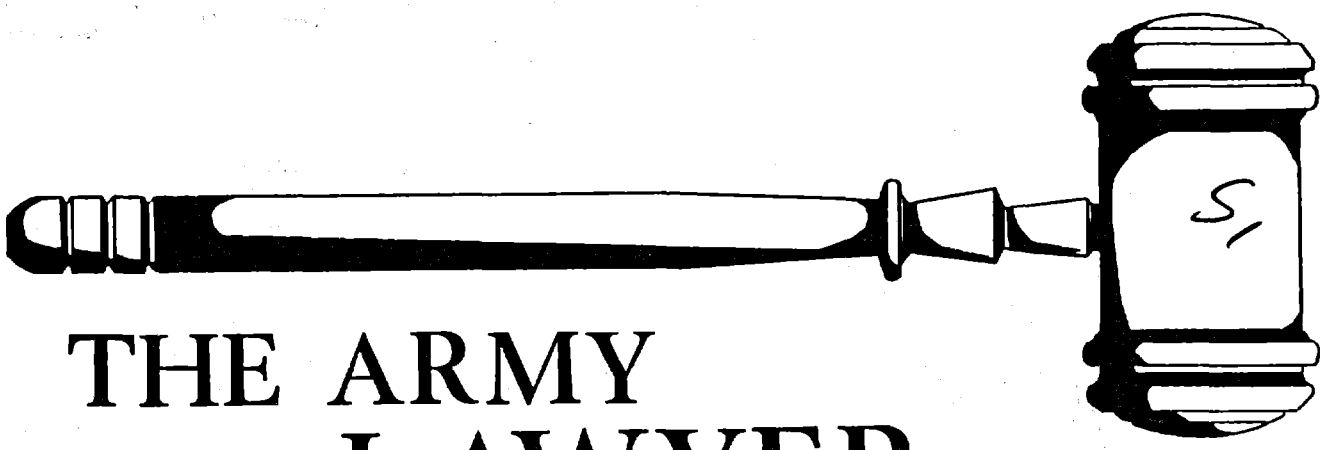

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Nix v. Williams and the Inevitable Discovery Exception to the Exclusionary Rule

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Almost from the inception of the exclusionary rule in 1914, the United States Supreme Court has carved out narrow exceptions to the operation of the rule of evidence that renders inadmissible in-court evidence and its fruits that have been discovered by virtue of unlawful official conduct. This term, the Court conferred constitutional status upon an "inevitable discovery" or "hypothetical independent source" exception to the exclusionary rule. This article surveys the development of the doctrine of inevitable discovery, the Supreme Court's acceptance of it in Nix v. Williams, *and concludes by venturing a prediction concerning the probable future contours of the doctrine.*

Recently, in *Nix v. Williams*,[1] reflecting the

[1] 52 U.S.L.W. 4732 (U.S. June 11, 1984).

clear trend in federal[2] and state[3] courts, the United States Supreme Court bestowed constitutional status upon the "inevitable discovery" exception to the exclusionary rule. In the case that, in its former life, was popularly known as the "Christian burial speech" case,[4] the Court held that, notwithstanding that certain evidence had *in fact* been uncovered as a direct result of the exploitation of illegal police misconduct, that evidence would nonetheless be admitted at a criminal trial if the government could establish that the evidence *would have been* found in the normal course of police investigation.[5] Most remarkable was the language of the Court, in what had been widely considered a fourth amendment case,[6] that may presage an application of this doctrine to evidence discovered in violation of other con-

[2]By the time of the Supreme Court's decision in *Nix v. Williams*, all eleven circuit courts of appeal and the United States Court of Military Appeals had accepted some version of the inevitable discovery exception to the exclusionary rule. *See, e.g.*, United States v. Fisher, 700 F.2d 780 (2d Cir. 1983); United States v. Apker, 705 F.2d (8th Cir. 1983); United States v. Romero, 692 F.2d 699 (10th Cir. 1983); United States v. Roper, 681 F.2d 1354 (11th Cir. 1982); Papp v. Jago, 656 F.2d 221 (6th Cir. 1981); United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980); United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980); United States v. Schmidt, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978); Government of Virgin Islands V. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States *ex rel.* Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); United States vs. Seohnlein, 423 F.2d 1051 (4th Cir.), *cert denied*, 399 U.S. 913 (1970); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); United States v. Kozak, 12 M.J. 389 (C.M.A. 1982); United States v. Lewis, 15 M.J. 565(N.M.C.M.R. 1983).

[3]*See, e.g.*, State v. Poit, 344 N.W. 2d 914 (Neb. 1984); State v. Holler, 459 A.2d 1143 (N.H. 1983); State v. Hein, 674 P.2d 1358 (Ariz. 1983); State v. Skjonsby, 319 N.W.2d 764 (N.D. 1982); Carlisle v. State, 642 P.2d 596 (Nev. 1982); State v. Nagel, 308 N.W. 2d 539 (N.D. 1981); Ketter v. Commonwealth, 222 Va. 134, 28 S.E.2d 841 (1981), *cert. denied*, 454 U.S. 1053 (1982); Martin v. State, 433 A.2d 1025 (Del. 1981); State v. Williams, 285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980); State v. Beede, 119 N.H. 620, 406 A.2d 125 (1979), *cert. denied*, 445 U.S. 907, *reh'g denied*, 446 U.S. 993 (1980); Cook v. State, 374 A.2d 264 (Del. 1977); State v. Lamb, 116 Ariz. 134, 568 P.2d 1032 (1977); Clough v. State, 92 Nev. 603, 555 P.2d 840 (1976); People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139, *cert. denied*, 414 U.S. 1033 (1973); Commonwealth v. Garvin, 448 Pa. 258, 293 A.2d 33 (1972); Lockridge v. Superior Court of Los Angeles County, 3 Cal.3d 166, 89 Cal. Rptr. 731, 474 P.2d 683 (1970), *cert. denied*, 402 U.S. 910 (1971); State v. Cook, 677 P.2d 522 (Id. App. 1984); People v. Buffardi, 459 N.Y.S.2d 893 (App. Div. 2d Dep't 1984); Vanderbilt v. State, 629 S.W. 2d 709 (Tex. Crim. App. 1981), *cert. denied*, 456 U.S. 910 (1982); State v. Hacker, 51 Or. App. 743, 627 P.2d 11 (1981); State v. Barry, 94 N.M. 788, 617 P.2d 873 (App. 1980); Leuschner v. State. 41 Md. App. 423, 397 A.2d 622 (1970); People v. Emanuel, 87 Cal. App. 3d 205, 151 Cal. Rptr. 44 (1978); People v. Pearson, 67 Ill. App. 3d 300, 24 Ill. Dec. 173, 384 N.E.2d 1331 (1978); State v. Mather, 147 N.J. Super. 522, 371 A.2d 758 (1977); *Ex parte* Parker, 485 S.W.2d 585 (Tex. Crim. App. 1972).

[4]*See infra* text accompanying notes 35-40.

[5]52 U.S.L.W. at 4735.

[6]Some commentators and courts have viewed inevitable discovery as only applicable to fourth amendment violations. *See, e.g.*, 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4, at 624 (1978); Kaczynski, *Inevitable Discovery—Reprise*, The Army Lawyer, Mar. 1983, at 21, 22 (quoting State v. Williams, 285 N.W.2d 248, 258 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980) (quoting in turn 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, *supra*)). *See also* Unger v. State, 640 P.2d 151, 158 (Alaska App. 1982) (inevitable discovery applicable only to fourth, not fifth, amendment violations).

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stitutional rights. This article will examine the roots and development of the inevitable discovery exception to the exclusionary rule, analyze the Court's holding and rationale in *Nix v. Williams*, and posit some situations in which the doctrine may be applied in the future.

The Ebb and Flow of the Exclusionary Rule

The exclusionary rule of evidence has recently become a septuagenarian.[7] However, the rule that requires the exclusion of evidence that has been discovered in violation of the Constitution has never been without exception. Almost from its inception, the Supreme Court has found various constitutional violations to be irrelevant to the admissibility of the proffered evidence. In *Silverthorne Lumber Co. v. United States*,[8] the Court adopted the "independent source" exception to the rule. In that case, notwithstanding that illegal activity had occurred,[9] the Court noted that facts so discovered do not "become sacred and inaccessible. If knowledge of [such facts] is gained from an independent source, they may be proved like any others. . . ."[10]. Thus, even if the police had misbehaved, the evidence would be admissible if it had *in fact* been discovered by means independent of the illegality; that the evidence was also discovered through other, illegal conduct was logically and factually irrelevant to the constitutional inquiry.

Subsequently, the Court further exempted from exclusion evidence that had been discovered "by means sufficiently distinguishable to be purged of the primary taint [of illegality]."[11] Finally, when the chain of causation between the illegal activity and the discovery of the evidence had become so attenuated as to offend logic and common sense, the

[7]Although first invoked to prohibit the introduction into evidence of compelled testimony in Boyd v. United States, 116 U.S. 616 (1886), the rule made its modern day debut in Weeks v. United States, 232 U.S. 341 (1914). In *Weeks*, the accused had been arrested without a warrant while the police twice went to his home to search. After gaining entry to the home with the assistance of a neighbor, the police seized various items that were introduced into evidence against Weeks at his trial for use of the mail to promote a lottery. The Supreme Court held that the items were improperly used against Weeks; "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394. The Supreme Court later adopted exclusionary rules for evidence obtained through violation of the fourth amendment in state criminal proceedings, Mapp v. Ohio, 367 U.S. 643 (1961), of the sixth amendment, Escobedo v. Illinois, 378 U.S. 478 (1964), and to confessions rendered without benefit of the warnings or the obtaining of a waiver required by Miranda v. Arizona, 384 U.S. 436 (1967). There is a statutorily-prescribed exclusionary rule for evidence gained by means of an unlawful oral or wire interception, 18 U.S.C. § 2515 (1982), and some courts have developed an exclusionary rule for evidence obtained in violation of the Posse Comitatus Act, 18 U.S.C. § 1385 (1982). *See* Taylor v. State, 645 P.2d 522 (Okla, Crim. App. 1982), *discussed in* Hilton, *Recent Developments Relating to the Posse Comitatus Act*, The Army Lawyer, Jan. 1983, at 1, 7. For an overview of the American exclusionary rule and how it compared to the manner in which other nations deal with illegally obtained evidence, *see* Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 Mil. L. Rev. 87 (1983).

[8]251 U.S. 385 (1920).

[9]In *Silverthorne*, the individual accuseds were arrested in their homes while the offices of their company were searched. A court ordered a federal marshal to return the original copies of all documents seized during the search. The marshal, however, was permitted to retain copies of the documents and photographs of other items, which he later used as the basis for a subpoena to regain control of the originals. The individuals refused to comply and were prosecuted for contempt of court. The Supreme Court refused to sanction the practice, holding that "knowledge gained by the government's own wrong cannot be used by it. . . ." *Id* at 391.

[10]*Id.* at 392.

[11]Wong Sun v. United States, 371 U.S. 471, 488 (1963) (quoting R. Maguire, Evidence of Guilt 221 (1969)). In *Wong Sun*, based upon information not amounting to probable cause, the police proceeded to a laundry, rang the bell, and observed the owner flee upon seeing them. The police then entered the laundry and arrested the owner, who then provided them with information that led them to the accused. *Id.* at 473-76. The Supreme Court refused to allow the government to utilize the link to the accused provided by the laundry owner: "[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more tangible fruits of the unwarranted intrusion." *Id.* at 485-86 (footnote omitted). Several days after his arrest, however, the laundry ownere returned to the police and provided them with incriminating information. The voluntary act of returning was deemed by the Court to be a sufficient intervening cause to purge the evidence so obtained from the taint of the initial illegality. *Id.* at 476.

connection may have become "so attenuated as to dissipate the taint."[12]

In the early 1970s, a new exception, hesitantly,[13] began to weave its way into fourth amendment jurisprudence. Like *Silverthorne*, it posited an "independent source," albeit a "hypothetical independent source." This was the doctrine of inevitable discovery.

From *Fitzpatrick* to *Williams II*: The Doctrine Evolves

Inevitable discovery made its first significant convert in the New York Court of Appeals in 1973 in *People v. Fitzpatrick*.[14] In *Fitzpatrick*, the defendant was a suspect in the shooting of two police officers.[15] After tracing the defendant to his home, the police entered the house and found Fitzpatrick in a closet.[16] He was handcuffed, removed from the closet, and advised of his rights. When questioned about the location of the weapon that had been used in the shooting, Fitzpatrick directed the police to the closet in which he had been hiding. The police thereupon searched the closet and located the gun, six spent shell casings, and twenty-seven other live rounds.[17] At trial, the court ruled that the government had failed in its burden to establish the voluntariness of Fitzpatrick's statement to the police concerning the closet. Nevertheless, the items discovered in the closet were admitted into evidence since "proper police investigation would have resulted in a search of that closet."[18] The defendant was thereafter convicted of first degree murder.[19]

The New York Court of Appeals affirmed the conviction. The court noted an increasing body of authority in support of an inevitable discovery exception to the exclusionary rule. The court defined the exception to mean that

> evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police

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[12]Nardone v. United States, 308 U.S. 338 (1939). *See also* Brown v. Illinois, 422 U.S. 590 (1976). Most recently, and subsequently to *Nix v. Williams*, the Court established yet another exception to the exclusionary rule. In United States v. Leon, 52 U.S.L.W. 5155 (U.S. July 5, 1984), and Massachusetts v. Sheppard, 52 U.S.L.W. 5177 (U.S. July 5, 1984), the Court held that where the police had sought and relied in good faith upon a warrant issued by a neutral and detached magistrate, evidence discovered in the execution of that warrant would be admissible notwithstanding that the warrant had erroneously been issued upon less than probable cause.

[13]The two earliest federal "inevitable discovery" cases, Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963), *discussed in infra* notes 24-27, and United States v. Soehnlein, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970), were carefully rested upon other grounds as well. *See Wayne*, 318 F.2d at 213-14 (emergency entry); *Soehnlein*, 423 F.2d at 1053 (search incident to arrest). That caution still inheres in some state courts today. *See* People v. Hoskins, 461 N.E.2d 941 (Ill. 1984); People v. Ruberto, 81 Ill. App. 3d 636, 37 Ill. Dec. 213, 401 N.E.2d 1306 (1980) (inevitable discovery as alternate holding). *See also* State v. Howard, 324 N.W.2d 216 (Minn. 1982) (even if search unsalvable under inevitable discovery, error was harmless); In Interest of M.D.J., 285 N.W.2d 558 (N.D. 1979) (same); People v. Fuentes, 91 Ill. App. 3d 71, 46 Ill. Dec. 823, 414 N.E.2d 876 (1980) (issue waived by government at trial level).

[14]32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139, *cert. denied*, 414 U.S. 1033 (1973), *discussed in* Kaczynski, *Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery*, The Army Lawyer, Aug. 1982, at a, 3-4; LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 Alb. L. Rev. 483, 488 (1976).

[15]The accused had been stopped by the officers as a suspect in a gas station robbery. While being questioned by the officers, he shot them and drove away. 32 N.Y.2d at 503, 346 N.Y.S.2d at 794, 300 N.E.2d at 140.

[16]One of the injured police officers managed to radio the license plate number and Fitzpatrick's last name to his headquarters. This information enabled the police to trace Fitzpatrick to his home. The New York Court of Appeals had no difficulty in sustaining the warrantless entry of the police into the house as necessary to prevent the danger to the public of a fleeing, armed, and recently murderous suspect. "Speed here was essential." *Id.* at 509, 346 N.Y.S.2d at 799, 300 N.E.2d at 143 (quoting Warden v. Hayden, 387 U.S. 294, 299 (1967)).

[17]*Id.* at 504, 346 N.Y.S.2d at 795, 300 N.E.2d at 140.

[18]*Id.* at 505, 346 N.Y.S.2d at 795, 300 N.E.2d at 140-41.

[19]Fitzpatrick was sentenced to death. *Id.*

> investigation would, in any case, even absent of illicit conduct, have inevitably led to such evidence.[20]

In *Fitzpatrick*, the court found that the police would undoubtedly have searched the closet incident to their arrest of the defendant.[21] That Fitzpatrick had first been questioned and that the questioning led to an earlier search of the closet was deemed "entirely fortuitious."[22] Accordingly, the defendant would not be afforded the "undeserved and socially undesirable bonanza" of the suppression of the weapon and ammunition.[23] Several states followed the New York lead in adopting the inevitable discovery exception to the exclusionary rule.[24]

Federal courts were slower to confer constitutional status on inevitable discovery. The earliest glimmer of acceptance is found in an opinion predating *Fitzpatrick* by a decade and *Nix v. Williams* by twenty years. In *Wayne v. United States*,[25] then-Judge Burger presciently forecast what would become an exception to the exclusionary rule. In *Wayne*, the sister of a victim of an illegal abortion clinic had escaped the clinic and contacted the police to inform them of her sister's death. Independently, the police arrived at the clinic and illegally entered it, thereupon finding the lifeless body of the sister.[26] The accused sought to suppress the findings of the autopsy of the sister, apparently alleging that the body was the fruit of an unlawful search and seizure. The trial court denied relief and the District of Columbia Circuit affirmed the denial. Although hedging its decision by holding that the police entry to the clinic had been lawful as an emergency measure,[27] the court noted:

> It is inevitable that, even had the police not entered appellant's apartment at the time and in the manner they did, the coroner would have sooner or later been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post mortem examination prescribed by law.[28]

Thus, notwithstanding the *actual* discovery of the body during the search of the clinic, the evidence of the condition of the body would have eventually have been uncovered in the course of normal police procedures.

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[20]Id. at 506, 346 N.Y.S.2d at 796, 300 N.E.2d at 141.

[21]That the accused had been handcuffed and removed from the closet did not vitiate the right of the police to search the closet incident to the apprehension. *Id.* at 508, 346 N.Y.S.2d at 798-99, 300 N.E.2d at 143.

[22]*Id.*

[23]*Id.* at 507, 346 N.Y.S.2d at 798, 300 N.E.2d at 142 (quoting *Maguire, How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., Criminology & Police Sci. 307, 317 (1964)). Fitzpatrick did, however, receive the "bonanza" of having his death sentence set aside and the New York statutory death penalty procedure declared unconstitutional. 32 N.Y.2d at 509-11, 346 N.Y.S.2d at 799-800, 300 N.E.2d at 143.

[24]*See* cases cited in *supra* note 3; discussion in United States v. Massey, 437 F. Supp. 843, 853-54 n.3 (M.D. Fla. 1977); State v. Williams, 285 N.W.2d 248, 256-60 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

[25]318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963). Strictly speaking, the earliest inevitable discovery case was authored by Judge Learned Hand in Somer v. United States, 138 F.2d 790 (2d Cir. 1943). In *Somer*, agents of the United States Alcohol and Tax Unit illegally entered the accused's home and obtained information from his wife that the accused was out deliverying "the stuff" and would be back shortly. The agents awaited Somer's return and arrested him, at which time contraband liquor was found in his car. Judge Hand reversed the trial court's order of exclusion and opined that

> quite independently of what Somer's wife told them, the officers would have gone to the street, have waited for Somer and have arrested him, excactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful.

Id. at 792. The Second Circuit appeared to then reject inevitable discovery nineteen years later, just prior to its endorsement in *Wayne*, in United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962) ("The test must be one of actualities not possibilities"). *See* LaCount & Girese, *supra* note 14, at 486-87.

[26]318 F.2d at 208-09.

[27]Judge Burger noted that the sister might have still been alive and that the entry might have been necessary as an emergency measure. *Id.* at 213-14.

[28]*Id.* at 209 (footnote omitted).

In subsequent years, inevitable discovery received a warm reception in the Second,[29] Third,[30] Fourth,[31] Seventh,[32] and Ninth[33] Circuits, while receiving repeated rejections in the Fifth Circuit,[34] and skepticism in the Eighth Circuit.[35]

It was the United States Supreme Court that provided the impetus for the increased acceptance of inevitable discovery among the federal courts. And it did so in a footnote.

The case was *Brewer v. Williams*.[36] In this *Williams I*, the accused had been apprehended and arraigned for the murder of a young girl. While in police custody, he spoke with one attorney by phone and with another in person. The latter attorney notified the police that they were not to question the accused until the two attorneys had conferred. The accused was then transported in a police car on a 160-mile trip to the appropriate jurisdiction; counsel was denied permission to accompany the accused.[37]

During the trip, one detective, knowing of the deeply professed religious beliefs of the accused and addressing the accused as "Reverend," rendered what became known as the "Christian burial speech":

> I want to give you something to think about while we're traveling down the road. . . . They are predicting several inches of show for here tonight, and I feel that you yourself are the only person that knows where this little girl's body is. . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is]. . ., I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the litte girl who was snatched away from them on Christmas [E]ve and murdered. . . .[38]

A discussion concerning the search for the body, then being conducted with the aid of 200 volunteers, ensued and the accused led the police to the location of the body.[39]

The Supreme Court reversed Williams' conviction for murder. Finding that the "Christian burial speech" had "been tantamount to interrogation" after the accused had been arraigned and elected to speak with counsel, the Court held that the detective had violated the accused's rights under the sixth and fourteenth

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[29]United States v. Falley, 489 F.2d 33 (2d Cir. 1973).

[30]Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Archie, 452 F.2d 897 (3d Cir. 1971).

[31]United States v. Soehnlein, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970).

[32]United states *ex rel.* Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); United States v. Hill, 447 F.2d 817 (7th Cir. 1971).

[33]United States v. Schmidt, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978); United States v. Finnegan, 568 F.2d 637 (9th Cir. 1977).

[34]United States v. Houltin, 525 F.2d 943 (5th Cir. 1976); Parker v. Estelle, 498 F.2d 625, *reh'g denied*, 503 F.2d 576 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); United States v. Castellana, 488 F.2d 65, *aff'd in part, rev'd in part*, 500 F.2d 324 (5th Cir. 1974). *But see* Gissendanner v. Wainwright, 482 F.2d 1293, 1297 n.4 (5th Cir. 1973) ("But the taint of the unlawful search may be removed if there are independent sufficient 'leads' by which the government may discover the [evidence]" (quoting United States v. Resnick, 483 F.2d 354 (5th Cir. 1973)).

[35]United States v. Kelly, 547 F.2d 82 (8th Cir. 1977) (did not reach question of inevitable discovery, but quoted Fifth Circuit case that had rejected it).

[36]430 U.S. 387 (1977).

[37]*Id.* at 392.

[38]*Id.* at 392-93.

[39]*Id.* at 393. An on-again, off-again conversation between Williams and the detective ensued. Williams first directed police to where he had left the victim's shoes, and then to where he had left the blanket in which the body had been wrapped. Searches at both locations proved unsuccessful. Finally, Williams directed the police to the location of the body. This search was successful. *Id.*

amendments.[40] In a telling footnote, however, the Court speculated:

> While neither Williams' incriminatory statements themselves nor any testimony describing his having led police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had the incriminatory statements not been elicited from Williams.[41]

This footnote provoked two responses. First, many jurisdictions that had previously rejected or skirted acceptance of the inevitable discovery doctrine now found it constitutionally palatable.[42] Second, Williams was retried. Based upon the Supreme Court's "advice," the state produced evidence of the scope of the ongoing search and of the condition of the body that bespoke a record of inevitability; had Williams not led the police to it, the body would have been found in the course of the ongoing

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[40] *Id.* at 400. The Court's holding in this regard was not itself remarkable. In Massiah v. United States, 377 U.S. 201 (1964), the accused had been indicted on drug charges, but was not in custody. A co-conspirator of the accused was wired for sound by the police and then dispatched to speak with Massiah. The ensuing conversation was recorded. This post-indictment activity of the police was held to have impermissibility interfered with Massiah's right to counsel at a "critical stage" of a criminal proceeding. *Id.* at 204-07. The police activity in *Williams*, once characterized as a disguised interrogation, would also fall within the same sixth amendment prohibition: "[T]he clear rule of Massiah is that once adversary proceedings have commenced against an individual [here, by arraignment], he has a right to legal representation when the government interrogates him." Brewer v. Williams, 430 U.S. at 410 (footnote omitted). Although the Court had been fairly straightforward in characterizing the basis of the holding in *Williams* as a violation of the sixth and fourteenth amendment rights of the accused, the Court later interpreted *Williams* as a case involving a violation of the strictures of Miranda v. Arizona, 384 U.S. 436 (1966). *See* Edwards v. Arizona, 451 U.S. 477, 484 & n.8 (1981).

[41] *Id.* at 407 n.12.

[42] The most noteworthy of those jurisdictions was the Fifth Circuit. Having previously decried the inevitable discovery doctrine in the harshest terms, *see, e.g.*, Parker v. Estelle, 498 F.2d 625, 629-30 n.12, *reh'g denied*, 503 F.2d 576 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) ("This rule might minimize the number of times a guilty defendant could avoid conviction but is hard to square with the deterrent purposes of the various exclusionary rules"); United States v. Castellana, 488 F.2d 65, 68, *aff'd in part, rev'd in part*, 500 F.2d 324 (5th Cir. 1974) ("To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police misconduct"), the court, after *Brewer v. Williams*, reevaluated its position and adopted the doctrine. United States v. Brookins, 614 F.2d 1037, 1046, 1048 (5th Cir. 1980). In fact, the Fifth Circuit's rejection of inevitable discovery had been so strident that the Mississippi Supreme Court, in 1983, three years after the Fifth Circuit's "reevaluation" in *Brookins*, still refused to adopt the inevitable discovery rule on the strength of what was assumed to be still-valid Fifth Circuit precedent. *See* Hill v. State, 432 So.2d 427, 436 n.4 (Miss. 1983) (citing United States v. Houltin, 525 F.2d 943 (5th Cir. 1976)). The Court of Military Appeals, having refused to accept inevitable discovery in United States v. Peurifoy, 22 C.M.A. 549, 48 C.M.R. 34 (1973), embraced it in United States v. Kozak, 12 M.J. 389 (C.M.A. 1982), *discussed in* Kaczynski, *supra* note 14, at 6-7. *See also* United States v. Lewis, 15 M.J. 656 (N.M.C.M.R. 1983); United States v. Yandell, 13 M.J. 616 (A.F.C.M.R. 1982). The *Brewer v. Williams* footnote recurred as authority in United States v. Durant, 730 F.2d 1180 (8th Cir. 1984); United States v. Steele, 727 F.2d 580 (6th Cir. 1984); United States vs. Parker, 722 F.2d 179 (5th Cir. 1983); United States v. Shaw, 701 F.2d 367 (5th Cir. 1983); United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982); United States v. Romero, 692 F.2d 699 (10th Cir. 1982); United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982); United States v. Miller, 666 F.2d 991 (5th Cir. 1982); Papp v. Jago, 656 F.2d 221 (6th Cir. 1981); United States v. Kandik, 633 F.2d 1334 (9th Cir. 1980); United States v. Huberts, 637 F.2d 630 (9th Cir. 1980).

search.[43] Evidence of the location and condition of the body was admitted and Williams was again convicted of the murder. The conviction was affirmed within the state court system[44] and certiorari was denied by the Supreme Court.[45] To the casual observer, *Williams II* appeared to be over. It was not.[46]

Williams promptly filed for a writ of habeas corpus[47] in federal district court, attacking the state's use of inevitable discovery at his second trial. The district court denied relief[48] and Williams appealed the denial to the Eighth Circuit. On January 10, 1983, over fourteen years after the murder for which the state sought to hold Williams accountable, the Eighth Circuit reversed the district court and ordered that the writ be issued.[49]

The opinion of the court was instructive. Despite Williams' constitutional protestations, the panel assumed, *arguendo*, that inevitable discovery was a valid exception to the exclusionary rule. The court's disagreement with the district court was simply evidentiary; in the view of the Eighth Circuit, the state had not met the burden of proof that the state supreme court had set.

In its affirmance of Williams' conviction, the Supreme Court of Iowa had set forth a two-pronged test for inevitable discovery first espoused by Professor Wayne LaFave:

> First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery would have occurred.[50]

The Eighth Circuit did not contest the "inevitability" of the discovery. Instead, focusing upon the first prong, the panel cited various excerpts from the Supreme Court's opinion in *Brewer v. Williams*, which alternatively characterized the police conduct as "*so clear* a violation of the Sixth and Fourteenth Amendments. . . [that it] cannot be condoned,"[51] "undertaken deliberately," "designedly," and "no doubt. . . con-

[43]Evidence was adduced that the search party consisted of about 200 volunteers, that, although the body was not located in a county within the original search plan, the search would have extended to that county once the original search proved unsuccessful, that the body was discovered in a culvert, one of the places that the searchers had been told to look, that the body was clad in a bright color, that only a light snow had fallen, and that temperatures could have preserved the body for approximately four months. State v. Williams, 285 N.W.2d 248, 261-62 (Iowa 1979), *cert. denied*, 466 U.S. 921 (1980).

[44]285 N.W.2d 248 (Iowa 1979).

[45]466 U.S. 921 (1980).

[46]Affectionados of America's national pasttime will recognize the phrase, "It's not over 'til it's over," attributed to Lawrence Peter Berra, *quoted in* Kaczynski, *Inevitable Discovery—Reprise*, The Army Lawyer, Mar. 1983, at 21, 21. It is submitted that until *Nix v. Williams*, that quotation also amply described the prosecution of Robert Anthony Williams. A similar sentiment was expressed in Adler, *The Return of the Christian Burial Case*, A.B.A.J., Jan. 1984, at 100.

[47]Pursuant to 28 U.S.C. § 2241 (1982), a person held "in custody" pursuant to the judgment of a state court may petition a federal court for a writ of habeas corpus at a hearing on which the legality of the detention will be adjudged. In Fay v. Noia, 372 U.S. 391 (1962), the Supreme Court had indicated that federal courts should entertain habeas petitions even concerning issues that had not been raised in the state proceeding, provided that the court not find that there had been a "deliberate bypass" of the state system. *Id.* at 439. Fourteen years later, in Stone v. Powell, 428 U.S. 465 (1976), the Court restricted the scope of collateral attack of allegations of violations of the fourth (and fourteenth) amendments. The Court refused to open the federal courts to habeas attacks where the petitioner had been afforded "an oapportunity for a full and fair litigation of fourth amendment claims" in state court. *Id.* at 482. It had been anticipated that the court might use *Nix v. Williams* as a vehicle to extend the "full and fair litigation" limitation to the sixth amendment arena. *See* Adler, *supra* note 46, at 103. Having decided to ground *Nix v. Williams* upon the constitutionality of the doctrine of inevitable discovery, however, the Court found no need to reach the issue. Nix v. Williams, 52 U.S.L.W. at 4737 n.7.

[48]528 F. Supp. 664 (D. Iowa 1981).

[49]700 F.2d 1164 (8th Cir. 1983).

[50]285 N.W.2d at 258 (quoting 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4, at 620-21 (1978)).

[51]Brewer v. Williams, 430 U.S. at 406 (Stewart, J.), *quoted at* 700 F.2d at 1171.

sciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and Fifth Amendment privilege against self-incrimination"[52] Further, noting the record of the retrial, at which proffered evidence could conceivably have wiped the slate clean of such judicial skepticism, the court found no evidence of the purported lack of bad faith on the part of the police.[53] Indeed, the court instead pointed to the activity of the police in breaking two express promises made to Williams' attorneys not to question Williams during the trip and to bring Williams *directly* to the police station in the appropriate jurisdiction.[54] Finding at least a lack of good faith,[55] the court held that the state had not discharged its burden of proof.[56] The Supreme Court granted certiorari.[57]

Nix v. Williams: Inevitable Discovery Adopted

Proponents of inevitable discovery must have been pleased to learn that the author of *Nix v. Williams* was the 1963 author of *Wayne v. United States*, then-Judge and now Chief Justice Burger. Indeed, the final episode of *Williams II* afforded the doctrine a far greater play then had been suggested by many of the courts that had theretofore adopted it.

The Chief Justice began the opinion by stating the underlying rationale of deterrence that lay behind the exclusionary rule: "[T]he prosecution is not to be put in a better position than it would have been in if no illegality had transpired."[58] Conversely, analogizing inevitable discovery, or the "hypothetical independent source," to the independent source rule of *Silverthorne*,

> [w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a *worse* position than they would have been in absent

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[52]*Id.* at 407 (Marshall, J., concurring), *quoted at* 700 F.2d at 1171.

[53]The court noted that the detective who had rendered the "Christian burial speech" did not even testify at the retrial. 700 F.2d at 1171 n.9. Moreover, the court viewed with disdain the "assumption" made by the Iowa Supreme Court that the detective did not act in bad faith. The state panel had stated:

> The issue of the propriety of the police conduct in this case. . . has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

State v. Williams, 285 N.W.2d at 260-61. To the Eighth Circuit, this was not a sufficient finding of fact to support a conclusion of lack of bad faith. 700 F.2d at 1170-71.

[54]700 F.2d at 1172.

[55]"These are not the actions of a man who believed he was doing the right thing, only to be confounded later on by a close vote on a question of law." *Id.* at 1173.

[56]*Id.* As the Supreme Court had done in *Brewer v. Williams*, *see* 430 U.S. at 406, the Eighth Circuit saw the crime as so hideous as warranting an explanation of its decision:

> It will inevitably be remarked that our opinion focuses more on the conduct of the police than of the alleged murderer. . . . A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results. . . . Some criminals do go free because of the necessity of keeping government and its servants in their place. This is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

700 F.2d at 1173.

[57]103 S. Ct. 2427 (1983).

[58]52 U.S.L.W. at 4735.

> any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place.[59]

On the issue of whether the government need establish that the police did not act in bad faith in accelerating the discovery, the Court continued the analogy. There is no such requirement for evidence to be admissible if discovered through an actual independent source. To add that requirement for admissibility pursuant to inevitable discovery would be "formalistic, pointless, and punitive" and unlikely to add to the deterrent value of the exclusionary rule.[60] Indeed, "[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered."[61] Consequently, inevitable discovery would require only that the prosecution "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means. . ."[62] Upon reviewing the facts developed before the state trial court, the Chief Justice concluded that the burden had been met.[63]

The degree to which the Court closely hewed to the independent source—inevitable discovery analogy may forecast an expansion of the limits of inevitable discovery beyond even those advanced by its proponents. Inevitable discovery had been considered to be part of

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[59] *Id.*

[60] *Id.* Moreover, this view "wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Id.*

[61] *Id.* (citation omitted).

[62] *Id.* This single sentence of the opinion settled two disputes among courts and commentators. First, the Court set forth a "would have been discovered" standard. One of the main criticisms of inevitable discovery has been the degree to which a judge must speculate about a hypothetical source. *See* quotation from *United States v. Castellana* in *supra* note 42; Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Cal. L. Rev. 579 (1968). Some courts had set a high threshold of inevitability. *See, e.g.*, State v. Cook, 677 P.2d 522, 529 (Ill. App. 1984) ("certain" to be discovered); United States v. Allen, 436 A.2d 1303, 1310 (D.C. App. 1981) ("certainty"); District of Columbia v. M.M., 407 A.2d 698, 702 (D.C. App. 1979) ("actuality"); People v. Emanuel, 87 Cal. App. 3d 205, 151 Cal. Rptr. 44 (1978) ("reasonably strong possibility"). Others had simply reviewed the evidence and, without extended discussion, found no inevitability. *See, e.g.*, People v. Quintero, 657 P.2d 948 (Colo. 1983); Stokes v. State, 289 Md. 155, 423 A.2d 552 (1980); State v. Preston, 411 A.2d 402 (Me. 1980); Commonwealth v. Wideman, 385 A.2d 1334 (Pa. 1978); Spierling v. State, 472 A.2d 83 (Md. App. 1984); People v. Thiele, 114 Ill. App. 3d 189, 70 Ill. Dec. 147, 448 N.E.2d 1025 (1983); State v. LeCroy, 435 So.2d 354 (Fla. Appl. 1983); People v. Gulley, 111 Ill. App. 3d 1091, 67 Ill. Dec. 735, 449 N.ED.2d 26 (1982); United States v. Allen, 436 A.2d 1303 (D.C. App. 1981); People v. Williams, 62 Ill. App. 3d 874, 20 Ill. Dec. 154, 379 N.E.2d 1222 (1978).

Second, the Court set the burden of proof of inevitability at a preponderance of the evidence. The Third Circuit had set the burden at a "clear and convincing" evidence standard. *See* Government of Virgin Islands v. Gereau, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Archie, 452 F.2d 897 (3d Cir. 1971). One commentator supported this view. *See* J. Hall, Search and Seizure § 22:13, at 637 n.20 (1982). Other courts opted for the preponderance standard. *See* United States vs. Cales, 493 F.2d 1215 (9th Cir. 1974); United States v. Schipani, 289 F. Supp. 43 (E.D. N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969); United States v. Kozak, 12 MJ. 389 (C.M.A. 1982). This standard was supported as the usual standard to be employed in "fruit of the poisonous tree" cases in LaCount & Girese, *supra* note 14, at 492.

[63] 52 U.S.L.W. at 4736. Although independently detailing the progress of the searchers, the Court twice noted that "three courts independently reviewing the evidence" had already found the requisite degree of inevitability. *Id.*

fourth amendment jurisprudence; few cases dealt with the admissibility of evidence discovered in violation of other constitutional rights.[64] The language of the Court in *Nix v. Williams* may presage the application of this doctrine to evidence discovered in violation of the fourth, fifth, and sixth amendments. This expanded application may take place for two reasons. First, however widely considered a search and seizure case, *Nix v. Williams* in fact was concerned with a violation of the *sixth* (and fourteenth) amendments. It was through interference with Williams' right to counsel at a critical phase of his prosecution, after arraignment,[65] that the body was located. This was not unnoticed by the Supreme Court, which briefly noted that inevitable discovery would not offend sixth amendment protections.[66]

Second, the close analogy to the independent source doctrine, which has been applied to fifth amendment violations,[67] certainly bodes an expansion of an inevitable discovery exception into fifth amendment jurisprudence as well. Indeed, the Second Circuit had already made that extension.[68]

If inevitable discovery does not require a showing of a lack of bad faith on the part of the police and may be extended into the fifth and sixth amendment arenas, then what, if any, may the limits of its development be? One limitation, at least in the fourth amendment area, may be in cases in which inevitable discovery is blatantly used by the police to circumvent the warrant clause. The Supreme Court has firmly established a preference for searches and seizures performed pursuant to a warrant duly issued by a neutral and detached magistrate.[69] Indeed, absent exigent circumstances, the Court has required that apprehensions, seizures of the person, that are made within the home be made pursuant to a warrant.[70] Given the importance attached to the warrant requirement by the Court, it is suggested that inevitable discovery may not, and should not, operate to permit the introduction of evidence obtained by avoidance of this requirement.

Both federal and state courts have taken this view in the past. In *United States v. Griffin*,[71] the police had dispatched an officer to obtain a search warrant for the accused's home. While awaiting the issuance of the warrant, however, the police broke into the home and discovered evidence that was sought to be used against the accused.[72] The Sixth Circuit expressly rejected the government's argument, then based on

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[64]*But see* United States v. Fisher, 700 F.2d 780 (2d Cir. 1983) (inevitable discovery applied to fifth amendment violation); State v. Skjonsby, 319 N.W. 2d 764 (N.D. 1982) (applied to fifth amendment violation); People v. Madson, 638 P.2d 18 (Colo. 1981) (possibly applicable to fifth amendment violations); Unger v. State, 640 P.2d 151 (Alaska App. 1982) (not applicable to confessions).

[65]*See supra* note 40.

[66]The Court noted that the exclusionary rule of the sixth amendment is designed to protect "against unfairness by preserving the adversary process in which the reliability of the proffered evidence may be tested by cross-examination." 52 U.S.L.W. at 4736 (citing United States vs. Ash, 413 U.S. 300, 314 (1973); Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973)). Inasmuch as it was the physical evidence, the body, its location, and condition, that was sought to be admitted, the Chief Justice concluded that suppression "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden of on the administration of criminal justice." 52 U.S.L.W. at 4736. On the contrary, the integrity of the judicial process would be undermined by placing *the state* in a worse position than that in which it would have been absent the prohibited conduct. *Id.*

[67]Kastigar v. United States, 406 U.S. 441, 460-61 (1972). The Supreme Court made particular mention of this in a footnote in Nix v. Williams, 52 U.S.L.W. at 4734 n.3. Whether this portends to have the effect of the footnote in Brewer v. Williams, 430 U.S. at 404, n.12, will await further litigation.

[68]United States v. Fisher, 700 F.2d 780 (2d Cir. 1983). *See also* State v. Skjonsby, N.W.2d 764, 787 (N.D. 1982). It has been suggested that the "greatest application" of inevitable discovery would be to cases involving defective confessions. LaCount & Girese, *supra* note 14, at 505, 508 n.11.

[69]Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[70]Payton v. New York, 445 U.S. 573 (1980).

[71]502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974).

[72]502 F.2d at 960.

Fitzpatrick,[73] that the items should be admitted into evidence on a theory of inevitable discovery since they would have been discovered upon the issuance of the warrant: "Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."[74] Similar sentiments have been expressed by the highest courts of the states of New York,[75] North Dakota,[76] Oregon,[77] and Massachusetts.[78]

Moreover, it would appear that circumvention of the warrant clause, at least where the police are relatively certain that they possessed probable cause to obtain one, would be precisely the situation that Chief Justice Burger thought unlikely in *Nix v. Williams*. Although suppression of items so discovered would place the police in a worse position than they would have been had the illegality not occurred, such a situation is also one in which a "police officer who is faced with the opportunity to obtain evidence illegally" *will* "be in a position to calculate whether the evidence sought would inevitably be discovered" since the means of consummating that inevitable discovery, obtaining the warrant, is largely within the control of the police. In such cases, "every warrantless nonexigent seizure automatically would be legitimized by assuming the hypothetical alternative that a warrant had been obtained."[79] Given the Chief Justice's aversion in *Nix v. Williams* to "dubious 'shortcuts' to obtain[ing] evidence,"[80] the Supreme Court itself might draw this line on inevitable discovery were the proper case presented.

A second potential limitation on the growth of inevitable discovery might be the continued exclusion of evidence discovered through the unlawful exploitation of an instrumentality that the legislature has chosen to specifically regulate. A prime candidate for continued exclusion would be the fruits of an illegal wire or oral in-

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[73]*See supra* text accompanying notes 14-24. The court also sought to distinguish *Fitzpatrick* in that, at the time that the police in *Fitzpatrick* searched the closet in which the evidence was found, the police possessed the right to do so. In *Griffin*, given a lack of exigency, the police had *no* right to enter the dwelling at the time that they did. 502 F.2d at 960-61.

[74]*Id.* at 961.

[75]People v. Knapp, 52 N.Y.2d 689, 439 N.Y.S.2d 871, 422 N.E.2d 531 (1981).

[76]State v. Johnson, 301 N.W.2d 625 (N.D. 1981); State v. Phelps, 297 N.W.2d 769 (N.D. 1980).

[77]State v. Hansen, 295 Or. 78, 644 P.2d 1095 (1983).

[78]Commonwealth v. Benoit, 382 Mass. 210, 411 N.E.2d 818 (1981). States have excused entries into premises while awaiting a warrant where exigency is found to be present. *See, e.g.*, State v. Nagel, 308 N.W.2d 539 (N.D. 1981); Ketter v. Commonwealth, 222 Va. 134, 278 S.E.2d 841 (1981), *cert. denied*, 454 U.S. 1053 (1982). In State v. Holler, 459 A.2d 1143 (N.H. 1983), one police offer illegally uncovered evidence while another was in the process of obtaining a warrant. The court allowed the evidence to be admitted on an inevitable discovery theory because the searcher had acted in good faith. *Id.* at 1146-47. In State v. Polit, 344 N.W.2d 914 (Neb. 1984), the police *were* armed with a warrant for a search of the house, but searched the accused first. When they did search the house, the police discovered a quantity of lysergic acid diethylamide (LSD). The court permitted the fruits of the premature search of the accused to be admitted on the rationale that, had the police proceeded in the correct manner and searched the house first, they would have discovered the LSD, arrested the accused, and searched him at that time. *Id.* at 917.

[79]People v. Knapp, 52 N.Y.2d 689, 698, 439 N.Y.S.2d 871, 876, 422 N.E.2d 531, 536 (1981).

[80]Nix v. Williams, 52 U.S.L.W. at 4755.

terception.[81] Both Congress[82] and state legislatures[83] have chosen to statutorily regulate this field. For example, not only has Congress mandated a statutory exclusion of illegal wiretap evidence,[84] but criminal penalties for illegal wiretapping have been provided as well.[85] In such circumstances, it might be said that society, through its legislators, has weighed the costs of exclusion of such evidence against the benefits of its admission and determined that the cost is socially acceptable.

Conclusion

However loathe the Supreme Court was to use the term, inevitable discovery will always involve speculation on the part of the trial judge. The court will not have before it an actual discovery based upon an actual independent source. To a large extent, the success or failure of an inevitable discovery theory will rest in the advocatory skills of the prosecutor and the cross-examination skills of the defense counsel. It has been noted that the "prosecution will almost inevitably have to put the investigator's state of mind into issue to bolster the proof. Often it will be grossly self-serving, and defense counsel can argue that self-serving state of mind evidence alone proves nothing if hard evidence does not corroborate it."[86] Conversely, the prosecutor's chore is to create a record, as at the trial level in *Williams II*, that demonstrates not absolute certainty, but a high probability that the proffered evidence would have been found in due course.[87] Testimony concerning the regular course of a police investigation and how that investigation would have led to the illegally obtained evidence might be essential to the case, particularly if the illegally obtained evidence was also located in the police's own files.[88] Finally, as in *Wayne v. United States*, evidence of police procedures which, in that case, would have provided the coroner with the information upon which to

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[81]This exception was suggested in LaCount & Girese, *supra* note 14, at 505. The Court may enforce this exception, however, only to the extent that the statutory wiretap requirements are mandated by the Constitution. In United States v. Caceres, 440 U.S. 741 (1979), evidence had been obtained through a consensual oral interception which, although constitutional, was performed in violation of Internal Revenue Service regulations. The Court nonetheless declined to impose a rule of exclusion for violation of those regulations. *Id.* at 754-57. Military courts have been of two m inds when determining whether to exclude evidence obtained in violation of a regulation, but not in violation of the Constitution. *Compare* United States v. Dillard, 8 M.J. 213 (C.M.A. 1980) (search conducted pursuant to oral authorization where regulation required written authorization; evidence suppressed) *with* United States v. Foust, 17 M.J. 85 (C.M.A. 1983) (administration of oath to informant by commander issuing a search authorization was required by regulation, but not Constitution; evidence admitted); United States v. Holsworth, 7 M.J. 184 (C.M.A. 1979) (violation of time schedule for random vehicle inspection; evidence admitted).

[82]Omnibus Crime Control and Safe Acts, Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2519 (1982)).

[83]*See, e.g.*, Cal. Penal Code §§ 630-37.2 (1981-82 Cum. Supp.); Mass. Gen. Laws. Ann. ch. 272, § 99 (1982-83 Cum. Supp.); N.Y. Crim. Proc. Law §§ 700.50 to .70 (McKinney 1982-83 Cum. Supp.).

[84]18 U.S.C. § 2515 (1982).

[85]*Id.* § 2511(1).

[86]Hall, *supra* note 62, at § 22:15, at 641.

[87]*See supra* text accompanying note 62 and note 62.

[88]*See, e.g.*, United States v. Martinez, 512 F.2d 830 (5th Cir. 1975), in which the court found that, once an independent arrest had focused attention on the accused, the Immigration and Naturalization Service would have checked their files and learned of accused's deportable status.

proceed to perform the autopsy, might be invaluable.[89]

Inevitable discovery, as a constitutional exception to the exclusionary rule, was unanimously adopted by the Supreme Court.[90] The extent to which that unanimity is maintained and inevitable discovery is allowed to expand into areas other than searches and seizures will depend upon the judicious application of the doctrine in the courts. Properly invoked, the doctrine provides an effective means for salvaging an otherwise unsalvagable search and guaranteeing that the trial will be in fact a search for truth.

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[89]Police investigations have been characterized as either routine or as "saturation investigations." In the former case, the fact that the same procedure is repeated in every case has proven persuasive to courts in determining the applicability of inevitable discovery. *See, e.g.*, United States v. Soehnlein, 42 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970) (FBI identification check); Lockridge v. Superior Court of Los Angeles, 3 Cal. 3d 166, 89 Cal. Rptr. 731, 474 P.2d 683, *cert. denied*, 402 U.S. 910 (1970) (search for witnesses). A particular classic case is that of inventory of vehicles, People v. Thompsen, 239 Cal. App. 2d 84, 48 Cal. Rptr. 455 (1965), or personal property, United States v. Finnegan, 568 F.2d 637, 642 n.5 (9th Cir. 1977). In the "saturation investigation," a court may be persuaded that a discovery is inevitable by the amount of police assets dedicated to a particular investigation. *See* Government of Virgin Islands v. Gereau, 502 F.2d 914, 927, 928 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) ("massive" police investigation was in wake of multiple killings); United States v. Falley, 489 F.2d 33, 40 (2d Cir. 1973) (investigator would have contacted *every* customs broker until found target of inquiry). The "saturation" rationale was not lost on the Supreme Court in *Nix v. Williams*, as the Chief Justice pointedly noted the number (200) of volunteers looking for the victim. 52 U.S.L.W. at 4732, 4736.

[90]The dissenters, Justices Brennan and Marshall, only differed from the majority concerning the burden of proof that is to be imposed upon the government to establish the inevitability of the discovery. The dissenters would not follow the inevitable discovery/independent source as closely as did the majority. Instead, to guarantee that those hypothetical sources are confined "to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule," they would require that the government establish inevitability by clear and convincing evidence. *Id.* at 4739 (Brennan & Marshall, JJ., dissenting).

Justice Stevens concurred separately, apparently only to berate the detective who embarked on the "Christian burial speech." To him, *Nix v. Williams* "graphically illustrates the societal costs that may be incurred when police officers decide to dispense with the requirements of law." *Id.* at 4737 (Stevens, J., concurring). Justice White also concurred, apparently only to berate Justice Stevens: "I write separately only to point out that many of Justice Stevens' remarks are beside the point when it is recalled that *Brewer v. Williams* was a 5-4 decision and that four members of the Court, including myself, were of the view that [the detective] had done nothing wrong at all, let alone anything unconstitutional." *Id.* at 4737 (White J., concurring).

Performance Specifications in Commercial Activity Contracts

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I. Introduction

This article compared the Office of Management and Budget's directives on writing and administering performance work statements in service contracts with existing boards of contract appeals and court decisions dealing with disputes over performance specifications. The emphasis is on avoiding problems in contract administration.

II. OFPP Pamphlet No. 4

The Office of Management and Budget (OMB) Supplement to OMB Circular No. A-76[1] directs that performance work statements and quality assurance plans be prepared in accordance with Office of Federal Procurement Policy (OFPP) Pamphlet No. 4[2] This pamphlet explains a technique referred to as "job analysis"[3] which results in a performance work statement (PWS) stating the minimum need for a service[4] as a performance end product.[5] The two main products of job analysis are the PWS and the surveillance plan.[6] The PWS results from a detailed review of the service required which divides that service into specific outputs with associated quality standards.[7] It is the contractor's responsibility to provide the management capable of meeting that level of performance.[8] The surveillance plan insures that systematic inspection procedures are used[9] based upon key performance indicators.[10] Each key performance indicator will have an associated acceptable quality level (AQL).[11] The AQL, expressed as a percentage of allowable error in a period of time, defines the acceptable variation from the standard indicator.[12] Three "Tools" are used to implement the surveillance plan: sampling guide, decision tables, and checklists.[13] The sampling guide is derived from the AQL and lot size called for in statistical tables in Military Standard 105D, Sampling Procedures and Tables for Inspection by Attributes.[14] The

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[1]Office of Management and Budget Supplement to OMB Circular No. A-76 (Revised), Performance of Commercial Activities (Aug. 1983) [hereinafter cited as OMB Supplement].

[2]Office of Federal Procurement Policy Pamphlet No. 4, A Guide for Writing and Administering Performance Statements of Work for Service Contracts [hereinafter cited as OFPP Pamphlet No. 4]; OMB Supplement, part I, ch. 2, para. B1, which states, "Performance work statements and quality assurance plans shall be prepared in accordance with Part II of this Supplement, 'Writing and Administering Performance Work Statements,' Office of Federal Procurement Pamphlet No. 4."

[3]OFPP Pamphlet No. 4, para. 1-1c, which states, "The new technique used in this document is called job analysis. It results in performance oriented statements of work that describe the desired services and their quality."

[4]*Id.* at 1-1a, which states, "[T]his document presents a method of identifying and stating requirements in such a way that the statement of work (SOW) will state accurately our minimum requirement."

[5]*Id.* at 1-3d, which states, "A performance oriented SOW must not contain detailed procedures unless absolutely necessary. Rely on a statement of the required service and an end product."

[6]*Id.* at 1-4, which states. "The design of a SOW and the surveillance plan is based on a systematic analysis of the function to be put under contract or already under contract. The procedure for deriving these two products is called job analysis."

[7]*Id.* at 1-4, which states, "[T]he procedure consists of a step-by-step review of the requirement to arrive at the specific output services and associated standards."

[8]*Id.* at 1-4c(1), which states, "[When the government] specifies the output performance and its quality standard, the contractor must then use the best management to achieve that level of performance."

[9]*Id.* at 1-6c, which states, "The surveillance plan is a document used to make sure that systematic quality assurance methods are used. It assumes that the contractor is responsible for managing and controlling the output of service. The government plan seeks to determine if contractor provided service meets the quantity and quality standards."

[10]*Id.* at 1-6c(1). In writing the surveillance plan, key performance indicators must be determined: "The job analysis phase identified many performance indicators. Not all of these indicators are critical to the service being provided." *Id.* When writing the surveillance plan, the drafter "must decide which indicators to include in the plan, using as criteria, the criticality of the process and its output, the availability of quality assurance manpower, and the adaptability of each indicator to overlap and check many kinds of outputs." *Id.*

[11]*Id.* at 3-3e(2). In addition to performance indicators the SOW will include acceptable quality levels (AQL) for each indicator.

[12]*Id.* at 2-7i, which states, "The acceptable quality level of a standard tells what variation from the standard (that is error rate) is allowed. . . . An acceptable quality level is expressed in terms of a percentage of allowable error in a time period."

[13]*Id.* at 1-6c(3).

[14]*Id.* at 1-6c(3)(a), which states, "The sampling guides used in this regulation are based on statistical techniques called for in Military Standard 105D, Sampling Procedures and Tables for Inspection for Attributes."

lot size is the number of times the services is to be sampled during the AQL period.[15] Given the lot size, the sample size is obtained from a chart in Military Standard 105D.[16] The rejection level is then obtained from another Military Standard 105D chart having sample size and AQL as its vertical and horizontal axes.[17] Finally, a random number table is used to insure a random sample.[18] Decision tables assist in determining who is at fault when a service is rejected.[19] The table correlates various kinds of failures with probable causes. Checklists are used to record the results of sampling or other relevant information.[20]

If a key performance indicator is sampled and rejected, a price deduction is normally provided for in the contract. Each performance indicator is assigned a percentage of the total price for the sample period, *e.g.*, monthly.[21] To calculate the deduction, the dollar amount for the indicator is obtained by multiplying the contract price by the indicator's percentage. That amount is then multiplied by the percentage of rejections in the sample, resulting in the amount to be deducted.[22] Individual rejections are documented on a Contract Discrepancy Report (CDR).[23]

[15]*Id.* at 4-3c(1), which states, "To determine the lot size, estimate (or count) the frequency of the services to be sampled, during the period it is to be sampled."

[16]*Id.* at 4-3d.

[17]*Id.* at 4-3e.

[18]*Id.* at 4-4.

[19]*Id.* at 1-6c(3)(b). "The decision table identifes different kinds of unsatisfactory performance, probable cause factors and the things from which these factors could result."

[20]*Id.* at 1-6c(3)(c). "Checklists are used to record what has been checked by a sampling guide and to record information or contract items not covered by sampling."

[21]*Id.* at 3-3e(2). The SOW equates a percentage of total contract price with each required service or performance indicator.

[22]*Id.* at 5-5.

[23]*Id.* at 5-3c.

This approach to writing the PWS and administering the contract attempts to make the process as mechanical as possible. The subjective aspects of the process are the performance indicator descriptions and the determination that a given sample is defective and therefore rejectable. These are the areas where problems will arise and a review of existing decisions involving performance specifications can assist in avoiding contract administration problems encountered under OFPP Pamphlet No. 4.

III. Performance Specifications

A definition is a good place to start, and the *Aerodex, Inc.*[24] case provides an often cited discussion of specifications. There are three categories of specifications: design, performance, and purchase description. Design specifications provide the details of production. If the contractor follows the design, the government warrants that he or she will meet the desired performance. A purchase description is a "brand name or equal" specification. Performance specifications are discussed by the Armed Services Board of Contract Appeals (ASBCA) in *Aerodex, Inc.*:

> There are also performance specifications, in which are stated the performance characteristics desired for the item, *e.g.*, a vehicle to attain a speed of 50 miles per hour. In such specifications, design, measurements, *etc.*, are not stated nor considered to be of importance so long as the performance requirement is met. . . . [T]he contractor accepts general responsibility for design, engineering and achievement of stated performance requirements. He has general discretion and election as to detail but the work or product is subject to the Government's reserved right of final inspection, and approval or rejection of the work or product.[25]

[24]ASBCA No. 7121, 1962, B.C.A. (CCH) ¶ 3492.

[25]*Id.* at page 17,822.

This definition is supported in a more recent case, *Falcon Jet Corp.*[26] where the Department of Transportation Board of Contract Appeals (DOTBCA) stated, "[T]he Government is entitled to performance in strict compliance with design specifications, performance specifications are not as strictly enforced since the contractor is expected to exercise his ingenuity and select the means for achieving the standard of performance required."[27] Although *Aerodex, Inc.* and *Falcon Jet Corp.* provide good discussions of performance specifications, neither was a true performance specification case. Both were decided based on design specification law.

IV. Construction Cases

Performance specification cases historically involved supply and construction contracts, which will be discussed separately. In *Tranco Industries, Inc.*[28] the contract was to modify and paint three fuel storage tanks at Cannon AFB, NM. Contract drawings required a new concrete ring around the circumference of each tank. The specifications required that the concrete be "tamped" to insure filling all voids in the reinforced form. The government ordered Tranco to tamp mechanically, which caused some delay and extra work but was never actually done. The ASBCA held that "since the specifications did not require a particular method of tamping concrete the order to tamp the concrete mechanically was a constructive change."[29] The requirement to "tamp" to "fill voids" was a performance specification and the method was discretionary so long as the contractor filled the voids. The overall specification was a "hybrid" because it contained both design and performance requirements.

In *Tutor-Saliba,*[30] the contract was for construction of a flight test mission control complex at Edwards AFB, CA. It included a requirement for diesel engine generators to supply standby power. The engine specifications required a "continuous service, stationary" engine. Performance requirements such as "solid-injection, diesel, water-cooled, two or four stroke cycle" were all specified. No horsepower rating was specified, only the output characteristics of the generator that was run by the engine. The contractor delivered an electric-set engine which ran the generator and provided the proper output and met the engine requirements. The government wanted a larger, higher horse power, "industrial" engine and argued that the term "continuous service, stationary" defined the larger engine. The ASBCA held, "We are persuaded by the evidence that the Government's position is unreasonable and that it is appropriate to use an electric generator-set engine to produce electricity."[31] This was a case of an ambiguous specification where the board gave preference to the plain meaning of the words used instead of the government's interpretation.

In *Diamond H, Inc.*,[32] the contractor was to construct 136 drain relief wells at Grenada Dam, MS. Part of this effort included pouring concrete in areas normally covered with water. The concrete was to be poured "in the dry" which required the contractor to lower the water table or "de-water" the area of each well. The contractor's bid was based on pumping to de-water the wells. This worked in all but thirty-six wells where he had to use a more costly method. Although the contractor argued that the specifications were defective, the Army Corps of Engineers Board of Contract Appeals (ENGBCA) concluded that "the contractor had a basic oglibation to de-water by whatever means was necessary to pour patch concrete 'in the dry' and that pumping the new wells was only one of the methods it might have to employ."[33] The requirements to "de-water"

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[26]DOTBCA No. 78-32, 82-1 B.C.A. (CCH) ¶ 15477.

[27]*Id.* at pg. 76,691.

[28]ASBCA Nos. 26305, 26955, 26989, 83-1 B.C.A. (CCH) ¶ 16414.

[29]*Id.* at pg. 81,657.

[30]ASBCA No. 24779, 82-2 B.C.A. (CCH) ¶ 15873.

[31]*Id.* at pg. 78,737.

[32] ENGBCA No. 4304, 82-2 B.C.A. (CCH) ¶ 16066.

[33]*Id.* at pg. 79,702.

and "pour in the dry" were performance specifications and, in this case, the government refrained from directing the method and won the appeal.

H.I. Homa Co. Inc.[34] involved a contract in the former Panama Canal Zone for the alteration of a building. The general provisions provided that a schedule for performing all work be submitted to the contracting officer for approval. The contractor submitted a "bar chart." The contracting officer disapproved the bar chart and required a "network analysis"-type progress schedule. The contractor complied and submitted a claim for the cost of developing the new schedule. The schedule required that start and completion dates for salient features be shown and that the percentage of work scheduled for completion at any one time be indicated. Also, the "type and size" should be "acceptable to the Contracting Officer." Since the bar chart satisfied the date and percentage requirements, the ENGBCA held that the contracting officer's direction for a more detailed method was a change; the time and percentage requirements were performance requirements met by the bar chart. The contracting officer could not direct a specific method of complying with those requirements.

In *Elrich Construction Co.*,[35] the contract was for renovation of a federal building in Arlington, VA which included the installation of individual room air cooling/heating units. Drawings depicted the overall dimensions of the enclosures; however, the fan coil units inside the enclosures were specified by performance requirements, *i.e.*, entering and exiting air and water temperatures. The contractor selected fan coil units smaller than the enclosure and extension collars were required to mate the coil unit with the vents in the enclosure. The contractor argued that the drawings were defective. The General Services Board of Contract Appeals (GSBCA) held that:

> Elrich was bound under the performance specifications here involved, to deliver conditioned air at specified temperatures into the rooms to be served by the installed units. . . . Without the extension collars Elrich could not meet the specifications. As general contractor, Elrich contracted for that risk and must bear the consequences of its failure to meet the specifications.[36]

Elrich illustrates how performance specification contracts are supposed to work. In *B.E.A.M., Inc.*[37] we see another illustration of well meaning but faulty contract administration. The contract was to add a prefabricated metal building to the roof of a VA medical center in Kansas City, MO. The method of attachment was not specified in the contract; only the loads which the building was to withstand were specified. Following award. B.E.A.M. submitted its proposed method of attaching the new building. The government rejected the proposed method on the basis that it was not capable of withstanding specified loads. The contracting officer required a different approach which B.E.A.M. developed and implemented. The specified loads were the attachment performance requirements and rejection for failure to meet that requirement would be proper. The government, however, could not prove that the first method proposed was inadequate. The Veteran's Administration Board of Contract Appeals (VABCA) stated:

> The Government cites design load criteria in the contract specifications in support of its rejection of B.E.A.M.'s proposal; however, it has presented no engineering date, calculations, or other empirical evidence to establish that the Appellant's proposed method was structurally unsound or unreasonable. Accordingly, we find that the Government's rejection of B.E.A.M.'s proposal was not supported by the evidence, was not reasonable, and constituted a change in the contract.[38]

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[34]ENGBCA Nos. PCC-41,-42, 82-1 B.C.A. (CCH) ¶ 15651.

[35]GSBCA No. 5821, 81-2 B.C.A. (CCH) ¶ 15291.

[36]*Id.* at pg. 75,709.

[37]VABCA No. 1520, 81-2 B.C.A. (CCH) ¶ 15242.

[38]*Id.* at 75,461.

In *B.E.A.M.*, the government could not prove that the initial method for rejection was correct.

These six construction cases illustrate two problem areas: method of performance and interpretation of performance requirements. In *Tranco, H.I. Homa*, and *B.E.A.M.*, the government directed a particular method of performance which resulted in a change to the contract for which the government was required to pay. In *Diamond H.* and *Elrich*, the government kept quiet and won. The *Tutor-Saliba* case illustrates the interpretation or ambiguity problem with understandable results.

V. Supply Cases

Many supply contracts also use performance specifications. *Johnson Controls, Inc.*[39] illustrates a contract administration problem where a subcontractor was not given credit for an innovative approach. The contract was for a temperature control/central monitoring system for a complex of buildings. Johnson was to provide a computer system for the prime construction contractor, Turner Construction Corp. (this was a construction contract but the computer system is similar to a supply situation). The bid package specified performance requirements but was drafted around equipment made by Honeywell. One of the requirements was that the system be redundant, providing a backup mode in the event the central processing unit (CPU) shut down. The model Honeywell system provided this redundancy through extra "hardware", *i.e.*, a second CPU. Johnson met the redundancy requirement through programming or "software." This meant that Johnson did not have the expense of a second CPU. Although Johnson's single CPU approach was evident in its proposal, the contracting officer was not aware of it until performance and refused to approve the work without the second CPU. The ASBCA held that:

> The evidence establishes that the JC 80/55 met the performance specifications with the hardware proposed by Johnson. We further hold that when Turner, on behalf of the Government, insisted on more equipment than contemplated by Johnson and Johnson complied, a change in the specification was made by Turner on behalf of the Government and an equitable adjustment is due Johnson.[40]

The government ended up paying an additional $221,150, plus litigation costs when the programming or "software" approach met the specifications in the first place.

In *Shuey Aircraft, Inc.*,[41] the Air Force was purchasing 1461 retainer assemblies consisting of a thin, hollow copper tube about eight inches long braised to a small brass head. The specifications were primarily design specifications except for the surface finish conditions which were stated in terms of allowable contaminates. Shuey could not initially meet the surface requirements and had to develop a special process to do so. A claim for the extra expense was denied and appealed. The ASBCA held that:

> [A]ppellant was free to choose the manufacturing process for achieving the surface conditions called out on the drawings, no method being specified. As to this limited aspect the contract was like a "performance" contract and, as in such a contract, appellant assumed responsibility for the means needed to obtain the required result.[42]

A closer case is *Continental Rubber Works*[43] where the contractor appealed a termination for default of a contract for 115 thirty-five-foot lengths of seven-inch interior diameter nonmetallic hose used in refueling ships. The contract contained both design and performance requirements. The performance requirements were mechanical characteristics of the material such as tensile strength, elongation,

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[39]ASBCA No. 25714, 82-1 B.C.A. (CCH) ¶ 15779.

[40]*Id.* at pg. 78,144.

[41]ASBCA No. 23477,80-2 B.C.A. (CCH) ¶ 14776.

[42]*Id.* at pg. 72,933.

[43]ASBCA No. 22447, 80-2 B.C.A. (CCH) ¶ 14754.

and adhesion. Along with these characteristics, "suggested formulations" were included giving the ingredients in parts by weight. Appellant failed to sustain a commercial impracticability argument and the board held that:

> [T]he appellant was responsible contractually for the means, know-how, and processes necessary to construct the hose to the performance requirements of the specification. The fact that the specification included a list of suggested formulations is not sufficient in this case to shift the risk of constructing the hose from the contractor to the Government.[44]

The Board relied on the discussion of performance specifications in *Aerodex, Inc.* to make this decision.

Even performance specifications that have never been successfully met can be enforced. In *Piasecki Aircraft Corp.*,[45] the Navy contracted for 867 banner tow targets. They were to be made of radar reflective cloth, measure 7½ feet by 40 feet and capable of being towed behind an aircraft for air-to-air gunnery practice. The contract did not specify the material or manufacturing process to be used. The relevant performance requirement in this case was "fraying and ripping." The only fraying or ripping allowed was within two feet of the trailing edge. A prior contractor failed to meet this requirement. Piasecki's first articles likewise failed, and the contract was terminated for default. The contractor argued superior knowledge based on *Helene Curtis Industries*,[46] the ASBCA, however, found that the government had no knowledge of banner materials superior to that of the contractor. The board ultimately held that:

> Appellant undertook performance with the understanding that some developmental effort on its part would be required. Appellant thus assumed a substantial risk that meeting the performance requirements might not be practicable within contract price and time limitations, a risk not improperly augmented by the Government. . . . Failure of the appellant to submit acceptable first articles justified termination of the contract for default.[47]

Piasecki failed to recognize the degree of risk involved and should have insisted on a cost-type contract. This case illustrates the power of performance specifications if the contractor accepts the risk and the government properly administers the contract.

The Court of Claims addressed performance specifications in *Penguin Ind.*[48] The contract was for ignition cartridges. Part of the cartridge is a cardboard tube, one end of which is glued to a hole in a disk. Neither the drawings nor the detailed specifications described the amount of glue to be used, or where the glue was to be applied. One lot out of twenty-seven was rejected based on an excess of glue which restricted the flow of gases. The contractor appealed the rejection. The court held that:

> As to this limited aspect, the contract was more like a "performance" contract than a "design" specification and, as in a performance contract, the contractor must assume responsibility for the means and methods selected to achieve the end result. . . . In short, it had the obligation to adopt and use a process of gluing that would achieve, in a workmanlike manner, a functional cartridge.[49]

The court included general workmanship as a performance requirement justifying rejection.

In *Gould, Inc.*[50] the contract was for 220,000 magnesium dry cell batteries for PRC-25 radio

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[44] *Id.* at pg. 72,829.

[45] ASBCA No. 18783, 78-1 B.C.A. (CCH) ¶ 12886.

[46] 312 F.2d 774 (Ct. Cl. 1963), where the court applied a superior knowledge test and found that the government had a duty to disclose manufacturing processes to the contractor.

[47] ASBCA No. 18783, 78-1 B.C.A. (CCH) ¶ 12886.

[48] 530 F.2d 934 (Ct. Cl. 1976).

[49] *Id.* at 937.

[50] ASBCA No. 16869, 75-2 B.C.A. (CCH) ¶ 11534.

sets. During negotiations, the cost data was based upon the use of a 54 A cell design. During contract performance, Gould shifted to a less expensive 18 CD cell design that met the performance requirements. The specifications did not designate any cell configuration. After invoking the parole evidence rule, the board held:

> [U]nder the terms of the contract the specification was strictly of the performance type, leaving the appellant with a right to select any type of cell configuration it considered suitable for compliance with performance requirements, and that the exercise of its option by a conversion to a different cell configuration during performance did not constitute a change. . . .[51]

The board denied the government's demand for a deductive change and the contractor's counterclaim under the value engineering provisions.

In *Monitor Plastics Company*[52] the Navy contracted for prototype sonar dome panels to determine, by fabrication and testing, the feasibility of mass production. Similar panels had been produced by the Navy by bonding small sections together. The contract was to demonstrate the feasibility of producing the panels in one piece. The precise manufacturing process was not stated, and the specification was a hybrid compilation of design, performance and purchase description specifications. Monitor was not able to produce the panels and was terminated for default. Monitor argued that the specifications were defective; however, the ASBCA held that appellant failed to prove that performance was impossible or impractical. After a good discussion of specifications, the board held that:

> The contract specifications describe an end product. The size given is the size of the final end product after complete fabrication. How the finished product is to be manufactured, except for vacuum pouring of the rubber, is left to the contractor's discretion and know-how. There is nothing in the contract which tells the contractor what tools to use or how to use them. He is not told how to mix the chemical components for the rubber; he is not told to pour the rubber in single, continuous or multiple mixes. Thus, the contract specifications describe what was to be made, but left to the contractor's devices generally how to do it. The evidence is not sufficient to show a design defect as distinct from a processing difficulty.[53]

Monitor Plastics, like Piasecki Aircraft, assumed the risk of meeting a specification that had never been met before. Monitor argued that a fixed price contract was inappropriate. Perhaps so, but Monitor should have thought about that before signing the contract. The contract was properly administered, and the specifications withstood an impossibility attack.

General Dynamics Corp.[54] involved a contract for digital communications equipment. It was a negotiated performance specification contract. During negotiation, General Dynamics demonstrated certain high speed card readers and submitted its proposal based on that equipment or its equivalent. After award, the brand of the card readers was changed; the contracting officer directed, however, that the brand originally demonstrated be delivered. General Dynamics complied and subsequently filed a claim. The effect of this demonstration was considered by the ASBCA:

> Having committed itself to the performance specifications appellant was bound not only to achieve the results called for by the contract but also to furnish a product as good as what it had demonstrated should that happen to be better than what the contract otherwise required. Its use of the word "equivalent" could mean no less and the Government could demand no more.[55]

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[51] *Id.* at pg. 55,051.

[52] ASBCA No. 14447, 72-2 B.C.A. (CCH) ¶ 9626.

[53] *Id.* at pg. 44,971.

[54] ASBCA No. 11928, 70-2 B.C.A. (CCH) ¶ 8401.

[55] *Id.* at pg. 39,062.

The demonstration set the minimum needs of the specification which became contractual. Unfortunately, the contracting officer did not allow General Dynamics to prove the equivalency of the new card readers and the government lost the case. The board noted:

> The legion of cases illustrating the importance of including within the terms of the contract the rights intended to be retained, not to mention the obligation to read the terms included prior to entering into the agreement, apply not only to those who deal with the sovereign but also to the sovereign as well.[56]

Another example of the effect of negotiations on performance specifications is *Polarad Electronics Corp.*[57] The contract was for radar. During negotiations, specific brands of an RF generator, balanced mixer, and crystal diodes were agreed upon. It was later determined that these components could not meet the performance specifications. The board evaluated the effect of the negotiations:

> On the finding of fact respecting the circumstances attending the negotiations as they progressed to execution of the contract, the negotiated contract as they entered into called for the use of the OKI Klystrom and the DeMornay-Bonardi balanced mixer, with IN53 crystal diodes, as components of the end product radar set, the obligation being the same as it would have been had these components been expressly called out in the contract. . . .[58]

The contractor won his appeal because what had occurred during negotiations impaired the ability to enforce the purely performance specifications.

Nine supply performance specification contracts have been summarized. *Shuey, Continental, Piasecki, Penguin,* and *Monitor* illustrate the power of performance specifications in shifting risk to the contractor. Two problem areas were illustrated. *Johnson* and *Gould* presented the situation where the government directed a method of performance. *General Dynamics* and *Polarad* dealt with the effect of negotiations on performance specifications.

VI. Service Cases

Tillipman Elevator Co.[59] dealt with a contract for maintenance of elevators at a federal building in Los Angeles, CA. The contract specifications required the contractor to perform all scheduled maintenance and make virtually all repairs and replacements that became necessary. Tillipman failed to win the follow-on contract, and another contractor reported that sheave bearings and hoist cables needed repair or replacement due to normal wear and tear. The cables were thirteen years old. Tillipman's contract was awarded on 3 August 1978 for a three-year period commencing 1 September 1978 and ending 31 August 1981. The government found Tillipman liable for these and other items and deducted the amount it paid another contractor to make repairs from Tillipman's other government contracts. The GSBCA decided:

> Unfortunately for appellant, the contract between the parties places the cost of wear and tear on appellant. . . . Over a three year cycle, the statistical likelihood of a given number and variety of failures ought to be sufficiently susceptible of accurate determination to permit a good bid estimate. . . . Whatever deficiencies existed in the elevators on September 1, 1981, that were the result of either wear and tear on improper maintenance were appellant's contractual responsibility.[60]

The maintenance requirements were performance requirements and placed responsibility for thirteen years of wear and tear on the three-

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[56] *Id.* at pg. 39,063.

[57] ASBCA No. 12992, 70-1 B.C.A. (CCH) ¶ 8304.

[58] *Id.* at pg. 38,531.

[59] GSBCA No. 6663, 83-1 B.C.A. (CCH) ¶ 16344.

[60] *Id.* at pg. 81,249.

year contractor. The beneficial risk allocation inherent in performance specification contracts applies to service contracts and is preserved by proper contract administration.

In *Space Services of Georgia, Inc.*[61] the contract was for food services at Lowry AFB, CO. Performance was from 1 August 1976 to 31 July 1977 with two one-year renewal options. The options were exercised, extending the period of performance through 31 July 1979. The performance specifications included "furnishing a sufficient number of qualified personnel to operate the above functions in a timely and completely satisfactory manner. . . ."[62] During the first six months of 1979, the contractor devoted substantial extra effort and personnel in an attempt to win a competition for the best food services establishment in the Air Force. His efforts succeeded and he was awarded the "Hennessey" award for 1979. After receiving the award, his personnel strength was reduced to the same level as before the competition, and his quality of performance was as high as before 1979, which met or exceeded all requirements of the contract. Unfortunately, the Chief of Services at Lowry had become accustomed to the award winning service and continually complained, both orally and in memos, about the reduction in personnel. He eventually got the contractor to increase manpower which resulted in a claim. The ASBCA held:

> [A]ppellant has met its burden of showing that respondent's Chief of Services by both word and deed required appellant to perform work in excess of that required of it. . . . The question must be asked, if respondent was not concerned by [method] performance why did it concern itself with the number of employees on the job. The respondent did not have the right to insist upon any specific number of employees. . . .[63]

The board relied upon a similar case involving janitorial services at the Bergstrom AFB hospital where the government required a certain number of employees.[64] Space Services of Georgia has contracts at other installations and has litigated disputes covering various aspects of service contracts.[65]

In *Clarkies, Inc.*[66] the subject of deductions was addressed. The contract was for janitorial services at the Naval Air Development Center, Warminster, PA. The contract allowed deductions for unsatisfactory performance. When the inspectors evaluated performance in a given area, "if any part of an area was found to be dirty, the entire area was marked as an area of non-performance."[67] No credit for any portion of the room or area that was clean was given. The ASBCA discussed the burden of proof, "We think it to be indisputable that since the Government reduced the contract price it had the burden of proof with respect to establishing that the price deduction taken reasonably represented the reduced value of appellant's services."[68] The contractor's appeal was sustained, and the board held, "The 'all or none' inspection procedure employed by the Government was improper under the circumstances and an unfair and unreasonable payment penalty to impose on the appellant."[69]

The *Clarkies* case was cited in the Comptroller General's decision in *Environmental Aseptic Services Administration & Larson Building Care, Inc.*[70] A number of protests

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[61]ASBCA No. 25793, 81-2 B.C.A. (CCH) ¶ 15250.

[62]*Id.* at pg. 75,490.

[63]*Id.* at pg. 75,493.

[64]ASBCA No. 21519, 78-1 B.C.A. (CCH) ¶ 12941.

[65]ASBCA No. 25655, 83-1 B.C.A. (CCH) ¶ 16189; ASBCA No. 26021, 82-2 B.C.A. (CCH) ¶ 15952; ASBCA No. 24877, 81-1 B.C.A. (CCH) ¶ 14906; ASBCA No. 20885, 76-2 B.C.A. (CCH) ¶ 12041.

[66]ASBCA No. 22784, 81-2 B.C.A. (CCH) ¶ 15313.

[67]*Id.* at pg. 75,831.

[68]*Id.* at pg. 75,832.

[69]*Id.*

[70]Comp. Gen. Dec. B-207771 (28 Feb. 1983), 83-1 C.P.D. ¶ 194.

were submitted "concerning the methodology employed by the Air Force to acquire various base-level services, including hospital housekeeping, custodial services, grounds maintenance and stocking commissary shelves."[71] The contractors objected to the quality assurance provisions that provided for deductions "for unsatisfactory service greatly exceeding the value of the services."[72] They also complained about their inability to reperform the service and avoid the deduction. The Comptroller General took jurisdiction despite an Air Force argument that this was a matter of contract administration. It held that the invitation for bid provisions violated the liquidated damages provision of DAR§1-310. The Defense Acquisition Regulation (DAR) provides that an amount of the liquidated damages "fixed without reference to probable actual damages may be held to impose a penalty and therefore be unenforceable."[73] The decision relied upon an example where a random sample of 200 "cleanings" is taken from the possible total of 7,080 cleanings in a month. Assuming that forty cleanings are unacceptable, the deduction is calculated as follows:

40 (defects) × .60 (percentage value of room cleaning)
200 (sample size)
$10,000 (total price for monthly cleaning) = $1,200.

This method of calculation is the same as described in section II of this article and OFPP Pamphlet No. 4 and must be included in Army solicitations. The problem in this case arose out of the Performance Requirement Summary (PRS), which was the equivalent of the Performance Work Statement (PWS) now used. For each "cleaning" the PRS specified a checklist of fourteen tasks and provided, "If a task fails, the room fails for that day."[74] Since this allowed for a deduction without regard to the percentage of the fourteen tasks satisfactorily completed, the Comptroller General found the liquidated amount unreasonable and sustained that aspect of the protest. With respect to the re-performance rights, the contractors argued that the inspection clause allows re-performance when the defect can be corrected without penalty. The Comptroller General agreed with the Air Force's position that timely performance was the key requirement and denied that portion of the protest.

The boards of contract appeals are becoming more involved in similar questions. In *Moustafa Mohamed*,[75] a government motion for reconsideration of finding of government breach of contract for improper default was denied. On the issue of inspections the GSBCA held, "We do require, however, that the Government act reasonably and fairly and that it proceed on the basis of real and not concocted deficiencies. . .. The inspector's findings of critical discrepancies were largely arbitrary and capricious, and the crucial ones had little or no basis in fact."[76] With respect to the right to default, the board held, "It cannot reasonably be argued that the parties intended that any discrepancy, however slight, in performing a food service contract could result in termination of the contract for default without an opportunity to cure."[77] In *Government Contractors, Inc.*,[78] the issue was whether 29,996 light fixtures had been cleaned. The burden of proof issue was addressed by the board: "When deductions are taken for work not performed, or performed unsatisfactorily, the Government has the burden of presenting a prima facie case that the contractor did not meet the requirements of its contract."[79] The timeliness of notice of deductions is not as much of a problem as burden of proof. In *Custodial*

[71] *Id.* at pg. 2.

[72] *Id.*

[73] *Id.* at pg. 6.

[74] *Id.* at pg. 4.

[75] GSBCA Nos. 5760-R, 5812-12, 5901-R, 83-2 B.C.A. (CCH) ¶ 16805.

[76] *Id.* at pg. 83,524.

[77] *Id.* at pg. 83,525.

[78] GSBCA No. 6776, 84-1 B.C.A. (CCH) ¶ 16934.

[79] *Id.* at pg. 84,243.

Guidance Systems, Inc.,[80] deductions were taken late without prior notice to the contractor. The board held, "Before we will penalize one party for late or nonexistent notice, we will insist on a showing of some resulting injury to the other."[81]

The relationship between the performance specifications, contract administration, deductions and default appears to be the major area for litigation in current and future service contract cases. In *Handyman Building Maintenance Co.*,[82] the contract administration was highlighted. It was a janitorial services contract. On the first day of the contract a deduction was taken for omitted services which were not scheduled to be performed until after office hours on that day. They were properly performed after the inspector left. On the second day, the government placed the contractor on a ninety-day probationary period for the performance problems encountered on a previous contract. The GSBCA noted, "These two unwarranted actions started the administration of the contract in an atmosphere of unnecessary hostility and confrontation, and lend some credence to Handyman's allegations of discrimination."[83] The board commented upon the administration as a whole: "The procedural discrepancies in the administration of this contract, as disclosed in the appeal file, are almost as numerous as the omitted services on the part of the contractor."[84] Next, the concept of deduction was discussed. The board viewed deductions as a recognition by the government that omissions of the service are anticipated and should not jusfity default in each instance:

> Each individual omission of a service is technically a default, but not necessarily a basis for default termination when the Government has indicated that it expects such omissions to occur. The contract may be terminated for default only when the number of individual defaults have accumulated to the point where it may be said that the contract has not been substantially performed.[85]

The concept of substantial compliance is based on the deduction clause. The default was converted to a termination for convenience.

The next case to be considered is probably the best case to date dealing with a service contract. In *Orlando Williams*,[86] the Army defaulted appellant's custodial service contract covering Fort Bragg. Although the term "Performance Requirements Summary (PRS)" was used rather than "Performance Work Statement (PWS)," the contract followed the procedures of OFPP Pamphlet NO. 4. Several issues were raised. Appellant alleged racial discrimination, however, the board found it had no jurisdiction over that issue. Also, the "filthy" initial condition of the buildings was determined to be appellant's risk based on the site inspection clause. The significant aspect of the case is the challenge to the method of inspection, which essentially was a challenge to OFPP Pamphlet No. 4. The ASBCA commented upon the PRS:

> Performance Requirements Summary (PRS) which listed the contract requirements considered most critical to the satisfactory performance of the contract and indicated the maximum allowable degree of deviation from perfect performance.... Thus was defined as the Acceptable Quality Level (AQL) and represented the level of quality normally achieved in in-house Army operations.[87]

A chart identifying the standard of performance, an AQL, and a surveillance method and deduction value assigned for each task was

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[80]GSBCA No. 6952, 83-2 B.C.A. (CCH) ¶ 16749.

[81]*Id.* at pg. 83,283.

[82]IBCA Nos. 1335-3-80, 1411-12-80, 83-2 B.C.A. (CCH) ¶ 16646.

[83]*Id.* at pg. 82,775.

[84]*Id.* at pg. 82,774.

[85]*Id.* at pg. 82,775.

[86]ASBCA Nos. 26099, 26872, 84-1 B.C.A. (CCH) ¶ 16983.

[87]*Id.* at pg. 84,754.

provided. The random sampling criteria of MIL-STD-105D were used along with Contract Discrepancy Reports, all specified in OFPP Pamphlet No. 4. The random sampling was compared with previous systems:

> While under the previous conventional inspection system the contractor had an opportunity to correct deficient services immediately upon inspection, under the random sampling system the contractor did not know which buildings were inspected on any given day and did not learn of deficiencies the inspectors had observed and recorded until at the end of the workday when correction no longer was feasible. Even more importantly, under this system the evaluation of performance on a "pass" or "fail" basis was recorded at the time the inspection was performed and could not be changed by subsequent corrective action.[88]

The critical issue is the inability to cure under random inspection. As previously discussed in *Environmental Aseptic Services*, the Comptroller General agrees that timeliness is critical. Likewise the board held," [T]he failure to perform a daily task is not cured by the performance of a similar task which is also required the following day. Each such failure is a default."[89] The appeal was denied. The contract also contained a specific provision allowing for default based on deficiencies for which deductions had been taken. This clause was also enforced:

> The rule that the Government must elect between termination for default action or deductions for the same unsatisfactory services, as announced in *W.M. Grace, Inc.*, ASBCA No. 23076, 80-1 BCA 14,256, and other cases is not for application here because the contracts involved in those cases did not contain a provision similar to paragraph 4.2.3 of the Performance Requirements Summary.[90]

[88] *Id.* at pg. 84,599.

[89] *Id.* at pg. 84,576.

[90] *Id.* at pg. 84,601.

The procedure required by OFPP Pamphlet No. 4 has been sustained by the ASBCA, and at least partially by the Comptroller General. The "pass" or "fail" procedure in *Orlando Williams* sounds much like the "all or nothing" approach criticized in *Clarkies, Inc.* and *Environmental Aseptic Services*. The pass or fail approach will probably be enforceable if it takes into account substantial compliance and if any deductions taken are tied to actual damage.

The U.S. Claims Court considered the issue of the termination of a janitorial service contract in *Cervetto Building Maintenance Co. v. United States*.[92] Cervetto collected 473 deficiency reports in the first three months of performance. If the deficiency related to a partially cleaned room the contractor was required to correct the problem; no correction was required for a total failure to clean a room. A total of $1,339.91 in deductions was taken for the defective performance. Most of the 473 deficiencies related to partially cleaned rooms. The contract was terminated for default. Cervetto argued that the government could not penalize him twice for a given deficiency, *i.e.*, first deduct and then terminate. It was an election of remedies defense. The court rejected this argument as "elegant" but leading to an "absurd result," and held that "when deficiencies become the rule, as they did in this case, necessitating corrections or deductions virtually every day, overall performance under the contract can be deemed unsatisfactory even though individual problems are resolved."[92] *Cervetto* also dealt with a "much closer question" involving a cure notice and the ten-day cure period. The contracting officer testified that he made the decision to terminate within the ten-day period even though the actual termination did not occur until after the period. The court held:

> The relevant question is not the timing of the decision to terminate but whether, in making the decision, the defendant considered all of the contractor's efforts to

[91] 2 Cl. Ct. 299 (1983).

[92] *Id.* at 301.

> comply with the cure notice. Thus it is entirely permissible for the government to make a tentative decision to terminate the contract before expiration of the cure period, so long as the decision is subject to reconsideration. . . . However, when an irrevocable decision to terminate is made before the end of the cure period, and a contractor's timely efforts to cure are ignored, the termination is improper.[93]

The court sustained the appeal and converted the termination for default to a termination for convenience.

VII. Conclusion

Avoiding problems in performance specification contracts is possible. Tell the contractor what you want in clear terms, do not tell him how to do it, and use reasonable inspections. As the cases indicate, there are fewer problems in supply contracts than construction contracts. Theoretically, the supply contractor could be given the contract and told not to come back until the date for acceptance testing. Construction requires more government presence because performance is covered up as work progresses. We must inspect the pouring of concrete while it is being done or lose much of our ability to inspect. As a result of the increased government interaction with the contractor, problems increase. Service contracts require even more government interaction because our ability to inspect is lost shortly after the service has been performed. If the bus gets there at 3:30 rather than 3:15, and our inspector isn't there to see it, the "defect" in delivery is unknown. Delivery and acceptance in service contracts is a continuous real time process. OFPP Pamphlet No. 4 recognizes this fact and the surveillance plan is the solution. The continued emphasis on commercial activities and contracting-out will result in much more litigation involving performance specification contracts. Challenges to OFPP Pamphlet No. 4 and its implementation will continue. The liquidated damage problem commented upon by the Comptroller General may be an inherent shortcoming of an inspection system primarily designed for supply contracts. If it is a problem, it should only apply to quantum and will not defeat default. If the performance indicators in the PWS are precise, contract administration under OFPP Pamphlet No. 4 could be rendered mechanical. This appears to be the ultimate goal of the pamphlet. Terms such as "on-time" can be quantified using specified times and and AQL, *i.e.*, plus or minus so many minutes. Other concepts such as "clean," "good tasting," "workmanlike," "acceptable," *etc.*, are not readily quantified. There will always be an element of subjectivity in the PWS because it is impossible to write a design specification for a service contract. Where performance indicators can be quantified, the system should always work. Where subjectivity remains we must be reasonable; don't argue that "continuous service, stationary" means a certain horse power as was argued in *Tutor-Saliba*. The contractor bases his or her interpretations on economic factors which realistically correspond to the minimum needs theory. The contractor's motivation is economy, as our should be, and his or her interpretations should be considered carefully.

The cases reviewed illustrate specific factual situations, but generally prove that more government involvement in methods of performance leads to more problems. Service contracts require more involvement than any other type. OFPP Pamphlet No. 4 provides an approach that limits that involvement to a surveillance plan based on statistics. It continuously tests an end product service by discrete indicators agreed upon by the parties. If OFPP Pamphlet No. 4 is implemented correctly it ought to work.

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[93] *Id.* at 303.

Vicarious Liability for Conspiracy: Neglected Orphan in a Pandora's Box

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Introduction

Conspiracy is recognized by both federal and military courts as a distinctly dangerous crime. Mr. Justice Frankfurter described its nature in *Callanan v. United States:*

> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.[1]

The distinctive nature of conspiracy has led to severe criminal penalties, including punishment for the conspiracy itself, separate from and in addition to punishment for any substantive offenses committed in the course of the conspiracy.[2]

The offense of conspiracy has two elements: an agreement between two or more persons to commit a substantive criminal offense, and an overt act by any one of the conspirators in furtherance of the agreement.[3] Once the offense of conspiracy is established, criminal liability attaches to each conspirator for any substantive offense committed by any conspirator in furtherance of the conspiracy.[4] It is not necessary for the individual conspirator to have participated in any way in the substantive offense, so long as it was committed while the conspirator remained a member of the conspiracy.[5]

Liability for substantive offenses committed in furtherance of a conspiracy may therefore be imputed to each member of the conspiracy without regard to actual participation in the substantive offenses; hence, the term "vicarious liability."[6] Where the individual conspirator actually participated in the substantive of-

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[1]364 U.S. 587, 593 (1961). The United States Supreme Court more recently approved this description by quoting it in its entirety in Iannelli v. United States, 420 U.S. 770, 778 (1976), as did the Court of Military Appeals in United States v. Washington, 1 M.J. 473, 475 n.3 (C.M.A. 1976). This paragraph, with minor modification, can also be used by prosecutors as an effective argument on sentencing.

[2]At common law, conspiracy was only a misdemeanor and merged with the substantive offense. Under prevailing federal and military law, however, conspiracy does not merge and is separately punishable. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640 (1946); Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 160 [hereinafter cited as MCM, 1969]; Manual for Courts-Martial, United States, 1984, Part IV, para. 5c(8) [hereinafter cited as MCM, 1984]; Yawn, *Conspiracy*, 51 Mil. L. Rev. 211 (1971); Annot. 37 A.L.R. 778 (1925); Annot. 75 A.L.R. 1405 (1931).

[3]18 U.S.C. § 371 (1982); Uniform Code of Military Justice art. 81, 10 U.S.C. § 881 (1982); MCM, 1969, para. 160; MCM, 1984, Part IV, para. 5b. *See also*, Yawn, *Conspiracy*, 51 Mil. L. Rev. 211, 214-22 (1971).

[4]Nye & Nissen v. United States, 336 U.S. 613 (1949); *Pinkerton v. United States*; United States v. Gaeta, 14 M.J. 383 (C.M.A. 1983).

[5]*Id.*

[6]Also termed co-conspirator liability or complicity.

fense, either directly or indirectly, liability may also be based on the law of principals, either as a principal or as an aider and abettor.[7]

This article discusses vicarious liability and its validity as a theory of prosecution in courts-martial. The discussion is designed to emphasize the utility of the theory and to focus on the need for jury instructions on the theory.

Vicarious Liability for Conspiracy—The Neglected Orphan

"A criminal conspiracy is a partnership in crime."[8] "And so long as the partners act they act for each other."[9] These two statements highlight the rationale of the United States Supreme Court in deciding *Pinkerton v. United States*. *Pinkerton*, the seminal case in the area of vicarious liability for conspiracy, determined that a conspirator could be held criminally liable for substantive offenses committed in furtherance of the conspirary, even though the conspirator was neither a principal nor an aider and abettor.[10] Mr. Justice Douglas, in a later opinion, commented: "[In *Pinkerton*] [w]e held that a conspirator could be held guilty of the substantive offense, even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it."[11] The necessary criminal intent is established by the entry into the conspiracy.[12]

Considering the ease of proving vicarious liability, compared to the aider and abettor theory, one would expect a routine preference for vicarious liability.[13] In military law, however, this has not been the case. Over the past thirty years, there are fewer than a dozen reported decisions from military appellate courts which have considered vicarious liability.

The earliest decisions appear to be *United States v. Espinelli*[14] and *United States v. Joyner*,[15] Air Force Board of Review decisions. In *Espinelli*, the findings were affirmed on a vicarious liability rationale, although there was also ample evidence to affirm on an aider and abettor theory.[16] In *Joyner*, the board reasoned that by joining the conspiracy the conspirator became a principal and that vicarious liability for all acts done in furtherance of the common design flowed from that status.[17]

The Court of Military Appeals acknowledged the vicarious liability theory as a "well established rule" in 1955, in *United States v. Jackson*, but decided the case on an aider and abettor theory.[18] Five years later, in *United States v. Rhodes*, the court affirmed a conviction based on the vicarious liability theory commenting, "Once a conspiracy is established, the act of any of the conspirator is the act of all."[19] In 1963, the court specifically acknowledged two distinct theories of conspirator liability, stating that a conviction may be predicated upon either participation as an aider and abettor, or on the

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[7] *See also* MCM, 1969, para. 156; MCM, 1984, Part IV, para. 1.

[8] *Pinkerton*, 328 U.S. at 644.

[9] *Id.* at 646.

[10] *Id.*

[11] *Nye & Nissen*, 336 U.S. at 618.

[12] *Pinkerton*, 328 U.S. at 646-47.

[13] *See* U.S. Dept. of Army, Pamphlet No. 27-9, Military Judges' Benchbook, pg. 7-1 (May 1982) [hereinafter cited as DA Pam 27-9]. *Compare* MCM, 1969, para. 156 with para. 160, and MCM, 1984, Part IV, para. 1 with para. 5.

[14] 2 C.M.R. 627 (A.F.B.R. 1949).

[15] 4 C.M.R. 755 (A.F.B.R. 1952).

[16] *Espinelli*, 2 C.M.R. at 644-45.

[17] *Joyner*, 4 C.M.R. at 758.

[18] 6 C.M.A. 193, 205, 19 C.M.R. 319, 331 (1955) (Brosman, J., concurring). The opinion cited both *Pinkerton* and *Nye & Nissen* and reasoned that liability did not depend on a finding of intent to commit the substantive offenses, but upon a finding that the offenses were the natural consequences of the conspiracy. *Id.* at 206, 19 C.M.R. at 332.

[19] 11 C.M.A. 735, 742, 29 C.M.R. 551, 558 (1960).

fact that the substantive offense was an act in furtherance of the conspiracy.[20]

Fifteen years elapsed before another decision was reported which considered the vicarious liability theory. The Air Force Court of Military Review broke the ice in 1978 with *United States v. Seberg*.[21] The court clearly acknowledged the two distinct theories by reversing a finding of guilty on the aider and abettor theory and noting that the result would be the same even if the vicarious liability theory were applied.[22] In 1980, the Air Force court affirmed guilty findings based on the vicarious liability theory.[23] In 1981, in *United States v. Herrick*, the Air Force court again affirmed guilty findings on a vicarious liability theory, although the trial court had been instructed only on the law of principals, *i.e.*, the aider and abettor theory.[24]

After an almost twenty-year hiatus, the Court of Military Appeals returned to the issue in 1982. In *United States v. Dunbar*, the court made it clear that vicarious liability was still the law in military courts, stating "Of course it is well established that a conspirator. . . can be prosecuted for substantive offenses which were committed pursuant to the conspiracy and to carry out its objectives."[25] The court also distinguished the two theories by disposing of the issue at bar on the aider and abettor theory, noting, "We need not consider in this case to what extent the [substantive offense] imposed vicarious criminal liability. . .."[26]

While the vicarious liability theory has been consistently approved by military appellate courts, the reported decisions are few, and cases in which the theory has been actually applied are fewer still. The obvious explanation is that the theory has been rarely used in the prosecution of courts-martial. This would appear inconsistent with the lesser proof requirements for vicarious liability, which require establishing only the existence of the conspiracy and the accused's membership therein at the time substantive offense was committed.

There is probably no single reason that the vicarious liability theory has not been utilized more often. Clearly it is available and appropriate in all conspiracy cases, while the aider and abettor theory is only available when the conspirator has actually participated, either directly or indirectly, in the substantive offense.

One reason for the lack of use of vicarious liability may be the lack of standard instructions on the theory. In contrast, there are comprehensive standard instructions on the law of aider and abettor, and it is by far the more prevalent theory.[27] The lack of standard instructions may have implied that the theory is not preferred and may have inhibited prosecutors' awareness of its existence and applicability.

Vicarious Liability Instructions—The Pandora's Box

It is not clear from the published opinions, including *Dunbar*, whether the trial judges fashioned their own instructions, or even if the

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[20]United States v. Salisbury, 14 C.M.A. 171, 175, 33 C.M.R. 383, 387 (1963). The court further noted that both theories involve imputed responsibility and the two theories are closely intertwined. *Id.*, 33 C.M.R. at 387.

[21]5 M.J. 895 (A.F.C.M.R. 1978), *petition denied*, 6 M.J. 282 (C.M.A. 1979).

[22]*Id.* at 900 n.4.

[23]United States v. Hewitt, 10 M.J. 561 (A.F.C.M.R. 1980), *petition denied*, 10 M.J. 337 (C.M.A. 1981) (the case involved the providence of a guilty plea based on vicarious liability). In 1980, the Air Force court also commented favorably on the theory of vicarious liability in United States v. Brown, 9 M.J. 599, 601 (A.F.C.M.R.), *petition denied*, 9 M.J. 413 (C.M.A. 1980) (citing *Pinkerton* in defining vicarious liability, and noting the similarity of vicarious liability and aider and abettor liability; the court, however, dismissed the guilty findings based on vicarious liability due to insufficient evidence.)

[24]12 M.J. 858 (A.F.C.M.R. 1981), *petition denied*, 13 M.J. 373 (C.M.A. 1982).

[25]12 M.J. 218, 220 (C.M.A. 1982).

[26]*Id.* at 220 n.1.

[27]DA Pam 27-9, pg. 7-1.

triers of fact were instructed at all on the vicarious liability theory. In *United States v. Woodley*,[28] a 1982 Army Court of Military Review case, the military judge instructed on the aider and abettor theory and gave the vicarious liability instruction from *Pinkerton:*

> [A]fter you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy, to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed.[29]

The Army Court of Military Review not only approved the application of the vicarious liability theory, but also approved the use of the *Pinkerton* instruction. The court implied that the trier of fact should be given both the aider and abettor instructions and vicarious liability instructions.

The issue of whether vicarious liability instructions are required to sustain a finding of guilty to a substantive offense where there is little or no evidence of aiding or abetting, reached the Court of Military Appeals in *United States v. Gaeta.*[30] In *Nye & Nissen v. United States*, the Supreme Court held that the trier of fact must be given proper instructions on the vicarious liability theory before a conviction under that theory could stand.[31] The Court of Military Appeals noted that the Supreme Court had never articulated a specific form for these instructions, and held that any instruction which fairly describes the vicarious liability theory would meet the *Nye & Nissen* requirement.[32] The court members in *Gaeta* had been instructed that in order to find the accused guilty of the substantive offense, they must find that

> [T]he accused and Specialist Four Johnson entered into an agreement to sell marihuana.
>
> . . .[T]hat at the time of the agreement, while the agreement continued to exist, Specialist Four Johnson, with the purpose of effecting the object of the agreement, sold. . . [a certain amount] of marihuana to. . . [the named buyer].
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> . . .[T]hat such sale was wrongful. And. . . that under the circumstances the conduct of. . . [the accused] and. . . Johnson was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.[33]

The Court of Military Appeals determined that "the substance of the required *Pinkerton* instruction was fairly conveyed to the members."[34]

It is important to note not only the date of the opinion, January 1983, but also that all three judges were in agreement on the instruction re-

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[28]13 M.J. 984 (A.C.M.R.), *petition denied*, 15 M.J. 77 (C.M.A. 1982).

[29]*Pinkerton*, 328 U.S. at 645 (n.6). Obviously, the military judge tailored the instruction to fit the facts of the case.

[30]14 M.J. 383 (C.M.A. 1983).

[31]336 U.S. at 618.

[32]*Gaeta*, 14 M.J. at 391.

[33]*Id.*

[34]*Id.*

quirements.[35] The date emphasizes the recency of the requirement for which there is currently little guidance available to the field. The unanimity indicates that the requirement is unlikely to be overruled or distinguished in the near future.

As a result of *Gaeta*, trial judges and prosecutors are left with a very subjective standard. While instructions are required, the test of the instructions is substantial compliance with the *Pinkerton* instruction. Further, since there are no standard instructions currently available, trial judges will be left to fashion their own instructions on a case-by-case basis. The number of potential variations is considerable.

With a substantial compliance standard, the courts of military review and the Court of Military Appeals will have to individually analyze each variation as it reaches their respective level. The resulting instability and uncertainty could obviate the distinct advantages that the vicarious liability theory has over the aider and abettor theory.

In addition, because vicarious liability strongly favors the prosecution, military judges may be reluctant to instruct *sua sponte* since that might invite charges that the judge departed from an impartial role and presented pro-prosecution instructions on a theory the prosecution likely did not realize applied.

In light of *Gaeta* and against this background, a change to the *Military Judges' Benchbook* has been approved which will incorporate standard instructions for vicarious liability. Until formal publication, however, prosecutors will have to specifically request vicarious liability instructions. The text of the pending standard instructions follows as an Appendix; requests should be tailored from these instructions.

Conclusion

Of the two distinct theories of conspirator liability which have been acknowledged and embraced by the Court of Military Appeals, the more prevalent is the aider and abettor theory, for which standard instructions exist. The "neglected orphan" is the vicarious liability theory enunciated in *Pinkerton* and followed in the military courts since 1949, although used only sporadically. Of the two theories, vicarious liability is an equally valid theory, of broader application and is easier to prove. It should be routinely employed in conspiracy trials. Unfortunately there are as yet no published standard instructions for vicarious liability.

The lack of instructions, especially in the aftermath of *Gaeta*, places vicarious liability in a "Pandora's box." Without formal guidance, trial judges will be left to develop their own instructions, to be evaluated by one of six different and independent panels of the Army Court of Military Review and eventually by the Court of Military Appeals. The considerable number of potential variations not only may give rise to numerous unnecessary appellate issues, but also will leave trial courts in a state of uncertainty regarding the use of the theory.

For these reasons, the instructions at the Appendix have been developed and are pending publication. They are clearly necessary, both to keep the lid on the Pandora's box and to encourage the use of the too long neglected orphan—vicarious liability.

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[35]Judge Cook wrote the opinion and Judge Fletcher concurred without opinion. Chief Judge Everett dissented from the application of the law to the facts of this case, but stated, "I agree fully with the general rules of law which the majority opinion lucidly expounds." *Id.* at 392.

Appendix

Proposed Change to DA Pam 27-9, Military Judges' Benchbook

Chapter 7: Evidentiary Instructions.

Page 7-1: Insert the following at the beginning of the chapter:

7-1. Vicarious Liability—Principals and Conspirators.

If the evidence at trial indicates that a person other than the accused committed the substantive criminal acts charged against the accused and that the prosecution is asserting criminal liability against the accused on a theory of vicarious or imputed liability, the theory of liability will usually rest on one or two bases: the law of principals and/or the rule of co-conspirators. The law of principals allows conviction of the accused for a substantive offense upon proof that the accused aided, abetted, counseled, commanded, or procured the commission of the offense by the actual perpetrator, or caused an illegal act to be done. The rule of co-conspirators allows conviction of the accused for a substantive offense upon a showing that the accused was a member of an unlawful conspiracy, and that while the accused continued to be a member of that conspiracy the offense charged was committed in furtherance of the conspiracy or was an object of the conspiracy.

While the two theories of liability are distinct, they are closely related and, in most cases, both theories will apply to the facts of the case. Occasionally, however, the facts will only support one theory or the other. The military judge may, in the exercise of his/her discretion, choose to instruct on one or both theories. Prior to deciding upon the appropriate instructions, the military judge may wish to question the trial counsel as to the theory being relied upon by the prosecution.

Change the current heading "7-1. Laws of Principals." to read:

a. Laws of Principals.

Page 7-3: Add the following to the end of the section 7-1:

b. Vicarious Liability of Co-conspirators.

The instructions in this section may be used as general guides in drafting instructions explaining the vicarious liability of co-conspirators for substantive offenses committed by another conspirator. Co-conspirators are criminally liable for any substantive offense committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy while the accused remained a member of the conspiracy. While the accused need not be formally charged with conspiracy, the existence of the conspiracy must be shown before the accused may be convicted of a substantive offense under this theory. Unlike the law of principals, the accused need not play any role in the commission of the substantive offense, nor must he/she have any particular state of mind regarding the offense, nor must he/she be aware of the commission of the offense. The instructions normally encompass three parts: instructions on the elements of conspiracy, instructions explaining vicarious liability of co-conspirators. The instructions should be carefully tailored to reflect this theory and should not be in language that would indicate that the accused was the active perpetrator. If the offense which was the original object of the conspiracy is different from the substantive offense charged against the accused, this distinction should be emphasized to avoid confusion.

For example, if the accused is charged with larceny (Article 121, UCMJ) but the prosecution's theory is not that he/she stole anything, but instead that he/she entered into a conspiracy to steal, and that a co-conspirator actually committed the larceny, then instructions

such as the following, tailored to reflect the theory of the prosecution, should be given (the use of elements relating to larceny is for illustrative purposes only):

With regard to (identify the appropriate charge and specification), the prosecution is alleging that, while the accused was a member of a conspiracy, the offense of larceny (_____) was committed by another conspirator in furtherance of that conspiracy. A member of a conspiracy is criminally responsible under the law for any offense which was committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy, even if he was neither a principal nor an aider and abettor in the offense. In order to find the accused guilty of this offense, you must first be satisfied beyond a reasonable doubt that, at the time that this offense was committed, the accused had entered into and continued to be a member of an unlawful conspiracy (as I have already defined to you) (as follows):

(1) That at (state the time and place raised by the evidence), the accused entered into an agreement with (state the name(s) of the co-conspirator(s)) to commit larceny (_____), an offense under the Uniform Code of Military Justice; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, (state the name of the co-conspirator allegedly performing the overt act(s)) performed (one or more) overt act(s), that is, (state the overt act(s) raised by the evidence), for the purpose of bringing about the object of the agreement.

Note 1. The overt act(s) which prove the conspiracy will normally be, but need not be, the commission of the substantive offense charged against the accused.

(The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.)

Note 2. Additional instructions should be given when an issue arises as to whether the accused may have abandoned or withdrawn from the alleged conspiracy, see Note 3 of paragraph 3-3.

If you are satisfied beyond a reasonable doubt that the accused had entered into and continued to be a member of this conspiracy, then you must next determine whether the evidence establishes beyond a reasonable doubt that the offense with which we are concerned, that is, larceny (_____), was committed by a member of the conspiracy. The elements of larceny are as follows:

(1) That, at (state the time and place alleged), a certain person (state the name of the co-conspirator(s) who committed the illegal act, if known) wrongfully (took) (obtained) (withheld) certain property, that is, (describe the property alleged), from the possession of (state the name of the owner or other person alleged);

(2) That the property belonged to (state the name of the owner or other person alleged);

(3) That the property was of a value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount); and

(4) That the (taking) (obtaining) (withholding) by (state the name of the co-conspirator(s) who committed the illegal act, if known) as with the intent permanently to:

(a) ((deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property); or

(b) (permanently to appropriate the property to his/her own use or the use of any person other than the owner).

Preventive Law: The Genuine Article

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Introduction

The most important aspect of a preventive law program aimed at avoiding or minimizing a soldier's legal problems is getting the message to the field. Memoranda, staff papers, and command information letters about preventive law topics are worthless to the average soldier at an installation if he or she does not see and read that particular paper. This article is about preparing and publishing preventive law items that soldiers will read and remember.

Identifying the Problem

The problems that a military legal assistance office should address is a thorough, competent preventive law program are similar to those encountered in the offices of any general practice law firm. Some common examples include:

1. Powers of attorney (types; potential uses; problems caused by failing to execute a power of attorney before it is needed, such as in the event of deployment or mental incapacity; possible misuse);
2. Consumer fraud (interstate land sales; magazine and photo developing promotions; "bait-and-switch" schemes; door-to-door sales; mail-order merchandise; "free gifts");
3. Commercial law (warranties; written contracts; finance charges; default; down payments);
4. Landlord-tenant problems (rental security deposits; lock-outs and evictions; warranties of habitability and quiet possession; "fair wear-and-tear"; duty to mitigate damages; "military clauses");
5. Other housing matters (contractors; materielman's liens; leases; closing costs; surveys, easements; encroachments);
6. Traffic law (DWI; vehicle registration; drivers' licenses; state taxes; car inspections; speeding violations); and
7. Family law (divorce and annulment; custody and visitation; child support and alimony; paternity; and property division).

While many other topics are also appropriate and relevant to a particular locality or installation, this list constitutes an adequate starting point for the staff judge advocate (SJA) or legal assistance officer who intends to initiate an aggressive preventive law publication program.

Choosing the Medium

It is essential to select a medium that attracts the attention of the target population—in most cases, soldiers and their family members. Unlimited media coverage of preventive law topics can be expensive and unnecessarily tax the resources of the SJA office. Telephone recordings, radio, or television may be used to convey preventive law messages effectively. Most of the time, however, the printed word, because of cost and convenience, will be selected as the most appropriate medium.

It is vitally important that the printed medium be widely circulated to insure that it is read and retained by soldiers and family members. Frequently, the installation newspaper offers the best opportunity for publication. It is usually distributed free to a large audience, contains articles of general interest to the target population, and its editors are usually eager to get "good copy" and newsworthy articles and features.

An off-post newspaper may also be targeted for preventive law features and articles. It will usually be published more often than the installation newspaper and will have a wide circulation among service members, retirees, and

their family members. Articles will have to be tailored to be relevant to both the civilian and military readers, and space may be restricted for features or articles which are not "hard news."

Some editors insist on topical stories or "hard news;" meeting this requirement is easier than one might suspect. For example, a judge advocate preparing a story on drunk driving and DWI might begin the story with a summary of the latest available statistics on convictions and penalties in civilian courts, an interview of a drunk driving accident victim, or a profile of the trial and sentencing in a particular case. Or a military lawyer writing a story about child support could begin the article with an interview of a local family court judge or social services official, or with a paragraph on the most recent federal or state statistics on the problem of nonsupport. Finally, a legal assistance officer preparing a feature on consumer protection might focus the article on recent actions by the state attorney general's office against consumer fraud, profile a soldier who was "ripped off," or list merchants and business establishments recently placed off limits by the installation's Armed Forces Disciplinary Control Board (AFDCB).

Additional media sources are available at most installations. The daily bulletin is frequently an excellent place for spot advertising items of interest. There may be weekly advertising packets or traders' exchanges published on post that can also be used to publicize preventive law. Occasionally, the monthly circular or newsletter printed by an individual command, wives club, religious activity, on-post housing community, or civilian employee organization is available for preventive law articles.

The Message

The choise of medium will always be closely connected to the particular message to be conveyed. The author of the preventive law series, frequently a legal assistance officer, should carefully analyze what he or she wishes to convey and tailor the message to the publications available. An informative four-paragraph article on wills, for example, might be perfect for the "99th Balloon Corps Wives' Club Monthly," but too long for the "Ft. Quagmire Daily Bulletin," and not topical and newsy enough for the "Fatalville Daily Disturber."

The lesson is simple: determine the goals to be achieved before deciding on the medium or message. Frequently a specific goal makes matching the medium and message much easier. For example, the SJA, Colonel Bruce Tremblechin, wants an article in every issue of the weekly installation newspaper captioned "The Justice Corner," with a logo showing a Manual for Courts-Martial. In this case the medium and, to a large extent, the message have already been determined.

On the other hand, Colonel Tremblechin might ask the chief of legal assistance to obtain maximum publicity for the latest action of the AFDCB in placing a certain landlord off-limits who routinely refused to return rental security deposits to soldier-tenants or to maintain clean and safe apartments. This particular goal might be accomplished by a shotgun approach—articles, short or long, in every available paper from daily bulletins to daily newspapers. Or, it might be effected better by investing the same amount of time and personnel in a front-page story for the installation newspaper, featuring interviews with soldier-tenants, the landlord affected (if willing), the officer who chaired the board, and a legal assistance officer. Above all, it is important that the officer selected to manage and implement the publication part of a preventive law plan carefully evaluate his or her goals and resources before deciding on the medium or the message.

Know the "Ropes"

While knowing the enemy may be vital on the battlefield, knowing the procedures for publication helps insure that the article, item, or feature story gets printed with minimum delay and editing, and with maximum impact.

Knowing the "ropes" begins with the public affairs officer or publication information coordinator. He or she can provide guidance as to what items or facts might be restricted from

release, how to contact particular editors or publishers, and what to cite for certain standard items included in news stories, *i.e.*, the size of Ft. Quagmire, the number of civilian dependents, the amount of the monthly military payroll, *etc.* The editor of a particular newsletter, bulletin, or newspaper can also be extremely helpful with information about deadlines, guidelines for articles, and standard feature sections that may be logical locations for an article on preventive law.

Contact with the installation newspaper is essential. Seek out the feature writer responsible for stories of interest to the general readership. He or she may be willing to write an article based on information provided by the attorney, transforming the attorney into a player in the drama, a character in the story. Consider the following hypothetical article:

> Early this week, Retroglide Staff Writer Seymour Bullhorn interviewed Captain Sandra Sandbag, the Chief of Legal Assistance at Ft. Quagmire, for her comments on the recent Widget recall. She was seated at her desk, arms crossed, grimly staring at the broken remains of a once-perfect Widget placed in the center of her desktop.
>
> "Everything you've heard about Widget malfunctions is true," she exclaimed. "The company is attempting to recall them, but it can't locate about 50% of the owners of pre-1975 Widgets with turbo-thrusters. If you have one of them, turn it over immediately to your local Widget dealer or the public health department. Do not, *under any circumstances*, attempt to operate it without a mudflap!"

This is probably better than the article on Widget malfunctions you would have prepared and certainly would be much easier to do and less time-consuming.

Do Not Reinvent the Wheel

On those occasions when the legal assistance officer must research, draft and submit a preventive law article, there are several resources which will simplify the task. The first and most obvious source of information is the legal assistance office itself. This office, with its direct contact with clients, weekly or monthly reporting requirements to the SJA, and its comprehensive overview of commonly encountered legal difficulties, provides the pulse-beat of preventive law. It is here that the author will first encounter the legal problems that must be publicized to be prevented. The best source of preventive law material is always one's own office.

Adtitional resources are readily available. In the consumer protection field, the state attorney general's office will frequently have handouts and news releases on common fraud schemes that may be adapted for use in a news feature. Another source of consumer information and news articles is the local Better Business Bureau or Chamber of Commerce. Consumer fraud might be researched by interviewing local officials in the district attorney's office, especially if that office has a "white-collar crime" or "consumer fraud" division. Also, the federal government's Consumer Information Center has a wealth of information available.

Finally, a writer should consider previous articles concerning the same or similar topics and remedies. Check with the particular medium to see whether articles have been written on the same topic and, if so, when. Articles over four years old can probably be "recycled" for use in the installation newspaper, since the readership has probably changed over that period of time.

An excellent source of previously written articles is the article bank maintained by The Judge Advocate General, U.S. Air Force. Further information concerning this vast compendium of preventive law articles may be obtained by contacting:

> Office of the Judge Advocate General, USAF
> ATTN: JACA
> Washington, D.C. 20330

This represents one of the best sources of well-written preventive law articles, available for pure plagiarism, partial modification or entire rewriting. If it has been written once, why reinvent the wheel?

Guidelines for the Author

The first-time writer should remember that articles are more interesting if they feature real people, quoted and identified by name and position. State and local officials enjoy being quoted and mentioned favorably in preventive law articles. It is common to create a quote (favorable, of course) for the official and to later obtain approval of the quoted words before release of the article. For example, our hypothetical chief of legal assistance, CPT Sandbag, might write the following for an article in The Retroglide, the Ft. Quagmire newspaper: "Commenting on the child support problem, East Carolina Attorney General Cornelius Cornhusker stated earlier this week, 'Nonsupport of children is the worst crisis faced by our Commonwealth in this decade. We need the support of our citizens in order to meet this monumental challenge to the public's financial resources.'" CPT Sandbag would, of course, obtain permission from Attorney General Cornhusker before printing this quote.

Well-written articles use the active voice and summarize the topic in the first few sentences. After the first paragraph, everything else is progressively less and less important. One should assume that the reader only has time to read the first, or first few, paragraphs. Thus an article on consumer protection might begin:

> An all-out attack on consumer fraud was the topic of a news conference held today by Fatalville District Attorney Rufus Slackjaw. "I'm forming today a white-collar crime task force to watch out for and defend the rights of the citizens and residents of this fair city," said Slackjaw. District Attorney Slackjaw has appointed four senior Assistant District Attorneys to manage the "Consumer Fraud Taskforce" that he organized.

Later sentences and paragraphs would detail the goals of the Task Force, the background of the personnel appointed to the Task Force, and the facts surrounding the consumer fraud problems in the locality.

Preventive law articles need not be complex or esoteric excursions into the law. The example below shows how to attract the reader's attention and explain the law in relatively simple terms:

> Sleeping on a Hard Bed . . .
> and How to Get Rid of It
>
> "So what's the deal, sir?" Specialist 5 Otto Grundoon looked up with curiosity. "You keep on mentioning the Truth-in-Lending Act."
>
> Captain Frank Jagman, the legal assistance officer, was in the process of interviewing SP5 Grundoon about a contract for a bedroom suite.
>
> "You bet I do," CPT Jagman responded "it's your only way to get out of this contract. You don't really want the furniture do you?" "Absolutely not," replied Grundoon, "the arms on the chairs are weak, the legs wobble, and the bed has noisy springs. Our neighbors keep on saying 'How's a body to get any sleep around here?' But Sam's Unique Upholstery won't answer my complaints."
>
> "The Federal Truth-in-Lending Act requires you to be told the cost of a credit purchase," stated CPT Jagman. "You weren't told that on this contract. You may be able to persuade Sam to cancel the contract if you agree not to file a lawsuit."
>
> "But what do I have to be told?" continued SP5 Grundoon.
>
> "The law," answered CPT Jagman, "states that you must be shown the 'APR' (or Annual Percentage Rate) on your credit sale. That's the rate it costs you to use credit. Your rate," added the legal assistance officer after some quick math, "is 22 percent. That's high."
>
> "You could've saved money by shopping around. A bank could have offered you a lower rate. Certainly a credit union's loan rate would have been lower. You could have even shopped at a few other finance companies to see about lower rates. The 'APR' is your key. Just remember, 'Buyer Beware—Better Compare!'"
>
> "You also must be told the dollars and cents amount of your finance charge,"

CPT Jagman continued. "Without both of these disclosures on your credit contract, you can sue Sam's Unique Upholstery for twice the amount of the finance charge plus court costs and reasonable attorney's fees."

"Leapin' lizards! Those are important things to know," exclaimed SP5 Grundoon. "I can see now how much easier the Federal Truth-in-Lending Act makes it to shop around and save money!"

"In addition," said CPT Jagman, "the Act applies when you make a purchase which includes a second mortgage on your home, such as a major repair or remodeling job. In such a case you would have three business days to think about the deal and to cancel it if you wish. All you do is send written notice of your cancellation to the creditor."

"I'll remember that sir. . . along with 'Buyer Beware—Better Compare.' Every soldier should learn about the Truth-in-Lending Act. In financial times like these, it's one easy way to save money that you need!"

Conclusion

Without a doubt, the media are there and waiting to be tapped as a resource for preventive law. All it takes is selection of the proper medium and messages, creativity to craft the features and articles, and dedication to make publicizing preventive law a full-fledged command activity.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

Opinions of The Judge Advocate General

(Nonappropriated Fund Instrumentalities—Operational Principles). **Credit Reporting Services May Be Used to Encourage Payment of Delinquent Club Accounts.** DAJA-AL 1983/3170, 13 December 1983.

An installation staff judge advocate sought advice whether the club system could apply for membership in a local credit reporting service in order to encourage payment of overdue club bills. Club management personnel felt that the potential for adverse credit reports would provide an incentive to delinquent club members to pay their club bills. The Judge Advocate General had no objection to use of credit reporting services for this purpose so long as applicable regulations and statutes are complied with and any agreement entered into does not contain a hold-harmless provision which would, *inter alia*, negate the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), in the event a soldier sued the credit bureau. Moreover, The Judge Advocate General noted that the U.S. Army Finance and Accounting Center is currently developing a comprehensive Army procedure for debt collection and recommended against entering into such agreement with a local credit bureau prior to receipt of the Army's plan.

(Motor Vehicles; Prohibited Activities—General). **Official Vehicles and Personnel Precluded from Transporting Children to Hospital in Absence of an Emergency.** DAJA-AL 1983/3491, 20 January 1984.

The Deputy Chief of Staff for Personnel asked whether government drivers and nongovernment vehicles placed under government control could be used to transport seriously ill child dependents, along with their parents, between a "Ronald McDonald House" and Walter Reed Army Medical Center.

The Judge Advocate General noted that 31 U.S.C. § 1344(a) provides that government vehicles can be used only for an "official purpose." DOD 4500.36-R, para. 2-5 requires that the term be defined in strict compliance with statutory and regulatory policies. The Deputy

Chief of Staff for Logistics (DCSLOG), responsible for "official use" determinations under para. 1-3*a*, AR 58-1, concluded that this proposal for personal convenience, non-emergency transportation was not for an "official purpose." This conclusion was consistent with The Judge Advocate General's 1974 objection to a change in AR 58-1 which would have permitted domicile-to-hospital transportation for Army outpatients.

The DCSLOG conclusion, concurred in by The Judge Advocate General, was also consistent with Comptroller General decisions which advise that use of government vehicles or government reimbursement for other travel is lawful only when the purpose is "official travel," which refers to travel on government business, at government direction, to fulfill a specific governmental need, or otherwise primarily for government benefit and not for personal benefit or convenience.

The Judge Advocate General noted that, in addition to the prohibition on the use of government vehicles for the above purposes, the official use of on-duty service members to drive private vehicles for the same purposes would also be precluded. In the absence of legislative authorization, service members cannot be assigned to perform chauffeur duties for the non-emergency personal convenience transportation of other service members or their dependents.

(Military Installations—Post Services: Nonappropriated Fund Instrumentalities—Private Organizations). **Permission to Conduct On-post School Raffle Denied.** DAJA-AL 1983/3352, 19 December 1983.

Kwajalein Missile Range asked for an exception to para. 2-7, AR 600-50, which generally prohibits gambling on government property. The exception was sought on behalf of the Kwajalein High School Junior Class which wanted to conduct a raffle to support its social activities. The Judge Advocate General noted that the class group apparently was an unofficial activity of the type mentioned in para. 1-2*b*(3), AR 210-1 (limited scope, activities, membership, or funds). Therefore the authority to conduct on-post raffles under para 4-2, AR 210-1 does not apply. The Judge Advocate General's policy is to grant an exception to allow fund-raising raffles only when the activity is especially beneficial to the Department of the Army because the proceeds go directly to an officially sanctioned activity. Because the raffle here would help only an unofficial activity, an exception is not warranted.

(Dependents; Pay—Travel). **Definition of Dependent for Purposes of the Student Travel Allowance.** DAJA-AL 1983-3285, 14 December 1983.

The Deputy Chief of Staff for Personnel asked whether a service member who is currently stationed in Germany and was awarded joint custody of his dependent child, was entitled to travel of his dependent child at government expense from CONUS for purposes of visiting him during the school holidays.

The Judge Advocate General noted that the applicable statutory and regulatory provisions do not address the issue of entitlement where a service member has joint custody. Section 910 of the 1984 DOD Authorization Act (which created 37 U.S.C. § 430) provided authority for the Secretary of Defense to prescribe regulations permitting a single "student travel" allowance annually for a dependent child to travel between the school attended by the dependent in the United States and a service member's overseas permanent duty station. The pertinent legislative history indicates only that the purpose of the new provision is to eliminate the disparity in entitlements available to civilian employees versus service members when both are stationed overseas. The new statutory provisions were implemented by message change to Volume 1, Chapter 7, Joint Travel Regulations (R221730Z Nov 83).

The Judge Advocate General concluded that the Comptroller General decisions construing the counterpart statutory provisions pertaining to civilian employees require that the dependent be a bona fide member of the service member's household rather than actually residing elsewhere with the former spouse. Under

the facts of this case, the dependent child established a permanent residence with the mother in CONUS and is allowed to visit the service member-father on school holidays and weekends. The child is, therefore, not a bona fide member of the father's household, but merely a visitor during extended vacations. Accordingly, student travel entitlement for the dependent child is not authorized under 37 U.S.C. § 430.

(Army Reserve; Separation from the Service). **No Mandatory Initiation of Separation Action Against USAR and ARNG Members Identified as Illegal Drug Abusers.** DAJA-AL 1984/1281, 21 March 1984.

The Deputy Chief of Staff for Personnel, based on a Forces Command inquiry, requested an opinion whether USAR and ARNG members serving on active duty, inactive duty training, or any other type of active duty are subject to the mandated actions for illegal drug abusers IAW AR 600-85, paragraphs 1-10 and 4-25.

The Judge Advocate General noted that UP AR 600-85, paragraph 1-2*a*, the Army's Alcohol and Drug Abuse Prevention and Control Program applies to USAR and ARNG members serving on active duty, initial active duty training, special tours of active duty training, or 45 days involuntary active duty training. When performing such duty, these service members would be subject to the mandated actions for illegal drug abusers established in AR 600-85, paragraphs 1-10 and 4-25, and separation action must be initiated IAW AR 636-100 or AR 635-200. USAR and ARNG members performing inactive duty training or annual training, however, are governed by AR 600-85, chapter 9, which does not establish mandated actions for illegal drug abusers. There is no regulatory requirement to initiate separation actions against these service members identified as illegal drug abusers. Reserve commanders, however, may initiate separation actions against members identified as illegal drug abusers based upon moral or professional derelection or misconduct, as appropriate. But separation authorities must be aware of limitations which may be imposed upon the characterization of service when conduct in the civilian community is the basis for separation.

Standards of Conduct: Endorsement of Unofficial Programs

In a memorandum for the Secretaries of the Military Departments and certain others, dated 15 September 1983, subject: Endorsement of Unofficial Programs, the Deputy Secretary of Defense provided the following guidance:

> By virtue of the position that most senior DOD officials hold, they often receive requests from charitable or other worthy organizations to use their names and titles in conjunction with benefits or similar fundraising functions. This frequently is in the form of a request to include one's name as a member of an "honorary committee." While this normally does not require direct involvement with the particular function, it may give the appearance of DOD sanction to the occasion. A summary of the applicable rules may be helpful to avoid misunderstanding and embarrassment.
>
> The basic guidance on Executive Branch standards of conduct matters is found in Executive Order 11222, May 8, 1965, implemented by DOD Directive 5500.7 and regulations of each of the DOD Components [AR 600-50]. Two provisions are particularly applicable. All officers and employees are admonished to "avoid any action. . . which might result in, or create the appearance of—
>
> 1. Using public office for private gain;
>
> 2. Giving preferential treatment to any organization or person. . ..
>
> While the endorsement of a private fundraising program by an official will not benefit that official personally, it does bestow an unauthorized official benefit upon the sponsors of the program. It also must be recognized that there are a great many worthy programs seeking support. The DOD official is not in a position to select the most deserving from among all of those asking for his or her endorsement. Those

endorsed will appear to have received preferential treatment.

It is recommended that support of charitable activities be limited to those programs administered by the Office of Personnel Management under its delegation from the President and to those other programs authorized by regulations of the DOD Components (DOD Directive 5035.1, "Fund-Raising Within the Department of Defense").

Even if a requested endorsement is not for fund-raising purposes, caution should be exercised. The objections of potential misuse of private office and preferential treatment still apply. It generally is not possible for senior officials to separate their personal endorsement from an apparent official endorsement by the Department.

In light of the above, I suggest that senior DOD officials adopt the habit of declining requests for the use of their names and titles.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

South Carolina Dower Law Held Unconstitutional

The South Carolina Supreme Court has ruled that a widow's common law right of dower is unconstitutional. In *Boan v. Watson*, decided May 22, 1984, the widow of a landowner brought an action to determine whether she was entitled to a dower interest in a parcel of land willed by her husband to his sister. The court noted that dower had existed in South Carolina not by statute or by any provision in the South Carolina constitution, but as a right created by case law. The court, however, looked to language of the U.S. Supreme Court in *Orr v. Orr*, 440 U.S. 268 (1979), in which the Court found that Alabama's divorce law which provided that husbands, but not wives, could be required to pay alimony, was unconstitutional. The Court reasoned that the gender-based distinction condemned by the Supreme Court in *Orr* was similar to the gender-based distinction for dower in South Carolina.

Expedited Funds Legislation Pending

Service members often experience hardships upon PCS when they open new accounts in their new locations only to be advised by the bank in which the new account is opened that they will be unable to use funds deposited by check into the account until the check has cleared. Sometimes this may mean a one-to-two week wait.

Legislation has been introduced in the House of Representatives, however, which would provide relief in these circumstances. If enacted, it would be known as the Expedited Funds Availability Act and would establish time limits for bank clearance of deposited checks.

The bill would establish temporary maximum time limits for clearance of checks by a depository institution. The following checks would have to be cleared in one business day:

—Checks of not more than $100;
—Checks drawn on a branch of the depository institution located within the same state;
—Cashier and certified checks; and
—Government checks (federal, state and local) deposited by the payee.

Checks drawn on a local depository institution would have to be cleared in three business days. Checks drawn on an in-state depository institution would have to be cleared in four business days, and checks drawn on out-of-state depository institutions would have to be cleared in eight business days. The Federal Reserve Board would be authorized to shorten any of these time periods by regulation.

Where foreign banks are concerned, each depository institution would be free to establish its own policy. States would be authorized to enact more stringent laws than the federal system and that law would then supersede the federal law. Additionally, before a potential customer opened an account, the depository institution would be required to disclose to him or her in writing its general policy on the clearance of deposited checks.

An aggrieved individual would be authorized to initiate a civil action in a federal district court within one year of the date of any alleged violation. A depository institution would not be held liable for an unintentional violation resulting from a bona fide error.

South Carolina Divorce Decision Affects Overseas Military Members

In a case of first impression, the South Carolina Court of Appeals has decided that time spent apart from one's spouse while on military service overseas can be counted toward the twelve-month period required for a no-fault divorce in South Carolina if the separation commenced prior to the military service or if the separation is independent of military service.

In *Niemann v. Niemann*, 10 Fam. L. Rep. (BNA) 1493 (July 17, 1984), the service member objected to the divorce and argued that to apply the no-fault statute to persons on involuntary military duty constitutes a violation of equal protection. The court rejected that argument and found that courts in Arkansas, Louisiana, and Nevada had reached similar results on similar facts.

The court found that the separation was independent of military service because the wife clearly indicated her intent to live separate from the service member before he left for sea duty. It also found that before he left for sea duty the husband lived apart from his wife in a beach house.

Custodial Parent Prohibited From Taking Child Overseas

What is described as an "emerging rule of law" may portend future problems for service members or family members who are custodial parents. In *Doe v. Doe*, 10 Fam. L. Rep. (BNA) 1480 (July 3, 1984), a mother was enjoined from taking her child to England by the New York Supreme Court for New York County.

The parents, upon their separation, entered into a separation agreement which included a joint custody provision. Following their subsequent divorce, the mother, who had physical custody of the child, became engaged to a British citizen and planned to relocate in London. The court, however, awarded residential custody to the father on the grounds that the proposed relocation by the mother would mean a change of lifestyle and environment and would effectively deprive the parent of regular access to the child. The court found that it would be in the best interest of the child to remain with the father where there was a "proven stable loving relationship" as opposed to a "probable untested relationship overseas."

Such decisions could create hardships for custodial military parents who are subjected to suits as they prepare to move to another location pursuant to military orders. These actions may most typically arise in cases where a service member has married a parent with custody of children of a prior marriage.

Student Loan Defaulters

Federal agencies are now required to report uncollectable debts to the IRS on IRS Form 1099-G. In addition, the agency must send a copy to the debtor.

The IRS will treat these debts as income in the year the debts are declared noncollectible and match the agency filings aginst the debtor's tax returns. It will increase the income of debtors who do not include such amounts on their tax returns.

Tax News

The U.S. involvement in Lebanon and Grenada focused national attention on the sacrifice that members of the United States Armed Forces and other U.S. Government employees must be prepared to make for their country. As

a result of that awareness, Congress passed and, on 10 April 1984, the President signed into law an amendment to section 692 of the Internal Revenue Code. The new law provides special federal income tax relief for specified individuals who die while in active service as a member of the Armed Forces of the United States or while a civilian employee of the United States as a result of wounds or injuries incurred outside the United States in a terrorist action. The law provides that no federal income tax will apply with respect to income of the individual for the year of death, or for any earlier year in the period beginning with the last year ending before the year in which the wound or injuries were incurred. In other words, federal income tax would be forgiven beginning with the tax year preceding the year in which the wounds or injuries were incurred. Note that the injury or wound must have been incurred outside the United States, though death could subsequently occur in the United States. Further, the injury or wound must have been incurred as a result of a terrorist or military aciton. That would include a military accident during an operation, such as a helicopter crash, but would not include a training accident. Note also that the new provisions do not apply if provisions in section 692(a) of the I.R.C. apply (death occurring in a combat zone). The law applies to death resulting from wounds incurred after December 31, 1979. It was intended to cover deaths occurring during the U.S. involvement in Lebanon, the rescue attempt in Iran, and U.S. military action in Grenada. Since legal assistance officers have traditionally provided legal assistance to survival assistance officers, and also provide assistance to survivors of service members who would be eligible for legal assistance if the service member were alive, they should be familiar with the relief provided by the law.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Senior Judge Advocate Positions

Assignment of Military Law Center commanders and staff judge advocates of ARCOM and GOCOM headquarters is the responsibility of The Judge Advocate General. The selection process set forth at para. 2-20h, AR 140-10 calls for the ARCOM or GOCOM commander to forward to The Judge Advocate General the names of at least three nominees for each position. All eligible officers assigned to the USAR Control Group who are located within the ARCOM or GOCOM area, must be considered. There have been instances where eligible officers within the geographic vicinity of an ARCOM or GOCOM have been overlooked in the selection process. Thus, to insure that all eligible officers are given an opportunity to be considered for these senior judge advocate positions. The Judge Advocate General has directed the semiannual publication of these positions and the termination date of the incumbent's tenure. Tenure for these positions is limited to three years unless exceptional circumstances justify an exception. Interested eligible officers should so advise the appropriate ARCOM or GOCOM commander no later than six months prior to the expiration of the incumbent's tenure. For those positions marked by an asterisk, eligible individuals should contact the respective ARCOM or GOCOM commander immediately.

Army Reserve Commands

First Army

ARCOM	*SJA*	*Vacancy Due*
77	COL C. E. Padgett	Feb 85
79	COL J. S. Ziccardi	Sep 85
94	COL L. R. Shuckra	Mar 86
97	COL W. P. George	Aug 85
99	COL J. A. Lynn	Jun 87

Second Army

ARCOM	*SJA*	*Vacancy Due*	
81	COL J. T. Gullage	Jan 87	
120	COL O. E. Powell	Jun 85	
121	COL J. B. Nixon	Apr 86	

Fifth Army

ARCOM	*SJA*	*Vacancy Due*	
83	Vacant	Jul 84*	
86	COL T. V. Barnes	Feb 85	
88	COL L. W. Larson	May 85	
90	COL J. M. Compere	Mar 85	
102	COL A. E. DeWoskin	Jun 85	
122	LTC J. S. Selig	Apr 86	
123	COL R. F. Greene	Sep 85	(Extension)*

Sixth Army

ARCOM	*SJA*	*Vacancy Due*
63	COL J. L. Moriarity	Jan 87
89	COL D. W. Kolenda	Apr 87
96	COL G. G. Weggeland	Aug 85
124	COL T. J. Kraft	Jun 87

Military Law Centers

First Army

MLC	*Commander*	*Vacancy Due*
3	COL A. S. Aguiar	Sep 85
4	COL M. Bradie	Feb 86
10	COL J. E. McDonald	Aug 86
42	COL R. L. Kaufman	Jun 87
153	COL P. A. Feiner	May 86

Second Army

MLC	*Commander*	*Vacancy Due*
11	COL J. H. Herring	May 85
12	COL W. B. Long	May 87
213	COL J.E. Baker	Jan 87

Fifth Army

MLC	*Commander*	*Vacancy Due*	
1	COL C. J. Sebesta	May 85	
2	COL R. H. Tips	Apr 86	
7	COL L. E. Strahan	Feb 85	(Extension)*
8	COL T. P. Graves	May 85	
9	COL T. P. O'Brien	Apr 87	
214	COL T. C. Klas	Feb 86	

Sixth Army

MLC	*Commander*	*Vacancy Due*
5	COL R. B. Jamar	Mar 85
6	COL J. L. Woodside	Jan 87
78	COL A. L. Fork	Jan 87
87	COL C. A. Jones	Oct 85
113	COL D. S. Simons	Feb 86

Training Divisions

First Army

TNG DIV	*SJA*	*Vacancy Due*	
76	MAJ B. F. McGovern	Jun 87	
78	LTC R. R. Baldwin	Oct 85	
80	LTC R. H. Cooley	Jul 85	
98	LTC D. W. O'Dwyer	Apr 86	

Second Army

100	MAJ M. K. Gordon	Sep 86	
108	LTC B. K. Jones	Jul 87	

Fifth Army

TNG DIV	*SJA*	*Vacancy Due*	
70	LTC E. D. Brockman	Feb 86	
84	COL L. E. Slavik	Sep 84	(Extension)*
85	LTC G. L. Coil	Jun 84	(action pending)*
95	MAJ J. S. Arthurs	Jul 86	

Sixth Army

TNG DIV	*SJA*	*Vacancy Due*
91	COL L. Hatch	Jul 86
104	COL R. B. Rutledge	Apr 84*

General Officer Commands (Major)

First Army

GOCOMS	*SJA*	*Vacancy Due*
352 CA CMD	LTC W. S. Little	Apr 87
353 CA CMD	LTC L. R. Kruteck	Oct 84*
300 SPT GP	LTC R. L. Bohannon	Oct 86
310 TAACOM	COL J. B. Gantt	Dec 85

Second Army

GOCOMS	*SJA*	*Vacancy Due*
412 ENGR CMD	Vacant	Sep 84*
290 MP BDE	MAJ D. Brace	Oct 85
143 TRANS BDE	LTC R. M. Morris	Jul 85
7581 USAG	COL F. V. DeJesus	Apr 86

Fifth Army

GOCOMS	*SJA*	*Vacancy Due*
103 COSCOM	COL C. W. Larson	Sep 85
377 COSCOM	LTC R. E. Chaffin	Oct 86
416 ENGR CMD	COL T. G. Bitters	Jun 86
420 ENGR BDE	Vacant	Jul 84*
30 HOSP CTR	MAJ H. E. Schmalz	Jul 85
807 HOSP CTR	MAJ G. A. Glass	Jul 86
300 MP CMD	MAJ J. Wouczyna	Apr 85
425 TRANS BDE	LTC R. G. Bernoski	Apr 86

Sixth Army

GOCOMS	*SJA*	*Vacancy Due*
351 CA CMD	MAJ J. P. Hargarten	Apr 86
311 COSCOM	COL D. M. Clark	Feb 85
HQ IX Corps	COL M. K. Soong	Oct 84*

Reserve Component Technical (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, instructors, and local action officers for the Reserve Component Technical (On-Site) Training Program for Academic Year (AY) 1985. The Judge Advocate General has directed that all Reserve Component judge advocates assigned to The Judge Advocate General Service Organizations (JAGSO) or to judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135-316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The On-Site Program features instructors from The Judge Advocate General's School and has been approved for continuing legal education credit in several states. Some On-Sites are co-sponsored by other organizations, such as the Federal Bar Association, and include instruction by local attorneys. The civilian bar is invited and encouraged to attend On-Site training.

Action officers are required to coordinate with all Reserve Component units in their geographical area with assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed forces installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Members of the IRR earn retirement point credit for attendance IAW AR 140-185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange enlisted legal clerk and court reporter training to run concurrently with On-Site training. In past years, enlisted training programs have featured Reserve Component JAGC officers and non-commissioned officers as instructors, as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison.

JAGSO detachment commanders will insure that unit training schedules reflect the scheduled technical training. SJAs of other Reserve Component troop program units should insure that the unit training schedule reflects judge advocate attendance at technical training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the installation SJA that mutual support will not be provided on the day(s) of instruction.

Questions concerning the On-Site instructional program should be directed to the appropriate action officer at the local level. Problems which cannot be resolved by the action officer or the unit commander should be directed to Captain Thomas W. McShane, Chief, Unit Training and Liaison Office, Reserve Affairs Department, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22901 (telephone (804) 293-6121; Autovon 274-7110, Extension 293-6121; or FTS 938-1301).

Reserve Component Technical (On-Site) Training Program, AY 85

Date	City, Host Unit and Training Site	Subjects/Instructors		Action Officer
13, 14 Oct 84	Philadelphia, PA 79th ARCOM Willow Grove NAS Willow Grove, PA	Admin & Civil Law Criminal Law	MAJ Brown MAJ Capofari	MAJ D. Lawrence Rubini 935 Second Street Pike Richboro, PA 18954 (215) 322-1225
20, 21 Oct 84	Minneapolis, MN 214th MLC Howard Johnson Motor Lodge, Convention Center #3 8401 Cedar Avenue Bloomington, MN	Contract Law Criminal Law	LTC Graves MAJ Schwender	LTC James Mahoney 801 Park Avenue Minneapolis, MN 55404 (612) 339-5863

3, 4 Nov 84	Boston, MA 94th ARCOM Hanscom AFB Bedford, MA	International Law Contract Law	MAJ McAtamney MAJ Cornelius	LTC James A. Paisley HQ, 94th ARCOM Hanscom AFB Bedford, MA 01731 (617) 742-6684
10 Nov 84	Detroit, MI 123d ARCOM USAR Center 26402 West 11 Mile Rd Southfield, MI	Admin & Civil Law International Law	LTC Cruden MAJ Romig	COL John F. Potvin 760 Fairford Grosse Pointe Woods, MI 48236 (313) 465-7000
11 Nov 84	Indianapolis, IN 123d ARCOM Gates-Lord Hall Building 400 Ft Ben Harrison, IN	Admin & Civil Law International Law	LTC Cruden MAJ Romig	MAJ William S. Gardiner 28 W. 62d Street Indianapolis, IN 46260 (317) 257-7100
1, 2, Dec 84	New York, NY 77th ARCOM Site TBD	International Law Contract Law	MAJ Gravelle CPT Post	LTC Francis X. Gindhart DSJA 77th ARCOM Fort Totten USAR Center Flushing, NY 11359 (212) 791-0119
8, 9 Dec 84	San Antonio, TX 90th ARCOM HQs, 90th ARCOM 1920 Harry Wurzbach Highway San Antonio, TX	Admin & Civil Law Contract Law	MAJ King CPT Post	MAJ Michael D. Bowles 7303 Blanco Road San Antonio, TX 78216 (512) 349-3761
12, 13 Jan 85	Los Angeles, CA 78th MLC Armed Forces Reserve Center Los Alamitos, CA	Criminal Law Admin & Civil Law	MAJ Boucher MAJ Hemingway	LTC John C. Spence 1535 Bellwood Road San Marino, CA 91108 (213) 974-3763
26, 27 Jan 85	Orlando, FL 81st ARCOM Court of Flags Ramada Inn Orlando, FL	International Law Contract Law	LTC Taylor LTC Graves	COL James E. Baker 5260 Redfield Court Dunwoody, GA 30338 (404) 221-6455 FTS 242-6455
29, 30 Jan 85	San Juan, PR 7581st USAG Fort Buchanan, PR	International Law Contract Law	LTC Taylor LTC Graves	MAJ Nestor D. Ramirez Orinoco 1690 El Cerezal Rio Piedras, PR 00926 (809) 722-5019
2, 3 Feb 85	Nashville, TN 121st ARCOM Vanderbilt University School of Law Nashville, TN	Admin & Civil Law Criminal Law	MAJ St. Amand MAJ Clevenger	MAJ Douglas A. Brace 23d Floor, L&C Tower Nashville, TN 37219 (615) 256-9999
9, 10 Feb 85	Seattle, WA 124th ARCOM University of Washington School of Law Seattle, WA	Admin & Civil Law Criminal Law	MAJ Jones MAJ Finnegan	LTC Charles A. Kimbrough Karr, Tuttle, Koch, Campbell, Mawer & Morrow, P.S. 111 Third Avenue, Suite 2500 Seattle, WA 98101 (206) 223-1313

Reserve Component Technical (On-Site) Training Program, AY 85

Date	City, Host Unit and Training Site	Subjects/Instructors		Action Officer
23, 24 Feb 85	Denver, CO 96th ARCOM Quade Hill Fitzsimons AMC Denver, CO	International Law Contract Law	MAJ Romig CPT Post	MAJ Robert B. Warren 5145 Maywood Court Colorado Springs, CO 80917 (303) 471-7700
2, 3 Mar 85	Columbia, SC 120th ARCOM University of South Carolina School of Law Columbia, SC	Admin & Civil Law Criminal Law	MAJ Wagner MAJ Hahn	MAJ Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 724-4523 FTS 677-4523
9, 10 Mar 85	Kansas City, MO 89th ARCOM Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law Contract Law	MAJ L. Kennerly MAJ Boucher MAJ Cornelius	COL David W. Kolenda 8990 W. Dodge Rd., Suite 335 Omaha, NE 68114 (402) 393-3227
16, 17 Mar 85	San Francisco, CA 5th MLC HQ, 6th US Army Presidio of San Francisco, CA	Criminal Law Admin & Civil Law	LTC Gordon MAJ Lederer	COl Joseph W. Cotchett 322 West Bellevue Avenue San Mateo, CA 94402 (415) 342-9000
19, 20 Mar 85	Honolulu, HI IX Corps (AUG) Bruyeres Quadrangle Ft. DeRussy, HI	Criminal Law Admin & Civil Law	LTC Gordon MAJ Lederer	MAJ Frank Yap HQ, IX Corps (AUG) 302 Maluhia Road Ft. DeRussy, HI 96815 (808) 521-6927
23 Mar 85	St. Louis, MO 102d ARCOM Metropolitan Bar Association 7777 Bonhomme 23d Floor Clayton, MO	International Law Admin & Civil Law	MAJ McAtamney MAJ Mulliken	LTC Robert L. Hartzog 211 South Central Clayton, MO 63105 (314) 863-2700
23, 24 Mar 85	Washington, D.C. 97th ARCOM HQ, First US Army Ft. Meade, MD	International Law Contract Law	LTC Taylor MAJ D. Kennerly	MAJ Robert Lowell 4028 Wildwood Way Ellicott City, MD 21043 (301) 962-7711
13 Apr 85	Pittsburgh, PA 99th ARCOM Malcolm Hay USAR Center 950 Saw Mill Run Blvd. Pittsburgh, PA	Admin & Civil Law International Law	MAJ Henry MAJ Romig	CPT Ernest B. Orsatti 219 Fort Pitt Blvd. Pittsburgh, PA 15222 (412) 281-3850
13, 14 Apr 85	New Orleans, LA LA ARNG Site TBD	Contract Law Criminal Law	MAJ Smith MAJ Gaydos	LTC W. Arthur Abercrombie, Jr. Taylor, Porter, Brooks & Phillips P. O. Box 2471 Baton Rouge, LA 70821 (504) 387-3221

20, 21 Apr 85	Columbus, OH 83d ARCOM Defense Construction Supply Center (DCSC) Columbus, OH	Criminal Law Admin & Civil Law	MAJ Peluso MAJ Rosen	LTC Dennis A. Schulze 9th JAG Detachment (MLC) Box 16515, DCSC Columbus, OH 43216 (614) 238-3702
27, 28 Apr 85	Chicago, IL 86th ARCOM SJA Conference Room Ft. Sheridan, IL	International Law Contract Law	MAJ McAtamney MAJ D. Kennerly	LTC William Raysa 7402 West Roosevelt Road Forest Park, IL 60130 (312) 386-7273

Enlisted Update

Sergeant Major Walt Cybart

Sergeants Major Academy Selections

The recently released Sergeants Major Academy (SMA) selection list revealed that only two 71Ds were selected for resident training along with one alternate. However, we had five 71Ds selected for the non-resident course. This is a .02% selection rate for resident training and a 100% selection rate for non-resident training. If your goal is to complete the SMA course, and it should be for all E7s(P) and E8s, you should be realistic about how you intend to accomplish this objective.

First Sergeant Position

The Corps has finally obtained a First Sergeant's position; it is with Co B, 2d Training Battalion, Fort Benjamin Harrison, Indiana. We hope that this will allow some of our people to attend the First Sergeants Course at Fort Bliss, Texas.

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 MACOM. Reservists obtain quotas through their unit or ARPERCEN, ATTN, DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training Offices. Additional information is available from the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

October 2-5: 1984 Worldwide JAG Conference.

October 15-19: 7th Claims Course (5F-F26).

October 15-December 19: 105th Basic Course (5-27-C20).

October 22-26: 13th Criminal Trial Advocacy Course (5F-F32).

October 29-November 2: 19th Fiscal Law Course (5F-F12).

November 5-9: 6th Legal Aspects of Terrorism Course (5F-F43).

November 5-9: 15th Legal Assistance Course (5F-F23).

November 26-December 7: 101st Contract Attorneys Course (5F-F10).

December 3-7: 28th Law of War Workshop (5F-F42).

December 10-14: 8th Administrative Law for Military Installations (5F-F24).

January 7-11:1985 Government Contract Law Symposium (5F-F11).

January 14-18: 26th Federal Labor Relations Course (5F-F22).

January 21-25: 14th Criminal Trial Advocacy Course (5F-F32).

January 21-March 29: 106th Basic Course (5-27-C20).

February 4-8: 77th Senior Officer Legal Orientation Course (5F-F1).

February 11-15: 5th Commercial Activities Program Course (5F-F16).

February 25-March 8: 102nd Contract Attorneys Course (5F-F10).

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103rd Contract Attorneys Course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JAGSO Team Training.

June 17-28: BOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21, 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

December

1: CCLE, Medical Malpractice (Video), Cortez, CO.

2-6: NCDA, Criminal Investigator's School, San Diego, CA.

2-7: NJC, Admin. Law: Procedure—Graduate, Reno, NV.

2-7: NJC, Intro to Computers & Tech. in Courts—Specialty, Reno, NV.

2-14: NJC, Admin. Law: Fair Hearing—General, Reno, NV.

2-14: NJC, Decision Making Process/Skills/Techniques—Grad., Reno, NV.

3-4: PLI, Bankruptcy Practicy & Procedure, San Francisco, CA.

3-5: PLI, Tax Law Series, San Francisco, CA.

3-7: FPI, Concentrated Course in Construction Contracts, Denver, CO.

5-6: IICLE, Federal Tax Course, Springfield, IL.

5-7: FPI, Medicine in the Courtroom, Vail, CO.

6-7: BNA, Employment Law 1984, Houston, TX.

6-7: PLI, Securities Litigation, San Francisco, CA.

7: WSBA, Appellate Practice, Olympia, WA.

7: GICLE, Developments & Trends in Securities Law, Atlanta, GA.

7: ABICLE, Estate Planning, Birmingham, AL.
7: IICLE, Trial Court Pleadings & Motions, Chicago, IL.
9-14: NJC, Evidence—Graduate, Reno, NV.
9-14: NJC, Judicial Administration—Specialty, Reno, NV.
11: IICLE, Contested Estates, Chicago, IL.
12-14: OLCI, Bankruptcy Practice, Houston, TX.
13: ABICLE, General Practice, Birmingham, AL.
13-14: IICLE, Federal Tax Course, Chicago, IL.
13-14: FBA/BNA, Labor Law & Relations—FBA/BNA Institute, New York, NY.
14: ABICLE, General Practice, Montgomery, AL.
14: IICLE, Health Care Program, Chicago, IL.
14: NCLE, Income Tax Law, Kearney, NB.
14: GICLE, Labor Law Institute, Atlanta, GA.
14: WSBA, Litigation Management, Seattle, WA.
14: OLCI, Practical Law For The Young Lawyer, Toledo, OH.
14-15: KCLE, Business Litigation, Lexington, KY.
15: NCLE, Income Tax Law, Omaha, NB.
18: OLCI, Practical Law For The Young Lawyer, Columbus, OH.
21: GICLE, Conflicts, Malpractice & Ethics, Atlanta, GA.
21: IICLE, Review of IRS Forms & IL Dept. of Revenue IL1040, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the April 1984 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still 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. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. 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 Center 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 un-

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AD B077555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD B078201	Criminal Law, Index/JAGS-ADC-83-13
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AD B079729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2
AD B077738	All States Will Guide/JAGS-ADA-83-2
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1
AD B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3

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

2. Videocassettes

The Television Operations Office of The Judge Advocate General's School announces that videocassettes on Supreme Court Advocacy are available to the field. The program consists of four ¾" videocassettes and was presented by CDR Kenneth F. Ripple, JAGC, USNR, Professor of Law, University of Notre Dame and formerly Special Assistant to the Chief Justice of the United States. If you are interested in obtaining copies of any of these programs, please send a blank ¾" videocassette *of the appropriate length* to: The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

Tape #/Date Running Time	Title/Synopsis
JA-371-1 30:00 Jun 84	**Supreme Court Advocacy, Part I** An overview of the special litigation ambiance at the Supreme Court of the United States. Designed to orient the advocate to the special needs of the Justices in the decision of cases. A prelude to tapes 2 and 3.
JA-371-2 44:13 Jun 84	**Supreme Court Advocacy, Part II** This tape deals with tactical and practical considerations in preparing a petition for writ of certiorari to the Supreme Court of the United States. Designed for use after tape 1.
JA-371-3 54:14 Jun 84	**Supreme Court Advocacy, Part III** Program discusses both tactical and practical considerations in the brief and arguing of military cases before the Supreme Court of the United States. Designed for use after tapes 1 and 2.
JA-371-4 41:50 Jun 84	**Supreme Court Advocacy, Part IV** This tape discusses the role of trial counsel in developing the record necessary for eventual Supreme Court review. Designed for independent use by trial counsel. However, tape 1 provides useful but not essential information for this tape. Tapes 2 and 3, while designed for appellate counsel, provide detailed additional information of use to trial counsel.

3. Regulations & Pamphlets

Number	Title	Change	Date
AR 27-20	Claims	18	15 Jun 84
AR 600-20	Army Command Policy & Procedures	I03	23 May 84
AR 600-290	Passports & Visas		15 Jun 84
AR 601-337	Army General's (sic) Counsel's Honors Program		1 Jul 84
AR 612-10	Reassignment Processing & Army Sponsorship & Orientation Program	1	15 Jun 84
DA Pam 310-1	Consolidated Index of Army Publications & Blank Forms		1 Jun 84

4. Articles

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Block, *The Semantics of Insanity*, 36 Okla. L. Rev. 561 (1983).

Breyer, *The Legislative Veto After* Chadha, 72 Geo. L.J. 785 (1984).

Grady, *Proximate Cause and the Law of Negligence*, 69 Iowa L. Rev. 363 (1984).

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Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U.L. Rev. 53 (1983).

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Taylor, *The Equal Credit Opportunity Act's Spousal Cosignature Rules and Community Property States: Regulatory Haywire*, 37 Sw. L.J. 1039 (1984).

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Note, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 51 Fordham L. Rev. 611 (1984).

Note, *Statutory Classification of Cocaine as a Narcotic: An Illogical Anachronism*, 9 Am. J.L. & Med. 225 (1983).

Note, *When Does a Limited Waiver of the Attorney-Client Privilege Occur?*, 24 B.C.L. Rev. 1283 (1983).

Freedom of Expression: Theoretical Perspectives, 78 Nw. U.L. Rev. 937 (1983).

Labor Law in the Ninth Circuit: Recent Developments, 17 Loy. L.A.L. Rev. 353 (1984).

The United States Action in Grenada, 78 Am. J. Int'l L. 131 (1984).

By Order of the Secretary of the Army:

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