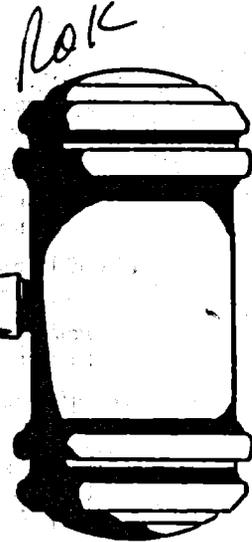


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# THE ARMY LAWYER

Headquarters, Department of the Army

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Department of the Army Pamphlet 27-50-188

August 1988

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**The Army Lawyer (ISSN 0364-1287)**

**Editor**

**Captain Matthew E. Winter**

*The Army Lawyer* is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as *The Army Lawyer*, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

# The DIVAD Procurement: A Weapon System Case Study

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Procurement of major weapon systems is big business. The Department of Defense (DOD) procurement account has grown substantially in recent years, increasing by one hundred and seventy-seven percent between fiscal years 1980 and 1985.<sup>1</sup> In fiscal year 1985, ninety-seven billion dollars were budgeted in the procurement account, representing thirty-four percent of the total DOD budget.<sup>2</sup> The defense build-up of the 1980's produced dozens of new types of ships, planes, missiles, tanks, helicopters and personnel carriers. Procuring those new weapon systems was not accomplished smoothly, however, and an ensuing uproar over DOD and defense contractor fraud, waste and abuse helped erode public support for continuing increases in the defense budget.<sup>3</sup> Concerns that taxpayers and the nation were not getting their money's worth grew as each report of problems in the weapons system procurement process was published.

The purpose of this article is to examine one acquisition program—the Sergeant York division air defense gun system (DIVAD)—and trace its procurement strategy from research and development through testing and production. The article is divided into five parts. First, I will discuss the procurement plan, a unique acquisition strategy that held great promise when it was entered into in 1978. Second, the development phase, award of the production contract, and subsequent test phases will be examined. Third, I will discuss the breakdown of the program and resulting congressional and press criticism following test results. A discussion of the cancellation of the procurement contract and its aftermath follows, and the article concludes with a review of lessons learned from the DIVAD acquisition.

## The Procurement Plan

The DIVAD program began in 1977. At that time, the Army determined that given the existing threat, its existing ground air defense capability was inadequate. The recent Arab-Israeli war of 1973 produced evidence of the importance of defending mobile armored columns against low-flying enemy high-performance aircraft. It also showcased a mobile Russian anti-aircraft gun called the ZSU-23-4. Equipped with four radar-directed, computer-controlled cannons, the ZSU-23-4 represented a capability that the

Soviets had that the United States did not. The Army's existing gun system was the fifteen-year-old, 20 millimeter Vulcan. The Vulcan could not repel enemy fixed-wing aircraft or attack helicopters, nor could it keep up with the new M-1 tanks, M-2 personnel carriers, and M-3 scout vehicles.<sup>4</sup> The more recent experience of Great Britain in the Falklands war in 1981 demonstrated that centering air defense on surface-to-air (SAM) missile systems was inadequate. Three of the four SAM air defense ships sunk by the Argentine air force were bombed by low-flying aircraft.<sup>5</sup> Two-thirds of the seventy-five Argentine aircraft kills came from British Harrier fighters in air-to-air battles, not the plethora of ground and sea based SAMS.<sup>6</sup> The five Harriers shot down over the Falklands were hit by visually aimed cannons. Our own experience in the Vietnam war is consistent with these results. Ninety-one percent of the high performance U.S. jets lost over North Vietnam were shot down by guns.<sup>7</sup>

To procure a new mobile air defense gun, the Army decided to employ a unique acquisition strategy that would theoretically save both time and money. Instead of the normal ten to fifteen years needed to bring a defense weapon system through research and development to the production phase, seven years was allotted for the DIVAD program.<sup>8</sup> The General Accounting Office described this process:

The acquisition strategy provided for two phases—a competition phase involving two contractors for a 29-month period charged with developing two prototype systems each and a subsequent concurrent development and initial production phase. The engineering development contracts for the first phase were a firm fixed-price type issued on January 13, 1978. They specified the government would be minimally involved. The Army provided the competing contractors a flexible requirements document to permit cost and performance trade-offs. There was, however, no flexibility in the June 1980 date when the first prototypes were to be delivered to Fort Bliss, Texas, for a competitive combined development and operational shoot-off.<sup>9</sup>

\*This article was originally submitted as a research paper in partial satisfaction of the requirements of the 35th Judge Advocate Officer Graduate Course.

<sup>1</sup> G.A.O. Report No. NSIAD 85-42, *Improvements to the Acquisition of Major Weapon Systems*, Mar. 1, 1985, at 3 [hereinafter *Systems Report*].

<sup>2</sup> *Id.* at 3-4.

<sup>3</sup> In May 1985, 45 of the top 100 defense contractors were under investigation for criminal contract fraud. *Bus. Wk.*, Jul. 1, 1985, at 24. Several corporations have pleaded guilty to various fraudulent practices.

<sup>4</sup> *Oversight on the Division Air Defense Gun System (DIVAD): Hearing before the Subcomm. on Tactical Warfare of the Senate Comm. on Armed Services, 98th Cong., 2d Sess. 33 (1984)* [hereinafter *DIVAD Hearings*] (statement of General Louis C. Wagner, Jr., Deputy Chief of Staff for Research, Development and Acquisition, Department of the Army).

<sup>5</sup> Easterbrook, *DIVAD*, *Atlantic*, Oct. 1982, 29 at 30.

<sup>6</sup> *Id.* at 31.

<sup>7</sup> *Id.* at 34.

<sup>8</sup> *DIVAD Hearings*, *supra* note 4, at 1-2 (statement of Senator Barry Goldwater).

<sup>9</sup> G.A.O. Report No. MASAD-83-8, *The Army Should Confirm Sergeant York Air Defense Gun's Reliability and Maintainability Before Exercising Next Production Option*, Jan. 27, 1983, at 7 [hereinafter *DIVAD Report*].

That competition took place and Ford Aerospace and Communications Corporation was subsequently declared the winner.<sup>10</sup>

The DIVAD's original development specifications called for a reaction time of not less than eight seconds for the gun to acquire and engage the airplane or helicopter target after it initially popped up or came within range. The targets were to be engaged at a range of four kilometers, considered to be the maximum effective stand-off range of threat targets.<sup>11</sup> The specifications also required that the gun be capable of being pointed 180 degrees in the opposite direction. The performance specifications required the gun system to be mobile enough to survive in the combat environment of a heavy division, and to be effective in all weather, day or night environment.<sup>12</sup> Within these contract parameters the Army adopted a "hands off" policy. The two contractors competing for the production contract were free to develop a DIVAD in any manner they chose, provided that the specifications were met. They were to use their best efforts to produce a winning prototype within the established cost guidelines.

### The Procurement

The initial competition between General Dynamics and Ford was controversial because although Ford's gun destroyed less than half as many targets as General Dynamics' gun and used the 40 millimeter cannon instead of the NATO-interoperable 35 millimeter cannon, it won the competition.<sup>13</sup>

On May 7, 1981, the Army awarded Ford a fixed price incentive contract with a ceiling price of 1.725 billion dollars. The contract required Ford to complete the engineering development, and it included three production options for 50, 96, and 130 systems, to be exercisable annually beginning in May 1982. A total production of 618 units was planned.<sup>14</sup>

One reason the accelerated acquisition strategy was chosen was that the DIVAD gun system was supposed to be an integration of proven major components, including the

M-48A5 tank chassis, twin Swedish Bofors 40 millimeter guns, and radars from the F-16 fighter. Procurement officials decided that concurrency in all program aspects was justified by this integration of proven subcomponents. Integrated logistics support development was deferred until award of the production contract.<sup>15</sup>

To balance this higher risk in development, the Army built in three risk protection devices. First, a fixed-price incentive type contract was included which featured a base year and three separate yearly production options. Second, the production contract incorporated twelve firm requirements and forty-three other requirements, which the contractor could trade off for cost and schedule benefits. Third, the contract's warranty provisions provided for contractor repair of deficiencies noted during initial production tests and, within the ceiling price, required the contractor to fix the problem, retrofit all production systems, and incorporate the changes into future production systems.<sup>16</sup>

It was acknowledged from the outset that this strategy emphasized a test-fix-test approach. "One price paid for this accelerated acquisition strategy is defined by some as 'limited testing'. The results of this 'limited testing' have been referred to by critics as indicative of fundamental problems. The test strategy was clear from the initiation of the program."<sup>17</sup>

Concurrency in weapons program structure is allowed by DOD policy to minimize the time to develop, produce, and deploy major systems for use by operational forces.<sup>18</sup> The degree of concurrency based on acquisition time savings must be balanced against cost, risk, and urgency of the mission need in each acquisition program.<sup>19</sup> Use of concurrency in the DIVAD program was justified by the seriousness of the threat and present inadequate defense capability, the predicted cost savings of one billion dollars, and the risk protection measures described above.<sup>20</sup>

The original strategy for the DIVAD involved concurrency beginning with the combination of developmental and operational testing in July through November 1980. Four other tests were planned, including a check test before the

<sup>10</sup> This decision proved to be controversial since the General Dynamics gun system appeared to score more target kills—nineteen to nine—by most accounts. See generally Easterbrook, *supra* note 5, at 29-39.

<sup>11</sup> Cannon shells take seven seconds to fly to the maximum standoff range of four kilometers, leaving eight seconds for DIVAD to spot a helicopter, traverse its turret, compute, aim, and fire. Easterbrook, *supra* note 5, at 33.

<sup>12</sup> *DIVAD Hearings*, *supra* note 4, at 40.

<sup>13</sup> After the test, the results were sent to the Army's Ballistics Research Laboratory, where explosions of Ford's proximity-fused rounds were ruled direct hits that ensured kills, and all proximity-shell firings by the General Dynamics gun were disqualified on the grounds that it used a non-regulation fuse. See Easterbrook, *supra* note 5, at 35.

<sup>14</sup> The estimated unit program cost was 6.8 million dollars. The total estimated program was 4.2 billion dollars. Funding was broken down as follows:

Category	Total (in millions)
Development .....	\$ 226.6
Fire Unit .....	\$2,991.8
Spares .....	\$ 379.3
Ammunition .....	\$ 584.1
Ammunition production facilities .....	\$ 47.5
TOTAL	\$4,229.3

<sup>15</sup> *DIVAD Hearings*, *supra* note 4, at 43 (statement of General Wagner).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> G.A.O. Report No. NSIAD-85-68, *Production of Some Major Weapon Systems Began With Only Limited Operational Test and Evaluation Results*, Jun. 19, 1985, at 1 [hereinafter *Testing Report*].

<sup>19</sup> *Id.* at 2.

<sup>20</sup> See *supra* text accompanying notes 15 and 16.

first production option. Of all the problems encountered in the DIVAD program, the testing phases produced the most criticism.

### Breakdown of the Procurement

The test-fix-test plan continued in 1981 and 1982 with a check test that took place before the Defense System Acquisition Review Council (DSARC III) meeting in May 1982. The results of that test are classified, but it appears that a substantial number of deficiencies previously noted in the Ford prototype were not corrected. Furthermore, the scheduled seven-month long reliability, availability, maintainability and durability (RAM-D) test was first postponed and then abandoned as the testing agencies determined that "the prototype's deficiencies rendered it unsuitable for testing."<sup>21</sup>

In addition to problems concerning the logistical support package, the General Accounting Office (GAO) found serious deficiencies in its 1983 report, including these results obtained from the aborted RAM-D tests:

For example, during the last of the three demonstration attempts, which included a 50-mile road test, the radar fire control system failed to operate reliably, the graphic display unit failed intermittently, and the armament feed system could not be satisfactorily operated. Further, during cold chamber testing the system's controlling computer performed erratically in temperatures below 25 degrees Fahrenheit and the hydraulics, which would not operate properly without being preheated, developed numerous leaks.<sup>22</sup>

DOD later acknowledged shortcomings in the DIVAD system's logistical supportability, and acknowledged that risks existed in proceeding into production, but said that these were outweighed by (1) evidence that remedial actions had been identified, (2) the urgency to field a new air defense gun, and (3) cost savings achievable by not delaying production.<sup>23</sup>

After an apparently bitter battle at the DSARC-III meeting, the first production contract was approved in May

1982. The DOD Inspector General's office would later investigate allegations made over the DOD hotline that the Army withheld information concerning the DIVAD's performance in the areas of identification friend or foe, reliability, threat assessment, electronic countermeasures and personnel hazards. It was also alleged that the Army overstated the lethality data by 300 percent and also overstated reaction times. The DOD Inspector General later determined that:

The operational test data that had been requested and is a prerequisite to the production decision was not available at the time DSARC met. What had been done was to portray development test data in a way that would give you the view that it was operational test type data. We felt that was optimistic . . . We felt there were optimistic assumptions, and we felt that it was overstated [referring to the kill and engagement times].<sup>24</sup>

The decision process was flawed in this case because the need to make a decision in May to exercise the contract option overrode waiting for the complete data, which became available in November.

The DOD Inspector General's report also focused on the procurement process between May 1980 and May 1981. Acknowledging the imaginative and ingenious nature of the procurement strategy, the report nevertheless criticized the cost and pricing data obtained as being both insufficient and incompletely used.<sup>25</sup> The report found that Ford obtained subcontracts at a price 84 million dollars below the pricing data it provided to the government, and that Ford apparently used government estimates to secure the cheaper prices.<sup>26</sup>

The Sergeant York gun's troubles were first noted in the press in October 1982.<sup>27</sup> In the fall of 1984, after the Secretary of Defense first postponed a decision on exercising option III in May, and then formally declined to use fiscal year 1985 funds to procure any more DIVADs, the system

<sup>21</sup> DIVAD Report, *supra* note 9, at 5.

<sup>22</sup> *Id.*

<sup>23</sup> Testing Report, *supra* note 18, at 16.

<sup>24</sup> DIVAD Hearings, *supra* note 4, at 12-13 (statement of Mr. Joseph H. Sherick, Inspector General, Department of Defense).

The GAO found that certain test data had been omitted concerning testing limitation and safety-related deficiencies that should have been included to demonstrate the durability and reliability of the Sergeant York. A test was planned to fire 15,000 rounds of ammunition and to travel 4,000 miles. Because of time limits, only 3,600 rounds were fired and due to frequent subsystem failures, the weapon traveled less than 300 miles. Rather than indicating that the testing was the minimum required, the data sheet only noted that the number of events conducted was less than planned. *Id.* at 25.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> *Id.* The Army disputed the 84 million dollar figure, claiming that the difference in constant and current dollars accounted for some of the pricing discrepancy, and that Ford was actually paying "about seven million dollars more than data showed, instead of 18 [sic] million dollars less as the IG believed." *Id.* at 36 (statement of General Wagner).

<sup>27</sup> Easterbrook, *supra* note 5.

received more negative press coverage.<sup>28</sup> The press reported several anecdotes concerning the gun system that did little to enhance its reputation in Congress.<sup>29</sup>

The critical testimony before Congress concerned the performance of the Sergeant York gun during the limited operational test held in July 1984 at White Sands, New Mexico. The test results were decidedly mixed. The bottom line appeared to be that the contractor was unable to improve significantly the performance of production models over the prototypes. The Deputy Director for DOD's Operational Test and Evaluation Office reported that, "[t]he reliability of the fire control system was on the growth curve while three of the four main subsystems—armament, power actuation and mobility—were below the growth curves.<sup>30</sup> This was four years after the prototype competition. Concerned about Sergeant York's performance in a battlefield environment, the Army had introduced electronic counter-measures and ground clutter during testing of DIVAD's radar. The results were disappointing. The Army then had to explain the results of those tests because they did not meet the specifications of the contract.<sup>31</sup>

Concern also grew about DIVAD's capability, assuming it met contractual specifications, to engage the latest Soviet helicopter threat. The Army then announced that it would consider incorporating Stinger missiles on the weapons system, a move that seemed to illustrate the futility of continuing DIVAD production.<sup>32</sup>

### Cancellation of the Procurement

The Army worked with the contractor for one more year and was under considerable pressure from the Secretary of Defense to demonstrate the system's worth.<sup>33</sup> Then, on August 27, 1985, the Secretary of Defense canceled the DIVAD procurement. Citing the weapon's effective range of four kilometers as inadequate given the current Soviet helicopter stand-off range of six kilometers, as well as a cost

savings of three billion dollars, the Secretary indicated that other weapon systems would be considered.<sup>34</sup> Sixty-five DIVADs had already been built, and 1.8 billion dollars had been spent on the program.<sup>35</sup>

Bad news about DIVAD continued to surface. Charges of fraud and conflict of interest were raised concerning the procurement.

In December 1985, General Dynamics, Ford's competitor for the production contract, was indicted on criminal charges of conspiracy and submitting false statements to government officials in connection with cost mischarging on the DIVAD pre-production contract.<sup>36</sup> In 1987, the Justice Department withdrew the indictments and dismissed the case.

It was also reported that at least six Army officers had retired to work for Ford Aerospace during the DIVAD procurement. The list included four lieutenant generals, including one former Deputy Chief of Staff for Research, Development and Acquisition, and a former commander of the Air Defense Center. Shortly after the production award, Ford hired the former director of the development and operational tests at Fort Bliss.<sup>37</sup>

The greatest disappointment is that the Army still has no new air defense weapons system. The threat is still present, however, and may even be enhanced.

### Lessons Learned

The DIVAD procurement is an excellent example of many of the problems with modern weapons acquisition programs. In the words of the DOD Inspector General, "The DIVAD program is an example of the failures of the process."<sup>38</sup> Beginning with the choice of accelerated acquisition strategy in 1977, and continuing through the exercise of the second production option in 1983, this procurement

<sup>28</sup> See e.g., *Bus. Wk.*, Aug. 6, 1984, at 28; Wilson, *Weinberger Due to Decide Fate of Army Gun that Failed Tests*, *Wash. Post*, Sep. 17, 1984, at ; Klare, *The Gun that Couldn't Shoot Straight*, *Harpers*, Oct. 7, 1984 at 76; Kittle, *Anatomy of a Pentagon Horror Story*, *U.S. News & World Rep.*, Oct. 15, 1984, at 69; Easterbrook, *Why DIVAD Wouldn't Die*, *Wash. Monthly*, Nov. 1984, at 10.

<sup>29</sup> In February 1982, at a demonstration for U.S. and British officers at Fort Bliss, DIVAD immediately swung towards the reviewing stands upon activation of its computer. After technicians worked on the system, the target was again presented and the gun blasted the ground in front of it 300 yards out. It never successfully engaged the targets that day. The Ford program manager explained that the vehicle was washed the day before, thereby fouling the electronics. The reporter's rejoinder was to ask him if it ever rains in central Europe. Easterbrook, *supra* note 5, at 37. In November 1982, after the first DIVADs came off the production line and during a performance test, one DIVAD locked onto a latrine fan. Easterbrook, *supra* note 28, at 15. During the limited operational test in July 1984, the lack of a suitable helicopter stationary target forced the Army to use a drone fixed to a certain height with its rotors turned by electric motors. When the DIVAD radar, which operates on the Doppler principle of searching for movement, could not detect the target, radar amplifiers that refocus radar beams (making it easier for the sending unit to detect) were installed. Eventually four were necessary before DIVAD acquired the target. This prompted one journalist to describe this whole process as the equivalent of testing a bloodhound's ability to track a man by covering him with beefsteaks and standing him still, alone and upright, in the middle of a parking lot. Easterbrook, *supra* note 28, at 15. In the spring of 1985, the Army released film of DIVAD testing. Reporters incorrectly concluded that DIVAD's targets were not hit by shells but instead were loaded with explosives and detonated from the ground to give the appearance of hits. Easterbrook, *York, York, York*, *New Republic*, Dec. 30, 1985, at 17. In fact, the drones were hit and knocked out of control by DIVAD. Only then were they detonated by command of the Range Safety Officer, according to Major Jose Aguirre, JAGC, an eyewitness to the test.

<sup>30</sup> *DIVAD Hearings*, *supra* note 4, at 26 (statement of Brigadier General Michael D. Hall). The reaction time was still inadequate. The operational portion of the test in all system modes produced times of 11-19 seconds for fixed wing targets and 10-11 seconds for rotary wing hovering targets, compared to the contract's required operational capability of 8 seconds. *Id.* at 40.

<sup>31</sup> *Id.* at 19, 26 (statement of Brigadier General Hall); 37-41 (statement of General Wagner).

<sup>32</sup> Easterbrook, *supra* note 28, at 12.

<sup>33</sup> See Wilson, *supra* note 28.

<sup>34</sup> *U.S. News & World Rep.*, Sep. 9, 1985, at 11.

<sup>35</sup> *Id.*

<sup>36</sup> See generally *United States v. General Dynamics, Corp.*, 644 F. Supp. 1497 (C.D. Cal. 1986).

<sup>37</sup> *U.S. News & World Rep.*, Apr. 29, 1985, at 30.

<sup>38</sup> Kittle, *supra* note 28, at 69.

reveals the failures that can occur despite the best of intentions. The inadequacies of the DIVAD procurement fall into three major areas: (1) inadequate specifications, (2) a favorable contract that nonetheless produced a rigid schedule that constrained decisionmaking, and (3) inadequate and untimely testing.

The specifications for Sergeant York were inadequate because they failed to state realistic battlefield criteria. When operational tests were conducted, the gun could not perform under battlefield conditions and still meet the contract specifications. It may have been difficult, perhaps impossible, to design such criteria, but it has been done for other weapons systems and is certainly necessary to evaluate a combat weapons system.

The specifications were also inadequate because unnecessary requirements were included. For example, Senior Army officials subsequently disclaimed the eight second reaction time and 180 degree traverse posture as unrepresentative of the modern battlefield; they similarly renounced the inclusion of waiting time with reaction time and the requirement to engage the target at the maximum range.<sup>39</sup>

Furthermore, the specifications were unworkable because they attempted the technologically impossible. Although each major subsystem was a proven component, the sum of the components could not match contract requirements, much less battlefield reality. The F-16 radar operates on detection of movement and was successful at acquiring moving targets. Unfortunately, it had difficulty acquiring stationary targets. The computer fire direction system could not adequately track moving targets because it could not anticipate where a moving aircraft would next go. Ironically, the human eye is a better fire direction system in this regard, because it can view the position of the aircraft's wing flaps and make judgments based on training and intuition so that the correct lead is computed. Finally, the M-48A5 chassis with its 750 horsepower diesel engine had no hope of keeping up with the M-1 tank and its turbine powered, 1500 horsepower engine, especially because the DIVAD turret weighed ten more tons than the old M-48A5 tank turret.<sup>40</sup>

The contract included several risk protection devices and appeared to be a good bargain for the government. Unfortunately, the built in cost savings, tough warranty provisions, and annual production options produced an incentive to stay on schedule to retain the contractual advantages despite the floundering performance of the product. The GAO concluded:

The Army successfully controlled costs until contract termination, which suggests that the use of the

fixed-price development contract and the three annual fixed-price production contract options were cost-effective. The contract's warranty provisions provided protection against cost increases emanating from defects in the design, component integration, materials, or workmanship. However, the fixed-price options did have a drawback because they put pressure on decisionmakers to proceed with production on schedule, despite technical difficulties, in order to take advantage of the favorable prices. Tight schedules and limited operational testing left the Army few opportunities to resolve the difficulties before committing to major production.<sup>41</sup>

The testing program was faulty because the tests were too late, constantly changed, and inadequately performed. As discussed above, the concurrent nature of the procurement accepted the risk of inadequate testing.<sup>42</sup> However, the development of the DIVAD proceeded so badly that the test-fix-test strategy could never keep up.<sup>43</sup> The first full scale production test—the initial production test—was not scheduled until the fall of 1984, three years after the base production contract was awarded. Intervention by DOD forced the Army to schedule the limited test in June 1984. Delays in production and the wearing out of the prototype models caused further testing difficulties. Much of the testing was performed by the project manager and the contractor, not the Army's normal testing agencies. The GAO explained the implications of this arrangement:

This is a departure from the normal weapon system acquisition procedure which is to have new weapon systems tested and evaluated by Army agencies that operate independent of the project manager and are looked to for objective assessments. The scope of the contractor tests is less than the one which the Army test and evaluation agencies had planned to do. The system will accumulate less mileage and fire less rounds, and the fire control system will be operated for a lesser number of hours.<sup>44</sup>

This arrangement contributed to the rigidity in decision-making noted above. The GAO again observed prophetically in its 1983 report that:

[i]t would have been preferable if this assessment [before exercising the second production option] could have been made by the Army test and evaluation agencies. In the absence of their usual degree of participation in a weapon system development, the project manager seems to be the only one with sufficient knowledge of the program to make this assessment. With attention focused on the project manager's assessment, we believe the project manager

<sup>39</sup> *DIVAD Hearings, supra*, note 4, at 36, 38, 41 (statement of General Wagner).

<sup>40</sup> Klare, *supra* note 28, at 77.

<sup>41</sup> G.A.O. Report No. NSIAD-86-89, *Sergeant York: Concerns About the Army's Accelerated Acquisition Strategy*, May 30, 1986, at 29.

<sup>42</sup> See *supra* text accompanying notes 15 and 16.

<sup>43</sup> The GAO summarized DOD's rationale for moving ahead with the second production option:

DOD stated that preliminary test data from a "short check test (combined DT/OT)" indicated that the weapon program had the potential to be effective, and therefore sufficient data was available to support going ahead with production. However, deficiencies and shortcomings found during the "short check test" were to be corrected and verified during a subsequent test. The subsequent test did not demonstrate the all deficiencies and shortcomings were corrected because the Army was constrained by too few prototypes, no spare parts, nor enough time to correct the deficiencies and shortcomings that surfaced in the short check test.

Testing Report, *supra* note 18, at 17.

<sup>44</sup> *DIVAD Report, supra* note 9, at 6.

will not permit any bias, stemming from the role as a program advocate, to influence the report. The decision on exercising the option, however, should be made at the highest Army level.

It is apparent, however, that greater priority has been given to adhering to the schedule than to correcting some serious system performance problems at this time. Moving ahead with the program, including exercising the first production option when the prototypes have continued to exhibit serious shortcomings, attest to this.<sup>45</sup>

The normal military "can-do" spirit, the paucity of information concerning the DIVAD's progress, and the attractiveness of the contract's cost savings and strong warranty provisions combined to keep the DIVAD procurement going as long as it lasted.

Of all the procurement failures, the testing programs are the easiest to correct. In 1983, Congress reorganized DOD's testing office and established a Director of Operational Test and Evaluation, who reports directly to the Secretary of Defense and to Congress.<sup>46</sup> More timely and accurate testing keyed to critical decisions in the development and production phases, and coupled with increased oversight, should right many of the problems that occurred in the DIVAD acquisition.

Finally, the use of fixed-price type contracts is often preferred in federal procurement.<sup>47</sup> They are preferred over cost type contracts because the contractor assumes the risk of increased costs of performance. The DIVAD pre-production contract was a firm fixed-price type contract. The production contract and options were fixed-price incentive type, meaning that the government shared the risk of increased costs. Although the Army appeared to successfully control cost growth with these contracts,<sup>48</sup> the beneficial warranty provisions were never invoked. The end result was that bad publicity overshadowed the successful use of contract types.

## Conclusion

The lessons learned from the DIVAD procurement include the realization that phases of the procurement plan cannot develop in isolation. Just as the individual sub-components of the Sergeant York were successful in their own right, so too the separate components of the procurement plan proved successful. Yet when combined without full consideration for the entire dynamic process, the gun and its procurement were doomed to failure. Perhaps the best way to state the lessons learned is to repeat a statement made in 1977, well before the DIVAD procurement, by the then Air Force Deputy Chief of Staff for Procurement and Manufacturing:

Our studies lead us to conclude that the effort should focus on the macro level rather than the micro or procedural aspects of service operations. For example, rather than looking at negotiation techniques for reducing overhead, correct the structural situations that cause high overhead. Rather than looking at incentives on individual contracts, look at the fundamental, structural incentives or requirements provided to the defense industry to build the organizations and cost base they have. Rather than looking at procedural techniques for more or less engagement in contract management, investigate the fundamental philosophy of individual contracting officers and procurement offices attempting to regulate an industry or individual firm thereof, through the force of individual contracts and programs. . . . In summary, look at the total environment in which we make our perfectly reasonable micro decisions which seek to add up to unreasonable macro results.<sup>49</sup>

If the flaws present in the Sergeant York acquisition are inherent within the procurement system, it will take no less an effort to avoid repeating such disasters.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> Systems Report, *supra* note 1, at 7-9.

<sup>47</sup> See FAR § 16-102-103. For a discussion of the trends in weapon system acquisition see *Reducing the Cost of Weapon System Acquisition: Hearing before the Task Force on Selected Defense Procurement Matters of the Senate Comm. on Armed Services, 98th Cong., 2d Sess.* (1984).

<sup>48</sup> See *supra* note 3 and accompanying text.

<sup>49</sup> J. Gansler, *The Defense Industry*, 283 (1980) (quoting Major General James Stansberry).

# Administrative Inspections in the Armed Forces After *New York v. Burger*

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The fourth amendment to the United States Constitution declares that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>1</sup>

In light of the amendment's language, the Supreme Court has held that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."<sup>2</sup> In other words, warrantless searches and seizures are presumed to be constitutionally unreasonable as a warrant is considered to be a necessary element of a "reasonable" search and seizure.<sup>3</sup> Despite this presumption, exceptions to the *per se* warrant requirement have been established.<sup>4</sup> Both the Supreme Court<sup>5</sup> and Military Rule of Evidence 313(b)<sup>6</sup> recognize warrantless administrative inspections as one such exception to the warrant requirement.<sup>7</sup>

This article will examine the constitutionality of administrative inspections conducted pursuant to Rule 313(b) in light of the Supreme Court's recent decision in *New York v. Burger*.<sup>8</sup> This article initially examines administrative inspections, in both the civilian and military context, and discusses the criteria, identified by the Supreme Court in *Burger*, that must be satisfied in order for a warrantless administrative inspection to meet the reasonableness standard

of the fourth amendment. The article goes on to analyze Military Rule of Evidence 313(b) in light of the Supreme Court's *Burger* criteria for a constitutionally valid administrative inspection. The final part of the article concludes that, although on its face, Rule 313(b) may appear to be suspect, the Supreme Court would uphold the Rule if it was challenged as violative of the requirements established by *Burger*.

## Warrantless Administrative Inspections

### Introduction

Although warrantless intrusions by the government, whether labeled inspections or searches, are presumptively unconstitutional,<sup>9</sup> warrantless administrative inspections are a recognized exception to that general rule.<sup>10</sup> Administrative inspections are authorized in a variety of situations<sup>11</sup> and are justified when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical."<sup>12</sup> Typically, the government establishes a regulatory scheme and unless the government can conduct inspections and searches outside the traditional warrant process, the scheme will either fail or its effectiveness will be substantially diminished.<sup>13</sup> There are limits, however, to the use of warrantless administrative inspections and searches. For example, the government may not use an administrative inspection to search for "evidence of criminal activity,"<sup>14</sup> and all such inspections must be "reasonable."<sup>15</sup>

<sup>1</sup> U.S. Const. amend. IV.

<sup>2</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>3</sup> S. Saltzburg, *American Criminal Procedure* 34 (2d ed. 1984).

<sup>4</sup> For a thorough discussion of the numerous exceptions to the *per se* warrant requirement, see *id.* at 134-297. Note that when the warrant requirement does not apply, only the reasonableness requirement must be satisfied.

<sup>5</sup> See *New York v. Burger*, 107 S. Ct. 2636 (1987); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

<sup>6</sup> *Manual for Courts-Martial, United States*, 1984, Mil. R. Evid. 313(b) [hereinafter Mil. R. Evid. 313(b)] provides, in part, that:

An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.

<sup>7</sup> Although administrative inspections do not require a warrant, they still must be "reasonable" in order to satisfy the fourth amendment. See *New York v. Burger*, 107 S. Ct. 2636, 2643-44 (1987); Mil. R. Evid. 313(b) ("[i]nspections shall be conducted in a reasonable fashion").

<sup>8</sup> 107 S. Ct. 2636 (1987).

<sup>9</sup> See *supra* notes 2-3 and accompanying text.

<sup>10</sup> For a general discussion of administrative searches and inspections, see Saltzburg, *supra* note 3, at 266-74.

<sup>11</sup> Examples of warrantless administrative searches and inspections include the use of magnetometers to screen airline passengers; searches conducted as a condition for entering a public building such as a courthouse; and administrative inspections of "closely regulated" industries designed to enforce regulatory statutes. *Id.* at 269-71.

<sup>12</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

<sup>13</sup> Saltzburg, *supra* note 3, at 258.

<sup>14</sup> *Michigan v. Clifford*, 464 U.S. 287, 292 (1984) (the constitutionality of a warrantless post-fire inspection depends upon "whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity"); *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) ("if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply")

<sup>15</sup> See *supra* note 7 and accompanying text.

### The Supreme Court's Burger Criteria

In *New York v. Burger*,<sup>16</sup> the Supreme Court examined the constitutionality of a warrantless inspection statute that authorized administrative inspections of vehicle-dismantling and automobile junkyard businesses.<sup>17</sup> Prior to *Burger*, the Court had established that under some circumstances, warrantless inspections of "closely regulated" industries are permissible because an owner or operator of a commercial business in a closely regulated industry has a reduced expectation of privacy.<sup>18</sup> In those earlier decisions, however, the Court did not explicitly identify the elements of a valid warrantless administrative inspection. The *Burger* Court addressed that issue directly, delineating three criteria which must be satisfied in order for a warrantless inspection to be deemed reasonable in the context of the fourth amendment. First, there must be a "substantial" government interest toward which the administrative inspection is directed.<sup>19</sup> Second, "the warrantless inspection [ ] must be 'necessary to further [the] regulatory scheme.'"<sup>20</sup> That is, if the government's regulatory scheme would be frustrated by a requirement that government officials obtain a warrant each time they want to conduct an inspection, a warrantless administrative inspection may be permissible. Third, the administrative inspection scheme, "in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."<sup>21</sup> The regulatory scheme must perform the two basic functions of a warrant: it must place an individual on notice and it must limit the discretion of the inspecting officers.<sup>22</sup>

### Administrative Intrusions in the Military

The military formulation of a warrantless administrative inspection is an inspection or inventory conducted pursuant to Military Rule of Evidence 313. In examining administrative intrusions (inspections or inventories) in the military, it is important to keep in mind the distinction between a search and an inspection. A search is a governmental intrusion into an area where a soldier has a reasonable expectation of privacy which is conducted for the purpose of obtaining evidence for use in a criminal prosecution. Consequently, because a search is made in anticipation of prosecution, it must be based upon probable cause.<sup>23</sup> An inspection, on the other hand, is an official examination

conducted to "determine and ensure security, military fitness or good order and discipline of the unit [or] organization."<sup>24</sup> Accordingly, although an inspection, like a search, is an intrusion into a place where a service member has a reasonable expectation of privacy, no probable cause is required because the underlying purpose of an inspection is to determine the fitness or readiness of a person, unit, or organization.<sup>25</sup>

Although Rule 313(b) identifies the prerequisites for conducting a warrantless administrative inspection in the military, the Supreme Court's decision in *Burger* raises the question of the constitutionality of Military Rule of Evidence 313(b) in view of the requirements established by the Court for a valid administrative inspection. In *United States v. Battles*,<sup>26</sup> the Court of Military Appeals expressly declined to rule on that question, declaring that "whether Mil. R. Evid. 313(b) is constitutional in light of the particular requirements [of *Burger*] is . . . a question for a later time."<sup>27</sup> The remainder of this article will examine that issue.

### Analysis of Military Rule of Evidence 313(b) In Light of *Burger*

#### Military Rule of Evidence 313(b)

Military Rule of Evidence 313 governs the admissibility at trial of evidence obtained from military inspections and inventories. Subsection (b) of the Rule addresses inspections, defining an inspection as an examination of persons and places conducted primarily as a means of determining and ensuring military fitness, security, and good order and discipline.<sup>28</sup> The Rule contains a nonexclusive list of general reasons for conducting an inspection:

1. To ensure that the command is properly equipped and functioning properly;
2. To maintain proper standards of readiness, sea or airworthiness, sanitation, and cleanliness;
3. To ensure that personnel are present, fit, and ready for duty.

Although Military Rule of Evidence 313(b) authorizes an inspection for a variety of reasons, it also imposes certain restrictions on the ability to conduct an inspection. Perhaps

<sup>16</sup> 107 S. Ct. 2636 (1987).

<sup>17</sup> *Id.* at 2639.

<sup>18</sup> See *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless, nonforcible inspections of gun dealers under the Gun Control Act of 1968 upheld); *Colonade Corp. v. United States*, 39 U.S. 72 (1970) (Congress may authorize warrantless searches of the premises of liquor dealers pursuant to federal revenue statutes).

<sup>19</sup> *Burger*, 107 S. Ct. at 2644.

<sup>20</sup> *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)).

<sup>21</sup> *Id.* (quoting *Donovan*, 452 U.S. at 603)).

<sup>22</sup> *Id.*

<sup>23</sup> W. LaFave, *Search and Seizure*, § 10.3, at 684 (2d ed. 1987).

<sup>24</sup> Mil. R. Evid. 313(b).

<sup>25</sup> LaFave, *supra* note 23.

<sup>26</sup> 25 M.J. 58 (C.M.A. 1987).

<sup>27</sup> *Id.* at 60.

<sup>28</sup> Inspections conducted pursuant to Mil. R. Evid. 313(b) are consistent with the pre-Rules practice of conducting "health and welfare" or "shakedown" inspections as a means of determining and maintaining fitness and good order and discipline. The Rule, however, does not use those terms. S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 233-34 (2d ed. 1986) [hereinafter MRE Manual]. Additionally, Mil. R. Evid. 313(b) is both a rule of evidence authorized by Congress under article 36 and an express Presidential authorization to conduct inspections. MRE Manual at 237 (Drafters' Analysis).

the most significant limitation is that examinations conducted for the primary purpose of obtaining evidence for use in a court-martial or other disciplinary proceeding are not inspections within the meaning of Rule 313(b).<sup>29</sup>

In addition to the proscription that an inspection may not be performed for the primary purpose of obtaining evidence, the Rule also establishes several other limitations on inspections. First, although the Rule explicitly states that inspections include examinations to locate and confiscate contraband, under some circumstances, the government must prove by clear and convincing evidence that an examination conducted to locate weapons or contraband was an inspection within the meaning of Military Rule of Evidence 313(b).<sup>30</sup> Second, the examination must be conducted in a "reasonable fashion." While the Rule is silent concerning the actual inspection methods or techniques that constitute "reasonable" examinations, the timing, underlying reasons, and manner of the intrusion are all relevant factors to be considered.<sup>31</sup> As a general rule, for an examination to constitute a valid inspection pursuant to Military Rule of Evidence 313(b), it should be evenhanded in purpose and scope and should be reasonably executed.<sup>32</sup>

Although an inspection must satisfy a general reasonableness standard, military leaders retain broad discretion in deciding how to actually conduct the examination.<sup>33</sup> As noted above, Military Rule of Evid. 313(b) is silent concerning what constitutes a "reasonable" examination. Additionally, an inspection may involve the use of "any reasonable natural or technological aid" and may be "conducted with or without notice to those inspected."<sup>34</sup> Furthermore, the Rule provides discretion concerning who is authorized to conduct an inspection. Although Military Rule of Evidence 313(b) does not specifically state who is empowered to inspect, the drafters' analysis declares that, unless otherwise limited by superior authority, "any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control."<sup>35</sup> Consequently, the authority to conduct an inspection is vested in a significant number of military

personnel who, without specific guidance from Rule 313(b) concerning how to conduct a "reasonable" inspection, must rely on their own discretion.<sup>36</sup>

#### *Burger Criterion #1: Substantial Government Interest*

In *Burger*, the Supreme Court held that the first required element of a "reasonable" warrantless administrative inspection is the existence of a substantial government interest toward which the administrative inspection is directed.<sup>37</sup> Rule 313(b) satisfies that criterion because administrative inspections in the military are oriented toward advancing a substantial governmental interest. In *Brown v. Glines*,<sup>38</sup> the Supreme Court recognized that the government has a substantial interest in ensuring that the nation's armed forces are both "capable of performing their mission promptly and reliably" and "ready to perform their duty whenever the occasion arises."<sup>39</sup> Military inspections conducted in accordance with the provisions of Military Rule of Evid. 313(b) are designed to further that substantial interest: The examinations help guarantee that military units are properly equipped and functioning efficiently; that military readiness and discipline are maintained; and that personnel are present, fit, and ready for duty.<sup>40</sup> Consequently, Military Rule of Evidence 313(b) satisfies *Burger's* first criterion for a valid warrantless administrative inspection in that inspections conducted pursuant to the Rule are directed toward advancing a substantial governmental interest.

#### *Burger Criterion #2: Necessity*

The second requirement for a constitutionally valid warrantless inspection program is that the warrantless inspections must be necessary to further the regulatory scheme.<sup>41</sup> That is, if requiring the government to obtain a warrant would frustrate the purpose of the regulatory scheme involved, a warrantless inspection may be permissible. As the Supreme Court declared in *United States v. Biswell*:<sup>42</sup>

<sup>29</sup> Rule 313(b), however, makes it clear that an inspection conducted for the secondary purpose of obtaining evidence is a valid inspection. MRE Manual, *supra* note 28, at 239 (Drafters' Analysis).

<sup>30</sup> Specifically, the prosecutor must prove by clear and convincing evidence that an examination was an inspection within the meaning of Military Rule of Evidence 313(b) if a purpose of the examination was to locate weapons or contraband and:

1. The examination was conducted immediately after a report of a specific offense and was not previously scheduled; or
2. Specific individuals were selected for examination; or
3. The persons examined were subjected to substantially different intrusions than others who were examined.

The government bears a greater burden to establish that the examination was a valid inspection in the above three situations because of the belief that those situations raise a strong likelihood that the "inspection" is a subterfuge for obtaining evidence. MRE Manual, *supra* note 28, at 244 (Drafters' Analysis).

<sup>31</sup> MRE Manual, *supra* note 28, at 236, 241-42.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 236.

<sup>34</sup> Mil. R. Evid. 313(b). Although notice of the inspection is not required, the drafters noted that advance notice of an inspection may be desirable as a matter of policy or in the interests of establishing an alternative basis for the examination (for example, consent). MRE Manual, *supra* note 28, at 241 (Drafters' Analysis).

<sup>35</sup> MRE Manual, *supra* note 28, at 239.

<sup>36</sup> This presumes, of course, that the local command has not established local regulations and standing operating procedures detailing proper inspection procedures.

<sup>37</sup> *Burger*, 107 S. Ct. at 2644; Anderson, *Permissible Law Enforcement Discretion in Administrative Searches*, *The Army Lawyer*, Sept. 1987, at 28.

<sup>38</sup> 444 U.S. 348 (1980).

<sup>39</sup> *Id.* at 354.

<sup>40</sup> See *supra* notes 24, 25, & 28 and accompanying text.

<sup>41</sup> *Burger*, 107 S. Ct. at 2644.

<sup>42</sup> 406 U.S. 311 (1972).

[Under some circumstances] if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections, are essential. In [those situations], the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.<sup>43</sup>

An example of necessity is found in *Donovan v. Dewey*,<sup>44</sup> wherein the Supreme Court held that requiring mine inspectors to obtain a warrant prior to each inspection might alert mine owners or operators to the upcoming examination, thereby frustrating the purposes of the Mine Safety and Health Act.<sup>45</sup>

Similarly, warrantless inspections in the military are necessary to further the objectives of the underlying regulatory scheme. Requiring a commander to obtain a warrant each time he or she wanted to conduct an inspection would undermine the primary purpose of such inspections: determining and ensuring the security, military fitness, and good order and discipline of the military. In effect, Rule 313(b) inspections are a way for a commander to obtain an accurate and unretouched "snap-shot" of the command's readiness, security, and general ability to perform its military mission. Requiring a commander to obtain a warrant would pose a serious risk of alerting members of the command of the impending inspection and thereby enabling them to obscure any deficiencies. Consequently, the commander would be unable to obtain an accurate picture of the command's ability to perform its mission at any given moment. This is implicitly acknowledged by Rule 313(b) which states that inspections may be conducted "with or without notice to those inspected."<sup>46</sup>

The necessity for warrantless inspections in order to advance the underlying purpose of Rule 313(b) is even more apparent when one considers that such inspections may be used to locate unlawful weapons or contraband.<sup>47</sup> Requiring a commander to obtain a warrant prior to an inspection could easily provide a soldier possessing contraband the necessary time to dispose of the material. This is especially true in the common situation where an inspection for weapons or contraband follows a report of a missing weapon or the commission of a specific offense. In such cases, if the commander is to locate the missing item or other contraband, time is of the essence and a warrant requirement could easily frustrate the commander's efforts in that regard.<sup>48</sup> Consequently, if Rule 313(b) inspections are "to be

effective and serve as a credible deterrent,"<sup>49</sup> warrantless inspections, with their element of surprise, are essential to the "regulatory scheme" and the objectives which underlie Rule 313(b). Thus, *Burger's* second criterion, that of necessity, is satisfied by Rule 313(b).

### *Burger Criterion #3: Constitutionally Adequate Substitute*

The third requirement that a warrantless inspection scheme must satisfy in order to be reasonable, is that the inspection program, in terms of its certainty and regularity of application, must provide a "constitutionally adequate substitute for a warrant."<sup>50</sup> In other words, the administrative inspection procedure must perform the two basic functions of a warrant: it must place the individual on notice and limit the discretion of the inspecting officer.<sup>51</sup> Because Rule 313(b) satisfies the first two *Burger* criteria,<sup>52</sup> the constitutionality of the Rule turns on its ability to perform each of the two functions served by a warrant.

A basic purpose of the warrant requirement is notice. A warrant notifies an individual, whose person or property is being examined, that the search is being conducted pursuant to the law and within a properly defined scope.<sup>53</sup> The Supreme Court has held that, in order for a warrantless administrative inspection scheme to satisfy this notice requirement, the statute authorizing the warrantless inspection must be "sufficiently comprehensive and defined that the owner of [the property to be inspected] cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."<sup>54</sup>

In the case of warrantless administrative inspections in the military, the notice function of a warrant is satisfied. Members of the armed forces are on notice that they are subject to periodic and unannounced inspections by their military leaders. This notice comes from two major sources. First, inspections by the chain of command to ensure unit readiness, good order, and discipline are a traditional part of the armed forces in that "[i]nspections are time-honored and go back to the earliest days of the organized militia [and] have been experienced by generations of Americans serving the Armed Forces."<sup>55</sup> Second, the inclusion of Rule 313(b) in the Manual for Courts-Martial advises military personnel that a military commander possesses the inherent authority to periodically inspect his or her command. Accordingly, the Rule places members of the military on notice that periodic inspections, both announced and unannounced, are authorized by law and will be periodically conducted. The Rule also notifies members of the armed

<sup>43</sup> *Id.* at 316.

<sup>44</sup> 452 U.S. 594 (1981).

<sup>45</sup> *Id.* at 600.

<sup>46</sup> Mil. R. Evid. 313(b).

<sup>47</sup> See *supra* notes 29-30 and accompanying text.

<sup>48</sup> Such was the case in *Battles*, *supra* note 26, wherein a ship's commanding officer, following the discovery of LSD in a postal package addressed to one of his sailors, ordered a "health and comfort inspection" of a particular berthing area. 25 M.J. at 59.

<sup>49</sup> *Biswell*, 406 U.S. at 316.

<sup>50</sup> *Burger*, 107 S. Ct. at 2644.

<sup>51</sup> *Id.* See also *Anderson*, *supra* note 38.

<sup>52</sup> See *supra* notes 37-49 and accompanying text.

<sup>53</sup> *Burger*, 107 S. Ct. at 2644.

<sup>54</sup> *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)).

<sup>55</sup> *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981).

forces that those inspections will have a specific purpose: to determine and ensure military readiness and discipline. By stating the purpose of military administrative inspections, Military Rule of Evid. 313(b) provides guidance to military personnel concerning how to comply with the Rule and its periodic intrusions.<sup>56</sup>

The second function performed by a warrant is to limit the discretion of the inspecting officers.<sup>57</sup> The Supreme Court, in determining whether a regulatory scheme properly limits the discretion of the inspectors, has declared that the warrantless inspection plan must be "carefully limited in time, place, and scope."<sup>58</sup> Although Rule 313(b) unmistakably places member of the armed forces on notice concerning the possibility of periodic inspections,<sup>59</sup> whether the Rule sufficiently limits the discretion of the inspecting officers acting pursuant to its provisions is a more difficult question. The issue of discretion could serve as the basis for a ruling that Military Rule of Evidence 313(b) does not provide a constitutionally adequate substitute for a warrant and therefore is not a "reasonable" warrantless inspection as required by the fourth amendment.

There are several arguments that Rule 313(b) does not place appropriate restraints upon the discretion of the inspecting officers. First, the Rule gives inspecting officers wide latitude concerning when they may conduct an inspection. Unlike the inspection scheme in *Burger*, where inspections could only be conducted during regular business hours,<sup>60</sup> Rule 313(b) allows an inspection to be performed at any time, day or night, provided the primary purpose of the examination is to determine and ensure the security, military fitness, or good order and discipline of a military organization.<sup>61</sup> Second, the Rule does not explicitly limit the area the inspecting officers may examine; commanders may order "an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle."<sup>62</sup> Third, the circumstances under which the inspecting officers may conduct an inspection are not clearly specified. Rather, an inspection is permissible whenever the "primary purpose" of the inspection is to ensure the health, welfare, morale, fitness and readiness of the unit and personnel inspected.<sup>63</sup> Finally, the permissible scope of an inspection is not narrowly defined. In *Burger*, the inspectors could only examine the junkyard's business records and any vehicles or parts of vehicles which were subject to the state law's recordkeeping requirements.<sup>64</sup> Rule 313(b) inspections, however, are not so narrowly defined; "any individual placed in a command or appropriate supervisory position

may inspect the personnel and property within his or her control,"<sup>65</sup> and an inspection may examine "the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle."<sup>66</sup> Unlike the limited warrantless inspection scheme in *Burger*, Rule 313(b) inspections do not appear to be "carefully limited in time, place, and scope."<sup>67</sup>

The only apparent counterweight to the broad discretion Rule 313(b) vests in inspecting officers is the vague requirement that all inspections "be conducted in a reasonable fashion."<sup>68</sup> Although this reasonableness standard may serve to limit the discretion of inspecting officers in terms of the inspection's timing and scope, the requirement can be easily manipulated to justify almost any inspection. For example, in conducting an inspection for a missing M-16, it would seem unreasonable to search a soldier's lock box. The commander could argue, however, that it is possible that the weapon has been dismantled and the lock box may contain the weapon's firing pin or other small components.

### Conclusions

The above analysis demonstrates that Military Rule of Evidence 313(b) satisfies the first two criteria for a constitutionally reasonable warrantless inspection. There is a "substantial" government interest underlying the regulatory inspection scheme, and warrantless inspections are necessary to further the objectives of that scheme. Arguably, however, the Rule does not satisfy the third *Burger* criterion in that it fails to impose sufficient restraints upon the discretion of the inspecting officers and therefore does not provide a constitutionally adequate substitute for a warrant. Although Rule 313(b) appears to be constitutionally suspect, there are several reasons why a claim that Military Rule of Evidence 313(b) fails to satisfy the *Burger* criteria would most likely be unsuccessful.

The Supreme Court would probably reject a constitutional challenge to Rule 313(b) because the balancing of interests involved in such a challenge would be different than in the typical administrative inspection case that reaches the Supreme Court. The government's interest in conducting a warrantless inspection is greater, the individual's constitutional protection from intrusions by the government is less, and the individual has a diminished expectation of privacy, than in analogous administrative inspection disputes in the civilian community. Administrative inspections in the military are designed to further the government's substantial interest in ensuring its armed

<sup>56</sup> Cf. *Burger*, 107 S. Ct. at 2648 (challenged statute provided a constitutionally adequate substitute for a warrant as the statute placed individuals on notice as to how to comply with the statute's provisions).

<sup>57</sup> *Id.* at 2644.

<sup>58</sup> *Id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315, (1972)).

<sup>59</sup> See *supra* notes 55-56 and accompanying text.

<sup>60</sup> *Burger*, 107 S. Ct. at 2648.

<sup>61</sup> See *supra* notes 28-37 and accompanying text.

<sup>62</sup> Mil. R. Evid. 313(b).

<sup>63</sup> *Id.*

<sup>64</sup> *Burger*, 107 S. Ct. at 2648.

<sup>65</sup> MRE Manual, *supra* note 28, at 239 (Drafters' Analysis).

<sup>66</sup> Mil. R. Evid. 313(b).

<sup>67</sup> *Burger*, 107 S. Ct. at 2644.

<sup>68</sup> Mil. R. Evid. 313(b).

forces are prepared to defend the nation and its vital interests.<sup>69</sup> Accordingly, the governmental interest involved appears to be greater than in the usual administrative inspection case that arises in the civilian sector. More importantly, the individual constitutional rights implicated are of a different nature. Although the protections of the fourth amendment are applicable to members of the armed forces,<sup>70</sup> the military is "by necessity, a specialized society separate from civilian society,"<sup>71</sup> and the constitutional rights of military personnel "must perforce be conditioned to meet certain overriding demands of discipline and duty."<sup>72</sup> Members of the military, therefore, are accorded less constitutional protection than the average citizen.<sup>73</sup> In determining the constitutionality of a warrantless inspection in the military, the balancing of interests is weighted toward protecting the government's substantial interest in determining and ensuring military readiness, not in safeguarding an individual's fourth amendment rights. A party challenging Rule 313(b) would therefore face the difficult task of showing that individual privacy interests outweighed the governmental interests that are advanced through the administrative inspection scheme. As such, the Supreme Court would be more amenable to upholding the military's warrantless inspection scheme and allowing military inspectors to exercise greater discretion than their civilian counterparts.

Another reason why a constitutional challenge to Rule 313(b) would fail is that the Supreme Court would hold the military to a less demanding application of the *Burger* criteria. There are two major reasons why the Court, in applying *Burger* to Rule 313(b), might adopt a more deferential approach. First, the Supreme Court has recognized that the military is a "specialized society separate from civilian society"<sup>74</sup> and that "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."<sup>75</sup> As a result, the Supreme Court has held that, while members of the military are not excluded from the protections afforded by the Constitution, "the different character of the military community and of the military mission requires a different application of those protections."<sup>76</sup> It is likely that the Supreme Court would similarly hold that the military's unique mission and environment dictate a different and more deferential application of the *Burger* criteria to warrantless military inspections.

Second, the Supreme Court would likely hold the military to a less stringent application of the *Burger* criteria because of the Court's traditional deference to the military in matters of command decisions. The Supreme Court has consistently refused to entertain suits that would require

the judiciary to second-guess military decisions through the adjudication of disputes involving "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force [decisions which] are essentially professional military judgments."<sup>77</sup> As such, the Court has rejected claims that would require commanding officers to testify in court in order "to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions."<sup>78</sup> The Supreme Court's deference to the military would likely result in the Court adopting a more deferential standard of review in considering the constitutionality of Military Rule of Evidence 313(b). As a result, the Court would probably hold the military to a less demanding application of the *Burger* criteria, reasoning that the Rule's reasonableness standard, together with its prohibition against using inspections as a subterfuge to search for evidence, are sufficient safeguards against violations of the fourth amendment.

A final reason why the Supreme Court would probably reject the argument that Military Rule of Evidence 313(b) violates the fourth amendment is the significant practical problems that would be encountered if they invalidated the Rule. Because of the government's substantial interest in conducting warrantless inspections of its military forces,<sup>79</sup> if Rule 313(b) were struck down as unconstitutional a new Rule would need to be established. Yet, there are significant (arguably insurmountable) problems in attempting to create a Rule that provides a more thorough and explicit list delineating the time, place, and scope of permissible warrantless administrative inspections. Rule 313(b) is a generic rule of evidence that applies to all four services and an extensive variety of military units and situations. It would be virtually impossible to draft a Rule detailing all possible situations and contexts in which inspections would be permitted and the procedures that must be followed in each situation. A better solution would be to retain the Rule's reasonableness standard as a check on an inspecting officer's discretion but require military commands to establish local regulations and standing operating procedures regulating administrative inspections conducted pursuant to Rule 313(b).

In summary, neither the Supreme Court nor the Court of Military Appeals has ruled on the constitutionality of Military Rule of Evid. 313(b) in light of the constitutional requirements set out in *New York v. Burger* for a valid warrantless administrative inspection. The Rule's only potential inconsistency with the *Burger* criteria involves the issue of whether the Rule provides a constitutionally adequate substitute for a warrant. The Supreme Court's view of the

<sup>69</sup> See *supra* notes 37-40 and accompanying text.

<sup>70</sup> *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979).

<sup>71</sup> *Parker v. Levy*, 417 U.S. 733, 743 (1974).

<sup>72</sup> *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

<sup>73</sup> See *Brown v. Glines*, 444 U.S. 348 (1980) (freedoms of speech and petition); *Greer v. Spock*, 424 U.S. 828 (1976) (freedoms of speech and assembly); *Parker v. Levy*, 417 U.S. 733 (1974) (freedom of speech).

<sup>74</sup> *Parker v. Levy*, 417 U.S. 733, 743 (1974).

<sup>75</sup> *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

<sup>76</sup> *Parker*, 417 U.S. at 758.

<sup>77</sup> *Gilligan v. Morgan*, 413 U.S. 1, 10 (1972); see also *United States v. Shearer*, 473 U.S. 52, 58-59 (1984).

<sup>78</sup> *Shearer*, 473 U.S. at 58.

<sup>79</sup> See *supra* notes 37-40 and accompanying text.

military as a unique environment and society, the diminished constitutional protections afforded military personnel, and the Court's great deference towards the military in disputes involving military command decisions, would, in all

likelihood, lead the Court to hold that Military Rule of Evidence 313(b) is constitutional.

## Virginia Military Advisory Commission Update

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In last September's edition of *The Army Lawyer*, we announced the formation of the Virginia Military Advisory Commission and of the Governor's Legal Advisory Committee established under it. It was hoped at the time that the commission would become a valuable and substantive adjunct to the military commands in Virginia as well as to the various divisions of State government. It has proven to be that, and more.

On May 23, 1988, the Virginia Military Advisory Commission held its fourth semiannual meeting at Langley Air Force Base, Virginia. Governor Gerald L. Baliles, Governor of Virginia, presided over the meeting, which was also attended by Lieutenant Governor L. Douglas Wilder, Attorney General Mary Sue Terry, a number of cabinet level officers of Governor Baliles' administration, and senior military commanders within Virginia.

Governor Baliles opened the meeting by announcing that the Virginia Military Advisory Council (VMAC), as it will be known effective July 1, 1988, has been established in law as a permanent advisory council to the Governor. He also used the forum of the meeting to brief the military commanders of Virginia on the Chesapeake Bay Agreement of 1987. The agreement, signed by the chief executive officers of Virginia, Pennsylvania, Maryland, and the District of Columbia, is a multimillion dollar comprehensive multi-state effort to clean up the Bay. The Governor asked for the Department of Defense's continued aggressive support for this project. Attorney General Terry then briefed the commission on VMAC sponsored or initiated legislation which had become law during the past legislative session. The following is a brief synopsis of those new laws.

a. *Virginia Military Advisory Council*: Effective July 1, 1988, the commission, which had been only a temporary advisory body to Governor Baliles, will now be permanently established in law and will not have to be re-created upon each change in administration.

b. *Operator Licensing Requirements*: Originally suggested by the Army, a change to Virginia law was accomplished to clarify that servicemembers and their families who are domiciliaries of another state can operate a motor vehicle licensed in the Commonwealth of Virginia while retaining an operator's license from their state of domicile.

c. *Landlord Tenant Act, Military Clause*: Originally suggested by the Army, this law will reduce a major irritant for military families, especially in the Northern Virginia and

Tidewater military communities. Historically, servicemembers who were reassigned within the commuting areas of Washington, D.C. and Tidewater, VA could not take advantage of the statutory military clause when military orders required them to move. This was due to a requirement in the law that the change of station had to be 50 miles or more. Had the VMAC sponsored legislation passed as proposed, it would have eliminated the 50 mile requirement altogether. However, the legislation as amended and enacted (1) reduced the 50 miles to 35 miles; (2) now includes soldiers required to go TDY for over three months; (3) includes soldiers directed to move into government quarters with the consequent forfeiture of BAQ; (4) includes all landlords, whereas prior law governed only landlords owning 10 or more units; and, finally, (5) includes coverage of full-time National Guard personnel.

d. *Family Law Jurisdiction in Virginia Courts*: Originally suggested by the Army, this law allows servicemembers stationed in the Commonwealth to file for divorce even though they never lived with their spouse in the state. Prior law required soldiers to cohabitate with their spouse in Virginia for at least six months prior to filing for divorce. The legislation removed this requirement that was also a discriminatory policy, as there is no similar residency requirement for civilians.

e. *In-State Tuition For Military Family Members*: Originally suggested by the Army and Air Force, and with substantial assistance from the Navy, this law passed over the strong opposition of a number of Virginia legislators. The law removed a statutory prohibition against nondomicile soldiers and family members receiving in-state tuition benefits while stationed in Virginia. Essentially, the law states that military family members get one year in-state status for purposes of tuition. The one-year tuition benefit begins on the date the servicemember reports for assignment in Virginia. Nevertheless, the applicant must continue to *compete for admission* as an out-of-state student. The VMAC will continue its efforts to achieve full in-state tuition benefits for military family members.

In addition, several ongoing, but nonlegislative initiatives originally developed by the Army were also discussed. These included jurisdiction over family law matters arising on military installations, the sharing of child protective service information, and job networking between State and Federal agencies.

The successes of the council during the recent legislative session have clearly proven its worth. Not only have council members established high level, yet informal and personal channels of communication between the military and the state administration, the council has also become an important vehicle for substantive change. The overall result is significant improvement in the quality of life for all uniformed servicemembers and their families assigned within the Commonwealth of Virginia. The Army's leadership role in this project is indeed an accomplishment in which all involved can be proud.

Both the future of the council as well as its substantive role are now ensured. The next council meeting is scheduled for early December 1988, in Richmond, Virginia;

General M. R. Thurman, Commander, U.S. Army Training and Doctrine Command, and MG Samuel N. Wakefield, Commander, U.S. Army Transportation Center and Fort Eustis, have already offered to host the spring 1989 council meeting at Fort Eustis, Virginia. The momentum of this initiative is continuing on, at least into the foreseeable future. This type of council could become a powerful adjunct to the more traditional channels of communication already established between the Department of Defense and the various state governments. Military lawyers should discuss the VMAC with their commanders with the goal of establishing similar programs in their own states.

## USALSA Report

United States Army Legal Services Agency

### *The Advocate for Military Defense Counsel*

#### **Attack on Big Mac? McOmber: A Counsel Right**

*Captain David C. Hoffman  
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In 1976, the United States Court of Military Appeals announced a prophylactic rule in *United States v. McOmber*,<sup>1</sup> giving a military suspect a counsel right that has not been matched in the civilian sector. The rule established in *McOmber* [hereinafter referred to as the *McOmber* rule, the rule or *McOmber*], requires an investigator to notify a suspect's attorney of an impending interview and provide that attorney with a reasonable opportunity to be present before the investigator may question the suspect. However, in *United States v. Roa*<sup>2</sup> the Court of Military Appeals, in three separate opinions, held that this long standing rule does not apply to a request by military investigators for consent to search. Is this a new exception to the *McOmber* rule? Has the Court of Military Appeals begun to erode the extra counsel right that it created for military suspects? The answer to both of these questions is "no." The explanation of this answer requires a reexamination of the *McOmber* rule.

#### **McOmber's Background**

Five years prior to deciding *United States v. McOmber*, the Court of Military Appeals decided *United States v. Estep*,<sup>3</sup> *United States v. Flack*,<sup>4</sup> and *United States v. Johnson*,<sup>5</sup> each containing strict warnings to military criminal investigators that once counsel has been appointed or retained to represent a military suspect, and once the investigator has notice of this representation, the investigator must contact that counsel before the suspect is to be questioned. In *Estep*, the Court of Military Appeals cautioned:

[W]hen an accused has asserted the right to counsel at a custodial interrogation and the criminal investigator thereafter learns that the accused has obtained counsel for that purpose, he should deal directly with counsel, not the accused, in respect to interrogation, just as trial counsel deals with defense counsel, not the accused, after the charges are referred to trial.<sup>6</sup>

However, in each of these cases the court declined to apply a *per se* error test, holding instead that "the omission is not fatal to the particular proceeding if there is no fair risk of

<sup>1</sup> *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976).

<sup>2</sup> *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987).

<sup>3</sup> 41 C.M.R. 201 (C.M.A. 1970).

<sup>4</sup> 43 C.M.R. 41 (C.M.A. 1970).

<sup>5</sup> 43 C.M.R. 160 (C.M.A. 1970).

<sup>6</sup> *Estep*, at 202.

prejudice to the accused."<sup>7</sup> In *Johnson*, the final case of this trilogy of warnings, the court further admonished investigators:

[W]e note that the requirement that the government deal through counsel is not burdensome or oppressive, especially where the investigator is on notice that counsel has been appointed or retained. Once counsel has entered the case, he is in charge of the proceedings and all dealings with the accused should be through him.<sup>8</sup>

### McOmber Revisited

Having given sufficient warning and time for implementation, the court, when confronted with the facts in *McOmber*,<sup>9</sup> observed "a continuing reluctance to abide by previous guidance absent the implementation of a judicial sanction to retard future violations."<sup>10</sup> Noting that the test for prejudice had encouraged infractions rather than diminished them, and that an investigator's minimum responsibilities in questioning a suspect with or without counsel were identical, the court decided to provide investigators with some incentive to alter their interrogation methods for individuals known to be represented by counsel.<sup>11</sup> Thus comes the often-quoted rule of law:

We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under article 31(d) of the Uniform Code.<sup>12</sup>

It is interesting to note that every published military appellate decision that purports to follow *McOmber* ends their recitation of the rule with the above quote. But *McOmber* does not end there. The statement above illustrates the "teeth" that the court gave the *McOmber* rule, but in no way illustrates the extent of its applicability. In the very next sentence the court tells us how far this newly created right extends:

This includes questioning with regard to the accused's future desires with respect to counsel as well as his right to remain silent, for a lawyer's counselling on these two matters in many instances may be the most important advice ever given his client.<sup>13</sup>

Therefore, if a military criminal investigator is required to advise accuseds of their article 31 rights,<sup>14</sup> and is aware that counsel has been appointed or retained, the investigator is also required to notify the accused's attorney that such an interview is about to take place before the article 31 rights advisement is given. Statements elicited in violation of this rule are subject to the exclusionary rule.<sup>15</sup>

The *McOmber* rule has been incorporated into Military Rule of Evidence 305(e) which states:

When a person subject to the Code who is required to give warnings . . . intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

While case law prior to the enactment of the Military Rules of Evidence indicates otherwise,<sup>16</sup> the Court of Military Appeals observed in *United States v. Sutherland*,<sup>17</sup> that Military Rule of Evidence 305(e) has expanded the rule to include not only the situation where the interrogator has actual knowledge of an attorney-client relationship, but also where the interrogator reasonably should be aware. The analysis<sup>18</sup> of Rule 305(e) lists the following six factors that may be considered to impute knowledge to an investigator that the person to be questioned has counsel for the purposes of the rule: 1) knowledge by the investigator that the person to be questioned had requested counsel; 2) knowledge by the investigator that the person to be questioned had been involved in a pretrial proceeding at which a person ordinarily would be represented by counsel; 3) regulations governing the appointment of counsel; 4) local standard operating procedures; 5) the interrogator's military assignment and training; and 6) the interrogator's experience. Despite the imputation of knowledge to the investigator of an attorney-client relationship in these situations, the court has refused to extend the burden on the investigator to ask the accused if an attorney has been obtained for representation in the matter under investigation.<sup>19</sup> The suspect still has the burden to inform the investigator that counsel has been obtained.

<sup>7</sup> *Id.*

<sup>8</sup> *Johnson*, at 165.

<sup>9</sup> At the initiation of a custodial interrogation at the security police office, and after having been advised of the nature of the suspected offense, his right to remain silent, and his rights concerning counsel, the accused immediately requested counsel whereupon the investigator terminated the interview. Two months later, after the accused's attorney had contacted the investigator to discuss the case, the investigator conducted a second interview after rewarning the accused of his right to counsel and right to remain silent. The second interview was conducted without counsel present and without prior notice to counsel. The resulting written statement was admitted into evidence at trial over a defense objection. *McOmber* at 381.

<sup>10</sup> *Id.* at 382.

<sup>11</sup> *Id.* at 382-383.

<sup>12</sup> *Id.* at 383.

<sup>13</sup> *Id.*

<sup>14</sup> Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

<sup>15</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>16</sup> *United States v. Roy*, 4 M.J. 840 (A.C.M.R. 1978); *United States v. Green*, 7 M.J. 687 (N.C.M.R. 1979).

<sup>17</sup> 16 M.J. 338, 339-340 (C.M.A. 1983).

<sup>18</sup> *Manual for Courts-Martial, United States*, 1984, Mil. R. Evid. 305(e) analysis, app. 22, at A22-14.1.

<sup>19</sup> *United States v. Spencer*, 19 M.J. 184 (C.M.A. 1985).

The notice requirement applies to not only those situations in which an investigator reasonably should know that a suspect is represented by counsel, but also to those situations when two or more offenses are factually related and the investigator knows that the suspect has representation on one of the offenses.<sup>20</sup> In *United States v. Lowry*, the Court of Military Appeals refused to make "subtle distinctions that require the separation of offenses occurring within the same general area within a short period of time."<sup>21</sup>

The court has not extended the notice requirement to factually unrelated offenses,<sup>22</sup> or to civilian investigators.<sup>23</sup> Two factually unrelated offenses are not related for the purposes of the *McOmber* rule even though at some later time they are tried together. "If the offenses are otherwise unrelated, an investigator may interview an accused as to one offense without contacting the lawyer who is representing him only as to the other offense."<sup>24</sup> The problem, however, is that "the investigator runs the risk that later a court-martial will perceive some relationship between the pending charges and the subject of the investigation, in which event [*McOmber*] will apply."<sup>25</sup> In addition, an attorney who claims to represent a person is presumed to do so, and should be provided notice of an intended interview.<sup>26</sup> In *Spencer*, the court stated:

[W]e also conclude that Mil.R.Evid. 305(e) should be applied liberally and that, when a military lawyer purports to be representing a servicemember in connection with the investigation or trial of a criminal offense, he should be provided notice of an intended interview, even though the investigator may be unsure whether the lawyer has authority for that representation. Investigators should not be encouraged to omit notice in the hope that later the purported "counsel's" authority to represent his client may be successfully challenged. Moreover, we believe that it would be profitless for trial and [appellate] courts to spend time in deciding exactly when a military lawyer is authorized by service directives to be counsel for a servicemember whom he claims to represent.<sup>27</sup>

Once the investigator is on notice that a suspect is represented by counsel, the investigator must furnish that counsel with notice of an intended interview with the suspect.<sup>28</sup> The *McOmber* rule provides that the manner in which the notice to counsel is given by the investigator must be sufficient to provide counsel with a reasonable opportunity to be present. In *United States v. Fountain*,<sup>29</sup> the Air Force Court of Military Review ruled that a personal

appearance by the investigator at the defense counsel's office, several hours before the intended interview, in order to inform the defense counsel of the time and place of a polygraph examination and post-polygraph interview, was proper notice. Inherent in the concept of notice is a requirement that the notice be reasonably conveyed so that the recipient can understand its intended meaning. In a practical sense, a notice of an impending interrogation, given in a manner to afford counsel reasonable opportunity to be present, should include, at a minimum, the time and place of the interrogation. The notice provided by the investigator in *Fountain*, although given only hours before the intended interview, provided the attorney with the minimum requisite information to amount to reasonable notice.

In *United States v. Holliday*,<sup>30</sup> the Army Court of Military Review held that an investigator's warning during an argument with an attorney that he intended to interview the attorney's client amounted to notice under *McOmber*. The argument occurred when both the investigator and the attorney arrived at the Installation Confinement Facility to speak to Holliday at the same time and each demanded to speak to him first. During the course of the argument, the attorney informed the investigator that he was Holliday's attorney and that he was going to tell Holliday not to talk to the investigator. The investigator responded, "I'm going to need for Holliday to tell me that." The Army Court of Military Review found that the statement of the investigator put the attorney on notice that the investigator was waiting to interview Holliday. Trial defense counsel are advised to attack the reasonableness of a notice when confronted with a similar "surprise" interrogation.

One final element of the *McOmber* rule that has crept into recent decisions of the Courts of Military Review,<sup>31</sup> is the requirement that the attorney convey to the investigator his or her desire to be present at the interview. Common sense dictates that the attorney's response be preceded by reasonable notice of the interview. It is also logical for the investigator to assume that the attorney has elected not to be present if no other intent was conveyed. In addition, Military Rule of Evidence 305(g)(2) allows an investigator to proceed without counsel present if the counsel fails to attend an interrogation that was scheduled within a reasonable period of time after notice was given.

#### *McOmber* and the Sixth Amendment

Having reviewed the various elements of the *McOmber* rule, it now becomes necessary to compare the military accused's rights under that rule to those rights under the sixth

<sup>20</sup> *United States v. Lowry*, 2 M.J. 55 (C.M.A. 1976).

<sup>21</sup> *Id.* at 59. See also *United States v. Dowell*, 10 M.J. 36, 41 (C.M.A. 1980).

<sup>22</sup> *Spencer*, at 187-88.

<sup>23</sup> *United States v. McDonald*, 9 M.J. 81 (C.M.A. 1980).

<sup>24</sup> *Spencer*, at 187.

<sup>25</sup> *Sutherland*, at 340.

<sup>26</sup> *United States v. Turner*, 3 M.J. 570, 573 (A.C.M.R. 1977) (Costello, concurring in part and dissenting in part), *adopted* 5 M.J. 148 (C.M.A. 1978); *Spencer*, at 187-88.

<sup>27</sup> *Spencer*, at 187-88.

<sup>28</sup> *McOmber*, at 383.

<sup>29</sup> 22 M.J. 561 (A.F.C.M.R. 1986), *pet. denied*, 23 M.J. 423 (C.M.A. 1987).

<sup>30</sup> 24 M.J. 686 (A.C.M.R. 1987), *pet. denied*, 25 M.J. 437 (C.M.A. 1987).

<sup>31</sup> *United States v. Fountain*, at 563 ("The defense counsel also did not indicate any desire to be present at the examination . . ."); *United States v. Holliday*, at 689 (The attorney expressed no interest or concern in appearing at the interrogation).

amendment of the United States Constitution. The similarities between the *Mcomber* rule and the sixth amendment end with the fact that *Mcomber* is a counsel right. *Mcomber* is a prophylactic rule providing a right that is predicated not on the sixth amendment, but on the military accused's statutory right to counsel set forth in article 27.<sup>32</sup> *Mcomber* is not a right to counsel, but is a right to notice to counsel. It does not provide an accused with the right to have counsel act as a "medium" between the accused and the government as does the sixth amendment,<sup>33</sup> but merely provides counsel with a reasonable opportunity to be present when their client is questioned.

The *Mcomber* rule is triggered by questioning, as is article 31.<sup>34</sup> If an investigator intends to perform acts that would require warnings to a suspect under *Miranda-Tempia*<sup>35</sup> or article 31, the *Mcomber* notice must be given before the warnings are provided. The *Mcomber* notice may, therefore, be triggered earlier in the criminal investigation process than an accused's sixth amendment right to counsel.<sup>36</sup> Because the *Mcomber* safeguards are triggered by the same conduct that triggers article 31, the notice to counsel must not only be provided before a custodial interrogation,<sup>37</sup> but before all questioning in which an incriminating response is either sought or is a reasonable consequence thereof.<sup>38</sup> The *Mcomber* notice must also precede any actions or conversations by an investigator or government agent that are designed to elicit an incriminating response from a suspect and are the "functional equivalent of the interrogation."<sup>39</sup> This requirement applies not only to a criminal investigator, but also to a suspect's superiors who have reason to question the servicemember due to the unique relationship between the accused's chain of command and the government.<sup>40</sup>

#### Waiver

In *United States v. Turner*,<sup>41</sup> the Court of Military Appeals ruled that an individual, after conference with an attorney, may waive the attorney's presence at an interrogation. Counsel confronted with the *Turner* holding should

argue that it has very limited precedential value. The majority opinion ignores the *Mcomber* rule by deciding the issue based solely on article 31, yet acknowledging that the accused had an attorney representing him.<sup>42</sup> Judge Cook correctly observes in his concurring opinion<sup>43</sup> that the majority opinion fails to provide any reasons for admitting the pretrial statement. He goes on to explain that the reason he concurred in the result was because he believed that the *Mcomber* rule should not be applied retroactively and that the investigators were not apprised that an attorney had undertaken representation of the accused.<sup>44</sup> Thus, whether the majority ruled that *Mcomber* was waivable, or whether they simply ruled that *Mcomber* did not apply, is debatable.

It is hard to imagine circumstances amounting to an actual waiver of the *Mcomber* notice by an accused, even if it is not a government initiated interrogation. The rule was designed to provide notice to an appointed attorney before a suspect is questioned concerning the right to counsel or right to remain silent. Because *Mcomber* is triggered by the same conduct that triggers article 31, if a person is entitled to advice under article 31, the attorney is entitled to notice before that advice is given.<sup>45</sup> Article 31 does not apply, however to a spontaneous, unsolicited statement that is made without compulsion or action by the government, and neither does *Mcomber*. An example of these circumstances is found in *United States v. Barnes*,<sup>46</sup> in which the Army Court of Military Review ruled that a first sergeant was not required to provide article 31 warnings or *Mcomber* notice when a soldier, who was being processed for pretrial confinement, asked to speak to him, even though the first sergeant had cleared all other people from the room to allow the soldier to speak privately. The basis for the court's ruling was not that the accused had waived *Mcomber*, but that he was not questioned, was not entitled to warnings under article 31, and therefore, *Mcomber* was never triggered.

Military Rule of Evidence 305(g)(2) provides "if notice to counsel in subdivision (e) is applicable, a waiver of the right

<sup>32</sup> *Mcomber*, at 383; *Lowry*, at 60; UCMJ, art. 27, 10 U.S.C. § 827 (1982).

<sup>33</sup> In *United States v. Turner*, Judge Costello's opinion, as adopted by the Court of Military Appeals, holds that an attorney who has announced that he represents a suspect may then assert on behalf of that person their right to counsel. This holding was not premised upon any right provided by the *Mcomber* rule, but was based upon a denial of the accused's sixth amendment rights. 3 M.J. at 573; 5 M.J. at 149. Judge Cook, in his separate opinion in *Turner*, correctly observes that the sixth amendment had not yet attached. 5 M.J. at 150. *Turner* holds little precedential value, in the face of the Supreme Court's holding in *Moran v. Burbine*, in which it was held that the attorney-client relationship itself does not independently trigger the sixth amendment right to counsel, and that a defense counsel is not empowered to act as a "medium" between the state and the client until the sixth amendment attaches. 475 U.S. 412 (1986).

<sup>34</sup> U.C.M.J., art 31, 10 U.S.C. § 831 (1982) [hereinafter article 31].

<sup>35</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

<sup>36</sup> See *Estelle v. Smith*, 451 U.S. 454 (1981); *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985).

<sup>37</sup> *Miranda v. Arizona*, 384 U.S. 436, (1966) (Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards).

<sup>38</sup> Mil. R. Evid. 305(b)(2).

<sup>39</sup> *Rhode Island v. Innis*, 446 U.S. 291 (1980); *United States v. Muldoon*, 10 M.J. 254 (C.M.A. 1981); *United States v. Dowell*, 10 M.J. 36 (C.M.A. 1980); *United States v. Carter*, 13 M.J. 886 (A.C.M.R. 1982).

<sup>40</sup> *United States v. Barnes*, 19 M.J. 890 (A.C.M.R. 1985), *affirmed*, 22 M.J. 385 (C.M.A. 1986).

<sup>41</sup> 5 M.J. 148, 149.

<sup>42</sup> "Turning to the facts surrounding the second interrogation, we see that the appellant not only had the privilege of advice of his counsel, but knowingly, intelligently and voluntarily waived his privilege against self-incrimination." *Id.*

<sup>43</sup> *Id.* at 151.

<sup>44</sup> *Id.*

<sup>45</sup> Mil. R. Evid. 305(e).

<sup>46</sup> *Barnes*, at 893.

to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given." The analysis<sup>47</sup> acknowledges that a waiver of the *Mcomber* notice without counsel present would allow an investigator to circumvent the rule, and declares that a *Miranda* type waiver in such situations clearly defeats the purpose of the *Mcomber* rule. It should be noted that this so-called waiver rule does not provide for a waiver of the *Mcomber* notice, but provides only for those instances where an investigator can proceed after the notice has been given without the presence of the attorney. The analysis<sup>48</sup> describes those two instances as: 1) counsel, after reasonable efforts, could not be notified; and 2) counsel did not attend the interrogation which was scheduled within a reasonable time after notice was given.

### Meaningless Advisement of Rights

The meaningless advisement of article 31 warnings to a suspect under circumstances in which those warnings were not necessary does not trigger *Mcomber*. The taking of blood specimens,<sup>49</sup> handwriting or voice exemplars,<sup>50</sup> and fingerprints<sup>51</sup> need not be preceded by the advisement of article 31 warnings. An investigator's prefatory advisement to a suspect of the article 31 warnings for the purpose of accomplishing any of these investigatory procedures is therefore meaningless and logically fails to trigger *Mcomber*. The intent of the investigator in giving the warnings, should be carefully tested to avoid those circumstances where an investigator attempts to obviate the need for the *Mcomber* notice by prefacing the article 31 warnings on one of these investigatory procedures.

One example of these circumstances can be found in *Holliday*.<sup>52</sup> The investigator advised Holliday of his article 31 rights and Holliday invoked those rights. The investigator then required Holliday to execute handwriting

exemplars. During the course of those exemplars, Holliday changed his mind concerning the invocation of his rights and submitted a confession. Had the investigator intended only to take handwriting exemplars, the initial advisement of the article 31 warnings would have been meaningless and the *Mcomber* notice unnecessary. It was apparent from the investigator's earlier statement at the confinement facility, however, that he intended to interview Holliday and not merely execute handwriting exemplars. The court in *Holliday* ruled that notice had been given for that initial advisement of rights, and that factually there was only one interview requiring only one *Mcomber* notice, despite the second advisement of rights.<sup>53</sup>

In *United States v. Roa*, the Court of Military Appeals noted an additional situation to which article 31 and the *Mcomber* notice do not apply—a request for a consent to search. Judge Cox and Chief Judge Everett observed in separate concurring opinions that a consent to search was not protected by the privilege against self incrimination since that right protects only testimonial evidence, not physical evidence. Both judges agreed that a request for a consent to search is far different than the "questioning" or "interrogation" requiring notice under *Mcomber*.<sup>54</sup> This decision is consistent with the theory that the *Mcomber* notice need only be given under circumstances that also require warnings under article 31.

### Conclusion

The decision in *United States v. Roa*,<sup>55</sup> does not create a new exception to the *Mcomber* rule, but observes that *Mcomber* was never triggered. Questioning a suspect concerning a consent to search does not require warnings under article 31 and therefore does not trigger *Mcomber*. *Mcomber* has not been eroded over the years by the Court of Military Appeals, but has been strictly protected, and the decision in *Roa*, does not indicate a shift in that sentiment.

<sup>47</sup> Mil. R. Evid. 305(g) analysis at A22-14.

<sup>48</sup> *Id.*

<sup>49</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>50</sup> *United States v. Mara*, 410 U.S. 19 (1973) (handwriting); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting); *United States v. Dionisio*, 410 U.S. 1 (1973) (voice); *United States v. Wade*, 388 U.S. 218 (1967) (voice); *United States v. Lloyd*, 10 M.J. 172 (C.M.A. 1981) (handwriting and voice).

<sup>51</sup> See *Roa*, at 300.

<sup>52</sup> *Holliday*, at 687.

<sup>53</sup> See *Fountain*, at 563.

<sup>54</sup> One of the differences between Judge Cox's opinion, *Roa*, at 297-300, and Chief Judge Everett's opinion, *Roa*, at 301-302, is the application of the term "questioning" to the *Mcomber* rule instead of the term "interrogation." Rather than performing the legal hair-splitting of differentiating between these terms, a more preferable analysis concentrates instead on the triggering device, article 31.

<sup>55</sup> 24 M.J. 297.

### Piercing the "Conditional" Peremptory Shield

In an attempt to shield a specific court member from exercise of the peremptory challenge by the defense, trial counsel may seek to employ a "conditional" challenge,<sup>1</sup> whereby a member is removed peremptorily on the condition that defense counsel not reduce the court-martial composition below the statutory limits.<sup>2</sup> In effect, the defense may be forced by such a tactic to use its only peremptory challenge either to remove the shielded member on its own or forego challenging another member that would cause the "condition" to exist.<sup>3</sup>

The Army Court of Military Review recently analyzed the use of "conditional" peremptory challenges in *United States v. Newson*.<sup>4</sup> In *Newson*, the accused elected trial by court-martial composed of officer and enlisted members. After *voir dire* neither side raised any challenge for cause against the six members. Three enlisted members were detailed, and trial counsel sought to defer exercising his peremptory challenge. Defense counsel objected on the basis that it was judicial practice for government to challenge first. Agreeing with this point, the military judge nonetheless permitted trial counsel to challenge an enlisted member "conditionally." Trial counsel challenged Master Sergeant (MSG) C. Defense counsel then peremptorily challenged another enlisted member which caused MSG C to be placed back on the panel. Thereafter, trial counsel was allowed to use his peremptory challenge again, this time to remove an officer from the panel.<sup>5</sup>

This procedure had the effect of protecting MSG C from challenge by the defense. Presumably, MSG C would have been kept off the panel if the defense had not peremptorily challenged another enlisted member. The Army Court of Military Review held that an "accused should not have to forego the full exercise of his rights in order to preserve those rights."<sup>6</sup>

In discussing the use of "conditional" challenges, the court analogized *Newson* with *United States v. Carter*,<sup>7</sup> in which the Court of Military Appeals held as a matter of judicial discretion, that when new members are added to a court-martial panel, the defense should generally be granted an additional peremptory challenge when requested. Employing the *Carter* rationale, the court opined that when members such as MSG C are peremptorily challenged and

subsequently reinstated, the defense may then make a good showing why the accused should be granted another peremptory challenge, upon request. The court reasoned that anything less would mean that an accused could be tried over his objection by members not subject to peremptory challenge by him. The court, quoting from *Carter*, stated that to permit the procedure adopted by the military judge below would be to "countenance procedural rules which would have a 'chilling effect' on the use of [the peremptory] challenge."<sup>8</sup>

The court held that while it was error to allow counsel the "conditional" peremptory challenge, relief in the case before it was not warranted. The court found waiver based upon the absence of the following: (1) objection to reappearance of MSG C on the panel; (2) a request for an additional peremptory challenge; and (3) a proffer on the record that the challenge would have been otherwise exercised. The *Newson* opinion is important to defense counsel because it deters trial counsel gamemanship in the peremptory challenge arena, and under like conditions, gives the defense counsel ammunition to obtain a heretofore elusive additional peremptory challenge. It also illustrates the need to perfect (and continue to perfect) objections on the record in order to obtain appellate relief. Finally, the opinion is solid authority to oppose conditional use of peremptory challenges.<sup>9</sup> First Lieutenant Pamela Dominisse

### Pornography, Sexual Paraphernalia, and Military Rule of Evidence 404(b)

In *United States v. LeProwse*,<sup>10</sup> the Army Court of Military Review ruled that pornographic literature was admissible to establish the requisite criminal intent for commission of the offense of indecent liberties with a child. A conviction for indecent liberties requires proof that the accused acted "with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both."<sup>11</sup> The accused had argued before the Army court that the pornographic material in question constituted inadmissible evidence of bad character introduced to prove criminal predisposition.<sup>12</sup> The court rejected that argument.

In *LeProwse*, the precise charge was attempted indecent liberties. The accused allegedly asked two boys, 10 and 11

<sup>1</sup> See generally *Manual for Courts-Martial, United States, 1984*, Rule for Courts-Martial 912(g) [hereinafter R.C.M.]; Uniform Code of Military Justice, art. 41, U.S.C. § 41(b) (1982) [hereinafter UCMJ].

<sup>2</sup> A court panel for a general court-martial shall not be less than five members, and a court panel for a special court-martial shall not be less than three members. See R.C.M. 501(a). An enlisted panel shall consist of at least one third enlisted members. See R.C.M. 503(a)(2).

<sup>3</sup> By reducing the court-martial below the one-third composition for enlisted personnel or by removing the fifth or third court member from a panel, the shielded member would be returned to the panel according to the terms of the conditional challenge.

<sup>4</sup> *United States v. Newson*, 26 M.J. 719 (A.C.M.R. 1988).

<sup>5</sup> *Id.* at 721.

<sup>6</sup> *Id.* at 722.

<sup>7</sup> *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988).

<sup>8</sup> *Newson*, 26 M.J. at 722.

<sup>9</sup> *Id.*

<sup>10</sup> 26 M.J. 652 (A.C.M.R. 1988).

<sup>11</sup> *Manual for Courts-Martial, United States, 1984*, Part IV, para. 87b(2)(e) [hereinafter MCM, 1984].

<sup>12</sup> See MCM, 1984, Mil. R. Evid. 404(b).

years old, if they would remove their pants for a dollar. The boys responded negatively. The next day, the accused was apprehended. An artificial penis and a tube of lubricating jelly were seized in a search of his person. The authorities searched his barracks room and found pornographic material.<sup>13</sup> Over trial defense counsel's objection, the military judge admitted into evidence all the paraphernalia and the pornographic literature.

In *United States v. Mann*,<sup>14</sup> the Court of Military Appeals analyzed time, situs, and nexus to determine that the pornographic material in that case was admissible to establish criminal intent. Without clearly relying on *Mann*, the Army Court of Military Review in *LeProwse* also examined time, situs, and nexus and found them satisfied with respect to the printed materials. They were in the accused's possession in close proximity to the time of the offense, i.e., the day after the offense. The victims testified that the accused possessed "a magazine" at the scene of the alleged incident. The court found the requisite nexus in that the content of the pornographic material suggested that the accused "was an individual inclined to seek sexual gratification by observing deviant behavior."<sup>15</sup> The court held, however, that the artificial penis and lubricating jelly were inadmissible.<sup>16</sup>

When confronted by *LeProwse* as authority for the admission of pornographic material, trial defense counsel should be prepared to critically distinguish *LeProwse*. In *LeProwse*, no witness was able to actually place the pornography at the scene of the alleged crime. The victims were unable to identify the title or type of "a magazine" which they reported the accused possessed at the scene of the incident. The court evidently assumed that the magazine possessed at the scene was one of the pornographic magazines later discovered in the accused's barracks room. In *Mann*, however, the pornographic literature was stored at the scene of the crime.

Furthermore, the nexus relied on by the court in *LeProwse* is tenuous. The accused was convicted of attempted indecent liberties with two young boys. The predominant theme of the pornography admitted into evidence was not pedophilia (sexual activity with prepubertal children).<sup>17</sup> Without evidence indicating that a correlation exists between the pornographic materials and homosexual pedophilia, it is impossible to establish a nexus between the exhibits and the charged criminal activity. This should be

compared to *Mann*, where the alleged indecent acts occurred with a nine-year old girl and involved penile substitute devices utilized for vaginal penetration. The Court of Military Appeals properly found a nexus between the indecent acts and magazines depicting naked children with adults and young ladies posing with electric and non-electric sexual aids.<sup>18</sup>

Finally, the Army court accepted the pornographic materials because they suggested that the accused was an individual inclined to seek sexual gratification by observing deviant behavior. Defense counsel should argue, that the Army court essentially found the pornography relevant to establish that the accused's character was such that he had a propensity or predisposition to act in the manner charged. This is precisely the type of evidence the rules preclude.<sup>19</sup>

*Mann* does not allow unrestrained admission of pornography when the accused's intent to satisfy sexual desires is at issue. Although the parameters of *Mann* are subject to dispute, the framework for analysis is clear. Therefore, trial defense counsel should continue to object to the admission of pornography. If the government successfully establishes time, situs, and nexus, trial defense counsel should then argue that the probative value of the pornography is substantially outweighed by the danger of unfair prejudice.<sup>20</sup> Timely objections by trial defense counsel will preserve the issue for appeal. Captain Gregory B. Upton

#### Don't Make Promises You Can't Keep

In *United States v. Kershaw*,<sup>21</sup> the Army Court of Military Review held that a federal agent's unkept promise not to prosecute, while not amounting to a formal grant of immunity by a general court-martial convening authority or his staff judge advocate,<sup>22</sup> still denied appellant a fair trial. The court found the prosecutorial effort so egregious as to offend due process of law, and set aside and dismissed the charges.<sup>23</sup>

Kershaw, a Staff Sergeant assigned to a military police company, was found guilty of violating a general regulation and obtaining services by false pretenses by smuggling currency out of Korea through the United States Army Post Office System. Some months prior to trial, appellant was targeted as a suspect and subjected to a custodial interrogation at the Criminal Investigation Command Headquarters in Korea by an officer of the United States Custom Service

<sup>13</sup> The authorities discovered paperback books entitled *Di's Black Boy*, *Boot Licking Recruit*, *Teen-Mastered*, and *Locker Room Lovers*; a *Gym* magazine depicting homosexual sodomy between men; and a directory listing bisexual males and females in Texas.

<sup>14</sup> 26 M.J. 1 (C.M.A. 1988).

<sup>15</sup> *LeProwse*, 26 M.J. at 656.

<sup>16</sup> The Army court found this evidence irrelevant to the charged offenses, but found the error in admitting them to be harmless. Judge Gilley, concurring, disagreed and felt that the artificial penis and lubricating jelly were admissible.

<sup>17</sup> The Army court relied on a description by the military judge to determine that paperback books examined by him but not entered into evidence "focused on homosexual acts between young boys." *LeProwse*, 26 M.J. at 656. See footnote 13, *supra*. This finding is not supported by the record, nor by the clearly adult homosexual orientation of the *Gym* magazine and directory listing which are attached to the record.

<sup>18</sup> See also *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983), *pet. denied*, 17 M.J. 204 (C.M.A. 1983) (sufficient nexus between homosexual pornography and assault with intent to commit homosexual sodomy); *United States v. Lips*, 22 M.J. 679 (A.F.C.M.R. 1986) (pornographic material depicting assault and physical abuse in a manner the victim alleged happened to her held admissible).

<sup>19</sup> Mil. R. Evid. 404(b).

<sup>20</sup> Mil. R. Evid. 403.

<sup>21</sup> 26 M.J. 723 (A.C.M.R. 1988).

<sup>22</sup> A convening authority's staff judge advocate has implicit authority to grant immunity by virtue of the special relationship which exists between these officers. *Kershaw*, 26 M.J. at 726. *citing* *United States v. Brown*, 13 M.J. 253 (C.M.A. 1982), and *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982).

<sup>23</sup> *Kershaw*, 26 M.J. at 728.

(Mr. W); an agent of the United States Internal Revenue Service (Mr. B); a high-ranking Korean prosecutor; and a senior prosecutor assigned to the United States Army Legal Service Agency, Korea (Captain C). At the onset of the custodial interview, Mr. W introduced each of the participants and began to question Sergeant Kershaw concerning his involvement with the illegal transfer of money from Korea. No article 31 UCMJ or *Miranda* rights advisements were given. Sergeant Kershaw repeatedly requested legal counsel and initially refused to answer any questions without legal counsel present. Mr. W told Sergeant Kershaw that he would not be criminally charged for his involvement, and further stated: "If I'm not interested in you for prosecution, no one here is."<sup>24</sup> After assurances and further badgering by Mr. B, Sergeant Kershaw relented and explained how he helped a Korean national illegally smuggle over \$200,000.00 out of Korea. Captain C apparently remained silent throughout the interview.

At trial, the defense counsel moved for dismissal of all charges on grounds of immunity. Alternatively, the defense counsel argued that even if Sergeant Kershaw was not cloaked with immunity, his due process rights were violated. The military judge ruled against the defense on these motions. A third motion to suppress all pretrial statements and derivative evidence obtained in violation of appellant's rights was withdrawn by the defense.<sup>25</sup>

The Army Court of Military Review found that Sergeant Kershaw was not granted immunity expressly or impliedly.<sup>26</sup> However, the court expressed "disappointment" with Captain C's conduct as his silence "encouraged the only possible perception—that in return for appellant's cooperation and information concerning the money changing scheme, the United States, including the Army, had no intention to prosecute appellant in any court."<sup>27</sup> By setting aside and dismissing the charges, the court would not allow the prosecutorial authorities to "stand back and deny knowledge, responsibility and participation in Mr. W's investigation and then profit from the results simply because a formal grant of immunity was not initiated and signed."<sup>28</sup>

When the facts suggest a reasonable belief on the part of your client that immunity was promised for cooperation, defense counsel should explore the nature of the possible immunity and whether a due process argument can be interposed as a bar to prosecution. Captain Jeffrey J. Fleming

<sup>24</sup> *Id.* at 725.

<sup>25</sup> The Army court expressed grave concern over defense counsel's withdrawal of this motion as appellant was clearly entitled to suppression of all statements and any derivative evidence obtained as a result of the illegal custodial interrogation under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Kershaw*, at 725, n.4. The court found the military judge's failure to assure the evidence was admissible contributed to the unfairness of the proceedings. *Id.* at 8.

<sup>26</sup> *Id.* at 727.

<sup>27</sup> *Id.* at 728.

<sup>28</sup> *Id.*

<sup>29</sup> Army Reg. 340-15, Preparing and Managing Correspondence (12 Nov. 1986) [hereinafter AR 340-15].

<sup>30</sup> See Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105 [hereinafter R.C.M.]. A recent Note discussed the importance of properly labeling post-trial submissions as R.C.M. 1105 matters where legal errors are alleged; Wilkins, *What's in a Name?*, *The Army Lawyer*, Feb. 1988, at 37. See also *United States v. James*, 24 M.J. 397 (C.M.A. 1987) (summary disposition); *United States v. Silva*, 23 M.J. 264 (C.M.A. 1987) (summary disposition); *United States v. McDaniel*, CM 8601388 (A.C.M.R. 30 Oct. 1987) (unpub.).

<sup>31</sup> The 12 November 1986 Update of AR 340-15 requires the use of the memorandum format which replaces what had been referred to as the military letter. Accordingly, trial defense counsel should use it for correspondence within and between Army commands. See para. 2-2, AR 340-15.

## Post-trial Submissions

In order to clarify and better preserve issues for appeal, post-trial submissions to convening authorities can be improved by (1) adopting the memorandum format of Army Regulation 340-15;<sup>29</sup> (2) concisely stating, in the first paragraph, the relief requested; (3) appropriately labeling the matter as either "R.C.M. 1105 Matters" or "Clemency Petition"; and (4) raising all potential legal issues for appeal pursuant to Rule 1105.<sup>30</sup>

Use of these guidelines will reinforce trial defense counsel's desire to prepare issues for appeal and increase the clarity and brevity of the requests for relief. Submission of a four-page document, in pleading format, which recites facts and "buries" the relief requested, is not helpful to the convening authority. Furthermore, the common practice of stating the client's offenses and punishment in the first paragraph of a request tends to draw attention to the client's wrongdoing. A better practice is for trial defense counsel to use the memorandum format of AR 340-15 to which the convening authority is accustomed.<sup>31</sup> An example of an R.C.M. 1105 submission follows as Sample 1; an example of a petition for clemency is at Sample 2. Captain Jon W. Stentz

### Sample 1

DEPARTMENT OF THE ARMY  
U.S. Army Trial Defense Service  
Fort Zero Branch Office  
APO 09025-5555

JALS-DA (MARKS NUMBER)

5 May 1988

MEMORANDUM THRU: Staff Judge Advocate, 11th Infantry Division, ATTN: AERJA, APO 09025-5555

FOR: Commander, 11th Infantry Division, APO 09025-5555

SUBJECT: R.C.M. 1105 Matters, *United States v. Doe*

1. [Specifically request action.] Request you set aside the findings of guilty as to the Specification of Charge I and Charge I, and order a sentence rehearing.
2. [Discuss legal issues as appropriate.] As explained below, the Staff Judge Advocate's post-trial recommendation is incorrect, and on behalf of my client, Private I. A. Doe, I respectfully disagree with the SJA's recommendation to you. The evidence is insufficient as a matter of law to support the findings of guilty as to the Specification of Charge I and Charge I (attempted distribution). The offense of attempt requires a substantial step towards commission of a crime, and that substantial step must be strongly corroborative of the firmness of an accused's criminal intent. See *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987); *United States v.*

*Bucknell*, 26 M.J. 523 (A.C.M.R. 31 March 1988). In Private Doe's case, the evidence is simply too ambiguous to support the findings.

a. At Private Doe's trial, the Government presented evidence that Private Doe entered his automobile with the Criminal Investigation Command agent and discussed where to get drugs. They never discussed price, quantity, or even the type of drug. Furthermore, they never drove the automobile off post where the drugs could be purchased. Accordingly, the evidence is insufficient to establish the offense of attempt.

b. Because there is a reasonable probability that the sentence would not have been the same absent the finding of guilty as to the Specification of Charge I and Charge I, a rehearing on sentence is required. See *United States v. Kinman*, 25 M.J. 99 (C.M.A. 1987).

3. POC is \_\_\_\_\_ at tele. 123-4567

HADLEY V. BAXENDALE  
CPT, JA  
Trial Defense Counsel

*Sample 2*

DEPARTMENT OF THE ARMY  
U.S. Army Trial Defense Service  
Fort Zero Branch Office  
APO 09025-5555

JALS-DA (MARKS NUMBER) 5 May 1988

MEMORANDUM THRU: Staff Judge Advocate, 11th Infantry  
Division, ATTN: AERJA, APO 09025-5555

FOR: Commander, 11th Infantry Division, APO 09025-5555

SUBJECT: Petition for Clemency; *United States v. Doe*

1. [Specifically request action.] Request you take action disapproving all confinement in excess of one year.

2. [State supporting reasons.] As counsel for Private I. A. Doe, 123-45-6789, B Company, 15th Evacuation Hospital, who was convicted of AWOL, larceny, and distribution of marijuana, I hereby request you consider the following factors in support of this petition:

a. Following trial, Private Doe assisted the Criminal Investigation Command in apprehending Mr. Smith S. Smith, reputed to be the largest drug dealer in the Fort Zero area.

b. Private Doe has returned to his roommate all \$105.00 taken on 5 July 1987.

c. Private Doe has an outstanding military record and was considered to be "one of the best young soldiers in the company" by his company commander.

d. Private Doe's mother, who is hospitalized, is partially dependent on Private Doe for support.

3. For the foregoing reasons, Private Doe requests you not approve any confinement in excess of one year.

4. POC is \_\_\_\_\_ at tele 123-4567

HADLEY V. BAXENDALE  
CPT, JA  
Trial Defense Counsel

*Government Appellate Division Note*

**Invited Comment on a Defendant's Refusal to Testify in the Wake of *United States v. Robinson***

*Captain Joseph P. Falcone*  
*Government Appellate Division*

***United States v. Robinson***

In *United States v. Robinson*<sup>1</sup> defense counsel mentioned several times in his closing argument that the government did not allow the defendant (who did not testify) to explain his side of the story and had unfairly denied him the opportunity to explain his actions.<sup>2</sup> Out of the jury's presence, the prosecutor objected to defense counsel's remarks, and contended that the defense had opened the door to commenting upon the defendant's failure to testify.<sup>3</sup> The judge agreed and the defendant did not object. The prosecutor, in his rebuttal summation, remarked that the defendant "could have taken the stand and explained it to you anything he wanted to. The United States of America has given

him, throughout, the opportunity to explain."<sup>4</sup> Defense counsel did not object. The judge gave the jury a cautionary instruction.

The Supreme Court held that the prosecutor's comment did not violate the defendant's fifth amendment privilege to be free from compulsory self-incrimination.<sup>5</sup> The defense counsel's closing argument remarks were interpreted to mean that the government had not allowed the defendant to explain his side of the story either before or during trial. The prosecutor's statements, in light of defense counsel's comments, did not infringe upon the defendant's fifth amendment rights. The Court held that those rights are violated when a prosecutor, on his own initiative, asks the jury

<sup>1</sup> 108 S. Ct. 864 (1988).

<sup>2</sup> *Id.* at 866.

<sup>3</sup> *Id.* at 867.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 868.

to draw an adverse inference from a defendant's silence or to treat such silence as substantive evidence of guilt.<sup>6</sup> No violation of the privilege takes place however, when the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim by the defense. Because the central purpose of a criminal trial is to decide the factual question of a defendant's guilt or innocence, it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.<sup>7</sup>

Compared with precedents that afforded greater license to an accused, however, *Robinson* indicates a break and needs to be further examined.

### Background

#### *Griffin v. California and Comments on the Refusal to Testify*

In *Griffin v. California*,<sup>8</sup> the Supreme Court proclaimed that comment on the defendant's failure to testify violated the self-incrimination clause of the fifth amendment. In *Griffin*, the prosecutor commented that the defendant "had not seen fit to take the stand to deny or explain" and "Essie May is dead, she can't tell you her side of the story. The defendant won't." In addition, the Court instructed the jurors that they could take into consideration the failure to testify in assessing the weight of the evidence against the defendant and draw an unfavorable inference thereon.<sup>9</sup> The Supreme Court held that comment on a defendant's refusal to testify would penalize those who invoke the constitutional privilege. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."<sup>10</sup>

Courts then began to apply *Griffin* in a manner dependent upon a determination of whether the comments were direct or indirect. The comments in *Griffin* were clearly direct comments.<sup>11</sup> Indirect comments, such as those mentioning that the evidence was "uncontradicted" would involve a more involved analysis. For example, the sixth circuit in *Raper v. Mintzes*<sup>12</sup> explained:

The rule set forth in *Griffin* applies to indirect as well as direct comments on the failure to testify. Cases involving direct comments pose little difficulty as the

court must reverse unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt. . . . Cases . . . involving indirect comments on the failure to testify are more troublesome. . . . [W]e recently refused to adopt a *per se* rule that comments as to the uncontradicted nature of evidence violated *Griffin* even where the evidence in question could only have been contradicted by the defendant. . . . Rather, the court must conduct a "probing analysis of the context of the comments," in order to determine "[w]hether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." [Citations omitted].<sup>13</sup>

#### *The Invited Response Doctrine: Previous Cases*

This doctrine has its genesis in *Lawn v. United States*,<sup>14</sup> where the defense counsel, in his closing argument, told the jury that the prosecution was initiated in bad faith and that government witnesses were perjurers. The prosecutor in turn vouched for the credibility of the witnesses, telling the jury that these witnesses testified truthfully. The Supreme Court held that defense counsel's comments clearly invited the reply.<sup>15</sup>

Previous cases recognized that the doctrine of "invited response" did not condone a prosecutor's descending to the level of an errant defense counsel, nor did it enact a proposition that two wrongs make a right. It merely recognized that the impact on the defendant from the prosecutor's misbehavior would be less if the defendant's counsel aroused the jury against the prosecutor. Setting a conviction aside would be punitive rather than remedial and would amount to a windfall to a defendant who hadn't been hurt by the prosecutor's remarks.<sup>16</sup>

In *Darden v. Wainwright*,<sup>17</sup> the Court again reiterated that the invited response doctrine was not used to excuse improper comments, but to determine their effect on the trial as a whole. In *Darden* the prosecutor referred to the defendant as an "animal" and hinted that the death penalty would be the only guarantee against future recurrences. In determining whether the defendant had a fair trial, however, the Court ruled that *Darden* was not a case where the

<sup>6</sup> *Id.* at 869.

<sup>7</sup> *Id.* at 869-70.

<sup>8</sup> 380 U.S. 609 (1965).

<sup>9</sup> *Id.* at 610, 611.

<sup>10</sup> *Id.* at 614.

<sup>11</sup> See, e.g., *United States v. Griggs*, 735 F.2d 1318, 1324 (11th Cir. 1984) (prosecutor's remark that "the defendant has not testified about it" was an unmistakable reference to an accused's exercise of fifth amendment privilege).

<sup>12</sup> 706 F.2d 161 (6th Cir. 1983).

<sup>13</sup> *Id.* at 164-65. Compare *Hearn v. Mintzes*, 708 F.2d 1072, 1077-78 (6th Cir. 1983) (comment that evidence uncontroverted was not harmless) with *United States v. Singer*, 732 F.2d 631, 637-38 (8th Cir. 1984) (prosecutor's description of evidence as "uncontradicted" was not an improper reference to defendant's silence since it was equally likely that jury viewed the comment as a reference to weight of evidence against accused, and, in any case, it was clear beyond a reasonable doubt that jury would have returned guilty verdict regardless).

<sup>14</sup> 355 U.S. 339 (1958).

<sup>15</sup> *Id.* at 359-60 and n.15.

<sup>16</sup> *United States v. Mazzune*, 782 F.2d 757, 763 (7th Cir. 1986), cert. denied, 107 S. Ct. 141 (1986) (prosecutor's misconduct may just have offset the defense counsel's misconduct, thus producing no effect on jury's deliberation).

<sup>17</sup> 106 S. Ct. 2464 (1986).

prosecutor's argument implicated a specific right of a defendant, such as the right to remain silent.<sup>18</sup> By implication the Court stated in *Darden* that violations of fifth amendment rights rise to a higher level of scrutiny than do mere inflammatory remarks.

### *United States v. Young*

In *United States v. Young*,<sup>19</sup> the defense counsel, in his closing argument, intimated that the prosecution deliberately withheld exculpatory evidence and engaged in reprehensible conduct by casting a false light on the defendant's activities. Defense counsel also stated that the prosecutor did not believe in the government's case.<sup>20</sup> The prosecutor did not object to the defense counsel's remarks, but during rebuttal argument, the prosecutor stated his opinion that the defendant was guilty and urged the jury to "do its job." Defense counsel made no objection. The Supreme Court held that the prosecutor's remarks during the rebuttal were error, but did not constitute plain error. The advocacy on both sides in this case was unworthy of emulation. In order to make an appropriate assessment, the reviewing court should not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's conduct. If the prosecutor's comments were invited and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.<sup>21</sup>

The Court noted that reviewing courts ought not be put in the position of deciding which of two inappropriate arguments was the least proper.<sup>22</sup> The Court noted that invited responses could best be discouraged by prompt action by the bench in the form of corrective instructions to the jury and, when necessary, an admonition to the errant advocate.<sup>23</sup>

The Court in *Young* warned against two dangers that exist when a prosecutor vouches for the credibility of witnesses and expresses a personal opinion concerning the guilt of a defendant. The Court was concerned that such comments would convey the impression that evidence not presented to the jury, but known to the prosecutor, supported the charges against the defendant and thus jeopardized an accused's right to be tried on the basis of evidence presented to a jury. In addition, there was a danger

that a jury would weigh a prosecutor's opinion more heavily than their own view of the evidence.<sup>24</sup>

### *Error Analysis*

**Plain Error** Federal courts have consistently interpreted the plain error doctrine as requiring an appellate court to find that the claimed error not only seriously affected substantial rights but that it had an unfair prejudicial impact on the jury's deliberations even though an objection at trial was not made. Only then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice.<sup>25</sup>

In *Young*, the Court concluded that notwithstanding the defense counsel's breach of ethical standards, the prosecutor's statement of his personal opinion should not have been made. The Court concluded, however, that any potential harm from this remark was mitigated by the jury's understanding that the prosecutor was countering defense counsel's repeated attacks on the prosecution's integrity and defense counsel's assertion that the evidence established no such crime.<sup>26</sup>

Factors that influenced the court to conclude that the prosecutor's remark was not prejudicial included the fact that the evidence was overwhelming and the fact that the jury had acquitted the defendant of the most serious charge he faced. This reinforced the court's conclusion that the jury was not influenced by the prosecutor's remarks.<sup>27</sup>

**Harmless Error** Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless because, by definition, the conviction would have been obtained notwithstanding the legal error. It is the essence of the harmless error doctrine that even in cases where a constitutional violation takes place, a judgment may stand when there is no reasonable probability that the practice complained of might have contributed to the conviction.<sup>28</sup>

In *United States v. Hasting*<sup>29</sup> the prosecutor, over a defense objection, told the jury that the defendants "didn't challenge" the government's case. The Supreme Court noted that "[t]he question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have

<sup>18</sup> *Id.* at 2472-73.

<sup>19</sup> 470 U.S. 1 (1985).

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> *Id.* at 11-13.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* See *United States v. Modica*, 663 F.2d 1173, 1181-82 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982) (although trial judge did not minimize any prejudice by having remarks stricken or by issuing cautionary instruction, no prejudice was apparent in that accused's story was inherently implausible), and *Hearn v. Mintzes*, 708 F.2d 1072, 1077 (6th Cir. 1983). Note that the giving of a cautionary instruction by the trial judge that the jury is not to draw any adverse inference from the defendant's decision not to testify is proper even if such instruction is given over the defendant's objection. *Lakeside v. Oregon*, 435 U.S. 333 (1978).

<sup>24</sup> *United States v. Young*, 470 U.S. 1, 18-19 (1985).

<sup>25</sup> *Id.* at 15-16. See Federal Rule of Criminal Procedure [hereinafter Fed. R. Crim. P.] 52(b) (plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court).

<sup>26</sup> *United States v. Young*, 470 U.S. 1, 17-18 (1985).

<sup>27</sup> *Id.* at 18-20 and n.15.

<sup>28</sup> *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Hasting*, 461 U.S. 499, 506 (1983). See also Fed. R. Crim. P. 52(b) (any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded).

<sup>29</sup> 461 U.S. 499 (1983).

returned a verdict of guilty?" based on the record as a whole.<sup>30</sup> The Court recognized that the prosecutor's remarks, although error, were harmless.

**Military Practice** Military practice parallels its federal counterpart. It is erroneous for a military trial counsel to comment on an accused's exercise of the right against compulsory self-incrimination.<sup>31</sup> In *United States v. Remai*<sup>32</sup> the Court of Military Appeals made it clear that the harmless error analysis applied to military courts. Citing *United States v. Hasting*, the Court of Military Appeals noted:

We perceive no reason why, by the failure to apply the harmless error test, a convicted service member should receive a windfall not available to his civilian counterpart. Instead, the recent enactment of legislation which for the first time subjects courts-martial to direct review by the Supreme Court tends to suggest a congressional intent that the same standards should be applied in the review of a court-martial conviction that would be employed in the review of a civil court conviction.<sup>33</sup>

Military case law, like its federal counterpart, has examined the effect of indirect prosecutorial comments on refusal to testify. For example, in *United States v. James*<sup>34</sup> the prosecutor's comment that the evidence was uncontradicted and that the accused was in the room when the drug transaction took place was not taken by the court as a comment on an accused's failure to testify. Similarly, in *United States v. Zeigler*,<sup>35</sup> where the prosecutor mentioned that the only evidence presented were certain documents as well as the testimony of people on the stand, the court held that it was a fair comment on the state of the evidence. There is a dearth of military cases, however, on the application of the invited comment doctrine.

#### Effect of *Robinson*

The Supreme Court in *Robinson* declared that the holding in *Griffin* was not to be read too broadly. By its narrowing of the *Griffin* case, *Robinson* eliminated the examination of whether the comments constituted error in a case involving an invited response.<sup>36</sup>

In construing *United States v. Griffin*, the Supreme Court in *Robinson* noted that:

The Court of Appeals and respondent apparently take the view that any "direct" reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*. We decline

to give *Griffin* such a broad reading, because we think such a reading would be quite inconsistent with the Fifth Amendment, which protects against compulsory self-incrimination. The *Griffin* court addressed prosecutorial comment which baldly stated to the jury that the defendant must have known what the disputed facts were, but that he had refused to take the stand to deny or explain them. We think there is considerable difference for purposes of the privilege against compulsory self-incrimination between the sort of comments involved in *Griffin* and the comments involved in this case.<sup>37</sup>

In *Robinson*, the Supreme Court rejected the method of examining whether the comment was direct or indirect, in construing fifth amendment issues.<sup>38</sup> The lower court had applied the direct/indirect analysis and found the comments to be an "overt reference on the defendant's failure to testify."<sup>39</sup> The Supreme Court stated that *Griffin* only covered cases where the prosecutor baldly states to the jury that the defendant must have known what the disputed facts were, but that he had refused to take the stand to deny or explain them.<sup>40</sup> This narrows *Griffin* to its facts: that while an unprovoked assertion that the defendant knew the facts but refused to take the stand is not proper, commenting on the refusal to testify is acceptable.

The Court in *Robinson* clearly modified its decision in *Young*. In *Young* the Court stated that while a reviewing court must take into account the defense counsel's opening salvo in weighing the impact of the prosecutor's remarks, the court must ultimately decide whether the prosecutor's remark affected the fairness of the trial and unfairly prejudiced the defendant.<sup>41</sup> Prosecutorial comments, although erroneous, would be examined to determine their prejudicial effect.

In *Young*, the Court stated that it desired to minimize "invited" responses.<sup>42</sup> In *Robinson*, the Court stated that no error occurs when the prosecutor fairly comments on the defendant's failure to testify, when the defendant had already opened the door. The Court in *Robinson* concluded:

[The] central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. To this end it is important both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another. The broad dicta in *Griffin* to the effect that the Fifth Amendment "forbids . . . comment by the prosecution on the accused's silence," must be taken in the light of the facts

<sup>30</sup> *Id.* at 510-511.

<sup>31</sup> *United States v. James*, 24 M.J. 894 (A.C.M.R. 1987); *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982), *United States v. King*, 13 M.J. 863 (N.M.C.M.R. 1982), *petition denied*, 14 M.J. 205 (C.M.A. 1982). See also Military Rule of Evidence 301.

<sup>32</sup> 19 M.J. 229 (C.M.A. 1985).

<sup>33</sup> *Id.* at 233.

<sup>34</sup> 24 M.J. 894 (A.C.M.R. 1987).

<sup>35</sup> 14 M.J. 860 (A.C.M.R. 1982), *petition denied*, 15 M.J. 461 (C.M.A. 1983).

<sup>36</sup> *United States v. Robinson*, 108 S. Ct. 864, 868-869 (1988).

<sup>37</sup> *Id.* at 868-69.

<sup>38</sup> *Id.*

<sup>39</sup> 716 F.2d 1095, 1098 (6th Cir. 1983), *rev'd*, 108 S. Ct. 864 (1988).

<sup>40</sup> *United States v. Robinson*, 108 S. Ct. 864-69 (1988).

<sup>41</sup> *United States v. Young*, 470 U.S. 1, 12-14 (1985).

<sup>42</sup> *Id.* at 14.

of that case. It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would forbid the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one.<sup>43</sup>

The Court found support for this position in *Lockett v. Ohio*.<sup>44</sup> In *Lockett*, it was found that the defense counsel focused the jury's attention on his client's silence. The defense counsel stated to the jury that his client would be a witness and that the defendant had a defense. In fact the defendant did not testify. In closing argument the prosecutor then noted that the state's evidence was "unrefuted" and "uncontradicted."<sup>45</sup>

In *Lockett*, "the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand."<sup>46</sup> (Emphasis added). In *Robinson* the prosecutor's remarks clearly added something to the case: while the accused claimed that he was prevented from testifying, the prosecutor added that the accused was able to testify but in fact would not.

In *Young* the Court recognized that the prosecutor's remarks constituted error, although it did not rise to the level of plain error.<sup>47</sup> Because no error was found in *Robinson*, there was no examination of the effect of the remarks on the trial as a whole, or a determination of whether overwhelming evidence of guilt existed. "Because we conclude there was no constitutional error at all, we do not reach the plain error issue."<sup>48</sup>

The Court in *Robinson*, in a footnote, explained why the comments in *Young* were improper, while the comments in *Robinson* were allowed. The Court stated:

In *United States v. Young*, and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held

that in context, those statements did not necessitate reversal. In contrast, a reference to the defendant's failure to take the witness stand may, in context, be perfectly proper.<sup>49</sup>

Under this analysis, cases such as *Young*, where the prosecutor responds to defense comments with inflammatory remarks that the accused is guilty and the jury should "do its job" will be examined for error. Cases such as *Robinson*, however, where the prosecutor responds to defense comments by alluding to an accused's silence, will not be analyzed for error. This distinction is recognized in the aforementioned footnote of the *Robinson* opinion. It appears that the Court views *Robinson* as something other than an invited response case. *Robinson* comes under the new rubric of "fair comment," which has a much broader application than is found in invited response cases. This is a significant departure from a long line of military and civilian precedent that has interpreted the fifth amendment guarantee against self-incrimination to mean that prosecutorial comments on the failure to testify violated a basic constitutional right and would be examined to determine their effect. Inflammatory remarks to a jury (other than those commenting on a failure to testify) have never enjoyed the same degree of scrutiny.<sup>50</sup> *Robinson* gives the defendant a greater degree of protection from inflammatory comments, and minimal protection from comments about a failure to testify, supposedly because the defense has "opened the door." This is irrational.

Nevertheless, military counsel should be aware that *Robinson* stands for the proposition that the prosecutor's comments in that case were not meant to bear on the accused's guilt but merely made the jury aware that the government had not barred the accused from taking the stand after the defense put that contention in issue. Military prosecutors may fairly comment on an accused's failure to testify in such circumstances and not run afoul of the fifth amendment. Therefore any reluctance to make such references is removed. While uninvited direct remarks by a prosecutor to a jury concerning an accused's exercise of fifth amendment rights constitute error, an accused can forfeit that protection by putting that contention in issue. Defense counsel should be wary of engaging in argument whose net result would allow the prosecution to highlight their client's silence.

<sup>43</sup> *United States v. Robinson*, 108 S. Ct. 864, 869-70 (1988) [citations omitted].

<sup>44</sup> 438 U.S. 586 (1978). See *Robinson*, 108 S. Ct. at 869.

<sup>45</sup> *Lockett v. Ohio*, 438 U.S. 586, 594-95 (1978).

<sup>46</sup> *Id.* at 595. In addition, the comments in *Lockett* were indirect (remark that the evidence was "uncontradicted") while in *Robinson* the comments were direct (he "could have taken the stand and explained it to you").

<sup>47</sup> *United States v. Young*, 470 U.S. 1, 14, 20 (1985).

<sup>48</sup> *United States v. Robinson*, 108 S. Ct. 864, 868 (1988). Justice Blackmun, in his concurring in part and dissenting in part opinion in *Robinson* noted "the considerations taken into account by the court in determining no error occurred should have been weighed, instead, in assessing whether the prosecutor's error qualified as plain error, requiring reversal despite the absence of a contemporaneous objection." 108 S. Ct. at 870.

<sup>49</sup> *Id.* at 869 n.5 [citations omitted].

<sup>50</sup> See, e.g., *United States v. Darden*, 106 S. Ct. 2464, 2472 (1986) ("[t]he prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent").

## The "Good Faith" Exception to the Commander's Search Authorization: An Unwarranted Exception to a Warrantless Search

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### Introduction

During the 1984 summer term, the United States Supreme Court adopted the "good faith" exception to the exclusionary rule in *United States v. Leon*.<sup>1</sup> This rule permits the admission of evidence seized during searches that were conducted by law enforcement officers acting in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate, even if that warrant is defective.<sup>2</sup>

Many writings soon appeared concerning the expected impact of this rule.<sup>3</sup> Articles in the military law publications addressed the applicability of this new rule to the military justice system. These articles recognized that applying this rule to a commander's search authorization creates special hazards.<sup>4</sup>

These dangers arise because a commander's search authorization is distinctly different from a search warrant.<sup>5</sup> The commander's authorization need not be in writing, need not be based on a written affidavit, and need not be based on an oath or affirmation.<sup>6</sup> Moreover, by virtue of

their position, commanders are not as neutral and detached as a magistrate.<sup>7</sup>

### The Court of Military Appeals Appears Poised to Decide the Applicability of the "Good Faith" Exception to a Commander's Search Authorization

Although four years have passed since the Supreme Court adopted the *Leon* rule, the military courts have not issued definitive guidance regarding whether the "good faith" exception applies to a commander's search authorization. The only two Court of Military Review decisions that have actually decided the issue have reached opposite results,<sup>8</sup> and the Court of Military Appeals has not yet decided this issue.

On May 23, 1988, the Court of Military Appeals came tantalizingly close, in *United States v. Queen*.<sup>9</sup> Although the court had granted this issue for review,<sup>10</sup> the court returned the case for an evidentiary hearing.<sup>11</sup> The court noted, "[I]t should not be automatically assumed that the 'good faith exception' for search warrants applies to a commander's authorization of a search."<sup>12</sup> The court then

<sup>1</sup> 468 U.S. 897 (1984). This exception was also applied that same day in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

<sup>2</sup> *Leon* applies the exception when the warrant is defective because the magistrate lacked probable cause; in *Leon*, it was determined that the information relied on was stale. *Sheppard* applies the exception when the warrant is defective for technical reasons; for example, as in *Sheppard*, if the warrant does not describe the specific property to be seized or fails to incorporate by reference the description set out in the affidavit submitted by the law enforcement officer, the fruits of the search are still admissible provided that the executing officer reasonably and in good faith relied on the warrant. The costs and benefits of permitting such an exception are ably discussed in LaFave, "The Seductive Call of Expediency": *U.S. v. Leon, Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895 (1985).

<sup>3</sup> See, e.g., Alschuler, "Close Enough for Government Work": *The Exclusionary Rule After Leon*, 1984 Sup. Ct. Rev. 309; Bradley, *The "Good Faith" Exception Cases: Reasonable Exercises in Futility*, 60 Ind. L. J. 287 (1985); and Wald, *The Unreasonable Reasonableness Test for Fourth Amendment Searches*, 4 Crim. Just. Ethics 2 (Winter/Spring 1985).

<sup>4</sup> Gilligan & Kaczynski, *Of Good Faith and Good Law: United States v. Leon and the Military Justice System*, *The Army Lawyer*, Nov. 1984, at 1; Vienna & Chema, *United States v. Leon: Good Faith and the Military Commander*, 25 A.F. L. Rev. 95 (1985); Stevens, *Examining the "Good Faith" Exception to the Exclusionary Rule and Its Application to Commanders' Search Authorizations*, *The Army Lawyer*, June 1986, at 55.

<sup>5</sup> Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 315(b) defines the terms "search warrant" and "search authorization."

<sup>6</sup> *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981).

<sup>7</sup> *Id.*

<sup>8</sup> In *United States v. Johnson*, 21 M.J. 553 (A.F.C.M.R. 1985), *rev'd on other grounds*, 23 M.J. 209 (C.M.A. 1987), the Air Force Court of Military Review held that it could not "adopt a 'good faith' exception under our Military Rules of Evidence, as presently written." This court recognized that "[i]t is significant to note there is no 'good faith' exception in the Military Rules of Evidence, and we find that we cannot interpret one into the rules." (emphasis in the original) Such an exception is now embodied in Military Rules of Evidence 311(b)(3). See *infra* note 14.

In *United States v. Queen*, 20 M.J. 817 (N.M.C.M.R. 1985), *rev'd on other grounds*, 26 M.J. 136 (C.M.A. 1988), the Navy-Marine Corps Court of Military Review adopted the "good faith" exception for a written search authorization issued by a commander and relied on in "good faith" by the searching official; the court noted that none of the exceptions in *Leon* applied. The *Queen* court relied on the rationale of *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985); the *Postle* court noted that the "good faith" exception applied to a commander's search authorization, but this conclusion was not a true holding since the court returned the case to the trial court for the trial court to apply the "totality of the circumstances" analysis from *Illinois v. Gates*, 463 U.S. 213 (1983), to the determination of whether probable cause existed in the first place; in other words, the *Postle* court's opinion was only advisory.

The only Army Court of Military Review case to address the "good faith" exception mentioned in a footnote that the searcher had relied in good faith on the search authorization; this case decided, however, that the evidence at issue was admissible on a different ground. *United States v. Ayala*, 22 M.J. 777, 782 n.9 (A.C.M.R. 1986).

<sup>9</sup> 26 M.J. 136 (C.M.A. 1988).

<sup>10</sup> *Id.* at 137.

<sup>11</sup> *Id.* at 142. The Court concluded that the defense had created an inference that an affiant's statements to the commander who authorized the search were made falsely or with reckless disregard for the truth. A search based on such flawed statements would not be permitted even under *Leon*. *Leon*, 468 U.S. at 923.

<sup>12</sup> *Queen*, 26 M.J. at 142.

directed that the case be returned directly to it to address the "good faith" exception issue if that issue remains alive after the hearing.<sup>13</sup> This article explores the applicability of the "good faith" exception to a commander's search authorization and concludes that the court should reject this exception.<sup>14</sup>

### The Military Rule Itself

The Military Rules of Evidence now permit the use of evidence obtained as a result of an unlawful search if three conditions are met: (1) a commander authorizes the search, (2) the commander had a "substantial basis" for determining the existence of probable cause, and (3) "[t]he officials seeking and executing the authorization reasonably and with good faith relied on the issuance of the authorization. . . ."<sup>15</sup> This provision took effect on March 1, 1986,<sup>16</sup> and has not yet been the subject of any court decisions.<sup>17</sup>

### Rejecting a "Good Faith" Exception for a Commander's Search Authorization Furthers the Purpose of the Exclusionary Rule

The three reasons that justified a "good faith" exception in *Leon* were: (1) the conclusion that the historic purpose of the exclusionary rule is to deter police misconduct, (2) the absence of evidence suggesting that judicial officers are inclined to ignore fourth amendment limitations, and (3) the absence of any basis for believing that the "exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."<sup>18</sup> None of these reasons supports adopting a "good faith" exception for a commander's search authorization. In fact, these reasons support rejecting such an exception.

Even if one assumes that the only purpose of the exclusionary rule is to deter police misconduct,<sup>19</sup> that purpose is still served by applying the exclusionary rule to a commander's search authorization. The commander is enough of a law enforcement officer to be deterred by the exclusion of evidence obtained as a result of the illegality that might be committed in the process. The commander has been called the "chief law enforcement official" within the command,<sup>20</sup> and is charged with maintaining discipline and fitness within his or her unit. The Court of Military Appeals has recognized that the commander is not a magistrate.<sup>21</sup> Indeed, the distinction between a magistrate and a military commander is so significant that it allows the commander to escape the bounds of the fourth amendment's warrant clause entirely.<sup>22</sup> The *Queen* court itself specifically recognized this distinction and found that a military commander "is more analagous to a police officer than to a judge."<sup>23</sup> Thus, the commander's law enforcement responsibility has already generated an exception for a search authorization: it need only be "reasonable" within the first clause of the fourth amendment.<sup>24</sup>

There is evidence to believe that a commander is more inclined to ignore fourth amendment limitations than is a magistrate. In one of the three relevant military appellate cases, the commander was waiting for the police officer seeking the authorization with "pen in hand"; his inclination to "rubber stamp" the request was so obvious that the police officer took special care to explain all of the information he had to the commander.<sup>25</sup> The commander's motivation to "shoot now and ask questions later" is understandable given the responsibility he has for the welfare of his subordinates. When put to the choice, the commander is likely to choose the welfare of many subordinates over the rights of one. The magistrate never faces this dilemma.

<sup>13</sup> *Id.*

<sup>14</sup> This article will not address the applicability of the "good faith" exception to search authorizations issued by military judges or magistrates or to search warrants issued by competent civilian authority. For a discussion of the applicability of the "good faith" exception in these circumstances, see Stevens, *supra* note 4, at 63.

<sup>15</sup> Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 311(b)(3) (as amended by Exec. Order No. 12,550, *infra* note 16) provides:

(3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) The search or seizure resulted from an authorization to search, seize, or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant issued by competent civilian authority;

(B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

This provision exceeds the *Leon* rule in two major ways. First, while *Leon* was limited to warrants issued by magistrates or judges, this provision extends to search authorizations by commanders. Second, this provision applies to evidence obtained from apprehensions or arrests and not just searches. Although this article will not directly address the propriety of extending the "good faith" exception to apprehensions or arrests, much of the analysis seems to apply with equal force to such authorizations.

<sup>16</sup> Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (1986).

<sup>17</sup> The *Queen* Court recognized that at the time of *Queen's* trial this provision had not yet been promulgated. *Queen*, 26 M.J. at 141.

<sup>18</sup> *Leon*, 468 U.S. at 916.

<sup>19</sup> No case has yet gone that far. The closest assertion is that the "prime" purpose of the exclusionary rule is to deter police misconduct. *United States v. Calandra*, 414 U.S. 338, 347-613 (1974). In *Leon* itself, the Court spoke of the functions of the exclusionary rule in the plural: "We have concluded that, in the fourth amendment context, the exclusionary rule can be modified somewhat without jeopardizing its intended functions." *Leon*, 468 U.S. at 905.

<sup>20</sup> *Stuckey*, 10 M.J. at 359 (quoting with approval *United States v. Ezell*, 6 M.J. at 328 (1979)).

<sup>21</sup> *Stuckey*, 10 M.J. at 361.

<sup>22</sup> The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Stuckey* held that a commander's search authorization need not meet the requirements of the warrant clause. *Stuckey*, 10 M.J. at 361.

<sup>23</sup> *Queen*, 26 M.J. at 141-42.

<sup>24</sup> *Stuckey* also held that a commander's search authorization is governed solely by the first clause of the fourth amendment. *Stuckey*, 10 M.J. at 361.

<sup>25</sup> *Postle*, 20 M.J. at 635.

The exclusion of evidence seized pursuant to an illegal search authorization is likely to have a significant deterrent effect on the issuing commander. Although the magistrate or judge who issues the warrant may never learn that their decision was later invalidated, the commander is likely to know immediately after the suppression hearing. Since that authorization may be oral and since such decision need not be based on a written affidavit, the commander is almost certainly going to be called to testify at the suppression hearing. In addition, even if not called to testify at that hearing, the commander will almost certainly have played a significant role in the decision to prosecute and may well be called to testify on the merits or in sentencing. The commander probably will have discussed the case with his or her lawyer, the trial counsel. If the commander's decision results in the suppression of evidence, a direct negative consequence will result. A subordinate who may very well be guilty of a crime, may go free. Other subordinates and peers may hold the commander accountable for this "mistake." This error in judgment might even be reflected in a future evaluation report. If the evidence cannot be admitted under the "good faith" exception, the commander will have to correct the error. If the "good faith" exception is invoked to save the evidence, however, the commander will have little incentive to become more proficient in search authorization procedures. Such a disincentive is unwarranted for a warrantless search authorization.

#### The Four Safeguards Set Out in *Leon* Lose Their Power in the Context of a Commander's Search Authorization

The *Leon* Court recognized that the "good faith" exception does not always operate to save defective search warrants. The exception will not apply if one of the following four factors is present: (1) the affiant knowingly or recklessly misleads the magistrate, (2) the issuing magistrate wholly abandons their judicial role, (3) the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or (4) the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."<sup>26</sup> These safeguards are inadequate to support a "good faith" exception to a commander's search authorization.

It will be difficult, if not impossible, to determine if an affiant has knowingly or recklessly misled the authorizing commander. Inquiries into knowing and reckless misrepresentations are difficult under the best of circumstances. In the context of a search authorization, such an inquiry is more difficult because no written affidavit is required. Months may pass between the search authorization and the suppression hearing. Memories will fade.<sup>27</sup> Witnesses will not have the benefit of refreshing their recollection with a writing and will be free to fill in the gaps in their memories as they see fit. Compounding the dangers inherent in an oral representation is the absence of a requirement for an oath or affirmation. An affiant is more likely to exercise

care in their initial representations if they are required to be made under oath or affirmation. Thus, at the suppression hearing, the court will be forced to try to determine "good faith" at the time of the issuance of an authorization based on unrefreshed and objectively unverifiable recall or oral statements not made under oath or affirmation. Even if the motive of a witness is pure, his or her memory is fallible. Without the guarantees of trustworthiness associated with a writing based on an oath or affirmation, the truth-seeking process may fail. In short, there will be no reliable way to determine if this safeguard is ever satisfied.

Ensuring the existence of the second safeguard—that the commander has not wholly abandoned their judicial role—is equally fraught with dangers. The only meaningful check on the wholesale abandonment of the commander's judicial role is the ability of the authorization seeker to observe the actions and hear the words of the commander. It is unrealistic, however, to expect this to occur. First, because of the superior-subordinate relationship, the seeker would likely be reluctant to question the commander's actions. Second, the seeker is even less likely to question the commander's actions because the seeker may realize that the commander has information about the subject of the search that the seeker does not have. This propensity to have additional information is an inherent characteristic of command that distinguishes a commander from a magistrate. Third, through the normal course of their duty to investigate and dispose of a criminal offense, a commander learns information concerning a case after a search has been authorized. It is unrealistic to expect a commander to isolate the sources of such information. This additional information, therefore, is likely to influence his or her testimony at a suppression hearing. That a commander is likely to gain this additional information is another consequence of command that distinguishes a commander from a magistrate. These hazards are not present with a civilian magistrate's search warrant.

The safeguard that applies if the affidavit entirely lacks indicia of probable cause also fails in the context of a commander's search authorization. Because the information presented to the commander may be oral, later review for facial invalidity will be extremely difficult. More important, this safeguard is inappropriate for a commander's search authorization because, as noted above, the commander may know additional information about the subject of the search, that the seeker will not know. For example, if the commander knows that a suspect has a prior conviction for the same kind of offense, the commander might rely on that fact in their probable cause determination. In short, what the commander knows, not what the affidavit, even if it exists, says or fails to say, controls.

It will also be extremely difficult to determine when the authorization is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." Review of an oral authorization is subject to the dangers of

<sup>26</sup> *Leon*, 468 U.S. at 923.

<sup>27</sup> In *Queen* itself, Judge Cox eloquently described the difficulties in recall that arise when a search authorization is based on an oral statement: It has now been 5 years since [the search authorization requester] approached [the commander] bearing the information given him by his crew members. I do not know if he is even alive, much less still in the Navy. If he is still in the Navy, I can only imagine how many seas he will have steered ships through in the interval and how many intense duties and responsibilities he will have borne, not to mention the mountains of "people problems" he will have encountered. If he can now remember even the names of those informants, much less exactly what they told him and when, he is a better man than I.

*Queen*, 26 M.J. at 143-44 (Cox, J., dissenting).

inaccurate recall and misunderstanding inherent in oral communications. In addition, in the military, the executing officials may be totally untrained subordinates who have no means to determine the validity of the authorization and every motivation to comply with the commander's directive, lest they be thought disobedient or derelict.

#### Additional Factors Support Rejecting the "Good Faith" Exception

Other aspects of military service also support rejecting the "good faith" exception to a commander's search authorization. Personnel turbulence caused by frequent transfers and terminations of service obligations make it difficult to train both commanders and searchers. Even if the training obstacle were overcome, this same turbulence would make it costly and sometimes impossible to reconstruct what happened in the search process with any degree of reliability. These difficulties would likely be even greater during a war.

Rejecting the "good faith" exception for a commander's search authorization would encourage authorization seekers to use military magistrates and judges. Such a practice should be encouraged.<sup>28</sup>

Perhaps the most persuasive argument against the application of a "good faith" exception to a commander's search authorization is that if the fruits of a violation of an accused's fourth amendment right to be free from unreasonable<sup>29</sup> searches are not suppressed, the violation will most likely go unremedied.<sup>30</sup> A military accused is not free to sue his or her commander for a violation of their constitutional rights.<sup>31</sup> A military accused is also not free to bring a complaint of wrong against a commander under article 138, UCMJ, for a matter relating to military justice.<sup>32</sup> Nor is a military accused likely to get relief from the appropriate Board for Correction of Military Records.<sup>33</sup>

<sup>28</sup> Gilligan, *supra* note 4, at n.163.

<sup>29</sup> One might wonder whether a commander who lacks "reasonable belief" to find probable cause within the meaning of Military Rule of Evidence 315(f) can have a "substantial basis" for determining the existence of probable cause as required by the "good faith" exception embodied in Military Rule of Evidence 311(b)(3)(B). But had the drafters intended to apply the same standard, they could have used the same language. More important, logic dictates that if the tests are the same, then there is no need for the "good faith" exception at all. The applicability of the exception does not become an issue unless the authorization is, by definition, "unreasonable." Although no military appellate court has addressed the differences between these two standards, civilian federal courts have applied a lower standard to evidence admitted under the "good faith" exception. See, e.g., *United States v. Little*, 735 F.2d 1048 (8th Cir. 1984) (suppressed evidence because the search warrant lacked probable cause), *aff'd on rehearing sub nom. United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984) (same evidence admitted in reliance on the "good faith" exception).

<sup>30</sup> *Postle* noted that the remedy for a violation of the fourth amendment lies "elsewhere than in the exclusionary rule." *Postle*, 20 M.J. at 647. It is interesting to note, however, that *Postle* did not identify where the remedy lies.

<sup>31</sup> See *Feres v. United States*, 340 U.S. 135 (1950), and its progeny, especially *Chappell v. Wallace*, 462 U.S. 296 (1983) (applying *Feres* doctrine to protect military officers from claims by subordinates in the nature of those in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)). For a recent denial of relief, see *Walden v. Bartlett*, 42 Crim. L. Rep. (BNA) 2449 (10th Cir. 1988); in *Walden*, the Tenth Circuit found that a military prisoner is barred by the "*Feres* Doctrine" from bringing a general federal question action under 28 U.S.C. 1331 seeking damages for alleged due process violations by military officials in his court-martial.

<sup>32</sup> Article 138 provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Uniform Code of Military Justice, art. 138, 10 U.S.C. 938 (1982).

Although this broad language seems to provide a remedy for a fourth amendment violation, service regulations have removed military justice matters from the usual scope of an article 138 complaint. See, e.g., Army Reg. 27-10, Legal Services—Military Justice, ch. 20, para. 20-5b(1) (March 18, 1988). Even if this regulatory restriction on an article 138 complaint is invalid, it is unlikely that a commander can grant any meaningful relief. For example, there appears to be no authority in article 138 for any commander to pay any money to a complainant.

<sup>33</sup> A Board for Correction of Military Records may grant relief only if "necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a) (1982).

<sup>34</sup> 94 L. Ed. 2d 364 (1987).

<sup>35</sup> *Id.* at 376.

#### A Recent Extension of the "Good Faith" Exception to a Warrantless Administrative Search Does Not Change the Analysis

Last term in *Illinois v. Krull*,<sup>34</sup> the United States Supreme Court extended the "good faith" exception to a warrantless administrative search. Pursuant to a state statute, a police officer conducted a warrantless "inspection" of an automobile wrecking yard. Although the statute was held unconstitutional, evidence seized pursuant to that statute was held admissible. The Court reasoned that excluding the evidence would have little deterrent effect on the police officer who was complying with the statute and no significant deterrent effect on the legislators who enacted the statute. The Court distinguished between the roles of legislators and law enforcers and noted that "[l]egislators enact statutes for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations."<sup>35</sup> According to the Court, the deterrence lay in finding the statute invalid, not in excluding the evidence. The commander's search authorization, however, is significantly different from the scenario in *Krull*. First, the commander is involved in the law enforcement process in an individual case. Second, there is no action similar to invalidating an offensive statute that acts as a deterrent to the commander. These differences warrant a different rule, especially considering the difficulties associated with oral representations and oral authorizations.

#### Conclusion

Although the Military Rules of Evidence now recognize a "good faith" exception to a commander's search authorization, neither wisdom, nor *Leon* warrants such an exception. The commander's search authorization is already enough of an exception to the traditional warrant requirement.

A commander is too intimately involved in law enforcement activities to be accorded the deference granted a civilian magistrate. The exclusionary rule's deterrent purpose is particularly effective for a military commander who is more a police officer than a judge.

The safeguards established to control the "good faith" exception are insufficient to justify applying it to a commander's search authorization. The safeguards are inadequate because the commander's search authorization may be based on unsworn, oral statements and need not be in writing. The reluctance of subordinates to question their superiors and the willingness of subordinates to comply

with the orders of their superiors further weaken these safeguards.

Personnel turbulence, training difficulties, and a desire to encourage the use of military magistrates and judges, also support rejecting the "good faith" exception for a commander's search authorization.

Finally, the absence of any other meaningful remedy for the violation of a soldier's fourth amendment rights compels the rejection of this unwarranted exception to a warrantless search.

## *Trial Judiciary Note*

### **Sentencing Guidelines for Courts-Martial:**

#### **Some Arguments Against Adoption**

*Lieutenant Colonel Craig S. Schwender  
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Congress mandated sentencing guidelines for federal courts in 1984 with a goal of reducing a perceived disparity in sentencing and promoting more evenhanded, predictable sentences.<sup>1</sup> The United States Sentencing Commission worked for three years to develop such guidelines,<sup>2</sup> which are now effective in United States district courts for offenses occurring after 1 November 1987.<sup>3</sup> It is too early to tell if the guidelines are working in the district courts. It is safe to say, however, that if there is some new and progressive "gimmick" in the world of jurisprudence, sooner or later someone will propose its adoption by military courts.

#### **Do We Really Have a Problem?**

We designed our system of criminal justice to give different sentences to different people. An individual sentence specifically tailored to fit both the crime committed and the criminal that committed it is a goal we seek.<sup>4</sup> Very rarely are criminals and crimes similar enough to deserve similar

sentences. When it does happen, however, and the two criminals get disparate sentences, somebody gets upset. Usually it is the criminal with the larger sentence.<sup>5</sup> Sometimes it is a segment of society that feels its members are too often the recipients of the higher sentence.<sup>6</sup> I am aware of no evidence that would indicate, or even hint, that disparate sentences are a significant problem in courts-martial today.

If an unfairness does occur,<sup>7</sup> our system has procedures in place to correct a sentence that is inappropriately severe. The convening authority can reduce the sentence in the action,<sup>8</sup> and the Courts of Military Review also have the power to reassess sentences.<sup>9</sup> This, combined with automatic review<sup>10</sup> and free legal representation<sup>11</sup> adequately protects service members from the infrequent sentence aberration.

More often, we have good reasons for different sentences, reasons that weigh against a constrictive set of guidelines

<sup>1</sup> Sentencing Reform Act of 1984 (Chap II of the Comprehensive Crime Control Act of 1984), Public Law 98-473, 12 Oct 1984; 28 U.S.C. § 994 (1984). In its mandate, Congress decreed that under new guidelines sentences were not to vary by more than 25%. 28 U.S.C. § 994(b) (1984).

<sup>2</sup> U.S. Sentencing Commission's *Sentencing Guidelines and Policy Statements for the Federal Courts*, 41 Crim. L. Rep. (BNA) 3087 (May 6, 1987).

<sup>3</sup> 28 U.S.C. § 994(p) (1984).

<sup>4</sup> See, e.g., Dep't of Army, Pam. 27-9, *Military Judges' Benchbook*, para 2-39 (1 May 1982).

<sup>5</sup> See, e.g., *U.S. v. Cooper*, 5 M.J. 850 (A.C.M.R. 1978). After conviction of attempted rape, a court sentenced Cooper to *inter alia*, 20 years' confinement at hard labor. Two days later his co-accused was tried and sentenced to confinement of only three years. The convening authority in his action reduced Cooper's confinement to three years.

<sup>6</sup> Sentencing Commission member Ilene H. Nagel cited disparities culled from statistics compiled by the Commission. For example, she contended a black male convicted in the South of selling drugs would very likely receive a jail sentence, but that drug dealers in the Southern District of New York were frequently given probation. 41 Crim. L. Rep. (BNA) 2338 (July 29, 1987).

<sup>7</sup> There are many who would argue that the unfairness occurs when one criminal's sentence is too light.

<sup>8</sup> Uniform Code of Military Justice art. 70, 10 U.S.C. § 870 [hereinafter UCMJ].

<sup>9</sup> UCMJ art. 66. The Court of Military Appeals cannot reduce sentences, but regularly remands cases to the lower court for such action.

<sup>10</sup> UCMJ arts. 64, 66, 67.

<sup>11</sup> UCMJ art. 70.

that would not properly allow the punishment to fit the crime. In the federal system there may be good reasons for similar offenses occurring in Texas and Maine to receive similar sentences. In the military, however, there are significant differences in the severity of an offense that occurs in garrison or in the field; at Fort Polk, Louisiana, or Camp Casey, Korea; at Fort Bragg, North Carolina, or somewhere in the Sinai.<sup>12</sup> There are also good reasons for differences in sentences between the services,<sup>13</sup> between units with different missions,<sup>14</sup> and between crimes committed in peacetime versus crimes committed during various levels of readiness, up to and including all-out war.<sup>15</sup> The flexibility our courts now exercise allows us to adequately assess all these factors and arrive at a proper sentence. No set of guidelines could include all the factors (and how the factors mix) necessary to do even as well as we do now. Any attempt to include every little factor would result in a cumbersome and unworkably inefficient system.

### The Judge Alone Problem

Sentencing in the federal courts is done by the judge.<sup>16</sup> If we adopted guidelines could we retain the option, now in the hands of the accused, of having the court-martial panel (sometimes incorrectly called the "jury") determine the sentence?<sup>17</sup> Probably not. While there are many arguments for and against<sup>18</sup> a move to judge alone sentencing, the proposal was considered and rejected in 1984.<sup>19</sup>

One of the big questions to consider is how the use of sentencing guidelines would affect the efficiency of the court-martial process? The federal courts now conduct a second hearing to fix a sentence, using a presentence report prepared after findings.<sup>20</sup> Military courts, on the other hand, most often handle sentencing immediately after entering findings.<sup>21</sup> Sentencing guidelines would most likely require military courts to use one or more days for trial and a separate later date for sentencing.<sup>22</sup> Thus, a significant decrease in judicial efficiency.

The sentencing hearing itself would be significantly longer. The same evidence that is now presented would still be admissible, plus much more.<sup>23</sup> In addition, use of the guidelines is not so easy as some proponents suggest; they take up fifty-six pages, in seven chapters. There are many very complicated steps in the process,<sup>24</sup> including the resolution of any of the sentencing factors that are disputed.<sup>25</sup>

Our present court-martial sentencing scheme allows for the "correct" sentence to evolve as the values of society and the military community change. For example, drunk driving is now sentenced much more severely than ten years ago, reflecting the desire of society to deter this type of crime. The system seems to be working well.

<sup>12</sup> Courts may consider a crime's impact on the military unit's discipline and mission. Army Reg. 27-173, Trial Procedure, para. 25-5e (15 Feb. 1987).

<sup>13</sup> Indeed there are some crimes that are not shared by the services. See, e.g., U.S. v. Johanns, 17 M.J. 862 (A.F.C.M.R., 1983), where the Air Force Court of Review found that fraternization is not a crime in the Air Force.

<sup>14</sup> For example, a military intelligence unit would be much more concerned if a member handling high level secrets were an addicted drug user than would an infantry unit whose members have a somewhat more mundane mission.

<sup>15</sup> The severity of the crime might be affected by where there was fighting, what kind of fighting, the nature of the enemy, and the duration of the conflict.

<sup>16</sup> Fed. R. Crim. P. 32.

<sup>17</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 903 [hereinafter R.C.M.].

<sup>18</sup> See, e.g., Byers, *The Court-Martial As a Sentencing Agency: Milestone or Millstone*, 41 Mil. L. Rev. 91 (1968).

<sup>19</sup> The Military Justice Act of 1983, 10 U.S.C. Sec. 867(g) (1983), created an advisory committee to study whether all noncapital sentencing should be exercised by the military judge. The committee's report in 1984 recommended no changes to the present practice.

<sup>20</sup> Fed. R. Crim. P. 32(c).

<sup>21</sup> R.C.M. 1001(a)(1).

<sup>22</sup> The guidelines require the court to "resolve disputed sentencing factors . . . , notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence." Guidelines, Sec. 6A 1.3(b) at 6.2.

<sup>23</sup> If sentence guidelines are to approach a "correct" result, much more information must be available to the sentencing agent than is presently allowed by the Rules for Courts-Martial. For example, the presentence report in the federal system includes many things normally inadmissible at courts-martial. See Fed. R. Crim. P. 32(c)(2), and 18 U.S.C. Sec. 3552.

<sup>24</sup> E.g., Try to follow the General Application Instructions, from Part B of Chapter One of the Guidelines, less than one page of the 56 pages:

#### PART B—GENERAL APPLICATION PRINCIPLES

##### Sec. 1B1.1 Application Instructions

(a) Determine the guideline section in Chapter Two most applicable to the statute of conviction. See Sec. 1B1.2 (Applicable Guidelines). The statutory index (Appendix A) provides a listing to assist in this determination. If more than one guideline is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted.

(b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guideline in Chapter Two.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps one through three for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three. The resulting offense level is the total offense level.

(f) Compute the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the total offense level and criminal history category.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

<sup>25</sup> Guidelines, Sec. 6 A 1.3 (b) at 6.2.

With guidelines, the military judge would not have broad discretion. It would take a change in the guidelines to reflect an evolution of society's perceived fears and needs. But, how firmly would the guidelines be "locked-in?" Will it take Congressional action to amend the UCMJ, the President to amend the Manual for Courts-Martial, or action by Department of Defense and service secretaries via directives and regulations? Guidelines would also have a significant adverse effect on appellate advocacy.<sup>26</sup> Trial courts will grapple with indistinguishable terms<sup>27</sup>, determining sentencing factors that may be of very little relevance<sup>28</sup>, and then adding up the numbers to pluck a sentence from a grid of lines and columns—all of which will be subject to appellate review. In the federal system, only a small percent of the criminal convictions are appealed. In the military, with free appellate representation and mandatory review, nearly 100 percent of eligible service members appeal. Appellate advocacy of sentencing guideline issues would make the chaos of multiplicity<sup>29</sup> seem crystal clear.<sup>30</sup>

### Pretrial Problems

Discovery will become a nightmare. If sentencing guidelines apply, the defense will need to know what sentencing factors the government will rely on before any meaningful advice can be given to the accused about the sentence he or she faces.<sup>31</sup> The government, however, will not know many of these factors until much later.<sup>32</sup> Processing time would certainly skyrocket, bringing with it the problems of witnesses leaving on permanent change of station or the end of enlistment, and memories fading over time.

The effect on plea bargains is unclear. Pretrial agreements would still be possible, but there would be a much greater incentive to bargain for a lower charge and to use stipulations to bind the court into finding, or not finding,

certain sentencing factors.<sup>33</sup> Assuming the convening authority retains the power to reduce the sentence, this would not necessarily happen in the military. Counsel could use such stipulations to bypass a convening authority with whom they found it difficult to deal.

### Would Disparity Be Reduced?

In one test of the federal guidelines conducted before their implementation, Judge Edward R. Becker, of the U.S. Court of Appeals for the Third Circuit, used real cases in which sentences had already been imposed. He had these cases scored by members of the probation department of the Eastern District of Pennsylvania, using the published preliminary guidelines. The result: "Drastically disparate totals were computed!"<sup>34</sup> Similar results were reported by Judge Gerald Heaney of the U.S. Court of Appeals for the Eighth Circuit, and Chief Judge Donald E. O'Brien, of the U.S. District Court for the Northern District of Iowa.<sup>35</sup> One judge testifying against the guidelines described the present system as recognizing that many small nuances can add up to very great differences in culpability.<sup>36</sup> He argued that a system of strict general rules cannot give us fair sentences because these nuances are not taken into account.<sup>37</sup> Even if guidelines reduced slightly what disparity there may be, is it worth the cost? One prosecutor expressed concern that guidelines might "promote uniformity in sentencing at the expense of the human element."<sup>38</sup> He felt that "visceral impressions" that "defy numerical calculation" are very important in the sentencing decision.<sup>39</sup>

Probably the first use of the federal guidelines came before the official implementation date via a motion to reduce sentence filed by Ilan Reich, one of the inside traders convicted of supplying inside information to stockbroker Dennis Levine. Reich argued that his one year and a day sentence was disparate; that others in the scheme received

<sup>26</sup> At a conference held 21-22 January 1988 in Washington, D.C., entitled "Defense Advocacy Under the New Federal Sentencing Guidelines," sponsored by the ABA's Criminal Justice Section and Complex Crimes Litigation Committee, as well as the National Association of Criminal Defense Lawyers, Chairperson Judy Clarke told the group that Federal courts "can be brought to their knees" by the guidelines. She urged the lawyers to "become trial attorneys again" by demanding trials instead of disposing of cases through pleas. 42 *Crim. L. Rep. (BNA)* 2336 (Feb. 3, 1988).

<sup>27</sup> E.g., the guidelines attempt to differentiate between crime "organizers" and "supervisors," and between participation that is "minimal" and "minor," and adjusts the sentence differently based on these vague distinctions. Guidelines, Sec. 3 B 1.1 and 1.2.

<sup>28</sup> E.g., Judge Sweet in the Reich case (See notes 40 and 41) would have had to determine under the guidelines the exact amount of money taken by the accused through the illegal activity. He found this to be very difficult to pinpoint and considered the exercise a waste of precious judicial time:

Were Reich actually being sentenced under the Guidelines, the court would naturally expect to see this factual question hotly litigated, because a dollar figure close to a cut-off point can translate into actual months served. But, of course, whether the total market gain from Reich's tips is more or less than \$500,001 is entirely beside the point in trying to do justice in any significant sense.

<sup>29</sup> *United States v. Baker*, 14 M.J. 361, at 372 (C.M.A. 1982) (J. Cook dissenting).

<sup>30</sup> See, e.g., Dissenting view of U.S. Sentencing Commission Commissioner Paul H. Robinson, 41 *Crim. L. Rep. (BNA)* 3174 (May 13, 1987).

<sup>31</sup> Ms. Judy Clarke (see note 26) recommended a basic form letter be sent to the prosecutor very early, asking for information on the factors the government will rely on to enhance the sentence. If the prosecution does not yet know or does not answer, the defense will go to the judge for relief arguing *inter alia* due process and *Brady v. Maryland*, 373 U.S. 83 (1963). 42 *Crim. L. Rep. (BNA)* 2336 (Feb. 3, 1988).

<sup>32</sup> E.g., the investigation must be complete before all factors are determinable, a crime records check completed, and perhaps even an entire presentence report!

<sup>33</sup> Judge Gerald W. Heaney, in testimony before the House Criminal Justice Subcommittee, worried that the guidelines would lead to plea bargains and stipulations that would not fully and completely inform the judge of actual offense. He said that was the result when guidelines were adopted in Minnesota. 41 *Crim. L. Rep. (BNA)* 2338 (Aug. 5, 1987).

<sup>34</sup> 41 *Crim. L. Rep. (BNA)* 2225 (Dec. 17, 1986).

<sup>35</sup> 40 *Crim. L. Rep. (BNA)* 2489 (Mar. 25, 1987).

<sup>36</sup> Judge Gilbert S. Merritt, speaking on behalf of the trial and appellate judges of the Sixth Circuit, before the House Criminal Justice Subcommittee hearings 15, 22 and 23 July 1987. 41 *Crim. L. Rep. (BNA)* 2337 (Aug. 5, 1987).

<sup>37</sup> *Id.*

<sup>38</sup> Henry E. Hudson, U.S. Attorney for the Eastern District of Virginia, speaking at public hearings held on the Sentencing Guidelines in Washington, D.C., 2 and 3 December 1986. 40 *Crim. L. Rep. (BNA)* 2225 (Dec. 17, 1986).

<sup>39</sup> *Id.*

lighter sentences when comparing their culpability to his. Judge Sweet used the sentencing guidelines to help him determine if there was an unfair disparity. After this one encounter with the guidelines the judge was decidedly not a convert:

With little meaningful empirical data, the shibboleth of disparity swept the Congress, created the Sentencing Commission, and has resulted in the Guidelines. Because of Reich's claim of disparity, the court has examined the sentence in the light cast by the draft Guidelines submitted by the Commission to Congress. This examination demonstrates that the Guidelines will require time-consuming calculations on issues tangential to the case, that they will create a host of litigable uncertainties for appeal, as well as a number of other undesirable side effects, but that they will fail to eliminate disparity in any meaningful way.<sup>40</sup>

But the judge in *Reich* saved his strongest criticism for the end of the opinion.

Finally, the amount and cost of litigation that would be expended in a case like this on tangential issues fail to serve any public purpose.

But perhaps even more importantly, the idea of restraining discretion through grids, columns, and various scores belittles the gravity of the social statement that attends the imposition of a criminal sentence. The formulae and the grid distance the offender from the sentencer—and from the reasons for punishment—by lending the process a false aura of scientific certainty. . . . The motion to reduce the sentence is denied.<sup>41</sup>

#### Where Do We Go From Here?

We should continue to do everything possible to reduce unfair disparity in sentencing.<sup>42</sup> We should encourage continued education, not only of judges<sup>43</sup> but also of court members.<sup>44</sup>

We should also, of course, observe the use of this new sentencing apparatus in the federal system.<sup>45</sup> If it seems successful, then we should study the possibility of adopting any part of the apparatus that would make military justice better.

We should not, however, be too quick to jump on this bandwagon.

<sup>40</sup> U.S. v. Reich, 41 Crim. L. Rep. (BNA) 2189 (S.D. N.Y. June 10, 1987).

<sup>41</sup> *Id.*

<sup>42</sup> Sentencing seminars are one method to enhance uniformity, and have been conducted by the military for many years. In a typical sentencing seminar a hypothetical crime and criminal are described in detail. Participants then state what sentence they would give, and participate in a discussion of the reasons. While differences of opinion always continue to exist, the usual course of the seminar is that after several cases the sentences form a tighter "shot group" as the most out of line participants yield to the views and reasoning of the mainstream.

<sup>43</sup> Military judges participate in sentencing seminars as a part of the three-week Military Judge Course at TJAGSA. They also normally encounter such seminars periodically at judicial conferences they attend within their circuit.

<sup>44</sup> Sentencing seminars are conducted at the Senior Officers Legal Orientation Course at TJAGSA. Other officers could benefit from similar training at their basic course or advanced course. Judge advocates in the field could also conduct such training for their commands.

<sup>45</sup> As I finish writing this, a U.S. District Court has found the guidelines invalid as a violation of the separation of powers doctrine. See, e.g., U.S. v. Arnold, 42 Crim. L. Rep. (BNA) 2377 (S.D. Cal. Feb. 18, 1988); U.S. v. Frank, 43 Crim. L. Rep. (BNA) 2021 (W.D. Pa. Mar. 30, 1988). On the other hand, several others have found the guidelines to be valid. See, e.g., U.S. v. Johnson, 43 Crim. L. Rep. (BNA) 2022 (W.D. Mo. Apr. 1, 1988); U.S. v. Ruiz-Villanueva, 42 Crim. L. Rep. (BNA) 2413 (S.D. Calif. Mar. 9, 1988).

## Trial Counsel Forum

### A Trial Attorney's Primer on Blood Spatter Analysis

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#### Introduction

Blood spatter analysis is a crime scene investigative technique that military courts have concluded qualifies as an area of scientific expertise.<sup>1</sup> An admixture of physics and deductive reasoning, blood spatter analysis has been used primarily in crime scene reconstruction in homicides and other crimes of violence. Blood spatter analysis is distinct

from serology, or blood-typing. While blood spatter analysis normally serves to explain either the manner in which a crime was perpetrated or the sequence of events, serological testing is generally performed in a laboratory by a forensic pathologist and is used as a means of establishing or excluding identity.

\*This article was originally prepared in partial satisfaction of the requirements of the 36th Judge Advocate Officer Graduate Course.

<sup>1</sup> See *United States v. Mustafa*, 22 M.J. 165 (C.M.A.), cert. denied, 107 S. Ct. 444 (1986); *United States v. Ayala*, 22 M.J. 777 (A.C.M.R. 1986), *aff'd*, 26 M.J. 190 (C.M.A. 1988); *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985), *aff'd*, 22 M.J. 288 (C.M.A. 1986), cert. denied, 107 S. Ct. 575 (1986).

Given the low threshold for qualification as an expert set forth in Military Rule of Evidence 702,<sup>2</sup> even the most minimally trained Criminal Investigation Division (CID) agent or military police investigator can provide valuable testimony in the area of blood spatter analysis. Military courts have already determined that blood spatter evidence can assist a trier of fact in resolving a matter in issue and is therefore admissible.<sup>3</sup> Whether a prospective witness can competently provide such evidence, however, must still be litigated in each case.

The purpose of this article is to provide an overview of blood spatter analysis that will be of assistance to both trial counsel and defense counsel. The article will trace the development of this specialized body of knowledge, provide a working understanding of its terminology and its application in military case law, and will conclude with guidance to the trial practitioner on litigating the issue of the expert's qualifications, and more importantly, the scope of his or her expertise.

### Historical Background

While criminal investigators, relying on logic, common sense, and their own powers of observation, have applied a rudimentary form of blood spatter analysis for hundreds, if not thousands, of years, it was not until the beginning of this century that an attempt was made to quantify these observations and deductions and create a scientific methodology. Two French researchers, Florence and Fricon, developed a system of classifying blood stains that was based on the angle of impact at which blood struck a surface and the height from which blood fell before striking a surface.<sup>4</sup>

In 1939, another group of French researchers published the results of their research using high speed cinematography to study blood droplet impacts.<sup>5</sup> Like Florence and Fricon, the experiments focused on the relationship between the height and the angle of impact of falling blood drops and the stain or spatter produced.

In 1953, P. L. Kirk, in his book, *Crime Investigations*,<sup>6</sup> gave brief treatment to the effect of velocity on blood stains. Dr. Kirk conducted a number of experiments in the area of blood spatter analysis, which he alluded to in his affidavit in the much publicized 1955 murder case of Dr. Sam

Sheppard,<sup>7</sup> but never published the results as a scientific work.

It was not until 1971, with the publication of Professor Herbert L. MacDonell's pamphlet, *Flight Characteristics and Stain Patterns of Human Blood*,<sup>8</sup> that the study of blood stains began to gain a degree of general acceptance. MacDonnell is regarded as the preeminent expert in the field today, and his text remains the most significant work in the field to date. MacDonnell is currently director of a forensic laboratory in New York,<sup>9</sup> has lectured extensively on the subject, taught numerous seminars and courses on the fundamentals of blood spatter analysis,<sup>10</sup> and has testified as an expert witness at a court-martial.<sup>11</sup>

### The Science of Blood Spatter Analysis

While a dissertation on the science of blood spatter analysis is beyond the scope of this article, the trial practitioner should possess a general understanding of the elemental principles and theories underlying its development.

When blood drips from a person or an object, or is spattered by the impact of a blow, its flight characteristics can be accurately predicted using the law of ballistics. Essentially, blood spatter analysis has evolved from the performance of a variety of experiments under known conditions using human blood, the quantification of this experimental data into standards of reference, and the comparison of blood stains found at a crime scene with the known standards. Based on such a comparison, the expert can predict: (1) the distance between the target surface (the blood stained object) and the source of the blood at the time the blood was shed; (2) point(s) of origin of blood; (3) the direction and velocity of the impact that produced blood stains; (4) the number of blows, shots, etc.; (5) the position of the victim and/or objects during bloodshed; and (6) movement and directionality of persons and/or objects while they were shedding blood.<sup>12</sup>

The accuracy of such predictions is directly correlated to the expert's level of experience and the degree of duplication between the laboratory setting and the actual crime scene. For example, the shape of a blood stain is primarily determined by the surface it falls upon, and not by the distance it falls.<sup>13</sup> An estimation of distance based on a

<sup>2</sup> Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<sup>3</sup> See *Mustafa*, 22 M.J. at 18; *Ayala*, 22 M.J. at 794-95; *Garries*, 19 M.J. at 857-58.

<sup>4</sup> Pizzola, P., Roth, R., and DeForest, P., *Blood Droplet Dynamics—I*, 31 J. Forensic Sci. 37 (1986).

<sup>5</sup> Balthazard, V., Piedelievre, R., Desoille, H., and Derobert, L., *Etude des Gouttes de Sang Projete*, 19 Annales De Medecine Legale de Criminologie Police Scientifique, Medecine Sociale, et Toxicologie, 265 (1939), cited in Pizzola, *supra*, at 37.

<sup>6</sup> Interscience Publishers, Inc., New York, 1953, pp. 176-80.

<sup>7</sup> Kirk, P. L., Affidavit Regarding *State of Ohio v. Samuel H. Sheppard*, Court of Common Pleas, Criminal Branch, No. 64571, 26 Apr. 1955, cited in Pizzola, *supra*, at 37. See also P. Holmes, *The Sheppard Murder Case*, 218-31 (1961). Dr. Kirk's affidavit was nearly ten thousand words long.

<sup>8</sup> MacDonnell's work was published by the United States Department of Justice under a grant from the Law Enforcement Assistance Administration.

<sup>9</sup> Laboratory of Forensic Sciences, P.O. Box 111, Corning, NY 14830, telephone (607) 962-6581.

<sup>10</sup> Special Agent Herndon, the government's expert witness in *Mustafa*, attended a seminar taught by MacDonnell. 22 M.J. at 166.

<sup>11</sup> MacDonnell testified as an expert witness for the government in *Ayala*, 22 M.J. at 794, though he is not identified by name in the opinion. Telephone interview with Herbert H. MacDonnell (Feb. 29, 1988).

<sup>12</sup> MacDonnell, *Flight Characteristics and Stain Patterns of Human Blood*, at 2 (1971).

<sup>13</sup> Generally, the harder and less porous the surface, the less spatter results.

comparison of blood spatters on dissimilar target surfaces will therefore normally be erroneous.<sup>14</sup>

While distance and angle determinations, to be accurate, must necessarily involve experimentation and measurements, an expert can, on visual examination alone, deduce from the shape of a blood stain its direction of flight<sup>15</sup> and the degree of force which produced the spatter.<sup>16</sup> Though an expert's observations of the crime scene can yield a wealth of information of potential value to the trial practitioner,<sup>17</sup> these deductions require an eye for detail coupled with a basic understanding of blood aerodynamics.

The science of blood spatter analysis, then, is highly dependent on the practical experience and technical knowledge of the expert. Unlike most other scientific fields which generally use verifiable testing procedures, blood spatter analysis relies heavily on subjective analysis.

### Terminology

Like any other specialized field of study, blood spatter analysis has its own particular language with which the trial practitioner should become familiar. Fortunately, the terms and definitions commonly used by the expert are, for the most part, easily understood.

"Impact" and "target" are basic definitions often used in defining other blood spatter terms or concepts. Impact refers to the point on a human body which receives a blow or other application of force, or the spot on a target surface which is struck by blood in motion. Target refers to the surface on which a blood stain is located.

"Cast-off" blood is produced by the motion of a blood-covered object, such as a knife. The progressive elliptical nature of the cast-off blood pattern will permit the expert to determine the direction and nature of the movement (i.e., overhead swing, horizontal thrust, backhand, etc.).<sup>18</sup>

"Transfer" occurs when a blood-covered object comes in contact with a target surface. A bloody handprint on a tabletop would be identified, in blood spatter parlance, as a transfer blood stain.

Bloodstains can also be classified, or defined, according to the degree of force which produces the bloodshed, or injury. Low velocity blood spatters, or splashed blood, results from a minor impact, or in the absence of impact, has a dropping distance of at least 4 inches.<sup>19</sup> Blood dripping

from a wound and falling to the floor would be an example of a low velocity blood spatter. Medium velocity blood spatters result from an impact of from 5 to 25 feet per second, with the blood breaking up into many small droplets of one-eighth inch diameter or smaller.<sup>20</sup> Almost any blow from a club, hatchet, rock, etc., will result in a medium velocity spatter. High velocity blood spatters are caused by an impact of from 25 feet per second or higher and produce an extremely high percentage of very fine specks of blood.<sup>21</sup> High velocity blood spatters are typically the result of a gunshot wound.

Hopefully, these simplified definitions, and the preceding overview of the methodology of blood spatter analysis, provide a basic understanding of blood spatter analysis which will be of use to the reader in the following review of military case law.

### Blood Spatter Analysis and Military Case Law

Cases addressing the presentation of blood spatter evidence at courts-martial are few in number and of recent origin. The three cases that will be examined are *United States v. Garries*,<sup>22</sup> *United States v. Mustafa*,<sup>23</sup> and *United States v. Ayala*.<sup>24</sup>

#### *United States v. Garries*

In *Garries*, the accused was convicted of the premeditated murder of his pregnant wife. The cause of death was blunt force trauma to the head. Blood stains were discovered on the basement steps of the accused's quarters and on the trunk latch and trunk liner of the accused's car.

Detective Green, an investigator for the El Paso County, Colorado, Police Department, testified at trial as an expert on blood spatter analysis.<sup>25</sup> He had received training in blood spatter analysis at Colorado University. The course of instruction was conducted by a nationally recognized expert in blood spatter analysis, and involved lectures, numerous experiments, and written examinations. His practical experience extended to twenty to thirty cases.

Detective Green testified that blood stains discovered on the stair steps, to include blood spatters found on the underside of the step risers, were not consistent with blood dripping down.<sup>26</sup> This evidence served to refute the accused's assertion that the blood stains were attributable to

<sup>14</sup> As noted by MacDonell, different thicknesses of otherwise identical cardboard will produce noticeable variations in the edge characteristics of a blood stain at the same dropping distance. MacDonell, *supra*, at 6. The only accurate way to estimate dropping distance is to conduct a series of blood drops v. distance experiments on the specific surface in question and use the known standards for comparison.

<sup>15</sup> Blood traveling right to left, or left to right, will produce a teardrop shaped blood stain, the tail of which will point towards its source of origin, or opposite its direction of travel.

<sup>16</sup> Generally, the higher the degree of force, or velocity at impact, the smaller and more numerous will be the resultant blood stains.

<sup>17</sup> In addition to direction and degree of force, the expert can, relying solely on a visual examination, arrive at other deductions, to include a rough estimation of distance. See *supra* text accompanying note 12.

<sup>18</sup> MacDonell, *supra*, at 9, 17-18.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *Id.* at 20.

<sup>21</sup> *Id.* at 21.

<sup>22</sup> 19 M.J. 845 (A.F.C.M.R. 1985), *aff'd*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 575 (1986).

<sup>23</sup> 22 M.J. 165 (C.M.A.), *cert. denied*, 107 S. Ct. 444 (1986).

<sup>24</sup> 22 M.J. 777 (A.C.M.R. 1986), *aff'd*, 26 M.J. 190 (C.M.A. 1986).

<sup>25</sup> It does not appear from a reading of the opinion that defense counsel objected at trial to Green's qualification as an expert. *Garries*, 19 M.J. at 858.

<sup>26</sup> *Id.* at 857.

the victim's frequent nosebleeds.<sup>27</sup> Detective Green further opined that the stains were low and medium velocity spatters, from which it was inferred that the stains resulted from the victim being struck by a blunt instrument.<sup>28</sup>

The Air Force Court of Military Review, relying on Military Rules of Evidence (MRE) 401<sup>29</sup> and 403,<sup>30</sup> concluded that the blood stain evidence was "clearly relevant and its probative value was not even remotely outweighed by any possible prejudice."<sup>31</sup> The court further concluded that Detective Green possessed special training and skill that could aid the fact finders in making their determination. The military judge, therefore, did not abuse his discretion in qualifying Green, under MRE 702,<sup>32</sup> as an expert.<sup>33</sup> As noted by the court, despite Green's expert status, the defense was free to attack the weight to be accorded his testimony.<sup>34</sup>

#### *United States v. Mustafa*

*Mustafa*,<sup>35</sup> decided by the United States Court of Military Appeals in 1986, is the paramount case in the military dealing with blood spatter analysis. Though blood spatter evidence was previously admitted in the *Garries* case, the Air Force Court did not specifically address the validity of blood spatter analysis as a field of scientific endeavor. It remained for *Mustafa* to explicitly hold that the flight patterns of blood and their implications is a specialized body of knowledge and is a matter as to which expert testimony is admissible.<sup>36</sup>

Karim Abdul Mustafa<sup>37</sup> was convicted in 1982 in Aschaffenburg, Germany, of the premeditated murder, rape,

and forcible sodomy of an eighteen-year old German female and was sentenced to death.<sup>38</sup> At his court-martial, one of the crime scene investigators, CID Agent Herndon, testified for the government, over defense objection,<sup>39</sup> as a blood spatter expert.<sup>40</sup> Herndon had earlier attended a five-day seminar on blood spatter analysis taught by Professor MacDonell.<sup>41</sup> The seminar consisted of lectures, written materials, experiments, and a written examination which Herndon passed. Herndon also had received an unspecified amount of instruction on the subject at CID school, and once used his training to solve a robbery case.

Herndon's testimony described the likely sequence of events on the night of the murder.<sup>42</sup> Based on his observations of blood stains at the crime scene, he theorized that the victim had been accosted on the street and wounded at that point.<sup>43</sup> She was then taken to the stairwell of a nearby building where blood stains indicated a further struggle occurred.<sup>44</sup> Herndon opined that the victim had been stabbed again at or near the top of the stairwell, then dragged to the bottom of the stairwell where additional wounds were inflicted.<sup>45</sup> In the course of his testimony, Herndon used such descriptive terms as "impact," "cast-off," "medium velocity," and "transfer."<sup>46</sup>

The Court of Military Appeals concluded that the military judge did not abuse his discretion in qualifying Herndon as an expert and permitting him to testify as to his theory of the crime.<sup>47</sup> In so holding, the court adopted a relevancy approach to the admission of scientific evidence, as set forth in Military Rule of Evidence 702,<sup>48</sup> instead of the more restrictive "general acceptance" test of *Frye* v.

<sup>27</sup> The accused claimed that the victim suffered from nosebleeds that were, at times, so severe that "she had to walk around with a bucket." *Id.* at 856. The court found this assertion unpersuasive. *Id.*

<sup>28</sup> A forensic pathologist testified that the victim's wounds were consistent with being struck with a two-by-four board. *Id.* at 857. Another witness testified he observed several two-by-fours in the accused's basement a few days before the murder. *Id.* at 849.

<sup>29</sup> Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

<sup>30</sup> Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<sup>31</sup> *Garries*, 19 M.J. at 857-58.

<sup>32</sup> See *supra* note 2.

<sup>33</sup> *Id.* at 858.

<sup>34</sup> *Id.*

<sup>35</sup> 22 M.J. 165 (C.M.A.), cert. denied, 107 S. Ct. 444 (1986).

<sup>36</sup> *Id.* at 168.

<sup>37</sup> a/k/a Joseph N. Brown, Jr.

<sup>38</sup> On appeal, the Army Court of Military Review dismissed a felony murder charge on multiplicity grounds, and reduced Mustafa's sentence to confinement for life in light of the constitutional defects in the capital punishment sentencing procedures then in effect. 22 M.J. at 166.

<sup>39</sup> Trial defense counsel objected to Herndon's qualification as an expert, not to the subject matter of his testimony. Record at 242, *Mustafa* (CM 443380).

<sup>40</sup> The military judge informed the court members that he would allow the witness to testify "with regard to his experience and training in this area," and that it was for the members "to evaluate and assess the weight to be given his testimony based on his experience and training." Record at 245.

<sup>41</sup> See *infra* pp. 3-4.

<sup>42</sup> For a more detailed synopsis of Herndon's testimony than that set forth in the opinion of the Court of Military Appeals, see Brief for the United States in Opposition to Petition for Writ of Certiorari at 4-5, *Mustafa v. United States*, 22 M.J. 165 (C.M.A.) (No. 86-143), cert. denied, 107 S. Ct. 444 (1986).

<sup>43</sup> 22 M.J. at 167.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* The victim's body was discovered at the base of the stairwell. *Id.* at 166. She had been stabbed 13 times in the head, neck, back, and arms. *Id.* at 167.

<sup>46</sup> *Id.* at 167.

<sup>47</sup> *Id.* at 168.

<sup>48</sup> See *supra* note 2.

*United States*.<sup>49</sup> Relying on Military Rules of Evidence 702, 703,<sup>50</sup> 401,<sup>51</sup> and 402,<sup>52</sup> the court fashioned the following two-part analysis for the admission of blood spatter evidence; (1) whether the subject of the witness's proffered testimony would be of assistance to the fact finder; and (2) whether the witness could competently provide such evidence.<sup>53</sup> As to the first part, the court concluded that blood spatter analysis was grounded in established laws of physics and common sense, was capable of quantification, and therefore, was "a body of specialized knowledge which would permit a properly trained person to draw conclusions" from the examination of blood stains.<sup>54</sup> As to Herndon's expert status, the court noted that, while Herndon "was not Professor MacDonell," he did have professional training and some experience that could have helped the court members.<sup>55</sup>

#### *United States v. Ayala*

In *Ayala*,<sup>56</sup> the accused was convicted of the premeditated murder of his wife. During the crime scene investigation, over 1,000 stains were found in the accused's quarters and on personal property that had been removed from the quarters.<sup>57</sup> At trial, the defense moved unsuccessfully to exclude blood spatter evidence based on an examination of these stains.

Professor MacDonell, testifying as an expert for the government,<sup>58</sup> described the stains as medium or high velocity spatters.<sup>59</sup> He theorized that the spatters resulted from "[a] very deliberate and extended beating."<sup>60</sup> The military judge, in admitting the testimony, found that: (1) the evidence would assist the trier of fact in resolving matters in

issue; (2) the defense objection went to the weight to be accorded the evidence rather than its admissibility; and (3) the relevance of the evidence outweighed its possible prejudicial effect.<sup>61</sup>

On appeal, the Army Court, citing *Garries* and *Mustafa* and applying the Military Rule of Evidence 403 balancing test,<sup>62</sup> upheld the military judge's ruling.<sup>63</sup> In doing so, the court determined that the evidence was probative in establishing, *inter alia*: (1) the general locations where the assaults occurred; (2) the duration and ferocity of the attack; and (3) the fact that the victim was attempting to defend herself during the attack.<sup>64</sup> The court also noted with approval that the military judge gave a very detailed, tailored instruction on circumstantial evidence that referred to the blood spatter evidence and to certain permissible inferences which could be drawn therefrom.<sup>65</sup>

#### Guidance for the Trial Counsel

The Court of Military Appeals has established a two-part test for the admissibility of blood spatter evidence: (1) whether such evidence would be of assistance to the fact finder; and (2) whether the prospective witness could competently provide such evidence.<sup>66</sup> The *Mustafa* decision has conferred on blood spatter analysis the favored status of "specialized knowledge,"<sup>67</sup> thereby foreclosing, for all practical purposes, future litigation on the validity of its principles and theories. The second prong of the test can only be resolved on a case-by-case basis and must be the focus of trial counsel's efforts.

Although Military Rule of Evidence 702<sup>68</sup> establishes a very low threshold whereby even the most minimally

<sup>49</sup> 293 F. 1013 (D.C. Cir. 1923). Under the *Frye* test, the proponent of evidence of a scientific nature is required to show that the principles or techniques from which the evidence was derived was "sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. at 1014. Justices White and Brennan would have granted certiorari to resolve the question of whether Federal Rule of Evidence 702, which Military Rule of Evidence 702 mirrors, incorporates the *Frye* test or established a lower threshold of admissibility. *Mustafa v. United States*, cert. denied, 107 S. Ct. 444 (1986). In a subsequent case, *United States v. Gipson*, the Court of Military Appeals has explicitly rejected the *Frye* test of general acceptance "as an independent controlling standard of admissibility," while holding that it is simply one factor to consider in determining the admissibility of scientific evidence. 24 M.J. 246, 251-52 (C.M.A. 1987).

<sup>50</sup> Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

<sup>51</sup> See *supra* note 29.

<sup>52</sup> Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

<sup>53</sup> 22 M.J. at 168.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 22 M.J. 777 (A.C.M.R. 1986), *aff'd*, 26 M.J. 190 (C.M.A. 1988).

<sup>57</sup> Though the great majority of the stains were too small to test, 171 of the stains tested proved to be human blood. 22 M.J. at 793.

<sup>58</sup> Professor MacDonell is identified in the opinion only as an expert in blood spatter stain interpretation. *Id.* at 794. See *supra* note 11.

<sup>59</sup> *Id.* at 794.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See *supra* note 30.

<sup>63</sup> *Id.* at 795.

<sup>64</sup> *Id.* at 795 n.37.

<sup>65</sup> *Id.* at 795 n.38.

<sup>66</sup> *Mustafa*, 22 M.J. at 168.

<sup>67</sup> *Id.*

<sup>68</sup> See *supra* note 2.

trained and inexperienced investigator could be qualified as an expert, a diligent defense counsel probably will require the government to meet the burden of demonstrating that the witness is a "properly trained"<sup>69</sup> person capable of drawing reliable conclusions from blood stain evidence.<sup>70</sup> Trial counsel must be prepared to establish the witness': (1) understanding of the science of blood spatter analysis; (2) the acuity of his or her observations; (3) the logic of his or her deductions; and (4) the extent, if any, to which the witness' attempted to verify his or her conclusions by experimentation. These facets of blood spatter analysis are particularly significant since they initially determine the witness' competency to present such evidence, and subsequently, the weight it is to be accorded. Each facet will be examined in turn.

It is elemental that exposure to knowledge does not necessarily equate with comprehension. The fact that a witness attended a seminar or a short course on blood spatter analysis does not establish that the witness possesses the requisite knowledge, training, or education to be qualified as an expert. Every counsel, faced with the prospect of trying a court-martial involving blood spatter evidence, should obtain a copy of MacDonell's pamphlet, *Flight Characteristics and Stain Patterns of Human Blood*.<sup>71</sup> The pamphlet contains a number of photographs and figures depicting blood stains which counsel can use to test the witness' ability to determine directionality, dropping distance, distinctions between medium and high velocity blood spatters, etc.

Acuity of observations, and logic of deductions, are functions of experience and common sense, and are matters which readily lend themselves to cross-examination. Counsel should require the witness to articulate the scope and detail of his or her observations, and the reasoning process by which he or she arrived at their conclusions, to include an explanation as to why other possible constructions were not considered or rejected.

<sup>69</sup> *Mustafa*, 22 M.J. at 168.

<sup>70</sup> For purposes of this discussion, the author will assume the government to be the proponent of blood spatter evidence. This reflects the common usage of blood spatter evidence at courts-martial wherein the government, in the absence of eyewitnesses or a living victim, relies on blood spatter evidence to reconstruct the sequence of events or manner of death.

<sup>71</sup> See *supra* note 8.

<sup>72</sup> By way of example, testimony as to dropping distance could establish whether the victim was upright, bent over, or kneeling. Knowledge of the victim's position at the time a wound is inflicted could support or refute a claim of self-defense, or be a matter in aggravation.

<sup>73</sup> *Mustafa*, 22 M.J. at 168 n.6.

<sup>74</sup> See *supra* note 2.

<sup>75</sup> Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.

<sup>76</sup> The following excerpt from the Brief for the United States in Opposition to Petition for Writ of Certiorari at 11-12, *Mustafa v. United States* (No. 86-143), is illustrative:

Agent Herndon's testimony . . . consisted mostly of ordinary observations, combined with the terminology he learned during his training. It required no arcane scientific expertise for Agent Herndon to conclude that the trail of blood that began near the street and ended where the victim's body was discovered indicated that the victim had initially been accosted and wounded near the street and then led to the stairwell. . . . Likewise, his conclusion that somebody reached for the railing in the stairwell where a bloody palm print was found . . . is hardly speculative, and his opinion that a further struggle occurred on the way down the stairs is the only logical explanation for the blood on the steps and walls of the stairwell. . . . That testimony, which was based on a visual observation of the scene, was not "of such a complex nature as to require a more detailed scientific foundation" or "a foundation in the science of physics," because "a layman or a member of the jury, after hearing and seeing a description of the blood stains, using common knowledge and experience, could have arrived at the same conclusion [as the witness]" (citations omitted).

The typical military investigator will not attempt to verify his or her conclusions with experiments duplicating the physical layout of the crime scene. In most cases, experimentation will not be necessary. However, in those cases in which the dropping distances of blood may be relevant,<sup>72</sup> experimentation is necessary to ensure accuracy. In certain cases, then, the failure to conduct experiments will diminish the reliability of proffered blood spatter evidence and preclude its admissibility.

Above all else, trial counsel should not consider the admissibility of blood spatter evidence to be contingent on the qualification of the witness as an expert. In *Mustafa*, Judge Cox, paraphrasing the words of Sherlock Holmes, described the field of blood spatter analysis as ". . . [S]implicity itself. . . . So much is observation. The rest is deduction."<sup>73</sup> Indeed, in many cases, blood spatter testimony can be admitted under either Military Rule of Evidence 702<sup>74</sup> or Military Rule of Evidence 701 (opinion testimony by lay witnesses).<sup>75</sup> Admission of blood spatter evidence under Military Rule of Evidence 701 would still permit an investigator to testify as to his or her observations and deductions.<sup>76</sup>

### Conclusion

Blood spatter evidence, despite the recent attention accorded it by military courts, is the type of crime scene evidence that routinely has been testified to by CID agents and military police investigators. Though such evidence may be couched in technical terminology and presented by a witness upon whom the lofty title of "expert" has been conferred, it is, at its core, observation and deduction, and is not so specialized a field that it is beyond the grasp of the average trial practitioner. Whether counsel is seeking to use or exclude such evidence, he or she should endeavor to develop a basic comprehension of blood spatter analysis in order to assess the reliability of the proffered evidence.

## Hindsight—Litigation That Might Be Avoided

Major Michael R. Neds  
Trial Attorney

This is the latest in a series of articles discussing ways in which contract litigation may be avoided. The trial attorneys of the Contract Appeals division will draw on their experiences and share their thoughts on avoiding litigation or developing the facts in order to ensure a good litigation posture.

### Problem

You are the new contract law advisor at Fort Swampy. Before your arrival, one of the contracting officers negotiated a contract to provide janitorial services for all the buildings on the installation. Since Fort Swampy has a large number of buildings, the negotiations were time consuming. In September, 1987, an agreement was reached with the Acme Cleaning Company to provide the services for one year commencing 1 October 1987. Acme was awarded the contract on 29 September and began performance on 1 October. To ensure continuity of service and to avoid conducting another set of long negotiations in the near future, the government included in the contract an option for Acme to perform the services at a slightly higher cost for the year commencing 1 October 1988. The contract provides that the option is to be exercised "within the last thirty days" of the current contract.

At the time of the award, Fort Swampy had received funding for FY 1988. Thus, no "availability of funds" clause<sup>1</sup> was included in the contract since the contacting officer believed it was unnecessary.

It is now 15 September 1988 and the contracting officer wants to exercise the option.<sup>2</sup> He has prepared an unsigned bilateral modification which states that the option is being exercised. His plan is for Acme to sign the modification and return it to him for signature. Funding for the next FY has not been approved so he has included an "availability of funds" clause in the modification. He has consulted you for advice on how to proceed.

### The Solution

The scenario raises three problems that can occur in the exercise of options: (1) whether the government can exercise the option; (2) whether the contracting officer is using the proper procedures; and (3) whether the option is properly funded. Each will be discussed in turn.

FAR Sec. 17.204(b) provides that the contract shall state the period in which the option may be exercised. Subparagraph (c) goes on to state that the period shall be set so that the contractor has adequate lead time to ensure continuous performance. The contracting officer appears to be timely in exercising the option within the last thirty days of the contract. The current contract is nearly over, however, and because the contract requires a major effort by the contractor, the exercise of the option at this point could well violate the lead time requirement. This problem can be prevented by having the original contract provide for exercise of the option prior to the last thirty days of the contract. If the government chooses to exercise the option, the contractor will have at least thirty days' notice which should meet the lead time requirement of the FAR. Under such a provision, however, the government must be aware of its rights and act accordingly. It cannot wait until the last month, as in this case, and still exercise the option because the period for exercise will have expired. This leads to the second issue—properly exercising the option.

Two rules apply in this area. First, the government's right to exercise an option is unilateral. Second, the government must strictly comply with the contract requirements in exercising the option. An option must be exercised within the specified period to be effective. A close examination will show that the contracting officer's plan is flawed.

As stated earlier, exercise of the option is a unilateral government right. Unless the contract states otherwise, all that is necessary is timely, written notification to the contractor that the option is being exercised.<sup>3</sup> Even a written letter accompanying an unsigned bilateral modification has been held to be sufficient to exercise the option.<sup>4</sup> There is no need to go through the procedure of circulating a bilateral modification.

Additionally, this procedure can also cause the contracting officer to have timeliness problems. Unless the contract provides differently, notice that the option is being exercised is not effective until *received* by the contractor.<sup>5</sup> The traditional mailbox rule which provides that acceptance is effective upon dispatch does not apply with options. In our case, the contracting officer has unduly complicated the simple, one-step process of exercising the option. These extra complications may well cause the option to be exercised late. The appropriate course for the contracting officer is to notify Acme of the exercise of the option in writing

<sup>1</sup> See Fed. Acquisition Reg. 52.232-18 (1 Apr. 1984) [hereinafter FAR].

<sup>2</sup> Assume that the contracting officer has properly determined that the exercise of the option is the most advantageous way of fulfilling the government's needs. See FAR 17.207(c).

<sup>3</sup> FAR 17.207(a).

<sup>4</sup> *Contel Paging Services Inc.*, ASBCA No. 32100, 87-1 BCA P19450, (1986).

<sup>5</sup> Restatement (Second) of Contracts, Sec. 63(b); *Dynamics Corporation of America v. United States*, 182 Ct. Cl. 62, 389 F.2d. 424 (1968).

and to either hand deliver or use return receipt mail to prove receipt.

The funding problem in this case presents a real dilemma for the contracting officer. His inclusion of the "availability of funds" clause with the exercise of the option is improper because the clause was not in the original contract. By including the clause with the option, the contracting officer has added an additional term not present in the original contract. This additional term renders the exercise of the option invalid.<sup>6</sup> If the original contract had contained an "availability of funds" clause, then the exercise of the option would have been proper.<sup>7</sup>

If the contracting officer tries to exercise the option without inserting the "availability of funds" clause, he has, in effect, attempted to exercise an option without funds to support it. This violates the FAR requirement that funds be available before an option is exercised.<sup>8</sup> The contracting officer must either do a new procurement or reach an

agreement with the contractor to include the clause in the option. This latter solution means that the government, in effect, has lost its unilateral right to exercise the option. To prevent this problem in the future, the contracting officer should include an "availability of funds" clause in a contract that has an option provision even if funding is available for the original performance period.

### Conclusion

Options can be a very valuable tool for the contracting officer. They can often provide a monetary savings to the government and save the contracting officer and staff a lot of time and resources that can be devoted to other procurements. However, the rules covering the exercise of options are narrowly drawn and strictly enforced. Without the careful attention of the legal advisor on these types of questions, a problem generating litigation and unnecessary expense can easily arise.

<sup>6</sup> *Lear Siegler Inc., Management Services Division*, ASBCA No. 30224, 86-3 BCA P19155 (1986).

<sup>7</sup> See *Contel Paging Services Inc.*, note 4 *supra*.

<sup>8</sup> FAR 17.207(c)(1). Such an action may also raise Anti-Deficiency Act problems.

## Patents, Copyrights and Trademarks Division Note

### Avoiding the Use of Copyrighted Music in Audiovisual Works

Lieutenant Colonel William V. Adams  
Patent Attorney

While the advent of the video camera-recorder (camcorder) has turned each of you into a potential Frank Capra or George Lucas, there is something to be said for avoiding the temptation of yelling: "Lights! Camera! Action!" at least where the product would be an Army audiovisual production. While everything you never wanted to know about this subject can be found in Department of Defense Directive 5040.2, Visual Information (VI), dated December 7, 1987; this note will focus on the use of copyrighted music in such a production. My recommendation is the same as Mrs. Reagan's policy on drugs: if asked, "Just say 'No'."

Unless you are assigned to a command with production agency responsibility,<sup>1</sup> reviewing a proposed audiovisual work for legal sufficiency is probably one of the farthest things from your mind. Remember, however, people do have a tendency to ask unusual questions, and sometimes

they forget to ask. The third horror story in twelve months to hit my desk prompted this note.

The copyright laws are found in title 17 of the United States Code. Exclusive rights of the copyright holder include the right to reproduce, prepare derivative works, distribute copies, and perform the copyrighted work publicly.<sup>2</sup> When determining the right to use music in the soundtrack of a video, you must begin by tearing apart the big ball of copyrights and analyzing each separately. If you are fortunate, you will find that the production manager chose a composition with words and music written by government employees as part of their official duties, and performed by an Army band or chorale. If you are so lucky, you will have no copyright problems, for the work will not be the subject of copyright protection.<sup>3</sup> If not, you must identify the copyright holder of the music, the lyrics, and the sound recording.

<sup>1</sup> Army Reg. 108-2, Army Training and Audiovisual Support, para. 7-5 (26 July 1976) (C2, 1 Oct. 1978) [hereinafter AR 108-2]. Chapter 7, AR 25-1, has recently been staffed and will replace AR 108-2. The proponent is the Director of Information Systems for Command, Control, Communication and Computers.

<sup>2</sup> 17 U.S.C. § 106 (1), (2), (3), and (4) (1982).

<sup>3</sup> 17 U.S.C. § 105 (1982). "Copyright protection under this title is not available for any work of the United States Government. . . ." 17 U.S.C. 101 (1982) "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties."

A sound recording is essentially a particular rendition of a performance preserved for playback on a record, tape or disk.<sup>4</sup> There is no exclusive performance right in a sound recording.<sup>5</sup> Therefore, in reviewing a license to the copyright in a recording obtained for use in a video, it is only necessary to ensure that the license allows copies to be made and distributed, and because the media will change from a sound recording to an audiovisual work, the synchronization of the musical work to the video portion is allowable as a derivative work.<sup>6</sup> If the musical work will be "chopped" up over several parts of the soundtrack, the license must be broad enough to allow such modification. It may be necessary to contact instrumentalists and vocalists separately, as well as unions such as the American Federation of Musicians and the American Federation of Television and Radio Actors. In some circumstances, the publisher or producer of the commercial recording will have obtained the sound recording copyright from the artists and will be able to grant a synchronization license that covers all the sound recording copyright holders.

For the lyrics and the music, the licenses obtained must cover the right to prepare a derivative work and the right to publicly perform the work. There are limited exemptions from the requirement that a performance be licensed. The non-transmitted performance of a musical work with no purpose of commercial advantage, no payment to performers, promoters, or organizers, and no admission charge would not require a license under copyright law,<sup>7</sup> nor would the performance of a musical work as part of a social function organized and promoted by a nonprofit veterans' organization or nonprofit fraternal organization under certain limited circumstances.<sup>8</sup> For this reason, it is necessary to know how the work will be used when obtaining licenses. Going back at a later date to ask for permission to show a work on television as part of a recruiting commercial or on the scoreboard at a major league sporting event can be costly, and is, at least, time consuming and inconvenient. In addition, the license obtained must be carefully scrutinized. I was recently surprised to see a license that, by its literal terms, required the Army to give up the limited performance rights afforded by the statute in order to obtain the synchronization rights.

It may come as a shock, but it is DOD policy to obtain a license that:

Convey[s] to the Government the perpetual right to duplicate, distribute, publish, exhibit, use, or transmit

all or any parts of the music or any other copyrighted material concerned as incorporated in the production for which the license was acquired or in any future use incorporating a part or whole of the production.<sup>9</sup>

As might be expected, such licenses, if available at all, can be quite expensive; if obtained, however, they make it very easy to answer inquiries about permissible uses of the work. In fact, when you view the DOD policy on copyright clearances along with the additional requirement for releases to protect the government from liability for invasion of privacy, trespass and violation of property rights,<sup>10</sup> it appears that one purpose of the Directive is to discourage the use of copyrighted music and any other material where the benefit gained by a particular use is greatly exceeded by the potential risk should a necessary release or clearance be overlooked.

I have reached the conclusion that DOD's mandate of central management of visual information with limitation on authority to produce audiovisual works and the requirement to obtain extensive license rights makes good copyright sense. The occasional reviewer may inadvertently overlook an unjoined interest that spells the absence of a necessary license and therefore expose the Government to liability. Centralizing authority in a limited number of production managers develops their knowledge of what rights must be obtained and the procedures necessary to acquire them. Requiring rights conservatively in excess of any foreseeably required may discourage the use of copyrighted material, but it also reduces the possibility of adverse publicity from claims that the Army has infringed. The use of works that are not copyright protected, or works in which the government has already obtained rights, simplifies the work of the production manager and the judge advocate who performs the legal review required when a work is intended for public release or sale.<sup>11</sup> There is little enjoyment in advising a first time video producer that 1000 ready for distribution video cassettes embodying as background a performance by the Pittsburgh Symphony of Dvorak's "Humoresque" were made without obtaining proper performance and sound recording licenses ("But, Dvorak is dead!"). The satisfaction gained in helping obtain the additional licenses required is insufficient reward for the effort, effort which could have been avoided if DOD policy had been followed.

<sup>4</sup> 17 U.S.C. § 101 (1982). "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."

<sup>5</sup> 17 U.S.C. § 114(a) (1982).

<sup>6</sup> A derivative work is defined at 17 U.S.C. § 101 as any one of several specified works based upon one or more preexisting works or "any other form in which a work may be recast, transformed, or adapted."

<sup>7</sup> 17 U.S.C. § 110(4)(A) (1982).

<sup>8</sup> 17 U.S.C. § 110(10) (1982).

<sup>9</sup> Dep't of Defense Directive 5040.2, Visual Information, Chapt. VI, para. L.3.b.(1) (Dec. 7, 1987).

<sup>10</sup> *Id.*, para. L.1.

<sup>11</sup> *Id.*, para. L.4.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Note

### Discharges Aren't What They Used To Be

The rule in military practice is that the soldier's status as a soldier provides the court-martial with its requisite legal authority to exercise jurisdiction.<sup>1</sup> Thus, as long as a soldier remains in the military, he is subject to the Uniform Code of Military Justice. Once, however, status terminates, so does the limited jurisdiction of the military.

The point of separation, and concomitantly the end of the military's power to try the soldier, is generally "upon delivery to him of the discharge certificate or other valid notice of the termination of his status."<sup>2</sup> The Court of Military Appeals, in *United States v. Garvin*,<sup>3</sup> however, tells us that an *erroneous* delivery of a discharge certificate does not terminate jurisdiction.

In *Garvin*, the accused was tried on 13 September 1984 by a special court-martial empowered to adjudge a bad-conduct discharge (BCD) and sentenced, *inter alia*, to a BCD. On 6 November 1984 he was placed on excess leave awaiting appellate review of his case. Private Garvin reported to the separation transfer point at Fort Bliss, Texas to out-process. That office erroneously prepared his bad-conduct discharge and on 20 November 1984, Private Garvin received his BCD in the mail.

Garvin, nevertheless, continued his relationship with the Army, at least to the extent of defrauding the finance office and the Army Emergency Relief Center at Fort Jackson, South Carolina. He was brought back on active duty, tried and convicted. On appeal he alleged no jurisdiction, because of the prior receipt of his discharge certificate. The Court of Military Appeals disagreed.

In resolving the issue the court noted that the type of discharge received by the appellant could only be issued after the appellant's case had completed appellate review or review had been waived.<sup>4</sup> This did not occur until 17 December 1985, well after the second trial. Thus, the court

found that the discharge mailed to the appellant had no legal effect. Moreover, the court noted that delivery of the discharge was not accomplished with the accompanying authority to issue a discharge and thus was an "ultra vires act" that could not terminate jurisdiction.<sup>5</sup>

*Garvin* continues a trend by military courts to limit the application of the discharge rule. For example, in *United States v. Cole*,<sup>6</sup> the Court of Military Appeals upheld jurisdiction where the soldier fraudulently procured his discharge certificate by filling out his own post clearance papers. In *United States v. Brunton*,<sup>7</sup> the Navy-Marine Court of Military Review also upheld jurisdiction where a sailor, home on terminal leave, received his discharge in the mail three days prior to ETS, but was called back to duty before that date. Additionally, in *United States v. Ray*,<sup>8</sup> the Air Force Court of Military Review upheld jurisdiction over an airman on excess leave, who should have been discharged, but was not, due to government error in not mailing the discharge for over three months.

In addition to recent case law, another potential limitation on the discharge rule comes from the recent amendment to article 3, UCMJ as part of new reserve jurisdiction legislation. This legislation became fully effective on 1 July 1988.

Article 3(d), UCMJ provides:

A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.<sup>9</sup>

Thus, under the black letter of article 3, UCMJ, a soldier who completes an active duty tour and goes immediately into a Reserve status may be subject to court-martial jurisdiction for any offense committed while on active duty, despite receiving a discharge certificate.<sup>10</sup> Today, the receipt of a discharge only starts the inquiry. Major Williams.

<sup>1</sup> *Solorio v. United States*, 107 S. Ct. 2924 (1987).

<sup>2</sup> *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985).

<sup>3</sup> 26 M.J. 194 (C.M.A. 1988).

<sup>4</sup> *Id.* at 195.

<sup>5</sup> *Id.* at 196 (Cox, J. concurring).

<sup>6</sup> *United States v. Cole*, 24 M.J. 18 (C.M.A.) cert. denied 108 S. Ct. 97, 98 (1987).

<sup>7</sup> 24 M.J. 566 (N.M.C.M.R.) pet. denied 25 M.J. 162 (C.M.A. 1987).

<sup>8</sup> 24 M.J. 657 (A.F.C.M.R. 1987).

<sup>9</sup> Uniform Code of Military Justice article 3(d), 10 U.S.C. § 803 (1982).

<sup>10</sup> *But see, United States v. Brown*, 31 C.M.R. 279 (C.M.A. 1962).

## Contract Law Note

### The Third Iteration of Rules for Contracting With Small Disadvantaged Business Concerns

In this space in the August 1987 edition of *The Army Lawyer*, I reviewed for you the 4 May 1987 interim rules which established a small disadvantaged business set aside program within the Department of Defense. Briefly, Section 1207 of the 1987 National Defense Authorization Act, Pub. L. No. 99-661, 100 Stat. 3973, established an objective for the Department of Defense of awarding five percent of its contract dollars during Fiscal Years 1987, 1988, and 1989 (approximately \$5 billion per year) to "small disadvantaged business concerns" (hereinafter called "SDB's"). In response to this new requirement DOD established a SDB set aside program. Interim rules were issued on 4 May 1987, which amend the DFARS where appropriate. 52 Fed. Reg. 16,263 (1987) (to be codified at 48 C.F.R. Parts 204, 205, 206, 219, and 252).

Then, in the May 1988 edition of *The Army Lawyer*, I explained the second iteration of these rules, which were published in the *Federal Register* on 19 February 1988 and became effective on 21 March 1988, replacing the old interim rules. The text of these new rules may be found in 53 Fed. Reg. 5114 (1988) (to be codified at 48 C.F.R. Parts 204, 205, 206, 219, 226, 235, and 252). These interim rules were issued because the Defense Acquisition Regulatory (DAR) Council received numerous Congressional and public comments on the content of the first set of rules, and because of some Congressionally mandated changes in Section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019.

As I predicted in these earlier Notes, we have not seen the last of the changes in this area. The third iteration of the rules for contracting with Small Disadvantaged Business Concerns was published in the *Federal Register* on June 6, 1988. 53 Fed. Reg. 20626 (1988) (to be codified at 48 C.F.R. Parts 204, 205, 206, 219, 226, 235, and 252). Except for one portion which became effective immediately as an interim rule, the third iteration of these rules made the second (February 1988) iteration a final rule effective for all solicitations issued on or after July 15, 1988. For practitioners, the key changes to the rules occurred in four areas.

First, effective immediately, the 10% evaluation preference for SDB's when competing against non-SDB's in certain competitive acquisitions does not apply to total small business set asides. 53 Fed. Reg. 20630 (to be codified at 48 C.F.R. 219.7000). Numerous public comments to the previous rule, which created the preference in all but a few selected types of acquisitions (e.g., small purchases, partial small business set asides—see 53 Fed. Reg. 5126 (to be codified at 48 C.F.R. 219.7000)), disclosed that SDB's in industries with thin profit margins (such as meat producers) had an insurmountable competitive advantage over small businesses in procurements totally set aside for small businesses.

Second, the new rules establish a presumption of both social and economic disadvantage for persons within certain designated groups (Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinental Asian Americans), consistent with Section 8(d) of the

Small Business Act. 53 Fed. Reg. 20628 (to be codified at 48 C.F.R. 219.301-70).

Third, the new rules require the contracting officer to challenge the eligibility, for further determination by the Small Business Administration (SBA), of a concern whose ownership is not within these designated groups if the concern is also neither currently enrolled in the 8(a) program (see Section 8(a) of the Small Business Act, 15 U.S.C. Sec. 637(a)) nor determined to be both socially and economically disadvantaged by the SBA within the six-month period immediately preceding the submission of the concern's offer. 53 Fed. Reg. 20628 (to be codified at 48 C.F.R. 219.301-70(b)(3)).

The last significant change to the rules concerns a revision to the incentive program for subcontracting with small and small disadvantaged business concerns. Prime contractors required to submit subcontracting plans may receive an additional fee (profit) for exceeding its established subcontracting goals (generally, ten percent of the difference between its actual subcontracted dollars awarded and its goal). 53 Fed. Reg. 20631 (to be codified at 48 C.F.R. 252.219-7009).

It is obvious that we have not seen the last of the changes to DOD's programs for contracting with SDB's. As further public comments come in on these new rules, and the statistics for Fiscal Year 1988 are announced this fall, we will know whether these new rules are helping the Department of Defense to reach the possibly unattainable Section 1207 goal of five percent of all contract dollars going to small disadvantaged businesses. Major McCann.

### Legal Assistance Items

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

### Consumer Law Notes

#### *Frequent Flier Format Fixed*

Continental Airlines' frequent flyer program, called OnePass, advertised during the first five months of 1988 that its frequent flyers would be credited with a minimum of 1,000 miles per flight segment and that program participants could use this mileage to fly, among other places, to Tokyo. Based on an investigation which revealed that program participants were awarded only 750 miles per flight rather than the promised 1,000 and that no Tokyo award existed, the Kansas attorney general has reached a nationwide agreement with Continental Airlines. Pursuant to this agreement, Continental will credit those who accrued frequent flyer miles with the promised minimum of 1,000 per flight segment and will create a frequent flyer award to Tokyo. The agreement also requires Continental to pay the attorney general's office \$20,000 in investigative fees and costs.

The Texas attorney general has filed a deceptive advertising suit in May against the National Fuelsaver Corporation, which manufactures a device known as the "Gasaver" or "Platinum Gasaver." According to the attorney general, advertisements which claim that a "gasaver" can improve automobile fuel economy by 22 percent, boost octane levels, and extend engine life are unsubstantiated, misleading, false, and deceptive. The complaint indicates that more than 100,000 of the devices, which were purchased for \$28 each and sold to consumers for \$89 each, have been sold worldwide. The attorney general is seeking an injunction from engaging in deceptive business practices and a \$2,000 civil penalty per violation.

#### States Regulate Rental-Purchase Agreements

Missouri and Florida have recently joined the states that have passed rental-purchase agreement laws. In both cases the recently enacted laws (the Missouri law, H.B. 988, will be effective August 13, 1988, and the Florida law, S.B. 568, will be effective September 1, 1988) will regulate agreements between merchants and consumers involving merchandise used by consumers for personal, family, or household purposes. Both laws apply to such goods if the initial rental period is for four months or less and the rental agreement is automatically renewable with each payment after the initial rental period, permitting the lessee eventually to acquire ownership of the merchandise. Both laws protect consumers by requiring that the lessor make certain disclosures before the transaction is completed.

Among other disclosures, the Florida statute requires that the lessor include the identities of the parties, a statement that the lessee has the option to purchase the rental property, a description of the rental property, the amount of the initial payment, the amount and timing of rental payments, the amounts of all other charges, and the total cost of the agreement. In addition, the Florida provision prohibits garnishment of the lessee's wages, granting a power of attorney to the lessor, and requiring the lessee to confess judgment.

Consistent with this consumer orientation, the Florida statute protects consumers who fail to make scheduled payments after they have converted from rental status to a credit purchase with scheduled payments. Rather than permitting the lessor to repossess the merchandise, the new law would convert the transaction from a credit purchase to a rental under the terms of the rental-purchase agreement, permitting the consumer to retain the acquired equity and reconvert the transaction to a credit purchase at a later time. The Florida law also places a limit on the rental renewal charge of \$5 and, if the lessor should violate the new law, requires payment by the lessor of attorneys' fees, court costs, and damages. The law further indicates that the lessee's waiver of any of the act's provisions are unenforceable and void.

Very similar to the Florida provision, the Missouri law requires disclosure of the cash price of the merchandise, the total amount and number of payments necessary to require ownership of the merchandise, the amount and timing of payments, the right to reinstate an agreement, and a statement of reinvestment rights. Finally, the statute regulates rental-purchase agreement advertisements and sets penalties for violations of its requirements.

A Missouri-based telemarketing company that promised out-of-state consumers a \$5,000 shopping spree, a home entertainment center, a Chevrolet Corvette, a Ford Ranger Pickup, or \$3,000 or more in cash has not performed as promised, according to the Missouri attorney general. The company, U.S.A. Exchange of Warsaw, Missouri, allegedly misled consumers to believe they had won prizes from a "Major Awards" category, asking them to send \$300 or more to cover shipping and administrative costs. The lawsuit seeks restitution to consumers, who typically received only an inexpensive television set or imitation diamond earrings rather than the promised prize, civil penalties of \$1,000 for each violation of Missouri consumer protection laws, payment to the State of ten percent of the total restitution, and payment of all costs of investigation. Major Hayn.

#### Estate Planning Notes

##### Courts Clarify Will Bequests

An important goal in drafting wills is to avoid ambiguities in making bequests. As three recent cases from state courts illustrate, will ambiguities give rise to expensive litigation and can result in dispositions not intended by the testator.

The indiscriminate use of the phrase "per stirpes" was involved in an Indiana case, *In re Estate of Walters*, 519 N.E.2d 1270 (Ind. Ct. App. 1988). The decedent in *Walters* died leaving two children born of his first marriage. His second wife predeceased him and, although she did not have any children from her marriage with the decedent, left two children from a prior marriage.

In his will, the decedent gave his second wife, who failed to survive him, a life estate in certain real property with the remainder to his children from his first marriage. The will left the residue of his estate to his second wife, per stirpes.

The two stepchildren argued that the addition of the words "per stirpes" in the residuary bequest created a substitutional gift in their favor because the addition of this term could have no other purpose than to benefit their mother's heirs. The decedent's two children, on the other hand, claimed that the words "per stirpes" added nothing to the bequest and, therefore, the bequest lapsed.

The Indiana court concluded that term "per stirpes" applies only to the mode of distribution of a bequest among a designated class and does not create a class when it is used in conjunction with a bequest to one person. The court found that including this language was merely a "legalistic flourish devoid of any expression of intent." *Id.* at 1273. According to the court, the testator would have used more comprehensible language had he actually intended to disinherit his natural children.

Although the court's decision probably disposes of the residuary estate in the manner intended by the testator, the superfluous addition of the term "per stirpes" caused unnecessary expense and delay in making the distribution. Drafters should avoid adding terms such as "per capita" and "per stirpes" to bequests unless a class gift had been created.

Perhaps a more difficult task of ascertaining the intention of a testator confronted a North Carolina Court in *McKinney v. Mosteller*, 365 S.E.2d 612 (N.C. 1988). In *McKinney*, the testator died leaving no lineal descendants. His will provided that if his wife did not survive him, the plaintiffs would receive two tracts of real property. The will further provided that if the testator's wife survived him, the residue of the estate would pass to the plaintiffs.

The testator's wife did not survive him and the plaintiffs claimed the residue, arguing that the testator clearly intended them to be secondary beneficiaries. The court disagreed with the plaintiffs. It concluded that the plain language used in the will distributed the residuary to the plaintiffs only if the testator's wife survived him. Since this condition precedent was not satisfied, the residue of the estate passed under interstate law.

The evidence presented at trial in *McKinney* strongly suggested that the testator intended to benefit the plaintiffs. Moreover, it is unlikely that the testator would have wanted the plaintiffs to take the residue if his wife survived him, but not if she predeceased him. The court, however, could not imply a gift in the face of the clear language of the will. This unfortunate result could easily have been avoided through more careful draftsmanship on the part of the attorney who prepared this will.

A different sort of will drafting problem was the subject of dispute in *In re Estate of Nelson*, 419 N.W.2d 915 (N.D. 1988). The will in this case gave the testator's sister "all my farm equipment, tools, trucks, machinery and other personal items used in connection with my farm. . ." *Id.* at 916. A dispute arose between the testator's sister and the residuary legatees over whether property such as cattle, tractors, grain, and bank accounts were used in connection with the farm.

The court in *Nelson* concluded that the trial court properly referred to extrinsic evidence to determine what items passed under the specific bequest. The court approved the trial court's finding that cattle not raised for resale, grain held for feed, and a tractor were all used in connection with the farm. The court also approved the award of three-fourths of a checking account to the sister because evidence showed that at least that percentage of the account was used for farm accounts.

The *Nelson* case illustrates that problems can arise when items of personal property are not specifically described in a will. Drafters should be aware that phrases such as "all my tangible property," "all my household goods," or "all my personal effects" could be construed to pass more property than is actually intended. See e.g., *Wik v. Wik*, 681 P.2d 336 (Alaska 1984); *Matter of Estate of Rudy*, 329 Pa. Super. 477, 478 A.2d 879 (1984); *Sandy v. Mohout*, 1 Ohio St. 3d 143, 438, N.E.2d 117 (1982); *Matter of Geis' Estate*, 132 Ariz. 350, 645 P.2d 1264 (1982). Major Ingold.

#### Tax Notes

##### *Electronic Filing Program to Expand in 1989*

The IRS has announced that it will expand the electronic filing program for receiving 1988 federal income tax returns. 50 Fed. Reg. 15,331 (1988) (I.R.S. News Release IR-88-86 (May 23, 1988)). Under this program, preparers, including legal assistance attorneys, can transmit individual

client returns to the IRS electronically. The IRS will accept electronic filing of the most commonly used forms and schedules.

In 1989, taxpayers in 36 states will be able to file electronically. The states with districts included in the program are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The IRS intends to expand the program to all other states in 1990.

The principal advantage of the electronic filing program is that clients receive refund checks two to three weeks faster than if paper returns had been filed. The program also allows preparers to serve their clients more efficiently and reduces the cost to the IRS of storing and retrieving returns.

Military installations interested in participating in the program in 1989 must meet the following qualifications: intend to transmit at least 500 1988 returns, have communications experience under IBM 3780 bisynchronous protocol at 4800 BAUD through dial up modem, be located in a participating district, and observe all Internal Revenue procedures.

Applications for participating in the program must be filed by 1 October 1988. More information on the program can be obtained by contracting the Electronic Filing Coordinator in the local IRS district office or by calling the IRS nationwide toll-free number, 1-800-424-1040. Legal assistance offices thinking about applying may also consider contracting one of the following offices that participated in the program in 1988: Pentagon, Military District of Washington (via Fort Myers), Fort Eustis, Fort Lee, Fort Bragg (82d Airborne Division and XVIII Airborne Corps), Fort Drum, Fort Rucker, Fort Campbell, Fort Benjamin Harrison, Fort Huachuca, Fort Lewis, Fort Ord, and Fort Clayton, Panama. Major Ingold.

##### *Tuition Assistance Payments Are Not Taxable According to IRS Proposed Regulations*

The 1986 Tax Reform Act included several provisions making it more difficult to exclude scholarship and employer provided tuition assistance payments from income. I.R.C. § 117, as amended by the Tax Reform Act of 1986, Pub. L. No. 99-514, § 117 (1988). Under the Act, the exclusion for scholarship or fellowship grants is available only to degree candidates and limited to amounts used for tuition and for course-required fees, books, supplies, and equipment. The new law also bars any exclusion for amounts representing payment for services. The Internal Revenue Service (IRS) recently issued proposed regulations to explain how the new laws will work. Prop. Treas. Reg. § 1.117-6, 53 Fed. Reg. 21,688 (June 9, 1988).

The proposed regulations contain good news for soldiers because they provide that tuition and subsistence allowances paid to members of the Armed Forces who are students at educational institutions operated or approved by the United States Government are not considered taxable

scholarships. Prop. Treas. Reg. § 1.117-6(c)(3)(ii). This exclusion applies to tuition assistance payments made to soldiers who are attending college classes during off-duty time and to full-time students of service academies and other institutions. The regulations also clarify that educational and training allowances paid to a veteran pursuant to the Servicemen's Readjustment Act of 1944 (58 Stat. 287) do not have to be included in the veteran's gross income.

The proposed regulations specify that other types of scholarships and fellowships will be excludible from income only to the extent that they are used to pay required fees or to purchase necessary books, supplies, and equipment. According to the proposed regulations, payments made to defray incidental expenses such as room and board, travel, research, clerical help, equipment, and other expenses not required must be included in gross income. Prop. Treas. Reg. § 1.117-6(C)(2). Scholarship students will not be able to exclude amounts received for equipment, such as word processors and personal computers, unless they are actually required for a particular course. Prop. Treas. Reg. § 1.117-6(c)(6), Example (1).

To qualify for the limited exclusion available under the new law, the scholarship recipient must be a degree candidate at a school that maintains a faculty and has a student body where its educational activities are conducted. Furthermore, the school must be authorized by state or federal law to offer its program and be accredited by a nationally recognized agency. Accordingly, students receiving payments to take correspondence courses will generally be required to include the payments received in their gross income. Prop. Treas. Reg. § 1.117-6(C)(6), Example 4.

The new limitations imposed by the 1986 Tax Reform Act will apply to all scholarships and fellowships granted after August 16, 1986. The more generous old rules will apply to all fellowships and scholarships granted before August 16, 1986 even if payments are received under them after this date. Major Ingold.

#### *Transfer to a Joint Tenancy Creates Gift*

Creating a joint tenancy is probably the simplest way of avoiding probate, but according to a recent letter ruling issued by the IRS, may have some tax disadvantages. Priv.

Ltr. Rul. 8,805,019 (Nov. 4, 1987). To avoid the expense and inconvenience of probate, a 90-year-old taxpayer sought to transfer by deed her sole ownership in real property to herself and her sole heir, her daughter. The service was asked to address the tax consequences of this proposed transfer.

The IRS ruled that, under these circumstances, the mother would be making a gift of one-half of the property at the time of the change in title. Thus, the transfer of one-half interest in the property would be subject to the gift tax imposed under section 2501 of the code. I.R.C. § 2501 (West Supp. 1988), see also Treas. Reg. § 25.2511-1(h).

The IRS declined to rule on whether the property would be includible in the mother's estate because that would involve ruling on the application of estate tax to a living person. Since the mother furnished all of the consideration for the property, however, it is likely that the full value of the property would be included in her gross estate.

The transfer of almost all types of property to a joint tenancy will create a gift. A special rule applies, however, if the property transferred to a joint tenancy is cash, such as a joint bank account. In that case, gift tax liability results only when the noncontributing joint tenant actually withdraws funds. Treas. Reg. § 25.2511(h)(4).

If the property being transferred is not cash, the taxpayer may be able to take advantage of the annual gift tax exclusion which allows the first \$10,000 in gifts to any one individual during each calendar year to pass free of tax. I.R.C. § 2503(b). Under this code provision, a taxpayer could transfer property worth less than \$20,000 to a joint tenancy without incurring gift tax liability.

Despite the tax disadvantages, there may still be compelling reasons to create a joint tenancy in higher value properties. Although the taxpayer may have to pay a gift tax on such a transfer, the tax paid can be taken as a credit against any estate tax that will have to be paid. Major Ingold.

# Claims Report

United States Army Claims Service

## Tort Claims Note

### Dram Shop Liability

From time to time, the Army receives claims for losses or injuries caused by intoxicated soldiers or civilian employees based on either the Dram Shop or social host liability. Within the United States, the government's liability under the Federal Tort Claims Act (FTCA), is based on the law of the place where the act or omission occurred.<sup>1</sup> While historically the English common law imposed no liability on an innkeeper,<sup>2</sup> most states have enacted statutes that provide a remedy for someone injured by an intoxicated person.<sup>3</sup> In most jurisdictions, liability under these statutes is directed at state licensed commercial vendors of alcohol.<sup>4</sup> It is doubtful whether such statutes apply to the Army club system as the clubs are not licensed by the state as vendors of alcohol.<sup>5</sup> Additionally, as the United States is not liable under the FTCA on the basis of absolute liability,<sup>6</sup> and as state Dram Shop statutes are generally based on such principles, it is questionable that a federal court would apply them to the Army club system.<sup>7</sup>

A few federal courts have held Army clubs liable on common law negligence principles.<sup>8</sup> However, most states do not recognize common law negligence as applying to cases for injuries caused by an intoxicated person who was served alcohol while obviously intoxicated, and will impose

liability only under a Dram Shop statute.<sup>9</sup> Liability under a common law negligence theory is popularly known as social host liability. Such liability could extend not only to the Army club system but also to office parties and individual responsibility. Only a few states have recognized "social host" liability.<sup>10</sup> If the injured party is a soldier, the "incident to service exception," or "Feres doctrine,"<sup>11</sup> should be advanced.<sup>12</sup>

In cases arising outside the United States, liability can only be imposed under the Military Claims Act.<sup>13</sup> Army Regulation 27-20, implementing that Act, provides that the general principles of tort law common to the majority of American jurisdictions apply.<sup>14</sup> As Dram Shop liability is based on state statutes which do not apply extra-territorially, such liability does not apply to the Army club system overseas. Because social host liability is the exception and not the rule under general principles of American common law, overseas claims based on common law negligence or the Restatement of Torts,<sup>15</sup> should not be paid whether a club function, or office or organization party is involved.

In view of the trend against excessive consumption of alcohol, as embodied in Army command policies and directives, the absence of any absolute civil liability of the United States, as discussed above, should not be considered as a license to allow excessive drinking. This is particularly

<sup>1</sup> 28 U.S.C. 2672 (1982).

<sup>2</sup> *Corrigan v. U.S.*, 815 F.2d 954 (4th Cir. 1987).

<sup>3</sup> See Ala. Code § 28-3A-25 (Supp. 1986); Alaska Stat. §§ 4.16.030, 4.16.051-052 (Supp. 1986); Ariz. Rev. Stat. Ann. §§ 4-241, 4-244 (Supp. 1986); Ark. Stat. Ann. § 48-529 (1977); Cal Bus & Prof Code §§ 25602, 25658 (1985 & West Supp. 1987); Colo. Rev. Stat. § 12-47-128 (Supp. 1986); Conn. Gen. Stat. Ann. § 30-86 (West Supp. 1987); Del. Code Ann. tit. 4 § 711 (1985); D.C. Code Ann. § 25-121 (Supp. 1986); Fla. Stat. Ann. § 562.11 (West 1987); Ga. Code Ann. §§ 5A-509, 5A-510 (Supp. 1986); Hawaii Rev. Stat. § 281-78(2) (1985); Idaho Code §§ 23-312, 23-929 (1977); Ill. Ann. Stat. ch. 43, § 131 (Smith-Hurd 1986); Ind. Code Ann. §§ 7.1-5-7-8, 7-11-5-10-14 to 15 (West 1984 & Supp. 1986); Iowa Code Ann. §§ 123.47, 123.47A, 123.49 (West 1987); Kan. Stat. Ann. § 41-715 (1986); KY Rev. Stat. §§ 244-070, 244-080 (Bobbs-Merrill 1981 & Supp. 1986); La. Rev. Stat. Ann. §§ 14.19, 26:683, 26:88 (West 1986 & Supp. 1987); ME Rev. Ann. tit. 28 §§ 303, 11058, 1058-A (Supp. 1986); MD Ann. Code art. 2B, §§ 118, 119 (1987); Mass. Gen. Laws Ann. ch. 138 §§ 34, 69 (West 1974 & Supp. 1987); Mich. Comp. Laws Ann. § 18.1004 (West 1986 & Supp. 1987); Minn. Stat. Ann. § 340A.801 (West Supp. 1987); Miss. Code Ann. §§ 67-1-81, 67-1.83.67.3-53 (Supp. 1986); Mo. Ann. Stat. § 311.310 (Vernon Supp. 1987); Mont. Code Ann. § 16.3-301 (1986); Neb. Rev. Stat. § 53-180 (1984); Nev. Rev. Stat. § 202.055 (Michigan 1986); NH Rev. Stat. Ann. § 175.6 (Supp. 1986); NJ Stat. Ann. §§ 33:1-39, 33:1-77 (West Supp. 1986); NM Stat. Ann. §§ 60-7A-16, 60-7B-1.1 (1978 & Supp. 1987); NY Alco. Bev. Cont. Law §§ 65.65-2 (McKinney 1970 & Supp. 1987); NC Gen. Stat. §§ 18B-302, 18B-305 (1983 & Supp. 1985); ND Cent. Code § 5-01-09 (1975 & Supp. 1985); Ohio Rev. Code Ann. §§ 4101.22, 4101.69 (Page 1982 & Supp. 1986); Okla. Stat. Ann. tit. 37 § 537 (West Supp. 1987); Or. Rev. Stat. § 471.410 (1985); Pa. Stat. Ann. tit. 47, § 4-493 (Purdon 1969 & Supp. 1987); RI Gen. Laws § 1-8 (Supp. 1986); SC Code Ann. §§ 61-3-990, 61-5-30 (Law. Co-op Supp. 1986); SD Codified Laws Ann. § 15-4-78 (Supp. 1987); Tenn. Code Ann. § 57-4-203 (Supp. 1986); Tex. Alco. Bev. Code Ann. §§ 1011.63, 106.03 (Vernon 1978 Supp. 1987); Utah Code Ann. §§ 32A-12B-8, 32A-12-9 (1986); VT Stat. Ann. tit. 7, § 658 (Supp. 1986); Va. Code § 4-62 (Supp. 1986); Wash. Rev. Code §§ 66.44.200, 66.44.270 (1985 & West Supp. 1987); W. Va. Code § 60-3-22 (Supp. 1987); Wis. Stat. Ann. 125.07 (West Supp. 1986); Wyo. Stat. §§ 12-5-502, 12-6-101 (Supp. 1986).

<sup>4</sup> *Meany v. Newell* Casenote by Y. Rodriguez—Schack, Tort & Insurance Journal, Vol XIII #2 Winter 1988.

<sup>5</sup> *Gallea v. United States*, 779 F.2d 1403 (9th Cir. 1986); *Gonzales v. United States* 589 F.2d 465 (9th Cir. 1979); *Konsler v. U.S.* 288 F. Supp. 895 (N.D. Ill. 1968).

<sup>6</sup> *Dalehite v. United States*, 346 U.S. 15 (1963); *Laird v. Nelms*, 406 U.S. 797 (1972).

<sup>7</sup> *Smith v. United States*, 588 F.2d 1209 (8th Cir. 1970); *Megge v. United States*, 344 F.2d 31 (6th Cir. 1965).

<sup>8</sup> *Vance v. United States*, 355 F. Supp. 348 (D. Mont. 1969); *Johnson v. United States*, 496 F. Supp. 597 (D. Mont. 1980); *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980).

<sup>9</sup> See supra notes 2 and 4; *Murray v. United States*, 382 F.2d 284 (9th Cir. 1967); *Simmons v. United States*, Civil #82-5289 (3d Cir. 1982).

<sup>10</sup> *Clark v. Mincks*, 364 N.W.2d 226 (Iowa 1985); *Ashlock v. Norris* 475 N.E.2d 1167 (Ind. App. 1985); *Koback v. Crook*, 366 N.W. 2d 857 (Wisc. 1985) to a minor; *Sutton v. Hutchings*, 327 S.E. 2nd 716 (Ga. 1985) to a minor; *Lind v. Gwinell*, 356 A.2d 15 (NJ App. 1986) to a minor.

<sup>11</sup> *Feres v. United States*, 340 U.S. 146 (1950).

<sup>12</sup> *Bozeman v. United States*, 780 F.2d 198 (2nd Cir. 1985); *Major v. United States*, 835 F.2d 641 (6th Cir. 1987).

<sup>13</sup> 10 U.S.C. 2733 (1982).

<sup>14</sup> Army Reg. 27-20, Legal Services: Claims para 3-8b (10 July 1987) [hereinafter AR 27-20].

<sup>15</sup> Restatement (Second) of Torts, § 315 (1965).

true in view of the fact that the intoxicated person is nevertheless individually both criminally and civilly liable and the United States bears financial responsibility and the costs of injuries or deaths in the form of medical costs, lost work time, and death benefits where payable. Mr. Rouse.

## Personnel Claims Notes

### Carrier Inspection and Repair of Damaged Items

Under the \$1.25 Increased Released Valuation, more carriers are inspecting damaged property, and an increasingly large number of them are offering to do repairs. Questions have arisen as to what claims offices should advise claimants.

The carrier has the right to inspect within 75 days of delivery or 45 days after the last DD Form 1840R has been dispatched, whichever is later. If the carrier notifies a claimant within this period of time that the carrier wants to inspect, the claimant is required to allow the carrier to inspect. Carriers have been instructed to contact the claims office if a claimant refuses to allow them to come in and look. The claims office will then direct the claimant to allow inspection. If the claimant continues to refuse, the claims office should inform the claimant that *all* potential carrier recovery will be deducted from the amount otherwise paid or payable on a claim to enforce the carrier's right to inspect. On Increased Released Valuation shipments, this is often the entire amount payable on the claim. The "50% Rule" for failure to provide timely notice on such shipments (for claims received before 1 July 1988) does not apply. Note that our policy is to settle meritorious personnel claims promptly, and claims offices should *not* delay settling a claim received before the carrier's inspection period has ended.

The carrier does not, however, have the right to repair (except when the claimant has purchased a Full Replacement Cost Protection). The claimant may, if the claimant chooses, settle directly with the carrier and allow the carrier to repair items. The claimant has the absolute right to refuse to do so and file a claim with the United States instead. This is the claimant's option.

If the carrier does repair the damaged items, using a repair firm it has selected, and a problem arises that the claimant and the carrier cannot resolve, the claimant should be directed to contact the claims office. A claimant obviously has the right to complain if repairs are not accomplished by the carrier in a competent and workmanlike manner. The carrier's repair firm does not necessarily have to complete repairs perfectly to please a difficult claimant, but the repairs must meet the standards normally expected of repair firms in order to maintain the integrity of the claims program. In the unlikely event that repairs are not completed in a professional manner and the carrier refuses to correct the problem, the claims office should accept and settle a claim from the claimant and pursue recovery normally. Mr. Frezza.

### Claims Information Sheets

The following two information sheets have been written by U.S. Army Claims Service and sent to DCSLOG for distribution to Installation Transportation Officers to use as

handouts. They contain a wealth of claims information and are adaptable for publishing local command information publications. Mr. Frezza.

### Claims Information on Household Goods Shipments

1. The law authorizing the Army to pay shipment claims is a gratuitous payment statute. The Army is not a total insurer for a soldier's property. Before you ship, understand the process.

2. A few soldiers need insurance in addition to the coverage the Army provides. The most the Army can pay on a claim is \$25,000, and there are additional limits on specific categories of property. For example, the maximum payment for an item of stereo equipment is \$1,000, and the maximum payment for all stereo equipment in a shipment is \$3,500. See "It's Your Move" for a listing. The ITO can explain the types of additional protection available.

3. Before the packers come, valuable artwork and similar items should be appraised. You should hand-carry small, extremely valuable items like jewelry. Secure them during packing so that they cannot be stolen or accidentally packed. If you do ship jewelry, make sure it's placed in a box and listed on the inventory. Also consider hand-carrying small items of great sentimental value like photo albums.

4. Packers should wrap items individually and well. Heavy items should not be packed with light items. Exposed surfaces of furniture should be wrapped. *Under no circumstances should you let packers take loose items to the warehouse to be packed.* An accurate inventory is essential to a claim. Boxes and items not in boxes should be listed on separate lines with complete descriptions (including size, model and serial number), such as "3.0 carton with 24 crystal glasses." Packers mark pre-existing damage using symbols explained at the top of the inventory. "BR 4-5-3" means "Broken, front left corner." Check these symbols carefully. Call the ITO if you do not agree.

5. When property is delivered, check off each inventory line item. You or someone accepting the delivery for you must list missing items and obvious damage on the DD Form 1840. Keep broken items until the claims office authorizes disposal, and dry all wet items. *Unpack and list any additional loss or damage on the DD Form 1840R (on back of the DD Form 1840), and get this form to the claims office within 70 days of delivery!* Although you have two years to file a claim, loss or damage must be reported within 70 days, or the Army loses its right to collect money from the carrier. This money the Army cannot collect will be deducted from the claim, which can result in no payment! The carrier has the right to inspect damaged items. Many carriers will offer to settle a claim directly with the soldier. Soldiers may accept a carrier's offer or go to the claims office.

6. Claims personnel can explain what can be claimed and documents needed to substantiate a claim. Soldiers are encouraged to file claims as soon as possible. There is no legal authority to pay a claim which is not filed within two years. Claimants must submit *one* copy of DD Forms 1842 and 1844. (Payment is based on the actual value of damage or loss. Old and worn items are worth less than new ones!) After soldiers are paid, the Army goes back and collects money from the carrier.

7. The claims process is designed to give complete service for a smoother move. For more information, contact your claims office.

#### Claims Information on Do-It-Yourself (DITY) Moves

1. Moving your property yourself can result in a claim by you if your property is lost or damaged, or in a claim against you if you are involved in an accident. Before you decide to move yourself, you need to understand the potential legal problems and decide whether you need to purchase private insurance coverage.

2. The only authority the Army has for paying loss or damage to your property during shipment (including DITY moves) is the Personnel Claims Act, 31 United States Code 3721. This is a gratuitous payment statute which compensates federal personnel for losses incident to their service. It does not make the Army a total insurer of your property. You can only be compensated if your claim is substantiated and if the loss or damage was not caused by your negligence, or the negligence of your spouse or other persons who are helping you to move.

a. *Substantiating a claim.* If your vehicle is stolen or burns with your household goods inside, you will have serious trouble substantiating what you own if you do not have a disinterested person (such as an NCO or officer in your unit) prepare a premove inventory for you. You should also keep purchase receipts and appraisals to substantiate value of expensive items.

b. *Losses which are not covered.* The claims office won't compensate you for damage caused by an accident in which you were at fault or lost control of the vehicle, or breakage caused because you didn't pack items carefully enough. Unfortunately, almost all the damage which occurs during a DITY move is attributable to all three causes. In addition, there are limitations on what the Government will pay. There is a \$25,000 total maximum payment, as well as maximum payments on various categories of property (see the "It's Your Move" pamphlet or the claims office for a list) which apply to every personnel claim. If an accident does occur in which you are not at fault, have the local police prepare an accident report and go to the claims office immediately upon arrival at your destination.

c. *Private insurance.* Because you are taking the risk that you will suffer damage for which the Government will not compensate you, consider buying private insurance coverage. Check your automobile and household goods insurance policies. Then talk to the truck rental company and your insurer about extra protection.

3. It is possible you will be sued if you are involved in an accident. If you move directly from your origin destination

to your destination, you may be considered to be performing official duties (depending on state law) and any lawsuit will be directed against the Government. In all cases, however, make sure you are covered by private insurance, just in case. Check your automobile policy first. Some auto insurance policies cover you while you are driving a rented truck or pulling a trailer, some do not. If you are not covered, talk to your insurer or to the truck rental company about purchasing extra insurance. The few extra dollars you spend could save you thousands.

4. Your local JAG office can provide you with more information. For a successful DITY move, understand the rules before you start.

## Management Note

### Claims Manual Change 8

In late June, USARCS mailed copies of Change 8 to the Claims Manual to all Claims Manual holders of record. The following changes are contained in Change 8:

Chapter 1, Personnel Claims, Bulletins #61, 87 and 96 are revised. Bulletins #102 (Use of AAFES Overseas Catalogues) and #103 (Criteria for Waiver of Maximum Amounts Allowable) are added. Appendix C (Worksheet for Partial Approval Letters) is revised. Bulletin #92 (Corps of Engineer Field Offices) is deleted since COE field claims offices, effective 15 March 1988, no longer process personnel claims (except certain Saudi Arabia claims—see revised Bulletin 87).

Chapter 2, Household Goods Recovery, Bulletin #11 (Use of HHB/HB Checklist and 3x5 Index Cards Discontinued) is added.

In Chapter 4, Torts—United States, Bulletin #5 (Effect of VA Benefits) is added. Bulletin #2 (LMD, AFIP Reviews) is deleted. The Federal Tort Claims Handbook is revised, substituting new handbook pages for old.

In Chapter 4 or Chapter 5 (depending on location of the Claims Manual holder), Torts—United States/Foreign Bulletin (Handling Medical Malpractice Claims; Use of Department of Legal Medicine, AFIP; Copying and Release of Medical Records) is added.

In Chapter 10, Automation/Information Management, Claims Automation Bulletin #2 is added.

For a listing of the contents of all previous changes, see *The Army Lawyer*, Feb. 1988, at 67 (change 7), *The Army Lawyer*, Oct. 1987, at 61 (change 6), *The Army Lawyer*, Aug. 1987, at 67 (change 5), *The Army Lawyer*, June 1987, at 49 (changes 1-4). LTC Gibb.

## Legal Assistance Note

*Legal Assistance Office, Office of The Judge Advocate General*

### **Involuntary Collection of DOD Overseas Banking Debts**

The U.S. Army Finance and Accounting Center (USAFAC) will soon begin to involuntarily offset from active duty, retired and reserve pay for debts incurred by military members to overseas military banking facilities (MBF). These debts become debts to the United States when they are purchased by DOD as required under the DOD banking contract.

These debts will then be transferred to USAFAC where an administrative determination that the debt is valid will

be made based upon the documentation of the debt furnished by the MBF. If the debt is deemed valid, collection action will be taken under 37USC1007(C). USAFAC will then issue demand for payment letters and afford the debtor due process as required under para. 70704a of the Department of Defense Pay Manual and 37USC1007(C). Any disputes over the validity or amount of the debt will be resolved by the USAFAC Legal Office based on the documentation of the debt and any information furnished by the military member. Mr. Gagermeier.

### **Guard and Reserve Affairs Items**

*Judge Advocate Guard and Reserve Affairs Department, TJAGSA*

#### **TJAGSA: From 22,000 Miles High**

*Colonel Benjamin A. Sims  
Director, JA Guard and Reserve Affairs*

An historical event took place on March 5, 1988 for the JAG School. A pilot satellite broadcast was beamed from the school to the Galaxy II Satellite and back to earth. The program was one hour in length and consisted of an update on decisions of the United States Court of Military Appeals.

The purpose of the pilot study was to determine whether satellite broadcasting to attorneys of the reserve components was suitable for continuing legal education, whether it was cost effective, and how student satisfaction with this broadcast compared with instruction from an on-premise instructor.

The primary test sites were San Antonio, Texas and Columbia, South Carolina. These sites were selected because they were having on-site training on March 5, 1988. Additionally, 24 active duty installations and 66 National Guard and reserve component legal units were notified about the broadcast and were given data about the transmission to enable them to participate in the evaluation if they desired.

The primary test sites were designed to be interactive. An interactive site is one where a student at a site can talk to the remote instructor and the students at all other locations can hear both the student and the instructor. Although there was some reception trouble in San Antonio, the program in Columbia went very well. Notwithstanding the San Antonio problems, enough of the program was received there for the attendees to respond to questionnaires circulated to them.

Two types of questionnaires were used; one for the primary test sites, and another for the secondary sites. The

questionnaire developed for the primary sites was more detailed than the other one, and concentrated primarily on the suitability of satellite broadcasts for CLE, cost effectiveness, and student satisfaction. The secondary site questionnaire was designed to determine how much difficulty those sites had in finding satellite receiver locations. Guard and Reserve Affairs had specifically located the two primary sites to provide such capabilities.

The military component composition of the attendees at the pilot on-sites was similar to that of the average on-site during the previous year.

There were 138 respondents to the primary questionnaire, out of 211 attendees. The survey showed that 87% of the attendees had enjoyed the instruction at least as much as they enjoyed instruction in the traditional format. Additionally, 39% considered the interactive feature necessary. Although 62% of the respondents felt that the interactive feature was not necessary, 78% thought it was at least worthwhile.

88 respondents stated that they would prefer that future broadcasts be made on weekends. Although weeknights were the second choice, only 32 respondents selected this option. Respondents were not limited to the most preferred choice on this question, and therefore, many selected more than one answer. The other choices received few selections.

Among the kinds of legal instruction preferred, the choices in order of preference were as follows: criminal law; international/operational law; civil law; government contract law; and other.

The pilot study shows that the satellite method of instruction has possibilities to expand instruction to the reserve components at a cost savings to them and TJAGSA. Use of satellite instruction could also allow more specialized training than is currently possible and would allow TJAGSA to focus on particular missions and legal needs of the attorneys in the reserve components.

In order to further test this concept and to move the program toward implementation, depending on funding, a pilot model program may be implemented in 1989, beaming additional satellite instruction during one weekend in April or May.

In 1990, if the test in 1989 is satisfactory, and if funding is available, at least four weekend transmissions would be completed. Each transmission would be devoted solely to one area of the law and would be designed to give the attendees more training in a particular area than is normally received.

The recent pilot study showed that satellite broadcasting is possible and will provide some benefits to reserve component attorneys and support personnel. Current plans do not call for displacement of any of the on-sites. Satellite broadcasting has been shown to be cost-effective and could be used if funding for continuing legal education on-site training is reduced or if additional training beyond that available through the on-sites is desired.

### **Army National Guard Quotas for TJAGSA Resident CLE Courses**

This article describes the procedures for obtaining course quotas to attend continuing legal education courses taught at The Judge Advocate General's School in Charlottesville, Virginia.

In June of each year the academic department at TJAGSA assigns quotas for each of the courses it will conduct during the upcoming academic year. The quotas are distributed among the various Army major commands and agencies including the Army National Guard. The quotas are determined based on historical usage in addition to annual solicitation of input from the commands themselves. Among the factors considered in setting the total number of quotas for each course are classroom size and the experience level of the students for whom the course is designed (entry level courses are assigned larger quotas than those advanced courses aimed at the expert legal practitioner).

Once the JAG School has set the number of quotas for each course, they are released to the commands and agencies that will issue the quotas directly to the students. Quotas are released to the National Guard in late June or early July of each year. These quotas are issued to the students on a first come first serve basis. Because of the limited number of quotas available for each course, it is incumbent upon the individuals to identify the course they want to attend and to request a quota as early as possible.

When the Guard Bureau (The ARNG Operating Activities Center) has issued all of the quotas for a particular course, they will place those individuals who did not obtain a quota on a waiting list. Should other agencies or commands turn back their quotas, then the School will offer them to the Guard. It should be noted that these quotas are not usually returned until close to the time the course is held.

Because of the last minute nature of returned quotas, it is important for those individuals who are on the waiting list for a particular course to remain flexible and to be ready for a last minute opening. Frequent coordination with the POC at the ARNG Operating Activities Center as the course grows near is vital. Prior arrangements for orders from the unit, if possible, are important. If the unit will not prepare orders prior to notification that a quota is available then the individual should take steps to ensure that the orders can be expedited upon last minute notification.

The POC obtaining quotas at the ARNG Operating Activities Center is Mr. Robert Bailey. His numbers are AVN 594-4789 or Commercial (301) 671-8189/8159.

### **1989 JAG Reserve Component Workshop**

The 1989 JAG Reserve Component Workshop will be held at The Judge Advocate General's School in Charlottesville, Virginia during the period 11-14 April 1989. As in the past, attendance will be by invitation only. Attendees should expect to receive their invitation packets by the end of December 1988. It is important that invitees notify TJAGSA of their intention to attend by the suspense date set in the invitation. Any suggestions as to theme, topics, or speakers for the 1989 Workshop are welcome. Additionally, any materials or handouts which might be appropriate for distribution at the Workshop would also be welcome. Since the planning process for the 1989 agenda is currently in progress, early input from the field is necessary. Send all comments and materials to The Judge Advocate General's School, Attention: Guard and Reserve Affairs Department.

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## **CLE News**

### **1. Resident Course Quotas**

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through

their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781

(Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

## 2. TJAGSA CLE Course Schedule

### NOTICE OF COURSE CANCELLATION

The 8th Commercial Activities Program (CAP) Course scheduled for 17-21 October 1988 has been cancelled. The CAP course will be combined with the 2d Advanced Installation Contracting Course to be held 22-26 May 1989. Information regarding the combined curriculum will be placed in future editions of *The Army Lawyer*.

1988

September 12-16: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

September 26-30: 10th Legal Aspects of Terrorism Course (5F-F43).

October 4-7: 1988 JAG's Annual CLE Training Program

~~October 17-21: 8th Commercial Activities Program Course (5F-F16): CANCELLED.~~

October 17-December 21: 117th Basic Course (5-27-C20).

October 24-28: 21st Criminal Trial Advocacy Course (5F-F32).

October 31-November 4: 96th Senior Officers Legal Orientation (5F-F1).

October 31-November 4: 40th Law of War Workshop (5F-F42).

November 7-10: 2d Procurement Fraud Course (5F-F36).

November 14-18: 27th Fiscal Law Course (5F-F12).

November 28-December 2: 23rd Legal Assistance Course (5F-F23).

December 5-9: 4th Judge Advocate & Military Operations Seminar (5F-F47).

December 12-16: 34th Federal Labor Relations Course (5F-F22).

1989

January 9-13: 1989 Government Contract Law Symposium (5F-F11).

January 17-March 24: 118th Basic Course (5-27-C20).

January 30-February 3: 97th Senior Officers Legal Orientation (5F-F1).

February 6-10: 22d Criminal Trial Advocacy Course (5F-F32).

February 13-17: 2d Program Managers' Attorneys Course (5F-F19).

February 27-March 10: 117th Contract Attorneys Course (5F-F10).

March 13-17: 41st Law of War Workshop (5F-F42).

March 13-17: 13th Admin Law for Military Installations Course (5F-F24).

March 27-31: 24th Legal Assistance Course (5F-F23).

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.

June 12-16: 28th Fiscal Law Course (5F-F12).

June 19-30: JATT Team Training.

June 19-30: JAOAC (Phase II).

July 10-14: U.S. Army Claims Service Training Seminar.

July 12-14: 20th Methods of Instruction Course.

July 17-19: Professional Recruiting Training Seminar.

July 17-21: 42d Law of War Workshop (5F-F42).

July 24-August 4: 119th Contract Attorneys Course (5F-F10).

July 24-September 27: 119th Basic Course (5-27-C20).

July 31-May 18, 1990: 38th Graduate Course (5-27-C22).

August 7-11: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

August 14-18: 13th Criminal Law New Developments Course, (5F-F35).

September 11-15: 7th Contract Claims, Litigation and Remedies Course (5F-F13).

## 3. Civilian Sponsored CLE Courses

November 1988

1-4: ESI, Contract Pricing, San Diego, CA.

1-4: ESI, ADP Contracting, Washington, DC.

2: UMC, Education Law, Kansas City, MO.

3-4: LSU, Developments in Legislation and Jurisprudence, Lake Charles, LA.

3-4: BNA, Hiring and Firing, Washington, DC.

3-4: PLI, Troubled Debt Financing, New York, NY.

3-4: ALIABA, Representing the Growing Technology Company, Coronado, CA.

3-4: ALIABA, The Role of Corporate Counsel in Litigation, San Francisco, CA.

3-4: ALIABA, How to Handle a Tax Controversy at the IRS and in Court, Chicago, IL.

3-4: ACLM, AIDS: The Disease and the Law, Atlanta, GA.

4: MBC, Social Security, St. Louis, MO.

6-11: NJC, Special Problems in Criminal Evidence, Reno, NV.

6-11: NJC, Administrative Law—Advances, Reno, NV.

10-11: PLI, Communications Law, New York, NY.

10-12: ALIABA, Trial Evidence, Civil Practice, and Effective Litigation Techniques in Federal and State Courts, San Juan, P.R.

10-12: ALIABA, Lender Liability: Defense and Prevention, Dallas, TX.

10-12: PLI, Product Liability of Manufacturers, San Francisco, CA.

11: MBC, Social Security, Kansas City, MO.

13-17: NCDA, Special Prosecutions, San Francisco, CA.

14-15: BNA, Environment and Safety, Washington, DC.

14-18: ALIABA, Planning Techniques for Large Estates, San Francisco, CA.

14-18: GCP, Construction Contracting, Washington, DC.

17-18: PLI, Equipment Leasing, San Francisco, CA.  
 17-18: PLI, Litigating Copyright, Trademark & Unfair Competition, New York, NY.  
 17-18: BNA, Patents, Washington, DC.  
 17-18: PLI, Immigration and Naturalization Institute, San Francisco, CA.  
 18-19: PLI, Deposition Skills Training Program, San Francisco, CA.  
 18-19: ALIABA, Improving Lawyer Supervision to Prevent Discovery Abuse, Conflicts, and Ethical Violations, Washington, DC.  
 27-30: NCDA, Child Abuse and Exploitation, Baltimore, MD.  
 27-12/1: NCDA, Prosecuting Drug Cases, San Antonio, TX.  
 28-30: GCP, Competitive Negotiation Workshop, Washington, DC.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.  
 AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 775-0083.  
 ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.  
 ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348-6230.  
 AICLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201. (501) 371-1071.  
 AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.  
 ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.  
 ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 72201. (501) 371-2024.  
 ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.  
 ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, D.C. 20007-4499. (800) 424-2725; (202) 965-3500.  
 BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026. (216) 729-7996.  
 BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.  
 CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.  
 CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209. (205) 870-2865.  
 CLEC: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303) 871-6323.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.  
 DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, 5000, Chicago, IL 60611. (312) 944-0575.  
 ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.  
 FB: The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 (904) 222-5286.  
 FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638-0252.  
 FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, D.C. 20005. (202) 633-6032.  
 FPI: Federal Publications, Inc., 1120-20th Street, N.W., Washington, D.C. 20036. (202) 337-7000.  
 GCP: Government Contracts Program, The George Washington University, National Law Center, T412, 801 22nd Street, N.W., Washington, D.C. 20052. (202) 994-6815.  
 GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (404) 542-2522.  
 GULC: Georgetown University Law Center, CLE Division, 25 E Street, N.W., 4th Fl., Washington, D.C. 20001. (202) 622-9510.  
 HICLE: Hawaii Institute for CLE, UH, Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.  
 ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.  
 IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.  
 ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia PA 19103.  
 IPT: Institute for Paralegal Training, 1926 Arch Street, Philadelphia, PA 19103. (215) 732-6999.  
 KBA: Kansas Bar Association CLE, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.  
 KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257-2922.  
 LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.  
 LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.  
 MBC: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.  
 MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.  
 MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906-7587. (800) 446-3410; (804) 295-6171.  
 MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.  
 MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 433-0100.  
 MNCLE: Minnesota CLE, 40 North Milton, Suite 101, St. Paul, MN 55104. (612) 227-8266.  
 MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330. (207) 622-7523.

- NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, Raleigh, NC 27612. (919) 828-0561.
- NCCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.
- NCDA: National College of District Attorneys, University of Houston, Law Center, University Park, Houston, TX 77004. (713) 749-1571.
- NCJFC: National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507-8978. (702) 784-4836.
- NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.
- NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.
- NITA National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in MN and AK.
- NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.
- NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 648-5571.
- NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland, Hts., KY 41076. (606) 572-5380.
- NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.
- NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.
- NUSL: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.
- NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.
- NYSTLI: New York State Trial Lawyers Institute, Inc., 132 Nassau Street, New York, NY 10038. (212) 349-5890.
- NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.
- NYUSL: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.
- OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.
- PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637 (PA only); (717) 233-5774.
- PLI: Practicing Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.
- PTLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.
- SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.
- SBMT: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59604 (406) 442-7760.
- SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.
- SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211-1039. (803) 771-0333.
- SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.
- SMU: Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214) 692-2644.
- TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.
- TLEI: The Legal Education Institute, 1875 Connecticut Avenue, N.W., Suite 1034, Washington, D.C. 20530.
- TLS: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, 6325 Freret St., New Orleans, LA 70118. (504) 865-5900.
- TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036. (202) 337-7000.
- UCCI: Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.
- UDCL: University of Denver College of Law, Program of Advanced Professional Development, 1895 Quebec Street, Denver, CO 80220. (303) 871-6323.
- UHCL: University of Houston, College of Law, Central Campus, 4800 Calhoun, Houston, TX 77004. (713) 749-3170.
- UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.
- UMC: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 112 Tate Hall, Columbia, MO 65211. (314) 882-6487.
- UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372-0140.
- UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.
- UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.
- USB: Utah State Bar, 425 East First South, Salt Lake City, UT 84111. (801) 531-9077.
- USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.
- UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.
- VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.
- VUSL: Villanova University, School of Law, Villanova, PA 19085. (215) 645-7083.
- WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98104-2599. (206) 448-0433.
- WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

#### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<i>Jurisdiction</i>	<i>Reporting Month</i>
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually

Idaho	1 March every third anniversary of admission	Oklahoma	1 April annually
Indiana	1 October annually	Oregon	Beginning 1 January 1988 in three-year intervals
Iowa	1 March annually	South Carolina	10 January annually
Kansas	1 July annually	Tennessee	31 January annually
Kentucky	30 days following completion of course	Texas	Birth month annually
Louisiana	31 January annually beginning in 1989	Vermont	1 June every other year
Minnesota	30 June every third year	Virginia	30 June annually
Mississippi	31 December annually	Washington	31 January annually
Missouri	30 June annually beginning in 1988	West Virginia	30 June annually
Montana	1 April annually	Wisconsin	31 December in even or odd years depending on admission
Nevada	15 January annually	Wyoming	1 March annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988		
North Carolina	12 hours annually		
North Dakota	1 February in three-year intervals		

For addresses and detailed information, see the July 1988 issue of *The Army Lawyer*.

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

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

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

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

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

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- AD B112101 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-87-1 (302 pgs).
- AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-87-2 (214 pgs).
- AD B100234 Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

#### Legal Assistance

- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD B116100 Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs).
- AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
- AD B116102 Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
- AD B116097 Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs).
- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
- AD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
- AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).

- AD B090988 Legal Assistance Deskbook, Vol I/  
JAGS-ADA-85-3 (760 pgs).  
AD B090989 Legal Assistance Deskbook, Vol II/  
JAGS-ADA-85-4 (590 pgs).  
AD B092128 USAREUR Legal Assistance Handbook/  
JAGS-ADA-85-5 (315 pgs).  
AD B095857 Proactive Law Materials/JAGS-  
ADA-85-9 (226 pgs).  
AD B116103 Legal Assistance Preventive Law Series/  
JAGS-ADA-87-10 (205 pgs).  
AD B116099 Legal Assistance Tax Information Series/  
JAGS-ADA-87-9 (121 pgs).

#### Claims

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

#### Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5  
(176 pgs).  
AD B087849 AR 15-6 Investigations: Programmed  
Instruction/JAGS-ADA-86-4 (40 pgs).  
AD B087848 Military Aid to Law Enforcement/  
JAGS-ADA-81-7 (76 pgs).  
AD B100235 Government Information Practices/  
JAGS-ADA-86-2 (345 pgs).  
AD B100251 Law of Military Installations/JAGS-  
ADA-86-1 (298 pgs).  
AD B108016 Defense Federal Litigation/JAGS-  
ADA-87-1 (377 pgs).  
AD B107990 Reports of Survey and Line of Duty  
Determination/JAGS-ADA-87-3 (110  
pgs).  
AD B100675 Practical Exercises in Administrative and  
Civil Law and Management/JAGS-  
ADA-86-9 (146 pgs).

#### Labor Law

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

#### Developments, Doctrine & Literature

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

#### Criminal Law

- AD B095869 Criminal Law: Nonjudicial Punishment,  
Confinement & Corrections, Crimes &  
Defenses/JAGS-ADC-85-3 (216 pgs).  
AD B100212 Reserve Component Criminal Law PEs/  
JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through  
DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal  
Investigations, Violation of the USC in  
Economic Crime Investigations (250 pgs).

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

## 2. Regulations & Pamphlets

Listed below are new publications and changes to existing  
publications.

Number	Title	Change	Date
AR 15-6	Procedure for Investigat- ing Officers and Boards of Officers		11 May 88
AR 15-8	Army Science Board		4 May 88
AR 37-104-1	Payment of Retired Pay to Members and Former Members of the Army		25 May 88
AR 95-11	Military Flight Data Telecommunications System		31 May 88
AR 108-2	Audiovisual Services	101	30 Apr 88
AR 210-135	Banks and Credit Unions on Army Installations		1 Jul 88
AR 350-50	Combat Training Center Program		27 May 88
AR 735-11-1	Uniform Settlement of Military Freight Loss		1 Jan 88
CIR 350-88-1	Army Individual Training Evaluation Program		27 May 88
DA Pam 360-416	Pocket Guide to Low Countries		1987
UPDATE 14	Enlisted Ranks Personnel		8 Jun 88

## 3. Articles

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

- Brickner, *Provide for the Common Defense: The Constitu-  
tion of the United States and its Military Significance*, 14  
No. Ky. L. Rev. 383 (1988).  
Larschan, *The War Powers Resolution: Conflicting Constitu-  
tional Powers, the War Powers and U.S. Foreign Policy*, 16  
Den. J. Int'l. L. & Pol'y. 33 (1987).  
Masters, *Drug-Testing in the Federal Sector: the Negotiabili-  
ty Controversy*, 39 Lab. L.J. 312-219 (1988).  
McFadden, *The Legality of Nuclear Weapons: A Response  
to Corwin*, 6 Dick. L. Rev. 313 (1988).  
Simien, *The Interrelationship of the Scope of the Fourth  
Amendment and Standing to Object to Unreasonable  
Searches*, 41 Ark. L. Rev. 487 (1988).  
Note, *A Proposal for Direct Use of the United States Mili-  
tary in Drug Enforcement Operations Abroad*, 23 Tex.  
Int'l. L.J. 291-316 (1988).  
Note, *Constitutional Law: Servicemen and Constitutional  
Tort Suits—United States v. Stanley*, 11 Harv. J.L. &  
Pub. Pol'y 575-83 (1988).  
Note, *First Amendment-Protected Expression-Selective Pros-  
ecution—Wayte v. United States*, 4 Hum. Rts. Ann.  
837-69 (1988).

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

2. The second part of the document outlines the various methods and techniques used to collect and analyze data. It includes a detailed description of the sampling process and the statistical tools employed to interpret the results.

3. The third part of the document presents the findings of the study, highlighting the key trends and patterns observed in the data. It also discusses the implications of these findings for the industry and the broader economy.

4. The fourth part of the document provides a comprehensive analysis of the data, including a comparison of the results with previous studies and a discussion of the limitations of the research.

5. The fifth part of the document offers recommendations and suggestions for future research, based on the findings of the study. It also includes a conclusion that summarizes the main points of the document.

6. The sixth part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

7. The seventh part of the document outlines the various methods and techniques used to collect and analyze data. It includes a detailed description of the sampling process and the statistical tools employed to interpret the results.

8. The eighth part of the document presents the findings of the study, highlighting the key trends and patterns observed in the data. It also discusses the implications of these findings for the industry and the broader economy.

9. The ninth part of the document provides a comprehensive analysis of the data, including a comparison of the results with previous studies and a discussion of the limitations of the research.

10. The tenth part of the document offers recommendations and suggestions for future research, based on the findings of the study. It also includes a conclusion that summarizes the main points of the document.

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