵ MCM, *supra* note 8, R.C.M. 802.

¹⁶⁶ *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003), *rev'g* 56 M.J. 935 (A. Ct. Crim. App. 2002).

¹⁶⁷ MCM, *supra* note 8, R.C.M. 810(d).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* R.C.M. 810(d)(2); UCMJ art. 63 (2008).

¹⁷⁰ *Mitchell*, 58 M.J. at 448 (citing *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000)).

¹⁷¹ *Id.*

¹⁷² *Id.* at 447.

and six years confinement.¹⁷³ The ACCA approved the sentence, but the CAAF reversed and held that “punitive separations are ‘qualitatively different’ from confinement and ‘other punishment.’”¹⁷⁴ “As a result, it is not possible in this case to make a meaningful comparison, objectively or otherwise, between the increased severity of Appellant’s discharge and the decreased severity of his confinement and forfeitures.”¹⁷⁵ Each category of punishment was viewed independently when calculating the maximum punishment.¹⁷⁶

What motions¹⁷⁷ must the military judge hear in a retrial on the merits? Procedures for rehearings are addressed under RCM 810(a). Full rehearings, “new trials” and “other trials” procedures “shall be the same as in an original trial except as otherwise provided in this rule.”¹⁷⁸ Sentence rehearings procedures “shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.”¹⁷⁹ The RCM 810(a) discussion, states: “matters excluded from the record of the original trial on the merits or improperly admitted on the merits must not be brought to the attention of the members as a part of the original record of trial.”¹⁸⁰ There is no specific discussion of motions practice in a rehearing in RCM 810, other than the discussion of “evidence properly admitted.”¹⁸¹ The references to admissible evidence seems to contemplate that defense counsel may challenge evidence from a previous trial whether it was unsuccessfully litigated in the previous court-martial or it is a new issue arising in the rehearing.

Trial counsel should always be prepared to litigate motions in a rehearing, at the very least a speedy trial motion, but also motions in limine or on the admissibility of previously admitted evidence or testimony.¹⁸² It is better to litigate these motions at trial than have the appellate court return the case for another rehearing. A military judge’s refusal to allow the defense to litigate motions can create an unnecessary appellate issue by leaving newly raised defense issues unresolved. Trial counsel should also carefully consider which defense motions to oppose, and occasionally which motions to join. Additionally, a defense counsel’s waiver of these motions on the record or in a PTA will generally moot the issue on appeal in the absence of appellate defense counsel alleging ineffective assistance of counsel. The goal of the parties in the rehearing process should be to resolve all relevant questions of law or fact for the appellate court and not create new issues.

D. Post-Trial Processing of a Rehearing

The post-trial processing in a rehearing is similar to an original jurisdiction case. Both trial and defense counsel are well advised to keep the court reporter informed of anything unusual that occurs during the trial and post-trial processing. Unexpected issues can arise, however, and counsel should deal with them at the earliest opportunity. Situational awareness of regulatory, administrative changes, and other types of unusual rehearing issues enables the trial counsel to limit further appellate issues and generally promotes finality in litigation.

An example of an administrative change with potential appellate consequences occurred in 2004 when the calculation of good time credit (GTC) for inmates serving their sentences changed. After 1 October 2004, inmates could only earn a maximum five days a month GTC, regardless of length of their sentence.¹⁸³ Prior to that date, inmates earned GTC on a

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 448.

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

¹⁷⁷ It is a good practice for counsel to keep the court reporter informed of motions and exhibits. This is particularly important in rehearings and *DuBay* hearings when the procedures are much more complex and the record of trial must reflect all relevant documents and exhibits.

¹⁷⁸ MCM, *supra* note 8, R.C.M. 810(a)(1).

¹⁷⁹ *Id.* R.C.M. 810(a)(2).

¹⁸⁰ *Id.* R.C.M. 810(a) discussion.

¹⁸¹ *Id.* R.C.M. 810(a)(2)(A) (discussing contents of the record in rehearings on sentence only).

¹⁸² *United States v. Currenton*, No. 20020848 (A. Ct. Crim. App. 2005) (memorandum opinion).

¹⁸³ Memorandum from Under Sec’y of Defense for Assistant Sec’y of the Army (Manpower and Reserve Affairs), subject: Clarification of DoD Policy on Abatement of Sentences to Confinement (17 Sept. 2004) (clarifying that the calculation of GTC would be in accordance with Appendix 4 of the *DoD Sentence Computation Manual*. U.S. DEP’T OF DEFENSE, INSTR. 1325.7-M, DOD SENTENCE COMPUTATION MANUAL app. 4 (Rate of GTC Earning for Partial Months Table) (27 July 2004) (C2, 9 Mar. 2007)). This issue has since been addressed and has grandfathered the calculation of GTC under the old system for inmates who are being retried. *Id.*

graduated scale, depending on the length of their sentence, with a maximum of ten days per month GTC for those inmates sentenced to over ten years confinement.¹⁸⁴ These changes did not take into account the effect that this would have on those inmates whose cases were being reheard. As a result, a number of accused could have lost the benefit of the extra GTC calculations and they would be in a worse position than if they had not been successful on appeal. In this situation, the GCMCA at Fort Leavenworth granted clemency in the form of directing the USDB in the convening authority's action to calculate GTC under the old system.¹⁸⁵ This action accomplished a number of goals: it honored the intent of the appellate process to ensure that the accused would not be in a worse position because he was successful in his appeal; it prevented an unnecessary and probably successful appellate issue for the accused, promoting judicial economy at the appellate courts; and it promoted a sense of good order and discipline among the inmates at the USDB because of the command's fair and equitable approach to the change in the rules.

Additionally, the convening authority should consider clemency in cases where the government has failed to comply with its own standards or regulations.¹⁸⁶ One example of appropriately granted clemency is where the government has taken too long in the post-trial processing of the case.¹⁸⁷ In these circumstances, the government should memorialize the reasons for the delay and include it with the chronology in the record of trial, and consider granting the accused relief and eliminating any prejudice suffered by the accused, thereby mooting an almost certain appellate issue.

Finally, defense counsel must continue to represent their clients and submit their clemency matters in an professional and timely manner. The TDS SOP¹⁸⁸ requires defense counsel to discuss a client waiving or withdrawing post-trial or appellate rights with both the Senior and Regional Defense Counsel and the immediate notification of the Chief of TDS of such client. Additionally, the appellate courts have adamantly and repeatedly stated that the best chance the accused has to receive clemency is from the convening authority.¹⁸⁹ Defense counsel will almost certainly trigger an ineffective assistance of counsel claim whenever they fail to comply with the RCM 1105 and 1106 rules, during either the trial or appellate process. The government should also annotate such failures in the record of trial.

V. Avoiding Rehearings—The Original Trial¹⁹⁰

The Government is responsible to ensure that the accused receives both real and perceived justice.¹⁹¹ Regardless of the trial counsel's opinion of the guilt or innocence of the accused, he must always ensure the Government's actions are legal and will survive the appellate courts' scrutiny. Professional objectivity is more important than emotional attachment to any case. By far, the easiest way to deal with a rehearing is to obviate the need for it, and conduct a solid trial the first time in the court room.

A. Trial Counsel Memoranda

Trial counsel should be required to prepare a "trial counsel memorandum" in all of their cases, especially rehearings. This ensures that the SJA and GCMCA understand the nuances of the particular rehearing, it will also help the CMJ manage expectations of the case. Creativity¹⁹² in a charge sheet is generally discouraged because it usually complicates the case

¹⁸⁴ U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 26 (17 July 2001) (C1, 10 June 2003).

¹⁸⁵ *United States v. Currenton*, No. 20020848, 2005 CCA LEXIS 474 (A. Ct. Crim. App. May 6, 2005) (unpublished), *decision on further review* (A. Ct. Crim. App. Nov. 29, 2006) (unpublished).

¹⁸⁶ Failure to comply with AR 190-47, para. 10-19(b)—transferring accused to a military facility as soon as possible can raise appellate issues that might be appropriately dealt with through clemency. AR 190-47, *supra* note 13, para. 10-19(b).

¹⁸⁷ *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The CAAF imposed a presumption of unreasonable delay after 120 days after the completion of trial and a similar presumption of unreasonable delay where the record of trial is not docketed by the service Court of Criminal Appeal within thirty days of the convening authority's action. *Id.*

¹⁸⁸ TDS SOP, *supra* note 44, paras. 3-9b, 3-17.

¹⁸⁹ *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998) ("It has long been asserted that an accused's best chance (for post-trial clemency is the convening authority.").

¹⁹⁰ Captain Timothy J. Saviano, *Avoidable Appellate Issues—The Art of Protecting the Record*, ARMY LAW., Nov.1990, at 27.

¹⁹¹ *Rex v. Sussex Justices, ex parte McCarthy* [1923] All ER 233. Lord Chief Justice Hewart stated: "a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Id.*

¹⁹² *United States v. Lubasky*, No. 20020924 (A. Ct. Crim. App. 2006) (memorandum opinion).

unnecessarily. Trial counsel should neither be overzealous in charging nor married to the charge sheet.¹⁹³ Requiring the trial counsel to write a trial counsel memorandum forces the trial counsel to take a step back and articulate his theory of the case and charging decisions. It also allows the CMJ and SJA, who are generally not emotionally attached to the case, to evaluate the Government's case properly and be the voice of reason if the trial counsel gets carried away by the facts of the case. Being unreasonably attached to the theory or charges is a good way to ensure the case comes back on appeal.

Some recent cases illustrate issues that can be faced at rehearings. *United States v Walton* is an example of the Government being too attached to its theory of the case.¹⁹⁴ The accused had been drinking heavily and argued with his girlfriend, he then drove away, crashing into another vehicle.¹⁹⁵ He injured the driver, killed one passenger, and inflicted a serious brain injury on the other passenger in the other vehicle.¹⁹⁶ The trial counsel charged the accused with murder,¹⁹⁷ and the panel convicted him, sentencing him to confinement for life.¹⁹⁸ The trial judge in that case wrote to the GCMCA, expressing his concerns and misgivings about the murder charge and recommending the GCMCA only approve the lesser included offense of involuntary manslaughter.¹⁹⁹ The GCMCA took no action to reduce the charge; however, he did reduce the sentence to twelve years.²⁰⁰ The ACCA found the conviction was factually insufficient, dismissed the murder charge, but upheld the lesser included offense, involuntary manslaughter.²⁰¹ The ACCA sent the case back to GCMCA where the accused was incarcerated for a sentence rehearing.²⁰² In this case the original trial team was perhaps too attached to its murder conviction, but hoped that a significant grant of clemency would resolve the problem. However, clemency cannot fix legal error, but it can severely limit the maximum punishment at the sentence rehearing. In *Walton*, the GCMCA's half-hearted misguided attempt to correct a legal error provided a windfall to the defense and greatly reduced the government's bargaining position at the accused's sentence rehearing.

In *United States v Lubasky*, the accused was assigned as a Casualty Assistance Officer to help the victim, an Army widow, with her financial affairs and obtain an ID card.²⁰³ The victim agreed to allow the accused to continue to help her with her financial affairs.²⁰⁴ From September 1998 to June 2000 the accused managed most of the victim's affairs, including obtaining an insurance policy which named him as a beneficiary and listing himself as joint owner on some of her bank accounts.²⁰⁵ The accused's original twenty-one page charge sheet contained forty-three separate specifications of larceny and three specifications of conduct unbecoming an officer and gentleman.²⁰⁶ The accused was convicted of fifteen specifications of larceny and conduct unbecoming an officer and gentleman.²⁰⁷ Here the charging decisions adversely affected the prosecution of the case because of the charge sheet's extraordinary length and complexity.²⁰⁸ Additionally, drafting these specifications provided no benefit to the Government because the maximum punishment for each specification was not increased, but there were unnecessary and confusing elements which had to be proved at trial (and the Government failed to

¹⁹³ See, e.g., *United States v. Walton*, No. 20011151, 2006 CCA LEXIS 472 (A. Ct. Crim. App. 2006).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at *3.

¹⁹⁶ *Id.* at *7.

¹⁹⁷ *Id.* at *1. The accused charges were drunken operation of a vehicle, murder while engaged in an act inherently dangerous to another, and assault upon a person in the execution of law enforcement duties (two specifications). *Id.*

¹⁹⁸ *Id.* at *1. The accused was sentenced to a dishonorable discharge, confinement for life with the eligibility for parole, forfeiture of all pay and allowances, reduction to Private E1, and a reprimand. *Id.*

¹⁹⁹ *Id.* at *8.

²⁰⁰ *Id.* at *2.

²⁰¹ *Id.* at *18.

²⁰² *United States v. Walton*, No. 20011151, 2007 CCA LEXIS 615, at *1 (A. Ct. Crim. App. 2006).

²⁰³ No. 20020924, 2006 CCA LEXIS 390, at *3 (A. Ct. Crim. App. 2006) (memorandum opinion).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at *2.

²⁰⁷ *Id.* at *1.

²⁰⁸ Here the maximum sentence was not enhanced by the massive number of charges, each lengthy charge was not considered mega-specifications because the larceny consisted of ATM (automated teller machine) withdrawals, not writing bad checks. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (recognizing that while specifications alleging two or more offenses are duplicitous, the CAAF permitted multiple checks to be charged in a single specification. The CAAF limited this type of pleadings to check cases describing it as the bad check "megaspec").

do so in twenty-eight of the forty-three specifications).²⁰⁹ The trial counsel worked hard drafting this charge sheet, but unfortunately the majority of the charges were dismissed by the trial and appellate courts.²¹⁰ These poor charging decisions meant that when the remaining charges were presented to the court-martial panel at the sentence rehearing they were much less egregious. A more attentive and reasonable CMJ and SJA could have ensured that this charge sheet was never preferred. Requiring a trial counsel memorandum would probably have prevented the case from going to trial as charged.

B. Creativity in the Pretrial Agreement

Creativity in PTA terms is also something that should be carefully considered and reviewed before the parties, particularly the trial counsel, enter an agreement.²¹¹ The trial counsel must be wary of unintended consequences²¹² if the government is agreeing to unusual PTA terms. If counsel are going to agree to terms that involve finance²¹³ or corrections²¹⁴ regulations they must research how these terms will be actually executed under current regulations and guidelines. This research cannot stop at a simple reading of the regulation. The trial counsel should speak to the subject matter experts to ensure that there is nothing preventing the government from fulfilling its part under the PTA. In *United States v. Lundy*, the CAAF stated: “If there is a misunderstanding or government nonperformance of a material term of the pretrial agreement, ‘the remedy is either specific performance of the agreement or an opportunity for the accused to withdraw from the plea.’”²¹⁵ Trial counsel should also avoid PTA terms that affect how the accused serves his sentence, for example, clemency and parole,²¹⁶ and even suspension of punishment. These issues are heavily regulated and ripe for appellate review with little or no benefit to the parties. Counsel must also ensure that all the PTA terms are in writing and guard against *sub rosa* agreements.²¹⁷

C. Discovery

The trial counsel’s job is not to ensure a conviction at all cost. This road leads to prosecutorial misconduct and must be avoided despite good intentions.²¹⁸ Some bright-line rules apply and the trial counsel violates them at great peril. The military justice discovery²¹⁹ rules are a prime example of these rules. The trial counsel may not engage in trial by ambush or gamesmanship—the rules dictate full and open discovery. The government should also ensure that it insists on reciprocal

²⁰⁹ *Lubasky*, 2006 CCA LEXIS 390, at *1–2.

²¹⁰ *Id.*

²¹¹ Colonel Louis J. Puleo, USMC, *Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, ARMY LAW., Aug. 2008, at 53, 55; Major Mary M. Foreman, *Let’s Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (Dec. 2001); Major Bradley J. Heustis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20. These articles provide a good history of the development of pretrial agreements and the dangers of counsel becoming too creative in the terms of those agreements.

²¹² Major Deidre J. Fleming, *The Year in Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., June 2007, at 31, 39.

²¹³ AR 37-104-4, *supra* note 132.

²¹⁴ AR 190-47, *supra* note 13.

²¹⁵ 58 M.J. 802, 803–04 (C.A.A.F. 2003) (quoting *United States v. Smith*, 56 M.J. 271, 273 (C.A.A.F. 2002)).

²¹⁶ *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007), *aff’g in part and modifying in part*, *United States v. Tate*, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005). One of the terms of the accused’s PTA stated that he was prohibited from requesting clemency for twenty years and must decline it if offered during that period. *Id.* at 271. The accused’s sentence was confinement for life. *Id.* at 269. The CAAF held that this provision violated RCM 705(c) and was unenforceable. *Id.* at 272.

²¹⁷ MCM, *supra* note 8, R.C.M. 910(f)(3) (requiring the military judge to require the disclosure of the entire pretrial agreement before the plea is accepted). *Id.* R.C.M. 705(d)(2) (requiring “[a]ll terms, conditions and promises between the parties shall be written”) (*Sub rosa* is defined as—“confidential, secret, not for publication.” BLACK’S LAW DICTIONARY 1427 (8th ed. 2004)).

²¹⁸ Major Kwasi L. Hawks, *To Err is Human, to Obtain Relief is Divine*, ARMY LAW., June 2007, at 55, 61 (Prosecutorial Misconduct). In *United States v. Edmond*, 63 M.J. 343 (2006), defense counsel subpoenaed a reluctant witness. *Id.* The trial counsel, and Special Assistant US Attorney (SAUSA), interviewed the witness and based on the witness’ demeanor and the conflict between his current and prior testimony believed the witness would be committing perjury. *Id.* The trial counsel warned the witness that he would be committing perjury if he testified if he corroborated the accused’s defense. *Id.* The trial counsel told the witness he was “free to go,” after the witness stated he wanted to leave. *Id.* Despite receiving a subpoena, the witness left without speaking to the defense counsel. *Id.* At the *DuBay* hearing the trial counsel indicated that he was trying to inform the witness of the consequences of perjury. *Id.* The CAAF found that the trial counsel was responsible for giving the witness an option to leave, despite the defense’s R.C.M. 703 entitlement to compulsory process. *Id.*

²¹⁹ MCM, *supra* note 8, R.C.M. 701.

discovery in the appropriate cases.²²⁰ One of the greatest dangers for the Government is in the area of electronic discovery, also known as E-discovery. The trial counsel should heed the warning, “the e-mail of the species is more deadly than the mail.”²²¹ Trial counsel should advise commanders to ensure that their correspondence is professional and they would not be embarrassed to discuss them in open court on the witness stand. The Government’s failure to discover and turn over appropriately requested e-mail correspondence can be very damaging to the case²²² and there is a continuing duty to disclose.²²³ Additionally, if the trial counsel discovers misconduct by government agents, either the unit or law enforcement, he must disclose the information to defense, and in appropriate circumstances to the military judge. Justice must be seen to be done and if the trial counsel appears to be involved in a conspiracy it can damage the case irreparably, and raise ethical issues for counsel.²²⁴

D. Ineffective Assistance of Counsel

Ineffective assistance of counsel²²⁵ is the government’s enemy because the accused is denied his right to competent legal representation. If the trial counsel suspects that the defense counsel is ineffective or not adequately advising the accused, he should bring this to the CMJ’s or SJA’s attention immediately. In certain circumstances it may be necessary to go to the Senior Defense Counsel or Regional Defense Counsel. Making the Government prove its case is an acceptable defense strategy, but lack of preparation or advocacy should cause both the trial counsel and the military judge to question defense counsel’s actions. A rehearing or *DuBay* hearing for IAC is in no one’s interest, especially the accused.

E. Evidence Accountability

The CMJ should be held professionally responsible and accountable for the premature destruction of evidence. These acts should be visible to the highest levels of the Judge Advocate General’s (JAG) Corps and CID chains of command. In the *United States v. Terry* rehearing, the legal office gave permission to destroy the evidence in the case prior to the completion of the appellate process, where the CAAF later authorized a full rehearing.²²⁶ The trial judge granted the defense’s motion to dismiss the case.²²⁷ The Government appealed under Article 62, UCMJ.²²⁸ The appellate court found that the trial judge abused his discretion in this case and granted the government’s appeal.²²⁹ However, the appellate court stated “the government’s loss of evidence is shocking. We will not hesitate to approve or make such a ruling [to affirm the military judge’s decision to dismiss the charges and specifications] in the appropriate case.”²³⁰ The CMJ should personally verify with the appropriate Clerk of Court to ensure that all appeals are completed prior to authorizing the destruction of evidence. It is better for the military justice system to be proactive in this area than to have rules imposed from either Congress or the appellate courts. Failure to safeguard the evidence could lead to the Government being forced to accept a Chapter 10 or an administrative discharge because the CMJ or law enforcement agents have lost or destroyed the evidence required for the rehearing. In these circumstances the record of trial cannot save the case.

²²⁰ *Id.* R.C.M. 701(b)(3).

²²¹ Quotes to Remember, <http://wulik.com/quotes.htm> (last visited June 25, 2008).

²²² MCM, *supra* note 8, R.C.M. 701(g)(3)(C). Failure to comply with the discovery rules can lead to the military judge prohibiting the part from introducing the evidence.

²²³ *Id.* R.C.M. 701(c).

²²⁴ *Id.* R.C.M. 701(g)(3); U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

²²⁵ Captain Scott A. Hancock, *Ineffective Assistance of Counsel: An Overview*, ARMY LAW., Apr. 1986, at 41; Captain John A. Schaefer, *Current Effective Assistance of Counsel Standards*, ARMY LAW., June 1986 at 7; Captain Robert Burrell, *Effective Assistance of Counsel: Conflicts of Interest and Pretrial Duty to Investigate*, ARMY LAW., June 1986, at 39; Captain Floyd T. Curry, *Ineffective Assistance of Counsel During Trial*, ARMY LAW., Aug. 1986, at 52; Major Eric T. Franzen, *USALSA Report: The Advocate for Military Defense Counsel: Effective Assistance of Counsel During Sentencing*, ARMY LAW., Oct. 1986, at 52; Captain Stephanie C. Spahn, *USALSA Report: The Advocate for Military Defense Counsel: Ineffective Assistance During the Post-Trial Stage*, ARMY LAW., Nov. 1986, at 36.

²²⁶ 66 M.J. 514 (A.F. Ct. Crim. App. 2008) (granting the Government’s interlocutory appeal under UCMJ art. 62(a)(1) of trial judge’s dismissal of the case, previously remanded for rehearing on findings and sentence by *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007)).

²²⁷ *Id.* at 515.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 520.

F. Improper Argument²³¹

Trial counsel should be aware of the danger of improper argument and the effect it can have on a trial. Rule for Courts-Martial 1001 permits the trial counsel to “present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.”²³² Such evidence may include “financial, social, psychological, and medical impact on or the cost to any person or entity who was a victim of the offense committed by the accused.”²³³ One example of improper argument is the impact of the court-martial on the unit, which fails to fall within the parameters or intent of RCM 1001. While the commander and Soldiers in the unit may be inconvenienced by the logistics of a court-martial, there is always the option of an alternative disposition, for example, an administrative discharge. The inconvenience to the unit is the cost of doing business when the command chooses the court-martial option. It is improper to elicit evidence on this issue. Trial counsel should be aware that unit impact as well as other improper argument can lead to a case being returned for a rehearing. “[T]rial counsel is well within his rights to strike hard blows by forcefully commenting on the evidence presented at trial; however, at the same time the blows must be fair and must not be made with the intent to incite the passions of the fact finder or the sentencing authority.”²³⁴

G. The Perils of Charging

1. Charging in the Conjunctive/Disjunctive

Charging in the conjunctive/disjunctive (“and/or”) is a dangerous practice and should be avoided by trial counsel. While not specifically prohibited, it has been strongly discouraged by the appellate courts²³⁵ because it can lead to ambiguity in findings which violates the Double Jeopardy Clause.²³⁶ The Court of Military Appeals has referred to the “abominable combination of a conjunctive and a disjunctive means either ‘and’ or ‘or’”²³⁷ and “[i]t’s presence in pleadings renders them void for uncertainty.”²³⁸ “As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term ‘and’ and not with the word ‘or’.”²³⁹ By far the easiest way to avoid an appellate issue in charging is to avoid this practice completely.

2. Duplicitous²⁴⁰ Specifications

The use of the word “divers” necessarily means the trial counsel has charged two or more separate offenses within a single charge. This is another charging practice which is of limited use in certain cases, for example bad check mega-specifications,²⁴¹ but in other circumstances can lead to appellate issues and ultimately the dismissal of the entire specification by the appellate courts. This method of charging, while not always facially fatally defective, can lead to ambiguous findings. For instance, in *United States v. Walters* the accused was charged with wrongful use of drugs “on divers occasions.”²⁴² The panel struck out the word “divers” without specifying which occasion or occasions Airman Basic Walters

²³¹ Puleo, *supra* note 211, at 66.

²³² MCM, *supra* note 8, R.C.M. 1001(b)(4).

²³³ *Id.*

²³⁴ *United States v. Waldrup*, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989).

²³⁵ *United States v. Autrey*, 30 C.M.R. 252, 253 (C.M.A. 1961) (“It is settled law that an offense may not be charged in the conjunctive or the disjunctive”).

²³⁶ U.S. CONST. amend. V.

²³⁷ *Autrey*, 30 C.M.R. at 254 (citations omitted).

²³⁸ *Id.* (citations omitted).

²³⁹ *Heflin v. United States*, 223 F.2d 371, 373 (5th Cir. 1955) (citations omitted).

²⁴⁰ MCM, *supra* note 8, R.C.M. 906(b)(5) discussion (“A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses . . . are not separate, nor is a continuing offense involving several separate acts. The sole remedy for a duplicitous specification is severance . . .”).

²⁴¹ *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (recognizing that while specifications alleging two or more offenses are duplicitous, the CAAF permitted multiple checks to be charged in a single specification. The CAAF limited this type of pleadings to check cases describing it as the bad check “megaspec”).

²⁴² 58 M.J. 391, 391 (C.A.A.F. 2003).

was acquitted of.²⁴³ The CAAF looked at Article 66(c), UCMJ²⁴⁴ noting that while it “affords the Courts of Criminal Appeals an ‘awesome, plenary, de novo power,’”²⁴⁵ it is not without limitation. “A Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty.”²⁴⁶ Essentially, the Double Jeopardy Clause prevents the appellate court from reviewing a finding of not guilty because double jeopardy attaches to the findings of which at least one resulted in an acquittal.²⁴⁷ By using the word “divers” in the charge, the trial counsel run the risk of having the affected charges overturned on appeal, without a rehearing on them being possible.²⁴⁸

3. Multiplicity²⁴⁹ and Unreasonable Multiplication of Charges

Multiplicity is a possible ground for a motion to dismiss under RCM 907(b)(3).²⁵⁰ “[M]ultiplicity is a concept that derives from the *Double Jeopardy Clause of the U.S. Constitution* . . . [and] deals with the statutes themselves, their elements, and congressional intent.”²⁵¹ Charging an offense and its lesser included offense is a clear example of multiplicity.²⁵² “Multiplicity is a questionable practice because it is, by definition, more likely to produce an unreasonable multiplication of charges than a more restrained charging posture.”²⁵³

The general rule under RCM 307(c)(4) prohibits the unreasonable multiplication of charges, where one person is charged with multiple offenses arising out of essentially the same transaction.²⁵⁴ However, it also acknowledges that there may be circumstances when charging under more than one theory for the same transaction may be appropriate.²⁵⁵ The discussion of RCM 307(c)(4) seems to contemplate that such circumstances do not normally apply and should be carefully considered by the trial counsel.²⁵⁶ The discussion²⁵⁷ specifically prohibits separately charging an offense and a lesser included offense in separate specifications.²⁵⁸ Unreasonable multiplication of charges is not based upon a violation of the Due Process Clause,²⁵⁹ rather it is based on more of a traditional legal standard of unreasonableness.²⁶⁰

Trial counsel should carefully consider their charging decisions and clearly articulate them in the trial counsel memorandum. This will ensure that both the charges and the conviction will survive the appellate process.

²⁴³ *Id.* at 393; *see also* United States v. Wilson, No. 09-0010 (C.A.A.F. June 18, 2009).

²⁴⁴ UCMJ art. 66 (2000).

²⁴⁵ *Walters*, at 395 (quoting United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001)).

²⁴⁶ *Id.* at 395 (citations omitted); *see also* United States v. Seider, 60 M.J. 36, 38 (C.A.A.F. 2004).

²⁴⁷ *Walters*, 58 M.J. at 397.

²⁴⁸ *Id.*

²⁴⁹ MCM, *supra* note 8, R.C.M. 907(b)(3)(B) discussion (“A specification is multiplicitious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicitious with another if they describe substantially the same misconduct in two different ways.”).

²⁵⁰ *Id.* R.C.M. 907(b)(3)(B) (“The 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”).

²⁵¹ United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001) (quoting United States v. Quiroz, 53 M.J. 600, 604 (N-M. Ct. Crim. App. 2000)).

²⁵² MCM, *supra* note 8, R.C.M. 907(b)(3)(B) discussion.

²⁵³ Major William T. Barto, *Alexander the Great, The Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 6–7 (1996).

²⁵⁴ *Id.* (“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(4) discussion (1995))).

²⁵⁵ MCM, *supra* note 8, R.C.M. 307(c)(4) discussion (“There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.”).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ U.S. CONST. amend. V.

²⁶⁰ United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).

4. Multiplicity for Sentencing and the Conditional Dismissal

The defense can litigate a motion for appropriate relief for multiplicity of offenses for sentencing purposes under RCM 906(b)(12).²⁶¹ This should usually be litigated prior to the hearing on the merits but the ruling should be deferred until after findings are entered.²⁶² The relief granted to the defense is usually either: (1) the dismissal of charges on the grounds of multiplicity²⁶³ (which is what the defense would prefer); or (2) a determination of the maximum punishment.²⁶⁴

One example of multiplicity arises with the new Article 120, UCMJ.²⁶⁵ One of the added complications with the new Article 120 is that it now requires the Government to articulate its theory of the case in the charges. The facts of a particular case may fall under both rape by rendering another unconscious²⁶⁶ and rape by administration of drug, intoxicant, or other similar substance.²⁶⁷ If the trial counsel drafts charges in a sexual assault case where the victim does not remember the events due to the voluntary use of intoxicants, there may be affirmative defenses available to the accused, to include, consent or mistake of fact. The victim's version of events may be vague or incomplete and could lead to several different theories of how the sexual assault occurred, and different theories of charging the offense. The most obvious course of action is to charge under multiple theories and leave it to the trier of fact to decide under which theory the accused may be guilty or not guilty.

The defense will object to charging under multiple theories of liability, namely multiplicity, unreasonable multiplication of charges, and multiplicity for sentencing.²⁶⁸ The defense's argument is that the extra charges and specifications on the charge sheet are, in and of themselves, disproportionately prejudicial to the accused regardless of their content. The charge sheet becomes vitally important because it is the first impression a court-martial panel has of the accused.

If the accused is convicted under both charged theories, the trial court is then left in a dilemma because the charges arose out of essentially the same transaction. Normally, the court would dismiss the charge or specification on the grounds of multiplicity²⁶⁹ but which charge should be dismissed and which should survive for appellate review? The trial counsel and the military judge should consider possible appellate implications action in these circumstances.²⁷⁰

A possible solution would be the concept of "conditional dismissal." Conditional dismissal was articulated as dicta in *United States v. Britton*.²⁷¹ In that opinion, Judge Effron recognized the Government's dilemma as a practical, rather than a constitutional double jeopardy concern.²⁷² This occurs if the trial court dismissed the charges that the appellate courts would have approved, and the appellate courts dismissed the remaining charges, there are essentially no charges left even though both courts agree that the accused is guilty of some of the charges. "The government is reluctant to agree to dismissal of a lesser charge, run the risk of losing the greater offense during further appeal, and then be put to the time and expense of a new trial when the conviction of the lesser offense was obtained lawfully."²⁷³ Judge Effron proposed the concept of the conditional dismissal.²⁷⁴ In *United States v. Fraizer*, Chief Judge Baum, recognized not only the "inherent authority of the

²⁶¹ MCM, *supra* note 8, R.C.M. 906(b)(12).

²⁶² *Id.* R.C.M. 906(b)(12) discussion; *see id.* R.C.M. 1003 (concerning determination of the maximum punishment); *see also id.* R.C.M. 907(b)(3)(B) (concerning dismissal of charges on grounds of multiplicity. A ruling on this motion ordinarily should be deferred until after findings are entered.).

²⁶³ *Id.* R.C.M. 1003(c)(1)(C) (Multiplicity) ("If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.").

²⁶⁴ *Id.* R.C.M. 906(b)(12) discussion; *see id.* R.C.M. 1003 (concerning determination of the maximum punishment).

²⁶⁵ UCMJ art. 120 (2008).

²⁶⁶ *Id.* art. 120b(1)(d).

²⁶⁷ *Id.* art. 120(1)(e).

²⁶⁸ MCM, *supra* note 8, R.C.M. 906(b)(12).

²⁶⁹ *Id.* R.C.M. 906(b)(12).

²⁷⁰ *Id.*

²⁷¹ 47 M.J. 195, 203 (C.A.A.F. 1997).

²⁷² *Id.* at 199, 202 (Effron, J. concurring).

²⁷³ *Id.* at 202-03 (Effron, J. concurring).

²⁷⁴ *Id.* at 203 (Effron, J. concurring).

In my view, this problem could be remedied if appellate authorities (*i.e.*, the Courts of Criminal Appeals and this Court) were to enter a "conditional dismissal" of a colorably multiplicitous charge under which the less-serious charge would be dismissed without

appellate courts”²⁷⁵ to order a conditional dismissal, but also stated, “we see no reason to believe that the trial judge lacks such authority.”²⁷⁶ Both the *Britton*²⁷⁷ and *Fraizer*²⁷⁸ courts dealt with cases involving charged lesser included offenses, which were clearly multiplicitous. In the Article 120 scenario, the multiplicitous charges arising out of different theories of essentially the same transaction, would be of equal weight. Judge Crawford expressed the need for a rule change,²⁷⁹ addressing the timing of the dismissal.²⁸⁰ She pointed out that the CAAF is apparently requiring the trial judge to dismiss charges after findings have been announced at the trial level, but recognizes that in the past this has created problems on appeal,²⁸¹ leading to significantly different results than if dismissal had occurred on direct appeal.²⁸²

Trial counsel must keep this issue in mind and ensure that he gives the military judge options to ensure that he protects the integrity of the conviction in a case. At the same time justice demands that the accused neither suffers from the dangers of a being convicted doubly for offenses arising out of the same transaction nor being punished doubly for the same offense

VI. Conclusion

After analyzing the pitfalls and hurdles of the order for a rehearing, MAJ Potter is confident that she can advise the SJA on the next steps. She has discussed the case with the VWL, who remembers the case well. She has assigned a paralegal to begin charting and tracking the rehearing, and also retrieved the original record of trial from “the stacks,” discovering that the record of trial is long, but reading the record of trial will not be too cumbersome (while also recognizing that it will not be accomplished during the duty day). She has also assigned her Senior Trial Counsel the task of litigating the case, assured that, with his experience, he will be capable of identifying potential pit falls. She now realizes that there is no need to reinvent the wheel, just recognize that it is a different type of wheel. She is ready for the briefing and no longer in a state of panic.

prejudice to: (1) considering the facts surrounding the lesser offense as matters in aggravation with respect to the sentence; and (2) reinstatement of the dismissed charge before the case becomes final should the more-serious charge be dismissed. There is the potential to substantially reduce appellate litigation in this area, without prejudice to either party, if appellate authorities—in the interest of judicial economy—were to dismiss conditionally lesser charges in any case involving a colorable allegation of multiplicity and no perceptible impact on the sentence.

Id.

²⁷⁵ *United States v. Fraizer*, 51 M.J. 501, 506 (C.G. Ct. Crim. App. 1999) (quoting *Britton*, 47 M.J. at 204). Chief Judge Baum went on to state:

We ascribe full vigor to the military judge’s conditional dismissal of the Article 92 offense. Despite the differences between facts here and those in the Government-cited cases, we are of the view that the finding under that charge may be revived and affirmed by us upon the setting aside of the corresponding indecent act offense, by analogy to what we would do with a lesser-included offense when the major offense is disapproved. In that latter circumstance, guilt of the lesser offense may be affirmed at the appellate level without an express finding of guilt at trial because the trial court’s guilty finding for the major offense necessarily included the lesser offense. Here, we have an express finding of guilt for the Article 92 offense, so there is no need for it to be a lesser-included offense within the disapproved indecent act offense under Article 134. Having disapproved the Article 134 offense, and thereby satisfying the military judge’s condition for restoring the Article 92 offense finding of guilty, we believe it may now be affirmed.

Id.

²⁷⁶ *Id.*

²⁷⁷ *Britton*, 47 M.J. 195.

²⁷⁸ *Fraizer*, 51 M.J. 501.

²⁷⁹ *United States v. Williams*, 62 M.J. 442, 443 (C.A.A.F. 2006) (Crawford, J., concurring).

²⁸⁰ *Id.*

For this reason, I would not require or suggest that dismissal be effected prior to action on direct appeal. To require otherwise, is to require the trial judge to predict how the appellate court may examine the issue.

As a pointed example, one need only consider the case in which an accused is charged with both felony murder and premeditated murder, ostensibly arising from the same facts. Are these multiplicitous? Is the election required before direct appeal is completed? If the answer now is “yes,” then the burden is either on this Court to recognize a “conditional dismissal,” or on the President to make a change to the Manual for Courts-Martial, both as suggested by Judge Effron in *United States v. Britton*.

Id.

²⁸¹ *Id.* (citing *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992)).

²⁸² *Id.*

Rehearings, retrials and resentencing are often complex and difficult cases for trial counsel. They present new and unusual legal problems and sometimes issues of first impression. While they are challenging, they do not have to be chores and they are a way to learn from other's mistakes. This article provides the basic guidance to process a rehearing from receipt of the record of trial through the post-trial process. Rehearings should also focus on the basics of trial practice.

Don't panic, there are materials and mentors to assist trial and defense counsel. This article seeks to demystify the process and enable counsel to concentrate on litigation and the law, rather than long hours and logistics. To that end, a Rehearing Check List and two information papers are included to assist counsel. Trial counsel play an essential role in the administration of justice, particularly in the difficult and technical area of rehearings. The Judge Advocates' focus should be on providing the best representation for both the government and the accused in an effective and efficient manner, without reinventing the wheel.

Appendix A

Rehearing Checklist

CMJ = Chief of Military Justice, TC = Trial Counsel, P = Paralegal

REHEARING TASK	Personnel Tasked
Receive Record of Trial (ROT) from Clerk of Court.	CMJ/TC/P
Begin Chronology—annotate receipt of ROT as Day 1 under RCM 707.	TC/P
Inventory all sets of the ROTs and evidence—original. Defense, and Military Judge (MJ).	CMJ/P
Read Appellate Court Order or Opinion.	CMJ/TC
Assign TC and Paralegal Team (maintains continuity of trial team).	CMJ
Inform Trial Defense Service (TDS), MJ, and Court Reporter of retrial.	CMJ
Determine whether pre-trial confinement (PTC) review is necessary.	CMJ/TC
Prepare for PTC immediately.	TC
If Accused in PTC—maintain situational awareness of conditions.	TC/P
Contact the confinement facility/law enforcement/parole authority/civilian law enforcement for information on the Accused's post-trial behavior.	TC/P
Review Confinement Treatment File (CTF), previous pre-trial confinement reports, and Disciplinary and Adjustment (D&A) Boards documents, treatment files; and work reports.	TC
Make copy of ROT if necessary (for Sanity Board, MJ, etc.).	P
Read all ROT including appellate briefs.	P
Begin spreadsheet for all witnesses and evidence.	P
Begin searching for witnesses (contact CID, internet sources, etc.).	P
Contact original Military Justice Office and TC. Request all case files.	TC/P
Order Accused's Official Military Personnel File.	P
Prepare documents to bring the Accused back to active duty, if necessary. Coordinate with the relevant agencies and the company commander.	CMJ/TC
Contact Accused's new company commander. Keep in mind that enlisted panel members cannot come from the Accused's company sized unit. This may factor into choosing which company to assign the Accused.	CMJ/TC
If Accused not in PTC coordinate with Personnel, Finance and the company, re uniforms, housing, pay, etc.	TC/P
Order evidence from CID.	P
Order National Crime Information Center (NCIC) report.	P
Monitor Chronology.	CMJ
Locate original TC and Defense Counsel (DC). Verify DC's status and whether he still represents the Accused.	CMJ/TC
Obtain Letter of Representation from Civilian Defense Counsel (CDC) before discussing case with him.	CMJ/TC
Read complete ROT (including appellate briefs)—tabbing the ROT <u>after</u> copies are made, can make it more user friendly).	TC
Review evidence.	TC
Coordinate with Victim Witness Liaison (VWL)/Victim Advocate (VA).	TC
Contact and interview victim and discuss case and prior testimony.	TC
Contact and interview witnesses and discuss prior testimony.	TC
Calculate maximum punishment.	TC
Draft Trial Counsel Memorandum.	TC
Assist preparation of SJA Pre-Trial Advice and GCMCA documents. Scan all signed copies of these documents.	CMJ
Manage Speedy Trial Clock and set milestones.	CMJ
Decide if it is necessary to request RCM 707 Exclusion.	CMJ/TC
Consider motions, including government motions <i>in limine</i> .	TC
Consider admissibility of evidence from the ROT and necessary redactions.	TC

	Prepare for Discovery Requests, including Reciprocal Discovery and Section III.	TC
	Comply with Pre-Trial Orders.	TC
	Research possible acceptable Pretrial Agreement (PTA) or Offers to Plead Guilty (OPG) terms.	TC
	Negotiate with DC re potential stipulations of fact and expected testimony.	TC
	Coordinate witness travel arrangements.	P
	Trial Script, ensuring that the procedural history of the case is completely documented.	TC
	Deliver all original documents, from the original trial and the rehearing to the Court Reporter.	TC
	Create the relevant trial and sentencing documents. Do not reveal prohibited information to the Court-Martial panel.	TC
	Prepare for <i>voir dire</i> .	TC
	Consider trial and sentencing instructions.	TC
	Refer case and flap charge sheet. Discuss amendments that need to be made to the charge sheet with the MJ but do not make changes until morning of the trial to ensure MJ approves proposed changes.	CMJ/TC
	Scan all relevant or signed documents originated in the rehearing.	P
	Be aware of post-trial and clemency issues.	CMJ/TC
	Ensure all post-trial documents are accurate, including the Result of Trial, Staff Judge Advocate Recommendation (SJAR), Action and Promulgating Order.	CMJ
	If possible, generate a complete electronic file of the case, including the rehearing ROT (and if possible the voice recordings of the court proceedings), and ensure that all the case files are secured until the case completes the appellate process. The CMJ should periodically check with the Clerk of Court to track the appellate status of the case.	CMJ/P

Appendix B

Rehearings Information

Rehearings

General Information

You have received an overturned case. What to do next?

The first step is to locate the accused. If the accused has not completed the term of confinement, the Soldier will normally be at the United States Disciplinary Barracks (USDB), Fort Leavenworth. If not at the USDB, one of the two Personnel Control Facilities (PCF) (Fort Knox or Fort Sill) should have contact information. As a last resort you may contact the Defense Appellate Division (DAD) attorney assigned to the case for contact information. Once you have located the accused, have the company commander send a memorandum advising the Soldier of the rehearing and to contact the company commander. Also, provide contact information to the Senior Defense Counsel (SDC).

Return to Duty

The Soldier must be ordered back to active duty for the rehearing. When deciding upon a report date, some consideration should be given to the Soldier's current employment and/or family situation. Discussions with the Trial Defense Counsel (TDC) if assigned, may be helpful in choosing a report date that is convenient for the Soldier, the defense and the prosecution. You should now provide the PCF with the name of the unit to which the Soldier will be assigned, if necessary. The PCF personnel will usually issue a reassignment order to the Soldier. The Soldier's new unit commander should then issue a written order terminating the Soldier's involuntary excess leave (IEL) and ordering him back to the unit on the established reporting date. This memorandum should explain that the purpose of the recall is the specific typed of rehearing ordered and should be accompanied with travel orders. These documents should be mailed to the Soldier via certified mail and a copy provided to the assigned TDC. Inform the unit of the rehearing early, this gives them time to plan how to utilize the Soldier so he is properly employed.

Referral

Referral involves the process of referring the rehearing hearing to a new court-martial with a convening order. This involves flapping the original charge sheet. A new referral section is taped over the original section so it can be flipped up and the original still seen. On the new flap, the General Court-Martial Convening Authority (GCMCA) refers it like any other case except that a clause defining the type of rehearing is typed in Block 14d, i.e. "This case is referred for resentencing only"

Scheduling the Rehearing

Under RCM 707(b)(3)(D) the speedy trial clock sets at 120 days from the GCMCA's receipt of the record of trial (ROT) and the opinion authorizing the rehearing. The speedy trial clock stops at arraignment or the first session under RCM 803 in those rehearings not requiring arraignment. You need to review RCM 707 and make a determination early if you are going to request the GCMCA to exclude time. It is best to exclude the time early for the time necessary to conduct a sanity board, locate witnesses or locate the accused, rather than an after the fact exclusion. Keep track of the time with a chronology that records each action taken to move the case to trial, you or your NCOs may have to testify as to your process towards court-martial.

Script Issues

When preparing for the rehearing you will need to know and put on the record the full procedural history of the case. The Military Judge (MJ) should give you guidance on exactly what and when he wants the information in the record. Additionally, the MJ will read the special rehearing instructions from the Military Judges' Benchbook, if needed.

Evidence

Evidence **properly** admitted on the merits in the original trial, relating to offenses for which the accused is being resentenced, is admissible, under RCM 810. For complete retrials the normal rules apply. If the Soldier originally pled guilty, the stipulation of fact, any incorporated exhibits and the providence inquiry can all be admitted and published to the

panel with this evidence, the government may not even need to call any live sentencing witnesses. If the original case was contested, however, consider calling at least one central witness to tie together the evidence and bring life to an otherwise paper case. The evidence may be presented in three ways: (1) direct excerpts from the ROT; (2) stipulations of fact or expected testimony; or (3) read into the record by a person.

Another Way

Of course, conducting a sentence rehearing is not the only option. In some cases, the initial order directing a rehearing may also authorize a sentence of no punishment if a rehearing is deemed impracticable by the GCMCA. Keep in mind, though, that such an order will require the restoration of all rights, privileges, and property of which the convicted Soldier has been deprived as a result of the originally approved sentence. Practically speaking, this will mean an Honorable or General Discharge and a substantial amount of back pay. You must determine if this windfall to the convicted Soldier is the just result. Additionally, in the case of a full rehearing Chapter 10 is available, as well as post-trial Chapter 10.

Justice Requires We Do Our Best

As you can see, rehearings are not as hard as they may at first seem. The unknown always seems more difficult. However, given the relative effort required and the consequences of not conducting the rehearing, they are well worth doing right.

What Follows Is More Detailed Guidance On Conducting Rehearings

Record of Trial

First you must read the complete record of trial, the court's opinion and the order. The appellate briefs may or may not help you prepare for trial.

Have the Paralegals begin attempting to locate witnesses named in the ROT.

Locate the Accused

The Accused may be located in various places:

- a. Confined in the USDB and assigned to the Correctional Holding Detachment (CHD/PCF).
- b. Confined at a Regional Confinement Facility (RCF) at Fort Knox, Fort Sill, or other DoD facility.
- c. Assigned to the CHD/PCF and on Mandatory Supervised Release (MSR) (parole). You must coordinate with the Army Clemency and Parole Board to have MSR terminate if sentence is overturned.
- d. Assigned to the CHD/PCF and on IEL pending appellate review (confinement completed but no approved discharge).
- e. Assigned to the PCF at one of the RCFs.

Once you have determined where the accused is assigned and his physical location you need to determine where he should be assigned during the process of the rehearing. Those accused still at the USDB should remain assigned to the CHD/PCF, but may be attached to Headquarters Company, Combined Arms Center (HQ CAC), Fort Leavenworth for administrative and day-to-day duties if released from confinement. If the accused is not assigned to the CHD/PCF, determine where it is appropriate to assign the accused to HQ, CAC or another unit. Remember that enlisted panel members cannot be from the same company sized unit as the accused.

Administrative Actions

- a. Review the accused's Correctional Treatment File (CTF), to include Discipline and Adjustment (D&A) Board Records, treatment files and work evaluations.

- b. Order the Official Military Personnel File (OMPF).
- c. Request a National Crime Information Center (NCIC) check.
- d. If the Soldier is released from confinement or is called back to duty coordinate with the company and insure that he gets his uniforms, pay, is started (at pre-conviction rank), and he receives proper housing or VHA, etc.
- e. Determine what, if any, restrictions need to be placed on the accused, pass privileges pulled, etc.
- f. ID cards for family members.
- g. Get DD 2704 Victim/Witness notification from the confinement facility (witness locations).
- h. If on MSR get records from his probation officer (US Federal Probation Officers supervise our MSR accused).
- i. Order complete CID file from the Headquarters CID or the investigating Resident Agency.
- j. Locate evidence (should be at the investigating Resident Agency). Coordinate with your CID office if you need help. They should maintain the evidence and return it to the original RA when the trial is completed.

New Review (SJAR) and Action

A new review and action is ordered to correct a post-trial error. Examples of error are ineffective assistance of counsel post-trial, and errors in the SJAR or Action.

When preparing the new review and action you must carefully read the opinion to ensure you are correcting the error as directed by the court. Additionally, you must ensure that you correct any other error that occurred pretrial or at trial. For example, if after reading the ROT you determine there is insufficient evidence on a charge. Disapprove the finding on that charge and reassess the sentence.

LTC Everett Yates, Chief of Military Justice, Fort Leavenworth, May 2006

Appendix C

Rehearings/*DuBay* Hearings—Bridge the Gap

1. Appendix D to the *Military Judges' Benchbook* provides some guidance as to language/scripts to be used at “Rehearings, New or Other Trials, and Revision Proceedings.” What it fails to do is to provide guidance to counsel concerning what is expected of them at the rehearing or at *DuBay* hearings. What follows are items that I have learned over the years should be included at these type proceedings (*see* RCM 810). (I express appreciation to my namesake and fellow judge (COL Rob Holland at Fort Leavenworth) for his insightful comments when reviewing a draft of this message.)

(a) **Full rehearing.** A full rehearing places the case back normally to the pre-trial advice stage, which requires the convening authority to refer the case to trial. The normal trial procedure guide is followed, except as follows:

(1) **Jurisdictional Papers/Summary of the Proceedings.**

Immediately prior to the judge's advice to the accused regarding counsel rights, the trial counsel should introduce as Appellate Exhibits copies of the jurisdictions papers, normally consisting of:

- (A) original charge sheet.
- (B) original promulgating order or subsequent orders.
- (C) appellate opinion.
- (D) Clerk of Court memorandum.
- (E) SJA recommendation and Convening Authority direction.

The trial counsel should summarize what has happened as reflected by these exhibits so all parties agree and understand what the current proceeding entails.

(2) **Right to Counsel.** The prior defense counsel for the accused may no longer be in TDS or around to represent the accused. However, the prior attorney-client relationship cannot be severed absent good cause. Before the rehearing, counsel should determine the identity and whereabouts of all prior trial defense counsel. If a prior defense counsel is not present at the rehearing, the judge should make a determination that the prior attorney-client relationship has been severed and obtain an affirmative waiver from the accused for the former counsel's absence.

(3) **Forum Selection.** The forum selection by the accused is not affected by what the accused chose at the original trial; that is, the accused can choose any lawful forum at the rehearing. The defense counsel and judge should make this clear to the accused.

(4) **Preliminary Instructions.** If the rehearing or proceeding will have court members, the judge should give a general instruction to the members after obtaining the concurrence of counsel. (Samples of these general instructions are at Appendix D, *Military Judges' Benchbook*.) Note: If the accused is convicted at the rehearing, the maximum punishment that can be approved (not adjudged) at the rehearing is limited to that ultimately approved after the original trial. In a court member trial, the judge will instruct the members only upon what they would hear at a normal trial: the authorized penalty provided by law for the offenses without mentioning what sentence can ultimately be approved by the Convening Authority. NOTE: The court members at the rehearing should not know the findings or sentence from the first court-martial.

(b) **Sentence Rehearing.** A rehearing on sentence places the case back to the point in the trial where the finder of fact has just announced findings. For the particular court-martial to have jurisdiction, the SJA must provide a pretrial advice and the convening authority must refer the case to trial. [Notes: (1) The accused cannot withdraw any plea of guilty upon which a prior finding of guilty was entered; however, the judge must be careful to ensure a prior guilty plea does not become improvident during the sentencing proceeding. If it does, the case is suspended and the matter is reported to the authority ordering the rehearing. (2) The maximum punishment which can be approved (not adjudged) at a sentence rehearing is limited to that ultimately approved after the original trial. In a court member trial, the judge will instruct the members only upon what they would hear at a normal trial: the authorized penalty provided by law for the offenses without mentioning what sentence can ultimately be approved by the Convening Authority. The court members should not know the sentence from the earlier court-martial.] The normal trial procedural guide should be followed, except with the deletions and additions noted below:

- (1) The jurisdictional papers as listed in paragraph 1.A.1., above.
- (2) Summarization by the trial counsel of the prior proceeding to include a statement as to the maximum punishment that was ultimately approved after the original trial.

- (3) Election of defense counsel and excusal of prior defense counsel if necessary.
- (4) The statement of the general nature of the charges may be omitted.
- (5) Include the script about challenging the military judge.
- (6) Forum selection must be included. (The accused has the right to change his selection from the original trial and the judge should make this clearly known to the accused.)
- (7) Omit the arraignment.
- (8) Ask if there are any motions.
- (9) If the rehearing is with court members, the judge should give a preliminary instruction with consent of counsel (*see* Appendix D, Military Judges' Benchbook) and go through *voir dire* as normal.
- (10) (Optional—opening statements by counsel)
- (11) Presentation of sentencing evidence—beware of any inadmissible evidence from the original trial. The pre-findings presentation of the facts to the court normally is via a stipulation or the mere reading of the transcript to the sentencing authority. (In judge alone trials, counsel could agree to let the judge read the prior transcript him or herself. Even in court member trials, counsel may agree that appropriately redacted portions of the prior transcript can be given to the members as an Appellate Exhibit for them to read in open court, in lieu of the transcript being read aloud in open court by counsel. Note that if this occurs, the members may not take this exhibit with them while deliberating.) At a RCM 802 Conference prior to the rehearing, counsel and the judge should review and agree upon any expedited procedures.
- (12) Remainder of trial is same as if was an original trial, to include post-trial and appellate rights advice.

(c) **DuBay Hearing.** This is a limited evidentiary hearing where the judge is to make findings of fact and conclusions of law pertaining to issues specified by the authority ordering the hearing. The following procedures should occur:

- (1) The jurisdictional papers as listed in paragraph 1.A.1. above, minus the charge sheets and promulgating order.
- (2) Summarization by trial counsel of the prior proceeding to include the issues to be addressed at the hearing.
- (3) Election of defense counsel and excusal of prior defense counsel if necessary.
- (4) The statement of the general nature of the charges may be omitted.
- (5) Include the script about challenging the military judge.
- (6) Omit the forum selection.
- (7) Omit the arraignment.
- (8) Ask if there are any motions.
- (9) (Optional—opening statements by counsel, but a good idea. Because most issues in a *DuBay* hearing have been raised by the defense on appeal, counsel and the judge should normally treat the issues as defense motions as if they were made at the original trial. This will typically dictate which counsel goes first and who has the burden of proof on the issues.)
- (10) Presentation of evidence.
- (11) Argument by counsel.
- (12) Ruling by the judge (from the bench or at sometime before authentication of the transcript.)

2. *DuBay* hearings seem to be happening more often, and require a special trial script. Another point about *DuBay* hearings: the Appellate Court usually specifies a suspense date for the government to have the record back to the appellate court. Trial counsel need to ensure that sufficient time is given after the date of the *DuBay* hearing for the judge to prepare the findings of fact and conclusions of law, for the court reporter to transcribe the record, for errata to be accomplished, and for mailing the authenticated transcript to the court.

3. In any type of rehearing, new or other trial, or revision proceeding, counsel should seek to clarify procedural issues well in advance with the military judge at a RCM 802 conference, either in person, telephonically, or via e-mail.

COL Gary J. Holland, Military Judge, FEB2001

Note from the Field

The “Two-plus-Four” Treaty: Current Implications for U.S. Forces’ Activity and Freedom of Movement in Berlin and the New German States

Major Brian Scott Frye*

Introduction

The eighteenth anniversary of German re-unification was marked on 3 October 2008. The years following re-unification have witnessed the collapse of the Soviet Union, regional conflicts in the Balkans and Caucasus, the North Atlantic Treaty Organization’s (NATO) eastward expansion, and, most recently, the growing confidence and resurgence of the Russian Federation as a military power. In light of U.S. military basing initiatives in Poland and the Czech Republic as well as NATO “air policing” in the Baltic States, U.S. military planners must be cognizant of the international legal framework in which U.S. Forces operate in the united Germany. Especially important are the treaty-based constraints on stationing, deployment, temporary presence, and transit of military forces in and through Berlin and the new German States.

The Treaty

The Treaty on the Final Settlement with Respect to Germany (so-called “Two-plus-Four” Treaty), signed in Moscow on 12 September 1990 by the Federal Republic of Germany (FRG), the German Democratic Republic, the French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, represents one of the great successes of twentieth century diplomacy.¹ It ended the artificial division of Germany and Berlin, provided for a complete withdrawal of Soviet Forces from Germany, and terminated all remaining Four-Power (quadrupartite) rights and responsibilities for Berlin and Germany as a whole.² It created the basis for the emergence of a united, democratic, and sovereign FRG and permitted the united Germany to remain in NATO.³

Despite its overwhelmingly positive aspects, the Two-plus-Four Treaty contains several prohibitions that affect U.S. Forces’ operations and freedom of movement in Berlin and the new German States.⁴ These treaty prohibitions are found in the last sentence of paragraph 3 of Article 5, “Foreign armed forces and nuclear weapons or their carriers will not be stationed in that part of Germany [i.e., Berlin and the new German States] or deployed there.”⁵

These prohibitions on the stationing and deployment of non-German forces in eastern Germany proved quite controversial.⁶ On the eve of the treaty signing ceremony, the British Delegation insisted upon an explicit guarantee to be permitted to conduct military maneuvers in the new German States.⁷ This resulted in a crisis that threatened to delay the treaty’s signing, which was resolved only after frantic negotiations that included the famous “Pajama Conference” in Moscow.⁸ The resulting “agreed minute” was crafted to lend flexibility to the treaty’s application and protect the future interests of the contracting parties. It is the only addendum to the treaty.

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¹ Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, T.I.A.S. ____, 1696 U.N.T.S. 124, 29 I.L.M. 1186 (with agreed minute and related letters) (entered into force Mar. 15, 1991) [hereinafter Treaty on the Final Settlement with Respect to Germany].

² Letter of Transmittal, 25 Sept. 1990, 101st Cong., S. TREATY DOC. 101-20.

³ *Id.*

⁴ The new German States encompass the former territory of the German Democratic Republic, including Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia.

⁵ Treaty on the Final Settlement with Respect to Germany, *supra* note 1.

⁶ Klaus-Rainer Jackisch, *An einem rundem Tisch mit scharfen Ecken*, DEUTSCHLANDFUNK, Oct. 3, 2005, <http://www.dradio.de/dlf/sendungen/hintergrundpolitik/425510/>.

⁷ *Id.*

⁸ On his own initiative, German Foreign Minister Hans-Dietrich Genscher went to the hotel where the American Delegation was staying to meet Secretary of State James Baker, who having retired for the evening under the combined effects of jet-lag, a sleeping tablet, and a small amount of whiskey, re-emerged from his hotel room clad in a bathrobe. Jackisch, *supra* note 6. Genscher convinced Baker to support a last minute change to the treaty in the form of an “agreed minute.” *Id.* German Foreign Office State Secretary Kastrup drafted it later that same night. *Id.*

The agreed minute provides that, “Any questions with respect to the application of the word ‘deployed’ as used in the last sentence of paragraph 3 of Article 5 will be decided by the Government of the united Germany in a reasonable and responsible way taking into account the security interests of each Contracting Party as set forth in the preamble.”⁹

In testimony before the Senate Armed Forces Committee, on 4 October 1990, a senior official in the U.S. Department of State revealed some of the thinking behind paragraph 3 of Article 5 and the agreed minute. He testified that,

Our interpretation of this provision [last sentence of paragraph 3 of Article 5] is that large-scale maneuvers, as these are defined in the Stockholm agreement, are not permitted, but that smaller-scale activities may take place at the discretion of the German Government. While the Germans may not wish certain types of smaller-scale activities to take place at certain times, our view is that freedom of decision is preserved in this regard.¹⁰

Thus, from a U.S. legal perspective, the force notification parameters agreed upon at Stockholm are the key to interpreting what constitutes a “deployment” for purposes of the treaty.¹¹

The Treaty in a Broader Context of International Law

Today, international law practitioners have an opportunity to consider numerous decisions taken by the Government of the united Germany in applying the last sentence of paragraph 3 of Article 5 of the treaty. Since the treaty’s entry into force, some official procedures have been established to regulate the military activities of the sending States (Belgium, Canada, France, the Netherlands, the United Kingdom, and the United States) in Berlin and the new German States. At this juncture, there is now substantial certainty about the types and levels of military activity the German Government will permit under the treaty.

In order to understand German Government decisions and practices within their proper context, one must understand the sophisticated legal approach taken by the German Government to the presence and status of foreign armed forces in the united Germany. German international law scholars, including those who shape official policy, make a distinction between the right of military forces to be present in a foreign country (*ius ad praesentiam*) and their legal status in the receiving State (*ius in praesentia*).¹² The German Foreign Office expresses this approach in the following formulation:

The presence of foreign forces on German territory requires a special legal basis. A distinction must be drawn between the right of presence and the law governing such presence. The right of presence derives from the required formal consent given by the Federal Republic of Germany to the presence of foreign armed forces within its territory. The law of residence governing their presence includes all legal provisions to which foreign forces are subject while present on German soil.¹³

Since 1954, U.S. Forces have been stationed in Germany on the basis of the so-called “Presence Convention.”¹⁴ Following re-unification in 1990, there was a review of various stationing agreements.¹⁵ On 25 September 1990, the German

⁹ Treaty on the Final Settlement with Respect to Germany, *supra* note 1, at agreed minute.

¹⁰ *Hearing on the Implications of Treaty on Final German Settlement for NATO Strategy and U.S. Military Presence in Europe Before the S. Armed Services Comm.*, 101st Cong. 7 (Oct. 4, 1990) (statement of James F. Dobbins, Jr., Principal Deputy Assistant Secretary of State for European and Canadian Affairs).

¹¹ At the Stockholm Conference, which met from January 1984 to September 1986, representatives of the participating States of the Conference on Security and Co-operation in Europe agreed to give notification in writing through diplomatic channels of a number of military activities. Document of the Stockholm Conference Confidence- and Security-Building Measures and Disarmament in Europe Convened in Accordance with the Relevant provision of the Concluding Document of the Madrid Meeting of the Conference on Security and Cooperation in Europe, Sept. 19, 1986, 26 I.L.M. 190. Specifically, they agreed to provide notice of the following military activities: those involving at least 13,000 troops, including support troops; those involving at least 300 battle tanks; those involving 200 or more sorties by non-rotary aircraft; parachute drops involving at least 3000 troops; and amphibious landings involving at least 3000 troops. *Id.*

¹² Dieter Fleck, *The Development of the Law of Stationing Forces in Germany: Five Decades of Multilateral Cooperation*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 349, 350 (Dieter Fleck ed., Oxford Univ. Press 2001).

¹³ German Foreign Office, *Legal Status of Forces in Germany and Abroad*, <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/Truppenstationierungsrecht.html> (last visited June 16, 2009).

¹⁴ Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954, 6 U.S.T. 55,689, T.I.A.S. No. 3426, 3 U.N.T.S. 334.

¹⁵ Major Wes Erickson, *Highlights of the Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 14.

Government and the six sending States exchanged diplomatic notes extending the applicability of the Presence Convention; however, it was agreed that its “existing territorial application . . . [would] remain unaffected by the establishment of German unity.”¹⁶

In order to fill the legal void concerning Berlin and the territory of the former German Democratic Republic, diplomatic notes were exchanged on two occasions (1990 and 1994) to provide a basis for temporary military presence as well as regulate the status of the armed forces of the sending States. The 1994 exchange of diplomatic notes, which amended the 1990 exchange of diplomatic notes, provided that the NATO Status of Forces Agreement (SOFA), the NATO SOFA Supplementary Agreement (Supplementary Agreement), and the Agreements related thereto “remain in force as amended,” subject to the following:

Taking account of the fact that the existing territorial application of these Agreements remains unaffected by the establishment of German unity, the forces of the sending States, their civilian components, their members and dependents shall enjoy the same status in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia as they are granted in the Laender Baden-Wuerttemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Saarland and Schleswig-Holstein. Their official activities in the first-named Laender are subject to approval by the Federal Government. The Federal Government shall decide taking into account the provisions of Article 5 (3) of the Treaty on the Final Settlement with respect to Germany of 12 September 1990, in accordance with the Agreed Minute of the same date to that Treaty.¹⁷

Thus, the sending States agreed, in express terms, that their “official activities” in Berlin and the new German States were subject to approval by the German Government. In a “Protocol Note” to the 1994 exchange of diplomatic notes, the following was noted by all parties:

In granting the approval necessary in accordance [with the 1994 exchange of diplomatic notes and other stationing agreements], German authorities will apply as generous criteria as possible.

In granting approval for official activities in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia, German authorities shall, as far as possible, apply *mutatis mutandis* the same technical procedures as those applicable in the Laender Baden-Wuerttemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatinate, Saarland and Schleswig-Holstein. In cases in which no suitable procedures exist, German authorities shall apply simple technical procedures or, as far as possible, issue a general approval.

Official visits to the Embassies and consular missions of the sending States in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thuringia are on the basis of reciprocity not subject to approval. Approval for official visits to German authorities in Berlin shall be deemed to have been given when an appointment is agreed.¹⁸

From reading the Protocol Note, one can glean that certain types of military activity fall outside the scope of Article 5 of the Two-plus-Four Treaty and are not subject to German Government approval. For example, “members of the force” and “members of the civilian component” may conduct “official visits” to the American Embassy in Berlin as well as the American Consulate General in Leipzig without having to obtain any additional form of approval from the German Government.¹⁹

¹⁶ Exchange of Notes between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom, and the United States of America Concerning the Status of Their Forces during Temporary Stays in Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, of 25 September 1990, BGBl. 1994, Pt. II, at 3716 (as amended on 12 Sept. 1994) [hereinafter Exchange of Notes]; *id.* Pt. II, S. 29 (as amended by exchange of notes from 12 Sept. 1994); *id.* Pt. II, at 3716).

¹⁷ *Id.*

¹⁸ Protocol Note to Paragraph 3 of the Exchange of Notes, Exchange of Notes between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom, and the United States of America Concerning the Status of Their Forces during Temporary Stays in Berlin, Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia, of 25 September 1990 (as amended on 12 Sept. 1994) BGBl. 1994, Pt. II, at 3719 [hereinafter Protocol Note].

¹⁹ *Id.* This permits Germany to fulfill its obligations under Article 36 of the Vienna Convention on Consular Relations, which reads as follows in pertinent part:

The Protocol Note requires German authorities to apply “generous criteria” when considering requests for official activity and provides for the issuance of “general approval[s]” in some cases.²⁰ In this latter regard, the final sentence of the Protocol Note serves as a form of general approval for “official visits to German authorities in Berlin.” It provides expressly that German Government approval “shall be deemed to have been given when an appointment is agreed.”²¹

Finally, the Protocol Note provides that technical procedures for obtaining German Government approval shall, as far as possible, be applied uniformly throughout Germany.²² In cases, in which no existing procedures exist, German authorities are required to “apply simple technical procedures.”²³

When planning military activity in Berlin or the new German States, the most important reference for a Judge Advocate or Department of the Army attorney to consult is the German Federal Ministry of Defense’s “Information on the Cooperation between the Sending Nations and the Federal Ministry of Defense” (*Hinweise für die Zusammenarbeit der Entsendestaaten mit dem Bundesministerium der Verteidigung*).²⁴ Although a full explanation of the *Hinweise* and its ramifications for the sending States could fill several pages in an international law journal, for purposes of this practice note it is best to summarize the *Hinweise* by quoting from its Preliminary Remarks (*Vorbemerkung*). “This document is a summary and result of the implementation of the relevant agreements and treaties and the provisions derived from them between the sending nations and the Federal Republic of Germany” (*Dieses Dokument bildet eine Zusammenfassung und Umsetzung der einschlägigen Abkommen und Verträge der Entsendestaaten und die daraus abgeleiteten Bestimmungen in der Bundesrepublik Deutschland*).²⁵

In regard to Article 5 of the Two-plus-Four Treaty, its agreed minute, and the 1994 exchange of diplomatic notes, the *Hinweise* has become the primary technical procedure for obtaining German Government approval for official activity of the armed forces of the sending States in Berlin and the new German States.²⁶ The *Hinweise* performs a dual function. It provides a mechanism for the German Government to grant general approval for a number of peace-time military activities conducted by forces of the sending States stationed in Germany, while also processing individual requests for categories of official activity that are not subject to general approval.²⁷

Although not mentioned in the text of the *Hinweise*, the German Federal Ministry of Defense performs an inter-ministerial staffing function within the German Federal Government. Upon receipt of individual requests, the German Federal Ministry of Defense circulates these requests to other interested federal ministries as well as subordinate agencies. For example, international border crossing requests are circulated to the Federal Ministry of Interior (border police), Federal Ministry of Finance (customs), Federal Economics Ministry (arms import and export restrictions), and most importantly the Foreign Office. As a matter of legal competency within the German Federal Government, the Foreign Office makes the final determination whether to permit a requested military activity.

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.

Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261, T.I.A.S. No. 6820 (entered into force Mar. 19, 1967).

²⁰ Protocol Note, *supra* note 18.

²¹ *Id.*

²² *Id.* As most Soldiers who have been stationed in Germany are aware, Germany is a highly regulated society. Along with the tremendous infrastructure and political support for training, moving, sustaining, and protecting the force comes an array of host nation legal requirements that must be satisfied. Fortunately, through many years of applied practice, the U.S. Forces satisfy these host nation requirements as matter of routine. Technical procedures for notifying German authorities and seeking their approval, in those cases where approval has not been granted on a general basis, vary depending on the type of military activity involved. For example, there are long-standing and separate technical procedures for notifying host nation authorities of maneuvers (i.e., off installation training) as well as scheduling training events at ranges and training areas operated by the German Armed Forces.

²³ *Id.*

²⁴ German Federal Ministry of Defense, Information on the Cooperation between the Sending Nations and the Federal Ministry of Defense (31 July 2008) [hereinafter *Hinweise*] (copy on file with USAREUR Office of the Judge Advocate (OJA) in both German as well as English).

²⁵ *Id.* at foreword.

²⁶ *Id.* para. 301.

²⁷ *Id.* app. 5/1.

Submission of individual official activity requests to the German Federal Ministry of Defense is accomplished through the U.S. Army Europe (USAREUR) Liaison Office, American Embassy Berlin, in accordance with guidance in the U.S. Department of Defense Foreign Clearance Guide.²⁸

One question, which is raised periodically at headquarters and in the field, is whether “official activity” by the U.S. Forces in West Berlin (i.e., former American, British and French Sectors) is covered under the treaty and subject to German Government approval. Over the years, USAREUR Liaison Office’s response has been a consistent, “Yes.”

This position is based on the following analysis. The treaty’s operative sentence in paragraph 3 of Article 5, “Foreign armed forces and nuclear weapons or their carriers will not be stationed in that part of Germany or deployed there” must be read within the context of the paragraph in which it appears.²⁹ The first sentence of this paragraph reads as follows,

Following the completion of the withdrawal of the Soviet armed forces from the territory of the present German Democratic Republic and of Berlin, units of German armed forces assigned to military alliance structures in the same way as those in the rest of German territory may also be stationed in that part of Germany, but without nuclear weapon carriers.³⁰

When read in context, one can see that the last sentence in paragraph 3 refers back to the first sentence of the same paragraph, specifically, “the territory of the present German Democratic Republic and of Berlin.”³¹ Although the ordinary meaning of the term, “Berlin,” encompasses the entire city (which at the time of the treaty’s signing remained under quadripartite occupation, at least in the view of the western allies), an argument can be made that the Soviet armed forces did not physically “withdraw” from the western sectors of Berlin, hence the treaty does not restrict the present stationing or deployment of non-German forces in these former occupation sectors. Notwithstanding this argument, under the 1994 exchange of diplomatic notes, cited above, official activities in the present State of Berlin are subject to German Government approval.³²

The Treaty in Practice

When considering whether the U.S. Forces are obligated to seek approval for official activity in the new German States or Berlin, it is helpful to categorize the planned military activity in one of three categories: (1) Activities and Personnel not subject to German Government approval; (2) Activities subject to general approval; and (3) Activities subject to specific approval based upon individual request.

1. Activities and Personnel not subject to German Government Approval

a. Private Activities

No German Government approval is required for purely private activities of U.S. Department of Defense (DoD) personnel in Berlin and the new German States. Thus, personnel in a leave, pass, or other non-duty status may travel to Berlin and the new German States on an unrestricted basis. In doing so, they may avail themselves to the full privileges,

²⁸ U.S. DEP’T OF DEFENSE, 4500.54-G, FOREIGN CLEARANCE GUIDE (1 June 2009) [hereinafter DoD 4500-54-G], available at <https://www.fcg.pentagon.mil/fcg.cfm>. The German Federal Ministry of Defense maintains a database of approved official activity requests. Upon request, the German Foreign Office makes this information available to the treaty’s other Contracting Parties. Periodically, the Russian Embassy in Berlin requests this information. The German Federal Ministry of Defense’s database serves as a sort of informal “audit trail” to substantiate treaty compliance. Hence it is important for U.S. military units and personnel to submit official activity requests.

²⁹ Treaty on the Final Settlement with Respect to Germany, *supra* note 1.

³⁰ *Id.*

³¹ *Id.*

³² Another legal consideration is the “Presence Convention.” Convention on the Presence of Foreign Forces in the Federal Republic of Germany, 23 Oct. 1954, 6 U.N.T.S. 5689. As discussed above, the Presence Convention does not extend to Berlin or the new German States. In the absence of German Government approval granted within the context of the exchange of diplomatic notes, the legal status of U.S. Forces’ personnel in West Berlin would be questionable. It is foreseeable that the German Government would consider any “unapproved” activity in West Berlin to constitute a violation of its national sovereignty. This could result in non-recognition of NATO SOFA status for U.S. Forces’ personnel that could pose serious problems for individuals with regard to foreign criminal jurisdiction and claims. Finally, the Russian Government could be expected to lodge diplomatic objections to any “unapproved” activity on the basis of the treaty itself.

immunities, and benefits afforded them under NATO SOFA and the Supplementary Agreement.³³ Under the 1994 exchange of diplomatic notes, NATO SOFA status for individual DoD personnel in Berlin and the new German States is not contingent upon the performance of official duties there.

b. Defense Attachés and Military Personnel with “A&T” status

Based on the presence of a robust Defense Attaché Corps in Berlin, it is safe to assume that Defense Attachés, possessing full diplomatic status, as well as military personnel, possessing “administrative and technical” (A&T) status, under the Vienna Convention on Diplomatic Relations, are not considered “foreign armed forces” or “stationed” in Berlin for purposes of Article 5 of the treaty.³⁴ They are not prohibited from performing their military-diplomatic duties in Berlin, which is once again the seat of Germany’s Federal Government. Furthermore, DoD personnel assigned duty in Berlin (e.g., U.S. Defense Attaché Office and Office of Defense Cooperation), who possess full diplomatic or A&T status³⁵ are not covered by the 1994 exchange of diplomatic notes.³⁶ Although they must undergo diplomatic accreditation, their official activities in Berlin and the new German States are not subject to approval by the German Federal Government to comply with the Two-plus-Four Treaty.

c. Visits to American Embassy Berlin and American Consulate General Leipzig

The Protocol Note to the 1994 exchange of diplomatic notes provides that, “[o]fficial visits to the Embassies and consular missions of the sending States in the Laender Berlin, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia are on the basis of reciprocity not subject to approval.”³⁷ Thus, “members of the force,” “members of the civilian component” and their “dependents” may visit these diplomatic facilities without any form of notification to host nation authorities, even when visiting in an official capacity.

d. Civilian Labor

The prohibitions in Article 5 of the treaty do not apply to local civilian labor employed by a sending State under Article 56 of the Supplementary Agreement. These employees, who tend to be German Citizens, and are not considered members of the civilian component, do not constitute “foreign armed forces” within the meaning of the treaty. Over the years, these employees (sometimes referred to as LN Employees) have visited numerous German civil and military authorities without objection.

e. DoD Contractors and DoD Contractor Employees

Arguably, DoD contractors and their employees do not constitute “foreign armed forces” for purposes of Article 5 of the treaty. This legal position is supported by NATO SOFA and the Supplementary Agreement.³⁸ In Germany, the majority of DoD contractor employees do not qualify for SOFA status as a member of the civilian component. Following this logic, the

³³ Exchange of Notes, *supra* note 16.

³⁴ Those members of the Defense Attaché Corps from NATO Member States also lack status under the NATO Status of Forces Agreement in Germany, by operation of the Protocol of Signature to the Supplementary Agreement.

Service attachés of a sending State in the Federal Republic, the members of their staffs and any other service personnel enjoying diplomatic or other special status in the Federal Republic shall not be regarded as constituting or included in a ‘force’ for the purpose of the NATO Status of Forces Agreement and the Supplementary Agreement.

Protocol of Signature to the Supplementary Agreement Pt. I, Re art. I, para. 1(a)2, 3 Aug. 1959, 102 T.I.A.S. 5351 (Agreed Minutes and Declarations concerning the Status of Forces Agreement) [hereinafter Protocol of Signature].

³⁵ A&T status is described in Article 37 of the Vienna Convention on Diplomatic Relations. Vienna Convention on Diplomatic Relations art. 37, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

³⁶ The exchange of diplomatic notes restricts the official activities of “members of the force,” “members of the civilian component,” and “dependents” only. Diplomatic personnel do not fit within any of these categories of persons possessing status under the NATO SOFA. Protocol of Signature, *supra* note 34.

³⁷ Protocol Note, *supra* note 18.

³⁸ *Id.*

United States has no legal duty to notify the German Government under the 1994 exchange of diplomatic notes, which covers only those personnel possessing NATO SOFA status. However, for political and diplomatic reasons, the American Embassy in Berlin notifies the German Government of most DoD contractor activity in the new German States and Berlin. This type of notification stems from the acute political sensitivities that prevail in re-unified Germany, not out of a strict legal obligation.³⁹

2. Activities Subject to General Approval

a. U.S. Military Aircraft Landing in Support of Visits to American Embassy Berlin and American Consulate General Leipzig

As a matter of longstanding practice, the German Federal Ministry of Defense has permitted U.S. military aircraft to fly and land in direct support of visits to U.S. diplomatic facilities using blanket diplomatic clearance numbers issued annually to the U.S. Forces. Since republication of the *Hinweise* in 2005, there has been explicit approval for aircraft from any of the six sending States to land in support of visits to diplomatic facilities in Berlin.⁴⁰ Recently, this privilege has been extended to other nations.⁴¹ All other U.S. military aircraft landing in Berlin or the new German States must request and obtain an individual diplomatic clearance number from the German Federal Ministry of Defense through U.S. Defense Attaché Office Berlin by following the procedures listed in the DoD Foreign Clearance Guide.⁴²

b. U.S. Military Flights over the new German States and Berlin

Initially, the German Federal Ministry of Defense insisted upon an individual diplomatic clearance number for each U.S. military aircraft flying in the airspace over the new German States.⁴³ This gave rise to hundreds of reported violations of German airspace and created a bureaucratic conundrum. To resolve this situation, on 23 April 2001, the German Federal Ministry of Defense decided to extend blanket diplomatic clearance, which had previously applied only to U.S. military flights over western Germany, to most U.S. military flights over the new German States.⁴⁴ This extended blanket diplomatic clearance has been granted on an annual basis since 2001.⁴⁵ In support of Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), numerous U.S. military flights have used these blanket diplomatic clearance numbers. Aircraft that require individual diplomatic clearance (e.g., those participating in air exercises) are described in the DoD Foreign Clearance Guide, which provides detailed guidance on how to request flight clearance numbers through U.S. Defense Attaché Office Berlin.⁴⁶

³⁹ Since the treaty entered force, there has been significant DoD contract activity in the new German States and Berlin. For example, DoD has ongoing contracts with German commercial firms to demilitarize U.S. Army ordnance and U.S. Air Force bombs at former ammunition plants in the State of Brandenburg. Also, in May 2006, DoD contractors began to use Leipzig-Halle International Airport to refuel and repair DoD contract aircraft transporting DoD personnel on rest and recuperation (R&R) to and from the United States. To date, approximately 1 million R&R passengers have landed at Leipzig-Halle. More recently, DoD contract aircraft have transported newly procured military vehicles from the United States, using Leipzig-Halle for technical stops enroute to their theaters of operation. In supporting these movements, the German Government has used military-diplomatic clearance procedures applicable to military flights. Each DoD contract flight is assigned an individual flight clearance number granted by the German Federal Ministry of Defense in response to an individual military-diplomatic request submitted by U.S. Defense Attaché Office Berlin. For more information and analysis of contractor use of Leipzig-Halle, see the German Federal Government's answer to a parliamentary interpellation from the Die Linke, a left-wing party in the political opposition. *Nutzung des Mitteldeutschen Flughafens Leipzig/Halle für militärische Zwecke* [Use of Central German Airport Leipzig/Halle for Military Purposes], *DEUTSCHER BUNDESTAG*, 16. Wahlperiode, Drucksache 4343.

⁴⁰ *Hinweise*, *supra* note 24, app. 5/2.

⁴¹ The Military Aeronautical Information Publication Germany (MIL AIP) provides that “[n]ations holding valid permanent flight permits do not need individual permits to enter Berlin in order to visit diplomatic representations.” GERMAN ARMED FORCES AIR TRAFFIC SERVICES OFFICE, MILITARY AERONAUTICAL INFORMATION PUBLICATION GERMANY, GEN 1.2 to 2.2, 5 (19 May 2009) [hereinafter MIL AIP], available at <http://www.mil-aip.de/>.

⁴² DOD 4500-54-G, *supra* note 28.

⁴³ Letter from German Federal Ministry of Defense—Fü S II 5—*Militärattachéreferat* to the American Embassy Berlin (copy on file with the USAREUR OJA).

⁴⁴ *Id.*

⁴⁵ This annual letter is underscored by Appendix 5/2 of the *Hinweise* which indicates no specific request is required for countries whose aircraft have been granted blanket clearance. *Hinweise*, *supra* note 24, app. 5/2.

⁴⁶ DOD 4500-54-G, *supra* note 28.

c. *Visits to German Civil Authorities in Berlin*

The Protocol Note to the 1994 exchange of diplomatic notes states that, “[a]pproval for official visits to German authorities in Berlin shall be deemed to have been given when an appointment is agreed.”⁴⁷ This language is buttressed by Appendix 5/1 of the *Hinweise* which extends general approval to visits of up to 100 persons to German civil authorities as long as the visitors are unarmed and not taking part in a military exercise and do not stay in a German military installation.⁴⁸ This general approval covers virtually all visits to German authorities in Berlin. Here it is important to note that the general approval in the *Hinweise* does not extend to visits to German military authorities and installations. Instead, the *Hinweise* requires individual requests for visits to German military authorities and installations in Berlin to follow the Request for Visit Process (*Besuchskontrollverfahren*).⁴⁹ In this regard, there is a certain tension between the Protocol Note to the 1994 exchange of diplomatic notes and the *Hinweise*.

d. *Trips by Unarmed Personnel to Berlin and the New German States*

Many types of routine military activity fall under a broad general approval published in the *Hinweise*. For example, band performances, battle staff rides (some favorite battle sites include Berlin, Leipzig, and Jena) and visits by military liaison personnel are covered under a general approval for visits of up to 100 unarmed persons provided they do not stay in any German military facility. Unfortunately, the *Hinweise* does not apply the same standard applied in the 1996 *Wichert Decree*.⁵⁰ Prior to the initial publication of the *Hinweise* in 2002, the sending States could cite the *Wichert Decree* for general approval for all visits by units less than “company strength,” even those with Soldiers under arms.

e. *Interstate German Travel without International Border-Crossing*

Appendix 5/1 of the *Hinweise* provides general approval for all military movements within the FRG that do not involve the crossing of an international border.⁵¹ Thus, military personnel stationed at bases in western Germany may travel through the new German States without having to file a separate transit request, so long as they do not cross into Poland or the Czech Republic or depart Germany from a port on the Baltic Sea.⁵² Such interstate travel is rare because most travel through the new German States involves movements to and from Poland. However, there have been instances in which troops headed to a North Sea port or training area in Schleswig-Holstein have been routed through the new German States.

3. *Activities Subject to Specific Approval Based upon Individual Request*

a. *Liaison Officers, Exchange Officers, and Military Students*

The German Government has permitted liaison officers from two sending States to perform duties in Berlin since the German Government moved from Bonn to Berlin in 1999. This practical step has permitted Germany and the sending States to fulfill their mutual obligations under NATO SOFA and the Supplementary Agreement.⁵³ In a recent diplomatic note, the German Foreign Office confirmed that the service in Berlin of a U.S. military officer performing liaison duties between the

⁴⁷ Protocol Note, *supra* note 18.

⁴⁸ *Hinweise*, *supra* note 24, app. 5/1.

⁴⁹ *Id.*

⁵⁰ The so-called Wichert Decree (*Wichert Erlass*) was issued by State Secretary Wichert. German Federal Ministry of Defense, Application Rules for Visits, Exercises, Transit Stays and Other Temporary Stays by Members of Foreign Armed Forces in the Federal Republic of Germany (14 Mar. 1996) (copy on file with the USAREUR OJA) (in German and in unofficial English translation).

⁵¹ *Hinweise*, *supra* note 24, app. 5/1.

⁵² Although the filing of a transit request (with the German Federal Ministry of Defense in Berlin) is not required for military movements taking place exclusively within Germany, military convoys may require “march credits” as well as other forms of host nation permission based on other existing agreements.

⁵³ Under Article 3 of the revised Supplementary Agreement to the NATO SOFA, “German authorities and the authorities of a Force” have an affirmation obligation to “ensure close and reciprocal liaison” in order to fulfill obligations imposed by the North Atlantic Treaty and implement NATO SOFA and the Supplementary Agreement. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany art. 3 (n.d.), 6 T.I.A.S. No. 5351.

stationed forces and German federal ministries does not violate Article 5, paragraph 3 of the Two-plus-Four Treaty.⁵⁴ The German Government has also permitted liaison officers to be assigned to units and activities outside the U.S. Embassy in Berlin. On 23 July 2002, the Chief of Staff of the German Armed Forces wrote the Chairman of the U.S. Joint Chiefs of Staff to cordially invite him to send a liaison officer on a permanent basis to the German Joint Operations Command in Potsdam, Brandenburg.⁵⁵ Although relatively small in number, the DoD has sent a steady stream of military personnel to Berlin and the new German States for career development purposes.⁵⁶ For example, U.S. Navy exchange personnel have served in German Naval units on the Baltic Coast.⁵⁷ United States Foreign Area Officers (FAOs) and other military students have attended the German Army Staff School at Dresden as well as studied at civilian universities in Berlin and the new German States.⁵⁸

b. U.S. Military Aircraft Landings

Other than missions in direct support of a diplomatic visit, as discussed above, U.S. military aircraft require individual diplomatic clearance to land in Berlin and the new German States.⁵⁹ On two occasions prior to OEF and OIF, the German Federal Ministry of Defense permitted a brigade of USAREUR rotary-wing aircraft to land and refuel at several airfields in eastern Germany on their way to and from Poland. These aviation assets (both attack and support helicopters) transited in support of a series of annual exercises known as VICTORY STRIKE that took place in western Poland.⁶⁰ Since the cancellation of VICTORY STRIKE IV, USAREUR aviation assets have transited to Poland infrequently and in much smaller numbers. United States Air Force aircraft have also been permitted to land in the new German States. For example, U.S. Air Force jet fighters have landed at the German Air Force Base in Laage, Mecklenburg-Western Pomerania, and remained there a few days.⁶¹ The German Federal Ministry of Defense permitted this temporary presence to facilitate close-air combat training with MIG-29 aircraft flown by the German Air Force. Finally, the German Federal Ministry of Defense has permitted foreign military (including U.S. Air Force and U.S. Army) aircraft to land at Schönefeld Airport, in Brandenburg, to participate in the internationally renowned Berlin Air Show.⁶²

c. Air Exercises

Military aircraft training in the airspace over the new German States require individual diplomatic clearance.⁶³ Since the treaty took effect, there has been minimal training by USAREUR aircraft in the airspace over the new German States. This fact results from the limited operating range of rotary-wing aircraft as opposed to any legal constraints. Geographic distance is also a factor that has limited the number and duration of training missions by U.S. Air Force aircraft over the new German States. However, the new Eurofighters stationed at the German Air Force Base at Laage are attractive training partners.

⁵⁴ German Foreign Office, Note Verbale, Berlin, (Mar. 24, 2005) (copy on file with the USAREUR OJA).

⁵⁵ Letter from General Wolfgang Schneiderhan, Chief of Staff, German Armed Forces, to General Richard B. Myers, Chairman of the U.S. Joint Chiefs of Staff (July 23, 2002) (copy on file with the USAREUR OJA). At present, military officers from eleven nations perform liaison duties at the German Joint Operations Command in Potsdam. These military liaison officers are from Austria, Belgium, Denmark, France, the Netherlands, Norway, Poland, Spain, Sweden, the United Kingdom, and the United States.

⁵⁶ This assertion is based on the author's professional experience of ten years at the U.S. Embassy, Berlin [hereinafter Professional Experience]. During the course of these duties, the author has personally met and spoken to some of the officers referred to above.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ This requirement may be found in *Hinweise*, as well as MIL AIP. *Hinweise*, *supra* note 24, app. 5/2; MIL AIP, *supra* note 41, GEN 1.2- 2.1. Specific guidance for DoD and DoD-contract flights are found in the DoD 4500.54-G. DoD 4500-54-G, *supra* note 28.

⁶⁰ The German Federal Ministry of Defense issued one diplomatic clearance number for all aircraft notified as taking part in the exercise. USAREUR LNO provided multiple data points to obtain diplomatic clearance for these aircraft, to include aircraft call-signs, airfield of origin, airfield of transit, final destination, arrival and departure times and dates.

⁶¹ This assertion is based on conversations that the author had with the USAFE Liaison Officer and e-mail traffic.

⁶² The author has visited the air show on at least two occasions and has seen the air aircraft on display there.

⁶³ Blanket diplomatic clearance granted in the annual letter from the German Federal Ministry of Defense does not cover military training flights over the new German States. Specific clearance requirements may be found in Appendix 5/2 of the *Hinweise*, *supra* note 24. Guidance for DoD and DoD-contract flights is contained in the DoD Foreign Clearance Guide. DoD 4500.54-G, *supra* note 28.

d. Ground Transits involving International Border-Crossing

Department of Defense personnel crossing the German-Polish Border or German-Czech Border via the new German States require individual diplomatic clearance.⁶⁴ Requests for transit are processed through the USAREUR Liaison Office to the German Federal Ministry of Defense. In the absence of a properly approved transit request, DoD personnel may experience border delays and other problems. Since the Two-plus-Four Treaty entered into force, significant numbers of foreign military personnel (principally British, Dutch, and U.S. Forces) have transited the new German States on their way to and from training exercises in Poland. During VICTORY STRIKE I, which took place in the fall of 2000, approximately 3000 U.S. Soldiers transited the new German States on their way to Poland.⁶⁵ To move this heavy brigade, USAREUR contracted for thirty commercial rail shipments, consisting of approximately 1000 flat-cars.⁶⁶ VICTORY STRIKE II, which took place in the fall of 2001, involved troop and equipment transits on a similar order of magnitude.⁶⁷ Since OEF and OIF, many USAREUR units have been deployed outside Germany, so that the frequency of transits to Poland has diminished. Transits in recent years have involved platoon and company-size troop movements.⁶⁸ For some recurring supply missions to Poland, the German Federal Ministry of Defense has issued blanket border-crossing approval to 21st Theater Sustainment Command activities for a period of up to one year.⁶⁹

e. Training at German Armed Forces' Facilities

There are a number of modern training areas operated by the German Armed Forces in the new German States. These include the German equivalent of the U.S. Army's National Training Center (*Gefechtsübungszentrum Heer* located in Altmark, Saxony-Anhalt), as well as a large military operations in urban terrain (MOUT) training site in Lehnin, Brandenburg.⁷⁰ In recent years, Dutch mechanized battalions have trained at *Gefechtsübungszentrum Heer*, while U.S. Special Forces and other light forces have trained periodically at the Lehnin MOUT site.⁷¹ Overall, U.S. Forces have trained very little on military bases in the new German States. To date, the largest U.S. training event comprised one armor battalion that spent a few weeks on a tank and maneuver range in the Oberlausitz, Saxony.⁷² The scheduling of unit training at German Armed Forces' facilities is accomplished by the U.S. Allied Training Scheduler, Joint Multinational Training Command (JMTC), in accordance with Army Europe (AE) Regulation 350-10 that implements a bilateral U.S.-German agreement providing for the co-use of training facilities.⁷³ The JMTC serves as European Command's lead service for training in Germany and schedules training events for all U.S. service components. In addition to the application of these technical procedures, USAREUR Liaison Office provides notice of all such training events to the German Federal Ministry of Defense in Berlin.

f. Maneuvers

Training outside military facilities is subject to approval of the German Federal Ministry of Defense. This rule applies in the old as well as new German States. Notice of maneuvers by units from all U.S. service components is provided to German authorities by the U.S. Forces Executive Agency for Maneuver (USFEAM), a function performed in the past by V Corps,

⁶⁴ *Hinweise*, *supra* note 24, app. 5/1. Specific guidance for DoD Personnel is contained in the DoD Foreign Clearance Guide. DoD 4500.54-G, *supra* note 28.

⁶⁵ Victory Strike, GlobalSecurity.org, <http://www.globalsecurity.org/military/ops/victory-strike.htm> (last visited June 16, 2009) [hereinafter Victory Strike].

⁶⁶ Professional Experience, *supra* note 56.

⁶⁷ Victory Strike, *supra* note 65.

⁶⁸ Professional Experience, *supra* note 56. The author has personally participated in processing transit requests for the above-referenced movements.

⁶⁹ Approval on file in USAREUR Liaison Office, American Embassy Berlin (copy on file with the USAREUR OJA).

⁷⁰ The Lehnin MOUT Site is located thirty kilometers southwest of Berlin and was constructed originally on a military base of the National People's Army (*Nationale Volksarmee*). It was completed in 1988, shortly before fall of the Berlin Wall. Tactical battle plans discovered after the fall of the Berlin Wall indicate that it was designed specifically to train National People's Army assault troops for an invasion of West Berlin.

⁷¹ Professional Experience, *supra* note 56. The author provided notice of this training to the German Ministry of Defense and personally spoke to the German Commander of the Training Area about this type training.

⁷² *Id.* The author provided notice to the German Ministry of Defense and personally spoke to the U.S. Army battalion commander.

⁷³ Arrangement between the Federal Minister of Defense of the Federal Republic of Germany and the Commander in Chief, United States Army, Europe and Seventh Army on the joint use of military training areas in the Federal Republic of Germany, which are under Bundeswehr or U.S. Army administration (Aug. 2, 1991) (as supplemented) (copy on file with the USAREUR OJA).

G5.⁷⁴ Notice is provided to local German authorities by applying procedures set forth in a 1993 agreement.⁷⁵ Additional notice is provided to the German Federal Ministry of Defense in Berlin. Since the final departure of the Russian Armed Forces from Germany in 1994, the U.S. Forces have conducted very few maneuvers in the new German States. The largest such maneuver, a signal brigade exercise, took place in 2000 in mountainous terrain in Thuringia.⁷⁶ Some other sending States have also maneuvered in the new German States. For example, British Forces' engineers periodically erect a pontoon bridge across the Elbe River in Saxony-Anhalt.⁷⁷

g. Visits to German Military Authorities

The German Federal Ministry of Defense requires most foreign military visitors to follow the Request for Visit Process (*Besuchskontrollverfahren*) as a precondition to any visit to a German military facility in the new German States or Berlin. Requests for DoD personnel are submitted to the German Federal Ministry of Defense by USAREUR Liaison Office or U.S. Defense Attaché Office, U.S. Embassy Berlin.

h. Personnel under Arms

On a few occasions, armed U.S. Forces' personnel have conducted security missions in the new German States, to include guarding shipments of ammunition and equipment. Also, U.S. Forces' security and logistic personnel have provided support for presidential and other state visits. This type activity is subject to German approval and is coordinated closely with German authorities.

Practice Tips

Before undertaking any activity in the new German States or Berlin, DoD personnel and DoD-sponsored civilians are well advised to consult and follow clearance procedures established in the U.S. DoD Foreign Clearance Guide. This is important for several reasons. First, non-compliance may result in an accusation that the U.S. Government has breached its obligations under Article 5 of the Two-plus-Four Treaty. Furthermore, non-compliance may cause interested parties to perceive a violation of German sovereignty—is no secret that U.S. Forces' activity in the new German States and Berlin is monitored. Finally, DoD Personnel who neglect to follow established clearance procedures place themselves in an untenable position whereby German authorities lack a legal basis upon which to recognize their status under the NATO SOFA and Supplementary Agreement. When one considers all the privileges, immunities, and benefits afforded by these cornerstone documents, one can readily envision the potentially serious legal implications, particularly concerning the areas of foreign criminal jurisdiction, claims, customs, and taxation, that a lack of recognized SOFA status co

⁷⁴ Due to USAREUR's ongoing transformation, V Corps, G5 is no longer the USFEAM. As of this writing, the new USFEAM has not been designated.

⁷⁵ Agreement to Implement Paragraph 1 of Article 45 of the Agreement of 3 August 1959, as Amended by the Agreements of 21 October 1971, 18 May 1981 and 18 March 1993, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany (Mar. 18, 1993) (copy on file with the USAREUR OJA).

⁷⁶ E-mail from USAREUR LNO, American Embassy Berlin, to Political Section, American Embassy Berlin (Mar. 16, 2000) (copy on file with the USAREUR OJA).

⁷⁷ Document from British Forces Liaison Office Germany (copy on file with the USAREUR OJA).

Claims Report
U.S. Army Claims Service

Personnel Claims Note

Damage to Rental Cars
*Douglas A. Dribben**

Common claims arising from the use of a rental vehicle by government travelers are those alleging property damage, personal injury, and death.¹ This article presents an updated overview of the processes for handling such claims as they arise worldwide. A key issue is identifying the claimant: is the claimant the rental agency (or an agent of the rental agency) or a third party?

There are three general methods for processing claims arising from use of a rental vehicle. The first method is through the travel card. The second, through the Defense Travel Management Office (DTMO) rental agreement. And the third, through the rental company as a contract claim.

A. Government Travel Card

Currently, the DoD travel card is a Citibank Visa Travel Card.² On 30 November 2008, Citibank replaced Bank of America as the bank providing the Department of Defense (DoD) government travel card. This change, however, does not alter the coverage provided by the card. Visa provides rental coverage benefits to government travelers who “[i]nitiate and complete the entire rental transaction with [an] eligible Visa card, and [d]ecline the vehicle rental company’s collision damage waiver (CDW/LDW) option, or similar provision, if offered by the auto rental company.”³ The coverage is for loss or damage to the rental vehicle only; Visa does not provide third-party coverage.⁴ If the rental agency insists that the traveler purchase the company’s insurance or damage waiver, the government traveler should contact the Visa Benefit Administrator for assistance.⁵ If the government traveler pays for the car rental with a credit card other than the Visa Travel Card, the protection is invalidated.

Visa’s coverage is primary coverage and pays first in any claim.⁶ The traveler must contact the Visa Benefits Administrator in order to trigger the coverage in the event of automobile loss or damage. Contact must be made within forty-five days from the date of loss or damage.⁷ However, Visa does not cover any charges associated with a delay in reporting the incident, such as storage charges.⁸

The coverage applies to most rental vehicles rented for thirty-one consecutive days or less.⁹ This coverage applies to loss or physical damage of the vehicle (but not personal belongings in the vehicle), loss-of-use charges arising from the loss or damage, and reasonable towing charges.¹⁰ However, coverage is not available for vehicles rented in Israel, Jamaica, the Republic of Ireland, or Northern Ireland,¹¹ and excludes antique and luxury cars, vans designed to carry more than eight

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¹ Throughout this article, the terms *government traveler* and *traveler* refer to Department of Defense employees in official travel status.

² Visa Travel Card, http://usa.visa.com/government/payment/travel_card/index.html (last visited Mar. 11, 2009).

³ Auto Rental Collision Damage Waiver, http://usa.visa.com/government/payment/card_benefits/bft_auto_rental.html (last visited Mar. 11, 2009) [hereinafter VISA Auto Rental Collision Damage Waiver Website] (follow “How do I activate this benefit?” hyperlink).

⁴ *Id.* (follow “What is *not* covered?” hyperlink).

⁵ For contact numbers, see App.

⁶ VISA Auto Rental Collision Damage Waiver Website, *supra* note 3 (follow “What type of coverage is this?” hyperlink). Note that Visa pays first only if the “rental is primarily for business purposes.” *Id.*

⁷ *Id.* (follow “How do I file a claim?” hyperlink); *see also* App. (providing contact information).

⁸ *Id.*

⁹ *Id.* (follow “What is covered?” hyperlink).

¹⁰ *Id.*

passengers, cargo vans, trucks, and motorcycles.¹²

Visa also excludes coverage for misuse of the rental vehicle.¹³ The exclusions include off-road operation of the rental vehicle, losses due to hostility, confiscation by authorities, lack of due care by the renter (e.g., leaving the keys in an unattended vehicle), intentional acts by the driver, and driving under the influence of drugs and alcohol.¹⁴

To report an incident, the traveler must contact Visa within the time limits described above, then file by mail or online.¹⁵ Either method requires the traveler to provide a Visa claim form, evidence that the rental was made and paid for with the Visa Travel Card, a scope statement from the renter's unit, the rental agency's accident report form, a police report, an itemized estimate or repair bill, and photographs of the damage.¹⁶ The Visa Benefits Administrator must receive these documents within ninety days of the date of loss or damage.¹⁷

Although most Executive Branch departments use Visa, some use MasterCard. MasterCard provides similar coverage (except it excludes all foreign countries), limits the total liability for damage to the rental vehicle to \$50,000, and includes a few other specific conditions.¹⁸ To report a claim using the U.S. Government MasterCard, call MasterCard's toll-free number within thirty days of the loss or damage, and provide documentary evidence within 180 days.¹⁹ The coverage is for the loss or damage to the rental vehicle only, and does not provide third-party coverage.²⁰

B. DTMO Rental Agreement

The second method of processing the claims is through the Defense Travel Management Office (DTMO) rental agreement (Agreement). This method requires travelers to be proactive. In fact, travelers must use rental agencies that participate in this Agreement, when available.²¹ This Agreement is a master agreement with many major rental companies in the United States and abroad.²² The DTMO was formerly known as the Military Traffic Management Command, and many still refer to the DTMO rental agreement as the "MTMC Agreement." The correct designation is the U.S. Government Car Rental Agreement Number 3, which became effective on 1 October 2002.²³

The Agreement provides coverage for loss or damage to the rental vehicle and third-party liability coverage for property damage, personal injury, or death arising from a collision with a vehicle rented under the terms of the Agreement.²⁴ Paragraph 7 of the Agreement contains certain requirements to trigger its application to a particular rental.²⁵ Once triggered, however, it overrides any contrary provision in the actual rental contract signed by the traveler, except for commercial,

¹¹ *Id.* (follow "What is *not* covered?" hyperlink).

¹² *Id.* (follow "What types of rental vehicles are *not* covered?" hyperlink).

¹³ *Id.* (follow "What is *not* covered?" hyperlink).

¹⁴ *Id.*

¹⁵ VISA Automobile Rental Collision Damage Waiver Claims Service, <https://www.eclaimsline.com/Default.aspx?> (last visited Mar. 11, 2009).

¹⁶ VISA Auto Rental Collision Damage Waiver Website, *supra* note 3 (follow "How do I file a claim?" hyperlink).

¹⁷ *Id.*

¹⁸ MasterCard Commercial Guide to Benefits, http://www.mastercard.com/us/business/en/pdf/Commercial_GTB.pdf (last visited Mar. 11, 2009) [hereinafter MasterCard Benefits Guide].

¹⁹ *Id.*; *see also* App. (providing contact information).

²⁰ *Id.*

²¹ JOINT FEDERAL TRAVEL REGS. para. U3415 B1a (Jan. 1, 2009) [hereinafter JFTR].

²² Domestic & Foreign Rates Tables at the DTMO, <http://www.defensetravel.dod.mil/Sections/Rent.cfm#ccrates> (follow "domestic (CONUS) ceiling rates" hyperlink; then follow "international (OCONUS) ceiling rates" hyperlink) (last visited Mar. 31, 2009) [hereinafter Domestic & Foreign Rates Tables] (providing a list of participating companies). In addition, a list of contacts for those companies may be found at <http://www.sddc.army.mil/sddc/Content/Pub/660/cben660.pdf> (last visited Mar. 11, 2009).

²³ Defense Travel Mgmt. Office, U.S. Government Car Rental Agreement No. 3 (Oct. 1, 2002), *available at* http://www.defensetravel.dod.mil/Docs/CarRentalAgreement_050508.pdf [hereinafter Agreement No. 3].

²⁴ *Id.* para. 9a.

²⁵ *Id.* para. 7.

special, or promotional government programs.²⁶

To trigger the Agreement's coverage, a government traveler must be in official travel status.²⁷ Travelers can authenticate that status by presenting the rental agency a copy of official travel orders or authorization at the time the traveler collects the vehicle.²⁸ Presenting a government travel card (MasterCard or Visa) also authenticates official travel status.²⁹ Since travelers are required to use the commercial travel office and the government travel card under the Travel and Transportation Reform Act of 1998³⁰ absent an exception to policy, the commercial travel office should automatically provide the rental agency with authentication of travel status. Nevertheless, the traveler should always use the government travel card to invoke both the terms of the Agreement and the coverage the card provides.

The Agreement does not apply to fleet rentals.³¹ Units desiring to reserve a fleet of vehicles should consider this important element, and determine whether their needs would allow drivers to rent the required vehicles individually, thereby invoking this coverage.

In return for this coverage, paragraph 2 of the Agreement obligates the Government to pay a government administrative fee (GARS) of five dollars per day on the rental agreements.³² Claims personnel should examine the executed rental agreement in a claim to see if this fee was charged; if so, the Agreement applies even if all other requirements have not been met.³³

Under the Agreement, all government employees age eighteen or older and properly licensed are authorized to operate the rental vehicle without being listed as authorized drivers in the rental agreement.³⁴ While the Agreement specifically covers such non-authorized drivers, the government MasterCard may not cover loss or damage caused by a driver not listed as an authorized driver in the rental agreement.³⁵ Thus, the traveler should specify all potential drivers in the rental agreement as authorized drivers.

The Agreement provides total coverage for loss or damage to the rented vehicle with no limitation.³⁶ This coverage includes towing, administrative costs, loss of use, and other charges arising from the loss or damage.³⁷ The Agreement, however, lists eleven exceptions to coverage. These eleven exceptions refer to improper use of the vehicle (racing, commercial uses, towing or pushing another vehicle, operation across international boundaries without authorization, off-road travel, or training and tactical maneuvers) or improper driver activity (obtaining the vehicle through fraud, intentional damage, operation by a non-authorized driver (as defined in the Agreement), operation by a driver under the influence of alcohol or drugs, or theft of the vehicle when the driver cannot produce the keys or show they were stolen in a robbery).³⁸

The Agreement applies to standard rental cars—generally, economy through full-size classes, with some companies including station wagons, sport utility vehicles, mini- and full-size vans, and pickup trucks.³⁹ The Domestic and Foreign Rates tables list the types of vehicles for each participating rental agency.⁴⁰ Units requiring vehicles not covered should

²⁶ *Id.* para. 1.

²⁷ *See id.* (Agreement No. 3 governs rental of cars only when such rental is authorized by the federal government).

²⁸ *Id.* para. 7.

²⁹ *Id.*

³⁰ Pub. L. No. 105-264, 112 Stat. 2350; *see also* JFTR, *supra* note 21, para. 030301A.

³¹ Telephone Interview with Christine Braswell, Military Surface Deployment & Distrib. Command Rental Car Program Administrator (Oct. 2005).

³² Agreement No. 3, *supra* note 23, para. 2.

³³ The GARS fee is specific to the DTMO agreement; its inclusion incorporates the terms of the agreement. *See id.* para. 9.

³⁴ *Id.* para. 8.

³⁵ *See* MasterCard Benefits Guide, *supra* note 18.

³⁶ *See* Agreement No. 3, *supra* note 23, para. 9b.

³⁷ *Id.*

³⁸ *Id.* (“The above exceptions are not valid where prohibited by state law.”).

³⁹ *See, e.g.,* Defense Travel Mgt. Office, Domestic Rental Car Ceiling Rates (Mar. 1, 2009), *available at* <http://www.defensetravel.dod.mil/Docs/DomesticCeilingRates.pdf>.

⁴⁰ *See* Domestic & Foreign Rates Tables, *supra* note 22.

consider whether using several covered vehicles, with the liability coverage under this Agreement, may better meet their needs than using one or more non-covered vehicles.

Should the vehicle become lost or damaged, the traveler should report the incident to the rental agency immediately, obtain a police report, if available, and complete a rental company accident report.⁴¹ The traveler should remind the rental agency that the coverage provided by the Agreement applies.

The traveler should provide the rental agency with both a valid official mailing address, and telephone number at the time of rental and when notifying the rental agency of loss or damage to the vehicle.⁴² If the rental agency desires to file a claim for loss or damage to the vehicle, they must file the claim with the traveler's office, and not the traveler.⁴³ The Agreement prohibits the rental agency from billing the government traveler's credit card for the loss or damage, and prohibits rental companies outside the United States from charging non-waivable excess fees for loss or damage to a rental vehicle unless those fees are mandated by law.⁴⁴

If the vehicle is lost or damaged due to one of the listed exceptions (for example, if the vehicle is stolen because the traveler left the keys in the ignition), the rental agency must bill the traveler's unit directly, and not the traveler.⁴⁵ If the unit determines that the traveler was within the scope of his employment when the loss or damage occurred, the unit pays the rental agency's claims from the unit temporary duty funds used to pay the travel, using its servicing Defense Finance and Accounting Service.⁴⁶ If the unit determines that the traveler was not acting within the scope of his employment when the loss or damage occurred (for example, if the driver was under the influence of alcohol), then the unit will inform the rental agency, and the rental agency may proceed against the traveler individually.⁴⁷

C. Contract Claim Under the Rental Agreement

Finally, if neither the government travel card benefits nor the DTMO Agreement apply to the rental, the loss or damage of the rental vehicle is processed as a contract claim under the rental contract. The standard commercial rental contract contains a provision making the renter liable for all loss or damage to the vehicle, and Army Regulation (AR) 27-20 excludes claims arising under the provisions of contracts.⁴⁸ The traveler must pay the damage claim and submit a claim for reimbursement on his travel voucher through the servicing claims office for adjudication. With the claim, the traveler must include any police report, traffic citations, witness statements, traveler's statement, itemized bills or estimates of repair, and other supporting documentation.⁴⁹ Should the amount of damage exceed the traveler's government travel card limit, the rental agency may submit its bill, with the same evidence required from the traveler, directly to the servicing finance office.⁵⁰ In either case, the claim should contain contact information for any third party liable for the damage, so that the Government may recoup its loss from that party.⁵¹

D. Third-Party Tort Claims

Third-party tort claims are adjudicated and paid or denied under the appropriate chapter of AR 27-20, *Claims*. Remember, the government travel card program provides no third-party coverage. If the rental was covered under the

⁴¹ See Agreement No. 3, *supra* note 23, para. 11.

⁴² *Id.* para. 3. Note that at the time of rental, the traveler need only provide this information if the rental company requests it. *Id.* As a matter of practice, however, it makes sense to provide this information even absent a request, especially since this information is necessary to process any future claims.

⁴³ *Id.* para. 9c.

⁴⁴ *Id.* para. 2.

⁴⁵ *Id.*

⁴⁶ JFTR, *supra* note 21, ch. 3, para. U3415c(5).

⁴⁷ Agreement No. 3, *supra* note 23, para. 9c.

⁴⁸ U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 2-28h (8 Feb. 2008).

⁴⁹ U.S. DEP'T OF DEFENSE, FINANCIAL MGMT. REG. 7000.14-R, vol. 9, para. 040704 (3 Mar. 2009).

⁵⁰ *Id.* vol. 9, para. 040705.

⁵¹ *Id.*

DTMO Agreement, however, the third party should be directed, upon receipt of a claim against the United States, to file a claim with the rental agency for the benefits provided in paragraph 9a of the Agreement.⁵² That paragraph requires the rental agency to provide \$100,000 per person for claims of death or personal injury, with a maximum of \$300,000 per incident, and \$25,000 property damage per incident.⁵³ Since this coverage is primary and claimants must mitigate their damage, claims offices should inform the claimant that this amount will be deducted from any damages the United States will pay, and should monitor the progress of the third party's claim against the rental agency.

Upon receipt of a third-party claim in an incident covered by the Agreement, the claims office should contact the unit to determine the traveler's scope status, and investigate whether any exceptions to the Agreement apply. The claims office should attempt to obtain a written acknowledgment of insurance coverage from the rental car company, refer the claimant to the rental agency, explain the agreement's coverage, and inform the claimant of his responsibility to mitigate his damages by filing a claim against the rental company. The claims office should also inform the claimant that it will refrain from final action on the claim until the rental company has resolved its portion of the claim. Claims offices should work with the rental agency to ensure any settlement agreement between the third party and the rental agency includes the United States and its driver in the release of liability provisions for the covered amounts.⁵⁴

If a traveler reports to a claims office that he has been sued by a third party for injury or property damage arising from in-scope travel, the claims office should verify the traveler's status with the unit. For claims arising under the Agreement, the claims office should investigate to see if any exclusions apply, determine from the rental agency if any insurance coverage applies, and contact U.S. Army Claims Service (USARCS) for assistance in substituting the United States as the defendant and removing the case to federal district court. The claims office should contact the claimant, inform it of the traveler's status, and request that the claimant voluntarily dismiss the suit. If the traveler was not within the scope of duty when the claim arose, the claims office should so inform the claimant, the traveler, and the traveler's personal insurance company, if any.⁵⁵

Units should note that vehicles rented by government travelers for official travel do not become government property, and are not proper subjects for conducting a financial liability investigation of property loss under AR 735-5, *Policies and Procedures for Property Accountability*.⁵⁶ That regulation applies to leased vehicles, and not to incidental rentals for authorized travel.⁵⁷

E. Collisions with Government Vehicles

Claims by rental agencies for damage to their vehicles caused by collisions with government-owned vehicles (GOVs) are also usually covered by the DTMO Agreement. Under paragraph 9 of the Agreement, the rental agency must maintain liability insurance that "will protect the United States Government and its employees" in claims arising from use of vehicles rented under the Agreement.⁵⁸ Furthermore,

[t]he conditions, restrictions and exclusions of the applicable insurance for any rental shall not be less favorable to the Government and its employees than the coverage afforded under standard automobile liability policies. When more favorable insurance terms are required under applicable state or foreign country law, such terms will apply to the rental.⁵⁹

⁵² Claimants have a responsibility to mitigate their damages. The coverage provided by the Agreement is primary, not secondary. See Agreement No. 3, *supra* note 23, para. 9c; VISA Auto Rental Collision Damage Waiver Website, *supra* note 3 (follow "What type of coverage is this?" hyperlink); MasterCard Benefits Guide, *supra* note 18.

⁵³ Agreement No. 3, *supra* note 23, para. 9c.

⁵⁴ U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 2-62d (21 Mar. 2008).

⁵⁵ *Id.* para. 2-62e.

⁵⁶ See U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (28 Feb. 2005).

⁵⁷ *Id.* glossary (defining Army Property as "all property under Army control"). As the government does not "own" the rented vehicle (title does not pass, but remains with the rental agency), the rental car is not "Army Property" subject to the Financial Liability Investigation process.

⁵⁸ Agreement No. 3, *supra* note 23, para. 9.

⁵⁹ *Id.* para. 9a.

Since the Agreement requires rental companies to protect the Government and not just the renters, the typical state insurance provisions governing claims apply. Most states do not permit an insurer to sue its insured for damages caused by the insured. In the case where a GOV causes damage to the rental vehicle, the rental agency (acting as the insurer for the Government) would not be permitted to claim the damages against its insured (the Government, as owner and employer of the GOV driver).⁶⁰ Claims offices should deny such claims with a reference to paragraph 9a of the Agreement and the applicable state insurance law or regulation.

F. Conclusion

The use of rental vehicles on official travel is a common occurrence in military operations worldwide. Unfortunately, so is loss of or damage to those vehicles. Unit budgets are at risk for claims by rental agencies for damage to the rental vehicles, and the U.S. Treasury is at risk for third party claims. To avoid this unnecessary risk, units should train travelers to be proactive in avoiding potential liability by stressing safe driving, using the government travel card, and renting from a DTMO-participating rental agency. While unit mission may override the claims protection, unit commanders should make the decision with full knowledge of the available coverage.

⁶⁰ *See id.* In essence, the rental agency is the insurer of the government. No state permits an insurer to sue its insured to recover funds paid on a claim by the insured for covered property.

Appendix

Credit Card Provider	Telephones	Web sites
VISA	(800) VISA-911 (847-2911) (410) 581-9994 (collect if outside US)	http://usa.visa.com/government/payment/card_benefits/bft_auto_rental.html Report claims to this number within 45 days of their occurring.
MasterCard	(800) MC-ASSIST (622-7747) 636-722-7111 (collect if outside US)	http://www.mastercard.com/us/business/en/pdf/Commercial_GTB.pdf Report claims to this number within 30 days of their occurring.

Book Reviews

THE DIRTY DOZEN¹

REVIEWED BY MAJOR JONATHAN HIRSCH²

*We are not final because we are infallible, but we are infallible only because we are final.*³

I. Introduction

In *The Dirty Dozen*, legal academician Robert A. Levy,⁴ has teamed up with seasoned litigator William Mellor,⁵ to show the danger of the Supreme Court's commonly fallible and practically final authority. Based on their experience and a completely unscientific opinion survey, the authors examined Supreme Court opinions since 1933, labeling twelve of them the "dirty dozen."⁶ Levy and Mellor contend that these twelve decisions have led to the greatest amount of harm to American society.⁷ The authors make compelling arguments concerning the far reaching impact of each of the decisions from three perspectives: the immediate impact of the case, the impact of the case on coordinate elements of the federal and state governments, and the impact of the case in question on subsequent cases.⁸ They advocate a change to the Supreme Court's method of interpreting the Constitution, giving greater respect to the words in the document.⁹

This review analyzes some of the book's legal and historical analysis. It will show that while the authors succeed in sounding an alarm, they undercut the arguments for their proposed solution in three ways. First, they examine constitutional texts in relative isolation, rather than considering the interpretation of textual portions in light of other articles and amendments. Second, they do not discuss alternate causes for the societal problems they claim the Supreme Court has caused through the case in question. Third, they limit the historical scope of the study too much. This review also presents an alternative thesis. Through considering this alternative thesis, the reader of the *Dirty Dozen* may develop an independent understanding of the role of the Constitution, the law, and the courts in our society.

II. Summary and Background

The authors set out to show that since 1933 the Supreme Court has harmed our society by abandoning the Founding Fathers' concept of social order.¹⁰ Levy and Mellor argue that judicial amendments to the Constitution have resulted in an expanded federal government and contracted individual liberties.¹¹ The authors show how the twelve chosen decisions have each judicially excised words, phrases, clauses, and entire amendments from the Constitution.¹² By following an expansive view of judicial supremacy, the authors show how the Supreme Court has done this.¹³ As they examine each case, the

¹ ROBERT A. LEVY & WILLIAM MELLOR, *THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM* (2008).

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³ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

⁴ LEVY & MELLOR, *supra* note 1, at 301. Mr. Levy is a senior fellow in constitutional studies with the Cato Institute, a policy institute. *Id.*

⁵ *Id.* at 302. Mr. Mellor is President, General Counsel, and co-founder of the Institute for Justice and a participant in the litigation at the Supreme Court of *Kelo v. City of New London*. 545 U.S. 469 (2005).

⁶ LEVY & MELLOR, *supra* note 1, at 5. Before 2005, the authors asked "seventy-four like-minded legal scholars" to name the worst post-1933 cases. *Id.*

⁷ *Id.* The authors, while guided by the poll, did not exclude their personal selections, including post-poll cases. *Id.*

⁸ *Id.* at 10. The authors also excluded decisions explicitly overruled. *Id.*

⁹ *Id.* at 222.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 4.

¹² *Id.* at 5.

¹³ *Id.* at 51.

authors look at the constitutional issue involved, the facts of the case, the Court's reasoning and its flaws, and the continuing impact of the decision involved.¹⁴

The authors devote one chapter of the book to each of the twelve cases. They have divided the cases into two types—those that expand the power of government at all levels, and those that diminish the liberty of individuals.¹⁵ Before diving into a discussion of the cases themselves, the authors present their theory of constitutional interpretation.¹⁶ After full discussion of the selected cases, the authors then go on to comment on the appropriate place of judicial activism under the Constitution.¹⁷ A full copy of the Constitution is provided in an appendix, so readers can see the full text of the provisions being discussed.¹⁸

A. Expanding Government

In the first section of the book, Levy and Mellor show how four Supreme Court decisions and their progeny removed the constitutional shackles from the federal government. The first case, *Comm'r v. Davis*, expanded the power of Congress under Article 1, Section 8, to spend funds for the general welfare, specifically the Social Security Administration and its programs, absent a specific grant of authority anywhere else in the Section.¹⁹ The second decision, *Wickard v. Fillburn*, redefined interstate commerce, allowing Congress to prohibit a vastly expanded set of activities, all of which had been previously outside of Congress' reach.²⁰ In the third case, *Home Building & Loan Ass'n v. Blaisdell*, the Supreme Court authorized Congress and state legislatures to invalidate contracts based on intent to address a social problem.²¹ Finally, in *Whitman v. American Trucking Ass'ns, Inc.*, the Supreme Court failed to halt the power of federal agencies to promulgate regulatory laws under a congressional delegation of authority.²²

B. Diminishing Freedom

The second set of cases examined by Levy and Mellor took away constitutional protections from individuals. The case of *McConnell v. Federal Election Commission* reclassified campaign contributions as quasi-speech, not entitled to protection under the First Amendment.²³ In *United States v. Miller*, the Court threw the individual right to bear arms on the scrap heap by failing to sufficiently support it.²⁴ Next, *Korematsu v. United States* demonstrated how the Executive branch, supported by Congress, can infringe on civil liberties during a perceived national emergency.²⁵ In *Bennis v. Michigan*, the authors showed how the Court has constricted protection against deprivation of property without due process of law through affirming asset forfeiture laws not containing an "innocent" owner defense.²⁶ With the fifth case, *Kelo v. City of New*

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 10. As a starting point, the authors see the Constitution as a document devoted to limiting federal government, enhancing individual rights, and providing a properly balanced set of powers within government at all levels. *Id.*

¹⁷ *Id.* The authors advocate a return to the original understanding and intent of the Constitution. *Id.*

¹⁸ *Id.* at 235.

¹⁹ 301 U.S. 619 (1937); LEVY & MELLOR, *supra* note 1, at 21. The discussion revolves around the views of the General Welfare Clause from Alexander Hamilton and James Madison. *Id.* at 21–22.

²⁰ 317 U.S. 111 (1942); LEVY & MELLOR, *supra* note 1, at 39. While the authors admit some retrenchment during 1995 to 2005, they see the ultimate harm of the case coming to rest with *Gonzales v. Raich*, 545 U.S. 1 (2005), affirming the prohibition of medical marijuana. LEVY & MELLOR, *supra* note 1, at 47.

²¹ 290 U.S. 398 (1934); LEVY & MELLOR, *supra* note 1, at 54. They further show the damage done to the Contracts Clause, Article I, Section 10, in the *Gold Clause Cases*, starting with *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935). LEVY & MELLOR, *supra* note 1, at 51.

²² 531 U.S. 457 (2001); LEVY & MELLOR, *supra* note 1, at 70. The discussion of the nondelegation doctrine starts in 1825. *Id.* at 71.

²³ 540 U.S. 93 (2003); LEVY & MELLOR, *supra* note 1, at 91. The authors also discuss how the door was opened for the regulation of contributions in *Buckley v. Valeo*, 424 U.S. 1 (1976). LEVY & MELLOR, *supra* note 1, at 94.

²⁴ 307 U.S. 174 (1939); LEVY & MELLOR, *supra* note 1, at 111.

²⁵ 323 U.S. 214 (1944); LEVY & MELLOR, *supra* note 1, at 129. This chapter will interest Judge Advocates, as it deals with military decisions that may have corollaries to the current operating environment. The authors believe the case of Jose Padilla is a direct consequence. *Id.* at 141.

²⁶ 516 U.S. 442 (1996); LEVY & MELLOR, *supra* note 1, at 145. This chapter contains one of the more interesting sidelights, a discussion of the historical development of the "guilty property" fiction emanating from the law of admiralty. *Id.*

London, the authors protested against the abuse apparent in the current understanding of the power of eminent domain.²⁷ In *Penn Central Transportation Co. v. New York*, the authors show how the power to restrict property use by regulation has led to the taking of property without just compensation.²⁸ Through *United States v. Carolene Products Co.*, the authors discussed how the Court has allowed the states to infringe on unenumerated rights, including the right to earn a living, through licensing requirements and other methods, effectively destroying the concept of constitutionally protected natural rights.²⁹ Finally, in *Grutter v. Bollinger*, the authors examined how the Court has turned the right to equal protection of the law on its head through the prism of racial preferences.³⁰

In the afterword, Levy and Mellor give an impassioned plea for a particular type of judicial activism they call “judicial engagement” to restore the Constitution to the framers’ understanding of the document.³¹ They propose to achieve this through appointment of “textualist” justices.³² As postscripts, the authors briefly discuss two additional cases. First, they discuss the controversial *Roe v. Wade*³³ as modified by *Planned Parenthood v. Casey*.³⁴ They forgive the Supreme Court for engaging in judicial legislation by concluding the case resulted in the same compromise the states would have arrived at anyway.³⁵ Second, they discuss *Bush v. Gore*, concluding that decision was not only legally correct, but also a proper example of judicial engagement.³⁶

III. Analysis

Levy and Mellor use questionable methods to make their points. First, they frame the constitutional issues, discuss the facts, and show the faults of the Court’s reasoning from only one point of view, favoring a government of strictly limited and enumerated powers.³⁷ In certain cases, they selectively rely on facts developed by their internal sources to show the continuing harm being done to society by these decisions.³⁸ In other cases, they parade the potential harms which could occur if the reasoning in the Court’s decision were followed to its logical end.³⁹ This style weakens the overall impact of the book by showing bias and using slippery slope arguments.

In one chapter, the authors ignore a key provision of the Constitution. While discussing the General Welfare Clause, the authors use an ellipsis for the phrase “to pay the Debts.”⁴⁰ Like the rest of the General Welfare Clause, the Debt Payment provision is not included in the enumerated powers appearing later.⁴¹ Yet, Congress still has, and must have, the power to

²⁷ 545 U.S. 469 (2005); LEVY & MELLOR, *supra* note 1, at 159. The authors use the progressive change of the meaning of the Takings Clause, being read as shifting from “public use” to “public purpose” under *Berman v. Parker*, 348 U.S. 26 (1954), as background. LEVY & MELLOR, *supra* note 1, at 157.

²⁸ 438 U.S. 104 (1978); LEVY & MELLOR, *supra* note 1, at 170. As the basis for their discussion, the authors assert the definition of property without providing authority. *Id.* at 169. They do not take into consideration the role of the sovereign authority of each state in determining the exact nature of “property.”

²⁹ 304 U.S. 144 (1938); LEVY & MELLOR, *supra* note 1, at 189. In this chapter, the authors finally mention the Civil War Amendments, the effect of the *Slaughter-House Cases*, 83 U.S. 36 (1873), and how the Court has since attempted to mitigate that decision. LEVY & MELLOR, *supra* note 1, at 187.

³⁰ 539 U.S. 306 (2003). LEVY & MELLOR, *supra* note 1, at 201. The authors conclude the effort to apply strict scrutiny has resulted in a system that continues to allow racial classification and preferences, as long as they are hidden within some other stated aim. *Id.* at 212.

³¹ *Id.* at 215.

³² *Id.* The authors further explain their position by showing the difference between originalists, judges who interpret the Constitution as it was understood by the framers, and textualists, who will interpret ambiguous terms with the original framework of the Constitution as their guide. *Id.* at 216. Textualists tend to employ a more holistic approach, and are the direct opposite of the living Constitution theorists. *Id.* at 217.

³³ 410 U.S. 113 (1973).

³⁴ 505 U.S. 833 (1992); LEVY & MELLOR, *supra* note 1, at 225.

³⁵ LEVY & MELLOR, *supra* note 1, at 227.

³⁶ 531 U.S. 98 (2000); LEVY & MELLOR, *supra* note 1, at 229. The authors also examined the Court’s basis for jurisdiction, under the Fourteenth Amendment. *Id.* at 229.

³⁷ *Id.* at 11. The authors completely ignore the ability of the relatively unlimited authority of full parliamentary democracies to operate effectively and still protect the electorate’s liberty interest.

³⁸ *E.g., id.* at 35, 84. The authors quote from Roger Pilon, the vice-president for legal affairs at the Cato Institute in his testimony before Congress. *Id.* at 262 (quoting Roger Pilon, Vice President for Legal Affairs, Cato Institute).

³⁹ *E.g., id.* at 45, 63, 82, 106, 140, 152, 179, 196, 212.

⁴⁰ Compare *id.* at 30, with *id.* at 238.

⁴¹ U.S. CONST. art I, § 8, cl. 1.

make expenditures to pay national debts. The authors engage in exactly the type of intellectual misconduct they accuse the Supreme Court of performing.

While the authors use consistent analysis throughout each chapter, they give almost no consideration to the effect of the Civil War and the Wartime Amendments on the structure of the Constitution and government. The effect of these events forms a middle thesis between textualists and living Constitution theorists, arguing the Fourteenth Amendment represented a revolutionary change in the structure of government.⁴² In discussing the Commerce Clause,⁴³ for example, the authors bemoan the expansion of Congressional authority since the New Deal.⁴⁴ They examine the words of the Commerce Clause in isolation.⁴⁵ The authors do not consider whether the grant of authority in the Fourteenth Amendment, to enforce provisions of that Amendment through appropriate legislation, increased Congress' authority to regulate interstate commerce.⁴⁶ If the protection of laws under the Commerce Clause are to be applied equally to all citizens, and Congress may pass laws to enforce that equality, then it follows that congressional authority extends beyond the purely interstate into the intrastate. The authors only briefly mention the fundamental shift in the relationship between federal and state government in the afterword, while discussing *Bush v. Gore*.⁴⁷ Had they applied this concept earlier, they may have granted greater respect to the majority opinions in the cases expanding the role of government, presenting a more balanced work.

The scope of the study ignores many significant decisions. The authors showed a tendency to concentrate on those decisions addressing the area of property rights or economic activity. Out of the twelve cases, Levy and Mellor examined just one case involving the right of free speech, but only in the context of the use of money as an instrument of that speech.⁴⁸ Also, the authors examine one case in the criminal law area, but only through the lens of government interference in property rights through asset forfeiture.⁴⁹

When examining gun control, the authors imply state imposed gun control has increased inner-city lawlessness without examining alternate causes.⁵⁰ The authors completely ignore cases involving criminal law and police procedure. They do not address the impact of the Exclusionary Rule in *Mapp v. Ohio*,⁵¹ the expansion of the zone of reasonable privacy granted in *Katz v. United States*⁵² and its progeny, and the wholly prophylactic application of the principle against self-incrimination in *Miranda v. Arizona*.⁵³ These cases, taken together, increase the liberty interests of all citizens with respect to the state. Increasing criminal activity can just as easily be explained as resulting from the abuse by the few of this increased liberty as coming from state restrictions on household weapons.⁵⁴

In discussing unenumerated rights, the authors again argue for giving the Constitution its "original understanding" without looking at how the words in the document play upon each other across Articles and Amendments.⁵⁵ If the authors

⁴² Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 13 (1987).

⁴³ U.S. CONST. art I, § 8, cl. 3.

⁴⁴ LEVY & MELLOR, *supra* note 1, at 48–49.

⁴⁵ *Id.* at 38–39.

⁴⁶ U.S. CONST. amend. XIV, § 5. See generally Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971 (2008). In Part I of his article, Blocher elaborates the point that "constitutional amendments can, and usually do, trump provisions of the original constitutional text, even though they rarely identify the specific section of the Constitution that they alter." *Id.* at 978.

⁴⁷ LEVY & MELLOR, *supra* note 1, at 231.

⁴⁸ *Id.* at 90.

⁴⁹ *Id.* at 142.

⁵⁰ *Id.* at 124. The authors cited crime statistics from the District of Columbia to support this proposition. *Id.* at 125.

⁵¹ 367 U.S. 643 (1961).

⁵² 389 U.S. 347 (1967).

⁵³ 384 U.S. 436 (1966).

⁵⁴ This revolution in criminal procedure has had a profound impact on public security. The creation of these judicial remedies has up to this point generally escaped criticism. Donald A. Dripps, *The Warren Court Criminal Justice Revolution*, 3 OHIO ST. J. CRIM. L. 125, 126–27 (Fall 2005). Since the authors measured cases by their effect on law and public policy by expanding government powers or imperiling individual liberties, and these cases tend to expand individual liberties, they do not fit in the analytical scheme. LEVY & MELLOR, *supra* note 1, at 5. Because they do not fit into the analytical scheme, the authors do not examine the effects of those cases. The increase in crime can be attributed to any number of alternate causes, including, for example, more acquittals due to police adjusting to the new restrictions leading to even bolder criminals. Pointing to one cause, gun control, ignores the complexity of criminal behavior.

⁵⁵ LEVY & MELLOR, *supra* note 1, at 216.

gave the Fourteenth Amendment its full effect upon the other provisions of the Constitution, the rest of the Constitution looks very different.⁵⁶ The authors agree the Fourteenth Amendment applied rights specified in the Bill of Rights against the states.⁵⁷ The authors also correctly identify *The Slaughter-House Cases* as eviscerating the Privileges and Immunities Clause of the same Amendment.⁵⁸ But the authors stop there. If the authors had extended their own arguments further, they would have discovered the flaw.⁵⁹ They do not examine the implication of the Fourteenth Amendment against, for example, the various rights of the Ninth Amendment. If the Fourteenth Amendment is seen as affecting all other words in the Constitution, a reasonable interpretation could be that the clauses of the Fourteenth Amendment specify the natural rights of the Ninth Amendment. A list of examples can be looked at as either a non-exclusive or exclusive list. In this case, since Congress could have included as many specific rights as needed in the Fourteenth Amendment, one could conclude this is now the exclusive list of our natural rights.

Going further down the same analysis, the authors do not consider whether *Wickard v. Fillburn*⁶⁰ could be understood as the Court finally coming to grips with the effect of the Due Process and Equal Protection clauses on the Commerce Clause, increasing Congress' enforcement powers. This is especially the case in light of Congress' explicit power under the Fourteenth Amendment to pass legislation to enforce those provisions.

IV. Conclusion

This volume, while a provocative discussion of general interest, will be of limited interest to Judge Advocates. The chapter concerning *Korematsu* can certainly inform military attorneys in the field of the dangers of internment and the potential abuse of executive authority. In some respects, the volume is already out of date, as *District of Columbia v. Heller*⁶¹ has overruled one of the dirty dozen cases, *United States v. Miller*.⁶² As well, in the area of greatest interest to Judge Advocates, the balance between civil liberties and national security, the cases of *Hamdan v. Rumsfeld*⁶³ and *Boumediene v. Bush*⁶⁴ were decided after this book was published.

As commentary on Constitutional Law, the work is also of limited value. The arbitrary cut-off of 1933 limits the way the authors discuss cause and effect. They could have included a full criticism of the judicial doctrines of *stare decisis* and judicial supremacy.⁶⁵ Justice Jackson observed the Supreme Court, if subjected to a super-appellate review, would no doubt be reversed.⁶⁶ To their credit, the writers of *The Dirty Dozen* do not advocate for the extreme end of their analysis, namely subjecting the Supreme Court to this super-appellate review and overruling the Supreme Court by amendment,⁶⁷ stripping it of the ability to judicially amend the Constitution in the future. This ultimately demonstrates the authors avoided legal extremism, keeping themselves within our legal tradition.

⁵⁶ See generally Blocher, *supra* note 46.

⁵⁷ LEVY & MELLOR, *supra* note 1, at 186.

⁵⁸ *Id.* The authors acknowledge the effect of this decision. They also acknowledge many subsequent decisions are an attempt by the Court to use the Equal Protection and Due Process clauses of the Fourteenth Amendment to counteract *The Slaughter-House Cases*. *Id.*

⁵⁹ The authors miss analyzing the fundamental nature of jural rights. When Congress is given a power by Constitutional amendment, it creates liabilities for all citizens, thus diminishing individual rights. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Legal Reasoning*, 23 YALE L.J. 16, 46 (1913). In Hohfeld's analysis, when one person has a right, such as a right to speak, another person has a liability that is correlative to it, such as a liability of silence. *Id.* If this analysis is applied to constitutional rights, then every right granted by all of us imposes a correlative liability upon all of us to allow for the exercise of that right. If one person has a right of equal protection, another has a liability to give up any privilege that would interfere with that equality of protection. *Id.* Without specifically granted privileges and immunities, the right of equal protection strips individuals of many perceived fundamental rights.

⁶⁰ 317 U.S. 111 (1942).

⁶¹ 128 S. Ct. 2783 (2008) (Second Amendment right for an individual to bear arms.).

⁶² 307 U.S. 174 (1939).

⁶³ 548 U.S. 557 (2006).

⁶⁴ 128 S. Ct. 2229 (2008) (holding that those held by Executive at Guantanamo Bay entitled to request habeas corpus review in Article III courts).

⁶⁵ See generally MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 29 (Regnery Publishing 2005).

⁶⁶ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

⁶⁷ *E.g.*, U.S. CONST. amend. XI (overruling *Chisolm v. Georgia*, 2 U.S. 419 (1793)).

HOW JUDGES THINK¹

REVIEWED BY MAJOR CASEY Z. THOMAS²

I. Opening Statement

For some lawyers, panic ensues at the mere thought of delving into *any* of the scores of books, legal opinions, or other works by the legendary Judge Richard A. Posner,³ “one of the intellectual giants of the legal profession.”⁴ However, no terror should result from anticipating or reading Posner’s newest comprehensive and aggressive work, *How Judges Think*. This book explores myriad internal and external factors and theories that “account [for] how judges actually arrive at their decisions in nonroutine cases”⁵ when “a judge is a legislator.”⁶ The intriguingly scathing book, though not faultless, has significant educational value and usefulness to the litigator, academic, and Judge Advocate alike.⁷

This review briefly highlights the main tenets of Posner’s ever-continuing “pragmatism”⁸ crusade, the positives and relevance of the book, and a few evidentiary weaknesses. Those who dare to explore this robust, persuasive volume must somewhat “earn” the education contained therein, due primarily to Posner’s particular writing style that can be challenging and tedious to navigate. In the end, however, the unique and enlightening journey is one well worth taking to better appreciate the complex and intriguing subject of judicial decision making and to reconcile “how unrealistic . . . the conceptions [are] of the judge held by most people, including practicing lawyers and eminent law professors”⁹

II. Posner’s Case-in-Chief

The remarkably prolific¹⁰ Richard A. Posner is no stranger to controversy,¹¹ “contentious opinions,”¹² or piercing intellectual wrestling matches. In his newest literary installment, he yet again invites a “firestorm of criticism”¹³ and a good old-fashioned academic brawl. In this book, Posner presents his argument in three main phases, and although he generally limits his analysis of decision-making to federal appellate judges and Supreme Court Justices, his “pragmatism”¹⁴ mantra is

¹ RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

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³ About Posner, <http://home.uchicago.edu/~rposner/> (last visited Apr. 16, 2009) (information on Posner including curriculum vitae, biography, published works, etc.).

⁴ Philip E. Johnson, *The Limits of Pragmatism*, FIRST THINGS: THE JOURNAL OF RELIGION, CULTURE, AND PUBLIC LIFE, Jan. 1996, at 52 (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1996)).

⁵ POSNER, *supra* note 1, at 19.

⁶ *Id.* at 15. Not everyone agrees with Posner or the celebrated Justice Benjamin N. Cardozo that “judge-made law [is] one of the existing realities of life.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

⁷ Intriguing because Posner does not hesitate to sharply criticize other judges even though he is a sitting judge.

⁸ Posner describes a pragmatic judge as one who “assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it.” POSNER, *supra* note 1, at 13.

⁹ *Id.* at 2.

¹⁰ Posner has authored more than thirty books, over 300 articles, and over 1900 judicial opinions. Larissa Macfarquhar, *The Bench Burner*, NEW YORKER, Dec. 10, 2001, at 78. Fascinatingly, the range of book topics includes constitutional matters, sex, antitrust law, aging, the 2000 U.S. presidential elections, the impeachment of President Clinton, and intelligence law, among others. Posner is so captivating to some people that a special website was created in his honor that catalogues his thousands of legal opinions in searchable form. Program on Law & Techno., Columbia Sch. of Law, Project Posner, <http://www.projectposner.org> (last visited Dec. 11, 2008).

¹¹ For instance, according to one commentator, Posner intimates in his book *Sex and Reason* that “high heels were considered sexy because they suggested that a woman was incapable of running away from her spouse . . . [and] that normal men would rape women and seduce children if there were no laws against it.” Macfarquhar, *supra* note 10, at 81.

¹² *Id.* at 78.

¹³ Michael Johnson, Note, *Posner on the Uses and Disadvantages of Precedents for Law*, 22 REV. LITIG. 143, 143 (2003).

¹⁴ Macfarquhar defines Posner’s “pragmatism” as focus by the judge on “what effects a law is likely to produce.” Macfarquhar, *supra* note 10, at 87. Peter Blum avers that Posner’s “pragmatism” mandates that “lawyers . . . be more concerned with whether the [legal] rule makes sense as a matter of public policy.” Peter Blum, Posner’s *Overcoming Law*: “Muddling Through” the Hard Cases, 61 BROOK L. REV. 129, 130 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1996)).

nevertheless omnipresent: “[L]egal uncertainty, which creates an open area in which the orthodox (the legalist) methods of analysis yield unsatisfactory and sometimes no conclusions, thereby allowing or even dictating that emotion, personality, policy intuitions, ideology, politics, background, and experience will determine a judge’s decision.”¹⁵

In the first section of his book Posner attacks, with notable precision, nine prominent judicial behavior theories that he contends “are overstated and incomplete.”¹⁶ Thereafter, he tinkers with and redefines the deficient theories and then masterfully melds them together using his pragmatism glue, resulting in what he claims is a “cogent, unified, realistic, and appropriately eclectic account”¹⁷ of judicial decision making. This section also includes a foray into how a judge is “a participant in [the] labor market”¹⁸ and also how judges, when analyzing the factors in a case, “blend the two inquiries, the legalist and the legislative,”¹⁹ yielding, according to Posner, an unavoidably consequence-and-policy-based decision from the bench in difficult cases.

In the second segment of the book, Posner explores a number of purported internal and external constraints on judges to support his argument that there are shortcomings in the “legalist”²⁰ theory and also to explain how those constraints²¹ on judges coalesce to yield unavoidably pragmatic judging. We also witness Posner “write not to defend himself, but to be accused”²² when he fiercely accuses law professors of “hav[ing] no clue as to how to help a court decide a case.”²³ In this section, Posner endeavors to prove that a whole host of intangible factors affect the judgment process and that judges are not duty-bound to a predetermined decision based solely on black letter law and technical legal rules.²⁴

In the last section of the book, with machete-like candor, Posner admonishes the Supreme Court and posits “that the Justices are interested in . . . mainly political consequences, though they are reluctant to acknowledge this, perhaps even to themselves.”²⁵ He then scrutinizes a number of Supreme Court decisions to attempt to reconcile his beloved pragmatism with legal decision-making at the highest level. He also tackles broader constitutional theories that ostensibly operate in the Supreme Court, but nevertheless asserts that “politically like-minded judges usually vote the same way despite their different judicial philosophies.”²⁶ Interestingly in this section he also critically attends to what he calls “judicial cosmopolitanism”: citing foreign legal decisions in Supreme Court cases.²⁷ He forcefully declares that “[c]iting foreign decisions is an effort to further mystify the adjudicative process, as well as to disguise the political character of the decisions at the heart of the Supreme Court’s constitutional jurisprudence.”²⁸

¹⁵ POSNER, *supra* note 1, at 11. Posner has been championing “Pragmatism” for quite some time: “For some years now . . . I have been arguing that pragmatism is the best description of the American judicial ethos.” RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 1 (2003).

¹⁶ POSNER, *supra* note 1, at 19.

¹⁷ *Id.*

¹⁸ *Id.* at 57. Posner is known as the father of the law and economics movement that caused “a general shift in much of the legal thought in the United States.” Johnson, *supra* note 13, at 143.

¹⁹ POSNER, *supra* note 1, at 84.

²⁰ Posner defines “the legalist tools . . . [as] those most hallowed ones of reasoning by analogy and strictly interpreting statutes and constitutions” *Id.* at 12.

²¹ Constraints such as the electorate, judicial independence, rules and standards, tenure and salary, experience, ideology, the judicial appointment process, and dissent aversion, among others.

²² Macfarquhar, *supra* note 10, at 78. Posner is also not afraid of a “real-time” fight because he partakes in debates on the web. Debate between Posner and Randy Kozel, *Are Law Reviews Really Rubbish?*, LEGAL AFFAIRS, Nov. 15, 2004, http://legalaffairs.org/webexclusive/debateclub_posner1104.msp.

²³ POSNER, *supra* note 1, at 227.

²⁴ Posner contends “that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines.” *Id.* at 7.

²⁵ *Id.* at 375.

²⁶ *Id.* at 346. The Justices’ political bents and their judicial mentalities thus trump legal theory, Posner argues.

²⁷ *Id.* at 353.

²⁸ *Id.* at 350. Thus, even those of the international law persuasion can enter the fray, who may take issue with Posner’s contention that “[t]here are grave objections to citing foreign decisions as authority even in the weak sense of the word.” *Id.* at 349.

III. The Merit & Relevance of Posner's Case

Notwithstanding the raging academic battle over divergent legal theories of judicial behavior and Posner's "uproarious pugilism and desire to shock,"²⁹ there are tangible educational and practical lessons to be gleaned from the book for the practitioner, academic, and military lawyer.

For the litigator and Judge Advocate, Posner supplies useful insights regarding argument to a court, including the contention that "[r]arely is it effective advocacy to try to convince the judges that the case law compels them to rule in one's favor."³⁰ He also cautions lawyers not "to think that they can win by rubbing the judges' noses in the precedents."³¹ This sage advocacy advice is quite profound, given that our entire legal system is largely built on the acute application of precedent that Posner now contends does not mandate a particular result but is merely a *factor* in a court's decision. Litigators armed with this knowledge may decide to reconsider how they approach a case, or to refine a particular argument, because they now understand—or at least consider—that if "a judge does bend a rule to avoid an awful result, he does not feel that he is engaging in civil disobedience; he thinks the *rule does not really compel* the awful result."³² Thus, heeding Posner's cues, counsel should cautiously consider to what degree precedent should be employed in order to best influence the judiciary.

Posner further urges practitioners to "understand what makes judges tick,"³³ and that the "most effective method [of argument] . . . is to identify the purpose behind the relevant legal principle and then show how that purpose would be furthered by a decision in favor of the advocate's position."³⁴ To analyze this concept by borrowing war-fighter analysis from the military: counsel must "maintain[] focus on fighting the enemy and not the plan."³⁵ Stated another way, if judges' decisions are truly "influenced by temperament, emotion, experience, personal background, and ideology"³⁶ then a litigator is most likely to be successful by decisively identifying, considering and addressing those influence factors that impact the judge's (the "enemy's") decision—which transcends the rote application of precedent (the "plan"). In other words, counsel should "fight" the legal battle using *all* factors that affect the judge and not be unduly wedded solely to precedent. In summation, litigators should read this book to obtain the valuable practice pointers for courtroom "combat"³⁷ contained therein.

How Judges Think is also relevant to the academic, historian, constitutional scholar, law student or any potential reader that has even a scintilla of curiosity about the judicial mentality. The scholarly reader or theorist may be compelled to action—or *at least* compelled to thought—in response to the vigorous contents of the book, including innumerable philosophies, wide-ranging contentions, pointed arguments, various theoretic nuances, and even provocative claims.³⁸ Those readers who are strictly rule or precedent minded may find themselves particularly fueled by fervent disagreement with

²⁹ Macfarquhar, *supra* note 10, at 80.

³⁰ POSNER, *supra* note 1, at 220. Even though Posner limits his analysis to appellate judges, it logically follows that his advice to argue more than just precedent is also appropriate at the trial court level. Accordingly, trial attorneys could safely argue more than just precedent at trial because the trial judge is unlikely to be overturned for considering the same factors that Posner contends the appellate courts consider.

³¹ *Id.*

³² *Id.* at 213 (emphasis added).

³³ *Id.* at 218. Also, "[judges] want to understand the real stakes in a case . . . They want the lawyers to help them dig below the semantic surface." *Id.* at 228.

³⁴ *Id.* at 220.

³⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para 11-14 (12 Oct. 2006). This necessary analysis of the judge is akin to developing the "battlespace—[an] analytical methodology employed to reduce uncertainties concerning the enemy [and] environment." JOINT ARMY REG. 115-10, AIR FORCE JOINT INSTR. 15-157, WEATHER SUPPORT FOR THE U.S. ARMY, SECTION II (TERMS) (31 July 1996). Consider also the Military Decision Making Process (MDMP): "develop[ing] a personal and in-depth understanding of the enemy operational environment." U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para 5-13 (27 Feb. 2008).

³⁶ POSNER, *supra* note 1, at 174. Additionally, if counsel can successfully identify the individual judge's "zone of reasonableness," which is "the area within which [the judge] has discretion to decide a case either way without disgracing himself," then counsel is more likely to be victorious, according to Posner. *Id.* at 86.

³⁷ Posner proclaims that law schools bear primary responsibility to prepare lawyers for courtroom "battle." *Id.* at 377. He argues that "[law] students are not taught how to present a case to a judge in a way that will strike a responsive chord." *Id.*

³⁸ See for example Chapter 11, where Posner assails Supreme Court Justice Breyer regarding Breyer's book, *Active Liberty*. *Id.* at 324–46.

Posner and his assertions, among others, that “judicial deliberation is overrated”³⁹ and that “[b]ecause behavior is motivated by desire, we must consider what judges want.”⁴⁰

Posner’s weighty and enormously comprehensive arguments⁴¹ are not flawless. Because Posner “is not, in the end, very interested in the sort of prudent rigor that produces water-tight logic,”⁴² immense opportunity exists for further intellectual scrimmage with Posner for those academics so inclined.⁴³ Consider as well that he “is so influential, his description of the law [and economics] has become self-fulfilling: these days, many judges think like economists because Posner told them to.”⁴⁴ Posner’s unabashed success with his previous hard-fought crusade, that of connecting law and economics, raises the question whether his pragmatism campaign will ultimately receive the same high glory.

IV. Opposing Arguments

Setting any trial practice wisdom to be gained or academic spark to be lit aside, the book has notable weaknesses.

First, Posner’s writing style can be tremendously intricate. Arguably, it is an impossible task to convert lackluster legal theory into exhilarating and enjoyable prose, but Posner’s sentence construction appears only to exacerbate the difficulty. Take, for example, the following passage:

Both the most able and the least able appellate judges are likely to stretch the zone—the most able because they will be quick to see, behind the general statement of a rule, the rule’s purpose and context, which limit the extent to which the general statement should control a new case; the least able because of difficulty in understanding the orthodox materials and a resulting susceptibility to emotional appeals by counsel, or, what is closely related, difficulty in grasping the abstract virtues of the systemic considerations that limit idiosyncratic judging, such as the value of the law’s being predictable.⁴⁵

While a reader can eventually parse through this language to glean Posner’s valuable point, it is an affirmative, deliberate, and time-consuming process that requires focused thought and energy. Thankfully, a reader does not need to labor in this manner throughout the entire book because his prose is this arduous only in certain places; however, any prospective reader must recognize, understand and appreciate that such “challenges” are simply inherent in earning the Posner education.⁴⁶

Second, Posner appears to simply decree certain “truths” that he thereafter fails to sufficiently support. For instance, Posner claims that judges are internally restrained in their “legislative” behavior because being “regarded as politicians in robes . . . would deny them a major satisfaction of a judgeship.”⁴⁷ This is a seemingly logical premise; however, he offers no tangible evidence or analysis to show how desire to be “good judges” actually impacted decisions in real cases.⁴⁸ Moreover,

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 11.

⁴¹ One could reasonably argue that Posner’s nearly 400 pages of excruciatingly detailed analysis are overly comprehensive. Alas, those readers yearning to actually engage Posner better be prepared!

⁴² Macfarquhar, *supra* note 10, at 78.

⁴³ There are already “critics, who claim that [Posner’s] adjudicative methods are not in fact as pragmatic as he claims they are.” Johnson, *supra* note 13, at 143. Others “have criticized Judge Posner’s everyday pragmatism as too lacking in content to guide meaningful decision making.” John F. Manning, Comment, *Twenty-Five Years of Richard Posner, The Judge: Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1169 (2007).

⁴⁴ Macfarquhar, *supra* note 10, at 87.

⁴⁵ POSNER, *supra* note 1, at 86–87.

⁴⁶ One reader was possibly unaware of Posner’s style before she read the book: “[W]hat a boring book this was It was like a lecture on paper.” Posting of Robin H. Rasmussen to Amazon.com, http://www.amazon.com/review/product/0674028201/ref=cm_cr_pr_viewpnt_sr_2?%5Fencoding=UTF8&filterBy=addTwoStar (May 28, 2008).

⁴⁷ POSNER, *supra* note 1, at 61. “[J]udges care about their reputation . . . and about being good judges.” *Id.* at 204. The notable lack of evidence regarding the professed restraints on judges’ decisions severely undercuts Posner’s ultimate (but tempered) argument that judges are not overt pragmatists, but are “constrained pragmatist[s].” *Id.* at 13. If desire to be a “good judge” truly has a dampening effect on the degree of pragmatism a judge may employ, then Posner should fully substantiate his claim via analysis of real cases. Posner merely declares that judges are “boxed in . . . by norms” but thereafter wholly fails to support this and other forceful edicts with tangible, relevant, “admissible” evidence, as it were. *Id.*

⁴⁸ And Posner meticulously analyzes or references approximately forty-eight cases.

Posner declares that he “draws heavily . . . on the *psychology* of cognition and emotion” to prove that pragmatism is a valid, comprehensive theory.⁴⁹ Nevertheless, Posner goes to great lengths, particularly during his contemptuous assault on the Supreme Court, to attack the technical logic and rationale of the judicial decisions, not the psychology, cognition or emotion that he claims may have influenced the Court’s conclusions.⁵⁰ It would be a difficult task to gather the empirical proof of the impact of Posner’s intangibles, but the proof is nonetheless necessary to properly buttress his claims.⁵¹

These weaknesses, however, do not detract greatly from the overall effectiveness and usefulness of the book and a brave reader has much to gain by tackling it.

VI. Closing Argument

How Judges Think is a realistic, remarkable, persuasive and praiseworthy installment in the enduring pragmatism campaign championed by the “freakish[ly] productiv[e]”⁵² Judge Richard A. Posner. Any Posner-induced panic should be muscled-through because this book is acutely useful to the practitioner and also exhilarating to the academic. Moreover, readers get to personally observe the spitfire judge preserve his status as one of the “most mercilessly seditious legal theorists of his generation,”⁵³ making for an interesting read with the added benefit of gaining some wisdom during the journey. Posner’s writing style makes the book difficult at points, but the difficulty can and should be overcome by those who dare. Additionally, although the empirical support for Posner’s claims is not pristine, those resultant evidentiary gaps provide opportunity for critics to continue to engage Posner in worthwhile intellectual skirmishes that eventually lead to increased knowledge.

Ultimately, Posner contends that judges, in the real world, must weigh consequences:

The weighting is the result of a complicated interaction—mysterious, personal to every judge—of modes of reasoning (analysis, intuition, emotion, common sense, judgment), political and ideological inclinations, personality traits, other personal characteristics, personal and professional experiences, and the constraints implicit in the rules of the judicial “game.”⁵⁴

There is a reason that “Posner naturally occupies a position at the forefront of legal debates.”⁵⁵ In this circumstance, courageous readers ought to be at the forefront *with* Posner to better appreciate and possibly demystify judicial decision-making.

⁴⁹ POSNER, *supra* note 1, at 7 (emphasis added).

⁵⁰ Despite significant analysis of many judicial opinions, Posner never points to specific cases where the judge’s purported psychology, cognition, or emotion tangibly influenced the outcome.

⁵¹ Interestingly, Posner blames law professors for the lack of empirical data on judicial decision-making. POSNER, *supra* note 1, at 218.

⁵² Macfarquhar, *supra* note 10, at 78.

⁵³ *Id.* Posner attacks, among others, Harvard and Yale law professors, the “cream of the current crop” whose “amicus curiae briefs are conventional in approach, poorly reasoned, and devoid of constructive content.” POSNER, *supra* note 1, at 227. “Can’t a law professor at Harvard or Yale write a brief?” *Id.* at 229.

⁵⁴ *Id.* at 376.

⁵⁵ Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688 (2003) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)).

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (2008—September 2009) (<http://www.jagenet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
WARRANT OFFICER COURSES		
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09

ENLISTED COURSES		
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F28H	2010 Hawaii Income Tax CLE Course	11 – 15 Jan 10
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
CONTRACT AND FISCAL LAW		
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
CRIMINAL LAW		
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	10 – 14 Aug 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (040)	3 Aug – 2 Oct 09
0258	Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)

BOLT	BOLT (040) BOLT (040)	27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
900B	Reserve Lawyer Course (020)	21 – 25 Sep 09
850T	SJA/E-Law Course (020)	20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
627S	Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (040)	14 – 18 Sep 09 (San Diego)
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
03RF	Legalman Accession Course (030)	11 May – 24 Jul 09
4040	Paralegal Research & Writing (020)	13 – 24 Jul 09 (San Diego)
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 10 6 – 9 Apr 10 6 – 9 Jul 10
NA	Legal Specialist Course (040)	26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (080) Legal Officer Course (090)	13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (060) Legal Clerk Course (070))	13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (060) Senior Officer Course (070)	10 – 14 Aug 09 14 – 18 Sep 09

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (070) Legal Officer Course (080)	20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (070) Legal Clerk Course (080)	27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (080)	14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI: American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program

The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

- IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080
- LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227
- LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837
- MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100
- NCDA: National College of District Attorneys
University of South Carolina
1600 Hampton Street, Suite 414
Columbia, SC 29208
(803) 705-5095
- NDAA: National District Attorneys Association
National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(703) 549-9222
- NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482
- NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
- NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is ***NLT 2400, 1 November 2009***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to submit Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.
- AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.
- AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

- A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).
- AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).
- AD A326002 Wills Guide, JA-262 (1997).
- AD A346757 Family Law Guide, JA 263 (1998).
- AD A384376 Consumer Law Deskbook, JA 265 (2004).
- AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).
- AD A360700 Tax Information Series, JA 269 (2002).
- AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
- AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).
- AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).
- AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).
- AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

- AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).
- AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

- AD A351829 Defensive Federal Litigation, JA-200 (2000).
- AD A327379 Military Personnel Law, JA 215 (1997).
- AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).
- AD A452516 Environmental Law Deskbook, JA-234 (2006).
- AD A377491 Government Information Practices, JA-235 (2000).
- AD A377563 Federal Tort Claims Act, JA 241 (2000).
- AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

- AD A360707 The Law of Federal Employment, JA-210 (2000).
- AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

- AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).
- AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).
- AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook,
JA-422 (2005).

* Indicates new publication or revised edition.

** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. TJAGSA Legal Technology Management Office (LTMO)

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.