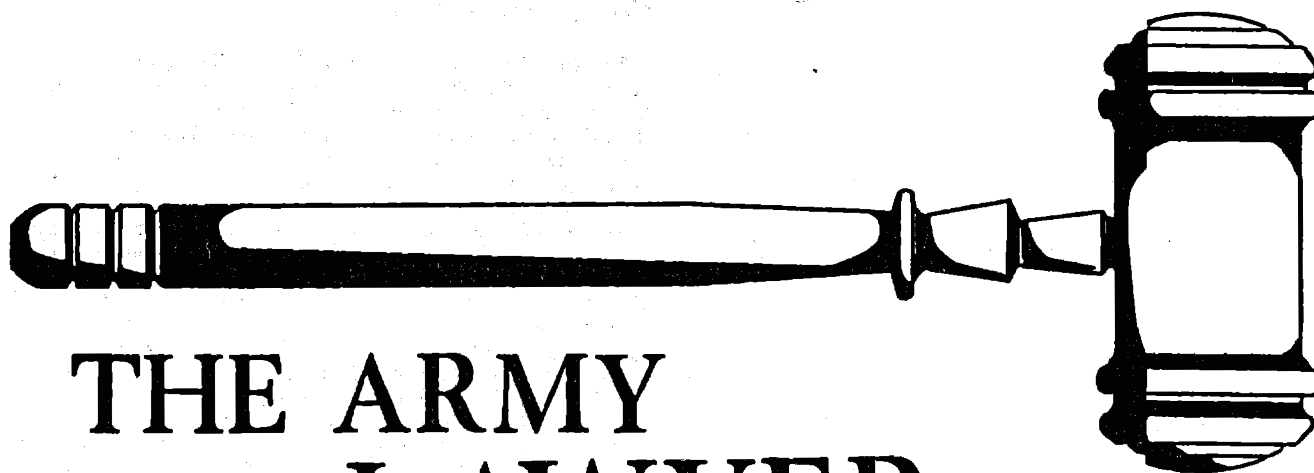

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27–50–156

December 1985

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The Army Lawyer (ISSN 0364-1287)

Editor
Captain David R. Getz

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

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer,* The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981) and the Uniform System of Military Citation (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals.* Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number]. Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

By Order of the Secretary of the Army:

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

REPLY TO
ATTENTION OF

4 NOV 1985

DAJA-AL

SUBJECT: Terrorist Threat Training - Policy Letter 85-5

STAFF AND COMMAND JUDGE ADVOCATES

1. The Army remains a target for terrorist activities within CONUS and overseas. Recent events highlight the vulnerability of Armed Forces personnel traveling to or through high risk areas. Judge advocates must be thoroughly familiar with their responsibilities to plan for and respond to terrorist incidents involving their installations, activities, units, or personnel.

2. You must ensure that you and your subordinates have a working knowledge of the following guidance dealing with terrorism:

a. AR 190-52, Countering Terrorism and other Major Disruptions on Military Installations.

b. TC 19-16, Countering Terrorism on U.S. Army Installations.

c. Memorandum of Understanding Between the Department of Defense, Department of Justice, and the Federal Bureau of Investigation, subject: Use of Federal Force in Domestic Terrorist Incidents (see The Army Lawyer, March 1985, at 12).

d. HQDA (DAMO-ZA) message 101618Z September 1985, subject: Department of the Army Travel Security Policy.

Hugh Overholt

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

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

REPLY TO ATTENTION OF

DAJA-ZX

23 October 1985

SUBJECT: JAGC Automation -- Policy Letter 85-4

STAFF AND COMMAND JUDGE ADVOCATES

1. In staff visits and meetings, I am frequently asked about automation. This policy letter provides some thoughts about JAGC automation and several guidelines which I hope you will find helpful.

2. A major goal for the Judge Advocate General's Corps is to take advantage of technology to improve productivity, but our commitment is to careful and deliberate progress. Given the pace of technology so far, a strong case can be made for advancing slowly. The track record in too many areas is filled with over-expectation and error.

3. The computer has already proven valuable for legal research, workload management, word processing, litigation support, data base management, and telecommunications. Some of you have seen these advantages and have taken the initiative to put automation to work for yourselves and your clients. I commend you on your foresight and success, and I encourage you to share your experiences with the rest of the Corps.

4. Automation literature encourages thinking about central development of elaborate systems to communicate worldwide. The cost of these systems as well as the time and manpower required for their development is staggering. In short, it is problematic whether we should "automate the JAGC Corps" from the top down. Even if we knew what that would require, the project could never compete successfully with other major Army automation projects for the tens of millions of dollars which would be necessary.

5. The following guidelines represent a basic predicate for satisfactory progress in automating our functional areas.

a. Designate one of your most talented people to serve as Information Management Officer. The complexity of the automation planning and budgeting process underscores one of our significant experiences so far: we must dedicate our most talented people to the task of automation.

DAJA-ZX
SUBJECT: JAGC Automation -- Policy Letter 85-4

b. Establish a solid, day-to-day working relationship with the Director of Information Management (DOIM) serving your installation. Some of our best progress so far has occurred by simple expansion of command automation projects to fill a particular requirement in our legal offices.

c. Establish a similar working relationship with the Information Management Officer in the Office of The Judge Advocate General to stay abreast of progress being made here and at other installations with requirements similar to yours. My IMO is LTC Dan Rothlisberger, who can be called at AV 227-8655 /8656.

d. Identify your information management requirements and, in coordination with your DOIM, develop plans to satisfy those requirements. Think ahead but be realistic.

e. Design systems around basic law office functions, such as, word processing, legal research, case and file management, administration, time and docket management, and telecommunications.

f. Anticipate and plan for site preparation. Some of our best projects have bogged down to await construction, electrical wiring, and cabling requirements overlooked in prior planning.

6. For most of us, automation is a new and difficult learning experience. I have directed increased use of The Army Lawyer to facilitate sharing information management plans and ideas. Make it a point to keep OTJAG informed of your progress. Many unnecessary problems can be avoided if we emphasize using the OTJAG IMO as a clearinghouse for sharing automation plans and ideas.

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

Religion and the Military: Recent Developments

Major Thomas R. Folk
Litigation Division, OTJAG

Government accommodation of religious practices is a perplexing issue under the first amendment's religion clauses.[1] One commentator has noted that "[t]he difficult body of doctrine derived from these [religion] clauses seems to consist of contradictory principles, vaguely defined tests, and eccentric distinctions."[2] This doctrinal confusion is especially frustrating in the military context, where interaction between government and religion is inevitable and where unique conditions often exist. Several recent developments, however, may clarify the analysis pertaining to accommodation of religious practices within the military. These developments include: the decision of the United States Court of Appeals for the Second Circuit rejecting an establishment clause challenge to the general validity of the Army chaplaincy;[3] completion of the first comprehensive Department of Defense study of accommodation of religious practices in the military;[4] promulgation of the first regulatory guidance issued by the Departments of Defense and the Army regarding accommodation of religious practices in the military;[5] and decisions by four different United States courts of appeals concerning free exercise challenges to general military requirements.[6] This article briefly discusses each of these developments.

Validity of the Army Chaplaincy: *Katcoff v. Marsh*

In *Katcoff v. Marsh*,[7] the United States Court of Appeals for the Second Circuit upheld the general validity of the Army chaplaincy program against a challenge that it violated the establishment clause. The challenge was brought by two taxpayers who commenced their suit while students at Harvard Law School. They alleged that the Army's "comprehensive religious program," which in 1981 included approximately 1,427 active duty chaplains, 1,383 chaplain assistants, 500 chapels, 100 religious education facilities, and an $85 million a year appropriated fund budget,[8] violated the establishment clause, particularly as interpreted under the three-part test developed by the Supreme Court in *Lemon v. Kurtzman.*[9]

Under *Lemon's* three-part test, to be valid under the establishment clause, a statute respecting religion must: have a secular legislative purpose; have a principal effect that neither advances nor inhibits religion; and may not foster excessive governmental entanglement with religion.[10] The court of appeals found *Lemon's* three-part test inapplicable to the chaplaincy.[11] Instead, it upheld the general validity of the military chaplaincy based on an analysis of its history, the interests of soldiers in the free exercise of religion, the unique military interests involved in providing religious support to soldiers, and the deference due Congress in the exercise of its constitutional war powers. The court declared that specific military chaplaincy activities are constitutional when they "appear reasonably relevant and necessary to furtherance of our national defense."[12] The court found that "the great majority of the Army's existing chaplaincy activities" passed this test.[13] It remanded the case to the district court, however, for consideration of whether chaplaincy programs involving two limited issues satisfied the test: furnishing military chaplains, facilities, and retreats at the Pentagon, San Francisco, and New York; and furnishing chaplain services to retirees.[14]

Katcoff is particularly significant for its rejection of the *Lemon v. Kurtzman*, three-part, establishment clause test as applicable to military religious support programs and its adoption of a far more deferential test that allows these programs as long as they are "reasonably relevant and necessary to our national defense." But, implicit in the *Katcoff* opinion are two additional constraints on military support to religious activities for soldiers and their families.

---

[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . . ." U.S. Const. amend I. These two clauses will be referred to as the establishment clause and free exercise clause respectively, and collectively as the religion clauses.

[2] Johnson, *Concepts and Compromise in First Amendment Religious Doctrine,* 72 Cal. L. Rev. 817 (1984).

[3] Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

[4] Department of Defense Joint Service Study Group on Religious Practice, Joint Service Study on Religious Matters (March 1985) [hereinafter cited as Joint Service Study].

[5] Dep't of Defense Directive No. 1300.17, Accommodation of Religious Practices within the Military Services (June 18, 1985) [hereinafter cited as DOD Directive 1300.17]; Dep't of Army, Reg. No. 600–20, Personnel—Army Command Policy and Procedures (15 Oct. 1980) (I05 26 Aug. 1985) [hereinafter cited as AR 600–20 (I05 1985)].

[6] Khalsa v. Weinberger, 759 F.2d 1418 (9th Cir. 1985); Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985); Goldman v. Weinberger, 734 F.2d 1531 (D.C. Cir.), *petition for rehearing denied,* 739 F.2d 657 (1984), *cert. granted,* 105 S. Ct. 3475 (1985); Cole v. Spear, 747 F.2d 217 (4th Cir. 1984).

[7] 755 F.2d 223 (2d Cir. 1985).

[8] *Id.* at 225, 228–29.

[9] 403 U.S. 602 (1971).

[10] *Id.* at 612–13.

[11] 755 F.2d at 232–235. The only recent case in which the Supreme Court has not applied *Lemon's* three-part test is *Marsh v. Chambers,* 103 S. Ct. 3330 (1983). The present utility of *Lemon's* three-part test has recently been the subject of discussion by members of the Supreme Court. *See* Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

[12] 755 F.2d at 235. *See also id.* at 234, 237–38.

[13] *Id.* at 237.

[14] *Id.* at 238.

These are that the program be "neutral when it comes to competition between [religious] sects,"[15] and voluntary "by leaving the practice of religion solely to the individual soldier, who is free to worship or not as he chooses, without fear of any discipline or stigma."[16]

Thus, under *Katcoff's* rationale, specific religious support activities by the military for soldiers and their dependents are sustainable when reasonably relevant and necessary to the national defense; neutral between sects; and voluntary.

Joint Service Study On Religious Matters

On 20 May 1985, the Deputy Secretary of Defense forwarded to Congress the Joint Service Study on Religious Matters, which had been required by section 554 of the Department of Defense Authorization Act of 1985.[17] The report is significant because it marks the first time the Department of Defense has examined comprehensively various potential conflicts (other than conscientious objection)[18] that religious practices can pose for service members, the military interests at stake when these conflicts arise, and possible accommodations. The study included an executive summary, an introduction, a legal overview, sections discussing the four key areas of conflict—ritual (primarily time off to observe worship, sabbath, or holy days), dress and appearance, diet, and medical—and supporting documentation.

The report's main value to the military practitioner is its discussion of military interests in allowing or not allowing certain religious-based exceptions to general military requirements. When a refusal to grant a religious-based exception to a general military requirement is challenged as a violation of the free exercise clause of the first amendment, the study is a good starting point for developing evidence regarding the government's interests in enforcing the requirement. Copies of the study can be obtained from the Department of the Air Force, MPXOS, Room 4E160, Pentagon, Washington, D.C. 20330–5060.

New Regulatory Guidance

General

On 20 May 1985, based on the recommendations in the Joint Service Study, the Deputy Secretary of Defense adopted the first Department of Defense regulatory guidance on accommodation of religious practices in the military. This regulatory guidance has since been incorporated in Department of Defense (DOD) Directive 1300.17, and implemented by the Army in AR 600–20.[19]

Much of the guidance in the DOD directive and the implementing Army regulation is advisory rather than mandatory. This is consistent with concerns expressed in the Joint Service Study that a mandatory regulation regarding the general subject of religious accommodation in the military, especially one that confers judicially-enforceable rights on individual service members, "runs the grave risk of undermining military discipline."[20] The Joint Service Study noted:

> The very nature of the military requires servicemembers to subordinate individual desires or beliefs to military mission and discipline. The longstanding legal doctrine under American military law and its British antecedents is that an individual's religious scruples are no defense to a charge of disobedience of a military order. A mandatory standard for religious accommodation would tend to negate this doctrine and elevate individual conscience over military orders absent a military need sufficiently weighty to meet the stated standard. That would interpose courts between individual servicemembers and their commanders as arbiters of whether the standard had been met and leave unclear in many situations whether a servicemember was free to disobey a particular order.[21]

While advisory, both the directive and the implementing regulation nonetheless indicate a very strong policy of dealing fairly and judiciously with legitimate claims to accommodation of religious practices. The Joint Service Study also contemplates that the DOD and the military departments will use internal procedures to ensure that service members are treated fairly.[22]

The DOD directive is quite general, containing a statement of policy; goals in eight specific areas, including religious services and observances, uniform and appearance, diet, immunizations, education, and recruitment; and procedures to use when evaluating requests for accommodation of religious practices. The Army's implementing regulation is far more detailed and discussion of its more specific provisions follows.

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[15] *Id.* at 231, quoting Zorach v. Clausen, 343 U.S. 306, 314 (1952).

[16] *Id.* at 231–32.

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

[18] The War Department did a review of the issue of conscientious objection in 1919. *See* U.S. War Department, Statement Concerning the Treatment of Conscientious Objectors in the Army (18 June 1919). The Selective Service System has also studied the issue of conscientious objection. *See* U.S. Selective Service System, Conscientious Objection, Special Monograph No. 11, (1950).

[19] *See supra* note 5. The change has also been incorporated into a complete revision of AR 600–20 scheduled for publication in the UPDATE format. Unfortunately, the paragraph numbers of section VI of chapter 5 in the interim change (which is effective 1 Jan. 1986) do not correspond to those in the complete revision in the UPDATE. References to paragraph numbers in this article are to those in the interim change while corresponding paragraph numbers in the pending UPDATE are referred to parenthetically.

[20] Joint Service Study, *supra* note 4, sec. I at 29. Under the Manual for Courts-Martial, a service member's religious scruples are no defense to the offense of disobedience of an order. Manual for Courts-Martial, United States, 1984, Part IV, para. 14c(2)(a).

[21] Joint Service Study, *supra* note 4, sec. I at 29.

[22] *Id.* at 30.

Army Regulation 600–20 Chapter 5, Section VI

General Organization & Procedure

The major provisions of AR 600–20 (I05 1985) include a general policy statement indicating the value the Army places on the rights of soldiers to observe the tenets of their religion and countervailing military interests; general procedures for evaluating requests for accommodation; and guidance pertaining to four specific areas, i.e., worship practices, dietary practices, medical practices, and dress and appearance practices.

The interim change contemplates a general methodology for evaluating requests for accommodation of religious practices. The decisionmaker first considers whether a request for accommodation is religious-based and sincere. If it is, the decisionmaker next considers whether granting the request will have an adverse impact on certain military interests. To assist the determination of whether to grant an accommodation, the decisionmaker weighs certain factors enumerated in paragraph 5–36c of the interim change (paragraph 5–39c of the pending UPDATE regulation) along with other relevant considerations.

Application of this general methodology varies with the specific type of practice addressed, however. For example, decisions whether to allow soldiers time off to observe worship practices are left to the unit commander and all general procedures and guidance apply. In contrast, in the area of dress and appearance, decisionmaking is more centralized, primarily at Headquarters, Department of the Army, and the general procedures and guidance are applied in a modified way to ensure greater uniformity.

Policy

Army Regulation 600–20, para. 5–37*b* (I05 1985) (UPDATE para. 5–34*b*) states essentially the same general policy as DOD Directive 1300.17. It provides:

> The Army places a high value on the rights of its members to observe the tenets of their respective religions. It is the policy of the Army that requests for accommodation of religious practices should be approved when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, health, safety, or discipline. However, accommodation of a soldier's religious practices cannot be guaranteed at all times but must depend on military necessity.

The general policy seems to suggest that requests for religious accommodation should only be granted when there will be no adverse impact on certain important military interests. The guidelines at paragraph 5–39*c* (UPDATE para. 5–36*c*), however, enumerate these important military interests as one factor among several to be weighed and indicate that there may be occasions when a commander could find it appropriate to grant a request for accommodation of a religious practice even though it may have a potentially adverse impact on one or more of the military interests enumerated in the policy statement.

Perhaps a good rule of thumb in interpreting the policy is that, while accommodation of religious practices should not generally result in an adverse impact on the military interests enumerated in the policy statement, a commander can appropriately grant requests that would have an adverse impact in some instances. Certainly, requests for accommodation for religious reasons should receive at least the same solicitude as requests for accommodation for nonreligious reasons under substantially similar circumstances.[23] Indeed, because of the high value owed free exercise of religion, they may require greater solicitude.

As several of the Supreme Court's recent establishment clause decisions illustrate, however, there are limits to the special solicitude that can be given even in the name of free exercise of religion. For example, in *Thornton v. Caldor,*[24] the Supreme Court found that a Connecticut statute requiring employers to give sabbath observers an absolute and unqualified right not to work on their sabbath violated the establishment clause of the first amendment. The Court found that by granting "unyielding weighting" in favor of sabbath observers over all other interests, the statute had a primary effect that impermissibly advanced a particular religious practice.[25] Although the *Thornton* court used the three-part test of *Lemon v. Kurtzman* found inapplicable to the Army chaplaincy in *Katcoff v. Marsh,* this does not mean that *Thornton's* reasoning would not apply to a similarly rigid military policy. The Supreme Court's opinion in *Larson v. Valente*[26] poses another potential establishment clause limit: one on selective or discriminatory accommodation of religious practices, a consideration also echoed in *Katcoff.*

When The Policies Apply — Religious Versus Nonreligious

The provisions of AR 600–20, chapter 5, section VI (I05 1985) apply only to accommodation of religious practices. How does one determine whether a practice is religious or nonreligious? Department of Defense Directive 1300.17 gives no guidance and AR 600–20 gives very little guidance on this issue: provides:

> Religious practices are not limited to the mandatory tenets of a faith group. Religious practices required by individual conscience may warrant consideration for accommodation even if not necessarily based on the tenets of a recognized religious faith. Questions of

[23] This standard is required in the area of religious speech, at least to the extent that countervailing establishment clause principles do not apply. *See* Widmar v. Vincent, 454 U.S. 263 (1981). *See also* Heffon v. Int'l Society of Krishna Consciousness, 452 U.S. 640 (1981) (recognizing that religious speech is as equally protectable as nonreligious speech). This general principle of at least equal treatment of similar religious and nonreligious practices (neutrality) appears equally applicable to areas not involving speech.

[24] 105 S. Ct. 2914 (1985).

[25] *Id.* at 2918.

[26] 456 U.S. 228 (1982).

whether a practice is religious should be referred to the servicing chaplain and judge advocate. . . .[27]

For further guidance, one must look to recent caselaw and legal commentary. These sources indicate that what is "religious" has a constitutional dimension and includes not only what one conventionally thinks of as "religious," but also possibly "all deeply held moral, ethical, or religious belief,"[28] or at least belief "that is sincere or meaningful [and that] occupies a place in the life of its possessor parallel to that fulfilled by the orthodox belief in God. . . ."[29] Moreover, even adherents of a particular religious denomination or sect are not limited to the tenets of their denomination.[30] The Supreme Court has emphasized that the government may reject as nonreligious only claims that are "bizarre" or "clearly nonreligious in motivation."[31]

Because of what amounts to a broad constitutional definition of what the government must consider as religious, the Joint Service Study notes that if the military grants any religious-based exemption in a given area, it would probably have to do so for any service member who sincerely believed in some deep, philosophical sense that he or she required the exemption.[32] Further, as in conscientious objector cases, to deny a request for an available exemption, the burden would appear to be on the military to show a basis-in-fact why a particular claimant was insincere.[33] Thus, resort to the criteria used in granting or denying conscientious objector applications[34] may provide the best analogy for evaluating whether to recognize a particular claim for accommodation as sincere and religious.

Procedures

The heart of the Army's regulatory guidance on accommodation of religious practices is procedure rather than substance. Army Regulation 600-20 establishes three significant procedural devices.

The first is its enumeration of five factors for unit commanders to weigh among others in determining whether to grant a request for accommodation in the areas in which the commander has discretion (*e.g.* time off for worship practices, dietary practices, and medical care). These factors are also in DOD Directive 1300.17 and in the Joint Service Study. They are:

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

(2) The religious importance of the accommodations 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.[35]

Neither AR 600-20, DOD Directive 1300.17, nor the Joint Service Study provide any guidance on how to weigh these factors. This is a deliberate omission. "These factors are set forth to promote a standard procedure for resolving difficult questions involving accommodation of religious practices. These factors recognize that each command is affected by different conditions that will require individual consideration."[36]

A brief examination of the five factors indicates how they should be used. How the first three factors weigh in favor of or against accommodation is the most obvious. Regarding the first factor (the importance of the military interests involved), obviously, the more important the military requirement from which a soldier requests exemption, the less likely an exemption should be made. For example, a commander might exempt a soldier from a routine cleanup detail to attend a worship service but legitimately might deny exemption from an important readiness test. On the other hand, under the second (the religious importance of the accommodation to the requester), the greater the importance, the more likely that an exemption should be made. The third factor (the cumulative impact of repeated accommodations) simply recognizes that making an exemption repeatedly or for a number of persons can have a different impact than making a one-time exemption for one person.

How to weigh the third and fourth factors is less immediately obvious. The fourth factor (alternative means available to meet the requested accommodation) can apply both to the unit and to the soldier. On one hand, if the unit can meet the military requirement from which a service member wants to be exempted by alternative means, this favors granting the accommodation. For example, instruction in a Saturday class that conflicts with a soldier's sabbath observance might be covered in a rescheduled class or by a tape recording of the class to be studied individually. On

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[27] AR 600-20, para. 5-39*b* (I05 1985) (UPDATE para. 5-36*b*).

[28] Welsh v. United States, 398, U.S. 333, 344 (1970).

[29] United States v. Seeger, 380 U.S. 163, 165-66 (1965). *See also* Clark, *Guidelines for the Free Exercise Clause,* 83 Harv. L. Rev. 327, 340-44 (1969); Riga, *Religion, Sincerity and Free Exercise,* 25 Cath. Law. 246 (1980); Comment, *The History and Utility of the Supreme Court's Present Definition of Religion,* 26 Loy. L. Rev. 87, 94-113 (1980); Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1057, 1063-83 (1978).

[30] *See, e.g.,* Thomas v. Review Board, 450 U.S. 707 (1981).

[31] *Id.* at 715.

[32] Joint Service Study, *supra* note 4, sec. 1 at 27.

[33] *Id.*

[34] Dep't of Army, Reg. No. 600-43, Personnel-Conscientious Objection, para. 1-7 (1 Aug. 1983).

[35] AR 600-200, para. 5-39c (I05 1985) (UPDATE para. 5-36c).

[36] *Id.*

the other hand, if the soldier requesting an accommodation can meet his or her religious requirement by alternative means, other than being excused from a military requirement, this weighs against granting a request for exemption. For example, if a soldier can reasonably find a substitute to take his or her place for a tour of guard duty on the sabbath, this then weighs against granting a request simply to be excused from guard without finding a substitute. This is somewhat analogous to the situation under Title VII, religious accommodation law,[37] which recognizes an inherent duty in the employment relationship for the employee to attempt to accommodate his beliefs himself and to cooperate with attempts at reasonable accommodation by his employer.[38]

The fifth factor (how the same or similar requests have been treated in the past) weighs in favor of continuing past treatment, absent a significant difference in situation. If a practice previously has been accommodated, then the commander should continue to accommodate it absent some significant, articulable change in circumstances. A change in circumstances should relate, of course, to the military interests enumerated in the first factor: individual and military readiness, unit cohesion, standards, health, safety, morale, and discipline.

Giving the commander these five specific factors to weigh, among others, guides the commander in the exercise of authority in those areas which are usually discretionary and which are important to his or her ability to lead the unit. This approach was supported by the testimony of several prominent military sociologists before the Joint Service Committee. They indicated that decisions about requested exemptions for religious practices should be made by the commander to enhance command authority, the unit's cohesion, and, ultimately military effectiveness.[39]

Nonetheless, the commander's exercise of discretion does not necessarily remain completely unreviewed. The Joint Service Study contemplates that the risk of unfair, inconsistent treatment will be minimized through use of available administrative remedies, such as the chain-of-command, the Inspector General, and Uniform Code of Military Justice Art. 138, 10 U.S.C. § 938 (1982).[40] Further, as discussed more fully below, AR 600–20 (IOC 1985) establishes the Committee for Review of Accommodation of Religious Practices within the US Army to advise on problem areas.

The regulation established procedures for maintaining written requests for accommodation in the unit policy file.[41] The procedures require new commanders of units in which accommodations of religious practices previously have been granted in writing to consult with the soldiers involved and to weigh the five factors enumerated above before eliminating these accommodations. The apparent intent is to protect soldiers from arbitrary changes to accommodations due simply to a change of command. Written requests under this provision must include a statement that the requesting soldier consents to maintaining the information in government records.[42] This statement is necessary to avoid violating the Privacy Act,[43] if the request is retrievable by an individual identifier.

The final procedural device in AR 600–20 tasks the Army's Deputy Chief of Staff for Personnel (DCSPER) with forming a standing committee called the Committee for Review of Accommodation of Religious Practices Within the US Army Committee.[44] The Committee consists of representatives from various Army staff offices and is chaired by the DCSPER's designee. It is charged with evaluating the Army's policies and procedures on accommodation of religious practices and with providing recommendations to the DCSPER regarding requests for accommodation of religious practices not specifically addressed by AR 600–20. The regulation generally contemplates permissive referral to the Committee for advisory opinions of requests for accommodation.[45] Referral is mandatory when a soldier seeks an advisory opinion concerning a denied or unresolved request for accommodation. The Committee will also evaluate and recommend whether requests for particular types of exceptions to uniform wear and appearance standards should be granted. The Committee's role is advisory. It does not supplant the role of the chain-of-command except to the extent its recommendations are adopted by the chain or are incorporated into Army regulation.

Substantive Guidance

Although the heart of AR 600–20, section VI of Chapter 5, is procedural, it gives some limited substantive guidance.

Consistent with the Joint Service Study and Department of Defense Directive 1300.17, the regulation indicates a preference for administrative over punitive action in cases of conflict between religious practices and military requirements.[46] There is also substantive guidance on

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[37] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e(j) (1982), requires employers "to reasonably accommodate" an employee's religious practices.

[38] Brenner v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1982). Title VII law is an imperfect analogy because it applies to private employers and not to decisions involving the military.

[39] *See* Joint Service Study, *supra* note 4, sec. II at 7 (relying *inter alia* on testimony of Dr. Charles Moskos presented to the Joint Service Study Group on January 10, 1985).

[40] *Id.*, sec. I at 30.

[41] AR 600–20, para. 5–40 (IO5 1985) (UPDATE para. 5–37).

[42] *Id.* at para. 5–40*a* (UPDATE at para. 5–37*a*).

[43] 5 U.S.C. § 552a(e) (1982), provides in part:

> Each agency that maintains a system of records shall—(7) Maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained. . . .

[44] AR 600–20, para. 5–38*a*(2) (IO5 1985) (UPDATE para. 5–35*a*(2)).

[45] *Id.* at para. 5–38*e*, 5–39*d* (UPDATE para. 5–35*e*, 5–36*d*).

[46] *Id.* at para. 5–39*e* (UPDATE para. 5–36*e*).

accommodation of religious medical practices which is largely consistent with past guidance.[47] Additionally, there is substantive guidance on wear of the uniform.[48] This guidance is consistent with the Joint Service Study and DOD Directive 1300.17. It permits chaplains to wear religious attire under certain circumstances, and, subject to temporary revocation due to health, safety, or mission requirements, allows soldiers to wear religious articles or jewelry when not visible or apparent and also under the same circumstances and conditions as when comparable nonuniform items (*e.g.*, jewelry) are allowed for nonreligious reasons. The regulation also allows requests for other types of religious exceptions to uniform and appearance requirements.[49] This provision contemplates that each request for a specific type of deviation will be evaluated initially by the Committee, and that Headquarters, Department of the Army (HQDA), will approve specific types of visible articles (*e.g.*, religious hats of particular colors and limited to certain dimensions, religious jewelry of designated style) for wear with the uniform under certain limited circumstances. To be consistent with the Joint Service Study and DOD Directive 1300.17, wear of these approved types of articles would be limited to "personal living spaces" and at religious worship services. It is unclear what the term "living spaces" will include, but it almost certainly will not include areas such as work sites. The Joint Service Study indicates that except when limited to areas where soldiers know each other very well, such as personal living spaces, religious-based exceptions to uniform and appearance standards are likely to adversely affect unit cohesion, military discipline, and standards.[50] Presumably, HQDA will specify with each announcement of an approved exception the limited circumstances and locations under which the exception will be allowed. Units with special needs may request exceptions to HQDA's general approval for wear of particular types of articles or appearance deviations for religious reasons.[51]

Recent Caselaw Involving Free Exercise Challenges to Military Actions

Within the past year, four United States courts of appeals have decided cases involving allegations that military actions have violated the free exercise clause of the first amendment. *Goldman v. Weinberger*[52] involves a first amendment challenge by an Air Force officer who is an orthodox Jew to adverse action taken against him for wear of a small skullcap (yarmulke) with his uniform while indoors. The district court found for the officer because it believed the Air Force's interest in uniformity "for uniformity's sake," not being based on empirical evidence or studies, was insufficient to outweigh the officer's interest in engaging in his religious practice.[53] The court of appeals reversed, finding that the "peculiar nature" of the military interest in enforcing uniform regulations was sufficient to outweigh Goldman's interest in wearing his skullcap while in uniform.[54] Significantly, rather than using the strict scrutiny test normally applied to free exercise claims in the civilian context,[55] the court applied a modified test based on *Roster v. Goldberg*.[56] Under this modified test, if a significant government interest conflicts with a religious practice, the military interest must be upheld.[57]

In *Ogden v. United States*,[58] the Seventh Circuit adopted *Goldman's* analysis. *Ogden* considered the actions of a Navy commander placing the "Christian Servicemen's Center" off limits because of sexual assaults, sexual intimidation, and encouragement of unauthorized absences of Navy members occurring there.[59]

Two other courts of appeals recently applied an even more deferential analysis to free exercise challenges to military actions. In *Cole v. Spear*,[60] the Fourth Circuit applied a reasonableness test to regulations giving precedence to disciplinary action over processing of a conscientious objector discharge application. In *Khalsa v. Weinberger*,[61] the Ninth Circuit would not review a free exercise challenge to Army uniform and appearance standards by a putative enlistee. *Khalsa* used the nonreviewability test first developed in *Mindes v. Seaman*[62] and now used by the majority of courts of appeals.

This recent caselaw indicates that the courts will apply a more deferential analysis to military decisions than that generally applied in civilian free exercise cases. To the extent they review them at all, the courts will probably uphold military decisions that involve significant military interests and are "designed to accommodate the individual

[47] *Id.* at para. 5-43 (UPDATE para. 5-40).

[48] *Id.* at para. 5-44 (UPDATE para. 5-41).

[49] *Id.* at para. 5-44*b*(2) (UPDATE para. 5-41*b*).

[50] Joint Service Study, *supra* note 4, sec. III at 21.

[51] AR 600-20, para. 5-44*b*(2) (I05 1985) (UPDATE para. 5-41*b*(2)).

[52] 734 F.2d 1531 (D.C. Cir.), *petition for rehearing denied*, 739 F.2d 657 (1984), *cert. granted*, 105 S. Ct. 4375 (1985).

[53] 29 Empl. Prac. Guide (CCH) ¶ 32,723 (D.D.C. Apr. 26, 1982).

[54] 734 F.2d at 1540.

[55] *See* Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 62-69, (1982).

[56] 453 U.S. 57 (1981).

[57] 734 F.2d at 1536, 1541. *See also* Ogden v. United States, 758 F.2d 1168, 1178-81 (7th Cir. 1985).

[58] 758 F.2d 1168 (7th Cir. 1985).

[59] The court of appeals remanded the case to the district court on the issue of whether the order placing the center off limits precluded legitimate community worship by servicemembers, and if so, whether it was feasible to modify the order to accommodate such worship without sacrificing the significant military interests at stake. 758 F.2d at 1183-85.

[60] 747 F.2d 217 (4th Cir. 1984).

[61] 759 F.2d 1418 (9th Cir. 1985).

[62] 453 F.2d 197 (5th Cir. 1971).

right to an appropriate degree."[63] If these cases remain the law, internal military administrative procedures, with oversight by the executive and legislative branches, rather than the courts, likely will remain the primary mechanism for resolving questions of religious accommodation in the military. This appears true at the very least when interests in the military mission, discipline, morale, and unit cohesion are involved.

Of course, the Supreme Court's decision to grant certiorari in *Goldman* leaves uncertain the continuing vitality of these cases. But, absent a radical change in the law by the Court, these recent developments provide useful guidance in handling the sensitive questions that arise in trying to achieve an appropriate accommodation between soldiers' religious practices and the requirements of an effective military.

[63] *Ogden*, 758 F.2d at 1180.

USALSA Report

U.S. Army Legal Services Agency

Beginning with this issue, the USALSA Report will become a regular part of The Army Lawyer. *This new section will include the Trial Counsel Forum, The Advocate for Military Defense Counsel, and notes from other sections of USALSA. Persons wishing to submit items for the USALSA Report should send them directly to the proper office within the USALSA.*

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An Appearance of Evil

Major James. B. Thwing
Trial Counsel Assistance Program

"It is axiomatic that the best way to dispel the appearance of evil is to publish the truth about the situation."[1]

The recent *en banc* opinions by the Army Court of Military Review in *United States v. Cruz*[2] and *United States v. Treakle*[3] serve as reminders that unlawful command influence is still a culprit in the military justice system. It is extremely difficult to reconcile this fact with the tremendous advances and developments that have taken place within the military justice system since the inception of the Uniform Code of Military Justice (UCMJ) in 1951. Indeed, the congressional hearings which preceded the enactment of the 1951 UCMJ centered almost entirely on establishing measures designed to abolish unlawful command influence.[4] Even so, the problem of unlawful command influence has persisted throughout every decade following the enactment of the 1951 UCMJ, seemingly suggesting that unlawful command influence bears a mystical quality discernible only be appellate courts. This article will review

[1] United States v. Cruz, 20 M.J. 873, 890 (A.C.M.R. 1985).

[2] 20 M.J. 873 (A.C.M.R. 1985).

[3] 18 M.J. 646 (A.C.M.R. 1984).

[4] House Army Services Committee Report, H.R. Doc. No. 491, 81st Cong., 1st Session, 1949 [hereinafter cited as Armed Services Report].

the problem inherent in military law in establishing limits over command influence, examine the likely focal points of unlawful command influence, analyze how trial counsel can prevent the occurrence of unlawful command influence, discuss how trial counsel should proceed at trial once unlawful command influence becomes an issue, and provide definition for actions that can be taken by commanders which can *lawfully* influence military justice.

I. The Problem of Limiting Command Influence.

The issue whether our system of military justice could operate without the influence of command authority has historically involved the question of whether, in the context of military responsibilities, the armed forces could operate in an environment in which the law that governed those forces could be independent of command authority. Early in this century the dimensions of this question were classically represented in the "Crowder-Ansell" dispute, which began in 1916.[5] Brigadier General Samuel T. Ansell, a senior officer in the Office of the Judge Advocate General, and Major General Enoch H. Crowder, then the Judge Advocate General, initially became engaged in a debate concerning the interpretation of section 1199 of the Revised Statutes of 1878[6] and whether it permitted the Judge Advocate General to set aside the findings of a court-martial after sentence had been executed. General Ansell supported the position that the Judge Advocate General possessed such power; General Crowder disagreed vehemently. This debate eventually drew national attention because it surfaced many more issues critical of the entire system of military justice. Of primary importance to this discussion, however, were the positions staked out by these men concerning the role of command authority in the military justice system. General Ansell, campaigning for a complete reformation of the military justice system, maintained that military justice was:

> a system arising out of and regulated by the mere power of Military Command rather than law, and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the conscience and alienate public esteem and affection from the Army that insists on maintaining it. . . .[7]

While General Crowder admitted that there were "imperfections" in the military justice system, his position regarding the need for reform of the system was diametrically opposed to General Ansell's. Interestingly, General Crowder's views were supported by Professor John H. Wigmore:

> The prime object of military organization is Victory, not Justice. In that death struggle which is ever impending, the Army, which defends the Nation, is ever strained by the terrific consciousness that the Nation's life and its own is at stake. No other objective than Victory can have first place in its thoughts, nor cause any remission of that strain. If it can do justice to its men, well and good. But Justice is always secondary, and Victory is always primary.[8]

These themes were present forty years later when the Forrestal Committee drafted the 1951 UCMJ. In testifying before Congress, then Secretary of Defense, James Forrestal stated:

> Another problem faced by the committee was to devise a code which would insure the maximum amount of justice within the framework of a military organization. We are all aware of the number of criticisms which have been leveled against the court-martial system over the years. . . . The point of proper accommodation between the meting out of justice and the performance of military operations—which involves not only the fighting, but also winning wars—*is one which no one has discovered.*[9]

Professor Edmund M. Morgan, chairman of the Forrestal Committee which framed the UCMJ, testified that:

> We were convinced that a Code of Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designed to administer justice. We therefore aimed at providing functions for command and appropriate procedures for administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor. . . . We have set up a system which resembles an independent civilian court, but we have placed it within the framework of military operations. . . . I am aware that there are many schools of thought on military justice, ranging all the way from those who sponsor complete presence of military control, to those who support a complete absence of military participation. I do not believe either of these extremes represents the proper solution.[10]

Accordingly, the framers of the 1951 UCMJ struck a compromise between what was believed to be a necessary expression of the power inherent in command authority and the power of the law by explicitly giving responsibility for the administration of military justice to the commander, while at the same time subordinating command authority to the law. To firmly establish the force of the law over

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[5] For an excellent discussion of this dispute *see* Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1 (1967).

[6] Act of June 23, 1874, ch. 458, § 2, 18 Stat. 244 provided that: "[T]he said Judge-Advocate-General shall receive, revise and have recorded the proceedings of all courts-martial, courts of inquiry and military commissions, and shall perform such other duties as have been heretofore performed by the Judge-Advocate-General of the Army. . . ." On a historical note, the "t" in The Judge Advocate General was not capitalized until 1924.

[7] Ansell, *Military Justice*, 5 Cornell L.Q. 1, 16 (1919).

[8] Wigmore, printed in 24 Md. St. B. Ass'n Transactions 183 (1919).

[9] Armed Services Report, *supra* note 4, at 597.

[10] *Id.* at 606.

command authority in terms which would define the unlawful expression of command authority, Article 37[11] was enacted providing, *inter alia,* that:

> No person subject to this code shall attempt to coerce, or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Article 98[12] bolstered this limitation over command authority, providing a criminal sanction for any person who knowingly and intentionally failed to enforce or comply with any provision of the UCMJ regulating the proceedings before, during, or after a court-martial.

It was not long after the adoption of the UCMJ, however, that unlawful command influence was identified by the newly-established Court of Military Appeals. In *United States v. Littrice,*[13] the Court of Military Appeals determined that an authorized pretrial conference with panel members of the accused's court-martial[14] had unduly prejudiced the accused's case to the extent that the accused had been denied a just and fair trial. The court held that the court-martial "was not free from external influences tending to disturb the exercise of a deliberate and unbiased judgement."[15] In arriving at this conclusion, the court stated that its role in establishing the existence of unlawful command influence was one of "maintaining a delicate balance between justice and discipline. . . ."[16] The court defined the balance between justice and discipline in the following terms: "Justice can be dispensed and discipline maintained if one is not permitted to overwhelm the other. Both should be given recognition and both must be governed and guided by the necessities peculiar to the military service."[17]

Unfortunately, this precedent established that discipline and justice were concepts governed by distinct and differing "necessities." More than any other single factor, this errant view of military justice has served to confuse the issues surrounding the lawful limits of command authority within the military justice system. Ample evidence of this can be seen in the variety of cases where unlawful command influence has been found.

II. Focal points of Unlawful Command Influence

As illustrated by military case law, the unlawful extension of command authority arises in three general areas where that authority has operated: command policy, command climate, and command control of military justice.

A. Command Policy

As indicated above, one of the first cases to determine the existence of unlawful command influence was *United States v. Littrice. Littrice* highlights not only the perils of implementing a command policy through the military justice system, but also demonstrates one of the central weaknesses of the MCM 1951, which created a potential for unlawful command influence: paragraph 38. This paragraph permitted the convening authority, through his staff judge advocate or legal officer or other appointed representative, to give general instructions to the personnel of a court-martial appointed by the convening authority. Paragraph 38 specifically provided that such instruction could:

> relate to the rules of evidence, burden of proof, and presumption of innocence, and *may include information as to the state of discipline in the command, as to the prevalence of offenses which have impaired efficiency and discipline, and of command measures which have been taken to prevent offenses. . . .*[18]

Unquestionably, this measure provided a wide-open possibility for unlawful command influence. In *Littrice,* the accused was charged with three specifications of larceny. Pretrial instructions to the panel members of the case were given by the commander's executive officer. As part of his instructions, the executive officer informed the members of the contents of a letter setting forth a policy by a higher headquarters entitled: "Retention of Thieves in the Army." The letter indicated that past courts-martial involving larcenies had resulted in "inadequate sentences" and urged that "retention in the armed forces of thieves and persons guilty of moral turpitude injuriously reflect upon the good name of the military service and its self-respecting personnel."[19]

In considering the propriety of this instruction in light of MCM, 1951, 38, the Court of Military Appeals opined that:

> Frequent thefts of the personal property of members cannot be condoned, and a general policy discouraging the imposition of inadequate sentences for such offenses is entirely reasonable. Such a general policy may be necessary and desirable and its communication to the personnel of the court proper. *However, it is preferable to give it to the command* rather than to a designated court-martial as there may be occasions when a court-martial, in good faith and in a given case

[11] Uniform Code of Military Justice art. 37, 50 U.S.C. § 612 (1951) [hereinafter cited as UCMJ]. The UCMJ was enacted as part of the act of May 5, 1950. It was thereafter revised, codified, and enacted into law as part of title 10, United States Code, by the Act of August 10, 1956 (*see* 10 U.S.C. §§ 801–940). Since that time, Article 37 has been 10 U.S.C. § 837.

[12] UCMJ art. 98.

[13] 3 C.M.A. 487, 13 C.M.R. 43 (1953).

[14] Pretrial conferences with court members were explicitly permitted under Manual for Courts-Martial, United States, 1951, para. 38 [hereinafter cited as MCM, 1951].

[15] 3 C.M.A. at 496, 13 C.M.R. at 52.

[16] *Id.* at 491, 13 C.M.R. at 47.

[17] *Id.* at 492, 13 C.M.R. at 48.

[18] MCM, 1951, para. 38 (emphasis added).

[19] 3 C.M.A. at 490, 13 C.M.R. at 46.

could conclude a punitive discharge was not warranted. *It is one thing to announce a general policy and yet another to use that principle to influence the finding and a sentence in a particular case.* [20]

Interestingly, in his concurring opinion, Judge Brosman wondered whether the language of paragraph 38 was "inconsistent with the mandate of the Code." [21]

In *United States v. Hawthorne,* [22] the implementation of a policy declaration during the referral process of court-martial charges was held to have been a product of unlawful command influence. In *Hawthorne,* a directive from higher headquarters concerning the elimination of regular Army soldiers having two or more court-martial convictions affected a company commander's recommendations regarding the level of court-martial to which the accused's case was to be referred. Additionally, another provision was aimed at bringing the policy squarely before panel members of a general court-martial:

> As a general rule, any charge against a Regular Army soldier with two admissible previous convictions should be referred to a general court-martial in order that para 127, Sec B, MCM, [sic] may be fully utilized. . . . This matter in information as to the state of discipline within the Command and, in accordance with the provisions of para 38, MCM, this letter will be brought to the attention of every member of every general courts-martial hereafter appointed. Care will be taken, however, that such action is taken prior to any case being referred for trial to the courts concerned. [23]

In determining that both provisions were extensions of unlawful "command control," the court stated:

> Not only did the commanding general seek to curb the power granted by the Uniform Code to the accused's immediate commander, but he also trenched upon the right of an accused to be tried by an impartial court-martial. By its express terms, the policy had to be brought to the attention "of every general courts-martial." The concurring member of the Court agrees with us that the terms of the directive were such as to necessarily influence the determinations of the court members. In our opinion, it not only had to influence them, but also the accused's own commanding officer. We cannot separate its effect. In sum, the policy directive directly tended to control the judicial processes rather than merely attempting to improve the discipline of the command. [24]

Despite the fact that the 1969 Manual for Courts-Martial [25] omitted the provisions of paragraph 38 of the 1951 Manual, cases involving the insertion of command policy in the judicial process continued.

In *United States v. Allen,* [26] the accused was convicted of one specification of wrongful sale of marijuana. During argument on sentence, the trial counsel briefly argued that the policy of the Navy Department was to prevent and eliminate drug abuse within the Navy and Marine Corps. The defense counsel was quickly objected to this argument; the objection was sustained by the military judge who also gave a cautionary instruction. Even so, the Court of Military Appeals determined that the actions of the trial counsel amounted to unlawful command influence, and summed up the trial counsel's actions:

> As we said in United States v. Estrada: "We . . . repeat here, that no cautionary instruction to members of the court that they may disregard the announced policies of their commander can relieve the error from prejudice. Each case is to be considered on the law and facts applicable to it alone and the policies of a particular commander have no place in the trial itself." [27]

This error was repeated in identical fashion in several subsequent cases. [28] One case involved an unusual set of circumstances. In *United States v. Brice,* [29] the accused in *Brice* was charged with possession, transfer, and sale of lysergic acid diethylamide (LSD). During the trial, the trial counsel advised the military judge that the convening authority had indicated that members of the court-martial would not be exempt from attending a speech to be delivered by the Commandant of the Marine Corps. It was noted that the subject of the Commandant's address would concern "drugs and things like that." [30] Despite the defense contention that such action would expose the members of the court-martial to improper command influence, the military judge allowed the court to recess in order to allow the court-members to attend the Commandant's speech. During the course of his speech, the Commandant of the Marine Corps specifically set forth the policy of the Marine Corps regarding drug trafficking, stating that "drug trafficking was intolerable" and that such persons should be "out" of the Marine Corps. [31]

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[20] *Id.* at 494, 13 C.M.R. at 50 (emphasis added).

[21] *Id.* at 496, 13 C.M.R. at 52 (Brosman, J., concurring).

[22] 7 C.M.A. 293, 22 C.M.R. 83 (1956).

[23] *Id.* at 297, 22 C.M.R. at 87.

[24] *Id.* at 299, 22 C.M.R. at 89.

[25] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM, 1969].

[26] 20 C.M.A. 317, 43 C.M.R. 157 (1971).

[27] *Id.* at 318, 43 C.M.R. at 158 (citation omitted).

[28] *See* United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Schomaker, 17 M.J. 1122 (N.M.C.M.R. 1984).

[29] 19 M.J. 170 (C.M.A. 1985).

[30] *Id.* at 171.

[31] *Id.*

In reviewing the facts of *Brice*, the Court of Military Appeals found them to be nearly identical to those in *United States v. McCann.*[32] In *McCann*, during a continuance of the trial, several court members attended a lecture on military justice given by the staff judge advocate wherein acts of misconduct identical to those committed by McCann were characterized as more reprehensible in the military than the civilian community. As a consequence of the similarities between the *Brice* and *McCann* cases, the Court of Military Appeals in *Brice* reiterated its holding in *McCann*: "The 'justice' lecture clearly constituted an improper influence upon the court members in regard to a case upon which they were then sitting. Under the circumstances, reversal of the accused's case is required."[33]

Actions of command authority in announcing or embracing a particular policy, seemingly outside the sphere of the military justice system, have been determined by several military appellate courts to have constituted unlawful command influence. In *United States v. Toon,*[34] the Commanding General of the 82d Airborne Division published a command letter in an 82d Airborne Division magazine discussing his attitude regarding appeals of soldiers who had been convicted and sentenced for drug trafficking offenses. The letter stated, *inter alia*:

> I believe that drug peddling and drug use are the most insidious form of criminal attack on troopers of this Division that faces us today. If I were an enemy, I could think of no better way to debilitate the combat effectiveness of the 82d than to fill its ranks with drug users, not only because the users become ineffective, but because they destroy a trooper's trust and confidence in the ability of his unit to function in a combat crisis. How many of you want to go to combat under a company commander who is a heroin addict or is hallucinating at the time? So my answer to [appeals of drug convictions] is, 'No, you are going to the Disciplinary Barracks at Fort Leavenworth for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?[35]

During the course of Toon's case, it was made clear that all panel members were aware of this statement. The panel members interpreted the "letter" to be a policy statement by the convening authority that he was taking a hard line towards drug dealers, that such persons should be dealt with harshly and should not expect leniency from him, and that if the court took a "hard line" toward a drug trafficker, the convening authority would "amen that." Even so, the panel members also indicated that they could act independently and would not be influenced by the convening authority's letter. The defense challenges of four of the panel members were denied by the military judge because he concluded that the commander did not intend to influence the court members to impose a severe sentence and he did not believe that the court members were influenced.[36] In an *en banc* opinion, the Army Court of Military Review held that the trial judge erred by failing to grant the defense challenges for cause. As to the commanding general's letter, the Army court held:

> In this case, the clearly laudable objective of the commander was to reduce drug traffic in his unit. Assuming the existence of a drug problem in the division, he would have been derelict as a commander had he not tried to solve the problem. While his command letter serves as a teaching vehicle by pointing out the undesirable features of drug use by members of a combat division, *its principal emphasis was on aggressive use of the judicial process to eliminate drug traffickers from his unit and from the Army.* Thus, his statement violates the basic rule permitting commanders to establish policy with respect to matters affecting discipline and morale within their units.[37]

The subtle difficulties of this particular aspect of command influence were manifested in *United States v. Dixon.*[38] In this case, the accused was found guilty of several offenses involving the illicit possession, transfer, and sale of drugs. Following his conviction and sentence, both the military judge and the staff judge advocate recommended that the bad conduct discharge adjudged in the accused's case be suspended. Contrary to these recommendations, the convening authority approved the sentence, including the adjudged discharge. Following appellate review of the accused's case, the convening authority was ordered, pursuant to MCM, 1969, para. 85c, to submit a letter explaining his action. Among several statements provided by the convening authority to explain his approval of the bad conduct discharge, was the statement that: "Because of the deleterious affect [sic] marijuana usage can have on the ability of the Marine Corps to fulfill its mission, there is an important interest in separating marijuana sellers from the Marine Corps."[39]

The Navy Court of Military Review opined that this statement read "like a command policy to separate all sellers, irrespective of the facts and circumstances of each case,"[40] and held that the discharge would be remitted because of "the supervisory authority's expressed predisposition to approve punitive discharges for all sellers of marijuana. . . ."[41]

[32] 8 C.M.A. 675, 25 C.M.R. 179 (1958).

[33] 19 M.J. at 172.

[34] 48 C.M.R. 139 (A.C.M.R. 1973).

[35] *Id.* at 141.

[36] *Id.* at 142.

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

[38] 10 M.J. 667 (N.C.M.R. 1980).

[39] *Id.* at 668.

[40] *Id.*

[41] *Id.* at 669.

These representative examples clearly demonstrate that commanders frequently seek out the military justice system to establish or inculcate command policy and that the interests in doing so are usually expressive of a determination to improve the welfare of the Army, improve a particular command, or change a state of conduct. It should also be clear that by expressing a policy, a commander may directly or indirectly affect the military justice system, and may do so personally or by some other representative. Most importantly, it is clear that the military appellate courts hold fast to the notion that any influence that a command policy may have upon the military justice process is highly suspected of being unlawful influence if it could conceivably be a detriment to an accused's case.

B. Command Climate

Command climate is generally defined as the state of readiness, training, discipline, and morale within a command. Military doctrine generally regards command climate as the expression of a commander's effectiveness. Case law illustrates that command authority has occasionally perceived the military justice system as a means of improving command climate.

In *United States v. Rosa*,[42] the Commanding General of the Marine Corps Base at Twenty-Nine Palms, California, was confronted with a serious assault case that had racial overtones. The incident took place shortly after the commanding general assumed command. Four days after the incident, he called a meeting of almost all the officers of his command "to apprise them of his policies as Commanding General."[43] Seven officers who testified on a motion for a change of venue of the accused's case variously related that the commanding general had rendered or reflected the following attitudes:

> The General stated that he was new on the base, had been looking things over, and had decided what he expected of people around the base. He saw a lot of things he wanted to change . . . . He wasn't going to put up with sloppy or obese Marines after giving them a fair chance . . . . Things were going to tighten up. He said that there had been a racial incident on a liberty bus and a Staff NCO who was present was lax in his duties and that he would do everything in his power to see that the people who were involved were caught and punished. The General . . . stated that any incidents of that nature would be a "personal vendetta to him" because he believed that there was only one Marine—a green one . . . . He stated that he considered the bus incident a blot on his record as a Commanding General.[44]

The issue of unlawful command influence was neither raised by the accused's defense counsel at trial nor by defense appellate counsel on appeal. Rather, this issue was surfaced by the Navy Court of Military Review:

> While it has not been specifically argued on this appeal we believe that the issue of possible unlawful command influence is reasonably raised by the record. The test for prejudice from unlawful command influence is not merely whether such influence actually existed but *whether there is an appearance of such influence.* For the appearance of the evil of command influence is as much to be avoided as the actual use of such influence.[45]

In applying this "test" to the actions of the Commander at Twenty-nine Palms, the court found that he had legitimate command interest in preventing discrimination, racial incidents, or other disruptions to the operation of his command. Consequently, the court did not disturb the findings in the case. The court did, however, set aside the sentence.

In *United States v. Cruz*,[46] a division artillery commander, who was also serving as an installation commander in the Federal Republic of Germany, was confronted with a problem of large-scale drug abuse and distribution within his command. One of his major subordinate units was seriously impaired by this problem. After learning of substantive evidence which pointed to illicit drug activity by a considerable number of soldiers in his command, the commander met with agents of the Criminal Investigation Division (CID), his servicing judge advocate, and members of his staff, and decided to execute a mass apprehension of the suspected soldiers. His decision to do so was based, in part, on advice from his servicing trial counsel. To effect the mass apprehension and to announce his aims regarding drug abuse, the commander arranged for a post-wide formation attended by approximately 1200 soldiers. In addressing the formation, the commander discussed leadership, discipline, command climate, and combat readiness. He then announced that there were soldiers in the formation who did not meet the Army's or the division's standards and who should be removed from their units. He then read the names of forty soldiers and instructed them to report to him. This group of soldiers included an officer and several noncommissioned officers. As these soldiers reported to the commander, they were ordered to form to the side of his platform. In some cases their unit crests were removed. Eventually, in full view of the entire formation, the forty soldiers were searched, arrested, placed in handcuffs, and transported to the CID office. Following interviews at the CID office, the soldiers were returned to their units. Because most of the soldiers apprehended belonged to the same unit, they were separated from the other members of their unit and required to live in a separate part of the barracks until charges were preferred against them. The accused, a member of this group of forty soldiers, was convicted at a general court-martial pursuant to his pleas of guilty to one specification of wrongful possession of hashish and two specifications of wrongful distribution of hashish. He was sentenced to a dishonorable discharge, confinement at hard labor for sixteen months, total forfeiture of pay and allowances, and reduction to Private E-1.

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[42] 46 C.M.R. 480 (N.C.M.R. 1972).

[43] *Id.* at 482.

[44] *Id.* at 482-89.

[45] *Id.* at 490.

[46] 20 M.J. 873, 875-77 (A.C.M.R. 1985).

On appeal, the accused alleged for the first time that the actions of the commander "had an impermissible chilling effect which denied [him] a 'fair forum' for the disposition of his case."[47] Among other things, the Army Court of Military Review assessed the effect of the commander's actions on the referral process of the accused's case, on witnesses who did or may have testified on behalf of the accused, and on the accused's pleas at trial. While the court determined that the actions of the commander neither resulted in actual command influence nor constituted the appearance of command influence, it did not approve them. Rather, the opinion of the Army court suggests that even the laudable ends intended by a commander may be judged as unlawful command influence if the commander's statements, *etc.*, are misinterpreted by participants in the military justice process, *i.e.*, they believe that they have no discretion in carrying out their functions, or if a substantial membership of the public (both military and civilian) believes that military justice has been compromised. This is a perilous standard for any commander who desires to enhance the climate of his command through the military justice process.

These cases clearly demonstrate that commanders believe that the military justice system is a positive, effective, and expedient means of establishing, improving, or ameliorating command climate. They also demonstrate that the standards for determining the unlawful nature of command influence within this field of command action are extremely complex and elusive.

C. Command Control of Military Justice

Case law also illustrates that command authority has frequently operated to establish or ensure a determined course of action by participants in the military justice system, especially with regard to the adjudication of sentences.

The *Littrice* case[48] not only provides an example of the operation of command authority in establishing command policy through the judicial process, but also demonstrates the operation of command authority as a control over the specific functions of the judicial process. In *Littrice,* one part of the "Retention of Thieves in the Army" letter brought to the attention of the court members, concerned the individual performance of court members:

> First, the greatest care should be exercised in the selection of officers who are to be appointed as members of all courts-martial. They must be the best qualified by reason of age, education, training, experience, length of service, and judicial temperament. Moreover, when the individual members have verified by their performance that they have those qualities, it is proper that you recognize that fact by appropriate notation on their efficiency report or by other written communication.[49]

The Court of Military Appeals determined that this portion of the "instruction" to the panel members was "[u]ndoubtedly the most offensive instruction given. . . ."[50] Within this perspective, the court stated that:

> No one would dispute that when services are well performed, the merits of the performance should be recognized. But commendations for outstanding performance should apply equally to all military duty and there is no compelling necessity to single out and emphasize the duties performed while a member of a court-martial and then mention efficiency report entries to personnel just before commencing consideration of a case. Actually the primary subject of the document was to place retention of thieves in the military service in its proper perspective. If considered for that purpose, no harm would be done; but immediately preceding the reference to efficiency report entries is a criticism of the sentences imposed by prior courts-martial. We believe that when the statement concerning the entering of commendatory remarks on the efficiency reports is considered in the context of the letter, there is a veiled threat that those members of the court who vote to convict an alleged thief and join in sentencing him to be dishonorably discharged from the service will receive a reward in the way of a commendation while those who do not will go unmentioned.[51]

In *United States v. Kitchens,*[52] the accused was convicted of several larceny offenses by a general court-martial and, among other things, was sentenced to be discharged from the Army with a bad conduct discharge. The accused had previously been convicted by a civilian court for the same offenses, but that sentence had been suspended and he had been placed on probation for a period of five years. Although his commander had initially intended to recommend administrative elimination of the accused following the civilian conviction, the post judge advocate advised the commander that he "had been to the front office and that the feeling was that the sentence was not adequate."[53] Consequently, charges were preferred against the accused and referred to trial by general court-martial. Prior to the accused's trial, a letter by the chief of military justice criticizing recent sentences adjudged in courts-martial was sent to all officers from captain to colonel at the installation. The letter was a "personal request" which requested information regarding the reason for the change in sentences. The addressees were informed that the letter would be used for instructional purposes and for guidance in the administration of military justice.

At the accused's trial, the defense moved to dismiss the charges against the accused on the basis of unlawful command influence. The six court members detailed to the accused's case admitted during *voir dire* that they had read the chief of military justice's letter. Three of them stated

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[47] *Id.* at 875.

[48] *See supra* notes 13–17 and accompanying text.

[49] 3 C.M.A. 487, 494, 13 C.M.R. 43,50 (1953).

[50] *Id.*

[51] *Id.*

[52] 12 C.M.A. 589, 31 C.M.R. 175 (1961).

[53] *Id.* at 590, 31 C.M.R. at 176.

that they believed the letter expressed an opinion on the adequacies of sentences adjudged by general courts-martial in the period recent to the accused's case. Although, it was not clear whether the court members had seen a second letter prepared by the chief of military justice, this second letter was also presented in evidence during the *voir dire* of the court members. The second letter outlined that many replies and helpful hints had been supplied to the staff judge advocate office and that although no addressee had indicated that there had been a misunderstanding of the purpose of the letter, defense counsel had contended that the letter constituted unlawful command influence. The letter then explained that the purpose of the initial letter was to obtain only information and that the initial letter was a personal request. All the court members testified that despite these letters they would not be influenced in forming an opinion as to what constituted an appropriate sentence in the accused's case. The motion to dismiss the charges was denied.

On appeal, the Court of Military Appeals held that the initial letter clearly was a criticism of the supposed inadequacy of sentences imposed in recent cases tried by general courts-martial. The court stated that, despite the averments of the court members that they would not be influenced by the letter, the fact that the accused was sentenced to a punitive discharge was evidence of the possible influence the letter actually had upon the court members. As a consequence, because the court could not conclude that the letter did not actually influence the court members, it stated that "the accused must be afforded the benefit of the doubt," and held that the accused was "prejudiced by the letter despite the *voir dire* representations of the court members."[54]

As to the second letter, which was intended to clarify the first, the court stated that this letter "aggravated, rather than alleviated, the import of the original letter. It attempted to undermine, before trial, any defense effort to challenge the import and influence of the letter."[55]

One of the most glaring cases of unlawful command influence that provides a constant source for criticism of the military justice system is *United States v. DuBay.*[56] It is not the record of trial in *DuBay* which details the extent to which command influence was involved in the case. Rather, it is the background of the case in the form of affidavits which reflect the underpinnings of the holding of the case. The *DuBay* case actually represents nearly 100 courts-martial which were affected by the questioned conduct of a general court-martial convening authority who was alleged to have unlawfully influenced the courts-martial process. While the *DuBay* sequence of cases occurred prior to the Military Justice Act of 1968, they demonstrate the difficulties faced even by senior judge advocates when confronted by a general officer intent upon controlling the military justice system. The following excerpt, taken from an affidavit provided by the staff judge advocate concerning his discussion with the convening authority concerning the admissibility of blood alcohol tests, illustrates this dilemma:

> During the course of the conversation and actually prior to the General [the convening authority] announcing exactly what he wanted, and prior to his directing Colonel Wiles to conduct the necessary tests, I advised him [the General] that in my opinion the Law Officer probably would not admit the evidence at any ensuing trial. The General then stated that he would order the Law Officer to do so, and when I informed him that the Law Officer was not a member of this command, he stated that he would get The Judge Advocate General to do so. When I advised him in my opinion that The Judge Advocate General would not do so, he inquired of me as to who was The Judge Advocate General's "boss." When I advised him that I supposed the Chief of Staff, United States Army, was the superior in line of command to The Judge Advocate General, he stated that he would get the Chief of Staff to issue the order. At that point I said nothing more because it became obvious to me that he was unaware of the rules pertaining to military justice under the operation of the Uniform Code of Military Justice. He did ask me if it were not true that the worst that could happen would be to have the Court of Military Appeals reverse the decision and give him "hell." I replied that this was true.[57]

Other cases demonstrate that the issue of unlawful command influence in the area of command control over the military justice system is far less obvious. In *United States v. Rivera,*[58] the accused was alleged to have unlawfully possessed heroin. His company commander initially recommended to his battalion commander that the accused be administered a field grade Article 15. The battalion commander returned this recommendation to the company commander instructing him to attach substantiating documents such as laboratory reports and witness statements. After the company commander complied with this instruction, the battalion commander again returned the accused's file to the company commander with the comment "returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." Eventually, the company commander preferred charges against the accused and the case was referred to a special court-martial empowered to adjudge a bad conduct discharge. The issue of unlawful command influence was neither raised at trial nor on appeal. Nevertheless, the Army Court of Military Review determined that the actions of the battalion commander amounted to unlawful command influence because the "the discretion placed by the Manual for Courts-Martial in the [accused's] immediate commander was effectively usurped by his battalion commander."[59] The court held that:

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[54] *Id.* at 593–94, 13 C.M.R. at 179–80.

[55] *Id.* at 594, 13 C.M.R. at 180.

[56] 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[57] H. Moyer, Justice and the Military 702 (1972).

[58] 45 C.M.R. 582 (A.C.M.R. 1972).

[59] *Id.* at 583.

> The fine line between lawful command guidance and unlawful command guidance is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them. If all viable alternatives are foreclosed as a practical matter, the superior commander has unlawfully fettered the discretion legitimately placed with the subordinate commander.[60]

Seemingly with *Rivera* in mind, the commanding general at Fort Knox, Kentucky, in 1971, published a command directive, "Processing of Serious Offenses."[61] This directive discussed the increase of serious offenses occurring at Fort Knox and their effect upon combat effectiveness and morale. Although the directive specifically urged subordinate commanders to exercise their discretion in taking action with regard to serious offenses, the directive also instructed subordinate commanders to forward to the staff judge advocate the case file of any accused charged with any of sixteen offenses identified in the directive if the individual commander had determined that trial by special court-martial or some lesser degree of action was appropriate. This command directive was carefully analyzed by the Army Court of Military Review in *Rembert*, where the accused, following his conviction for aggravated assault, complained on appeal that he was prejudiced by the directive. Although the Army court did not find that the command directive constituted unlawful command influence, it did find that the directive was suspect because "the list of offenses over which the subordinate commanders' discretion was limited included such a broad spectrum of crimes that question is raised about the purpose of the letter."[62] The Army court also stated: "[W]e do not favor issuance of a letter of the type in this case and in fact we discourage its use. . . ."[63]

Perhaps the most perplexing, complex, and yet instructive case in the area of command control over the military justice process is *United States v. Treakle*.[64] The perplexing dimensions of *Treakle* surface with the clearly laudable intentions of the convening authority. The facts of *Treakle* show that shortly after the commanding general of the 3d Armored Division (the general court-martial convening authority) assumed command, he spoke at a meeting with his subordinate commanders and senior noncommissioned officers where he addressed, among other topics, the subject of testimony on behalf of soldiers at courts-martial. Prior to this meeting, the division staff judge advocate had clearly outlined the legal limits for the commanding general's remarks on this topic. The SJA cautioned the commanding general to ensure that his remarks could not be interpreted as an admonishment against testifying on behalf of soldiers at courts-martial and that they could not be used by a superior officer or noncommissioned officer as a basis for warning subordinates against testifying on behalf of soldiers at courts-martial. During sworn testimony in a companion case to *Treakle* in which the intent of the 3d Armored Division Commander was similarly questioned,[65] the commanding general testified that he had been concerned by cases in which subordinate commanders had recommended trial by general or bad-conduct discharge special courts-martial, then during sentencing proceedings stated that the accused was a "good soldier" who should not be discharged. His message to subordinates centered on two basic points: that a commander should recommend a lower level of court-martial if he did not believe the accused should be discharged; and that in sentencing proceedings a commander should not testify that the accused was a "good soldier" or recommend retention if he believed the accused should be discharged. These same points were also conveyed to senior noncommissioned officers. These points were mentioned at ten subsequent meetings over a period of eight months. Although the SJA attended the first meeting in which these points were discussed, he was absent from most of the subsequent sessions. Unfortunately, neither the cautionary instructions provided by the SJA nor the intentions or clarity of purpose of the division commander prevailed. Those who heard the division commander speak reported widely different *perceptions* of his message. While nine battalion commanders understood the exact gravamen of the commanding general's message, several others believed that he was discouraging favorable character testimony once a recommendation had been made for trial by a court-martial empowered to adjudge a bad-conduct discharge. Other battalion commanders understood that the commanding general was encouraging recommendations for lower-level courts-martial when the commander felt the accused should be retained. The company commanders who heard the commanding general's discussion of these matters held a similar diversity of perceptions as to what he had stated. The widest diversity of perception occurred among the senior noncommissioned officers. Some understood the commanding general's theme of "consistency." Other senior noncommissioned officers understood that they should testify only in support of their commander's recommendations. A few senior noncommissioned officers understood that the commanding general discouraged favorable character evidence both before and after findings.

The complexities of *Treakle* arose when, following the accused's trial, a division-wide letter authored by the division command sergeant major was distributed which contained the statement that, "Noncommissioned Officers DON'T: . . . Stand before a court-martial jury or an administrative elimination board and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty."[66] This letter had not been reviewed for legal sufficiency or brought to the 3d Armored Division Commander's attention. Further aggravating this circumstance was a similar letter published by the division's second brigade command sergeant major containing a more strident message:

[60] *Id.* at 584.

[61] United States v. Rembert, 47 C.M.R. 755, 756 (A.C.M.R. 1973).

[62] *Id.* at 757.

[63] *Id.*

[64] 18 M.J. 646 (A.C.M.R. 1984).

[65] *Id.* at 650 & n.3.

[66] *Id.* at 651.

Once a soldier has been "convicted," he then is a convicted criminal. There is no way he can be called a "good soldier" even though up until the day he's court-martialed he is a super star.

The NCO Corps does not support "convicted criminals." We are ruthless and unrelenting in our pursuit of law and order and fully accept our role in upholding the moral ethics and principles upon which our nation is founded.

If you personally cannot subscribe to this philosophy my friend, you need to leave the Army and find another occupation in life.[67]

Shortly after the division command sergeant major's letter was published, it was discovered by the SJA. The commanding general was promptly notified of the impact of the letter. The commanding general at once recognized that corrective action was necessary and he immediately issued a command letter stating that:

1. Let's all understand several rules related to testifying on behalf of an accused soldier.

2. At courts-martial or administrative elimination proceedings, an accused soldier has an absolute right to have available witnesses, if any, testify about his or her good conduct, reputation or record for efficiency, or any trait desirable in a good soldier. Stated another way, if a witness has information favorable to the accused soldier and useful to the court-martial or elimination board in determining an appropriate sentence or recommendation, that witness is duty-bound to provide testimony to that effect. Indeed, to go a step further, I believe that the witness ought to take the initiative to let the accused soldier or his defense counsel know what information he has.[68]

Following the issuance of this letter, the division command sergeant major rescinded his letter and similarly substituted corrective guidance with respect to testifying at courts-martial. Additionally, at meetings, conducted over a period of three months, the commanding general and the SJA discussed with subordinate commanders and senior noncommissioned officers that there was no policy against testifying favorably for accused at courts-martial. The commanding general also emphasized that there was a legal and moral obligation to testify favorably.

The recitation of the facts in *Treakle* alone are instructive of the problems which are encountered when command authority is used to correct a perceived error in the military justice process. The opinion of the Army court lends perspective to these problems in stating that they were generated by two failings of command and staff responsibility: a failure to announce policies and directives clearly; and a failure to follow-up to see that directives were correctly understood and properly executed.[69] While the Army court determined that the actions of the 3d Armored Division Commander did not disqualify him as the convening authority nor affect the providency of the accused's guilty pleas, it did hold that there was an unrebutted presumption that the court-members who sentenced the accused were unlawfully influenced. Consequently, the accused's sentence was set aside. Additional rehearings were ordered in almost 100 other cases from the 3d Armored Division which presented issues similar to those in *Treakle*.

Unquestionably, this representative sampling of cases involving unlawful command influence over various aspects of the military justice process presents a clear focal point for assessing the authorized limits of command influence. They also demonstrate the dilemma that exists when the authorized limit of command influence is measured by the *perceptions* of the participants in the military justice process rather than the commander's intent. For this reason, the clear proscriptions of UCMJ art. 37 have not always been instructive as to the limits of authorized command influence.

III. Preventing Unlawful Command Influence

Preventing the occurrence of unlawful command influence begins with two important threshold considerations. First, discipline and justice within the context of military law are not separate concepts governed by distinct and different necessities. While the military appellate courts have historically upheld this axiom of military law,[70] the fact that the notion has prevailed that there is a difference between discipline and justice has served to inhibit the ability of the military attorney to clearly define the limits of lawful command influence. This exact issue was commented upon as early as 1960 in a report on the UCMJ by the Powell Committee which was submitted to then Secretary of the Army, the Honorable William M. Brucker:

To many civilians discipline is synonymous with punishment. To the military man discipline connotes something vastly different. It means an attitude of respect for authority developed by precept and by training. Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.[71]

The second threshold consideration is that unlawful command influence has rarely resulted because of the absence

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[67] *Id.*

[68] *Id.* at 652.

[69] *Id.* at 653, 654.

[70] United States v. Littrice, 3 C.M.A. 487, 491, 13 C.M.R. 43,47 (1953).

[71] *Committee on the Uniform* Code of Military Justice, Good Order and Discipline in the Army: Report to Honorable Wilber M. Bruckner, Secretary of the Army, at 11 (18 Jan. 1960).

or rejection of legal guidance. The cases discussed above prove that unlawful command influence is a problem which is not confined solely to the military commander. While the locus of responsibility for unlawful command influence has centered upon the commander, the mantle of command authority has been held, expressly or impliedly, to reside in those who serve the commander in a representative capacity, *e.g.*, staff judge advocates and trial counsel.[72]

By understanding the common truths evident in these considerations, trial counsel can confront the two central problems inherent in preventing unlawful command influence: predictability and foreseeability.

A. Predicting Unlawful Command Influence

The focal points for unlawful command influence outlined above provide trial counsel with a basis for avoiding being overtaken or becoming part of a process which leads to unlawful command influence. Frequently, the altruistic intentions of commanders may disguise the ultimate implications of their actions. This is precisely why unlawful command influence is easier found by hindsight than foresight. By understanding that commanders frequently envision the military justice system as a means to obtain command goals such as implementing command policy, improving command climate, or establishing a consensus of approach to discipline, trial counsel can be prepared to provide legal direction for these aims which will avoid their potential for unlawful command influence. For example, the military appellate courts have clearly demonstrated that the attempted establishment of policy on any aspect of the military justice process is clearly suspect action regardless of the commander's intent. These courts have also held the commander responsible for his actions even if his activities were oriented towards improving command climate outside the military justice process if those actions directly or indirectly affected the discretion or determination of a participant within the military justice process. Trial counsel should note that cases law on command climate reveal that commanders frequently take action to improve or adjust command climate either at the inception of their command or following serious misconduct which receives public attention. This knowledge not only provides trial counsel with a means for predicting in what context unlawful command influence will arise, but also when it will arise.

B. Foreseeing the Effects of Command Influence

Resolving the problem of foreseeability provides trial counsel the same advantage of hindsight in assessing the effects of command action that is afforded the appellate courts. The cases discussed above make clear that assessing the issue of unlawful command influence is not governed by the commander's intent. Rather, the appellate courts have assessed the effects of command action using one of three criteria: whether it was evil, whether it was perceived to be evil, or whether it appeared to be evil. Until the recent decision in *United States v. Cruz,*[73] however, it was unclear, except for the holdings which determined what command actions constituted actual unlawful command influence, how the criteria of "perceived evil" or "appearance of evil" could be used accurately to assess the effects of a particular command action *before appellate review.* Even more confusing was the fact that case law seemed to suggest that the criterion of "perceived evil" was identical to the criterion of "appearance of evil." Consequently, when assessing the possible effects of a commander's action upon the military justice process within the context of the proscriptions of Article 37 of the UCMJ, staff judge advocates and trial counsel could provide specific guidance only where case law had determined that a particular command action had constituted actual unlawful command influence. Confronted with command intentions such as improving the quality of Regular Army soldiers,[74] ridding the Army of "drug peddlers",[75] or obtaining a consensus of ethical "consistency,"[76] the problem of determining whether such intentions would result in an "unauthorized" influence upon the court-martial process was extremely complex. It was complex because the legal advisor had to speculate about what might develop aside from the ends sought by the commander and convince the commander that it was *possible* that his actions would be determined to be unlawful. *Cruz* resolves this complexity.

In *Cruz,* the Army Court of Military Review provided, for the first time, an accurate analysis of the parameters of unlawful command influence:

> Command influence law addresses two different questions which must be considered from two different points of view. The first question is whether the accused was prejudiced by *actual* unlawful command influence. The second question is whether there will exist in the minds of the public the *appearance* that he was.[77]

Within this framework, the Army court has rightly determined that actual command influence "must be considered from inside the military justice system" and that the appearance of unlawful command influence "must be considered from outside the military justice system . . . through the eyes of reasonable members of the public. . . .[78] The Army court defined "public" as "not only the civilian population, but also the rank and file of the services."[79] Most importantly, the Army court held that the perception of a participant in the military justice system "is not to be confused with the appearance of unlawful

[72] *See also,* United States v. Guest, 3 C.M.A. 147, 11 C.M.R. 147 (1953) and United States v. Godwin, 25 C.M.R. 600 (A.B.R. 1958).

[73] 20 M.J. 873 (A.C.M.R. 1985). *See supra* notes 46–47 and accompanying text.

[74] United States v. Hawthorne, 7 C.M.A. 293, 22 C.M.R. 83 (1956).

[75] United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973).

[76] United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984).

[77] 20 M.J. at 882.

[78] *Id.*

[79] *Id.*

command influence."[80] In this regard, the Army court stated that:

> [T]he *perception* of a participant in the military justice system as to what he has been told by his commander is relevant to the existence of *actual* unlawful command influence. For example, if a witness mistakenly believes he has been told not to testify, and complies, then the case has actually been affected, not merely apparently affected.[81]

Using this analysis, trial counsel is afforded the advantage of advising a commander that he will be held responsible for his actions, despite his underlying intent, through the perceptions of others within the military justice system, and through the eyes of reasonable members of the public outside the military justice system. Admittedly, it is arguable that such advice seemingly renders command action subject to public opinion, thus further exacerbating the problem of "speculation," but this need not inhibit trial counsel. Because the commander is responsible, the commander must know that the risks in transgressing the limits set by military law are great, requiring any action he takes to be "accurately stated, clearly understood, and properly executed."[82] Such advice should compel the commander to objectively assess whether any action he takes is necessary and will resolve the problem as he sees it, whether the possible participants within the military justice system will correctly interpret the action *as they see it*, and whether those outside the military justice system will understand the action and have confidence that it is correct. Such an approach should provide the element of foreseeability so clearly wanting in the past.

Given the factual setting of *Cruz* and applying this approach, a trial counsel could readily predict that intentions similar to those of the commander in *Cruz* could lead to a finding of unlawful command influence. With this in mind, the crucial issues underlying such intentions are readily highlighted. For instance, would a formation for the purpose of publicly proclaiming the effects of illicit drug activity coupled with a public apprehension of those suspected of such illicit activity improve "discipline, morale, command climate, and readiness"? Would such actions deter future illicit drug activity? Would *all* those attending the formation correctly understand the intent of the commander? Would there be a reasonable possibility of improper influence upon potential participants in the military justice process, including those responsible for charging, investigating, and referring the case to trial, as well as potential witnesses for any accused? Would the faith and confidence in the "fairness" of the military justice system by reasonable members of the "public" be sustained or impaired? Most importantly, knowing that many of these issues are resolvable only after trial, would the commander accept full responsibility if it is determined that his actions constituted unlawful command influence? Proper resolution of these issues should provide the commander with a clear vision of his actions and properly discharge trial counsel's unquestioned responsibility in this vital area of military law.

IV. Handling Unlawful Command Influence at Trial

Military case law is clear that the issue of unlawful command influence is frequently determined for the first time on appellate review. Several of the cases discussed above[83] clearly evidence this fact. It is clear that neither a guilty plea nor a failure by defense counsel at trial to raise the issue of unlawful command influence operate to waive the issue. For example, in his concurring opinion in *United States v. Ferguson*, Chief Judge Quinn stated:

> Although I agree that the exercise of command control will not deprive the court-martial of jurisdiction to try an accused, I believe that on a proper showing, a board of review has the power to ascertain the existence of command control, *even though no suggestion of it appears in the record of trial itself.*[84]

Similarly, in *United States v. Hawthorne*, the Court of Military Appeals held that:

> The Government maintains that even if the policy is objectionable, the accused's failure to interpose a motion for appropriate relief at the trial or to challenge the court members constitutes a waiver. It can strongly be argued that error resulting from the exercise of improper command control strikes at the heart of the court-martial system itself, and, therefore, cannot be waived.[85]

The Court of Military Appeals recently reaffirmed this position in *United States v. Blaylock*, in holding that:

> In view of the policy in Article 37, we have never allowed doctrines of waiver to prevent our consideration of claims of improper command control. . . . [T]o invoke waiver would be especially dangerous, since a commander willing to violate statutory prohibitions against command influence might not hesitate to use

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[80] *Id.* at 883.

[81] *Id.*

[82] *Treakle*, 18 M.J. at 653.

[83] United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (issue arose when accused filed affidavit after approval of sentence, while in confinement at U.S. Disciplinary Barracks); United States v. Dixon, 10 M.J. 667 (N.C.M.R. 1980) (issue of unlawful command influence arose when appellate court required commander to explain why he disagreed with the staff judge advocate's recommendation to suspend portion of accused's sentence); United States v. Rosa, 46 C.M.R. 480 (N.C.M.R. 1972) (issue of unlawful command influence arose on appeal after reviewing trial defense counsel's motion for change of venue); United States v. Rivera, 45 C.M.R. 582 (A.C.M.R. 1972) (issue of command influence arose when, on appellate review, allied papers indicated potential issue of unlawful command influence).

[84] 5 C.M.A. 68, 82, 17 C.M.R. 68, 82 (1954) (Quinn, C.J., concurring) (emphasis added).

[85] 7 C.M.A. 293, 299, 22 C.M.R. 83, 89 (1956).

his powers to dissuade trial defense counsel from even raising the issue.[86]

This latter opinion strongly suggests that a pretrial agreement, even if initiated by defense counsel, could not be drafted to avoid the issue of unlawful command influence. Indeed, in commenting recently on this matter in *United States v. Corriere*, the Army Court of Military Review stated that an agreement requiring an accused to withdraw a motion alleging unlawful command influence "would be void against public policy."[87]

Consequently, given the potential devastating effects of command influence, as evidenced by the *DuBay* and *Treakle* sequence of cases, trial counsel should understand that it is his or her responsibility to establish a basis for the fullest possible examination of potential issues of command influence at trial *regardless of the posture of the defense.*

The scope of trial counsel's analysis of potential issues of unlawful command influence at trial is not unlike that of the analysis conducted by military appellate courts. The opinion of the Army Court of Military Review in *United States v. Cruz* is instructive in this regard even though its opinion more directly establishes an "appellate model"[88] for analyzing issues of unlawful command influence.

In *Cruz*, the Army court made it clear that the rights and remedies for an accused who is allegedly the victim of unlawful command influence differ depending whether in a given case the action of command authority constitutes either actual unlawful command influence or the appearance of unlawful command influence. As to the appearance of unlawful command influence, the Army court determined that it was the "interests of the military justice system . . . which are endangered"[89] and which must be remedied. Such remedies "logically should be tailored to the restoration of public confidence under the particular circumstances of the case at hand; should avoid unnecessary expenditure of scarce resources; and should not create an actual injustice in the place of an apparent one."[90] In terms of appellate review, the Army court stated that the "mere fact an appellate court has examined a case and affirmed the results is sufficient in the vast majority of court-martial cases to satisfy the public that justice was done by the trial court."[91] Trial counsel can achieve this same remedy by ensuring that possible issues of unlawful command influence are raised and thoroughly examined at trial, whether or not raised by the defense, in every trial which may have been affected by the alleged unlawful command influence. The Army court also warned in *Cruz*, however, that "a case may occur in which the appearance of unlawful command influence is so aggravated and so ineradicable that no remedy short of reversal of findings and sentence will convince the public that the accused has been fairly tried."[92] Obviously, the avoidance of this consequence by trial counsel must begin well before trial.

As to actual unlawful command influence, including the perception of unlawful command influence, trial counsel, in bringing the matter to the attention of the court, must look to each participant in the military justice process to assess the potential rights and remedies of the parties. Trial counsel need not be intimidated by evidence that shows that it is possible that some prejudice in an accused's case has resulted. In *Cruz*, the Army court clearly recognized that evidence of unlawful command influence which shows a mere possibility "cannot overcome the general presumption of regularity"[93] of a trial. Consequently, whether the issue of unlawful command influence is raised by trial or defense counsel, the burden of persuasion that the accused's case is affected by unlawful command influence resides initially with the defense. This burden, according to the court in *Cruz*, does not shift to the government until the defense produces or points out evidence, which, "considering the totality of circumstances, is sufficient to allow a reasonable person to conclude that actual unlawful command influence affected [the accused's] case."[94] Accordingly, while trial counsel has direct access to those participants in the military justice process who prefer, investigate, and refer charges, and can assess the possible effect of a suspect command action upon these participants and institute corrective measures, proving such matters as the intimidation of defense witnesses is recognized in *Cruz* to be the responsibility of the defense.[95]

Trial counsel must be equally aware that cosmetic approaches to the problem of unlawful influence have been unsuccessful. For instance, trial counsel have relied upon such approaches as rescinding command letters, directives, and policies where there has been some suspicion of unlawful command influence. Likewise, trial counsel have often used the sentencing limitations of pretrial agreements to remedy the possible effects of unlawful command influence. In court, *voir dire* has been frequently thought of as a cure for the possible effects of unlawful command influence upon court members. The military appellate courts have been quick to hold that these measures do not rectify the problems associated with unlawful command influence.

While publishing written directives, letters, or policies intending to rescind any previous action considered to bear a potential for unlawful command influence may remedy the

[86] 15 M.J. 190, 193 (C.M.A. 1983).

[87] 20 M.J. 905, 907 (A.C.M.R. 1985).

[88] 20 M.J. at 884–86.

[89] *Id.* at 889.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 892.

[93] *Id.* at 886.

[94] *Id.*

[95] *Id.* at 887.

problem of the appearance of command influence, such efforts should never be considered to remedy the issues underlying the problem of actual unlawful command influence. Additionally, as discussed above in *United States v. Kitchens,*[96] trial counsel should understand that such actions can usually *aggravate* the problem.

Trial counsel should never rely on sentence limitations contained in pretrial agreements to ameliorate the problems of either actual unlawful command influence or the appearance of unlawful command influence. Case law is clear that, if anything, a sentence limitation contained in a pretrial agreement which is less than the limits adjudged in court is evidence which substantiates rather than repudiates unlawful command influence. For instance, in setting aside a sentence adjudged by court members in *United States v. Rosa,* the Navy Court of Military Review stated that:

> [W]e are unable to say with any degree of certainty that the court members' deliberations on sentence were completely uninfluenced. . . . Particularly is this true since the confinement portion of the sentence adjudged by the Court is three times as severe as that which the [convening authority] himself had considered to be appropriate *evidenced by the terms of the pretrial agreement.*[97]

Case law is also clear that when unlawful pressure has or appears to have been brought to bear on a court member, the law presumes that the member has, in fact, been influenced. Standing alone, a member's denial that he or she was not influenced is ordinarily insufficient to rebut this presumption. In *United States v. Treakle,* the Army Court of Military Review held that the presumption of command influence is rebuttable "only by clear and positive evidence that no actual influence [has] occurred."[98] Consequently, trial counsel should never rely solely upon *voir dire* to remedy the possible effect of unlawful command influence. Instead, absent the availability of positive evidence to counter this presumption, trial counsel should strongly consider removing court members who have been "influenced" and, if possible, replacing them with members who have not. Such an approach should be taken in every case where the court members manifest knowledge of a command action which bears the presumption of unlawful influence.

Viewed within the framework outlined in *Cruz,* the methods of resolving an issue of unlawful command influence at trial can be as consuming as withdrawing an entire case from court and transferring it to another jurisdiction for action, or as simple as appointing new court members. Even if the effort to resolve a problem of unlawful command influence at trial may be time consuming, cumbersome, or embarrassing, however, these efforts bear little comparison to the unmerited windfalls sometimes achieved by accused and the costs incurred following appellate review, as evidenced by the *DuBay* and *Treakle* sequence of cases.

V. Lawful Command Influence

Frequently, when a commander is confronted with serious misconduct which threatens public confidence in the armed forces or where the discipline of his command requires direction, he asks his legal counsel, "Don't tell me what I can't do; tell me what I can do."

Military law has never served to restrain the proper influence of a commander. Indeed, the appellate courts have continually recognized that "the responsibility of the commander for the maintenance of discipline within his command and the proper conduct of courts-martial cannot be questioned."[99] Military case law also demonstrates, however, that while commanders have rightly recognized that the military justice system is a positive force in promoting the essential truths of military life necessary to sustain the mission of the armed forces, they, as well as their legal advisors, have wrongly recognized that the military justice system is useful for compelling a desired result. For example, in *United States v. Toon,*[100] the Army Court of Military Review did not hold that it was improper for the commanding general of the 82d Airborne Division to publicize his feelings about illicit drug activity within his command. Instead, it was the apparent intent by the commander to use the judicial process to effect his attitudes which the Army court found improper. Likewise, in *United States v. Rosa,*[101] the Navy Court of Military Review determined that the Commanding General of Twenty-nine Palms Marine Base had a legitimate interest in preventing discrimination, racial incidents and other disruptions of his command, but also determined that the personalization of these interests to the extent that they were announced as a "blot on *his* record" substantially impaired the exercise of free discretion by court members in sentencing the accused. Case law also demonstrates that a commander may take specific action under military law when he determines that the state of discipline within his command requires closer attention. In *United States v. Rembert,*[102] where the Commanding General of Fort Knox, Kentucky, was concerned about the increase in number of serious crimes, the Army Court of Military Review recognized that he could, consistent with UCMJ art. 23(b),[103] properly require his subordinate commanders to refer cases involving serious offenses to him for his consideration. The Army court, while recognizing that this policy was lawful, however, warned against using such a policy in a manner which would operate to deprive subordinates of their independent discretion

[96] 12 C.M.A. 589, 31 C.M.R. 175,180 (1961).

[97] 46 C.M.R. 480, 490 (N.C.M.R. 1972) (emphasis added).

[98] 18 M.J. at 658

[99] Littrice, 3 C.M.A. 487, 13 C.M.R. 43 (1953).

[100] 48 C.M.R. 139 A.C.M.R. 1973).

[101] 46 C.M.R. 480 (N.C.M.R. 1972).

[102] 47 C.M.R. 756 (A.C.M.R. 1973).

[103] UCMJ art. 23(b), at the time of the opinion in United States v. Rembert, provided that if a special court-martial convening authority was an accuser "the court shall be convened by superior competent authority, and *may in any case be convened by such authority if considered advisable by him*" (emphasis added). This provision is consistent with UCMJ art. 23(b) (1982).

in exercising *their* responsibilities under military law. Even so, military law does not prohibit a commander from disagreeing with the actions of his subordinates and taking appropriate action. This point was made clear in *United States v. Thomas.*[104] In *Thomas,* a division commander disagreed with his brigade commander's referral of a case to trial by special court-martial. Subsequently, and prior to the commencement of any proceedings, the division commander withdrew the case from the special court-martial and referred it to a special court-martial empowered to adjudge a bad conduct discharge. The Army Court of Military Review held that there was no demonstration in the action taken by the division commander to restrict the exercise of the discretion of his subordinate. With regard to the issue of unlawful command influence, the Army court stated:

> This case involves nothing more than two commanders reaching different conclusions as to the lowest court that could impose an appropriate, adequate sentence. Under the military structure, the superior commander who had the ultimate responsibility and decision on matters within his command made the decision. The division commander's disagreement with the brigade commander's decision was no more command influence than was the brigade commander's disagreement with the battalion commander's recommendation for trial by general court-martial.[105]

One major aspect of military justice where the military appellate courts have sought to circumscribe command influence almost totally is the sentencing process. The discussion of case law above manifests the concern of the appellate courts that court members be absolutely free from command influence despite even the most laudable intentions of the commander. Even so, UCMJ art. 25 grants to the commander the power to detail members to a court-martial who are "best qualified by reason of age, education, training, experience, length of service, and judicial temperament." One thing that can be seen in those cases where a commander has unlawfully influenced court members.[106] is a lack of faith that a proper sentence will be adjudged. Even if such a lack of faith was justified (the majority of case law suggests otherwise), the real responsibility held by the commander in this regard is insuring that the quality of the court members, rather than a command policy, is enhanced. Too often, commanders seeking to preserve the best qualified officers of their command for other "more important" duties appoint court members who are not the best qualified to understand the full implications of misconduct upon a command. When the result of this form of command influence is a series of unremarkable sentences, it is evident that many commanders look for remedies to bolster court members, rather than the process by which court members are selected. Yet, even here, the commander must be wary. The process of *selecting* court members is reposed solely in the commander by military law.[107] Military appellate courts have discouraged staff judge advocates and chiefs of military justice from participating in the selecting process. In *United States v. Crumb,* Judge Jones in his concurring opinion stated that "there is no place for the use of partisan government advocates in the sensitive area of selection of court members."[108] This position was confirmed by the Court of Military Appeals in *United States v. Cherry.*[109]

It is clear that the search for lawful command influence lies not in discerning the difference between discipline and justice, but in how the responsibility for both is discharged. A simple, yet eloquent statement in the *Armed Forces Officer* provides a clear framework for discharging this responsibility. "In our system, that discipline is nearest perfect which assures to the individual the greatest freedom of thought and action while at all times promoting his feeling of responsibility toward the group."[110]

No less is true of justice. Hence, great latitude is available for commanders to promote this responsibility. The restraint placed over this latitude is that which denies commanders unbridled power to compel individual thought and action. Frequently, commanders speak of the need to establish a consensus of belief in the morals, values, and traditions of military life, and yet constrain that opportunity by foreclosing the very process by which these ends can be achieved: a public trial on the merits attended by members of the command.

Accordingly, in once again reviewing the factual setting of *United States v. Cruz,* and in addressing the question, "What can I do?", it seems clear that the effect of a public proclamation decrying illicit drug activity and its impact upon the command, coupled with public arrests and accusations against those suspected of such activity, is overshadowed by the effect that could have been obtained by holding public trials of those suspected, attended by members of the command, coupled with a public proclamation of the sentences adjudged.

Conclusion

The ultimate difference between military justice and its civilian counterpart is that military justice is aspirational. In fulfilling its natural function, the military justice system neither seeks to establish a minimum state of discipline nor confine morality to the limits of contemporary vogue. In *Schlesinger v. Councilman,* the United States Supreme Court recognized that:

> To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history;

[104] 2 M.J. 400 (A.C.M.R. 1975).

[105] *Id.* at 402.

[106] United States v. Albert, 16 C.M.A. 111, 36 C.M.R. 267 (1966); United States v. Johnson, 14 C.M.A. 548, 34 C.M.R. 328 (1964); United States v. Leggio, 12 C.M.A. 8, 30 C.M.R. 8 (1960); United States v. Hunter, 3 C.M.A. 497, 13 C.M.R. 53 (1953).

[107] United States v. Ryan, 5 M.J. 97 (C.M.A. 1978).

[108] 10 M.J. 520, 527–28 (A.C.M.R. 1980) (Jones, J., concurring).

[109] 14 M.J. 251 (C.M.A.) 1982).

[110] DOD GEN—36, 1975, at 125.

but they are founded on unique military exigencies as powerful now as in the past.[111]

For these reasons, command influence is not simply necessary, it is vital. No less vital is proper legal guidance which leads to the proper lawful limits for command influence. The responsibility of trial counsel, chiefs of military justice, and staff judge advocates to provide effective guidance is clear. As seen from the discussion above, however, most of the errors made by commanders in exercising their influence have been made coincident to legal advice. Inherent in this dilemma is the fact that the law regarding command influence has been less than certain, providing ample reason for the continuation of a problem that should have long ago been resolved. The Army Court of Military Review in *United States v. Cruz* provided a clear framework for legal advice which can be used to avoid the devastating results of having a commander's action labeled unlawful. By recognizing the true value of this case and executing their unquestioned responsibility in area of command influence, trial counsel can close the chapter on the long history of unlawful command influence.

[111] 420 U.S. 738, 757 (1975).

Use of Videotaped Article 32 Testimony

In past issues of the *Forum*, TCAP advised trial counsel to consider making the transcripts of Article 32 investigations[1] verbatim, or to request and produce a videotaped deposition, in child abuse cases, in anticipation of the recanting or reluctant child witness.[2] One resourceful trial counsel in USAREUR combined both techniques and successfully introduced a *videotaped Article 32 investigation* where the sexual child abuse victim had been whisked away to CONUS by the family and was thus unavailable for trial.[3] The basis for admission was Mil. R. Evid. 804(b)(1) (prior testimony), which normally provides for the introduction of the verbatim transcript. Obviously, as the trial counsel realized, the members' opportunity to view the witness' reactions as she testified, or even just to see her inherent vulnerability, was invaluable, as compared simply with the written record.

Coast Guard Court Comes Aboard

In the November issue of the *Forum*, TCAP highlighted Air Force and Navy opinions which suggested that these courts would follow a liberal interpretation of service connection where one service member rapes another service member off-post.[4] In similar fashion, the Coast Guard Court of Military Review has taken an expansive view of service connection over an off-base child molestation of another service member's child.[5]

In *United States v. Solorio*, the Coast Guard court overturned a military judge's conclusion that there was insufficient service connection to try an accused for acts of attempted rape, indecent assault, and indecent liberties, where the offenses occurred in the accused's privately owned home eleven miles from the federal office building where he worked. Because there were no government quarters for the Coast Guardsmen to occupy in Juneau, Alaska, and no base or post to keep secure, as referred to in *O'Callahan v. Parker*[6] and *Relford v. Commandant*,[7] the military judge concluded that the civilian interest in prosecution was equal to or greater than the military's. The government appealed this decision.

In a lengthy and detailed analysis, the Coast Guard court held that a commander's responsibility to maintain order relates to the people under his command, "without regard to the physical attributes and location of the command."[8] Thus, the court substituted "command" for "post" or "base" in applying the *Relford* factors in determining service connection. The court stated that, in applying the *Relford* factors, it could place "overriding importance on . . . factors (b) and (e), with their emphasis on the responsibility and authority of a military commander for maintenance of order in the command [b] and the need to have court-martial jurisdiction to support that authority . . . when there is the possibility that civil courts . . . will have less than complete interest . . . for vindicating that authority[e]."[9] The Coast Guard court then concluded that, despite the civilian prosecutor's willingness to try the case if the military could not do so, the civilian interest was hardly equal to the military's, especially when all parties had been transferred out of Alaska.[10]

The Coast Guard court, like the Air Force and the Navy, is taking a flexible approach in determining service connection where the crimes are rape or child molestation offenses. In doing so, these courts are using the same approach used by the Court of Military Appeals in determining service connection over drug offenses, beginning with *United States v. Trottier*.[11] Consider a similar flexible approach argument when you believe a certain offense highlights one or more of the *Relford* factors and the military's interest cannot be properly vindicated in a civilian court.

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

[2] *See* Thwing, *Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases, Part II*, The Army Lawyer, June 1985, at 55; Child, *Effective Use of Residual Hearsay*, The Army Lawyer, July 1985, at 31.

[3] United States v. Carpenter, CM 446473 (VII Corps 19 July 1984).

[4] *Service-Connection in Off-Post Rapes of One Soldier by Another*, The Army Lawyer, November 1985, at 33.

[5] United States v. Solorio, Misc. Dock. 004-85 (C.G.C.M.R. 24 Sep. 1985).

[6] 395 U.S. 258 (1969).

[7] 401 U.S. 355 (1971).

[8] *Solorio, slip op.* at 13.

[9] *Id.*

[10] *Id.* at 14.

[11] 9 M.J. 337 (C.M.A. 1980).

Army Government Appeals: Round Two

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Earlier articles appearing in *The Army Lawyer*[1] have discussed two cases involving government appeals under Article 62 of the Uniform Code of Military Justice[2]: *United States v. Howard*[3] and *United States v. Browers.*[4] Events have since overtaken the Army Court of Military Review's opinions in those cases: the Court of Military Appeals has reversed both cases.

In *Howard,* a case involving *in personam* jurisdiction, the Court of Military Appeals rejected the government's argument that the Secretary of the Army could establish the "moment" of a soldier's discharge.[5] The accused was issued a discharge certificate and left the command. Before midnight of the same day, however, the command revoked the certificate[6] on the belief that the discharge was not effective until midnight.[7] At the accused's subsequent court-martial, the trial judge found that the delivery of the discharge certificate and final pay to the accused terminated court-martial jurisdiction. This ruling was reversed by the Army Court of Military Review.[8]

The Army court's decision in *Howard* recognized prior cases that held revocation improper under similar circumstances,[9] but distinguished those cases on the basis of subsequent legislative changes.[10] The Court of Military Appeals rejected the Army court's approach, finding no intention expressed in the legislative history to change this "longstanding historical precedent."[11] Judge Cox, writing for the court, indicated that the commander could have retained the accused within the command until midnight but did not do so. According to Judge Cox, the delivery of the discharge certificate prior to midnight had significant legal consequences and operated to terminate court-martial jurisdiction.[12]

In *United States v. Browers,* the Article 62 appeal began with the denial of a government request for a continuance to locate key missing witnesses.[13] After the military judge denied the government's request, trial counsel requested a delay under R.C.M. 908, MCM, 1984, to determine whether to appeal the judge's ruling.[14] The military judge denied that request on the basis that he had not entered a ruling that was appealable under Article 62, UCMJ, and thus the provisions of R.C.M. 908 did not apply.[15] Trial then proceeded, but, in the absence of its witnesses, the government had no further case to present.[16] Accordingly, the military judge entered a finding of not guilty and the government appealed.[17]

The Army Court of Military Review reversed the trial judge in a lengthy opinion with broad impact on courts-martial. First, the Army court held that the denial of a continuance in this case was appealable since it met an "effects test," *i.e.,* the ruling had the effect of excluding evidence.[18] The Army court then held that when the government requests a delay under R.C.M. 908 to consider appealing a ruling, the request automatically interrupts court-martial proceedings and any proceedings held after such a request are a "nullity."[19] Thus, the acquittal in *Browers* had no effect and double jeopardy considerations did not bar further

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[1] Galligan, *Government Appeals: Winning the First Cases,* The Army Lawyer, Mar. 1985, at 38; *Trial Counsel's Emergency Brake,* The Army Lawyer, June 1985, at 63.

[2] Uniform Code of Military Justice art. 62, 10 U.S.C. § 862 (1982) [hereinafter cited as UCMJ]. *See also* Manual for Courts-Martial, United States, 1984 Rule for Courts-Martial 908 [hereinafter cited as MCM,1984 and R.C.M., respectively].

[3] 19 M.J. 795 (A.C.M.R.), *rev'd,* 20 M.J. 353 (C.M.A. 1985).

[4] 20 M.J. 542 (A.C.M.R.), *rev'd,* 20 M.J. 356 (C.M.A. 1985).

[5] 20 M.J. at 354.

[6] *Id.* at 353–54.

[7] *See* Dep't of Army, Reg. No. 635–200, Personnel Separations-Enlisted Personnel, para. 1–31(d)(5 July 1984) [hereinafter cited as AR 635–200].

[8] 20 M.J. at 354.

[9] United States v. Scott, 11 C.M.A. 646, 29 C.M.R. 462 (1960); United States v. Brown, 12 C.M.A. 693, 31 C.M.R. 279 (1962).

[10] *Howard,* 19 M.J. at 796.

[11] 20 M.J. at 354.

[12] *Id.* at 354–55.

[13] Record at 209, United States v. Browers, Misc. No. 1985/1 (21st Support Command, 18 Oct. 1984).

[14] *Id.* at 209–11.

[15] *Id.* at 211.

[16] *Id.* at 211–12. A statement by the accused to investigators had been admitted into evidence during a pretrial session held pursuant to a UCMJ art. 39a.

[17] 20 M.J. at 545–46.

[18] *Id.* at 547–48.

[19] *Id.* at 551, 552.

court-martial action.[20] Finally, the Army court held that the denial of the continuance was an abuse of discretion under the facts of the case.[21]

While appeal of the Army court's decision in *Browers* was pending at the Court of Military Appeals, the command initiated administrative action against the accused. Witness availability was still a problem,[22] so court-martial charges were withdrawn and dismissed without prejudice, and an administrative discharge action under AR 635-200, chapter 14, was initiated for misconduct.[23] On this factual basis, the government in its argument to the Court of Military Appeals took two jurisdictional positions—in addition to its position on the merits of the legal issues decided by the Army court.[24] First, the government argued that the Court of Military Appeals had no jurisdiction because no court-martial was pending,[25] and second, it argued that the case was not ripe because no court-martial action was pending or contemplated.[26] Writing for the court, Chief Judge Everett rejected both jurisdictional arguments[27] and reaffirmed the court's position that it has jurisdiction to hear appeals from decisions of the courts of military review in Article 62 appeals.[28] The court then held that the convening authority could not defeat the court's jurisdiction by withdrawing the charges.[29]

Chief Judge Everett responded to the government's mootness argument by stating that the final status of an acquittal would have a bearing on the pending administrative discharge action because an acquittal would bar a subsequent administrative discharge for the same acts.[30] Thus, the case was far from moot.

Having thus cleared the asserted jurisdictional bars, Chief Judge Everett proceeded to address the issues decided by the Army court. He first clarified that, if the military judge's trial ruling was not appealable, the trial proceeded properly and the subsequent acquittal was valid.[31] The opinion observed that there was no automatic interruption or "emergency brake" applied to courts-martial by government requests for delay; if the order was not appealable, the trial judge need not halt proceedings.[32]

The court then held that the order in *Browers*—the denial of a continuance—was not appealable.[33] Chief Judge Everett opined that "exclusion" of evidence involved a term of art, *i.e.*, a ruling that evidence was *inadmissible*, and determined that there was no reason to believe that Congress in drafting Article 62 thought otherwise.[34] Chief Judge Everett recognized that his interpretation of Article 62 left the military accused with an advantage in attacking denials of continuances which had the effect of excluding evidence. He concluded, however, that Article 62 was not designed to "produce exact parity between the government and the accused."[35] The court reinstated the military judge's finding of not guilty after determining that the denial of the continuance was not appealable and that the trial judge properly proceeded with trial.[36]

Judge Cox concurred, adding his own warning on what rulings should be appealed by the government. The government should appeal: "only when reasonable men do not differ that the pretrial ruling either ends the proceedings prior to jeopardy having attached, or suppresses or excludes evidence that is necessary to prove an essential element of the offense. A mere weakening of the government's case is not sufficient."[37]

The Court of Military Appeals' decision in *Browers* reaffirmed the military judge's control of the court-martial proceedings. Consequently, military judges have gained some measure of assurance that their rulings will not be overturned lightly. Moreover, the decision in *Browers* established that military judges can safely disregard meritless government claims of appealability. As Judge Cox declared:

> This case clearly demonstrates that we must continue to give military trial judges the responsibility and authority to manage and control courts-martial, subject,

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[20] *Id.* at 553 n.13.

[21] *Id.* at 548-49.

[22] Record, *Browers*, Government Appellate Exhibit 3.

[23] *Id.*, Appendix I, Government Opposition to Motion for Stay of Administrative Discharge Proceedings; United States v. Browers, 20 M.J. at 357-58.

[24] 20 M.J. at 358.

[25] *Id.*

[26] Record, *Browers*, Government Motion to Summarily Deny Appellant's Petition for a Grant of Review Without Prejudice.

[27] 20 M.J. at 358.

[28] *Id.*; see also United States v. Tucker, 20 M.J. 52 (C.M.A. 1985).

[29] 20 M.J. at 358.

[30] *Id.*; AR 635-200, para. 1-19*b*.

[31] 20 M.J. at 359.

[32] *Id.* The Army court had analogized its "automatic interruption" to an emergency brake on a railroad train: "[w]hen the cord is pulled, the train immediately stops without debate over whether there is sufficient danger to justify the delay or whether the cord was pulled in good faith." 19 M.J. at 552 n.10.

[33] 20 M.J. at 360.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*, (Cox, J. concurring). Parenthetically, it is interesting to note the very careful limits of Judge Cox's language which suggest possible concern with the reach of R.C.M. 908 beyond the area of pretrial rulings. This aspect of R.C.M. 908 was an issue in United States v. Poduszczak, 20 M.J. 627 (A.C.M.R. 1985), a case which has not been reviewed and is not pending review by the Court of Military Appeals. The appellant's petition for grant of review was withdrawn. 20 M.J. 328 (C.M.A. 1985).

of course, to each convening authority's ultimate responsibility to carry out the command's military mission. . . .

. . . The appellate courts of our system must zealously defend the military trial judge's authority to manage the proceedings over which he presides; they must not permit that authority to be yielded to either trial or defense counsel.[38]

Another Article 62 appeal, *United States v. Burris,*[39] may provide further guidance on the extent on the trial judge's authority and discretion. In *Burris,* the military judge found the government accountable for 123 of 136 days of pretrial restriction and dismissed the charges on a speedy trial motion.[40] The government appealed this decision to the Army Court of Military Review. The Army court recognized that it was limited to questions of law when reviewing government appeals,[41] but nevertheless held that there was no evidence in the record to support some of the trial judge's findings of fact attributing time to the government.[42] Because the Army court found that the military judge's findings of fact were "wholly unsupported by the evidence,"[43] it held those findings to be an abuse of discretion and vacated the military judge's dismissal of the charges.[44]

The issue now before the Court of Military Appeals is not only the rules of attribution for speedy trial, *i.e.,* what constitutes a defense delay, but also the authority of the Army Court of Military Review to disturb the trial judge's factual findings in this case.[45] This issue, the deference to be given to a trial judge's factual findings and the scope of appellate review in government appeals, appeared to be of great interest to the judges of the Court of Military Appeals during oral argument.[46] The decision in *Burris* should provide further guidance concerning the scope of a trial judge's authority.

Although it is too early to say with any degree of confidence where the Court of Military Appeals is heading in the area of Article 62 litigation, it seems that Article 62 appeals will be closely scrutinized to ensure they are not being improperly used to appeal every ruling by a military judge which may weaken the government's case.

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[38] 20 M.J. at 360, 361 (Cox, J. concurring).

[39] 20 M.J. 707 (A.C.M.R.), *petition filed,* 20 M.J. 325 (C.M.A.), *argument ordered,* 20 M.J. 403 (C.M.A. 1 Aug 1985).

[40] 20 M.J. at 708. *See* R.C.M. 707(a).

[41] UCMJ art. 62b.

[42] 20 M.J. at 709.

[43] *Id.* at 708, *citing* United States v. Lewis, 19 M J. 869, 870 (A.F.C.M.R. 1985).

[44] *Id.* at 708–10.

[45] Record, United States v. Burris, Appellant's Supplement to Petition for Grant of Review. *See also* Government's Answer to Supplement to Petition for Grant of Review, in the United States Court of Military Appeals.

[46] Oral argument in *Burris* was heard before the Court of Military Appeals on 13 August 1985.

The Last Ditch Defense: Necessity and the Choice of Evils

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Simonides, the ancient Greek epigrammatist, once commented that even the gods bow to necessity.[1] The same cannot always be said of the courts. The doctrine of necessity remains a remote and illusive defense in both definition and application. It is a precarious balance between a choice of evils. It can appropriately be labeled as the "Last Ditch Defense:" "The person claiming the defense of coercion and duress must be a person whose resistance has brought him to the last ditch."[2]

One of the most difficult problems with understanding the concept of necessity is to distinguish it from the other justification defenses that spring from the same jurisprudential roots.[3] Often appellate courts use the terms "necessity," "coercion," "compulsion," and "duress" interchangeably. Each permits conduct where the accused has made a choice which is in violation of the letter of the law but for which there is an excuse or justification.[4] In effect, the necessity doctrine is a relief valve for social good whereby the individual is exonerated for having chosen the lesser harm when faced with a greater evil.[5]

The simplest way to distinguish these terms is by defining the source or nature of the threat which has created the greater evil. For example, "coercion" is a threat or other means of intimidation directed by another person to accomplish a stated purpose.[6] "Compulsion" is the effort of another to overcome one's will by means of actual force or physical restraint. "Necessity" is a threat from some unavoidable circumstance, condition, or fact which leaves no choice of action.[7] Finally, "duress" is used to refer collectively to coercion, compulsion and necessity.

Another distinction is often said to be the mental state involved. For example, coercion or compulsion exists when a driver is compelled to speed away from the crime scene by a bank robber who is forcing that action through threats or actual harm. The innocent driver has no free will in the matter because another is in control. In contrast, necessity arises when a driver elects to speed in order to save the life of a seriously ill individual. Even in this situation, there is very limited free will on the part of the accused because circumstances have dictated his response. If there had been another safe and reasonable way to aid the individual without speeding, then the accused would not have a defense based upon necessity.

Rule for Courts-Martial 916(h) has reformulated the defense of necessity in the military. It now provides:

> (h) Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.[8]

The only significant change from the prior Manual for Courts-Martial provision is to permit an accused to qualify for the defense while attempting to protect persons other than himself from such harm.[9] Formerly, the defense did not apply when the fear compelling the act threatened "an injury in the future or injury to reputation or property."[10] This change does not signal a significant shift away from the immediacy requirement for threats. Under the new provision, however, property damage may qualify as a permissible basis for a necessity defense in minor offenses. This should be especially true where the social good heavily

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[1] Anagka d'oude theoi machontai—literally: "Not even the gods fight against necessity"; Crosby & Schaeffer, An Introduction to Greek (1966).

[2] D'Aquino v. United States, 192 F.2d 338, 359 (9th Cir. 1951) (treason trial of Tokyo Rose wherein the defendant raised a necessity defense).

[3] Luckstead, *Choice of Evils Defenses in Texas: Necessity, Duress and Public Duty,* 10 Am. J. Crim. L. 179, 180 (1982).

[4] Perkins & Boyce, Criminal Law 1065 (3d ed. 1982).

[5] Comment, *Necessity Defined: A New Role in the Criminal Defense System,* 29 U.C.L.A. Rev. 409, 411–12 (1981).

[6] United States v. Fleming, 19 C.M.R. 439, 450 (A.B.M.R. 1955), *aff'd* 7 C.M.A. 543, 23 C.M.R. 7 (1957).

[7] Traditionally, the dilemma giving rise to the defense of necessity was caused by physical forces or significant events beyond the actor's control, for example: shipwrecks, wars, diseases, famine, fires, riots, and sudden emergencies. In actuality, necessity is used interchangeably with duress, coercion, and compulsion. *See D'Aquino,* 192 F.2d at 357–58.

[8] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(h) [hereinafter cited as MCM, 1984, and R.C.M., respectively].

[9] MCM, 1984, R.C.M. 916(h) analysis.

[10] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 216*f,* provided in part: "The fear compelling the act must be of immediate death or serious bodily injury and not an injury in the future or of an injury to reputation or property."

outweighs the prohibited conduct.[11] For example, committing housebreaking or trespass to obtain a fire extinguisher to fight a dangerous fire would appear to be reasonable conduct falling within the parameters of the defense.

There has been considerable case law interpreting the applicability of defenses involving necessity within the military. Although the courts generally have been indiscriminate in their use of the terms, the decisions provide some guidance as to when the "necessity defense" applies.

Four cases arising from the Korean War contributed substantially to the development of the necessity defense in the military.[12] In each of these cases, prisoners of war were convicted of unlawful collaboration and communication with the enemy. On appeal, the appellants asserted that the defense of necessity should not be limited only to situations where the accused had a well-grounded apprehension of *immediate and impending* death or serious bodily injury. The appellants acknowledged that such limitations were valid when there were legal authorities available to intervene on appellant's behalf and thereby offer a true opportunity to avoid the coerced criminal conduct. They contended, however, that these limitations on the defense should not apply when one has been forced to survive in a society of barbaric fiat where any resistance is potentially life threatening. The appellate courts approached the arguments in a similar manner—the accused had failed to show that resistance to the orders of the enemy would reasonably result in death or serious injury. Although the courts acknowledged that atrocities had been regularly committed by the enemy, they determined that no evidence existed that the accused in each case had actually been a target of such atrocities. According to the decisions in these cases, an accused who commits treason or misbehavior must produce some credible evidence to validate his apprehension and justify his misconduct. The immediacy of death or serious injury has been the traditional touchstone of proof.

The Court of Military Appeals was also careful to distinguish the defense of necessity from the "good intentions" defense.[13] In these cases, the defendants argued that their communication with and aid to the enemy was motivated by the desire "to protect the lives and well-being of [their] fellow prisoners of war."[14] The court rejected this argument and held that good motives alone are not a defense to a crime.[15]

The providence inquiry has become the single most fertile area for litigation of the necessity doctrine in the military appellate system. Eleven reported cases discuss whether the evidence of record raises the defense of necessity to the extent that it is inconsistent with the accused's plea of guilty.[16] These cases provide a general idea of the circumstances which may give rise to the Last Ditch Defense. These cases, however, only address whether matters have been raised which are inconsistent with a plea of guilty.[17] They do not establish that the defense of necessity would actually exonerate similar conduct in other cases.

One recurring issue in guilty plea cases which appears unsettled is whether there has to be a direct nexus between the actual threat and the crime committed. In *United States v. Barnes,*[18] the Army Court of Military Review reversed its holding in *United States v. Malone* by ruling that duress involving payment of a debt could not constitute a valid defense to the crime of robbery.[19] In other words, coercing the payment of a debt with threats of physical harm could only be a defense if the threats were also made to force the accused to commit robbery. It is evident from the subsequent decision by the Court of Military Appeals in *United States v. Palus*[20] that coercing payment of a debt constitutes more than a "mere possibility of a defense." The court in *Pallus* held that a guilty plea to charges of uttering worthless checks and forgery was improvident even though the threats did not directly involve the offenses.[21]

In contested cases involving the defense of necessity, the guidance has been more limited. The issues litigated in these cases involve instructional errors and sufficiency of the evidence. The cases addressing instructional errors primarily involve whether there was sufficient evidence before

[11] The Court of Military Appeals has shown a willingness to accept a relaxed standard for duress when applied to minor disorders involving minor punishments. *See* United States v. Brookman, 7 C.M.A. 729, 732, 23 C.M.R. 193, 196 (1957).

[12] *United States v. Fleming;* United States v. Olson, 7 C.M.A. 460, 22 C.M.R. 250 (1957); United States v. Batchelor, 7 C.M.A. 354, 22 C.M.R. 144 (1956); United States v. Bayes, 22 C.M.R. 487 (A.B.R. 1956).

[13] *United States v. Fleming; United States v. Batchelor.*

[14] United States v. Fleming, 7 C.M.A. at 565, 23 C.M.R. at 19.

[15] *See also* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948).

[16] United States v. Palus, 13 M.J. 179 (C.M.A. 1982) (fear that wife would be physically harmed if gambling debt was not paid made plea to worthless checks improvident); United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976) (fear of harm to children made guilty plea to housebreaking improvident); United States v. Roby, 23 C.M.A. 295, 49 C.M.R. 544 (1975) (fear of future beatings made plea to absent without leave (AWOL) improvident); United States v. Pinkston, 18 C.M.A. 261, 39 C.M.R. 261 (1969) (fear of harm to fiancee and child made plea to larceny improvident); United States v. Talty, 17 M.J. 1127 (N.M.C.M.R. 1984) (sincere belief that hazardous levels of radiation existed is not a defense to disobeying order); United States v. Montford, 13 M.J. 829 (A.C.M.R. 1982), *petition denied,* 15 M.J. 183 (C.M.A. 1983) (fear for family's safety was insufficient to make plea improvident to AWOL; United States v. Parker, 10 M.J. 849 (N.C.M.R. 1981) (fear of retaliation because of accused's homosexuality made AWOL plea improvident); United States v. Barnes, 12 M.J. 779 (A.C.M.R. 1981), *petition denied,* 13 M.J. 207 (1982) (fear of harm to fiancee if debt not paid was insufficient to make plea improvident to robbery); United States v. Malone, 46 C.M.R. 1079 (A.C.M.R. 1972) (fear of harm from drug pusher to pay large debt made plea to robbery improvident); United States v. Figueroa, 39 C.M.R. 494 (A.B.R. 1967) (fear of being sent to front lines by superior does not constitute a defense); United States v. Dorey, 14 C.M.R. 350 (A.B.R. 1953) (insufficient to raise the defense).

[17] Uniform Code of Military Justice art. 45, 10 U.S.C. § 845 (1982); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); *but see* United States v. Logan, 22 C.M.A. 349, 47 C.M.R. 1 (1973) ("mere possibility" that defense exists is insufficient to find plea improvident).

[18] 12 M.J. 779 (A.C.M.R. 1981), *petition denied,* 13 M.J. 207 (1982).

[19] *Id.* at 780.

[20] 13 M.J. 179 (C.M.A. 1982).

[21] *Id.* at 180.

the trier of fact to require an instruction on the defense of necessity. Because the threshold of proof for such instructions is low, the cases have only limited applicability.[22] The cases involving the sufficiency of evidence, however, clearly delineate what will or will not constitute an adequate defense based upon necessity.[23]

A recent case from this group, *United States v. Roberts,*[24] indicates a significant departure from longstanding limitations on the defense of necessity. The Navy-Marine Court of Military Review held in *Roberts* that the record established that a female sailor had a reasonably grounded fear of immediate hazing and that this fear compelled her unauthorized absence.[25] Two factors weighed heavily in her favor—her prior complaints of sexual harrassment had gone unheeded by her chain of command, and a prior physical assault (hazing) had already occurred. The court held that the defense applied, even though there was no indication that any person ever "initiated" or "hazed" had received serious bodily injury, and although the accused failed to return to military control at the earliest possible opportunity.[26] The Court of Military Appeals indirectly approved the decision in *Roberts* by extending relief on the same basis to the sailor's husband, who had gone AWOL with her.[27]

In *United States v. Hullum,* the Court of Military Appeals extended the holding of *Roberts* even further by ruling that appellate defense counsel failed to represent their client effectively in not raising the racial harrassment that the appellant had suffered prior to going AWOL.[28] The decision reads in pertinent part:

> Thus, if an accused's continued presence endangers his life or that of a close family member, his absence may be excusable under some circumstances. . . . In United States v. [Roberts] . . . the Court of Military Review applied this principle in disapproving a female sailor's conviction for unauthorized absence because of the sexual harrassment to which she had been subjected. . . . In view of established national policy, which frowns on racial discrimination, we see no reason to treat such a claim differently from life-endangering sexual harrassment.[29]

The Army Court of Military Review recently applied this precedent in a case involving a retraining brigade soldier who went AWOL to avoid participating in a rigorous physical training regimen with his injured foot.[30] The court held that the accused's unrebutted testimony that his chain of command forced him to participate in the training despite a physical profile and his numerous pleas for help, raised the defense of duress which the government did not disprove beyond a reasonable doubt.

Conclusion

Defense counsel should investigate the availability of the necessity defense whenever the accused has an exculpatory story involving a voluntary choice to commit some criminal act to avoid a greater harm. The proverbial "red flag" should also arise whenever the behavior of the accused seemed like the best possible choice under the circumstances even though the elements of the offense appear to be satisfied. If necessity is indicated, the interview and investigation should focus on the traditional limitations placed on the defense: reasonable fear, immediate threat of harm, possibility of serious bodily injury or death if ignored, attempts to notify proper authorities, and cessation of illegal acts at first opportunity. If there is evidence that the chain of command has ignored prior requests for assistance, then the fear of bodily injury or other elements may be subject to a lower level of proof. Sexual or racial harrassment should prompt special attention by counsel, especially in AWOL situations (regardless of the length of the absence). The availability of the defense should be fully explored and explained to the accused. Where the defense will be raised at trial, considerable time should be spent in adapting standard instructions to the particular facts of the case.[31] Finally, the client and attorney must appreciate that the evidence needed to find a guilty plea improvident or to obtain an instruction is considerably less than that needed to obtain a finding of not guilty. The necessity defense is both figuratively and literally a Last Ditch Defense.

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[22] United States v. Blair, 16 C.M.A. 257, 36 C.M.R. 413 (1966) (brutality of guards could constitute defense to escape from confinement and assault); United States v. Margelony, 14 C.M.A. 55, 33 C.M.R. 267 (1963) (instruction on defense of duress required for both worthless check charge and lesser included offense of failing to maintain sufficient funds).

[23] United States v. Hullum, 15 M.J. 261 (C.M.A. 1983) (evidence of racial harrassment should have been presented to court of review as defense to AWOL); United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982) (reasonable fears of immediate initiation rites and sexual harrassment constitute an adequate defense of necessity), *decision adopted in companion case,* 15 M.J. 106 (C.M.A. 1983); United States v. Guzman, 3 M.J. 740 (N.C.M.R. 1977) (unhealthy working conditions not a defense to AWOL); United States v. Peirce, 42 C.M.R. (A.C.M.R. 1970) (proof of race riots and brutality by guards insufficient to support defense to escape unless accused was directly threatened or harmed).

[24] 14 M.J. 671.

[25] *Id.* at 672–74.

[26] *Id.*

[27] United States v. Roberts, 15 M.J. 106 (C.M.A. 1983).

[28] United States v. Hullum, 15 M.J. 261, 268.

[29] *Id.* at 265–66.

[30] United States v. Hansen, SPCM 21155 (A.C.M.R. 25 Oct. 1985).

[31] Dep't of Army, Pam. No. 27-9, Legal Services—Military Judges' Benchbook (May 1982), para. 5–5; Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions, Criminal 8.06 (1984); Devitt & Blackmar, Federal Jury Practice and Instructions § 58.19 (1977); Federal Judicial Center, Pattern Criminal Jury Instructions § 56 (June 1982).

Clerk of Court Note

A Brief History of the United States Army Court of Military Review

The United States Army Court of Military Review (ACMR) has existed by that name since the Military Justice Act of 1968 became effective in August 1969. Prior to that time, this intermediate appellate authority was composed of "boards of review."

The original Army boards of review existed well prior to the enactment of the Uniform Code of Military Justice (UCMJ), predating the U.S. Court of Military Appeals, as well as that Court's nominal Army predecessor, the Judicial Council. An Army board of review was established as a result of General Order No. 7 (1918), which was prompted by the troublesome "Texas Mutiny" and "Houston Riot" cases. In the latter case, several death sentences were adjudged and approved on one day and carried out the following morning. General Order No. 7 required that no serious sentence be executed prior to review in the Office of the Judge Advocate General. Shortly thereafter, the Judge Advocate General (the "t" was not capitalized until 1924) constituted a board of review to advise him in the review of courts-martial.

The 1920 revision of the Articles of War (AW) added a new provision, AW 50½, which statutorily established the board of review and incorporated requirements similar to those contained in General Order No. 7. With minor exceptions, AW 50½ required mandatory review by a board of review for cases in which the sentence included death, dismissal, dishonorable discharge, or confinement in a penitentiary. Although slightly modified in the 1948 revision of the Articles of War, this provision remained in effect until supplanted by the UCMJ.

The UCMJ, enacted in 1950, established boards of review for each of the services. While institutionalizing the previously existing boards of review, the 1950 UCMJ redefined their jurisdiction and authority and for the first time made their decisions binding on The Judge Advocate General, the service Secretaries, and the President. The UCMJ unified the appellate review structure and procedure for all services.

The Military Justice Act of 1968 changed the name of the boards of review to "courts of military review," but made no substantive changes in the tribunals' jurisdiction or the qualifications of their judges. The 1968 Act allowed these courts to sit *en banc* and to have a chief judge. The changes effected by this Act were designed to "improve and enhance the stature and independent status of these appellate bodies. . . ." S. Rep. No. 1601, 90th Cong., 2d Sess. 14 (1968).

Under UCMJ art. 66(a), each Judge Advocate General is responsible for establishing a court of military review, designating its chief judge, and appointing the appellate military judges. Although Article 66(a) provides that judges may be either commissioned officers or civilians, the overwhelming majority of judges have been senior judge advocates on active duty.

Appellate military judges serving on the ACMR are not tenured; unlike the judges of the Court of Military Appeals, they are not appointed for fixed terms. Although the total number of judges serving on the ACMR has varied, five panels of three judges each currently comprise the ACMR. Each panel is assigned a judge advocate, generally a captain, to serve as its commissioner. Compared to most intermediate appellate courts, the ACMR has a heavy caseload. The 1984 annual report of The Judge Advocate General of the Army indicates that during fiscal year 1984, ACMR reviewed 2,998 cases and had 1,084 pending at the close of the period.

Appellate procedures vary based upon the nature of the legal issues presented on appeal. In some cases, the accused may waive the right to appellate counsel. In other cases, counsel may submit a written brief alone, choosing not to request oral argument. In cases controlled by unambiguous legal precedent, the court may issue opinions in "short form," simply affirming findings and sentence without legal analysis. With respect to more complex cases, the ACMR frequently renders substantial opinions, although if a panel of the court wishes, it may decide a complex case without explaining its reasoning or responding to allegations of serious error urged by counsel.

The courts of military review operate under a set of uniform rules of procedure prepared by the Judge Advocates General in accordance with UCMJ art. 66(f). These rules, set forth in a joint regulation, delineate the particulars of practice before the courts of military review and provide sample formats for pleadings.

The ACMR is vested with an exceptionally broad scope of review. Like other appellate courts, the ACMR may rule on questions of law raised on appeal. Additionally, Article 66(c), provides that a court of military review may affirm "only such findings of guilty as it finds correct in . . . fact and determines, on the basis of the entire record, should be approved." In contrast to most appellate courts, including the Court of Military Appeals, the ACMR reexamines every factual, as well as legal, determination made at trial. In fulfilling its statutory obligation, the ACMR is empowered to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(c).

The ACMR may therefore overturn a conviction if it is not convinced of the accused's guilt beyond a reasonable doubt. The Court also may reduce an inappropriately severe, even though legal, sentence. Findings of fact made by the ACMR are binding on the Court of Military Appeals unless erroneous as a matter of law.

Throughout its existence, the ACMR has provided trial attorneys, judges, and legal advisors with guidance through interpretations of military law. With the recent changes to the UCMJ and with the promulgation of the 1984 Manual for Courts-Martial, the Court's future role promises to be even more important, particularly in light of the provision for interlocutory appeal by the United States from certain adverse rulings by military judges.

U.S. Army Judiciary Notes

Magistrate Matters

Recently a military judge was required to review the propriety of pretrial confinement imposed upon a soldier. The part-time military magistrate who approved the pretrial confinement and later reviewed the necessity for continued pretrial confinement was called to testify as a witness. The memorandum he made concerning his conclusions was admitted into evidence. The military judge determined that the pretrial confinement imposed was improper because the testimony of the part-time military magistrate and his memorandum demonstrated that he applied the wrong standard of proof during his review of the pretrial confinement. Rule for Courts-Martial 305(i)(3)(C) provides that the requirements for pretrial confinement must be proved by a preponderance of the evidence. Military magistrates are cautioned to observe this requirement.

Challenges for Cause

Recent appellate cases have emphasized that military judges should be liberal in granting challenges for cause. *See, e.g., United States v. Miller,* 19 M.J. 159 (C.M.A. 1985). Several recent trials have been delayed because their membership fell below a quorum after challenges were granted. Such delays can be avoided by appointment of a sufficient number of members. When several challenges are anticipated, it may be appropriate to appoint alternates who are to be available on call.

Examination and New Trial Note

HQDA Policy on Forfeitures

Trial records continue to indicate that staff judge advocates are not advising convening authorities of AR 190–47, para. 6–19*f*(1), in appropriate cases. That regulation provides, in pertinent part, that "any sentence imposed on an enlisted person that exceeds forfeiture of two-thirds pay per month for nine months should be remitted by the convening authority unless the sentence includes, and the convening authority approves, a punitive discharge or confinement, unsuspended, for the period of such forfeitures." If the staff judge advocate recommends against following the policy in a particular case, his or her reasons should be set forth.

Regulatory Law Office Note

In accordance with AR 27–40, para 2–1c, all judge advocates and legal advisors are reminded to continue to report to the Regulatory Law Office the existence of any action or proceeding involving communications, transportation, utility services, or environmental matters which affect the Army. Contact the Regulatory Law Office at the U.S. Army Legal Services Agency, ATTN: JALS–RL, Falls Church, Virginia, 22041–5013. The telephone number is (202) 756–2015 or AUTOVON 289–2015.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

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Contract Law Note

GAO Bid Protests: Contractor Service on the Agency

The General Accounting Office (GAO), headed by the Comptroller General, has been reviewing bid protests from disgruntled bidders for over forty years. Until recently, however, the GAO had no direct statutory authority to review bid protests.[1] With the passage of the Competition in Contracting Act, (CICA),[2] the GAO now has direct statutory authority to review bid protests. As a result of statutory changes made by CICA, GAO has issued new bid protest procedures. These procedures, which are published at 4 C.F.R. Part 21, became effective on January 15, 1985.

One rule change of particular interest to the government attorney is the subject of this note. It is of special importance because it may assist in the early resolution of the bid protest without the necessity of addressing the merits. The GAO bid protest procedures provide, in part, that:

> the protester shall furnish a copy of the protest (including relevant documents not issued by the

[1] The GAO cited the Budget and Accounting Act of 1921 as statutory authority. 42 Stat. 23, 31 U.S.C. § 3702 (1982). The act provides that "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

[2] Pub L. No. 98–369, 98 Stat. 1175 (1984), to be codified at 31 U.S.C. §§ 3551–3556.

contracting agency) to the individual or location designated by the contracting agency in the solicitation for receipt of protests. If there is no designation in the solicitation, the protester shall furnish a copy of the protest to the contracting officer. The designated individual or location or, if applicable, the contracting officer must receive a copy of the protest no later than 1 day after the protest is filed with the General Accounting Office. The protest document must indicate that a copy has been furnished within one day to the appropriate individual or location.[3]

The GAO procedures, then, require the protester to "serve" the contracting officer or other designated individual within one day of filing the protest. These rules also provide that the GAO may dismiss a protest for failure to comply with this requirement.[4] There have been a number of GAO decisions dismissing protests for a protester's failure to comply with the one-day service requirement.[5] Based on these decisions, it appeared the GAO was going to require strict compliance with the one-day requirement. There have been a number of recent decisions, however, where the GAO has refused to dismiss protests when the protestor failed to comply with the one-day service requirement.[6]

In these decisions, the GAO has reviewed the purpose of the one-day requirement. The CICA and the GAO implementing regulations impose a strict time limit of twenty-five working days for an agency to file a written report with GAO.[7] The twenty-five day time limit may be extended by the GAO. Extensions are to be considered exceptional and used sparingly, however.[8] The agency's ability to comply with this requirement is dependent on promptly receiving a copy of the protest. Hence, the purpose of the one day service rule.

The GAO will review the facts of each protest to determine whether to dismiss the protest when the protester fails to comply with the one-day requirement. In one case, the GAO held that dismissal was not warranted where the agency was aware of the basis of the protest, raised no objection prior to filing its protest report, and timely filed the protest report.[9] In a second case, the GAO refused to dismiss where the contracting agency became aware of the protest basis by other means within one day after the protest was filed with the GAO.[10] In another recent decision, the GAO refused to dismiss the protest for failure to comply with the one-day "service" requirement, holding that the purpose of the one-day requirement was otherwise satisfied when the contracting officer was telephonically advised through agency channels of the protest on the same day it was filed with the GAO, and the Army command conducting the procurement received an electronically transmitted copy of the protest from higher headquarters the day after the protest was filed.[11]

The purpose of the one-day "service" requirement is to ensure the agency has sufficient time to comply with the twenty-five day requirement for filing the protest report. If the GAO believes the agency has not been prejudiced by the protester's technical failure to comply with the one-day requirement, the protest may not be dismissed.

The GAO is required to notify the agency involved within one day after a protest is received.[12] The GAO telephonically notifies the Contract Law Division, Office of The Judge Advocate General (OTJAG). OTJAG will then telephonically notify the installation involved that a protest has been received. Once you receive this notice from OTJAG, you need to determine whether the contracting officer has been timely served. If not, you should promptly notify the Contract Law Division, OTJAG. The personnel of that office will decide whether to request dismissal by the GAO. Finally, to assist in this decision, you need to document any prejudice (inability to file the administrative report within twenty-five days) caused by the failure of the protester to comply with the one-day requirement.

Criminal Law Note

Navy-Marine Court Construes Speedy Trial Rule

In two recent cases, the Navy-Marine Corps Court of Military Review narrowly construed the exclusions of the 120 day speedy trial rule, R.C.M. 707, to deny government appeals.

In *United States v. Kuelker,*[13] the prosecution was delayed by the need to obtain U.S. Treasury checks allegedly forged by the accused which were in the hands of the Treasury Department. The government argued that the time to obtain the checks was excludable under R.C.M. 707(c)(8), the "catch-all" exclusion for "good cause." The court, however, narrowly construed this seemingly broad exclusion, finding "delay for good cause" "well-defined by

[3] 4 C.F.R. § 21.1(d) (1985).

[4] 4 C.F.R. § 21.1(f) (1985).

[5] Comp. Gen. Dec. B-219510.2 (30 Aug 85) 85-2 CPD para. 256; Comp. Gen. Dec. B-218148 (11 Mar 85) 85-1 CPD para. 300; Comp. Gen. Dec. B-218088 (8 Mar 85) 85-1 CPD para. 289; Comp. Gen. Dec. B-218154 (6 Mar 85), 85-1 CPD para. 282.

[6] Comp. Gen. Dec. B-219448.2 (12 Aug 85) 85-2 CPD para. 160; Comp. Gen. Dec. B-218424 (1 Aug 85) 85-2 CPD para. 113; Comp. Gen. Dec. B-218033 (6 Mar 85) 85-1 CPD para. 280.

[7] 31 U.S.C.A. § 3553; 4 C.F.R. § 21.3(a) (1985).

[8] 4 C.F.R. § 21.3(d) (1985).

[9] Comp. Gen. Dec. B-218033 (6 Mar. 1985), 85-1 CPD para. 280.

[10] Comp. Gen. Dec. B-219448.2 (12 Aug 1985) 85-2 CPD para. 160.

[11] Comp. Gen. Dec. B-219001 (20 Aug 1985) 85-2 CPD para. 200.

[12] 31 U.S.C.A. § 3553(b)(1); 4 C.F.R. § 21.3(a) (1985).

[13] 20 M.J. 715 (N.M.C.M.R. 1985) (per curiam).

the illustrations" provided in R.C.M. 707(c)(8) of " *'unusual'* operational requirements and military *exigencies.*" [14] The court concluded that "good cause" required "an extraordinary situation" rather than the normal difficulties of gathering the prosecution's evidence. [15] The court also declined to permit the government to "restart the 'speedy trial clock' " where the original charges were withdrawn and then repreferred three days later with little change. [16] In closing, the court briefly considered whether the exclusion of R.C.M. 707(c)(5) for delay at the request of the prosecution in order to obtain substantial evidence might apply. It rejected the exclusion because the government had not "invoke[d] the relevant mechanism in R.C.M. 707(c)(5)" by requesting a continuance. [17] Finding 157 days of prosecution accountable time from the initial notice of preferral to trial, the court denied the government's appeal.

In *United States v. Harris,* [18] the court considered possible exclusions in a 122-day period from notice of preferral to trial. The government argued that time for negotiation of a pretrial agreement initially proposed by the defense was excludable as delay "at the request or with the consent of the defense" under R.C.M. 707(c)(3). The court disagreed, reasoning that plea negotiations, like requests for administrative discharge in lieu of court-martial, are a " 'normal incident' of pretrial military justice" and are not "defense generated delay." [19] The government also contended that it was delayed for "good cause," R.C.M. 707(c)(8), because the convening authority was deployed aboard ship during portions of the plea negotiations. The court rejected this argument as well, finding the deployment not "unusual" or exigent, citing *Kuelker.* [20]

Legal Assistance Items

Tax Assistance Program

The Judge Advocate General, in a letter dated 18 October 1985, stressed the need to provide soldiers and their family members with the best possible tax assistance, and asked staff judge advocates to implement a viable Tax Assistance Program. A model Standing Operating Procedure for such a program will be mailed to staff judge advocates in the near future. The text of the letter, which outlines the concept of a Tax Assistance Program and explains the role of the judge advocate in the Program, is reprinted here for your convenience.

1. Income tax preparation for many of our soldiers and their family members is a complicated and time-consuming exercise. Those who prepare their own tax returns frequently pay more than necessary because they fail to claim legitimate deductions and tax credits. Others needlessly pay commercial organizations to prepare simple tax returns. Some fall prey to illegal income tax refund schemes run by unscrupulous firms which prey on unsuspecting soldiers. Our soldiers deserve the best possible tax assistance.

2. While paragraph 4a(1)(f), AR 600–14, Preventive Law, makes tax assistance a command responsibility, it is an area in which judge advocates usually have a higher degree of expertise. Therefore, I ask each of you to take an active role in the creation of a viable and effective command-sponsored Tax Assistance Program. You should:

—Educate commanders as to their responsibility under AR 600–14.

—Take the lead in supervising establishment of a tax program.

—Incorporate Unit Tax Advisors (UTA), volunteers rendering tax assistance, judge advocates, and other available tax assistance assets into the program.

—Secure the appointment of quality UTA's who will be responsible for providing basic tax assistance.

—Request local Army Community Service (ACS) offices develop a pool of volunteers to supplement the UTA's.

—Coordinate with the Internal Revenue Service's Volunteer Income Tax Assistance Program (VITA) to provide training and materials.

—Order necessary Federal and State tax forms for your installation.

—Provide supplemental advice and assistance to resolve questions beyond the capabilities of UTA's and ACS volunteers.

3. Our goal is to preclude any need for soldiers to go to commercial tax preparers for assistance with simple tax returns. The prohibition contained in paragraph 2–2a(5), AR 27–3, Legal Assistance, against actual "preparation" of tax returns is intended only to prevent clients from dropping off their paperwork and having their forms completed by a legal assistance attorney. It is not intended to prohibit eligible clients from obtaining detailed assistance from unit tax advisers, volunteers rendering tax assistance, and judge advocates. Authorized assistance may include helping the client fill out forms line by line. The prohibition in paragraph 2–4c, AR 27–3, against rendering advice and assistance on private income-producing business activities applies to tax matters as well.

[14] 20 M.J. at 716.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 717.
[18] 20 M.J. 795 (N.M.C.M.R. 1985).
[19] *Id.* at 797.
[20] *Id.*

4. While further direction will be forthcoming, now is the time to begin planning for a successful tax season. If you have any ideas for improving our service in this important area, please let me know.

Tax News

CCH State Tax Guide

To assist legal assistance offices with the administration of a viable Tax Assistance Program, the Army Law Library Service (ALLS) has ordered the CCH State Tax Guide for all offices. This publication includes reproducible copies of all state tax forms for the fifty states and includes instructions on how to complete the forms. Offices should continue to order state tax forms and instructional booklets in bulk directly from state authorities, as this is the most cost-effective way for the office to provide the needed forms. The CCH State Tax Guide, however, will provide the needed forms for those states which either do not respond to requests for forms, or do not send all of the various forms which are needed. Additionally, the CCH State Tax Guide will give the legal assistance officer a handy reference for instructions on how to complete the forms. While ALLS funded the initial acquisition of this publication, the annual upkeep of the publication will be the responsibility of local offices. Staff judge advocates should evaluate the worth of this publication and, if found to be helpful, budget for its update service in future years. All offices will also be receiving the corresponding Federal Tax Guide and will likewise be responsible for budgeting for future upkeep of that publication.

Interest on Unpaid Taxes

Taxpayers who request and receive an extension of time in which to file their returns receive only an extension of time in which to complete their return, not an extension of time to pay tax due. Any amount due must be paid by the deadline (April 15th for calendar year taxpayers). The IRS recently announced that the interest which will be charged on any tax deficiency will be reduced from the current 11% to 10%, effective 1 January 1986. This rate will remain in effect through 30 June 1986, at which time it will be recomputed.

Veterans Educational Benefits

Soldiers and retirees often make use of educational benefits offered by the Veterans Administration. There has been some confusion in the past as to whether these benefits are taxable income and whether the expenses qualify as a deductible educational expense. Educational benefits received from the Veterans Administration are exempt from federal taxation by 38 U.S.C. § 3101(a) (1982). The question then arises whether the educational expenses which otherwise qualify as a deductible business expense will be deductible even though the taxpayer has received-tax-free-educational benefits to offset some or all of the educational expenses. Initially, the IRS indicated that educational expenses need not be reduced by the amount of any educational benefits paid by the Veterans Administration. Rev. Rul. 62-213, 1962-2 C.B. 59. That initial position was reversed in 1983 by Rev. Rul. 83-3, 1983-1 I.R.B. 10. Since then, the law in this area has been somewhat confused.

The confusion has resulted from the distinction between VA educational benefits, some of which provide a living allowance not directly dependent on the cost of the educational program, and others which merely reimburse the veteran for all or part of the actual cost of the specific educational program. Flight-training programs are of the latter type, and the IRS first determined that flight-training expenses would not be deductible to the extent that a taxpayer receives tax-exempt educational benefits from VA under former 38 U.S.C. § 1677(b). Rev Rul. 80-173, 1980 C.B. 60. This ruling was made retroactive. The IRS later examined general educational programs and similarly determined that veterans may not deduct amounts expended for educational programs to the extent they are allocable to tax-free benefits paid by the VA. Rev. Rul. 83-3, 1983-1 I.R.B. 10. This later ruling, concerning general educational benefits, was applied prospectively only.

The rule is clear for present and future educational expenses. They will only be deductible to the extent they exceed tax-free educational benefits received from VA. The only question remaining concerns whether the IRS should have applied the rule denying the deduction for flight training expenses retroactively. A number of cases have answered that question affirmatively. *Becker v. Commissioner*, 751 F.2d 146 (3d Cir. 1984); *Manocchio v. Commissioner*, 710 F.2d 1400 (9th Cir. 1983). *See also Rivers v. Commissioner*, 727 F.2d 1103 (4th Cir. 1984). Recently, the Eleventh Circuit reached the opposite conclusion. In *Baker v. United States* 748 F.2d 1465 (11th Cir. 1984), the court determined that the IRS abused its discretion by applying the ruling denying the deduction for flight-training expenses retroactively, while applying the ruling denying general educational expenses only prospectively. Thus, this final question remains subject to a split in the circuits.

National Association of Attorneys General Consumer Protection Report

The National Association of Attorneys General publishes seven newsletters that constitute the country's major reporting services for comprehensive state-level legal developments. Each issue of each newsletter includes a major article, essay, law review-type note, or continuing legal education seminar proceedings, as well as coverage of litigation in the newsletter's area of concern. Newsletters are published on antitrust and commerce, criminal justice, drug enforcement, environmental protection, and medicaid, as well as a general AG report. In addition, an excellent consumer protection report is published, which is invaluable for legal assistance officers.

The Consumer Protection Report reflects enforcement actions and other proceedings under the 50-state consumer protection laws. It is also the Association's vehicle for reporting abuses of state charitable solicitations laws and state laws regulating charitable trusts. The newsletter has proved useful to and popular with investigative reporters, consumer agencies, businesses, students, and libraries as well as practicing attorneys. It is published twelve times per year. A subscription, $145 a year, can be ordered through: Publication Division, National Association of Attorneys General, 444 North Capitol Street, Suite 403, Washington,

D.C. 20001. Purchase orders should be made payable to NAAG Publications.

Professional Fundraisers and Phony Charities

Legal assistance officers should be aware of the recurring problem of phony charitable solicitation. Two recent cases have been reported which characterize this problem. In Pennsylvania, three family members allegedly ran a phony charity from a telephone boiler room. The members would telephonically solicit donations in the name of the "White Cane Club" to provide blind people with guide dogs, braille books, and typewriters. People were encouraged to give under the false promise that many area agencies for the blind would benefit from the donation. The Pennsylvania Attorney General has filed suit against the three, alleging that they pocketed most of the money donated. This suit was filed one month after Pennsylvania authorities brought suit against another phony charity called the "Palombaro Center." Further information concerning these suits may be obtained from Deputy Attorney General John Calabro at (215) 560-2414.

In Washington, suit has been brought against Oliver Colbert, who allegedly has been selling garbage bags under the pretense that the proceeds would go to a charity entitled "Community Outreach." Colbert has been soliciting sales by telephone and has been enticing donations by telling people that the funds would be used for drug education programs. The complaint indicates that Colbert was instead profiting from the scheme. Interestingly, Colbert allegedly has represented himself as a former drug counselor in the military. The state indicated that Colbert was merely a dental hygienist in the Air Force. The action seeks to enjoin Colbert and asks for civil penalties and restitution. More information can be obtained from Assistant Attorney General Jay Uchida at (206) 464-7243.

Bank Charges for Insufficient Funds

Legal assistance officers frequently counsel soldiers and their family members concerning late charges being imposed by banks for checks drawn on accounts which did not have sufficient funds to cover the amount of the draft. A recent case from California should be of interest and followed. In *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985), a class action law suit has been filed challenging the legality of the banks imposition of a $6.00 charge for checks drawn on accounts with insufficient funds. The plaintiffs are account holders who signed a contract with the bank which contained language indicating that the account is subject to all applicable laws and to the banks rules, regulations, practices, and charges. The contract did not indicate the amount of the charges which would be imposed by the bank for processing checks drawn on accounts with insufficient funds.

The plaintiffs challenged the banks $6.00 per check charge as oppressive and unconscionable. The lower court dismissed the complaint. The appellate court reversed, determining that the petitioners had a right to a factual hearing on whether the charge was reasonable, or whether the bank had violated its duty of good faith and fair dealing. In its discussion, the court indicated that while the charge may not seem exorbitant, price alone is not a reliable guide, and small charges applied to a large volume of transactions can yield a sizable sum. The plaintiff's complaint alleged a 2,000% profit on each charge. This case should be followed to see whether relief may become available for those subject to similar insufficient check charges.

JAGC Officer Personnel Note

Personnel, Plans and Training Office, OTJAG

All judge advocates in a career status of Conditional Voluntary Indefinite, Voluntary Indefinite, or Regular Army are reminded to complete the JAGC Personnel Records Audit. Completed audit forms should be returned to HQDA(DAJA-PT) ATTN: Major Gray, Washington, DC 20310-2206, not later than 15 December 1985.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

1986 JAG Reserve Workshop

The 1986 JAG Reserve Workshop will be held at The Judge Advocate General's School in Charlottesville, Virginia, from 1–4 April 1986. Attendance is by invitation only; attendees can expect to receive their invitation packets by the beginning of February 1986. It is imperative that invitees notify TJAGSA of their intention to attend by 3 March 1986.

On-Site Schedule Change

The dates published in the August 1985 issue of *The Army Lawyer* for the San Antonio, Texas, On-Site training program have been changed from 12 March 1986 to 3–4 May 1986. All other published information regarding the San Antonio On-Site training program remains the same.

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: 938-1304).

2. TJAGSA CLE Course Schedule

January 13–17: 1986 Government Contract Law Symposium (5F-F11).

January 21–28 March 1986: 109th Basic Course (5-27-C20).

January 27–31: 16th Criminal Trial Advocacy Course (5F-F32).

February 3–7: 32nd Law of War Workshop (5F-F42).

February 10–14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24–7 March 1986: 106th Contract Attorneys Course (5F-F10).

March 10–14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10–14: 10th Admin Law for Military Installations (5F-F24).

March 17–21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24–28: 18th Legal Assistance Course (5F-F23).

April 1–4: JA USAR Workshop.

April 8–10: 6th Contract Attorneys Workshop (5F-F15).

April 14–18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21–25: 16th Staff Judge Advocate Course (5F-F52).

April 28–9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5–9: 29th Federal Labor Relations Course (5F-F22).

May 12–15: 22nd Fiscal Law Course (5F-F12).

May 19–6 June 1986: 29th Military Judge Course (5F-F33).

June 2–6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10–13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16–27: JATT Team Training.

June 16–27: JAOAC (Phase II).

July 7–11: U.S. Army Claims Service Training Seminar.

July 7–11: 15th Law Office Management Course (7A-713A).

July 14–18: Professional Recruiting Training Seminar.

July 14–18: 33d Law of War Workshop (5F-F42).

July 21–26 September 1986: 110th Basic Course (5-27-C20).

July 28–8 August 1986: 108th Contract Attorneys Course (5F–F10).

August 4–22 May 1987: 35th Graduate Course (5–27–C22).

August 11–15: 10th Criminal Law New Developments Course (5F–F35).

September 8–12: 85th Senior Officers Legal Orientation Course (5F–F1).

3. Civilian Sponsored CLE Courses

March 1986

3–7: GCP, Cost Reimbursement Contracting, Washington, DC.

6–7: PLI, Bankruptcy & Reorganization—Current Developments, New Orleans, LA.

6–7: PLI, Income Taxation of Estates & Trusts, San Francisco, CA.

6–8: UMCC, Medical Institute for Attorneys, Miami, FL.

7–8: SBA, Workers' Compensation Conference, Wickenberg, AZ.

13–14: PLI, Hazardous Waste Litigation, Dallas, TX.

14: SBA, Lawyer's Guide to Negotiation & Settlement, Phoenix, AZ.

14–15: KCLE, Legal Issues for Bank Counsel, Lexington, KY.

15–21: PLI, Patent Bar Review Course, New York, NY.

17–18: PLI, Discovery in Personal Injury Cases, New York, NY.

19–20: FBA, 10th Annual Tax Law Conference, Washington, DC.

20–21: PLI, Bankruptcy & Reorganization—Current Developments, New York, NY.

20–22: ALIABA, Labor Relations & Employment Law, Washington, DC.

23–26: NCDA, Violent Crime, St. Louis, MO.

3/31–4/4: GCP, Construction Contracting, Washington, DC.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the October 1985 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Vermont	1 June every other year
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the August 1985 issue of The Army Lawyer.

Current Material of Interest

1. New Additions to DTIC

Several TJAGSA publications have been added to the inventory of the Defense Technical Information Center. Ordering information and identification numbers are listed in the next paragraph. The new materials include Proactive Law Materials, a compilation of model legal assistance programs, and several 1985 Criminal Law Deskbooks recently given to the Graduate Course.

2. TJAGSA Materials Available Through Defense Technical Information Center

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

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

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

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

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD 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 B078095 Fiscal Law Deskbook/ JAGS–ADK–83–1 (230 pgs).

Legal Assistance

AD B079015 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–84–1 (266 pgs).

AD B077739 All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).

AD B089093 LAO Federal Income Tax Supplement/ JAGS–ADA–85–1 (129 pgs).

AD B077738 All States Will Guide/ JAGS–ADA–83–2 (202 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

AD B087847 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–84–6 (39 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).

AD B087774 Government Information Practices/ JAGS–ADA–84–8 (301 pgs).

AD B087746 Law of Military Installations/ JAGS–ADA–84–9 (268 pgs).

AD B087850 Defensive Federal Litigation/ JAGS–ADA–84–10 (252 pgs).

AD B087745 Reports of Survey and Line of Duty Determination/JAGS–ADA–84–13 (78 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 B086937 Criminal Law, Evidence/ JAGS–ADC–84–5 (90 pgs).

AD B086936 Criminal Law, Constitutional Evidence/JAGS–ADC–84–6 (200 pgs).

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).

AD B095870 Criminal Law: Jurisdiction, Vol. I/ JAGS–ADC–85–1 (130 pgs).

AD B095871 Criminal Law: Jurisdiction, Vol. II/ JAGS–ADC–85–2 (186 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).

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.

3. Regulations & Pamphlets

Number	Title	Change	Date
UPDATE #6	Enlisted Ranks Personnel		15 Oct 85
UPDATE #1	Evaluations		14 Oct 85
UPDATE #6	Officer Ranks Personnel		30 Oct 85
UPDATE #3	Message Address Directory		25 Oct 85

4. Articles

Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468 (1985).

Charney, *Rebuttal: Administration of the Breathalyzer*, 64 Mich. B.J. 625 (1985).

Child Abuse and the Law: Symposium Issue, 89 Dick. L. Rev. 577 (1985).

Drather, *Read This Before You Buy a Computer System*, A.B.A.J., Aug. 1985, at 48.

Duhamel, *Rights of the Nonbilled Utility User*, 19 Clearinghouse Rev. 249 (1985).

Feldman, *Ethics Workshop: Prosecutorial Interference With Defense Access to Prospective Witnesses*, 21 Crim. L. Bull. 353 (1985).

Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 Fam. L.Q. 369 (1985).

Graham, *Evidence and Trial Advocacy Workshop: Prior Conviction Impeachment; Discretionary Balancing; Dishonesty and False Statement*, 21 Crim. L. Bull. 338 (1985).

Hardy, *Product Liability and Weapons Manufacture*, 20 Wake Forest L. Rev. 541 (1984).

Jaffee, *Of Probativity and Probability: Statistics, Scientific Evidence, and the Calculus of Chance at Trial*, 46 U. Pitt, L. Rev. 925 (1985).

Katkin, Hunt, & Bullington, *Drug Paraphenalia in Perspective: The Constitution and the Spirit of Temperance*, 21 Crim. L. Bull. 293 (1985).

Katz, *Paradoxical Role of Informers Within the Criminal Justice System: A Unique Perspective*, 7 U. Dayton L. Rev. 51 (1981).

Lobell, *State Usury Laws*, 102 Banking L.J. 349 (1985).

Miller, *The Kentucky Law of Products Liability in a Nutshell*, 12 N. Ky. L. Rev. 201 (1985).

Morris, *Mental Health Professionals in the Criminal Justice Process: The ABA Standards*, 21 Crim. L. Bull. 321 (1985).

Motley, *Terrorist Warfare: Formidable Challenges*, 9 Fletcher F. 295 (1985).

Owen, *Innocent Possession of Drugs in the Military: What's Wrong With* Rowe [United States v. Rowe, 11 M.J. 11]?, 48 Tex. B.J. 390 (1985).

Shimomura, *The History of Claims Against the United States: The Evolution From a Legislation Toward a Judicial Model of Payment*, 45 La. L. Rev. 625 (1985).

Smith, *Government Contracts: Contesting the Federal Government's Award Decision*, 20 New Eng. L. Rev. 31 (1984–85).

Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443 (1985).

Whitcomb, *Prosecution of Child Sexual Abuse: Innovations in Practice*, Ct. Rev., Fall 1985, at 19.

Special Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 Cornell L. Rev. 1058 (1985).

Note, Doe *and* Dronenburg: *Sodomy Statutes Are Constitutional*, 26 Wm. & Mary L. Rev. 645 (1985).

Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction*, 83 Mich. L. Rev. 1428 (1985).

Note, *New Mexico Vietnam Veterans' Property Tax Exemption and Judicial Review in Equal Protection Analysis:* Hooper v. Bernalillo County Assessor, 15 N.M.L. Rev. 389 (1985).

The Army Lawyer 1985 Index

This edition contains a subject, title and author index of all articles appearing in The Army Lawyer *from January 1985 through December 1985. Articles appearing in the Trial Counsel Forum and The Advocate for Military Defense Counsel are indexed in the above indexes and in separate subject indexes as well. Reader notes and short briefs which appeared in these sections are in the separate subject index only. In addition, there are separate indexes for Policy Letters and Messages from the Judge Advocate General; Article 69, UCMJ Applications (digests); and Legal Assistance Items. References to* The Army Lawyer *are by month, year, and page.*

Indexes for items published in prior issues of The Army Lawyer *are as follows:*

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ABA

LAMP Committee Report, *by CPT Thomas W. McShane,* Jan. 1985, at 75.

ACQUISITION LAW SPECIALTY PROGRAM (ALS)

Acquisition Law Speciality Program—Where Are We Going?, The, *by COL Frederick E. Moss and LTC Walter B. Huffman,* Nov. 1985, at 4.

ACTS

Claims Commissions in USAREUR: The Price of Friendship, *by LTC Bryan H. Schempf,* July 1985, at 17.
Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?, The, *by CPT James P. Pottorff,* May 1985, at 1.
Military Supreme Court Practice, *by Defense Appellate Division and MAJ Robert M. Ott,* Jan. 1985, at 63.
Overview of the Military Justice Act of 1983 Advisory Commission Report, An, *by CPT Kevin Thomas Lonergan,* May 1985, at 35.

ALCOHOL

Drunk Driving: The Army's Mandatory Administrative Sanctions, *by MAJ Phillip L. Kennerly,* Jan. 1985, at 19.

AR 600–20

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*U.S. GOVERNMENT PRINTING OFFICE: 1986-490-999:40089

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