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Lore of the Corps

Contracting in China:

The Judge Advocate Experience, 1944–1947

Fred L. Borch
Regimental Historian & Archivist

While procurement law has been an important component of judge advocate practice for many years, few men and women today know that Army lawyers were involved in the negotiation and supervision of contracts in China during World War II and the immediate post-war period. What these contract law attorneys did and how they did it is a story worth telling.

While American troops had been stationed in China prior to World War II, the Japanese attack on Pearl Harbor caused the United States to greatly strengthen its relationship with the Chinese, if for no other reason than to keep China in the war against Japan. Recognizing that strengthening General Chiang Kai-shek's army could inflict considerable damage on their common enemy, the War Department created the China-Burma-India (CBI) Theater in 1942. As one of its lines of effort against Japan, the United States supplied the Chinese Army with weapons, ammunitions, food and other supplies by using the Burma Road, until the Japanese disrupted its use in 1942, and by airlifts flown over "the Hump," the air route over the 14,000 foot Himalayas Mountains located between India and southern China. While a total of 650,000 tons of supplies would eventually be airlifted to China, the limitations on what could be flown and how much could be flown meant that essential supplies still had to be purchased in local markets. Fuel was the single most important item for purchase. Army officers negotiated contracts for gasoline for aircraft and alcohol for use in motor vehicles. But contracts also were signed for fresh fruits and vegetables and other supplies that could not be brought into China via the Burma Road or over "the Hump."[1]

The first judge advocates apparently arrived in China in mid-1944 and were headquartered at U.S. Forces, China Theater, under the command of Lieutenant General (LTG) Albert C. Wedemeyer in Chungking.[2] From that time until mid-1947, some twenty judge advocates served at U.S. Forces, China Theater, and its successor commands, U.S. Army Forces China, Nanking Headquarters Command, and Army Advisory Group, China. At any one time, the maximum number of Army lawyers in the country was twelve, and all judge advocates apparently had departed China by June 1947.[3]

While most were involved in supervising courts-martial, investigating war crimes, processing claims, and providing legal assistance, a small number of Army lawyers supervised the preparation of procurement contracts and reviewed existing contracts for legal sufficiency.

The most difficult issue for judge advocates involved in the negotiation of contracts (and leases for real estate, in which Army lawyers also participated) was the requirement that "Chinese National Currency will be the medium of exchange in all fiscal matters."[4] At first, this requirement was not a problem, as the Chinese yuan held its value but, by early 1945, the currency was rapidly losing its value. As Colonel (COL) Edward H. "Ham" Young[5] explained in his report on legal operations in China, this exchange rate fluctuation presented serious difficulties:

> Since most procurement contracts called for large advance payments to enable the local contractors to purchase raw materials, and since most leases provided for large advance payments, the fluctuation of the currency necessitated frequent modifications of contracts. . . . By agreement between the governments of the

[1] CENTER OF MILITARY HISTORY, U.S. ARMY CAMPAIGNS IN WORLD WAR II: CHINA OFFENSIVE 4 (1992).

[2] Albert Coady Wedemeyer, appointed by President Franklin D. Roosevelt as the Commanding General of the U.S. Forces in the China Theater and the Chief of Staff to Chiang Kai-shek, arrived in China on 31 October 1944. Wedemeyer had served in China from 1930 to 1934, and consequently had the perspective and experience necessary for success. *See* ALBERT C. WEDEMEYER, WEDEMEYER REPORTS! (1958) (providing more information on Wedemeyer's life as a Soldier).

[3] EDWARD H. YOUNG, REPORT OF THE JUDGE ADVOCATE, UNITED STATES FORCES, CHINA THEATER, UNITED STATES ARMY FORCES CHINA, NANKING HEADQUARTERS COMMAND, AND ARMY ADVISORY GROUP CHINA, 1 JANUARY 1945 TO 10 JUNE 1947, at ii (1948).

[4] HEADQUARTERS, U.S. FORCES CHINA THEATER, CIR. NO. 37, PURCHASING AND PROCUREMENT POLICIES—CHINA THEATER para. K (17 Feb. 1946).

[5] Edward Hamilton "Ham" Young was one of the most well-known and admired judge advocates of his generation. A graduate of the U.S. Military Academy, Young was serving as an infantry officer when the Army sent him to law school so that he could return to West Point to teach. Young liked law and, after being detailed to the Judge Advocate General's Department, obtained his law degree from New York University's law school. During World War II, Colonel Young served as the first Commandant of The Judge Advocate General's School and is widely credited with creating the educational curriculum that transformed civilian lawyers into judge advocates. *See* Colonel Edward H. Young, *The Judge Advocate General's School (1944)*, DETROIT B.Q., Jan. 1944, *reprinted in* ARMY LAW., Sept. 1975, at 29.

> United States and China, the rate of exchange between the Chinese Yuan and the U.S. dollar was fixed . . . . However, contracts were entered into with individuals to whom this fixed rate did not apply and who made the open market and black market rates of exchange the basis for the determination of the costs of their services rendered or materials furnished.[6]

As COL Young observed, if American negotiators and their judge advocate supervisors tried to deal with the local suppliers on the basis of the fixed yuan-dollar exchange rate, U.S. units would be unable to obtain essential materials. No wonder Young reported that this meant that procurement in the China Theater was done in accordance with "local conditions."[7]

In addition to currency fluctuation, inflation presented challenges for Americans stationed in China. When "sky-rocketing prices in local commercial establishments" made it difficult for U.S. troops to obtain necessary goods and services, Army Special Services opened snack bars, barber shops, and gift shops. Chinese concessionaires operated these establishments, but judge advocates were "called upon to develop procedure and to draft contracts to meet each particular situation."[8]

Inflation and currency fluctuation also affected the hiring of local Chinese personnel. Employment contracts for cooks, clerks, guards, drivers and other similar laborers contained provisions requiring pay adjustments when changes in the monthly cost-of-living index occurred. The Shanghai Municipal Government, for example, issued a monthly index that covered various items such as rent, clothing, and food. This index had been created using prices that existed in 1939, prior to the Japanese occupation of Shanghai. By 1944, however, variations in the monthly cost-of-living index occurred so frequently that judge advocates "worked closely with all Purchasing and Contracting Officers" in drafting payments clauses. These clauses modified existing contracts in such a way to adjust pay when changes in the index occurred without having to amend each employment contract each month.

Contracts for real estate presented equally thorny issues for judge advocates. One unusual situation involved the use of facilities owned by the Methodist Missionary Society in Chungking. When LTG Wedemeyer opened his new China Theater Headquarters in that city in October 1944, the society offered the use of its privately owned middle school compound for the military headquarters. General Wedemeyer accepted this offer because the society did not want any rent for its use. Prior to taking occupancy of the facilities, however, the United States requested that the Chinese Government make "large scale repairs" and build additional structures on the property, which the Chinese did.[9]

The Methodist Missionary Society then asked the Chinese Government to execute a written instrument guaranteeing that the school compound would be returned to the society at the end of the war, when American forces presumably would leave China. When the Chinese Government refused to give any such written assurances, the society looked to LTG Wedemeyer and the Americans for support. Colonel Young and his judge advocates advised that, regardless of whether the Chinese ultimately returned the property to the Methodist Missionary Society, the use of the property by the United States would create a quasi-contractual relationship between the Army and the society and potentially expose the United States to a claim for the fair market value of the rental property. Based on this legal advice, COL Young and his lawyers "conducted a series of conferences with all parties involved" and, as a result of these negotiations, the Chinese Government agreed that the premises would be returned to the Methodist Missionary Society. In return, the society "executed a general release in favor of United States forces exempting the United States from all future claims 'which may have attended its occupancy.'"[10]

As for real estate leases generally, judge advocates working in Shanghai and other locations in China quickly learned that "transfers of property to and between the Japanese during the regime of the Puppet Government . . . threatened to involve the U.S. military authorities in lengthy litigation."[11] This was because more than one Chinese national would claim to be the rightful owner of the same leased premises, and demand that the moneys due under the lease be paid to him. Fortunately, a close working relationship with Chinese authorities "overcame most of these difficulties."[12] One solution was for the Chinese to take over the property in question and then permit the U.S. Army to use it until the true owner was found or determined. While this ensured that U.S. personnel had use of the premises—an important point—this only postponed the ownership issue and ultimately, the Americans paid a claim for the full value of the leased property to the rightful owner.

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[6] YOUNG, *supra* note 3, at 19.

[7] *Id*.

[8] *Id*. at 20.

[9] *Id*. at 18.

[10] *Id*. at 19.

[11] *Id*. at 20.

[12] *Id*.

When COL Young, who served as the senior judge advocate in China from 1 January 1945 to 10 June 1947, returned home to the United States, he lauded the "ability, versatility and loyalty" of the "relatively small group of judge advocates" and others who had served alongside him in China. As this short history of contracting in China shows, Young certainly included his contract law attorneys in this group.[13]

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/8525736A005BE1BE

[13] *Id*. at iii.

A Primer on Trial *in Absentia*

Major S. Charles Neill[*]

Give me one reason to stay here and I'll turn right back around
Because I don't want leave you lonely
But you got to make me change my mind.[1]

I. Introduction

A military accused facing trial by court-martial has more than one reason to stay here (and turn right back around) when pending trial, including many rights and procedural safeguards. An accused is entitled to assist defense counsel during trial, confront prosecution witnesses, and personally testify at trial. These rights ensure an accused has the opportunity to defend against court-martial charges. To state the obvious, an accused can only exercise these rights when present for trial.

This article discusses the limited circumstances in which a military accused may be tried *in absentia*.[2] The court-martial of an accused who is not present in court can be deceptively difficult, implicating constitutional rights and procedural requirements. Part II discusses the accused's constitutional right to be present at trial, rooted in the Confrontation Clause and Due Process Clause, as well as the two circumstances in which this right can be personally waived. Part III discusses the "arraignment requirement," a prerequisite to the two exceptions to the general rule that an accused shall be present for the entire court-martial. Part IV discusses the first exception, when an accused is voluntarily absent from trial after arraignment. Part V discusses the second exception, when an accused is removed from the courtroom for disruptive conduct. Part VI discusses unresolved issues in this area of the law. When contemplating trial *in absentia*, it is important to recognize the significant constitutional rights affected when the accused is not present at trial.

II. The Accused's Constitutional Right to Be Present During the Court-Martial

An accused has a right under the Constitution and by statute to be present during the entire court-martial.[3] This right is further defined under Rule for Courts-Martial (RCM) 804(a), which provides, "The accused *shall be present* at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule."[4] The accused's presence throughout trial is part and parcel of the accused's rights under the Confrontation and Due Process Clauses.[5] As the Supreme Court has long held, "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."[6] Presence is necessary because an accused cannot challenge panel members, confront witnesses, or assist in his defense if he is not present during the court-martial. Given the importance of the accused's presence, RCM 804 provides two narrow exceptions to the general requirement that an accused be present for the entire court-martial.

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[1] TRACY CHAPMAN, *Give Me One Reason*, *on* NEW BEGINNING (Elektra 1995).

[2] A "trial *in absentia*" is a "trial held without the accused being present." BLACK'S LAW DICTIONARY 1645 (9th ed. 2009).

[3] *See* U.S. CONST. amends. V–VI; UCMJ art. 39(b) (2012).

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(a) (2012) [hereinafter MCM] (emphasis added).

[5] *See id.*, R.C.M. 804 analysis, at A21-46 (discussing Rule for Court-Martial (RCM) 804(a) and noting, "The right is grounded in the due process clause of the Fifth Amendment and the right to confrontation clause [*sic*] of the Sixth Amendment of the Constitution."); *see also* United States v. Gagnon, 470 U.S. 522, 526 (1985) (holding that the right to be present at trial is "rooted" in Confrontation Clause of Sixth Amendment as well as Due Process Clause of Fifth Amendment); United States v. Ward, 598 F.3d 1054, 1057–58 (8th Cir. 2010) ("The right to be present, which has a recognized due process component, is an essential part of the defendant's right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence."); United States v. Tureseo, 566 F.3d 77, 83 (2d Cir. 2009) ("The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant to be present at trial to confront witnesses and the evidence against him.") (citing *Gagnon*, 470 U.S. at 526); Gray v. Moore, 520 F.3d 616, 622 (6th Cir. 2008) ("A defendant's right to be physically present at every stage of his trial has a longstanding tradition in this country's criminal jurisprudence, with roots in both the Due Process Clause and the Confrontation Clause of the Sixth Amendment.") (citations omitted); United States v. Mitchell, 502 F.3d 931, 987 (9th Cir. 2007) ("[A] defendant's right to be present at every trial stage [is] derived from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.").

[6] Illinois v. Allen, 397 U.S. 337, 338 (1970) (citing Lewis v. United States, 146 U.S. 370 (1892)).

Under RCM 804(c), an accused may be tried *in absentia* if, following a valid arraignment, he is voluntarily absent or removed for disruption.[7] If one of these exceptions applies, "the accused shall be considered to have waived the right to be present."[8] Under both provisions, the accused must have been present at a valid arraignment, a requirement that has triggered a surprising amount of litigation.

III. The Arraignment Requirement

Because RCM 804(c) only allows trial *in absentia* post-arraignment, the requirements for arraignment have been strictly interpreted by military courts. The arraignment is governed by RCM 904, which only requires that a valid arraignment consist of charges being read to the accused and the accused being called upon to enter a plea.[9] The rule expressly allows the accused to waive reading of the charges without affecting the validity of the arraignment.[10] The discussion to RCM 904 reads that the accused may also defer entering pleas.[11] Put another way, the arraignment is complete once the Government offers to read charges to the accused and the military judge calls on the accused to enter a plea; the arraignment is valid even if the accused waives reading of the charges and defers entering a plea.

Military courts have exactingly enforced the requirements for a valid arraignment in the course of appellate review. In *United States v. Price*, the accused was tried *in absentia* after he was voluntarily absent.[12] On appeal, the Court of Appeals for the Armed Forces (CAAF) set aside the findings and sentence, concluding the accused had not been properly arraigned. Specifically, the military judge stated during arraignment, "I will not ask for the accused's plea, as I was served with notice of several motions that I would obviously need to resolve before any plea was entered in this case."[13] Noting that the text of RCM 904 unequivocally requires an accused be called upon to enter a plea at arraignment, the CAAF ruled that the arraignment was not completed at the time of the accused's absence.[14] The CAAF reasoned that trial *in absentia* is only permitted if the accused is absent "after arraignment."[15] Because the military judge did not call on the accused to enter a plea, the arraignment was incomplete under a plain reading of RCM 904.[16] Because the arraignment was not completed and the plain language of RCM 804 requires an arraignment before an accused may be tried *in absentia*, the CAAF set aside the findings and sentence.[17]

The *Price* decision arguably placed form over substance, overturning a conviction despite substantial conformity with the requirements for an arraignment, and two judges dissented from the opinion.[18] In a short dissenting opinion, Judge Sullivan argued that the accused's arraignment had begun but was only "incomplete" because the accused left before he was called upon to plead.[19] Because the requirements for trial *in absentia* had been "substantially complied with" during the incomplete arraignment, Judge Sullivan would have held the minor "regulatory technicality" did not warrant reversal.[20] A second dissenting opinion by Judge Crawford reasoned that the accused was clearly on notice of the time and date for the court-martial and was voluntarily absent.[21] Specifically, the accused had been present for two Article 39(a) hearings.[22] At the first hearing, the accused elected trial by enlisted members and the court noted several motions from the defense.[23] At the second hearing, the parties litigated motions, the military judge made rulings in two motions adverse to the accused, and the court notified the parties of the trial date.[24] Judge Crawford concluded that the accused was properly on notice of the trial date and only fled because the military judge made unfavorable rulings.[25] The majority,

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[7] MCM, *supra* note 4, R.C.M. 804(c).

[8] *Id.* R.C.M. 804(c). Federal courts have similarly found a civilian defendant may waive the right to be present for trial. *See generally Tureseo*, 566 F.3d at 83 ("The defendant's constitutional and statutory right to be present, however, may be either expressly or effectively waived by the defendant.") (citation omitted).

[9] MCM, *supra* note 4, R.C.M. 904. The rule reads in its entirety: "Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading." *Id.*

[10] *Id.* ("The accused may waive the reading.").

[11] *Id.* R.C.M. 904 discussion ("Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment."). *See also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 604 (7th ed. 2008) ("The accused's plea itself is not a part of the arraignment, and in most cases will not be entered until after the defense has raised any pretrial motions.").

[12] 48 M.J. 181 (C.A.A.F. 1998).

[13] *Id.* at 182.

[14] *Id.* at 182–83.

[15] *Id.* at 182. At the time of the accused's trial, the 1995 edition of the *Manual for Courts-Martial* listed the same text that appears in the current RCM 804(c)(1) at RCM 804(b)(1). *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(b)(1) (1995), *with* MCM, *supra* note 4, R.C.M. 804(c)(1).

[16] *Price*, 48 M.J. at 183.

[17] *Id.*

[18] *See id.* at 183–84 (Sullivan, J., dissenting); *id.* at 184–86 (Crawford, J., dissenting).

[19] *Id.* at 183–84 (Sullivan, J., dissenting).

[20] *Id.* at 184 (Sullivan, J., dissenting). The dissent added, "It is black letter law that defective arraignments do not warrant reversal of a conviction." *Id.* (Sullivan, J., dissenting) (citation omitted).

[21] *Id.* at 184–85 (Crawford, J., dissenting).

[22] *Id.* at 182.

[23] *Id.* at 184 (Crawford, J., dissenting).

[24] *Id.* (Crawford, J., dissenting).

[25] *Id.* (Crawford, J., dissenting). Judge Crawford added later in her dissenting opinion: "In essence, after a number of motions were decided against appellant, he voluntarily absented himself from trial. By his

however, rejected this analysis and arguably held the error was jurisdictional in nature and, therefore, not waivable.[26] The strict reading of the "arraignment requirement" is likely a byproduct of the federal approach, which only allows trial *in absentia* after the trial has begun.[27]

Federal Rule of Criminal Procedure 43 (Rule 43) and RCM 804 are similar in their requirements for trying an accused who is voluntarily absent, though RCM 804 allows for trial after arraignment while the federal rule more narrowly requires the absence to occur after trial has actually begun.[28] In interpreting the federal counterpart to RCM 804, the Supreme Court noted, "The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial."[29] Notably, the federal rule does not define when the trial has "begun," though appellate courts have generally found that the beginning of jury selection is the pivotal event.[30] The Supreme Court has explained "a defendant's initial presence serves to assure that any waiver is indeed knowing."[31] Because the arraignment in a court-martial can occur several weeks before members are sworn, *Price*'s bright line rule for requiring a complete arraignment is sound.[32]

Once an accused has been arraigned, the court-martial may continue in his absence if either of the two exceptions under RCM 804(c) applies: (1) the accused is voluntarily absent, or (2) the accused is removed for disruption. The next two parts will consider each exception respectively. For the first exception, the court-martial may proceed after arraignment if the accused is voluntarily absent. While the first exception may seem straightforward, courts have struggled to decide what evidence is necessary to prove the absence is actually voluntary and which party bears the burden of proof.

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conduct, it is patently obvious that appellant knowingly and voluntarily waived his right to be present at trial." *Id.* at 185 (Crawford, J., dissenting).

[26] The defense counsel did not object to the court-martial proceeding in the accused's absence. *Id.* at 182. Normally, failure to raise an objection at trial results in waiver of appellate review for that issue. *See* MCM, *supra* note 4, R.C.M. 801(g) ("Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual . . . shall constitute waiver thereof . . . ."); *id.* R.C.M. 905(b) (listing pretrial motions that must be raised before plea is entered); *id.* R.C.M. 905(e) (The defense waives issues listed under RCM 905(b) by failing to object or make a motion for appropriate before entering pleas; however, "[o]ther motions, requests, defenses, or objections, *except lack of jurisdiction* or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and . . . failure to do so shall constitute waiver."). *See also* United States v. Jungbluth, 48 M.J. 953, 957 (N-M. Ct. Crim. App. 1998) (citing *Price* for ruling that "technical violation of the court-martial rule on trial *in absentia* held jurisdictional"), *review denied*, 52 M.J. 294 (C.A.A.F. 1999).

[27] United States v. Ward, 598 F.3d 1054, 1056 n.1 (8th Cir. 2010) ("A criminal trial may not proceed if the defendant is not present at its inception.") (citing Crosby v. United States, 506 U.S. 255, 262 (1993)); United States v. Newman, 733 F.2d 1395, 1401 (10th Cir. 1984) ("A trial may continue if a defendant voluntarily absents himself after the trial has begun.") (citing Taylor v. United States, 414 U.S. 17 (1973)).

[28] *Compare* FED. R. CRIM. P. 43(a) ("[T]he defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."), *with* MCM, *supra* note 4, R.C.M. 804(a) ("The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions . . . ."). *Compare* FED. R. CRIM. P. 43(c)(1) ("A defendant who was initially present at trial . . . waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent *after the trial has begun*, regardless of whether the court informed the defendant of an obligation to remain during trial . . . ."), *with* MCM, *supra* note 4, R.C.M. 804(c) ("[T]he accused shall be considered to have waived the right to be present whenever an accused, initially present: (1) Is voluntarily absent *after arraignment* (whether or not informed by the military judge of the obligation to remain during the trial) . . . .") (emphasis added).

[29] Crosby v. United States, 506 U.S. 255, 262 (1993). The Court expressly declined to address arguments that the accused's constitutional rights were violated by the improper trial *in absentia*. *Id.* ("Because we find Rule 43 dispositive, we do not reach Crosby's claim that his trial *in absentia* was also prohibited by the Constitution.").

[30] United States v. Bradford, 237 F.3d 1306, 1309 (11th Cir. 2001) ("[E]very other circuit to address the issue . . . [has] held that a trial commences under Rule 43 when jury selection begins.") (citations omitted); *see also* United States v. Krout, 56 F.3d 643, 646 (5th Cir. 1995) ("We . . . hold that, for the purposes of Rule 43 of the Federal Rules of Criminal Procedure, trial begins when jury selection begins."); Government of the Virgin Islands v. George, 680 F.2d 13, 14–15 (3d Cir. 1982) (interpreting Rule 43 for trying a defendant *in absentia*, concluding trial has commenced when jury selection begins, and rejecting defense argument that trial has not commenced until jeopardy has attached). *But cf.* United States v. Lucky, 569 F.3d 101, 107–08 (2d Cir. 2009) (affirming judge's decision to begin and complete jury selection in the defendant's absence after defendant asked to stay in his cell, suggesting the court implicitly found the beginning of trial for purposes of Rule 43 to occur before jury selection); United States v. Lawrence, 161 F.3d 250, 255 (4th Cir. 1998) (suggesting trial had begun "when the case was called" and before jury selection, though assuming *arguendo* that this had been error, it would constitute "invited error" based on defendant's on-the-record request to be absent); United States v. Hines, 407 F. App'x. 975, 978 (7th Cir. 2011) (stating in dicta "the circuits are split about whether a trial commences at or before jury selection").

[31] *Crosby*, 506 U.S. at 261.

[32] *See* United States v. Price, 48 M.J. 181, 183 (C.A.A.F. 1998) ("Military law, however, extends the presumptive waiver point back to arraignment, which often arises well prior to commencement of trial on the merits.") (citations omitted). *Cf.* United States v. Bass, 40 M.J. 220, 223 (C.M.A. 1994) ("In the military justice system, arraignment is the commencement of trial.") (citations omitted). In *Crosby*, the civilian defendant fled the area after appearing before a federal magistrate, entering a not guilty plea, attending pretrial hearings with counsel, and being informed of the scheduled trial date. *Crosby*, 506 U.S. at 256. The Supreme Court reversed, reasoning that the defendant was improperly tried *in absentia*, as he had not been present at the beginning of trial as required by Rule 43. *Id.* at 258–59. This decision illustrates the differences between the military rule and its civilian counterpart. A military accused waives his right to be present if he is voluntarily absent after arraignment, a proceeding that may be limited to trial counsel offering to read the charges and the accused being called on to enter a plea. By contrast, the *Crosby* defendant appeared in front of a magistrate for pretrial hearings and actually entered a plea, which was insufficient to satisfy the federal rule, even though these proceedings were more exhaustive than an arraignment. The *Crosby* Court reasoned that fleeing in the midst of trial is substantively different from fleeing before the beginning of trial, and this interpretation ensures a defendant knowingly waived the right to be present. *Id.* at 262–63; *see also* Pelaez v. United States, 27 F.3d 219 (6th Cir. 1994) (reversing conviction for defendant tried *in absentia* even though he fled to Colombia after being notified in pretrial hearing of firm trial date).

IV. The "Voluntarily Absent" Exception

You got a fast car
And I want a ticket to go anywhere.[33]

Under RCM 804(c)(1), an accused may be tried *in absentia* if "voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain present during the trial)."[34] The text of this subparagraph provides no additional guidance for the "voluntarily absent" provision. The exception ultimately hinges on two requirements. First, the accused must be present for a valid arraignment. Second, the accused must be voluntarily absent from trial. As set forth above, the CAAF has adopted a simple bright line rule for what constitutes an arraignment, strictly enforcing the RCM 904 requirements that the charges are read to the accused and the accused is called upon to enter a plea.[35] The second requirement is significantly more nuanced and fact-intensive.

Under RCM 804(c)(1), the Government carries the burden to show by a preponderance that the accused is voluntarily absent from trial.[36] The discussion section to RCM 804(c)(1) somewhat cryptically explains, "Voluntariness may not be presumed, but it may be inferred, depending on the circumstances."[37] The discussion notes, as an example, that if an accused was present when the court recessed, knew of the scheduled date for future proceedings, and was not present when the court reconvened, it "may be inferred" that the absence is voluntary.[38] Much of this non-binding discussion to RCM 804 can be traced back to case law.

The seminal and most-instructive case for trying a voluntarily-absent military accused is *United States v. Sharp*.[39] Sharp was granted holiday leave following an arraignment that generally alluded to a January trial date.[40] When the accused did not return from holiday leave, the military judge granted a continuance to the end of January, and the accused was ultimately tried *in absentia*.[41] On appeal, the defense argued that it was improper to try an absent accused when the "government failed to establish that [he] was given notice of the trial date."[42] The court rejected this argument and concluded there was no requirement that an accused be notified of the *exact* trial date at arraignment.[43] The court further held that an absent accused could be tried even if not warned that trial might continue in his absence.[44] The current version of RCM 804(c)(1) similarly imposes no requirement that the military judge notify the accused of the trial date or that the accused may be tried *in absentia* if he leaves the area.[45] However, there may be some limited exceptions to this rule. Notably, *Sharp* cited an earlier case holding that an absent accused was improperly tried *in absentia* because he was not notified of a scheduled trial date eight months after a continuance.[46] Put another way, if an accused flees during an extended delay without notice of the general date of trial, the military judge or appellate court could properly make a factual finding that the accused did not *knowingly* waive the right to be present at trial.[47]

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[33] TRACY CHAPMAN, *Fast Car*, *on* TRACY CHAPMAN (Elektra 1988).

[34] MCM, *supra* note 4, R.C.M. 804(c).

[35] *Id.* R.C.M. 904; *supra* notes 9–17 and accompanying text.

[36] MCM, *supra* note 4, R.C.M. 804(c) discussion ("The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary."); *see also* United States v. Stewart, 37 M.J. 523, 525 (A.C.M.R. 1993) ("The government has the burden of proving the absence is voluntary by a preponderance of the evidence.").

[37] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[38] *Id.*

[39] 38 M.J. 33 (C.M.A. 1993), *cert. denied*, 510 U.S. 1164 (1994).

[40] *Id*. at 34. At arraignment, the military judge did not advise the accused of the date for the court-martial. *Id*. Rather, the military judge granted a defense continuance request, which sought a delay to 4 or 5 January. *Id*. The military judge then noted that he might call another session or phone conference "prior to the 4th of January." *Id.* Notably, neither counsel asked for clarification about the date for trial. *Id*.

[41] *Id*. The accused's authorized leave ended on 2 January. *Id*. When he did not return, his civilian defense counsel proffered that the accused was en route to his home of record and never arrived, which suggested he was injured as opposed to being voluntarily absent. *Id*. The military judge then granted a defense continuance to 31 January. *Id*.

[42] *Id*.

[43] *Id.* at 35 ("The initial question we must answer is whether notice to appellant of the exact trial date is a prerequisite to trying appellant *in absentia*. We answer this question in the negative.").

[44] *Id.* ("There is no requirement that appellant be warned that he has a right to be present and that the trial might continue in his absence.") (citing Taylor v. United States, 414 U.S. 17, 19 (1973)); *see also Taylor*, 414 U.S. at 19–20 (rejecting argument that civilian defendant did not *knowingly* waive his right to be present at trial, even though judge did not expressly warn him that trial would continue in his absence).

[45] MCM, *supra* note 4, R.C.M. 804(c)(1) (noting an accused who is voluntarily absent may be tried *in absentia* "whether or not informed by the military judge of the obligation to remain during the trial").

[46] *Sharp*, 38 M.J. at 37 (citing United States v. Peebles, 3 M.J. 177 (C.M.A. 1977)).

[47] The non-binding discussion to RCM 804(c) also adopts this position. MCM, *supra* note 4, R.C.M. 804(c) discussion ("For an absence from court-martial proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them."). Judge Wiss wrote separately in *Sharp* to argue, "It would seem that a knowing waiver in this regard, at a minimum, would require some notice to the accused of at least the general point at which the proceedings would resume (at least if the hiatus is to be lengthy) . . . ." *Sharp*, 38 M.J. at 39 (Wiss, J., concurring in part and in the result) (citing *Peebles*, 3 M.J. 177). Judge Wiss also argued the accused must be on notice the proceedings could continue in his absence, as the Supreme Court has implicitly reasoned an absence from trial only constitutes a waiver of the right to be present if the waiver is both knowing and voluntary. *Id*. at 38–39 (Wiss, J., concurring in part and in the result) (citing Crosby v. United States, 506 U.S. 255 (1993)). However, the discussion section to RCM 804(c), reviewed in this footnote, seems to combine the voluntary and knowing requirements based on its recommendation that a waiver is only voluntary if the accused knows of the next scheduled proceeding.

There has been some confusion among appellate courts regarding who bears the burden of showing the accused's absence is "voluntary" for applying RCM 804. The most logical reading of RCM 804(c) and related cases is that the Government bears the burden at trial to show by a preponderance that the accused is voluntarily absent.[48] However, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) has suggested a possible burden shift to the defense in the right circumstances.[49] This approach is problematic, particularly considering the constitutional rights at issue when an accused is tried *in absentia*. The Army appellate court recommends a more conservative approach, allowing for a presumption that the absence is voluntary when there is no evidence to the contrary.[50]

At the trial level, the military judge has great discretion in making factual and legal determinations regarding an absent accused. For the factual determination about whether an absence is voluntary, the Army's approach of a rebuttable presumption is more appropriate. Given the constitutional rights at stake when an accused is tried *in absentia*, military judges would be wise to make findings of fact that rely on evidence that the accused is voluntarily absent as opposed to more-speculative inferences.[51] At a minimum, the court should review evidence about the accused's absence, which may be as simple as testimony about the accused taking a vehicle, packing up his room, or other proof of a voluntary absence. This evidentiary hearing may be necessary to show the accused had the mental capacity to voluntarily waive the right to be present.[52] The military judge also has discretion in determining whether trial should proceed, even if the accused is voluntarily absent. The discussion to RCM 804(c)(1) notes the rule "authorizes but does not require trial to proceed in the absence of the accused upon the accused's voluntary absence."[53] Hence, a military judge can make findings of fact regarding the voluntariness of the accused's absence and decide whether the court-martial should proceed. Finally, the military judge has wide discretion in allowing recesses or continuances before proceeding with trial *in absentia*.[54] A more recent case illustrates the challenges in establishing relevant facts for trying an absent accused.

United States v. Asif provides a typical fact pattern for trying an accused *in absentia*.[55] Asif was in an AWOL status at the time of trial.[56] Before his absence, he was present for arraignment and another pretrial hearing; at both proceedings, the military judge warned the accused that trial could proceed in his absence.[57] In order to show the accused was voluntarily absent, the Government called an agent from Naval Criminal Investigative Service (NCIS) who testified that he attempted to locate the accused without success.[58] The trial counsel also contacted Asif's uncle and mother, who said they did not know where to find him.[59] Although the record is unclear about how the trial counsel obtained this information, he further proffered that the accused had met with his civilian defense counsel, cancelled a later appointment with counsel, and then missed another appointment because of car trouble.[60]

In a unanimous, unpublished decision, the NMCCA found these facts sufficient to show the accused was voluntarily absent from trial.[61] However, the court added questionable and unnecessary legal analysis in arriving at its

[48] MCM, *supra* note 4, R.C.M. 804(c) discussion ("The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary.").

[49] United States v. Bolden, No. 95-00456, 1996 CCA LEXIS 553, at *10–11 (N-M. Ct. Crim. App. Apr. 19, 1996) (per curiam) (unpublished) ("The *Sharp* court also recognized that in order to preclude trial *in absentia*, the burden of proof is on [the] accused to demonstrate that he did not voluntarily absent himself from the proceedings.") (citing United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); United States v. Abilar, 14 M.J. 733, 735 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 324 (C.M.A. 1983)), *review denied*, No. 96-0891, 1996 CAAF LEXIS 505 (C.A.A.F. July 29, 1996).

[50] United States v. Stewart, 37 M.J. 523, 525 (A.C.M.R. 1993) ("Absence alone warrants a finding of voluntariness if there are no circumstances indicating the contrary.") (citing United States v. Peebles, 3 M.J. 177, 179 (C.M.A. 1977); United States v. Cook, 43 C.M.R. 344 (C.M.A. 1971)).

[51] *See Sharp*, 38 M.J. at 38 n.1 (Wiss, J., concurring in part and in the result) ("I have some concern that the majority opinion—speaking as it does in terms of a defense 'burden of going forward' and concluding as it does 'that the defense' here 'did not meet this burden,'—might mislead a reader into thinking that voluntariness may be presumed.") (quoting *Sharp*, 38 M.J. at 37).

[52] MCM, *supra* note 4, R.C.M. 804(c) discussion ("Where there is some evidence that an accused who is absent for a hearing or trial may lack mental capacity to stand trial, capacity to voluntarily waive the right to be present for trial must be shown.") (citing *id.* R.C.M. 909). The Court of Military Appeals held that "mere absence" does not justify a finding that the accused's absence is voluntary when there is evidence of mental illness that could have triggered the absence. *Peebles*, 3 M.J. at 179 (discussing *Cook*, 43 C.M.R. 344).

[53] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[54] *Id.* ("When an accused is absent from trial after arraignment, a continuance or a recess may be appropriate, depending on all the circumstances."). *See also* United States v. Aldridge, 16 M.J. 1008, 1010 (A.C.M.R. 1983) (military judge's decision to grant or deny continuance after accused's absence is reviewed for abuse of discretion, and requires balancing accused's right to be present against cost and inconvenience to government, witnesses, and court).

[55] No. 200601040, 2009 WL 1285528 (N-M. Ct. Crim. App. May 7, 2009) (unpublished), *review denied*, 68 M.J. 401 (C.A.A.F. 2009).

[56] *Id*. at *1.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*. at *8. The court summarily rejected an argument on appeal that the accused was possibly absent for trial because the original trial date was moved ahead one day; this argument carried little weight as the accused continued to be absent on the second day of trial (when the court-martial was previously set to begin). *Id*. at *2 ("[E]ven if the appellant was somehow unaware that his court-martial was to begin on 13 August 2001, he, nevertheless, failed to appear the following day, 14 August 2001, when he claims his court-martial was scheduled to begin.").

decision. First, the court ruled that once an accused is not present at trial, the defense bears the burden of offering evidence to refute the inference that the absence is voluntary.[62] As discussed above, this burden shift to the defense is likely contrary to the rule, which directs that the Government bears the burden of proof by a preponderance of the evidence.[63] Second, the NMCCA noted that the military judge held that "the case law created an affirmative duty" on the accused to "stay in touch with his counsel, and keep apprised of developments regarding his case once RCM 804 warnings are issued."[64] The appellate court neither expressly adopted nor rejected the military judge's conclusion. This approach is also problematic, as the waiver of a constitutional right must be knowing and voluntary, as opposed to a mere failure to coordinate with counsel.[65]

Much less common, an accused may affirmatively waive the right to be present for trial without leaving the area. The discussion section to RCM 804 notes an accused may "expressly waive" the right to be present, even though there is no recognized right to be absent from one's court-martial.[66] While not binding, the discussion provides this sage guidance that encourages the Government to require the accused be present, even if the accused attempts to waive that right:

> The right to be present is so fundamental, and the Government's interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right, and the consequences of foregoing it, and secures the accused's personal consent to proceeding without the accused.[67]

Because the right to be present at trial is grounded in the Constitution, an accused's waiver of that right must be knowing and voluntary.[68]

There are several practice pointers from these cases to assist military judges and practitioners when an accused is absent after arraignment. First, courts have not established a minimum time for an absence that allows for trial *in absentia* under RCM 804. As the Air Force Court of Criminal Appeals (AFCCA) has noted, there is no "witching hour before which the military judge may not proceed."[69] The military judge is given latitude to determine the reasons for the accused's absence and then to decide if trial *in absentia* is appropriate.[70] Second, while not expressly required, military judges would be wise to warn the accused at the initial arraignment that the trial could proceed *in absentia* if the accused flees.[71] Such a warning may discourage an accused from fleeing the court-martial, or at least ensure that an absent accused understood the consequences before leaving the area. As set forth above, there is a strong argument that a lengthy break between arraignment and the court-martial would vitiate the inference that an accused is voluntary absent from trial.[72] Third, in making findings of fact, military judges would be wise to focus on evidence that the accused affirmatively waived the right to be present, rather than inferences or a speculative duty for the accused to maintain contact with counsel. When an accused waives the right to be present at trial by voluntarily leaving the area, that act necessarily includes waiver of due process and confrontation rights. The Supreme Court and the CAAF have reasoned that such a waiver must be knowing and voluntary, as opposed to mere forfeiture by inaction.[73] If the waiver is knowing and voluntary, an accused may waive substantial constitutional rights.[74]

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[62] *Id*. at *2 (citing United States v. Sharp, 38 M.J. 33, 37 (C.M.A. 1993)).

[63] *See supra* note 36 and accompanying text; *see also supra* note 51.

[64] *Asif*, 2009 WL 1285528, at *2.

[65] *See infra* notes 68, 73–74, and accompanying text.

[66] MCM, *supra* note 4, R.C.M. 804(c) discussion. The military judge can compel the accused's presence at trial, which may be necessary for in-court identification. *See* United States v. Lumitap, 111 F.3d 81, 84 (9th Cir. 1997) (holding that government can compel defendant's presence for in-court identification); United States v. Durham, 587 F.2d 799, 800 (5th Cir. 1979) (holding that the judge did not abuse discretion by ordering defendants' presence in court when necessary for witnesses to identify them).

[67] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[68] *See* Cohen v. Senkowski, 290 F.3d 485, 491 (2d Cir. 2002) (discussing criminal defendant's right to be present at trial and noting "waiver of this constitutional right 'must be both knowing and voluntary'") (quoting United States v. Fontanez, 878 F.2d 33, 36 (2d Cir. 1989)), *cert. denied*, 537 U.S. 1117 (2003).

[69] United States v. Lane, 48 M.J. 851, 857 (A.F. Ct. Crim. App. 1998); *see also id*. ("We decline to establish any brightline rule for how long is long enough to justify proceeding without the accused.").

[70] *Id*. ("[W]e leave that determination to the discretion of the military judge with the reminder to consider the number of prior delays granted, the timeliness and stage in the proceedings at which the continuance is requested, and the completeness of the military judge[']s inquiry into the reasons for the requested continuance.") (citations omitted).

[71] *See* United States v. Bass, 40 M.J. 220, 223 n.4 (C.M.A. 1994) ("We agree that it would be a good practice at arraignment for military judges to warn a defendant of the consequences of a voluntary absence."). The *Military Judges' Benchbook* provides a suggested advisement following arraignment:

> An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every stage of your trial. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled even if you were not present, up to and including sentencing, if necessary.

U.S. DEP'T OF THE ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-7-26, at 152 (Jan. 1, 2010) [hereinafter BENCHBOOK].

[72] *See supra* note 46 and accompanying text.

[73] United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting Johnson v. Zerbst, 304 U.S.

Once an accused is voluntarily absent, the court-martial will proceed at the procedural posture of the case at the time of the accused's absence. If the accused leaves after arraignment and before entering a plea, the military judge is required to enter a plea of "not guilty" on the accused's behalf.[75] If the accused has not made forum election, the court will proceed with an officer panel.[76] If the accused has properly made forum election before fleeing, the court-martial can proceed with that election.[77] If the accused has entered a plea of guilty but did not successfully complete the providence inquiry before his absence, the military judge must enter a plea of "not guilty" on the accused's behalf and the Government may proceed with a contested trial.[78] Finally, if the case is tried before members, the military judge should instruct the panel to draw no negative inference from the accused's absence, using the suggested language from the *Benchbook*.[79]

If the accused returns during the trial, the military judge would be wise to give the defense an opportunity to present additional matters. In *United States v. Jackson*, the accused absented himself after arraignment, was tried *in absentia*, and then was apprehended while the members were deliberating on the merits.[80] The military judge advised the accused that the defense could reopen its case and provide additional evidence to the members; the accused declined.[81] Following this summary, the appellate court noted with approval that the accused's "interests were protected throughout this court-martial despite his own misconduct."[82]

When a military accused is tried *in absentia*, it is normally because he has fled the area following arraignment, effectively waiving the right to be present for the rest of the court-martial. Though less common in military courts, an accused may also be tried *in absentia* if the military judge orders removal based on disruptive conduct.

V. Removal for Disruption

Should I stay or should I go, now?
If I go there will be trouble
And if I stay it will be double.
So you gotta let me know
Should I stay or should I go?[83]

Under RCM 804(c)(2), following arraignment, an accused may be tried *in absentia* if he "[a]fter being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom."[84] The discussion notes that to be disruptive, the

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458, 464 (1938)); United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *Olano*, 507 U.S. at 733.).

[74] *Gladue*, 67 M.J. at 314 ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.") (quoting United States v. Mezzanatto, 513 U.S. 196, 201 (1995)).

[75] MCM, *supra* note 4, R.C.M. 910(b) ("If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.").

[76] *Id.* R.C.M. 903(c)(3) ("In the absence of a request for enlisted members or a request for trial by military judge alone, trial shall be by a court-martial composed of officers."); *id*. R.C.M. 903(c)(2)(A) discussion ("Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding.").

[77] United States v. Amos, 26 M.J. 806, 809, 810–11 (A.C.M.R. 1988) (accused provided written request for trial by panel of officer and enlisted members, absented himself, and defense counsel then stated the accused actually wished to be tried by military judge alone; military judge properly denied the request and directed trial in accordance with written request).

[78] *Id.* at 809 n.2 (concurring with military judge's assessment that an absent accused cannot plead guilty as judge cannot advise an absent accused, there is no way to ensure the accused understands the meaning and effect of the plea and is entering voluntary plea, and the military judge cannot elicit a factual basis from the accused). *See also* MCM, *supra* note 4, R.C.M. 910(c)–(e) (listing same requirements for guilty plea inquiry).

[79] The recommended instruction admonishes panel members that the accused's absence may not be used in any way during the merits or presentencing phases of trial:

> You are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inference adverse to the accused because (he) (she) is not appearing personally before you. You may neither impute to the accused any wrongdoing generally, nor impute to (him) (her) any inference of guilt as respects (his) (her) nonappearance here today. Further, should the accused be found guilty of any offense presently before this court, you must not consider the accused's nonappearance before this court in any manner when you close to deliberate upon the sentence to be adjudged.

BENCHBOOK, *supra* note 71, para. 2-7-23, at 146 (Jan. 1, 2010). The military judge should not tell members that the absence is unauthorized. *See* United States v. Minter, 8 M.J. 867, 868–69 (N.C.M.R. 1980) (finding military judge erred by instructing members that an accused's absence was "unauthorized" before proceeding with trial *in absentia*), *aff'd*, 9 M.J. 397 (C.M.A. 1980) (summary disposition). *Minter* recommends military judges advise the members that the accused has waived his right to be present and that the absence cannot be held against the accused. *Id*. at 869. *But cf.* United States v. Lane, 48 M.J. 851, 858 (A.F. Ct. Crim. App. 1998) (affirming military judge's decision to admit Air Force form at presentencing that indicated accused was in unauthorized absence status during dates of trial, as personnel record relating to character of service under RCM 1001(b)(2)), *review denied*, 51 M.J. 322 (C.A.A.F. 1999).

[80] 40 M.J. 620 (N.M.C.M.R. 1994), *review denied*, 42 M.J. 18 (C.A.A.F. 1994).

[81] *Jackson*, 40 M.J. at 625.

[82] *Id.*

[83] THE CLASH, *Should I Stay or Should I Go*, *on* COMBAT ROCK (Epic 1982).

[84] MCM, *supra* note 4, R.C.M. 804(c)(2). The language in the rule is similar to the Supreme Court's conclusions regarding the removal of a civilian defendant who disrupts proceedings.

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, *after he has been warned by the judge that he will be removed* if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court

conduct must "materially interfere" with the court-martial.[85] While there is scant military case law on removing an accused for disruption, civilian courts have uniformly held mere disruption is not sufficient, but rather the defendant's conduct must be so extreme as to hinder the proceedings.[86]

In *United States v. Ward*, a civilian defendant, charged with production and possession of child pornography, was improperly removed for disruption.[87] The Eighth Circuit Court of Appeals found that the defendant was denied his constitutional right to be present at trial, so it reversed and remanded for a new trial.[88] The facts leading up to the defendant's removal suggest he was disruptive and mildly erratic. Before the federal trial began, Arkansas authorities charged the defendant with rape; he was convicted and sentenced to life in prison before the federal child pornography case was tried.[89] At the federal trial, the defendant agreed to plead guilty, but filed several written objections that caused the judge to reject the plea.[90] The judge ordered a mental examination of the defendant, which concluded he was mentally responsible and could assist in his own defense; however, the mental evaluation noted, "behavioral issues are considered likely, given various statements by the defendant of 'fireworks' in the court."[91] This prediction proved to be entirely accurate.

At his next court appearance, the defendant complained he was not allowed to bring legal papers from the jail and defense counsel grumbled that the defendant was "going off on tangents."[92] The judge directed the prosecutor to provide the defendant's legal papers to defense counsel.[93] Before voir dire began, defendant "repeatedly" interrupted defense counsel and the court.[94] The judge directed the defendant "to write out what you want to tell your lawyer . . . because if you've been in his ear, he can't listen to me."[95] The defendant responded that he needed to speak to his counsel to ensure objections were made in a timely manner.[96] The judge then told the defendant, "If you interrupt me again if you talk again without going through your lawyer, I'm going to send you to a cell and you can hear the trial from there."[97] A few moments later, the judge admonished the defendant for speaking to his counsel too loudly and then had the defendant removed.[98]

After removal, defense counsel suggested the judge give the defendant time to "cool down."[99] The court overruled the request and proceeded to jury selection with the defendant absent.[100] After jury selection, the judge directed defense counsel to tell the defendant that he could return if he would

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> that his trial cannot be carried on with him the in the courtroom.

Illinois v. Allen, 397 U.S. 337, 343 (1970) (emphasis added). *See also id.* at 350 (Brennan, J., concurring) ("Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior."); 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 13–17 (3d ed. 2006) ("Before taking any action, the military judge must warn the accused of the possible consequences of misconduct in the courtroom.").

[85] MCM, *supra* note 4, R.C.M. 804(c) discussion ("In order to justify removal from the proceedings, the accused's behavior should be of such a nature as to materially interfere with the conduct of the proceedings.").

[86] *See* Tatum v. United States, 703 A.2d 1218, 1223 (D.C. 1997) ("Several federal and state courts, however, have held that under *Illinois v. Allen*, a defendant may constitutionally be excluded from the courtroom during the testimony of a witness only when his behavior is extreme, abusive, disrespectful, or likely to hinder seriously the progress of the trial. Behavior that is merely disruptive is insufficient under *Allen* to justify removal.") (citing *Allen*, 397 U.S. 337); *see also* Hasan v. Gross, Nos. 13-8011, 13-8012, 2012 WL 6050349 (C.A.A.F. 2012) (per curiam) (stating in dicta that there was insufficient showing on the record that an accused who had been removed for disruption had "materially interfered with the proceedings" by growing and displaying a beard in violation of both Army grooming standards and an order from the court to shave) (citing MCM, *supra* note 4, R.C.M. 804 discussion).

[87] 598 F.3d. 1054 (8th Cir. 2010).

[88] *Id*. at 1056, 1060.

[89] *Id.* at 1056.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* The defendant told the trial judge: "The being quiet I got a problem with . . . . The last time they tell me to be quiet, then they want to later say, because I didn't say something, then I can't object to it later." *Id*. (alteration in original).

[97] *Id.*

[98] *Id*. The opinion provided this summary:

> THE COURT: We can hear you talking up here [Mr. Ward]. Everybody in the courtroom can hear you talking and I've told you to write or be quiet.
>
> THE DEFENDANT: I'm talking to my attorney.
>
> THE COURT: You can write him a note.
>
> THE DEFENDANT: I can't do that, Your Honor. If you have someone I can dictate to and have them write it, because I can't do it.
>
> THE COURT: Are you ready to go to the lock-up?
>
> THE DEFENDANT: You can do whatever you want.
>
> THE COURT: Let's move him—he won't hush—over his objection.
>
> THE DEFENDANT: You cannot go further in this case without me present. I prohibit you to do it. You are not to go any further with any of my defense. You have to wait until I'm here. If he won't bring me –
>
> (Defendant removed from courtroom.)

Id. at 1056-57 (alterations in original).

[99] *Id*. at 1057.

[100] *Id.*

"pledge" not to speak out loud and only communicate in writing with counsel.[101] Before trial began in the afternoon, defense counsel told the judge the defendant could not comply with the court's requirements.[102] On the second day of trial, defense counsel renewed his objection to the defendant's absence from proceedings but also stated, "I don't see there's any way he could guarantee that he'd be quiet."[103] On the third day of trial (which consisted of instructions, closing arguments, and deliberations), there was no discussion in the record of the defendant returning to the courtroom.[104] During deliberations, the jury asked the court why the defendant was not present.[105]

The Eighth Circuit emphasized that a criminal defendant has a constitutional right to be present throughout the trial.[106] Relying on the Supreme Court's decision in *Illinois v. Allen*, the court found this right can be waived if the defendant's conduct is sufficiently disorderly to stop the proceedings.[107] In this case, the defendant had not threatened anyone and was not violent. The court noted a judge "clearly has discretion to take firm action" when courtroom safety is at issue.[108] When a defendant is removed for disruption alone, the judge is afforded less discretion.[109] In this case, the judge erred by (1) issuing an "absolute ban" on the defendant speaking to his counsel, a possible violation of the right to counsel; and (2) not personally advising the defendant about his right to return if he could "conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."[110]

The Government alternatively argued that the defendant's absence, if error, was harmless.[111] Because this error violated a constitutional right, the Government had to prove the error was harmless beyond a reasonable doubt.[112] In rejecting the Government argument, the Eighth Circuit noted the defendant was not able to assist in jury selection, confront the witnesses and evidence against him, or be "brought face to face with the jurors at the time when the challenges were made."[113] The jurors also inquired during deliberations about the defendant's absence.[114] While this laundry list was enough to show prejudice, the court added: "If more concrete harm than this is needed, which we strongly doubt, we note that the video of the twelve-year-old girl was the sole basis for Ward's conviction of *producing* child pornography, for which he received a 300-month sentence . . . . As described at trial, it [the video] includes nudity but appears not to depict 'sexually explicit conduct' as defined in 18 U.S.C. § 2256(2) as a matter of law."[115] Finally, the Eighth Circuit soundly reasoned that the defendant's improper removal also obliterated his right to testify, a fundamental constitutional right that only the defendant may waive.[116] Defendant had "repeatedly asserted" that the Government tampered with video evidence, which suggested he may have testified even if counsel advised him to the contrary.[117] More interestingly, the court suggested the defendant could not have *knowingly* waived his right to testify, as he was not present when the video was shown to the jury.[118]

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[101] *Id*. The trial judge offered the following to the defense counsel:

> I'd like for you to visit with your client and if he can pledge to you that he will act right . . . not be talking out loud and if he will communicate with you in writing when you're trying to listen to witnesses and me and the other lawyer and everything, that I will allow him to come back in the courtroom.

Id.

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*. ("The Supreme Court has long held that, 'One of the most basic of the rights guaranteed by the Confrontation Clause [of the Sixth Amendment] is the accused's right to be present in the courtroom at every stage of his trial.'") (quoting Illinois v. Allen, 397 U.S. 337, 338 (1970)) (alteration in original); *id.* at 1057–58 ("The right to be present, which has a recognized due process component, is an essential part of the defendant's right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence.").

[107] *Id*. at 1058 (rejecting government argument that defendant's behavior warranted removal, concluding "that argument pays too little heed to the narrower *holding* in *Allen*—a defendant may be removed if he 'insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court *that his trial cannot be carried on with him in the courtroom.*'") (quoting *Allen*, 397 U.S. at 343) (emphasis added by court).

[108] *Id.* at 1059.

[109] *Id*.

[110] *Id*. The court held the trial judge should have personally addressed the accused about his right to return to court; it was not sufficient to use defense counsel as a conduit for this advisement. *Id*.

[111] *Id*. at 1060.

[112] *Id*. (citing United States v. Shepherd, 287 F.3d 965, 968 (8th Cir. 2002)).

[113] *Id*. *See also* Tatum v. United States, 703 A.2d 1218, 1224 (D.C. 1997) (reasoning that erroneous removal of criminal defendant during witness testimony "can almost never be harmless" because it violates confrontation rights).

[114] *Ward*, 598 F.3d at 1057, 1060.

[115] *Id*. at 1060.

[116] *Id*. at 1059 (citing Rock v. Arkansas, 483 U.S. 44, 49, 51-52 (1987)).

[117] *Id*.

[118] In dicta, the court questioned, "[H]ow could Ward's waiver be knowing when he had not seen the version of the tape viewed by the jury, and how could the court be satisfied that defense counsel's resting without putting on any evidence reflected Ward's *personal* waiver of his constitutional right to testify?" *Id.* at 1059 (emphasis in original).

Ward is notable because it illustrates the challenges for defense counsel in representing a contumacious accused. At the time of trial, the defendant had already been sentenced to life in Arkansas state court on a separate charge, so he had little to lose at the federal trial.[119] The court correctly opined that both the judge and defense counsel probably preferred to try the case without the defendant, but the Constitution compels a different result:

> [B]oth defense counsel and the judge wanted to be free of Ward's interruptions. Ward's absence no doubt ensured a smoother trial, probably to Ward's ultimate advantage. But the defendant's right to be present at trial is a more powerful, constitutionally mandated concern. *A defendant's constitutional right to be present at his trial includes the right to be an irritating fool in front of a jury of his peers*.[120]

Defense counsel should have continually objected to trial in the accused's absence. Because the defendant's disruptions were too minor to warrant his removal from the courtroom, the Eighth Circuit reversed the case and remanded for a new trial.

When an accused is so disruptive that he substantially interferes with the proceedings, the military judge can take certain remedial actions. As a threshold matter, the military judge must warn the accused that he may be removed for disrupting the proceedings and that the court-martial will continue in his absence.[121] In the rare case that an accused creates an immediate threat to courtroom safety, a warning may not be necessary before removal.[122] After warning the accused, the military judge may order the removal of an accused who continues to be disruptive, provided the disruptive conduct is so severe that it interferes with the proceedings.[123] The court may order the accused be physically restrained or segregated in the courtroom.[124] The discussion to RCM 804 advises, "The military judge should consider alternatives to removal of a disruptive accused."[125] However, it is not mandatory for the military judge to attempt alternatives before removing a disruptive accused.[126] In deciding between these options, the military judge should consider the *Manual*'s guidance that "[r]emoval may be preferable to such an alternative as binding and gagging, which can be an affront to the dignity and decorum of the proceedings."[127] The American Bar Association similarly recommends removal over restraining the accused.[128] As a practical matter, it may be less prejudicial for a disruptive accused to be removed, rather than sitting before the factfinder bound and gagged.[129] Further, a shackled accused would have difficulty communicating with counsel, which is otherwise one of the principal benefits of remaining in the courtroom during trial.[130]

Once an accused has been removed from the court-martial for disruption, the military judge has several matters to address. In terms of protecting the accused's rights, the military judge should liberally allow recesses for defense counsel to consult with the accused, periodically advise the accused that he may return so long as he is not disruptive, and, if possible, allow the accused to observe the proceedings by closed-circuit feed or otherwise listen to the proceedings.[131] The American Bar Association has a similar

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[119] *Id*. at 1056.

[120] *Id.* at 1059 (emphasis added).

[121] MCM, *supra* note 4, R.C.M. 804(c)(2). *See also* Gray v. Moore, 520 F.3d 616, 624 (6th Cir. 2008) (analyzing Supreme Court and circuit court cases and determining a trial court must give unruly defendant "one last chance to comply with courtroom civility" before ordering removal). If the accused has elected trial before members, the military judge should warn the accused during an Article 39(a) session without members present in order to prevent any improper inferences against the accused.

[122] *See Ward*, 598 F.3d at 1059 ("A trial judge with a legitimate concern for safety in the courtroom faces a very different situation and clearly has discretion to take firm action.") (citing Bibbs v. Wyrick, 526 F.2d 226, 227–28 (8th Cir. 1975), *cert. denied*, 425 U.S. 981 (1976)).

[123] MCM, *supra* note 4, R.C.M. 804(c)(2); *id.* R.C.M. 804(c) discussion ("Trial may proceed without the presence of an accused who has disrupted the proceedings, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom."). *See also* 1 GILLIGAN & LEDERER, *supra* note 84, at 13–17 ("Given such a warning, an accused who continues to misbehave in a fashion that makes it 'difficult or wholly impossible to carry on the trial' may be excluded from trial or restrained.") (quoting Illinois v. Allen, 397 U.S. 337, 338 (1970)) (footnotes omitted); Captain Steven F. Lancaster, *Disruption in the Courtroom: The Troublesome Defendant*, 75 MIL. L. REV. 35, 40 (1977) ("A minor disruption of a nonviolent character, such as a single profane word or gesture may prompt the judge to delay taking action . . . . On the other hand, a judge can warn the defendant concerning his conduct at the time it takes place, with the hope that such a warning will inhibit future misconduct.").

[124] MCM, *supra* note 4, R.C.M. 804(c) discussion ("Such alternatives include physical restraint (such as binding, shackling, and gagging) of the accused, or physically segregating the accused in the courtroom.").

[125] *Id.*

[126] *Id.* ("Such alternatives need not be tried before removing a disruptive accused under subsection (2).").

[127] *Id.*

[128] *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-3.8, at 65 (3d ed. 2000) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] ("Removal is preferable to gagging or shackling the disruptive defendant.").

[129] *See* Illinois v. Allen, 397 U.S. 337, 344 (1970) ("[T]he sight of shackles and gags might have a significant effect on the jury's feelings about the defendant . . . .").

[130] *Id*. ("Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.").

[131] MCM, *supra* note 4, R.C.M. 804(c) discussion. The discussion provides these suggestions:

> When the accused is removed from the courtroom for disruptive behavior, the military judge should—(A) Afford the accused and defense counsel ample opportunity to consult throughout the proceedings. To this end, the accused should be held or otherwise

framework for handling a disruptive civilian defendant.[132] As set forth in *United States v. Ward*, the military judge should also advise the accused of his right to testify and have the accused make an election on the record.[133] While it may go without saying, the military judge should also "[e]nsure that the reasons for removal appear in the record."[134] Finally, if the case is tried before members, the military judge should instruct the panel to draw no negative inference from the accused's absence.[135]

The disruptive accused seems to be rare in military practice. The military judge faced with such an accused should follow guidance from federal courts and only remove a disruptive accused as a last resort. The *Ward* decision provides useful guidelines for addressing a disruptive accused while also ensuring a fair trial. The trial of an absent accused implicates important constitutional protections and there are still some open issues in this area.

VI. Open Issues

For practitioners and military judges, there are two potentially problematic areas when trying an accused *in absentia*. The first area concerns presentencing evidence. For defense counsel, the CAAF has held that privileged information may not be disclosed in a trial *in absentia* unless the accused has previously consented.[136] The court even extended this rule to include the accused's unsworn statement, so defense counsel is barred from offering privileged information during presentencing even if it is in the accused's best interest.[137] Defense counsel should also be cautioned against submitting post-trial matters discussing the accused's absence.[138] For trial counsel at presentencing, there is some authority for admitting personnel records showing the accused's unauthorized absence during trial, though the *Benchbook* instruction directs the panel to disregard the accused's absence during sentencing deliberations.[139] This creates a fine line that allows evidence of the absence to be admitted, though the panel may only consider it for rehabilitative potential.[140] The trial counsel may also cross-examine defense character witnesses on the

> required to remain in the vicinity of the trial, and frequent recesses permitted to allow counsel to confer with the accused.
> (B) Take such additional steps as may be reasonably practicable to enable the accused to be informed about the proceedings. Although not required, technological aids, such as closed-circuit television or audio transmissions, may be used for this purpose.
> (C) Afford the accused a continuing opportunity to return to the courtroom upon assurance of good behavior. To this end, the accused should be brought to the courtroom at appropriate intervals, and offered the opportunity to remain upon good behavior.

Id. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 128, at Standard 6-3.8, cmt., at 66 ("[W]hen practical, the removed defendant should be permitted to hear and observe the proceedings through audio / visual equipment."). *See also Allen*, 397 U.S. at 351 (Brennan, J., concurring) ("[W]hen a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, keep apprised of the progress of his trial."); 1 GILLIGAN & LEDERER, *supra* note 84, at 13–18 ("The accused should be permitted to return to trial after a promise to comply with normal standards of behavior.") (footnote omitted).

[132] The ABA Criminal Justice Standards Committee provides:

> Standard 6-3.8. The disruptive defendant
>
> A defendant may be removed from the courtroom during trial when the defendant's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. The removed defendant ordinarily should be required to be present in the court building while the trial is in progress. The removed defendant should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed defendant who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 128, at 65.

[133] United States v. Ward, 598 F.3d. 1054, 1059 (8th Cir. 2010). In dicta, the court questioned, "[H]ow could Ward's waiver be knowing when he had not seen the version of the tape viewed by the jury, and how could the court be satisfied that defense counsel's resting without putting on any evidence reflected Ward's *personal* waiver of his constitutional right to testify?" *Id.* at 1059 (emphasis in original).

[134] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[135] *See supra* note 79 and accompanying text.

[136] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). The CAAF reasoned:

> Therefore, if an accused is absent without leave his right to make an unsworn statement is forfeited unless prior to his absence he authorized his counsel to make a specific statement on his behalf. Although defense counsel may refer to evidence presented at trial during his sentencing argument, he may not offer an unsworn statement containing material subject to the attorney-client privilege without waiver of the privilege by his client.

Id. at 210. *See also* MCM, *supra* note 4, MIL. R. EVID. 511(a) ("Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.").

[137] *Marcum*, 60 M.J. at 210. For a more detailed analysis of the privilege issues facing defense counsel representing an absent accused, see Francis A. Gilligan & Edward J. Imwinkelried, *Waiver Raised to the Second Power: Waivers of Evidentiary Privilege Representing Accused Being Tried* in Absentia, 56 S.C. L. REV. 509 (2005).

[138] Courts have used the accused's post-trial submissions to confirm that the accused was voluntarily absent. United States v. Stewart, 37 M.J. 523, 526 n.1 (A.C.M.R. 1993) ("In his petition for clemency pursuant to R.C.M. 1105, the appellant admitted that he left his unit on 17 December 1991 to avoid trial.").

[139] *See supra* note 79 and accompanying text.

[140] United States v. Lane, 48 M.J. 851, 859 (A.F. Ct. Crim. App. 1998).

absence as a specific instance of misconduct, though extrinsic evidence may not be admitted for this purpose.[141]

The second nebulous area concerns appellate review of trial *in absentia* cases and whether errors are jurisdictional in nature or subject to harmless error analysis. As discussed in Part III section of this article, *United States v. Price* ruled that an accused was improperly tried *in absentia* because the military judge did not complete the arraignment before the accused fled.[142] Notably, the defense counsel did not object at trial, so the CAAF may have treated the defective arraignment as jurisdictional in nature.[143] Outside from defects in the arraignment, other errors in trying an accused *in absentia* are clearly subject to a harmless error analysis. The analysis to RCM 804 notes that the accused's absence from trial is "not jurisdictional" and that erroneously conducting a trial in the accused's absence may be harmless in some circumstances.[144] However, the analysis also notes that such an error will "normally require reversal."[145] In an unpublished decision, the AFCCA found that a military judge erred by conducting a five-minute Article 39(a) session in the accused's absence, though the error was "harmless beyond a reasonable doubt" on the facts of the case.[146] Federal courts have similarly applied this legal standard to determine if a defendant's absence from trial warrants appellate relief.[147] In considering whether erroneous removal amounted to harmless error, appellate courts review the portions of the trial the defendant did not attend. It will normally constitute prejudicial error if the defendant is improperly removed during the testimony of government witnesses,[148] during voir dire of members,[149] or during instructions to the members.[150] Because an appellate court will likely find prejudice if an accused is erroneously tried *in absentia*, judges and practitioners should proceed with caution.

VI. Conclusion

Like many areas of the law, the rules for trial *in absentia* balance conflicting interests. An accused has the right to confront witnesses and assist in his own defense under the Confrontation Clause and Due Process Clause. As the Supreme Court has correctly observed, "courts must indulge every reasonable presumption against the loss of constitutional rights."[151] During a trial *in absentia*, the accused has effectively lost the right to confront witnesses, to consult with counsel, and to present a defense. At the same time, it would be unjust if the accused were able to paralyze the court-martial process by fleeing the area or

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[141] *Id*. at 858 (citing United States v. Wingart, 27 M.J. 128, 136 (C.M.A. 1988)).

[142] United States v. Price, 48 M.J. 181 (C.A.A.F. 1998).

[143] *See* United States v. Jungbluth, 48 M.J. 953 (N-M. Ct. Crim. App. 1998) (citing *Price* for "technical violation of court-martial rule on trial *in absentia* held jurisdictional").

[144] MCM, *supra* note 4, R.C.M. 804 analysis, at A21-46 (discussing RCM 804(a) and noting, "The requirement that the accused be present is not jurisdictional"); *id.* (discussing RCM 804(a) and noting, "While proceeding in the absence of the accused, without the express or implied consent of the accused, will normally require reversal, the harmless error rule may apply in some instances.") (citing United States v. Walls, 577 F.2d 690 (9th Cir.) *cert. denied*, 439 U.S. 893 (1978); United States v. Nelson, 570 F.2d 258 (8th Cir. 1978); United States v. Taylor, 562 F.2d 1345 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977)).

[145] *See* MCM, *supra* note 4, R.C.M. 804 analysis, at A21-46 (discussing RCM 804(a)).

[146] United States v. Minor, ACM S30801, 2006 WL 2268868 (A.F. Ct. Crim. App. July 26, 2006) (unpublished), *review. denied*, 64 M.J. 237 (C.A.A.F. 2006). The military judge erroneously conducted a five-minute Article 39(a) session with counsel in the accused's absence. *Id.* at *1. The military judge had recessed the court-martial for lunch until 1300; at 1245, an Article 39(a) session was held regarding panel instructions. *Id.* The accused was not present but his defense counsel said he was prepared to discuss instructions in his client's absence. *Id.* The military judge noted the accused was "probably still at lunch" and proceeded with the session. *Id.* The military judge and counsel discussed the findings instructions and findings worksheet and then concluded at 1250. *Id.* When court reconvened at 1300, the accused was present. *Id.* The Air Force Court Criminal Appeals found that conducting the session without the accused violated Article 39(b), as well as the accused's constitutional right to be present during trial: The court noted the legal standard, "Since this error was of a constitutional dimension, the test is whether the reviewing court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Id.* at *2 (quoting United States v. Bins, 43 M.J. 79, 86 (C.A.A.F. 1995) (quoting Chapman v. California, 386 U.S. 18, 24 (1967))). On these facts, the AFCCA found the error was harmless beyond a reasonable doubt. *Id.* Specifically, the Article 39(a) session only lasted five minutes; the instructions were standard for a wrongful use case; the accused was present when the instructions were read to the panel and did not object to the instructions; the findings worksheet included a single charge and specification with no lesser-included offenses; and counsel did not object to the instructions at trial or argue on appeal that additional instructions were warranted. *Id*. Practitioners should note that the AFCCA correctly ruled that defense counsel could not waive an accused's "statutory and constitutional right" to be present. *Id*. at *1.

[147] *See* United States v. Toliver, 330 F.3d 607, 611 (3d Cir. 2003) ("Other circuit courts have more directly (and more recently) addressed whether a violation of a defendant's constitutional and statutory rights to be present in all trial phases is properly subject to harmless error analysis, with many concluding that it is.") (citing United States v. Rosales-Rodriguez, 289 F.3d 1106, 1111 (9th Cir. 2002); United States v. Sylvester, 143 F.3d 923, 928–29 (5th Cir. 1998); United States v. Coffman, 94 F.3d 330, 335–36 (7th Cir. 1996); United States v. Gomez, 67 F.3d 1515, 1528 (10th Cir. 1995); United States v. Harris, 9 F.3d 493, 499 (6th Cir. 1993)).

[148] *See* Tatum v. United States, 703 A.2d 1218, 1224 (D.C. 1997) ("This court has expressly held that the erroneous exclusion of a defendant during the testimony of a witness can almost never be harmless because it infringes the defendant's rights under the Sixth Amendment.") (reversing case in which defendant was removed for a portion of a prosecution witness's testimony that lasted approximately thirty minutes).

[149] *See* Cohen v. Senkowski, 290 F.3d 485, 489 (2d Cir. 2002) (noting that defendant has constitutional right to be present during impaneling of jury).

[150] Larson v. Tansy, 911 F.2d 392, 395–96 (10th Cir. 1990). *Cf.* United States v. Henderson, 626 F.3d 326, 342–43 (6th Cir. 2010) (no prejudice when, after jury had been excused for deliberations, judge answered question from jury in open court in defendant's absence about recessing early for the weekend and instructed jurors to deliberate); United States v. Brika, 416 F.3d 514, 527 (6th Cir. 2005) (no prejudice when "the judge did nothing more than give the jurors a technical and perfunctory rereading or explanation of previously-given jury instructions" without defendant present).

[151] Illinois v. Allen, 397 U.S. 337, 343 (1970) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

disrupting trial. In limited circumstances, a trial should be able to continue without the accused. When considering a trial *in absentia*, the military judge should carefully balance the accused's right to be present against the government's interest in the timely administration of justice.[152] The framework under RCM 804 can guide this assessment and ensure the court-martial of an absent accused comports with constitutional and legal requirements.

[152] *See* Lancaster, *supra* note 123, at 39 ("[T]he judge must delicately balance the rights of the accused with the interest of society in the expedient, orderly process of justice. This is not an easy task, nor one which should be approached with less than total awareness of the interests involved.").

A Staking a Claim:
A Guide for Establishing a Government Property Affirmative Claims Program

Major Mary N. Milne[*]

Introduction

As a new judge advocate (JA) in the claims division, you are eager to learn your job and make a significant contribution to the organization. The civilians working in the office have been in their positions for a very long time and are experienced, knowledgeable, dedicated, and hardworking. They need little supervision and you are not sure how you will be able to positively affect this operation.[1] Determined to find a niche, you stumble upon a type of claim that no one appears to be pursuing actively—Government property affirmative claims.[2] Finally, an opportunity exists to stake your claim,[3] establish a new program, and make a lasting contribution.

Government property affirmative claims (property claims)[4] are claims asserted on behalf of the Government against tortfeasors for damage to Government property.[5] As a custodian of Government property, the U.S. Army has not only a statutory right, but also a duty to recover for damage to Government property.[6] In fiscal year 2011, U.S. Army claims offices asserted 715 property claims totaling almost $1.9 million. Although this figure gives the impression that the Army has an active property claims program, a further breakdown of asserted property claims reveals that most of the claims came from just a few offices. Only four claims offices asserted more than ten property claims; many asserted none.[7] Did offices that asserted few or no property claims not assert claims because there simply were few incidents of damage to Government property on their installations? Or, was it because property claims are too difficult to assert and presumably not worth the time and effort? The likely problem is that claims personnel are unaccustomed to asserting this type of claim and therefore rarely do.

Skim your installation's daily military police report (blotter) on any given day and you likely will find an incident involving damage to Government property. You might read about a contractor who lost control of his vehicle and brought down a chain-link fence, a Soldier who damaged protected wetlands while joyriding in a training area, a rowdy civilian who broke a window at the post club, or some minors who vandalized a building. All of these incidents involve a potential property claim.

With just a minimal investment of time and effort—and a dose of enthusiasm—you can assert a claim against these individuals for damaging Government property. As a claims JA, it is your responsibility to hold tortfeasors accountable for their acts while at the same time putting money back into the government's coffers.[8] Developing an active property claims program will fortify your relationships around the installation and enhance the image of your office and that of your Office of the Staff Judge Advocate (OSJA).[9] Once a framework is established, you can expand your program into a conspicuous recovery operation and make a lasting contribution to your office and the installation.

This article provides a claims JA with a simple guide for establishing a property claims program. It begins by laying out the statutory authority for property claims programs and then discusses the current state of programs in U.S. Army claims offices while suggesting why most claims offices do not have an established program. This article then guides the claims JA through the planning and implementing of a property claims program by concentrating on a type of claim

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[*] Judge Advocate, U.S. Army. Presently assigned as Officer in Charge, U.S. Forces-Afghanistan Det. Reach Back, Al Udeid Air Force Base, Qatar.

[1] Colonel R. Peter Masterton, *Claims Report, U.S. Army Claims Serv.: Claims Office Mgmt.*, ARMY LAW., Sept. 2011, at 48.

[2] Affirmative Claims Management Program, JAGCNET, https://www.jagcnet2.army.mil/8525768E0070D086/MainPageDefault?OpenForm [hereinafter ACMP] (last visited Jan. 9, 2013).

[3] The idiom to "stake a claim" comes "from the idea of marking land that is not owned by someone with stakes . . . to show it is yours." *Stake a Claim Definition*, THEFREEDICTIONARY, http://idioms.thefreedictionary.com/stake+a+claim (last visited Feb. 15, 2012).

[4] Government property affirmative claims are sometimes referred to as property damage recovery claims, damage recoveries, or affirmative property claims. This article refers to them as property claims.

[5] Property claims also include claims for loss to or destruction of Government property. U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 14-3 (21 Mar. 2008) [hereinafter DA PAM. 27-162].

[6] *Id.*

[7] U.S. Army Claims Service-Europe asserted 337 claims, Joint Base Lewis-McChord (JBLM) asserted 233 claims, U.S. Armed Forces Claims Services (USARCS) Korea asserted 38 claims, and Fort Drum asserted 11 claims. Twenty-seven offices asserted fewer than 10 claims and twenty-three asserted none. ACMP, *supra* note 2.

[8] Bases for Compromise, 31 C.F.R. § 902.2 (2006).

[9] Major Brown, *A System for Processing Motor Vehicle Claims*, ARMY LAW., Oct. 1989, at 41, 42. An excellent way to showcase your program is by completing a submission for TJAG's Excellence in Claims Award. The application is posted on JAGCNet and is due to USARCS by the end of January. Memorandum from U.S. Army Claims Serv., to Staff Judge Advocates and Heads of Area Claims Offices, subject: The Judge Advocate General's Excellence in Claims Award for FY 2012 (15 Nov. 2012), *available at* https://www.jagcnet2.army.mil/USARCS [hereinafter Claims Award Memo].

that is simple to assert and likely to generate a successful recovery—a small claim involving an insured motorist. Once JAs are comfortable with asserting small, simple claims, they can then expand their program by either addressing the backlog of potential claims; by uncovering other sources of potential claims; or by exploiting different methods of collection.

The Current State of Affirmative Claims

Before beginning a property claims program in your office, it is important to understand the statutory authority for asserting affirmative claims. By looking at the development of the medical affirmative claims (MAC) program, you can gain an understanding of the likely reasons why there is not already an established property claims program in your office and the foreseeable future rewards of establishing a program.

Rights, Duties, and Responsibilities

The American public entrusts the U.S. Army with protecting and guarding U.S. Government property in its custody. As a property owner, the U.S. Army often finds itself a victim of property damage and incurs costs associated with repair or replacement of such property.[10] Under these circumstances, the Army has not only a statutory right, but also a duty to pursue recovery for the costs associated with the damage to Government property.[11] United States Army claims offices are responsible for identifying and pursuing potential recovery incidents, also called affirmative claims.[12] An affirmative claim is a demand for payment under tort liability from an individual (or the insurer) asserted on behalf of the Government.[13] There are two types of affirmative claims: medical affirmative claims (MAC) and property claims.[14] This article touches briefly on MACs, but focuses primarily on property claims.

Congress requires federal agencies to recover money for loss, damage, or destruction of Government property through the Federal Claims Collection Act (FCCA) of 1966, as amended by the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996.[15] The implementing regulation is Army Regulation (AR) 27-20, *Claims*, supplemented by Department of the Army Pamphlet (DA Pam) 27-162, *Claims Procedures*.[16] These references provide the authority and guidance for pursuing and processing property claims. In 1989, The Judge Advocate General (TJAG) of the Army, Major General Hugh Overholt, highlighted the importance of the Army Affirmative Claims Program by issuing a policy memorandum requiring staff judge advocate (SJA) offices to "fully accomplish the affirmative claims mission."[17] The area of affirmative claims had risen to the attention of the highest levels of leadership in the Judge Advocate General's Corps.

Medical Affirmative Claims—A Success Story

Despite congressional mandate, implementing regulations, and emphasis by TJAG, it would take further legislation by Congress to jump-start affirmative claims programs in the Army. Beginning in 1994, Congress passed a series of laws which allowed claims offices to deposit medical recoveries into the accounts of medical treatment facilities and TRICARE,[18] and related lost wages recoveries to be deposited into the accounts of local commands.[19] This had a profound and immediate impact on the MAC program.[20] Prior to this legislation, claims offices deposited medical recoveries and lost wages recoveries into the miscellaneous receipts fund of the General Treasury—which made the funds unavailable to the organizations that had

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[10] *See* DA PAM. 27-162, *supra* note 5, para. 14-1(2)(a) (citing Cotton v. United States, 52 U.S. (11 How.) 229 (1850)) (discussing the United States' right to assert a claim as a property owner).

[11] Collection and Compromise, 31 U.S.C. § 3711 (2006).

[12] 32 C.F.R. § 537.6 (2006). The U.S. Army Claims Service, Tort Claims Division, Affirmative Claims Branch provides oversight, guidance, and training to U.S. Army claims offices. U.S. Army Claims Serv., *Affirmative Claims General Information*, JAGCNET, https://www.jagcnet.army.mil/8525752700444FBA/0/D11127BDAE6F4FE58525782C00461B19?opendocument (last visited Mar. 9, 2012).

[13] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS glossary, at 106 (8 Feb. 2008) [hereinafter AR 27-20].

[14] Medical affirmative claims (MAC) include military treatment facility claims, TRICARE claims, and lost wages claims. Thomas Kennedy, Chief, Affirmative Claims, U.S. Army Claims Serv. , Presentation at the U.S. Army Claims Serv. Affirmative Claims Conference: Affirmative Claims 101 (Sept. 19, 2011), *available at* https://www.jagcnet.army.mil/8525752700444FBA/0/E1B5C2FCC636D3658525790B0050C342?opendocument&noly=1 [hereinafter Affirmative Claims 101 Presentation].

[15] *See* The Federal Claims Collection Act (FCCA) of 1966, The Debt Collection Act of 1982, and the Debt Collection Improvement Act of 1996 (codified as 31 U.S.C. §§ 3711–3720 (2006)).

[16] AR 27-20, *supra* note 13, ch. 14; DA PAM. 27-162, *supra* note 5, ch. 14.

[17] Memorandum from The Judge Advocate General, U.S. Army, to Staff and Command Judge Advocates, subject: Army Affirmative Claims Program – Policy Memorandum 89-1 (12 Jan. 1989), *in* ARMY LAW., Mar. 1989, at 3 [hereinafter Affirmative Claims Policy Memo].

[18] Health Care Services Incurred on Behalf of Covered Beneficiaries: Collection from Third-Party Payers, 10 U.S.C. § 1095(b) (2006).

[19] Depositing of Collections, 32 C.F.R. § 537.14 (2006).

[20] Thomas Kennedy, *2009 Agreement with TRICARE*, ARMY LAW., Sept. 2011, at 40.

incurred the costs. With the new legislation, these organizations had a tangible reason for pursuing medical claims. Nonetheless, with a seemingly insurmountable backlog of claims and a constant loss of institutional knowledge, MAC programs struggled to keep up with new and existing claims.[21]

In the late nineties, the U.S. Army Claims Service (USARCS) identified and addressed the continuing problems hindering claims offices.[22] Through training and assistance to field offices,[23] the USARCS grew the MAC program from total recoveries of $1.5 million in fiscal year (FY) 1999 to total recoveries of $26 million in FY 2011.[24] The MAC program is now well-established and projected to grow in the coming years.[25]

Property Claims—Overshadowed and Misunderstood

Due in part to the focus and resulting success in MAC, claims offices generally have overlooked the requirement to pursue property claims. As was previously the case with medical recoveries, most property recoveries are not available to the organizations responsible for repairing or replacing the damaged property; thus, installations have little interest in pursuing these claims.[26] That may soon change, however, with proposed legislation expected to pass in the next couple of years.[27] Once enacted, the amendment would "allow funds collected for damage to all Government property, controlled by the Department of Defense (DoD), to be deposited into and obligated from the account responsible for the repair or replacement of the damaged Government property."[28] Currently, recoveries for damage to real property can be deposited into an installations operations and maintenance (O&M) account, but cannot be spent. After six years, the installation is required to return this money to the General Treasury. Assuming the proposed legislation passes, any recoveries deposited into the installations O&M account in the preceding six years immediately would become available to the installation.[29]

Even with this added future incentive, most claims offices are not in a position to begin a property claims program. They lack the institutional knowledge and are further impeded by minimal and unclear guidance provided in the statutes and implementing regulations. For the most part, the available guidance pays only cursory attention to property claims and presumes that the process prescribed for pursuing medical claims can be applied easily to property claims. The guidance does not address the potential for a straightforward process for pursuing small property claims.[30] This guide provides the claims JA with a simple approach to start a property claims program and pursue these claims.

Starting a Government Property Affirmative Claims Program

Starting a property claims program requires minimal time and effort. Initially, you should take some time to get yourself organized and form a plan before orienting yourself to available resources. Once you are familiar with property claims and have sketched out a plan, discuss your plan with your supervisor and your SJA for buy-in.

Formulate a Plan

Establishing a property claims program begins with formulating a plan. Set daily, weekly, and monthly goals.[31] This is a good way to keep you on track. Take about a week to familiarize yourself with the program. Then, plan on

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[21] Claims judge advocates (JAs) "gain competency and familiarity with MAC only to be mobilized, PCS'd, or reassigned to other duties," and seasoned claims paralegals often "retire without passing institutional knowledge to junior claims employees." Thomas J. Kennedy, *Backlogs & Tiger Teams*, Affirmative Claims Discussion Board, JAGCNET (Dec. 3, 2010, 3:57 PM), https://www.jagcnet2.army.mil/Archive/Discussion/claimsdb.nsf/topicThread.xsp?documentId=D714A0B277B162FE852577EE00732792&action=openDocument.

[22] *Id.* The USARCS provides offices with an unmanageable MAC backlog with assistance visits by "tiger teams." These teams are comprised of "seasoned examiners . . . who will review files, mail assertion letters to all parties, obtain medical records and billings, communicate with attorneys, etc. Along the way, local claims personnel will work side-by-side and gain valuable hands-on experience." *Id.*

[23] The USARCS dedicates one day of its annual torts conference to affirmative claims. The USARCS also holds quarterly affirmative claims video-teleconferences. Masterton, *supra* note 1, at 50.

[24] Kennedy, *supra* note 20, tbl.1, at 45.

[25] Affirmative Claims 101 Presentation, *supra* note 14. The USARCS is now turning its attention to labor cost recoveries which have been declining consistently despite the success of medical recoveries. *Id.*

[26] Damage to Real Property: Disposition of Amounts Recovered, 10 U.S.C. § 2782 (2006).

[27] E-mail from Thomas J. Kennedy, Chief, Affirmative Claims, U.S. Army Claims Serv., to author (8 Nov. 2011, 10:48 EST) (on file with author).

[28] *Authority for Use of Amounts Recovered for Damage to Government Property: Hearing on S. 981 Before the Comm. on Armed Serv.*, 112th Cong. (2011) [hereinafter *Proposed Legislation*].

[29] *Id.*

[30] Medical claims usually involve higher dollar amounts, lengthy investigation of the facts and research of the law, extensive data collection, and frequent communications and negotiations with personal injury lawyers and insurance companies. *See generally* 31 U.S.C. §§ 3711–3720 (2006); AR 27-20, *supra* note 13, ch. 14; DA PAM. 27-162, *supra* note 5, ch. 14.

[31] Mary Manderscheid, Office of the Staff Judge Advocate, Fort Leavenworth, Presentation at the U.S. Army Claims Serv. Tort Claims Conference: Affirmative Claims: MAC Office Mgmt. (Oct. 2009) [hereinafter MAC Office Mgmt. Presentation].

dedicating an average of one hour a day reviewing the blotter and gradually working through a claim and establishing your procedures as you work on that claim. After a couple of months, you likely will have received and deposited your first claim. Take another month to run multiple claims through the process and fine-tune your procedures. Once you are comfortable with asserting a basic claim and have a solid system in place, aim to expand your program.[32]

Become Familiar with Available Resources

Set aside a couple of days to familiarize yourself with property claims. Visit the USARCS website, peruse the available resources, and familiarize yourself with the affirmative claims discussion board.[33] You may even want to post a message introducing yourself to the rest of the affirmative claims community. Additionally, contact the USARCS Affirmative Claims Branch directly and let them know that you are planning to establish a property claims program in your office. The Affirmative Claims Branch provides guidance and oversight on property claims and is ready to support your efforts. Although they do not actually "work" claims the way field offices do, the Affirmative Claims Branch at USARCS can get you in contact with experienced people in the field who will share their practical knowledge with you.[34]

Next, print out the jurisdictional chart and sample forms and letters available on the website.[35] Make sure also to have a hard copy and electronic copy of AR 27-20, *Claims*, and DA Pam 27-162, *Claims Procedures*. Request a user account for the Affirmative Claims Management Program (ACMP), the web-based database that you will use to track your affirmative claims. Once you gain access to ACMP, print the user manual under the help tab and familiarize yourself with the database.[36]

Lastly, begin drafting a standard operating procedure (SOP) for your office. Appendix A may serve as a basic outline for your SOP, or contact USARCS for a sample SOP upon which you can then build.[37] Assemble your draft SOP, references, sample forms, sample letters, and this article in a binder. As you work through the process and develop your program, continuously update your SOP, adding contact and other key information to the folder. Strive to create a product that is not only useful to you, but detailed enough to allow someone with no experience pursuing property claims to pick up your SOP and process a simple property claim.

Promote Your Plan

Now that you have a solid plan and a basic framework for establishing a property claims program, discuss your plan with your supervisor and secure his support. Tell him how much time you will be investing to get the program started and that, once established, you can expand the program to where it may require a significantly larger time commitment. Once you obtain your supervisor's buy-in, you will need to sell your idea to the boss—most likely the SJA or the Deputy SJA. Consider your audience and find out what their priorities are. There are numerous reasons why starting an affirmative property claims program is a good idea. Determine which reasons will best influence your bosses and be prepared to persuade them accordingly.[38]

The most obvious reason to set up an affirmative property claims program is to recover money for the repair or replacement of damaged Government property.[39] Total recoveries last fiscal year for property claims were $585,000—negligible in the grand scheme.[40] However, if one considers that most claims offices asserted no property claims at all and one further presumes that Government property is in fact being damaged daily, one can imagine that the potential Army-wide recovery for property damage is massive.[41] As the national debt continues to grow, any money recovered for property damage contributes to the financial security of the Government.[42] Continuing to overlook the Army's responsibility to pursue this potential source of income is fiscally irresponsible.

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[32] *See* Appendix A (Quick Reference Guide for Establishing a Government Property Affirmative Claims Program) (providing suggested timeline).

[33] *U.S. Army Claims Serv.*, JAGCNET, https://www.jagcnet.army.mil/8525752700444FBA (last visited Mar. 9, 2012) [hereinafter USARCS Website].

[34] Fran Hawkins, U.S. Army Claims Serv., Presentation at the U.S. Army Claims Serv. Affirmative Claims Conference: USARCS File In-take (Oct. 2009) (on file with author).

[35] USARCS Website, *supra* note 33.

[36] ACMP, *supra* note 2.

[37] As of this writing, the USARCS had only two standard operating procedures (SOPs) with any mention of property claims. E-mail from George R. Westerbeke, Affirmative Claims Paralegal, U.S. Army Claims Serv., to author (31 Jan. 2012, 17:05 EST) (on file with author).

[38] MAC Office Mgmt. Presentation, *supra* note 31.

[39] Money recovered and deposited into the miscellaneous receipts account is not available to the installation but instead goes back to the U.S. Treasury. AR 27-20, *supra* note 13, para. 14-14.

[40] ACMP, *supra* note 2.

[41] Of the Army offices that did assert property claims last fiscal year, most appear to assert property claims only for higher value incidents. Few offices appear to be asserting claims valued less than $1000. *Id.*

[42] Affirmative Claims Policy Memo, *supra* note 17.

Although most recovered funds are not available to the installation for repairing or replacing damaged property, the Army is responsible for safeguarding that property and pursuing recoveries for damage to Government property. Further, in all likelihood, legislation soon will pass to allow installations to spend recovered funds. Pursuing property claims now will put the installation in a better position for when those funds do become available.

Another significant benefit of establishing a property claims program is that it can serve to justify creating, upgrading, or even retaining a position. Property claims generate excellent quantitative data (metrics) which plainly show the value of a position. With the current budget crisis, SJA offices can use this data to justify a claims job.

Fiscal responsibility aside, for the more justice-oriented practitioners, holding individuals financially accountable for their tortuous acts helps maintain good order and discipline and can serve as a powerful deterrent. Tortfeasors would be, rightfully, paying for the damage they caused to Government property. The ability to assert a claim would also give commanders one more option for disposing of Soldier misconduct where other forms of punishment may not be appropriate. Especially where the crime is victimless—merely against the Government—payment on an affirmative claim may be a better option than a prosecution or other form of punishment.

Asserting a Government Property Affirmative Claim

Now that you have a plan in place and the go-ahead from your supervisors, you can begin to work your first claim. Most property claims are considered "small claims" under $5000.[43] Small claims are investigated and processed in a simplified manner.[44] The procedures for processing a small claim, as discussed below, may not work for claims over $5,000 and you should research those procedures separately.[45]

Further, although claims officers in overseas locations will find this guide useful, they should research procedures in their specific locations. Overseas claims are governed not only by Army regulations, but also by local laws and agreements with the host nation.[46] Additionally, the DoD has designated single-service jurisdiction for certain countries; so, in certain locations, a claim of one service may be the sole responsibility of a sister service.[47]

Pursue Simple Claims First

To begin, decide which claims you will pursue. Which claims you choose to pursue may be specific and unique to your area of responsibility. Initially, you should pursue those claims that will be easiest to process and recover. Do not worry about the dollar value at this point. The initial goal is to get the program started and become familiar with the systems and processes.[48]

A good starting point to get your program off the ground is to focus on damage to Government property caused by insured motorists. An example of this would be a motorist who loses control of his vehicle and runs through a chain link fence. Where the motorist is insured, asserting a claim against the insurance company is simple and will yield good results. The remainder of this section will focus on pursuing an insured motorist claim. The basic process for asserting a claim against an insured motorist involves gathering documents including the military police (MP) report and the fence repair estimate, mailing a demand for payment to the motorist and the insurance company, and depositing the payment with the accounting and finance office.

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[43] In fiscal year 2010, 90% of property claims (517 of 572) were under $5,000. ACMP, *supra* note 2.

[44] AR 27-20, *supra* note 13, paras. 2-14, 14-8; DA PAM. 27-162, *supra* note 5, paras. 2-14, 2-26.

[45] Larger claims are infrequent. When you do get a larger claim, reach out to USARCS and the claims community for assistance. *See generally* USARCS Website, *supra* note 33.

[46] A JA supporting a unit located overseas or a unit that deploys to an overseas location must conduct an extensive search to determine what, if any, international agreements are in place and apply to affirmative claims. These agreements are often "obscure, poorly publicized, and occasionally classified." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 113–114, OPERATIONAL LAW HANDBOOK para. II.A, at 113(2011).The Department of Justice publishes a list of unclassified treaties in force at http://www.state.gov//s/l/treaty/tif/index.htm. To obtain the full text of agreements, a JA can search several websites including the Center for Law and Military Operations at http://www.jagcnet.army.mil, the United Nations at http://www. un.org, and the North Atlantic Treaty Organization at http://www.nato.int. A JA can also work through his chain of command up to the combatant command's legal staff who are responsible for maintaining a list of all agreements for countries within their area of responsibility or can contact the Department of the Army International and Operational Law Division at (571) 256-2910, DSN 225, the Country Desk at the Department of State, see http://www.state.gov/documents/organization/115480.pdf, or the Military Group within the country, see http://www.usembassy.gov.

[47] U.S. DEP'T OF DEF., DIR. 5515.8, SINGLE-SERV. ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS (9 June 1990). For maritime claims of Army property within the admiralty jurisdiction of a U.S. district court, see Admiralty Claims by United States, 10 U.S.C. § 4803 (2006) and AR 27-20, *supra* note 13, ch. 8.

[48] Affirmative Claims 101 Presentation, *supra* note 14. Once your program is well-established, adjust your priorities by pursuing claims that are high-dollar-value and show the most promise of recovery. *Id.*

Identify a Potential Claim

To identify a potential claim, first establish a contact at the provost marshal's office (PMO) to receive the daily MP report, also known as the blotter.[49] Scan the blotter daily and identify any incidents of damage to Government property involving a privately owned vehicle (POV). Some common examples include damage to a fence, guard rail, light post, traffic sign, or structure, such as a bus stop.[50] Make it a daily priority to scan the blotter. Investing a mere fifteen minutes a day scanning the blotter over a cup of coffee may be all you need to keep your program running. If you are not finding enough potential claims on the current blotter reports, you may want to go back to old blotters and search those for potential claims.[51] If you come across other types of potential claims, set those aside for now.[52] Once you are familiar with processing simple claims against insured motorists, you can address other types of potential property claims.

Start a File

Once you identify a potential recovery incident, begin a file on the Affirmative Claims Management Program (ACMP) located on the USARCS website. The ACMP is a data management program provided by USARCS. It is available to all Army claims offices and is divided by jurisdictional responsibilities.[53] The database provides USARCS with visibility of large claims, and creates an invaluable historical document if a claim goes to litigation.[54] The ACMP is also an effective tool for measuring the growth of affirmative claims by providing numerical data on asserted and recovered claims.[55]

Open a new file for your potential claim even though you have not established liability or feasibility of recovery.[56] Using the database from the initial identification of a potential claim is a simple way to track your claim, record key contact information, and create a chronology of your investigative efforts and enforcement actions.[57] The ACMP is meant to be the one and only database for filing your affirmative claims information and streamlining your operation. Do not create other databases or spreadsheets and duplicate your efforts. If it is not meeting your needs, recommend changes to USARCS.[58]

Aside from ACMP, you should maintain a physical drop file for each claim you are working. You will be required to have hard copies of documents when you assert your claim, so you will need somewhere to put these. You also should maintain a drop file for any incidents that you recognize might be a potential claim, but that you are not yet ready to examine.

Gather Evidence

Small claims involving insured motorists require minimal investigative efforts.[59] Once you have identified a potential claim involving a POV, you will need to request an incident report from the PMO. This may require physically going to the PMO initially, but should evolve into getting this report via email upon request.[60] Flip through the report until you find the section for insurance information. (If there is no insurance information, then add this potential claim to a drop file of claims to address at a later time.) Also, scan the report for details of the property damage.[61]

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[49] There are many ways to get the blotter. Some units will modify the report to fit their needs. So, it is best to get the official and complete report from the Provost Marshall's office. Many of your fellow JAs in other sections of the staff judge advocate office receive the blotter report and can help you get on the email distribution list.

[50] ACMP, *supra* note 2.

[51] The statute of limitations on asserting a property claim is three years. Time for Commencing Actions Brought by the United States, 28 U.S.C. § 2415 (2006).

[52] *See* Appendix A (providing examples of other types of property claims).

[53] Affirmative Claims Policy Memo, *supra* note 17. *See also* DA PAM. 27-162, *supra* note 5, para. 14-3.

[54] Preservation of Evidence, 31 C.F.R. § 904.3 (2006).

[55] Angela Hunter-Coppedge, Office of the Staff Judge Advocate, Fort Meade, Presentation at the U.S. Army Claims Serv. Tort Claims Conference: Affirmative Claims: The Value-Added of the ACMP (Oct. 2009) [hereinafter ACMP Presentation].

[56] The database is intuitive and user-friendly. Nonetheless, you should refer to the user manual available on the database until you are well versed in what to do. ACMP, *supra* note 2.

[57] The claims regulation suggests using a modified version of DA Form 1668, Small Claims Certificate. AR 27-20, *supra* note 13, para. 14-8. This form is mainly used to memorialize your investigation and action. U.S. Dep't of Army, DA Form 1668, Small Claims Certificate (June 1971). However, there is no requirement to submit this form to another office and the author of this article feels that this form is of limited utility especially since ACMP, when used as intended, adequately memorializes all investigation efforts and actions. ACMP, *supra* note 2.

[58] MAC Office Mgmt. Presentation, *supra* note 31.

[59] AR 27-20, *supra* note 13, paras. 2-14, 14-8; DA PAM. 27-162, *supra* note 5, paras. 2-14, 2-26.

[60] Thomas Kennedy, Chief, Affirmative Claims, U.S. Army Claims Serv., Presentation at the U.S. Army Claims Serv. Affirmative Claims Conference: Best Practices as Derived from Excellence in Claims Award and Blue Chip Application (Sept. 19, 2011), *available at* https://www.jagcnet.army.mil/8525752700444FBA/0/E1B5C2FCC636D3658525790B0050C342?opendocument [hereinafter Best Practices Presentation].

[61] U.S. Dep't of Army, DA Form 3946, Military Police Traffic Accident Report (Dec. 1998).

Next you will need to attain estimates of repair for the damaged property. Establish a contact within the Directorate of Public Works (DPW). A good division to start with is the work order section.[62] Take the MP report along (in case they are not aware of the damage) and request a copy of the work order or similar document. The document they provide must include a description of the damaged property, the location of the damaged property, and an estimate (or actual) cost of repair.[63] Again, this may require physically going to DPW initially, but should evolve into getting the documents via email once you establish a working relationship.

Assert a Claim

Having gathered all necessary documents, you can now assert a claim.[64] Draft your demand letters for the tortfeasor (motorist) and the insurer (motorist's insurance company).[65] If there is more than one tortfeasor or more than one insurer, draft demand letters for all of them. To the maximum extent possible, use e-mail or fax to send letters to the recipients. Send e-mails with a read receipt and print confirmation sheets for faxes.[66] If you must use mail, send the demand letters certified mail—return receipt requested. Ensure you receive a read receipt for e-mails and a return receipt for letters. Update the ACMP database to reflect that you asserted the claim.

If the amount you are claiming is nominal and the letter and documentation is clear, insurance companies usually will pay it outright without further investigation. If you do not receive some sort of reply within a few weeks, call the insurance company to ensure they received the initial demand letter and have the information they need to pay the claim.

Allow thirty days for a response and then send a final notice to the motorist.[67] Also, if the motorist is a Soldier, call the commander. If you still are unable to secure payment from the motorist or the insurance company, set this claim aside until you are ready to expand your program.

Deposit Recoveries and Close the File

Once you receive payment, usually by means of a check from the insurance company, you should deposit the check immediately. If you cannot deposit the check on the same day you receive it, place the check in the office safe.[68] Fill out a DD Form 1131, Cash Collection Voucher[69] and have the check endorsed on behalf of the United States by someone with claims settlement authority (this may be you, your supervisor, or the SJA). Take the voucher and the check to the accounting and finance office for deposit.[70] Deposit the check to the designated account for recoveries of damage to real property.[71] Update the ACMP database to reflect that you received and deposited payment, and then close the file.

Test Your Procedures

Now that you have established the process for asserting insured motorist claims, find more of the same type of claim in old blotters and feed those potential claims through your process. The statute of limitations on a tort claim is three years—which means you have three years worth of reports from which to draw potential claims.[72] Addressing these old claims will yield significant returns with little effort.

If you are fortunate enough to recruit temporary help in your office (a summer intern, a funded legal education program (FLEP) officer, or a reservist on two-week annual training) this is a perfect project to keep them meaningfully engaged. Have your recruit scan the blotter daily and research old blotters. Using your draft SOP, have your recruit walk a potential claim through the process to test your procedures and fine-tune your SOP. Your SOP should evolve into a product that is not only useful to you, but detailed enough to allow someone with no experience in pursuing property claims to pick up your SOP and process a simple property claim.

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[62] Best Practices Presentation, *supra* note 60.

[63] DA PAM. 27-162, *supra* note 5, para. 14-9.

[64] As soon as you determine that the Government has a valid claim, send the demand letters. A sum certain is not necessary to assert a demand. The demand letter can state that an amount will be furnished later. *Id.*

[65] *See* Appendices B (Sample Demand Letter to Insured Motorist) and C (Sample Demand Letter to Motorist's Insurance Company) (providing sample letters).

[66] AR 27-20, *supra* note 13, paras. 2-14, 14-8.

[67] *See* Appendix D (Sample Final Notice to Insured Motorists).

[68] AR 27-20, *supra* note 13, para. 11-24.

[69] U.S. Dep't of Defense, DD Form 1131, Cash Collection Voucher (Dec. 2003). *See* Appendix E (Sample Cash Collection Voucher (DD Form 1131).

[70] Thomas J. Jackson, *RE: Deposit of Tricare Recovery Checks*, Affirmative Claims Discussion Board, JAGCNET (Mar. 5, 2008, 16:59), https://www.jagcnet2.army.mil/Archive/Forums/fac.nsf/b76c69a8a3b2d0fe85256a1900521a69/177d537ac6b6d388852574030078c655?OpenDocument.

[71] *See* Thomas J. Jackson, *RE: Real Property Damage Claims - Deposits*, Affirmative Claims Discussion Board, JAGCNET (Feb. 12, 2008, 08:38), https://www.jagcnet2.army.mil/Archive/Forums/fac.nsf/b76c69a8a3b2d0fe85256a1900521a69/177d537ac6b6d388852574030078c665?OpenDocument.c655?OpenDocument.

[72] 28 U.S.C. § 2415 (2006). Work through these reports backward (from most recent to oldest). You are less likely to collect on older claims.

Expanding Your Program

After several months of asserting property claims involving insured motorists, your program should be well-emplaced. It is now time to consider expanding your operations. There are several ways to do this: you can address the backlog of claims not yet asserted, you can look into networking with organizations to uncover other sources of potential claims, or you can look into alternate ways of collecting on affirmative claims.

Address the Backlog

Recall all of those potential claims that you have been setting aside to address another day? Now is the time to address those claims. Through your experience with insured motorist claims, you have learned what is required to process an affirmative claim and you also have an idea of what a simple claim looks like. Take the file of claims you have been setting aside and prioritize them; separate the claims based on how difficult they will be to investigate and on how likely they are to result in a successful recovery.[73] You may want to separate them based on the type of damage, the type of incident, or the type of tortfeasor. Be aware that certain types of damage are not collectable under affirmative claims and there are numerous other agencies that conduct recovery for damage to Government property.[74]

Uncover Other Sources of Potential Claims

The best way to expand your program is to network with other offices and agencies that have information relating to potential claims.[75] Identify contacts in each activity and unit in your area of responsibility to establish close working relationships with them. Show them how to identify potential affirmative property claims in their line of work and then screen their reports periodically to make sure they are not missing potential claims.[76] In time, these contacts will come to you with timely information on potential claims instead of you having to seek them out.[77]

Start networking in your immediate area first. Information on potential property claims may be entering the claims office as part of other types of claims. For example, a Soldier seeks advice from the claims office for filing a claim against a carrier for loss of household goods. The loss includes army-issued gear (TA-50) which the Soldier cannot claim because he does not own it. His unit will conduct a financial liability investigation of property loss (FLIPL) and determine that he is not liable for the loss and will write off the property from their books without taking any further action to recover. To recover the cost of the loss, the Affirmative Claims Branch can assert a claim against the carrier on behalf of the Government for the loss of the property.[78]

Also in your immediate area are the administrative law division, the military justice division, and the federal litigation division of the OSJA. The administrative law division reviews numerous investigations and reports that may have potential claims including FLIPLs,[79] AR 15-6 investigations, and summary courts-martial proceedings. The military justice division has greater visibility of misconduct than appears on blotter reports. And lastly, the Special Assistant United States Attorneys (SAUSAs) working in the federal litigation division deal with cases involving property damage. Ask your fellow JAs in each of these divisions to contact you whenever they identify an incident involving damage to Government property.

Outside of the OSJA, two agencies critical to your operation that are accustomed to working closely with JAs are the MP and the Criminal Investigation Division (CID).[80] Establish relationships with these two offices and stress the importance of complete information on their reports. Information such as insurance, which may be lacking in a single vehicle accident, or details about property damage, which may seem unimportant in a fatal shooting incident, are essential for your program. Enlist these offices to help in creating more detailed reports that will lead to more successful recoveries.[81]

Another organization key to a robust property claims program is the DPW, which is the organization that repairs

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[73] Affirmative Claims 101 Presentation, *supra* note 14.

[74] *See* Appendix A (providing examples of different types of potential property claims).

[75] ACMP Presentation, *supra* note 55.

[76] 32 C.F.R. § 537.6 (2006).

[77] Best Practices Presentation, *supra* note 60. *See* Appendix A (providing other organizations that may have information on potential property damage claims).

[78] Telephone Interview with Donovan Shields, Claims Paralegal, Affirmative Claims Div., JBLM (Feb. 27, 2012).

[79] When unit property is lost or damaged, units initiate a financial liability investigation of property loss (FLIPL). If the investigation finds that a Soldier was not responsible for the loss or damage, the investigation is closed with no further collection action. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY para. 13-32 (28 Feb. 2005). Where an individual, not a Soldier, was responsible for the loss or damage, a potential affirmative claim exists. For example, if an embittered spouse destroys a Soldier's TA-50, a FLIPL likely would find the Soldier not liable; however, you may be able to assert a claim against the spouse.

[80] 32 C.F.R. § 537.6.

[81] Michael Romano, *Claims Note: Affirmative Claims/Note*, ARMY LAW., May 1989, at 59, 60.

any damage to real property on the installation. The DPW work order section manages requests for repairs and can tell you what has been broken and how much it will cost to repair it. Requesting a copy of their work order spreadsheet will identify potential claims that are not on the blotter.[82]

Maximize Alternate Methods of Enforcement

Another way to expand your property claims program is to maximize alternate methods of enforcement. These include repayment in kind (RiK), restitution, and administrative offset. These are discussed below.

Repayment in kind involves having the tortfeasor repair or replace the damaged property in lieu of paying the General Treasury for the damage.[83] An example of a RiK arrangement is where a tortfeasor who has caused damage to a government vehicle pays the local garage directly for repairs to the vehicle instead of writing a check to the General Treasury. As a result, the activity that suffered the damage does not incur the cost of repairing the vehicle.[84] Another example of RiK is where a tortfeasor who has been caught dumping garbage illegally cleans up the dump site instead of paying the cost of clean-up in the form of a check to the General Treasury.[85] Repayment in kind is the preferred method of recovery and "should be used whenever possible" since it saves an organization the cost of repairing or replacing the damaged property.[86] Activities that are aware of RiK are more likely to refer potential claims to your office in order to spare their budgets.[87]

Administrative offset, also referred to as an involuntary collection, is a powerful method of enforcing collections. Under the Debt Collection Act of 1982, the Army can withhold money payable by the United States to an individual to satisfy a debt owed by that individual.[88] An administrative offset can be applied against a Soldier's pay,[89] a Department of the Army civilian's pay,[90] or even a retired civil service employee's retirement pay.[91] For individuals who do not fall into the aforementioned categories, it may still be possible to collect on a debt owed to the Government through the Treasury Offset Program. Contact USARCS for guidance on executing administrative offsets.[92]

If a tortfeasor is also charged with a crime, talk to the prosecutor in the case about the property claim. Although the prosecutor may be unwilling to add a charge of destruction to Government property to the charge sheet,[93] they can nonetheless request a fine at trial or add restitution to a pretrial agreement. Further, defense counsel is likely to encourage a client to pay restitution even before the trial in the hopes of greater leniency on an adjudged sentence.[94]

Recent proposed revisions to the claims regulation encourage claims attorneys in busy jurisdictions to obtain an appointment as a SAUSA.[95] This facilitates securing a federal judgment against a tortfeasor who refuses to pay.[96] Absent appointment as a SAUSA, you should work with your fellow JAs at the federal litigation division of the office to make sure they are requesting fines in cases they are prosecuting and to see if they would be willing to take your property claim cases to court.[97]

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[82] 32 C.F.R. § 537.6.

[83] DA PAM. 27-162, *supra* note 5, para. 14-9a(5).

[84] Captain Travis Sommers, *Repayment in Kind*, Affirmative Claims Discussion Board, JAGCNET (Apr. 29, 2008, 21:40), https://www.jagcnet2.army.mil/Archive/Forums/fac.nsf/b76c69a8a3b2d0fe85256a1900521a69/1903dfd432180c658525743b00092909?OpenDocument

[85] Best Practices Presentation, *supra* note 60.

[86] Thomas J. Jackson, *RE: Repayment in Kind*, Affirmative Claims Discussion Board, JAGCNET (May 13, 2008, 16:10) https://www.jagcnet2.army.mil/Archive/Forums/fac.nsf/b76c69a8a3b2d0fe85256a1900521a69/cbf9e7a92f11b96c85257448006ed9a6?OpenDocument. Even a partial repayment in kind is permissible. *Id.*

[87] Best Practices Presentation, *supra* note 60.

[88] Administrative Offset, 31 U.S.C. § 3716 (2006).

[89] Deductions from Pay, 37 U.S.C. § 1007 (2006).

[90] Installment Deduction for Indebtedness to the United States, 5 U.S.C. § 5514 (2006).

[91] 31 U.S.C. § 3716.

[92] DA PAM. 27-162, *supra* note 5, para. 11-37.

[93] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 32 (2008).

[94] *See generally* Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 NAVAL L. REV. 1 (2005).

[95] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 14-11 (forthcoming 2012) (Draft). There are currently no claims attorneys assigned as Special Assistant United States Attorneys (SAUSAs). Telephone Interview with Lieutenant Colonel Russell Jackson, Chief of Torts Litigation, Office of the Staff Judge Advocate (Feb. 28, 2012).

[96] Minimum Amount of Referrals to the Department of Justice, 31 C.F.R. § 904.4 (2006).

[97] U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION para. 5-2 (19 Sept. 1994). The JBLM federal litigation division plans to take its first of several referred property claim cases to court in the near future. Telephone Interview with Major Jonathan Persons, Chief of Federal Litigation, JBLM (Feb. 9, 2012) and Telephone Interview with Donovan Shields, Claims Paralegal, Affirmative Claims Div., JBLM (Feb. 27, 2012).

Publicize Your Program

There are numerous ways you can publicize your program to ensure organizations around the installation are aware of the program and will refer any potential claims to your office. For starters, write an information paper about property claims.[98] Post the information paper on the SJA office or installation website and disseminate it through command channels to all offices that may have potential property claims. Create a short PowerPoint presentation and ask to brief at training meetings in the SJA office and other organizations around the installation. Distribute your information paper as a handout at these training sessions so that your audience will have a reference sheet they can take with them.[99] There are many ways to publicize your program, but the main focus is to get the word out that a property claims program exists.

Conclusion

Government property affirmative claims long have been neglected and largely misunderstood. Until now, installation leadership has shown little interest in pursuing property claims since most recoveries are unavailable to the installation.[100] However, similar to a surge in medical recoveries upon availability of recovered monies,[101] property recoveries should see a significant surge as proposed legislation eventually will allow installations access to money recovered from property claims to fund their operations.[102]

Although claims offices are required to aggressively pursue affirmative claims,[103] most offices feel they lack the resources and institutional knowledge to institute a program to address property claims. However, this articles shows how a claims JA requires only a minimal amount of time and effort to establish property claims program. Initially focusing on smaller, easier claims, a claims JA can establish a program within a matter of months by investing a little time each day. Once a framework is well-established, a claims JA can then address the backlog of property claims or branch out into other sources of potential property claims and fulfill their affirmative claims mission—to aggressively pursue potential claims.

[98] For examples, see Information Paper, Office of the Staff Judge Advocate, Fort Belvoir, subject: Affirmative Claims (30 Nov. 2009), *available at* http://www.belvoir.army.mil/sja/newsite/claimsCommandersInformation Papers.asp (last visited Feb. 26, 2012). *See also* Information Paper, Office of the Staff Judge Advocate, Fort Jackson, subject: Affirmative Claims (n.d.), *available at* http://www.jackson.army.mil/SJA/Claims.htm (last visited Feb. 26, 2012).

[99] Claims Award Memo, *supra* note 9. You also may want to consider writing an article for the post paper or using other media outlets—such as radio, television, e-mail, and social websites—to get publicity for your program. *Id.*

[100] Masterton, *supra* note 1, at 55.

[101] Kennedy, *supra* note 20, at 40.

[102] *Proposed Legislation*, *supra* note 28.

[103] Aggressive Agency Collection Activity, 31 C.F.R. § 901.1 (2006).

Appendix A

Quick Reference Guide for Establishing a Government Property Affirmative Claims Program

Week 1: Familiarize Yourself with Property Claims

Visit USARCS website at https://www.jagcnet.army.mil/8525752700444FBA
Contact USARCS Affirmative Claims Division
Request an ACMP account
Introduce yourself on the affirmative claims discussion board
Print out sample forms, letters, jurisdictional charts, etc.
Get a copy of AR 27-20, Claims and DA Pam 27-162, Claims Procedures
Draft an SOP and update it regularly

Week 2: Identify a Potential Claim

Get on the blotter distribution list
Review the blotter for incidents involving government property damage
Focus on incidents involving motorists and damage to real property
Put other incidents aside for now (see chart below for examples)
Update the SOP

Week 3: Start a File

Start a file on the ACMP as soon as you identify a potential claim
Print out the ACMP user manual and use it to navigate the database
Continuously update the database when you take any action on the claim
Create a drop file for any documents you collect
Update the SOP

Week 4: Gather Investigative Reports

Go to the PMO and pick up the MP report
Check for description of property and damage
Check for insurance information
Determine if claim is collectible

Claims Against Different Tortfeasors

Tortfeasor	Process	Authority
Uniformed Member or DoD Employee		
within scope of employment	fwd to unit for FLIPL	AR 735-5
not within scope of employment	collectible	DA Pam 27-162, para. 11-37c
Contractor		
within scope of employment	fwd to contracting officer	DoD Reg. 7000.14-R, vol. 10, ch. 18
not within scope of employment	collectible	DA Pam 27-162, para. 11-37d
Minor Dependent	collectible against member	state tort law
Civilian	collectible	DA Pam 27-162, para. 11-37d

Update the file status on the ACMP
Update the SOP

Week 5: Collect Cost Estimates

Go to DPW work order section
Take MP report with you

Request a copy of the repair estimate or invoice
Update the file status on the ACMP
Update the SOP

Week 6: Draft and Send Demand Letters

Draft demand letter for motorist and insurance company
Send letters by e-mail or fax, if possible
If sending by mail, send by certified mail, return-receipt requested
Update the file status on the ACMP
Update the SOP

Week 7: Deposit a Claim

Go to the finance and accounting office and determine their procedures for deposits
Once you receive payment
Secure it in the office safe until you are ready to deposit it
Endorse the check by someone with claims settlement authority
Fill out a Cash Collection Voucher, DD Form 1131
Take the endorsed check and DD Form 1131 to the finance office for deposit
Close the file on the ACMP
Update the SOP

Week 8: Follow-Up

Follow up on a demand if you have not heard back from motorist or insurance company
Call insurance company
Call Commander
Prepare a final notice to the motorist (send after 30 days of initial demand letter)
Update the file status on the ACMP

Week 9 - Week 12: Revise the SOP

Continue to assert claims involving insured motorists and damage to real property
Enter all actions on the ACMP
Revise processes and procedures and update the SOP

Expand the Program

Address the backlog (statute of limitations is three years)
Explore alternate methods of enforcement
Repair in kind
Restitution
Administrative offset

Publicize the program

Create an information paper
Post the paper on the SJA or installation website
Hand the paper out to organizations in your jurisdiction
Create a PowerPoint Presentation
Brief at training meetings around the installation

Network with organizations in your jurisdiction

Organizations with Potential Claims Information

Organization	Examples of Potential Claims
Military Police	traffic accidents, vandalism, trespass, off-roading in protected areas
Criminal Investigation Division	theft, assault, disorderly conduct
Directorate of Public Works	repair to real property, clean-up of garbage or fuel leaks, waste removal
OSJA	
Claims	loss of TA-50 by carrier
Military Justice	damage to unit property
Administrative Law	FLIPLs finding member not liable
Federal Litigation	theft, traffic accident
Contracting	damage caused by construction contractor
Housing	damage to housing and furnishings
Army and Air Force Exchange Svcs	theft, vandalism
Defense Commissary Agency	theft, vandalism
Non-Appropriated Funds	damage to club furnishings, damage to gaming machines
G4/S4/Logistics Officer	FLIPLs finding member not liable
Range Control	damage to protected areas, abandoned vehicles, illegal dumping
Transportation Management Office	damage to government vehicles
Safety Office	serious incidents
Emergency Services	response services, accident clean-up
Recruiting, USAR, and ARNG units	damage to rental vehicles, damage to military vehicles
Medical Treatment Facility	theft of medical supplies or equipment

Appendix B

Sample Demand Letter to Insured Motorist

DEPARTMENT OF THE ARMY
[ORGANIZATIONAL NAME/TITLE]
OFFICE OF THE STAFF JUDGE ADVOCATE
[STANDARDIZED STREET ADDRESS]
[CITY, STATE, AND ZIP + 4 CODE]

REPLY TO
ATTENTION OF:

[Month DD, YYYY]

Affirmative Claims Division

[Title/Rank and Name of Motorist]
[Street Address]
[City, State, and Zip + 4 Code]

Dear [Title/Rank and Name of Motorist]:

The United States hereby gives notice of its claim against you from an incident on [Month DD, YYYY] wherein [brief description of incident and government property damaged]. The Army Claims Identification Number for this incident is: [number automatically generated by ACMP]. Our investigation determined that you are liable for the damage to Government property in the amount of $XXX.XX. The investigative report and the invoice showing the repair cost are enclosed. A copy of this letter and its enclosures has also been provided to your insurance company, [motorist's insurance company].

Pursuant to the Federal Claims Collection Act, 31 U.S.C. § 3711, this letter constitutes a demand for payment. Please make payment in the form of a cashier's check or money order payable to "The United States Treasury" and refer to the above claim number. Forwarded the payment to:

Department of the Army
[Organizational Name/Title]
Office of the Staff Judge Advocate
Attn: Affirmative Claims Division
[Standardized Street Address]
[City, State, and Zip + 4 Code]

Failure to respond to this letter within 30 days will be taken as a negative response. After 30 days, you will begin to incur interest fees and penalty charges. Your file will then be forwarded to the appropriate agency with a recommendation to pursue final financial/judicial action and you may incur additional processing fees.

The point of contact for this action is [Title/Rank and Name of Claims Officer] at (XXX) XXX-XXXX or by email at [official email address].

Sincerely,

[Name of Claims Officer]
[Rank], US Army
Claims Judge Advocate

Enclosures

Appendix C

Sample Demand Letter to Motorist's Insurance Company

REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
[ORGANIZATIONAL NAME/TITLE]
OFFICE OF THE STAFF JUDGE ADVOCATE
[STANDARDIZED STREET ADDRESS]
[CITY, STATE, AND ZIP + 4 CODE]

[Month DD, YYYY]

Affirmative Claims Division

[Name of Motorist's Insurance Company]
[Street Address]
[City, State, and Zip + 4 Code]

Dear Sir or Ma'am:

The United States hereby gives notice of its claim against your insured:

[Name of Motorist]
Policy Number: [policy number from police report]

Refer to the enclosed letter sent to your insured for details of the incident. Please make payment to "The United States Treasury" and forwarded it to:

Department of the Army
[Organizational Name/Title]
Office of the Staff Judge Advocate
Attn: Affirmative Claims Division
[Standardized Street Address]
[City, State, and Zip + 4 Code]

The point of contact for this action is [Title/Rank and Name of Claims Officer] at (XXX) XXX-XXXX or by email at [official email address].

Sincerely,

[Name of Claims Officer]
[Rank], US Army
Claims Judge Advocate

Enclosure
as

Appendix D

Sample Final Notice to Insured Motorist

DEPARTMENT OF THE ARMY
[ORGANIZATIONAL NAME/TITLE]
OFFICE OF THE STAFF JUDGE ADVOCATE
[STANDARDIZED STREET ADDRESS]
[CITY, STATE, AND ZIP + 4 CODE]

REPLY TO
ATTENTION OF:

[Month DD, YYYY]

Affirmative Claims Division

FINAL NOTICE

[Title/Rank and Name of Motorist]
[Street Address]
[City, State, and Zip + 4 Code]

Dear [Title/Rank and Name of Motorist]:

In a letter dated [Month DD, YYYY of demand letter], you were notified of the United States' claim against you for damage to Government property in the amount of $XXX.XX. As of the date of this letter, you have failed to respond.

You are hereby notified of the United States' intention to turn this matter over to the appropriate agency with a recommendation to pursue final financial/judicial action. You will begin to incur interest fees and penalty charges and may incur additional processing fees.

To avoid action being taken against you, *immediately* pay the above amount. Make payment in the form of a cashier's check or money order payable to "The United States Treasury" and refer to the above claim number. Forwarded the payment to:

Department of the Army
[Organizational Name/Title]
Office of the Staff Judge Advocate
Attn: Affirmative Claims Division
[Standardized Street Address]
[City, State, and Zip + 4 Code]

The point of contact for this action is [Title/Rank and Name of Claims Officer] at (XXX) XXX-XXXX or by email at [official email address].

Sincerely,

[Name of Claims Officer]
[Rank], US Army
Claims Judge Advocate

Appendix E

Sample Cash Collection Voucher (DD Form 1131)

CASH COLLECTION VOUCHER	1. DISBURSING OFFICE COLLECTION VOUCHER NUMBER 2. RECEIVING OFFICE COLLECTION VOUCHER NUMBER

3. RECEIVING OFFICE

a. ACTIVITY *(Name and Location) (Include ZIP Code)*
[Organizational Name/Title]
Office of the Staff Judge Advocate - Affirmative Claims Division
[Standardized Street Address], [City, State, and Zip + 4 Code]

b. RECEIVED AND FORWARDED BY *(Printed Name, Title and Signature)*
[Rank and Name of Claims Officer]
Claims Judge Advocate

d. DATE *(YYYYMMDD)*

c. TELEPHONE NUMBER *(Include Area Code)*:
COMMERCIAL: DSN:

4. DISBURSING OFFICE

a. ACTIVITY *(Name and Location) (Include ZIP Code)*

b. DISBURSING OFFICER *(Printed Name, Title and Signature)*

d. DISBURSING STATION SYMBOL NUMBER

c. TELEPHONE NUMBER *(Include Area Code)*:
COMMERCIAL: DSN:

e. DATE *(YYYYMMDD)*

5. PERIOD: a. FROM: b. TO:

6. DATE RECEIVED	7. NAME OF REMITTER DESCRIPTION OF REMITTANCE	8. DETAILED DESCRIPTION OF PURPOSE FOR WHICH COLLECTIONS WERE RECEIVED	9. AMOUNT	10. ACCOUNTING CLASSIFICATION
	[Rank/Tile and Name of Tortfeasor] [SSN if known] [Check/Money Order ###]	Claim Number: (ACMP generated #) Damage to Government Property - [description of property]		[Account Number (contact the Affirmative Claims Branch for proper account number]
		11. TOTAL	0.00	

DD FORM 1131, DEC 2003 PREVIOUS EDITION IS OBSOLETE. Adobe Professional 8.0

A View from the Bench

Sentencing: Focusing on the Content of the Accused's Character

Lieutenant Colonel Tiernan P. Dolan[*]

Introduction

In the military justice system, sentences are crafted based on the unique characteristics of the accused and the specific details of the crime(s) she has committed. The *Federal Sentencing Guidelines* do not apply at courts-martial, and no tables exist to assist the military judge or court members in determining an appropriate sentence. Instead, the military justice practitioner's job during the sentencing phase of the court-martial is to provide the sentencing authority with a clear picture of the accused, and why a particular sentence in this particular case is appropriate.

Counsel, particularly trial counsel (TC), are frequently hesitant to directly make an issue of the accused's character. While this hesitancy may be understandable on the merits, it is misplaced during sentencing proceedings.[1] On the merits, a myriad of rules largely discourages the TC from putting on character evidence by setting an appropriately high burden.[2] Our system is predicated on the notion that "fair play"[3] governs the trial, and thus shuns the notion that guilt may be proven merely by showing the accused to be a habitually bad apple who therefore must have committed the crimes alleged.[4] Thus, these rules appear to have the effect of making counsel cautious before attempting to introduce character evidence during sentencing. However, this prudence is misplaced as the fact-finder's role shifts during this phase of the trial. Having determined the guilt of the accused, the fact-finder is now charged with crafting an appropriate sentence. This process is based largely on an assessment of the accused. Consequently, both defense and trial counsel should focus their sentencing cases on the accused's character.

A clear and steady focus on Rule for Court-Martial (RCM) 1001 should guide both parties in their presentation of sentencing evidence. For the prosecution, RCM 1001(b) provides the roadmap to a sentencing case, while the defense is guided by RCM 1001(c). On rebuttal, both parties are then constrained by the scant guidance provided by RCM 1001(d), as supplemented by case law.

Government Case

Trial counsel typically focus on getting a sentencing witness to provide an opinion on the accused's "rehabilitative potential." "Rehabilitative potential" is a term of art that is defined for the witness by the MCM.[5] Counsel, after having sailed through a too often formulaic establishment of the requisite foundation, then, after properly orienting the witness to the definition of rehabilitative potential in RCM 1001(b)(4),[6] asks the ultimate question: "What is her rehabilitative potential?" The answer is generally "high," "medium," or "low." Is this really that helpful? Not so much. Counsel have missed the opportunity to present a picture of the accused by rushing through the foundation, expecting the answer of "low rehab potential" to be both meaningful to the fact-finder and justifying counsel's request for a particular sentence.

By emphasizing the various foundational elements set forth in RCM 1001(b)(5),[7] and eliciting an answer on each, trial counsel will better inform the fact-finder not only of the foundation for the witness's ultimate opinion, but also of the accused's character. It might be tempting to elicit an opinion from the witness about each of the foundational elements by asking such questions as "What is your opinion about the accused's desire to be rehabilitated?" However, RCM 1001(b)(5)(D) provides that opinions offered under the rule

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 analysis, at A21-73 (2012) [hereinafter MCM] ("The accused's character is in issue as part of the sentencing decision, since the sentence must be tailored to the offender.").

[2] *See* Major Walter A. Wilkie, *A Primer on the Use of Military Character Evidence*, ARMY LAW., June 2012, at 26 (covering the use of character evidence on the merits).

[3] 1A WIGMORE, EVIDENCE § 57 (Tillers rev. 1983) ("This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure.").

[4] *Id.* ("The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."). *But see* MCM, *supra* note 1, MIL. R. EVID. 413, 414.

[5] MCM, *supra* note 1, R.C.M. 1001(b)(5) ("Rehabilitative potential refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."); *see also* United States v. Ohrt, 28 M.J. 301, 304 (C.M.A. 1989); United States v. Horner, 22 M.J. 294, 295–96 (C.M.A. 1986).

[6] Obviously the military judge and counsel are familiar with the definition; however, the members are not. The preferred method of orienting the witness in a members trial is to read the definition from Rule for Courts-Martial 1001(b)(4) before asking the ultimate opinion question. This method ensures all present in the courtroom are operating from a common definition and minimizes the chance the witness will answer that question with an impermissible euphemism.

[7] Such foundational elements include, "but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses." MCM, *supra* note 1, R.C.M. 1001(b)(5).

are "limited to whether the accused has rehabilitative potential and the magnitude or quality of any such potential."

Does this mean that, when examining a witness about the rehabilitative potential of the accused, TC may not ask such questions as "How would you rate the accused's moral fiber?" The question appears to be an open one. Rule for Courts-Martial 1001(b)(5)(A) provides that counsel may present "evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation." Since counsel may explicitly ask about the accused's duty performance, it follows that counsel must also ask about the foundational elements contained in RCM 1001(b)(5)(B) even if these questions do not lead to an "ultimate issue" question about rehabilitation potential.[8]

In the event counsel find that a military judge forbids a TC from eliciting an opinion on the foundational aspects concerning rehabilitative potential, counsel could ask the witness whether the accused meets the expectations of the witness. One such method is shown in the following colloquy:

> TC: Are you familiar with the accused's desire to be rehabilitated?
>
> Wit: Yes.
>
> TC: What would you expect to see from a Soldier who desires to be rehabilitated?
>
> Wit: I would expect such a Soldier to show in word and deed that he truly wants to abide by the Army values, that his commitment to integrity and selfless service remains paramount.
>
> TC: Has the accused shown you such attributes?
>
> Wit: Yes/No. (In conducting such questions, the TC ought to know what answer will follow. Not knowing the answer will lead to predictably embarrassing results.)

In eliciting a response to each of the foundational predicates required by RCM 1001(b)(5)(B), a TC will provide the sentencing authority with a clearer picture of the accused's character. Such a picture will aid the fact-finder in fashioning an appropriate sentence more than an opinion based solely on whether the accused does or does not have rehabilitative potential.

Rule for Courts-Martial 1001(b)(5)(B) provides that among the relevant information and knowledge a witness may possess an opinion on the rehabilitative potential of the accused is the "nature and severity of the offense or offenses."[9] However, a witness may not testify at sentencing if the testimony is based solely on the severity of the offenses.[10] Trial counsel should therefore be hesitant to call a witness whose only demonstrable knowledge of the accused is familiarity with the offense(s) committed. This is true even when the witness is called to rebut defense evidence showing that the accused ought to be retained.[11]

The TC may also choose to display the character of the accused through the filter of recidivism.[12] Using this filter, which typically requires the use of an expert witness, the TC seeks to portray the offender as one who is likely to reoffend, thus negatively impacting his rehabilitative potential.[13] The expert must be shown to have sufficient knowledge of the accused and her crimes to offer such opinion.[14] Pitfalls to this approach abound, among them the danger of presenting profile evidence[15] and of presenting evidence that is merely generic and not necessarily applicable to the accused.[16]

Defense Case

An examination of the accused's character can be, by definition, a presentation of mitigation evidence, particularly where the accused's background is one of hardship and

[8] This should not be interpreted as granting a license to the trial counsel to smuggle in specific acts of conduct under the guise of laying the foundation for rehabilitative potential. Such would be improper. *See* United States v. Powell, 45 M.J. 637 (N-M. Ct. Crim. App. 1997), *aff'd* 49 M.J. 460 (C.A.A.F. 1998) (Government can not smuggle in specific acts of misconduct under the guise of laying a foundation for an opinion on rehabilitative potential.).

[9] MCM, *supra* note 1, R.C.M. 1001(b)(5)(B).

[10] United States v. Armon, 51 M.J. 83 (C.A.A.F. 1999); MCM, *supra* note 1, R.C.M. 1001(b)(5)(C).

[11] *See* United States v. Eslinger, 70 M.J. 193 (C.A.A.F. 2011).

[12] United States v. Ellis, 68 M.J. 341 (C.A.A.F. 2010) (holding that the military judge did not abuse his discretion in allowing recidivism expert to opine on the rehabilitative potential of the accused, despite not having personally examined the accused).

[13] *Id.* This kind of evidence has a high potential for misuse; obviously the members can only sentence the accused for the offenses of which she has been convicted, not because she is a future risk to reoffend. Accordingly, the military judge might consider an instruction to the members limiting this evidence to its impact, if any, on the accused's rehabilitative potential.

[14] *Id.* at 346 (providing the following helpful string cite: United States v. Gunter, 29 M.J. 140, 141 (C.M.A.1989) (reviewing data from a drug rehabilitation file was sufficient basis); United States v. Stinson, 34 M.J. 233 (C.M.A. 1992) (reviewing accused confession; observing the guilty plea inquiry; reviewing the Office of Special Investigation report and statements by the victim; reviewing the accused's mental health records; and interviewing the victim was sufficient basis); United States v. Scott, 51 M.J. 326, 328 (C.A.A.F.1999) (reviewing an accused's unsworn statement and two mental health evaluations was sufficient basis); United States v. McElhaney, 54 M.J. 120, 134 (C.A.A.F. 2000) (interviewing the victim and observations in court were not sufficient basis, also relying on fact that expert was a child psychiatrist rather than a forensic psychiatrist)).

[15] United States v. Banks, 36 M.J. 150 (C.M.A. 1992).

[16] *McElhaney*, 54 M.J. at 134.

disadvantage.[17] Defense counsel (DC) too often rely on the accused's unsworn statement to present such evidence. While this is an appropriate method, others might prove more persuasive.

Defense counsel should begin preparing their sentencing cases by first talking to the accused. This background interview can provide several leads for witnesses or documentary evidence in support of the defense theme. In cases where the theme, for example, is overcoming serious hardships, records documenting the accused's placement in foster care, orphanages, and other difficult or abusive environments should be a DC's target. Witnesses unrelated to the accused who can recount the nature of such hardships will often prove more persuasive than relatives providing similar information.

Few matters are more important and indicative of an accused's character of service than the awards and decorations a Soldier has received.[18] Defense counsel often present the enlisted record brief or officer record brief of the accused, combined with the "good Soldier book," as the sole evidence on these matters. Counsel should, however, consider that the citations in support of awards and decorations, while informative, are not as compelling as an account by an eyewitness establishing the reasons for the decoration. Award-earning service in a combat zone merits a detailed inquiry. Counsel should take heed that a Soldier who has deployed multiple times to Iraq and Afghanistan has contributed a level of service to the country that few can claim. Such service should be highlighted, explored, and offered as mitigation whenever available.

Defense counsel often ask their witnesses about the rehabilitative potential of the accused. This ignores the fact that the term "rehabilitative potential" comes from RCM 1001(b)(5), the portion of the rule outlining what the prosecution may present in sentencing. Defense should find far more profit in focusing on matters in mitigation and extenuation, those matters provided for in RCM 1001(c).[19]

In many cases, the accused's goal will be to continue her military service. Several methods may be employed to convey this theme to the sentencing authority. A particularly persuasive method of conveying this "retention evidence" to the sentencing authority is through the testimony, letters, and affidavits of fellow Soldiers who have served with the accused.[20] While retention evidence appears to be a euphemism for "no punitive discharge is warranted here," the courts have consistently held that such evidence is indicative of the accused's rehabilitative potential and is thus allowed.[21] Nonetheless, "there can be a thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge."[22] Defense counsel should ensure they stay on the right side of this thin line by focusing the inquiry on the witness's willingness to serve or deploy with the accused again rather than the appropriateness of a punitive discharge; otherwise, the TC, in rebuttal, may seek to provide a "consensus view of the command."[23] Counsel should anticipate whether this view will differ from that offered by the defense witnesses.[24] Defense counsel should be alert to the prosecution overreach during rebuttal, as when the TC puts on a commander with limited knowledge of the accused or when such a commander brings with him the specter of unlawful command influence.[25]

Defense counsel should also consider the use of recidivism experts, particularly where the accused is vulnerable to a lengthy sentence to confinement. Such experts often come from the field of psychiatry.[26] In cases where the crime is particularly egregious, DC may best serve their clients by focusing their sentencing strategy on "rehabilitation of the wrongdoer" and "protection of society from the wrongdoer."[27] Such a focus could lead DC to seek

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[17] *See* United States v. Loving, 68 M.J. 1 (C.A.A.F. 2008).

[18] United States v. Demerse, 37 M.J. 488 (C.M.A. 1993) (finding "defense counsel's unexplained failure to present as sentencing evidence appellant's service record of awards and decorations for Vietnam service was legal error").

[19] United States v. Hill, 62 M.J. 271 (C.A.A.F. 2006) (finding that the defense "has broad latitude to present evidence in extenuation and mitigation under R.C.M. 1001(c), is not subject to the limitations of R.C.M. 1001(b)(5).").

[20] United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005) (finding retention evidence to be "classic mitigation evidence, which has long been relevant in courts-martial") (internal citations omitted).

[21] *Id.* at 410; United States v. Eslinger, 70 M.J. 193 (C.A.A.F. 2011); *Hill*, 62 M.J. 271; United States v. Danes, No. 20091072, 2011 WL 6010041 (A. Ct. Crim. App. Nov. 23, 2011) (unpublished), *rev'd on other grounds*, 71 M.J. 353 (C.A.A.F. 2012).

[22] *Griggs*, 61 M.J. at 409.

[23] *Id.* at 410 (quoting United States v. Aurich, 31 M.J. 95, 97 (C.M.A. 1990)).

[24] *See Eslinger*, 70 M.J. 193 (providing an account of how such evidence can favor both the government and the defense, and how both sides can commit error in presenting such evidence).

[25] United States v. Pompey, 33 M.J. 266, 270 (C.M.A. 1991) ("Where a rehabilitation opinion lacks a proper 'rational basis' or presents a risk of command influence, the opinion is no less objectionable because it is offered at the rebuttal stage rather than at the aggravation stage of the sentencing proceeding.").

[26] United States v. Barfield, 46 C.M.R. 321, 322 (C.M.A. 1973) ("[P]sychiatric evaluations of offenders and the nature of their behavior are often considered [at sentencing]. Whether such behavior is likely to be repeated or is an isolated aberration on the accused's part is obviously of importance in determining the sentence to be imposed.").

[27] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 2-6-9 (1 Jan. 2010) (listing the five principal reasons society recognizes as justifying a sentence for one who breaks the law. They are: rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society of the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crimes and (his) (her) sentence from committing the same or similar offenses.).

and present expert evidence tending to minimize the future dangerousness of the accused, or on presenting evidence showing that rehabilitative programs available in confinement will prevent the accused from posing a threat to society in time. In the absence of a witness able to explain, for example, about sex offender rehabilitation programs at the United States Disciplinary Barracks at Fort Leavenworth, DC could ask the military judge to take judicial notice of such programs.[28]

Conclusion

In the end, both TC and DC should focus their sentencing cases on the character of the accused. Such a focus is in line with military practice, a practice which treats each case as unique and each accused as worthy of an individually crafted sentence.

[28] United States v. Flynn, 28 M.J. 218 (C.M.A. 1989) (finding the judge's instruction on such a program at Fort Leavenworth not to be error when the judge instructed on similar programs available at the Fort Riley Correctional Activity). Of course, to inform the military judge's decision on the request for judicial notice, counsel should be prepared to provide substantiating documentation to the military judge regarding the issue on which judicial notice is sought.

A Train in Winter: An Extraordinary Story of Women, Friendship, and Resistance in Occupied France[1]

Reviewed by *Major Trevor Barna*[*]

They had learnt, they would say, the full meaning of friendship, a commitment to each other that went far deeper than individual liking or disliking; and they now felt wiser, in some indefinable way, because they had understood the depths to which human beings can sink and equally the heights to which it is possible to rise.[2]

Introduction

On 24 January 1943, a train departed Compiègne, France, bound for the infamous Auschwitz-Birkenau concentration camp in Oswiecim, Poland.[3] On board were 230 French women, of whom only forty-nine would survive to return home to France at the end of World War II.[4] The women, many communist political activists and members of the French Resistance, had rallied against the collaborationist Vichy Government and the German occupation of France.[5] In *A Train in Winter*, biographer Caroline Moorehead[6] tells the story of *Le Convoi des 31000*, the collective eponym by which the 230 women would be known, the name taken from the number designation of the transport train to Auschwitz.[7]

In the preface, Moorehead writes that her book is "about friendship between women, and the importance that they attach to intimacy and to looking after each other, and about how, under conditions of acute hardship and danger, such mutual dependency can make the difference between living and dying."[8] Moorehead oversimplifies the myriad reasons the forty-nine women survived the Nazi occupation and the death camps. Even though Moorehead does not prove her own theory, she ultimately succeeds in proving another: that the women instinctively adopt and live by a moral and ethical code of conduct. By and large, the women conduct themselves consistent with what the U.S. military refers to as the Code of Conduct.[9] For a judge advocate, *A Train in Winter* is an effective case history validating the importance and effectiveness of the U.S. military's Code of Conduct.[10] Time and again the women demonstrate through their actions, in relation both to each other and to their captors, the existence of an inner philosophy more indefatigable than mere kinship or good luck.

Part One: A Futile Resistance

A Train in Winter opens in 1940 with the beginning of the German occupation of France.[11] After Germany defeated the overwhelmed French forces, a new puppet government was created in the town of Vichy.[12] In France, the Germans found a government and a segment of the population not only willing to cooperate but also instrumental in the Nazi's plans to eradicate 'undesirables' from Europe, Jews and communists included.[13] The French communists, more akin to labor or union activists than Cold War Soviets, began to resist, utilizing skills learned protesting the disparate treatment of the French working class in the mid to late 1930s.[14] In large part, the actions of the communists were non-violent; they wrote and distributed manifestos critical of the Vichy Government, or they helped those in danger escape occupied France.[15]

Threatened by the nascent uprising, the Nazis and their Vichy counterparts began investigating and persecuting the communist organizations and their sympathizers.[16] Many of

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[1] CAROLINE MOOREHEAD, A TRAIN IN WINTER: AN EXTRAORDINARY STORY OF WOMEN, FRIENDSHIP, AND RESISTANCE IN OCCUPIED FRANCE (2011).

[2] *Id*. at 314.

[3] *Id*. at 175.

[4] *Id*. at 285–86.

[5] *Id*. at 176.

[6] *Author: Caroline Moorehead*, HARPER COLLINS PUBLISHERS, http://www.harpercollins.com/authors/34212/Caroline_Moorehead/index.aspx (last visited Jan. 3, 2012).

[7] MOOREHEAD, *supra* note 1, at 192.

[8] *Id*. at 6–7.

[9] *See* Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958), *available at* http://www.archives.gov/federal-register/codification/executive-order/10631.html (establishing the Code of Conduct for U.S. servicemembers), *amended by* Exec. Order No. 12633, 3 C.F.R. 561 (1988) [hereinafter Code of Conduct]; U.S. DEP'T OF ARMY, PAM. 360-512, CODE OF THE U.S. FIGHTING FORCE (1 June 1998) [hereinafter DA PAM. 360-512] (providing the Code of Conduct as well as setting forth its principles and standards).

[10] Code of Conduct, *supra* note 9.

[11] MOOREHEAD, *supra* note 1, at 11.

[12] *Id*. at 15.

[13] *Id*.

[14] *Id*. at 25–29.

[15] *Id*. at 176.

[16] *Id*. at 62–159 (detailing the capture and treatment of several of the women by the French).

the women were arrested, tortured, and interned by their own government at a French prison, Romainville.[17] As reprisals for attacks on Germans and as a means to quell the uprising, the Germans began killing the French prisoners by the hundreds, including the husbands and lovers of the women.[18] Ultimately, the Nazis instituted a program of "Night and Fog," a plan formulated to terrorize the French public by causing the women to quietly and mysteriously disappear.[19]

Part One of *A Train in Winter* is the lesser of the two sections of the book, both in content and structure. Primarily, the introductory chapters suffer from Moorehead's attempt to condense volumes worth of information about the communist resistance in France, both before and during World War II. In short, Moorehead overextends herself by introducing a significant number of the women who comprise *Le Convoi des 31000*, presenting an historical background of the communist organizations in France, detailing the communist uprising against the Vichy and Nazi regimes, as well as detailing the investigation and capture of the women.

Having done too little with too much, Moorehead is forced to quickly introduce women who do not appear again for several chapters,[20] a relatively minor flaw, but an unnecessary distraction considering the sheer number of characters in the book. Moorehead could serve the readers better by focusing her book on a few of the women instead of them all. It is apparent that Moorehead wants to include each woman, perhaps as a way to honor each victim. Fortunately, Moorehead includes an appendix of short biographies in which she describes each of the 230 women.[21] These short stories about the women are at times as powerful as the brief references to them in the main part of Moorehead's book.

Unfortunately, Moorehead complicates matters by requiring the reader to possess a significant amount of complex historical knowledge about the political tension in Europe in the early twentieth century: specifically, 1920's French communist or socialist leaders,[22] Nazi leadership, and the Spanish Civil War and its traumatic impact on France. For example, Moorehead references Léon Blum, the first Socialist to become Premier of France, on six separate occasions throughout the book, but leaves the reader guessing as to who he was and what his role was in the political movement occurring before and during World War II.[23] Referencing these figures or events without adequate context or explanation leaves the reader confused and distracted.

As Moorehead's stated purpose is to demonstrate the connection the women had with one another—regardless of their individual politics, religion, or class—this focus on their background, upbringing and beliefs offers little. The motivation of the communist women to resist, may explain why they "shared a sense of solidarity and comradeship,"[24] but their political beliefs only provide an explanation why they were arrested, not why they survived. Part One of *A Train in Winter* is a somewhat informative introduction, yet due to its confusing and superficial content, ultimately expendable.

Part Two: Surviving the Holocaust

Where Caroline Moorehead is at her best and where *A Train in Winter* succeeds is in the retelling of the women's struggle to survive in Auschwitz. Here the story of *Le Convoi des 31000* is most compelling. The list of primary characters becomes focused and the reader is able to connect with each woman and agonize over the horrors she must face. Moorehead's focus on politics becomes less important; instead, it is the women themselves who become truly vital to the story.

Immediately upon their arrival at Auschwitz, the women were subjected to unspeakable horrors. The camp guards brutalized the prisoners. On one occasion, the women were forced to literally run for their lives as the guards beat them with clubs.[25] Those who did not run fast enough past the gauntlet of guards were selected for immediate death.[26] Many who survived the guards' attacks later succumbed to disease or the harsh winter conditions.[27]

Many of the 230 women, 177 to be exact, did not survive the first six months at Auschwitz.[28] They died of disease or starvation, were beaten to death, or died in the gas chambers.[29] Even those seen by the other women as invincible died. Danielle Casanova, a dentist and a leader of the group, was selected to work in a relatively clean and safe

[17] *Id.* at 151–79.

[18] *Id*. at 116–18, 132, 164–65.

[19] *Id*. at 172–73 (describing the meaning of "*Nacht und Nebel*," translated from German as "Night and Fog").

[20] *See, e.g.*, *id*. at 52–53, 129 (introducing Jeanne Serre, then casually referencing her seventy-six pages later in the book when she is arrested).

[21] *Id*. at 319–35.

[22] *See, e.g.*, *id*. at 32–33 (listing various intellectuals and writers).

[23] *See Léon Blum*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/70542/Leon-Blum (last visited Jan. 3, 2012).

[24] MOOREHEAD, *supra* note 1, at 31.

[25] *Id*. at 199.

[26] *Id*.

[27] *Id*. at 209.

[28] *Id*. at 237.

[29] *Id*. at 286.

dental office. However, she was unable to escape the disease-ridden fleas and lice infesting the camp, dying in May 1943 after contracting typhus.[30]

How does someone survive such horrors? Moorehead hypothesizes that sheer luck and friendship are what saved the forty-nine women who lived.[31] However, Moorehead does note other factors that appear to play a part in helping the women survive. Specifically, Moorehead points out the French women had an "ability to adapt and organise themselves."[32] She notes that "[a]daptability was crucial, resignation fatal."[33] Moorehead was lucky enough to speak with one of the survivors, Simone Alizon, known as "Poupette" to her friends. Summarizing what Alizon told her, Moorehead writes, "Knowing that the fate of each depended on the others, Poupette would say that all individual egotism seemed to vanish and that, stripped back to the bare edge of survival, each rose to behavior few would have believed themselves capable of."[34] Rather than mere friendship, what Moorehead unknowingly describes is something greater: a combination of camaraderie and a moral code that the women possess. This ethos is ultimately more powerful than the prisons which hold the women; it saves their hearts, bodies and souls.

Part Two of *A Train in Winter* is easily the better half of the book. Moorehead's writing is more concise and stays on point. While there are still numerous characters to follow, the description of the infinite horrors of Auschwitz and the question of who survives make the book hard to put down.

Live by Example

The lessons gleaned from *A Train in Winter* are useful for the military leader endeavoring to educate others on ethical and honorable conduct if captured by an enemy, even when that enemy believes itself to be bound neither by international customary law nor by any sense of moral obligation for the humane treatment of prisoners. As Moorehead points out, the Nazis did not abide by international rules of treatment for prisoners,[35] and yet the women applied an unspoken code of conduct, which helped them not only to survive, but survive with dignity. The conduct of these women in the face of unimaginable terror and violence is to be emulated.

Rather than mere camaraderie, the women developed a sense of responsibility for one another and found ways to resist their Nazi guards. While at Auschwitz, the Germans were determined to cultivate a plant to synthesize rubber, a scarcity during the war.[36] Several of the women were sent to work in the agricultural camp. The women performed "small acts of sabotage" including "selecting the weaker roots for propagation, mixing up the numbers of batches and treating the plants with chemicals to stunt their growth."[37] These small acts of sabotage were not likely to bring the Nazi regime to its knees. Still, the acts of rebellion made the women feel as though "they were not entirely without power."[38] This mind-set is recognized by the U.S. military as a valuable ideal: Article III of the Code of Conduct states in part, "If I am captured I will continue to resist by all means available."[39]

While all the women are fitting exemplars of the Code of Conduct in practice, there are two women who most epitomize the concepts contained in the Code. The two, Danielle Casanova and Adelaïde Hautval, carried out innumerable acts of personal courage while maintaining unwavering fidelity with their compatriots. The actions of the women could easily have been the model for Article IV of the Code of Conduct, which states in part, "If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command."[40] Danielle Casanova, a dentist by trade, a communist party member, and one of the leaders of *Le Convoi des 31000*, exemplifies this tenet. Casanova continually rallied the women to keep up their spirits. "Her energetic, cheerful, determined presence and her healthy appearance became a source of strength to the others . . . ."[41] Selected to serve as a prisoner dentist for the German guards at Auschwitz; Casanova was able to help her French comrades by virtue of her position. On several occasions Casanova was able to find safer and cleaner working conditions for the other women, effectively saving their lives.[42]

Adelaïde Hautval, a doctor from Alsace, is an illustrative model of Article III, resisting her captors "by all

[30] *Id*. at 218.

[31] *Id.* at 313–14.

[32] *Id*. at 220.

[33] *Id*.

[34] *Id*. at 213.

[35] *Id*. at 63.

[36] *Id*. at 221.

[37] *Id*. at 224.

[38] *Id*.

[39] Code of Conduct, *supra* note 9, art. III. The pamphlet further states, "The duty of a member of the armed forces to use all means available to resist the enemy is not lessened by the misfortune of captivity." DA PAM. 360-512, *supra* note 9, para. 4*b*.

[40] Code of Conduct, *supra* note 9, art. IV.

[41] MOOREHEAD, *supra* note 1, at 212.

[42] *Id*. (describing various examples of how Casanova saved other prisoners, or used her position to improve their living conditions).

means available."[43] Hautval, neither a member of the communist party nor particularly close to the other women, was detained after she attempted to intervene when she witnessed a group of German soldiers abusing a Jewish family.[44] Dr. Hautval was tasked with caring for prisoners who were likely to be killed if deemed too ill.[45] She resisted her German captors by finding ways to make the desperately ill appear healthy.[46] Dr. Hautval was later ordered to assist in the medical experiments conducted by sadistic Nazi doctors and scientists.[47] Ultimately, Hautval refused knowing that she would likely be executed for her disobedience.[48] She herself was saved by another prisoner and ultimately survived the war. Hautval perfectly captured the unwritten ethical code when she told another prisoner, "I was fortunate enough to have higher values than life itself."[49]

The women of *Le Convoi des 31000*, received little to no formal military training. There were no written rules outlining a code of conduct should any of the women be taken prisoner. Nevertheless, these women encapsulate the theories of the U.S. military's Code of Conduct. In *A Train in Winter*, Moorehead and *Le Convoi des 31000* provide the military leader with countless illustrations as to how and why the Code of Conduct is not only critical but relevant to today's servicemembers who may face similarly brutal and merciless captors.

Conclusion

A Train in Winter does not provide a complete view of either the French Resistance movement nor of the horrors of the German concentration camps. A more powerful, more descriptive, and more disturbing account of survival in Auschwitz can be found in Primo Levi's Survival in Auschwitz.[50] However, where Moorehead and A Train in Winter shine is in the presentation of countless models of prisoners believing in and living by an inherently moral code of conduct in the second part of the work. The women of Le Convoi des 31000 deserve to have their story told and heard, not just because they were victims of the Nazis, but because their actions should be known and used as a model of honorable conduct of prisoners of war. While Caroline Moorehead argues that luck and friendship explain why these women were able to survive,[51] her book proves that Le Convoi des 31000 possessed much more than those modest qualities. They maintained fidelity, strength of character, and an inherent, unwritten code of conduct. For that reason alone *A Train in Winter* is a valuable resource to educate both leaders and servicemembers on how to survive and return with honor, even in the face of true horror.

[43] Code of Conduct, *supra* note 9, art. III.

[44] MOOREHEAD, *supra* note 1, at 123.

[45] *Id*. at 232–34 (various examples of Hautval taking personal risks to save other women).

[46] *Id*. at 235.

[47] *Id*. at 234–35.

[48] *Id*. at 236–37.

[49] *Id*. at 237.

[50] PRIMO LEVI, SURVIVAL IN AUSCHWITZ: IF THIS IS A MAN (Stuart Woolf trans., The Orion Press 1959) (1958).

[51] MOOREHEAD, *supra* note 1, at 314.

CLE News

1. Resident Course Quotas

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

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

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

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

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

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

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

2. TJAGLCS CLE Course Schedule (September 2012–September 2013) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
	GENERAL	
	61st Judge Advocate Officer Graduate Course	13 Aug 12 – 23 May 13
	62d Judge Advocate Officer Graduate Course	12 Aug 13 – 22 May 14
5-27-C20	189th JAOBC/BOLC-B (Ph 2)	1 Feb – 18 Mar 13
	190th JAOBC/BOLC-B (Ph 2)	22 Feb – 1 May 13
5F-F1	225th Senior Officer Legal Orientation Course	4 – 8 Feb 13
5F-F1	226th Senior Officer Legal Orientation Course	18 – 22 Mar 13
5F-F1	227th Senior Officer Legal Orientation Course	17 – 21 Jun 13
5F-F1	227th Senior Officer Legal Orientation Course	26 – 30 Aug 13
5F-F3	19th RC General Officer Legal Orientation Course	27 May – 1 Jun 13
5F-F40	Brigade Leader Course (Pilot)	22 – 25 Jan 13
5F-F1	CSM Legal Orientation Course	29 – 31 Jan 13

5F-F5	2013 Congressional Staff Legal Orientation (COLO)	21 – 22 Feb 13
5F-F52	43d Staff Judge Advocate Course	3 – 7 Jun 13
5F-F52-S	16th Team Leadership Course	3 – 7 Jun 13
5F-F55	2013 JAOAC	7 – 18 Jan 13
5F-57E	16th Paralegal Triennial Training	15 – 26 Jul 13
5F-F70	44th Methods of Instruction	27 May – 1 Jun 13
5F-F70	45th Methods of Instruction	4 – 6 Sep 13
JARC-181	JA Recruiting Course	17 – 19 Jul 13

NCO ACADEMY COURSES		
512-27D30	2d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	3d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	4th Advanced Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D30	5th Advanced Leaders Course (Ph 2)	10 – 16 Jun 13
512-27D30	6th Advanced Leaders Course (Ph 2)	12 Aug – 17 Sep 13
512-27D40	2d Senior Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D40	3d Senior Leaders Course (Ph 2)	10 – 16 Jun 13
512-27D40	4th Senior Leaders Course (Ph 2)	12 Aug – 17 Sep 13

WARRANT OFFICER COURSES		
7A-270A0	20th JA Warrant Officer Basic Course	20 May – 28 Jun 13
7A-270A1	24th Legal Administrator Course	24 – 28 Jun 13
7A-270A2	14th JA Warrant Officer Advanced Course	25 – 29 Mar 13
ENLISTED COURSES		
512-27D/20/30	24th Law for Paralegal NCO Course	18 – 22 May 13
512-27D/DCSP	22d Senior Paralegal Course	10 – 14 Jun 13
512-27DC5	40th Court Reporter Course	4 Feb – 22 Mar 13
512-27DC5	41st Court Reporter Course	29 Apr – 21 Jun 13
512-27DC5	42d Court Reporter Course	5 Aug – 20 Sep 13
512-27DC6	13th Senior Court Reporter Course	8 – 12 Jul 13
512-27DC7	18th Redictation Course	7 – 11 Jan 13
	19th Redictation Course	8 – 12 Apr 13

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	66th Law of Federal Employment Course	29 Jul – 2 Aug 13
5F-F24	37th Administrative Law for Military Organizations	11 – 15 Feb 13
NA	Tax Year 2012 PACOM Income Tax CLE	7 – 11 Jan 13
5F-F28H	Hawaii Tax Course Off Site	14 – 18 Jan 13
5F-F29	31st Federal Litigation Course	26 – 30 Aug 13
5F-F202	11th Ethics Counselors Course	8 – 12 Apr 13

CONTRACT AND FISCAL LAW		
5F-F10	166th Contract Attorneys Course	15 – 26 Jul 13
5F-F12	84th Fiscal Law Course	11 – 15 Mar 13
5F-F14	31st Comptrollers Accreditation Fiscal Law Course	18 – 22 Mar 13

CRIMINAL LAW		
5F-F33	56th Military Judge Course	15 Apr – 3 May 13
5F-F34	44th Intermediate Trial Advocacy Course	4 – 15 Feb 13
5-F-301	16th Advanced Trial Communications Course	29 – 31 May 13

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	9th Intelligence Law Course	12 – 16 Aug 13
5F-F47	59th Operational Law of Armed Conflict Course	25 Feb – 1 Mar 13
5F-F47	60th Operational Law of Armed Conflict Course	29 Jul – 9 Aug 13
5F-F48	6th Rule of Law Course	8 – 12 Jul 13

3. Naval Justice School and FY 2012–2013 Course Schedule

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

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
03RF	Legalman Accession Course (10) Legalman Accession Course (20)	4 Mar – 17 May 13 10 Jun – 23 Aug 13
03TP	Basic Trial Advocacy (10)	4 – 8 Feb 13
049N	Reserve Legalman Course (10) (Phase I)	Cancelled
056L	Reserve Legalman Course (10) (Phase II)	Cancelled
07HN	Legalman Paralegal Core (10) Legalman Paralegal Core (20) Legalman Paralegal Core (30)	21 Jan – 17 May 13 20 May – 9 Aug 13 29 Aug – 18 Dec 13
08LM	Reserve Legalman Phases Combined (10)	TBD
08XO	Legal Ethics for Paralegals Course (20) Legal Ethics for Paralegals Course (30)	28 Jan – 1 Feb 13 26 – 30 Aug 13
09XU	Professional Development (10)	Cancelled
09XY	Afghanistan Pre-Deployment (10) Afghanistan Pre-Deployment (20)	TBD TBD
09XZ	Information Operations Law Training (10)	TBD
09YA	Sexual Assault Disposition Authority Class for JA-Mobile Training Teams (10)	TBD
09YB	Sexual Assault Disposition Authority Class for Convening Authorities - Mobile Training (10)	TBD
09YF	Sexual Assault Disposition Authority Class for JA-Distance Learning (10)	TBD
09YO	Litigating Complex Cases (10)	20 – 24 May 13
09Y9	Working with Experts (10)	Cancelled
10E1	Ethics for Trial and Defense (20)	6 – 13 May 13

10E2	Post Trial Review (20)	15 – 30 Apr 13
10E3	Operational Law (20)	10 – 28 Jun 13
10E4	Law of Armed Conflict (20)	29 Apr – 13 May 13
846L	Senior Legalman Leadership Course (10)	22 – 26 Jul 13
932V	Coast Guard Legal Technician Course (10)	TBD
0257	Lawyer Course (20) Lawyer Course (30)	22 Jan – 29 Mar 13 29 Jul – 4 Oct 13
0258	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (110) Senior Officer (120) Senior Officer (130) Senior Officer (140)	22 – 24 Jan 13 (Newport) 11 – 13 Feb 13 (Newport) 11 – 13 Mar 13 (Newport) 15 – 17 Apr 13 (Newport) 13 – 15 May 13 (Newport) 17 – 19 Jun 13 (Newport) 1 – 3 Jul 13 (Newport) 29 – 31 Jul 13 (Newport) 26 – 28 Aug 13 (Newport) 23 – 25 Sep 13 Newport)
627S	Senior Enlisted Leadership Course (Fleet) (50) Senior Enlisted Leadership Course (Fleet) (60) Senior Enlisted Leadership Course (Fleet) (70) Senior Enlisted Leadership Course (Fleet) (80) Senior Enlisted Leadership Course (Fleet) (90) Senior Enlisted Leadership Course (Fleet) (100)	20 – 22 Feb 13 ((San Diego) 25 – 27 Mar 13 (San Diego) 29 – 31 May 13 (Norfolk) 29 – 31 May 13 (San Diego) 31 Jul – 2 Aug 13 (Norfolk) 16 – 18 Sep 13 (Pendleton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	15 – 19 Apr 13 (San Diego) 16 – 20 Sep 13 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (10)	29 Jul – 2 Aug 13
786R	Advanced SJA/Ethics (10)	22 – 26 Apr 13
846M	Reserve Legalman Course (10) (Phase III)	Cancelled
850T	Staff Judge Advocate Course (10) Staff Judge Advocate Course (20)	25 Feb – 8 Mar 13 8 – 19 Jul 13
850V	Law of Military Operations (10)	6 – 17 May 13
900B	Reserve Legal Assistance (10)	15 – 19 Apr 13

961J	Defending Sexual Assault Cases (10)	12 – 16 Aug 13
2622	Senior Officer (Fleet) (20) Senior Officer (Fleet) (30) Senior Officer (Fleet) (40) Senior Officer (Fleet) (50) Senior Officer (Fleet) (60) Senior Officer (Fleet) (70) Senior Officer (Fleet) (80) Senior Officer (Fleet) (90) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120)	14 – 17 Jan 13 (Cancelled) 25 – 28 Feb 13 (Cancelled) 8 – 11 Apr 13 (Cancelled) 20 – 23 May 13 (Cancelled) 24 – 27 Jun 13 (Cancelled) 8 -12 Jul 13 (Camp Lejeune, NC) 15 – 19 Jul 13 (Quantico, VA) 22 – 26 Jul 13 (Parris Island) 19 – 22 Aug 13 (Cancelled) 9 – 13 Sep 13 (Cancelled)
4040	Paralegal Research & Writing (20) Paralegal Research & Writing (30)	11 – 22 Feb 13 16 – 27 Sep 13
4048	Legal Assistance Course (10)	15 – 19 Apr 13
7878	Legal Assistance Paralegal Course (10)	15 – 19 Apr 13
S-5F-1217	Prosecuting Alcohol Facilitated Sexual Assaults (10)	12 – 16 Aug 13
S-5F-1218	TC/DC Orientation (10) TC/DC Orientation (20)	29 Apr – 3 May 13 9 – 13 Sep 13
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	10 Jan – 12 Apr 13 11 Jul – 10 Oct 13
NA	Legal Services Military Justice (10)	13 – 24 May 13
NA	Legal Services Post Trial Review (10)	22 Apr – 3 May 13
NA	Legal Services Admin Law (10)	3 – 14 Jun 13
NA	Legal Services Admin Board Recorder (10)	TBD
NA	Legal Specialist Course (20) Legal Specialist Course (30)	10 Jan – 12 Apr 13 7 May – 18 Jul 13
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (10)	Cancelled

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (30) Legal Officer Course (40) Legal Officer Course (50) Legal Officer Course (60) Legal Officer Course (70) Legal Officer Course (80) Legal Officer Course (90)	28 Jan – 15 Feb 13 11 – 29 Mar 13 8 – 26 Apr 13 6 – 24 May 13 10 – 28 Jun 13 8 – 26 Jul 13 12 – 30 Aug 13
0379	Legal Clerk Course (30) Legal Clerk Course (40)	28 Jan – 8 Feb 13 11 – 22 Mar 13

	Legal Clerk Course (50) Legal Clerk Course (60) Legal Clerk Course (70) Legal Clerk Course (80)	8 – 19 Apr 13 10 – 21 Jun 13 8 – 26 Jul 13 12 – 23 Aug 13
0360	Senior Officer Course (30) Senior Officer Course (40) Senior Officer Course (50) Senior Officer Course (60)	14 – 16 Jan 13 29 Apr – 1 May 13 3 – 5 Jun 13 9 – 11 Sep 13

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (30) Legal Officer Course (40) Legal Officer Course (50) Legal Officer Course (60) Legal Officer Course (70) Legal Officer Course (80)	28 Jan – 15 Feb 13 25 Feb – 15 Mar 13 6 – 24 May 13 10 – 28 Jun 13 22 Jul – 9 Aug 13 19 Aug – 6 Sep 13
947J	Legal Clerk Course (30) Legal Clerk Course (40) Legal Clerk Course (50) Legal Clerk Course (60) Legal Clerk Course (70) Legal Clerk Course (80) Legal Clerk Course (90)	7 Jan – 18 Jan 13 4 – 15 Feb 13 4 – 15 Mar 13 13 – 24 May 13 17 – 28 Jun 13 29 Jul – 9 Aug 13 26 Aug – 6 Sep 13
3759	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	8 – 10 Apr 13 (San Diego) 29 Apr – 1 May 13 (San Diego) 3 – 5 Jun 13 (San Diego) 16 – 18 Sep 13 (Miramar)

4. Air Force Judge Advocate General School Fiscal Year 2013 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB,AL	
Course Title	**Dates**
Trial & Defense Advocacy Course, Class 13-A	7 – 18 Jan 13
Gateway, Class 13-A	7 – 18 Jan 13
Paralegal Apprentice Course, Class 13-02	15 Jan – 8 Mar 13
Homeland Defense/Homeland Security Course, Class 13-A	22 – 25 Jan 13
CONUS Trial Advocacy Course, Class 13-A	28 Jan – 1 Feb 13 (Maxwell AFB, AL)
Joint Military Judge’s Annual Training, Class 13-A	39 Jan – 1 Feb 13

Legal & Administrative Investigations Course, Class 13-A	4 – 6 Feb 13
Judge Advocate Staff Officer Course, Class 13-B	11 Feb – 12 Apr 13
Paralegal Craftsman Course, Class 13-02	11 Feb – 29 Mar 13
Wills Preparation for Paralegals Course, Class 13-C	12 – 14 Mar 13
Paralegal Apprentice Course, Class 13-03	19 Mar – 8 May 13
Environmental Law Update Course-DL, Class 13-A	26 – 28 Mar 13
Defense Orientation Course, Class 13-B	1 – 5 Apr 13
Advanced Labor & Employment Law Course, Class 13-A (off-site)	2 – 4 Apr 13 (Washington, D.C.)
Air Force Reserve & Air National Guard Annual Survey of the Law, Class 13-A (off-site TBD)	12 -13 Apr 13
Military Justice Administration Course, Class 13-B	15 – 19 Apr 13
European Trial Advocacy Course, Class 13-A (off-site)	22 – 26 Apr 13 (Ramstein AB, Germany)
Cyber Law Course, Class 13-A	23 – 24 Apr 13
Negotiation & Appropriate Dispute Resolution, Class 13-a	29 Apr – 3 May 13
Advanced Trial Advocacy, Class 13-A	6 – 10 May 13
Operations Law Course, Class 13-A	6 – 17 May 13
CONUS Trial Advocacy Course, Class 13-B (off-site)	13 – 17 May 13 (Lackland AFB, TX)
Reserve Forces Paralegal Course, Class 13-A	20 – 29 May 13
Paralegal Apprentice Course, Class 13-04	20 May – 11 Jul 13
CONUS Trial Advocacy Course, Class 13-C (off-site)	3 – 7 Jun 13 (Nellis AFB, NV)
Staff Judge Advocate Course, Class 13-A	10 – 21 Jun 13
Law Office Management Course, Class 13-A	10 – 21 Jun 13
Paralegal Craftsman Course, Class 13-03	10 Jun – 26 Jul 13

Wills Preparation for Paralegals Course, Class 13-D	24 – 26 Jun 13
Judge Advocate Staff Officer Course, Class 13-C	8 Jul – 6 Sep 13
Paralegal Apprentice Course, Class 13-05	23 Jul – 12 Sep 13
Gateway, Class 13-B	29 Jul – 9 Aug 13
Environmental Law Course, Class 13-A	12 – 16 Aug 13
Paralegal Craftsman Course, Class 13-04	12 Aug – 27 Sep 13
Paralegal Contracts Law Course, Class 13-A	19 – 23 Aug 13
Accident Investigation Course, Class 13-A	27 – 30 Aug 13

5. Civilian-Sponsored CLE Courses

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

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

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

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

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

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

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

CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837

MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421

TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2013 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2012 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. Training Year (TY) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
8 – 10 Feb 13	Mid-Atlantic Region 154th LOD Focus: Military Justice and Separations	Norfolk, VA	MAJ Darrell Baughn Darrell.baughn@usar.army.mil SFC Daniela Davis daniela.davis@usar.army.mil
8 – 10 Mar 13	Southeast Region 12th LOD Focus: Administrative and Civil Law	Atlanta, GA	LTC Phil Lenski plenski@saclc.net SSG Kayla Thomas shakaylor.thomas2@usar.army.mil
19 – 21 Apr 13	Southwestern Region 22d LOD Focus: Military Justice and Separations	Camp Robinson North Little Rock, AR	CPT DeShun Eubanks d.eubanks@usar.army.mil SFC Tina Richardson Tina.richardson@usar.army.mil
3 – 5 May 13	National Capital Region 151st LOD Focus: Fiscal and Contract Law	Camp Dawson, WV	LTC Tom Carter gcarter@nmic.navy.mil SGT Jessica Steinberger jessica.f.keller@usar.army.mil
31 May – 2 Jun 13	Northeast Region 4th LOD Focus: Client Services	Philadelphia, PA	LTC Leonard Jones ltcleonardjones@gmail.com SSG James Griffin james.griffin15@usar.army.mil CWO Chris Reyes chris.reyes@usar.army.mil
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

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

(2) Follow the link that reads "Enter JAGCNet."

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The Judge Advocate General's School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

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

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

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

4. The Army Law Library Service

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

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

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