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United States v. Weasler and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?

Major Michael E. Klein

Make every bargain clear and plain, That none may afterward complain.[1]

Introduction

The centuries old advice in this quote captures perfectly the essence of bargaining. Indeed, it deftly reinforces the message with the thrift and precision of its words. However, even in a society as *legocentric*[2] as America, few people would equate the legal process involved in haggling over Mr. Ray's family cow in seventeenth century England with the legal process by which the vast majority of people who are guilty of crime end up in jail. Yet, those who are in frequent contact with the criminal justice system know that the bargain analogy is perfectly apt. Much like the buyer and seller of a cow, participants in the criminal justice system conduct their discourse through negotiation and compromise. Certainly, the bargains are distinguishable by the object of the exchange; no one would seriously equate the moral importance of trading money and a cow in the first instance with trading constitutional rights and liberty in the second. Nevertheless, the basic bargaining construct describes these two situations equally well.

Two commentators on the issue of bargaining in the criminal justice context have observed that "[plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system."[3] Their assertion, based on analysis of both state and federal criminal justice systems,[4] holds true for the military criminal justice system as well.[5] Acknowledging the reality of a system dominated by plea bargaining does little, however, to describe the practice. How does plea bargaining work? Who are the players in the process? Why do pretrial agreements exist in the first place? What are the rules of the bargaining process? It is easy to imagine a dozen or more similarly relevant questions.[6]

This article focuses on the decision of the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Weasler*[7] to narrow the examination of military plea bargaining. *Weasler* is a useful vehicle to examine the basic premise underlying military plea bargaining—guilty pleas ben-

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1. John Ray, *English Proverb* (1670), *in* A New Dictionary of Quotations 83 (H.L. Mencken ed., 1942).

2. *See* The American Heritage Dictionary of the English Language 417 (William Morris ed., 1980) (legocentric is a mutation of the word "egocentric").

3. Robert E. Scott & William J Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992). Dean of the University of Virginia School of Law, Scott is a contract law expert who has written extensively on contracting from a law and economics perspective. Stuntz is a member of the Virginia Law Faculty, specializing in criminal law. The two make a compelling case for recognition of plea bargaining as contract and not, as most critics of plea bargaining insist, a process whose root and regulation are found in the Constitution. *Compare* Scott & Stuntz, *supra*, *with* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979 (1992) *and* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969 (1992).

4. Scott & Stuntz, *supra* note 3, at 1909 n.1, *citing* U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 502 tbl. 5.25 (Kathleen Maguire & Timothy J. Flanagan eds., 1990) (where figures from 1988 and 1989 reflect disposition of cases through plea bargaining ranging between 86% in the federal system to 91% in state systems).

5. *See* Clerk of Court Notes, *Courts-Martial and Nonjudicial Punishment Rates*, Army Law., Jan. 1996, at 93. In fiscal year 1995, 58.1% of general courts-martial and 55.6% of bad-conduct discharge special courts-martial were disposed through guilty pleas. Although these numbers certainly include cases where the accused pleaded guilty without the benefit of a pretrial agreement, experience indicates that the majority of guilty pleas result from the plea bargaining process. Statistically, military practice relies less on plea bargaining than the civilian justice system does. The military, however, disposes of better than half of all courts-martial through pretrial agreements, making the practice a key component of the military system.

6. As this article's focus is to examine narrowly the resilience of military plea bargaining when that practice comes into conflict with unlawful command influence, this article does not address much of the modern debate surrounding the efficacy of plea bargaining as a practice. However fervent that debate may be, this article assumes that plea bargaining will remain a viable and dominant aspect of military practice. Because the military criminal justice system affords an accused tremendous procedural protection before a guilty plea is accepted, this article is not concerned with the prospect of innocent soldiers going to jail pursuant to a guilty plea. *See* Peter J. McGovern, *Guilty Plea—Military Version*, 31 Fed. Bar J. 88, 98 (1972) ("Few courts go so far to insure the protection of the rights of the accused and his full understanding of those rights before his guilty plea is accepted . . . . Perhaps the 'Guilty Plea' procedure of the military justice practice with its forthright pretrial agreements could be universally adopted into the civilian criminal process."). However, the debate in the civilian sector is primarily concerned with the possibility of the innocent pleading guilty, and many who practice in or study the criminal justice system have voiced their concerns. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3 (1978); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 Ethics 93 (1976); Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & Soc'y Rev. 527 (1979); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037 (1984).

7. 43 M.J. 15 (1995). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) changed the names of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. This article will use the name of the court in existence at the time the decision was rendered.

efit both the accused and the government—because it tests that proposition against one of the great bogeymen of military criminal justice, unlawful command influence.[8] If the true measure of a person, institution, or idea is found by testing it against adversity, a true measure of plea bargaining is found in its response when challenged by unlawful command influence issues. *Weasler* highlights the tension between the benefit that parties can derive through artful use of plea bargaining and the potential harm to the military justice system when unlawful command influence is contractually waived.

This article will selectively track the development of both plea bargaining and unlawful command influence to the point of their most recent and significant convergence in *Weasler.*[9] Plea bargaining and unlawful command influence will be *selectively* tracked because both subjects encompass vast areas of regulatory, statutory, and case law not relevant to explaining the tension created when the two are in conflict. Therefore, Part I of this article examines the precedent for pretrial agreements in the military. It will explore the goals and the mechanics of the process as the practice grew in the military. Understanding the goals of the bargaining process not only illuminates the *Weasler* majority opinion, but also provides critical context that both anchors and explains the stridency of the concurring opinions from Chief Judge Sullivan and Judge Wiss. Similarly, examination of the mechanics of the military plea bargain help to explain why it was so important to the *Weasler* majority that the *accused* suggested waiver of unlawful command influence motions. Part I concludes by examining the boundaries of plea bargaining through a survey of case law that provides an evolutionary analysis of pretrial agreement terms that are permissible and those that are impermissible.

Considering next the unlawful command influence component of *Weasler*, Part II examines aspects of unlawful command influence jurisprudence as it impacts pretrial agreements. Because understanding the statutory basis of the jurisprudence informs the development of the case law, Article 37 of the Uniform Code of Military Justice (UCMJ) is considered. Judicial amplification of the Article 37 mandate created the conditions necessary for the tension found in *Weasler's* approach to balancing the benefit derived from plea bargains against the potential harm that unlawful command influence waiver portends for the military justice system. Therefore, a survey of relevant unlawful command influence cases since the mid-1980s illuminates the ultimate issue. Part II concludes by focusing on the cases that were precursors, either directly or by analogy, for *Weasler's* consideration of whether unlawful command influence can ever be appropriately bargained away in a pretrial agreement.

Part III establishes the facts of *Weasler* and explores the majority and concurring opinions, revealing the fullness of the court's disagreement over unlawful command influence waiver as a term in a pretrial agreement. The article ends by assessing pretrial agreement and unlawful command influence jurisprudence in light of *Weasler*.

I. Pretrial Agreements in the Military

Pretrial agreements are relatively new to the military justice system.[10] The practice did not receive official sanction and widespread use until nearly a decade after World War II.[11] Even though the military has allowed an accused to plead guilty to charges for well over a century, its willingness to confer some benefit on the accused in exchange for that guilty plea is a relatively new practice.[12] Predictably, the experience of World War II, during which the flaws, excesses, and abuses of the military justice system were exposed to the general public, prompted a dramatic overhaul of the entire system.[13] Both the Congress and the President undertook a comprehensive review of the military justice system, resulting in enactment of the UCMJ in 1950 and the *Manual for Courts-Martial (Manual)* in 1951, which implemented the UCMJ.[14] One of the beneficiaries of that overhaul was the accused, who had an opportunity

8. It is beyond the scope of this article to trace the evolution of unlawful command influence from its origins to the present. This article assumes general conversance in the historical development of unlawful command influence jurisprudence and will thus deal mainly with unlawful command influence developments in the 10-15 years prior to *Weasler. See* Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988). *See also* UCMJ art. 37 (1988) (stating that it is unlawful to influence the action of a court-martial); *id.* art. 98 (punitive article allowing punishment for violation of UCMJ art. 37 by anyone who "knowingly and intentionally" engages in unlawful command influence); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (first of the 3d Armored Division cases to comprehensively address widespread command influence within a unit); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (1st Armored Division case that traces the statutory as well as the judicial development of unlawful command influence from the post-WWII congressional hearings onward), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987); United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (further refinement of the *Treakle* and *Cruz* approach to unlawful command influence).

9. As will be discussed in some detail in Part II, the courts have dealt with bargaining away unlawful command influence issues prior to *Weasler. See* United States v. Corriere, 20 M.J. 905 (A.C.M.R. 1985) (holding that an agreement requiring the accused to withdraw a motion asserting unlawful command influence would be void as against public policy); United States v. Kitts, 23 M.J. 105 (C.M.A. 1986) (condemning the coercion of an accused into withdrawing an issue of unlawful command control in order to obtain a pretrial agreement).

10. *See* United States v. Cummings, 38 C.M.R. 174, 175 (C.M.A. 1968) ("[Pretrial agreements] have been employed in military trials since 1953, and this court has approved of their use, though not without reservation."). Though formally used since 1953, it is not difficult to imagine the informal use of such agreements before this time. Informal agreements persisted even after 1953, although not without the court's condemnation. *See* United States v. Peterson, 24 C.M.R. 51 (C.M.A. 1957) (accused pleaded guilty with the *understanding* that the convening authority would not pursue other charges, although the understanding was never reduced to writing).

11. *See* Bower, *supra* note 8, at 67 (citing *History of the Judge Advocate General's Corps, United States Army,* THE JUDGE ADVOC. J., 4 July 1976, at 22) ("With over 2,000,000 courts-martial convened during that wartime period, one in eight servicemen was exposed to [the] criminal code . . . .").

to bargain with the government for his guilty plea beginning in 1953.[15] Not surprisingly, the pretrial agreement practice, once established, gained widespread use in the military.[16] The reasons for this eager acceptance were quite simple—both the accused and the government benefited from the bargaining process.

Goal of the Plea Bargaining System: Everyone Benefits

In 1953, The Acting Judge Advocate General of the Army addressed the efficacy of pretrial agreements.[17] In a letter to Army staff judge advocates, Major General Shaw articulated what stand today as the most prominent, and at times incompatible,[18] themes of the pretrial agreement regime. In his letter, Major General Shaw advocated use of pretrial agreements to "encourage speedier disposition of cases and to encourage defense counsel to obtain better results for their clients in hopeless cases."[19] He also cautioned judicious use of pretrial agreements, noting that "it would be better to free an offender completely, however guilty he might be, than to tolerate anything smacking of bad faith on the part of the government."[20] In that letter, Major General Shaw posited the rationale for viewing a pretrial agreement as beneficial to both the government *and* the accused. Its use as a practical tool of expedience and certainty would benefit both parties to the bargain.[21] He cautioned, however, that its use must always preserve the integrity of the criminal system by ensuring that justice is done.

Justice

The first purpose of military law is to promote justice.[22] In criminal law, justice for an accused means assurance of a fair trial.[23] Therefore, a pretrial agreement serves the ends of justice only to the extent that it guarantees the accused a fair trial.

12. *See* Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 198 (1991). Common sense suggests that soldiers have been pleading guilty to charges as long as there have been military tribunals. However, Elling's point of reference is the modern era of military justice in which manuals, rules, and precedent guide a tribunal in the proper receipt of a guilty plea. *See generally* W. WINTHROP, MILITARY LAW AND PRECEDENTS 270 (2d rev. ed., 1920); MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 154a (1921); MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 70 (1928).

13. *See* Arnold A. Vickery, *The Providency of Guilty Pleas: Does the Military Really Care?*, 58 MIL. L. REV. 209, 231 (1972). In overhauling the military justice system, Congress relied on input from both within and without the military. Many civilian lawyers, both practicing attorneys and law school professors, were called on to help shape the new system. One such group of civilian attorneys, known as the Keefe Board, profoundly impacted the procedures military courts would later use in determining the providency of guilty pleas and the validity of the pretrial agreements that prompted those pleas. *Id. See generally* W. GENEROUS, SWORDS AND SCALES 14-34 (1973) (chronicling the attacks on the military criminal justice system prior to the adoption of the UCMJ).

14. *See* Bower, *supra* note 8, at 68-69.

15. The ability to bargain resulted from an affirmative policy decision by the Army Judge Advocate General's Corps leadership to encourage the practice. Nowhere in the new code was there a provision for pretrial agreements, and there was no other statutory or regulatory authorization for the practice. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 analysis, app. 21, at A21-38 (1995) [hereinafter MCM].

16. *See* Charles W. Bethany Jr., The Guilty Plea Program 4-7 (April 1959) (unpublished Advanced Course thesis, The Judge Advocate General's School) (on file in The Judge Advocate General's School Library, Charlottesville, Virginia).

17. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 12-10.00, 454 & n.2 (1991) (citing 1 CRIMINAL LAW MATERIALS 10-2 (The Judge Advocate General's School, U.S. Army, May, 1981)). Major General Shaw's support for plea bargaining was based on the benefit he saw in the federal court system. In 1950, over 94% of all convictions in federal district courts resulted from guilty pleas. In 1951, out of 34,788 convictions, 32,734 resulted from guilty pleas. By contrast, in the military, which did not sanction plea bargaining prior to 1953, only about one percent of all military convictions resulted from guilty pleas. *See* Bethany, *supra* note 16, at 4-5.

18. Few would disagree that the goals of justice, certainty, and expedience continue to motivate the criminal practice in the area of pretrial agreements, just as those goals justified the practice in the beginning. However, *Weasler* demonstrates that not everyone believes that the goals can coexist. Clearly, Chief Judge Sullivan and Judge Wiss believe that in cases where unlawful command influence is injected into the mix, justice suffers for the sake of certainty and expedience.

19. *See* GILLIGAN & LEDERER, *supra* note 17, § 12-10.00, at 454.

20. *See* Bethany, *supra* note 16, at 6 n.13 (citation omitted).

21. Above all else, a guilty accused wants the certainty of knowing his maximum sentence. It matters little whether the proceeding saves time or not, or whether the trial comports strictly with all of the rules that guarantee a just proceeding; more than anything, the accused wants the certainty of knowing the maximum number of days, months, and years he will spend in jail. The government also seeks the certainty that pretrial agreements offer. Certainty of a conviction is the ultimate benefit to the government. Even critics who claim that the plea bargaining system is unjust agree that certainty benefits both sides. *See generally* Scott & Stuntz, *supra* note 3, at 1913-17. As the military courts have focused primarily on ensuring that justice is not sacrificed for the sake of expediency in the guilty plea process, so too will this article focus on this justice/expedience interplay. Although acknowledging the motivating force of certainty for both sides, this article will not further explore that aspect of the process.

22. *See* MCM, *supra* note 15, pt. I.

Complicating the issue is the requirement that the trial be fair from both the subjective perspective of the defense and prosecution and the objective perspective of the criminal justice system, as articulated by military trial and appellate courts. Early in the military practice of plea bargaining, military appellate courts served notice that, regardless of what the parties thought fair, appellate judges would scrutinize pretrial agreements. The United States Court of Military Appeals (COMA) set the tone for judicial review by declaring that the courts would not let pretrial agreements "transform the trial into an empty ritual."[24] Appellate judges would consider unjust any agreement that interfered with the traditional function of the trial.

Although there are a number of incentives that might prompt an accused to enter into an agreement with the convening authority,[25] the accused is ultimately bargaining for one thing—the likelihood that his maximum sentence specified in the pretrial agreement will be lower than the sentence he would receive in a contested trial.[26] Early on, the appellate courts recognized that the chief motivation of the accused when negotiating a pretrial agreement is sentence limitation.[27] However, in *United States v. Cummings*,[28] the COMA condemned the propensity of pretrial agreements to cause an accused to enter a legally insufficient plea.[29] To obtain what he felt was a favorable sentence limitation, Private Cummings affirmatively waived any issues contesting his right to both a speedy trial[30] and due process.[31] Although the COMA was satisfied of his factual guilt, the waiver provision of the agreement rendered the plea improvident.[32] Declaring the waiver of such issues "contrary to public policy and void,"[33] the COMA relied on several earlier decisions that disapproved of waiver provisions in pretrial agreements.[34] Concluding that the only appropriate matters open to bargaining were charging decisions and sentence limitation, the COMA rejected inclusion of waiver provisions that imperiled fundamental rights.[35]

In *United States v. Holland*,[36] the COMA found unacceptable a pretrial agreement that contained a provision which required the accused to enter his plea of guilty prior to raising any other motions. By forgoing his opportunity to raise motions prior to pleading guilty, the accused secured a sentence limitation of ten months confinement.[37] The accused pleaded guilty, was sentenced to twenty months confinement, and the convening authority reduced the sentence to the agreed upon ten months.[38] The COMA reversed, relying on *Cummings* and the concept that certain terms of a pretrial agreement could ren-

23. *See* U.S. CONST. amends. V, VI.

24. United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957).

25. *See* MCM, *supra* note 15, R.C.M. 705(b)(2). The convening authority may agree to "[r]efer the charges to a certain type of court-martial; [r]efer a capital offense as non-capital; [w]ithdraw one or more charges or specifications from the court-martial; [h]ave the trial counsel present no evidence as to one or more specifications . . . and [t]ake specified action on the sentence adjudged by the court-martial." *Id.*

26. *See id.* All of the concessions that a convening authority might make ultimately affect the maximum sentence that an accused can receive. For example, an agreement by the convening authority to refer a case to a special court-martial empowered to adjudge a bad-conduct discharge automatically limits the accused's possible sentence to the jurisdictional limit of that level court, which is six months confinement, forfeiture of two-thirds pay for a maximum of six months, reduction to the lowest enlisted grade, and a bad-conduct discharge. *See id.* R.C.M. 201(f)(2).

27. *See* United States v. Holland, 1 M.J. 58, 59 (C.M.A. 1975) ("[T]here are certainly benefits which accrue to an accused from a bargain ensuring a fixed maximum sentence.").

28. 38 C.M.R. 174 (C.M.A.1968).

29. *Id.* at 175 (citing United States v. Chancellor, 36 C.M.R. 453 (C.M.A. 1966); United States v. Drake, 35 C.M.R. 347 (C.M.A. 1965)) (condemning situations where the insufficiency of the law officer's providence inquiry lead to improvident pleas by accuseds who were intent on securing their sentence limitation)).

30. *See* U.S. CONST. amend. VI; UCMJ art. 10 (1988).

31. *Cummings*, 38 C.M.R. at 176 (noting that untimely forwarding of charges when Private Cummings was confined awaiting disposition of his charges raised potential violation of Private Cummings' right to due process).

32. *Id.* at 177 (citing United States v. Banner, 22 C.M.R. 510 (C.M.A. 1956)).

33. *Id.*

34. *Id.* (citing *Banner*, 22 C.M.R. at 519) ("[N]either law nor policy could condone the imposition by a convening authority of [waiver of issues concerning personal jurisdiction] in return for a commitment as to the maximum sentence which would be approved."); United States v. Callahan, 22 C.M.R. 443, 448 (A.B.R. 1956) (holding that a term in a pretrial agreement in which the accused forfeits his right to offer evidence in extenuation and mitigation during the presentencing phase of the trial is "an unwarranted and illegal deprivation of the accused's right to military due process.")).

35. *Cummings*, 38 C.M.R. at 176.

36. 1 M.J. 58, 59 (C.M.A. 1975).

37. *Id.* at 59.

der the entire bargain null and void. The COMA noted that even when the offending term originates with the accused,[39] if its effect is to render the trial unfair, the agreement is void.[40]

Both *Cummings* and *Holland* echoed the "trial as an empty ritual" theme identified in *Allen* as the chief evil to be guarded against any time a pretrial agreement is the subject of appellate review.[41] The clear message of these early decisions is that justice requires a trial unfettered by restriction of due process or waiver of fundamental rights.[42] The courts were not concerned that the accused concurred in, or even proposed, the offending term. Furthermore, the courts found it immaterial that the accused received significant benefit from his pretrial agreement in terms of sentence limitation.[43] Faced with validating the justness of the plea bargaining process, the highest military court defined justice not in terms of the accused's ability to limit his potential sentence—which is the measure of justness the accused cares most about—but instead by how the pretrial agreement altered the traditional processes of courts-martial. Because the COMA found that "efficiency and expedition" of cases was antithetical to a just proceeding, it declared that it would scrutinize pretrial agreement terms designed to further expedience.[44]

Expedience

The government's interest in expedience must be considered in the proper context. Conditions which made expedience desirable in 1953 may or may not persist in 1998.[45] Nevertheless, since the military first started using pretrial agreements, savings in the time it takes to try an accused have been a significant benefit to the government.[46] As a goal of the system, however, saving time is valid only if the time saved is better used elsewhere. Therefore, it is crucial to determine how participants in the criminal justice process use the time saved.

The major participants in the military justice system are: military attorneys, judges, and the chain of command. Unlike the civilian judiciary, law enforcement agencies, and criminal trial bar, whose *raison d'être* is the operation of the criminal justice system, many of the key players in the military criminal justice system (like the chain of command) are simultaneously employed in other aspects of military life. Thus, time saved in administering the military justice system translates into more time available for other duties.

The primary mission of trial counsel, defense counsel, and judges in the military, much like their civilian counterparts, is the operation of the criminal justice system.[47] That system, like its civilian analogue, depends on efficient disposition of criminal cases to be effective. Pretrial agreements are a means of promoting efficient disposition of cases. When a pretrial agree-

38. *Id.* at 58.

39. *Id*. at 59. *But see* United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (holding that the accused's proposal of a pretrial agreement which called for trial by military judge alone was a valid condition because the idea originated with the accused).

40. *Holland*, 1 M.J. at 60 ("Being contrary to the demands inherent in a fair trial, this restrictive clause renders the agreement null and void.").

41. *See id*. at 59; United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968).

42. *But see Cummings*, 38 C.M.R. at 179 (Quinn, C.J., dissenting) (citation omitted). In his dissent, Chief Judge Quinn identifies inconsistency in the court's approach to waiver of fundamental rights by citing the court's denial of review in *Dudley*, where the COMA let stand a law officer's determination at trial that in the making his plea of guilty, Dudley had waived any speedy trial issues. *Id*.

43. *But see id*. (Quinn, C. J., dissenting) (stating that "[the] majority opinion disadvantages the accused by depriving him of the benefit of the relatively modest sentence provided for in a pretrial agreement.").

44. *See Holland*, 1 M.J. at 59.

45. Today's widespread use of administrative separations has enabled the military to separate soldiers from the service without the need for a trial. Unlike the time of Major General Shaw, where a court-martial was the primary means to punish and to separate soldiers for misconduct, commanders now use nonjudicial punishment and administrative separation to rid the unit of all but the most egregious criminals. *See* UCMJ art. 15 (1988); U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (17 Sept. 1990); *see also* 10 U.S.C. § 1181(b) (1994) (authorizing the administrative separation of officers for misconduct, moral or professional dereliction, or in the interests of national security). The routine cases of ill discipline that clogged courts-martial dockets in the 1950s, creating a real need for the expedience of pretrial agreements, are not common in 1998. As courts-martial dockets have been generally freed from the glut of routine cases through the use of administrative separations, more complex and serious cases have filled the dockets. Both the decrease in routine cases and the increase in more serious and complex cases may argue for a *decrease* in the use of pretrial agreements, if the goal of their use is simply to save time. The justice system is no longer required to process a large volume of simple drug use or absence without leave (AWOL) cases in which the issue of guilt is not really in question. When those cases were prevalent, the system could afford bargaining to save time with confidence that justice did not suffer for the sake of expedience. Fewer such cases today makes less compelling the need to risk justice for expedience. Similarly, because cases today generally involve complex legal issues and may result in significant confinement for an accused, the credibility of the criminal justice system might increasingly depend on litigating all issues in a contested trial. Notwithstanding an accused's compelling interest in bargaining to limit his sentence, the government might consider reining in the use of pretrial agreements, if only to preserve the integrity of the military justice system in the eyes of the public.

46. *But see* Elling, *supra* note 12, at 195 ("After investigating a case, consulting with the client, negotiating a pretrial agreement, and preparing the client for the providence inquiry, the military defense counsel probably would dispute whether military guilty plea practice actually results in any savings in time and energy. Trial counsel or military judges may have similar misgivings . . . .").

ment results in counsel and the military judge spending a fraction of the time that they would have otherwise spent had the case been fully contested, time is made available for quicker resolution of the next case.[48] Thus, pretrial agreements benefit the principal operators of the criminal justice system by allowing them more time to process more cases.[49] Assuming there are indeed more cases to try, a real benefit results from the time saved by pretrial agreements.[50] Even as counsel and military judges benefit from this process, expedience serves the chain of command to an even greater and more important degree.

The preamble to the *Manual* states that "[t]he purpose of military law is . . . to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment . . . ."[51] The military chain of command is ultimately responsible for ensuring that the purpose of military law is achieved.[52] The responsibilities of the accused's commander only begin with the preferral, forwarding, and referral of charges. Huge investments in time and energy are made by the officers and noncommissioned officers (NCOs) in a unit whenever one of their soldiers is charged and ultimately tried by court-martial. Serving as court-martial panel members[53] or investigating officers,[54] officers and NCOs outside of the unit also invest significant time and energy in the administration of military law.

Pretrial agreements help leaders to maintain good order and discipline within their units because such agreements expedite the trial process and thereby remove problem soldiers from their units sooner rather than later. A soldier who faces court-martial disrupts the normal conduct of business in a unit, affecting everything from training to morale. Thus, the plea agreement process enables leaders to fulfill one of their primary functions under military law, promotion of good order and discipline. Pretrial agreements also enhance the "efficiency and effectiveness of the military establishment . . . ."[55] Time leaders spend administering military law is time away from their primary duties of leading and training soldiers, sailors, airmen, and marines. Any mechanism that allows leaders more time to fulfill their war-fighting mission can only make them more efficient and effective in their primary role, and thus enhance combat readiness.

The goal of expediting cases appears to serve a legitimate end because the benefactors of the process (attorneys, judges, and particularly unit leaders) can put the time saved to better use than if every case resulted in a contested trial. Nevertheless, if that expedience were obtained at the price of a just proceeding, the military criminal justice system would be subject to ridicule. The *Cummings* majority and dissent framed the limits of the debate concerning the justice/expedience tension inherent in the plea bargaining process and foreshadowed the course the debate would follow over the quarter century leading to *Weasler*.[56] However, the mechanics of the plea bargaining process also evolved as the military practice grew, particularly in the years between C*ummings* and *Weasler*. Thus, a basic understanding of how parties enter into pretrial agreements and

47. *See* UCMJ art. 6 (1988).

48. Assuming a typical scenario resulting from a pretrial agreement (e.g., judge alone trial with a limited case in aggravation and a defense waiver of distant witnesses), the greatest beneficiary of the pretrial agreement, in terms of time saved, is the trial counsel. The trial counsel is responsible not only for marshaling the physical evidence and witnesses necessary to prove the charged offenses, but also for: (1) ensuring the attendance of all defense witnesses; (2) logistical support for all witnesses, government and defense; (3) ensuring that the court-martial panel is notified and on time at the appointed place of duty; (4) securing escorts and a bailiff; (5) setting up the court room; and (6) keeping the chain of command informed of the trial's progress. The trial counsel is able to eliminate or to reduce significantly these additional duties when the accused enters into a pretrial agreement. The military judge is second in time saved, as he often will be able to conduct a judge alone guilty plea in four to eight hours, whereas the contested case plus motions hearings and time spent authenticating the record of trial could take days to complete. Defense counsel derives the least benefit from a pretrial agreement, as he faces the considerable task of preparing the accused for the providence inquiry and a case in extenuation and mitigation on sentencing. Of course, defense counsel's client is the ultimate beneficiary in time saved, a period generally measured in months and years. These observations are based on the author's personal experience as both a trial counsel and senior trial counsel over a 28-month period.

49. *But see* Clerk of Court Notes, *supra* note 5, at 93. The total number of general courts-martial declined each year between 1990 and 1995, from a high of 1451 trials in 1990 to only 825 trials in 1995. A similar trend in bad-conduct discharge special courts-martial resulted in a drop from 772 cases in 1990 to 333 in 1995.

50. *Id.* This may not *currently* be a valid assumption, considering the decline in courts-martial rates during the 1990s. However, the criminal justice system must remain flexible enough to handle increased case loads during a build-up and must operate efficiently whether during war time or peace. *See also supra* note 45 and accompanying text.

51. *See* MCM, *supra* note 15, pt. I.

52. *Id.*

53. *See id.* R.C.M. 911, 912.

54. *See id.* R.C.M. 405.

55. *See id.* pt. I.3.

56. *See* United States v. Cummings, 38 C.M.R. 174, 179 (C.M.A. 1968). Chief Judge Quinn was the lone dissenter in *Cummings* but would have found himself comfortably in the majority when *Weasler* was decided. Chief Judge Quinn's interpretation of the law pertaining to permissible pretrial agreement terms tracks the modern orientation of the court and its solicitude for the accused's efforts to limit his sentence.

how that process has changed over time assists in evaluating the continued vitality of plea bargaining practice in the military.

Mechanics of the Plea Bargaining Process

When he first encouraged his subordinates to incorporate plea bargaining into their trial practice, Major General Shaw offered little guidance as to how they should accomplish the mission.[57] Besides stating that offers to plead guilty must originate with the accused[58] and that the rights of the accused would be zealously protected in whatever system was devised,[59] the Army leadership provided little procedural guidance. Senior leaders believed that staff judge advocates, working in conjunction with their convening authorities, could best devise a bargaining system which was responsive to the needs of the command.[60] This ad hoc approach to plea bargaining in the mid-1950s resulted in a remarkable change in courts-martial practice. From its one percent rate of guilty pleas prior to 1953, the Army reported that sixty percent of all convictions resulted from guilty pleas in Fiscal Year 1956.[61]

Although plea bargaining was conducted on an ad hoc basis initially, several threads of consistency wove through the system as it developed.[62] First, the convening authority became the sole authority able to bind the government to a pretrial agreement with an accused.[63] Second, by 1957, both the Army and the Navy[64] issued formal instructions which mandated that plea bargaining must originate with the accused and that any offer to negotiate a guilty plea should be in writing and signed by the accused.[65] Even as the earliest regimes recognized that only the convening authority and the accused could perfect the agreement, negotiation over terms and conditions of a plea bargain became the responsibility of the trial[66] and defense counsel.[67] In the early days of plea bargaining, the staff judge advocate served as the first-line check against excesses in the negotiation process. The staff judge advocate's responsibilities included ensuring that sufficient evidence supported the plea, that the proposed sentence was appropriate for the crime, that charging decisions did not unduly pressure the accused into proposing a deal, and that the agreement did not repress the rights of the accused.[68] The staff judge advocate was responsible for ensuring that the agreement was just, both in the sense of appropriately punishing the accused as well as guaranteeing the credibility of the criminal justice system.

The military appellate courts also played a significant role in establishing the mechanics of the plea bargaining process. They put their judicial imprimatur on the requirements that the accused initiate the bargaining process,[69] that trial and defense counsel should only negotiate over charging decisions and sentence limitations,[70] and that the agreement must be in writing.[71] Although the UCMJ provided no specific guidance, the courts relied on Article 45 to impose restrictions on the parties as they developed the practice of pretrial agreements.[72] In *United States v. Care*,[73] the COMA articulated a model providence

57. *See* Bethany, *supra* note 16, at 5.

58. *Id.*

59. *Id.* at 6.

60. *Id.* (citing Report of Proceedings, Army Judge Advocate's Conference 84 (Sept. 1954)).

61. *Id.* at 7 (citing Report of Proceedings, Army Judge Advocate's Conference 226-27 (1956)). Bethany points out that the one-percent figure represented those cases that were disposed of entirely by a guilty plea. The figure grew to nearly ten percent in mixed pleas or cases when the trial counsel opted to prove the greater charged offense. He was also careful not to attribute the entire increase in the years immediately following Shaw's letter to the use of pretrial agreements. Bethany nevertheless notes that the dramatic increase resulted from a systemic awareness of the predictability that plea bargaining injected into the courts-martial process. *Id.*

62. *See* United States v. Cummings, 38 C.M.R. 174, 178 (C.M.A. 1968) (condemning an agreement which forbade resolution of collateral issues as contrary to the accepted practice of only bargaining for charging decisions and sentence limitation). The COMA noted that "[i]t appears the type of agreement here involved is limited to the jurisdiction whence it came and is contrary to that contemplated for use by the Department of the Navy." *Id.*

63. *See* Kenneth D. Gray, *Negotiated Pleas in the Military*, 37 FED. BAR J. 49, 50 n.6 (1978) (UCMJ arts. 22-24 grant convening authorities certain judicial authority that make participation in the pretrial agreement process a natural adjunct to other statutory responsibilities).

64. *See id.* at 49 n.4 (the Air Force did not allow plea bargaining in any form until 23 January 1975, and when it initially did allow the practice, approval of The Judge Advocate General was needed on a case-by-case basis).

65. *See* Bethany, *supra* note 16, at 27 n.82. *See also* United States v. Villa, 42 C.M.R. 166 (C.M.A. 1970) (recognizing pretrial agreements in the Coast Guard for the first time).

66. *See* Bethany, *supra* note 16, at 32 (trial counsel appraises the evidence, the likelihood of conviction, and the probable sentence and then recommends to the staff judge advocate whether or not the convening authority should agree to the offer to plead guilty).

67. *Id.* at 26 (defense counsel negotiates always on behalf of his client, who has the final say in all matters regarding a pretrial agreement).

68. *Id.* at 35.

69. *See* United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) (holding that only an accused could propose a pretrial agreement).

inquiry and established a requirement that all trial judges adhere to that inquiry as a means of ensuring that the accused was knowingly, voluntarily, and intelligently agreeing to the terms of the pretrial agreement.[74] During the first thirty years of plea bargaining practice in the military, The Judge Advocates General of the respective services[75] and the trial courts[76] created the rules and procedures.

The mechanics of the plea bargaining system remained largely unchanged from the time pretrial agreements were first negotiated in the 1950s until *Weasler*. However, several significant changes to the practice occurred in the 1980s and 1990s. The first important change coincided with the first major revision of the *Manual* since 1969.[77] The 1984 *Manual*[78] was the first to consolidate all of the service policies and case law pertaining to pretrial agreements and to codify the materials as a Rule for Courts-Martial (R.C.M.).[79] Rule for Courts-Martial 705 did not necessarily change the way parties plea bargained as much as it systematized the practice.[80] The new R.C.M. added predictability to the plea bargaining process by specifying both the procedures that the parties would follow and the kinds of pretrial agreement terms that the COMA found acceptable or objectionable.[81]

The second significant change to the plea bargaining process occurred when the 1991 amendments to the *Manual* included a change to R.C.M. 705.[82] The new language in R.C.M. 705(d) reflected a complete abandonment of the requirement that the accused initiate plea negotiations. According to the amended rule, "[p]retrial agreement negotiations [could] be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, [the] convening authority, or their duly authorized representatives."[83] Not only did the change bring military practice in line with civilian practice on this point,[84] it also demonstrated a fundamental shift in emphasis from the agreement's form to its substance. The change was possibly prompted by Judge Cox's concurrence in *United States v. Jones*,[85] in which he advocated abandonment of the requirement that only the accused could initiate negotiations or propose terms for a pretrial agreement.[86] After this change, the COMA was much less concerned with tracing the agreement's origin than it was with ensuring that the record established that the accused completely understood the terms of his agreement.[87] However, as *Weasler* demonstrates, the CAAF will scrutinize who proposes a term for inclusion in an agreement if that term or condition suggests bad faith on the part of the government.[88]

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70. *See, e.g.*, United States v. Banner, 22 C.M.R. 510 (A.B.R. 1956); United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958); United States v. Scoles, 33 C.M.R. 226 (C.M.A. 1963).

71. *See, e.g.*, United States v. Stevens, 51 C.M.R. 765 (A.C.M.R. 1975).

72. UCMJ art. 45 (1988). The judges at the appellate level viewed subsection (a) as their mandate to police plea bargaining procedures. It states:

> [i]f an accused, after arraignment, makes an irregular pleading, or after a plea of guilty sets up matters inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

73. 40 C.M.R. 247 (C.M.A. 1969).

74. *Id.* at 248.

75. *See generally* MCM, *supra* note 15, R.C.M. 705 analysis, app. 21, at A21-38(a) (citations omitted). *See also* Joseph P. Della Maria Jr., *Negotiating and Drafting the Pretrial Agreement*, 25 JAG J. 117 (1971).

76. *But cf.* United States v. Villa, 42 C.M.R. 166, 172 (C.M.A. 1970) (Ferguson, J., dissenting) (indicating that at least one of the three members of the COMA viewed pretrial agreements as more trouble than they were worth; noting with approval the Air Force practice of not allowing bargained pleas).

77. MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969) [hereinafter 1969 MANUAL].

78. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

79. *Id.* R.C.M. 705. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 9-2, 321 (3d ed. 1992).

80. *See* SCHLUETER, *supra* note 79, at 322.

81. *See supra* note 94 and accompanying text.

82. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 705(d) (1984) (C5 27 June 1991) [hereinafter MCM C5].

83. *Id.*

84. *Id.* R.C.M. 705(d) analysis, app. 21, at A21-40.

85. 23 M.J. 305 (C.M.A. 1987) (Cox, J., concurring in the result).

Except for the few notable mechanical changes resulting from changes to the *Manual*, the mechanics and goals of the plea bargaining practice in the military have remained largely unchanged in the forty-two years between Major General Shaw's initiative and the CAAF's decision in *Weasler.* While ultimately concerned with ensuring justice, the participants in the plea bargaining process sought the benefits of certainty and expedience that the practice offered. However, while the procedures remained generally static and the goals unchanged, the terms and conditions that parties sought for inclusion in pretrial agreements were constantly changing. Although somewhat reluctantly, the military courts' standards also changed as they considered novel terms which the parties were increasingly including in pretrial agreements. A survey of cases from the 1950s to the 1990s demonstrates a gradual willingness to allow the parties greater leeway in crafting pretrial agreements.

Terms of a Pretrial Agreement: What Are the Boundaries?

From the time that military courts first began reviewing pretrial agreements in the mid-1950s to the present, they have struggled conceptually with classification of the plea bargaining process. Even though the terminology[89] and methodology[90] employed by the courts when reviewing pretrial agreements find their roots in contract law, the courts initially refused to recognize pretrial agreements as contracts.[91] Whether rejecting the analogy to contract law was ever appropriate,[92] military courts have increasingly recognized the benefits that pretrial agreements offer.[93] As the courts have become more comfortable characterizing the process as contractual in nature, the scope of permissible terms and conditions has expanded.

Permissible Terms and Conditions[94]

Since *United States v. Allen*[95] in 1957, the COMA has premised pretrial agreement term permissibility on one simple

86. *Id.* at 308-09. Judge Cox noted:

> I write to distance myself from any implication in the majority opinion that the point of origin or "sponsorship" of any particular term of a pretrial agreement is outcome determinative. In the first place, I anticipate that determining the point of origin will be problematic. For example if, over a period of months or years, the local defense bar comes to realize that the only pretrial agreements ever approved by a particular convening authority contain certain waiver or waivers, who has sponsored the term? I would assume that the convening authority did, regardless of who literally may have caused the language to be inscribed on a particular document and transmitted to the opposing party. Moreover, with few notable exceptions (including but not limited to, the rights to counsel, allocution, appeal, and the right to contest jurisdiction), I see no problem with the Government's sponsoring, originating, dictating, demanding, etc., specific terms of pretrial agreements (citation omitted). I take it that the convening authority's ability to refuse entirely to enter into pretrial agreements or to enter into any particular agreement is the ultimate command-sponsored limitation.

87. *See* MCM C5, *supra* note 82, R.C.M. 705(d) analysis, app. 21, at A21-40.

88. *See supra* notes 236-240 and accompanying text.

89. *See* SCHUELTER, *supra* note 79, at 322 (noting that the terminology of pretrial agreements—offer, acceptance, consideration—is the terminology of contact law).

90. *Id.* nn.6-8 and accompanying text (requirement that offers be in writing; convening authority accepts by signing; ambiguous terms construed against the convening authority). Legal commentators also have long used contract law as a construct for critique of pretrial agreements in the military. *See generally* Gray, *supra* note 63, at 51 ("[A] pretrial agreement is a contract between the convening authority and the accused."); Della Maria, *supra* note 75, at 118 ("The pretrial agreement is . . . nothing more than a contract between the convening authority and the accused.").

91. *See* United States v. Weasler, 43 M.J. 15, 21 (1995) (Sullivan, C.J., concurring in the result) ("[T]he contract rationale proffered by the majority is dead wrong."); United States v. Cummings, 38 C.M.R. 174, 178 (C.M.A. 1968) ("Attempting to make [pretrial agreements] into contractual type documents which forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as on appeal, substitutes the agreement for the trial and, indeed, renders the latter an empty ritual."). *See also* United States v. Koopman, 20 M.J. 106 (C.M.A. 1985); United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977); United States v. Cox, 46 C.M.R. 69 (C.M.A. 1972).

92. *See* Scott & Stuntz, *supra* note 3, at 1967 ("The [contract] framework offers a fairly clear answer to the most basic questions policymakers (legislative or judicial) might want answered."). Although not possible to examine within the confines of this article, the contract rationale that Scott and Stuntz posit for application in the civilian plea bargaining context deserves thoughtful consideration in the military context. Because bargaining in the military context is mightily constrained by custom, regulation, statute, and case law (far more so than in the civilian system), the military's predisposition to an orderly and open process seems particularly well-suited to embrace contract law as a means of regulating that process. The continued ad hoc approach to determining which pretrial agreement terms will be enforced and which will be rejected might be unnecessary with the ready surrogate of contract law to serve as a template for systematic review.

93. *See Weasler*, 43 M.J. at 19 ("To hold [against appellant] would deprive [him] of the benefit of his bargain."). *But see id.* at 21 (Sullivan, C.J., concurring in the result) ("[T]he contract rationale proffered by the majority is dead wrong.").

94. The purpose of this section is not to recite a laundry list of pretrial agreement terms and conditions that the courts have found permissible; others have done that with great economy. *See* GILLIGAN & LEDERER, *supra* note 17, §§ 12-25.10 to 12-25.19(d); SCHLUETER, *supra* note 79, § 9-2(B)(1); MCM, *supra* note 15, R.C.M. 705(c)(2). The goal, however, is to explore the judicial process that leads to a greater liberalization of plea bargaining practice and how the judicial focus shifted somewhat from a strictly paternalistic protection of fundamental rights to a more detached appraisal of rights bargaining as a process mutually beneficial to the accused and the government.

idea: the agreement term must not derogate the courts-martial function of ensuring that justice is done. The appellate judges who first reviewed pretrial agreements had a very narrow view of what was permissible under the *Allen* standard.[96] If the terms of the pretrial agreement involved anything other than the charges to which the accused would plead guilty or the maximum sentence that the convening authority would agree to approve, the appellate courts viewed the deal with suspicion.[97]

When parties first began including waiver provisions in their pretrial agreements, the COMA would have none of it. The COMA predicated its rejection of rights waiver terms on *United States v. Ponds*[98] and *United States v. Darring*.[99] In *Ponds*, the accused had no pretrial agreement but, after pleading guilty at trial and then losing his initial appeal to the board of review, waived his appeal of right to the COMA.[100] Declaring the waiver a "legal nullity," the COMA noted that similar waivers in the future would be scrutinized to ensure that an accused was not mistakenly waiving his rights for the government's convenience.[101] The accused in *Darring* waived his right to appellate counsel based on his mistaken belief that his guilty plea at trial assured rejection of any claim on appeal.[102] Although this case also did not involve a pretrial agreement, the court rejected Darring's waiver of appellate review for the same reasons articulated in *Ponds*.[103]

The first time that an appellate tribunal reviewed a pretrial agreement containing terms that specifically called for waiver of an accused's right to present extenuation and mitigation evidence during the pre-sentencing phase of his trial, the judges relied on *Ponds* to invalidate the term. In *United States v. Callahan*,[104] the Army Board of Review (Board) held that a term which prevented the accused from offering favorable sentencing evidence was an "unwarranted and illegal deprivation of the accused's right to military due process."[105] Similarly, in *United States v. Banner*,[106] the Board dismissed the charge and upbraided the convening authority for conditioning the pretrial agreement on a term which forced the accused to waive any challenge to the court-martial's jurisdiction; the Board stated that the term was contrary to law and public policy.[107]

United States v. Cummings[108] was the high-water mark for appellate intolerance for rights waivers in pretrial agreements. Because of several unauthorized absences and subsequent periods of confinement in the Camp Pendleton confinement facility, there was a seven-month lapse between the time of Private Cumming's first confinement and the time that charges were referred to a general court-martial. As part of his pretrial agreement, Cummings waived any issues relating to his right to a speedy trial or claims that he had been denied due process under the law.[109] Overturning the conviction, the COMA chided the convening authority for attempting to secure by waiver a forfeiture of rights that was not allowed by law.[110] The COMA stated that a guilty plea could never be predicated on waiver of statutory or constitutional rights.[111] The COMA reemphasized its

95. 25 C.M.R. 8, 10 (C.M.A. 1957). The facts in *Allen* did not present the court with an onerous pretrial agreement term. The issue on review was ineffective assistance of counsel. Private Allen had a pretrial agreement with the convening authority which limited his maximum sentence to 18 months confinement at hard labor for a guilty plea to one specification of desertion. However, PVT Allen's counsel did not put on any evidence during the presentencing phase of the trial, even though plenty of favorable extenuation and mitigation evidence existed. Before addressing the effectiveness issue, the COMA addressed pretrial agreements in general and announced the "trial as an empty ritual" doctrine that provides the legal context that, to this day, underlies consideration of pretrial agreements.

96. *But see* United States v. Cummings, 38 C.M.R. 174, 179 (C.M.A. 1968) (Quinn, C.J., dissenting) (pointing out that a tactical decision to waive a fruitless speedy trial motion as part of a pretrial agreement was a sound tactical decision which the majority was wrong to condemn).

97. *Id.* at 177 (holding, in part, that pretrial agreements should cover nothing more than charging and sentencing issues).

98. 3 C.M.R. 119 (C.M.A. 1952).

99. 26 C.M.R. 431 (C.M.A. 1958).

100. *Ponds*, 3 C.M.R. at 120.

101. *Id.* at 121.

102. *Darring*, 26 C.M.R. at 434-35.

103. *Id.* at 435.

104. 22 C.M.R. 443 (A.B.R. 1956).

105. *Id.* at 448.

106. 22 C.M.R. 510 (A.B.R. 1956).

107. *Id.* at 519.

108. 38 C.M.R. 174 (C.M.A. 1968).

109. *Id.* at 176.

long-held view that only terms pertaining to sentence limitation were appropriate for inclusion in a pretrial agreement.[112]

Beginning with *United States v. Care*,[113] decided one year after *Cummings*, the COMA began to systematize judicial consideration of guilty pleas at the trial level.[114] The inquiry mandated by *Care* not only ensured that the accused demonstrated his factual guilt to the legal satisfaction of the military judge, but it also, for the first time, required the judge to inform the accused of the fundamental rights that he was waiving by pleading guilty.[115] The 1969 *Manual* also aided in formalizing the guilty plea process.[116] Refining the practice further, in *United States v. Green*,[117] the COMA announced that additional inquiry of the accused would become part of every *Care* inquiry.[118]

The aim of these rulings was to increase public confidence in the military justice system by further guaranteeing the reliability of guilty findings obtained via the plea bargaining process.[119] The result of the *Care, Elmore,* and *Green* line of cases was to shift to the trial judge much of the responsibility for determining the permissibility of pretrial agreement terms and conditions.[120]

As military courts continued formalizing the pretrial agreement process, two Supreme Court cases influenced military practice. Decided in 1971, *Santobello v. New York*[121] was important because it put the Supreme Court's imprimatur on the value of plea bargaining. By legitimizing the civilian plea bargaining practice—a system without the myriad procedural protections found in military plea bargaining—*Santobello* provided the COMA with a measure of confidence as it strove to improve the military plea bargaining practice.[122] Decided in 1978, *Bordenkircher v. Hayes*[123] went directly to issues confronting military trial judges who had to determine the legality of pretrial agreement terms. In that case, the Court upheld a prosecutor's threatened use of a capital murder charge and pos-

110. *Id.* The COMA noted, "we have expressly pointed out a guilty plea waives neither the right to speedy trial nor the right to due process in the handling of charges." *Id.* (citations omitted).

111. *Id.*

112. *Id.* at 178 ("We reiterate our belief that pretrial agreements are properly limited to the exchange of a plea of guilty for approval of a stated maximum sentence.").

113. 40 C.M.R. 247 (1969).

114. *See* Gray, *supra* note 63, at 53 (noting that the decision established the parameters of the military judge's inquiry in guilty plea cases).

115. *Care*, 40 C.M.R. at 257. Judge Darden wrote for the majority, "[t]he record must also demonstrate the military judge . . . personally addressed the accused, advised him that his plea waives his right against self incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him; and that he waives such rights by his plea." *Id.*

116. 1969 MANUAL, *supra* note 77, para. 70.

117. 52 C.M.R. 10 (C.M.A. 1976).

118. *See* Gray, *supra* note 63, at 56. The ruling in *Green* requiring an expanded *Care* inquiry was premised on Judge Fletcher's concurrence in United States v. Elmore, 1 M.J. 262, 264 (C.M.A. 1976) (Fletcher, J., concurring). Pointing out the trial judge's role in cases involving negotiated pleas, Judge Fletcher noted:

> The trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by an existing pretrial agreement. Where the plea bargain encompasses conditions which the trial judge believes violate either appellate case law, public policy, or the trial judge's own notions of fundamental fairness, he should, on his own motion, strike such provisions from the agreement with the consent of the parties.
>
> In addition to his inquiry with the accused, the trial judge should secure from counsel for the accused as well as the prosecutor their assurance that the written agreement encompasses all of the understandings of the parties and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain.

119. *See* United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) (holding that trial level scrutiny of pretrial agreements will enhance public confidence in the plea bargaining process).

120. *See* Gray, *supra* note 63, at 56.

121. 404 U.S. 257 (1971) (noting that plea bargaining is an essential and highly desirable component of the justice system which should be encouraged). After negotiations with the prosecutor, Santobello withdrew his plea of not guilty to a felony gambling charge and agreed to plead guilty to a lesser-included charge. In exchange for the plea, the prosecutor agreed to make no recommendation to the judge during sentencing. Santobello pleaded guilty as promised, and the sentencing hearing was set for several weeks later. While awaiting sentencing, a new prosecutor took over the case. When Santobello finally faced the judge for sentencing proceedings, the new prosecutor, who knew nothing of the agreement that Santobello had made with the previous prosecutor, recommended that Santobeloo be sentenced to the maximum one-year sentence for his crimes. Santobello objected, but the trial judge informed the parties that, whether or not there was such an agreement, he would sentence Santobello to the maximum sentence anyway because of Santobello's criminal history. The case went forward on appeal based on Santobello's claim that the new prosecutor's breach of the pretrial agreement impermissibly influenced the trial judge to adjudge the maximum sentence. While recognizing the legitimacy of the plea bargaining system, the Supreme Court vacated the sentence and remanded the case to the state court to determine whether Santobello was entitled to specific performance of his pretrial agreement. *Id.* at 257-60.

sible death sentence to convince the accused to plead guilty to a murder charge with a guaranteed sentence of life imprisonment. The Court observed that the tendency of such a tactic to discourage an accused from exercising his full rights in a trial setting was an "inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[124]

Whereas *Santobello* demonstrated that plea bargaining in general suffered no constitutional infirmity, *Bordenkircher* demonstrated that the process passed constitutional muster even when used aggressively by the government. Thus, as plea bargaining entered its fourth decade of use in the military, rulings from the Supreme Court legitimized and expanded the use of the practice.

In *United States v. Mills*,[125] the COMA invalidated an agreement between the convening authority and the accused because the agreement truncated full appellate review.[126] However, the majority opinion noted that nothing prohibited parties from drafting terms that limited rights of the accused, as long as the accused fully understood the consequences of the terms and agreed to their inclusion.[127] Citing *Bordenkircher,* the COMA acknowledged the permissibility of "practices [within the plea bargaining realm] which tend to chill the assertion of a defendant's rights."[128]

United States v. Jones[129] marked the COMA's move further away from the paternalism that characterized its analysis of rights waiver terms during the 1950s and 1960s.[130] The COMA upheld a defense-proffered term which waived the accused's right to contest search and seizure and victim identification issues.[131] In his concurrence, Judge Cox drew on *Bordenkircher* to suggest that the government should be allowed to affirmatively mandate specific terms of a pretrial agreement.[132]

In *United States v. Schaffer*,[133] the COMA permitted defense-initiated waiver of the right to an Article 32 investigation.[134] Recognizing its ability to forbid the practice, the COMA noted, "[o]ur paternalism need not extend to that extreme."[135] In *United States v. Zelenski*,[136] the COMA upheld a defense-initiated waiver of the right to trial by a panel of officer and/or enlisted soldiers.[137] Six years later in *United States v. Andrews*,[138] the Army Court of Military Review (ACMR) relied on the 1991 changes to R.C.M. 705 to validate the *government's* conditioning acceptance of an offer to plead guilty on the accused's waiver of the right to trial by members.[139] The COMA came to the same conclusion two years

122. *See* Gray, *supra* note 63, at 49.

123. 434 U.S. 357 (1978).

124. *Id.* at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

125. 12 M.J. 1 (C.M.A. 1981).

126. *Id.*

127. *Id.* at 4.

128. *Id.*

129. 23 M.J. 305 (C.M.A. 1987).

130. *Id.* at 308.

131. *Id.* The COMA cautioned, however, that an identical term, proposed by the government, would not receive such willing acceptance. *Id.* As this case predated the 1991 change to the 1984 *Manual*, there still existed a prohibition against anyone but the accused originating an offer to enter into a pretrial agreement or proposing terms for inclusion.

132. *Id.* (Cox, J., concurring in the result).

133. 12 M.J. 425 (C.M.A. 1982).

134. *Id.* at 429.

135. *Id.*

136. 24 M.J. 1 (C.M.A. 1987).

137. *Id.* The COMA noted that the government could not condition acceptance of a pretrial agreement on waiver of the right to trial by members. However, because the defense had decided that the best interests of the accused favored such a waiver, the COMA found the term permissible. *Cf.* United States v. Burnell, 40 M.J. 175 (C.M.A. 1994) (noting that the 1991 changes to R.C.M. 705 make the origin of pretrial agreement term irrelevant, thus allowing the government to condition pretrial agreements on waiver of trial by members).

138. 38 M.J. 650 (A.C.M.R. 1993).

later in *United States v. Burnell*,[140] ruling that the government could make acceptance of a pretrial agreement contingent on the accused agreeing to trial by military judge alone.[141] The COMA's primary concern in reviewing pretrial agreements was to ensure that the accused entered into the agreement voluntarily and intelligently.[142]

The COMA had come a long way by the time it considered *Weasler* in 1995. The unwillingness to allow terms other than charging and sentence limitation, which characterized judicial review in the 1950s and 1960s, gave way to a standard of review which was more solicitous of the desires of the parties. The COMA was confident in the institutional safeguards that *Care* and the 1984 *Manual* imposed on pretrial agreement practice. The COMA's natural evolution,[143] coupled with the 1984 and 1991 changes to the *Manual*, enabled it to overcome its historic uncertainty and to focus on the essential judicial concern—did the accused enter into the pretrial agreement voluntarily and intelligently?[144] Nevertheless, even as the courts grew more tolerant of creative bargaining between the accused and the convening authority, certain terms remained off limits.

Impermissible Terms and Conditions[145]

Neither the *Manual* nor the COMA permit a pretrial agreement term or condition unless the accused voluntarily agrees to it.[146] Forcing an accused into such an agreement not only invalidates the agreement but probably would constitute a basis for adverse action against a convening authority for violation of the UCMJ.[147] The professionalism and independence of trial defense counsel make such an event very unlikely. Typically, it is the accused, ever willing to trade legal rights to lessen his time behind bars, who enthusiastically suggests terms and conditions which the courts refuse to embrace. Such terms fail because they threaten the fairness of the trial.[148]

Certainly, the accused has willing accomplices. If professional judgment and experience tell defense counsel that nothing is gained by litigating certain motions, they often encourage waiver of the motions (even where fundamental rights are involved), recognizing that their clients' bottom line is to minimize confinement.[149] Trial counsel are eager to support any initiative of the accused that results in foregone motions and speedy disposition of a guilty plea. The waiver provisions are typically supported by staff judge advocates and agreed to by the convening authorities because the accuseds are capitulating on the issue, and contested trials are costly in terms of personnel, time, and money. Finally, military trial judges, unlike appellate judges who never face an accused, desperately trying to remain provident to preserve favorable sentence limitations, will try to give meaning and effect to terms and conditions which the accused voluntarily agreed to and obviously wants enforced. Thus, impermissible terms find appellate scrutiny

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139. *Id.* (conditioning acceptance of pretrial agreement upon accused's waiver of right to trial by members does not violate public policy). *But see* United States v. Young, 35 M.J. 541 (A.C.M.R. 1992) (noting that government *demand* of trial by members waiver is unenforceable).

140. 40 M.J. 175 (C.M.A. 1994).

141. *Id.*

142. *Id.*

143. The judges on the COMA who wrestled with establishing an appropriate standard of review for the military were also spectators of the process as it evolved in civilian society. Not only was their approach to the task informed by the law and policy of the military, but it must necessarily have been affected by civilian practice as well. Over time, even as the COMA and the drafters of the *Manual* erected procedural safeguards to ensure that only a truly guilty accused would be allowed to plead guilty, the court—undoubtedly aware of the robust bargaining in the civilian sector—became increasingly willing to allow the guilty accused and the government to decide for themselves how best to allocate risks and resources attendant to the process.

144. *See* MCM, *supra* note 15, R.C.M. 705(c)(2) (agreement must be entered into freely and voluntarily); United States v. Burnell, 40 M.J. 175 (C.M.A. 1994) (upholding a decision to waive trial by members as long as the decision is voluntary and intelligent).

145. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); SCHLUETER, *supra* note 79, § 9-2(B)(2), at 330; GILLIGAN & LEDERER, *supra* note 17, § 12-25.20, at 470.

146. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(A) ("A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it."); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

147. *See* UCMJ art. 37(a) (1988) ("No person . . . may attempt to coerce or, by any unauthorized means, [to] influence the action of a court-martial . . . in reaching the findings . . . in any case . . . .") Were it even possible, a convening authority who forced an accused to accept a term of a pretrial agreement would be guilty of exercising unlawful command influence. The convening authority would thus subject himself to prosecution for violation of article 98 of the UCMJ. *See id.* art. 138.

148. *See* SCHLUETER, *supra* note 79, § 9-2(B)(2), at 330.

149. *See* United States v. Cummings, 38 C.M.R. 174, 180 (C.M.A. 1968) (Quinn, C.J., dissenting). This tactic, often employed by defense counsel, has found some sympathy on the court, providing the judge agrees with the defense counsel's appraisal of the evidence. Judge Quinn noted that "we cannot close our eyes to the obvious 'probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense' and, therefore, chose 'to disregard the evidence in favor of the possible advantage of a guilty plea.'" *Id.* at 180 (citing United States v. Hinton, 23 C.M.R. 263 (C.M.A. 1957)). *See also* United States v. Bertleson, 3 M.J. 314, 315-16 (C.M.A. 1977).

because the parties at the trial level have actively, though sometimes unwisely, sought their inclusion.

Although the list continues to shrink, the courts will not allow certain fundamental rights to be waived because of the perceived effect that such waiver would have on the credibility of the military justice system.[150] The right to counsel cannot be waived, whether at the trial or appellate level.[151] Due process rights are not subject to bargained waiver.[152] Parties cannot agree to waive jurisdictional issues,[153] and they cannot agree to waive speedy trial issues,[154] complete sentencing proceedings,[155] or exercise of posttrial and appellate rights.[156]

This was the legal backdrop when *Weasler* was argued on appeal. Although willing to give the parties great leeway when crafting pretrial agreements, the *Weasler* court steadfastly refused to permit terms and conditions that, when viewed through the eyes of the public, threatened the integrity of the military justice system. *Weasler* presented the CAAF with the ultimate system integrity dilemma. Invoking the specter of unlawful command influence, Weasler's appellate counsel challenged the CAAF to expand its list of fundamental rights that could not be waived. He asked the CAAF to repudiate Weasler's pretrial agreement, claiming that it forced waiver of Weasler's right to a preferral of charges that were free from unlawful command influence.[157]

II. Unlawful Command Influence

The drafters of the UCMJ were able to craft a criminal code that is responsive to the military's need for both justice and discipline.[158] The drafters recognized the command's legitimate discipline interests in administering the criminal justice system while also recognizing that too much influence could take *justice* out of the military justice system.[159] The statutory mandate of Article 37 was designed to protect the integrity of the court-martial by ensuring that none of the participants would suffer at the hands of a superior who disagreed with the results of the proceeding.[160]

Early on, the COMA sought to ensure that unlawful command influence did not affect court-martial participants, particularly panel members.[161] In *United States v. Littrice*,[162] the COMA set aside the findings and sentence because an acting commander unlawfully influenced panel members prior to their service in Private Littrice's case.[163] Over time, the COMA relied on Article 37 as its bulwark against excessive command

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150. *Compare Cummings*, 38 C.M.R. at 177 ("[Pretrial agreements] should concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions . . . ."), *with Bertelson*, 3 M.J. at 315-16 ("If an accused and his lawyer, in their best judgment, think there is a benefit or advantage to be gained . . . we perceive no reason why they should not be their own judges with leeway to do so.").

151. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958).

152. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); *Cummings*, 38 C.M.R. at 174.

153. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Morales, 12 M.J. 888 (A.C.M.R. 1982).

154. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); *Cummings*, 38 C.M.R. at 174.

155. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Callahan, 22 C.M.R. 443 (A.B.R. 1956).

156. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Schaller, 9 M.J. 939 (N.M.C.M.R. 1980).

157. *See generally* Final Brief on Behalf of Appellant, United States v. Weasler, 43 M.J. 15 (1995) (No. 94-1249/AR).

158. *See* United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953).

159. *Littrice*, 13 C.M.R. at 48-49 (recognizing a legitimate command interest in administering the criminal justice system, UCMJ article 25 requires the convening authority to select courts-martial members based on established criteria). *See also id.* at 47 (citing H.R. REP. NO. 81-491, at 8) ("we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.").

160. *Id.* at 47. Article 37 of the Code provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, [to] influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

UCMJ art. 37 (West 1995).

161. *See* Bower, *supra* note 8, at 70 n.34.

162. 13 C.M.R. 43 (C.M.A. 1953).

control exerted during any phase of criminal justice administration.

Evolution of Unlawful Command Influence Jurisprudence

The COMA's expansion of Article 37's reach was prompted by recognition that *apparent* and *perceived* unlawful command influence could be as harmful as the actual occurrence. In *United States v. Johnson*,[164] the COMA recognized that command actions that *appeared* to be improper could tarnish the public's perception of the integrity of the justice system just as much as those actions that actually amounted to unlawful command control.[165] Foreshadowing a theme that would figure prominently in the philosophical split of the *Weasler* court twenty years later, *Johnson* signaled increased judicial vigilance where command action threatened society's confidence in the fairness of the military criminal process.

Unlawful command influence jurisprudence expanded further with the COMA's condemnation of command actions that created a *perception* of unlawful command influence. In a series of cases arising out of the 3d Armored Division in Germany, the COMA expanded Article 37's reach to include unlawful command influence over *potential* witnesses at a court-martial. *United States v. Treakle*[166] and its progeny demonstrated the COMA's willingness to go beyond the original scope of Article 37[167] to shield not only panel members, counsel, and military judges, but also rank and file soldiers who might potentially provide favorable character evidence for an accused.[168]

If the 3d Armored Division cases in the mid-1980s represented the high-water mark for the COMA's expansive approach to unlawful command influence,[169] its tolerance for an accused's claim of prejudice based on unlawful command influence began to wane by the early 1990s. Increasingly, the COMA was confronted with soldiers who sought the windfall of appellate reversal based on technical violations of the rules governing the judicial process. Unwilling to continue Article 37's expansion, the service appellate courts decided a series of cases that revealed a profound split on the COMA.

Accusatorial v. Adjudicative Unlawful Command Influence

163. *Id.* at 49-52 (holding that a briefing about command policy on courts-martial service, retention of thieves in the Army, and ramifications of panel service on efficiency reports was prejudicial to the accused). *See* United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961) (holding that an assistant staff judge advocate's letter to panel members pointing out sentence variances in recent cases unlawfully influenced members by suggesting appropriateness of sentence); United States v. McCann, 25 C.M.R. 179 (C.M.A. 1958) (holding that a staff judge advocate's lecture to members that the offenses for which the accused was charged were more reprehensible in the military than in civilian society is unlawful command influence); United States v. Fowle, 22 C.M.R. 149 (C.M.A. 1956) (holding that trial counsel's reading of a Secretary of the Navy Instruction pertaining to larceny to the court members is unlawful command influence); United States v. Pierce, 29 C.M.R. 849 (A.B.R. 1960) (finding that a base commander's informal comments to several panel members, suggesting that the length of trial was not important as long as the panel convicted the accused and hanged him, even if made in jest, was unlawful command influence).

164. 34 C.M.R. 328 (C.M.A. 1964) (holding that a staff judge advocate's issuance of a pamphlet entitled "Additional Instruction for Court Members" to members of the panel was guidance beyond that contemplated in Article 38 and created a rebuttable presumption of unlawful command influence).

165. *See* Bower, *supra* note 8, at 77 nn.76-80. Bower notes that the origin for apparent command influence doctrine could be traced ten years earlier to a dissenting opinion in *United States v. Navarre*, 17 C.M.R. 32 (C.M.A. 1954), and had been supported in dicta in *Fowle*, 22 C.M.R. 139. The dissent in *Navarre* articulated the appearance theory of unlawful command influence, noting, "[W]e are concerned here with much more, I believe, than the protection of an accused person named Navarre . . . . A judicial system operates effectively only with public confidence and, naturally, this trust only exists if there also exists a belief that triers of fact act fairly and without undue influence." *Navarre*, 17 C.M.R. 32. *See*, United States v. Grady, 15 M.J. 275 (C.M.A. 1983) (noting that the appearance of external influence affects public confidence in the fairness of the military system).

166. 18 M.J. 646 (A.C.M.R. 1984), *cert. granted*, 20 M.J. 131 (C.M.A. 1985) (holding that commanding general briefings that addressed testifying on behalf of soldiers convicted at courts-martial created perception in soldiers of the command that their leaders disapproved of testifying on behalf of a convicted soldier's good character and fitness for continued service, thus chilling the accused's ability to secure favorable evidence and a fair and impartial trial). *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (holding that where pervasive climate of unlawful command influence is established, the government must convince the appellate court, beyond a reasonable doubt, that the findings and sentence were not affected by the unlawful action); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (1st Armored Division case determining whether unlawful command influence has prejudiced the accused requires consideration of the perception of unlawful command influence within the command, as well as whether objective analysis indicates the appearance of unlawful command influence), *cert. granted*, 22 M.J. 100 (C.M.A. 1986); United States v. Stokes, 19 M.J. 781 (A.C.M.R. 1984) (holding that perception created within command that it is not career enhancing to testify on behalf of an accused's good character is not dissipated merely by removing from the judicial process the convening authority who created the perception). *See generally* Bower, *supra* note 8, at 81-86.

167. *See* Bower, *supra* note 8, at 70.

168. *See Treakle*, 18 M.J. at 646.

169. After the 3d Armored Division cases, the COMA's unlawful command influence regimen required three distinct inquiries: (1) was the accused's trial affected by *actual* unlawful command influence; (2) has the command action threatened public confidence in the military justice system by creating the *appearance* of unlawful command influence; and (3) has the command action created within the unit a *perception* of unlawful command influence, thereby chilling soldiers' willingness to testify on behalf of the accused. The real debate in *Weasler* centered on the *appearance* of unlawful command influence.

In 1990, the ACMR considered the case of Sergeant First Class Bramel.[170] Sentenced to a dishonorable discharge and twenty years confinement for engaging in forcible sodomy with a child under the age of sixteen, the accused claimed that the trial judge's denial of a motion for a new pretrial investigation denied him a fair trial. The motion was predicated on a claim that the summary court-martial convening authority, who ordered the hearing, exerted unlawful command influence over the investigating officer by ordering him to utilize a partition to shield the child victim from the accused when testifying. The ACMR agreed with the trial judge that the *Manual* authorized this order[171] and that the convening authority's actions neither affected the impartiality of the proceeding nor amounted to unlawful command influence.[172]

Expanding on the issue of unlawful command influence, the ACMR noted that pretrial investigations are part of the *accusatorial* process that serves as a predicate to the referral of charges.[173] The ACMR then considered the plain language of Article 37(a) and determined that it proscribed unlawful command influence over the *adjudicative* processes of a trial.[174] The ACMR concluded that the use of Article 37(a) was inapposite in situations like Sergeant Bramel's, where the claimed impropriety occurred during the *accusatorial* stage of a proceeding.[175]

United States v. Bramel represented the first time an appellate court distinguished the exercise of unlawful command influence based on *the point in time* at which it was exerted.[176] By determining that there was nothing unlawful about the convening authority's actions even *if* Article 37(a) applied to the accusatorial process, the ACMR provided a basis for the COMA to affirm if that court disagreed with the unique approach to trial process demarcation. The COMA summarily affirmed without addressing the unlawful command influence issue raised in *Bramel*.[177]

In 1994, the ACMR once again considered the accusatorial versus the adjudicative impact of improper command control in *United States v. Drayton*.[178] Staff Sergeant Drayton pleaded guilty to larceny from the post exchange and was sentenced to a reduction, forfeitures, and a bad-conduct discharge.[179] On appeal, Drayton alleged that his battalion commander exerted unlawful command influence over his company commander by directing the company commander to recommend a certain level of court-martial.[180] Relying on *Bramel*, the ACMR differentiated unlawful command action during the accusatorial phase from action during the adjudicative phase of a judicial proceeding. The *Drayton* court acknowledged that *Bramel* repudiated nearly thirty-five years of unlawful command influence jurisprudence;[181] however, the ACMR found that charging decisions and dispositions were clearly accusatorial processes that were not amenable to Article 37 review. The ACMR went further than *Bramel*, however, by articulating two methods for an accused to challenge accusatorial process defects.[182] Thus, while the COMA remained silent, the ACMR decided two cases that removed a whole category of unlawful command action from the purview of Article 37 analysis and provided trial judges with a paradigm for consideration of accusatorial process issues.

The COMA finally addressed the effect of unlawful command influence at different stages of a proceeding in *United States v. Hamilton*.[183] Sergeant Hamilton cut a fellow soldier

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170. United States v. Bramel, 29 M.J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

171. *See* MCM, *supra* note 15, R.C.M. 405 (authorizing the convening authority to give procedural instructions to the hearing officer).

172. *Bramel*, 29 M.J. at 967.

173. *Id.*

174. *Id.*

175. *Id.* (citation omitted). The ACMR found that, "[b]y definition, an Article 32 investigation is designed to gather evidence upon which a recommendation can be made to enable a convening authority to decide whether there is sufficient evidence to warrant referral of charges to trial." *Id.*

176. *See* Criminal Law Division Note, *United States v. Drayton: Limiting the Application of UCMJ Article 37*, ARMY LAW., Sept. 1994, at 9.

177. *Id.* at 10.

178. 39 M.J. 871 (A.C.M.R. 1994), *aff'd*, 45 M.J. 180 (1996) (upholding the ACMR's decision and specifically embracing the lower court's classification of improper command action based upon the stage of the judicial proceeding during which it is exerted). The CAAF decided *Drayton* one year after its decision in *Weasler*. Thus, the court's decision in *Drayton* had no bearing on the *Weasler* decision. However, *Drayton* demonstrates the soundness of the rationale behind the decision and validates the COMA's embrace of an adjudicative versus accusatorial distinction as articulated in *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994).

179. *Drayton*, 39 M.J. at 872.

180. *Id.* nn. 2-3.

181. *Id.* at 873. *See generally* Criminal Law Division Note, *supra* note 176, at 7-8.

182. *Drayton*, 39 M.J. at 874 (identifying the de facto accuser doctrine and R.C.M. 401 as the proper mechanisms for challenging accusatorial process deficiencies).

with a knife and a razor blade and received a company grade Article 15 as punishment. Believing the disposition of the offense inappropriate, the division staff judge advocate recommended to Sergeant Hamilton's brigade commander that such a serious offense required a court-martial. The brigade commander ultimately preferred charges and recommended that the case be referred to a special court-martial empowered to adjudge a bad-conduct discharge. The accused was convicted of aggravated assault and sentenced to forfeitures, reduction in grade, two months confinement, and a bad-conduct discharge. On appeal, the accused claimed that the division staff judge advocate unlawfully influenced the brigade commander to prefer charges.[184]

Without acknowledging either *Bramel* or *Drayton*, the COMA adopted the rationale behind those cases and held that the critical inquiry in any unlawful command influence case is at what stage of the process the alleged unlawful command action occurred. The COMA relied on the principle of waiver to differentiate between improper actions in the preferral and forwarding of charges, and those that occur during and after referral.[185] The COMA noted that when a commander is coerced into preferring charges, those charges are considered unsigned and unsworn.[186] Similarly, any interference with a commander's independent discretion in recommending disposition of charges violates R.C.M. 401.[187] Defects in either preferral or forwarding of charges, the COMA reasoned, are waived if not raised prior to the entry of pleas.[188] Declaring such defects neither jurisdictional[189] nor the proper subject for Article 37 analysis,[190] the COMA noted that Article 37 protects against unlawful command influence during the referral, trial, and posttrial processes.[191] Without using the *Bramel* and *Drayton* terminology of "accusatorial versus adjudicative process review," *Hamilton* validated the ACMR's unique approach to the unlawful command influence issue.

Hamilton represented the COMA's first real attempt to narrowly define unlawful command influence. By anchoring the accusatorial stage analysis on waiver doctrine, the COMA essentially said that improper command *action* prior to referral, whatever one may call it, is not properly labeled as unlawful command *influence*.[192] Thus, *Hamilton* created the conditions necessary for the reevaluation of unlawful command influence waiver as part of a pretrial agreement in *Weasler.*

Precursors to United States v. Weasler

In *United States v. Corriere*,[193] the ACMR considered a pretrial agreement predicated on waiver of unlawful command influence motions. Captain Corriere pleaded guilty to drug charges and conduct unbecoming an officer, charges which arose from the famous 1st Armored Division "peyote platoon"

183. 41 M.J. 32 (C.M.A. 1994).

184. *Id.* at 33-36.

185. *Id.* at 36.

186. *Id.* (citing United States v. Miller, 31 M.J. 798, 801 (A.F.C.M.R. 1990), *aff'd on other grounds*, 33 M.J. 235 (C.M.A. 1991); United States v. Bolton, 3 C.M.R. 374 (A.B.R. 1952), *pet. denied*, 3 C.M.R. 150 (C.M.A. 1952)).

187. *See* MCM C5, *supra* note 82, R.C.M. 401 discussion.

188. *Hamilton*, 41 M.J. at 36 (citing Frage v. Moriarty, 27 M.J. 341 (C.M.A. 1988)).

189. *Id*. at 37. Citing United States v. Jeter, 35 M.J. 442 (C.M.A. 1992), the COMA reiterated that even egregious cases of unlawful command control during the preferral and forwarding of charges did not amount to jurisdictional error, and the issues would be waived if not raised at trial. *But see* United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1990) (holding that failure to raise at trial unlawful command influence issues relating to the referral, trial, or posttrial review are not waived and may be litigated for the first time on review). The majority's seemingly inconsistent reliance on both *Blaylock* and *Jeter* can best be explained by the imprecise use of the term "unlawful command influence." *Compare* United States v. Johnston, 39 M.J. 242, 245 (C.M.A. 1994) (Crawford, J., concurring in the result) (noting that improper preferral of charges is not unlawful command influence) *with Hamilton*, 41 M.J. at 40 (Wiss, J., concurring in the result) (suggesting that it is unwise to equate unlawful command influence in the preferral process to some minor technical defect that can be waived).

190. *Hamilton*, 41 M.J. at 36.

191. *Id.* at 36-37.

192. The COMA steadfastly reaffirmed the *Blaylock* holding that unlawful command influence is never waived; yet, it also held that challenges to improper conduct of the staff judge advocate during preferral was waived if not raised at trial. For the two statements to be true, the court must necessarily view command actions that result in a defective preferral or forwarding of charges to be something other than judicially cognizable unlawful command influence. Judge Crawford's concurrence in *United States v. Johnston*, 39 M.J. 242, 245 (C.M.A. 1994) previewed the COMA's definitional sharpening in *Hamilton.* In *Johnston*, allegations that a superior improperly ordered a subordinate to prefer charges, and thus engaged in unlawful command influence, prompted Judge Crawford to note, "I have concluded that the real issue here is not whether there was unlawful command influence, but rather, whether there was an improper preferral of charges." *Johnston*, 39 M.J. at 245. Judge Crawford saw unlawful command influence and improper command actions that affect preferral of charges as two distinct issues with equally distinct remedies under the law. This concurrence not only helped to make sense of the new approach to unlawful command influence taken in *Hamilton*, but also foreshadowed the decision in *Weasler.*

193. 20 M.J. 905 (A.C.M.R. 1985).

cases.[194] He was sentenced to dismissal and fifteen months confinement.[195]

On appeal, Corriere claimed that a *sub rosa* agreement between defense counsel and the convening authority predicated government acceptance of the pretrial agreement on the accused's waiver of any unlawful command influence motions. Unable to resolve the issue on the scant trial record before it, the ACMR nevertheless noted that if a rehearing revealed a *sub rosa* agreement, such agreement would be contrary to public policy and therefore void.[196] The ACMR placed unlawful command influence issues in the first rank of fundamental protections that could not be waived in a pretrial agreement[197] and noted that such matters "are of such vital importance as to . . . require notice to the military judge and possibly litigation, or resolution during a providency inquiry, as opposed to resolution in a plea bargain."[198] Including such terms in a pretrial agreement, much less a *sub rosa* agreement, vitiated the fundamental fairness of a trial.

In *United States v. Kitts*,[199] the COMA validated *Corriere* by holding that government attempts to condition a pretrial agreement on waiver of motions that would reveal unlawful command influence were void and against public policy.[200] Pursuant to a pretrial agreement, the accused pleaded guilty to a number of drug charges. Prior to his trial on board ship, the command showed a video which informed the crew about the dangers of LSD use and that a major LSD distribution ring had been broken. At trial, Kitts planned to seek a change of venue to obviate the unlawful command influence effects of the video, but he agreed to waive the venue motion (and the certain airing of the unlawful command influence issue) in exchange for a favorable sentence limitation.[201] On appeal, Kitts claimed that the video amounted to unlawful command influence and chilled his ability to obtain favorable character testimony. The COMA reviewed his providence inquiry, found that his factual guilt had been established, and so denied relief on findings.[202] However, the COMA ordered a rehearing on the unlawful command influence issue so that the trial court could determine whether the unlawful command action, if substantiated, required a new hearing on sentence.[203]

The decisions in *Corriere* and *Kitts* demonstrated the appellate courts' intolerance for anything but complete litigation of unlawful command influence allegations at the trial level. The courts would not tolerate s*ub rosa* agreements or tactical maneuvering designed to silence an accused's claim of unlawful command influence. Concerned for the credibility of the military justice system in the aftermath of the 3d Armored Division cases, the COMA rejected bargained waiver of unlawful command influence issues.

Although *United States v. Jones*[204] did not involve waiver of unlawful command influence, the COMA employed in this case a rationale for reviewing pretrial agreement terms that figured prominently in the *Weasler* majority opinion. The COMA found waiver of search and seizure and victim identification motions to be an appropriate term in Jones' pretrial agreement. Although implicating fundamental rights, the COMA deferred to "a defense judgment that its proposal was in the best interests of the accused and a well-orchestrated effort to achieve a successful outcome."[205] The COMA allowed the accused, through aggressive bargaining, to attempt to manipulate the pretrial process to his advantage.[206] Provided the integrity of the trial itself was not jeopardized by the term or condition,[207] the COMA was willing to relax its vigilance and to allow the accused and counsel to determine what was in the accused's best interest.[208] Unlike *Corriere* and *Kitts*, this fundamental right waiver issue was fully developed at the trial level. The COMA's willingness

194. *See, e.g.*, United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (incident at Pinder Barracks in Germany where dozens of soldiers were publicly ridiculed at a mass apprehension resulted in tremendous appellate litigation over actual and perceived unlawful command influence issues).

195. *Corriere*, 20 M.J. at 907.

196. *Id.* at 908.

197. *Id.* (citing United States v. Schaffer, 46 C.M.R. 1089 (A.C.M.R. 1973) (requiring waiver of all motions is void as against public policy); United States v. Peterson, 44 C.M.R. 528 (A.C.M.R. 1971) (requiring waiver of search and seizure motion is void)).

198. *Id.*

199. 23 M.J. 105 (C.M.A. 1986).

200. *Id*.

201. *Id.* at 107-08.

202. *Id.* at 108.

203. *Id.* at 109.

204. 23 M.J. 305 (C.M.A. 1987).

205. *Id.* at 307.

206. *Id.* (footnote omitted).

to validate the pretrial agreement was due, in part, to its confidence that there was no undisclosed evil that would compromise the justice system's credibility. Assured that the term did not endanger the system, the COMA deferred to defense counsel's judgment that the rights waiver would benefit the accused.

The Army Court of Criminal Appeals (ACCA)[209] applied similar logic in *United States v. Griffin*[210] and upheld an accused's affirmative waiver of an unlawful command influence motion. Pursuant to a pretrial agreement, the accused pleaded guilty to charges that included wrongful drug use. Because of a policy letter from the convening authority that suggested that all drug users should be eliminated from the service, the accused reserved his right to litigate a defective referral based on the convening authority's exercise of unlawful command influence. After raising the unlawful command influence motion, but prior to litigating it, the accused and the government renegotiated the pretrial agreement, resulting in government withdrawal of the drug charge and the accused agreeing to waive the defective referral/unlawful command influence motion.[211] The judge considered the new agreement and, after all parties convinced him that the convening authority's policy letter had no effect on the referral or trial process and noting the substantial benefit which the accused gained, approved the new pretrial agreement without litigating the unlawful command influence motion.[212]

The ACCA rejected appellate defense counsel's assertion that the military judge had a sua sponte duty to litigate the unlawful command influence motion once it was raised by the defense. The ACCA stated that it would not "adopt a rule that would require a military judge to undo the benefit to the accused of an excellent bargain exacted from the government . . . ."[213] The ACCA recognized that alleged unlawful command influence implicated the adjudicative process,[214] yet found nothing wrong with defense counsel raising an objection to the command action and then, after extracting the best deal possible for his client, affirmatively waiving the issue.[215] As the COMA had in *Jones*, the ACCA approved waiver of a fundamental right because the trial record made clear that the judicial process was not threatened by the pretrial agreement. The ACCA again proved that it was willing to give effect to a term that conferred benefit on both the government and the accused.

III. The Case of *United States v. Weasler*

Specialist (SPC) Weasler wrote $8920 worth of bad checks.[216] After discussing SPC Weasler's misconduct with the battalion commander, Weasler's company commander, Captain (CPT) Morris, decided to recommend a general court-martial. As she was about to go on leave, CPT Morris briefed First Lieutenant (1LT) Hottman, who would be the acting commander while CPT Morris was on leave, about the impending preferral of charges against Weasler. Captain Morris told 1LT Hottman that if the Weasler charges appeared while she was on leave, 1LT Hottman should simply sign them. The charges appeared, and 1LT Hottman preferred[217] the charges as instructed and recommended[218] a general court-martial. Weasler's battalion and brigade commanders also recommended a general court-martial, which was ultimately the disposition directed by the convening authority in referring the case to trial.[219]

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207. *Id.* (citing United States v. Holland, 1 M.J. 58, 60 (C.M.A. 1975) (orchestrating trial through pretrial agreements shall not be allowed to turn the proceeding into an "empty ritual")).

208. *Id.* at 308. The COMA emphasized that if the government insisted, or even suggested, that the accused waive his right to litigate these issues, the agreement would fail. This reasoning is mitigated somewhat by the 1991 changes to R.C.M. 705, which permits either side to initiate plea bargaining or to propose terms of a pretrial agreement. However, when waiver of fundamental rights is implicated by a term, the CAAF still looks to the origin of the proposal and is more willing to validate the term, notwithstanding the 1991 *Manual* changes, if the accused conceives of the idea.

209. *See supra* note 7 for an explanation of change in appellate court names.

210. 41 M.J. 607 (Army Ct. Crim. App. 1994).

211. *Id.* at 609.

212. *Id.*

213. *Id.* at 609-10 ("[T]here is no good reason to impose such a duty on a judge in a case like this.").

214. *Id.* at 610 (citing United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994)).

215. *Id.* The ACCA found several factors compelling. First, assurance in open court by both trial and defense counsel that the policy letter had no impact on the accused's referral or panel selection allowed the trial court to make a record, short of full litigation, that would dispel even the appearance of unlawful command influence. Second, by withdrawing the one charge that could have been implicated by the improper influence of the policy letter, the court found that the convening authority had done all he could do, as a prophylactic measure, to dissipate the effects of any possible unlawful influence.

216. United States v. Weasler, 43 M.J. 15 (1995). The recitation of facts that follow in the remainder of this paragraph are found on page 16 of the opinion.

217. *See* MCM, *supra* note15, R.C.M. 307 (establishing the proper procedures for charge preferral).

218. *See id.*, R.C.M. 401 (establishing the proper procedure for forwarding charges).

Seeking to limit his maximum punishment, Weasler entered into a pretrial agreement with the convening authority.[220] He initially agreed to plead guilty to six specifications of an Article 123a charge[221] in exchange for a maximum confinement period of seven months.[222] Unable to establish the providency of his guilty plea,[223] Weasler withdrew from his pretrial agreement and elected trial before a panel of officers.[224] Prior to panel selection, Weasler sought once again to plead guilty, this time to the lesser-included offense under Article 134.[225] The military judge found his pleas provident, and the government chose to pursue the greater charged offense before the panel.[226] While conducting *voir dire* of the panel, facts surrounding the preferral came to light, and the defense moved to dismiss the charge and its specifications because of the alleged unlawful command influence exerted by CPT Morris over 1LT Hottman during the preferral process.

After hearing testimony from CPT Morris, the military judge found that the defense had met its burden of a prima facie showing of unlawful command influence.[227] Unfortunately, 1LT Hottman was not available to testify, and, after several additional witnesses, the military judge made clear his inclination to grant the motion to dismiss based on the evidence before him. Wanting to hear from 1LT Hottman prior to ruling, the military judge instructed counsel to arrange for Hottman's presence in court or to agree to a stipulation of his expected testimony.

During the recess, the parties crafted *another* pretrial agreement which limited Weasler's maximum sentence to three months confinement and a bad-conduct discharge in exchange for his waiver of the unlawful command influence motion and plea to the lesser offense. Back in court, defense counsel explained that the idea to waive the unlawful command influence motion originated with the defense and was offered in light of the almost certain repreferral of charges that would result if the defense prevailed on the motion.[228] Defense counsel convinced the military judge of the propriety of the waiver, and the military judge ultimately agreed that the pretrial agreement was valid. Weasler was found guilty of the lesser charge and sentenced to nine months confinement.[229] Pursuant to the pretrial agreement, the convening authority disapproved confinement in excess of three months.

All five judges on the CAAF agreed that SPC Weasler suffered no harm by waiving an unlawful command influence motion in exchange for a favorable sentence limitation. However, the CAAF was badly divided over the rationale used to achieve the unanimous result. Writing for the court, Judge Crawford, joined by Judges Cox and Gierke, relied on *Hamilton* to validate Weasler's waiver. Chief Judge Sullivan and Judge Wiss, writing separate concurrences, believed the decision to be a landmark folly.

The Court's Opinion

Judge Crawford began the court's opinion by noting both the insidious nature of unlawful command influence[230] and the

219. *See id.*, R.C.M. 601 (establishing the proper procedure for referring charges).

220. *See* Final Brief on Behalf of Appellant, United States v. Weasler, 43 M.J. 15 (1995) (No. 94-1249/AR). The facts in the remainder of this paragraph are found on pages 2-7 of this brief.

221. UCMJ art. 123a (1988) (addressing the making, drawing, or uttering of a check, draft, or order without sufficient funds).

222. The maximum sentence that Weasler faced without the protection of a plea agreement was 30 years confinement, total forfeitures, reduction to the lowest enlisted grade, and a dishonorable discharge. *See* MCM, *supra* note15, app. 12, at art. 123a (table of maximum punishments).

223. *See id.*, R.C.M. 910. Rule for Courts-Martial 910 provides the procedure for considering an accused's plea. Pleading guilty to an offense is not as easy as intuition might suggest. Before a soldier is allowed to plead guilty, he must convince the military judge of his guilt in a proceeding known as a providence inquiry. The most likely forum in which a waiver of unlawful command influence motions will arise is the providence inquiry. Such was the case in SPC Weasler's trial. For a comprehensive examination of providence inquiries, see Vickery, *supra* note 13, and Elling, *supra* note 12.

224. *See* MCM, *supra* note 15, R.C.M. 910. An accused retains the right to withdraw his guilty plea and withdraw from any pretrial agreement in the event the military judge does not accept his plea as provident.

225. UCMJ art. 134 (1988) (check, worthless, making and uttering—by dishonorably failing to maintain funds).

226. The procedural posture of *Weasler* is not at all uncommon. Because of the exacting nature of the military providence inquiry, an accused often will say something, when describing the factual basis for his guilt, that is legally inconsistent with an element of the offense. Thus, the judge finds the accused's plea improvident. Left without the protection of his pretrial agreement because of his failure to deliver on his guilty plea, the accused usually scrambles to preserve his deal by either convincing the judge to allow him to recite his "recollection" of why he is guilty one more time or by convincing the government to preserve the agreement providing that the accused can successfully plead guilty to a lesser-included offense. In the latter case, the government typically reserves the right to proceed to trial on the charged offense in hope of convicting the accused of the greater offense.

227. *See* Final Brief on Behalf of Appellant, United States v. Weasler, 43 M.J. 15 (1995) (No. 94-1249/AR), at 4.

228. *See* MCM, *supra* note15, R.C.M. 905. Rule for Courts-Martial 905(b) and the discussion that accompanies the text indicate that defects in preferral or forwarding of charges are nonjurisdictional in nature and thus will not result in dismissal of charges with prejudice in the event the accused prevails on his motion.

229. The entire sentence was: confinement for nine months, reduction to the grade of E-1, and a bad conduct discharge.

measures taken by Congress and the courts to combat the evil.[231] Wasting little time, the CAAF identified *Hamilton* as the fulcrum that would provide the intellectual leverage required to legitimize bargained waiver of unlawful command influence issues. Although not a case of bargained waiver, *Hamilton* established the CAAF's new analytical approach when considering unlawful command influence issues.[232] Central to that approach was Judge Crawford's recognition of the CAAF's historical imprecision in applying the term *unlawful command influence* to a vast number of situations where superiors unlawfully fetter subordinates' actions under the UCMJ.[233] Henceforth, consideration of command improprieties would occur in the context of *Hamilton's* distinction between the different *stages* in the trial process.[234]

The CAAF had a substantial record before it due to the trial court's preliminary inquiry into the accused's claim. The judges also knew that, after raising the issue, the *accused* reinitiated negotiations with the government, resulting in a new pretrial agreement which limited his sentence in exchange for waiver of the issue. The appellate court found that the alleged unlawful command action implicated the accusatorial process.[235] Relying on *Hamilton,* the CAAF reasoned that accusatorial process defects which were not raised at trial were waived on appeal.[236] While recognizing the impropriety of government insistence on accusatorial defect waiver as a condition of a pretrial agreement,[237] the CAAF noted that Weasler proposed the waiver term.[238] Presented with these facts, the CAAF's inescapable logic, not to mention its sense of equity, called for approval of the pretrial agreement. Judge Crawford observed:

> If an accused waives an allegation of unlawful command influence in the preferral of charges by failure to raise a timely objection at trial, then surely an accused, following a timely objection, should be permitted to initiate an affirmative and knowing waiver of an allegation of unlawful command influence in the preferral of charges in order to secure the benefits of a favorable pretrial agreement. To hold otherwise would deprive appellant of the benefit of his bargain.[239]

Furthermore, the CAAF noted that the actions of the company commander did not affect the integrity of the trial process,[240] nor was there concern that public confidence in the military justice system would suffer as a result of the pretrial agreement.[241]

The CAAF also relied on *United States v. Mezzanatto*[242] to anchor its opinion. *Mezzanatto* involved a defendant who waived his right to exclude communications made during plea negotiations. When Mezzanatto and the government were unable to agree to a satisfactory plea agreement, Mezzanatto sought to stop the prosecutor from using at trial information obtained during the plea negotiations. The trial judge upheld the waiver, even though plea negotiations had failed, and allowed the prosecutor to use the otherwise privileged commu-

230. United States v. Weasler, 43 M.J. 15, 16 (1995). Citing *United States v. Thomas* (citation omitted), the CAAF used the obligatory language from the 3d Armored Division cases that came to represent the court's single-minded determination to protect the integrity of the military justice system from the evil of unlawful command influence. Both the Chief Judge and Judge Wiss take the majority to task for merely paying lip service to the court's role as the ultimate protector of the system's integrity. *Id.* at 21-22. Ironically, neither Chief Judge Sullivan nor Judge Wiss dissent in *Weasler,* which can only make one question from whence the lip service came.

231. *Id.* at 16-17 (citing Articles 37 and 98 of the UCMJ, R.C.M. 306(a), and judicial vigilance as the historical checks against unlawful command influence).

232. *But cf.* United States v. Hamilton, 41 M.J. 32, 40 (C.M.A. 1994) (Wiss, J., concurring in the result) (observing that the majority incorrectly relies on precedent supporting waiver of preferral defects if not raised at trial). The majority in *Hamilton* did not establish an entirely new regime for consideration of unlawful command influence as Judge Wiss and Chief Judge Sullivan imply. The holding is limited to improper command action that results in a defective accusatorial process (preferral, forwarding, and referral of charges). The majority did not say that commanders can never unlawfully influence a proceeding even in the earliest stages of the process. The CAAF decision in *United States v. Gleason,* 43 M.J. 69 (1995) (findings and sentence dismissed due to pervasive illegal influence of command throughout the entire proceeding) demonstrates the majority's willingness to condemn unlawful command action even when it is exerted in the accusatorial stage of a proceeding.

233. *Weasler,* 43 M.J. at 17.

234. *Id.* For the first time, the CAAF adopts the *Bramel* and *Drayton* accusatorial versus adjudicative process terminology as its own. Even though it adopted this rationale in *Hamilton,* nowhere in that decision did the court actually use the specific terminology. In *Weasler,* the CAAF did deviate from the *Bramel, Drayton,* and *Hamilton* decisions by moving command actions which implicate the referral process into the accusatorial process category of defects which are waived if not raised at trial.

235. *Id.* at 19 (citing United States v. Jeter, 35 M.J. 442 (C.M.A. 1992); *Hamilton,* 41 M.J. at 36) (including defective preferral, forwarding, and referral as accusatorial processes).

236. *Id.*

237. *Id.* The court still clung to the proposition that "it is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement." United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986).

238. *Weasler,* 43 M.J. at 19.

239. *Id.*

nications in the trial against the accused.[243] The Supreme Court upheld the waiver.

Whereas *Hamilton* provided an intellectual fulcrum for the COMA, the judges on the military court used *Mezzanatto* as the intellectual muscle to move the court over the historically high barrier which prohibited the waiver of unlawful command influence issues. Much like *Bordenkircher* before it, *Mezzanatto* demonstrated the Supreme Court's tolerance for aggressive government use of plea negotiations. As Judge Crawford noted, *Mezzanatto* reflected the Supreme Court's willingness to enforce waiver provisions that implicated the *adjudicative* process.[244] Even when waiver impacted the adjudication of guilt, the Supreme Court was loathe to invalidate a waiver provision entered into knowingly and voluntarily.[245]

By relying so prominently on *Mezzanatto*, the CAAF bolstered its approval of Weasler's knowing, voluntary, *defense-initiated* waiver that implicated not the adjudicative process, but the largely ministerial *accusatorial* process.[246] If the Supreme Court sanctioned a waiver in which the accused got no benefit whatsoever—indeed, a waiver that worked to his distinct disadvantage at trial—why should not the military court allow an accused to squeeze every drop of benefit from a voluntary waiver of his right to a procedurally correct preferral of charges? Chief Judge Sullivan and Judge Wiss answered that question passionately.

Concurrence Only in Result

Although he affirmed the case on a harmless error standard,[247] Chief Judge Sullivan considered the majority opinion a landmark betrayal of the CAAF's unlawful command influence jurisprudence.[248] He rejected the majority's reliance on *Hamilton* as the appropriate analytical framework to resolve the issue and insisted on a traditional Article 37 analysis instead.[249] Also relying on *Mezzanatto*, the Chief Judge warned that unlawful command influence was an issue of such fundamental importance that its waiver would jeopardize the credibility of the entire military justice system.[250] He believed that the majority unwisely elevated the interests of the individuals involved in the system over the interests of the system.[251] Allowing waiver of an unlawful command influence motion for a significant sentence limitation legitimized an accused's ability to "blackmail" a convening authority.[252] He warned that the convening author-

240. *Id.* As defense counsel acceded at trial, the company commander's actions were careless rather than malicious. The action amounted to little more than a technical irregularity in the preferral process, and both the accused and the court recognized that the likely remedy for the accused would be dismissal without prejudice to the government. The accused had every reason to believe that the government would simply reprefer the charges. Not only would the accused have lost the benefit of his new pretrial agreement, dismissal without prejudice would have obviated his original agreement. Neither the trial nor the appellate court could ignore the real possibility that the government would not agree to any deal the second time around as a way of assessing an aggravation cost upon SPC Weasler. Such a situation would create a perverse disincentive for a guilty accused who, instead of bringing command irregularities to the light of day whereby both he and the system benefit, would be better off ignoring the command action and preserving his sentence limitation in the face of a certain conviction. Common sense indicates that neither an accused nor an appellate court seeking to ensure a just system are interested in such Pyrrhic victories.

241. *Id.* The CAAF also noted that it was satisfied beyond a reasonable doubt that neither the findings nor the sentence were affected by the company commander's actions. This final pronouncement was the CAAF's fail-safe in the unlikely event that the Supreme Court ever considered the case on a grant of certiorari. *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (holding that once a prima facie case is established by the defense, the government must prove beyond a reasonable doubt that the unlawful command influence did not affect the findings or the sentence).

242. 513 U.S. 196 (1995).

243. *Id.* at 199.

244. *See Weasler*, 43 M.J. at 18 (noting that the adjudicative stage is impacted by waiver of Federal Rule Evidence 410).

245. *Id.* at 18-19. *See Mezzanatto*, 513 U.S. at 200. The Supreme Court has long upheld knowing and intelligent waiver of fundamental constitutional and statutory rights. *See, e.g.*, Peretz v. United States, 501 U.S. 923, 936 (1991) (noting that most of the basic rights of an accused are subject to waiver); Ricketts v. Adamson, 483 U.S. 1, 10 (1987) (upholding waiver of double jeopardy defense via pretrial agreement); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (waiving right against compulsory self-incrimination, trial by jury, and confrontation by accusers attendant to guilty plea); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (upholding waiver of Sixth Amendment right to counsel).

246. *Weasler*, 43 M.J. at 18-19.

247. *Id. at* 19 (1995) (Sullivan, C.J., concurring in the result); *see id.* at 20 n.1.

248. *Id.* at 20.

249. *Id.* Chief Judge Sullivan noted that "Article 37 of the Code does not provide for waiver or private deals between an accused and a command to cover-up instances of unlawful command influence which have been discovered at trial." *Id.* at 20-21.

250. *Id.* at 21.

251. *Id.* Chief Judge Sullivan flatly rejected the majority's analytical approach. "In view of this Court's experience with unlawful command influence for over 44 years, the 'contract' rationale proffered by the majority is dead wrong. The majority's condonation of bartered justice is not only self-defeating in an institutional sense but reneges on our traditional commitment to vigilance on this issue." *Id.*

ity's self-interest might cause him to ransom the integrity of the criminal justice system to avoid public disclosure of improper command action. Nothing less than the trust of "the American people and its military forces" was threatened by Weasler's pretrial agreement.[253] The Chief Judge's concern was not that Weasler had been prejudiced by the actions of his company commander. What he feared was the appearance of impropriety created by such deals between a heavy-handed commander and an opportunistic accused.

Judge Wiss was similarly distressed by the majority opinion. Recalling his separate opinion in *Hamilton*, he reiterated his opposition to the majority's *accusatorial versus adjudicative* classification of unlawful command influence.[254] Judge Wiss rejected the majority equation of unlawful command influence during preferral or forwarding of charges to mere "inadvertence [or] technical flaws . . . ."[255] Showing his exasperation with the majority's willingness to allow waiver of unlawful command influence motions that emanate from the accusatorial process, Judge Wiss stated:

> The *greatest* risk presented by unlawful command influence has nothing to do with the stage at which it is wielded; it has nothing to do with whether an accused is bludgeoned with it or whether, in an exercise of ironic creativity, an accused is able to turn the tables and actually use it to his advantage. Instead, it is in its insidiously pernicious character.[256]

Although he clearly thought that the system suffered under the majority rationale, Judge Wiss' primary concern was the dangerous incentive that the majority's opinion created for commanders. He feared that by suppressing full and open litigation of unlawful command influence issues through individualized deal-making, other accuseds, who did not know of the illegal command action, would suffer.[257] Like Chief Judge Sullivan, Judge Wiss condemned the majority for allowing the accused and the convening authority to place self-interest above the collective interest.

Bargained Waiver of Unlawful Command Influence: Common Sense or Heresy?

To the majority, common sense dictated allowing an accused to raise and affirmatively to waive a right that he would otherwise lose if not asserted at trial.[258] They saw this case as being primarily about the appropriate limits of plea bargaining. Although the majority recognized improper command action as the root of the problem, relying on *Hamilton*, the CAAF felt confident relegating CPT Morris' improper actions to little more than defects in the charging process that could be waived at the accused's option. The CAAF resolved to look beyond the label that the appellate defense counsel placed on improper command action and to determine whether the action truly required resolution under Article 37 analysis. Determining that it did not, and therefore did not threaten to "undermine public confidence in [the] proceedings or in military criminal law generally,"[259] the CAAF focused on the traditional pretrial agreement query of whether the term impermissibly altered the judicial process.[260]

The majority concluded that affirmative waiver of an issue the acccused would lose by default if not raised at trial did not threaten the trial process.[261] Improper command action during the accusatorial process, *whether waived by default or raised and affirmatively waived*,[262] did not implicate any fundamental rights which the CAAF traditionally placed beyond the bounds of pretrial agreements.[263] The majority concluded that the pretrial agreement was appropriate because it neither waived unlawful command influence nor imperiled the traditional function of courts-martial.

Chief Judge Sullivan and Judge Wiss viewed the concept of unlawful command influence proffered by the majority as heretical. Command influence, no matter what its stripe, demanded full and open litigation and was never appropriately waived pursuant to a pretrial agreement.[264] Interestingly, neither judge invalidated Weasler's agreement. Though vehemently opposed to waiver in theory, this particular waiver

252. *Id.*

253. *Id.*

254. *Id.* at 21 (Wiss, J., concurring in the result).

255. *See* United States v. Hamilton, 41 M.J. 32, 40 (C.M.A. 1994) (Wiss, J., concurring in the result).

256. *Weasler*, 43 M.J. at 21.

257. *Id.* at 21-22.

258. *Id.* at 19.

259. *Id.*

260. *See* United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968) (citing United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957)).

261. *Weasler*, 43 M.J. at 19.

survived their scrutiny because both judges could find no prejudice to the accused.[265] For all their indignation over the majority's creation of a standard that subordinated the good of the system to the good of the few, both judges validated the agreement.[266] Why was neither judge able to dissent even though their concurrences were so angst-ridden?

The apocalyptic vision the two judges shared is unrealistic. First, it strains credulity to believe that a defense counsel would waive a command influence issue of such significance that the likely outcome of the issue's litigation would be dismissal. Systemically important issues will be litigated.[267] Second, because *sub rosa* agreements are illegal, affirmative waiver will necessarily result in public disclosure of potential unlawful command influence issues.[268] Therefore, the majority approach actually *lessens* the chance that an overbearing convening authority will be able to bury his misconduct.[269] Third, the military judge will ensure during the providence inquiry that the accused makes a voluntary, knowing, and intelligent waiver of his right to litigate the unlawful command influence motion.[270] The providence inquiry, therefore, enhances public confidence that the accused is not the victim of unlawful coercion. Finally, bargained waiver exacts a cost on the convening authority by lessening the maximum sentence which the accused might receive. This alone will have a self-correcting influence on commanders at all levels who have a real interest in an accused receiving the full sentence adjudged by the court-martial.[271]

Although they conjure up scary scenarios, neither Chief Judge Sullivan nor Judge Wiss backs up the rhetoric with a dissent in *Weasler.* In the final analysis, neither judge believed a procedurally perfect preferral was a fundamental, nonwaiverable right. Neither judge was willing to subordinate Weasler's real interest in plea bargaining to a greater, but speculative, systemic interest in ensuring an accusatory process free from improper command action. The common sense of the majority opinion prevailed: a just system values an accused's interest in minimizing confinement time through plea bargaining more than it does a defect-free charging process.

Conclusion

In *Weasler,* two important criminal justice system interests conflicted. The outcome expanded pretrial agreement jurisprudence and narrowed unlawful command influence jurisprudence. By allowing Weasler to waive his right to a defect-free charging process, the CAAF expanded an accused's options when bargaining with the government. The decision also benefited the justice system by creating an additional incentive for an accused to expose improper command action.[272] The CAAF showed its resolve not to be constrained by past decisions which forbade bargaining over anything but charges and sentence. However, before the majority could extend pretrial

262. *See id.* Just as clearly as the CAAF legitimized affirmative and default waiver of accusatorial defects resulting from improper command actions, the majority also reiterated its commitment to ensuring such waivers are never mandated by a command. By embracing *Hamilton,* the CAAF implicitly recognized that attempts by a commander to force an accused to waive defects in the preferral or forwarding of charges would be an unlawful attempt to influence the trial and would thus run afoul of Article 37. Defects not properly evaluated under the Article 37 regime, if waived voluntarily or by default, become amenable to such analysis when command coercion prompts their waiver. *See* United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994). The *Weasler* majority's reliance on *United States v. Kitts* and the proposition that "[i]t is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement" is consistent with the view articulated in *Hamilton*. *See id*. (quoting United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986)). Notwithstanding the 1991 changes to R.C.M. 705, which allow any party to initiate bargaining and propose terms, and regardless of the broad sweep of *Mezzanatto* (which, like *Bordenkircher* before it, invited a more aggressive use of plea bargaining by the government), the majority in *Weasler* reaffirmed the CAAF's commitment to act if presented with command action that threatens the integrity of the military justice system. *But see* Criminal Law Note, *Recent Developments in Military Pretrial and Trial Procedure*, ARMY LAW., Mar. 1996, at 42 (suggesting that the court should have used *Mezzanatto* to announce a rule allowing government mandated waiver of accusatorial defect issues).

263. *See supra* notes 145-56 and accompanying text.

264. *Weasler,* 43 M.J. at 22.

265. *See id.* at 22-23.

266. *Id.* at 21.

267. Even if the accused has a complete dolt as her defense counsel and an egregious case of unlawful command influence is either waived by failure to raise it at trial or waived pursuant to a bargain that somehow passes the military trial judge's muster, the accused has a remedy. Relying on either an ineffectiveness of counsel remedy or the court's continued adherence to *Blaylock's* holding that unlawful command influence issues that affect the fairness of a trial can always be raised, an accused will always have recourse to the appellate courts for relief. *See* United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983).

268. *See* MCM, *supra* note15, R.C.M. 705(d)(2).

269. *But cf. Weasler,* 43 M.J. at 22 (Wiss, J., concurring in the result).

270. *See generally id.*; United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

271. Trial counsel who have briefed commanders after trial and have had to inform them that the accused's sentence from the court was longer than that provided for in the pretrial agreement understand the disappointment that commanders feel in knowing that the accused will serve less confinement than what the sentencing authority felt was appropriate for the crime. This sentiment is particularly strong when soldiers in the command believe that the accused has gotten off easy. No commander wants to be responsible for an accused getting a particularly lenient sentence due to the commander's own inappropriate action.

agreement jurisprudence to allow waiver of improper command action, it needed to ensure that neither the accused nor the criminal justice system would be harmed by the practice.[273] This required reappraisal of unlawful command influence jurisprudence.

Beginning with Judge Crawford's concurrence in *Johnston*, the judges began to narrow their definition of unlawful command influence.[274] *Hamilton* and *Weasler* found a majority of the CAAF agreeing that the term "unlawful command influence" was used too broadly in the past.[275] No longer would the ghosts of the 3d Armored Division cases cause the court to reflexively condemn improper command action under the rubric of unlawful command influence.[276] A majority of the court, confident in the ability of the trial process to protect both the accused and the system, looked beyond the labels that the appellate counsel placed on the actions of the parties. The result was a victory of content over form.

The CAAF sharpened the focus of its unlawful command influence jurisprudence in *Weasler*, but the majority ultimately found that Weasler did not suffer from unlawful command influence. Although there was unlawful command action in the charging process, these defects did not implicate the integrity of commanders or their role in administering the criminal justice system. Thus, the CAAF had only to determine whether the defense-initiated waiver of a procedurally correct charging process waived a fundamental right that threatened to turn the trial into a sham. The CAAF found no such fundamental right at stake. Therefore, heeding Mr. Ray's centuries-old advice, the CAAF had only to satisfy itself that the pretrial agreement between SPC Weasler and the government was a "bargain clear and plain."[277] Satisfied it was; the CAAF refused to hear SPC Weasler "afterward complain."[278]

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272. The accused's incentives to raise charging defect issues prior to this decision were limited. Because the defects could be corrected prior to trial, such issues rarely resulted in tangible benefit to the accused. Forcing the government to reprefer charges or to send them back through the chain of command for proper recommendation and transmittal, though providing some sense of personal satisfaction in tweaking the command, generally would not change by one day the time an accused ultimately spent in jail. Indeed, raising such issues could actually backfire on the accused who now had to deal with an angry command. *See supra* note 240 and accompanying text. This decision gives an accused a real benefit because he can now trade his right to force the government to spend additional time in perfecting the charging process for the government's right to see him spend the entire time adjudged in confinement.

273. *See Weasler*, 43 M.J. at 19. *But see id.* at 19-22 (concurring opinions of Chief Judge Sullivan and Judge Wiss).

274. *See* United States v. Johnston, 39 M.J. 242, 245 (C.M.A. 1994) (Crawford, J., concurring in the result) (noting that defective preferral of charges is not unlawful command influence and is therefore subject to waiver if not raised at trial).

275. *See* United States v. Drayton, 39 M.J. 871 (A.C.M.R. 1994), *aff'd*, 45 M.J. 180 (1996); *Weasler*, 43 M.J. at 17; United States v. Hamilton, 41 M.J. 32, 36 (C.M.A. 1994); United States v. Bramel, 29 M.J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition). The ACMR had come to the conclusion that unlawful command influence analysis was being applied too broadly fully four years before the COMA.

276. However, the CAAF was still willing to enforce draconian sanctions on the government when true unlawful command influence subverted the integrity of courts-martial. *See* United States v. Gleason, 43 M.J. 69 (1995) (dismissing findings and sentence, the CAAF found the accused's battalion commander's actions unlawfully influenced witnesses and infected the entire court-martial process).

277. *See* Ray, *supra* note 1.

278. *Id.*

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, Virginia 22903-1781.

Consumer Law Note

Seventh and Ninth Circuits Hold That Bad Checks Are Debts Under the FDCPA

The Federal Trade Commission (FTC) has consistently stated that bad checks are "debts" under the Fair Debt Collection Practices Act (FDCPA).[1] The statutory definition of "debt" appears to support this position.[2] An opinion by the U.S. Court of Appeals for the Third Circuit, however, has caused the FTC's position to be controversial and has spawned some litigation.

In *Zimmerman v. HBO Affiliate Group*,[3] the Third Circuit faced a claim which alleged that HBO had violated the FDCPA in the course of its attempts to collect compensation for unauthorized use of its microwave television signals.[4] The court did not limit itself to deciding whether the compensation for microwave signals was a "debt" under the FDCPA. Instead, the court held "that the type of transaction which may give rise to a 'debt,' as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer."[5] This expansive language was used in subsequent litigation by debt collectors who argued that the FDCPA did not apply to their actions.[6] One type of debt which was attacked in this fashion is checks that were returned for insufficient funds, so-called "bad checks."

The issue of whether a dishonored check is a "debt" under the FDCPA was squarely presented to two circuit courts in recent cases. The first decision, which was issued by the Seventh Circuit, was *Bass v. Stolper*.[7] In that case, the plaintiff held a joint checking account with a consumer who had written a check for groceries; the check was returned for insufficient funds.[8] The defendant was a law firm hired by the grocery store to collect the debt after the check bounced.[9] Relying primarily on the plain language of the statute, the Seventh Circuit held that "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA."[10] The court also stated that "[e]ven if the language in the Act's definition of 'debt' was so unclear as to require our resort to extrinsic sources, these sources only further support our holding today."[11] The court found that the legislative history of the FDCPA expressly supports the court's resolution of this particular case—that "debt" includes obligations based upon bad checks.[12] The Seventh Circuit specifically addressed *Zimmerman* and disagreed with the Third Circuit, stating that "to the extent that the *Zimmerman* court creates a requirement that only credit-based transactions constitute 'debt' under the FDCPA, we must respectfully part ways."[13]

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1. *See* Consumer Law Note, *The Fair Debt Collection Practices Act Applies to Bad Checks*, ARMY LAW., Oct. 1996, at 25. The FDCPA is codified at 15 U.S.C.A. §§ 1692-92o (West 1997).

2. The FDCPA defines debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C.A § 1692a (5).

3. 834 F.2d 1163 (3d Cir. 1987).

4. *Id.* at 1165-68.

5. *Id.* at 1168.

6. *See generally Now Before the Circuits: FDCPA Coverage of Bounced Checks and Condo Fees and the (Invented) Credit Requirement*, 15 NCLC REPORTS, DEBT COLLECTION AND REPOSSESSION EDITION (Nat'l Consumer L. Ctr.) July/Aug. 1996, at 1.

7. 111 F.3d 1322 (7th Cir. 1997). The court framed the issue before it in this way: "[W]e face only the task of resolving the parties' dispute over the scope of the FDCPA, specifically whether the payment obligation that arises from a dishonored check constitutes a "debt" as defined in the FDCPA." *Id.* at 1324.

8. *Id.* at 1323.

9. *Id.*

The Ninth Circuit followed suit in *Charles v. Lundgren & Associates, P.C.*[14] The facts were similar to those in *Bass*. The plaintiff wrote a check for a meal at a restaurant, and the check was later returned for insufficient funds.[15] The suit alleged violations of the FDCPA and was initiated against a law firm involved in the collection of the debt resulting from the bad check.[16] The Ninth Circuit agreed with the Seventh Circuit's analysis of whether or not a bad check is a "debt" under the FDCPA, stating:

> The only federal court of appeals that has considered this question is the Seventh Circuit. In a well-reasoned and persuasive opinion, that court recently held that a dishonored check is a "debt" under the FDCPA. We agree with its conclusion that, because "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA," the FDCPA governs the collection of dishonored checks.[17]

These cases are significant because it seems that "the lasting effect of the Third Circuit's dicta [has] finally . . . been put to rest."[18] They may become increasingly significant to legal assistance practitioners as AAFES contracts out its check collection operations.[19] Bad checks written to AAFES comprise a significant number of the dishonored checks written by soldiers overall. Since obligations based upon bad checks are "debts" covered by the FDCPA, it will provide valuable protections to soldiers once collections are turned over to a company that may fall within the definition of "debt collector."[20] Major Lescault.

Family Law Notes

North Carolina Changes Vesting Requirements for Division of Pension

The Uniformed Services Former Spouses' Protection Act[21] (USFSPA) allows state courts to divide disposable military

10. *Id.* at 1326. In discussing the plain language of the statute, the court commented that:

> Appellants would have us read into [the definition of "debt"] the additional requirement that the debt flow from a specific type of consumer transaction—one involving the offer or extension of credit. However, we see no language in the Act's definition of "debt" (or any other section of the Act) that mentions, let alone requires, that the debt arise from an extension of credit. Nor do we find patent ambiguity in the definition of "debt." The definition is not "beset with internal inconsistencies [or] . . . burdened with vocabulary that escapes common understanding." In the absence of ambiguity, our inquiry is at an end, and we must enforce the congressional intent embodied in the plain wording of the statute.

Id. at 1325 (citations omitted).

11. *Id.* at 1326-27.

12. The court said that "the legislative history provides an unequivocal statement of the drafters' intent on this issue: '[T]he committee intends that the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations.'" *Id*. at 1327 (quoting H.R. REP. NO. 95-131, at 4 (1977)).

13. *Id.* at 1326.

14. 119 F.3d 739 (9th Cir. 1997).

15. *Id.* at 741.

16. *Id.*

17. *Id.* (citations omitted).

18. *FDCPA Applies to Dishonored Check & Condominium Fee Collections*, 16 NCLC REPORTS, DEBT COLLECTION AND REPOSSESSION EDITION (Nat'l Consumer L. Ctr.) July/Aug. 1997, at 27.

19. *See Exchange Outsources Returned Check Processing*, (visited Jan. 6, 1998) <http://www.aafes.com/pa/news/97news/97011.htm> (announcing the contracting of collection efforts within the first sixty days after return of the checks to National City Processing Company for all installations in Europe and for ten CONUS installations beginning 1 February 1997).

20. Under the FDCPA, a debt collector is defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6) (West 1997). Ordinarily, FDCPA provisions do not apply to AAFES collections because the Act does not apply to "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." *Id*. § 1692a(6)(A). Normally, AAFES collects its own debts as a creditor. In this instance, practitioners must look to state law, which may provide protections against collection abuses by a creditor. Additionally, AAFES, as a government agency, may well fall in the government actor exception. The FDCPA definition of debt collector expressly excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." *Id*. § 1692a(6)(C). Contractors who are collecting on behalf of the government have not been included in this exception, at least in the context of student loans. *See* Consumer Law Note, *The Fair Debt Collection Practices Act Can Still Help with Government Contracted Debt Collectors*, ARMY LAW., Dec. 1996, at 20. Consequently, it is unlikely that the AAFES collection contractor could avail itself of this exception, and, if it meets the basic requirements of the definition, the contractor would be a "debt collector" subject to the FDCPA.

retirement pay as property in a divorce action. It does not, however, create a federal right to a division of military retirement pay. Therefore, the divorce forum's state law requirements for dividing pensions apply to the division of a military retirement. Some states refuse to divide any retirement pension unless the retirement is vested, reasoning that there is no property interest to divide until the pension vests. When a retirement plan vests is usually defined by the plan itself or by law. There is no statutory definition of "vesting" for a military retirement.

Until recently, North Carolina defined vesting by case law.[22] In a dramatic change for military spouses and service members, the North Carolina legislature enacted a new law in June 1997 which did away with the vesting requirement for division of pensions.[23] The statute specifically includes military retirement benefits that are eligible under the USFSPA as marital property and are subject to division.[24] The new statute applies to all petitions for equitable distribution filed on or after 1 October 1997.[25] Major Fenton.

Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards

The Uniformed Services Former Spouses' Protection Act (USFSPA) allows states to divide disposable military retirement pay as property in a divorce action.[26] The USFSPA defines "disposable military retirement pay" specifically and excludes portions of retirement which are waived in order to accept Veterans Administration (VA) disability[27] or salary received subject to the Dual Compensation Act (DCA).[28] In order to receive either VA disability payments or salary subject to the limits of the DCA, a retiree must voluntarily waive a portion of longevity retirement.[29] This waiver often has a drastic effect on the amount of disposable retirement pay available for division under a divorce decree. Despite this provision of the USFSPA, many state courts continued to divide gross retirement pay.

Many practitioners and service members believed *Mansell v. Mansell*[30] settled the issue once and for all. In *Mansell*, the U.S. Supreme Court held that state courts are federally preempted from dividing military retirement pay which is waived by the service member in order to receive VA disability benefits.[31] However, the dissent, led by Justice O'Connor, set out a position that has taken hold in the state courts during the ensuing eight years of litigation. Justice O'Connor found this limitation on the USFSPA fundamentally unfair to the former spouse because it amounted to a unilateral change to a court-awarded property settlement.[32] A majority of state courts agree with Justice O'Connor and take equitable action to compensate the former spouse when this reduction in disposable military retirement pay occurs.

Abernethy v. Fishkin,[33] a recent Florida case, illustrates a common approach by state courts when a property settlement is contained in a separation agreement which is later incorporated

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21. 10 U.S.C.A. § 1408 (West 1996).

22. *See* George v. George, 444 S.E.2d 449 (N.C. 1994), *rehearing den.*, 463 S.E.2d 236 (N.C. 1995). An enlisted soldier and his wife separated after seventeen years in the service. The divorce decree reserved the distribution of military retirement pay until such time as the soldier retired. After his retirement, the ex-wife petitioned for equitable distribution of the military retirement. The trial court awarded her thirty-one percent of the military retirement. The Court of Appeals for North Carolina reversed and held that the military retirement was not vested as of the separation and therefore was not subject to equitable distribution because it was not marital property at the time of the divorce.

23. H.B. 535, 1997 Sess., S.L. 212 (N.C. 1997) (amending chapter 50 of the North Carolina General Statutes).

24. *Id.* § 1.

25. *Id.* § 6

26. 10 U.S.C.A. § 1408 (West 1996).

27. VA disability payments awarded under 38 U.S.C. § 5305 are tax-free to the service member. To receive these payments, the USFSPA requires the retiree to waive an equal amount of the longevity retirement. 10 U.S.C.A. § 1408(a)(4)(B).

28. 5 U.S.C.A. § 5532(b) applies only to federal employees in the civil service who were officers in the armed forces. If an officer secures federal employment after military service, Section 5532(b) requires the employee to waive a portion of his military longevity retirement in order to receive his federal salary. 5 U.S.C.A. § 5532(b) (West 1996).

29. 10 U.S.C.A. § 1408(a)(4)(B).

30. 490 U.S. 581 (1989).

31. *Id.* at 594-95.

32. *Id.* at 601-02 (O'Connor, J., dissenting).

33. 699 So. 2d 235 (Fla. 1997).

into the divorce decree. In *Abernethy*, the parties divorced after almost fifteen years of marriage. They signed a separation agreement which awarded Fishkin twenty-five percent of any retirement pay received by Abernethy. In addition, the separation agreement contained a clause prohibiting Abernethy from pursuing any course of action to defeat Fishkin's right to receive her allotted portion of disposable military retirement pay and requiring Abernethy to indemnify Fishkin for any breach.[34] Later, Abernethy elected to leave the military and to collect voluntary separation incentive (VSI)[35] pay.[36] A Florida trial court awarded Fishkin a twenty-five percent interest in the annual VSI payments.[37] As with retirement pay, a service member who is collecting VSI payments must waive a portion of that pay if he accepts VA disability payments.[38] Abernethy began receiving VA disability payments, thus reducing his disposable VSI payments.[39]

The Supreme Court of Florida found that Fishkin was entitled to receive payments equal to the amount she was receiving before Abernethy elected to receive VA disability payments.[40] Specifically, the court found that Abernethy was not receiving any disability benefits when the property settlement was agreed to in the separation agreement; therefore, the calculation of the amount of retirement pay awarded to Fishkin did not impermissibly include VA disability benefits.[41] In addition, the separation agreement contained an indemnification clause which indicated the parties' intent to maintain monthly payments at a certain level.[42] Nothing in the indemnification clause required Abernethy to provide the funds from the VA disability benefits. Rather, he could pay with any asset.[43]

A similar issue arises in the context of the DCA. In *Gaddis v. Gaddis*,[44] the Arizona Court of Appeals ruled that the former spouse's property interest remained at the original level, despite waiver of military retirement to collect salary covered by the DCA.[45] The trial court awarded Mrs. Gaddis fifty percent of the disposable military retirement pay at the time of the divorce.[46] Mrs. Gaddis received approximately $750 per month until Mr. Gaddis took a civil service job, reducing Mrs. Gaddis' portion of disposable retirement pay by fifty percent.[47] Mrs. Gaddis filed a petition for an order to show cause, and the trial court ordered Mr. Gaddis to continue paying the original $750. [48]

Applying the same reasoning as the *Abernethy* court, the Arizona court found that the original award of community property established an enforceable property interest.[49] Since Mr. Gaddis did not receive federal employment income which was subject to the DCA at the time of the divorce, the court was not dividing his DCA salary.[50] The court found Mr. Gaddis'

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34. *Id.* at 236.

35. 10 U.S.C.A. § 1175 (West 1996). VSI is a temporary program to provide a financial incentive for service members to leave the service earlier than their scheduled end of term of service to assist with the downsizing of the military.

36. *Abernethy*, 699 So. 2d at 237. Although this case involves an award of VSI payments, the Florida court addresses the impact of the USFSPA. Florida treats VSI and SSB payments as retirement pay. *See*, Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996). Most states do not go as far as Florida does and call these payments retirement pay; however, most states which have addressed the issue do a USFSPA analysis because they treat the payments as the "functional equivalent" of retirement pay and divide it subject to USFSPA limitations.

37. *Abernethy*, 699 So. 2d at 237.

38. 10 U.S.C.A. § 1175(e)(4).9

39. *Abernethy*, 699 So. 2d at 238.

40. *Id.* at 239.

41. *Id.* at 240.

42. *Id.* at 237.

43. *Id.* at 240.

44. No. 2 CA-CV 96-0315, 1997 WL 467023 (Ariz. App. Aug. 14, 1997).

45. *Id.* at *3.

46. *Id.* at *1.

47. *Id.*

48. *Id.*

49. *Id.* at *2.

50. *Id.* at *4.

deliberate frustration of the decree's award fundamentally unfair to his former spouse.[51] Both of these cases distinguish *Mansell's* holding the same way. The California trial court in *Mansell* awarded Mrs. Mansell a portion of the gross retirement pay Major Mansell received. At the time of the divorce and property settlement, Major Mansell was already retired, received VA disability payments, and had already waived a portion of the longevity retirement.[52]

Issues concerning the USFSPA remain very state specific. Legal assistance attorneys who advise clients on separation and divorce must be aware of the growing trend to ensure that former spouses' property interests are protected in the event of a future award of VA disability or federal employment by the service member. Major Fenton.

Uniformed Services Employment and Reemployment Rights Act Note

Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees

On 22 December 1997, the Merit Systems Protection Board (MSPB) promulgated interim procedural regulations[53] for claims by federal employees that their agencies or the Office of Personnel Management did not comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA).[54] Under the interim regulations, all USERRA actions brought before the MSPB will be processed under the board's appellate jurisdiction procedures. Past board actions involving government employee restoration after military duty were handled under the board's appellate procedures, and the MSPB has determined that the USERRA does not require the board to change this practice.[55]

The interim regulations also establish time limits for filing USERRA complaints with the MSPB.[56] All federal employees are given a minimum of six months (180 days) from the date of an alleged USERRA violation to file a complaint directly to the MSPB.[57] "If a person seeks assistance from DOL [the Department of Labor] under 38 U.S.C. § 4321 but does not file a formal complaint under 38 U.S.C. § 4322(a), he or she may subsequently file an appeal with [the] MSPB at any time during the 180-day period."[58] If a federal employee files a formal complaint with his agency and the DOL investigates, is unable to resolve the issue, and so notifies the employee in writing, the employee may choose to file directly with the Board within the 180-day limit or within thirty days of receiving the DOL non-resolution notice, whichever is later.[59]

The DOL can also refer complaints to the Office of Special Counsel (OSC).[60] If, after investigation, the DOL refers a complaint to the OSC and the OSC notifies the employee that the OSC "will not represent the person before [the] MSPB, [the employee] may subsequently file an appeal with [the] MSPB within 30 days after receipt of the notification from the special counsel or within 180 days of the alleged violation, whichever is later."[61] If the OSC agrees to represent the employee, the MSPB will not set a time limit for filing.[62] The board's rationale is that the special counsel should have time to secure voluntary agency compliance before filing with the MSPB.[63] The board assumes that the OSC should give the agency one

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51. *Id.*

52. Mansell v. Mansell, 490 U.S. 581, 585-86 (1989).

53. *See* Merit Systems Protection Board Practices and Procedures, 62 Fed. Reg. 66,813 (1997) (to be codified at 5 C.F.R. pt. 1201).

54. Pub. L. No. 103-353, 108 Stat. 3150 (1994), *codified at* 38 U.S.C. §§ 4301-33 (1994).

55. 62 Fed. Reg. at 66,813. The original jurisdiction procedures for the Office of Special Counsel when processing cases before the MSPB, found at 5 C.F.R. part 1201, subpart D, do not apply to USERRA cases. 5 C.F.R. § 1201.3 (1997).

56. 62 Fed. Reg. at 66,814. These regulations address the lack of a statute of limitations in the USERRA and the problems raised because the MSPB did not set a time limit on considering USERRA discrimination and job restoration claims. *See* Petersen v. Department of Interior, 71 M.S.P.R. 227, 233 (1996); Jasper v. U.S. Postal Serv., 73 M.S.P.R. 367, 370 (1997).

57. 62 Fed. Reg. at 66,814.

58. *Id.* (to be codified at 5 C.F.R. §§ 1201.22(b)(2)(i), 1201.22(b)(2)(ii)).

59. *Id.* (to be codified at 5 C.F.R. § 1201.22(b)(2) (iii)). A copy of the DOL notification must be filed with the appeal to get the thirty-day extension. *Id*.

60. *See* 38 U.S.C.A. § 4322(a) (West 1997).

61. 62 Fed. Reg. at 66,814 (to be codified at 5 C.F.R. § 1201.22(b)(2) (iv)). A copy of the OSC "no merit" notice must be filed with the appeal to get the thirty-day extension. *Id.*

62. *Id.*

63. *Id.*

last chance to resolve issues after refusing to do so with DOL investigators.

The MSPB interim regulations guarantee federal employees at least six months from the time of an alleged USERRA violation to file an appeal with the MSPB. If a person files a formal complaint with the DOL or seeks OSC representation, the time limit for filing may extend beyond six months. The new regulations encourage federal employees to use the free services of the DOL and the OSC to resolve USERRA complaints prior to filing a formal complaint with the MSPB. Lieutenant Colonel Conrad.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Impeachment by Prior Inconsistent Statement[1]

A woman calls the military police (MPs) to report a rape. She identifies the alleged perpetrator as Private First Class B, a soldier assigned to Fort Swampy. The MPs notify the local Criminal Investigation Command (CID), and an agent interviews the victim and takes a sworn statement detailing the facts surrounding the alleged rape. The victim goes to the post hospital and undergoes a rape kit examination. Private First Class B's unit commander prefers a charge for rape, and, after an Article 32 investigation, the case ends up at a general court-martial. The trial counsel has just completed direct examination of the victim. The defense counsel stands to cross-examine the victim.[2]

When confronting a witness on cross-examination at trial, an attorney will often aim to show the court-martial that the witness' recitation of events is not worthy of belief. The witness may be lying or simply mistaken, but opposing counsel's mission is to attack the credibility of the testimony. One effective means of impeachment is to use a witness' prior inconsistent statement.

Whether the witness is untruthful or unable to recall accurately what occurred is generally less significant than the fact that the inconsistency exists. Having demonstrated an inconsistency, counsel can argue either lack of candor or lack of recall—or, better still, let the panel sort out the reason—to show that the court-martial should not believe the testimony of the witness. To make this attack successfully, counsel must know how to develop statements, to organize them for trial, and to confront the witness with her relevant[3] prior inconsistent statements. Counsel's task is to investigate fully all statements, to identify key facts in each, to index the relevant points, and to apply this template against the witness' testimony in the court-martial.

Where to Find Prior Inconsistent Statements

In the hypothetical above, the witness made a number of prior statements. Whether such statements are inconsistent will not be determined until the witness testifies at trial. How many times did the witness above say something about what happened on the night of the alleged rape? She made an initial report to the MPs and likely answered some follow-up questions to complete the report. She described the events, presumably in more detail, in a sworn statement to a CID agent. When she went to the hospital for a rape kit examination, she told the attending physician what happened. The victim consented to a pretrial interview as part of defense counsel's case investigation.[4] She testified under oath at the Article 32(b) investigation. In addition, she may have talked with friends or family about the alleged rape.

All of the foregoing statements, written and oral, are prior statements which may be used to impeach the witness at trial, depending on her direct testimony. Counsel should locate any record of a statement given, interview any witness to whom a statement was made, and interview the witness as a necessary part of the pretrial investigation.

Implicit in setting up impeachment by prior inconsistent statement is letting the witness talk, thus creating the opportunity for inconsistencies. There is little impeachment value in merely asking a witness at an Article 32 hearing, "Did you give this statement to CID on 10 July?"[5] Similarly, in setting up a potential inconsistent statement, the following exchange produces little useful information:

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1. *See generally* James Martin Davis, *Impeachment by Prior Inconsistent Statement*, Trial, Mar. 1989, at 64; Janeen Kerper, *Killing Him Softly with His Words: The Art and Ethics of Impeachment with Prior Statements*, 21 Am. J. Trial Advoc. 81 (1997).

2. This scenario depicts a defense counsel's use of a prior inconsistent statement to impeach a victim. Note, however, that this impeachment technique is available for use by either the trial or defense counsel against any witness who testifies at trial and who has made prior inconsistent statements.

3. By focusing on relevant points, counsel avoid allegations of unethical conduct in asking questions designed to embarrass or to harass a witness. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. A, para. 4.4 (1 May 1992).

4. An attorney who interviews a witness as part of counsel's own pretrial investigation has several options to memorialize the information provided by the witness, including: (1) having someone else present during the interview (often a colleague or legal clerk), (2) having the witness sign a statement—sworn or unsworn—at the conclusion of the interview, (3) having the witness initial notes taken by counsel to vouch for their accuracy, or (4) the attorney's own recollection. The first three options provide counsel additional evidence of the substance of the prior inconsistent statement, and the evidence can be offered at trial if, when confronted with the statement, the witness denies having made it. The last option, counsel's own recollection, is useful if it is more important to show that the witness is not credible than to offer the substantive testimony of the prior statement.

5. In a given case, this question might add value by showing that the witness vouched for or had an opportunity and failed to correct his earlier statement, but the question does not generally yield another potential inconsistent statement.

DC: What happened after you were drinking with the accused at the party?
W: He raped me.
DC: Did you go to the doctor?
W: Yes.
DC: And did you give a statement to CID?
W: Yes.

Conversely, ignoring the witness' earlier detailed sworn statement and asking the witness at the Article 32 investigation, "What happened?," sets up sworn testimony that may conflict with subsequent trial testimony. Counsel who are trying to set up impeachment by prior inconsistent statement must probe details and must make the witness do the talking—remember, it is impeachment by the *witness'* prior inconsistent statements, not affirmation or denial by the witness of *counsel's* statements. In the pretrial investigation, use open-ended, non-leading questions to make the witness give narrative responses. Consider some of the questions that counsel could ask in the above scenario:

> Who was with you? How much did you have to drink? Was the accused drinking? How much? Where did the alcohol come from? What time did you go to the barracks? How did you know the accused? Where was your friend when you say the rape occurred? Where were the other soldiers? How did you sit on the bed? Where did the accused sit? Who initiated any physical contact? How was contact initiated? What happened next?

Counsel should walk very slowly through the entire scenario, having the witness tell the story, to develop prior statements by the witness that might later be inconsistent with the witness' in-court testimony. An exhaustive, detailed examination risks reinforcing some negative testimony, but it also forces the witness to make statements that might later prove useful for impeachment.

Organization for Trial

All successful advocates have a system for organizing case materials, but it is important also to organize and to prepare to address prior inconsistent statements. Consider using a topical index of prior statements, as shown below:

Fact	Sworn Statement 10 Jul XX	Art. 32 testimony 29 Jul XX	Direct Examination
Consumption of Alcohol	"drinking a little" (line 9)	"had 10 beers" (p. 7/line 15)	
	"earlier at friend's house" (p. 11)	"shots of whiskey" (p. 7/line 18)	
Initiated Contact	"he threw me on the bed and raped me" (line 12)	"I kissed him a few times" (p. 9/line 7)	
	"we were sitting on the bed, hugging and kissing (line 12).		

Using this system of organization, counsel has identified relevant facts on which to impeach the witness at trial. Identifying these key facts prior to trial helps counsel to resist confronting the witness about every minor inconsistency that may arise, thereby diluting the key points of impeachment. Counsel has also identified each of the prior statements by type and date given. While counsel must have each of these statements or transcripts accessible in his case file, the relevant quotes set out on the chart help counsel identify whether trial testimony is inconsistent with the prior statement. Thus, counsel can move quickly and easily to set up confrontation with the prior inconsistent statement without shuffling various documents. Finally, by indicating page or line numbers on the chart, counsel can seize control of the courtroom by directing the witness or informing opposing counsel exactly where the relevant language appears. Such control minimizes objections from opposing counsel and demonstrates confidence and knowledge to the panel, thus enhancing the effect of the impeachment.

Impeachment by Prior Inconsistent Statements

Having identified prior inconsistent statements and having determined that the point is relevant to an issue at trial, counsel now impeaches the witness. A three-step process can be adapted to any of the types of prior statements made by the witness.

Reinforcement—Depending on the clarity of the witness' testimony, this step may not be necessary. On the other hand, counsel may want to lock in the witness' testimony on direct examination. For example, "Your testimony today is that you had only a couple of beers on 10 July?" Counsel should, however, be cautious not to overemphasize testimony which is damaging to the case. For example, "So your testimony today is that you were not drunk or kissing my client, and he threw you on the bed and raped you in the barracks on the night of 10 July?"

Foundation—Counsel establishes that the witness made a prior statement of a certain type at a given time and place. Validating the prior statement limits the witness' ability to dismiss it. In this step it is also useful to point out that the prior statement was made closer in time to the event and was intended to help the investigation. For example, counsel might ask the following questions: "You gave a statement to the CID agent? You reviewed the statement for corrections after it was typed? The CID agent swore you to the statement? You made this statement the night of the incident? You told the truth so that CID could arrest the accused?"

Confrontation—Here counsel asks if the witness made the prior statement, using the exact words and reading from the document. For example, "And you told the agent that Private First Class B initiated contact when 'he threw me on the bed and raped me,' is that right?" In confronting the witness with the prior statement, counsel enhances the accuracy of the prior statement by reading directly from the statement, transcript, or report.

If the witness denies having made the prior inconsistent statement, counsel may want to offer into evidence the document containing the prior statement. On the other hand, if counsel has laid a good foundation and read from the statement, transcript, or report, a denial by the witness sounds and looks like a lie. Whether counsel chooses to offer the prior statement depends in part on counsel's objective in the impeachment. If the purpose is to show that the witness is not credible, the mere denial looks less credible; if the objective is to use the prior statement for its substance (e.g., the witness was sitting on the bed kissing the accused), call the required witness(es) to testify to the prior inconsistent statement.

Nine DON'Ts! for Effective Impeachment

1. **Don't confront unless it is a true inconsistency.** Quibbling over a witness' choice of words sounds to a panel more like disingenuous fancy lawyering than substantive changes in a witness' recollection. A relevant point is either a main issue in the case or a point that reveals dishonesty in the witness' testimony.

2. **Don't be antagonistic toward the witness.** The foundation and confrontation flow more smoothly if questions are less accusatory and simply review facts. Thus, counsel appears more helpful to the panel and less rude to the witness.

3. **Don't abbreviate the foundation to get to confrontation.** A detailed foundation with visual images (e.g., "And you raised your right hand to take an oath?") lends credibility to the prior statement and is especially important if counsel wants the court-martial not only to disbelieve the witness' testimony in court, but also to believe the substance of the prior statement.

4. **Don't confront the witness by asking if he "*remembers* saying in a sworn statement . . . ."** This question misdirects the inquiry to whether the witness remembers and not whether he in fact made the prior statement. The witness can, in good faith, deny any memory and thus weaken the impeachment. Counsel should ask whether the witness *made* the statement.

5. **Don't summarize the prior statement.** Counsel must quote directly the particular words on the relevant point and show the panel by picking up the document and reading from it.

6. **Don't let the witness read from the document.** The witness may summarize, insert words, read another line, or stumble through the relevant line, any of which distract the court from the inconsistency counsel desires to show.[6]

7. **Don't let the witness explain the inconsistency.** Although Military Rule of Evidence 613(b)[7] requires that the witness be afforded an opportunity to explain or to deny the prior inconsistent statement, it is not an obligation of the counsel impeaching the witness. There is virtually no circumstance where counsel enhances the impeachment by asking, "How do you explain this inconsistency?" Leave it for opposing counsel's redirect examination.

8. **Don't engage the other side in protracted examination.** Once counsel establishes an inconsistency, the other side may use redirect to bring out an explanation for the inconsistency. Counsel impeaching the witness should save rebuttal for argument. Counsel can point out to the panel the other side's effort to explain away problems in their case, but highlight what the witness said closer in time to the event in question—a point at which he was only trying to provide helpful information.

9. **Don't call the witness a liar.** The lawyer gains no advantage or favor for himself or his case by making personal attacks against a witness. The important point is what the witness said

6. Some trial advocates prefer to have the witness read the prior inconsistent statement for some dramatic value. This technique is proper and valid, though counsel gives up some control of the courtroom when he gives the document to the witness.

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 613(b) (1995).

in the prior inconsistent statement, not whether he is lying, mistaken, or inaccurate now.

Sample impeachment

W (direct exam): We had been drinking a little before he threw me on the bed and raped me. I only had about two beers, and I only drank at the barracks. But I never led him on.

TC: No further questions.

DC: You only drank two beers on 10 July? [*Reinforcement*]

W: Yes.

DC: You testified previously at an Article 32 investigation about this matter, didn't you? [*Foundation*]

W: Yes.

DC: That was on 29 July, just a few weeks after the alleged rape?

W: That's right.

DC: And you took an oath at that hearing, raising your right hand and promising to tell the truth, as you did today?

W: Yes.

DC: You testified truthfully at that hearing because you wanted to catch the person who you say raped you?

W: Yes.

DC: At that hearing, when asked how much you had to drink that day, you said, on page 7, line 15, (counsel reading from transcript) "I had about ten beers," didn't you? [*Confrontation*]

W: Yes.

DC: Now, you also talked about this incident to a CID agent on 10 July, is that right? [*Foundation*]

W: Yes, when I reported it.

DC: And the agent took a sworn statement from you?

W: Yes.

DC: You told him what happened on the same day it occurred, didn't you?

W: Yes.

DC: You told the CID agent the truth so that CID could arrest someone?

W: Yes.

DC: When the statement was typed, you had a chance to review it and make corrections?

W: Yes.

DC: And then the agent had you swear that the statement was true, and you signed it?

W: Yes.

DC: (picking up sworn statement) And in that statement to CID on 10 July, you said, on the second page, fourteen lines down, "we were sitting on the bed hugging and kissing," didn't you? [*Confrontation*]

W: No.

DC: [*Admission*] (Note: If counsel wants to argue the substance of the prior inconsistent statement, then counsel next has the witness authenticate her signature on the statement and moves to admit the document into evidence.)

DC: No further questions.

In the above example, counsel *reinforced* the witness' testimony as to the quantity of alcohol consumed prior to impeaching the witness. On the second relevant fact, however, counsel skipped the *reinforcement* step to avoid having the witness repeat the damaging accusation that the accused "threw me on the bed and raped me." After reinforcing part of the testimony, counsel laid detailed *foundations* for the prior statements on both relevant facts, including questions which showed that such statements were made closer in time to the event (thus enhancing the likelihood of their accuracy) and for the purpose of helping the investigation with accurate information. When *confronting* the witness, counsel directed the witness to a specific place in the document which contained the prior inconsistent statement. Thus, counsel showed the panel that he was bringing out specific information to help the court, and not playing meaningless word games with the witness. When counsel got the witness to admit having made the prior inconsistent statement, he stopped his examination on that point, leaving any explanation to the other side.

The most important step in impeaching a witness with prior inconsistent statements is the diligent investigation and examination to locate and to develop prior statements. Once counsel has built an arsenal of prior statements through investigation and good pretrial questioning, counsel should organize to test the witness' testimony at trial against his prior statements. By exposing such inconsistencies and confronting the witness with them, counsel shows the court-martial that the witness' testimony in court is not worthy of belief, having changed on a relevant point. Major Allen.

Horse-shedding the Evidence[8] —Twenty Do's and Don'ts of Witness Preparation

Few witnesses in courts-martial are experienced players.[9] For most, the first time they hear the trial counsel mumble "Your honor, the government calls . . . " will probably be their last time inside a courtroom, and they will very likely feel uneasy. Therefore, they usually must be coached, coddled, and caressed, and they must be told what to wear, how to act, and when to respond—in other words, they must be prepared for the experience.[10] Yes, Virginia, sorry to burst your bubble, not only

8. The phrase "horse-shedding the witness" can be attributed to James Fenimore Cooper, who used it in referring to the practice of lawyers rehearsing the testimony of their witnesses in carriage sheds near the courthouse. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 49 (3d ed. 1994).

9. LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 51 (1991).

10. David H. Berg, *Preparing Witnesses*, 13 LITIG. 13, 14 (1987) (describing a failure to prepare witnesses prior to trial as a combination of strategic lunacy and gross negligence).

is there no Santa Claus,[11] but some witness preparation prior to giving opening statements is essential to fulfill the ultimate goal of any competent trial advocate—presenting a persuasive case to the fact-finder.

Counsel swear by a variety of different techniques.[12] Some prepare by going over the entire direct examination in question and answer format, working on each response as necessary, and then conducting a mock cross-examination. Others outline the general scope of the witness' testimony by summarizing the direct, anticipating the cross, and (re)familiarizing the witness with important documents or pieces of evidence.[13] A rare few concentrate on simply molding witness personality and courtroom demeanor. To some degree, all of these methods enable counsel to achieve the goal of presenting witnesses who are thoroughly familiar with the subject matter of their testimony and ready to say what they know in a clear, concise, confident, and convincing manner.[14] In most cases, a practice examination will be best because the perceived benefit from spontaneous responses achieved through unrehearsed testimony will more than be outweighed by the potential disasters awaiting you with the "surprises" guaranteed to come from the witness while on the stand.[15]

Whatever method you choose, preparing your witnesses is essential if you expect to effectively present their testimony at trial.[16] The Witness Preparation Checklist[17] provides several time-tested tips[18] to help you remember those seemingly minor, though still important, details about how witnesses should conduct themselves on the stand. Copy it,[19] make it part of your trial notebook,[20] and use it when preparing your witnesses for their day in court. Lieutenant Colonel Henley.

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11. It was one century ago, in December 1897, that the *New York Sun* printed the now famous response to eight-year old Virginia O'Hanlon's letter to the editor questioning the very existence of the man from the North Pole by stating definitively, "Yes, Virginia. There is a Santa Claus."

12. *See* John P. DiBlasi, *Preparing Your Witnesses For Trial*, N.Y ST. BAR J., Dec. 1993, at 48, 49-52.

13. *See* THOMAS A. MAUET, TRIAL TECHNIQUES 477 (4th ed. 1996) (explaining in greater detail both the question and answer and the witness summary methods).

14. Alternatively, two well-known commentators have listed 13 objectives for witness preparation:

> help the witness tell the truth; make sure the witness includes all the relevant facts and eliminates the irrelevant facts; organize the facts in a credible and understandable sequence; permit the attorney to compare the witness' story with the [victim's/accused's] story; introduce the witness to the legal process; instill the witness with self-confidence; establish a good working relationship with the witness; refresh, but not direct, the witness' memory; eliminate opinion and conjecture from the testimony; focus the witness' attention on the important areas of testimony; make the witness understand the importance of his or her testimony; teach the witness to fight anxiety; and show how to defend him or herself during cross-examination.

ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL 82 (1985).

15. Of course, counsel should be prepared to adapt preparation style and technique to the witness' maturity, intelligence, and confidence level.

16. ARON & ROSNER, *supra* note 14, at 390-91 (asserting that witness preparation is the most important aspect of trial advocacy).

17. *See* Judy Clarke, *The Trial Notebook*, CHAMPION, June 1995, at 8 (detailing forms and lists for both pretrial and trial preparation, from which this checklist was developed).

18. *See* Douglas E. Acklin, *Witness Preparation: Beyond the Woodshed*, 27 A.F. L. REV. 21, 25 (1987) (suggesting several common sense tips for trial and defense counsel).

19. *See* UCMJ art. 108 (West 1995).

20. For a first-rate discussion on the proper assembly of a trial notebook, see *The Art of Trial Advocacy*, ARMY LAW., Nov. 1997, at 40.

_____1. Your appearance is almost as important as what you have to say. Make sure that you wear all authorized ribbons and that your uniform is pressed. Battle dress uniforms are not appropriate. Military witnesses should have a fresh haircut, hopefully not parted down the middle (the "probable cause haircut"). Women should keep make-up and jewelry to a minimum. Civilians should wear clean clothes, conservative dress.

_____2. Stand up straight when taking the oath and say "I do" in a loud, clear voice. Sit up straight in the witness chair; do not slouch or lean over the rail.

_____3. Avoid undignified behavior. When you are testifying, do not have anything in your mouth, such as gum, toothpicks, candy, or cigarettes. Resist the urge to chew your nails, crack your knuckles, or play with your glasses.

_____4. Don't mumble. Keep your voice up so that no one has to ask you to repeat your response. Keep your hands away from your mouth. Speak so that the farthest panel member can hear you without having to strain. Above all, use your own vocabulary not someone else's.

_____5. Testify in a confident, straightforward manner. This will give the panel more faith in what you are saying.

_____6. In order to make your testimony appear spontaneous, do not go home and memorize what you are going to say.

_____7. Take your role seriously. Avoid laughing and talking about the case in the hallways, bathrooms, post exchanges, dining facilities, the company area, or anywhere else. You never know who may be listening.

_____8. When answering the questions, look at the panel, if there is one. Make eye contact and speak like you are talking to your best friend or neighbor. This will help to communicate sincerity and to create an impression of candor and honesty.

_____9. Stick to the facts. You usually will not be able to testify as to what someone may have told you or what you heard someone else say. Do not testify as to what someone else told you, unless the military judge says it is okay.

_____10. On cross-examination, listen carefully to the questions asked of you and do not answer until the lawyer has had an opportunity to complete it. Answer directly and simply with a "yes" or "no," if possible, then stop. Do not volunteer anything.

____11. If your answer on cross-examination was wrong, correct it immediately. If it was not clear, clarify it. It is better for you to correct the mistake than to have the opposing lawyer discover it. If you think you answered incorrectly, simply say "Can I correct something I said earlier?" or "Something I said needs to be clarified."

_____12. If you do not understand the question, say so and ask that it be repeated.

_____13. Pause after each question before responding. Do not lose your temper when the opposing counsel examines you.

_____14. Your credibility will suffer if you become rude, angry, hostile, obnoxious, or arrogant. Always be polite to the lawyers who are asking the questions and to the military judge.

_____15. If the other lawyer asks you if you have talked to anyone about this case, answer yes. Tell him you reviewed your testimony with me before coming to court. There is generally nothing wrong with talking to people about the case. Just tell him, "yes I have talked to CPT Jones, the MPs, the company commander, the first sergeant, the accused," or whoever.

_____16. If I object to a question, do not answer until the judge rules on the objection. If he sustains the objection, that means you do not have to answer. If the judge overrules an objection, this means you must answer the question. If you have forgotten the question by that time, you can always ask that it be repeated. If the other lawyer objects, stop talking until told what to do.

_____17. Do not guess. If you do not know an answer to a question, do not make one up. Simply say, "I don't know."

_____18. Do not look to me or to the military judge for help while testifying on cross-examination. If I think the question is improper, I will object and take it up with the judge. Trust me to ask follow-up questions if it is important enough.

_____19. Always, always, always tell the truth.

_____20. When you leave the stand, look confident, not sad or dejected. You should go home or back to work. Avoid hanging around the courthouse so the panel doesn't think that you have an interest in the outcome of the case.

Avoiding the Specter of Patriot Village: The Military Housing Privatization Initiative's Effect on Federal Funding of Education

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Introduction

The federal government has long recognized the importance of education.[1] Congress acknowledged this in 1950 when it passed the Federal Impact Aid Statute, which provides federal financial assistance to local school districts that educate, among others, children of military service members.[2] Ironically, by improving on-post military family housing through the recently enacted Military Housing Privatization Initiative,[3] installation commanders are now in a position to jeopardize inadvertently the amount of federal impact aid funding that their local elementary and secondary schools receive A good example of this unintended consequence of privatization is Patriot Village on Travis Air Force Base, California.

Patriot Village is a housing development that was built within the boundaries of the base on land owned by a private developer and leased to the Air Force.[4] The residents of the 300-unit development are active duty service members and their families, and approximately 160 of the children in Patriot Village attend Travis Unified School District schools.[5] Although these students have an enrollment impact on the school district, the district loses between $300,000 and $400,000 in impact aid funds each year because these children do not reside on federal property within the meaning of the impact aid statute.[6]

The Decline of Military Housing

Congress enacted the Military Housing Privatization Initiative (MHPI) as part of the National Defense Authorization Act for Fiscal Year 1996.[7] The goal of the MHPI was to provide "new authority to acquire and [to] improve military housing and supporting facilities through the use of private expertise and capital."[8] The impetus behind the MHPI was the deteriorating state of military family housing and the eagerness of the Department of Defense (DOD) to gain legislative authority to pursue alternatives to standard military construction contracts. Joshua Gotbaum, Assistant Secretary of Defense for Economic Security, outlined the DOD's concerns and proposed solutions to the House of Representatives during hearings on the 1996 Defense Authorization Act.[9] Mr. Gotbaum emphasized that ensuring a high quality of life for American troops and their families is critical for retaining a quality professional military force. However, he described current on-base family housing as inadequate and "dramatically in need of renovation and repair."[10] The scope of the problem is extensive.[11]

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1. *See* S. REP. NO. 89-146, at 4 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1449. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

2. *See* 20 U.S.C. § 236 (1950) (Congress passed the statute in "recognition of the responsibility of the United States for the impact which certain federal activities have on local educational agencies in which such activities are carried on"). *See also* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 1965 U.S.C.C.A.N. 1446, 1450 (citing Senator Robert Taft's declaration that "[e]ducation is primarily a state function, but as in the fields of health, relief, and medical care, the federal government has a secondary obligation to see that there is a basic floor under those essential services for all adults and children in the United States").

3. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801, 110 Stat. 206 (1996) (codified at 10 U.S.C. §§ 2871-85).

4. *Hearing on Impact Aid Before the Subcommittee on Early Childhood, Youth, and Families of the House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong. 24 (1996) (testimony of Superintendent Paul Rose of the Travis Unified School District).

5. *Id.*

6. *Id.* at 25.

7. Pub. L. No. 104-106, § 2801, 110 Stat. 206 (codified at 10 U.S.C. §§ 2871-85).

8. Statement by President William J. Clinton upon Signing S. 1124 [National Defense Authorization Act for Fiscal Year 1996], 32 WEEKLY COMP. PRES. DOC. 260 (Feb. 19, 1996).

9. *See* H.R. REP. NO. 104-8, at 347 (1995).

10. *Id.* at 347-48. Robert Bayer, the principal assistant deputy undersecretary of defense, has also stated, "We want to hold onto our best personnel; our best personnel are often now married. In order to do that, we need to provide them with quality housing, safe housing, so that when they are deploying they can focus their attention on their mission." *Hearing on Impact Aid Before the Subcommittee on Early Childhood, Youth, and Families of the House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong. 7 (1996).

Approximately one-third of military families live in on-post government housing, and the DOD owns about 350,000 houses.[12] The average age of these houses is thirty-three years; twenty-five percent of them are over forty years old.[13] Because many of these structures were not well maintained, they require new electrical, heating, and plumbing systems. Although conditions vary, the DOD found that it has well over 200,000 unsuitable houses which need to be repaired or closed.[14]

In light of the military's housing problem, the DOD determined that it could not solve the problem by itself; it needed private capital and private management.[15] Before the DOD could take advantage of private capital, however, it was essential for Congress to provide the service secretaries with the authority, the mechanisms, and the flexibility to harness this private capital.

> There is no single 'magic bullet' to this problem. In real estate, one size does not fit all. Each location, each project, the terms of each deal will vary in many respects: market conditions, market penetration, land cost and availability, developer capabilities, and our housing renovation or construction requirements. Approaches that work in one location can fail dismally at another. Therefore, the Department will need a 'kit bag' of tools and flexibility in the way we use them, to respond and [to] take advantage of each installation's unique circumstances.[16]

The legislative "kit bag" had to allow for the selling of existing on-base housing; the renting back of existing housing after renovation or replacement; the exchange of government-owned land for housing; co-investment with private investors to create military/commercial housing projects; and the encouragement of investment by insuring investors against changes in personnel levels or stationing.[17]

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11. Although the military housing problem has been gradually worsening over time because of many different factors, the DOD has specified four main reasons for the deterioration of its family housing. First, during the cold war years that followed World War II, the DOD was forced to allocate financial resources to increase force levels, to modernize the military structure, and to ensure the effective readiness of the fighting forces. As a result, investment in military housing was frequently a secondary concern. Second, federal housing procurement and management procedures have become increasingly centralized and specialized. Third, contract specifications have become overly detailed, depriving government contractors of the flexibility to adjust to their local needs and increasing the overall cost of the contract. Fourth, the federal government's focus on annual appropriations constrained resources for long-term projects like housing. H.R. REP. NO. 104-8, at 348-349, 359 (1995).

12. *Id.* at 358.

13. *Id.*

14. *Id.* The House of Representatives made similar findings in its conference report on the National Defense Authorization Act for Fiscal Year 1997.

> The condition of military housing for families and unaccompanied personnel . . . is in a similar state of deterioration. According to the Defense Science Board Task Report on Quality of Life, 62% of barracks and dormitories are currently unsuitable, and 64% of family housing units are in the same condition. In spite of these serious deficiencies, the administration's budget request fails to keep pace with current levels of funding to support the construction of barracks and dormitories . . . . The administration also proposes to reduce funding for the basic maintenance of family housing.

H.R. CONF. REP. NO. 104-724, at 828 (1996).

15. *See* H.R. REP. NO. 104-8, at 362 (1995):

> Our housing problem cannot be solved using traditional military construction methods. [The] DOD spends on average about $6700 per year (including $2000 for utilities) to maintain and [to] operate our old inefficient houses; that figure is rising. To build new on-base housing, we spend $135,000 per unit. These costs are substantially above private industry averages. At current funding levels and acquisition cycle times, it would take 30-40 years to correct our housing deficit. We must find a better way.

Mr. Gotbaum testified: "[T]he private market provides the authorities of most of our housing; two-thirds of it for families. There is a place to go. Almost every other institution in our nation relies for housing and facilities upon private capital and private management." *Id.*

16. *Id.* at 365.

17. *Id.* In the conclusion of his housing and quality of life paper to the House of Representatives, Mr. Gotbaum stated:

> We can develop practical and cost-effective tools to make use of private capital, but only with your help. We will need strong Congressional support, not only to legislate new authorities, but also to streamline executive and congressional budgeting and appropriations practices, to work with the flexibility and schedules of the private sector. With your support, we can gain access to billions of dollars of private capital and the extraordinary depth of private expertise. Together we can improve the quality of life for hundreds of thousands of service members and their families.

Id. at 367.

Congress Responds with the Military Housing Privatization Initiative

On 10 February 1996, Congress responded to the DOD's concerns by enacting the MHPI, which gives the secretaries of the various military agencies broad, temporary authority to undertake the privatization of military housing.[18] Specifically, the statute authorizes service secretaries to "exercise any authority or any combination of authorities provided under [the statute] to provide for the acquisition or construction by private persons of . . . family housing units on or near military installations within the United States and its territories and possessions."[19] Under the MHPI, the service secretaries may make direct loans and loan guarantees to private entities for the acquisition or construction of military family housing,[20] lease military family housing units constructed by private entities,[21] make equity and creditor investments in private entities undertaking projects for the acquisition of military family housing,[22] provide rental guarantees,[23] and make differential lease payments.[24] However, the grant of authority which has the potential for having the greatest ramifications outside of the housing arena is the ability of the service secretaries to convey or to lease existing property and facilities to private entities.[25]

> The Army's Strategic Management Plan calls for the *total privatization* of all Army Family Housing (AFH) facilities and operations in the U.S. by the year 2005 using [Capital Venture Initiative (CVI)] authorities. To do this we are focusing on whole-installation CVI projects that allow the Army to divest of AFH ownership, operations, management, revitalization, and deficit reduction (the latter only if economically feasible). Therefore, CVI projects should be developed *by leveraging all existing assets* (e.g., land and housing) to consummate the deals, and any programmed MILCON project funds will be used for mortgage guarantees.[26]

The Birth of the Federal Impact Act Statute

During World War II, the federal government had to carry out extensive and unprecedented mobilization and war-production programs.

> These federal activities, involving as they did the removal of real property from local tax rolls, and a sudden and substantial increase in the population of many areas, placed a tremendous financial burden on many American communities, with the result that many of these communities found it extremely difficult, if not impossible, to maintain and [to] provide the necessary facilities and services for public education.[27]

In 1950, Congress enacted the Impact Aid Act[28] to provide assistance to state education agencies for the increased school-age populations which resulted from nearby military activities

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18. Under the legislation, the authority for military agencies to enter into privatization contracts expires five years from the statute's enactment on 10 February 1996. 10 U.S.C.A. § 2885 (West 1997).

19. *Id.* § 2872. The statute also grants the same authority to the service secretaries for the acquisition and construction by private persons of military unaccompanied housing units on or near such military installations. *Id.* However, since "military unaccompanied housing" refers to military housing intended to be occupied by members of the armed forces who are serving a tour of duty unaccompanied by dependents, such projects would not impact the education of the children of those military members.

20. *Id.* § 2873.

21. *Id.* § 2874.

22. *Id.* § 2875. In conjunction with investing in private entities for the acquisition or construction of military family housing units, the service secretary must "ensure that a suitable preference will be afforded members of the armed forces and their dependents in the lease or purchase, as the case may be, of a reasonable number of the housing units covered by the investment." *Id.* § 2875(d).

23. *Id.* § 2876.

24. *Id.* § 2877.

25. *Id.* § 2878. To facilitate the conveyance or lease of military property or facilities, the MHPI exempts the conveyance or lease from compliance with the Federal Property and Administrative Services Act (40 U.S.C. § 471), section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. § 11401), and section 321 of the Economy Act (40 U.S.C. § 303b). *Id.* at § 2878(d). Additionally, the service secretary is not bound by 10 U.S.C. § 2667, which authorizes military departments to lease only "non-excess property" (property presently not needed for public use). *Id.*

26. Policy Memorandum from Department of the Army, Assistant Chief of Staff for Installation Management, subject: Army Capital Venture Initiative (CVI) Program Guidance (1 Aug. 1997) (on file with author) (emphasis added).

27. S. REP. NO. 81-2489, at 1 (1950), *reprinted in* 1950 U.S.C.C.A.N. 4014.

28. Pub. L. No. 874, § 1124 (1950) (codified at 20 U.S.C. §§ 236 through 241-1).

and for significant losses in tax income due to federal ownership of property within local school districts.[29] Congress recognized that, since the United States had created these financial burdens on local school systems which were still legally bound to educate the children of military parents, the federal government had a responsibility to provide financial assistance to the local school systems.[30]

Although impact aid, as originally passed, was not meant to be a permanent measure,[31] it is now among the nation's oldest federal education programs.[32] The amount Congress has appropriated for impact aid has increased from the initial appropriation of $29,080,788 in fiscal year 1951 to the fiscal year 1997 appropriation of $730,000,000.[33]

In 1994, Congress repealed the original statutory authority and reauthorized impact aid with a new method of calculating the amount of financial assistance that local educational agencies would receive.[34] The reason for refashioning impact aid was to allow the federal government to assist states and local school districts better in meeting modern educational demands. Specifically, Congress believed that the old method of calculating payments was overly complicated.[35] Although the method of calculating the amount of impact aid has changed, the purpose of the revised statute is practically identical to its predecessor.[36]

Basic Support Under the Impact Aid Statute[37]

The impact aid statute created financial assistance payments known as basic support.[38] Basic support payments go directly to local school districts which provide free public education to children whose parents are in the military services.[39] Although the statute considers various factors which affect the amount of a school district's basic support payment,[40] a significantly smaller amount of aid is generally provided to a school district that educates military children who live on private property, as opposed to federal land.[41]

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29. *See* S. REP. NO. 100-222, at 49 (1988), *reprinted in* 1988 U.S.C.C.A.N. 150. Property taxes, sales taxes, and personal income taxes traditionally account for a large portion of the average school district's budget. However, children of military families adversely affect a school district's financial base because their parents: (1) often pay no state income or vehicle taxes because they are domiciled in a different state; (2) live on non-taxable federal property; and (3) shop at installation stores that do not generate state sales taxes. *See* NATIONAL ASSOCIATION OF FEDERALLY IMPACTED SCHOOLS' IMPACT AID BLUE BOOK 9 (Pauline L. Proulx ed., 1996-1997) [hereinafter IMPACT AID BLUE BOOK]. "Impact aid funds are mailed directly from the Department of Education to local school districts rather than to states." S. REP. NO. 100-222, at 50 (1988).

30. *See* 20 U.S.C.A. § 236(a) (West 1997). *See also* S. REP. NO. 81-2489, at 2 (1950), *reprinted in* 1950 U.S.C.C.A.N. 4015. The Equal Protection Clause of the United States Constitution forbids a state from refusing to educate a child of a military member because that member does not contribute to the funding of the educational system. When a state has undertaken to provide public education, it must make it available to all on equal terms. *See* Plyer v. Doe, 457 U.S. 202, 221-23 (1982) (holding that denial of education to some isolated group of children poses an affront to the Equal Protection Clause); Brown v. Board of Educ., 347 U.S. 483, 493 (1953). Furthermore, some state constitutions explicitly mandate that free public education be open to all children. *See, e.g.*, IND. CONST. art. VIII, § 1; ARIZ. CONST. art. XI, § 6.

31. S. REP. NO. 81-2489, at 1-2 (1950), *reprinted in* 1950 U.S.C.C.A.N. 4014-15.

32. *See* S. REP. NO. 100-222, at 49 (1988), *reprinted in* 1988 U.S.C.C.A.N. 150.

33. IMPACT AID BLUE BOOK, *supra* note 29, at 19.

34. *See* Improving America's School Act of 1994, Pub. L. No. 103-382, § 331(b), 108 Stat. 4057 (1994) (codified at 20 U.S.C. §§ 7701-14).

35. *See* H.R. REP. NO. 103-425, at 3, 38 (1994).

36. *Compare* 20 U.S.C.A. § 236 (West 1997) *with id.* § 7701.

37. The impact aid statute provides two broad categories of financial support—payments for property and basic support payments. The first type, payments relating to the federal acquisition of real property, reimburses school districts for the loss of taxable land when it is acquired by the federal government. This payment is in lieu of the taxes that would normally be paid by the private landowner, and it is not based on the presence of children residing on the property. *Id*. § 7702. Although this component of impact aid is important, it is not likely to be involved in a military housing privatization project as basic support payments would.

38. *Id.* § 7703.

39. *Id*. To be eligible to receive impact aid basic support, the school district must educate at least 400 federally-connected children, or these students must comprise at least three percent of the average daily attendance. *Id.* § 7703(b)(1)(B). Although the term "federally-connected child" also covers children whose parents are employed on federal property, reside in low-rent housing, reside on Indian lands, or reside on federal property, this note addresses the statute's affect on military members only.

40. *Id.* § 7703.

41. *See Hearing on Impact Aid Before the Subcommittee on Early Childhood, Youth, and Families of the House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong. 11 (1996). The rationale for this distinction is that private property on which military children live generates property tax for the local community which can be used to support education. *Id*.

In determining the amount of impact aid that a school district is entitled to receive, the Secretary of Education must first determine the number of federally-connected children who were in average daily attendance in the schools within the district during the preceding school year.[42] After calculating and classifying the number of federally-connected children, the total number from each group of federally-connected children is multiplied by a different weighted unit which depends on whether the child resided on federal or private land during the preceding school year.[43] For example, the total number of children who had parents on active duty during the preceding school year and who resided on federal property is multiplied by a weighted unit of 1.0.[44] If the same children did not reside on federal property, their total is multiplied by a weighted unit of .10.[45] In this case, whether military children resided on federal or private property during the preceding school year could cause a school district to lose ninety percent of its impact aid money.

In passing the impact aid statute, Congress also determined that "there are a number of school districts that have high proportions of federally-connected children with disabilities because the adjacent military bases have very good medical facilities and reputations within the military communities for being 'compassionate posts.'"[46] The statute adds another weighted unit calculation which results in additional assistance for school districts which educate these children.[47] The total number of children of military parents who are eligible to receive services under the Individuals with Disabilities Education Act[48] and who resided on federal property during the preceding school year is multiplied by a weighted factor of 1.0.[49] However, if these same children resided on non-federal property during the preceding school year, their total would be multiplied by a weighted factor of .50.[50]

Balancing the Books: Education & Finance

Impact aid payments per child vary widely from school district to school district due to each district's controlling set of facts and how those facts relate to the various factors considered in the basic support payment formula.[51] The loss each school district would face if federal housing were privatized cannot be ascertained without examining each district's specific set of facts, but it is unreasonable to believe that every school district could make up the loss of impact aid by taxing the private developer to whom federal property is deeded under the MHPI. The property taxes assessed against the developer would have to be equal to or greater than the reduction in impact aid caused by the reclassification of military children from "living on federal property" to "living on private property."[52] In many cases, such a property tax assessment will not be possible.

For example, the Virginia Beach public school board passed a resolution concerning its potential losses in impact aid due to the privatization of military housing.[53] The school board stated that it could receive approximately $2700 per student in impact aid for military children who live on federal land; the amount would be approximately $270 per student for military children who live on private property. This means that Virginia Beach would have to make up in property taxes $2430 in lost aid for

42. 20 U.S.C.A. § 7703.

43. *Id*. § 7703(a)(2). Federal property is defined as "real property that is not subject to taxation by any state or political subdivision of a state due to federal agreement, law, or policy, and that is owned by the United States or leased by the United States from another entity. *Id*. § 7713(5)(A). The term "federal property" also includes any non-federal lease, or other such interest in federal property, not including any fee-simple interest, whether or not subject to taxation by a state or a political subdivision of a state. *Id.* § 7713(5)(C).

44. *Id.* § 7703(a)(2)(A).

45. *Id.* § 7703(a)(2)(D).

46. H.R. REP. NO. 103-425, at 38 (1994).

47. 20 U.S.C.A. § 7703(d)(1).

48. *Id.* §§ 1400-85.

49. *Id.* § 7703(d)(1)(A).

50. *Id.* § 7703(d)(1)(B).

51. *See* IMPACT AID BLUE BOOK, *supra* note 29, at 137-219 (breaking down each school district's basic support payments for the 1996-97 school year). In determining each school district's basic support, the statutory formula considers the number of federally-connected children whom the district educates, the district's expenditures per pupil, the percentage of the per-pupil expenditures which are paid for by local and state taxes (local contribution rate), and the local tax rate in the district in relation to the average tax rate of comparable school districts. 20 U.S.C.A. § 7703(f)(3)(A).

52. *Hearing on Impact Aid Before the Subcommittee on Early Childhood, Youth, and Families of the House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong. 37 (1996) (testimony of Deputy Controller Richard Knott of the San Diego Unified School District).

53. Virginia Beach City Public Schools' Privatization of Military Housing Resolution (May 6, 1997) (copy on file with author).

each student who is reclassified due to the privatization of military housing.[54] Other school districts which support military activities have also voiced their concerns about the quality of education that they would be able to provide if impact aid is affected by privatization. [55]

To avoid seriously impacting the school districts which support military families, there are several options available to installation commanders as they prepare military housing privatization proposals. First, if the land is federally-owned and leased out to the developer, and only the improvements are conveyed to the developer, the military children would still be considered to reside on federal land for the purposes of calculating impact aid.[56] This type of arrangement was used at Fort Carson, Colorado, when it recently privatized its military family housing under the MHPI.[57] Another alternative is available if the commander wants to deed federal land to a developer in exchange for the construction of new housing on the installation. The installation can move the military children from the federally-owned parcel that will be conveyed to a federally-owned parcel where new housing has been constructed.[58]

Conclusion: Caveat Vendor

"[M]ilitary personnel risk their lives defending their country, and their children should be ensured of the same high quality education as that provided to their non-military peers."[59] To ensure that the children of service members receive a quality education as well as quality housing, installation commanders need to determine what impact privatization will have on local school districts. If a commander fails to take into account the effects that alienating federal land will have on impact aid, relations between the military installation and the local communities will suffer along with the quality of education in the local school districts. The best solution to military housing problems will vary from installation to installation. As long as installation commanders remain aware of the interplay between the MHPI and federal impact aid, however, they and their judge advocates can fashion solutions which provide their soldiers with quality family housing while maintaining quality education for their children.

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54. *Id.* Virginia Beach estimated that privatization of military housing could potentially cost it $1.5 million annually in lost aid. In light of the potential loss of impact aid, the Virginia school board resolved to urge the DOD to ensure that all federal land remains under federal jurisdiction as it moves forward with the privatization of military housing.

55. These schools include the Travis Unified School District in Fairfield, California; the San Diego Unified School District; the Lawton Public Schools in Lawton, Oklahoma; and the Fountain-Fort Carson School District. *Hearing on Impact Aid Before the Subcommittee on Early Childhood, Youth, and Families of the House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong. 24-26, 29-32, 37-38, 40-41, 43-44 (1996). Howard Kuchta, the business manager for Lawton Public Schools, stated:

> We know that the committee is sensitive to the financial needs of the schools and is trying to prevent school districts from suffering a significant and unwarranted reduction in impact aid funding which supports the education of military dependents. If there was some "sure" way to make this transition at a full ad valorem tax level, then Lawton, as an example, would gain financially, and federal impact aid could be reduced. However, because of the uncertainties involved in placing such private property on the tax rolls, there appears to be a more likely possibility that something less than full property assessment would occur, resulting in districts receiving a major reduction in funds.

Id. at 41. "Impact aid has been absolutely crucial to the maintenance of our educational program because our tax base is so low . . . . If the related students no longer qualify for federal impact aid, we stand to lose in excess of $5.5 million. Quite simply, this would bankrupt our school system." *Id.* at 43 (testimony of Superintendent Dale Gasser of the Fountain-Fort Carson School District).

56. *See supra* note 43. If, however, both the land and the improvements are deeded to the developer, the property would not belong to the federal government. The property would then be taxable, and the local school district would count military students who lived on the property as living off federal property. *See Hearing on Impact Aid Before the Subcommittee on Early Childhood, Youth, and Families of the House of Representatives Committee on Economic and Educational Opportunities*, 104th Cong. 37 (1996).

57. The Fort Carson privatization project is not yet complete. It is merely used to illustrate a possible alternative.

58. The movement of personnel from one parcel of land to another is rarely completed contemporaneously with the construction or renovation of military housing. In many cases, military families have to move off-post during the construction or renovation period. As a result, prior to 1996, the Department of Education was not counting these children as living on federal property. The result was major reductions in impact aid to school districts with no corresponding reductions in the number of children whom the school districts had to educate. Given these facts, Congress wanted to ensure that the DOD's construction and renovation of military housing did not deprive military children of the impact aid that their school districts required. In 1996, Congress amended the statute to make it clear that these children should be counted as living on federal property if a representative from the Secretary of Defense (such as the installation commander) certifies that those children would have resided on federal property if not for the housing renovation. *See* 20 U.S.C.A. § 7703(a)(4) (West 1997); *see also* H.R. REP. NO. 104-560, at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2896.

59. H.R. REP. NO. 104-560, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N 2897.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial for which records of trial were received by the Army Judiciary during the fourth quarter of Fiscal Year 1997 are shown below. For comparison, the times for the previous quarters are also shown below.

General Courts-Martial

	1Q, FY 97	2Q, FY 97	3Q, FY 97	4Q, FY 97
Records received by Clerk of Court	169	192	174	177
Days from charges or restraint to sentence	66	63	71	68
Days from sentence to action	86	94	93	85
Days from action to dispatch	7	11	9	10
Days en route to Clerk of Court	11	9	9	12

BCD Special Courts-Martial

	1Q, FY 97	2Q, FY 97	3Q, FY 97	4Q, FY 97
Records received by Clerk of Court	42	35	34	45
Days from charges or restraint to sentence	56	38	43	39
Days from sentence to action	83	82	69	68
Days from action to dispatch	5	15	6	12
Days en route to Clerk of Court	11	8	7	11

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial and nonjudicial punishment rates for the fourth quarter of fiscal year 1997 are shown below. The figures in parentheses are the annualized rates per thousand. The rates are based on an average strength of 485,377.

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.36 (1.43)	0.33 (1.31)	0.80 (3.21)	0.18 (0.71)	0.84 (3.34)
BCDSPCM	0.18 (0.73)	0.18 (0.73)	0.29 (1.17)	0.07 (0.27)	1.25 (5.01)
SPCM	0.01 (0.02)	0.01 (0.02)	0.00 (0.00)	0.02 (0.09)	0.00 (0.00)
SCM	0.24 (0.95)	0.28 (1.12)	0.11 (0.44)	0.13 (0.53)	0.42 (1.67)
NJP	22.75 (91.00)	24.33 (97.32)	19.77 (79.10)	23.79 (95.18)	14.62 (58.46)

Litigation Division Note

Sixth Circuit Rules on Title VII Compensatory Damage Cap[1]

On 4 December 1997, the United States Court of Appeals for the Sixth Circuit ruled that the Title VII compensatory damage cap is a limit on the amount of recovery possible for an entire lawsuit.[2] The Sixth Circuit was the first appellate court to rule on the issue[3] and held that a plaintiff who alleged discrimination under Title VII could not recover the statutory maximum of $300,000 in compensatory damages for each different claim or basis of discrimination presented in the lawsuit.[4]

The court noted that whether the statutory cap applies on a "per claim" or a "per lawsuit" basis was purely a matter of statutory construction,[5] and the plain meaning of the statute is conclusive.[6] Under the plain language of the statute, the cap on compensatory damages applies to each complaining party in an "action."[7] An "action" is simply a "lawsuit brought in court."[8] The court flatly rejected the notion that an action refers to each different basis for a discrimination complaint, whether the basis is race, color, religion, sex, or national origin.

Although the Equal Employment Opportunity Commission (EEOC) general counsel advocated a "per claim" cap in an amicus curiae brief filed in the Eleventh Circuit,[9] the court declined to defer to the EEOC position. The court noted that "such deference is only appropriate with respect to ambiguous language . . . . The EEOC's interpretation is entitled to no deference when its position is at odds with the plain language of the statute."[10]

Finally, the court also refused to accept the appellant's argument that a per lawsuit cap will encourage plaintiffs to file multiple lawsuits in order to circumvent the limitation. Consolidation of actions under the federal Rules of Civil Procedure and doctrines such as res judicata will prevent such multiplicity,[11] particularly for actions that arise out of the same core facts. Major Berg.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated

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1. This note follows-up on a previous note which outlined the issues involved in greater detail. *See*, Litigation Division Note, What is a Case Worth? How to Defend the $300,000 Cap on Compensation Damages in Title VII Suits, ARMY LAW., Mar. 1997, at 30.

2. Hudson v. Reno, No. 96-5232, 1997 U.S. App. LEXIS 34059 (6th Cir. Dec. 4, 1997).

3. The Eleventh Circuit was presented with the same issue in *Reynolds v. CSX Transportation, Inc*., but the court declined to address the issue and decided the case on other grounds. 115 F.3d 860 (11th Cir. 1997).

4. *Hudson*, 1997 U.S. App. LEXIS 34059, at *21.

5. The relevant portion of Title VII provides: "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5 or § 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory . . . damages as allowed in subsection (b) of this section . . . ." 42 U.S.C. § 1981a(a)(1) (1994). Subsection (b)(3) of the statute provides:

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . awarded under this section, shall not exceed, for each complaining party—
>
> . . . .
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id. § 1981a(b)(3).

6. *Hudson*, 1997 U.S. App. LEXIS 34059, at *16.

7. *Id.*

8. *Id.*, *quoting* BLACK's Law Dictionary 18 (6th ed. 1990).

9. Reynolds v. CSX Transp., Inc., 115 F.3d 860 (11th Cir. 1997).

10. *Hudson*, 1997 U.S. App. LEXIS 34059, at *20.

11. *Id.* at *21.

Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 3, is reproduced in part below.

Update on Lead-Based Paint in the Soil

The issue of lead-based paint in the soil has caused a considerable controversy between the Environmental Protection Agency (EPA), states, and the Department of Defense. The problem arises when lead-based paint that has been applied to the exterior of a building flakes off during the normal weathering process and deposits in the soil around the building. The problem often comes to light during the transfer of property at base realignment and closure (BRAC) sites. The issue typically has been raised through non-concurrences on draft findings of suitability to transfer (FOSTs) and findings of suitability to lease (FOSLs) under the recently-enacted early transfer authority.[12] The issue has also been raised with EPA approval of records of decision (RODs) at national priority list sites.

The regulators' position is that the soil surrounding buildings should be cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[13] This cleanup would include soils around all types of buildings, from residential to industrial. The Army position, however, is that lead-based paint in the soil is not actionable under the CERCLA and should instead be addressed under the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X).[14] Title X applies only to residential buildings that are considered target housing.[15] Target housing is generally defined as residential housing constructed before 1978.[16]

The controversy recently reached a new level when the State of Indiana, dissatisfied with the Army's approach to lead-based paint at Fort Benjamin Harrison, invoked dispute resolution procedures under the Department of Defense and State Memorandum of Agreement (DSMOA).[17] While some question whether the DSMOA is an appropriate mechanism to address the issue, talks are progressing with the state in hopes of reaching a solution. This new approach to the lead-based paint issue could be used at other installations.

Until this issue is settled, Army installations should continue to follow current Army policy. At BRAC sites where the EPA non-concurs on a FOST or FOSL, the comment should be attached as an unresolved comment and processed through normal Army channels. The DOD Policy on Lead-Based Paint at Base Realignment and Closure Properties[18] remains in effect. Transferees will continue to be notified of the lead-based paint issue, and the requirement to abate will generally be passed on to the transferee. At sites where an ROD or the section 334 process is contemplated, installations should not agree to do any sampling or remediation of soils without approval from the major command or the Headquarters, Department of the Army. Finally, should a state attempt to invoke the DSMOA process, the installation should contact its major command immediately. Major Polchek.

EPA's Uniform Hazardous Waste Manifest Revisions Project

As of December 1997, the Environmental Protection Agency's (EPA's) Office of Solid Waste began holding meetings to announce the Uniform Waste Manifest Revisions Project.[19] In addition to outlining the strategies that the EPA is considering in an upcoming rulemaking, the EPA is soliciting input on whether its proposed strategies would reduce the burden of the current system. In the meetings, the EPA will explain the constraints the EPA is under in designing a new system and why manifest revisions are needed.

The EPA believes that revisions are necessary to reduce the variability and inefficiencies in the present system and to increase overall effectiveness in tracking hazardous waste.[20] The record-keeping burden of the system is high, with a total of 4.8 million hours and $192,000,000 expended each year in complying with requirements. The EPA estimates that the fed-

12. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 334, 110 Stat. 2422, 2486 (1996).

13. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (1994).

14. Residential Lead-Based Paint Hazard Reduction Act, Pub. L. No. 102-550, 106 Stat. 3897 (1992).

15. *Id.* § 1012.

16. *Id.* § 1004.

17. Letter from Robert Moran, Branch Chief, Project Management Branch, Office of Environmental Response, Indiana Department of Environmental Management, to Lieutenant Colonel Robert Lavoit (Oct. 31, 1997) (copy on file with author).

18. Department of Defense Policy on Lead-Based Paint at Base Realignment and Closure Properties (July 1995), *reprinted in* U.S. DEP'T OF DEFENSE, 4165.66-M, BASE REUSE IMPLEMENTATION MANUAL, app. F-68 (July 1995).

19. This article is based on the first public meeting, which was held by the EPA on 11 December 1997 in Crystal City, Virginia, and on materials provided at that meeting [hereinafter Meeting] (copy on file with author).

20. *Id.*

eral burden is eighty-six percent of the total. Another primary problem with the current system is the patchwork of requirements from state to state. The number of copies, the acquisition process, manifest fees, and submission requirements vary by state. The principal constraints in revising the manifest system are Resource Conservation and Recovery Act [21] requirements, Department of Transportation shipping requirements, and state regulatory needs.

The EPA's approach in designing a new manifest system is three-pronged. First, proposed revisions to the manifest form include eliminating many unnecessary data fields and streamlining routing requirements.[22] Second, the EPA will study how automation improvements can make the system more effective and efficient.[23] Possible automation improvements include automating the entire manifest cycle, developing electronic signature standards, and allowing electronic storage of records. Third, the EPA will examine possible exemptions from the manifest system.[24] Two significant exemptions being considered are the elimination of redundant requirements for generators with multiple sites and elimination of the requirement for full manifests for shipment of recyclables.[25]

In January 1998, the EPA and three states began a pilot project to test the electronic tracking of the generation, storage, and disposal of hazardous waste.[26] The project will test an electronic data exchange system that transfers data electronically from facilities to regulatory agencies.[27] The second part of the pilot project will test the electronic signature technology that ensures the integrity and security of the manifests.[28] This project will assist the EPA in drafting the rulemaking, which the EPA expects to propose in October 1998.[29] Major Anderson-Lloyd.

Committee Nears Completion of Review of Overseas Environmental Baseline Guidance Document

An interservice committee, comprised of representatives from the military departments, the chairman of the Joint Chiefs of Staff, and the Defense Logistics Agency[30] is scheduled to complete a review of the Overseas Environmental Baseline Guidance Document (OEBGD) during the second quarter of fiscal year 1998.[31] When the OEBGD has been revised, the committee will send the OEBGD to the deputy under secretary of defense for environmental security for coordination, final approval, and distribution.

The OEBGD lays out implementation guidance, procedures, and criteria for environmental compliance at Department of Defense (DOD) installations outside of the United States, its territories, and its possessions.[32] Environmental executive agents use the OEBGD to develop the final governing standards to be used by all DOD installations in a particular host nation.[33] The document includes specific DOD environmental criteria which the environmental executive agents must consider. Unless it is inconsistent with applicable host nation law, base rights, status of forces agreements, or other international agreements or practices established pursuant to such agreements, DOD components which are stationed in foreign countries will apply the OEBGD when host nation environmental standards do not exist, are not applicable, or provide less protection to human health and the natural environment than the OEBGD guidnce.[34] Major Egan.

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21. 42 U.S.C.A. §§ 6901-92 (West 1997).

22. Meeting, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Committee membership is determined pursuant to Department of Defense Instruction 4715.5. *See* U.S. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) [hereinafter DOD INSTR. 4715.5].

31. Memorandum, subject: Overseas Environmental Baseline Guidance Document (OEBGD) Review Committee Meeting Minutes (9 Sept. 1997) (copy on file with author).

32. DOD INSTR. 4715.5, *supra* note 30, para. F.2.

33. Environmental executive agents are appointed by the secretary of defense for host nations where significant DOD installations are located. *Id.* para. F.1.a.

34. DOD INSTR. 4715.5, *supra* note 30, para. 3c(1).

Claims Report

United States Army Claims Service

Personnel Claims Notes

Recovery Under the Point to Point POV Pilot Program

Currently, the military has two programs for shipping privately-owned vehicles (POVs). One is known as the Point to Point POV Pilot Program (P5).[1] Under this program, which began on 1 November 1994, a single contractor is responsible for POV shipments to and from Germany. It applies to approximately fifty percent of the POVs shipped between Germany and the continental United States (CONUS). The program covers all vehicles shipped between Germany and three locations in CONUS: St. Louis (Pontoon Beach, Illinois), Dallas, and Baltimore.

The second program is the one which was in existence prior to the P5. Under this program, the government may contract with a number of carriers to ship POVs to Germany, Hawaii, or other locations throughout the world. The simplest way to determine which of these programs was used to ship a vehicle is to look at the origin and destination. If the vehicle is being shipped between Germany and one of the three locations in CONUS listed above, the shipment is a "P5" shipment; otherwise, it is a "non-P5" shipment.

Recovery procedures for non-P5 shipments are well established.[2] Because of the number of carriers involved and the difficulty in assessing liability against a single carrier, however, the amount of recovery is often small. A policy note in the December 1994 edition of *The Army Lawyer* explains the recovery procedures for P5 shipments.[3] Unfortunately, many field offices have experienced difficulties in these recovery actions. As a result, the U.S. Army Claims Service (USARCS) has directed all CONUS field claims offices to forward impasses in P5 recoveries directly to the Recovery Branch at the USARCS.[4] European field claims offices should continue to forward P5 recoveries to the U.S. Army Claims Service, Europe.[5] This note looks at the problems encountered in P5 recovery actions and suggests approaches to dealing with them.

The contractor for the P5 contract, American Auto Carriers (AAC), frequently denies liability for loss and damage to POVs. Some of the grounds raised by the contractor are, in the view of the USARCS, unacceptable. When processing a P5 recovery action, field claims offices should carefully examine any grounds for denial which the contractor raises. Claims office personnel should be especially sensitive to the alleged grounds for denial in this note.

Uninspectable items. AAC sometimes denies liability for damage to the undercarriage and interior of POVs because these areas are "uninspectable." However, AAC's contract does not indicate any "uninspectable" areas of a POV.[6] Field claims office personnel must make their own determinations as to whether damage claimed was preexisting or occurred during shipment. A blanket statement that an area of a vehicle is "uninspectable" will not relieve AAC of liability.

Failure to verify damages and use of the term "As Stated By Owner." AAC has denied liability for damage to POVs because an AAC employee wrote the words "disagree" or "as stated by owner" on the Department of Defense Form 788 (DD Form 788), Private Vehicle Shipping Document for Automobile, at destination. However, AAC's contract requires it to bring any disagreements to the attention of a contracting officer's representative, a government employee who is located at each vehicle processing center.[7] Therefore, a notation by an AAC employee generally will not defeat AAC's liability. In addition, the term "As Stated By Owner" does not indicate that the AAC employee has disagreed with what the owner has written on the form. This term should not be interpreted to be a disagreement.[8]

1. *See generally* Lieutenant Colonel Philip L. Kennerly, *The Single Contractor Privately-Owned Vehicle Pilot Program,* Army Law., Dec. 1994, at 46. Currently, the Military Traffic Management Command is planning to extend this pilot program to cover essentially all POV shipments worldwide. It is anticipated that this new global contract will begin on 1 November 1998.

2. U.S. Dep't of Army, Reg. 27-20, Legal Services, Claims, para. 11-35 (1 Aug. 1995) [hereinafter AR 27-20]. *See* Robert Frezza, *Recovery on Privately Owned Vehicle Shipment Claims,* Army Law., Oct. 1992, at 44.

3. *See* Kennerly, *supra* note 1, at 46.

4. Legal Automation Army-Wide System Bulletin Board Service Claims Forum Message # 444961, Pete Masterton, topic: Processing Offsets on P5 (POV) Claims (26 Aug. 1997).

5. AR 27-20, *supra* note 2, para. 11-35a(4).

6. Point to Point POV Pilot Program Contract, Statement of Work (1 Nov. 1994) [hereinafter P5 Contract] (copy on file with author). *See* Kennerly, *supra* note 1, at 48-51 (reproducing the claims provisions of the contract).

7. *See* P5 Contract, *supra* note 6, para. C.6.2.1.8, *reproduced in* Kennerly, *supra* note 1, at 49.

Mechanical defects. AAC has sometimes denied liability because damage is alleged to be a mechanical defect. AAC's contract indicates that it is not liable if it "can prove absence of fault or negligence, or that loss or damage arises out of causes beyond the contractor's control."[9] Although this relieves AAC from liability for wear and tear and similar mechanical damage, it does not relieve it from liability for "mechanical damage" caused by shipment, such as a muffler which has been torn from a vehicle.

Catalog prices. In some cases, AAC has offered to pay reduced liability because it alleges that the repair estimates are inflated in comparison to catalog prices. The contract provides that AAC is liable for the full value of repairs.[10] Field claims offices should fully investigate whether repair estimates are inflated. However, the fact that a repair estimate is higher than a catalog price quoted by AAC should not, in itself, relieve AAC of liability. This is especially true where catalog prices do not include the cost of labor to install a replacement part.

Preexisting damage. AAC sometimes denies liability because it alleges that the damage claimed was preexisting. In such circumstances, field claims personnel must carefully examine the damages noted on the origin DD Form 788 to determine if the damages were, in fact, preexisting. In addition, field claims personnel should inspect the vehicle and annotate their observations on the claims chronology sheet or a locally reproduced inspection sheet. It is especially important to note whether the claimed damage appears to be fresh and how this was determined (for example, fresh paint chips or lack of rust). AAC should be held responsible for damages which were not preexisting.

Depreciation. Sometimes, AAC has offered to pay reduced liability because it has taken depreciation on replacement parts in excess of what the local military claims office has taken. Field claims offices are required to depreciate replacement parts if they are ordinarily replaced during the useful life of a vehicle (such as a muffler or tires).[11] AAC has sometimes offered less than the full amount demanded because it has taken depreciation deductions on items which are not ordinarily replaced during the useful life of a vehicle. Since AAC's contract provides that it is liable for the full value of repair,[12] this is improper.

Maximum amounts allowable. AAC has offered to pay reduced liability because it has applied the military's maximum amounts allowable. Military claims offices have maximum amounts which can be paid for certain items based upon the *Allowance List-Depreciation Guide*.[13] AAC's contract does not contain any provision which permits it to rely on these same limitations in making its payment in response to a demand from a military claims office. Furthermore, such a limitation makes no sense, since the USARCS can waive the maximum amounts allowable.[14]

Scratches to bare metal. Because DD Form 788 indicates that "hairline" scratches which do not go to the bare metal should not be noted, AAC has sometimes alleged that it is not liable for such scratches. Field claims office personnel must make an independent determination of whether such scratches were caused by shipment. AAC's contract does not exclude liability for hairline scratches, unless AAC can prove that they were preexisting.[15]

Inability to inspect because of snow, dirt, or protective coating. In a few cases, AAC has denied liability because snow, dirt, or a new car protective coating prevented inspection at origin. In such cases, field claims office personnel should make an independent determination of whether damage was caused by shipment. If it was, AAC should be held responsible for the damage. AAC's contract requires it to ensure that a vehicle is clean at origin so that the inspection can be conducted.[16] AAC's failure to do so does not relieve it of liability.

In order to be successful in P5 recovery actions, field offices must ensure that POV claims are properly adjudicated and well

8. Recently, AAC's subcontractor in Germany, Transcar, instructed its agents not to use the term "as stated by owner" on the DD Form 788. In addition, Transcar has reminded its agents of the responsibility to notify the contracting officer's representative if there is any disagreement, so that he or she can verify the damage. Letter, Transcar, Langer Kornweg 16, 65451 Kelsterbach, Germany, to all Transcar Offices, subject: Standardized Remarks DD Form 788 (10 Nov. 1997) (copy on file with author).

9. *See* P5 Contract, *supra* note 6, para. C.6.2.1.7, *reproduced in* Kennerly, *supra* note 1, at 49.

10. *Id*.

11. U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS, para. 2-50a (15 Dec. 1989) [hereinafter DA PAM 27-162].

12. *See* P5 Contract, *supra* note 6, para. C.6.2.1.7, *reproduced in* Kennerly, *supra* note 1, at 49.

13. *See* AR 27-20, *supra* note 2, para. 11-14b; DA PAM 27-162, *supra* note 11, para. 2-35.

14. AR 27-20, *supra* note 2, para 11-14b.

15. *See* P5 Contract, *supra* note 6, para. C.6.2.1.7, *reproduced in* Kennerly, *supra* note 1, at 49 (providing that "the contractor assumes full liability for all loss and damage, except where the contractor can prove absence of fault or negligence, or that the loss or damage arises out of causes beyond the contractor's control."). The DD Form 788 indicates that scratches which do not go to bare metal should not be noted after the "initial inspection." This implies that AAC *should* note such scratches *during* the initial inspection at origin and, therefore, may not escape liability for new scratches noted at destination.

documented. Careful review of the DD Form 788 is vital. However, it is equally important for field claims personnel to conduct a well-documented inspection of the vehicle. It is especially important to indicate whether the claimed damage appeared to be caused by shipment and, if so, the reasons for that conclusion.

Field claims office personnel should carefully scrutinize all denials of liability by carriers during the recovery process. This is especially important in the case of P5 claims. Lieutenant Colonel Masterton.

Policy Changes to be Published in New Regulation

Introduction

The U.S. Army Claims Service (USARCS) is currently working on several important changes in personnel claims policy. These changes will be published in the new versions of *Army Regulation 27-20*[17] and *Department of the Army Pamphlet 27-162*.[18] Both of these publications will be issued soon and will have the same effective date. This note describes three of the most important changes in personnel claims policy in the new claims regulation and pamphlet. These changes will affect the rules on vehicle vandalism, requests for reconsideration, and waiver of maximum amounts allowable.

Vehicle Vandalism

The new claims regulation and pamphlet will significantly expand the authority to pay for vehicle vandalism and theft. The new rules will permit payment for vehicle theft and vandalism which occurs anywhere on post and, in certain circumstances, off post. The new vehicle theft and vandalism rules are *not* retroactive. They will apply only to incidents which occur on or after the effective date of the new regulation and pamphlet.

Currently, a personnel claim for vandalism or theft of a privately-owned vehicle is generally only payable if the damage or loss occurs at "quarters."[19] For these purposes, "quarters" include on-post quarters in the United States and both on-post and off-post quarters outside of the United States.[20] The current regulation does not permit payment for vehicle theft and vandalism which occurs at other locations on an installation.[21]

Under the new regulation,[22] vandalism or theft of a privately-owned vehicle will be compensable if it occurs *anywhere* on post or at off-post quarters overseas.[23] Theft or vandalism will be presumed to have occurred off post and, therefore, will not be compensable.[24] The claimant will be required to rebut this presumption with clear and convincing

16. *Id*. para. C.5.1.7.

> [T]he contractor will insure that the POV is clean and free of road tar and dirt and able to be accurately inspected. When the condition of the POV impairs the DD Form 788 or commercial equivalent inspection process, the contractor shall . . . request the customer to clean the POV prior to processing.

17. AR 27-20, *supra* note 2.

18. DA PAM 27-162, *supra* note 11.

19. AR 27-20, *supra* note 2, para. 11-5e(3). This provision superseded the provision on vehicle vandalism contained in *DA Pam 27-162*, paragraph 2-29c, which is currently incorrect. The current regulatory provision also permits payment for vehicle vandalism and theft if the incident occurs when the vehicle is used in the performance of military duty, when the vehicle is being shipped, and when the vehicle is located in an area on the installation where the command has assumed responsibility for security. *Id*. paras. 11-5e(1), (2), (4).

20. The regulation defines quarters for these purposes as:

> (1) Quarters, wherever situated, which are assigned to the claimant or otherwise provided in kind by the Government; (2) Quarters outside the United States, which are occupied by the claimant in compliance with competent authority but are neither assigned to the claimant nor otherwise provided in kind by the Government; or (3) Any place of lodging wherever situated, such as a hotel, motel, guest house, transit billet, or other place, when occupied by the claimant while in the performance of temporary duty or similar authorized military assignment of a temporary nature.

Id. para. 11-5. The regulation does not permit payment for losses at off-post quarters (in other words, quarters not provided in kind by the government) in the United States because the Personnel Claims Act prohibits payment of a claim if the loss occurred "at quarters occupied by the claimant in a State or in the District of Columbia that were not assigned or provided in kind by [the government] . . . ." 31 U.S.C. § 3721e (1994).

21. *See* AR 27-20, *supra* note 2, para. 11-5e(5) (allowing payment for vehicle damage "other than at quarters on a military installation" only if it is caused by fire, flood, hurricane, or other unusual occurrence; theft and vandalism damage is specifically excluded).

22. *See* app. A, *infra*. This appendix shows the portions of the current regulation and pamphlet which have been eliminated (printed in crossed out text) and the new provisions which have been added (printed in bold text). The new regulation and pamphlet will not contain this detail.

23. The new provision will provide that losses at off-post quarters are compensable if they did not occur within a state or the District of Columbia. This should make it clear that vehicle vandalism and other compensable losses at off-post quarters are payable in territories of the United States, such as Puerto Rico.

evidence that the theft or vandalism occurred on post or at overseas quarters. A claimant's uncorroborated statement will not be enough to rebut the presumption. Instead, the regulation will require a statement from a disinterested third party, such as a statement in the military police report that broken glass was found next to the vehicle or a statement from a disinterested third party who saw the claimant's vehicle and several others vandalized in a like manner.

In addition, vehicle theft or vandalism which occurs off post will be compensable under the new regulation if there is a clear connection between the vandalism and the claimant's duties. However, such theft or vandalism is not compensable if it occurs at off-post quarters in the fifty states or the District of Columbia.[25] For off-post vehicle theft or vandalism to be payable, there must be clear evidence which establishes the connection between the claimant's duties and the damage. For example, if the claimant's vehicle is spray painted with the phrase "soldiers kill babies," there is a direct connection to the soldier's duties, and the claim could be paid. On the other hand, if a rock is thrown from an overpass and breaks the claimant's windshield, the claim is not payable because there is no clear connection to duty.

Requests for Reconsideration

The new claims regulation and pamphlet will give staff judge advocates (SJAs) significantly expanded authority to take final action on requests for reconsideration. The new provisions will give SJAs the authority to take final action on most requests for reconsideration which involve $1000 or less.

A request for reconsideration is the only possible type of appeal of a personnel claim.[26] Currently, only the USARCS commander can take final action on most requests for reconsideration.[27] The head of an area claims office, who is generally an SJA,[28] can take final action on requests for reconsideration only when the claimant is fully satisfied by the SJA's action.[29]

Under the new regulation and pamphlet,[30] an SJA may still take final action on a request for reconsideration if the claimant is fully satisfied. However, an SJA may also take final action if: (1) the reconsideration request does not contain new facts or a new legal basis, (2) the request was not timely, or (3) the total amount in dispute does not exceed $1000.

The provision permitting SJAs to take final action on reconsideration requests which state no new facts or legal bases was designed to eliminate the need to forward vague requests to the USARCS. Under this provision, an SJA could take final action on a vague request consisting solely of the statement "I request reconsideration" written on a settlement letter. In deciding whether reconsideration requests contain new facts or new legal bases, SJAs should interpret the requests liberally. If there is any argument that the request states new facts or a new legal basis, the SJA should forward the request to the USARCS or rely on a different provision which permits final action by the SJA.

The provision which permits SJAs to take final action on untimely reconsideration requests should only be used if the claimant has no legitimate reason for submitting the request after the sixty-day time frame has elapsed.[31] If the claimant has any explanation for submitting a late request, the SJA should forward the request to the USARCS or rely on a different provision for taking final action.[32]

24. The current regulation contains the same presumption. *See* AR 27-20, *supra* note 2, para. 11-5e(3). However, the new regulation will make it plain that the burden of proof is clear and convincing evidence and that the uncorroborated statement of the claimant is not enough to overcome the presumption.

25. As mentioned in note 20, *supra,* the Personnel Claims Act does not permit payment for incidents occurring within the 50 states and the District of Columbia at quarters that were "not assigned or provided in kind by [the government] . . . ." 31 U.S.C. § 3721e (1994).

26. The Personnel Claims Act provides that "settlement of a claim under this section is final and conclusive," meaning that an agency's administrative determination may not be appealed to the courts. *Id.* § 3721k.

27. AR 27-20, *supra* note 2, para. 11-20b. As an exception, the Commander, U.S. Army Claims Service, Europe, may take final action on any request for reconsideration forwarded there by a subordinate office, as long as it does not involve waiving a maximum allowance. *Id*. para. 11-20b(4).

28. *Id*. para. 1-5d (defining "area claims offices" as those offices under the supervision of a senior judge advocate which are designated by the USARCS commander). The senior judge advocate, who is usually an SJA, is the head of the area claims office. *Id.* para. 1-5d(1).

29. *Id.* para. 11-20b(4). This paragraph requires that a request for reconsideration be forwarded to the USARCS if the claimant does not wish to accept an additional payment as full relief. Therefore, a field claims office can take final action only if the claimant is fully satisfied with the additional payment. Technically, this final action can be taken by any "settlement" authority (which generally means any claims attorney who can pay personnel claims) or the "denial" authority (the head of an area claims office, generally an SJA). *See id*. paras. 1-5f, 11-20b(4).

30. *See* app. B, *infra.*

31. The time frame for submitting a reconsideration request has not changed. *See* AR 27-20, *supra* note 2, para. 11-20c.

32. Waivers of the sixty-day time limitation should be granted liberally, unless the claimant's delay has prejudiced the government's right to recover. *See* Personnel Claims Note, *Requests for Reconsideration*, ARMY LAW., Aug. 1997, at 46.

The most important of the new reconsideration rules is the provision which permits SJAs to take final action on requests for reconsideration in which the amount in dispute is $1000 or less. This will undoubtedly apply to a large number of reconsideration requests.[33] To determine the amount in dispute, SJAs should subtract the amount of any additional payment from the amount requested by the claimant in the request for reconsideration. For example, if a claimant requests an additional $1200 for a damaged couch and the claims office pays an additional $400, the amount in dispute is only $800. Do not consider amounts claimed for any items the claimant withdraws from reconsideration or for which the claimant accepts an additional payment as full satisfaction. If the request does not contain a specific amount, look to the amounts requested in the original claim for items mentioned in the request. If in doubt as to the amount, the SJA should forward the request to the USARCS or rely on some other provision for taking final action.

If none of the above provisions apply, the SJA must forward the request for reconsideration to the USARCS.[34] Even if one of the provisions for taking final action applies, an SJA must forward a request for reconsideration to the USARCS if: (1) the SJA personally acted on the claim and believes the request should be denied or (2) the request involves a question of policy or practice that the SJA believes is appropriate for resolution by the USARCS. Since the SJA is the only person who can deny personnel claims, the first exception will apply to most requests for reconsideration in which the original claim was completely denied.[35] The second exception is designed to enable the USARCS to provide policy guidance to field offices when novel situations arise.

Only an SJA or higher authority can take final action on reconsideration requests. The authority to act on reconsideration requests is personal to the SJA (or the acting SJA) and may not be delegated.[36] When taking final action on a reconsideration request, the SJA should personally sign the action. Similarly, when forwarding a reconsideration request to the USARCS, the SJA must personally sign the forwarding memorandum or endorsement and must recommend a specific action to be taken on the request.

Maximum Amounts Allowable

The new claims regulation and pamphlet will significantly expand the authority of SJAs to waive maximum amounts allowable. The *Allowance List Depreciation Guide* establishes maximum amounts which may be paid for specific categories of property.[37] For example, the maximum which may be paid for a vehicle damaged during shipment is $20,000.[38] Under the current regulation, only the USARCS may waive a maximum amount allowable.[39] Under the new regulation and pamphlet,[40] an SJA may waive a maximum amount allowable. Before doing so, however, the SJA must determine that there is good cause and that the claimant has established four factors by clear and convincing evidence: (1) the property was not held for commercial purposes, (2) the claimant owned the property, (3) the property had the value claimed, and (4) the property was damaged or lost in the manner alleged.

Good cause for waiving the maximum amount allowable should be interpreted liberally. There is no need to prove that there was an injustice because government officials misinformed the claimant about coverage under the Personnel Claims Act or because the claimant was unable to obtain insurance protection, as was previously required.[41] Under the new regulation, an economic loss is sufficient to establish "good cause," as long as the claimant establishes the four factors described above by clear and convincing evidence.

The first factor, that the property was not held for business purposes, can usually be assumed, absent evidence to the contrary. The second factor, ownership, can be proven by purchase receipts, photographs, or statements by others who observed the property in the claimant's possession. The third factor, value, is generally established by purchase receipts, appraisals obtained before the loss, or similar evidence; a statement from the claimant or a friend of the claimant is not sufficient. The

33. An informal study conducted by the Personnel Claims and Recovery Division, USARCS, indicated that approximately half of all requests for reconsideration involve disputes of $1000 or less.

34. If the claim arose from an office subordinate to the Commander, U.S. Army Claims Service, Europe, the request should be forwarded to that office for final action.

35. AR 27-20, *supra* note 2, para. 1-5f.

36. This authority may devolve to an acting SJA in the absence of the SJA.

37. *See* ALLOWANCE LIST DEPRECIATION GUIDE (15 Apr. 1995) [hereinafter DEPRECIATION GUIDE] (copy on file with author); AR 27-20, *supra* note 2, para. 11-12.

38. DEPRECIATION GUIDE, *supra* note 37, item 7.

39. AR 27-20, *supra* note 2, para. 11-14b (providing that the Chief, Personnel Claims and Recovery Division, may waive the maximum in a particular case for good cause shown).

40. *See* app. C, *infra.*

41. DA PAM 27-162, *supra* note 11, para. 2-35b.

fourth factor, loss or damage, can be proven by an inventory, if the loss was shipment related; however, a generic reference on the inventory may be insufficient. For example, if an inventory lists a rug, this will not be sufficient to establish that a $4000 Turkish rug was lost.

Only the SJA may waive maximum amounts allowable. This authority is personal to the SJA (or the acting SJA) and may not be delegated. The SJA must personally sign a memorandum which attests to the four required factors.

Conclusion

The new provisions discussed in this note are a significant departure from current policy. Field claims office personnel must be familiar with these new rules and must implement them properly. The new rules give SJAs much greater authority to act on personnel claims. With the new authority, however, come new responsibilities. Previously, the USARCS retained the power to act on requests for reconsideration and to waive maximum amounts allowable, in order to ensure that personnel claims were adjudicated uniformly and fairly throughout the Army. Field claims personnel and SJAs now have the task of ensuring that these claims are uniformly and fairly adjudicated. Field claims personnel must carefully monitor the claims forum of the Legal Automation Army Wide System bulletin board system, *The Army Lawyer*, and other sources of claims information to ensure that the new authority is exercised properly. Lieutenant Colonel Masterton.

Appendix A

Changes to Vandalism Provisions

Additions to the current version are in **bold**.
Deletions from the current version are ~~crossed out~~

SUMMARY OF CHANGE: Expands authority to pay for vehicle vandalism claims, permitting compensation for all vandalism on post, rather than limiting compensation to vandalism at quarters. Retains current requirement for extrinsic evidence of location of vandalism. Permits payment of vandalism claims off post where there is a nexus to claimant's service.

TEXT OF CHANGE:

Change para. 11-5a(2), *Army Regulation 27-20* (*AR 27-20*) as follows (this will be renumbered para. 11-5d(2)):

(2) Quarters **not located in a state or the District of Columbia** ~~outside the United States~~, which are occupied by the claimant in compliance with competent authority but are neither assigned to the claimant nor otherwise provided in kind by the Government. However, a claim is not cognizable when the claimant is:

(a) A civilian employee who is a local inhabitant.

(b) A U.S. citizen hired as a civilian employee while residing abroad or after moving to a foreign country as a part of the household of a person who is not a proper party claimant.

(c) A family member **not** residing **in a state or the District of Columbia** ~~outside the United States~~ while the soldier is stationed in a different country.

(d) A local inhabitant of a U.S. territory who is in that territory at the time of a loss when he or she is in the ARNG either on Full Time-National Guard Duty (FTNGD) or on active duty under Title 10, or in the USAR on active duty for any reason.

Change para. 11-5e(3), *AR 27-20* as follows (this will be renumbered para. 11-5h(3)):

(3) Located at quarters or place of lodging, as defined in paragraphs ~~a(1)~~ **d(1)**, (2), and (3) above, ~~which for purposes of this paragraph includes garages, carports, driveways, assigned parking spaces, and lots specifically provided and used for the purpose of parking at one's quarters~~ or located on a military installation, provided that the loss or damage is caused by fire, flood, hurricane, or other unusual occurrence, or by theft or vandalism. **For the purposes of this paragraph, the term "quarters" includes garages, carports, driveways, assigned parking spaces, and lots specifically provided and used for the purpose of parking at one's quarters or other areas normally used for parking while at quarters by the claimant and other occupants of the claimant's building, or by the claimant's neighbors. The term "military installation" is used broadly to describe any fixed land area, wherever situated, controlled and used by military activities or the DOD.** For this category, there is a presumption that vehicle theft or vandalism ~~occurs off the military installation~~ **does not occur on the military installation or at quarters** and is generally not compensable. Claims for theft or vandalism to vehicles (including property located inside a vehicle) are only payable when a claimant proves that the theft or vandalism occurred while the vehicle was **on the military installation or** at ~~his or her authorized or assigned~~ quarters (for example: a military police report indicates broken glass from the window ~~is on the driveway~~ **was found at the on-post parking lot where the vehicle was vandalized). A vehicle that is properly on the installation or at quarters should be presumed to be incident to service unless such a presumption would be unreasonable under the particular circumstances, such as visiting a fellow soldier on another installation while on leave.**

Change para. 11-5e(5), *AR 27-20* as follows (this will be renumbered para. 11-5h(5)):

(5) ~~Located other than at quarters on a military installation, provided that the loss or damage is caused by fire, flood, hurricane, or other unusual occurrence. Theft or vandalism are excluded. The term "military installation" is used broadly to describe any fixed land area, wherever situated, controlled, and used by military activities or the DOD. A vehicle that is properly on the installation should be presumed to be incident to the claimant's service unless the application of such a presumption would be unreasonable under the particular circumstances, such as visiting a fellow soldier on another military installation while on leave.~~ **Located off the military installation when the loss or damage is directly connected to the claimant's service, provided the incident does not occur at quarters in a state or the district of Columbia that were not assigned or provided in kind by the government.**

Add the following after the above paragraph (this will be numbered para. 11-5h(6), *AR 27-20*):

(6) To the extent the provisions of this paragraph make vehicle loss claims payable, when they would not be payable under previous policy, such claims will be considered for payment only if the loss occurred after the effective date of this regulation.

Add the following after para. 2-29c(2), *Department of the Army Pamphlet 27-162* (*DA Pam 27-162*) (Because of a complete reorganization of the pamphlet, which will enable its provisions to be numbered in the same manner as the regulation, this paragraph will be renumbered para. 11-5h(3)(c)):

(c) Standard of proof for vandalism and theft claims. In the case of vandalism and theft, the claimant must be able to show that the vandalism or theft occurred at quarters or on the military installation by clear and convincing evidence. There is a presumption that vehicle theft or vandalism did not occur at quarters or on the military installation and, therefore, is not compensable. The claimant must rebut this presumption with clear and convincing extrinsic evidence. An MP report that corroborates that broken glass from the claimant's vehicle was found on the parking lot outside the claimant's place of duty will be sufficient to rebut this presumption. Similarly, a statement by a disinterested third party who saw that the claimant's vehicle and a number of other vehicles parked near it in the PX parking lot were vandalized in a like manner will be sufficient to rebut this presumption. However, the claimant's uncorroborated statement that a vehicle was vandalized on the military installation or at quarters will not be sufficient.

Add the following after the above paragraph (this paragraph will be renumbered para. 11-5h(4), *DA Pam 27-162*):

(4) Vehicles not located on the installation or at quarters. Theft or vandalism involving vehicles which are not located on the installation or at quarters, as defined above, may be compensable if the claimant can establish that these acts occurred incident to service. A claimant must establish a clear connection between the theft or vandalism and the claimant's duties supporting a conclusion that the damage occurred directly incident to the claimant's service. Damage caused by random acts of vandalism or theft that occur off-post are not compensable. This risk should be covered by private insurance. The use of a vehicle off the military installation for commuting to or from work does not make the use incident to service for purposes of this paragraph. If a rock is thrown from an off-post overpass and breaks a claimant's car windshield while he is driving to work, the damage is not incident to service and is not compensable. If a soldier's vehicle bearing a military sticker is spray painted at an off-post location with the phrase "soldiers kill babies," there is a direct connection between the claimant's service and the damage; therefore, a claim for such damage could be paid. Off-post theft or vandalism which occurs at economy quarters in a state or the District of Columbia is not compensable, even if it is incident to service as defined in this subparagraph. The Personnel Claims Act specifically prohibits compensation for damages incurred at off-post quarters in a State or the District of Columbia.

Appendix B

Change to Reconsideration Provisions

Additions to the current version are in **bold**.
Deletions from the current version are ~~crossed out~~.

SUMMARY OF CHANGE: Gives SJAs authority to act on certain reconsideration requests.

TEXT OF CHANGE:

Replace para. 11-20b(3), *AR 27-20*, with the following:

> **(3) If the approval or settlement authority cannot take final action on the request (see para. c below), he or she will issue any offered payment and will forward the claim through any intervening approval or settlement authorities to the official authorized to take final action on the request.**

Delete para. 11-20b(4), *AR 27-20*.

Add the following after para. 11-20b, *AR 27-20*:

> An approval or settlement authority:
>
> **c. May take final action on a request for reconsideration if the action taken on reconsideration results in the acceptance by the claimant as full relief on the claim.**
>
> **d. May take final action on a request for reconsideration if he or she is the head of an area claims office or higher settlement authority and –**
>
> **1. The reconsideration request does not contain new facts or legal basis for requesting reconsideration.**
>
> **2. There was no timely request for reconsideration and no exceptional circumstances are present.**
>
> **3. The total amount in dispute after the settlement or approval authority has acted on the request for reconsideration does not exceed $1000.**
>
> **e. Will forward to USARCS for action a request for reconsideration which does not meet any of the above criteria or which—**
>
> **1. Involves a claim on which the head of an area claims office or higher settlement authority has personally acted, where that individual believes the request for reconsideration should be denied.**
>
> **2. Involves a question of policy or practice that the head of an area claims office or higher settlement authority believes is appropriate for resolution by USARCS.**
>
> **f. As an exception, the Chief, U.S. Army Claims Service, Europe (USACSEUR), may take final action on any reconsideration request forwarded there by a subordinate office. The Chief, USACSEUR, will include a complete copy of the final action and will forward the file to the Commander, USARCS.**
>
> **g. The authority to take final action on reconsideration requests is personal to the head of the area claims office and may not be delegated.**
>
> **h. Prior to forwarding a request for reconsideration, the settlement or approval authority must notify the claimant, in writing, of the action he or she has taken.**

Change para. 11-20c, *AR 27-20*, as follows (this material will be placed at the beginning of para. 11-20):

> c. A claimant has 60 days from the settlement date of the claim to request reconsideration. The head of an area claims office may waive this time period in exceptional cases. The claimant will receive written notification of this time limit as part of the notice of action on the claim. ~~Any reconsideration where denial is recommended because it was not timely filed will be forwarded according to paragraph (b)4 above. The Chief, Personnel Claims and Recovery Division may grant relief on untimely requests for reconsideration on the basis of substantial new evidence, fraud, mistake of law, or mathematical miscalculation. In appropriate situations, he or she may deny relief if the filing delay precluded acquiring additional facts.~~

Change para. 2-59b, *DA Pam 27-162* as follows (this paragraph will be renumbered para. 11-20g(2)):

(g) (2) Action by the original approval or settlement authority. The original approval or settlement authority may ~~take action if he or she determines that the original action taken should be modified.~~ **modify the original action, if he or she believes this to be appropriate. A settlement or approval authority may take final action on a request for reconsideration if the action taken results in the claimant's acceptance as full relief on the claim. In addition, the head of an area claims office (typically a SJA) or higher settlement authority may take final action on a request for reconsideration if :**

(a) The action taken on reconsideration results in the claimant's acceptance as full relief on the claim.

(b) The reconsideration request does not contain new facts or legal basis for requesting reconsideration.

(c) There was no timely request for reconsideration and no exceptional circumstances are present.

(d) The total amount in dispute after the settlement or approval authority has acted on the request for reconsideration does not exceed $1,000. The amount in dispute is the difference between the amount requested by the claimant in the request for reconsideration and the amount granted by the settlement or approval authority in response to the request for reconsideration, after deducting:

•The amount claimed in the request for items which the claimant voluntarily withdraws from reconsideration, after receiving an explanation for the partial payment or nonpayment, or for any other reason.

•The amount claimed in the request for items where the claimant accepts the amount offered in full relief for the damage or loss.

If the request for reconsideration does not contain a request for a specific amount, the amount requested by the claimant will be considered to be the amount requested in the original claim for the items included in the request for reconsideration. If there is a question as to the amount in dispute, err on the side of determining that the amount is over $1,000 and forward the request.

Add the following paragraph after the above paragraph (this will be numbered para. 11-20g(3), *DA Pam 27-162*):

(3) Forwarding the request for reconsideration. The head of an area claims office must forward a request for reconsideration to USARCS or U.S. Army Claims Service, Europe (USACSEUR) for final action if it—

(a) Does not meet the criteria in subparagraphs (g)(2)(a) through (d) above;

(b) Involves a claim on which the head of an area claims office has personally acted, where that individual believes the request for reconsideration should be denied; or

(c) involves a question of policy or practice that the head of an area claims office believes is appropriate for resolution by USARCS or USACSEUR.

Change para. 2-59d, *DA Pam 27-162* as follows (this paragraph will be renumbered para. 11-20g(5)):

(5) Procedure. **Each** ~~The~~ settlement **or approval** authority must act on the request personally; this authority may not be delegated. If additional payment is made, the chronology sheet and other documents in the file must reflect the basis for it. ~~If the settlement authority grants a request for reconsideration, in part but not in full, additional payment should be made; he or she must then forward the file, along with a personnel claims memorandum of opinion, through any intervening settlement authority to USARCS (in Europe, to USACSEUR) for final action.~~ **The settlement or approval authority should notify the claimant in writing of the action taken on the request for reconsideration. If the action taken on the request modifies the original action, the settlement or approval authority should make any additional payment involved and determine if the modification satisfies the claimant. The settlement or approval authority should forward appropriate claims files and personnel claims memoranda of opinion to the head of the area claims office. The head of the area claims office may take final action on a request for reconsideration according to the criteria set forth above; this authority may not be delegated. If the request must be forwarded to USARCS or USACSEUR, t**he outside cover of the file must be clearly marked "RECONSIDERATION." The claimant should be told that the claim has been forwarded**,** but **not what action the claims office has** ~~should not be told what was~~ recommended. A **head of the area claims office** ~~settlement authority~~ may concur in a previous memorandum of opinion or may attach a supplemental memorandum. **When a request for reconsideration is forwarded to USARCS or USACSEUR for final action, the file should contain a memorandum or endorsement personally signed by the head of the area claims office. This memorandum or endorsement must contain, at a minimum, a specific recommendation on the request for reconsideration.** For example, a claimant at Fort Sill puts in a written request for reconsideration of the amount paid on a table, contending that the amount awarded will not cover the cost of repair. The claimant requests payment of an additional $150. Claims personnel discuss the matter and allow the claimant 14 days to get a second estimate of repair. After reviewing the second estimate, the CJA **or claims attorney** pays the claimant an additional $100 ~~and forwards the file with a personnel claims memorandum of opinion through the SJA (or Acting SJA), who concurs, to USARCS, recommending that no further payment be made~~. **The CJA or claims attorney should notify the claimant in writing of the action taken and determine if he or she is satisfied. If the claimant is not satisfied, the CJA or claims attorney should forward the file with a personnel claims memorandum of opinion to the head of the area claims office. The head of the area claims office may take final action on the request for reconsideration or forward the claim to USARCS if he or she believes the request involves an issue of policy which is appropriate for resolution by USARCS. If the head of the area claims office forwards the claim to USARCS, he or she may prepare a new personnel claims memorandum of opinion or an endorsement concurring in the previous memorandum of opinion. In either case, the memorandum or endorsement must be personally signed by the head of the area claims office and recommend a specific action to be taken on the request for reconsideration.**

Appendix C

Change in Waiver of Maximum Allowables

Additions to the current version are in **bold**.
Deletions from the current version are ~~crossed out~~.

SUMMARY OF CHANGE: Gives SJA authority to waive maximum allowables.

TEXT OF CHANGE:

Change the second sentence of para. 1-5f, *AR 27-20*, to read as follows:

> The authority to act upon appeals or requests for reconsideration, **to waive maximum allowables**, to disapprove claims (including disapprovals based on substantial fraud), or to make final offers will not be delegated.

Add the following after the last sentence of para. 11-14b, *AR 27-20*:

> **In addition, the head of an area claims office, or higher settlement authority, may waive the maximum in a particular case for good cause if the claimant establishes the elements in subparagraph (1) through (4) below. The head of the area claims office must personally certify this by including a memorandum in the claims file providing a written explanation detailing the facts relied upon which constituted good cause and detailing how the claimant has established each one of the four elements below by clear and convincing evidence. This authority is non-delegable and must be exercised personally by the head of the area claims office. The elements which must be established are—**
>
> **(1) The property was not held for use in a business or for commercial purposes.**
>
> **(2) The property was actually owned by the claimant.**
>
> **(3) The property had the value claimed.**
>
> **(4) The property was damaged or lost in the manner alleged.**

Replace para. 2-35b, *DA Pam 27-162*, with the following (this paragraph will be renumbered para. 11-14a(2)):

> **(2) Waiver of maximum allowances. The head of an area claims office, or a higher settlement authority, may waive the maximum allowable for good cause in certain situations. Before doing so, the settlement authority must personally sign a written memorandum for the file including—**
>
> **a. The facts establishing good cause.**
>
> **b. An explanation of how the claimant has established the following four factors by clear and convincing evidence:**
>
> **1. The property was not held for use in a business or for commercial purposes.**
>
> **2. The property was actually owned by the claimant. For lost or stolen items this is generally established by purchase receipts or statements by others who observed the property in the claimant's possession.**
>
> **3.The property had the value claimed. This is generally established by a purchase receipt, appraisal obtained before the loss, or similar evidence. A statement by the claimant or a relative, friend, or acquaintance of the claimant is not sufficient to establish the alleged value.**
>
> **4. The property was damaged or lost in the manner alleged. In a claim for loss during a government shipment, the fact that the property was lost during shipment is generally established by showing that the property was clearly identified on the inventory. However, a generic reference on the inventory may be insufficient. For example, if the inventory simply lists four rugs, this will not be sufficient to establish shipment of four handmade wool Turkish rugs that cost $4,000 each.**

CLAMO Report

Center for Law and Military Operations (CLAMO), The Judge Advocate General's School

The Best Job in the JAG Corps

This is the first in a series of articles dealing with judge advocates who are serving at the combat training centers. The series will offer judge advocate observer/controller insights into all five training centers and will also provide updates on the operations and issues arising in the training centers. The series will be supplemented by after action reports which highlight the lessons learned. The series should not, however, be mistaken for instructional pieces or primers; for such information, contact CLAMO to receive practical guides and comprehensive after action reports.

I am jerked awake by the sound of my alarm clock at 0330 hours. My one-hour shift on "TOC watch" begins in thirty minutes. Outside, it is a chilly forty-seven degrees, and it is not much warmer inside my "hummer,"[1] my home during every rotation. I reach out of my sleeping bag for the engine start switch, and, with the flick of my wrist, the early morning stillness is broken by the familiar rattle of a diesel engine. I crank the heater switch to high and dress by the light of a red lens flashlight. As I am getting dressed, I reflect on why I believe that I have the best job in the U.S. Army Judge Advocate General's (JAG) Corps. I am the senior judge advocate observer/controller for brigade command and control, operations group, Joint Readiness Training Center (JRTC), Fort Polk, Louisiana.

Observer/controllers (O/Cs) provide the interface between the training unit (the BLUEFOR) and the JRTC. The O/Cs are the principal trainers and the most visible representatives of the JRTC. My primary role is to teach, to coach, and to mentor commanders, staffs, and brigade judge advocates throughout the sixteen days of a standard JRTC rotation. Every month, I follow some of the Army's best and brightest young attorneys, "shadowing" judge advocates as they operate in a simulated low-intensity conflict while deployed to the fictional country of Cortina as part of a light infantry brigade staff.

The O/Cs observe unit performance, control engagements and operations, teach doctrine, coach to improve unit performance, monitor safety, and conduct professional after action reviews (AARs). I observe whether judge advocates are integrated into, and synchronized with, the rest of the staff; whether they are proactive or reactive; and whether the legal advice provided to the staff is timely and accurate.

Four times during each rotation, the battlefield "freezes," and the O/Cs conduct AARs. The AARs are the most important events at the JRTC. In the AARs, I discuss what occurred, what was done well, and what could have been done better. I emphasize the lessons learned and focus on applying those lessons in the future. More importantly, I encourage judge advocates and their legal noncommissioned officers to look inward and to do self-critiques of their performances.

As is true with every Army organization, the people make the difference. The personnel assigned as O/Cs at the JRTC are hand-picked experts in the doctrine and tactics associated with command and control issues, and they are experts in particular battlefield operating systems (BOS), such as maneuver, fire support, and air defense artillery. In addition to the judge advocate assets,[2] my unit includes O/C representatives from the Engineer, Chemical, Armor, Infantry, Military Police, Signal, Aviation, Air Defense Artillery, Field Artillery, Civil Affairs, Psychological Operations, and Military Intelligence branches. Every day of a JRTC rotation, I learn something new about one of these BOS areas from my colleagues. Whether it is minefield breaching techniques, area security, or the military decision-making process, each of these lessons learned makes me a better Army officer.

As I write this while on "TOC watch" in the brigade tactical operations center (TOC), the brigade support area comes under a non-persistent chemical attack, and the brigade staff goes to MOPP level two. As BLUEFOR personnel in the TOC get into their chemical protective suits, I ask the senior chemical O/C what effect the outside temperature and humidity will have on the chemical attack OPFOR[3] that was just launched. I receive a short, but very detailed, lesson on "moisture density." In the process, I increase my knowledge, and I become a better officer and a better O/C. Learning opportunities like this happen every day during a rotation. All I need do is take advantage of them. This is probably the single most rewarding experience of being an O/C.

While I learn much from my colleagues, I am also constantly educated by those I am tasked to observe. As I follow BLUEFOR judge advocates, seemingly invisible with every bit of exposed flesh painted camouflage and my cover always firmly in place (even indoors), my horizons are continually expanded. I think, in fact, that I learn as much from them as they might learn from me. While every judge advocate has been through basically the same basic course that I attended in 1987, our pro-

1. The operational law cell within the operations group has two High Mobility Multi-purpose Wheeled Vehicles (HMMWVs or "hummers").

2. There are three judge advocate O/Cs and one noncommissioned officer O/C assigned to the JRTC.

3. OPFOR are the permanently positioned opposing force for training units at the JRTC.

fessional experiences since that time vary as widely as the assignments we have held. As an O/C, I am able to share my experience with these judge advocates, and they are able to share their experiences with me. Like a trial counsel who seeks a second opinion on how to best introduce an important piece of evidence, the brigade judge advocate and I are able to put our heads together at any given time on the many legal issues which may arise during the rotation. The issues run the gamut from those considered to be "traditionally operational law-related" (such as targeting, rules of engagement, and the law of armed conflict) to fiscal law concerns, legal assistance questions, and claims.

If it is true that our "teaching, coaching, and mentoring" better trains the Army, I am utterly convinced that the knowledge and professionalism exhibited by our brigade judge advocates has just as great an effect. I and all the other O/Cs learn a great deal as we watch new and unique approaches toward resolving often complex legal problems which face brigade commanders and their staffs during these rigorous and realistic training center rotations.

The JRTC and the other combat training centers strive to provide stressful training under tough and realistic conditions. This realism and rigor demand, therefore, that O/Cs live and work under combat conditions. Life as an O/C is physically and mentally demanding. The duty is tough, the hours are long, and the issues can be complex. We are in the "box"[4] at least sixteen full days every month. And yes, life in the "box" is Spartan, but O/Cs receive the support and independence to do their jobs effectively.

Both during and out of rotation, the senior O/Cs operate their respective BOS teams autonomously. There is no micromanagement or requirement for strict adherence to a duty schedule. If, out of rotation, a team has completed its tasks by 1430, everyone may be cut free to attend to personal business. There is free time between rotations as well. The first weekend after an exercise is always a three-day weekend; the next is a four-day weekend. The following week, however, another rotation begins.

Every O/C can "refit" three times during the last twelve days of the rotation. A refit is the opportunity to break contact with your counterpart and go home for a quick break. It is a great opportunity to take a warm shower, eat a normal meal at a dinner table, hug the kids and the spouse, and sleep between clean sheets in a real bed. At the end of each refit, I am fully refreshed, my batteries are charged, and I am ready and eager to get back into the fight.

The JRTC gives O/Cs the equipment needed to do the job and the assets to maintain that equipment. When my hummer has a radio problem or a faulty generator, the crack maintenance staff repairs it right away. If I have a flat tire or my vehicle breaks in the "box," maintenance comes to my location to make repairs. There is never a lengthy wait to get equipment repaired—both the radio and vehicle maintenance shops operate on a twenty-four-hour schedule during the entire time we are in a rotation. We work our equipment hard, and having such responsive maintenance personnel is a great benefit. It saves a lot of time and frustration, and it allows us to get back to our duties quickly.

An additional, and very exciting, benefit is that I and most of the other O/Cs are on jump status. Often, I will meet the training unit at its home station and fly into the area of operations. What an experience it is to be with an entire airborne brigade as it jumps in to begin a rotation. Literally thousands of parachutes, miles of silk, in the air at one time. And we draw jump pay to boot!

The greatest reward of all, however, is seeing our soldiers, the best in the world, in action. Day and night, in bad weather, and under tough conditions, I witness the perseverance and "can do" attitude which sets the American soldier apart from all others. No other job, short of actual deployment, gives a judge advocate the opportunity to live every day under conditions which prepare our forces to conduct any operation, in any environment.

It is now 0455 and my replacement has just relieved me on TOC watch. I depart the brigade TOC enroute to my hummer under a clear, chilly sky lit by a beautiful, full moon. On the walk back to O/C parking, I reflect on what I have just written and smile to myself. It is a smile of recognition—I really do have the best job in the JAG Corps. Major Banks and Major Kantwill.

4. The "box" isa term for the maneuver area. It is called a box because ingress and egress to the area are controlled.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riveraju@otjag.army.mil. Major Rivera.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at http://www.army.mil/usar/vacancies.htm. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....tromeyto@otjag.army.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera,.....riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1997-1998 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ Stephen Parke LTC James Lovejoy COL Keith Hamack	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
28 Feb- 1 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara LTC Mark Henderson MAJ John Einwechter COL Thomas Tromey	COL Robert P. Johnston Office of the SJA, 12th LSO Bldg. 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Michael Marchand BG John F. DePue LTC Karl Ellcessor MAJ Scott Morris COL Thomas Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Thoms W. Eres MAJ Christopher Garcia MAJ Norman Allen Dr. Mark Foley	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol. com

21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John Cooke BG John F. DePue MAJ Thomas Hong MAJ Geoffrey Corn Dr. Mark Foley	MAJ Ronald C. Riley 20825 Brookside Blvd. Olympia Fields, IL 60461 (312) 603-6064
28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran COL Thomas Tromey	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Joseph R. Barnes BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows Dr. Mark Foley	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364
25-26 Apr	Newport, RI 94th RSC Naval War College 686 Cushing Road Newport, RI 02841	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Maurice Lescault LTC Stephen Henley Dr. Mark Foley	MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140/2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton COL Keith Hamack	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17 May	Kansas City, MO 89th RSC Westin Crown Center 1 Pershing Road Kansas City, MO 64108 (816) 474-4400	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N. Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

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

2. TJAGSA CLE Course Schedule

1998

February 1998

9-13 February	68th Law of War Workshop (5F-F42).
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).
23-27 February	42nd Legal Assistance Course (5F-F23).

March 1998

2-13 March	29th Operational Law Seminar (5F-F47).
2-13 March	140th Contract Attorneys Course (5F-F10).
16-20 March	22d Admin Law for Military Installations Course (5F-F24).
23-27 March	2d Contract Litigation Course (5F-F102).
23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).
30 March-3 April	147th Senior Officer Legal Orientation Course (5F-F1).

April 1998

20-23 April	1998 Reserve Component Judge Advocate Workshop (5F-F56).
27 April-1 May	9th Law for Legal NCOs Course (512-71D/20/30).
27 April-1 May	50th Fiscal Law Course (5F-F12).

May 1998

4-22 May	41st Military Judges Course (5F-F33).
11-15 May	51st Fiscal Law Course (5F-F12).

June 1998

1-5 June	1st National Security Crime and Intelligence Law Workshop (5F-F401).
1-5 June	148th Senior Officer Legal Orientation Course (5F-F1).

1-12 June	3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).
1 June-10 July	5th JA Warrant Officer Basic Course (7A-550A0).
8-12 June	2nd Chief Legal NCO Course (512-71D-CLNCO).
8-12 June	28th Staff Judge Advocate Course (5F-F52).
15-19 June	9th Senior Legal NCO Course (512-71D/40/50).
15-26 June	3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).
29 June-1 July	Professional Recruiting Training Seminar.

July 1998

6-10 July	9th Legal Administrators Course (7A-550A1).
6-17 July	146th Basic Course (Phase 1, Fort Lee) (5-27-C20).
7-9 July	29th Methods of Instruction Course (5F-F70).
13-17 July	69th Law of War Workshop (5F-F42).
18 July-25 September	146th Basic Course (Phase 2, TJAGSA) (5-27-C20).
22-24 July	Career Services Directors Conference.

August 1998

3-14 August	10th Criminal Law Advocacy Course (5F-F34).
3-14 August	141st Contract Attorneys Course (5F-F10).
10-14 August	16th Federal Litigation Course (5F-F29).
17-21 August	149th Senior Officer Legal Orientation Course (5F-F1).
17 August 1998-28 May 1999	47th Graduate Course (5-27-C22).
24-28 August	4th Military Justice Managers Course (5F-F31).
24 August-4 September	30th Operational Law Seminar (5F-F47).

September 1998

9-11 September	3d Procurement Fraud Course (5F-F101).
9-11 September	USAREUR Legal Assistance CLE (5F-F23E).
14-18 September	USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1998

February

19-20 Feb ICLE	Advocacy & Evidence Courtroom Evidence Atlanta, GA

March

12-13 Mar ICLE	Trial Evidence Atlanta, GA
26 Mar ICLE	Cutting Edge in Courtroom Persuasion Atlanta, GA
27 Mar ICLE	Jury Selection and Persuasion Atlanta, GA

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

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200

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

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

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

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

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	Local Official	CLE Requirements
Alabama**	Administrative Assistant for Programs AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrator State Bar of AZ 111 W. Monroe Ste. 1800 Phoenix, AZ 85003-1742 (602) 271-4930	-Fifteen hours per year; three hours must be in lprofessional responsibility which includes ethics, professionalism, malpractice prevention, substance abuse . -Reporting date: 15 September.
Arkansas	Director of Professional Programs Supreme Court of AR Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1853	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 100 Van Ness Ave. 28th Floor San Francisco, CA 94102 (415) 241-2117	-Thirty-six hours over 3 year period. Eight hours must be in legal ethics or law practice management, at least four hours of which must be in legal ethics; one hour must be on prevention, detection and treatment of substance abuse/emotional distress; one hour on elimination of bias in the legal profession. -Full-time U.S. Government employees are exempt from compliance. -Reporting date: 1 February.
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094	-Forty-five hours over three year period; seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.

Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 658-5856	-Thirty hours over a two-year period; three hours must be in legal ethics, and a minimum of two hours, and a maximum of six hours, in professionalism. -Reporting date: 31 July.
Florida**	Program Assistant Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 561-5842	-Thirty hours over a three year period, two hours must be in legal ethics. -Active duty military attorneys, and out-of-state attorneys are exempt but must declare exemption during reporting period. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500	-Thirty hours over a three year period; two hours must be in legal ethics. -Reporting date: Every third year determined by year of admission.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943	-Thirty-six hours over a three year period. (minimum of six hours per year); of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year; two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (913) 357-6510	-Twelve hours per year; two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3225	-Twelve and one-half hours per year; two hours must be in legal ethics. -Reporting date: June 30.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 528-9154	-Fifteen hours per year; one hour must be in legal ethics and professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (612) 297-1800	-Forty-five hours over a three-year period. Three hours must be in ethics, two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056	-Twelve hours per year; one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt, but must declare exemption. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128	-Fifteen hours per year; three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5	-Fifteen hours per year. -Reporting date: 1 March
Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. 2 Reno, NV 89502 (702) 329-4443	Twelve hours per year; two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.

New Hampshire**	Assistant to the NH MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942	-Twelve hours per year; two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client disputes; six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 (505) 797-6015	-Fifteen hours per year; one hour must be in legal ethics. -Reporting date: 31 March.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123	-Twelve hours per year; two hours must be in legal ethics; Special three hours (minimum) ethics course every three years; nine of twelve hours per year in practical skills during first three years of admission. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404	-Forty-five hours over three year period; three hours must be in legal ethics. -Reporting date: Reporting period is 1 July - 30 June. Report must be filed by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Twenty-four hours over two year period; two hours must be in legal ethics and substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma**	MCLE Administrator OK State Bar P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Twelve hours per year; one hour must be in legal ethics. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 368	-Forty-five hours over three year period; six hours must be in legal ethics. -Reporting date: Every three years from admission; new members must report after first year.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253	-Twelve hours per year, one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA defer their requirement, but must declare their exemption. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 277-4942	-Ten hours each year; two hours must be in legal ethics. -Active duty military attorneys are exempt, but must declare their exemption. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Fourteen hours per year; two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096	-Fifteen hours per year; three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106	-Fifteen hours per year; three hours must be in legal ethics. -Full-time law school faculty are exempt. -Reporting date: Last day of birth month each year.

Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Ste. 312 Salt Lake City, UT 84111-3834 (801) 531-9095	-Twenty-four hours, plus three hours in legal ethics per two year period. -Reporting date: 31 December (end of assigned two-year compliance period.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281	-Twenty hours over two year period. -Reporting date: 15 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0578	-Twelve hours per year; two hours must be in legal ethics. -Reporting date: 30 June.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL4 Seattle, WA 98121-2330 (206) 727-8202	-Forty-five hours over a three-year period including six hours ehtics. -Reporting date: 31 January.
West Virginia	Mandatory CLE Coordinator MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992	-Twenty-four hours over two year period; three hours must be in legal ethics and/or office management. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Suite 715, Tenney Bldg. 110 East Main Street Madison, WI 53703-3328 (608) 266-9760	-Thirty hours over two year period; three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be filed by 1 February.
Wyoming	CLE Program Analyst WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-3737	-Fifteen hours per year. -Reporting date: 30 January.

* Military exempt
**Must declare exemption.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. ABA Network (http://www.abanet.org/).

The ABA site, in addition to giving useful information about the ABA and its programs, lists and provides links to ABA approved law schools (http://www.abanet.org/legaled/approved.html) and selected federal government executive, legislative, and judicial sites (http://www.abanet.org/lawlink/home.html).

b. The Legal List (http://www.lcp.com/The-Legal-List/index4.html).

This is an excellent site for the beginning legal internet researcher. It provides very helpful information for focusing a search and good legal research starting points, along with numerous links to judicial, administrative, legislative, academic, and international sources.

c. West's Legal Directory (http://www.wld.com/).

This site contains a very comprehensive database of lawyers and law firms. Search for colleagues and create or update your own listing quickly and easily. You can also read and download articles in forty-two practice areas from West's Encyclopedia of American Law.

d. Hieros Gamos (http://www.hg.org/hg.html).

Hieros Gamos is a comprehensive legal site with over 20,000 original pages and more than 70,000 links. HG I contains information on over 6,000 legal organizations, including every government in the world. HG II's 200+ practice areas, 300+ discussion groups, and 50 doing business guides provide free access to substantive information. Hundreds of hours of online seminars have been incorporated as well. HG III's self-listing user-modifiable databases for meetings, publications, employment, law firms, experts, court reporters, private investigators, and process servers provide a free place for the entities within the worldwide legal profession to list information about themselves and for users to be personally notified by e-mail of new content which meets their precise interests.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Ser-

vices Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A303938	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
AD A333321	Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).
AD A326002	Wills Guide, JA-262-97 (150 pgs).
AD A308640	Family Law Guide, JA 263-96 (544 pgs).
AD A283734	Consumer Law Guide, JA 265-94 (613 pgs).
AD A323770	Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (60 pgs).
*AD A332897	Tax Information Series, JA 269-97 (116 pgs).
*AD A329216	Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).
AD A276984	Deployment Guide, JA-272-94 (452 pgs).
AD A313675	Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).
AD A326316	Model Income Tax Assistance Guide, JA 275-97 (106 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

*AD A328397	Defensive Federal Litigation, JA-200-97 (658 pgs).
AD A327379	Military Personnel Law, JA 215-97 (174 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).
AD A301061	Environmental Law Deskbook, JA-234-95 (268 pgs).
AD A311070	Government Information Practices, JA-235-96 (326 pgs).
*AD A325989	Federal Tort Claims Act, JA 241-97 (136 pgs).
*AD A332865	AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692	The Law of Federal Employment, JA-210-97 (290 pgs).
AD A318895	The Law of Federal Labor-Management Relations, JA-211-96 (374 pgs).

Developments, Doctrine, and Literature

AD A332958	Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A302312	Senior Officer Legal Orientation, JA-320-95 (297 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967	Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for Worl d Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information

on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that

happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.
ALAW.ZIP	June 1990	*The Army Lawyer*/ *Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
21ALMI.EXE	January 1998	Administrative Law for Military Installations Deskbook, March 1997.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.

97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.
JA210.EXE	January 1998	Law of Federal Employment, May 1997.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	January 1998	Federal Tort Claims Act, May 1997.
JA250.EXE	January 1998	Readings in Hospital Law, January 1997.
JA260.EXE	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.EXE	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.EXE	January 1998	Tax Information Series, December 1997.
JA269W6.DOC	December 1997	Tax Information Series, December 1997.
JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	January 1998	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280HH.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 4, Legal Assistance, Chapter HH, October 1997.

JA280P1.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 1, LOMI, October 1997.
JA280P2.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 2, Claims, October 1997.
JA280P3.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 3, Personnel, October 1997.
JA280P4.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 4, Legal Assistance (minus Chapter HH), October 1997.
JA280P5.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 5, Reference, October 1997.
JA285V1.EXE	January 1998	Senior Officers Legal Orientation Deskbook, December 1997.
JA285V2.EXE	January 1998	Senior Officers Legal Orientation Deskbook, December 1997.
JA280P1.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.
JA280P2.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	December 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/ Reference), February 1997.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.

JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.

YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on “Files” button.

(3) At the “Files Libraries” window, click on the “File” button (the button with icon of 3" diskettes and magnifying glass).

(4) At the “Find Files” window, click on “Clear,” then highlight “Army_Law” (an “X” appears in the box next to “Army_Law”). To see the files in the “Army_Law” library, click on “List Files.”

(5) At the “File Listing” window, select one of the files by highlighting the file.

a. Files with an extension of “ZIP” require you to download additional “PK” application files to compress and decompress the subject file, the “ZIP” extension file, before you read it through your word processing application. To download the “PK” files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the “PK” files, execute your download task (follow the instructions on your screen and download each “PK” file into the same directory. *NOTE: All “PK”_files and “ZIP” extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select “c:\wp60\wpdocs\ArmyLaw.art” and download all of the “PK” files and the “ZIP” file you have selected. You do not have to download the “PK” each time you download a “ZIP” file, but remember to maintain all “PK” files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on “Download Now” and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the “c:\” prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The “PK” files and the “ZIP” extension file(s) must be in the same directory!

(8) Type “dir/w/p” and your files will appear from that directory.

(9) Select a “ZIP” file (to be “unzipped”) and type the following at the c:\ prompt:

PKUNZIP JANUARY.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General’s School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. Articles

The following information may be useful to judge advocates:

Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961 (1997).

8. TJAGSA Information Management Items

The Judge Advocate General’s School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

9. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.