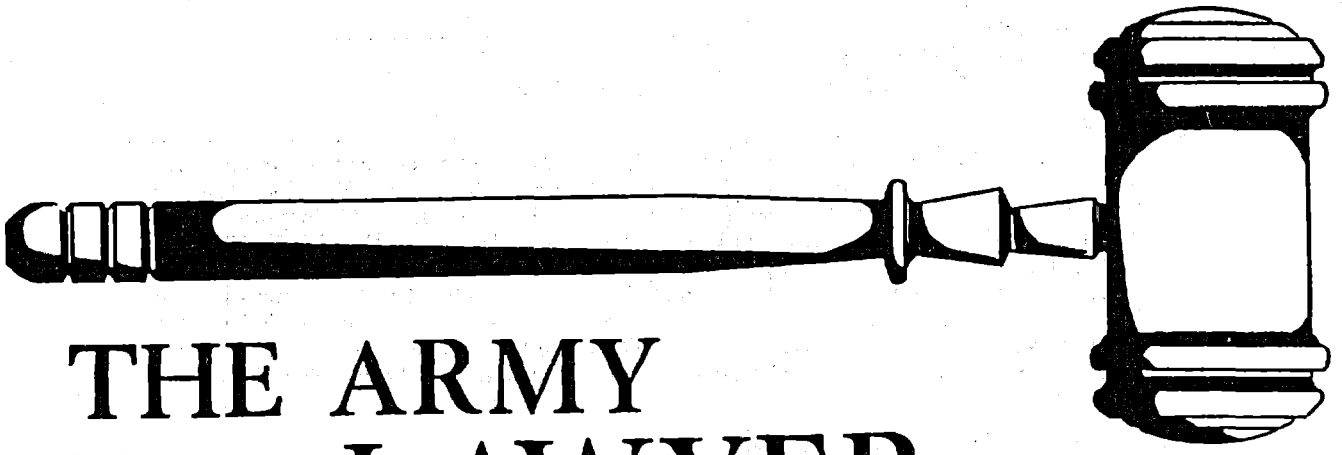

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Religious Accommodation in the Military

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Introduction

The Constitution guarantees the free exercise of religion.[1] In addition, the Army, out of tradition and an appreciation of the "spiritual dimension" of soldiering, is inclined to respect the faith of its soldiers.[2] In the face of military needs, however, the Army frequently must restrict or abrogate the free exercise of religion on the part of individual soldiers.

How the Army decides which religious practices can be accommodated and which cannot is a matter of intense national interest. Congress required a report on religious accommodation in the military as part of the 1985 Department of Defense Authorization Act.[3] This led to a change to Army Regulation 600–20, setting forth guidelines for the accommodation of religious practices.[4]

The problems of accommodation are most dramatically illustrated when military duties collide with a religiously-inspired day of rest or Sabbath. A soldier may feel conscience-bound to refuse to perform virtually all military duty for the duration of his or her Sabbath. This article will consider the problems of accommodation of a religious Sabbath within the Army. Because questions of religious accommodation are fact specific,[5] the problem will be considered by way of a hypothetical fact situation loosely based on two actual incidents. The applicable case law and regulatory guidelines will be considered in light of this fact situation.

Facts

Staff Sergeant (SSG) Sal[6] is a clinical specialist technician assigned to a United States Army Forces Command (FORSCOM) installation Medical Activity (MEDDAC). He has served on active duty with the Army for thirteen years. His service includes a tour in Vietnam, where SSG Sal served as a combat medic because of his conscientious objection to performing combat duties.

SSG Sal is pending assignment as a wardmaster. Wardmaster duty, a normal part of SSG Sal's career progression, is primarily supervisory. A wardmaster supervises four to twelve people. Enhanced training and administrative responsibilities are an important part of wardmaster duties. SSG Sal's chain of command considers him to be a highly competent, professional soldier.[7]

The MEDDAC Sergeant Major (SGM) nominated SSG Sal to attend the Primary Leadership Development Course (PLDC). This decision was based upon: SSG Sal's not having attended any prior Noncommissioned Officer Education System (NCOES) courses; and the MEDDAC SGM's belief that PLDC would enhance SSG Sal's soldierly and supervisory skills.

NCOES, of which PLDC is a component course, "provides leader and MOS [military occupational specialty] skill training in an integrated system of resident and nonresident training."[8] This system applies to all enlisted personnel of all Army components.[9] The objectives of NCOES are as follows:

> *a.* To train NCOs [non-commissioned officers] to be trainers and leaders of soldiers who will work and fight under their supervision.
>
> *b.* To provide tactical and technical competency job training for NCOs.
>
> *c.* To improve collective mission proficiency through individual proficiency of NCOs and subordinate soldiers.[10]

PLDC emphasizes leadership training and the duties, responsibilities, and authority of the NCO. It also emphasizes leadership in a combat environment. First priority for course attendance is for soldiers who have been selected for promotion to sergeant and sergeants who have not previously attended NCOES leadership courses. Declination requests for PLDC will not be favorably considered.[11]

PLDC is a four week, twenty-four hours a day, seven days a week, resident course. Training days normally begin at 0430 hours and run to 2000 hours. PLDC cycles cover three Saturdays. The first Saturday stresses supervisory maintenance and trains supervisors to oversee the maintenance of common military equipment such as masks, M–16 rifles, and radios. The second Saturday is a day off for attendees with the exception of those who are academically deficient or who have committed minor disciplinary infractions. The third Saturday centers on air mobile operations

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*This article was originally submitted as a research paper in partial satisfaction of the requirements of the 34th Judge Advocate Officer Graduate Course.

[1] U.S. Const. amend. I.

[2] Department of Defense Joint Service Study Group on Religious Practice, Joint Service Study on Religious Matters II–4 (Mar. 1985) [hereinafter Joint Service Study].

[3] Pub. L. No. 98–525, 98 Stat. 2492 (1984).

[4] Dep't of Army, Reg. No. 600–20 Personnel—General—Army Command Policy and Procedures (20 Aug. 1986) [hereinafter AR 600–20].

[5] Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981).

[6] Not his real name.

[7] Statement of MEDDAC sergeant major.

[8] Dep't of Army, Reg. No. 351–1, Individual Military Education and Training, para. 5–1 (3 Dec. 1986) [hereinafter AR 351–1].

[9] AR 351–1, para. 5–1c.

[10] AR 351–1, para. 5–2.

[11] AR 351–1, para. 5–28e.

with movement to an assembly area, offensive combat classes, and defensive combat classes. Attendees with medical specialties are excused from offensive combat classes. The air mobile operations module is a continuous four-day field training exercise. Training facilities are very limited. Throughout the cycle, attendees are granted a three-hour pass each week to participate in religious observances of their choice.

SSG Sal objected to attending PLDC because it requires training on two Saturdays, interfering with his observing those days as his Sabbath. SSG Sal is a member of the Seventh-Day Adventist Church, which claims Saturday as its Sabbath. In accordance with church beliefs, this Sabbath extends from sundown Friday until sundown Saturday. During this time no work is to be done; rather, the day is spent in religious worship.[12] SSG Sal has responded to emergencies, alerts, and medical duties on Saturdays, however, believing these are consistent with his Sabbath observance. SSG Sal heretofore has routinely been allowed to observe his Sabbath. SSG Sal's beliefs are of long standing. His sincerity is vouched for by the Installation Chaplain's Office. His case has attracted the attention of and he is supported by various nationally-known civil liberties organizations and his church's headquarters.

Judicial Standards

The first amendment to the United States Constitution provides that Congress shall make no law prohibiting the free exercise of religion. Nonetheless, not all burdens on religion are unconstitutional.[13] For example, *Prince v. Massachusetts*[14] upheld state child labor laws that were used to prohibit the sale of religious literature by child adherents of the Jehovah's Witnesses. *Reynolds v. United States*[15] upheld a federal statute prohibiting the practice of polygamy as applied to Mormons. In both of these cases, it was urged that the respective laws directly interfered with the religious beliefs of the petitioners. These cases failed to give significant guidance on appropriate judicial standards for when religiously motivated conduct may be regulated.[16]

Strict Scrutiny

Sherbert v. Verner[17] involved the denial of unemployment benefits to a Seventh-Day Adventist who refused to accept suitable work on her Sabbath. The Supreme Court held that denial of the benefits under the circumstances violated her first amendment right to free exercise of religion absent a compelling state interest.[18] This compelling state interest is not easily shown because "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[19] The compelling interest advanced by the state was the possibility that fraudulent claims filed by persons feigning religious objections to work might dilute state funds and hinder the scheduling of necessary work by employers.[20] The Court implied that to demonstrate this compelling interest required proof that there would be a large number of fraudulent claimants and serious interference with work scheduling and proof that the regulation was the least restrictive alternative available.[21]

Strict scrutiny was also applied to find a free exercise right to exemption from state regulation in *Wisconsin v. Yoder*[22] and *Thomas v. Review Board.*[23] In *Yoder,* a state compulsory education law was found not sufficiently compelling against the right of Old Order Amish to educate their children within their community in accordance with their religious beliefs. In *Thomas,* the Court, using "strict scrutiny," found that denying unemployment benefits to a worker who voluntarily quit his job for religious reasons violated his free exercise rights. His religious beliefs forbade participation in arms production. Like *Sherbert, Thomas* held that state interests opposing religious exemptions were not compelling absent evidence of unemployment claims numerous enough to seriously affect the state's interest.[24]

Departure from Strict Scrutiny

In *Gillette v. United States,*[25] the issue was whether "Congress interferes with free exercise of religion by conscripting persons who oppose a particular war [Vietnam] on grounds of conscience and religion."[26] Here, "substantial government interests" replaced "compelling government interests" as the test. The Court stressed the "justification" of the burdens placed upon selective conscientious objectors. It spoke of the "valid concerns" of Congress—the difficulty in making fair determinations as to who would be entitled to selective conscientious objector status.[27] Note that it was precisely these sorts of administrative concerns that were rejected in *Sherbert* as not compelling—the difficulty in preventing misuse of unemployment benefits. Of additional interest is the connection of the conscription statute to the constitutional authority to raise and support armies. The

[12] Dep't of Army, Pam. No. 165–13, Religious Requirements and Practices, at 1–31 (28 Apr. 1978) [hereinafter DA Pam 165–13].

[13] United States v. Lee, 455 U.S. 252, 256 (1982).

[14] 321 U.S. 158 (1944).

[15] 98 U.S. 145 (1878).

[16] Folk, *Military Appearance Requirements and Free Exercise of Religion,* 98 Mil. L. Rev. 53, 64 (1983).

[17] 374 U.S. 398 (1963).

[18] *Id.* at 403.

[19] *Id.* at 406.

[20] *Id.* at 407.

[21] *Id.*

[22] 406 U.S. 205, 215 (1972).

[23] 450 U.S. 707 (1981).

[24] *Id.* at 719.

[25] 401 U.S. 437 (1971).

[26] *Id.* at 461.

[27] *Id.* at 455, 456.

connection seems to confer "substantial government interest" status of itself. There was no mention of a need for proof that the conscription statute was the least restrictive alternative available.

Johnson v. Robinson[28] considered whether Congress interfered with the free exercise of religion by denying veterans' educational benefits to conscientious objectors performing alternate nonmilitary service. The Court said no, cited *Sherbert,* and then followed the *Gillette* analysis of "[s]ubstantial governmental interest."[29] This test was met by the constitutional authority to raise and support armies. Like *Gillette,* there was no requirement for a least restrictive alternative.

In *United States v. Lee,*[30] the issue was whether social security taxes interfered with the free exercise of religion by Old Order Amish. The Court said the state may justify a limitation on religious liberty by showing that it was essential to accomplish an "overriding government interest." There was no requirement that the government show (as in *Sherbert* and *Thomas*) that a sufficiently large number of people would claim exemptions so as to imperil the fiscal vitality of the government program. The "overriding government interest" here was the preservation of a sound tax system from hypothetical future claims.[31] A similar interest, the dilution of state unemployment funds by future claims, had been rejected in *Sherbert* as noncompelling. Also, like *Gillette,* the case stressed the need for "administrable" government operations.

In sum, one can conclude that conscription, veterans benefits, and the Social Security system are all government interests that outweigh free exercise. In addition, *Gillette* identifies the need for administrable government operations as a valid consideration in balancing government interest and free exercise.

A New Test

With *United States v. Robel,*[32] the Supreme Court began expressing disapproval of what was essentially the balancing of the competing government and individual interests in first amendment cases. In *Robel,* the Court considered the first amendment right of association against a congressional statute designed to safeguard the national defense under its constitutional War Powers and said:

> We have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. *But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict."*[33]

Rather than balancing a government interest against the first amendment right, the court considered accommodating the individual right with a more narrowly drawn definition of the government interest. The emphasis was not what interest "outweighs" the other, but how to avoid the conflict.

The departure from balancing individual rights and government interests continued in *Rostker v. Goldberg.*[34] There, the Supreme Court considered the appropriate level of scrutiny to review a congressional decision to exclude women from draft registration. The competing interests were the constitutional authority granted Congress to raise and regulate armies and navies against the fifth amendment due process prohibition of gender-based discrimination. The court refused to consider a particular level of scrutiny to weigh these interests against each other and instead addressed the issue of whether "Congress, acting under an explicit constitutional grant of authority, has by that action transgressed an explicit guarantee of individual rights which limits the authority so conferred."[35] Both interests being vital, they could not be balanced against each other; the real question was how the interests could be accommodated.

This emphasis on accommodation was applied to a free exercise case by the Court of Appeals for the D.C. Circuit in *Goldman v. Secretary of Defense.*[36] In *Goldman,* an Air Force regulation prohibiting the wear of headgear indoors was challenged by an Orthodox Jewish officer. The officer claimed that wear of a yarmulke, or skullcap, was a requirement of his faith and was protected by the free exercise clause. The court cited *Rostker* and declined to balance the competing interests. These interests were the Air Force's congressionally granted authority to regulate military appearance to enhance teamwork, motivation, and discipline against the officer's free exercise rights.[37]

The court instead followed *Robel* and *Rostker.* First, the court determined that there was a clash between individual rights and government powers.[38] Second, it considered whether legitimate military ends were sought to be achieved in a way designed to accommodate the individual's right to an appropriate degree.[39] The Air Force regulation allowed exceptions for religious wear only if the religious item is not visible. In reviewing this standard, the court held:

> We are nevertheless persuaded that the peculiar nature of the Air Force's interest in uniformity renders the

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[28] 419 U.S. 361 (1974).

[29] *Id.* at 383, 384.

[30] 455 U.S. 252 (1982).

[31] *Id.* at 258.

[32] 389 U.S. 298 (1967).

[33] *Id.* at 268 n.20 (emphasis added).

[34] 453 U.S. 57 (1981).

[35] *Id.* at 69–70.

[36] 734 F.2d 1531 (D.C. Cir. 1984), *aff'd,* 106 S. Ct. 1310 (1986).

[37] *Id.* at 1540.

[38] *Id.* at 1538.

[39] *Id.* at 1536.

strict enforcement of its regulation permissible. That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. . . . [T]he Air Force argues that it cannot make exceptions to the cutoff line [point of visibility] for religious reasons without incurring resentment from those who are compelled to adhere to the rules strictly (and whose resentment would be intensified by the arbitrariness of the rules), thereby undermining the goals of teamwork, motivation, discipline, and the like; and that it cannot move the line, so as to avoid the problem of making exceptions, without losing the benefits of uniformity altogether.[40]

The regulation of military appearance to enhance teamwork, motivation, and discipline was legitimate. Moreover, the peculiar nature of the interest demanded a high degree of uniformity for the sake of enforcement. This necessarily high degree of uniformity could not tolerate exceptions to the visibility rule without compromising the very government interests at stake. The court, therefore, allowed the Air Force's limitation of visible religious garb because the limitation was a reasonable accommodation. It was a reasonable accommodation because it allowed for free expression of religion through the wear of religious garb so long as it did not violate the visibility line. At that line, the legitimate and narrowly construed government interest in uniformity to enhance teamwork, motivation, and discipline operated to limit the free expression. By inference, the Air Force would not have been allowed to limit invisible religious garb to achieve uniformity. The ability to wear invisible religious garb in the military would appear to be protected by the right of free exercise, absent some other conflicting government interest.

In *Ogden v. United States,*[41] the Court of Appeals for the 7th Circuit adopted the two step *Goldman* test: whether the case involves legitimate military ends clashing with valid religious practices; and a determination of whether legitimate military objectives are sought to be achieved by means "designed to accommodate the individual right to an appropriate degree."[42]

In *Ogden,* a naval installation commander placed a local church off limits because church officials encouraged sailors to go absent without leave (AWOL) and to engage in homosexual activities. The court found there was a clash between legitimate military interests in discipline, loyalty, morale, and preparedness and valid first amendment free exercise of religion.[43]

Accommodation to an "appropriate degree," the second step, involved two questions. First, did the challenged action restrict the protected first amendment conduct no more than was reasonably necessary to protect the military interest (taking into account the deference due to the specialized judgments concerning internal military governance)?[44] Second, how much protection was the affected religious practice due (based on its importance to free exercise) and how seriously did the military action interfere with the practice)?[45]

The court found that the manner in which the Navy sought to protect their legitimate interest, placing the church off limits, was not arbitrary, invidious, or irrational given the substantial evidence of wrongdoing at the church.[46] The court was not satisfied, however, that the off limits order was designed to accommodate the individual right to an appropriate degree. Requiring individuals to worship separately from their congregation was a severe interference with free exercise. At the same time, the government interest in protecting sailors from homosexual advances and encouragement to go AWOL was not seriously affected during the period of organized worship. Most of the illicit activities seemed to occur in "one on one" counselling sessions. Therefore, the court ruled that, absent a showing of unusual circumstances, the off limits order should be tailored to allow sailors to attend the organized worship service. Otherwise, the off limits order stood.[47]

The significant departure of the *Goldman-Ogden* test from previous ones is that situations where significant government interests compete with explicit individual rights are no longer "all or nothing" propositions, where either the government interest or the individual right gives way. Rather, the governmental interests and individual rights are to accommodate one another to "an appropriate degree." What is appropriate depends upon how much restriction of the religious practice is necessary to protect the legitimate government interest, as narrowly drawn, contrasted with the importance of the religious practice and the degree the military action interferes with that practice. In effect, both the government interest and the individual right are subject to "judicial pruning." How much each is pruned depends on the specific facts of each case. Therefore, in *Goldman,* the Air Force was allowed to regulate religious garb, but only to the point of visibility, to effectuate its interest in teamwork, motivation, and discipline. The Air Force cannot regulate invisible religious garb, absent some other interest such as safety, health, etc. In *Ogden,* the Navy can place a church off limits when the church's activity disrupts discipline, morale, and preparedness. The off limits restriction must be drawn to allow worship that does not disrupt discipline, morale, and preparedness, however.

It is also significant that judicial deference to internal military decision-making in areas of military expertise and internal regulation is considered both in the preliminary evaluation of the legitimacy of the military interest and the manner in which the interest is effectuated.

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[40] *Id.* at 1540.

[41] 758 F.2d 1168 (7th Cir. 1985).

[42] *Id.* at 1179–80 (citing *Goldman,* 734 F.2d at 1536).

[43] *Id.* at 1182.

[44] *Id.* at 1180.

[45] *Id.*

[46] *Id.* at 1180, 1182–83.

[47] *Id.* at 1183–84.

Of passing interest is a case arising under Title VII of the Civil Rights Act of 1964.[48] In *United States v. City of Albuquerque,*[49] the Court of Appeals for the Tenth Circuit upheld the City of Albuquerque's refusal to guarantee a Seventh Day Adventist that he would not have to work on his Sabbath. The basis for the decision included an unjustified financial burden, compulsion of other firefighters to accept less favorable working conditions, reduction in firefighting efficiency, and imposition of scheduling burdens.[50] Furthermore, the decision held that courts should go slowly in restructuring the employment practices of a business that exists to protect the lives and property of a dependent citizenry.[51]

The analogy to religious accommodation in the Army is clear. The Army too exists to protect the lives and property of a dependent citizenry. In the Army there also comes a point when financial burdens, reduction in efficiency, and fairness to other soldiers will not justify accommodation of a twenty-four hour Sabbath.

Recently, the United States Supreme Court affirmed the D.C. Circuit's decision in *Goldman v. Secretary of Defense.*[52] The opinion was supported by a majority of five justices with a concurring opinion by Justice Stevens in which two of the majority joined. This diversity of viewpoints makes it difficult to discern any usable test for resolving the conflict between government interest and individual free exercise of religion.

The majority opinion, however, took note of the two step *Goldman* test, whether "legitimate military ends are sought to be achieved" and whether the military rule is "designed to accommodate the individual right to an appropriate degree."[53]

The opinion next considered the strict scrutiny test, but rejected its application to the military because of its status as a "specialized society separate from civilian society."[54] In an earlier case, Justice Stevens, also rejected the strict scrutiny test for free exercise claims.[55] At the least, therefore, a bare majority of the court would not apply strict scrutiny to a free exercise claim in a military setting.

Otherwise, the majority did not articulate a test for resolving free exercise-government interest conflicts, whether in or outside of the military. Instead, the opinion stressed judicial deference to military decision making.[56] The opinion did state that "the First Amendment does not require the military to accommodate such [religious] appearance practices in the face of its view that they would detract from the uniformity sought by the dress regulations."[57] Despite the use of the word "accommodation," the two step *Goldman-Ogden* test is not really being applied. Rather, the Court avoided the question of the appropriate degree of accommodation by deferring to the Air Force's view that the requested accommodation would interfere with the government interest.[58] This view the majority pronounces is reasonable and evenhanded. The majority does not explain its reasons for this conclusion, however.

The key to the majority opinion is deference to military decision-making; the reference to accommodation of the competing interests is mere flirtation with the *Goldman-Ogden* two-step test. Not only is the *Goldman-Ogden* accommodation test not adopted, but no clear test for deciding free exercise government interest conflicts emerges.

Application of Regulatory Guidelines

The new regulation, AR 600–20, requires commanders to consider the sincerity of the requestor and surrounding military necessity when faced with requests for accommodation of religious practices.

Sincerity

SSG Sal's commander has the initial responsibility to either grant or deny a request for accommodation.[59] Before doing so, he must decide if the request is in fact religiously based.[60]

In *United States v. Ballard,*[61] the Supreme Court held that classification of a belief as a religion does not depend upon the tenets of its creed; moreover, it was not the business of courts to evaluate religious creeds for their religious authenticity.[62] Even adherents of a particular religious faith are not limited by the main-stream beliefs of their church; the government may reject as non-religious only

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[48] 42 U.S.C. § 2000e (1982). The analogy is imperfect because Title VII only applies to civilian employees, not soldiers. *See* Gonzalez v. Department of Army, 718 F.2d 926, 928 (9th Cir. 1983).

[49] 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977).

[50] *Id.* at 114.

[51] *Id.*

[52] 106 S. Ct. 1310 (1986). For a further discussion of *Goldman* and its implications, see Folk, *The Military, Religion, and Judicial Review: The Supreme Court's Opinion in* Goldman v. Weinberger, The Army Lawyer, Nov. 1986, at 5; O'Neil, *Civil Liberty and Military Necessity—Some Preliminary Thoughts on* Goldman v. Weinberger, 113 Mil. L. Rev. 31 (1986).

[53] 106 S. Ct. at 1312.

[54] *Id.* at 1312–13 (citations omitted).

[55] United States v. Lee, 455 U.S. 252, 262 (1982) (Stevens, J., concurring).

[56] 106 S. Ct. at 1313.

[57] *Id.* at 1314.

[58] *Id.*

[59] AR 600–20, para. 5–35*c*.

[60] AR 600–20, para 5–35*a*(1).

[61] 322 U.S. 78, 86–87 (1943).

[62] *See also* Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1057, 1062–83 (1978).

claims that are bizarre or clearly non-religiously motivated.[63] So if a soldier chose to observe a Sabbath on a day other than that customarily observed by his faith or observed the Sabbath in a different way, the Army could not dismiss this as not religiously-based.

In *United States v. Seegar,* the Supreme Court defined religious belief for conscientious objection purposes as "belief that is sincere or meaningful and that occupies a place in the life of the possessor parallel to that fulfilled by an orthodox belief in God."[64] Therefore, if a soldier did not adhere to any particular sect, but rather as a philosophical and ethical duty analogous to religion set apart one day per week to "commune with nature," he or she could claim this practice as religious under the *Seegar* test.

Based on the foregoing, commanders can reject as not religiously based only the most obviously irreligious request for accommodation, such as duty time off to go bowling. A requestor's sincerity, however, may be subject to question.[65]

The burden of establishing insincerity is on the Army.[66] Under a test drawn from conscientious objection cases, the Army is responsible for establishing a basis in fact, or "some proof that is incompatible with the applicant's claim" to conclude that expedience rather than sincerity prompted the claimant's action.[67] This standard is the narrowest standard of review known to the law.[68]

Legal commentators and case law suggest several ways in which this might be done: the history of subscription to a given belief or consistent acts according to the conscientiously motivated principles;[69] external indices, such as the claimant's demeanor or the consistency of his or her current statements with prior statements and action;[70] and examination of extrinsic evidence, including patterns of inconsistent activities or statements.[71]

Note that these tests were suggested for use in conscientious objection cases, the great majority of which involve individuals *outside* of the military services trying to stay out. For purposes of evaluating sincerity as a prelude to possible religious accommodation, the individual would be inside the service and would most likely have a well established "track record" as to his or her religious practices. It would be difficult for an active duty, insincere practitioner to keep up a pretense of sincerity in front of barracks room peers and supervisors observing the individual on a daily basis. Thus, sincerity tests might be more workable in accommodation situations than in conscientious objection cases.

These sorts of tests have been applied in some cases to successfully contest a religious claimant's sincerity. In *Ron v. Lennane,*[72] a prisoner, an orthodox Yemenite Jew, claimed that his free exercise right had been violated by prison authorities who interrupted his daily morning prayers for "head counts." There was no question that morning prayers were part of his religious heritage. The court found his testimony supporting his sincerity incredible based upon his speech and demeanor, however, and found his explanation of his religious faith contrived. Evidence of the prisoner's past criminal activities, which included schemes to defraud charitable Jewish-Americans corroborated the court's conclusion about the prisoner's credibility.

In *United States v. Kuch,*[73] a defendant indicted for possession and sale of illicit drugs claimed that psychedelic drugs were the "True Host" of his church and therefore their use was protected as an exercise of his religious beliefs. The church, the "Neo American Church," incorporated in California in 1965, claimed 20,000 members. It taught that drug use brought about religious awareness and that it was the religious duty of all members to use drugs regularly. Upon examining the church's "Catechism and Handbook," the court found it to be "full of goofy nonsense, contradictions, and irreverent expressions." The church symbol was a three-eyed toad; its motto was "Victory over Horseshit" and the official church songs were "Puff the Magic Dragon" and "Row, Row, Row Your Boat." Each member carried a "Martyrdom Record" reflecting his arrests.[74] That sincerity was the pivotal point in *Kuch* is illustrated by a comparison with *People v. Woody,*[75] which held that a state statute prohibiting the unauthorized use of peyote could not constitutionally be applied to members of the Native American Church.

A final case concerns an Air Force officer who sought discharge because of conscientious objection. This claim was denied because of the officer's "incompatible activities." These activities included two previous applications for discharge on other grounds; the filing of the first application one month after receiving active duty orders; and the officer's arranging for schooling that conflicted with military service.[76]

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[63] Thomas v. Review Board, 450 U.S. 707, 715 (1980).

[64] 380 U.S. 163, 165–66 (1965).

[65] Galanter, *Religious Freedoms in the United States: A Turning Point?,* 1966 Wisc. L. Rev. 217, 264 n.81; *see also* Joint Service Study, *supra* note 2, at I–27.

[66] Koh v. Secretary of the Air Force, 719 F.2d 1384, 1385–86 (9th Cir. 1983).

[67] *Id.* at 1386.

[68] *Id.* at 1385 (citing Taylor v. Clayton, 601 F.2d 1102, 1103 (9th Cir. 1979)).

[69] Clark, *Guidelines for the Free Exercise Clause,* 83 Harv. L. Rev. 327, 342 (1969).

[70] Note, *The History and Utility of the Supreme Court's Present Definition of Religion,* 26 Loy. L. Rev. 87, 103 (1986).

[71] Note, *supra* note 62, at 1081.

[72] 445 F. Supp. 98 (D. Conn. 1977).

[73] 283 F. Supp. 439 (D.D.C. 1968).

[74] *Id.* at 444–45.

[75] 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

[76] Koh v. Secretary of the Air Force, 719 F.2d 1384, 1385–86 (9th Cir. 1983).

Commanders are constantly called upon to evaluate the sincerity of individual soldiers. It is done formally in settings such as Article 15, Uniform Code of Military Justice[77] hearings, and informally such as in requests for time off. There is no reason to believe commanders cannot evaluate a soldier's sincerity in requesting religious accommodation.

In our situation, the commander would have little reason to doubt SSG Sal's sincerity given his long standing adherence to the Seventh-Day Adventist Church, his status as a conscientious objector medic in Vietnam consistent with his faith's principles, and his overall record of amenability to military discipline. This is also an easy decision because a formal tenet of the Seventh-Day Adventist Church is the observance of a twenty-four hour Sabbath on Saturday, wherein only the saving of human life or the relief of human suffering are permitted.[78]

Military Necessity

Once it is established that the request for accommodation is in fact religiously based, the commander must consider if accommodation would have an adverse impact on military readiness, unit cohesion, standards, health, safety or discipline.[79] The regulation lists five non-exhaustive factors to consider:

1. The importance of military requirements in terms of individual and military readiness, unit cohesion, standards, health, safety, morale and discipline.

2. The religious importance of the accommodation to the requestor.

3. The cumulative impact of repeated accommodations of a similar nature.

4. Alternative means available to meet the requested accommodation.

5. Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.[80]

The first factor involves an analysis of the military requirement that conflicts with the religious practice. What is it? How important is it? Why is it important? The requirement, attendance at PLDC, represents a training interest vital to military readiness. The Secretary of the Army has exercised his constitutional/congressional authority to establish a comprehensive and mandatory training program for NCOs. This program is directly related to the important government interest of military readiness and serves to implement it.

SSG Sal was selected for PLDC, a component of NCOES, for reasons unrelated to his religion. Specifically, he was selected because he had never been to any NCOES training and was therefore a priority selectee. In addition, SSG Sal's supervisors felt that attendance would enhance his soldiering, supervisory, and leadership skills. As a soldier, SSG Sal must be ready to serve on a battlefield anywhere in the world. As a supervisor, he must be prepared to train his subordinates to similarly serve anywhere and to lead them in so serving. Skills taught on the first Saturday, such as supervisory maintenance of common military equipment, may be vital to these ends. Air mobile operations taught on the third Saturday prepare SSG Sal to go where the troops go and develop leadership skills and confidence. Without these skills, SSG Sal may be unable to carry out his and his unit's mission of caring for sick and wounded soldiers.

There is also a potential impact on unit cohesion here. "Accommodation" implies unequal treatment, generally more favorable treatment.[81] This is at the heart of military concerns about religious accommodation, particularly as it affects unit cohesion.

> Individuals develop comraderie, trust, and mutual confidence through interaction. They achieve a sense of belonging to a group by being part of that group. The individual who does not undergo the same experiences, who is drawn away from the unit by other commitments, will have fewer opportunities to develop these bonds. He or she may be perceived by the rest of the group as not fully committed to their activities and goals. The adverse effect on the individual and on the unit—of not being "one of the gang" would be greatest during periods of intense activity and stress.[82]

If SSG Sal is excused from attending PLDC, an otherwise mandatory course that all NCOs attend, his peers and subordinates in his unit may trust him less in a combat situation because he has not received important training. In addition, he will not have shared the same experiences with his fellow NCOs and therefore may not be regarded as a full member of the unit.

Also, unequal treatment implies that SSG Sal is better. Peer envy will likely result as fellow soldiers perceive that SSG Sal has escaped an onerous requirement they have not. All these things add up to impeded cohesion and teamwork.[83] Because the adverse effect is greatest during periods of intense activity and stress, the unit could be significantly crippled in responding to peacetime medical emergencies as well as battlefield operations.

Similarly, if SSG Sal attends PLDC and is excused from the Saturday training, the training unit will suffer the same disruption in cohesion described above. In addition, other trainees could conclude that the Saturday training was not that important, as individual needs took precedence over it.[84] They would then tend to take that training less seriously and consequently learn the skills less completely. When the other trainees returned to their units, they would

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[77] Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1982).

[78] DA Pam. 165–13, at 1–31.

[79] AR 600–20, para. 5–35*a*(2).

[80] AR 600–20, para. 5–35*c*.

[81] Brown v. General Motors Corp., 601 F.2d 957 (8th Cir. 1979); Black's Law Dictionary 15 (5th ed. 1979).

[82] Joint Service Study, *supra* note 2, at II–5.

[83] *Id.* at II–6 and 8.

[84] *Id.*

be hampered in their own efforts to train, supervise, and develop cohesion because of the flawed training.

Unit cohesion is intertwined with unit morale.[85] The accommodation of SSG Sal's Sabbath will inevitably affect morale as well. In Title VII civilian employment situations, an adverse morale impact on other employees can relieve an employer from having to accommodate an employee's Sabbath.[86] While Title VII does not apply to uniformed members of the Armed Forces,[87] by analogy we can conclude that the Army's concern for morale *vis-a-vis* religious accommodation should be recognized. This is particularly so considering the much greater importance of morale in a military setting than in the civilian workplace.

Readiness, unit cohesion, and morale are all significantly at stake with the PLDC training. Granting the accommodation sought by SSG Sal will significantly interfere with these aims not only within SSG Sal's unit, but in other units as well.

The second regulatory factor is the religious importance of the accommodation to SSG Sal. The doctrine of the Seventh-Day Adventist Church regarding twenty-four hour Sabbath observance is clear. "Observance of the seventh-day Sabbath . . . is a requirement for membership." "[The] Weekly Sabbath is celebrated from sundown Friday to sundown Saturday." "Normally during Sabbath hours only those duties which pertain to the saving or preserving of human life or alleviation of suffering are engaged."[88]

Sabbath observance, being a "requirement for membership," is obviously of central importance to a Seventh-Day Adventist. SSG Sal's actions in refusing Sabbath duty and the support of senior Seventh-Day Adventist officials is consistent with this conclusion. The accommodation of his Sabbath is extremely important to SSG Sal.

The third regulatory factor is the cumulative impact of repeated accommodations of a similar nature. The adverse effect on readiness, unit cohesion, and morale from excusing SSG Sal from either the entire PLDC training or the two Saturdays would be multiplied many times by additional requests for accommodation of this kind. It would be difficult to grant the accommodation request of one Sabbatarian while denying the requests of others. Religious faiths existing in the United States that claim a twenty-four hour Sabbath include the General Conference of Seventh-Day Adventists, Conservative Judaism, Orthodox Judaism, Reform Judaism, Seventh Day Baptists of U.S.A. and Canada, and the Worldwide Church of God.[89] Members of these faiths can be expected, to a greater or lesser degree, to request accommodation for the observance of a twenty-four hour Sabbath. In addition, these and other religious faiths may request accommodation for specified "holy days." Finally, there will be soldiers who as a matter of individual conscience will claim accommodation of a religious day of rest or Sabbath. These soldiers, in accordance with *Seegar*, have an equal claim to accommodation as the soldiers of formal Sabbatarian faiths. It is not possible to distinguish between faiths. All must be treated alike.[90] Given the potentially significant numbers of soldiers who could request accommodation for a twenty-four hour Sabbath, and the significant adverse consequences of excusing soldiers from training, the cumulative impact of repeated accommodations of twenty-four hour Sabbath observances could be catastrophic to readiness, unit cohesion, and morale.

The fourth regulatory factor is whether there are alternative means available to meet the requested accommodation. This factor can apply both to the unit and the soldier.[91] A partial accommodation is already available because arrangements can be made to release SSG Sal for three hours on his Sabbath. Given the strength of SSG Sal's beliefs concerning the Sabbath, however, it is unlikely that this will be acceptable to him.

An accommodation that might be acceptable to SSG Sal is to require him to attend the PLDC training, but to change the nature of his duties on Saturdays. Note that SSG Sal's beliefs do not require the cessation of all work on his Sabbath; permitted are duties that pertain to saving or preserving human life or alleviating suffering.[92] Taking advantage of SSG Sal's training as a medic, he could be assigned to participate in that capacity for the air mobile operations and combat classes. Concerning the other Saturday, where equipment maintenance was to be taught, SSG Sal might be able to participate by giving classes on maintaining medical equipment and related topics.

Providing for SSG Sal's physical presence at the training might do much to limit the adverse impact on the cohesion and morale of the training unit. In addition, the cohesion and morale of the home unit would benefit from SSG Sal's having substantially completed PLDC. This scheme suffers, however, because SSG Sal, by only observing rather than participating in much of the two Saturday's training, would undoubtedly not develop the skills that were being taught. In addition, there is a point at which "accommodation" of military duties becomes dangerous. The notion that a soldier can question legitimate orders and seek their modification is potentially destructive of discipline. "Even to try to distinguish between routine and lifesaving or alleviation of suffering duties would be detrimental to military discipline because it would encourage subordinates constantly to question the commander on what constituted a requirement important enough to require individuals to violate their Sabbath."[93] These problems argue against granting the suggested accommodation here.

The fifth regulatory factor is the previous treatment of the same or similar requests including those made for other

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[85] *Id.* at II–4.

[86] Brenner v. Diagnostic Center Hospital, 671 F.2d 141, 147 (5th Cir. 1982).

[87] Gonzalez v. Department of Army, 718 F.2d 926, 928 (9th Cir. 1983).

[88] DA Pam. 165–13 at 1–31.

[89] Joint Service Study, *supra* note 2, at Appendix.

[90] Larson v. Valente, 456 U.S. 228 (1982).

[91] Brenner v. Diagnostic Center Hospital, *supra*; Folk, *Religion and the Military: Recent Developments,* The Army Lawyer, Dec. 1985 at 9.

[92] *See supra* text accompanying note 88.

[93] Joint Service Study, *supra* note 2, at II–10.

than religious reasons. This factor "weighs in favor of continuing past treatment, absent a significant difference in the situation.[94] Here our facts do not indicate whether the commander has had previous requests for accommodation of a twenty-four hour Sabbath for PLDC or other training. Non-religious requests, if any, were probably denied given the mandatory nature of PLDC.[95] Other factors deemed appropriate can also be considered.[96] At this point, however, it does not appear possible to accommodate SSG Sal's Sabbath to the extent he will deem necessary.

The regulatory guidelines, as applied to our factual situation, are consistent with the two step *Goldman-Ogden* test and would withstand judicial review. The first step, whether there is a clash between a legitimate government interest and a valid religious practice, is satisfied. The government interest is in training to achieve an effective military force. This interest has as its source article I, section 8 of the Constitution, which grants Congress the power to make rules for the government and regulation of the land and naval forces. This power has been delegated to the Secretary of the Army.[97] Pursuant to this authority, NCOES was established as the integrated and continuing training vehicle for NCOs and senior enlisted personnel. This program is mandatory. Moreover, this training interest is directly related to readiness, unit cohesion, and morale, which were considered legitimate military interests by the *Goldman* and *Ogden* courts. These interests would likely be considered legitimate here.

Is a twenty-four hour Sabbath a valid religious practice? Merely terming a twenty-four hour period a "Sabbath" or "day of rest" is not determinative of its character; rather, what activities occur during this time are determinative.[98] So, if SSG Sal were to spend three hours attending a worship service, which is undeniably a religious practice, and the other waking hours in activities inconsistent with his professional beliefs, the twenty-four hour period he claims cannot be called in its entirety a religious practice. Nothing in the facts suggests this, however. Assuming SSG Sal spends the day in devotional activities at his church or in his home and otherwise in religious contemplation, then the entire twenty-four hour period can be considered a valid religious practice.

In the second step, one considers whether requiring SSG Sal to attend PLDC during his Sabbath (less three hours to attend a worship service) restricts free exercise no more than is reasonably necessary to protect the government interest. The government interest is in training to achieve military readiness. The training takes place in an intense twenty-four hour a day, seven day a week environment. Such an environment is deemed necessary to induce a high degree of unit cohesion among the trainess who pass through each cycle so that the training will be most effective.[99]

In addition, because training facilities on the installation are very limited, the course cannot be redesigned to exclude weekends. Other than the PLDC training cycle, the Army has permitted SSG Sal to observe his Sabbath, either by giving him Saturdays off or allowing him to perform only activities consistent with his Sabbath beliefs.

On the other hand, the affected religious practice, a twenty-four hour Sabbath observance, is due a high degree of protection, because religious worship, a fundamental religious practice, is involved.[100] Requiring SSG Sal to attend PLDC during his Sabbath effectively curtails his Sabbath practice on the affected days and perhaps jeopardizes his standing in his religious community.[101]

Under *Goldman-Ogden,* the military action, being tailored to specific military interests of training, readiness, unit cohesion, and morale, must be upheld. It is significant that the Army has encroached on SSG Sal's Sabbath apparently on only one or two Saturdays out of his thirteen year career. In addition, the Army has allowed SSG Sal to be absent from training on the affected Saturdays for three hours so that he may engage in religious worship. The Army can demonstrate that the remainder of the time is closely related to legitimate military training in furtherance of the government interest of military readiness.

Conclusion

The first step of the *Goldman-Ogden* test is whether legitimate military ends clash with valid religious practices. The regulation under the military necessity prong requires the unit commander to consider the importance of the challenged military requirement to readiness, unit cohesion, standards, health, and safety. The regulation is simply calling for a very detailed articulation of the legitimacy of the military ends. Similarly, the *Goldman-Ogden* evaluation of the validity of the religious practice is consistent with the unit commander's duty to consider the religious importance of the accommodation to the requestor. Validity of the religious practice and the religious importance of the accommodation ultimately becomes a determination of the requestor's sincerity.[102]

The second step of the *Goldman-Ogden* test is whether the legitimate military objectives are sought to be achieved by means designed to accommodate the individual right to an appropriate degree. What is appropriate would include questions of the cumulative impact of repeated accommodations of a similar nature, alternatives to the requested accommodation, and previous treatment of the same or similar requests—the very factors the regulation requires the commander to consider.

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[94] Folk, *supra* note 91, at 9.

[95] AR 351–1, para. 5–28*e*.

[96] AR 600–20, para. 5–35c.

[97] 10 U.S.C. § 3012 (1982).

[98] Ogden v. United States, 758 F.2d 1168, 1181 (7th Cir. 1985).

[99] Joint Service Study, *supra* note 2, at II–5, 6.

[100] Ogden v. United States, 758 F.2d 1168, 1183 (7th Cir. 1985).

[101] *See supra* text accompanying note 88.

[102] *See supra* notes 64–76 and accompanying text.

Thus, there is a close relationship between the regulation and the *Goldman-Ogden* test. Specifically, the regulation more completely articulates the *Goldman-Ogden* test. Also, the regulation, by forcing the unit commander to evaluate the question of accommodation at an early stage in the process, will provide a better factual record when accommodation decisions are challenged in federal courts.

The military services will continue to face conflicts between individual free exercise of religion and military requirements. Commanders who, in accordance with the new regulatory guidance, carefully analyze the competing interests, will find that their decisions are better made. These decisions are much more likely to survive judicial review as well.

Not Guilty—Only by Reason of Lack of Mental Responsibility

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"In a world filled with crime and the inability to cope with it, focusing on insanity is like worrying whether the violin is out of tune in the band playing on the deck of the Titanic."[1]

Introduction

Few legal issues in America have aroused the intense public display of emotions associated with the insanity defense.[2] Even before the June, 1982 verdict of "not guilty by reason of insanity" in the trial of John Hinckley, Jr., for the attempted assassination of President Reagan, public concern with, and distrust of, this escape from criminal liability was readily apparent.

Congress, sensing the public's outrage, responded with the Insanity Defense Reform Act.[3] This Act, the first federal legislation of its kind, substantively and procedurally shifts the perceived inequities of the insanity defense from the prosecution to the accused. The Act is of special significance in the military justice system because it is the basis for a major substantive change to military insanity rules. For the first time, the insanity defense is specifically included in the Uniform Code of Military Justice as a new Article 50a.[4]

Article 50a, signed into law as part of the "Military Justice Amendments of 1986,"[5] removes the insanity defense from its favored position in military law. This article will address the major changes to the insanity defense standard, procedural considerations, and the impact of the legislation on the limited defense of partial mental responsibility.

Major Changes to the Insanity Defense Standard

Introduction

The previous insanity defense standard was established by the Court of Military Appeals in *United States v. Frederick.*[6] In that decision, the Court of Military Appeals struck down the existing rule in the Manual for Courts-Martial,[7] holding the insanity standard to be a rule of substantive law and thus outside the President's rule-making authority under Article 36, UCMJ.[8] The court then substituted the American Law Institute's test from the Model Penal Code.[9] The *Frederick* standard, later codified at Rule for Courts-Martial 916(k)(1), provided:

> It is a defense to any offense that the accused was not mentally responsible for it. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity either to appreciate the criminality of that person's conduct or to conform that person's conduct to the requirements of the law.[10]

Article 50a, UCMJ, which replaces this standard, provides:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[11]

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[1] A. Miller, *quoted in* A.B.A. J., Mar. 1984, at 44.

[2] Fentiman, *Guilty But Mentally Ill: The Real Verdict is Guilty,* 26 B.C.L. Rev. 601 (1985).

[3] 18 U.S.C. § 20 (Supp. III 1985). In fact, as a result of the Hinckley trial, over sixty bills were introduced in Congress aimed at either restricting or eliminating the insanity defense. Fentiman, *supra* note 2, at 603.

[4] Military Justice Amendments of 1986, Pub. L. No. 99-661, 100 Stat. __ (1986) (to be codified at Uniform Code of Military Justice article 50a, 10 U.S.C. § 850a) [hereinafter UCMJ art. 50a].

[5] *Id.*

[6] 3 M.J. 230 (C.M.A. 1977).

[7] Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 120c.

[8] *Frederick,* 3 M.J. at 234.

[9] *Id.* at 237.

[10] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k)(1) [hereinafter R.C.M. 916(k)(1)].

[11] UCMJ art. 50a(a).

It changes the *Frederick* standard in several ways.[12]

A "Severe" Mental Disease or Defect

First, the threshold is greater. Article 50a requires a "severe mental disease or defect" as its foundational requirement. In comparison, the *Frederick* standard only required a "mental disease or defect" as its threshold.[13] In both cases, however, the clear intent of the drafters was to preclude minor mental disorders, such as non-psychotic behavior and neuroses, from being used to support the complete insanity defense. Courts, nevertheless, have historically struggled in defining the terms "mental disease or defect."[14] To eliminate these semantic battles in the new standard, the terms "mental disease or defect" were qualified by the addition of the word "severe."[15] The purpose, of course, was to reinforce the drafters' intent that only serious mental disorders should support the complete insanity defense.[16]

A Test of "Complete" Impairment

The new standard also changes the quantity of mental impairment required to support the insanity defense. Under the *Frederick* standard, the accused need only be "substantially" or "greatly" impaired either in appreciating the criminality of his or her conduct or conforming his or her conduct to the requirements of the law to be found legally insane. Under Article 50a, the accused must be "unable" to appreciate the nature and quality of his or her acts or their wrongfulness. It is a test of complete impairment of the accused's mental faculties. Again, the purpose is to ensure that only exceptional cases and individuals fall under the insanity standard's protections.[17]

Elimination of the Volitional Prong

The *Frederick* standard provided two ways in which the accused may be absolved of criminal liability: by lacking the substantial capacity to appreciate the criminality of his or her conduct (a cognitive prong); or by lacking the substantial capacity to conform his or her conduct to the requirements of the law (a volitional prong).[18] The cognitive prong focused on the accused's understanding of his or her conduct, while the volitional prong focused on the accused's ability to control his or her behavior. The volitional prong was originally added to the insanity standard because of the perceived harshness of previous rules.[19] In practice, however, it has been the subject of intense criticism.[20] As Professor Richard J. Bonnie, Professor of Law and Director of the Institute of Law, Psychiatry, and Public Policy, explained in hearings on the insanity defense:

> Unfortunately, however, there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by "moral guesses." To ask it at all, in my opinion, invites fabricated claims, undermines equal administration of the penal law, and compromises its deterrent effect.[21]

Because of this criticism, Article 50a eliminates the volitional prong of the test. The accused's ability to control his or her behavior is no longer a consideration.

Wrongfulness v. Criminality

The final change to the insanity standard is in the degree of understanding required for the cognitive component. Under the *Frederick* standard, the accused must not have appreciated the "criminality" of his or her conduct.[22] Article 50a opts for a standard of appreciating the "wrongfulness" of one's actions. This distinction may cause litigation.

For example, if an individual was acting under his *own* personal moral code, he might not appreciate the "wrongfulness" of his conduct despite clearly recognizing the criminal nature of his actions. Arguably, the accused could then use this new standard to try to persuade the trier of fact that he must be found not guilty by reason of insanity.

Procedural Changes

Burden of Proof

The most significant change to the insanity rules is in the allocation of the burden of proof. Under the *Frederick* standard, the prosecution had the burden of proving the accused's sanity, once the issue was raised, by proof beyond

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[12] The previous standard for mental responsibility, however, retains legal significance. First, because the insanity standard is a substantive rule of law, it can only be applied prospectively. United States v. Samuels, 801 F.2d 1052 (8th Cir. 1986). Second, many of the terms in the "new" standard remain the same. Thus, the rules and case law employed with the previous standard should be of some precedential value. *See, e.g.*, Unites States v. Cortes-Crespo, 13 M.J. 420 (C.M.A. 1982) (defines the terms "mental disease or defect").

[13] R.C.M. 916(k)(1).

[14] *See, e.g.*, United States v. Cortes-Crespo, 9 M.J. 717 (A.C.M.R. 1980), *aff'd*, 13 M.J. 420 (C.M.A. 1982).

[15] *See* S. Rep. No. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3411 [hereinafter S. Rep. No. 225]. The legislative history of the Insanity Defense Reform Act is relevant because Article 50a is based on 18 U.S.C. § 20 (Supp. III 1985).

[16] *See id.*

[17] *See* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183 (1986). The new test is very similar to the rule in *M'Naughten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (House of Lords 1843).

[18] Carroll, *supra* note 17, at 188.

[19] *See Frederick*, 3 M.J. at 237–38.

[20] Carroll, *supra* note 17, at 188.

[21] S. Rep. No. 225, *supra* note 15, at 3408–09.

[22] R.C.M. 916(k)(1).

a reasonable doubt.[23] Under Article 50a, the burden is now switched to the accused, who must carry that burden by "clear and convincing evidence."[24]

The switch in burdens was caused by the belief that the insanity defense, as an affirmative defense, should properly be on the accused. The high standard of proof—clear and convincing evidence—was justified by the vagaries of psychiatric testimony.[25] Additionally, the switch mandates new voting procedures on findings.

Bifurcated Voting Procedures

The previous Manual rules governing the insanity defense provided for a single vote by the court members as to the guilt or innocence of the accused. If the accused was acquitted by reason of insanity, he or she was simply found not guilty. Today, however, with the split burdens—proving the guilt of the accused on the government and establishing insanity on the accused—two votes are necessary.[26]

The first vote determines the guilt or innocence of the accused. That burden still requires at least a two-thirds majority for the government.[27] If the accused is acquitted, there is no second vote.[28]

If, however, the accused is found guilty, the issue of sanity remains.[29] A second vote will then be taken on the accused's mental responsibility for his or her actions. On this vote, the accused must prevail by a majority of the members.[30] For example, in an eight person court-martial panel, the accused must persuade five of the eight members, by "clear and convincing evidence," that he is insane. A decision for the accused on this second vote also produces a new verdict.

Not Guilty—Only by Reason of Lack of Mental Responsibility

The new verdict is "not guilty—only by reason of lack of mental responsibility."[31] Although seemingly a semantic change, this new verdict may have a major impact on the accused. Under the previous standard, it was impossible to determine why the accused was acquitted. Whether an acquittal was because of a failure of proof or a lack of mental responsibility was truly a court-martial panel's secret. This new verdict removes that doubt. To reach the second vote, the accused must be found guilty of the offense itself. Thus, we have a guilty accused but we are merely excusing his or her misconduct.

Many states will civilly commit an accused after trial if he or she is found not guilty by reason of insanity. A pure not guilty verdict, however, does not provide the state with a sufficient determination upon which to base its actions. This new verdict will, in many cases, permit military authorities to seek state assistance in dealing with the accused found not guilty only by reason of lack of mental responsibility.[32]

Retroactivity and Effective Date

As previously noted, the insanity standard is a rule of substantive law.[33] Because of this status, it can only be applied prospectively.[34] Article 50a thus only applies to offenses committed on or after 14 November 1986, the date the President signed the Act into law. The *Frederick* standard must be applied to all offenses committed before that date.

Partial Mental Responsibility

Impact of Article 50a, UCMJ

The new standards for mental responsibility also affect the limited defense of partial mental responsibility.[35] Under Article 50a, mental disorders not rising to the level of a complete insanity defense do not "otherwise constitute a defense."[36] Thus, the defense of partial mental responsibility is eliminated.[37]

What impact does this change have on specific intent crimes? Is psychiatric testimony or evidence that does not rise to the level of a complete insanity defense precluded from being used to negate the specific intent element of a crime? Proposed changes to the Manual for Courts-Martial

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[23] R.C.M. 916(b).

[24] UCMJ art. 50a(b). The constitutionality of switching the burden of proof to the accused has been tested and upheld. United States v. Amos, 803 F.2d 419 (8th Cir. 1986).

[25] S. Rep. No. 225, *supra* note 15, at 3412.

[26] UCMJ art. 50a(e).

[27] R.C.M. 921(c)(2).

[28] UCMJ art. 50a(e).

[29] This assumes that the issue is raised at trial.

[30] UCMJ art. 50a(e)(1).

[31] UCMJ art. 50a(d)(3).

[32] The author notes that the military medical system has procedures for dealing with mentally ill accused, but not on a long term basis. Mentally ill soldiers are usually medically discharged and then turned over to the Veteran's Administration. Hospitalization by state authorities may be a valid alternative.

[33] *See Frederick*, 3 M.J. at 236.

[34] United States v. Samuels, 801 F.2d 1052 (8th Cir. 1986).

[35] Under R.C.M. 916(k)(2):
A mental condition not amounting to a general lack of mental responsibility under subsection (k)(1) of this rule but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element.

[36] UCMJ art. 50a(a).

[37] *See* United States v. White, 766 F.2d 22 (1st Cir. 1985); United States v. Pohlot, No. Cr. 85-00354-01 (E.D. Pa. Mar. 31, 1986).

take the position that they are inadmissible for this purpose.[38] The defense, however, has several arguments.

Defense Response

First, due process considerations of presenting a defense support the use of any evidence that tends to negate an element of a crime.[39] Second, the legislative history of the Insanity Defense Reform Act, which is the basis for Article 50a, does not clearly indicate that the Act was meant to do away with the defense of diminished capacity.[40] Moreover, the legislative history affirmatively addressed the continued availability of voluntary intoxication as it affects a special state of mind.[41] And, third, at least one federal court, in *United States v. Frisbee,*[42] has held that the Insanity Defense Reform Act was not meant to do away psychiatric testimony that tends to negate a specific intent. It is an area ripe for litigation.

Conclusion

The insanity defense has been dealt a severe blow caused by public outrage at its perceived coddling of the criminal accused. Its prominence as an issue in criminal law will certainly be diminished. Despite its dimunition, however, it remains an important aspect of criminal practice, an aspect that still must be considered in the preparation of any case for trial. Moreover, as with any other legislation, Article 50a creates new areas in need of further definition. This definition can only be provided by innovative litigation.

[38] R.C.M. 916(k)(2) (proposed change to Manual for Courts-Martial forwarded to the Department of Justice on 25 Nov. 1986).

[39] *See* Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Johnson, 3 M.J. 143 (C.M.A. 1977).

[40] S. Rep. No. 225, *supra* note 15, at 3411.

[41] *Id.*

[42] 623 F. Supp. 1217 (N.D. Cal. 1985).

A Model of Management-Employee Relations/Labor Counselor Cooperation*

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In July, 1985 the Army issued Interim Change I05 to Army Regulation 690–700 concerning discipline.[1] During that same month, two major commands jointly sponsored an Advanced Labor Relations Course. Most of the attendees were employee and/or labor relations specialists. One of the liveliest topics of discussion during the four day course was the requirement in the Interim Change to coordinate disciplinary actions with labor counselors: "Formal disciplinary actions are initiated by supervisors, but must be coordinated with the servicing civilian personnel office (CPO). The CPO staff will assure appropriate oral or written coordination with the Labor Counselor on all formal disciplinary actions."[2]

The employee/labor relations specialists were nearly unanimous in their condemnation of this requirement. They related a litany of "war stories" to the audience, centering around what were essentially differences of opinion between management-employee relations (MER) branch personnel and the lawyers in the office of the staff judge advocate (SJA). The command labor counselor conducting the session attempted to soft-pedal the requirement, pointing to its vagueness. The assault on this individual was such that he finally resorted to the time-honored, "That's the way it is; make the best of it."

The attack by the MER people was wrong-headed and short-sighted. It ignored the advantages of close cooperation between management-employee relations personnel and the labor counselor. The purpose of this article is to discuss those advantages and to propose a simple way to implement a cooperative, team approach in the management and defense of adverse actions taken against Department of the Army civilian employees.

Emphasis on the need to coordinate certain personnel actions with the labor counselor is not new. In an effort to ensure that comprehensive legal services were available to civilian personnel officers at a time when the responsibility of Army commanders for civilian personnel management was becoming increasingly complex, the Director of Civilian Personnel announced on 12 July 1974 that an Army attorney at each installation would be designated a principal counselor to the civilian personnel officer and his staff.[3] Shortly thereafter, The Judge Advocate General directed staff judge advocates to designate an attorney as labor

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[1] Dep't of Army, Reg. No. 690–700.751, Civilian Personnel—Personnel Relations and Services, Discipline (15 Nov. 1981) (I05, 8 July 1985).

[2] *Id.*, para. 1–3c(1).

[3] Deputy Chief of Staff for Personnel, Labor Relations Bulletin No. 80, subject: Relationships Between Civilian Personnel Officers and Judge Advocate Staffs, 12 July 1984.

counselor, to ensure that training for and time to perform this function were made available to that attorney, and to foster a sound working relationship with the civilian personnel officer and his staff.[4]

Both the Director of Civilian Personnel and The Judge Advocate General deemed increased cooperation between the legal staff and the civilian personnel office to be essential to defend the Army's interests in the personnel law and labor relations arena. Both set forth several areas in which the labor counselor would be expected to participate, including review of labor relations policies and procedures; third-party proceedings, including preparation of briefs; grievance resolution and arbitration; contract negotiation and interpretation; representation in adversary forums; and management training.

Unfortunately, no one bothered to specify how this was to be accomplished. An attorney—almost always a civilian attorney advisor, if one was available—was designated as labor counselor at each installation, in accordance with The Judge Advocate General's directive. That attorney, who almost always performed the labor counselor job as an additional function, usually added labor counselor to his or her job description and promptly dealt with his or her other functions until and unless the civilian personnel office called.

Most of the time, the civilian personnel office did not call. There may have been several reasons for this. The civilian personnel officer or personnel management specialists were unaccustomed to calling on the legal staff for assistance. Perhaps they feared to appear incompetent or unable to do their own jobs without help. Finally, the lawyers may have considered themselves too busy with "more important" things. The result was that, in all too many cases, adequate coordination—perhaps cooperation is a better word—between the labor counselor and the civilian personnel office was lacking.

Concerned about the rising tide of administrative complaints and court cases flowing from grievances, adverse actions, and discrimination complaints, especially in class action suits—one of which required 7500 man hours simply to answer plaintiff's first set of interrogatories and request for production of records (a second request was pending)—The Judge Advocate General, on 17 November 1977, strongly reemphasized the necessity for close communication, coordination, and joint action between the labor counselor and the civilian personnel office, emphasizing the professional responsibility of the attorney to effectively represent and advise the local command.[5] The Judge Advocate General pointed out that early consultation with the labor counselor could materially contribute to effective administration of the command's management-employee relations program and to the preparation of a record that could form a sound basis for the defense of agency personnel actions. He also noted that failure to accomplish such coordination early in the case meant that an inordinate effort would be required to perform these tasks at the trial stage.

Title VII of the Civil Service Reform Act of 1978[6] did not ease the situation. The Act generated a flood of cases in which federal unions and employees tested virtually every major provision of the law, sometimes with startling success. As this flood rolled on, members of the Merit Systems Protection Board (MSPB), notably Mr. Ronald T. Wetheim, urgently admonished agency heads to bring lawyers and personnel administrators together on cases as soon as possible.[7] The Director of Civilian Personnel also promised that he would remind all civilian personnel officers of the cooperative venture begun in 1974 with the creation of the labor counselor program and that he would once again urge their wholehearted support and participation. Most recently, The Judge Advocate General forwarded another letter to staff and command judge advocates emphasizing once again the importance of an effective labor counselor program and stressing the need to develop a strong relationship between the civilian personnel office and labor counselor.[8]

Despite these exhortations and admonitions, coordination and cooperation between the labor counselor and the civilian personnel or management employee relations specialist have frequently retained a hit-or-miss quality. As a result of this lack of communication, unions, employees and even managers have sometimes played the personnel management specialists off against the lawyers. A simple example illustrates this point. A personnel officer declined to provide a union certain information incident to a contracting-out action. The union, and not the CPO, contacted the legal office, and discovered that recent legal decisions required management to provide the information. Closer cooperation between the CPO and the labor counselor on this request would have resulted in a unified management position on this point and avoided embarrassment to the command.

The presentation of a carefully considered, unified management position is especially important in the administration of employee disciplinary actions. Employee disciplinary actions have three primary objectives: first, to change the offending employee's behavior; second, usually but not always following the failure of the first, to get rid of the offending employee; and third; to set an example. If an employee who is absent without leave can be convinced to report to work, you have scored a point. On the other hand, if you cannot change the behavior, the elimination of the employee will serve to promote the efficiency of the service. In either case, fellow employees will become aware of the consequences of misconduct.

There is also a secondary objective which is required to support the first three. Winning is not everything. It is, however, important. Losing once in a while can be a positive demonstration that you are testing the limits of what

[4] Letter, DAJA-CP 1974/8342, Office of The Judge Advocate General, U.S. Army, subject: The Army Lawyer as Counselor to the Civilian Personnel Officer.

[5] Letter, DAJA-LC, Office of The Judge Advocate General, U.S. Army, subject: Update of the Labor Counselor Program (17 Nov. 1977).

[6] Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

[7] Tariela v. Cleveland, MSPB Order No. SES-80-1 (C-4) (Oct. 19, 1979).

[8] Policy Letter 85-3, Office of The Judge Advocate General, U.S. Army, subject: The Labor Counselor Program, 23 Sept. 1985, *reprinted in* The Army Lawyer, Nov. 1985, at 3.

can be done. But you will not change employee's behavior, or put other employees on notice, if the actions you take are overturned by a grievance examiner, arbitrator, or the Merit Systems Protection Board.

Losing too often can have two adverse effects: it may cause the MER staff to become reluctant to take action; and it may lead employees to believe that disciplinary actions taken by management are unlikely to be upheld. If this latter opinion becomes widespread, it will be difficult to convince the workforce that management seriously intends to enforce its standards of conduct.

Both the MER staff and the labor counselor serve as advisors to managers in the administration of an effective disciplinary program. The manager or supervisor knows what transgression has occurred and what effect it may have on the efficiency of the service. The MER staff and the labor counselor must advise the manager of the appropriate action to take. To achieve the objectives of a disciplinary program, therefore, managers must take disciplinary action for just cause and reasonably assess penalties; the MER staff, with the assistance of the lawyers, must ensure that the requirements of pertinent laws and regulations are followed; and the lawyers must be able to defend the action before a third party. Ensuring that this is done efficiently, through a team approach to management employee relations, is the key to our proposal.

At present, there are several typical relationships between the MER and SJA staffs. In order of increasing degree of cooperation these are:

Hostility. The staffs appear to argue as to the wisdom or defensibility of most actions. They vie for the attention and approval of the managers they are purportedly serving. The diversity of recommendation and the intensity of presentation tends to force managers into selecting the advice that best conforms to their wishes. This mode of operation serves no one well and the command least of all.

Non-cooperation. There is no active conflict between the two staffs in this situation. The MER branch is usually called upon to assist in the preparation of disciplinary actions. It does not bother to consult the SJA staff at any point in the process. The SJA staff does not appear to be concerned that it is uninvolved in the process.

After action cooperation. The MER staff advises the manager until he or she takes the formal personnel action. If the employee does not contest the action, the case is closed. If, however, the action is appealed or brought to arbitration, the MER staff is more than willing to turn it over to the labor counselor. The labor counselor is then faced with the task of defending an action into which he or she had no input and with which he or she has no familiarity. MSPB presiding officials have recounted stories of attorneys being presented with a case the night before the hearing. Needless to say, the attorneys are ill-prepared either to defend management's actions or to make the case for the agency.

Formal coordination of actions at agreed upon points. What these points are vary from installation to installation. What they have in common is that the SJA is asked to approve or "chop on" actions at some point prior to third party proceedings. This "chop" is limited to a determination that the action is "legally sufficient", *i.e.*, that it meets the minimum essential regulatory requirements and does not positively offend statute or case law. It is not a certification that the action, if challenged, will survive.

Because of the changes in employee management relations that have followed the Civil Service Reform Act of 1978, agency personnel actions are now being closely scrutinized by third parties, be they MSPB presiding officials, Equal Employment Opportunity Commission investigators, Federal Labor Relations Authority attorney-examiners, arbitrators, or federal courts. Managers are being cross-examined about their decisions and how those decisions were reached. Agency actions are being subjected to rigorous analysis and are carefully measured against statute and case law. Agencies are also finding that their decisions are being reversed by outsiders and that they are being ordered to compensate employees (and sometimes to pay their attorney fees) who were thought to have been properly disciplined. Like it or not, civilian personnel administrators have entered a hostile, litigious environment, one where they cannot hope long to survive unscathed if they do not make better use of the legal resources available to them. To do their jobs properly, lawyers must likewise seek new modes of communication and new ways of interacting with and providing service to their client civilian personnel offices.

At Headquarters, Military Traffic Management Command, Eastern Area, we have developed a better relationship than those described above. This relationship grew out of an innovation in the operation of the MER staff itself.

In July, 1984, the MER branch chief and the specialists began a series of case review meetings. During these meetings, the status of on-going cases was discussed, courses of action developed, and target dates set. This program was instituted in response to the relative inexperience of the staff. The staff needed a sharing of ideas and strong direction. These meetings were held four times a week. As the staff grew in experience and competence, the frequency of the meetings was gradually reduced until they are now held once a week. This case review meeting system has been an efficient management technique for the supervisory employee relations specialist, as it assists him in maintaining control of active cases and permits him to effectively guide his subordinates. It is also a useful learning experience for the employee relations specialists concerned.

For some time, there had been a relatively good relationship between the MER and SJA staffs. All proposal letters, decision letters, and third step grievance decisions were formally coordinated. We were functioning in the fourth mode discussed above. There were few instances of basic disagreement.

There were, however, some shortcomings that could not go unnoticed. Review of formal letters notifying employees of proposed adverse actions or advising employees of decisions on such proposals was complicated because the labor counselor usually had little background knowledge of the case. The labor counselor did not understand some of the more obscure personnel policies and practices. The labor counselor saw the letters only after the important decisions had been taken by managers with the advice of the MER staff.

The real problems began when these cases proceeded to the third party stage. At this point, the labor counselor

would begin his preparation of management's case. As anyone familiar with the case preparation stage knows, there never seems to be enough time to adequately prepare written statements of position, develop a method of approach, or prepare witnesses. The labor counselor had to first develop an understanding of the case and all that was involved in the many stages that led up to the third party stage. This information could be gained only through extensive discussions with the MER staff and the managers involved. He would often have to take time to become familiar with the particular personnel rules, practices, and policies. In sum, valuable time was wasted while the labor counselor was brought up to speed.

During the development of the case for third party presentation, the labor counselor would often be able to point out matters that might have been handled better or at least differently. That difference might have made it easier to present the case and thus easier to win.

In response to these shortcomings, the MER branch chief and the labor counselor agreed that the labor counselor should attend the weekly case meetings. This allowed the labor counselor to be in on every case from the beginning. Each case, as it arose, would be introduced to the MER staff and the labor counselor at the same time by the responsible specialist. The weekly system that had worked well now began to work better.

From the very beginning, the advice of the labor counselor was sought and given. The way cases proceeded was now being influenced from the outset by considerations that would take on considerable importance at the later stages. The quality of case processing has thereby improved. Sometimes this takes the form of identifying proposed actions that either are not legally sufficient or would, for one reason or another, be difficult to defend before a third party. Alerted early to such considerations, the MER staff can try to find another way to deal with the problem before the agency is committed to an untenable position.

Cases continue to be managed by the individual MER specialists, who normally provide all advice to agency managers. In some cases, however, the labor counselor is able to suggest slight changes in the way an action is handled or documented that builds a better record for the agency, one put together with a view toward successful defense of the agency position—and management's action—in litigation. The labor counselor, having been involved with the case since its inception, is comfortable with the facts, understands why agency managers took the action, is familiar with the applicable law, regulations and policies, and has had an opportunity to consider the arguments that will be offered by the adverse party at the hearing and what response he will make to those arguments. Last but not least, the labor counselor will have a vested interest in winning the case because his advice has been relied on throughout the action.

This system also results in improved performances by MER specialists. Since this innovation, the MER staff's appreciation of the factors to be considered in the event the action is challenged has deepened. Their advice to managers now incorporates the guidance and suggestions of the labor counselor. On the other hand, the labor counselor, in addition to being familiar with the case from the outset, has improved his knowledge of civilian personnel rules, regulations, and methods of operation. This opportunity for improvement is of particular benefit to those labor counselors who are Judge Advocates. These officers typically have little, if any, experience with federal civilian employment matters prior to their assignment and usually have only the vaguest notion how the civilian personnel system operates.

An added benefit from this relationship is growing mutual respect for each other's abilities and a greater understanding of the concerns and problems encountered by both parties.

While this relationship may not be unique, we believe that it is sufficiently rare to offer it as a suggestion to and model for other Army activities. For those who will consider its adoption, there are two possible problems that must be overcome. The first is that the MER branch chief will now have a stranger attending the meetings where he gives direction to his subordinates as to the course of action to be taken. This will, at first, feel uncomfortable. The second is that the labor counselor may feel that he is being absorbed by the MER branch, being used for its purposes, and that his objective perspective is being threatened.

These problems can be overcome if the two parties enter into the relationship with the understanding that they form a partnership whose mutual cooperation is a necessity in maintaining an effective management employee relations program. Both parties should remember that they each have individual areas of expertise which, in the context of management-employee relations, are interdependent. It should be clear that the Chief, MER branch retains decision making authority and administrative control over the action. This should not pose any serious difficulty for experienced attorneys, who understand that their role is one of advisor and counselor rather than action officer.

We are satisfied that the relationship has been a profitable one for both of us individually and for the command as a whole. Active, regular participation in the management employee relations program by the labor counselor provides a resource for the civilian personnel office staff to help it perform its job more effectively and educates all concerned as to what is being done and why. Such a program of cooperation can only enhance a command labor program and improve the quality of Army labor relations.

Uncharged Misconduct: Towards a New Standard of Proof?

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Since the adoption of the Military Rules of Evidence in 1980, military prosecutors have been provided with a vital framework for investigating, assessing, and planning for the admissibility of unique and critical evidence in criminal cases. In turn, military prosecutors have been availed of an even greater opportunity of, and responsibility for, presenting a more comprehensive portrayal of an accused's criminal activity. Military Rule of Evidence 404(b),[1] which provides for the admissibility of an accused's uncharged acts of misconduct[2] to prove some relevant facet of a case, has been of special significance in allowing prosecutors to present a criminal case in its fullest dimension.[3] In order that this form of evidence is not misapplied,[4] however, prosecutors must have a precise knowledge regarding the limitations surrounding its admissibility. One of the critical threshold concerns confronting a prosecutor who possesses relevant uncharged misconduct is the standard of proof necessary to demonstrate that the accused committed the uncharged misconduct. Because both Mil. R. Evid. 404(b) and its federal counterpart, Fed. R. Evid. 404(b), are silent as to this requirement, federal and military appellate courts have attempted to establish this standard on their own. The result in both sectors of appellate effort has not been uniform. Further, as the result of a recent opinion by the Court of Military Appeals, *United States v. Brooks*,[5] which seems to have departed from the "plain, clear, and conclusive" standard of proof established by the court in *United States v. Janis*,[6] this lack of uniformity will unquestionably pose future problems for trial judges and, consequently, prosecutors. Accordingly, in order that prosecutors are fully advised regarding the parameters of the standards of proof now understood by the federal and military appellate courts to be applicable towards establishing whether the accused committed the uncharged misconduct sought for admission into evidence, an elucidation of the various appellate resolutions of this issue is necessary. The ultimate aim is to provide prosecutors with a framework for understanding and satisfying the problem of proving uncharged misconduct at trial.

The *Beechum* Rationale

Shortly after the Federal Rules of Evidence were adopted, the Court of Appeals for the Fifth Circuit, in *United States v. Beechum*,[7] rendered a leading opinion comprehensively establishing the parameters for the admissibility of uncharged misconduct under Fed. R. Evid. 404(b). One of the central issues in *Beechum* was whether the prosecution had satisfactorily "proven" that the accused had committed the acts of uncharged misconduct.

Beechum was a substitute letter carrier for the South Dallas, Texas, post office. For a considerable period of time, he had been suspected of rifling the mail. Accordingly, postal inspectors planted a letter containing an 1890 silver dollar, a greeting card, and sixteen dollars (dusted with powder visible only under ultraviolet light) in a mailbox on Beechum's route. Beechum was watched as he retrieved the letter. Later, at the postal station, the letter was discovered to have been opened, and the silver dollar and the currency were missing. Beechum was searched, and the silver dollar was discovered in his hip pocket. A search of Beechum's wallet revealed two credit cards from Sears, Roebuck & Company. Subsequent investigation of these credit cards revealed that they had been mailed to addresses of individuals on Beechum's mail route during the ten month period preceding Beechum's arrest. Because of Beechum's pretrial statements, the prosecution anticipated that the central issue in Beechum's case would be his intent. Indeed, during his testimony at trial on the charge of unlawfully possessing

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[1] Mil. R. Evid. 404(b) provides that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[2] Federal courts, rather than using the term "uncharged misconduct," more frequently refer to such evidence as "extrinsic evidence" or "other crimes" evidence. It should also be remembered that such "extrinsic evidence" need not be criminal in nature. *See* United States v. Lips, 22 M.J. 679 (A.F.C.M.R. 1986).

[3] This is so especially where the accused is engaged in a course of conduct, and the past conduct is incapable of prosecution because it is barred by the statute of limitations, Uniform Code of Military Justice art. 43, 10 U.S.C. § 843 (1982).

[4] United States v. Maxwell, 21 M.J. 229 (C.M.A. 1986).

[5] 22 M.J. 441 (C.M.A. 1986).

[6] 1 M.J. 395 (C.M.A. 1976).

[7] 582 F.2d 898 (5th Cir. 1978) (en banc).

the stolen silver dollar, Beechum maintained that it fell out of a mailbox as he was raking out the mail and that he picked it up and placed it first in his shirt pocket, and later (after it had fallen out) in his hip pocket, where he claimed to keep his change. He also testified that, upon return to the postal station, he intended to turn the silver dollar over to his supervisor. The trial judge permitted the prosecution to introduce the evidence regarding the credit cards during its *case-in-chief* in order to establish the accused's intent in unlawfully possessing the silver dollar. To establish that the accused intentionally and unlawfully possessed the silver dollar, the prosecution was permitted to introduce evidence that neither credit card was issued to Beechum and that neither was signed. The prosecution was also permitted to introduce evidence indicating that the cards had been mailed some ten months prior to Beechum's arrest to two different addresses on routes he had serviced as a letter carrier. Other than the permissible inferences that could be drawn regarding the accused's possession of the credit cards, however, no direct proof that he had stolen them was presented by the prosecution. Following his conviction, Beechum appealed. A panel of the Fifth Circuit held that the trial court had erred because the "[credit] cards and [inferences the jury might draw from the accused's possessing them] were insufficient to satisfy the strict standards for admissibility of extrinsic evidence established by *United States v. Broadway*,"[8] which required the prosecution to prove such evidence by "plain, clear, and convincing evidence."[9]

In confronting the holding of the panel and its own decision in *Broadway*, the Fifth Circuit, sitting en banc, determined that "a straightforward application" of Fed. R. Evid. 404(b) required that *Broadway* be overruled.[10] According to the court, "the proper standard for proof for ruling upon factual conditions to relevancy is supplied by Fed. R. Evid. 104(b)."[11] In discussing the application of Fed. R. Evid. 104(b) (which is identical to Mil. R. Evid. 104(b)),[12] the court stated that

> As the rule provides, the task for the trial judge is to determine whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense. . . . The judge need not be convinced beyond a reasonable doubt that the defendant committed the extrinsic offense, nor need he require the Government to come forward with clear and convincing proof. The standard for the admissibility of extrinsic evidence is that of rule 104(b): "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist."[13]

In applying this standard of proof to the facts in *Beechum*, the Fifth Circuit determined that "the evidence in the record clearly supports a finding that Beechum possessed the credit cards with the intent not to relinquish them to their rightful owners."[14] The court made the following observations in this regard:

> Beechum possessed the credit cards of two different individuals. Neither card had been signed by the person to whom it was issued. When asked about the cards, Beechum answered first that the only cards he had were his own. When confronted with the credit cards, which were obviously not his own, Beechum responded that they had never been used. He refused to respond further because the inspector "had all the answers." The logical inference from this statement is that Beechum was attempting to mitigate his culpability, having been caught red-handed. The undisputed evidence indicated that he could have possessed the cards for some ten months. The jury would have been wholly justified in finding that Beechum possessed these cards with the intent permanently to deprive the owners of them.[15]

"Plain, Clear and Convincing Evidence"

Although the *Beechum* rationale regarding the standard of proof necessary to establish the accused's commission of uncharged acts of misconduct has been followed by the Fourth,[16] Tenth,[17] and Eleventh[18] Circuits, the remaining circuit courts have established a higher threshold of proof. The standard of proof found acceptable in these other circuit courts that have examined evidence admitted under Fed. R. Evid. 404(b) is that evidence of extrinsic criminal activity is admissible only if "the trial court . . . make[s] a preliminary finding that there is 'clear and convincing evidence' to connect the defendant to the other crime."[19] In nearly every instance where these courts have addressed the standard of proof issue as to the uncharged misconduct, however, it is clear that these courts have engrafted onto Fed. R. Evid. 404(b) this traditional common law standard of proof without actually delineating how this standard is applied or whether it is required. The lineage of cases leading to the Eighth Circuit's decision in *United States v.*

[8] *Id.* at 910 (citing *Beechum*, 555 F.2d 487, 499 (5th Cir. 1977)).

[9] United States v. Broadway, 447 F.2d 991, 995 (5th Cir. 1973).

[10] *Beechum*, 582 F.2d at 910.

[11] *Id.* at 913. Significantly, in the recent decision of United States v. White, 23 M.J. 84 (C.M.A. 1986), The Court of Military Appeals cited Mil. R. Evid. 104(b) as the standard to determine whether the uncharged misconduct (prior child abuse) was committed by White.

[12] Fed. R. Evid. 104(b) provides that: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Mil. R. Evid. 104(b) contains the identical wording but adds the following: "A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary."

[13] *Beechum*, 582 F.2d at 913 (citation omitted).

[14] *Id.* at 916.

[15] *Id.*

[16] United States v. Tate, 715 F.2d 864 (4th Cir. 1983).

[17] United States v. Van Cleave, 599 F.2d 954 (10th Cir. 1979).

[18] United States v. Astling, 733 F.2d 1446 (11th Cir. 1984).

[19] United States v. Shelton, 628 F.2d 54, 56 (D.C. Cir. 1980).

Drury[20] illustrates this fact. Drury was charged and convicted of violating the Mann Act[21] by inducing Minnesota prostitutes to ply their trade during the 1977 session of the South Dakota Legislature. On appeal, the accused argued, among other things, that the trial court had erred by allowing into evidence testimony of prior criminal acts. The testimony with which the appeal was concerned arose when the prosecutor asked one of its witnesses (a prostitute) if the accused had discussed with her any other girls he had used as prostitutes in South Dakota. The witness' response indicated that the accused had told her that he had "some black girls brought into town before—prior to us and they had been staying in a trailer in Ft. Pierre."[22] In analysing whether this evidence was properly admissible under Fed. R. Evid. 404(b), the Eighth Circuit observed that

> Under this rule, evidence of other wrongdoing is admissible only if the trial court makes the following findings: (1) a material issue is raised on a subject for which such evidence is admissible; (2) the proferred evidence is relevant to that issue; (3) the wrongdoing is similar in kind and reasonably close in time to the offense charged; (4) *the evidence is clear and convincing;* and (5) the probative value of the evidence outweighs its prejudicial possibilities.[23]

Interestingly, the court did not expressly determine whether the testimony of the witness was sufficient proof that the accused had actually previously violated the Mann Act. Rather, in support of its five-prong analysis of Rule 404(b), the court merely indicated that this analysis stemmed from its previous holding in *United States v. Clemons,*[24] and in a footnote indicated that, "[t]he *Clemons* test has apparently survived [the] adopting in 1975 of the Federal Rules of Evidence."[25] A tracing of the "*Clemons* test," however, reveals its origin in *United States v. Paris;*[26] a 1919 Eighth Circuit opinion. In *Paris,* the accused was charged with unlawfully carrying on the business of dealing in illicit narcotics. To prove the accused's intent to sell narcotics, the prosecution introduced evidence that the accused had been arrested on a prior occasion, shortly after purchasing a train ticket from Tulsa, Oklahoma to Memphis, Tennessee, and had been discovered to be in possession of twenty bottles of morphine. In assessing whether this evidence was properly admitted, the *Paris* court discussed the general rule then applicable to the admissibility of uncharged misconduct. The court stated that

> The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. *Evidence of a vague and uncertain character regarding such an alleged offense is never admissible.*[27]

Interestingly, there was no dispute in *Paris* that the accused while in Tulsa, Oklahoma had purchased a train ticket to Memphis, Tennessee, nor that shortly after his arrest a search of his luggage revealed twenty bottles of morphine. Instead, the court found that there was no proof that the accused intended to carry on the business of illicitly trafficking in morphine. Consequently, it was not the separate acts of the accused that failed the standard of proof set by the court, but rather the completed crime the prosecution sought to prove by the inferences surrounding those acts. The court found evidence that the accused was addicted to morphine to be sufficiently compelling to rebut the inference that the accused's possession of the twenty bottles of the drug indicated an intent to conduct a business of trafficking morphine.

The *Paris* decision, rather than clarifying the standard of "plain, clear, and conclusive" evidence, actually reduced its clarity because the court's determined standard of proof was not applied to the issue whether the accused committed the acts but to whether the acts committed could be characterized as an offense that was relevant to a factor at issue. In other words, the actual formula established by the court was not that the acts of the accused were not proven by "clear and convincing" evidence, but that the characterization of those acts were not proven in accordance with this standard. In applying this reasoning to the facts, the court was really determining that proof of possession of illegal narcotics had no relevance to an explicit factor in the charged offense of conducting an illicit drug trafficking business. Such analysis is completely different than that implied by the straightforward requirement that the accused's uncharged misconduct be proven by "plain, clear, and conclusive" evidence. Accordingly, this standard when applied to *Drury* is meaningless because the context in which the standard is applied in *Paris* is markedly different than its application in *Drury.* Yet, it is apparent that the Eighth Circuit has engrafted this standard into its consideration of evidence sought to be admitted under Fed. R. Evid. 404(b).

Another illustration of the problems that can be encountered with regard to the differing contextual applications of the "clear and convincing" standard is highlighted by the

[20] 582 F.2d 1181 (8th Cir. 1978).

[21] 18 U.S.C. § 2422 (1970).

[22] 582 F.2d at 1184.

[23] *Id.* (emphasis added).

[24] 503 F.2d 486 (8th Cir. 1974).

[25] 582 F.2d at 1184 n.6.

[26] 260 F. 529 (8th Cir. 1919).

[27] *Id.* at 531 (emphasis added).

Court of Appeals for the Seventh Circuit's decision in *United States v. Byrd.*[28] In *Byrd,* the accused was charged and convicted of bank larceny and possession of stolen money. Byrd coerced a female acquaintance, Sara Carlton, to withdraw money from the account of Edna Busch. Because of a pre-existing debt owed by Carlton to Byrd, Byrd convinced Carlton to use a bank statement belonging to Edna Busch (who Byrd explained was deceased) to withdraw money from Busch's bank account. According to Carlton's testimony, because she successfully retrieved some money from Busch's account, Byrd then threatened to expose her to bank officials if she did not continue this scheme. Carlton also testified that Byrd made a $300 deposit into his employer's account out of the proceeds of one of her withdrawals from Busch's account. According to Carlton, Byrd told her that "he had to cover some money that was taken that he said he had got robbed, but really didn't."[29] Byrd testified that he drove Carlton to the bank at which Busch's account was kept only on one occasion. He maintained that this one occasion occurred on the same day he made a deposit of $300 in his employer's account and admitted that bank statements from Edna Busch's account had come to his place of employment. Following his conviction, Byrd appealed, alleging among other things that Carlton's testimony concerning the $300 deposit in his employer's bank account was inadmissible evidence "because the government did not prove that a theft or fake robbery took place."[30]

The court, recognizing that the prosecution had sought introduction of this portion of Carlton's testimony under Fed. R. Evid. 404(b) to establish the accused's motive, determined that the essential issue was "whether the conduct was proved by clear and convincing evidence."[31] In commenting on whether the testimony of a witness was clear and convincing evidence that the acts testified to occurred, the court observed that so long as such testimony was direct and unimpeached, it constituted clear and convincing evidence that such acts had occurred.[32] The court was not satisfied, however, that Carlton's testimony satisfied this standard of proof. The court observed:

> Her testimony was *not a direct quotation* but bears the earmarks of loose paraphrase. Her *testimony was vague* as to the nature and of the misconduct and *lacking in details.* It suggested but did not clearly describe embezzlement. It can be read so that the only misconduct Byrd admitted was the making of a false statement to the effect that a robbery took place; that money was taken does not necessarily mean that Byrd took it.[33]

In pursuing this analysis of Carlton's testimony, the court noted that testimony from a witness describing uncharged misconduct must unquestionably be assessed by the standard of "clear and convincing" evidence, especially where the testimony establishes a crime the proof of which establishes an essential factor in the charged offense. The court made it clear that where that standard is not met because the testimony leaves substantial room for doubt that the misconduct took place, then "its probative value is sharply diminished and the danger that the jury will be prejudiced by it requires that it be kept from them."[34] The court recognized an exception to this standard, however. The court provided the following illustrative example:

> [S]uppose that a bank teller testifies that the defendant, in committing a robbery, pointed to a bulge in his coat pocket and said, "I've killed three people with this, and I'll kill you too." The testimony is probative of the fact that the robber was armed. But its probative value does not depend on the truth of the robber's statement that he has killed three people. The testimony is not offered to prove that the robber killed three people in the past, in order to prove from that uncharged misconduct some fact material to the crime for which he is now on trial. . . . It does not matter whether the killings took place or not. In such a case, the requirement of clear and convincing evidence does not apply.[35]

In harmonizing these two views of the "clear and convincing" standard, the court concluded that the dispositive question in applying this standard to *testimonial evidence* was as follows:

> [T]he dispositive question is whether the probative value of the testimony depends essentially on the *actual existence* of the misconduct the testimony reports. If it does, then the misconduct must be proved by clear and convincing evidence; otherwise not. To put it another way, if the nonexistence of the misconduct would not affect the probative value of the testimony that reports it, then the existence of the misconduct need not be proved by clear and convincing evidence.[36]

The *Janis* Rationale

The Court of Military Appeals embraced the "plain, clear, and conclusive" standard of proof of uncharged misconduct in *United States v. Janis.*[37] Janis was convicted of the unpremeditated murder of his three-month old son, Steven. To establish the intent element of the offense, the prosecution was permitted to introduce the accused's admissions that he had similarly struck and killed another son, Edward, three years prior to Steven's death. Additionally, Edward's autopsy report was allowed into evidence. The court determined that this evidence under the "plain, clear, and conclusive" standard of proof was "sufficiently

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[28] 771 F.2d 215 (7th Cir. 1985).

[29] *Id.* at 220.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 221 (emphasis added).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 222–23 (emphasis added).

[37] 1 M.J. 395 (C.M.A. 1976).

persuasive to warrant its admission."[38] It is interesting to note that the standard of "plain, clear, and conclusive" proof was drawn from an Eighth Circuit opinion, *Kraft v. United States.*[39] *Kraft* lies in the lineage of Eighth Circuit cases that stemmed from the *Paris* decision discussed above and, like those progeny, makes no assessment whether the uncharged misconduct admitted was proved according to the standard of "plain, clear, and conclusive" evidence.

Although the *Janis* rationale was established before the adoption of the Military Rules of Evidence, the Army Court of Military Review has not yet had occasion to abandon the "plain, clear, and conclusive" standard. For example, in *United States v. White,*[40] where the accused was charged and convicted of the voluntary manslaughter of his two-year-old son, the prosecution was permitted by the trial judge to introduce prior injuries similar to those that caused the victim's death. Some of these injuries were as recent as 24 to 48 hours preceding the victim's death, and some were injuries that occurred during the two years of the victim's life. Additional testimony from the accused's wife indicated that the accused cared for the child alone and that she had not injured the child. Expert testimony was elicited to the effect that the prior injuries were neither accidental nor self-inflicted. According to the Army court, this evidence met "the 'plain, clear and conclusive standard' "[41] because "[b]y a process of elimination, the evidence established . . . that [the accused] was the source of the relevant prior injuries to his son."[42] The Army court noted in this regard that "[t]he fact that the evidence was circumstantial rather than direct [was] of no moment as either kind of evidence can suffice."[43] The Army court applied this standard as recently as May 1986 in *United States v. Merriweather.*[44] In *Merriweather,* the accused was charged with intentional infliction of grievous bodily harm on her three-year-old son. The prosecution, in an effort to establish that the accused's assault was intentional, introduced prior injuries that the child had suffered, including old scars, bruises, and burns. On appeal, the accused alleged that the introduction of this uncharged misconduct was error because the evidence at trial did not establish that she was the one who inflicted these prior injuries. The Army court disagreed, holding that "the evidence established conclusively that [the accused] was the source of the prior injuries."[45]

The Navy-Marine Court of Military Review has pursued a different standard in analysing the standard of proof for uncharged misconduct. In *United States v. Peterson,*[46] the Navy-Marine court rejected the *Janis* rationale that evidence of uncharged misconduct must be plain, clear, and conclusive.

Peterson was a government appeal. The facts showed that the accused was charged with the rape, sodomy, and kidnapping of Miss S.W. on 5 February 1984. The offenses occurred after the victim accepted a ride in the accused's automobile. She was driven to a remote area where she was asked to have sex. When she refused, she was beaten, raped, and sodomized. The uncharged misconduct sought to be admitted by the prosecution included two other allegations of rape; one occurring before the charged crimes and one after. Both incidents involved women who were expected to testify that they were induced into the accused's vehicle, prevented from leaving against their will, threatened, and subsequently, after being driven to a remote area, physically and sexually abused. To prevent the introduction of this evidence, the accused moved to have it excluded and the trial judge sustained the motion. The government appealed pursuant to Rule for Courts-Martial 908.[47] On appeal, the accused asserted that the evidence of the extrinsic offenses must be plain, clear, and conclusive as enunciated in *Janis.* In rejecting this standard, the Navy-Marine court observed that

> There is no rigid limitation with respect to the quantum of proof required for admissibility of an extrinsic offense. The evidence must be sufficient, however, to permit the members to conclude that the accused in fact committed the extrinsic offense. If the members could not reasonably so conclude, the proof would be insufficient and inadmissible.[48]

The Navy-Marine court reaffirmed this view in *United States v. Cuellar.*[49] In *Cuellar,* the accused was charged and convicted of one specification alleging an indecent act upon a female under sixteen years of age. The evidence presented by the prosecution demonstrated that the accused hosted a large family gathering at his quarters on Thanksgiving Day 1983. Among those in attendence was the accused's sister-in-law and her four children. After finishing dinner and helping clean the kitchen, the victim, a ten-year-old girl, went to bed with the accused's son and daughter. Later, the accused went to the victim's bed and began unbuttoning her pants and rubbing her lower stomach. The victim awoke, and the accused told her to lie back down. The accused then lifted the victim's underpants and inserted his hand to a point approximately one inch from the victim's vagina. At this moment, the victim punched

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[38] *Id.* at 397.

[39] 238 F.2d 394 (8th Cir. 1956).

[40] 19 M.J. 995 (A.C.M.R. 1985), *aff'd,* 23 M.J. 84 (C.M.A. 1986).

[41] *Id.* at 996. When the case reached the Court of Military Appeals, the result was affirmed, but with slightly different, and for the purposes of this article, significantly different reasons. The Court of Military Appeals did not use the "plain, clear, and conclusive" standard of *Janis,* but rather used Mil. R. Evid. 104(b) as the standard to apply in deciding whether the uncharged misconduct had been committed by White. The Army court's use of the *Janis* standard should not be interpreted as an endorsement of *Janis,* but rather a way of safesiding its decision.

[42] 19 M.J. at 996.

[43] *Id.* at n.2.

[44] 22 M.J. 657 (A.C.M.R. 1986).

[45] *Id.* at 660.

[46] 20 M.J. 806 (N.M.C.M.R. 1985).

[47] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 908.

[48] United States v. Peterson, 20 M.J. 806, 813 (N.M.C.M.R. 1985).

[49] 22 M.J. 529 (N.M.C.M.R. 1986).

the accused. The accused then warned the victim not to tell anybody. The victim immediately ran to her parent's bedroom and related what had just happened. Against this testimony, the accused's defense counsel repeatedly questioned the victim's ability to positively identify the accused as the person who assaulted her. In response, the prosecution, over strenuous objection by the defense, was permitted to present the testimony of four other young girls (one of the girls being the victim's sister) who claimed to have been sexually molested by the accused at different times during the previous year. In fact, two of the incidents testified to had been the subject of separate civilian criminal trials at which the accused had been acquitted. On appeal, the accused raised, among several issues, the question whether the evidence of the four witnesses constituted "plain, clear, and conclusive" evidence of the accused's commission of the uncharged misconduct that was the subject of their respective testimonies. This issue was especially critical as to those incidents described by the two witnesses in which the accused had been acquitted. Once again, the Navy-Marine court rejected the *Janis* standard of proof, reaffirming its holding in *Peterson*. In so doing, the court observed that

> In this case, the only evidence of the extrinsic offenses alleged by the Government was the testimony of the victims themselves. We find that, based on such testimony, the members could reasonably conclude that appellant committed the acts. . . . We further note that the direct testimony of a victim of an alleged extrinsic offense has been held to be sufficient to satisfy even the stricter clear and convincing standard of *Janis*. *United States v. Williams*, 17 M.J. 548 (A.C.M.R. 1983). Thus, we find that the testimonies of the victims of the extrinsic offense were sufficient to render evidence of the prior acts admissible pursuant to Mil. R. Evid. 404(b). [50]

In its consideration of the issues concerning the testimony of the witnesses whose cases had resulted in acquittals in state criminal proceedings, the Navy-Marine court held:

> The fact of a prior acquittal of an extrinsic offense does not in any way insulate the underlying facts from admissibility under [Rule 404(b)]. *United States v. Wyatt*, 762 F.2d 954 (11th Cir. 1985); *United States v. Van Cleave*, 599 F.2d 954 (10th Cir. 1979); *Smith v. Wainwright*, 568 F.2d 362 (5th Cir. 1978). This rule of law was recognized long before the advent of the Federal Rules of Evidence. . . . Rule 404(b) attaches to those extrinsic acts of which an accused was found not to be criminally liable as well as those for which there is no potential for criminal liability (under State or Federal law). The fact that the extrinsic offense resulted in a conviction or an acquittal is not a decisive factor, although it is to be weighed by the trial judge in deciding whether resulting prejudice outweighs probative value. [51]

United States v. Brooks: A Rejection of *Janis*

Most recently, the Court of Military Appeals, in *United States v. Brooks*, [52] in resolving whether a prosecutor's question intended to impeach a witness was impermissibly suggestive of the accused's unproven uncharged misconduct, seemed to suggest that the *Janis* rationale had been replaced by the adoption of Mil. R. Evid. 404(b).

Brooks was convicted of one specification of possessing marijuana and one specification each of possessing and distributing Lysergic Acid Diethylamide (LSD). At his trial, the prosecution developed facts that showed that the accused had participated in the sale of four "hits" of LSD to a government informant. As the sale of the LSD took place inside the accused's trailer, the only government witness to the sale was the informant. Also present, however, was a civilian identified as "James." On the morning following the sale, the accused was apprehended on post by agents of the post Criminal Investigation Division (CID). The accused was then searched and found to be in possession of two marijuana cigarettes. Additional LSD was not found during this search. Subsequently, the accused's trailer was searched and, again, LSD was not discovered. A trailer belonging to James was searched by civilian law enforcement authorities, however, and ten tablets of LSD were discovered. In his defense, the accused called James as a witness. James, testifying under a state grant of immunity, testified that although the accused had brought the informant to the trailer it was he (James) who had sold the LSD to the informant. James further maintained that he gave the twenty dollars that the informant gave him to the accused because of a preexisting debt James owed the accused. The testimony of James, in total, was that the accused was an innocent bystander.

The prosecutor apparently knew that James and the accused had made both an illegal purchase and other illegal sales of LSD. Accordingly, during an out-of-court hearing, he requested the opportunity to cross-examine James regarding James' knowledge as to these other wrongful acts. The prosecutor hoped that James' truthful answers to these questions would reveal evidence that was admissible to show a common plan or scheme on the part of both James and the accused. Over objection by the defense, the trial judge permitted the prosecutor to conduct his cross-examination of James in accordance with the purported acts of uncharged misconduct. Contrary to the hopes of the prosecutor, however, James denied that the accused was either involved in a trip to purchase illicit drugs or in any other sale of drugs. On appeal, the accused argued that the trial judge had erred by permitting the prosecutor to ask questions concerning the accused's possible uncharged misconduct because they implied the existence of such without any proof—including even an offer of proof.

The Court of Military Appeals found the locus of its opinion in Mil. R. Evid. 404(b) rather than the military rules regarding proper impeachment. The court observed in this regard that the central question was whether there was

[50] *Id.* at 532.

[51] *Id.* at 533–34.

[52] 22 M.J. 441 (C.M.A. 1986).

a basis for the admissibility of the evidence sought to be obtained from James.[53] This issue placed the *Janis* rationale as to the standard of proof of uncharged misconduct squarely before the court. Observing that "[p]rior to the adoption of the Military Rules of Evidence, reception of 'uncharged misconduct' into evidence was strictly limited,"[54] the court, without explicitly rejecting the *Janis* rationale, went on to observe that

> Since September 1, 1980, the admission of [uncharged misconduct] has been governed by Mil. R. Evid. 404(b). . . . Like its forerunner, Mil. R. Evid. 404(b) permits the introduction of evidence of other crimes, wrongs, or acts only for specific purposes. . . . The admissibility of such evidence is also subject to the requirement that its probative value be weighed against the danger of unfair prejudice.[55]

Accordingly, applying Mil. R. Evid. 404(b) to the equation established by the prosecutor's questioning of James, the court held that

> While the Government's initial theory of the case was that [the accused] sold the drugs directly, it was entitled to proceed on the alternate theory of [the accused's] guilt. Evidence of [the accused's] prior participation would have rebutted his claim of being an innocent bystander and tended to show a *community of intent* with James to distribute drugs. Therefore, the evidence would have been relevant to show that [the accused] aided and abetted the sale, and thus was guilty as a principal.[56]

The court failed to discuss whether James' testimony would have been sufficient proof of the accused's uncharged misconduct, had James responded as the prosecutor expected. Furthermore, it is also not entirely certain that the court intended by its language in *Brooks* to reject its rationale in *Janis* that the accused's uncharged misconduct must be proven by "plain, clear and conclusive" evidence.

Conclusions

Whether the Court of Military Appeals abandoned the *Janis* standard of proof in *Brooks*, as seems to clearly be the case,[57] may not be as important as what standard the court expects prosecutors (and trial judges) to pursue in the future. The future potential issue whether the *Janis* standard correctly survived the adoption of either the Federal or Military Rules of Evidence is resolved by tracing the development of that standard's origins. It is evident from such an effort that "other crimes" evidence has undergone a metamorphosis in most American courts which now recognize that Rule 404(b) is a rule of inclusion—the evidence is admissible unless its sole reference is the disposition of the accused. In departing from their former suspicion of "other crimes" evidence, however, which the Court of Military Appeals recognized in *Brooks* was manifested by stricter standards, these courts have been slow to abandon the standard of "plain, clear, and convincing" (or "conclusive") evidence. Instead, as reflected by the lineage of cases in the Eighth Circuit concerning this standard of proof, the courts engrafted the standard of "plain, clear, and conclusive" evidence onto Rule 404(b) seemingly out of an abundance of caution and natural suspicion of the rule itself. As discussed above, however, in most of these cases even the context in which this standard was developed has been incorrectly applied and, especially in more recent decisions, almost always without reflection or discussion as to how this standard actually applies to the evidence. The Fifth Circuit seems to have recognized this fact in *Beechum* by rejecting the "plain, clear and convincing" standard in favor of a more reasoned, flexible, and consistent approach under Fed. R. Evid. 104(b).

The framework established by *Beechum*, with apparent agreement by the Navy-Marine Court of Review in its two recent opinions, *Peterson* and *Cuellar*, provides the prosecutor with a realistic framework for assessing the quality of the available evidence of the accused's alleged other crimes *or acts* desired for admission and *staging* its presentation for admission. In assessing such evidence, three essential questions must be resolved by the prosecutor. First, is the evidence more certain than equivocal; in other words, are there a variety of other reasonable inferences that could be drawn from the evidence that would cause the fact-finder to overestimate the accused's guilt? The *Paris* case, discussed above, provides a good analysis of where difficulties are encountered by prosecutors in this regard. Second, does the evidence contain sufficient detail so as to be clearly understood by the fact-finder? A good illustration of the quandry faced by the fact-finder where the evidence does not contain sufficient detail (and also infers other harmful non-relevant matters) is the *Byrd* case discussed above. Finally, the prosecutor should determine with regard to either of these questions whether other evidence is available to provide clarity to the existing evidence sought for admission. If the evidence is equivocal, confusing, lacks self-verifying detail, and cannot be supported by other independent corroborative evidence, then its use by a prosecutor is an abandonment of his or her responsibility to present justifiably admissible evidence. Otherwise, however, a prosecutor, armed with clear evidence of uncharged misconduct that is necessary to the case, relevant to a particular factor of that case, and helpful to the truth-finding process, should vigorously seek its admission.

The prosecutor, after determining the point in the trial where the evidence finds its most assured point of admissibility (*i.e.*, case-in-chief; cross-examination; or rebuttal)[58] must then present the evidence to the trial judge in a setting that allows a full exploration of its factual underpinnings. This is similar to the conduct of a trial within a trial. Within this setting, the trial judge is compelled to assess the evidence from the vantage point of the following questions:

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[53] *Id.* at 444.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Recently, in United States v. White, 23 M.J. 84 (C.M.A. 1986), the court had to decide if previous uncharged assaults had been committed by White. The court stated the standard of proof needed as follows: "Obviously, evidence of prior injuries was relevant only if appellant had inflicted them. Therefore, the evidence must support such a finding. Mil. R. Evid. 104(b)." *Id.* at 87. Clearly, the court has moved away from the *Janis* rationale.

[58] *See* Thwing, *Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal*, The Army Lawyer, Jan. 1985, at 50.

First, Will the court-members believe this evidence might be helpful in deciding the case?,[59] and, second, Is there sufficient evidence to warrant a reasonable court-member in concluding that it is to be believed?[60] As pointed out by the authors of the Military Rules of Evidence Manual,[61] a "no" answer to either of these questions precludes the admissibility of the evidence. The authors of that treatise also warn that "[i]t is very important that the judge not decide whether *he* believes the evidence . . . [but] . . . only whether a reasonable court-member could believe it."[62]

A presentation of the available evidence as proof of the accused's commission of the uncharged misconduct within this framework completely satisfies the requirements of Mil. R. Evid. 404(b) and avoids the hollow and mechanistic standard of "plain, clear, and convincing" evidence long upheld yet not shown to be of any greater assurance against trial error. In evaluating certain various types of uncharged misconduct, however, prosecutors are encouraged to seek out cases decided by the courts that have employed this standard because approval of similar evidence would, *a fortiori*, seem to meet the threshold standard of proof outlined in *Beechum*, *Peterson*, and *Cuellar*.

Is the sole testimony of a percipient witness sufficient evidence to prove an accused's uncharged misconduct? Are the natural or lawful inferences drawn from a series of acts undertaken by the accused sufficient proof that the accused committed the acts implied by those inferences? These are some of the perplexing questions that confront the prosecutor when considering the admissibility of uncharged misconduct under Mil. R. Evid. 404(b) and will transport a prosecutor from the realm of theory to the realm of stunning reality when he or she takes the first steps, in court, to introduce such delicate evidence. Consequently, understanding what standard of proof must be met in this regard is not simply an adjunct matter for consideration in the process of analysing the admissibility of evidence sought for introduction under Mil. R. Evid. 404(b). A failure to satisfy a trial judge that the accused committed the "other crimes" evidence provides a far easier basis for its exclusion than the determination whether, on balance, the evidence is unfairly prejudicial to the accused. The *Beechum* rationale provides the prosecutor with certain direction for marshalling all the available evidence necessary to prove that the accused committed the extrinsic acts sought for admission and presenting it in a manner that is helpful to the decision-making process of the trial judge and understandable to the fact-finder in assessing the application of the evidence. For these reasons, it eminently qualifies as a redeeming tool of assistance in the truth-finding process.

[59] S. Saltzburg, L. Schinasi & D. Schleuter, Military Rules of Evidence Manual 46 (2d ed. 1986).

[60] *Id.*

[61] *Id.*

[62] *Id.*

Government Brief

United States v. Rappaport: A Case Where Angels Fear to Tread?

The correct use of uncharged misconduct is an evidentiary issue that continues to challenge trial counsel. Whether the conduct in question is introduced for impeachment purposes alone or as affirmative evidence[1] is of particular importance. For example, the basis upon which the evidence is admitted will determine the strength of counsel's case, counsel's latitude in argument, and the military judge's instruction. In *United States v. Rappaport*,[2] the Air Force Court of Military Review and the Court of Military Appeals confronted the issue of whether other acts of an accused could be used as affirmative evidence or only as impeachment evidence.

The accused in *Rappaport* was an Air Force psychologist who was charged with several offenses involving improper conduct with his patients. These included charges of adultery and sodomy with two patients, Mary and Donna, soliciting another patient, Debbie, to commit adultery, and soliciting Debbie's husband, Sergeant Arnold, to possess marijuana. Both Mary and Donna testified that the accused provided them with marijuana which he referred to as "sinsemilla" and suggested their participation in a *menage a trois*. The accused admitted at trial to having committed the offense of adultery with one of the patients but not the other. He denied the solicitation offenses and testified that he had only smoked marijuana once with Mary. He further testified, during direct examination, that he had taken numerous urinalysis tests for drugs and that the results were always negative. According to the Air Force court, "[t]he clear implication of his direct testimony was that he did not use drugs except for the one occasion he admitted to."[3]

The prosecution had two instances of uncharged misconduct that it introduced under Military Rule of Evidence 404(b) to prove the charged offenses. The first instance of misconduct was proved by the testimony of Mrs. S., who was a former patient of the accused. She testified that the accused had committed adultery with her and had referred to the marijuana they smoked together as "sinsemilla" and had suggested a *menage a trois*. The trial judge permitted this testimony to be admitted under Rule 404(b) for the

[1] Affirmative evidence refers to evidence relevant to the issue of guilt or innocence and not limited to the issue of credibility.

[2] 19 M.J. 708 (A.F.C.M.R. 1984), *aff'd*, 22 M.J. 445 (C.M.A. 1986).

[3] 19 M.J. at 712.

purpose of indicating a plan or scheme on the part of the accused in committing the charged offenses. Both the Air Force Court of Military Review and the Court of Military Appeals ruled that evidence of the accused's misconduct with Mrs. S. did not demonstrate a plan or scheme on the part of the accused to take advantage of his female patients. Rather, according to the Court of Military Appeals, these acts "tended to establish propensity not plan" and ruled that the evidence was inadmissible under Rule 404(b).[4]

The second item of evidence the prosecution introduced was the testimony of Dr. "B." who testified in rebuttal that he had smoked marijuana with the accused on several occasions three years before the charged offenses. At trial, the evidence was admitted for the purpose of proving intent with respect to the charges of solicitation to possess marijuana. The members were instructed that the evidence was to be considered for the "limited purpose" of its tendency to prove the accused's intent with respect to the solicitation offenses.[5] Both the Court of Military Review and The Court of Military Appeals found the evidence of the prior drug use inadmissible, but for different reasons. Interestingly, the Air Force Court ruled that Dr. B.'s testimony was inadmissible under Military Rule of Evidence 608(b), which prohibits proving by extrinsic evidence specific instances of conduct which attacks a witness' credibility. In contrast, the Court of Military Appeals rules the prior misconduct inadmissible under Military Rule of Evidence 404(b). The *Rappaport* decision is perplexing because of what is stated by the Air Force court concerning Rule 608(b) and impeachment evidence, and what is left unstated by the Court of Military Appeals in reviewing the lower court's decision.

The Air Force court found that when the accused testified concerning his prior use of marijuana and indicated that he did not use drugs except for the one occasion, he "opened the door sufficiently to allow cross-examination on his use of marijuana with Dr. B."[6] The court further, however, ruled that the government could not introduce extrinsic evidence of the marijuana use with Dr. B. under Rule 608(b). Clearly, the accused raised a relevant issue on direct examination and the government had probative evidence on that issue. The Air Force court's decision would allow the trial counsel to cross-examine the accused concerning that evidence, but would bind the government to the answer given by the accused. This answer could be clearly false and concern a relevant issue raised by the accused. The dissenting opinion in that case, citing numerous federal decisions concerning Rule 608(b),[7] pointed out that such a result does not serve the truth-seeking process and distorts the purpose of Rule 608(b), which is to prevent litigation of *collateral* matters. "Simply stated, when the evidence is offered to contradict the witness on a material issue, it is no longer collateral."[8]

The Court of Military Appeals was able to side-step the Rule 608(b) issue by reviewing the evidence only for the purpose for which it was admitted at trial, that is, its admissibility to show the accused's "intent" to solicit the Arnolds to use marijuana. The evidence was not considered impeachment evidence by the Court of Military Appeals, but as affirmative evidence to prove intent. The court found that the prior use of marijuana with Dr. B. was not relevant in showing a "similar state of mind 3 years later when he smoked marijuana with his patients" and therefore not relevant to the accused's intent.[9]

The discussion by both courts leaves several questions unanswered. In *Rappaport,* the clear import of the accused's testimony was to portray himself as a person who did not use drugs. Clearly, such a portrayal is favorable to the accused in a case where he is charged with drug abuse. But this is a false image of the accused that can be rebutted by reliable evidence. The accused had in fact used marijuana on several occasions. The dilemma of exposing the false portrayal was not addressed by the Court of Military Appeals and several questions remain. When is an issue, which is raised by an accused and which is clearly relevant to the case, a collateral matter under Rule 608(b)? Is *contradictory evidence* to be considered a specific instance of conduct for purposes of attacking credibility under Rule 608(b)? Where the accused presents false testimony, is counsel limited to cross-examining him or her concerning contradictory evidence? If an accused persists in a falsity, despite vigorous cross-examination, is counsel bound by the accused's responses? If so, would counsel's questions alone justify a limiting instruction even though no evidence to the contrary has been admitted? When an accused portrays his or her character in a false light, has he or she opened the door for rebuttal evidence under Rule 404(a)? Captain Stephen B. Pence.

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[4] 22 M.J. at 447.

[5] *Id.*

[6] 19 M.J. at 712.

[7] Federal Rule of Evidence 608(b) is substantially the same as Military Rule of Evidence 608(b).

[8] 19 M.J. at 715 (Snyder, concurring in part and dissenting) (citation omitted).

[9] 22 M.J. at 447.

DAD Notes

Raising the Issue of Restriction Tantamount to Confinement

What happens when a military judge erroneously rules that an accused is entitled to 118 days of administrative credit for restriction tantamount to confinement? In *United States v. McElyea,*[1] the Army Court of Military Review considered whether the military judge's ruling was correct, and if so, whether the accused's right to a speedy trial had been violated.[2]

At trial, the defense counsel requested credit for 118 days of restriction tantamount to confinement. The military judge granted the request, believing the restriction was imposed as punishment. Consequently, the defense counsel moved that all charges and specifications be dismissed because the accused's right to a speedy trial had been violated.[3] The military judge denied the motion, indicating that appellant's restriction clearly was not confinement and therefore, his right to a speedy trial had not been violated.

In resolving the speedy trial and *Mason*[4] credit issues, the Army Court of Military Review, using its fact-finding powers,[5] examined the terms of appellant's restriction and determined that the restriction was not tantamount to confinement. In making this determination, the Army court applied the "totality of circumstances" test enunciated in *United States v. Smith,*[6] and the standard applied in *United States v. Schilf.*[7] Notwithstanding this determination, the Army court felt constrained under equitable considerations to retain the accused's 118 days of administrative credit.[8]

McElyea demonstrates the importance of defense counsel raising the "restriction tantamount to confinement" issue at the trial level. The military judge may grant the request for administrative credit and the Army court will normally not overturn this decision unless the military judge abused his or her discretion.[9] If the military judge does not grant the request, the defense can raise the issue again on appeal. If the restriction issue is not raised at the trial, however, the Army court has held that the issue is waived on appeal.[10] It is imperative that defense counsel litigate the restriction issue at trial. Captain Joseph Tauber.

Can You Aid and Abet a Negligent Act?

United States v. Brown[11] involved the involuntary manslaughter and aggravated assault of two German boys. These offenses occurred when Specialist Four Robinson asked Private Brown if he could drive Brown's car home from a party. Robinson was unable to control the vehicle because he was intoxicated and he ran into the two boys, killing one and seriously injuring the other.

At trial, Private Brown pled guilty. The military judge explained the law of principals, and discussed culpable negligence and proximate cause. The Court of Military Appeals granted review on whether an individual could be held liable as an aider and abettor to another who commits a criminally negligent act. The issue, however, was never reached because the court based its decision on Private Brown's own culpable negligence in allowing the other soldier to drive.

The grant of review on this issue by the court shows a willingness to reconsider its decision in *United States v. Waluski,*[12] which stated that one could be held liable for a death based on aiding and encouraging another in the culpably negligent operation of a vehicle.

In his concurring opinion, Chief Judge Everett stated that he was not yet convinced that one can be convicted of aiding and abetting a crime predicated on negligence. He based this on the idea that aiding and abetting requires the sharing of a purpose, and that one cannot share a purpose with someone who has no purpose, but is merely negligent.[13]

Trial defense counsel should be aware that this may now be a feasible issue. When faced with this situation, the logic of Chief Judge Everett's opinion should be argued and *Brown* cited. To increase the chances of a successful appeal, trial defense counsel should attempt to force the government to fully develop its theory of the case. This will hopefully preclude appellate courts from finding alternative grounds for holding the accused liable and thus squarely

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[1] 22 M.J. 863 (A.C.M.R. 1986).

[2] The court considered Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(d) [hereinafter R.C.M.] to be an effective substitute for the *Burton* rule. *See* United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[3] R.C.M. 707(d); Uniform Code of Military Justice art. 10, 10 U.S.C. § 810 (1982) [hereinafter UCMJ].

[4] United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (summary disposition).

[5] UCMJ art. 66(c).

[6] 20 M.J. 528 (A.C.M.R.), *petition denied,* 21 M.J. 169 (C.M.A. 1985).

[7] 1 M.J. 261 (C.M.A. 1976).

[8] *McElyea,* 22 M.J. at 866 n.7; *see* United States v. Bower, 21 M.J. 400 (C.M.A. 1986) (summary disposition).

[9] 22 M.J. at 865.

[10] In United States v. Ecoffey, CM 447363 (A.C.M.R. 23 Oct. 1986), the Army court held that, effective ninety days after the court's decision, it would apply waiver to all cases involving a restriction tantamount to confinement issue if not raised by the defense at trial.

[11] 22 M.J. 448 (C.M.A. 1986).

[12] 6 C.M.A. 724, 21 C.M.R. 46 (1956).

[13] Brown, 22 M.J. at 451 (Everett, C.J., concurring).

present the issue for their decision. Captain James J. McGroary.

Reopening the Case

In *United States v. Eshalomi,*[14] the Court of Military Appeals reaffirmed the defense's equal opportunity to obtain evidence. In the lead opinion by Chief Judge Everett, the court held that the trial counsel's deliberate withholding of requested information concerning a victim's medical and psychiatric history, and the victim's conflicting statements, greatly impeded the defense counsel's ability to impeach the victim and probably affected the outcome of the trial.[15] The lead opinion reviewed *United States v. Bagley,*[16] the Supreme Court's latest attempt to deal with prosecutorial failure to disclose requested impeachment evidence. An analysis of the plurality opinion in the *Bagley* case is beyond the scope of this note. Defense counsel, however, should take special note of Chief Judge Everett's comment that while *Bagley* may describe the minimal constitutional requirements of disclosure, it does not prevent Congress or the President from prescribing a higher standard for courts-martial regarding "equal opportunity to obtain witnesses and other evidence."[17]

In his concurring opinion, Judge Cox reviewed the practical import of how to deal with newly discovered evidence. Judge Cox indicated that the military judge has the power under Rule for Courts-Martial 913(c)(5)[18] to permit a party to reopen its case upon defense motion if the newly discovered evidence is found before the announcement of the sentence.[19] In deciding the motion, he would adopt the same test that is used to determine if a new trial should be warranted by the discovery of the new evidence: "[T]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused."[20] Such a motion and offer of proof by trial defense counsel to reopen a case, even if not effective at the trial level, certainly would improve the client's chances for reversal on appeal.

This case reminds trial defense counsel that trial counsel must produce discoverable evidence during any stage of the trial. Trial defense counsel must also remember to be vigilant not only in requesting discovery, but also to move to reopen the case upon discovery of conflicting or new evidence. Captain Kevin T. Lonergan.

Recent Developments in Urinalysis Prosection

In *United States v. Douglas,*[21] the Army Court of Military Review held that a positive urinalysis test result *alone* is sufficient evidence for conviction of wrongful use of marijuana even when the defense has presented affirmative evidence of innocent ingestion.[22] The Court of Military Appeals has granted petition for review in four urinalysis prosecutions in which the urinalysis results were the sole evidence of wrongdoing and where the defense relied upon a simple denial of wrongfulness, presenting affirmative evidence of innocent ingestion.[23] Defense counsel should continue to challenge the use of *Douglas* in litigation because this issue is far from resolved.

The defense in *Douglas* consisted of appellant's denial of use of marijuana, although he readily admitted his presence at a party where use occurred. The defense included the testimony of a woman who, unknown to the party's hostess and guests, baked a cake laced with marijuana.[24] The Army court rejected appellant's defense and found his evidence to be unbelievable.[25]

It is difficult to see how the defense could present any better evidence to rebut the permissive inference of wrongfulness associated with a positive urinalysis test result than an in-court felony admission by a live witness. The court refused to shift the burden of proving the element of wrongfulness back to the prosecution, however. Under *Douglas,* a positive urinalysis test result alone is almost a presumption of guilt. The opinion should be attacked on this basis.

The use of presumptions that relieve the prosecution of its burden of persuasion beyond a reasonable doubt of every element of an offense has been condemned as unconstitutional.[26] When using a permissive inference of wrongfulness, the production of any credible evidence rebutting the inference requires the government to undertake its burden of persuasion through the introduction of additional proof.[27]

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[14] 23 M.J. 12 (C.M.A. 1986).

[15] *Id.* at 28.

[16] 105 S. Ct. 3375 (1985).

[17] *Eshalomi,* 23 M.J. at 24; *see* UCMJ art. 46.

[18] R.C.M. 913(c)(5).

[19] *Eshalomi,* 23 M.J. at 28 (Cox, J., concurring).

[20] *Id.* (quoting R.C.M. 1210(f)(2)(C)).

[21] 22 M.J. 891 (A.C.M.R. 1986).

[22] The supplement to petition for grant of review in *Douglas* was filed on 27 August 1986.

[23] United States v. Culton, CM 85–3804 (N.M.C.M.R. 1985), *petition granted,* 22 M.J. 378 (1986); United States v. Hall, CM 52–6813 (A.F.C.M.R. 1986), *petition granted,* 22 M.J. 352 (1986); United States v. Wilson, CM 85–3568 (N.M.C.M.R. 1985), *petition granted,* 22 M.J. 369 (1986); United States v. Murphy, CM 85–1856 (N.M.C.M.R. 1985), *petition granted,* 21 M.J. 399 (1986). In *Murphy,* the issue granted was "[w]hether the results of urinalysis tests alone are sufficient under the circumstances of this case, as a matter of law, to sustain a finding of guilty to wrongful use of marijuana." The court heard oral argument in *Murphy* on September 17, 1986.

[24] Record at 242–46, United States v. Douglas, SPCM 22028. This reference to the record clarifies the summary of the defense challenge to the positive test results as stated in 22 M.J. at 893.

[25] *Douglas,* 22 M.J. at 895. In his concurring opinion, Senior Judge Raby found the defense case to be lacking in credibility. Inferentially, he found the testimony of the civilian witness to be "perjured or otherwise absurd." *Id.*

[26] Francis W. Franklin, 471 U.S. 307 (1985).

[27] *See* County Court of Ulster County v. Allen, 442 U.S. 140, 157 n.16 (1979).

The requirement for production of additional evidence when an inference has been rebutted was preserved in *United States v. Harper.*[28] When defense practitioners are faced with a prosecution based solely upon a urinalysis test result, they should read *Harper* carefully, and be prepared to distinguish their cases from *Douglas.* Captain Alfred H. Novotne.

[28] 22 M.J. 157, 163 (C.M.A. 1986). Note Judge Cox's final comment *id.* at 164.

Trial Judiciary Note

The Recalcitrant Witness

Lieutenant Colonel Michael B. Kearns
Military Judge, Fourth Judicial Circuit, Fort Lewis, Washington

The usual witness in the courts-martial process is a soldier or a civilian employee of the Army. These witnesses rarely, if ever, refuse to testify or produce evidence when ordered to do so. Civilians who are not subject to military orders are becoming necessary with increasing frequency as witnesses in courts-martial, however. At times, these witnesses are less than willing to voluntarily comply with a subpoena. This article will address the available procedures to coerce such witnesses' compliance or punish them for a failure to do so. The procedures are not complex, but they can be time-consuming and quite frustrating.

A civilian witness must be served with a valid subpoena and witness fees before he or she can be forced to testify.[1] A subpoena may be issued by the summary court-martial, the trial counsel of a special or general court-martial, the president of a court of inquiry, or an officer detailed to take a deposition.[2] The procedural steps for issuing and serving the subpoena must be complied with in order for the subpoena to be enforceable.[3]

After service of the subpoena and witness fees, if the witness refuses without excuse to comply, a warrant of attachment under the authority of Rule for Courts-Martial 703(e)(2)(G)(i) may be issued by the military judge, or, if there is none, by the convening authority.[4] This latter situation would arise when a subpoena based upon a pre-referral deposition has been ordered. The warrant of attachment is issued via a Department of Defense Form 454.[5]

The warrant of attachment may be executed either by a United States marshal or any person 18 years of age or older designated by the issuing authority.[6] Thus, if a United States marshal is unavailable, for whatever reason, to execute the warrant of attachment, military law enforcement personnel could be used. Although not required, prudence would seem to dictate that a United States marshal be the first choice for execution of the warrant of attachment and military law enforcement personnel used as a last resort.

If a witness refuses to comply with a subpoena, he or she may be tried on information in United States district court for a violation of Article 47 of the Uniform Code of Military Justice,[7] even if a warrant of attachment has not been used. The maximum penalty for such offense is a $500 fine and/or imprisonment for not more than six months. A possible problem with a prosecution under Article 47 is that it requires the cooperation of the United States Attorney. If that officer declines to prosecute, then for all practical purposes there is no way to force compliance with a military subpoena as a military judge's contempt authority does not include such coercive power.[8]

Neither the use of a warrant of attachment or prosecution under Article 47 of the UCMJ guarantee that a totally uncooperative witness can be quickly, if ever, coerced into compliance with a subpoena. A possible remedy for this problem would be an amendment to the UCMJ by adding a section similar to title 23, United States Code, section 1826. Section 1826 allows any court or grand jury of the United States to summarily order the confinement of a witness

[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(e)(2) [hereinafter R.C.M.].

[2] R.C.M. 703(e)(2)(C).

[3] A subpoena shall be served by delivering a copy of the subpoena to the person named, and by tendering to the person named travel orders and appropriate fees. R.C.M. 703(e)(2)(D).

[4]
> A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear.

R.C.M. 703(e)(2)(G)(ii). *See* United States v. Hinton, 21 M.J. 267 (C.M.A. 1986).

[5] Dep't of Defense, Form No. 454, Warrant of Attachment (Oct. 1984).

[6] R.C.M. 703(e)(2)(G)(iv).

[7] Uniform Code of Military Justice art. 47, 10 U.S.C. § 847 (1982).

[8] *See* R.C.M. 809(a) discussion.

who, without just cause, refuses an order to testify or provide other information. A provision such as this in the UCMJ would give courts-martial a better means of handling the recalcitrant witness than the procedure currently in existence.

Army Court of Military Review Note

May It Please the Court: The Commissioners of the Army Court of Military Review

Captain J. Frank Burnette[1]
Commissioner, United States Army Court of Military Review

In the front of West's Military Justice Reporters since volume twelve, there appears a list of the commissioners of the United States Army Court of Military Review. The list follows the enumeration of the judges who compose the court. This listing in the bound volumes is the only public recognition of one of the unique positions in the Judge Advocate General's Corps.

The court consists of five, three judge panels. The judges are senior lieutenant colonels or colonels. Each panel is assigned a proportional share of the appellate caseload. Each panel has a legal secretary and a commissioner. While it may be explanatory to say that judges judge and secretaries perform secretarial duties, it provides no insight to say that a commissioner "commissions." The duties of a commissioner are similar to those of a law clerk for a federal appellate judge.

Selection

Assignment to the court as a commissioner is the product of a process that is geared toward selecting officers who can assist the court in making contributions to military law. The position requires an extensive knowledge of the appellate process, and demonstrated abilities in legal writing and research. Commissioners are most often selected from among the action counsel of the Government and Defense Appellate Divisions of the United States Army Legal Services Agency, a collective body of approximately five dozen judge advocates who are predominantly captains.

It is not unusual for an outstanding first-tour captain to be selected as a commissioner after one or two years' experience with one of the appellate divisions. Nominations are provided by the appellate division chiefs at the request of the chief judge of the court when an opening is identified. The nominations are reviewed by the panel judges on a competitive basis. A panel then requests the individual desired by name. Final approval is vested in the chief judge.

Duties

It has been said that a commissioner is the administrator of the panel to which he or she is assigned. There are many administrative duties required: monitoring the overall caseload of the panel and the cases internally assigned to each judge; serving as the normal point of contact for counsel from the appellate divisions; coordinating the scheduling of oral arguments; and serving as the bailiff at oral arguments.[2] Commissioners are also tasked with ensuring the technical accuracy of published and unpublished opinions, coordinating with the clerk of court on a variety of procedural matters, and supervising use of the summer intern assigned to the panel. There is a considerable amount of minutiae involved in these administrative responsibilities, but it rapidly becomes second nature. Giving these responsibilities to the commissioner frees the judges to immerse themselves in the more substantive aspects of evaluating and deciding the cases before them.

Commissioners are more than administrative assistants to their respective panels. They perform substantive duties as well. The precise nature of these duties varies with each panel, depending on the emphasis placed on them by the judges.

The ability to conduct efficient legal research is fundamental to the position. A commissioner may be asked to find a particular decision, described only by the proposition for which it stands. More characteristically, the task is to determine the status of the law on a specific point, or how the military law compares to federal or state law in an area of concern. Legislative history, current decisional law, and recent trends in the law are the basic parameters that may need to be explored. While trial attorneys tend to be nonchalant about such matters,[3] the commissioner can not afford the luxury.

Once the research is conducted, it must be communicated to the judge or judges. On occasion, an oral briefing is appropriate. More often than not, a bench memo is needed. Format and style are flexible. Clear and concise presentation is the guiding principle. While a bench memo may not be absolutely necessary before an oral argument is heard by the court, a condensation of the respective contentions of the parties and the supporting precedent will permit the judges to focus counsels' attention on the more troublesome issues in the case.

There is a common misconception as to the function of the commissioner in writing opinions. It has been speculated that commissioners author all per curiam opinions. A

[1] The opinions and views expressed in this article are those of the author and do not purport to represent the opinions or views of the judges of the Army Court of Military Review.

[2] When there is a motion before the court to admit a new counsel to practice, it is the commissioner who administers the oath.

[3] One accomplished trial attorney quipped to me that he had little time to research the law because he was too busy making it.

competing, and equally unsupported theory, suggests that all published opinions are ghost written by commissioners. The simple reality is that while commissioners may prepare draft opinions for some judges, it is the judge who provides the guidance and exercises complete authority over the finished product.

The final aspect of "commissioning" is the most mentally demanding and fascinating. The commissioner, like all attorneys who practice before the court, is an officer of the court. The dimensions of this role are dramatically expanded for the commissioner, however. The judges necessarily take the commissioner into their confidence when a case is under advisement. The judges will often "think aloud" on the issues with the commissioner and they expect comments and suggestions. This is because commissioners are not advocates for any particular client. Rather, they are an adjunct to the decisionmaking process. It is taken for granted that a commissioner's comments concerning a case are free from the bias that is inherent in advocating a client's interests. Therefore, it is essential to develop an even-handed approach to the cases. Commissioners may well assume the posture of a devil's advocate in "thinking aloud" about a case, but the final analysis must be cognizant of the trust reposed in them.

This aspect of "commissioning" spills over outside the judges chambers. The judge advocates in the appellate divisions are well aware that the commissioner has more extensive contact with the judges than any advocate may hope to acquire through oral arguments and the submission of written briefs. As a result, commissioners are advised to speak carefully, lest idle remarks be erroneously interpreted as some *sub silentio* suggestion from the court.

Conclusion

As one fascinated with the various aspects of the criminal justice system, I was anxious to have a front row seat in the appellate process. That experience was acquired during two and one-half years in the appellate division. My perspective on the appellate process has become considerably more acute since I was selected to be a commissioner. I have discovered that appellate judges breathe life into the "cold" volumes of the record of trial when a case is under advisement. Consideration of any case by the Army court is a thoughtful, deliberate process. Being a participant in the appellate process is a valuable experience, but I never suspected I would be fortunate enough to be permitted such an intimate view.

Clerk of Court Note

Staff judge advocates attending the 1986 JAG Conference saw the Army Chief of Staff illustrate his talk with slides, one of which showed the number of Article 15s imposed in each of the last several years. The information furnished in the monthly JAG–2 reports submitted by general court-martial (GCM) jurisdictions is relied on and used at the highest levels of the Army. That is why we repeatedly emphasize that your reports must be both accurate and timely. Necessarily, negative reports are required, so that we may account for each GCM jurisdiction, but these negative reports may be telephoned to AUTOVON 289–1790 or sent by message or mail. We ask that you NOT enclose JAG–2 reports—or any other individual documents—with boxed records of trial. Even when they are not damaged, they are too likely to be mistaken for some of the wide variety of packing material we find and discard.

Patents, Copyrights, and Trademarks Note

Legislative Update on DOD Patent and Data Rights

John H. Raubitschek
Patents, Copyrights, and Trademarks Division

In October 1986, Congress passed several laws directly affecting intellectual property rights in the Department of Defense (DOD). One of these was Public Law 99–591, which provided appropriations for the Department of Defense. It included language from the National Defense Authorization Act for Fiscal Year 1987 as agreed during the joint House and Senate Committee Conference.[1] In Public Law 99–591, various changes were made to the data policy for DOD previously contained in Public Law 98–525 and implemented in the interim regulations published on 24 October 1985.[2] These regulations therefore need to be revised and the Technical Data and Computer Software Committee of the Defense Acquisition Regulatory (DAR) Council is preparing a draft. This draft will also consider

[1] H.R. Rep. No. 1001, 99th Cong., 2d Sess. (1986).

[2] 50 Fed. Reg. 43,158 (1985).

the recommendations of the Packard Commission[3] and the public comments on the proposed regulation of 10 September 1985[4] which generated a lot of controversy. The proposed regulations must be published by 18 January 1987 and in final form by 18 April 1987. They will apply to contracts for which a solicitation was issued after 18 March 1987.

Congress made some changes to the validation procedures in 10 U.S.C. § 2321. DOD must now make a thorough review of any restrictive rights legend prior to the end of a three-year period beginning with the final payment or the delivery of the data, whichever is later. Objections by DOD must be made within this three-year period unless the data is publicly available without restriction or furnished to the government without restriction. The policy provision in 10 U.S.C. § 1202(g) was deleted that prevented DOD from acquiring data in privately developed technology as a condition of contract. 10. U.S.C. § 2320(a)(2)F now permits DOD to acquire limited rights in such technology and so is consistent with existing policy. Congress remains concerned about DOD coercing contractors to relinquish legitimate rights in technical data and felt DOD should generally acquire the same rights as a commercial customer would in the same product. Congress recognized, however, that where the government was going to purchase a substantial number of items, it would need to acquire unlimited rights in data relating to items developed at private expense.

In 10 U.S.C. § 2320, Congress divided technical data into three categories, unlimited rights, limited rights, and intermediate rights. Unlimited rights apply where the development was "exclusively" funded by the United States, and limited rights apply where the contractor provided all the funds. The rights for "mixed" funding are to be negotiated based on a number of factors. It is not clear that Congress intended to change the policy under which DOD automatically gets unlimited rights in mixed funding situations.[5] In addition, Congress allowed DOD to limit its rights even if it provided all the development funds on the condition that it retain a royalty-free license that includes the right to competitively procure. This concept was included in the Packard Commission report in order to provide additional incentive for contractors to develop new technology.[6]

One thing Congress did not do was to define the terms "developed" and at "private expense," although in 10 U.S.C. § 2320(a)(3), DOD was required to come up with definitions. In addition, Congress criticized the definition in the proposed regulations as being "excessively stringent"[7] and provided some guidance that seems consistent with the approach taken by the Armed Services Board of Contract Appeals in *Bell Helicopter Textron.*[8]

The other legislation was Public Law 99–502, entitled the "Federal Technology Act of 1986."[9] It provides authority for government laboratories to enter into cooperative research agreements whereby they can accept money, personnel, services, and property from the private sector in exchange for providing personnel, services, and property. Although use of this authority is optional, all agencies may be required by executive directive to permit their laboratories to exercise it. One of the controversial provisions in this law is the requirement that the agency share at least fifteen percent of royalties in any licensed patent up to an annual ceiling of $100,000. Larger awards may be made upon presidential approval. Agencies can develop an alternate compensation scheme for inventors if it met four rather restrictive conditions, however, one of which is to give the inventors at least fifteen percent of the royalties. It is doubtful that many agencies will choose this option. The remaining royalties are available for use by the laboratories for limited purposes. This represents a major change in policy because heretofore, all royalty income was returned to the United States Treasury as a part of "miscellaneous receipts." At present, DOD does not earn much royalty income. In FY 85, the amount was $19,300, and in FY 86 it was $22,000, of which Army's contribution was about $5000 and $8000, respectively. This new law may encourage the laboratories to go out and push technology, however, thereby increasing royalty income.

Finally, DOD is about to implement[10] Public Law 98–620 which, among other things, lessened some of the restrictions on universities retaining title to their inventions made with federal funds as provided by Public Law 96–517. DOD's implementation of Public Law 98–620, which passed in 1984, was delayed until the Department of Commerce issued its regulations in July 1986.[11]

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[3] President's Blue Ribbon Commission on Defense Management, final report, A Quest for Excellence (June 1986) [hereinafter *A Quest for Excellence*].

[4] 50 Fed. Reg. 36,888 (1985).

[5] Prior policy and decisions are described in R. Nash & L. Rawicz, *Patents and Technical Data* 446 (1983); Maizel, *Trade Secrets and Technical Data Rights in Government Contracts*, 114 Mil. L. Rev. 225 (1986).

[6] *A Quest for Excellence, supra* note 3, at 134.

[7] H.R. Rep. No. 1001, 99th Cong., 2d Sess., at 511 (1986).

[8] ASBCA No. 21192, 85–3 BCA para. 18,415.

[9] This is an amendment to the Stevenson-Wydler Technology Innovation Act of 1980 which is codified at 15 U.S.C. § 3701 (1982).

[10] DAR Case 85–56. The changes will appear in the Federal Acquisition Regulation Part 27.300 and Parts 52.227–11, 12 and 13.

[11] 51 Fed. Reg. 25,508 (1986).

Army lawyers should be familiar with Dep't of Army, Pamphlet No. 27–153, Legal Services—Contract Law, chapter 22, section I (25 Sept. 1986) [hereinafter DA Pam. 27–153], which provides some background to utilities and telecommunications acquisition. This section notes that pursuant to Dep't of Army, Reg. No. 27–40, Legal Services—Litigation, para 2–1c(3) (4 Dec. 1985) [hereinafter AR 27–40], judge advocates and legal advisors have initial responsibility to report proposed rate increases and knowledge of the existence of any action or proceeding involving utilities and telecommunications services to the Regulatory Law Office (USALSA, ATTN: JALS–RL) Falls Church, Virginia 22041–5013; AUTOVON 289–2015, Commercial (202) 756–2015. DA Pam. 27–153 also has a general outline of a typical regulatory proceeding.

The Army Power Procurement Officer (the Chief of Engineers) is responsible for the administration of the purchase of utilities services and for policies, rates and legal sufficiency in connection with all utilities services transactions and contracts for the Department of the Army. This authority is appropriately delegated and is to be exercised in accordance with Dep't of Army, Reg. No. 420–41, Utilities Contracts (1 Oct. 1982) and Armed Services Procurement Regulation Supplement No. 5, Procurement of Utility Services [hereinafter S–5]. Utility Services include such services as electricity, gas, and water. S–5 § 101.1.

These services have historically been available only from a regulated utility operating in an exclusive service area that has been established by an appropriate regulatory scheme. The prices that a utility may charge for its services are generally controlled by a regulatory commission. Unless an alternative supplier is available, such service is obtained on a sole source basis. With increasing frequency, contracting officers have available opportunities to obtain such services on an unregulated basis.

Telecommunications services are not within the definition of utility services and are not obtained under S–5. Army officials obtain pertinent authority and guidance from Dep't of Army, Reg. No. 105–23, Administrative Policies and Procedures for Base Telecommunications Services (1 July 1978). These services are also obtained under and beyond regulation.

The Regulatory Law Office represents the consumer interests of the Department of the Army before regulatory tribunals concerning the acquisition of utility and telecommunications services. Judge advocates and legal advisors should make themselves aware of the utility services used at their installations in order to carry out their responsibility under AR 27–40. Additionally, these individuals should maintain close liaison with those who are responsible for administering utility and telecommunications services contracts to ensure that relevant information is made available to the Regulatory Law Office as soon as possible. Observant legal officers can also obtain such information from local newspapers or other sources.

Following receipt of the AR 27–40 report or other information about a pending proceeding, attorneys assigned to the Regulatory Law Office review the circumstances and recommend whether intervention in the proceeding should be sought. Upon a decision by the chief of the office to intervene, a petition for leave to intervene is prepared for filing with the appropriate commission. Proper form is ensured by checking the office files that contain the rules of practice for all fifty states.

The commission concerned typically issues an order granting the intervention of the Army and other interested parties and sets a date for a pre-hearing conference. This conference is used to set future procedural dates. Normally, the utility company seeking a rate increase has the burden of proof and the commission sets a date at the pre-hearing conference for the company to file its initial testimony. Dates are also set for the filing of interrogatories by the other parties, for company responses to such interrogatories, and for cross-examination of company witnesses.

The company's direct case contains the basis for any rate increase and covers accounting, economic, financial and technical matters. Most of the facts are derived from company records and sponsored by company officers. On broader issues such as rate of return, the company usually retains expert witnesses to provide their opinions on the cost of capital. The several methodologies used by such experts to recommend a proposed profit margin for the company include comparable earnings, alternative investment opportunities, discounted cash flow, capital asset pricing, and risk-premium.

Intervening parties are allowed to cross-examine the company's witnesses and to pre-file testimony and present their case in opposition. The Regulatory Law Office often sponsors expert rate of return testimony. The office either uses experts employed by the General Services Administration or retains outside experts to offer this testimony.

The company may cross-examine the other parties' witnesses and present rebuttal. The record is then closed and a date for filing briefs is set. After reviewing the briefs of the parties, the commission issues a decision that may be appealed to the courts.

As this brief outline shows, the administrative hearing process is very similar to any other type of trial. As any attorney in the Regulatory Law Office can attest, however, these proceedings are rife with "traps for the unwary." Please continue to promptly report notice of hearings to this office accordingly. Legal officers also need to request our assistance when contracting officers seek to obtain utility or telecommunications services where no regulatory controls appear to apply.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Administrative and Civil Law Note

Environmental Law Note

The September 1986 issue of *The Army Lawyer* included a Regulatory Law Office Note (at 41) that discussed Department of Defense (DOD) policy regarding payment of state-imposed fines and forfeitures for violations of environmental statutes and regulations in general and Resource Conservation and Recovery Act (RCRA) violations in particular. Based on an analysis of the federal waiver of sovereign immunity embodied in that act (*see* 10 U.S.C. § 6961 (1982)), the DOD General Counsel opined that federal agencies need not pay such penalties. The corollary to this conclusion is perhaps of even greater consequence to finance officers and their legal advisors than is the rule itself—we have no authority to disburse federal funds to pay such fines.

The problem is that state regulators may not be in accord with the DOD General Counsel on this point; they want their money, and they are quick to point out that RCRA does not explicitly say the federal government does not pay. As the September note suggests, however, the statute's silence cuts against the states instead of bolstering their position.

Now there is case law supporting the DOD position. In *Meyer v. United States Coast Guard,* 644 F. Supp. 221 (E.D.N. 1986), North Carolina sued to enforce a $10,000 administrative penalty it sought from the Coast Guard for the agency's alleged failure to apply in a timely fashion for a permanent RCRA permit for its Elizabeth City, North Carolina, facility. The United States Department of Justice (DOJ), representing the Coast Guard, in turn moved for a dismissal for lack of jurisdiction. The court reviewed 10 U.S.C. § 6961, holding that it "does not clearly and unambiguously state that the federal government will be subject to fines and other penalties [levied] by states." The court also concluded that neither is there in RCRA any implied consent to be sued for administrative fines and penalties; indeed, it found that the legislative history suggests such a waiver was specifically rejected by Congress. Finally, further support for a decision that the Coast Guard was not liable for the penalty was found in *California v. Walters,* 751 F.2d 977 (9th Cir. 1984), and *Florida v. Silvex Corp,* 606 F. Supp. 159 (M.D. Fla. 1985); these were discussed in the September note. All these rationales established that the state had no authority to sue an agency of the federal government to enforce a penalty, and therefore DOJ's motion to dismiss was granted.

A word of caution may be appropriate, however. While 10 U.S.C. § 6961 is silent on *administrative* sanctions imposed by states, it clearly does waive sovereign immunity regarding "federal, state, interstate, and local requirements, both substantive and procedural (including . . . any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste." Thus, while states may not have authority to *fine* Army installations, they may seek injunctions against us, and the relief available could include more costly responses to solid waste matters than we would choose to implement. More significantly, the state could seek an order which effectively, or explicitly, shuts down noncomplying operations on the installation. Despite *Meyer,* then, the need to maintain a cooperative relationship with state officials remains.

Another recent case shows how far-reaching the RCRA waiver of sovereign immunity can be. The city of Monterey, California, passed a local ordinance designating Monterey City Disposal Service, Inc. (MCDS), as exclusive franchisee for the collection of solid waste (*i.e.*, trash) within the city. Subsequently, the Army and the Navy issued invitations for bids (IFBs) for the collection of solid waste at the Presidio of Monterey and the Naval Postgraduate School, both located within Monterey, and at Fort Ord, outside the city limits. MCDS protested the IFBs to the Comptroller General (CG) and then sought an injunction against awarding the contract to anyone other than MCDS. The basis for the complaint was that the city ordinance constitutes a "local requirement" "respecting control and abatement of solid waste" within the meaning of 10 U.S.C. § 6961, and thus sovereign immunity from the local regulation has been waived. Following this reasoning, MCDS would be entitled to the contract on a sole-source basis.

The court issued a temporary injunction pending the CG's review of the bid protest. The CG then issued its decision in *In re Monterey City Disposal Service, Inc.,* case numbers B–218624 and B–218880, reported at 64 Comp. Gen. 813 (1985). Essentially, the CG adopted MCDS's rationale. The Army and the Navy argued against a waiver of sovereign immunity based on the *Silvex* and *Walters* decisions; the CG found these cases to be inapposite because sanctions were not at issue.

The navy also pointed out that the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2301–2306 (Supp. III 1985) seems to require a competitive rather than sole source procurement. The CG was unpersuaded. Section 2304(c)(5) of Title 10 recognizes an exception to the rule of competition when "[a] statute expressly authorizes or requires that the procurement be made . . . from a specified source." Because the waiver of sovereign immunity in 10 U.S.C. § 6961 "expressly requires federal agencies to obtain waste disposal services [from franchisees] where local government requires [it]," as the CG put it, the CICA exception applied here. Unfortunately, the decision failed to elaborate on the reasoning that leads to this conclusion; certainly it is not obvious that section 6961 constitutes a statute that "expressly requires" a noncompetive procurement.

The financial consequences of this result are not insignificant. For example, of the three responses the Navy received under the solicitation, the low bid was $107,400, the second lowest bid was $129,000, and the third bid—from MCDS—was $250,432. Perhaps worse, MCDS established that its bid was in accordance with the rate structure established by the city ordinance. The CG nonetheless found the $250,432 figure to be "reasonable under the circumstances"

as the rates are "subject to local government regulation and judicial review."

Thus, the CG recommended that the Navy cancel the IFB and award the contract on a sole-source basis to MCDS. As for the Army, the same recommendation applied to procurement of solid waste disposal services for the Presidio of Monterey, which is located within the city limits. Fort Ord, lying outside the city, was found not to be affected by the ordinance; procurement of trash collection services could proceed on a competitive basis for the installation.

What about the lawsuit? The federal judge reviewed the CG's opinion and then issued a permanent injunction essentially requiring that the contracts for the Postgraduate School and the Presidio be awarded to MCDS.

Several teaching points spring from this case. Perhaps the most significant is the most general; it illustrates just how broadly the environmental waivers of sovereign immunity can be interpreted. No doubt many commanding generals will be surprised to learn that the local mayor can dictate not only who will pick up the trash, but also how much will be paid for the service. Couple this power with state or local authority to define what constitutes "waste" and to prescribe methods of storage, treatment, and disposal, and the potentially disruptive impact of local regulation on installation activities becomes enormous.

The possibility of such regulation underscores the need to maintain a cooperative relationship with civilian officials regarding environmental matters. Clearly the most successful strategy is one that demonstrates there is no need for local regulation. This requires a reasonable responsiveness to local concerns combined with effective communication. The communication, however, must be more than simply responding to questions posed by the public or their representatives; installations should incorporate in their public relations program a requirement to go out and "tell the Army story." Through news releases and public speakers, the local populace should continually be informed of the installation's efforts to reduce pollution and improve the environment.

Open communication channels will also serve to alert Army officials on environmental actions being considered by state or local officials. This affords an opportunity to discuss with appropriate agencies the effects any proposal will have on the installation. The result may be special provisions exempting the Army from unnecessary or overly constraining regulation. For example, the city of Fairfield, California, had an ordinance similar to Monterey's, but here the city expressly exempted Travis Air Force Base *(see Solano Garbage Company,* MS. Comp. Gen. B–222931 (May 1986); the city, however, has since amended its ordinance to include Travis).

Not surprisingly, some trash collection companies frequently support exclusive franchise ordinances, but foreknowledge of pending regulation gives us the chance to encourage second thoughts. For example, Fort Ord itself is outside Monterey city limits, but a portion lies within Marina, California. Previously, MCDS had the contract to collect trash from Fort Ord, but Marina, observing the success of the Monterey Ordinance, created its own exclusive franchise arrangement, and it designated Carmel Marina Corporation as the franchisee. Thus, through its victory MCDS gained an exclusive right to service the Presidio and the Postgraduate School, but it lost the Fort Ord contract. Pointing out such potential consequences may cool local interest in creating such ordinances.

Other local concerns can be affected by decisions to create burdens for federal facilities. For example, cities sometimes find it advantageous to annex portions of military installations to bring them within the city limits. The benefit to the city is that this increases population, thus entitling it to more state and federal revenue sharing programs, without significantly increasing demands on city-supplied services; it also increases the tax base for many purposes. In most cases, military officials have not sought to hinder the annexation because the effect on the installation has been minimal. The waivers of sovereign immunity have potentially altered this equation, however, and municipalities should understand our new concern regarding annexation matters, especially when the city is contemplating regulatory schemes applicable to the military *(see* Dep't of Army, Pam. No. 27–21, Military Administrative Law, para, 2–9*b* (1 Oct. 1985)).

At the very least, open communication channels may help avoid the situation in the Monterey case where the "pollution control" services cost more than twice the market rate. Installation concerns about funding and taxation issues can be raised to persuade the regulators to be reasonable.

The Monterey case highlights a more purely legal issue arising from the CG's rationale in sustaining the bid protests. The decision rested in part on a delegation of authority from the Environmental Protection Agency (EPA) through the state to the local governmental body. California's application to operate its own RCRA program, as approved by the EPA, included a specific provision allowing local authorities to establish waste collection standards. Moreover, under state law the city of Monterey had explicit authority to establish an exclusive trash collection franchise as a means of pollution abatement and control. Efforts by other local governments to impose such requirements may not find support in the CG opinion, however, unless similar authority exists under applicable state statutes. If questions arise about a given state's authority to promulgate environmental regulations or to delegate such authority, a good starting point for exploring the issue is to consult with the Federal Facility Coordinator at the regional EPA office. Discussions with counsel advising the local authority (*i.e.*, the city, county, or regional body) and the state attorney general may further clarify the extent of local power to enact the ordinance in question.

In conclusion, it is fair to say that questions involving the environmental waivers of sovereign immunity are not as easily resolved as may first appear. Defense to local regulation may exist. The better approach, however, is to cooperate with state and city authorities to eschew the need for regulation. Major Guilford.

Criminal Law Notes

Significance of a Denial of Certiorari

The Supreme Court denied certiorari in *United States v. Mustafa* on November 10, 1986.[1] Significantly, two of the Justices dissented. Their basis for wanting to hear the case was a split in the circuit courts of appeal on the interpretation of Rule of Evidence 702[2] that they felt the Supreme Court should resolve.[3] In effect, Justice White, joined by Justice Brennan, would hear the *Mustafa* case to resolve the Federal controversy over the continued validity of the *Frye* rule.[4]

This willingness to equate a ruling by the Court of Military Appeals with a ruling by a Federal circuit court is a significant step in military law. It signals the continuing maturation of the Military Rules of Evidence,[5] and a willingness by those outside the military to view the Court of Military Appeals as a high level court.

Criticism of the Court of Military Appeals, both from within[6] and without the military[7] has appeared in the past. The willingness of two of the Justices on the Supreme Court to hear an appeal of a military case to interpret a rule of evidence that will affect all the Federal courts helps to nullify this criticism and legitimize the work of the court as an appellate body. Major Capofari.

Multiple Credit for Pretrial Restraint: *United States v. Gregory*

Brigade Commander: Well, Judge, how did that trial go this morning?

Trial Counsel: Sir, we got the conviction and the court sentenced him to a bad conduct discharge and six months confinement. The bad news is that he'll probably only spend about a month in jail.

Brigade Commander: What do you mean? How can he be sentenced to six months and get out so soon?

Trial Counsel: Sir, the problem was with his restriction before trial. The judge ruled that the accused was to be given five days credit off his sentence for every day spent in his room.

Brigade Commander: How in the world is anyone entitled to five to one credit off a sentence just for restriction?

The conversation is hypothetical but very possible in light of the Court of Military Appeals' recent summary affirmance in *United States v. Gregory.*[8] The court affirmed a decision of the Army Court of Military Review[9] holding that an accused is entitled to double credit for a restriction that is tantamount to confinement and for the failure to follow the procedural rules set forth in Rule for Courts-Martial 305(k).[10] This decision increases the possibility of multiple credit for time spent in pretrial confinement or other equivalent restraint.[11]

An accused may be entitled to credit for pretrial confinement for several different reasons.[12] In *United States v. Allen,*[13] the Court of Military Appeals held that all accused are entitled to day-for-day credit against the adjudged sentence for time spent in pretrial confinement. *Allen* was not concerned with illegal pretrial confinement but addressed the separate issue of credit simply because a soldier was confined pending trial. The court later concluded that "severe restriction tantamount to confinement" would also entitle the accused to *Allen* credit.[14]

Prior to deciding *Allen,* the Court of Military Appeals had addressed the issue of illegal pretrial confinement that violated Article 13's[15] prohibition against punishment before trial.[16] The court said that in egregious cases of illegal pretrial confinement, the military judge could order

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[1] 22 M.J. 165 (C.M.A. 1986), *cert. denied,* 55 U.S.L.W. 3374 (U.S. Nov. 10, 1986).

[2] Military Rule of Evidence 702 is identical to Federal Rule of Evidence 702.

[3] The issue in *Mustafa* is the admissibility of scientific evidence, evidence of blood splatters. Some courts have interpreted the Federal Rules of Evidence as abandoning the rule from Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), that to be admissible, scientific evidence must be "generally accepted in the scientific community." In *Mustafa,* the Court of Military Appeals joined the growing number of courts and applied a different, more relaxed standard, using Rule 702. *Compare* Barrel of Fun, Inc. v. State Farm, 739 F.2d 1028, 1031, n.9 (5th Cir. 1984) (*Frye* rule still has validity) *with United States v. Downing,* 753 F.2d 1224 (3rd Cir. 1985) (Rules superceed *Frye* test).

[4] *See* Sullivan, *Novel Scientific Evidence's Admissibility at Courts-Martial,* The Army Lawyer, Oct. 1986, at 24.

[5] The title "Military Rules of Evidence" was chosen to make it clear that military evidentiary law should echo the civilian federal law. Mil. R. Evid. 1103 analysis.

[6] United States v. McConnell, 20 M.J. 577, 589 (N.M.C.M.R. 1985) (calling the Court of Military Appeals, "a court formed under Article I of the Constitution as a quasi-administrative body, possessing no inherent power").

[7] O'Callahan v. Parker, 395 U.S. 258, 265 (1969) (Military courts "are singularly inept in dealing with the nice subtleties of constitutional law").

[8] No. 54,755/AR (C.M.A. Nov. 13, 1986) (summary disposition).

[9] 21 M.J. 952 (A.C.M.R. 1986). For a discussion of this decision, see Note, *New Developments,* The Army Lawyer, Mar. 1986, at 45.

[10] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(k) [hereinafter MCM, 1984, and R.C.M., respectively].

[11] The decision by the Court of Military Appeals clearly negates a contary decision reached by another panel of the Army Court of Military Review in United States v. Amos, 22 M.J. 798 (A.C.M.R. 1986). *Amos* held that restriction tantamount to confinement did not entitle an accused to sentence credit under R.C.M. 305, which the court construed to be limited to situations when an accused was locked in a confinement facility or under the control of a guard who would physically oppose the accused's unauthorized departure. For a discussion of *Amos,* see Note, *To Credit or Not To Credit, That is the Question,* The Army Lawyer, Sept. 1986, at 35.

[12] For a discussion of pretrial confinement and credit, see Finnegan, *Pretrial Restraint and Pretrial Confinement,* The Army Lawyer, March 1985, at 15.

[13] 17 M.J. 126 (C.M.A. 1984).

[14] United States v. Mason, 19 M.J. 274 (C.M.A. 1985). Affording day for day credit under *Allen* for restriction tantamount to confinement is thus more aptly termed *Mason* credit or *Allen-Mason* credit.

[15] Uniform Code of Military Justice art. 13, 10 U.S.C. § 813 (1982).

[16] *See, e.g.,* United States v. Malia, 6 M.J. 65 (C.M.A.1978); United States v. Larner, 1 M.J. 371 (C.M.A. 1976).

more than day-for-day credit against the sentence. In *United States v. Suzuki,*[17] the accused was billeted, mingled, and worked with sentenced prisoners. In addition, for a period of about ten days, the accused was put in administrative segregation in a sparsely furnished, dimly lit 6 × 8-foot cell. On one occasion, he was released from the cell only after he agreed to work with sentenced prisoners. The trial judge ordered three days credit for each day of this illegal confinement[18] and the Court of Military Appeals upheld that decision, stating that the military judge can conclude that circumstances require more than a day-for-day remedy where pretrial confinement is illegal for several reasons.[19]

In addition to *Allen* credit and credit for pretrial confinement that violates Article 13, the 1984 Manual for Courts-Martial, which rewrote the rules for pretrial confinement, specified a remedy for pretrial confinement imposed in violation of certain provisions of R.C.M. 305.[20] That rule sets out specific procedures to be followed when a soldier is put into pretrial confinement and dictates day-for-day credit against confinement adjudged when certain steps in the procedures are omitted or carried out incorrectly. This credit for "procedurally illegal confinement" is in addition to *Allen* credit, giving an accused in pretrial confinement in violation of the pertinent provisions of R.C.M. 305 a double credit, intended to deter violations of the Manual rule.[21]

The question that the *Gregory* and *Amos* panels of the Army Court of Military Review addressed was whether this double credit applied to accused who were not actually confined, but were in restriction tantamount to confinement. Because the Court of Military Appeals had already ruled in *Mason*[22] that those persons were entitled to *Allen* credit, the question became whether violating the provisions of R.C.M. 305 dealing with correct procedures for putting a soldier into pretrial confinement were applicable when the soldier was never actually put into confinement but was severely restricted instead. In *Gregory,* the court decided that restriction tantamount to confinement was simply the equivalent of confinement and should be treated in the same manner, no matter what label was put on the restraint.[23] In *Amos,* a different panel of the court held that the provisions of R.C.M. 305 should be applied only to soldiers actually placed in confinement.[24] With the Court of Military Appeals' summary affirmance of *Gregory,*[25] it is clear that when restriction is severe enough to be equivalent to pretrial confinement, the accused will be entitled to *Allen-Mason* credit *and* to additional credit for failure of the command to follow the provisions of R.C.M. 305.

Suzuki is authority for the military judge to grant even more credit for egregious illegal confinement. Assume that a commander decides to restrict the accused to a sparsely furnished, dimly lit room, only allowing the accused to leave the room accompanied by an armed guard to go to the latrine or to the dining facility. This accused would be entitled to *Allen-Mason* credit, to credit under *Gregory* for violation of R.C.M. 305, and possibly to additional credit for the egregious conditions that seem to amount to punishment before trial, a violation of Article 13. The military judge could order five-for-one credit—one day under *Allen-Mason,* one day under *Gregory,* and three days under *Suzuki.*

These decisions give prosecutors and commanders additional incentives for avoiding restriction tantamount to confinement. Under a recent change to the Manual, pretrial restraint in the nature of conditions on liberty does not start the speedy trial clock.[26] The rule was amended to prevent the 120-day rule[27] from starting when the prosecutor was unlikely to be aware of minor restraint.[28] Restricting the accused under conditions tantamount to confinement, like any other restriction, however, does start the speedy trial clock. The lesson for prosecutors is not a new one: they should coordinate closely with commanders on all cases involving pretrial restraint to ensure that the accused has not been restricted illegally or improperly.

Trial counsel should use these decisions to at least avoid credit under R.C.M. 305 and *Suzuki.* If a commander believes that an individual should be in pretrial confinement, that is where the accused should be placed, if the prerequisites for confinement are met. Commanders should not attempt a subterfuge by placing the accused under a harsh restriction to avoid the requirements of R.C.M. 305, because they will trigger the credit provision of the rule if they avoid the procedures and a court finds restriction tantamount to confinement. In those cases, they will have provided the accused with double credit. In addition, the rule and its procedures were adopted to protect the accused and ensure that proper steps were taken before pretrial confinement. Because the military system does not provide for bail, pretrial confinement can be a drastic step, and R.C.M. 305 and its requirements recognize that fact. Commanders who avoid the rule's requirements by imposing restriction tantamount to confinement are also ignoring the purpose of the rule in protecting the accused before trial.

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[17] 14 M.J. 491 (C.M.A. 1982).

[18] *Id.* at 492.

[19] *Id.* at 493.

[20] R.C.M. 305(k). The day-for-day credit results when the accused has not received requested military counsel prior to review of confinement; when the commander has failed to comply with the 72 hour rule for review of confinement or failed to properly consider the reasons for confinement and document them in a written memorandum; when the review procedures have not been complied with; or for any confinement served as an abuse of discretion. *Id.*

[21] R.C.M. 305(k) analysis.

[22] United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

[23] 21 M.J. 952 (A.C.M.R. 1986).

[24] 22 M.J. 798 (A.C.M.R. 1986).

[25] No. 54,755/AR (C.M.A. Nov. 13, 1986) (summary disposition).

[26] Exec. Order No. 12,550, 51 Fed. Reg. 6497 (1986), *reprinted in* MCM, 1984, R.C.M. 707 (C2, 15 May 1986).

[27] R.C.M. 707 mandates that the accused must be brought to trial within 120 days of notice of preferral of charges or imposition of pretrial restraint, whichever is earlier.

[28] R.C.M. 304 defines the types of pretrial restraint, including "conditions on liberty," the least restrictive.

Prosecutors can give meaningful guidelines to commanders who do not know when restriction might be tantamount to confinement. If the accused is restricted to a relatively small area such as a room or a floor of a barracks, required to sign in hourly, and required to be escorted by an armed guard, a court will almost surely find restriction tantamount to confinement.[29] Courts are likely to make the same finding when an individual is locked in his or her room and only allowed outside the room or area with a guard. Individuals who are restricted to post, even with an hourly sign-in requirement, would probably not be considered in restriction tantamount to confinement.[30]

Where there is restriction tantamount to confinement because no confinement facility is available, the prosecutor should ensure compliance with the procedural requirements of R.C.M. 305. Defense counsel should request additional credit for an accused placed in restriction tantamount to confinement when the government has not complied with the provisions of the Manual rule.

Pretrial confinement can be a troublesome area because commanders sometimes wish to punish the accused or at least get the accused out of the unit pending trial. This can lead to circumvention of the procedural rules for pretrial confinement. The 1984 Manual intended to make it somewhat easier for commanders to confine accused soldiers before trial,[31] but the Manual also exacted a price in the form of additional credit for failure to follow the rules. Commanders should comply with the procedural requirements and prosecutors should assist them in doing so. The courts have made it clear that resorting to restriction that is as severe as confinement will not avoid the credit mandated for pretrial confinement. Colonel Gilligan and Major Finnegan.

[29] *See, e.g.*, United States v. Acireno, 15 M.J. 570 (A.C.M.R. 1982).

[30] *See, e.g.*, United States v. Schilf, 1 M.J. 251 (C.M.A. 1976).

[31] R.C.M. 305(h)(2)(B) analysis.

Legal Assistance Items

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

Trying to Reach Out and Touch Legal Assistance?

The phone numbers at TJAGSA have been changed. The new phone number for the TJAGSA Legal Assistance Branch is (804) 972-6369.

Legal Malpractice Legislation

In November 1986, the President signed into law an amendment to Chapter 53 of title 10, United States Code, which provides for the defense of certain suits arising out of legal malpractice. The new provision, which will be codified at 10 U.S.C. § 1054, is reprinted in this issue of *The Army Lawyer*, at 49.

Pursuant to this legislation, the exclusive remedy for claims of malpractice brought against legal assistance officers, paralegals, or legal clerks, for alleged negligent or wrongful acts or omissions, will be against the United States. This will be true, however, only for claims in connection with the provision of legal service while the individual is acting within the scope of his or her duties or employment. Thus, there is statutory protection against actions for legal malpractice as long as the malpractice occurred as a result of actions within the scope of employment. This would likely be the case as long as the attorney were providing services within the guidelines of Army Regulation 27-3, or pursuant to a decision of the staff judge advocate to deviate from the guidelines of AR 27-3. When a decision to deviate is made, the office should comply with paragraph 1-10, AR 27-3, and prepare a memorandum for record documenting the decision to deviate. One copy of the memorandum should be retained by the office and one should be forwarded to HQDA (DAJA-LA), Washington, D.C. 20310. The legal assistance officer who is rendering the assistance pursuant to the variation may want to retain a copy in his or her files. Major Mulliken

Testamentary Gifts to Minors

A frequent issue that legal assistance officers must address is how, when preparing a will, to advise clients to leave property to their children. The issue is easy when the children are adults. When the children are minors, as is the case with many legal assistance clients, the decision is more complicated.

One option frequently recommended by legal assistance officers is to leave the property to the guardian for the child under the Uniform Gift to Minors Act. This scheme is frequently used because it is simple and relatively inexpensive. This option suffers from the disadvantages that it provides less control over the property, and relinquishes complete control over the property to the child in a lump sum at a relatively early age (normally 18 or 21). Additionally, clients frequently do not have a custodian in mind with the required financial management abilities required or whom the clients feel they can completely trust.

Perhaps even more significant, legal assistance officers should be aware that making a testamentary gift to a minor child is not possible in all states. States that adopted the provision found in the original Uniform Gift to Minors Act do not provide for testamentary gifts to minors. States that have adopted the Uniform Transfer to Minors Act or a

modified Uniform Gift to Minors Act generally permit testamentary gifts to minors.

Nineteen states and the District of Columbia have passed the Uniform Transfer to Minors Act. They are Arkansas, California, Colorado, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New Hampshire, Nevada, North Dakota, Oregon, Rhode Island, South Dakota, and West Virginia. Nineteen additional states have amendments to their Uniform Gifts to Minors Act that permit testamentary gifts to a custodian for a minor. These states are Alabama, Connecticut, Delaware, Indiana, Iowa, Maine, Maryland, Massachusetts, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington, Accordingly, all of the states listed above permit testamentary transfers of gifts to minors.

The twelve states that do not provide for a testamentary transfer to minors, and therefore require special consideration, are Alaska, Arizona, Georgia, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, New Mexico, Vermont, Wisconsin, and Wyoming.

When states do not permit testamentary gifts to minors under either the Uniform Gift or Uniform Transfer to Minors Act, but one is attempted in a will, the normal result will be that the probate court will not honor the bequest until a separate proceeding is conducted to appoint a conservator for the property. This entails the time and expense of a second court proceeding, and causes the person selected as the conservator to be subjected to the continuing jurisdiction of the court. This added expense and inconvenience can be avoided by proper drafting of the will.

For states that do not provide for testamentary gifts to minors, the frequent option is to provide in the will for a testamentary trust for minors. Examples of simple minors trusts are included in the *All States Will Guide.* These trusts are not complicated documents designed to avoid estate or income taxes. Rather, they merely provide for the management and use of the property while the children are minors or until they reach an alternate age designated in the trust.

Colonel Leo E. Eickhoff, USAR, and attorney in St. Louis, Missouri, suggests that there is an alternative to using a minors trust when there is an acceptable person who can act as custodian, and, therefore, a court conservatorship of the minor's property is not needed. Colonel Eickhoff suggests that a clause could be put in a will and trust instrument, in lieu of provisions for a minors trust, that provides for distribution to a custodian. He suggests use of the following language:

> If any beneficiary entitled to receive a distribution of property (under this Will) (from this trust) is a minor at the time of distribution, I direct that my (personal representative) (trustee) deliver the property to a custodian for the beneficiary under the Uniform Transfers to Minors Law, Uniform Gifts to Minors Law, or a similar custodian law of the State of _____ or any state where the beneficiary then resides; and I give to my (personal representative) (trustee) the power to designate any adult person or trust company, including my (personal representative) (trustee), as custodian for the property distributed to each beneficiary under that law.
>
> If the law of the state designated does not provide for custodianships created in this manner, the distribution shall be made to the custodian as trustee for the minor and the terms of the trust shall be the Uniform Transfer to Minors Act as promulgated by the National Conference of Commissioners on Uniform State Laws, with the trust to terminate when the minor is twenty-one years of age.

Legal assistance officers should ensure that they are not attempting testamentary gifts to minors under a uniform act in the twelve states that do not recognize a testamentary transfer of gift. Major Mulliken.

Adult Custodianships in Missouri

The following information was also provided by Colonel Leo E. Eickhoff, USAR, of St. Louis, Missouri.

Missouri has extended the minor's custodianship concept to adults in a law entitled the Missouri Personal Custodian Law. It closely follows that state's transfer to minors law. Under the concept, an adult may create a statutory custodianship by transferring property to a person as custodian under the law. A personal custodianship is terminable on demand, but if the adult beneficiary becomes incapacitated, the powers of the custodian continue. In this sense, it becomes a statutory trust or a statutory durable power of attorney.

This law may be useful in managing estates of retirees, managing property interests of military personnel going overseas, and handling gifts to retarded or incapacitated adults.

The Uniform Law Commissioners have established a drafting committee to consider the proposal for a recommended uniform law to be called the Uniform Personal Custodian Trust Act. Information on the current status of that law may be obtained from the NCCUSL, 645 North Michigan—Suite 510, Chicago, Illinois 60611.

Mortgage Refinancing

Many homeowners are considering whether to refinance their loans while interest rates are low. This is a difficult decision. The Federal Trade Commission has published a brochure that discusses the issue and gives tips to consumers to help them decide whether to refinance their home mortgages. For example, it advises that refinancing may not be worthwhile for consumers who plan to sell their home within three years. This brochure is an excellent handout for the legal assistance office or housing referral office. It can be obtained by writing the Federal Trade Commission, Public Reference Branch, Room 130, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Tax Notes

Income Taxation of Members of the Panama Canal Commission

The Supreme Court has resolved the question concerning the tax status of salaries earned by civilian employees working for the Panama Canal Commission. Before this decision, Panama Canal Commission employees had an argument that their earnings were exempt from United States income tax as well as Panamanian tax based on interpretations of provisions of the Panama Canal Treaty. Federal

circuit courts had split on the tax implications of the treaty. The Supreme Court, in *O'Connor v. United States*, 107 S. Ct. 347 (1986), resolved the issue against the taxpayers. The Court determined that the treaty only exempted salaries of Panama Canal Commission employees from Panamanian taxes. Those salaries remain taxable by the United States. While the Supreme Court did not specifically address the issue, it is likely that the Court would determine that salaries of military members earned in the Canal Zone would likewise be exempt only from Panamanian taxes and not from United States taxation. Members of the Armed Forces are subject to a similar tax provision in the Panama Canal Treaty as are civilians, though the language is slightly altered.

Legal Assistance Mailout 86–4

All legal assistance offices should have received the fourth mailout, which was sent during November, 1986. Included in the mailout were copies of the 1986 editions of the *All States Consumer Law Guide*, the *All States Marriage and Divorce Guide*, and the *All State Guide to State Garnishment Laws and Procedures*. Additionally, a new publication, *The Preventive Law Series*, was included in the mailout. This publication includes thirty-one camera-ready handouts that contain helpful information for clients on numerous consumer topics. The publication is intended for use in a preventive law program. The fact sheets have an attractive cover sheet on which the local office address and telephone number can be inserted. The handouts can be reproduced and made available in legal assistance offices, housing referral offices, and other convenient locations.

Funding was obtained to purchase copies of an excellent *Lemon Litigation Manual* for all offices, and that manual was also included in the mailout. We were again fortunate to obtain copies of the Air Force's Shortburst Newsletter for July/August, 1986, and copies of those were also included.

The mailout also provided offices with a copy of the letter establishing The Judge Advocate General's Award for Excellence in Legal Assistance. Also included was a copy of the revised Legal Assistance Operations Format with instructions, which should be used to report statistics for the month of January, 1987. Reports are due to HQDA (DAJA–LA), Washington, D.C. 20310–2215, not later than 15 February, 1987. A second report covering the period 1 January 1987 through 31 March 1987, will be required to be submitted not later than 1 May 1987.

Offices that did not receive the mailout should contact the Legal Assistance Branch, The Judge Advocate General's School, ATTN: JAGS–ADA–LA, Charlottesville, VA 22903–1781.

Legal Assistance to Survivors of Gander

The following is a synopsis of a message concerning assistance to survivors of the soldiers killed in the Gander, Newfoundland, crash, which some offices may not have received:

This message, dispatched 14 November 1986, has the following date-time group: P 141100Z NOV 86.

SUBJECT: Air Crash Legal Assistance Update No. 21

1. The litigation surrounding the Gander Crash is progressing in Florida State Court and in Kentucky Federal Court. Discovery in these cases has been consolidated. Simultaneously, there has been an increase in the rate of settlements. The bankruptcy court is no longer publishing the value of the settlements, so this office does not have specific valuation information. However, reports indicated that the value of the settlements has also been increasing.

2. The one year anniversary of the crash is approaching. While the Warsaw Convention contains a two year statute of limitations, many jurisdictions have a shorter statute. In particular, the Newfoundland and Kentucky wrongful death statutes contain one year statutes of limitation. While the Florida statute is two years, they will adopt relevant lesser statutes. Thus, Florida may well adopt the Newfoundland one year statute in this case. Legal action should be initiated NLT 11 Dec 86 in order to protect any unsettled claim. LAO's who may be working with civilian counsel who have not filed suit should discuss this matter with civilian counsel. If any LAO is working with a survivor on a settlement with Arrow, they must notify this office.

3. Some families and attorneys may be waiting to the last minute to file suit. Such parties should be aware that if they intend to file in Kentucky, they must first open an ancillary estate administration in Kentucky. While this may be easily done, it will take additional time. Arrow's insurer has indicated that they will require plaintiffs to comply strictly with this procedural requirement. Hence an otherwise timely filed case may not toll the statute of limitations if it was not properly filed because the ancillary administration had not been opened. LAO's should ensure that local counsel are aware of this requirement.

4. The federal judge has yet to rule on the defense motion to dismiss for lack of jurisdiction those cases originally filed in Kentucky. As a result, many of the attorneys who brought those actions are filing a savings petition in the Florida federal courts.

Consumer Law Notes

"Electric Muscle Stimulator" Treatments

The Washington Attorney General has announced settlement of a consumer protection lawsuit against Body Tech, a salon operated by Image Centers International, which had been offering "electrical muscle stimulator" treatments. The suit alleged that Body Tech had made untrue and misleading claims about the safety and effectiveness of the treatments, which use electrical impulses to cause muscles to contract. Body Tech had claimed that the treatments reduce weight, provide physical conditioning, and improve cardiovascular capacity. The consent decree prohibits such claims, requires that future clients be warned about the possible dangers of the treatment, permits only licensed physical therapists to administer the treatments, and requires that the treatments be conducted only pursuant to medical prescription.

Billing Procedures of Time, Inc.

Pursuant to an agreement with the Missouri Attorney General, Time Inc., publisher of *Time* and *Money* magazines, will cease its practices of sending subscribers renewal notices that look like invoices and of dunning

customers who decline to pay the "invoice," which is actually a subscription renewal form. The Attorney General's action was taken in response to Time's billing procedure, initiated in 1983, pursuant to which subscribers who renewed *Time* magazine subscriptions were placed on a continuous service program that automatically renewed the magazine for another subscription period at the price then in effect. When the new subscription period arrived, subscribers were sent "invoices" seeking payment for the next subscription period. "Final invoices" arrived on stationery from Time's credit department, stating in part, "Your account with *Time* is now seriously overdue. You are approximately three months into your current service period, yet, as of this mailing, you have neither returned payment nor cancelled your *Time* subscription. To honor your original agreement you must do one or the other immediately." The Attorney General's complaint alleged that this billing procedure was improper, absent a clear and conspicuous disclosure that, by resubscribing, consumers were signing up for life.

Under the agreement, Time Inc. also agreed to stop its practice of failing to clearly detail the nature of a sweepstakes in which *Money* magazine solicited subscribers to take part. The Attorney General's complaint alleged that by taking part in the sweepstakes, subscribers automatically renewed their subscriptions to the magazine unless they took affirmative steps to avoid renewal. The steps required to avoid renewal were described in minimal detail and in extremely small print. In addition to changing the content of its solicitation forms, Time Inc. also agreed to refund the unused portion of the subscription payment to any Missouri customer who demanded a refund because they were misled by the subscription promotions. Captain Hayn.

Vacation Certificates

Alleging false advertising, unfair business practices, and violations of California's travel promoter statute, the California Attorney General has obtained a temporary restraining order against Resort Vacations, a Los Angeles based marketer of low-cost Mexican vacation certificates. Resort Vacations markets Mexican vacation certificates for approximately $200 per certificate nationwide through a network of distributors. The certificates entitle the holder to round-trip air fare from the United States to any of a number of Mexican cities plus hotel accommodations for four days and three nights.

According to the complaint, the company has repeatedly failed to provide certificate holders with the trips for which they paid, to deposit ninety percent of all certificate payments into a trust account as required by state statute, to use funds received for air transportation and hotel accommodations for those purposes, to provide customers with an information statement concerning the trip, to refund $170 deposits, to provide refunds to purchasers who have cancelled trips in accordance with the provisions stated on the vacation certificates, to disclose that purchasers would have to show Resort Vacations officials proof of marriage, W–2 tax forms or pay stubs, and other documents, to honor certificates sold by distributors in dispute with Resort Vacations, and to provide airline tickets fourteen days prior to departure as promised (some purchasers never received tickets).

The restraining order requires Resort Vacations to comply with applicable law, particularly requiring that the company comply with the provisions of California's travel promoter statute which mandates that such companies deposit ninety percent of all payments for vacation certificates into a trust account and provide customers with an information statement concerning the trip at the time they pay for the trip. Captain Hayn.

Leasing Automobiles

A recent study of the automobile-leasing industry conducted by the Maryland Consumer Council indicates that more than 1.8 million cars were leased for personal purposes in 1985. Many consumers currently consider leasing as an alternative to buying because cars are often the second-most expensive purchase people make (after home purchases), with the average cost of a 1986 car being $12,000. When determining whether to lease a car, consumers should carefully inquire into their rights and obligations under leasing contracts, because state lemon laws and implied warranty statutes are often inapplicable to automobile leases and consumers are often required to maintain and repair the leased cars at their own expense.

Some states, including Maryland, are currently considering legislation designed to clarify consumers' rights (including warranty coverage), to ensure stronger enforcement of federal Truth in Lending Act provisions, to create a cooling-off period following signing of the contract, to require that security deposits are treated in a manner similar to those paid by tenants to landlords (possibly including placement of these funds in escrow accounts and payment of the interest on the deposit to the lessee), and to provide other protections. Because state law may be changing in this area, consumers should carefully review both the terms of their lease contracts and their rights and liabilities under current state law before signing car-lease agreements. Captain Hayn.

Long Distance Telephone Service Uses Unlawful Pyramiding Scheme

Independent Communications Network (INC) of Wautoma, Wisconsin, has been recruiting salespeople in North Dakota who, in turn, recruit others. Pursuant to this multi-level marketing plan (often called a "pyramiding" scheme), subscribers may earn up to $27,380 per month in commissions when they recruit other members and those new members recruit additional members (through five levels of recruits). According to the Wisconsin Attorney General, this scheme violates state law, rendering participants guilty of a class C felony. The Attorney General notes that he has also received complaints from those who subscribe to INC, which provides unlimited long-distance telephone service in the continental United States for $100 per month, indicating frequent difficulty in placing calls.

Audi Safety Under Investigation

The Center for Auto Safety and the Attorneys General of New York, Illinois, and Ohio have recently filed a petition with Elizabeth Dole, Secretary of the U.S. Department of Transportation, requesting a full investigation of Audi 5000 cars with automatic transmission based upon the tendency of these cars to accelerate suddenly after being shifted from park to drive or reverse. During the past six years, nearly

600 reports of unexpected sudden acceleration have been filed, involving nearly one of every 500 Audi 5000s sold in North America and causing dozens of injuries and at least three deaths.

To date, Audi has issued two recalls: the first to adjust and secure the floor mat to ensure noninterference with the accelerator; and the second to adjust the distance between the accelerator and brake pedals to avoid striking both simultaneously. Although these recalls covered only 1978–1983 models, Audi has indicated that it will issue a "Customer Notification Letter" offering the accelerator/brake pedal adjustment to owners of 1984–1986 Audi 5000s as well.

Increasing Protections for Video Club Members

The Maryland General Assembly has responded to the sharp increase in the number of video clubs by passing a law designed to protect video club members who are required to leave a signed credit card authorization form with the club when they join. The law requires the club to print on the credit card authorization form the types and amounts of fees that may be charged to the card without prior approval (such as returning rented tapes late and failing to rewind tapes prior to return) and the maximum length of time (not to exceed six months) for which such charges may be made before the club must renew the credit card authorization.

Washington Protects Auction Bidders—No Shill

The 1986 Washington legislature passed a law protecting those who buy goods from auction companies. The law makes it illegal for auctioneers to hire individuals, often called "shills," to bid up prices. Additionally, the law prohibits "undisclosed buy-backs," making it illegal for auctioneers to employ their own bidders to purchase items when other bidders fail to bid at predetermined levels.

Sears Advertises Goods "Made in America"

Although Sears has advertised in some of its recent promotional catalogues that all items advertised were domestically produced, the National Association of Attorneys General Consumer Protection Committee discovered that this claim was incorrect and that some of the goods were imported. Following negotiation, Sears agreed to refund money to any consumers who had purchased foreign goods that were advertised as having been made in the United States. Sears also agreed to advertise accurately in the future.

Health Care Fraud

A panel of the National Association of Attorneys General Consumer Protection Committee has recently opined that national health care fraud may cost consumers up to $25 billion per year and may cost consumers far more than mere money. The committee noted that the types of frauds perpetrated vary widely and include cancer fraud (costing $3 billion annually), disease therapy ($3 billion), anti-aging and sexual potency fraud ($2 billion), mental illness and Alzheimer's disease fraud ($1 billion), and fake food supplement pills and powders ($6 billion). In addition, the panel estimated that up to $150 million is spent annually on mail order medicines and that quack diploma mills, promoting organizations, promotional literature, and cult, quack, or illegitimate practitioners cost consumers up to $6 billion per year.

The Kansas City Council Against Health and Nutrition Fraud and Abuse maintains records of illegitimate health care practitioners and files of state laws, regulations, and licensing standards that are available to all states to study, modify, and adopt as appropriate. The Iowa, California, and Missouri Attorneys General have also developed programs designed to assist and educate consumers. Captain Hayn.

Shop Around for Your Credit Card!

Consumers are reminded that they may benefit financially from shopping around for banking services just as they do for other purchases. Although many banks continue to charge high interest rates for credit cards such as Visa and MasterCard, some banks have reduced their rates and abolished annual fees. Consequently, consumers who are paying more than an annual interest rate of 18% should be out shopping for another card.

Family Law Notes

Changes to the Uniformed Services Former Spouses' Protection Act

Just as it has done with every DOD Authorization Act since the Uniformed Services Former Spouses' Protection Act (USFSPA) was first formulated, Congress recently used the 1987 Defense Authorization Act to amend the scheme for providing benefits to former spouses. The changes are very significant this time, revising courts' authority to order a member to designate a former spouse as a beneficiary under the Survivor Benefit Plan (SBP) and somewhat redefining the term "disposable retired pay." In addition to the specific modifications embodied in the Authorization Act, Congress' treatment of these issues may cause some courts to rethink their interpretation of other key provisions of the USFSPA.

Section 641 of the 1987 Authorization Act, Pub. L. 99–500, 100 Stat. 1783 (1986), amends 10 U.S.C. § 1450(f)(4) to read as follows: "(4) A court may require a person to elect (or to enter into an agreement to elect) under section 1448(b) of this title to provide an annuity to a former spouse (or to both a former spouse and a child)." This provision reverses the rule originally established under the USFSPA that any decision to designate a former spouse as an SBP beneficiary must be a voluntary act by the member and that no court could order such an election.

Under the new law, former spouses will receive SBP coverage if the member agrees or, in the absence of an agreement, if state law authorizes a judge to order an election and the judge concludes that such an order is fair and equitable considering the circumstances of the particular case. New York, for example, has been at the forefront of developing a body of law requiring annuity protection for former spouses of civilian retirees, notably fire and police personnel. Other jurisdictions now may follow suit, at least in regard to military retirees.

This change may not mark the end of disputes, and legislation, about former spouse SBP entitlements. As significant as the new provision is, it does not go as far as some interest groups want it to. Pressure to afford former spouses

with an *automatic* designation as beneficiaries will probably not abate because such a move would provide them with protection more nearly equal to that enjoyed by current spouses of retirees from active duty.

At any rate, as the law now stands, soldiers have lost a bargaining chip previously used in many cases to aid in negotiating a favorable property settlement agreement. Effective with respect to court orders issued on the date the 1987 Authorization Act was enacted, October 18, 1986, this new provision applies to all cases presently pending in various state courts and all future cases.

The second change modifies the definition "disposable retired pay." Section 644 of the Authorization Act amends 10 U.S.C. § 1408(a)(4) to delete the exclusion of disability retired pay in the introductory language defining "disposable retired pay" and replaces the current working of subsection E with the following provision:

> ["Disposable retired or retainer pay" means the total monthly retired or retainer pay . . . less amounts which—]
>
> . . . .
>
> (E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list).

Previously the USFSPA failed to touch on the issue of disability retired pay; it addressed only "regular" retired or retainer pay. Consequently, it was irrelevant regarding the question of divisibility of disability pay, and several states had concluded they were free to apply state law to resolve the issue. For example, California and Texas courts have held that disability retired pay may be divided as marital property. Conversely, other states have concluded that, although the USFSPA was silent on the matter, they were bound by the same principles of federal preemption that *McCarty v. McCarty*, 453 U.S. 210 (1981) applied, and that they therefore could not use state law as authority to divide military disability retired pay.

Now the USFSPA encompasses disability pay. Instead of excluding such payments from the definition of "disposable retired pay," § 1408(a)(4) as amended addresses *all* retired pay. In calculating "disposable retired pay," however, note that it does exclude a portion of disability retired pay that is proportional to the extent of the retiree's disability.

Here is an example of how the provision works. Suppose a soldier is retired for disability after 22 years of active duty because he is 40% disabled (and because he is otherwise qualified for disability retirement under 10 U.S.C. chapter 61). His retired pay is the greater of 2½% times the number of years of active duty times his active duty base pay or the percentage of disability times the base pay. With these facts, the applicable formula would be 2½% times 22 years, or 55% of his base pay. Assuming a base pay of $2000, his monthly disability retired pay would be $1100. Under chapter 61, 40% of this amount would be considered disability pay because he is 40% disabled. Thus under 10 U.S.C. § 1408(a)(4), his disposable retired pay would now be $1100 minus 40%, or a total of $660, and a state court can treat this sum as marital property. Under the previous rule, his disposable retired pay would have been $0 because all disability payments under chapter 61 were excluded.

For a second example, suppose a soldier is placed on the temporary disability retired list after eight years of active duty because he is 75% disabled. His retired pay is the greater of 75% of his active duty base pay or 2½% times the number of active duty years. Because the latter formula would yield only 20% of his base pay, the 75% figure is used in this case. Assuming a base pay of $1000, his monthly retired pay would be $750, and 75% of this is attributable as disability pay. Thus, the "disposable retired pay" portion would be 25% of $750, or $187.50. A state court can treat this latter sum as marital property.

The new provision should affect decisions in both categories of states noted above. The "California rule" must be trimmed to conform to the limitations imposed by the amendment. The state's presumption that it had authority to divide disability pay is partially vindicated, but federal law now provides that only a portion of such pay may be treated as marital property. Previously, these states held they could treat all disability retired pay as marital property in accordance with state law.

States that have declined to divide disability retired pay based on the preemption concept now clearly have authority to apply state law to a portion of such pay. It is worth noting, however, that preemption was not the only reason states refused to divide disability pay. Under statutes and caselaw in some jurisdictions, any form of disability payments are deemed to be the separate property of the injured party and thus not susceptible to division upon divorce. The effect of the amendment in these states is difficult to predict. It may be that no change will occur; on the other hand, a court could conclude that only the excluded portion of disability retired pay is truly "disability pay" under state law. The result could then be that the portion of disability retired pay that federal law says renders divisible would be divisible under state law also.

This new subsection E just discussed replaces the old language, but the previous provision had nothing to do with retired pay. Rather, it listed government life insurance premiums as a deduction in calculating "disposable retired pay." The result was that the former spouse "paid" a portion of the premium because that money theoretically was not available for division by a court. The effect of deleting the original language of subsection E is to shift the entire cost of the premium to the retiree. This is probably fair except in those cases where the retiree agrees to, or is ordered to, name the former spouse as the beneficiary of the policy. In future cases where the former spouse is to be the beneficiary, it is necessary to ensure that the burden of premiums is placed where the parties intend; the former spouse no longer automatically shares in these costs.

You may have noted the qualified statement above that money paid on life insurance premiums is *theoretically* not available for distribution by state courts. The theory is that before the USFSPA, there was *McCarty* which said that retired pay was not subject to state marital property law. Then came the Act which provided that states "may treat disposable retired or retainer pay . . . as property of the member and his spouse." States, however, have generally been dissatisfied with this language. They want to divide *gross* retired pay, not just disposable retired pay, and this

authority may be necessary in some cases to ensure an equitable result after tax consequences are factored into the situation. Indeed, many courts are purporting to divide gross retired pay, holding that the "disposable" language in the USFSPA was only intended to limit the amount of money subject to the direct payment provisions of 10 U.S.C. § 1408(d).

This rationalization has the merit of allowing a state to equally divide retired pay, as may be preferred by state law, but it stretches the language of the USFSPA to the breaking point. In fact, this interpretation may be untenable in light of the new amendments. Congress effected a major change by bringing disability pay within the Act's ambit, and it achieved this result by adjusting the definition of "disposable retired pay" rather than by drafting a new provision separately addressing the issue of disability pay. One conclusion to be drawn is that Congress intends "disposable retired pay" to be a key definition in the scheme it has erected. Additionally, as previously noted, Congress' tinkering included an alteration of the provision regarding payment of government life insurance premiums. If the term "disposable retired pay" only affects the amount available for direct payment, this change is so trifling as to be meaningless. On the other hand, if Congress intended its words to be imbued with their literal meaning, leaving states with the power to treat only disposable retired pay as marital property, then the change makes sense because it corrects the unfairness inherent in requiring the former spouse to pay a portion of the member's insurance costs. It remains to be seen, however, whether the new provisions will cause states to reexamine their position on the gross pay versus disposable pay issue.

In summary, the Authorization Act for 1987 includes two important changes in the rights extended to former spouses. These new provisions are effective with respect to court orders issued on or after October 18, 1986, the date the Authorization Act was enacted, and they may significantly effect our legal assistance clients. Additionally, these amendments shed some light on the very important issue of a state's authority to divide retired pay in excess of the "disposable" amount as that term is defined in the statute. Major Guilford.

Claims Report

United States Army Claims Service

Tort Claims Arising from Federally Supported National Guard Training

Joseph H. Rouse
Chief, General Claims Division

A recent federal court ruling in Hawaii has highlighted issues surrounding claims arising from the performance of duties by members of the National Guard under title 32, United States Code, sections 316, 502, 503, 504 and 505, herein referred to as "training duty claims."

For a state National Guard unit to receive federal support, all members of the unit must enlist in or be members of both the State National Guard and the National Guard of the United States (NGUS), *i.e.*, be "Federally" recognized. Unless such a member is on active duty under federal *orders*, however, he or she remains under state control. Thus, members on training duty that is merely federally supported remain under State control and are not employees of the United States in the absence of federal legislation that expressly provides that the government is responsible for the torts of such members.[1] Where the state has waived its sovereign immunity in a manner that includes the National Guard on training duty, state courts have ruled that suits for National Guard torts can lie against the state.[2]

In 1960, the National Guard Claims Act[3] was passed to ensure that potential claimants who lacked a remedy under the Federal Tort Claims Act (FTCA)[4] when harmed by a National Guardsman would be provided a federal remedy. The catalyst for this Act was explosions at NIKE sites manned by state National Guard units.[5] One major omission of the Act was that it did not provide any individual immunity for National Guard drivers while on training duty, *e.g.*, while on weekend drill[6] or at two-week training duty;[7] the Federal Drivers Act[8] applied only to Federal

[1] Levin v. United States, 381 U.S. 41 (1965).

[2] Florida v. Crawford, Case No. 81–694 (Fla. 5th Dist. Ct. App.) *jurisdiction declined by* Fla. Sup. Ct., Case No. 62,097 (1982); Morrison v. State, 179 N.W.2d 439 (Iowa 1970); Berk v. Ohio National Guard, Civil #77–0287 (Ct. Claims Ohio 1978).

[3] Act of Sept. 13, 1960, 74 Stat. 878, 32 U.S.C. § 715.

[4] 28 U.S.C. §§ 1346(b); 2671–2680 (1982).

[5] The impetus for passage arose following an explosion at Middletown, New Jersey NIKE site in 1959 which coincidentally was manned by active Army units. At that time, however, one-half of all NIKE sites, a purely federal activity, were maintained by units of the Active Army and one-half by personnel from various State National Guard units (not activated into federal service), nominally called "National Guard technicians."

[6] 32 U.S.C. § 502 (1982).

[7] 32 U.S.C. § 503 (1982).

employees and extended only to Guardsmen in the active Federal service.

To resolve this problem, the FTCA was amended in 1981 to include members of the National Guard while on training duty for claims arising on or after 29 December 1981.[9] The National Guard Claims Act was not repealed, however, and its present use is largely limited to claims arising out of noncombat activities, inasmuch as the FTCA is the preemptive negligence remedy in the United States. Finally, when the FTCA was amended, there was no effort to immunize states from suits arising from the training activities listed above.[10]

The case of *Lee v. Yee*[11] was an individual suit against Sergeant Yee, a supply technician for the Hawaii National Guard engaged in recruiting duties under 32 U.S.C. § 503. On 21 April 1982, while driving a National Guard jeep, he rear-ended the Lee vehicle. The state suit against Yee was removed and dismissed pursuant to the Federal Driver's Act. The complaint was then amended to include the state and the United States, but Lee later agreed to dismiss the state. He also had filed an administrative claim under the FTCA that was not settled. In June 1984, the United States answered the complaint and also filed a third party complaint against the state. In August 1986, a settlement in the sum of $40,000 to be paid by the United States was agreed upon in exchange for the releases of all parties, including the state, but preserved the right of the United States to seek contribution from the state.

In this final phase of the suit, Judge Fong ruled that the United States could sue a state in federal court under a valid cause of action even if a state attempts to limit the cause of action to suits in a state court.[12] In this case, the state waiver of sovereign immunity statute expressly included members of the Hawaii National Guard as employees of the state. Additionally, Hawaii has adopted the Uniform Contribution Among Tortfeasors Act. The state argued that the 1981 amendments to the FTCA mandated that Yee could not have been a state employee pursuing his duties at the time of the accident; Judge Fong saw no reason why Yee could not have been an employee of both the United States and the state. He based his determination of state employee status on a detailed analysis of Yee's duties as an administrative supply technician and the fact that the Governor, not the President, was in control. He pointed out that nothing in the 1981 amendment and its legislative history indicated that Congress intended to immunize a state, but rather that the purpose was to immunize National Guard drivers. Because Yee was under the control of the Governor and, according to Judge Fong, not performing a Federal function, he awarded the United States contribution in the amount of $36,000, or ninety percent of the settlement.[13]

Prior to the 1981 amendment to the FTCA, the United States Army Claims Service (USARCS) had an arrangement with the State of Hawaii whereunder the payments in "training duty claims" would be shared equally. Such sharing arrangements had been and still are authorized by Army regulations.[14]

It has been the policy of USARCS to not actively seek contribution, however, but to ensure that equitable claims are paid without the delay that attempts to obtain state contribution would entail.[15] Sharing costs of administrative claims is practical only when a state has an existing, funded mechanism for paying claims generated by National Guard personnel on training duty.

Sharing arrangements still continue with several states despite the 1981 amendments and are still encouraged by USARCS as being in the best interests of both parties. The legislative history of the National Guard Claims Act reflects that such sharing was originally considered and then abandoned by the Administration. While Judge Fong awarded ninety percent contribution in *Lee*, a share and share alike arrangement is more equitable in most cases. Exceptions more likely would be in the opposite manner, that is, where actual control is vested in the United States, as in the case with National Guard fighter planes.

The use of federally titled but state controlled vehicles or aircraft for state purposes is not considered to be training duties and has created problems in the past. In *Rhodes v. United States*,[16] a National Guard officer was permitted to use a federally titled National Guard vehicle to leave summer camp to register for civilian college courses; this was not considered to arise from duty under 32 U.S.C. § 503. While this determination was made under the National Guard Claims Act, a similar decision could be made under FTCA. "Official use" of a National Guard vehicle is controlled by state, not federal regulations, and such use for recreational activities or community action projects is frequently more liberal under state regulation and serves no training purpose. Not infrequently, a trip is made in a Federally titled vehicle or plane ostensibly for both federal and state purposes. In such cases, the determination as to whether the claim is cognizable under the FTCA or the National Guard Claims Act turns on whether the destination of the vehicle or plane at the time of the incident was for the federal purpose. The status of the operator is not the key determining factor.

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[8] 28 U.S.C. § 2679(b) (1982).

[9] Pub. Law No. 97-124. Such claims are now routinely processed under the FTCA. *See* Dep't of Army, Reg. No. 27-20, Legal Services—Claims, chap. 4 (18 Sept. 1970 [hereinafter AR 27-20]).

[10] It is doubtful that such an amendment is constitutionally valid as National Guardsmen remain employees of the state while on training duty. In other words, it is up to a state to provide such immunity to its National Guard while on training duty.

[11] 643 F. Supp. 593 (D. Haw. 1986).

[12] *Id.* at 596 (citing United States v. California, 655 F.2d 914 (9th Cir, 1980); Lee v. Brooks, 315 F. Supp. 729 (D. Haw. 1970)).

[13] Because a legislative appropriation is necessary in order for the state to pay its share, an extension until 31 July 1987 was granted before interest would be charged against the state.

[14] *See* AR 27-20, para. 4-7*d* and 6-14.

[15] It has also been the policy of USARCS to not enter a sharing arrangement "after the fact" unless such an arrangement will apply to all future cases. Thus, if a state is successfully sued in a matter that could properly fall under the FTCA or the NGCA, any arrangement to share costs would apply not only to the case at hand, but to future cases as well.

[16] 760 F.2d 1180 (11th Cir. 1985).

Sharing arrangements may be considered even though a state has waived immunity only to the extent of purchasing insurance. For example, where a state insures all its vehicles under a fleet policy, the premium costs are usually prorated among state agencies possessing vehicles. The National Guard must bear its share of such costs for both state titled vehicles (usually few in number) and federally titled vehicles when used on state duty. The additional costs, if any, of insuring the use of such vehicles on training duty should be balanced against the risk of a successful suit against the state when FTCA coverage is ruled inapplicable. If a sharing arrangement is entered into, the premium increase would be reduced to the extent of the contribution made under the arrangement.

This article has addressed the FTCA remedy for training duty claims which immunizes the National Guard driver. The FTCA, however, provides no immunity for states and in certain instances may provide no coverage. A sharing arrangement will not broaden FTCA coverage to cases for which a state may be responsible; coverage under FTCA is based on scope of employment while insurance coverage is based on use of a vehicle, which can be broader than scope of employment. Claims officers dealing directly with State National Guard agencies should develop a close working relationship with the designated state office to insure the expeditious disposition of claims. Utilization of a sharing arrangement in appropriate cases may expedite such disposition as the state may process the claim where agreed upon. The actual payment of the Army's share must be to the claimant, however, and not to the state. Questions concerning the foregoing should be directed to the General Claims Division, USARCS.

Advising the Hospital Commander

Claims attorneys have frequent contact with physicians in the Medical Activity (MEDDAC) when investigating claims and potential claims. Hospital commanders and their deputies are often interested in claims investigations and offer assistance.

Hospital commanders are also very involved in administering their quality assurance program and its components of risk management, patient care assessment, utilization review, and credentialing. Risk management is a great source of information for the claims attorney, and there is a close association between risk management and the investigation of potential claims.

The focus of physician and nurse credentialing is somewhat different than claims investigation. The focus of claims investigation is ultimately to build a file for the protection of the government, and the ultimate disposition may be a settlement with a claimant patient. The focus of credentialing is on the individual provider. Credentialing investigations are conducted under Dep't of Army, Reg. No. 40–66, Medical Services—Medical Record and Quality Assurance Administration, para. 9–17 (31 Jan. 1985), and certain protections must be afforded the health care provider. The ultimate disposition may result in the loss of one's career.

The claims attorney must be able to approach a physician and obtain candid information about a case. A claims attorney who participates in credentialing investigations will find his or her sources of candid information to be very limited thereafter. To ask a claims attorney to advise a hospital commander on credentialing reviews or to participate in a credentialing investigation presents him or her with a real conflict of interest; both jobs cannot be done effectively by the same attorney. Staff judge advocates must be sensitive to this dilemma and should give the administrative law attorney responsibility for advising the hospital commander on credentialing.

Personnel Claims Note of the Month

This note is designed to be published in local command information publications as part of a command preventative law program.

This month's note concerns changes to the policy concerning the loss and damage to personal tools used to perform official duties. Set out below is a revised copy of Personnel Claims Bulletin Number 70. This bulleting states the current policy of the U.S. Army Claims Service. It is recommended that a copy of the revised bulletin be published in local command information publications.

Personnel Claims Bulletin Number 70

Tools—Personal Tools Used to Perform Official Duties

The policy concerning the payment of personnel claims for loss or damage of basic required personal tools is changed. Department of the Army civilian employees and National Guard employees who are required to use basic personal tools as a condition of their employment will now have coverage for such tools under Title 31, United States Code, Section 3721 (Chapter 11, AR 27–20). To provide appropriate guidelines for the payment of these claims, agencies employing such employees must accomplish the following:

a. Provide each employee a list of all basic required tools.

b. Provide a method to substantiate the tools' actual ownership and possession by the employee.

c. Provide for the security of such tools.

d. Inform each employee on a periodic basis that the maximum allowable limits are $1,500 for tools and $250 for a toolbox.

The policy of this Service concerning the voluntary use of personal tools during employment has also changed. If a soldier uses personal tools for assigned tasks on a temporary basis with the specific authorization of the unit commander, the loss or damage of such tools will be payable as a loss incident to service. This policy applies only if the soldier uses the personal tools because government equipment is not available.

Bicentennial of the Constitution

Bicentennial Update

From now until 1991, the United States will celebrate the bicentennial of our Constitution and the Bill of Rights. From time to time, *The Army Lawyer* will publish accounts of important events in the chronology of bicentennial dates. This is the first of this series.

The Annapolis Convention. At the end of the Revolutionary War, our forefathers faced the problem of converting the wartime alliance of thirteen states into an effective national government. The Articles of Confederation, ratified in 1781, proved to be ineffective. A group of men, led by James Madison and George Washington, led the movement for a better national government. On January 21, 1786, Virginia invited all the states to attend a special convention on commercial issues beginning the first week of September 1786. Nine states named delegations, but only New York, Pennsylvania, Delaware, and New Jersey sent representatives to the convention, held in Annapolis. When the convention opened on September 11, the delegates realized that they could not proceed because too many states were not represented; moreover, the delegations attending had different grants of authority from their states. Instead, the delegates recommended that another meeting take place in Philadelphia in 1787 to discuss strengthening the Articles of Confederation. The Philadelphia convention later wrote the Constitution.

Shays' Rebellion. Poor economic conditions fostered discontent and led to Shays' Rebellion. By 1786, many farmers in western Massachusetts had lost their homes and farms; some went to jail for not paying their debts. The farmers appealed to the state legislature to print paper money to help pay these debts. The legislature, however, did not respond. Mobs formed to stop government officials from taking action against debtors or auctioning off their property. Daniel Shays, a veteran of the War of Independence, led a band of several hundred rebels in an uprising against the Massachusetts government in November 1786. His men threatened state government officials until February 1787. At that time, because they needed weapons, Shays' men tried to capture the arsenal at Springfield, Massachusetts. On February 4, 1787, Shays' forces were routed by the state militia, led by General Benjamin Lincoln. Although short-lived, Shays' Rebellion received widespread notoriety and focused attention on the need for an effective central government.

Annapolis Convention Recommendations Approved. On February 21, 1787, the Congress of the Confederation cautiously endorsed the plan adopted at the Annapolis Convention for a new meeting of delegates. The Congress saw only a limited charter for the new convention; it was to be "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein."

Bicentennial Essay Contest

For 200 years, the United States Constitution has governed the relationships among the branches of government, between national and state governments, and between the government and its citizens. As we celebrate the bicentennial of this unique document, its principles remain as valid as the day they were first recognized.

The Department of the Army is the executive agency for the Department of Defense's observation of this historic occasion. The Army theme for the celebration, "To Provide for the Common Defense," reflects the place of the military in the constitutional scheme. The Judge Advocate General's Corps theme, "The Constitution: Ours to Support and Defend," enhances this concept.

As part of the Army celebration of the bicentennial, The Judge Advocate General's Corps is sponsoring a series of essay contests over the next three years, to be run by The Judge Advocate General's School. The 1987 contest is open to Active Army, National Guard, Reserve, and Department of the Army civilian attorneys. The winner will receive a United States savings bond and have his or her name engraved on a plaque at the School. In addition, the winning entry will be considered for publication in *The Army Lawyer* or the *Military Law Review.*

Entries should not exceed 5,000 words (exclusive of footnotes) and should focus on some aspect of the relationship of the military to the Constitution. The role of the military under the Constitution; the application of the Constitution in the military; and the role of the executive, legislative, and judicial branches in determining military functions, are examples of possible approaches. The deadline for entries is June 30, 1987. The staff of The Judge Advocate General's School will review all entries. The winner will be selected by the School Commandant, whose decision is final. The Commandant in his discretion may elect not to declare a winner. The competition is not open to members of the staff and faculty of The Judge Advocate General's School.

Entries must be typed, double spaced, on 8½" by 11" paper, with 1" margins. Footnotes (if any) should be double spaced and appear as a separate appendix at the end of the text. All entries become the property of The Judge Advocate General's School. The School shall have first right to publish all entries. Submission of an entry constitutes a certification by the author that the essay is a product of

original research and writing and that the essay has not been submitted elsewhere for publication.

Entries and any questions about the contest should be sent to:

1987 Bicentennial Essay Contest
The Judge Advocate General's School
Attention: Literature and Publications
Charlottesville, Virginia 22903–1781
(804) 972–6396

Staff judge advocates are requested to give the widest possible publicity to the contest.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Legal Malpractice Legislation

In November 1986, the President signed into law an amendment (section 1054) to chapter 53 of title 10, United States Code, which provides for the defense of certain suits arising out of legal malpractice. This is a noteworthy piece of legislation as it has broad applicability extending to all Reserve judge advocate personnel who are in a duty or training status.

Specifically, the new law provides that the remedy against the United States, as outlined in sections 1346(b) and 2672 of title 28 for damages for injury or loss of property caused by the negligent or wrongful act or omission of any person, who is any attorney, paralegal, or other member of a legal staff within the Department of Defense, is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to such action or proceeding. The negligent or wrongful act or omission must be in connection with providing legal services while acting within the scope of the individual's duties or employment.

National Guard personnel engaged in training or duty under title 10, as well as title 32, sections 316 (detail of members of Army National Guard for rifle instruction), 502 (required drills and field exercises), 503 (participation in field exercises), 504 (National Guard schools and small arms competition), and 505 (Army and Air Force school and field exercises), are also covered by the legislation.

The defense for any civil action brought pursuant to this amendment will be provided by the United States Attorney General's office. Process served against a member of the National Guard or Reserves should be promptly given to the individual's immediate supervisor who, in turn, should promptly furnish copies of the process to the United States Attorney for the district where the action was brought; to the Attorney General; and to the head of the agency concerned. The Attorney General will make an initial review of the pleadings and make a determination as to whether the individual was acting in the scope of his or her duties or employment at the time of the incident which gave rise to the suit. If the Attorney General makes a determination that the act or omission did occur within the scope of the individual's duties or employment, then the action shall be deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. The Attorney General has the authority to settle any claim asserted in this type of action in the manner provided in section 2677 of title 28.

It should also be noted that the new law is applicable only to claims accruing on or after the date of the enactment of the Act (November 14, 1986), regardless of when the alleged negligent or wrongful act or omission occurred.

This legislation should go a long way toward reducing the fears of many Reserve Component attorneys who have previously been reluctant to provide legal assistance to eligible personnel. These fears were based on the perceived inadequacy of the *Feres* doctrine, as applied to malpractice claims. These cases *normally* resulted in Department of Justice representation and payment of any judgment or settlement by the United States as the government was *normally* a party to the action. These protections, however, were not guaranteed. Also, private malpractice insurance usually applies only to fee-generating cases. With the ever-increasing emphasis on providing legal assistance to Reserve Component personnel, Reserve Component judge advocates may now deliver these services with confidence, knowing that should the need arise, they will be protected.

Reserve Component judge advocates are encouraged to review additional substantive and procedural aspects of the amendment. A complete text of Section 1054 is provided below.

Defense of Legal Malpractice Suits

(a)(1) In General. Chapter 53 of title 10, United States Code (as amended by section 662), is amended by adding at the end of the following new section:

Section 1054. Defense of certain suits arising out of legal malpractice.

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for injury or loss of property caused by the negligent or wrongful act or omission of any person who is an attorney, paralegal, or other member of a legal staff within the Department of Defense (including the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32), in connection with providing legal services while acting within the scope of the person's duties or employment, is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) (or the estate of such person) for any such injury. Any person against whom such a civil action or proceeding is brought shall deliver, within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person (or an attested true copy

thereof) to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers. Such person shall promptly furnish copies of the pleading and process therein—

(1) to the United States attorney for the district embracing the place wherein the action or proceeding is brought;

(2) to the Attorney General; and

(3) to the head of the agency concerned.

(c) Upon a certification by the Attorney General that a person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court—

(1) shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending; and

(2) shall be deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to a cause of action arising out of a negligent or wrongful act or omission in the provision of legal assistance.

(f) The head of the agency concerned may hold harmless or provide liability insurance for any person described in subsection (a) for damages for injury or loss of property caused by such person's negligent or wrongful act or omission in the provision of authorized legal assistance while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with an entity other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(g) In this section, the term "head of the agency concerned" means the Secretary of Defense or the Secretary of a military department.

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item: 1054. Defense of certain suits arising out of legal malpractice.

(b) Effective Date. Section 1054 of title 10, United States Code, as added by subsection (a), shall apply only to claims accruing on or after the date of the enactment of this Act, regardless of when the alleged negligent or wrongful act or omission occurred.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 928-1304).

2. TJAGSA CLE Course Schedule

February 2-6: 87th Senior Officers Legal Orientation Course (5F-F1).

February 9-13: 18th Criminal Trial Advocacy Course (5F-F32).

February 17-20: Alternative Dispute Resolution Course (5F-F25).

February 23-March 6: 110th Contract Attorneys Course (5F-F10).

March 9-13: 11th Admin Law for Military Installations (5F-F24).

March 16-20: 35th Law of War Workshop (5F-F42).

March 23-27: 20th Legal Assistance Course (5F-F23).

March 31-April 3: JA Reserve Component Workshop.

April 6-10: 2d Advanced Acquisition Course (5F-F17).

April 13-17: 88th Senior Officers Legal Orientation Course (5F-F1).

April 20-24: 17th Staff Judge Advocate Course (5F-F52).

April 20-24: 3d SJA Spouses' Course.

April 27-May 8: 111th Contract Attorneys Course (5F-F10).

May 4-8: 3d Administration and Law for Legal Specialists (512-71D/20/30).

May 11-15: 31st Federal Labor Relations Course (5F-F22).

May 18-22: 24th Fiscal Law Course (5F-F12).

May 26-June 12: 30th Military Judge Course (5F-F33).

June 1-5: 89th Senior Officers Legal Orientation Course (5F-F1).

June 9-12: Chief Legal NCO Workshop (512-71D/71E/40/50).

June 8-12: 5th Contract Claims, Litigation, and Remedies Course, (5F-F13).

June 15-26: JATT Team Training.

June 15-26: JAOAC (Phase IV).

July 6-10: US Army Claims Service Training Seminar.

July 13-17: Professional Recruiting Training Seminar.

July 13-17: 16th Law Office Management Course (7A-713A).

July 20-31: 112th Contract Attorneys Course (5F-F10).

July 20-September 25: 113th Basic Course (5-27-C20).

August 3-May 21, 1988: 36th Graduate Course (5-27-C22).

August 10-14: 36th Law of War Workshop (5F-F42).

August 17-21: 11th Criminal Law New Developments Course (5F-F35).

August 24-28: 90th Senior Officers Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

April 1987

2–3: SMU, Labor & Employment Law Seminar, Atlanta, GA.

2–4: ALIABA, Health Care Law, Tampa, FL.

3–4: ABA, Self Insurance, Las Vegas, NV.

3–4: UKCL, Kentucky Uniform Commercial Code, Lexington, KY.

3–5: NITA, Advocacy Teachers Training, Cambridge, MA.

5–9: NCDA, Prosecution of Violent Crime, Reno, NV.

5–10: NJC: Introduction to Computers in Courts, Reno, NV.

8: NKU, Workers' Compensation, Highland Hts., KY.

9–10: PLI, Employment Litigation, New York, NY.

10: ULSL, Workers' Compensation (Intermediate), Louisville, KY.

10–11: ALIABA, Airline Labor Law, Washington, DC.

10–11: UKCL, Environmental & Natural Resources Law, Lexington, KY.

14: MICLE, Securities Law for Real Estate Attorneys, Grand Rapids, MI.

16–17: FBA, Tax Law Conference, Washington, DC.

22–2: NITA, Pacific Regional Trial Advocacy, San Diego, CA.

23–24: PLI, Financial Services Institute, New York, NY.

23–24: PLI, Negotiation Workshop for Lawyers, Los Angeles, CA.

25: NKU, Torts: Accident Reconstruction, Highland Hts., KY.

26–30: NCDA, Office Administration, Ft. Lauderdale, FL.

26–5/1: SMU, Institute on Fundamentals of Commercial Lending, Dallas, TX.

26–5/1: NJC, Judicial Writing, Reno, NV.

26–5/15: NJC, General Jurisdiction, Reno, NV.

28: PLI, Mergers and Acquisitions, New York, NY.

30–5/1: ABA, Appellate Advocacy, Boston, MA.

30–5/1: PLI, Title Insurance, San Francisco, CA.

30–5/2: ALIABA, Banking and Commercial Lending Law—1987, New York, NY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1986 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Requirement

Twenty-four states currently have a mandatory continuing legal education (MCLE) requirement. The latest additions are Indiana, Missouri, New Mexico, and Tennessee.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (Oct. 1986) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269–1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually.
*Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education 190 East 9th Avenue Suite 410 Denver, CO 80203 (303) 832–3693	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually.
*Georgia	Executive Director State Bar of Georgia 84 Peachtree Street Atlanta, GA 30303 (404) 522–6255	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342–8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.

State	Local Official	Program Description
Indiana	No address available.	—Effective October 1986. —No further information available.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281–3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission 301 West 10th Street Topeka, KS 66612 (913) 296–3807	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually.
*Kentucky	Containing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564–3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 875 Summitt Ave St. Paul, MN 55105 (612) 227–5430	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 March every third year.
*Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually.
Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635–4128	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Effective 1 July 1987 —Reporting date: 30 June annually beginning in 1988.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442–7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826–0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
New Mexico	No address available.	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Effective 1 January 1987. —Reporting date: 1 January 1988 or first full report year after date of admission to Bar.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255–1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military are exempt, but must declare exemption. —Reporting date: 1 April annually, beginning in 1987.

State	Local Official	Program Description
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799–5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
Tennessee	No address available.	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt. —Effective 1 January 1987. —Reporting date: 31 December.
*Texas	Texas State Bar Attention: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463–1382	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: Depends on birth month.
*Vermont	Vermont Supreme Court Committee of Continuing Legal Education 111 State Street Montpelier, VT 05602 (802) 828–3279	—Active attorneys must complete 10 hours of approved continuing legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Board 700 East Main Street, Suite 1622 Richmond, VA 23219 (804) 786–2061	—Active attorneys must complete 8 hours of approved continuing legal education per year. —Reporting date: 30 June annually beginning in 1987.
*Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison Seattle, WA 98104 (206) 622–6021	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
*Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110E Main Street Madison, WI 53703 (608) 266–9760	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632–9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Current Material of Interest

1. Extension of Fraternization Policy Letter

On 23 November 1984, the Department of the Army issued Headquarters, Department of the Army, Letter No. 600–84–2, DAPE–HRL (M), subject: Fraternization and Regulatory Policy Regarding Relationships Between Members of Different Ranks. The original expiration date of the letter was 23 November 1986. Pursuant to HQDA Letter 600–86–2, DAPE–HRL (M), subject as above, 21 November 1986, the original letter has been extended to 23 November 1987.

2. Toll-Free Number for TJAGSA.

As part of its new telephone system, TJAGSA now has a toll-free number. This number cannot be used by callers in the states of Virginia and Alaska. Callers from the rest of the United States may call 1–800–654–5914. This will connect you with the front desk, which will transfer you to the party you are calling. The toll-free number is for official use only.

3. TJAGSA Publications Available Through Defense Technical Information Center

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with

the letters AD are numbers assigned by DTIC and must be used when ordering publications. The 1986 All States Guides are now in DTIC.

Contract Law

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

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509	All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD–B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD–B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD–B094235	All-States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).

Claims

AB087847	Claims Programmed Text/ JAGS–ADA–84–4 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B087850	Defensive Federal Litigation/ JAGS–ADA–86–6 (377 pgs).
AD B100756	Reports of Survey and Line of Duty Determination/JAGS–ADA–86–5 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

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

Developments, Doctrine & Literature

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

Criminal Law

AD B100238	Criminal Law: Evidence I/ JAGS–ADC–86–2 (228 pgs).
AD B100239	Criminal Law: Evidence II/ JAGS–ADC–86–3 (144 pgs).
AD B100240	Criminal Law: Evidence III (Fourth Amendment)/JAGS–ADC–86–4 (211 pgs).
AD B100241	Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS–ADC–86–5 (313 pgs).
AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B095872	Criminal Law: Trial Procedure, Vol. I, Participation in Courts-Martial/ JAGS–ADC–85–4 (114 pgs).
AD B095873	Criminal Law: Trial Procedure, Vol. II, Pretrial Procedure/JAGS–ADC–85–5 (292 pgs).
AD B095874	Criminal Law: Trial Procedure, Vol. III, Trial Procedure/JAGS–ADC–85–6 (206 pgs).
AD B095875	Criminal Law: Trial Procedure, Vol. IV, Post Trial Procedure, Professional Responsibility/JAGS–ADC–85–7 (170 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

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

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

4. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 1–27	Chief of Staff, Army, Reduction of Administrative Workload for Unit Commanders Program		17 Nov 86
AR 5–3	Installation Management and Organization		10 Nov 86
AR 5–22	The Army Proponent System		3 Oct 86
AR 25–400–2	The Modern Army Recordkeeping System (MARKS)		15 Oct 86
AR 30–1	Army Food Service Program		14 Nov 86
AR 30–12	Inspection of Subsistence Supplies and Services		3 Nov 86
AR 40–65	Review Procedures for High Cost Medical Equipment		1 Nov 86
AR 50–6	Chemical Surety		12 Nov 86
AR 70–1	Systems Acquisition Policy and Procedures		12 Nov 86
AR 95–15	Certification and Use of Army Airfields by Other Than U.S. Department of Defense Aircraft		3 Nov 86
AR 190–54	Army Nuclear Reactor Security Program		12 Nov 86
AR 335–15	Management Information Control System		28 Oct 86
AR 340–15	Preparing and Managing Correspondence		12 Nov 86
AR 350–17	Noncommissioned Officer Development Program		15 Dec 86
AR 351–1	Individual Military Education and Training		3 Dec 86
AR 700–127	Integrated Logistic Support		16 Dec 86
DA Pam 25–400–2	Modern Army Recordkeeping System (MARKS) for TOE and Certain Other Units of the Army		1 Jan 87
DA Pam 27–9	Military Judge's Benchbook	Chg 2	15 Oct 86
UPDATE 3	Personnel Evaluations		1 Nov 86
UPDATE 7	Message Address Directory		27 Oct 86

5. Articles

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

Abney, *For Whom the Statute Tolls: Medical Malpractice Under the Federal Tort Claims Act,* 61 Notre Dame L. Rev. 696 (1986).

Butler, *Records and Proceedings of Hospital Committees Privileged Against Discovery,* 28 S. Tex. L.J. 97 (1986).

Catania, *Contracting Out: Management and Labor at War Under Section 7106 of the Civil Service Reform Act,* Pub. Cont. L.J., Aug. 1986, at 287 (1986).

D'Amato, *Superior Orders vs. Command Responsibility,* 80 Am. J. Int'l L. 604 (1986).

Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?* 33 UCLA L. Rev. 1063 (1986).

Doucette, *Handling the Indecisive Defendant,* Case & Com., Nov.–Dec. 1986, at 3.

Ford, *The Role of Extralegal Factors in Jury Verdicts,* 11 Just. Sys. J. 16 (1986).

Hans, *The Conduct of Voir Dire: A Psychological Analysis,* 11 Just. Sys. J. 40 (1986).

Hoyt, *How Settlements Affect Nonsettling Tortfeasors' Liability: From No Contribution to Equitable Apportionment,* 17 Tex. Tech L. Rev. 775 (1986).

Kelly & Thomas, *Torts: Survey of New Mexico Law,* 16 N.M.L. Rev. 85 (1986).

Law and National Security: Access to Strategic Resources, 38 Okla. L. Rev. 771 (1986).

Lieber, *Internal Revenue Code of 1986—Changes Affecting Individuals, Corporations and Other Organizations,* 57 Pa. B.A.Q. 167 (1986).

Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power,* 134 U. Pa. L. Rev. 1035 (1986).

McMains, *Contribution and Indemnity Problems in Texas Multi-Party Litigation,* 17 St. Mary's L.J. 653 (1986).

Martin, *Personal Computers in the Law Office,* Case & Com., Nov.–Dec. 1986, at 39.

Perdue, *Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts Up the Stakes?,* 28 S. Tex. L.J. 37 (1986).

Phoenix & Schlueter, *Hospital Liability for the Acts of Independent Contractors: The Ostensible Agency Doctrine,* 30 St. Louis U.L.J. 875 (1986).

Protecting Abused and Neglected Children in the 1980's: Is There a Need for Continuing Legal Reform?, 11 U. Dayton L. Rev. 503 (1986).

Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications,* 24 J. Fam. L. 625 (1985–86).

Slicker, *Child Sex Abuse: The Innocent Accused,* Case & Com., Nov.–Dec. 1986, at 12.

Susman, *Risky Business: Protecting Governments Contract Information Under the Freedom of Information Act,* Pub. Cont. L.J., Aug. 1986, at 15.

Tottenham, *Current Hospital Liability in Texas,* 28 S. Tex. L. Rev. 1 (1986).

Turner, *Confidences of Malpractice Plaintiffs: Should Their Secrets Be Revealed?,* 28 S. Tex. L.J. (1986).

Walters, Scrapansky & Marrlow, *The Emotionally Disturbed Military Criminal Offender: Identification, Background, and Institutional Adjustment,* 13 Crim. Just. & Behav. 261 (1986).

Weaver, Clayton, Roche, Krause, Lloyd & Bamonte, *The Legality of the Chicago Nuclear Weapon Free Zone Ordinance,* 17 Loy. U. Chi. L.J. 553 (1986).

Weigel, *Punitive Damages in Medical Malpractice Litigation,* 28 S. Tex. L.J. 119 (1986).

Comment, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?,* 33 UCLA L. Rev. 1189 (1986).

Note, *Constitutional Law: Urinalysis and the Public Employer—Another Well-Delineated Exception to the Warrant Requirement?,* 39 Okla. L. Rev. 257 (1986).

Note, *Developments Under the Freedom of Information Act—1985,* 1986 Duke L.J. 384.

Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement,* 54 Geo. Wash. L. Rev. 404 (1986).

Note, *Medical Ethics and Competency To Be Executed,* 96 Yale L.J. 167 (1986).

Note, *Military Medical Malpractice and the* Feres *Doctrine,* 20 Ga. L. Rev. 497 (1986).

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