THE ARMY LAWYER

Headquarters, Department of the Army

June 2011

ARTICLES

Post-Trial Delay: The Möbius Strip Path
Major Andrew D. Flor

Solutions for Victims of Identity Theft: A Guide for Judge Advocates to Assist Servicemembers in Deterring, Detecting, and Defending Against This Growing Epidemic
Major Cindie Blair

USALSA REPORT

U.S. Army Legal Services Agency

Trial Judiciary Note

A View from the Bench: The Care and Keeping of Documents: Proper Handling and Use of Documentary Exhibits at Trial
Lieutenant Colonel Wendy P. Daknis

CLE NEWS

CURRENT MATERIALS OF INTEREST

Department of the Army Pamphlet 27-50-457

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

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Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

Lore of the Corps

Articles

USALSA Report

U.S. Army Legal Services Agency

Trial Judiciary Notes

Lore of the Corps

Who is Where and What are They Doing? A History of the JAGC Personnel Directory

Fred L. Borch III

Regimental Historian & Archivist

Today's JAG PUB 1-1, *JAGC Personnel and Activity Directory and Personnel Policies*,[1] appears every October and is eagerly anticipated by more than a few Army lawyers. Why? Because it shows who is in charge at a particular location or command, other judge advocates (JAs) assigned there, when individuals might be scheduled to depart, and a host of other details. The directory also is handy for calculating who is eligible for promotion, and when, and who must retire. But while JAs in the field use it for these purposes, the history of the directory reveals that its original purpose was very different.

Prior to 1963, there was no directory. But then again, the Career Management Division (CMD) for the Corps (as today's Personnel, Plans and Training Office (PP&TO) was then known) did not have much in the way of procedures for managing Army lawyers. In the first place, it "was staffed almost exclusively with civilian employees . . . and there were only two lawyers," both of whom were captains.[2] While the head of the CMD was a lieutenant colonel, it was clear that it was the civilian personnel who were in charge of managing Corps personnel. Consequently, when then–Lieutenant Colonel (LTC) George S. Prugh arrived in the Pentagon in June 1962 to be the new Chief, CMD, he was shocked to learn the process in place for assigning JAs throughout the Army. As Prugh explained in 1975:

> I found that assignments were being made by the chief clerk, a civilian named Eileen Burns, who was well known throughout the Corps. I decided in my own mind that it was wrong for a civilian to be assigning the lawyers. A lawyer could and should assign other lawyers, because he knows best what sort of requirements are needed at particular jobs. I was horrified on two or three occasions early in that game, going to visit with Miss Burns to see The Judge Advocate General [MG Charles L. "Ted" Decker], when she would make an assignment on a senior officer, a colonel, for example, and in discussing [the officer] would say, "Oh! He has a mediocre record," or some other slighting remark that would be clearly devastating to that man's position with respect to The Judge Advocate General who apparently didn't know many of the officers below the rank of colonel.[3]

Prugh quickly put a stop to Miss Burns' role in managing JA careers (she was called "General Burns" behind her back and the CMD in her day was affectionately known as the "Career Manglement Division"). But, while assignments of Army lawyers began to be made, or at least controlled, by other uniformed attorneys, Prugh discovered that getting control of the JA assignment process was difficult, because the CMD did not have a roster of active duty JAs, their current assignments, or locations. Other than pulling the actual paper file on a particular Army attorney, there was no way to know many details about who was in the Corps, much less how long a particular JA had been in a particular assignment, or who was up for promotion to the next grade.

What the CMD did have was a large table (known by the moniker "bun warmer") and when this table was opened (it had a rolling top) there was an organization chart that showed which Army commands and units had JAs assigned to them. But there was still nothing more than a name and rank. This made managing people difficult, because there was not enough information to match JAs with assignments, ensuring that those best suited for a particular job got that job. Additionally, when a JA with special qualifications was needed, it was "an impossible situation." As Prugh explained, "if we wanted, say, a captain with five years of experience, who could speak Spanish and was an international law expert, we would have one heck of a time trying to find out who this was."[4]

Realizing that the management of personnel in the Corps had to be done better, LTC Prugh directed that two rosters be created of JAs and legal administrative technicians (as warrant officers (WOs) in the Corps were then called). The first list, called the "Station Roster," listed each location

[1] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY, at i (Aug. 1963) [hereinafter JAG PUB. 1-1].

[2] U.S. Army Military History Institute, Senior Officers Debriefing Program: Conversations Between Major General (MG) George S. Prugh and Major (MAJ) James A. Badami 2 (June 18, 1975) [hereinafter Prugh Oral History] (unpublished manuscript, on file with The U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS) Library, Charlottesville, Virginia). For more on MG Prugh, see George R. Smawley, *The Past as Prologue: Major General George S. Prugh, Jr. (Ret.) (1942–1975)—Witness to Insurgent War, the Law of War, and the Expanded Role of Judge Advocates in Military Operations*, 187 MIL. L. REV. 96 (2006).

[3] *Id*. at 3.

[4] *Id*. at 4–5.

where JAs and WOs were assigned, and then listed each individual by name, grade, Regular Army or other active duty status. For organizations in the Continental United States (CONUS), the date that each individual was assigned to the organization was shown. For overseas organizations, the date listed was the "projected normal reassignment date." The second roster was an alphabetical listing of all JAs and warrant officers, listing name, service number, rank, and assignment location.

After LTC Prugh and the personnel in the CMD completed these rosters, Prugh decided that the information should be published and disseminated to the field. The result was the August 1963 publication of the first "JAGC Personnel and Activity Directory." On the cover of this 89-page, 8½-by-11-inch stapled paperback was a drawing of a JA in his Class A uniform and the Corps' crossed pen and sword branch insignia. The directory included the names of all Regular and Reserve JAs on active duty, all warrant officers on active duty, and all civilian attorneys. It also listed all Army officers attending law school on the excess leave program (the Funded Legal Education Program did not yet exist).

The "Foreword" to this first directory announced that "it is planned to publish the directory annually."[5] In fact, yearly publication did occur; a new directory has been published every year since 1963. For more than thirty years, release of the directory coincides with the annual World Wide Continuing Legal Education conference held the first week of October in Charlottesville, Virginia.

From the beginning, the directory was a handy reference for personnel working in the Career Management Office and its successor organization at Office of The Judge Advocate General (OTJAG), PP&TO. First, the directory was a quick guide to see who was pending a "PCS" (permanent change of station) or "DEROS" (date eligible for return from overseas). Second, the directory was the starting point to check the number of personnel actually assigned against an SJA office's "TOA" (table of allowances) or "TDA" (table of distribution and allowances)—which PP&TO had to monitor to ensure authorizations matched the actual number and grade of officers assigned to an office. Finally, the directory was the "JAG Corps Phonebook" in the era when the only possible real-time communication was by telephone. From 1983 to 1985, for example, when then–LTC Raymond P. Ruppert served as the assignment officer at PP&TO for captains, majors, and lieutenant colonels, Ruppert used the directory to find a telephone number when he wanted to speak with a JA about an assignment. Ruppert also had a copy of the directory at home, which he used when placing late night telephone calls through the Pentagon switchboard to JAs assigned in Korea who needed new assignments in the Corps.[6]

While the importance of the directory to the management of the Corps is clear, Army lawyers in the field found it just as valuable in their careers. From the beginning, JAs have used the directory for at least four purposes. First, to determine who is where and, if that location is desirable, when that person might be departing in order to request that person's assignment. Second, to identify who is in a particular promotion zone and who is likely to be promoted. Third, when promotion lists are announced, to go through the date of rank roster and place a "P" next to the promotable person's name, thereby tracking career progression of other JAs. Fourth, when they needed to make contact with other organizations, to find a legal point of contact (POC) and talk lawyer-to-lawyer before approaching outside commanders directly. As long as there is a personnel directory, this is likely to continue.

Over the years, the size of the directory—and its contents—have increased greatly. In the late 1970s, for example, PP&TO published its first "JAGC Personnel Policies" handbook. This booklet contained basic Army personnel policies for officers, but also added the important JAGC-specific policies, e.g. assignment of husband-wife JAs. This separate publication was merged with the Personnel Directory in the 1980s and today is contained in an appendix to JAG PUB 1-1.

Another major addition to the directory also occurred in the late 1970s, when PP&TO created an alphabetical listing of personnel by grade. Until this occurred, it was impossible to find where a JA CPT was stationed, for example, without going through the entire station roster or date of rank roster. Other additions over the years include a roster of all Reserve Component JAs and WOs, and a roster of all military occupational specialty (MOS) 27D enlisted personnel in the Corps. As a result, the 89-page booklet started by Prugh is now more than 500 pages.

While the first directory had a white paper cover, subsequent issues began to change color on an annual basis: red, yellow, blue, buff, tan, green, and so forth. When then LTC Barry Steinberg was the Chief, PP&TO, however, he had a special issue of the directory published with pink covers for distribution to the few female judge advocates assigned to OTJAG. Five copies were printed. One was presented to The Judge Advocate General, Major General Hugh Clausen, who accepted it in the humorous spirit it was intended. One was given to each of the three female JAs in OTJAG. One was saved in PP&TO. It is hard to know whether the three female JAs who received pink copies thought their special edition was humorous, but one told Steinberg she did not think having a pink directory was

[5] JAG PUB. 1-1, *supra* note 1, at i.

[6] E-mail from Colonel (Ret.) Raymond P. Ruppert, to author (17 May 2011, 12:14:00 EST) (on file with Historian's files, TJAGLCS).

funny.[7] Whether any of Steinberg's special issue directories have survived is unknown, but PP&TO no longer has a copy. For the last several years, the JAG PUB 1-1 has abandoned the old solid-color binding and the cover is now illustrated with photographs.

Beginning in the 1980s, as JAs began to be assigned to clandestine units in the Army, those individuals would disappear from the directory—for as long as they were in these "black" jobs. This continues to be the practice: a JA will disappear for two or three years and then reappear in the pages of JAG PUB 1-1.

In the 1960s, 1970s and 1980s, the directory was known as the "stud book," and this moniker is still heard today. Officially, however, the directory is called the "JAGC Personnel and Activity Directory."

How long *The Directory*, as the 2010-2011 issue of JAG PUB 1-1 is titled, will be published in paper, and on an annual basis, is an open question. Advances in electronic media and in portable document files make it likely that an all-electronic directory will soon replace the paperback version that has been the norm since 1963. But even the emergence of a paperless directory will not change the reason that a directory is still necessary as a management tool to show who is where and what they are doing.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

[7] E-mail from Colonel (Ret.) Barry Steinberg, to author (15 May 2011, 16:05:00 EST) (on file with Historian's files, TJAGLCS).

Post-Trial Delay: The Möbius Strip Path[1]

Major Andrew D. Flor[*]

I. Introduction

Post-trial delay, or delay between the trial and appellate review, is not a new problem. In fact, post-trial delay has been the subject of frequent appellate opinions almost since the inception of the Uniform Code of Military Justice (UCMJ) in 1950.[2] However, a historical review of post-trial delay appellate decisions reveals an interesting phenomenon. Over the last fifty years, courts have twice departed from the original standard of review based upon prejudice, only to later return to that prejudice-based standard. This circuitous path that the courts have followed has only caused confusion and uncertainty with regards to post-trial delay. This article argues that the appellate courts should stop wandering this Möbius strip path, as depicted in Appendix A, and instead continue to apply the prejudice test to post-trial delay.

The courts should adhere to this standard for three primary reasons. First, post-trial delay does not normally affect the findings or the sentence in each case. Generally speaking, the accused stands convicted and sentenced for the crimes he or she committed regardless of the post-trial delay in the case.[3] Second, and because the post-trial delay does not affect the findings or the sentence, those cases without prejudice should not receive relief for what amounts to an administrative delay.[4] This position is consistent with Article 59, UCMJ,[5] and the standard of prejudice articulated by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Wheelus*.[6] Finally, the standard of prejudice may occasionally lead to arbitrary results,[7] but this simple prejudice test would be no more arbitrary than the artificial timelines that the courts have attempted to impose on post-trial delay over the years.[8]

In order to show that post-trial delay review has only briefly deviated from the standard of simple prejudice in the past, and that it never should, this primer will trace the Möbius strip path followed by the military appellate courts over the years. First, this primer will examine the history and origins of post-trial delay from the earliest published opinions up until *Dunlap v. Convening Authority, Combined Arms Center* in 1974. The *Dunlap* decision signaled the first major shift for post-trial delay review away from prejudice, but that shift lasted only five years. This article will next cover that short period from the *Dunlap* decision until it was abandoned in 1979 in *United States v. Banks*.[9] Third, this article will cover the period of case-by-case post-trial delay review following the *Banks* decision in 1979 until 2002, when the CAAF decided *United States v. Tardif*.[10] Next, this article will examine the current state of post-trial delay review from the *Tardif* decision to the present. Finally, this

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[1] A Möbius Strip is a piece of paper that has been twisted 180 degrees and the ends taped together. It creates a continuous, one-sided surface from start to finish. For example, if a pencil line is drawn along the length of the strip from the starting point, it will traverse the entire piece of paper on "both" sides and end up at the exact same starting point. The Moebius Strip, http://mathforum.org/sum95/math_and/moebius/moebius.html (last visited Jan. 28, 2011).

[2] *See* 64 Stat. 108 (1950) (enacting the UCMJ). The Court of Military Appeals (CMA) issued the earliest recorded post-trial delay opinion in 1958. *See* United States v. Tucker, 26 C.M.R. 367, 369 (C.M.A. 1958).

[3] However, one major problem with post-trial delay is that the convening authority must approve the results of the court-martial before the conviction and sentence become final, or before the case can be reviewed on appeal. *See* UCMJ arts. 60, 66 (2008). Delays in the post-trial process can impede this important role the convening authority plays, and can impede the possibility of clemency for the accused. "It is at the level of the convening authority that an accused has his best opportunity for relief." United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

[4] "[W]e conclude that any meaningful relief available would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay." United States v. Magincalda, No. 200900686 (N-M. Ct. Crim. App. Aug. 26, 2010) (refusing to grant relief for a post-trial delay of 857 days from trial until action).

[5] "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices the substantial rights of the accused*." UCMJ art. 59(a) (2008) (emphasis added).

[6] The court in *Wheelus* held:

> [T]he following [is the] process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity.

49 M.J. 283, 288 (C.A.A.F. 1998).

[7] *Compare* United States v. Tucker, 26 C.M.R. 367, 369 (C.M.A. 1958) (granting dismissal with prejudice for a two year delay), *with* United States v. Bush, 68 M.J. 96, 104 (C.A.A.F. 2009) (granting no relief for a seven year delay).

[8] *See, e.g.*, Dunlap v. Convening Authority, Combined Arms Center, 48 C.M.R. 751, 754 (C.M.A. 1974) (imposing an arbitrary ninety-day limit from trial to convening authority action), and United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006) (imposing three arbitrary timelines: 120 days from trial to convening authority action, thirty days from convening authority action to docketing at the service court, and eighteen months from docketing to appellate court decision).

[9] United States v. Banks, 7 M.J. 92, 93–94 (C.M.A. 1979).

[10] United States v. Tardif, 57 M.J. 219, 223–25 (C.A.A.F. 2002).

primer will use the 2009–2010 term of court as a case study to establish the true Möbius strip nature of post-trial delay review. The 2009–2010 term of court will also show that despite any opinions to the contrary, the courts ultimately, and correctly, test post-trial delay cases for prejudice.

A. The Origins of Post-Trial Delay Review (1958–1974)

1. The Earliest Post-Trial Delay Opinions (1958–1960)

As early as 1958, post-trial delay was addressed in a published opinion: *United States v. Tucker*.[11] The post-trial delay at issue in *Tucker* was not the normal type of post-trial delay we see today. Most delays today are caused by slow processing before the appellate court decision.[12] In *Tucker*, the delay occurred after the initial appeal when the Government took more than one year to serve the Navy Board of Review (NBR)[13] opinion on the appellant after it was decided.[14] In addition to that delay, the appellant's petition for review was not forwarded to The Judge Advocate General of the Navy for more than one year after the opinion was finally served.[15] The Court of Military Appeals (CMA) dismissed the charge and its specifications, stating that "[u]nexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this Court."[16]

Two years later, in *United States v. Richmond*, the court faced a question of "speedy trial" rights that the court decided as an issue of "timely review" instead.[17] The court distinguished the two types of delay by stating that "[a]n accused is guaranteed the right to a speedy trial, but that privilege must be distinguished from his rights on appeal."[18] The former right evolved from the Magna Carta and is found in the Sixth Amendment to the Constitution and must be "jealously guarded," while the latter normally results in relief only if the accused is prejudiced by the delay. The court cited to *Tucker* as the only example in the court's history where post-trial delay was severe enough to require dismissal of the charges.[19] The only delay in *Richmond* that garnered any attention by the court was the ten month delay from trial to convening authority action, which the court called "unusual." However, in the "absence of any assertion that the accused's defense on rehearing was impaired or hampered, or that he was otherwise prejudiced," the court would not dismiss the conviction.[20]

As shown by *Richmond*, as early as 1960 the court started to address post-trial delay under a standard of prejudice. And, even while the post-trial delay review in *Tucker* was not directly decided on grounds of prejudice, the court was clearly concerned with the prejudicial impact of other errors in the case that might have influenced their decision to dismiss the case.[21]

2. The Early 1970s

After *Tucker* and *Richmond*, post-trial delay did not receive attention from the court for another ten years. However, from 1970 through 1974, the court would publish no fewer than eleven post-trial delay opinions. Almost all of these eleven opinions would base their decisions, at least in part, on whether the accused suffered prejudice from the delay. All eleven opinions are discussed below.

In September 1970, the court decided *United States v. Ervin*, in which the record of trial was lost for almost three years, so that the appellant was not promptly served his copy of the Navy Board of Review decision. The court found that the case was due to be reversed because of erroneous sentencing instructions, and noted that the accused would have a case for dismissal on rehearing based on the three-year delay. The court cited to *Richmond* for the proposition that "consideration still must be given to whether the accused was prejudiced by the delay." The court concluded that rehearing would serve no useful purpose, as the appellant had long since served his sentence and been

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[11] *Tucker*, 26 C.M.R. at 369. Ironically, showing the true Möbius nature of post-trial delay review, the Court of Appeals for the Armed Forces (CAAF) cited *Tucker* in the *Tardif* decision. *See Tardif*, 57 M.J. at 222. There do not appear to be any published post-trial delay opinions prior to 1958 (research on file with author).

[12] *See, e.g.*, *Moreno*, 63 M.J. at 133.

[13] The precursor to the Navy-Marine Corps Court of Criminal Appeals.

[14] Article 67 requires that any appeal to the CAAF be filed within sixty days from the date the accused is served with the decision of the Court of Criminal Appeals (CCA) or the date of mailing of the decision of the CCA. *See* UCMJ art. 67(b) (2008). While this does not impose a requirement on how expeditiously the service CCA decisions must be served, it does set a guideline. This requirement did not exist when *Tucker* was written, but the courts were concerned about expeditious post-trial processing. *See* Military Justice Amendment of 1981, Pub. L. No. 97-81, 95 Stat. 1087 (adding the sixty-day provision to the statute). *See also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 13-9 (16 Nov. 2005) (requiring service of the Army CCA decision on the accused in a manner as "expeditiously as possible").

[15] *See* UCMJ art. 67(b) (2008).

[16] *Tucker*, 26 C.M.R. at 369.

[17] United States v. Richmond, 28 C.M.R. 366, 368 (C.M.A. 1960).

[18] *Id.* at 369.

[19] *Id.*

[20] *Id.* at 371.

[21] Specifically, the court was concerned with the "prejudicial effect" of prior convictions that were improperly revealed to the panel. In fact, in its decretal paragraph, the court stated, "The decision of the Board of Review is reversed. In view of all the circumstances [including, presumably, the delay] the charge, with all its specifications, is dismissed." *Tucker*, 26 C.M.R. at 368.

separated from the service, and dismissed the charges.[22] In a concurring opinion citing to *Tucker*, Judge Ferguson wrote that he would have dismissed the charges "regardless of the existence of any other error" because the lengthy delay constituted "a due process violation."[23]

Five post-trial delay opinions were issued by the CMA in early 1971. In *United States v. Fortune*, the Navy Board of Review decision was not served on the appellant for twenty months. The court cited *Ervin* and dismissed the charges and specifications in a terse three-paragraph opinion. The court does not mention prejudice, but the court noted that the Government conceded that the sentencing instructions were erroneous, and that the appellant was currently separated from the service, so there was "no useful purpose in continuing the proceedings."[24]

In *United States v. Prater*, the court made several interesting observations surrounding post-trial delay. First, the court stated that "the due process clause of the Fifth Amendment [does not apply] *ex proprio vigore* to appellate review of military trials."[25] Instead, the concept of "military due process" covered the issue of post-trial delay. Second, the court cited to *Richmond* for the principle that post-trial delay is not covered by the same law as a speedy trial claim.[26] Finally, the court held that a nine-month delay from trial to convening authority action was "not a sufficient" basis for reversal in the absence of prejudicial error (citing *Tucker* and *Ervin*).[27] Unfortunately, the *Prater* opinion seemed to be of dubious precedential value. The lead opinion was only from one judge, Judge Darden.[28] The concurrence in the result by Chief Judge Quinn disagreed on the concept of due process.[29] The dissent by Judge Ferguson, like his opinion in *Ervin*, stated that he would have granted relief, finding "prejudice in the fact of delay alone."[30] Judge Ferguson would have also found other errors in the case.[31]

In April 1971, after *Fortune* and *Prater*, the court decided *United States v. Davis*. The delay consisted of six separate periods of delay, one as short as five days between authentication and convening authority action, and the longest being seventy-eight days to prepare a thirty-nine-page record of trial. The court cited to both *Richmond* and *Prater* for the proposition that "[i]nordinate delays do not '*ipso facto*' demonstrate prejudice." In the absence of any identified prejudice, the court did not grant any relief.[32] As in *Prater*, the majority opinion consisted of Judge Darden, while Chief Judge Quinn concurred in the result, and Judge Ferguson dissented and would have dismissed the charges based on the delays (again citing *Tucker*).[33]

The next post-trial delay opinion was a month later, in *United States v. Adame*. This time, Judge Ferguson joined the majority in voting to dismiss, while Judge Darden (the author of *Fortune* and *Davis*) dissented. The court dismissed the charges based upon an erroneous ruling on admissible evidence combined with a delay of sixteen months in serving the Navy Board of Review opinion on the appellant, and cited to *Ervin* and *Fortune* for the proposition that "no useful purpose" would be served by a remand because the appellant's sentence to confinement had long since been served, and the suspension period for his bad conduct discharge had also expired.[34] The dissent cited to *Davis* and *Prater*, and stated that a rehearing could still be appropriate, as the appellant was still on active duty.[35]

Seven days later, in a per curiam opinion, the court cited *Fortune* and *Adame* and dismissed the charges in *United States v. Sanders* for a failure to serve the Navy Board of Review decision on the appellant within nineteen months. Again, the case showed errors independent of the delay (in this case, all irregularities in the record of trial), but because of the delay "the period of confinement and the probationary period for remission of the bad-conduct discharge" had expired, so that the case "[could] properly be concluded" with a dismissal.[36]

These five opinions in 1971 show that the court was still requiring prejudice or at least independent error before it would grant relief for post-trial delays. The opinions that granted relief (*Fortune*, *Adame*, and *Sanders*) did so based on errors that would have warranted reversal without the delays, but found that the delays had rendered rehearing pointless. The two opinions that did not grant relief (*Prater* and *Davis*) specifically cited the absence of prejudice. One judge (Judge Ferguson) held the opinion that delay alone

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[22] United States v. Ervin, 42 C.M.R. 289, 290 (C.M.A. 1970).

[23] *Id.* at 291 (Ferguson, J., concurring).

[24] United States v. Fortune, 43 C.M.R. 133, 133 (C.M.A. 1971).

[25] United States v. Prater, 43 C.M.R. 179, 182 (C.M.A. 1971). *Ex proprio vigore* means "[b]y their or its own inherent force." BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

[26] *Prater*, 43 C.M.R. at 182.

[27] *Id.* at 183.

[28] *Id.* at 180.

[29] *Id.* at 183 (Quinn, C.J., concurring in the result).

[30] *Id.* (Ferguson, J., dissenting).

[31] *Id.* at 186 (Ferguson, J., dissenting). Judge Ferguson would also have found errors in the detailing of defense counsel to represent the accused, as well as error in the accused being treated as a sentenced prisoner prior to review by the convening authority. *Id.*

[32] United States v. Davis, 43 C.M.R. 381, 382 (C.M.A. 1971).

[33] *Id.* at 383 (Ferguson, J., dissenting).

[34] United States v. Adame, 44 C.M.R. 3, 3 (C.M.A. 1971).

[35] *Id.* at 3–4 (Darden, J., dissenting).

[36] United States v. Sanders, 44 C.M.R. 10, 11 (C.M.A. 1971).

could justify dismissal in the absence of other error or more specific prejudice, but his views did not prevail at that time.

After those five opinions in early 1971, the court did not decide another post-trial delay opinion for almost ten months. In 1972, the court decided *United States v. Whitmire*, which dealt with a long delay in appellate review of the record of trial. *Whitmire* showed that the court had started to solidify the law regarding post-trial delay.[37] While the length of the delay was not mentioned in the opinion, the court assumed that the explanation for the delay was inadequate. The court nonetheless held that for relief to be granted, "[i]t must further appear that the delay presents a fair risk of prejudice to the accused," which was lacking in this case. The court cited *Prater* as authority and granted no relief based on post-trial delay.[38]

Later in 1972, the court addressed an interesting issue in *United States v. Wheeler*. The appellant faced both pretrial and post-trial delays. As a result, he attempted to argue that the combination of the two violated his rights. The court did not agree. Each delay was, and should be, addressed separately according to the court. With respect to post-trial delay, the court cited *Prater* for the proposition that "unexplained appellate delays may demand a dismissal if prejudicial errors have occurred." Finding no such error, the court did not grant relief for post-trial delay.[39]

In 1973, the court decided *United States v. Timmons*. The court held that a six-month delay in the convening authority review of the case to be unreasonable because it was without valid explanation.[40] However, the other errors in the case had been remedied by the Army Court of Military Review, and the court was "loathe [sic] to declare that valid trial proceedings are invalid solely because of delays in the criminal process after trial."[41] The court affirmed the findings of guilty and remanded the case for reassessment of the sentence based on an error in the Staff Judge Advocate's Recommendation.[42] The dissent agreed that the SJAR was prejudicially inadequate, but stated that "the interest of justice would be better served by dismissal," citing *Tucker* without further explanation.[43]

Later in 1973, the court decided *United States v. Gray*. This case dealt with a delay of 212 days from trial until convening authority action. Relying heavily on *Timmons*, the court found that despite the "deplorable and unreasonable" delay in this case, the lack of prejudice did not require relief for post-trial delay.[44] However, the tone had clearly shifted over the previous few years. The stronger language used by the court ("deplorable") signaled that their patience was running out, and that a seismic shift was coming.

The last opinion before that seismic shift was *United States v. Jefferson*. The post-trial delay in this case was 244 days from trial until convening authority action. The court again called the delay "deplorable and unreasonable," and stated that the "respectability" of any jurisdiction collapses if it does not serve the ends of justice by providing "an expeditious and impartial review." However, the court could find no prejudice to the appellant. As a result, the court granted no relief. In a parting shot before the landmark *Dunlap* opinion, the court held, "[o]ur affirmance on this case should not be read to mean that the Government may delay the post-trial review of a case with impunity. The Uniform Code provides one means of insuring against unnecessary delay in the deposition of a case, Article 98, UCMJ, 10 USC § 898."[45] The fact that the court highlighted the possibility of criminal prosecution against parties responsible for post-trial delay signaled that the court had run out of patience with post-trial delay.

Of the eleven post-trial delay cases from 1970 through 1974, six explicitly denied relief based on lack of prejudice to the appellant. Four others (*Ervin*, *Fortune*, *Adame*, and *Sanders*) had reversible errors independent of post-trial delay, and were dismissed rather than remanded because, in the court's view, the delays had rendered other remedies pointless.[46] In one case (*Timmons*), the court remanded the case for a different error, and expressed its unwillingness to dismiss for delay alone. Thus, the court was deciding cases on a prejudice standard: unreasonable post-trial delays could convert a reversal into a dismissal, but the court would not reverse for delay alone in the absence of prejudice. However, the standard was about to change.

B. The *Dunlap* Era (1974–1979)

In 1974, the seismic shift finally came. In the landmark opinion of *Dunlap v. Convening Authority, Combined Arms*

[37] United States v. Whitmire, 45 C.M.R. 42, 43 (C.M.A. 1972).

[38] *Id.* at 43.

[39] United States v. Wheeler, 45 C.M.R. 242, 248–49 (C.M.A. 1972).

[40] United States v. Timmons, 46 C.M.R. 226, 227 (C.M.A. 1973).

[41] *Id.* at 228.

[42] *Id.* at 229.

[43] *Id.* (Quinn, J., dissenting).

[44] United States v. Gray, 47 C.M.R. 484, 486 (C.M.A. 1973).

[45] United States v. Jefferson, 48 C.M.R. 39, 40–41 (C.M.A. 1971) (citing *Timmons*, 46 C.M.R. at 227–28 (Article 98, UCMJ, Noncompliance with Procedural Rules, is a punitive article that could be used for prosecuting individuals responsible for "unnecessary delay in the disposition of any case." *See* UCMJ art. 98 (2008)).

[46] This is consistent with the court's ruling in *Tucker*, where various other errors warranted reversal, but "in view of all the circumstances" (including the delay) the court instead decided to dismiss.

Center, the court prospectively required convening authorities to take action on cases where the accused was in confinement or continuous restraint after trial within ninety days after the end of trial, or else a presumption of prejudice would arise. If that happened, the court would dismiss unless the Government could meet a "heavy burden" to show its own diligence.[47]

In *Dunlap*, the accused pleaded guilty in Germany and was sent to confinement in Fort Leavenworth. The Staff Judge Advocate recommended a sentence rehearing because the court-martial did not have enough enlisted members. The convening authority agreed, but sent the record and request for a rehearing to Fort Leavenworth instead of ordering it himself. The Leavenworth convening authority concluded that the court-martial had lacked jurisdiction and that retrial was necessary. He returned the record of trial to the Soldier's command in Germany, which ordered retrial and asked Leavenworth to assume jurisdiction. Eleven months after the original trial, Leavenworth re-referred the charges. Three months after that, the appellant filed a petition for extraordinary relief with the CMA, asking them to dismiss the charges based upon unreasonable post-trial delay. Throughout these proceedings, he remained in confinement.[48] The CMA dismissed the charges against Dunlap,[49] but also created a prospective rule to discourage further unreasonable delays.

The court noted that unreasonable post-trial delays had been a serious problem for several years, citing the joint annual reports issued by the court and the services' Judge Advocates General. It quoted the 1972 report as calling for "positive action" to assure speedy justice, and cited various other authorities on the need for expeditious processing of criminal justice actions, before and after trial. The court made clear that even though there was no statute comparable to Article 10, UCMJ, for post-trial delay, Congress had still commanded that the post-trial process be timely, for example by requiring the court to act on petitions for review within thirty days.[50] Finally, the court reached back to *Tucker*, and reiterated that "[u]nexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this [c]ourt."[51] In setting the ninety-day limit, the court stated that "[y]ears of experience have demonstrated the need for a guideline" when the accused is confined after trial, and took the ninety-day period from its then-existing Article 10 case law.[52]

One judge dissented. Judge Duncan, while he agreed that the "evil or apparent evil" that results from post-trial delay is unacceptable, disagreed with the arbitrary nature of the ninety-day limit. Under the circumstances, he would have held to the simple post-trial prejudice test from *Gray* and *Timmons*.[53]

It took several more decisions to elucidate the true extent of the *Dunlap* decision. For example, in *United States v. Brewer*, the court confirmed that a general court-martial convening authority's post-action review, when required, had to occur within the ninety-day window.[54] In *United States v. Manalo*, the court confirmed that the first day of confinement did not count toward the ninety-day window, but the date of the action did count.[55]

Dunlap had serious consequences in the field. Cases were dismissed even if the delay was ninety-one days, a mere one day over the limit.[56] In *United States v. Montgomery* the convening authority acted ninety-one days after trial. One day of that delay was attributable to a snowstorm which closed the entire post. The Army Court of Military Review was not sympathetic, and dismissed the charges with prejudice.[57] In *United States v. Brantley*, the convening authority took action on the ninety-first day. After much discussion of the "onerous and disruptive" *Dunlap* rule, the Navy Court of Military Review dismissed the charge with prejudice.[58]

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[47] Dunlap v. Convening Authority, Combined Arms Center, 48 C.M.R. 751, 754 (C.M.A. 1974). In requiring the "heavy burden," *Dunlap* cited *United States v. Marshall*, 47 C.M.R. 409, 410–13 (C.M.A. 1973), applying a "heavy burden" standard to an Article 10 case.

[48] *Dunlap*, 48 C.M.R. at 752.

[49] *Id.* at 756. While the court did not explicitly address the issue of prejudice, it noted that no competent authority had explicitly determined why Dunlap should remain confined once the original court-martial was declared invalid, and that he had repeatedly requested release. *Id.* at 755. Thus, the court implicitly found prejudice before dismissing (as was to be expected, since the new rule abandoning that requirement did not go into effect until thirty days after *Dunlap* was issued). *Id.* at 754.

[50] *Dunlap*, 48 C.M.R. at 753–54 (citing UCMJ art. 67(c) (1968)).

[51] *Id.* at 754 (quoting United States v. Tucker, 26 C.M.R. 367 (C.M.A. 1958)).

[52] *Id.* at 756–57 (Duncan, J., dissenting).

[53] *Id.*

[54] United States v. Brewer, 1 M.J. 233, 234 (C.M.A. 1975). Brewer's bad conduct discharge special court-martial was convened and his sentence approved by the special court-martial convening authority, but because his sentence included a BCD, it had to be reviewed by the general court-martial convening authority. The court held that both the action and the review had to occur within the ninety-day window.

[55] United States v. Manalo, 1 M.J. 452, 453 (C.M.A. 1976).

[56] *See* United States v. Banks, 7 M.J. 92 (C.M.A. 1979).

[57] United States v. Montgomery, 50 C.M.R. 860, 861–62 (A.C.M.R. 1975). In part by relying on the CMA's Article 10 case law, the court stated that its inquiry was into the "overall" diligence of the Government, and did not find such diligence.

[58] United States v. Brantley, 2 M.J. 594, 595–97 (N.C.M.R. 1976). The court expressed "the greatest reluctance" in dismissing the case, as the evidence established the accused's guilt in stabbing a fellow Marine in the throat. *Id.* at 594.

After five short years, the CMA reversed course and abrogated the *Dunlap* rule in *United States v. Banks*. *Banks* answered a certified question from the Army Judge Advocate General: whether dismissal was required "where the accused received a fair trial free from error, was found guilty beyond a reasonable doubt, and where the delay of 91 days in the review of the conviction by the convening authority caused him to suffer absolutely no prejudice." The court answered in the affirmative, but prospectively eliminated the *Dunlap* rule.[59] In doing so, the court noted that post-trial prisoners had several protections that had not existed at the time of *Dunlap*, including continuous post-trial representation by counsel and availability of deferred sentencing.[60] Citing *Gray*, the court declared that future applications for relief based on post-trial delay would be tested for prejudice.[61]

C. The Case-by-Case Era of Post-Trial Delay Review (1980–2001)

For the next several decades, each case was dealt with separately on the standard of prejudice.[62] Until deciding *United States v. Tardif*[63] in 2002, the court did not establish any more post-trial timelines. On rare occasions, the court would find prejudice and grant relief. For example, in *United States v. Shely*, the convening authority took 439 days to take final action on a thirty-eight page record of trial. After being released from confinement, the appellant was assigned to the disciplinary barracks (instead of the transient barracks) for over a year while waiting for the convening authority to act. He provided the court a detailed affidavit describing the onerous conditions there. The court cited "indefensible delay at the convening authority and supervisory authority level," held that the case represented "another of a disturbing number of cases involving intolerable delay in the post-trial processing of courts-martial which have arisen since" *Banks* overturned *Dunlap*, and also found that Shely had "amply" demonstrated prejudice. The court dismissed the charges.[64]

Shely, however, was a rare example. Most post-trial delay cases between *Banks* and *Tardif* did not receive relief. For example, in *United States v. Dunbar*, the court did not find any prejudice in a 1,097-day delay between convening authority action and docketing at the court of military review. The entire verbatim record of trial was twenty-four pages, and the Government took thirty seven-months total to move the case from trial until docketing at the court of military review. Despite finding "bungling and indifference" and "egregious delay," the court found no prejudice and granted no relief.[65] Likewise, in *United States v. Jenkins*, the record of trial was lost for over four years. The total delay in the case was six-and-a-half years from trial until the first appellate decision. After stating that the court had "repeatedly denounced unexplained delays in the post-trial processing of courts-martial," the court held that the appellant had not shown any prejudice, and did not grant any relief.[66]

During the case-by-case era, questions of post-trial delay revolved around whether or not the accused was prejudiced by what amounts to an administrative delay.[67] In none of these cases did the post-trial delay directly impact the findings or the sentence that the accused received at trial. However, major changes in post-trial delay review would be forthcoming in two seminal cases, *United States v. Tardif* and *United States v. Moreno*.[68] Despite these opinions, the court did not return to a period of *Dunlap*-style relief for post-trial delay cases.

D. Post-Trial Delay: The Current State of the Law (2002 through Present)

The current state of the law originated in 2002. During that year, the CAAF issued the landmark decision of *United States v. Tardif*. The delay in that case consisted of more than twelve months from trial until referral of the record to the Coast Guard court. The Coast Guard court had held that the "appellant must show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights."[69] However, the CAAF reversed the Coast Guard court, and held that "a CCA has the authority under Article 66(c), UCMJ . . . to grant appropriate relief for unreasonable and unexplained post-trial delays." This relief could be granted even in the absence of prejudice.[70] This authority to grant relief under Article 66(c), UCMJ, exists independently of the ability of the court to find error in law under Article

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[59] *Banks*, 7 M.J. at 92–93.

[60] *Id.* at 93 (citing United States v. Palenius, 2 M.J. 86 (C.M.A. 1977), United States v. Brownd, 6 M.J. 338 (C.M.A. 1979)).

[61] *Banks*, 7 M.J. at 94 (citing United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973)).

[62] *See, e.g.*, United States v. Bell, 46 M.J. 351 (C.A.A.F. 1997).

[63] 57 M.J. 219 (C.A.A.F. 2002). *See infra* Part I.D.

[64] United States v. Shely, 16 M.J. 431, 431–33 (C.M.A. 1983).

[65] United States v. Dunbar, 31 M.J. 70 (C.M.A. 1990).

[66] United States v. Jenkins, 38 M.J. 287, 288 (C.M.A. 1993).

[67] Post-trial delay, however egregious, does not usually affect the validity of the findings or sentence, and is therefore administrative rather than substantive in nature.

[68] *See infra* Part I.D.

[69] United States v. Tardif, 55 M.J. 666, 668 (C.G. Ct. Crim. App. 2001) (citing United States v. Banks, 7 M.J. 92 (C.MA. 1979); United States v. Jenkins, 38 M.J. 287 (C.M.A. 1993); and United States v. Hudson, 46 M.J. 226 (C.A.A.F. 1997)).

[70] United States v. Tardif, 57 M.J. 219, 220–21 (C.A.A.F. 2002).

59(a), UCMJ, such as a due process violation for post-trial delay.[71] On remand, the appellant was granted five months of relief from his sentence to confinement.[72]

Tardif has its limitations. Article 66(c), UCMJ, by its very wording, applies only to Courts of Criminal Appeal.[73] Once a case is before the Court of Appeals for the Armed Forces, this review authority no longer applies.[74] *Tardif* also does not mandate or prescribe consistent results. Each of the Courts of Criminal Appeal applies and grants relief under *Tardif* in its own way.[75]

In 2005, the CAAF decided *Diaz v. Judge Advocate General of the Navy*, holding that Fifth Amendment Due Process rights included a right to "timely" post-trial review.[76] This laid the groundwork for the landmark case of *United States v. Moreno* one year later. In *Moreno*, the court took *Diaz* one step further and applied the four-factor *Barker v. Wingo*[77] due process violation test to post-trial delays. The four factors are: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right to a speedy review; and (4) prejudice. Each factor is weighed against the others, and no single factor is required to make a finding of a due process violation.[78] The court also further subdivided the prejudice factor into three sub-parts: (1) oppressive incarceration pending appeal; (2) anxiety and concern; and, (3) impairment of the ability to present a defense at a rehearing.[79]

Finally, the court set several post-trial review timeline standards where, if violated, there would be a presumption of unreasonable delay, and the *Barker v. Wingo* four-factor test would automatically be triggered. First, the convening authority action must take place within 120 days of trial. Second, the record of trial must be docketed with the service court of criminal appeals within thirty days. Third, the service courts must decide the case within eighteen months of docketing.[80] The Government can rebut the presumption of unreasonable delay on a case-by-case basis. In *Moreno*, the court found a due process violation based upon multiple delays totaling 1688 days from trial until completion of appellate review, including 490 days from trial to action, seventy-six-days from action to docketing, and 925 days from docketing to appellate decision.[81] The court reversed the case and allowed a rehearing, but capped the sentence upon rehearing to a punitive discharge.[82]

Following the *Moreno* decision, there were fears that the court was signaling a return to the harsh *Dunlap* review standard that the court implemented from 1974 through 1979. Despite these fears, the CAAF has consistently shown since then that *Moreno* was not *Dunlap* revisited.[83] Immediately following the *Moreno* decision, the CAAF declined to grant dismissal of cases in the event of a due process violation for post-trial delay.[84]

Three months after *Moreno*, in *United States v. Toohey*, the court placed a further limitation on its *Moreno* framework, expressly elevating the importance of prejudice in the following language:

> [This] case presents us with the question of how to strike this due process balance in the absence of any finding of prejudice under the fourth *Barker* factor. We believe that such circumstances warrant a different balancing of the four factors.

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[71] *Id.* at 223–25.

[72] United States v. Tardif, 58 M.J. 714 (C.G. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 394 (C.A.A.F. 2004) (summary disposition).

[73] "[T]he Court of Criminal Appeals may . . . affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact . . . should be approved." UCMJ art. 66(c) (2008).

[74] The CAAF review authority is limited to "the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Id.* art. 67(c) (2008). This means that the CAAF cannot reduce the sentence like a CCA. *See id.* art. 66(c).

[75] *See infra* Part I.E. *See also* United States v. Collazo, 53 M.J. 721, 726–27 (A. Ct. Crim. App. 2000) (granting four months sentence credit for unreasonable ten-month sentence delays under UCMJ art. 66(c) in the absence of prejudice). *Collazo* was written before and cited in *Tardif.*

[76] Diaz v. Judge Advocate General of the Navy, 59 M.J. 34, 37–38 (C.A.A.F. 2003).

[77] 407 U.S. 514 (1972). This opinion was a pre-trial delay due process violation decision, but had also been applied to post-trial delay due process violations by other courts. *See* United States v. Moreno, 63 M.J. 129, 135 n.6 (C.A.A.F. 2006).

[78] *Moreno*, 63 M.J. at 135–36 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972). *Barker* was a Sixth Amendment case dealing with pre-trial delays, but as noted in *Moreno*, civilian courts had been applyijng its test to post-trial delays analyzed as due process violations. *Id.* at 135 & n.6).

[79] *Id.* at 138–41.

[80] *Id.* at 142.

[81] *Id.* at 136–37.

[82] *Id.* at 144. On rehearing, Moreno was convicted again, and sentenced to a dishonorable discharge (DD). *See* United States v. Moreno, No. 200100715, 2009 WL 1808459, at *1 (N-M. Ct. Crim. App. June 23, 2009). His DD was later affirmed by the CAAF. *See* United States v. Moreno, 69 M.J. 36 (C.A.A.F. 2010) (summary disposition).

[83] For additional analysis of how the court has not returned to the harsh *Dunlap* rule, see Lieutenant Colonel James L. Varley, *The Lion Who Squeaked: How the* Moreno *Decision Hasn't Changed the World and Other Post-Trial News*, ARMY LAW., June 2008, at 80, 81–87; and Major Andrew D. Flor, *"I've Got to Admit It's Getting Better": New Developments in Post-Trial*, ARMY LAW., Feb. 2010, at 10, 10–17.

[84] *See, e.g.*, United States v. Dearing, 63 M.J. 478, 488–89 (C.A.A.F. 2006); United States v. Harvey, 64 M.J. 13, 25 (C.A.A.F. 2006); United States v. Simon, 64 M.J. 205, 208 (C.A.A.F. 2006) (*Dearing* and *Harvey* explicitly rejected dismissal "under the circumstances," and all three cases were remanded to the service courts for determination of further relief).

> Hence, where there is no finding of *Barker* prejudice, we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military system.[85]

The court found such "egregious" delay and remanded the case because over six years passed between the day of trial and the decision of the CCA. Following *Toohey*, at least one service court granted minor sentence relief in the absence of prejudice, but only with a finding of "egregiousness" after delays of nine years.[86]

A more recent case shows that the court had made yet another loop on the Möbius strip of post-trial delay review: *United States v. Bush*.[87]

In *Bush*, the record of trial was lost in the mail for over six years. The CAAF agreed with the lower court in finding this to be facially unreasonable, particularly in light of the fact that the trial was a guilty plea and the record of trial was only 143 pages. Despite this, the court held that the appellant's unsupported affidavit alleging prejudice due to a failure to find employment based upon a lack of a DD Form 214 was insufficient to establish prejudice under *Barker v. Wingo*.[88] The court then applied a secondary prejudice test in determining whether or not the due process violation was harmless beyond a reasonable doubt. The Government had met their burden to prove that the violation was harmless because the appellant's unsupported affidavit was insufficient to establish prejudice.[89] To hold otherwise, the court held, would "adopt a presumption of prejudice . . . in the absence of *Barker* prejudice."[90]

Despite language in *Moreno* to the contrary, *Bush* reflects the current state of the law: prejudice is the standard of review for post-trial delay.[91] Ironically, the court keeps returning to this standard throughout the history of post-trial delay review.[92] As the next section will show, the 2009-2010 term of court serves as an excellent case study to show that the post-trial delay standard of review has completed a full circuit on the Möbius strip and has essentially returned to a simple prejudice test.[93]

E. Analysis of All Post-Trial Delay Opinions in the 2009–2010 Term of Court

Over the 2009–2010 term of court, there were twenty-five opinions from the military appellate courts that addressed post-trial delay.[94] Only one of these opinions was issued by the CAAF.[95] The remaining twenty-four opinions were from the service courts of criminal appeal. Only three of those opinions granted any relief for post-trial delay: *United States v. Benson*,[96] *United States v. Beaber*,[97] and *United States v. Sapp*.[98] None of these three opinions granted relief for a due process violation under *Moreno*. All granted relief under the service courts' authority to assess sentence appropriateness under Article 66(c), UCMJ.[99]

Each of the service courts issued opinions dealing with post-trial delay, but the number of opinions varied depending on the service. The Air Force and the Navy-Marine Corps courts had the most opinions dealing with post-trial delay with ten and nine cases, respectively. Meanwhile, the Army and the Coast Guard courts each had three opinions dealing with post-trial delay. Appendix B

[85] United States v. Toohey, 63 M.J. 353, 361–62 (C.A.A.F. 2006).

[86] United States v. Walden, 2008 WL 5252700, at *4–5 (N-M. Ct. Crim. App. Dec. 18, 2008). The case took over nine years after trial to reach the CCA. The relief granted was disapproval of $1800 in forfeitures and the 45-day sentence to confinement, which had long since been served. Even with this delay, in the absence of prejudice, the court declined to disapprove a bad-conduct discharge, expressing concern that this would present a "windfall" to the appellant. *But see* United States v. Myers, 2008 WL 5191293, at *4 (A.F. Ct. Crim. App. Dec. 12, 2008) (case took about 2½ years to reach CCA after a previous remand, court found an "egregious" delay amounting to a "total breakdown" of the appellate processs, but nonetheless found the delay harmless beyond reasonable doubt).

[87] 68 M.J. 96 (C.A.A.F. 2009).

[88] *Id.* at 99–100. The court placed emphasis on the fact that the affidavit was unsupported. The appellant provided no documentation from the Costco store in Alabama where he applied stating that they would have hired him, despite his bad conduct discharge, had he provided a DD Form 214. *Id.* at 99. Whenever the appellant provides a supported affidavit, the court finds prejudice far more easily. *See* United States v. Jones, 61 M.J. 80, 84–85 (C.A.A.F. 2005) (finding prejudice where the appellant provided three sworn affidavits from a potential employer stating that they would have hired the appellant if he had a DD Form 214).

[89] *Bush*, 68 M.J. at 103.

[90] *Id.* at 104.

[91] *Id.* at 96.

[92] *See supra* Parts I.A–C.

[93] *See infra* Part I.E.

[94] *See infra* Appendix F.

[95] United States v. Mullins, 69 M.J. 113 (C.A.A.F. 2010).

[96] No. 20071217 (A. Ct. Crim. App. Jan. 29, 2010)

[97] No. 24416 (C.G. Ct. Crim. App. Apr. 15, 2010).

[98] No. 24411 (C.G. Ct. Crim. App. July 14, 2010).

[99] *Benson* was granted relief under the Army court's more specific *United States v. Collazo*, 53 M.J. 721 (A. Ct. Crim. App. 2000), opinion. *See supra* note 75 (providing further discussion of *Collazo*). *Beaber* and *Sapp* were granted relief under the CAAF's general decision in *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

provides a graphical representation of the number of post-trial delay cases from each service.

Just as the number of cases varied by service, the reasons for the delay varied from case to case as well. Appendix C provides a graphical representation of the post-trial delay reasons broken down by the three *Moreno* timelines.[100] The most common reason for post-trial delay was delay between the trial and the convening authority action. Sixteen of the twenty-five cases had delays that exceeded the 120-day presumptively unreasonable delay standard from *Moreno*. The second most common reason for post-trial delay was delay from convening authority action to docketing at the service court. Eleven of the twenty-five cases had a delay that exceeded the thirty-day presumptively unreasonable delay standard from *Moreno*. Finally, five of the cases had a delay that exceeded the eighteen month appellate decision presumptively unreasonable delay standard from *Moreno*.[101]

Curiously, the Air Force Court of Criminal Appeals addressed post-trial delay in three cases that did not violate *Moreno* at all.[102] While *Moreno* did not set a minimum review standard for all post-trial delay cases, most appellate decisions since *Moreno* have required at least a *Moreno* timeline standard to be exceeded before addressing the issue on appeal.[103]

Even though the rationale for the post-trial delay varied from case to case, the average delay, regardless of the reasons, still varied widely between the services.[104] Appendix D shows the normalized average post-trial delay per case, by service.[105]

The average delay for the Navy and Marine Corps is much higher than the other services. However, this higher average delay is due to more than just one extreme case of delay. As shown in Appendix G, only one of the Navy and Marine Corps cases was even close to the *Moreno* delay timelines—*United States v. Burgess* with a normalized delay of only four days[106]—while the remainder of the Navy and Marine Corps cases were at least 240 days over the *Moreno* presumptively unreasonable delay standards.[107]

Of the twenty-five opinions this term, the post-trial delay in seventeen was held to be harmless beyond a reasonable doubt. The post-trial delays in five others were held to be simply non-prejudicial, and the remaining three cases were granted relief under Article 66(c). Most of the cases decided were found to be harmless beyond a reasonable doubt, even when post-trial delay violated the appellants' due process rights. As discussed previously, the reason for this failure to grant relief for a due process violation is that the CAAF has, in keeping with its decision in *Toohey*, elevated the fourth prong of the *Barker v. Wingo* four-factor test, prejudice, to a "super-prong."[108] In the absence of prejudice, the appellant normally will not prevail on post-trial delay. In essence, the court has returned to the prejudice test from the pre-*Dunlap* days, as exemplified by *United States v. Gray*,[109] despite all the timelines and tests that are now applied to post-trial delay. For example, in *United States v. Mullins*, the CAAF assumed a due process violation and proceeded immediately to the issue of prejudice.[110] Since there was no prejudice, the court found the delay harmless beyond a reasonable doubt.[111] Of course, the courts of criminal appeal still have the ability to discipline the post-trial process through Article 66(c) review, as confirmed by *United States v. Tardif*.[112]

Of the three opinions that granted relief this term for post-trial delay, the amount of relief granted varied. In *Benson*, the court granted one month of confinement

[100] Note that the total number of delays (32) exceeds the number of cases (25) because some cases had delay in several categories. *See infra* Appendix F.

[101] *See infra* Appendix F.

[102] *Id.*

[103] Research on file with author.

[104] *See infra* Appendix G.

[105] To normalize the delays, the standard number of days of delay allowed by *Moreno* was deducted from each case. For example, in *United States v. Ney*, 68 M.J. 613 (A. Ct. Crim. App. 2010), the delay was 174 days from sentencing to action. This delay exceeded the *Moreno* standard by fifty-four days. Fifty-four days is the number used to average against the other delays. This was done because delays below the *Moreno* standards are not presumptively unreasonable. *See* United States v. Moreno, 63 M.J. 129, 142–43 (C.A.A.F. 2006). For example, a case that takes 119 days from trial to action does not automatically trigger a *Moreno* review on appeal. Normalizing the delays also allows an accurate comparison between the different delay standards. If the *Moreno* standards were not deducted from each period of the delay, then delays based upon tardy appellate decisions would bias the average in every circumstance merely because the standard is eighteen months. This would not allow a fair comparison against the docketing standard of thirty days.

[106] No. 200900521 (N-M. Ct. Crim. App. Jan. 28, 2010).

[107] *See infra* Appendix G.

[108] The CAAF has never actually called prejudice the "super-prong," but the language in *Toohey* and the result in *Bush* show that its analysis essentially hinges every post-trial delay decision on whether or not prejudice existed.

[109] *See supra* note 44 and accompanying text.

[110] 69 M.J. 113, 118–19 (C.A.A.F. 2010). As discussed above in note 88 and accompanying text, this type of prejudice is different from the fourth *Barker v. Wingo* factor. However, the willingness of the CAAF to jump immediately to this prejudice test shows that the court has returned to a simple prejudice test to determine whether or not to grant relief in a post-trial delay case.

[111] *Id.* at 118–19.

[112] 57 M.J. 219, 223 (C.A.A.F. 2002).

credit.[113] In *Beaber*, the court disapproved the bad-conduct discharge.[114] In *Sapp*, the court granted seventy days of confinement credit.[115] None of the three opinions followed the *Tucker* method of dismissing the charges with prejudice.[116] Appendix E shows a graphical representation of the rationales for each of the twenty-five opinions this term.

Conclusion

Ultimately, the CAAF has returned to the original post-trial delay standard of review over its fifty-two year history of deciding post-trial delay cases, just like a line drawn on a Möbius strip.[117] Starting with *United States v. Tucker*,[118] the court took a hard-line stance of dismissal with prejudice, which two years later was unwound to a simple prejudice test by *United States v. Richmond*.[119] After that, the court took another hard-line stance of dismissal with prejudice in *Dunlap v. Convening Authority*, *Combined Arms Center*[120] which was unwound five years later to return to the simple prejudice test by *United States v. Banks*.[121] Many years later, the court took their latest hard-line stance of presumptive unreasonableness in *United States v. Moreno*,[122] which seemingly has been unwound yet again by one of the court's more recent opinions in *United States v. Bush* to a simple prejudice test.[123]

Regardless of the cyclical trend the CAAF seems to follow with regard to post-trial delay, one trend unifies the majority of the cases. Whether the court is following a hard-line stance or not, prejudice to the appellant is the one factor that the court will not tolerate. In every case where the appellant suffered some form of verifiable prejudice, the court has either dismissed the charges outright[124] or granted some form of meaningful relief.[125] This is the standard that the courts should apply. Not only is the standard of prejudice consistent with Article 59, UCMJ, and *United States v. Wheelus*,[126] but also applying a review standard based upon verifiable prejudice will grant relief in those cases that need relief, while denying relief for those cases where a post-trial delay had minimal impact on the accused. As stated previously, the crux of post-trial delay review is whether or not the accused was prejudiced by what amounts to an administrative delay.[127] Almost never does the post-trial delay itself have an impact on the findings or sentence of the case. A standard of prejudice will avoid a potential windfall to an accused who suffered no prejudice from the delay, while holding the Government responsible for the delay in those cases where the accused did suffer some form of prejudice from the delay.[128]

[113] No. 20071217 (A. Ct. Crim. App. Jan. 29, 2010).

[114] No. 24416 (C.G. Ct. Crim. App. Apr. 15, 2010).

[115] No. 24411 (C.G. Ct. Crim. App. July 14, 2010).

[116] *See supra* note 16 and accompanying text.

[117] *See infra* Appendix A.

[118] 26 C.M.R. 367 (C.M.A. 1958).

[119] 28 C.M.R. 366, 368 (C.M.A. 1960).

[120] 48 C.M.R. 751 (C.M.A. 1974).

[121] 7 M.J. 92, 92–93 (C.M.A. 1979).

[122] 63 M.J. 129 (C.A.A.F. 2006).

[123] 68 M.J. 96 (C.A.A.F. 2010).

[124] *See* United States v. Shely, 16 M.J. 431, 431–33 (C.M.A. 1983) (charges dismissed with prejudice due to post-trial delay, after a finding that the appellant had "amply" demonstrated prejudice).

[125] *See Moreno*, 63 M.J. at 129 (court capped the sentence at a rehearing to a punitive discharge due to the post-trial delay, after finding prejudice).

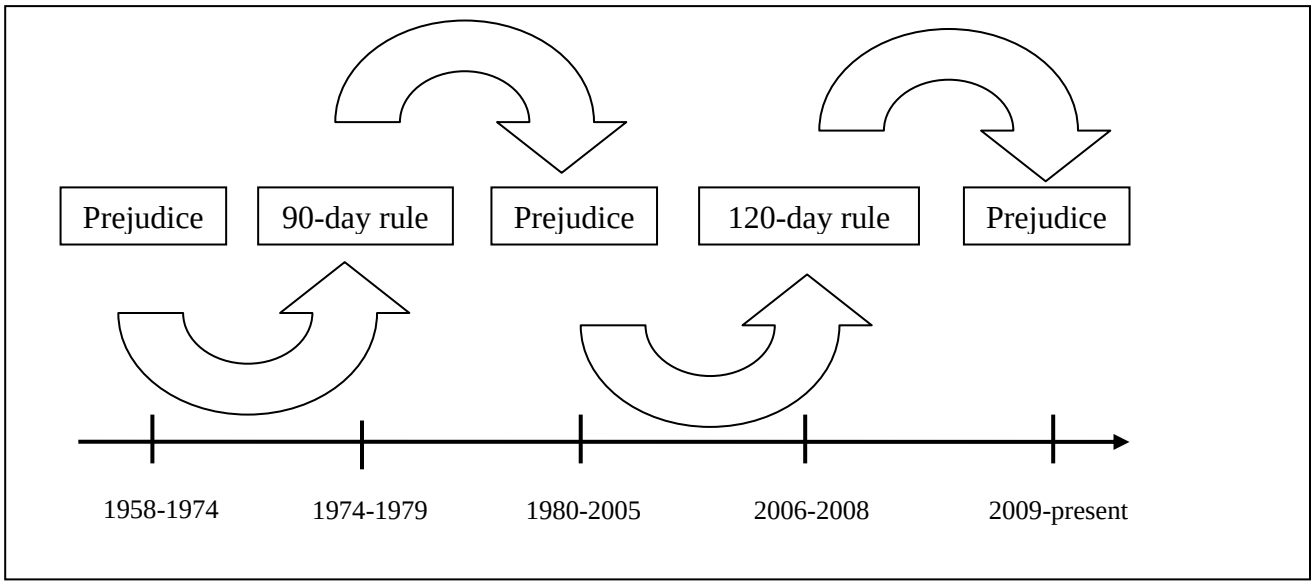
[126] *See* UCMJ art. 59 (2008); United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998).

[127] *See supra* note 4 and accompanying text.

[128] *See supra* note 34 and accompanying text.

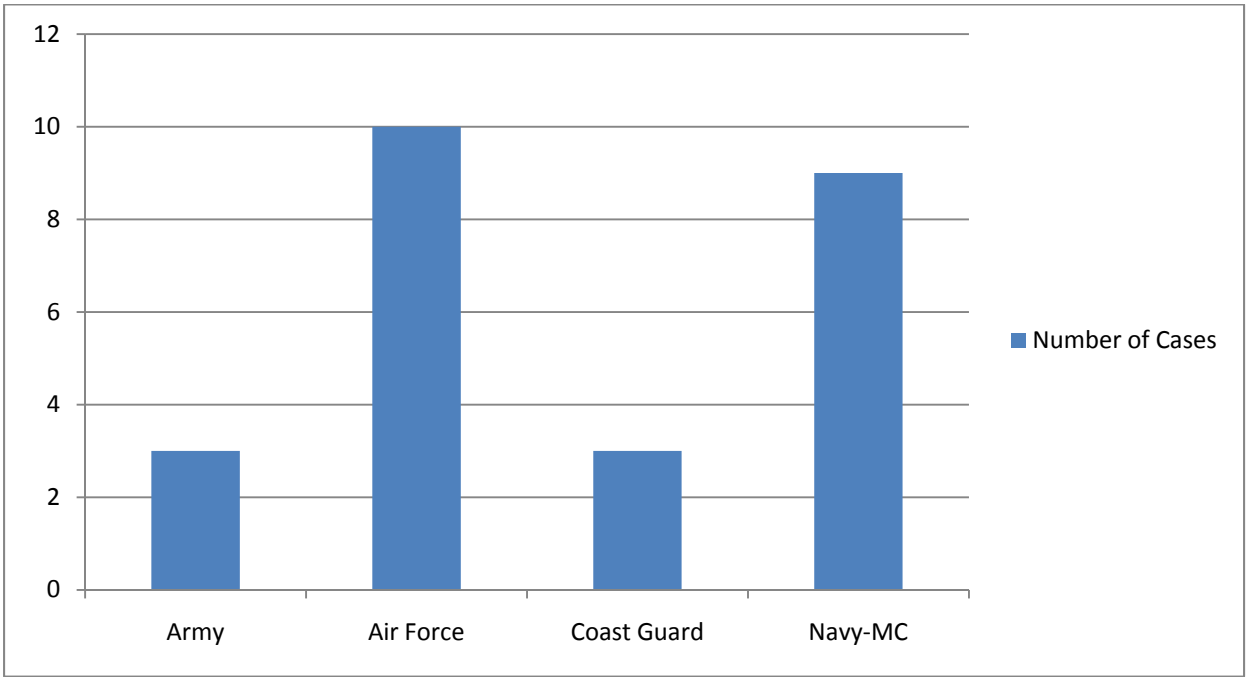
Appendix A

The Post-Trial Möbius Strip



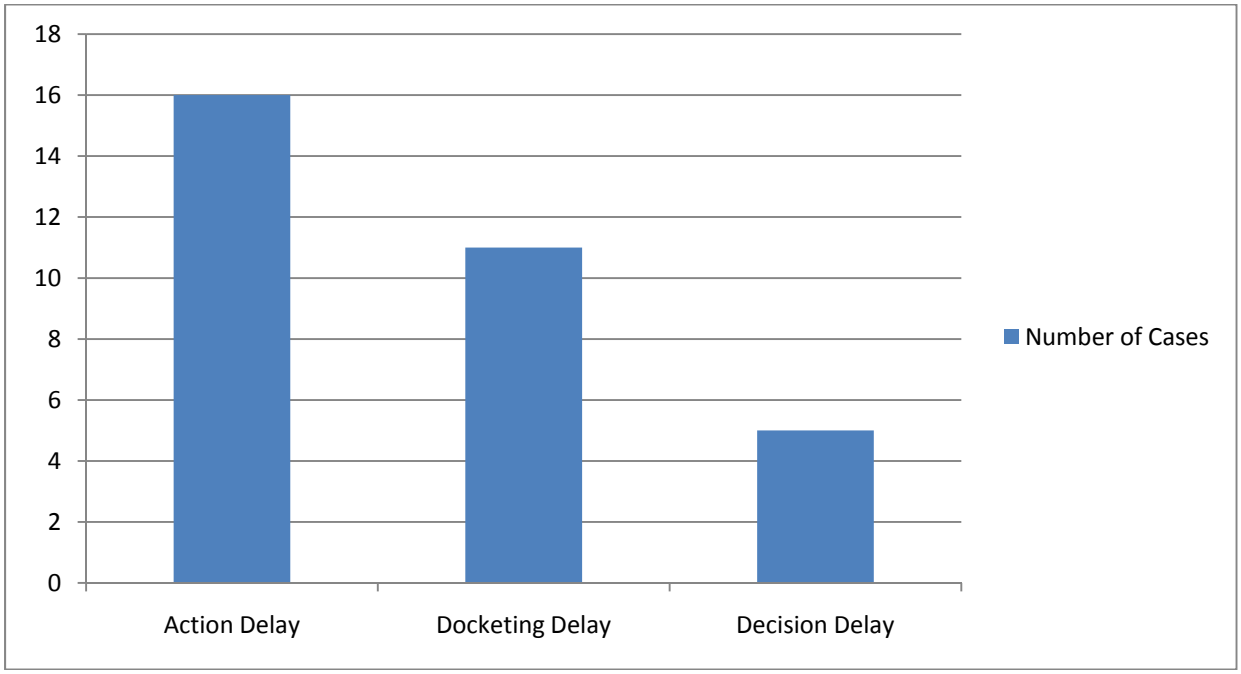
Appendix B

Number of Post-Trial Delay Cases by Service



Appendix C

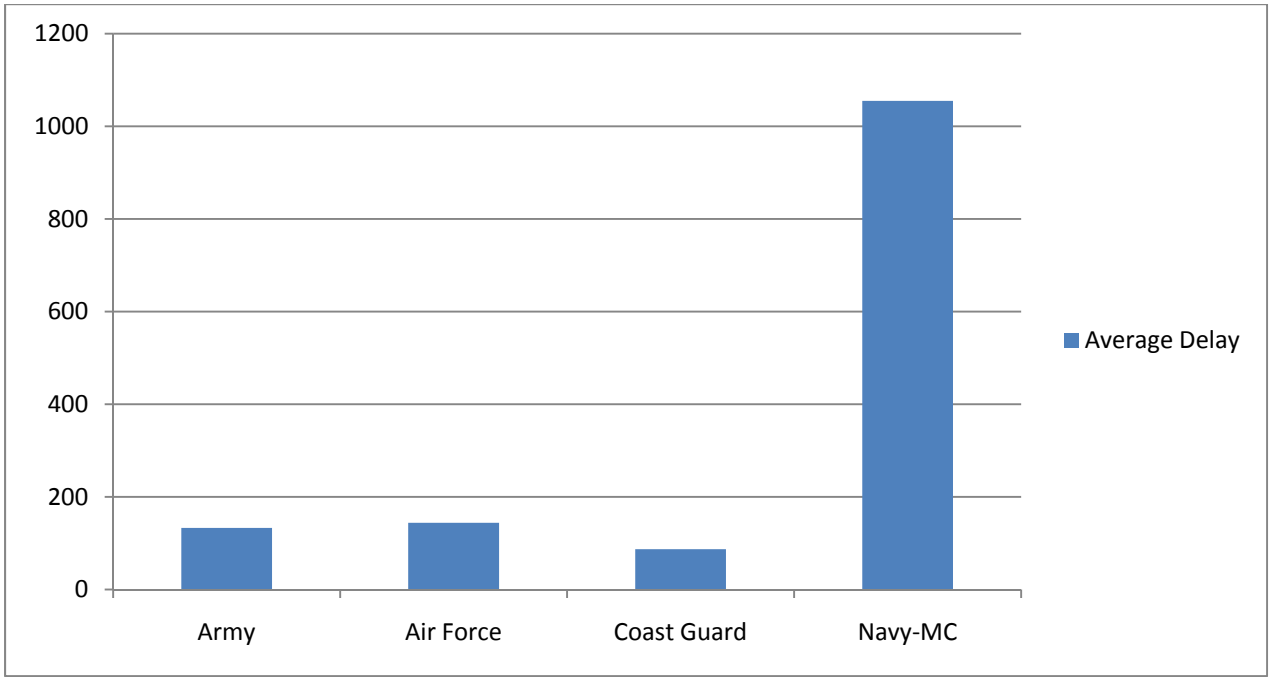
Reasons for Delay



Appendix D

Normalized Average Post-Trial Delay by Service

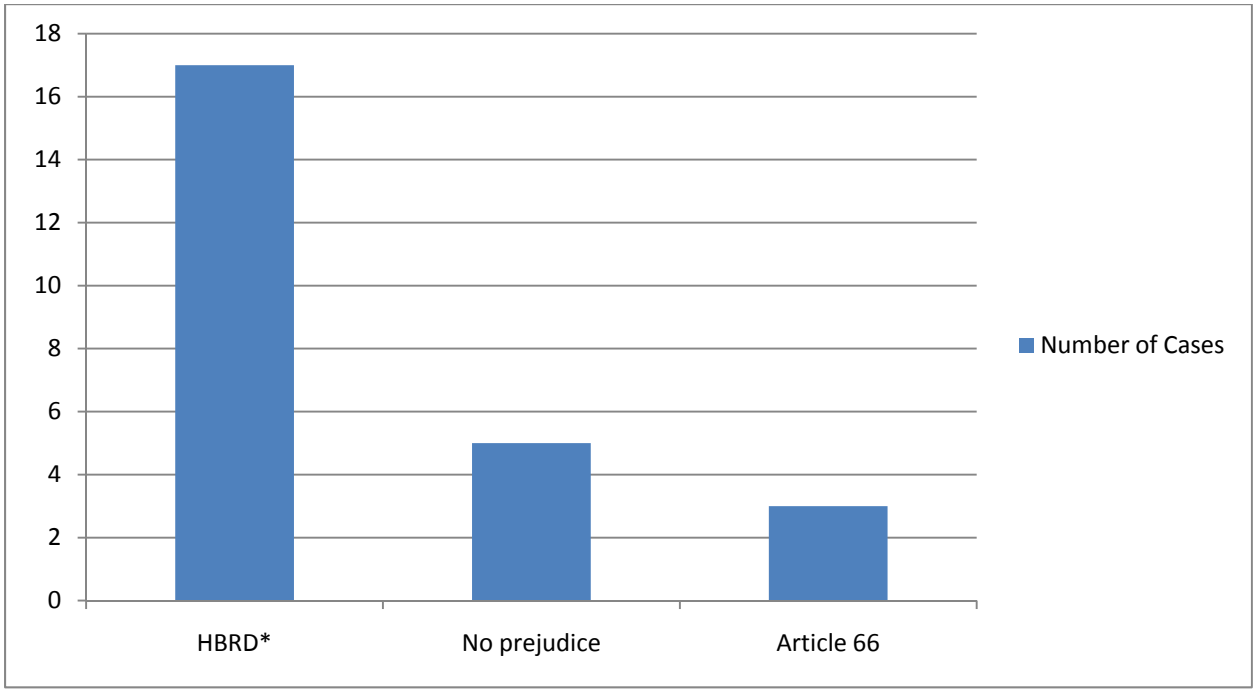
(2009-10 Service-Court Appellate Cases Addressing Post-Trial Delay)	
Service	Average Delay
Army	133 days
Air Force*	144 days
Coast Guard	87 days
Navy-Marine Corps	1055 days



* Three opinions from the Air Force that did not exceed any of the presumptively unreasonable delay *Moreno* standards are included, even though the normalized number of days of delay equaled zero for those cases. *See infra* Appendix G.

Appendix E

Post-Trial Delay Opinion Rationale



* Harmless Beyond a Reasonable Doubt

Appendix F

2009–2010 Term of Court Post-Trial Delay Opinions (All Service Courts)

#	Case Name	Case Cite	Court and Date	Number of Days	Decision
1	United States v. Mullins	69 M.J. 113	C.A.A.F. 2010	360 days to action; 448 days from docketing to defense appellate counsel first contact with appellant	Harmless Beyond a Reasonable Doubt (HBRD)
2	United States v. Ney	68 M.J. 613	Army. Ct. Crim. App. 2010, *review denied*, 69 M.J. 86 (C.A.A.F. 2010)	174 days from sentencing to action	No due process violation, no relief
3	United States v. Cox	No. 20080819, 2010 WL 3522561	Army. Ct. Crim. App. Jan. 11, 2010, *review denied*, 68 M.J. 88 (C.A.A.F. 2010)	248 days from action to docketing	No due process violation, no relief
4	United States v. Benson	No. 20071217	Army Ct. Crim. App. Jan. 29, 2010 , *review denied*, 69 M.J. 157 (2010)	156 days from action to docketing	No prejudice, but one month confinement granted as relief under *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000)
5	United States v. Dunn	No. S31584	A.F. Ct. Crim. App. Aug. 31, 2010, *review granted on unrelated issue*, 69 M.J. 457	136 days from sentencing to action	HBRD
6	United States v. Van Valin	No. 37283	A.F. Ct. Crim. App. July 26, 2010, *review denied* 69 M.J. 450 (2010).	690 days on appeal at AFCCA (fifteen defense enlargements)	HBRD
7	United States v. Van Vliet	No. 36005	A.F. Ct. Crim. App. Aug. 23, 2010 , *review denied*, 69 M.J. 480 (C.A.A.F. 2011)	951 days to return to the court after the initial decision, plus 93 days until the second convening authority action	HBRD (the court did not hold that the 93 days for the second action was unreasonable, but based on the entire delay, forwarded the record to AF TJAG for consideration)

8	United States v. Hudson	No. 37249	A.F. Ct. Crim. App. Aug. 23, 2010, *remanded*, 69 M.J. 41 (C.A.A.F. 2011)	74 days to action; 20 days to docketing; AFCCA does not address 750 days on appeal	Neither delay violated *Moreno*; assuming error, HBRD
9	United States v. Berry	No. 37310, 2010 WL 2265612	A.F. Ct. Crim. App. May 7, 2010, *review denied* 69 M.J. 275 (C.A.A.F. 2010)	585 days on appeal at AFCCA (eleven defense enlargements)	HBRD
10	United States v. McDaniel	No. 36649	A.F. Ct. Crim. App. Mar. 16, 2010 , *aff'd*, 69 M.J. 195 (C.A.A.F. 2010) (summary disposition)	560 days to return to AFCCA after remand (382 days to docket after action)	HBRD
11	United States v. Arriaga	No. 37439, 2010 WL 2265581	A.F. Ct. Crim. App. May 7, 2010, *rev'd*, 70 M.J. 51 (C.A.A.F. 2011)(court reversed finding of HBRD and remanded for further proceedings)	243 days from sentencing to action	HBRD
12	United States v. Astacio-Pena	No. 37401, 2010 WL 2265592	A.F. Ct. Crim. App. Apr. 30, 2010	109 days to action	Delay did not violate *Moreno*; assuming error, no prejudice
13	United States v. Long	No. 37044	A.F. Ct. Crim. App. Dec. 18, 2009, *review granted on unrelated issues*, 69 M.J. 169 (C.A.A.F. 2010), 70 M.J. 141 (C.A.A.F. 2011)	880 days on appeal at AFCCA	HBRD

14	United States v. Strout	No. 37161	A.F. Ct. Crim. App. Dec. 10, 2009, *review denied*, 69 M.J. 49 (2010),	307 days on appeal at AFCCA	HBRD (despite the fact that the delay did not violate *Moreno*, the court found a violation)
15	United States v. Beaber	No. 24416	C.G. Ct. Crim. App. Apr. 15, 2010	191 days to action; 77 days to docket	No due process violation; BCD disapproved as relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)
16	United States v. Sapp	No. 24411	C.G. Ct. Crim. App. July 14, 2010	183 days to action; 97 days to docket	No due process violation; confinement reduced from 90 to 20 days as relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)
17	United States v. Lucas	No. 24399	C.G. Ct. Crim. App. Dec. 22, 2009	132 days to action	No relief; dissent argued for relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)
18	United States v. Harper	No. 200800091	N-M. Ct. Crim. App. May 27, 2010	Approximately six years due to remands (including more than four years to initial docketing and nearly two years to controlling convening authority action)	HBRD; convening authority eventually disapproved the entire sentence due to the delay
19	United States v. Magincalda	No. 200900686	N-M. Ct. Crim. App. Aug. 26, 2010	857 days from sentencing to action	HBRD
20	United States v. Bock	No. 200900336	N-M. Ct. Crim. App. Mar. 4, 2010	162 days to action; 1504 days to docketing (faulty waiver of appellate review)	HBRD
21	United States v. Vincent	No. 200900477	N-M. Ct. Crim. App. Feb. 12, 2010	1405 days from trial to docketing	HBRD

22	United States v. Bachiocchi	No. 200700680	N-M. Ct. Crim. App. Apr. 29, 2010	352 days to docketing; 847 days to final docketing (repeated remands for improper post-trial processing)	HBRD
23	United States v. Lobsinger	No. 200700010, 2009 WL 3435922	N-M. Ct. Crim. App. Oct. 27, 2009, *review denied*, 69 M.J. 44 (2010)	349 days from trial to docketing (299 to action); 1020 days on appeal at NMCCA	No due process violation, no relief
24	United States v. Burgess	No. 200900521	N-M. Ct. Crim. App. Jan. 28, 2010	34 days from action to docketing	HBRD
25	United States v. Turner	No. 200401570, 2009 WL 4917899	N-M. Ct. Crim. App. Dec. 22, 2009	2636 days from trial to action (three prior actions were withdrawn or set aside)	HBRD

Appendix G

Normalized Average Post-Trial Delay Chart

#	Case Name	Service	Normalized Number of Days of Delay – Delay Minus *Moreno* Presumption of Unreasonable Delay Standard*
1	United States v. Mullins	Navy-MC (CAAF decision)	240 days
2	United States v. Ney	Army	54 days
3	United States v. Cox	Army	218 days
4	United States v. Benson	Army	126 days
5	United States v. Dunn	Air Force	16 days
6	United States v. Van Valin	Air Force	150 days
7	United States v. Van Vliet	Air Force	411 days
8	United States v. Hudson	Air Force	0
9	United States v. Berry	Air Force	45 days
10	United States v. McDaniel	Air Force	352 days
11	United States v. Arriaga	Air Force	123 days
12	United States v. Astacio-Pena	Air Force	0
13	United States v. Long	Air Force	340 days
14	United States v. Strout	Air Force	0
15	United States v. Beaber	Coast Guard	118 days
16	United States v. Sapp	Coast Guard	130 days
17	United States v. Lucas	Coast Guard	12 days
18	United States v. Harper	Navy-MC	1502 days
19	United States v. Magincalda	Navy-MC	737 days
20	United States v. Bock	Navy-MC	1516 days
21	United States v. Vincent	Navy-MC	1255 days
22	United States v. Bachiocchi	Navy-MC	1049 days
23	United States v. Lobsinger	Navy-MC	679 days
24	United States v. Burgess	Navy-MC	4 days
25	United States v. Turner	Navy-MC	2516 days

* Note that some calculations are approximate if the delay description in the opinion was not specific. See note 105 above for why I calculated this normalized delay.

Solutions for Victims of Identity Theft: A Guide for Judge Advocates to Assist Servicemembers in Deterring, Detecting, and Defending Against This Growing Epidemic

Major Cindie Blair[*]

Good name in man and woman, dear my lord, is the immediate jewel of their souls. Who Steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name, Robs me of that which not enriches him. And makes me poor indeed.[1]

Introduction

Identity theft is one of the fastest growing crimes in the United States and is rapidly becoming an epidemic that leaves many judge advocates ill prepared to assist victim servicemembers. From 2007 to 2008 identity theft increased by 21% and it costs consumers roughly $50 billion annually.[2] Even though identity theft reports declined by 5% in 2009, it still represents the number one complaint to the Federal Trade Commission (FTC), accounting for 21% of complaints received in 2009.[3] Specifically, credit card fraud is the most common form of theft.[4]

Recovering from identity theft can be frustrating, time consuming, and expensive.[5] Police often ignore these complaints, claiming they do not believe the victim or do not have jurisdiction over the crime.[6] Shockingly, 28% of victims in a survey were unable to restore their identities and fix their credit even after a year of trying.[7] Additionally, in 2003, the FTC surveyed identity theft victims and found that 9% lost their identity to a member of their own family.[8] The increases in identity theft crimes led to new legislation, which not only criminalized stealing another's identity, but also defined the crime.[9]

The current federal statute defines identity theft as something that occurs when one "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable state or local law."[10] In simpler terms, identity theft is the misuse of another person's information to commit fraud.[11] This crime typically consists of three stages: (1) the thief tries to obtain someone's personal information; (2) the thief tries to misuse the information he has obtained; and, (3) the thief completes the crime, leaving the victim to attempt to mitigate the consequences.[12] People must combat identity theft at all three stages to safeguard their good names.[13]

This article serves a dual purpose. First, the article will educate servicemembers on the increased risk of identity theft and how to protect themselves, which will create a greater awareness of the problem and reduce the growing number of victims in the armed forces. Second, it serves as a guide for judge advocates to teach servicemembers and assist victims with the most common problems arising from identity theft. In order to successfully combat these crimes, servicemembers need to be aware of the common scams sweeping across the country and take the proper precautions to safeguard their own identity.

Servicemembers are especially vulnerable to thieves due to overseas deployments, multiple relocations, and the numerous agencies requiring the use of their Social Security Number (SSN) as identification. With proper training and advice from judge advocates, servicemembers can learn to take precautions to safeguard their identities and significantly reduce the risk of becoming victims of identity theft. An article educating judge advocates about the increased risk of identity theft and providing instructions on how servicemembers can protect themselves will create a

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[1] MARTIN T. BIEGELMAN, IDENTITY THEFT HANDBOOK: DETECTION, PREVENTION, AND SECURITY 27 (2009) (quoting WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3, at ll. 155–6).

[2] KRISTIN M. FINKLEA, CONG. RESEARCH SERV. REPORT, R40599, IDENTITY THEFT: TRENDS AND ISSUES, at CRS–1 (2009).

[3] FTC ISSUES REPORT OF 2009 TOP CONSUMER COMPLAINTS (Feb. 24, 2010), *available at* http://www.ftc.gov/opa/2010/02/2009fraud.shtm.

[4] DIONYSIOS POLITIS, PHAEDON KOZYRIS, & IONNIS IGLEZAKIS, SOCIOECONOMIC AND LEGAL IMPLICATIONS OF ELECTRONIC INTRUSION 65 (2009).

[5] BIEGELMAN, *supra* note 1, at 177.

[6] *Id*.

[7] *Id*.

[8] RACHAEL LININGER & RUSSELL DEAN VINES, PHISHING: CUTTING THE IDENTITY THEFT LINE 1 (2005).

[9] Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information, 18 U.S.C. § 1028(a)(7) (2006).

[10] *Id*.

[11] THE PRESIDENT'S IDENTITY THEFT TASK FORCE, COMBATING IDENTITY THEFT: A STRATEGIC PLAN 2–3 (Apr. 2007) [hereinafter IDENTITY THEFT TASK FORCE], *available at* http://www.idtheft.gov/reports/StrategicPlan.pdf.

[12] *Id*.

[13] *Id*.

greater awareness of the problem and reduce the growing number of servicemember victims.

This article will address identity theft in three parts: "detection, deterrence, and defense."[14] The first section identifies the problem by informing servicemembers about how thieves steal their information and later use it to commit a crime. It also addresses how victims learn they have been compromised and why servicemembers are so vulnerable. The second section addresses how and when judge advocates should conduct preventative training to servicemembers on this issue. Finally, the third section will serve as a step-by-step guide for legal assistance attorneys responsible for helping victims of identity theft repair their damaged credit, thus restoring "[t]he immediate jewel of their souls."[15]

Detection: Identifying the Problem

How Do Thieves Obtain My Information?

Before anyone can prevent identity theft, he must first identify what to avoid. Thieves obtain personal information from victims in a number of ways, and many involve theft from a careless consumer. This is done through various methods such as stealing someone's purse or wallet (with credit and bank cards, identification, and checks); taking someone's mail; stealing personal identifier documents (driver's licenses, birth certificates, social security cards, and employee badges); rummaging through people's trash ("dumpster diving"); or by taking personal information from the home (usually by a roommate or family member).[16]

Savvy identity thieves will get personal information from businesses or other entities. They can steal records while they are working; trick employees into divulging personal information about themselves or others; bribe a records custodian; copy information from unattended identification; or even hack into a computer records database.[17] Some clever thieves even submit a false change of address to intercept mail or use portable skimming devices that record your credit card information during an authorized transaction for future fraudulent use.[18]

The most sophisticated thieves acquire information via computers and the internet. This is accomplished in a variety of ways and is often referred to as "phishing."[19] One such method works by offering the unsuspecting victim free software, such as antivirus protection.[20] Once the consumer attempts to download the application, he exposes his system to spyware that allows thieves to record keystrokes and to gather sensitive information.[21] Another common ruse involves sending emails to consumers indicating someone fraudulently used their account and threatening to close the account unless the victim sends their personal information.[22] Similarly, the thief may send an email from a business or bank indicating the company lost records or needs to verify information.[23] More experienced computer hackers can even successfully compromise major databases containing personal information.[24]

How Do Thieves Use My Information?

Once a consumer is aware of how thieves access personal information, the next step is to realize how the criminal uses the stolen identity. Depending on the information obtained, thieves can defraud victims in a number of ways. With personal identification, thieves can alter the identification information; produce counterfeit documents; distribute or sell personal information to others; and open credit or bank accounts in the victim's name.[25] Some criminals even use personal information to impersonate the victim or take over their actual identity.[26] Illegal immigrants assume the identity of a citizen to get jobs benefits, to obtain mortgages and credit cards, and to be welcomed into society.[27] There is also an increase in the use of other people's SSNs to make false medical claims with insurance companies.[28] Additionally, the thief may file fraudulent tax returns in victims' names or even provide a victim's information to police if arrested.[29]

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[14] TAKE CHARGE: FIGHTING BACK AGAINST IDENTITY THEFT, at cover (n.d.) [hereinafter TAKE CHARGE], *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt04.shtm (last visited Jan. 10, 2010).

[15] WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3, at ll. 155–6.

[16] BIEGELMAN, *supra* note 1, at 177; *see also* TAKE CHARGE, *supra* note 14, at 2.

[17] TAKE CHARGE, *supra* note 14, at 2.

[18] BIEGELMAN, *supra* note 1, at 36; *see also* ID THEFT: WHAT IT'S ALL ABOUT 11 (June 2005), *available at* http://www.ftc.gov/bcp/pubs/consumer/idtheft/idt08.shtm.

[19] LININGER & VINES, *supra* note 8, at 1 (Phishing is the "act of obtaining personal information directly from the end user through the internet. This information can then be used for fraud, Identity theft, or other purposes."). *Id.*

[20] BIEGELMAN, *supra* note 1, at 30.

[21] *Id*. (Spyware is a type of malware that is installed on computers and collects little bits information at a time about users without their knowledge.).

[22] LININGER & VINES, *supra* note 8, at 9.

[23] *Id*.

[24] *Id*. at 22.

[25] BIEGELMAN, *supra* note 1, at 28; *see also* IDENTITY THEFT TASK FORCE, *supra* note 11, at 18.

[26] BIEGELMAN, *supra* note 1, at 28

[27] *Id*.

[28] BIEGELMAN, *supra* note 1, at 28; *see also* IDENTITY THEFT TASK FORCE, *supra* note 11, at 20.

[29] TAKE CHARGE, *supra* note 14, at 4.

If a criminal obtains a credit card number either by visual inspection, an old receipt, or through "skimming,"[30] he can make purchases online while the card is still in the consumer's possession.[31] Skimming also allows the thief to encode data from the card and into blank cards for use by multiple people at any company that accepts credit.[32] If the thief goes a step further by forwarding or stealing the victim's mail, the consumer may not get a statement or be alerted when fraudulent transactions occur.[33] There are countless ways a thief can fraudulently use someone's personal information; the key is for the victim to identify the breach early and act immediately.

How Do I Know I Have Been Victimized?

The more time that passes between the act of identity theft and when the victim discovers the crime, the more it costs the victim.[34] Often victims learn about theft only when it negatively affects their lives.[35] For instance, if an unsuspecting consumer is not vigilant, he may learn he is a victim only through a denial of credit, receipt of credit cards not applied for, or calls from bill collectors.[36]

A consumer may also see an unrecognized charge or debit on a bank or credit account statement.[37] If diligent, they may learn about fraudulent activity when checking a credit report for unrecognized transactions and credit.[38] Victims may even be arrested for crimes they did not commit or receive merchandise in the mail they did not order.[39] However the victim discovers the fraud, the issue must be addressed immediately.

What Makes Servicemembers Vulnerable?

Of all the information a thief can use, the SSN most facilitates their crime and is usually necessary to commit identity theft because it provides access to an individual's entire financial life.[40] In 1969, the Department of Defense (DoD) replaced the military service number with the SSN as an identifier for servicemembers.[41] The U.S. Government Accountability Office (GAO) first reported the identity theft risk of using SSNs in public records in 2006.[42] The report found that eight million DoD identification cards contained the full SSN of the employee or servicemember.[43] In April 2008, responding to the growing concern of identity theft, the DoD decided to no longer use the full SSN on identification cards.[44] However, a servicemember's full SSN still appears on their identification tags (i.e., "dog tags").[45]

Additionally, the servicemember's (and often their family's) SSN was or is still contained on military records (including medical and dental records), duffel bags, relocation documents, orders, dining facility rosters, and in many databases including those of TriCare and the Veteran's Administration.[46] Having an SSN so readily accessible to others puts servicemembers and their families at a higher risk than civilians who are not required to use their SSN as often. Many unmarried servicemembers also live in a shared environment like the barracks, allowing roommates or a visitor's easy access to identification cards or dog tags.

Because the military uses the SSN as an identifier, many military-related databases contain this sensitive information, leading computer savvy thieves to target the military.[47] Every year the number of database breaches increases.[48] Of the five industries with the greatest number of recorded breaches, the military is the third largest at 16.8%.[49]

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[30] BIEGELMAN, *supra* note 1, at 36 (defining skimming as using a portable credit card reader to capture account data from the magnetic stripe and then placing that information on a counterfeit card for fraudulent use).

[31] IDENTITY THEFT TASK FORCE, *supra* note 11, at 18.

[32] *Id.*

[33] TAKE CHARGE, *supra* note 14, at 3.

[34] POLITIS, KOZYRIS, & IGLEZAKIS, *supra* note 4, at 66.

[35] *Id.*

[36] ID THEFT: WHAT IT'S ALL ABOUT, *supra* note 18, at 11.

[37] LININGER & VINES, *supra* note 8, at 21.

[38] ID THEFT: WHAT IT'S ALL ABOUT, *supra* note 18, at 11.

[39] TAKE CHARGE, *supra* note 14, at 2.

[40] BIEGELMAN, *supra* note 1, at 236; *Prepared Statement of the Fed. Trade Comm'n on "Identity Theft" Before the S. Comm. on Tech., Terrorism and Gov't Info. of the Comm. on the Judiciary* (May 1998) (Statement of David Medine, Assoc. Dir. for Credit Practices, Bureau of Consumer Prot., Fed. Trade Comm'n); Oscar Gandy, Professor, Comments of the Elec. Privacy Info. Ctr., Consumer Action, Privacy Activism, Commercial Alert, Privacy Journal, World Privacy Forum, Privacy Rights Clearinghouse 3 (June 22, 2005), http://epic.org/privacy/profiling/dodrecruiting.html.

[41] Social Security Number Chronology (Nov. 9, 2005), http://www.socialsecurity.gov/history/ssn/ssnchron.html.

[42] Privacy Rights Clearinghouse; My Social Security Number—How Secure Is It? (June 1993), http://www.privacyrights.org/print/fs/fs10-ssn.htm [hereinafter Privacy Rights Clearinghouse].

[43] *Id*.

[44] *Id*.

[45] Melanie Henson, *Identity Theft and the Military: U.S. Service People Are Prime Targets*, CREDIT IDENTITY SAFE, Nov. 10, 2008, *available at* http://creditidentitysafe.com/prevention/identity-theft-and-the-military-us-people-are-prime-targets.htm.

[46] Byron Acohido & Jon Swartz, *Military Personnel Prime Targets for ID Theft*, USA TODAY, June 14, 2007, *available at* http://creditidentitysafe.com/tech/news/computersecurity/infotheft/2007-06-14-military-id-thefts_N.htm?csp=34 ; *see also* Henson, *supra* note 45.

[47] Kelly P. Pate, *Identity Theft: Army Protecting Its Own in New Ways*, ARMY.MIL/NEWS, Oct. 15, 2008, http://www.army.mil/-news/2008/10/15/13304-identity-theft-army-protecting-its-own-in-new-ways/.

[48] FINKLEA, *supra* note 2, at CRS–20.

[49] *Id*.

One example of a database breach affecting military personnel involved an incident in 2006 when someone stole a Department of Veterans Affairs laptop from an employee's home.[50] The computer held personal information on more than 28 million veterans, military personnel, and their spouses.[51] Over 50,000 of the affected individuals was on active duty.[52] The Department of Veterans Affairs were similarly complacent in August 2006, when it lost computer data for 38,000 patients; on 2 November 2006, when it lost a computer with data for 1,600 patients; and in February 2007, when it compromised data on a hard drive containing information for two million VA patients and doctors.[53] In 2002, the theft of computer servers from a military health care contractor in Phoenix, Arizona, compromised SSNs and other personal data for more than 500,000 active duty and retired servicemembers and their families.[54]

While most people fear strangers gaining access to major military databases, studies over the last few years have found the largest identity theft threat is from trusted insiders within organizations.[55] Unfortunately, this is also true for military units and has resulted in criminal prosecutions of servicemembers for theft and misuse of sensitive personal information. One such case involved Airman First Cass Shepherd, an administrative apprentice for his Air Force squadron.[56] Airman Shepherd used the names and SSNs of other airmen obtained from unit rosters to open fraudulent cellular telephone accounts.[57]

A similar case involved a Marine staff sergeant (SSgt) working as an administration chief in the finance office.[58] The SSgt used personal information obtained in the course of his duties to make false identification papers in the name of one of the reservists receiving checks at his office.[59] He then opened a bank account and cashed the reservist's checks using the false identification.[60]

One of the most recent prosecutions involved Specialist (SPC) Reynaldo Jimenez, an active duty Finance Technician in the Army who helped military members with payroll issues from 2005 to 2008.[61] Part of SPC Jimenez's job required him to assist servicemembers access their payroll information through "MyPay"[62] where he would obtain and keep a list of SSNs and MyPay passwords from numerous military personnel.[63] In 2008, SPC Jimenez left his Korean duty station without authorization and used some of the stolen SSNs and passwords to change information in their accounts.[64] He then obtained two false driver's licenses and opened debit card accounts in his fellow Soldiers' names, which he used to route some of the victim's pay to his own account.[65] SPC Jimenez tried to steal over $35,000 from more than thirty-five active duty servicemembers but was only successful in stealing about $6,500.[66]

Besides the use of SSNs and computers, several other factors put servicemembers at a higher risk to become victims of identity theft. Not only does the military provide a regular income paid bi-monthly, but servicemembers are strongly encouraged to pay debts and are subject to criminal prosecution under the Uniform Code of Military Justice for failure to pay their debts.[67] Also, it is easy for bill collectors to locate the servicemember in case of default due to theft.[68] As a result, many servicemembers receive an inordinate amount of offers from credit card companies that thieves can

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[50] BIEGELMAN, *supra* note 1, at 241.

[51] *Id*.

[52] Henson, *supra* note 45.

[53] Acohido & Swartz, *supra* note 46.

[54] Steve Lynch, *Year of Preventing Identity Crime: Prevention Is the Best Protection for the U.S. Coast Guard's Ninth District*, POLICE CHIEF MAGAZINE, June 6, 2008, *available at* http://policechiefmagazine.org/magazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1530&issue_id=62008.

[55] BIEGELMAN, *supra* note 1, at 243.

[56] United States v. Shepherd, ACM 34766, 2002 CCA LEXIS 189 (A.F. Ct. Crim. App. Aug. 20, 2002) (unpublished) (Appellant was found guilty of five drug offenses in addition to the dereliction of duty charge involved with failing to safeguard Privacy Act information and sentenced to a bad conduct discharge, confinement for two years, reduction to E-1, and forfeiture of all pay and allowances.).

[57] *Id*.

[58] United States v. Krauss, 20 M.J. 741, 742 (N.M.C.M.R. 1985) (Appellant was convicted at a general court-martial for twelve counts of check forgery, twelve counts of treasury check theft, and dereliction of duty and sentenced to a bad conduct discharge, confinement for two years, reduction to E-1, and forfeiture of all pay and allowances).

[59] *Id*.

[60] *Id*.

[61] Press Release, Fed. Bureau of Investigation, Former U.S. Army Finance Technician Sentenced in Manhattan Federal Court to 42 Months in Prison for Theft of Soldiers' Social Security Numbers and Pay (Sept. 30, 2009), *available at* http://newyork.fbi.gov/dojpressrel/pressrel09/nyfo093009.htm.

[62] *Id*. ("MyPay" is a military website that contains leave and earnings statements and other personal financial information and also directs where a servicemember's pay will be deposited.).

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*. (Jimenez pleaded guilty in April 2009 in the Southern District Court of New York to one count of identity theft, one count of access device fraud, one count of fraud in connection with protected computers, and one count of aggravated identity theft. In addition to forty-two months in prison, the judge also ordered Jimenez to serve three years of supervised release, forfeit $6,557.47, and pay to the Government $6,557.47 in restitution.).

[67] Memorandum from Deputy Assistant Judge Advocate Gen. Legal Assistance (Code 16) on Identity Theft—What It Is and How to Avoid It (n.d.) (last visited Jan. 13, 2010) [hereinafter Identity Theft Memorandum], *available at* http://www.ig.navy.mil/Divisions/Intel/Intel_Security%20(Identity%20Theft).htm (last visited Jan. 13, 2010); *see also* UCMJ art. 134 (2008).

[68] Identity Theft Memorandum, *supra* note 67.

easily intercept.[69] Many servicemembers are further vulnerable because they tend to be young and lack financial expertise.[70] These young enlisted servicemembers are generally commercially unsophisticated, trusting, inexperienced, and away from home for the first time.[71]

Deployed personnel are probably the most targeted group of servicemembers for identity crimes.[72] One reason is that deployed members have limited access to on-line services or even regular mail delivery, and therefore may not look at a credit report for a year or more.[73] Additionally, most mail forwarded to deployed servicemembers is delayed, which prevents swift discovery of fraudulent transactions.[74] Even if servicemembers detect fraud, deployments interfere with immediate reporting since most police departments do not accept reports over the phone.[75] One Marine corporal returned from Iraq in 2006 only to learn someone in San Diego had opened credit card accounts, bought a house, and fraudulently started a business using his identification.[76] While the corporal eventually cleared his good name, his efforts still took a year, even with the help of a commercial fraud protection company.[77]

Families of deployed personnel are also frequently targeted for identity theft.[78] Identity thieves obtain information about when a servicemember is deployed and his family's contact information from a variety of sources, including official military websites, other family members, military insiders, or even websites maintained by the servicemembers themselves—such as an account on Facebook or another social networking cite.[79] Once thieves have this information, they use it to accomplish a variety of scams.

One of the most reprehensible scams perpetrated using only a deployment schedule and a phone number, is accomplished by the thief calling a deployed servicemember's family posing as someone from the DoD.[80] The thief asks a family member for the SSN of the relative who was allegedly killed in combat in order to confirm the identity of the deceased member.[81] A similar scam involves the caller posing as a Red Cross representative stating the servicemember was hurt while deployed.[82] The caller advises the family that treatment cannot start until paperwork requiring verification of the member's SSN and date of birth are completed.[83]

Deterrence: Preventing the Problem

What Do We Teach Servicemembers?

In order to stop thieves from taking advantage of servicemembers, it is essential to teach prevention and to incorporate preventative measures into standard processes for handling and storing personal information. There are numerous steps all servicemembers and their families should take to protect themselves from becoming victims of fraud.

Take Precautions to Safeguard Social Security Numbers

Because SSNs are the key to identity theft, servicemembers should avoid providing their SSNs whenever possible.[84] The servicemember can avoid this by not printing the full number on checks or dog tags.[85] Additionally, the member should strongly challenge all businesses or other entities requesting a SSN, and provide it only if required by law.[86] Servicemembers and their families should not carry a Social Security, insurance, or any other card with a visible SSN and should keep wallets on their person or locked up at all times.[87]

Many people are unaware that some states use the SSN as a driver's license number; however, new federal legislation has been introduced prohibiting states from displaying the SSN on a license.[88] Most states will issue a license with an alternative number for a minor fee.[89] Servicemembers with a SSN as driver's license number are encouraged to contact

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[69] Henson, *supra* note 45.

[70] Identity Theft Memorandum, *supra* note 67.

[71] Lynch, *supra* note 54.

[72] Henson, *supra* note 45; *see also* Acohido & Swartz, *supra* note 46.

[73] Pate, *supra* note 47.

[74] Lynch, *supra* note 54.

[75] *Id*.

[76] Acohido & Swartz, *supra* note 46.

[77] *Id*.

[78] Paul McNamara, *Cruel ID Thieves Target Military Families*, NETWORKWORLD.COM COMMUNITY, Oct. 11, 2006, http://www.networkworld.com/community/node/8842; *see also* Henson, *supra* note 45.

[79] McNamara, *supra* note 78.

[80] *Id*.

[81] *Id*.

[82] New Scam Targeting Military Spouses, May 29, 2007, http://protectour http://protectourmilitary.org/public_advisories.

[83] *Id*.

[84] BIEGELMAN, *supra* note 1, at 296.

[85] Social Security Number and Date of Birth Issues, Concerns, and Policy, http://www.dogtagsrus.com/catalog/information.php?info_id=5 (last visited 14 Jan. 2010); *see also* BIEGELMAN, *supra* note 1, at 295.

[86] Privacy Rights Clearinghouse, *supra* note 42.

[87] BIEGELMAN, *supra* note 1, at 296.

[88] U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESSIONAL COMMITTEES, GAO-05-1016T: FEDERAL AND STATE LAWS RESTRICT THE USE OF SOCIAL SECURITY NUMBERS YET GAPS REMAIN (2005), *available at* http://www.gao.gov/new.items/d051016t.pdf.

[89] Privacy Rights Clearinghouse, *supra* note 42; *see also* TAKE CHARGE, *supra* note 14, at 32.

their state's department of motor vehicles and request a replacement as soon as possible.[90]

Safeguard Other Important Information

While it is crucial servicemembers protect their SSN, it is just as important to safeguard access to all personal and financial information, such as date of birth, bank accounts, credit cards, insurance, and other information.[91] One simple way to minimize theft is to limit the number of credit cards owned or used and carry only the minimum number of cards and information that are absolutely necessary.[92] Servicemembers should never carry ATM PINs or other passwords in their wallet or store them on cell phones or computers.[93]

Servicemembers should also never give confidential information, such as a mother's maiden name or birth date, over the telephone, through the mail, or on the internet unless familiar with the requestor, and should always inquire why someone needs this information.[94] Additionally, servicemembers should use a confetti-cut shredder to shred any written documentation with personal information such as credit card or bank statements, copies of applications, or credit card receipts and offers before discarding them in the trash.[95]

Review Credit Reports

Everyone is entitled to a free credit report from all three bureaus (TransUnion, Equifax, and Experian) every twelve months or anytime a creditor takes adverse action against a person, so long as he requests a report within 60 days of receiving notice of the adverse action.[96] The only way to order a free report from all three reporting companies simultaneously is by visiting www.annualcreditreport.com, calling 1-877-322-8228, or mailing an Annual Credit Report Request Form to: Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348-5281.[97]

A better way to ensure credit and identity remain safe is to order a report separately from one of the three credit bureaus every four months.[98] For example, a person can write Equifax in October for a free annual report, TransUnion in February and Experian in June. This enables a person to receive a free credit report three times a year instead of annually for a more thorough inspection of financial information.

Servicemembers should also review their children's credit reports to ensure thieves have not confiscated the minor's identity.[99] When reviewing the report, look for unauthorized credit inquiries or approved credit and any other mistakes regardless of whether it is fraud related.[100] If the servicemember finds any issues, he should immediately report the problem to the credit bureaus and seek legal assistance if necessary.[101]

Review Credit Card and Bank Statements

Due to the risk of mail theft and the frequency with which military personnel relocate, it is imperative servicemembers know the billing cycle of credit card and bank statements and review the paperwork every month.[102] Thieves often submit change-of-address notices of potential victims or steal mail from unlocked boxes in order to obtain another's personal information.[103] When reviewing statements, the servicemember should look for unauthorized charges or debits and other mistakes such as excess or double charging by the creditor.[104] It is also important to review cancelled checks on bank statements and reconcile the account to make sure a thief has not changed the amount on the check or accessed the account.[105]

Computer and Internet Awareness and Safety

If the servicemember must disclose personal information over the internet, he should take precautions to ensure he has the latest spyware and anti-virus software installed.[106] Military personnel are provided free anti-spyware software at https://iase.disa.mil/sdep and anti-virus software or at

[90] *Id*.

[91] BIEGELMAN, *supra* note 1, at 296.

[92] *Id*.; *see also* TAKE CHARGE, *supra* note 14, at 32.

[93] BIEGELMAN, *supra* note 1, at 296.

[94] *Id*.

[95] *Id.* at 298; *see also* TAKE CHARGE, *supra* note 14, at 32.

[96] TAKE CHARGE, *supra* note 14, at 28.

[97] *Id*.

[98] BIEGELMAN, *supra* note 1, at 297 (These reporting companies may be contacted separately for a credit report at: Equifax: 1-800-525-6285; www.equifax.com; Experian: 1-888-EXPERIAN (397-3742); www.experian.com; and TransUnion: 1-800-680-7289; www.transunion.com.).

[99] *Id*.

[100] *Id*.

[101] *Id*. at 296.

[102] *Id*. at 305

[103] *Id*. at 296.

[104] *Id*. at 304.

[105] *Id*.

[106] Privacy Rights Clearinghouse, *supra* note 42.

https://infosec.navy.mil for use on their home computers.[107] The military also has strict rules mandating periodic changes to computer passwords utilizing a mix of alpha and numeric characters in combination for better security.

Servicemembers should practice the same diligence on their home computers to protect against unauthorized access to computers, accounts, and wireless networks.[108] People should not record the passwords or make them easily identifiable.[109] Additionally, the passwords should be at least eight characters in length, but fourteen or more is best.[110] Stronger passwords will contain random letters, numbers, punctuation, and symbols that are not repeated or written down, and the user should change the password on a regular basis.[111] It is also best to enable password protection on a home computer and ensure encryption of any home wireless networks so thieves cannot access it and steal personal information.[112] Servicemembers should also avoid using public computers, which are often infected with malware or viruses that allow thieves access to the websites and files a person uses.[113]

Additionally, servicemembers should only do business with well-known, reputable online companies and ensure the connection is secure by looking for the closed padlock symbol on the bottom of the page.[114] Another indication of a secure site for passing personal information is when the Uniform Resource Locator (URL) address at the top of the page changes from "http" to "https."[115] Computers should also have sufficient firewall protection to help block thieves from remotely loading virus programs that can record and transmit keystrokes and other files.[116]

Servicemembers must be aware of phishing and other email schemes.[117] Do not open messages or files from strangers and be sure to use the junk mail filter provided by most email services to eliminate mail from an unknown contact.[118] In addition, banking and other financial institutions do not generally request personal information online.[119] If a financial or other institution claims to require an update to personal information, the servicemember should contact the institution directly to check its legitimacy instead of responding.[120] Another common scam is to offer free software, vacations, electronics, or other prizes to obtain personal information for fraudulent uses.[121] A good rule of thumb for dealing with this type of fraud is to remember that if it sounds too good to be true, it probably is.[122]

Finally, when disposing of old computers, ensure servicemembers remove the hard drive and either smash or drill holes in it prior to reselling, donating, or discarding an old computer.[123] This is the best way to ensure thieves do not recover confidential information.[124] At a minimum, the servicemember should use a "wipe" utility program to overwrite the hard drive since reformatting or deleting may not completely erase personal information.[125]

Place Fraud Alerts on Credit Reports and Consider Alternative Protections

Credit reports contain personal information, such as past and current addresses, whether someone has been sued or filed for bankruptcy, and how and when bills are paid.[126] The three credit reporting bureaus also sell personal information to creditors, employers, and other businesses that use the data to (among other things) evaluate credit, rental, and employment applications.[127] A fraud alert is a notification on a person's credit report that requires creditors to contact the registrant and verify applications prior to approval.[128] When someone places a fraud alert on his credit report, consumer reporting companies also remove the person's name from the marketing lists for prescreened offers of credit and insurance.[129]

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[107] Computer Resources for Military Service Members, http://freecomputerzone.com/downloads/military.html (last visited Jan. 15, 2010) (At the INFOSEC site, click on the COMPUSEC tools tab and scroll down to the anti–spyware link, second from the top. The servicemember can then save the software to a local hard drive to write on a CD–ROM or other portable media for home use. Users must be on a ".mil" workstation to download the software.).

[108] BIEGELMAN, *supra* note 1, at 300 (For example, Microsoft offers additional guidance for improving computer and network security at www.microsoft.com/security; additionally, Microsoft has a password checker to gauge the level of security for chosen passwords at www.microsoft.com/protect/yourself/password/checker.mspx.).

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] Privacy Rights Clearinghouse, *supra* note 42.

[115] BIEGELMAN, *supra* note 1, at 301.

[116] *Id*. at 300.

[117] *Id*.

[118] *Id*.; *see also* TAKE CHARGE, *supra* note 14, at 33.

[119] BIEGELMAN, *supra* note 1, at 300.

[120] *Id*.

[121] *Id*. at 300, 307.

[122] *Id*. at 307.

[123] *Id*. at 300.

[124] *Id*.

[125] TAKE CHARGE, *supra* note 14, at 34.

[126] 'ACTIVE DUTY' ALERTS HELP PROTECT MILITARY PERSONNEL FROM IDENTITY THEFT 1 (July 2005) [hereinafter 'ACTIVE DUTY'], *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt147.shtm.

[127] *Id*.

[128] BIEGELMAN, *supra* note 1, at 308.

[129] 'ACTIVE DUTY', *supra* note 126; *see also* Identity Theft Memorandum, *supra* note 67 (servicemembers should also remove their name, phone

An initial fraud alert lasts for ninety days and is used when a person believes he is at risk for identity theft due to a lost wallet or other compromise.[130] Requesting a fraud alert entitles the consumer to additional free copies of credit reports, and if a compromise actually occurs, the initial fraud alert may be extended and remain in effect for seven years.[131] If a servicemember is deployed he may also place an "active duty alert" on his credit report.[132] An active duty alert is much like the initial alert except that it lasts for one year, unless early removal is requested.[133] A personal representative is also allowed to remove or place an active duty alert and it can be extended if the deployment exceeds one year.[134] Additionally, the servicemember may consider alternative protections such as using a credit freeze or paying for a credit account monitoring service.

Credit freezes are relatively new and expected to become a significant weapon used in the battle against identity theft.[135] Placing a credit freeze with the credit bureaus blocks a potential creditor from issuing new credit without obtaining express permission from that person.[136] The credit freeze also prevents the bureaus from issuing the servicemember's credit score, which is essential information necessary before a business will extend new credit.[137] A credit freeze blocks the issuance of instant credit and is often seen by stores who offer big discounts on purchases when opening a new line of credit at the same time.[138]

Monitoring services are companies the servicemember subscribes to that will notify clients via email, text, or telephone of any changes to the credit report such as credit inquiries or the opening of new accounts.[139] These companies will monitor the report for fraudulent activity and will even take action on the servicemembers behalf if necessary.[140] Most of the services monitoring companies provide for a fee people can do themselves for free, but it requires servicemembers take time and be diligent in monitoring their own credit reports at least annually.[141]

How Do We Teach Servicemembers?

A key component to properly educating servicemembers rests with a good preventative law program. Individual legal problems negatively affect the unit's combat readiness and cause low morale and disciplinary problems.[142] Additionally, servicemembers may have security clearances suspended, possibly resulting in a suspension of duties, if they have negative credit issues resulting from being victimized.[143] Legal assistance attorneys responsible for implementing the preventative law program must act aggressively and think creatively when educating service members and their families on identifying potential legal issues like identity theft.[144] Identifying such issues early may prevent theft from occurring and will reduce the time and resources necessary to correct problems if they do occur.[145]

Briefings concerning identity theft should concentrate mostly on prevention; however, the attorney should also cover the basics of repairing a problem. If time allows, the attorney should prepare and give a one-hour annual briefing on preventing identity theft and consider including the brief at training installations as part of in-processing. At a minimum, the attorney should include identity theft as a portion of an annual preventative law brief.

Additionally, since deployed servicemembers face a higher risk of being victims, the attorney should include information about identity theft in pre-deployment briefs.[146] Attorneys should also prepare and distribute a one-page handout providing information about identity theft and include the family members in briefings. These handouts should be available not only in legal service offices but also in other community offices such as the housing office, family services, or other high-traffic areas for families looking for assistance and information. Servicemembers and their families should be aware of the support and assistance they can receive from the legal office if

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number, and home address from marketing lists by notifying the Direct Marketing Association: (1) DMA Mail Preference Service, P.O. Box 9008, Farmingdale, NY 11735-9008, http://www.the-dma.org; (2) DMA Telephone Preference Service, P.O. Box 9014, Farmingdale, NY 11735-9014, http://www.the-dma.org and call 1-888-5OPTOUT to stop delivery of pre-approved credit offers.).

[130] TAKE CHARGE, *supra* note 14, at 5.

[131] BIEGELMAN, *supra* note 1, at 308; *see also* TAKE CHARGE, *supra* note 14, at 6.

[132] MILITARY PERSONNEL AND FAMILIES FIGHTING BACK AGAINST IDENTITY THEFT 1 (n.d.), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt02.pdf (last visited Jan. 13 2010).

[133] *Id*.

[134] *Id*.

[135] BIEGELMAN, *supra* note 1, at 308; *see also* TAKE CHARGE, *supra* note 14, at 309.

[136] *Id*.

[137] *Id*.

[138] *Id*.

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] RICHARD A. GITTINS, THE MILITARY COMMANDER & THE LAW 347 (4th ed. 1996).

[143] Lynch, *supra* note 54.

[144] U.S. DEP'T OF HOMELAND SECURITY, COMDTINST 5801.4E, LEGAL ASSISTANCE PROGRAM 11 (26 Oct. 2005).

[145] GITTINS, *supra* note 142, at 339.

[146] Henson, *supra* note 45.

victimized, and attorneys should be trained and prepared to assist them in repairing the aftermath of identity theft.

Defense: Fixing the Problem

Even with an effective preventative law program, identity theft still occurs. Therefore, it is equally important to know what steps to take once a victim is identified. Sadly, in identity-theft cases, the victim often has to prove his or her innocence and the criminal is rarely prosecuted.[147] Victims of identity theft often face lingering repercussions that negatively affect their credit rating for years.[148] There are many different types of identity theft and related fraud that result in a variety of consequences and often require differing courses of action. This section outlines the most common types faced by military members.

Unauthorized Charges or Lines of Credit

The Fair Credit Billing Act (FCBA) limits liability to $50 for fraudulent charges on a credit card if the servicemember properly handles the transaction.[149] If a servicemember finds an unauthorized charge on a credit card bill or an unrecognized line of credit in his name, the first step is to contact the creditor to report the incident and cancel the credit card.[150] A written log should be kept of all contact made with any agency that includes the name of the agency and person contacted, the agency phone number, date and time of contact, and synopsis of the conversation.[151]

The next step is to contact one of the credit reporting services and place a fraud alert on the servicemember's credit report.[152] Only one call is necessary because the agency contacted is required to pass the information to the other two bureaus.[153] This will ensure that for at least ninety days, creditors will contact the servicemember prior to issuing credit to a possible thief or releasing credit information to requesting entities.[154] The servicemember should also obtain a police report documenting the theft as well as file a complaint with the FTC.[155] While the police will generally not aggressively pursue the crime, the report will lend credibility to the claim and the credit card company may require it before removing the fraudulent charge or account.[156]

After completing the initial steps, the servicemember should send a dispute letter to the creditor mailed to the address for "billing inquiries," not the address for mailing payments.[157] The letter must reach the company within 60 days after the creditor mailed the erroneous bill, so it is essential to send the dispute by certified mail with a return receipt as proof.[158]

The servicemember also has the right to prevent the company from reporting the fraudulent information to the reporting agencies by sending a request,[159] along with an identity theft affidavit, to the proper address.[160] Be sure to maintain copies of all correspondence and follow up with the creditor if they have not responded in the required 30 days.[161] While most credit card companies will accept notice via telephone and resolve the issue immediately for a fraudulent charge, it is always recommended to follow the above FBCA guidelines to ensure the servicemember's rights are protected.[162]

Correcting Fraudulent Information on Credit Reports

The Fair Credit Reporting Act (FCRA) places the burden of correcting fraudulent credit report information on the credit bureaus and the reporting creditor.[163] As soon as a servicemember spots fraudulent information on a credit report, he should immediately contact the creditor and reporting agency to deny the transaction and place a fraud alert on his credit report.[164] The victim must complete an

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[147] BIEGELMAN, *supra* note 1, at 177.

[148] *Id*.

[149] Truth in Lending Act, 15 U.S.C. § 1601(161)(e) (2006).

[150] BIEGELMAN, *supra* note 1, at 310.

[151] TAKE CHARGE, *supra* note 14, at 11.

[152] BIEGELMAN, *supra* note 1, at 310.

[153] TAKE CHARGE, *supra* note 14, at 5 (The credit reporting companies can be contacted at the following telephone numbers: Equifax 1-800-525-6285; Experian 1-888-Experian; and TransUnion 1-800-680-7289.).

[154] *Id*. at 6.

[155] *Id*. at 8 (Reports can be filed on the FTC website at www.ftc.gov/idtheft or by calling 1-877-IDTheft. The FTC is also releasing a new video showing how people can file a complaint, and offers examples of what complaints the FTC handles at http://ftc.gov/multimedia/video/scam-watch/file-a-complaint.shtm).

[156] *Id*.

[157] *Id*. at 19; *see also* Appendix D.

[158] TAKE CHARGE, *supra* note 14, at 19.

[159] *See* Appendix D (providing a sample dispute letter to a creditor to stop the company from reporting fraudulent, negative information to credit reporting agency).

[160] REMEDY THE EFFECTS OF IDENTITY THEFT 2 (n.d.), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt09.pdf (last visited Jan. 10, 2010); *see also* Appendix B (providing a sample of an identity theft affidavit, which is a form that details information about a specific fraud).

[161] TAKE CHARGE, *supra* note 14, at 19.

[162] *Id*. at 13.

[163] *Id*. at 17.

[164] *Id*.

identity theft affidavit and a blocking letter[165] informing the reporting agency of the fraud.[166]

Next, the victim should report the theft to local police and the FTC and include a copy of the police report with the affidavit and blocking letter.[167] Once the reporting agency receives the necessary paperwork, the servicemember can extend the 90-day fraud alert for up to seven years as necessary.[168] It is important to keep a file with any documentation and request all transaction paperwork from the reporting company and the debt collector if applicable.[169] As with any fraud issue, the servicemember should keep a detailed log of all contact made with agencies and send any correspondence by certified mail with a return receipt.[170] It is also important to follow-up with the reporting agency to ensure it removes the negative report and always maintain a file to show as proof if the agencies re-report the transaction.[171]

Fraudulent Electronic Bank Withdrawals

Unauthorized electronic transactions dealing with credit or banking is governed by the Electronic Fund Transfer Act.[172] If a servicemember loses an ATM card, he must report the loss within two business days of discovery to limit his losses to $50.[173] The liability to the consumer increases to $500 if the loss is reported between two and sixty days of discovery and no limit exists if the missing card is reported after sixty days.[174] Most banks do not adhere to these strict rules and will generally cover the loss.[175] If the card is stolen, immediately report it to the police and keep a copy of the report.[176] The servicemember should also diligently check his bank records to spot any fraudulent transactions.[177]

If the servicemember does find an unauthorized transaction, he should call the bank to report the fraud and send a dispute letter (as with the fraudulent credit card transactions).[178] The institution will then investigate the erroneous transaction within 10 days but may take up to 45 days if necessary.[179] The bank must respond three days after completion of the investigation and remove the error one day later.[180]

Fraudulent Checks or Bank Paper Transactions

Unlike electronic transactions, there is no federal law limiting a consumer's liability for fraudulent paper transactions, although state law may apply.[181] If a thief fraudulently uses or counterfeits the servicemember's checks, the victim should immediately stop payment, close the account, and notify the check verification system used in these cases.[182] The check verification system keeps retailers from honoring the checks, and will verify if other bank accounts were fraudulently opened in the servicemember's name.[183]

Check verification systems can also provides a consumer report when requested, showing information about checking accounts.[184] The same procedures for correcting credit reports should be followed to correct the consumer report if errors exist.[185] If the bank is not assisting the servicemember with the fraud, he should contact the overseeing federal or state agency that regulates banking operations.[186] The consumer should also contact the business where the thief passed the bad check to ensure they do not send the bill to collections or submit a negative report to the credit reporting agencies.[187]

Correcting a Criminal Record

While correction procedures may vary according to state, there are general guidelines to follow if wrongful, criminal

[165] *See* Appendix C (providing a sample blocking letter to a credit reporting agency).

[166] TAKE CHARGE, *supra* note 14, at 17.

[167] *Id*. at 8.

[168] *Id*. at 6.

[169] *Id*. at 10.

[170] *Id*.

[171] *Id*.

[172] Electronic Funds Transfer, 15 U.S.C. § 1693 (901) (b) (2006).

[173] TAKE CHARGE, *supra* note 14, at 13.

[174] *Id*.

[175] *Id*.

[176] *Id*. at 8.

[177] *Id*. at 27.

[178] *Id*. at 13; *see also* Appendix D (providing a sample dispute letter).

[179] TAKE CHARGE, *supra* note 14, at 13.

[180] *Id*.

[181] *Id*. at 14.

[182] *Id*. at 14–15 (Chex Systems, Inc. is a company used to report fraud to retailers to prevent them from honoring stolen checks and may be contacted at 1-800-428-9623; other such reporting agencies include TeleCheck at 1-800-710-9898; and Certegy at 1-800-437-5120. A company called SCAN will assist in finding out if a thief is passing bad checks in your name and may be contacted at 1-800-262-7771.).

[183] *Id*.

[184] *Id*. at 15.

[185] *Id*.

[186] *Id*. (To contact the FDIC call 877-ASKFDIC (877-275-3342). The FDIC Call Center will direct your call.).

[187] *Id*.

violations are recorded using the servicemember's name.[188] First, the victim should contact the police department or court agency where the arrest occurred or warrant was issued.[189] The servicemember should confirm his identity and immediately file an impersonation report with the department or court.[190] This is usually done by having the law enforcement agency take fingerprints and a current photograph, and by providing copies of all identifying documents for comparison with the imposter.[191] If the arrest warrant or incident occurred far from home, solicit assistance from the local police department in filing the impersonation report and identification.[192]

Once the department is satisfied with the proof provided, it should issue a clearance letter or certificate of release that should remain in the servicemember's possession at all times.[193] The next step is to request the police department file the appropriate paperwork proving the servicemember's innocence with the district attorney's office or court, resulting in an amended complaint.[194] The victim may also request the name of the perpetrator be changed to the actual criminal or to John or Jane Doe if unknown, with their own name as an alias.[195] Finally, the servicemember will need to contact the district attorney's office for the correct paperwork necessary to regain his good name.[196] Experts also recommend checking with the Department of Motor Vehicles (DMV) for fraudulent use of a servicemember's driver's license and request the DMV flag the file for possible fraud.[197]

Conclusion

Servicemembers need and deserve special consideration and assistance with respect to identifying and combating identity theft. As judge advocates, it is our responsibility to educate military members and ensure commanders know that we can equip their unit to detect, deter, and defend against identity theft, thereby improving combat readiness. To do so, we need to conduct initial, annual, and pre-deployment training for all servicemembers on the dangers of complacency; how to stay vigilant; what thieves are looking for; how to keep criminals from obtaining their personal information; and, what steps to take if servicemembers or their families become victims. Servicemembers sacrifice many things in support of their country and the mission, but their good names should not be one of them.

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[188] *Id*. at 20.

[189] *Id*.

[190] *Id*. (An impersonation report is a specific police report confirming the wrongful use of another's identity.).

[191] *Id*. at 21.

[192] *Id*.

[193] *Id*.

[194] *Id*.

[195] *Id*. at 17.

[196] *Id*. at 20.

[197] *Id*. at 21.

Appendix A

Annual Credit Report Request Form

You have the right to get a free copy of your credit file disclosure, commonly called a credit report, once every 12 months, from each of the nationwide consumer credit reporting companies – Equifax, Experian, and TransUnion.

For instant access to your free credit report, visit www.annualcreditreport.com.
For more information on obtaining your free credit report, visit www.annualcreditreport.com or call 1-877-322-8225.
Use this form if you prefer to write to request your credit report from any, or all, of the nationwide consumer credit reporting companies. The following information is required to process your request. Omission of any information may delay your request.
Once complete, fold (do not staple or tape), place into a #10 envelope, affix required postage and mail to:

Annual Credit Report Request Service P.O. Box 105281 Atlanta, GA 30348-5281

Please use a black or blue pen and write your responses in PRINTED CAPITAL LETTERS without touching the sides of the boxes like the examples listed below

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	0	1	2	3	4

Social Security Number: ___ – ___ – ____ **Date of Birth:** __ / __ / __
Month **Day** **Year**

First Name **M.I.**

Last Name

Current Mailing Address:

House Number **Street Name**

Apartment Number / Private Mailbox **For Puerto Rico Only: Print Urbanization Name**

Previous Mailing Address: (complete only if at current mailing address less than two years)

House Number **Street Name**

Apartment Number / Private Mailbox **For Puerto Rico Only: Print Urbanization Name**

City **State** **Zip Code**

Shade Circle like this ●
Not like this ⊗
Or this ✓

I want credit a credit report from (shade each that you would like to receive).

○ Equifax
○ Experian
○ TransUnion

○ Shade here if, for security Reasons, you want your Credit report to include no more than the last four digits of your Social Security Number

If additional information is needed to process your request, the consumer credit reporting company will contact you by mail.
Your request will be processed within 15 days of receipt and then mailed to you.

Appendix B

ID Theft Affidavit

Name_____ Phone number _____Page 1

Victim Information

(1) My full legal name is _____
(First) (Middle) (Last) (Jr., Sr., III)

(2) (If different from above) When the events described in this affidavit took place, I was known as:

_____
(First) (Middle) (Last) (Jr., Sr., III)

(3) My date of birth is _____
(day/month/year)

(4) My Social Security number is_____

(5) My driver's license or identification card state and number is _____

(6) My current address is _____

City _____State _____Zip Code _____

(7) I have lived at this address since _____
(month/year)

(8) (If different from above) When the events described in this affidavit took place, my address was_____

City _____ State _____ Zip Code _____

(9) I lived at the address in Item 8 from _____until _____

(10) My daytime telephone number is (_____)_____

My evening telephone number is (_____)_____

DO NOT SEND AFFIDAVIT TO THE FTC OR ANY OTHER GOVERNMENT AGENCY

How the Fraud Occurred

Check all that apply for items 11 - 17:

(11) ☐ I did not authorize anyone to use my name or personal information to seek the money, credit, loans, goods or services described in this report.

(12) ☐ I did not receive any benefit, money, goods, or services as a result of the events described in this report.

(13) ☐ My identification documents (for example, credit cards; birth certificate; driver's license; Social Security card; etc.) were ☐ stolen ☐ lost on or about _____ (day/month/year).

(14) ☐ To the best of my knowledge and belief, the following person(s) used my information(for example, my name, address, date of birth, existing account numbers, Social Security number, mother's maiden name, etc.) or identification documents to get money, credit, loans, goods or services without my knowledge or authorization:

_____	_____
Name (if known)	Name (if known)
_____	_____
Address (if known)	Address (if known)
_____	_____
Phone number(s) (if known)	Phone number(s) (if known)
_____	_____
Additional information (if known)	Additional information (if known)

(15) ☐ I do NOT know who used my information or identification documents to get money, credit, loans, goods or services without my knowledge or authorization.

(16) ☐ Additional comments: (For example, description of the fraud, which documents or information were used or how the identity thief gained access to your information.)_____
_____
_____

(Attach additional pages as necessary.)

Victim's Law Enforcement Actions

(17) (check one) I ☐ am ☐ am not willing to assist in the prosecution of the person(s) who committed this fraud.

(18) (check one) I ☐ am ☐ am not authorizing the release of this information to law enforcement for the purpose of assisting them in the investigation and prosecution of the person(s) who committed this fraud.

(19) (check all that apply) I ☐ have ☐ have not reported the events described in this affidavit to the police or other law enforcement agency. The police ☐ did ☐ did not write a report. In the event you have contacted the police or other law enforcement agency, please complete the following:

_____	_____
(Agency #1)	(Officer/Agency personnel taking report)
_____	_____
(Date of report)	(Report number, if any)
_____	_____
(Phone number)	(email address, if any)
_____	_____
(Agency #2)	(Officer/Agency personnel taking report)
_____	_____
(Date of report)	(Report number, if any)
_____	_____
(Phone number)	(email address, if any)

Documentation Checklist

Please indicate the supporting documentation you are able to provide to the companies you plan to notify. Attach copies (NOT originals) to the affidavit before sending it to the companies.

(20) ☐ A copy of a valid government-issued photo-identification card (for example, your driver's license, state-issued ID card or your passport). If you are under 16 and don't have a photo-ID, you may submit a copy of your birth certificate or a copy of your official school records showing your enrollment and place of residence.

(21) ☐ Proof of residency during the time the disputed bill occurred, the loan was made or the other event took place (for example, a rental/lease agreement in your name, a copy of a utility bill or a copy of an insurance bill).

(22) A copy of the report you filed with the police or sheriff's department. If you are unable to obtain a report or report number from the police, please indicate that in Item 19. Some companies only need the report number, not a copy of the report. You may want to check with each company.

Signature

I certify that, to the best of my knowledge and belief, all the information on and attached to this affidavit is true, correct, and complete and made in good faith. I also understand that this affidavit or the information it contains may be made available to federal, state, and/or local law enforcement agencies for such action within their jurisdiction as they deem appropriate. I understand that knowingly making any false or fraudulent statement or representation to the government may constitute a violation of 18 U.S.C. §1001 or other federal, state, or local criminal statutes, and may result in imposition of a fine or imprisonment or both.

_____ _____

Signature Date Signed

_____ (Notary) [Check with each company. Creditors sometimes require notarization. If they do not, please have one witness (non-relative) sign below that you completed and signed this affidavit.]

Witness:

_____ _____

(signature) (printed name)

_____ _____

(date) (telephone number)

Fraudulent Account Statement

Completing This Statement

• Make as many copies of this page as you need. **Complete a separate page for each company you're notifying and only send it to that company**. Include a copy of your signed affidavit.
• List only the account(s) you're disputing with the company receiving this form. **See the example below**.
• If a collection agency sent you a statement, letter or notice about the fraudulent account, attach a copy of that document (**NOT** the original).**Completing this Statement**

I declare (check all that apply):

☐ As a result of the event(s) described in the ID Theft Affidavit, the following account(s) was/were opened at your company in my name without my knowledge, permission or authorization using my personal information or identifying documents:

Creditor/Name and address (the company that opened the account or provided the goods and services)	Account number	Types of unauthorized credit/goods/services provided by creditor (if known)	Date issued or opened (if known	Amount/ Value provided (the amount charged or the cost of the goods/ services)

☐ During the time of the accounts described above, I had the following account open with your company:

Billing name _____

Billing address _____

Account number _____

Appendix C

Sample Blocking Letter to Reporting Company

Date
Your Name
Your Address
Your City, State, Zip Code

Complaint Department
Name of Consumer Reporting Company
Address
City, State, Zip Code

Dear Sir or Madam:

I am a victim of identity theft. I am writing to request that you block the following fraudulent information in my file. This information does not relate to any transaction that I have made. The items are also circled on the attached copy of the report I received. (Identify item(s) to be blocked by name of source, such as creditors or tax court, and identify type of item, such as credit account, judgment, etc.)

Enclosed is a copy of the law enforcement report regarding my identity theft. Please let me know if you need any other information from me to block this information on my credit report.

Sincerely,

Your name

Enclosures: (List what you are enclosing.)

Appendix D

Sample Dispute Letter to Creditor

Date
Your Name
Your Address
Your City, State, Zip Code

Complaint Department
Name of Consumer Reporting Company
Address
City, State, Zip Code

Dear Sir or Madam:

I am writing to dispute a fraudulent (charge or debit) on my account in the amount of $_____. I am a victim of identity theft, and I did not make this (charge or debit). I am requesting that the (charge be removed or the debit reinstated), that any finance and other charges related to the fraudulent amount be credited, as well, and that I receive an accurate statement.

Enclosed are copies of (use this sentence to describe any enclosed information, such as a police report) supporting my position. Please investigate this matter and correct the fraudulent (charge or debit) as soon as possible.

Sincerely,

Your name

Enclosures: (List what you are enclosing.)

Appendix E

Sample Chart of Course of Action

CHART YOUR COURSE OF ACTION

Use this form to record the steps you've taken to report the fraudulent use of your identity. Keep this list in a safe place for reference.

NATIONWIDE CONSUMER REPORTING COMPANIES — REPORT FRAUD

BANKS, CREDIT CARD ISSUERS, AND OTHER CREDITORS (Contact each creditor promptly to protect your legal rights.)

LAW ENFORCEMENT AUTHORITIES — REPORT IDENTITY THEFT

Creditor	Address/Phone Number	Date Contacted	Contact Person	Comments

Agency/department	Phone Number	Date Contacted	Contact Person	Report Number	Comments

Consumer Reporting Company	Phone Number	Date Contacted	Contact Person	Comments
Equifax	1.800.525.6285			
Experian	1.888.EXPERIAN (397.3742)			
TransUnion	1.800.680.7289			

Trial Judiciary Note

A View from the Bench: The Care and Keeping of Documents: Proper Handling and Use of Documentary Exhibits at Trial

Lieutenant Colonel Wendy P. Daknis[*]

Introduction

Nearly every case, whether a simple judge alone guilty plea or a complex contested panel case, involves the use of documents. These exhibits come in all shapes and sizes, ranging from sworn statements made by the accused to Enlisted Record Briefs to enlarged diagrams of the crime scene. Despite the frequency with which these documents come into play at trial, military justice practitioners often struggle with the proper handling and use of documentary exhibits. This note is designed to assist counsel by outlining the basic rules for the use of documents, as well as by providing practical tips on the actual handling of documents during trial. Following these guidelines should ensure that your use of documents at trial not only follows the law and *Rules of Practice Before Army Courts-Martial*[1] (*Rules of Practice*), but also assists, instead of distracts, the fact-finder in determining guilt or innocence and an appropriate sentence, if necessary.

Choosing Documents

Counsel should always ask themselves the question: "For what purpose am I offering this document?" The answer to that question drives all that follows. Not all documents discovered during the investigatory stage and pre-trial preparation can or even should be used during trial. Documents tending to prove or disprove a fact in issue may be relevant.[2] Documents which contain prior statements of witnesses testifying at trial might be helpful to refresh a witness' recollection[3] or be admissible as the witness' recorded recollection.[4] Some documents may even be useful as demonstrative evidence to assist a witness in her testimony or to aid the fact-finder in understanding the witness' testimony.[5]

After identifying a relevant document, counsel should next determine if all portions of the document are relevant. For example, if an accused is charged with breaking restriction during a certain time period and the trial counsel has obtained the Installation Access Control System (IACS) records for the accused, the trial counsel might limit the IACS records to the relevant time period, rather than introduce every entry available for the accused. While counsel should certainly present all documents at court-martial which are necessary, there is no need to use each and every page of each and every document.

Marking Documents

The *Rules of Practice* direct that counsel shall provide all documents that they intend to use or introduce at trial to the court reporter for marking prior to trial.[6] This rule also applies to pre-trial hearings such that all documents intended for use during a motions hearing should also be marked prior to the hearing. Waiting until the middle of trial or the middle of a hearing to mark documents unnecessarily delays the presentation of the case and wastes time.

When marking documents, counsel should have those documents that they intend to use during the merits or sentencing case marked for identification as either Prosecution Exhibits or Defense Exhibits. Prosecution Exhibits will be numbered consecutively with Arabic numbers and Defense Exhibits will be labeled consecutively with capital letters, i.e., Prosecution Exhibit 1 for Identification and Defense Exhibit A for identification. All other exhibits, to include those used in support of motions, will be marked as appellate exhibits and numbered consecutively with Roman numerals, i.e., Appellate Exhibit I. When marking documents, counsel should have the documents marked in the order that they anticipate using the documents at trial or during the course of the hearing.[7]

Documents used in support of a motion should ordinarily be attached to the written brief at the time the written brief is marked as an Appellate Exhibit. Counsel frequently provide

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[1] U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL 15.1 [hereinafter RULES OF PRACTICE].

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2008) [hereinafter MCM].

[3] *Id.* MIL. R. EVID. 612.

[4] *Id.* MIL. R. EVID. 803(5).

[5] *See* United States v. Heatherly, 21 M.J. 113, 115 & n.2 (C.M.A. 1985) (citing generally J.E. Macy, Annotation, *Evidence: Use and Admissibility of Maps, Plats, and Other Drawings to Illustrate or Express Testimony*, 9 A.L.R.2d 1044 (1950)).

[6] RULES OF PRACTICE, *supra* note 1, 15.1.

[7] *Id.*

the military judge and opposing counsel with electronic documents when electronically "filing" a motion (or response),[8] but then fail to include those documents with the original document at the hearing. Those documents that were provided at the time of filing are a part of the written brief and must be marked for the record. If additional documents are presented by counsel at the motions hearing, they should be marked before the hearing as separate Appellate Exhibits.

Finally, keep in mind when marking documents that any document that is shown to a witness should first be shown to opposing counsel;[9] counsel are required by the *Rules of Practice* to show all exhibits to opposing counsel prior to trial.[10] Consequently, the wisest and most efficient course of action is to show opposing counsel all documents prior to marking them, whether before trial or, in the rare exception, during the course of trial.[11] Assuming the exhibit, after being shown to opposing counsel and marked, has remained with the court reporter as required by the *Rules of Practice*,[12] it is rarely necessary to show it to opposing counsel again before showing the exhibit to a witness or offering the exhibit into evidence.

Referring to Documents

Once a document has been marked, counsel should refer to the document by its exhibit name and number or letter. Appellate Exhibits are always referred to as an Appellate Exhibit, i.e., "Appellate Exhibit I" or "Appellate Exhibit IX." Prosecution and Defense Exhibits, on the other hand, are first marked for identification and until they are admitted into evidence, should always be referred to by the appropriate number or letter and as being "for identification," as in "Prosecution Exhibit 5 for identification" or "Defense Exhibit C for identification."[13]

Often, counsel refer to an exhibit that has been marked for identification as "what has been marked as Prosecution Exhibit 5 for identification." While not technically incorrect, this extra language is unnecessary. It is more appropriate and straightforward to refer to the exhibit as "Prosecution Exhibit 5 for identification." Most frequently, this arises when counsel are describing a certain document as they hand it to a witness; for example, "Mr. Witness, I'm handing you the accused's Enlisted Record Brief, which has been previously marked as Prosecution Exhibit 5 for identification." There are two problems with this approach. First, there is rarely a need to identify a piece of evidence for a witness. If that witness does not recognize the document, then he or she most likely should not be testifying about that document.[14] Second, the identification is unnecessarily wordy. If there is a specific need to identify the document for the witness, an efficient way to handle this is to state, "Mr. Witness, I'm handing you Prosecution Exhibit 5 for identification."

Once the exhibit has been offered and admitted into evidence, the military judge will strike the words "for identification" and the exhibit becomes simply a Prosecution or Defense Exhibit and should be referred to as "Prosecution Exhibit 5" or "Defense Exhibit C." Counsel frequently make the mistake of referring to an exhibit as "what's been marked as Prosecution Exhibit 5." Remember that once it has been admitted, it is no longer "marked" as an exhibit, it *is* the exhibit as labeled.

Handling Documents During Trial

After a document has been marked, it should remain with the court reporter for the duration of the trial.[15] When counsel need to show a document to a witness, they must first retrieve the document from the court reporter. As counsel approach the court reporter, they should announce that they are retrieving the document. When handing the document to the witness, they must also announce which document they are handing to the witness. Finally, counsel should indicate that the opposing counsel has previously viewed the document. As an example, imagine a case in which Prosecution Exhibit 6 for identification is a DA Form 3881, Rights Warning Procedure/Waiver Certificate, dated 7 June 2008. The trial counsel wishes to show the DA Form 3881 to a Criminal Investigation Division (CID) witness to lay the foundation for the form in order to enter it into evidence. The trial counsel would approach the court reporter, announcing, "I am retrieving Prosecution Exhibit 6 for identification, which has previously been shown to the defense, from the court reporter." The trial counsel would then take the DA Form 3881 from the court reporter and carry it to the witness, announcing, "I am handing Prosecution Exhibit 6 for identification to the witness." At that point, the trial counsel would hand the DA Form 3881 to the witness.

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[8] Note that the RULES OF PRACTICE consider a document to be "filed" when the original, with enclosures, is provided to the court reporter, with a copy (with enclosures) provided to the judge and opposing counsel. On occasion, the judge may allow "filing" to be done electronically, with the original given to the court reporter at the time of the motions hearing. *Id.* 3.1.

[9] *Id.* 15.1.

[10] *Id.* 15.4.

[11] As noted below, when actually offering the exhibit, counsel will confirm they have done this by concluding their offer with the phrase "previously shown to the [Government][defense];" i.e., "The Government offers Prosecution Exhibit 1 for identification, previously shown to the defense."

[12] *See* "Handling Documents During Trial," *infra*.

[13] RULES OF PRACTICE, *supra* note 1, 15.1.

[14] Identifying the document might also be leading—if the point is to find out whether the witness can identify the document—or it might disclose to the members information that should not be published to the members prior to admission of the document itself.

[15] RULES OF PRACTICE, *supra* note 1, 15.1.

The trial counsel will next conduct any necessary examination of the witness with respect to the document. When the examination is complete, and prior to cross-examination, the trial counsel should retrieve the document from the witness and return it to the court reporter,[16] announcing, "I am retrieving Prosecution Exhibit 6 for identification from the witness and returning it to the court reporter." Counsel must not leave the exhibit on the witness stand with the witness. Additionally, counsel must never take the exhibit back to counsel table, nor should they leave the exhibit on the lectern. Exhibits that are not being used during the course of examination belong in one place—with the court reporter.[17]

Showing Documents to Witnesses

Any document presented to a witness or used by a witness must first be marked as an exhibit. Counsel must not hand a document to a witness or show a witness a document without first having it marked. Likewise, counsel must never permit a witness to bring an unmarked document with him to the witness stand.[18] If, during the course of a witness' testimony, counsel discover that a particular document would be helpful to the witness, but that document has not been marked as an exhibit, counsel should pause, show the document to opposing counsel, hand the document to the court reporter to be marked as an exhibit, and then hand the exhibit to the witness.

When handing an exhibit to a witness, counsel should always give the original exhibit to the witness. Often, counsel have previously made copies of the exhibit for their own use; however, these copies are not a substitute for the exhibit and may not be given or shown to the witness. For example, defense counsel may intend to use Defense Exhibit D for identification, a sworn statement, while examining an eyewitness to a shooting. If the sworn statement is long, the defense counsel may have highlighted the relevant portions on her copy for her use. The defense counsel may not then hand her version of Defense Exhibit D for identification to the witness and ask him to review the highlighted portion, as this copy of Defense Exhibit D for identification does not accurately reflect Defense Exhibit D for identification because it contains additional markings that are not contained on Defense Exhibit D for identification. If the highlighted portion is absolutely necessary, the defense counsel should either highlight that portion and show it to the opposing counsel prior to having the document marked or, while using the document during examination, highlight the portion, show it to the opposing counsel, and then hand the document to the witness. Keep in mind that once an exhibit has been admitted into evidence, it cannot be changed or marked upon under any circumstance without first obtaining permission from the military judge.[19]

Although there are circumstances when it is appropriate for a witness to read a document to the panel,[20] it is improper for a witness to read from a document that has not been admitted into evidence.[21] Likewise, it is improper for a witness to read a document to herself, then look up and testify about what the document says. For example, it is improper for a law enforcement agent to examine a sworn statement for the time that the statement was given, and then announce to the court, "According to the sworn statement, we concluded at 1630 hours." Testifying about the contents of a document that has not been admitted into evidence is just as impermissible as reading aloud from that same document.

Notwithstanding the prohibition on reading documents to the fact-finder which have not yet been admitted into evidence, Military Rule of Evidence (MRE) 612 does allow a witness to read a document to herself to refresh her memory.[22] To properly refresh a witness' memory, counsel should first establish that (1) the witness does not currently remember a particular fact and (2) reviewing a particular document would assist the witness to remember that fact.[23] Once counsel have laid this basic foundation, the process of refreshing a witness' memory is very simple. Counsel should show the witness the relevant document, which has already been marked for identification as an exhibit, and have her read it (or a particular portion of it) silently to herself. When she is done reading, counsel should first retrieve the document and then determine if the document did, in fact, refresh the witness' memory. If the document was successful in refreshing the witness' memory, she may then testify about that specific fact. If the document did not refresh her memory, she may not rely on what she read in the exhibit as a basis for her testimony.[24]

[16] *Id.*

[17] *Id.*

[18] This is a frequent problem with experts, who have a tendency to bring case files with them. Trial counsel must be alert to intercept these files before the witness takes the stand.

[19] RULES OF PRACTICE, *supra* note 1, 15.1.

[20] *See* "Publishing Documents," *infra*.

[21] Until a document is admitted into evidence, the military judge has not made a determination under Military Rule of Evidence (MRE) 104 that the evidence is admissible, and therefore proper for consideration by the Court. MCM, *supra* note 2, MIL. R. EVID. 104(a). Allowing a witness to read from a document that has not been admitted into evidence invites violation of MRE 103(c), which states, "In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members." *Id.* MIL. R. EVID. 103(c).

[22] *Id.* MIL. R. EVID. 612.

[23] STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 612.02[04] (6th ed. 2006) (citing United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980)).

[24] Counsel might want to consider past recollection recorded in this situation. *See* MCM, *supra* note 2, MIL. R. EVID. 803(5).

Admitting Documents Into Evidence

Before documents can be considered by the fact-finder, they must be admitted into evidence. In order to be admissible as evidence, a document must be relevant as defined by MRE 401,[25] meaning that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[26] Even if relevant, the admissibility of a document is dependent on the application of all the MRE and may be excluded for a variety of reasons.[27]

To properly admit documentary exhibits, counsel must lay a proper foundation for each document, identifying the evidence and connecting it with the issue in question.[28] Laying a proper foundation does not need to be, and rarely should be, formulaic. The foundation will naturally vary based on the exhibit and the purpose for which it is offered.

After showing its relevance and laying a proper foundation, the next hurdle in moving to admit a document into evidence is authenticating the document, or convincing the court that the document is what it purports to be.[29] Military Rule of Evidence 901, 902, and 903 govern the means and methods by which documents may be authenticated; as noted in MRE 901, there is no set method for proving authenticity.[30] Generally, the ways counsel may authenticate a document are: (1) through the testimony of a witness and (2) by self-authentication following MRE 902.

Laying a proper foundation and authenticating a document are not the only evidentiary requirements counsel face when introducing a document into evidence. Other applicable rules of evidence when introducing documents include the original documents rule, rule of completeness, and hearsay.

The original documents rule is addressed by MREs 1001 through 1008. Although MRE 1002 establishes the general rule requiring the production of the original document to prove the contents of any writing,[31] this strict rule is attenuated by MRE 1003, which allows a "duplicate" to be admitted into evidence as long as there is no question about the authenticity of the original and it would not be unfair to admit the duplicate in lieu of the original.[32] Applying MRE 1003 practically, a duplicate will be adequate in most circumstances. Further, MRE 1004 and MRE 1005 provide even more specialized circumstances under which a duplicate will be admissible, to include when the original is lost, destroyed, not obtainable, or collateral[33] and when the document is a public record.[34]

The rule of completeness is contained in both MRE 106 and MRE 304(h)(2). Military Rule of Evidence 106 allows an adverse party to require opposing counsel to introduce a full document, as opposed to just a portion of the document, when fairness would demand it.[35] Specifically, when providing just one portion of a document to the fact-finder would present the evidence in a manner that is misleading because the full disclosure of all the contents would fill in relevant facts and/or circumstances, MRE 106 would apply.[36] Additionally, MRE 106 allows an adverse party to require opposing counsel to introduce other documents which ought in fairness be considered contemporaneously with the document being introduced.[37] Military Rule of Evidence 304(h)(2) applies the rule of completeness to admissions or confessions such that the defense may introduce any remaining portions of an admission or confession that the Government did not introduce.[38]

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[25] *Id.* MIL. R. EVID. 402.

[26] *Id.* MIL. R. EVID. 401.

[27] *Id*. MIL. R. EVID. 402. Some reasons for excluding relevant documents include: the document cannot be authenticated properly under MRE 901; the document is inadmissible hearsay under MRE 802; the document is the result of privileged communications under MREs 502, 503, 504, or 513; or the probative value of the document is substantially outweighed by the danger of unfair prejudice under MRE 403.

[28] BLACK'S LAW DICTIONARY 656 (6th ed. 1990) (citing Taylor v. State, 642 P.2d 1294, 1295 (Wyo. 1982)).

[29] MCM, *supra* note 2, MIL. R. EVID. 901(a).

[30] *Id*. MIL. R. EVID. 901(b).

[31] *Id*. MIL. R. EVID. 1002.

[32] *Id*. MIL. R. EVID. 1003.

[33] *Id*. MIL. R. EVID. 1004.

[34] *Id*. MIL. R. EVID. 1005.

[35] *Id*. MIL. R. EVID. 106.

[36] *See, e.g.*, United States v. Salgado-Agosto, 20 M.J. 238, 239 (C.M.A. 1985) (applying MRE 106 to favorable portions of the accused's personnel records when the Government admits unfavorable portions); *see also* United States v. Maracle, 26 M.J. 431, 433 (C.M.A. 1988) (holding that MRE 106 permitted defense counsel to require the trial counsel to introduce the sentence imposed at a prior court-martial when introducing evidence of conviction by a prior court-martial) ("[B]asic considerations of fairness require that if the members be informed that appellant committed prior crimes for purposes of sentencing, they also should be informed how he was punished for them.").

[37] MCM, *supra* note 2, MIL. R. EVID. 106; *see, e.g.*, Mariani v. United States, 80 F. Supp. 2d 352, 361 (M.D.Pa. 1999) (holding that under Fed. R. Evid. 106, the Thompson Committee Minority Report should be admissible if the Majority Report was accepted into evidence).

[38] MCM, *supra* note 2, MIL. R. EVID. 304(h)(2). Military Rule of Evidence 304(h)(2) "(1) applies to oral as well as written statements; (2) governs the timing under which applicable evidence may be introduced by the defense; (3) permits the defense to introduce the remainder of a statement to the extent that the remaining matter is part of the confession or admission or otherwise is explanatory of or in any way relevant to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay; and (4) requires a case-by-case determination as to whether a series of statements should be treated as part of the original confession or admission or as a separate transaction or course of action for purposes of the rule." United States v. Gilbride, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing United States v. Rodriguez, 56 MJ 336, 341–42 (C.A.A.F. 2002)).

Finally, the hearsay rules under MREs 801 through 807 apply to documentary evidence. If a document contains an assertion by a person, was made prior to trial, and is offered to show that the contents are true, then that document most likely contains hearsay[39] and will not be admissible at trial unless it fits within one of the exemptions in MRE 801(d) or one of the exceptions contained within MRE 803, MRE 804, or MRE 807.[40] When counsel introduce documents that fit one of the hearsay exemptions or exceptions, laying a proper foundation for that exemption or exception is particularly important. Consequently, counsel should carefully evaluate all documents for hearsay prior to introducing them and ensure that they are prepared to lay the foundation for their admission well before the start of trial.

Once the proper foundation has been laid and the authenticity of the document has been established, the verbal introduction of a document into evidence is a simple process. With respect to Appellate Exhibits, they are ordinarily marked and accepted by the military judge without any formal offer from counsel. While the military judge is bound by the rules of evidence when deciding many motions,[41] she is not bound by the rules of evidence (except those concerning relevance and privilege) when resolving "preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness."[42] For those matters in which the rules of evidence do not apply, the military judge will consider all appellate exhibits submitted by counsel, as long as they are relevant. For motions where the rules do apply, counsel should be ready to lay a proper foundation, to include establishing authenticity, for those documents or get opposing counsel to agree to admissibility in advance.[43] Procedurally, if the military judge determines that a document submitted by either side as an Appellate Exhibit is inadmissible and should not be considered, she will indicate on the record that she is not considering that particular document.

For Prosecution and Defense Exhibits, counsel should first retrieve the document from either the court reporter or the witness who was laying a foundation for the document. Counsel should then make an offer similar to the following: "Your Honor, the Government moves to admit Prosecution Exhibit 1 for identification into evidence." Although many trial guides suggest that counsel offer an exhibit into evidence "as Prosecution Exhibit 1" (for example),[44] this extra step is unnecessary. If the exhibit is admitted, it will already include the number or letter that is marked on it.

Assuming that counsel have already shown opposing counsel the document prior to offering it into evidence (an assumption that ought to be true ninety-nine percent of the time), there is no need to show the document to opposing counsel a second time prior to offering it. Counsel should instead include the fact that the exhibit has been previously shown to the opposing counsel at the time it is offered into evidence; i.e., "Your Honor, the defense moves to admit Defense Exhibit F for identification, which has been previously shown to the Government, into evidence." If the document has previously been shown to a witness, then counsel should have already accounted for the showing of the document to the other side; there is no need to restate this information.

Contemporaneously with verbally offering the document into evidence, counsel should hand the document to the court reporter, who will in turn hand the document to the military judge. The military judge needs to be afforded an opportunity to review the document before determining whether to admit it into evidence. Additionally, once the military judge has admitted the document, the military judge will indicate on the document that it has been admitted by lining through the words "for identification" and placing his initials on the document. After admitting a document, the military judge will return the document to the court reporter and counsel can retrieve the document from the court reporter for further use.

Publishing Documents

Counsel may only publish a document to the panel that has been previously admitted into evidence. One limited exception to this rule is demonstrative exhibits. Demonstrative exhibits are those which assist a witness with his testimony or assist the fact-finder in understanding the witness' testimony. These types of exhibits are quite frequently used by expert witnesses to illustrate their testimony in a manner to make it more understandable to the fact-finder; examples include photographs, charts, maps, and diagrams. Like all documents used during the course of trial, demonstrative exhibits must be marked and included in the record of trial; however, they do not need to be admitted into evidence before the fact-finder can consider them. When publishing demonstrative exhibits, the exhibit should be large enough and positioned for all parties to see.[45] If

[39] MCM, *supra* note 2, MIL. R. EVID. 801.

[40] *Id*. MIL. R. EVID. 802.

[41] *Id*. MIL. R. EVID. 1101(a).

[42] *Id*. MIL. R. EVID. 104(a).

[43] Most of the time, there is no legitimate dispute concerning the authenticity of documents in support of the motion (or opposition to the motion) and parties should readily agree to the documents being considered on the motion rather than waste time or effort disputing such matters at the motions hearing. Counsel should focus their energies on how the law ought to apply to the facts to achieve the desired outcome.

[44] *See, e.g.*, EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 65 (7th ed. 2008) (recommending the following verbiage for offering evidence: "Your Honor, I now offer plaintiff's exhibit number ten for identification into evidence as plaintiff's exhibit number ten.").

[45] RULES OF PRACTICE, *supra* note 1, 15.3.

counsel wish to provide individual copies of a piece of demonstrative evidence, such as a chart, to all members, they must first obtain the permission of the military judge.[46]

For documents that have been admitted into evidence, counsel may ask the court's permission to publish the document to the panel immediately after it has been admitted into evidence, so that the panel members are aware of its contents and can use that information while evaluating further evidence as the case develops.[47] Documentary evidence may be published in a number of ways, including, but not limited to: displaying it by electronic projection that allows each member to view the document, handing the document to the panel members for their review, or having a witness read the document to the members.

Unless the courtroom is specially designed to handle electronic projection, this method of publishing documents is the least desirable. Given that the majority of military courtrooms cannot accommodate having electronic equipment pre-arranged and ready for use at a moment's notice, the time and inconvenience of setting up the electronic equipment to project a document outweighs most benefits of publishing in this manner.

The most practical means of publishing a document is to hand it to the panel members for their review. A common mistake counsel make when publishing documents this way is to hand the original document to the panel and wait for all members to have an opportunity to examine the original document. Not only does this waste time, but it also violates the *Rules of Practice*. According to the Rules, "[w]hen a counsel requests to publish a document admitted in evidence to the members, that counsel will have previously made copies for each member."[48] Counsel should publish the document by having the bailiff assist in passing copies to each member and then collecting them when they have finished looking at the document.

Another way to publish documents to the members is to have a witness read the document to the members. This method of publication is most effective when the document is a personal letter or note. Generally, the witness authenticating the document is the most appropriate person to read the document to the members.

Reading documents to the panel members is not only an optional form of publication for most documents, but is also required in some circumstances. One instance in which reading a document to the members is required is when the contents of the document are admitted as a hearsay exception under MRE 803(5), recorded recollection.[49] When a document is admitted into evidence under MRE 803(5), the rule allows the document to be read to the members, but the document itself may not be shown to the members unless it is offered by an adverse party.[50] In this circumstance, the witness whose recollection has been recorded is the appropriate person to read the document to the members.

Another circumstance requiring the reading of a document to the members is when the parties have entered into a written stipulation of expected testimony. In accordance with the MRE, when a stipulation of expected testimony has been accepted into evidence, the stipulation "shall be read to the members, if any, but shall not be presented to them."[51] In this case, the counsel who introduced the stipulation into evidence should then read the stipulation to the members. Keep in mind that because the members will not have an opportunity to examine the stipulation later and must rely on their recollection and notes from the reading, counsel should be careful to read slowly and carefully to give the members time to digest the substance of the witness' expected testimony.

Using Documents During Opening Statements and Closing Arguments

Unless already admitted into evidence, the presentation of documents to the members during opening statements is rarely wise. As the military judge instructs the panel, "Opening statements are not evidence; rather, they are what counsel expect the evidence will show in the case."[52] In making opening statements, counsel should only remark on evidence which "they believe in good faith will be available and admissible."[53] While showing the members documents which they believe will be admitted in opening statements is not per se limited by the Rules for Courts-Martial, counsel must first receive permission from the military judge before showing such documents to the members during opening statements.[54] In most cases, the slight benefit that might be

[46] *Id.*

[47] Counsel should be prepared to explain to the judge why this publication is necessary for the members to understand other evidence that will follow. Otherwise, it should suffice that the members will have the exhibit for their use during deliberations.

[48] RULES OF PRACTICE, *supra* note 1, 15.2. Opposing counsel should be given the opportunity to confirm the copies are accurate reflections of the original which was admitted into evidence.

[49] Military Rule of Evidence 803(5) provides that a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly" is not excluded by the hearsay rule. MCM, *supra* note 2, MIL. R. EVID. 803(5).

[50] *Id*.

[51] *Id*. MIL. R. EVID. 811(f).

[52] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-5 (1 Jan. 2010).

[53] MCM, *supra* note 2, R.C.M. 913(b) discussion.

[54] RULES OF PRACTICE, *supra* note 1, 14.

gained by introducing documents to the members that have not been admitted into evidence is negated by the risk that the document will not be admitted. If a counsel believes that a document will be particularly useful during opening statements, he should seek to admit that particular piece of evidence prior to trial through an appropriate motion in limine.

Similarly, counsel must exercise caution when using documents during closing arguments. Although all documents admitted into evidence may certainly be referenced and shown to the members during arguments, those that were not received into evidence may not be used during closing arguments.[55] Additionally, documents may only be used in arguments for the purpose for which they were received into evidence. For example, when documents are introduced as extrinsic evidence of a prior inconsistent statement of a witness under MRE 613, the contents of the document may be used only to cast doubt on the witness' in-court testimony, and may not be used to argue the truth of the out-of-court statement.[56] Counsel's obligation to ensure that documents are used properly extends to all phases of the trial, to include closing arguments.

Including Documents in the Record of Trial

All marked exhibits, whether received into evidence or not, must be included in the record of trial.[57] With permission from the military judge, copies of exhibits may be included in the record of trial in lieu of originals.[58] Counsel should make a request to include copies in the record of trial either when the exhibit is offered into evidence or before authentication of the record of trial.[59] Ordinarily, the request is made at the conclusion of the trial, prior to adjournment of the proceedings. Any copies produced for the record of trial must be legible, permanent-type photocopies that mirror the actual exhibit as closely as possible, to include the use of color copies when the exhibit is in color.[60]

Conclusion

Handling and using documents in the courtroom need not be complicated, provided counsel follow certain basic rules established in the MCM and the *Rules of Practice*. Start by choosing documents carefully and understand the purpose behind each document—for example, is the document a vital piece of evidence, intended only to refresh a witness' recollection or simply a demonstrative aid? Determine well in advance of trial how to lay the proper foundation and authenticate each document—will witnesses be necessary or will a self-authenticating certificate suffice? Ensure that documents offered into evidence comply with the MREs—is the document hearsay and, if so, is there a hearsay exemption or exception allowing admissibility? Make copies of those documents that will be offered into evidence and published to the panel. Show each document to opposing counsel before trial and have all documents, with enclosures, marked prior to trial. Ensure that documents remain under the control of the court reporter and that only original exhibits are shown to witnesses. Publish documents only with the court's permission, after admission into evidence. Only argue the substance of documents that were admitted into evidence for substantive purposes. If copies need to be substituted in the record of trial, request permission from the military judge before the court adjourns. Planning for the use of documents and anticipating the requirements for their presentation to witnesses or the members, as well as for their admission into evidence, will make their use not only more efficient, but also more effective at trial.

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[55] MCM, *supra* note 2, R.C.M. 919(b) ("Arguments may properly include reasonable comment on the evidence in the case.").

[56] *See* United States v. Taylor, 44 M.J. 475, 480 (C.A.A.F. 1996) ("The fact that extrinsic evidence is permissible under Mil.R.Evid. 613(b) does not mean that the prior statement is admissible as substantive evidence.") (footnote omitted).

[57] MCM, *supra* note 2, R.C.M. 1103(b) and R.C.M. 1103(c).

[58] *Id*. R.C.M. 1103(b)(2)(D)(v) and R.C.M. 1103(b)(3)(B).

[59] RULES OF PRACTICE, *supra* note 1, 15.5.

[60] *Id*. 15.2, 15.5.

CLE News

1. Resident Course Quotas

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

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

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

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

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

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

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

2. TJAGLCS CLE Course Schedule (June 2010–September 2011) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
	GENERAL	
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C20	186th JAOBC/BOLC III (Ph 2)	4 – 1 Feb 12
5-27-C20	187th JAOBC/BOLC III (Ph 2)	17 Feb – 2 May 12
5-27-C20	188th JAOBC/BOLC III (Ph 2)	20 Jul – 3 Oct 12
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F1	219th Senior Officer Legal Orientation Course	17 – 21 Oct 11
5F-F1	220th Senior Officer Legal Orientation Course	23 – 27 Jan 12
5F-F1	221st Senior Officer Legal Orientation Course	19 – 23 Mar 12
5F-F1	222th Senior Officer Legal Orientation Course	11 – 15 Jun 12
5F-F1	223d Senior Officer Legal Orientation Course	27 – 31 Aug 12
5F-F3	18th RC General Officer Legal Orientation Course	30 May – 1 Jun 12
5F-F5	2012 Congressional Staff Legal Orientation (COLO)	23 – 24Feb 12

5F-F52	42d Staff Judge Advocate Course	4 – 8 Jun 12
5F-F52-S	15th SJA Team Leadership Course	4 – 6 Jun 12
5F-F55	2012 JAOAC	9 – 20 Jan 12
5F-F70	43d Methods of Instruction	5 – 6 Jul 12
5F-JAG	2011 JAG Annual CLE Workshop	3 – 7 Oct 11

NCO ACADEMY COURSES		
512-27D30	1st Advanced Leaders Course (Ph 2)	17 Oct – 22 Nov11
512-27D30	2d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	3d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	4th Advanced Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D30	5th Advanced Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D30	6th Advanced Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D40	1st Senior Leaders Course (Ph 2)	17 Oct – 22 Nov 11
512-27D40	2d Senior Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D40	3d Senior Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D40	4th Senior Leaders Course (Ph 2)	9 Jul – 14 Aug 12

WARRANT OFFICER COURSES		
7A-270A0	19th JA Warrant Officer Basic Course	20 May – 15 Jun 12
7A-270A1	23d Legal Administrator Course	11 – 15 Jun 12
7A-270A2	13th JA Warrant Officer Advanced Course	26 Mar – 20 Apr 12
7A-270A3	2012 Senior Legal Administrator Symposium	31 Oct – 4 Nov 11
ENLISTED COURSES		
512-27D/20/30	23d Law for Paralegal NCO Course	19 – 23 Mar 12
512-27D/DCSP	21st Senior Paralegal Course	18 – 22 Jun 12
512-27D-BCT	BCT NCOIC Course	7 – 11 May 12
512-27DC5	37th Court Reporter Course	23 Jan – 23 Mar 12
512-27DC5	38th Court Reporter Course	16 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	23 Jul – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12

512-27DC7	16th Redictation Course	9 – 13 Jan 12
512-27DC7	17th Redictation Course	26 – 30 Mar 12
5F-F58	2012 27D Command Paralegal Course	31 Oct – 4 Nov 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F23	67th Legal Assistance Course	24 – 28Oct 11
5F-F23E	2011 USAREUR Legal Assistance CLE Course	17 – 21 Oct 11
5F-F24	36th Administrative Law for Military Installations & Operations	13 – 17 Feb 12
5F-F24E	2011 USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F24E	2012 USAREUR Administrative Law CLE	10 – 14 Sep 12
5F-F26E	2011 USAREUR Claims CLE	14 – 18 Nov 11
5F-F28	2011 Income Tax Law Course	5 – 9 Dec 11
5F-F28E	2011 USAREUR Tax CLE Course	28 Nov – 2 Dec 11
5F-F28H	2012 Hawaii Income Tax CLE Course	19 – 13 Jan 12
5F-F28P	2012 PACOM Income Tax CLE Course	2 – 6 Jan 12
5F-F29	30th Federal Litigation Course	30 Jul – 3 Aug 12
5F-F202	10th Ethics Counselors Course	9 – 13 Apr 12

CONTRACT AND FISCAL LAW		
5F-F10	165th Contract Attorneys Course	16 – 27 Jul 12
5F-F11	2011 Contract & Fiscal Law Symposium	15 – 18 Nov 11
5F-F12	83d Fiscal Law Course	12 – 16 Mar 12
5F-F14	30th Comptrollers Accreditation Fiscal Law Course	5 – 9 Mar 12
5F-F101	12th Procurement Fraud Course	15 – 17 Aug 12
5F-F103	2011 Advanced Contract Law Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F33	55th Military Judge Course	16 Apr – 5 May 12
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Oct 11
5F-F34	40th Criminal Law Advocacy Course	30 Jan – 3 Feb 12
5F-F34	41st Criminal Law Advocacy Course	6 – 10 Feb 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12
5F-F35	35th Criminal Law New Developments Course	1 – 4 Nov 11
5F-F35E	2012 USAREUR Criminal Law Advocacy Course	9 – 12 Jan 12

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2012 Brigade Judge Advocate Symposium	7 – 11 May 12
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
5F-F45	11th Domestic Operational Law	17 – 21 Oct 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F47	57th Operational Law of War Course	27 Feb – 9 Mar 12
5F-F47	58th Operational Law of War Course	30 Jul – 10 Aug 12
5F-F47E	2011 USAREUR Operational Law CLE	19 – 23 Sep 11
5F-F47E	2012 USAREUR Operational Law CLE	17 – 21 Sep 12
5F-F48	5th Rule of Law Course	9 – 13 Jul 12

3. Naval Justice School and FY 2010–2011 Course Schedule

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

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030)	1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (080)	6 – 9 Sep 11 (Newport)

2622 (Fleet)	Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (030)	13 Jun – 28 Aug 11
07HN	Legalman Paralegal Core (020) Legalman Paralegal Core (030)	24 May – 9 Aug 11 31 Aug – 20 Dec 11
627S	Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	8 – 10 Aug 11 (Millington) 20 – 22 Sep 11 ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
900B	Reserve Lawyer Course (020)	26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
3759	Legal Clerk Course (080)	19 – 23 Sep 11 (Pendleton)
NA	Legal Service Court Reporter (030)	22 July – 7 Oct 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (090)	15 Aug – 2 Sep 11
0379	Legal Clerk Course (080)	22 Aug – 2 Sep 11
3760	Senior Officer Course (060) Senior Officer Course (070)	8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (070) Legal Officer Course (080)	25 Jul – 12 Aug 11 22 Aug – 9 Sep 11

947J	Legal Clerk Course (080) Legal Clerk Course (090)	1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB,AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11
Defense Orientation Course, Class 12-A	3 – 7 Oct 2011
Federal Employee Labor Law Course, Class 12-A	3 – 7 Oct 2011
Paralegal Apprentice Course, Class 12-01	3 Oct – 22 Nov 2011
Judge Advocate Staff Officer Course, Class 12-A	11 Oct – 15 Dec 2011
Paralegal Craftsman Course, Class 12-01	3 Oct – 18 Nov 2011
Civilian Attorney Orientation, Class 12-A	11 – 12 Oct 2011
Advanced Environmental Law Course, Class 12-A (Off-Site Wash DC Location)	12 – 14 Oct 2011
Medical Law Mini Course, Class 12-A	15 – 18 Nov 2011
Article 32 Investigating Officer Course, Class 12-A	18 – 19 Nov 2011
Deployed Fiscal Law & Contingency Contracting Course, Class 12-A	5 – 9 Dec 2011
Pacific Trial Advocacy Course, Class 12-A (Off-Site, Japan)	12 – 16 Dec 2011
Trial & Defense Advocacy Course, Class 12-A	9 – 21 Jan 2012
Gateway, Class 12-A	9 – 20 Jan 2012
Paralegal Apprentice Course, Class 11-02	10 Jan – 2 Mar 2012
Homeland Defense/Homeland Security Course, Class 12-A	23 – 27 Jan 2012

CONUS Trial Advocacy Course, Class 12-A (Off-Site)	30 Jan – 3 Feb 2012
Legal & Administrative Investigations Course, Class 12-A	6 – 10 Feb 2012
European Trial Advocacy Course, Class 12-A (Off-Site, Kapaun AS, Germany)	13 – 17 Feb 2012
Judge Advocate Staff Officer Course, Class 12-B	13 Feb – 13 Apr 2012
Paralegal Craftsman Course, Class 12-02	13 Feb – 29 Mar 2012
Paralegal Apprentice Course, Class 12-03	5 Mar – 24 Apr 2012
Environmental Law Update Course-DL, Class 12-A	27 – 29 Mar 2012
Defense Orientation Course, Class 12-B	2 – 6 Apr 2012
Advanced Labor & Employment Law Course, Class 12-A (Off-Site DC location)	11 – 13 Apr 2012
Air Force Reserve and Air National Guard Annual Survey of the Law, Class 12-A (Off-Site Atlanta, GA)	13 – 14 Apr 2012
Military Justice Administration Course, Class 12-A	16 – 20 Apr 2012
Paralegal Craftsman Course, Class 12-03	16 Apr – 1 Jun 2012
Will Preparation Paralegal Course, Class 12-A	23 – 25 Apr 2012
Paralegal Apprentice Course, Class 12-04	30 Apr – 20 Jun 2012
Cyber Law Course, Class 12-A	24 – 26 Apr 2012
Negotiation and Appropriate Dispute Resolution Course, Class 12-A	30 Apr – 4 May 2012
Advanced Trial Advocacy Course, Class 12-A	7 – 11 May 2012
Operations Law Course, Class 12-A	14 – 25 May 2012
CONUS Trial Advocacy Course, Class 12-B (Off-Site)	14 – 18 May 2012
CONUS Trial Advocacy Course, Class 12-C (Off-Site)	21 – 25 May 2012
Reserve Forces Paralegal Course, Class 12-A	4 – 8 Jun 2012
Staff Judge Advocate Course, Class 12-A	11 – 22 Jun 2012
Law Office Management Course, Class 12-A	11 – 22 Jun 2012
Paralegal Apprentice Course, Class 12-05	25 Jun – 15 Aug 2012
Will Preparation Paralegal Course, Class 12-B	25 – 27 Jun 2012
Judge Advocate Staff Officer Course, Class 12-C	9 Jul – 7 Sep 2012
Paralegal Craftsman Course, Class 12-04	9 Jul – 22 Aug 2012

Environmental Law Course, Class 12-A	20 – 24 Aug 2012
Trial & Defense Advocacy Course, Class 12-B	10 – 21 Sep 2012
Accident Investigation Course, Class 12-A	11 – 14 Sep 2012

5. Civilian-Sponsored CLE Courses

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

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

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

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

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

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

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

CLA:
Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100

MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900

UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

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

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

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

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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

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

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

4. The Army Law Library Service

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

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