THE ARMY LAWYER

Headquarters, Department of the Army

December 2011

ARTICLES

Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information
Major Kristy Radio

Working with Proximate Cause: An "Elements" Approach
Captain Daniel D. Maurer

Speedy Trial Demands
Captain Joseph D. Wilkinson II

TJAGLCS FEATURES

Lore of the Corps

A Butler in FDR's White House, Combat Infantryman in Italy, and Judge Advocate in the Corps: Rufus Winfield Johnson (1911–2007)

New Developments

Administrative & Civil Law

Veterans' Benefits Act of 2010 Amends Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act
Lieutenant Colonel Baucum Fulk

BOOK REVIEWS

Court-Martial at Parris Island: The Ribbon Creek Incident
Reviewed by Major Paul Welling

CLE NEWS

CURRENT MATERIALS OF INTERESTS

THE ARMY LAWYER INDEX FOR 2011

Department of the Army Pamphlet 27-50-463

Editor, Captain Joseph D. Wilkinson II
Technical Editor, Charles J. Strong

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.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at TJAGLCS-Tech-Editor@conus.army.mil.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Writing Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. *The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to TJAGLCS-Tech-Editor@conus.army.mil. Articles should follow *The Bluebook, A Uniform System of Citation* (19th ed. 2010) and the *Military Citation Guide* (TJAGLCS, 16th ed. 2011). No compensation can be paid for articles.

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 and at the Library of Congress website at http://www.loc.gov/rr/frd/MilitaryLaw/Army_Lawyer.html.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to TJAGLCS-Tech-Editor@conus.army.mil.

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

Lore of the Corps

A Butler in FDR's White House, Combat Infantryman in Italy, and Judge Advocate in the Corps: Rufus Winfield Johnson (1911–2007) 1

Articles

Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information
Major Kristy Radio 4

Working with Proximate Cause: An "Elements" Approach
Captain Daniel D. Maurer 16

Speedy Trial Demands
Captain Joseph D. Wilkinson II 24

TJAGLCS Features

New Developments

Administrative & Civil Law

Veterans' Benefits Act of 2010 Amends Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act
Lieutenant Colonel Baucum Fulk 34

Book Reviews

Court-Martial at Parris Island: The Ribbon Creek Incident
Reviewed by *Major Paul Welling* 37

CLE News 40

Current Materials of Interest 51

***The Army Lawyer* Index for 2011** 53

Individual Paid Subscriptions to *The Army Lawyer* ..... Inside Back Cover

Lore of the Corps

A Butler in FDR's White House, Combat Infantryman in Italy, and Judge Advocate in the Corps: Rufus Winfield Johnson (1911–2007)

Fred L. Borch III
Regimental Historian and Archivist

Rufus Winfield Johnson served as a butler in the White House in the 1930s and saw fierce combat as an officer in the 92d Infantry Division in World War II. He also defended Soldiers at courts-martial during the Korean War and, after transferring to the Judge Advocate General's Corps in 1959, finished his Army career as a Reserve lieutenant colonel. While Johnson sometimes faced prejudice because of his ethnicity, he did not let racism prevent him from having a superb career as a Soldier and lawyer—or from making legal history.

Born on a farm in Montgomery County, Maryland, on 1 May 1911, Johnson was the seventh son of a seventh son. After his mother died when Johnson was four years old, he was raised by an aunt and uncle in Coatesville, Pennsylvania. According to an obituary published in 2007, Johnson first faced racial discrimination when he was a Boy Scout: he needed a swimming badge to make Eagle Scout, but could not earn that badge because African-Americans were prohibited from using the local whites-only swimming pool.[1]

After finishing high school in 1928, Johnson attended Howard University in Washington, D.C., graduating in 1934. He subsequently completed law school at Howard in 1939 and then went to work at the White House. Although he was relatively short at five feet six inches, Johnson was exceptionally athletic and had qualified as a lifeguard while participating in the Army Reserve Officer Training Corps (ROTC) program in college. That explains why he was asked to watch over President Franklin D. Roosevelt as he exercised his polio-afflicted legs in the White House pool. Later, Johnson served as White House butler. He liked to tell about the time he spilled soup on Roosevelt yet kept his job. According to Johnson, the president, "seeking an advantage while dining with a political adversary," reached up to the butler tray Johnson was carrying "and calmly tripped a bowl of soup into his own lap, talking all the while, as his dining companions looked on, horrified."[2]

Eleanor Roosevelt took a liking to Johnson and, when the president's wife learned that he was studying for the bar exam at the end of his twelve-hour workday at the White House, she arranged for Johnson to serve her tea in the afternoons. She then instructed Johnson that he was to use these two hours to study. Her kindness meant that Johnson was able to take the District of Columbia bar exam in October 1941.[3]

The following month, Johnson was ordered to active duty. Having been commissioned as a Reserve infantry officer in 1934 (through ROTC at Howard), First Lieutenant Johnson reported to Fort Dix, New Jersey. After a short assignment at that location—and promotion to the next rank—Johnson reported to the all-African-American 92d Infantry Division. When that unit sailed for Italy in 1944, Captain (CPT) Johnson was with it.

A member of the 3d Battalion, 371st Infantry Regiment, CPT Johnson excelled as an infantry officer and took command of Company I in early 1945. According to a questionnaire he completed in 1997, Johnson remembered telling newly arrived Soldiers:

> I am Capt. Johnson, your new company commander. My job is getting the enemy killed and you home in one piece. I can get these two things done only if you follow my orders promptly, without hesitation, or question, and use everything you were taught to do during your training.[4]

Johnson saw hard combat in the Rome-Arno River, North Apennine, and Po Valley campaigns. At one point during his tenure as a company commander, CPT Johnson was ordered by the division commander, Major General Edward "Ned" Almond, to attack a hill held by the Germans. Johnson later remembered that it was a "suicide mission"[5] and only a few men survived. Johnson was near the top of the hill when he found himself alone with a sergeant, who had been shot in the arm and both legs. Johnson shot and killed a German about to throw a grenade. Then, while

[1] Patricia Sullivan, *Lawyer and Lt. Col. Rufus W. Johnson*, WASH. POST, July 10, 2007, at B6.

[2] *Id*.

[3] Johnson learned in 1942 that he had passed the bar examination but, since he was no longer in Washington, D.C., he was not able to personally appear in court and be admitted to practice until he was released from active duty in 1946.

[4] Rufus W. Johnson, Questionnaire, U.S. Military History Inst., Carlisle Barracks, Pa. 6 (20 Aug. 1977) [hereinafter Johnson Questionnaire].

[5] *Id*. at 22.

under fire, Johnson picked up the injured man and carried him to safety.[6]

In his questionnaire, Johnson explained that he became so enraged by what had happened on the hill that, when he returned to camp, he charged into Almond's tent and berated him for endangering his men. Apparently there was some pushing and shoving and Almond threatened to court-martial Johnson. While that did not occur, Johnson believed that Almond took his revenge at a later date by destroying a recommendation that Johnson be awarded the Silver Star for his gallantry during the Po Valley campaign. Johnson did, however, receive the Bronze Star Medal and Purple Heart.

While his duties as an infantry officer took the majority of his time in Italy, Johnson served as counsel at a number of courts-martial held in Italy. He "personally defended 11 cases involving capital crimes including 5 murders and three rapes."[7]

Johnson was discharged from the Army in February 1946. He was excited to be back on American soil, but this homecoming was bittersweet:

> Released from active duty in Virginia; refused service at lunch counter in every bus station on way to D.C.; had to ride in the back of the bus; upon arrival in D.C., I tried to buy a milk shake at the lunch counter in my uniform as a captain; was told, "Sorry, but we don't serve colored." That was in the Greyhound bus station.[8]

After a short association with another Washington, D.C., lawyer, Johnson opened his own office. His specialty was criminal law, and he "handled every type of case individually from minor police infractions to and including manslaughter, rape and robbery."[9] He also was "associate counsel" on several murder cases.[10]

In 1949, Johnson moved to San Bernardino, California, took and passed the bar exam, then opened a private law practice. A year later—in October 1950—he was recalled to active duty as part of a general mobilization of reservists during the Korean War. Captain Johnson was assigned briefly to Fort Knox, Kentucky, where he was a battalion executive officer and summary court officer. Although still an infantry officer, his legal background soon came to the attention of his superiors and resulted in Johnson being detailed to serve as trial and defense counsel at both general and special courts-martial. He also worked as an "Assistant Legal Assistance Officer."[11]

After CPT Johnson was assigned to the Far East Command and deployed to Korea in September 1951, he was appointed an Assistant Staff Judge Advocate at Headquarters, 2d Logistical Command. In this duty position, Johnson reviewed general court-martial records, examined boards and reports, and also conducted staff visits to units.[12] He also served as a defense counsel at special courts-martial held in Korea. Johnson was successful in this defense work—he obtained a number of acquittals for his clients—and consequently requested a transfer to the Judge Advocate General's Corps. But his request was denied because the Infantry Branch wanted to retain him as a combat unit commander.

Despite the Army's decision to keep crossed rifles on CPT Johnson's collar, his superiors permitted him to continue working as a lawyer: in his last assignment before leaving active duty in April 1953, Johnson served as "Assistant Staff Judge Advocate and Assistant Legal Assistance Officer" for Headquarters, III Corps and Fort MacArthur, located in Los Angeles, California. He was also the Chief of the Military Justice Branch. His rater, Colonel (COL) Doane F. Kiechel, then serving as III Corps Staff Judge Advocate, wrote the following on Johnson's Officer Efficiency Report:

> One of the finest officers and gentlemen of my acquaintance. Possesses unimpeachable character and integrity, high intelligence and a broad background of military-legal training and experience. Has a fine sense of ethical values. Outstanding in loyalty and devotion, with a particular aptitude for working calmly and efficiently under stress.[13]

---

[6] Sullivan, *supra* note 1.

[7] U.S. Dep't of Army, DA Form 1056, Legal Experience Statement, The Judge Advocate Gen. Admin. Div., Johnson, Rufus W. block 16 (24 May 1951) [hereinafter DA Form 1056].

[8] Johnson Questionnaire, *supra* note 4, at 14.

[9] DA Form 1056, *supra* note 7, block 16.

[10] *Id.*

[11] U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (7 March 1951 to 18 July 1951). Note that the Articles of War were still in effect during this period, which explains why a non-Judge Advocate was permitted to serve as counsel at general courts-martial. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES 277 (1949) (Eleventh Article of War: "[T]he trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps *or* officers who are members of the bar of a Federal court or of the highest court of a State. . . ." (emphasis added)).

[12] U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus, W. (18 September 1951 to 8 January 1952).

[13] U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Johnson, Rufus W. (1 March 1953 to 19 April 1953).

His senior rater, COL Norman B. Edwards, wrote: "An outstanding officer. Well liked, competent, efficient, courteous and hard working. I concur fully with the comment of the rating officer."[14]

After leaving active duty, CPT Johnson remained in the Army Reserve and, during his yearly two weeks of active duty for training, served as an instructor for the Advanced JAGC Course at the Presidio of San Francisco. Major (MAJ) Johnson was finally able to transfer to the JAG Corps—on 20 February 1959—becoming one of the few African-American judge advocates in the Army.[15] After he completed the USAR School Associate Judge Advocate Advanced Officer Course in 1961, MAJ Johnson received "equivalent credit" for the JA Officer Advanced Course.[16] He served another ten years in the Army Reserve before retiring as a lieutenant colonel in 1971.

During these years, Johnson made legal history. In April 1962, a group of Navajos met in the California desert and performed "a religious ceremony which included the use of peyote." Police officers, who had watched part of the ceremony, arrested them for illegally possessing the substance, which was outlawed because of its hallucinogenic qualities. The Navajos were later convicted in state court and they appealed to the California Supreme Court—with Johnson representing them on appeal.[17]

Johnson argued that the possession of peyote by his client, Jack Woody, and the other Navajos should be lawful because the peyote was being used for bona fide religious reasons, and consequently was protected by the First Amendment. The California Supreme Court agreed with Johnson, ruling that any state interest in proscribing the use of peyote was insufficient to overcome the right to religious freedom guaranteed by the U.S. Constitution. On 24 August 1964, the court, sitting *en banc* and by a vote of six to one, announced that it was reversing Woody's criminal conviction. *People v. Woody* continues to be cited in legal cases involving Native American religious freedom, and the name "Rufus W. Johnson, Anaheim, for defendants and appellants" will forever be associated with this decision.[18]

Johnson closed his law practice in 1978 and moved to Fayetteville, Arkansas. In 1995, he moved to Mason, Texas, to live with his step-daughter. He remained proud of his time as a Soldier and was a life member of the American Legion, Veterans of Foreign Wars, and Military Order of the Purple Heart. As he explained in 1977, he had joined these organizations because "they are noble, charitable, and patriotic . . . and were the '*heart*' of a real nation."[19]

Lieutenant Colonel Johnson died on 1 July 2007. He was ninety-six years old. In accordance with his wishes, he was buried at Arlington National Cemetery. This made perfect sense, as Johnson loved the Army and believed in it as an institution. As he put it, "the military is the one segment of American life that Martin Luther King Jr.'s dream has come closest to reaching a reality."[20]

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.

[14] *Id*.

[15] Johnson was promoted to major on 1 October 1953. U.S. Dep't of Army, DA Form 66, Officer Qualification Record, Johnson, Rufus W. block 12.

[16] Certificate of Completion, The Judge Advocate Gen.'s Sch., U.S. Army, Johnson, Rufus W. (1 Aug. 1961).

[17] People v. Woody, 394 P.2d 813, 814 (1964).

[18] *Id*. at 815–22. The court admitted the State's power to proscribe the use of peyote, and stated that "[a]lthough the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the First Amendment is not so rigid." However, the court found that the State had not demonstrated a "compelling state interest" sufficient to outweigh the defendants' interest in religious freedom. Part of this finding rested on expert opinion that peyote did not cause any "permanent deleterious effects" to its users.

[19] Johnson Questionnaire, *supra* note 4, at 19 (emphasis in original).

[20] *Id*. at 9.

Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information

Major Kristy Radio[*]

Introduction

You are a new trial counsel preparing for your first contested court-martial. Naturally, you have worked diligently to gather the evidence which will secure your first victory. The last thing you need is the accused's medical records. Since the records are in the hands of the local Army hospital, you simply send your trusted paralegal to "collect the accused's entire medical file." You figure, "I will sort out what is relevant later. Right now I have to interview witnesses, respond to a discovery request, and prepare for my meeting with the Chief of Justice tomorrow." Imagine your stress level rise when your paralegal returns empty handed and reports that your request did not comply with Health Insurance Portability and Accountability Act (HIPAA).[1] You need those medical records now and you know the Chief of Justice is going to ask about them tomorrow.

Trial counsel routinely face issues regarding the acquisition, use, and release of medical records. However, the very mention of the acronym HIPAA causes many judge advocates to stick their heads in the sand and hope that the administrative hurdle to obtaining medical records will simply disappear. Access to medical records can be critical when gathering evidence to prosecute a Soldier, especially in cases with charges of assault and sexual assault. Trial counsel often need medical records to help prove an element of the offense, offer evidence in aggravation, or respond to a defense discovery request. New trial counsel may have little, if any, time to research the proper and most efficient method to request medical records of the accused or the alleged victim.

In addition to preparing for courts-martial, trial counsel must be prepared to advise commanders on HIPAA-related issues. Although commanders have limited access to the protected health information (PHI) of their Soldiers, commanders should be careful not to overstep their authority when accessing or releasing PHI. In order to properly advise the command on this complicated area of the law, judge advocates must clearly understand the applicable right and left lanes of HIPAA as it applies within the military community.

This primer will provide military justice practitioners with an overview of the relevant portions of HIPAA, an analysis of its applicability within the Department of Defense (DoD) and the Department of the Army (DA), the available methods for requesting PHI from military and civilian facilities, the proper format for drafting a request for PHI, and practical guidance for advising commanders on HIPAA-related issues.

Background: The Health Insurance Portability and Accountability Act

Legislative History

Prior to 1996, there were no standard rules or regulations to protect a patient's healthcare information.[2] Requirements varied between states and from hospital to hospital. Despite the implementation of some state regulations and local policies, there were simply too many cases of providers failing to safeguard private healthcare information, such as leaving medical records lying around on fax machines.[3]

Congress intended for HIPAA to bring uniformity to the healthcare system through the "establishment of standards and requirements for the electronic transmission of certain health information."[4] The statute was enacted in 1996 under the umbrella of regulating certain economic provisions of healthcare, such as claims, payments, and referrals, which cross state lines. Because Congress never passed specific privacy legislation, the Department of Health and Human Services (HHS) later published the Privacy Rule and its subsequent modifications to implement the standards of HIPAA.[5]

When drafting the Privacy Rule, HHS intended to provide a flexible rule. The goal was to protect the privacy of medical information and still allow healthcare entities to share necessary medical information when administering healthcare.[6] The Privacy Rule is rooted in the general public policy that doctors have a fiduciary relationship to patients

---

[*] Judge Advocate, U.S. Army. Presently assigned as Chief, International and Operational Law, U.S. Army Central Command, Shaw Air Force Base, Sumter, South Carolina. Previously assigned to the Office of the Center Judge Advocate, William Beaumont Army Medical Center, Fort Bliss, Texas, 2005–2007.

[1] Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104–191, 110 Stat. 1938 (1996) [hereinafter HIPAA].

[2] The Privacy Act of 1974 applied to the Federal Government. *See* Privacy Act, 5 U.S.C. § 552a (2006).

[3] PATRICIA IYER, BARBARA J. LEVIN & MARY ANN SHEA, MEDICAL LEGAL ASPECTS OF MEDICAL RECORDS 165–66 (2006).

[4] *Id.* at 166; HIPAA, *supra* note 1, § 261.

[5] U.S. DEP'T OF HEALTH & HUM. SERVS., OFFICE OF CIVIL RTS., SUMMARY OF THE HIPAA PRIVACY RULE (2003) [hereinafter HHS HIPAA SUMMARY], *available at* http://wwhttp://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf. *See generally* 45 C.F.R. §§ 160, 164 (2010).

[6] HHS HIPAA SUMMARY, *supra* note 5, at 1.

and communications between them should be maintained as confidential.[7] This primer highlights for judge advocates HIPAA's exceptions to the principles of medical privacy.

HIPAA Enforcement and Preemption

Judge advocates should be aware that there is no private cause of action for a HIPAA violation. However, there are potential civil and criminal penalties for noncompliance. The Secretary of HHS is the designated civil enforcement authority for HIPAA violations. The Secretary is directed to impose a penalty of at least $100 for each violation that is not punishable under the criminal enforcement provision.[8] Criminal sanctions are also available when a covered entity knowingly discloses individually identifiable health information in violation of HIPAA.[9]

Although HIPAA provides a national privacy regulation, judge advocates should review applicable state health information privacy laws, especially when requesting medical records from a civilian provider or in cases involving the medical records of a minor.[10] When the state law is contrary to the federal regulation, HIPAA preempts the state law.[11] However, state law is not preempted by HIPAA if the state law is more stringent or better protects a patient's PHI.[12] For example, the State of New York has more stringent laws regarding the dissemination of HIV records. Specifically, patient authorizations must specify if the release includes HIV information; a generic HIPAA authorization is not sufficient.[13]

HIPAA and the Department of Defense

Applicability

The Privacy Rule and the corresponding DoD regulation are applicable to most DoD medical records.[14] The Privacy Rule applies to any "covered entity," which is defined as "a health care provider who transmits any health information in electronic form in connection with a transaction" covered by the Rule.[15] Covered entities perform most medical treatment within the Military Health System.[16]

DoD Health Information Privacy Regulation (DoDR 6025.18-R)

The DoD acknowledges the importance of protecting the health information of its patients. However, given the unique nature of the military, the DoD has the additional burden of balancing privacy goals against the commander's

---

[7] The Principles of Medical Ethics, adopted 17 June 2001, states that "a physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law." AM. MED. ASS'N, COUNSEL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS (n.d.), *available at* www.ama-assn.org.ama/pub/physician-resources/medical-ethics/about-ethics-group/ethics-resource-center/educational-resources/pocket-principles.shtml. "The Hippocratic Oath emphasizes patient privacy. Accordingly, U.S. laws protect medical confidentiality." Specifically, the Hippocratic Oath states, "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." Sonia Gupta, *The Hippocratic Oath and HIV: A Conflict of Ethics?*, 7 YALE J. MED. & L. (Oct. 5, 2010), http://www.yalemedlaw.com/2010/10/the-hippocratic-oath-and-hiv-a-conflict-of-ethics.

[8] 42 U.S.C. § 1320d-5(a) (2006).

[9] A covered entity could face a fine of $50,000 and one year imprisonment. The potential penalties increase to the level of a felony for use of false pretense or the intent to sell, transfer, or use the information for commercial advantage, personal gain, or malicious harm. 42 U.S.C. § 1320d-6(b). *Cf.* U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD AND ADMINISTRATION AND HEALTHCARE DOCUMENTATION para. 2-2d (17 June 2008) (RAR, 4 Jan. 2010) [hereinafter AR 40-66] (requiring Department of the Army (DA) personnel to report all possible violations of AR 40-66 to the HIPAA privacy officer and the commander who will then seek guidance from his or her legal advisor to determine the next step in reporting the potential violation). For an overview of the criminal enforcement provision of HIPAA, see Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6, Op. O.L.C., 2005 WL 2488049 (2005) (preliminary print) (explaining which "persons" may be directly prosecuted and what level of knowledge is required to meet the "knowingly" element of the offense). *See* HITECH Act, 42 U.S.C. § 17931 (2006) (extending criminal penalties to individuals whether or not they are employees of the covered entity, extending HIPAA violations to cases involving willful neglect, increasing monetary penalties, and establishing a compensation methodology).

[10] U.S. DEP'T OF DEF., REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION para. C2.4.2 (Jan. 23, 2003) [hereinafter DOD REG. 6025.18-R]. ("As a general rule, state laws pertaining to healthcare are not applicable to healthcare programs and activities of the Department of Defense (DoD). However, there are some matters concerning which DoD rules and procedures call for the DoD Components to follow State law. For example, in cases involving disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor, the State law of the State where the treatment is provided shall be applied."). *See infra* note 54.

[11] 45 C.F.R. § 160.203 (2010); DOD REG. 6025.18-R, *supra* note 10, para. C2.4.1.

[12] DOD REG. 6025.18-R, *supra* note 10, para. C2.4; 45 C.F.R. § 160.202 (outlining the factors to determine if a state law is more stringent: (1) prohibits or restricts a use or disclosure more than HIPAA; (2) provides greater access to or rights to amend information; (3) provides more information; (4) narrows the scope or duration of an authorization or consent, increases privacy protections, or reduces the coercive effect regarding expressing legal permission; (5) requires recordkeeping of disclosure in more detail or for longer duration; or (6) in general provides the individual with an increase in privacy protection for Protected Health Information (PHI)).

[13] *See* N.Y. PUB. HEALTH LAW § 2782(5) (McKinney 2010).

[14] DOD REG. 6025.18-R, *supra* note 10, para. C1.1.

[15] 45 C.F.R. § 160.102.

[16] *But see* AR 40-66, *supra* note 9, at 198 (glossary) (defining the term "covered entity": "Not all healthcare providers affiliated with the Armed Forces are covered entities; among those who are not providers associated with the Military Entrance Processing Stations and Reserve Components practicing outside the authority of military treatment facilities (MTFs) who do not engage in electronic transactions covered by DoD 6025.18-R and non-network civilian providers."). *See infra* text accompanying notes 68–74 (providing information about accessing civilian medical records).

need to execute a mission.[17] Shortly after HHS published the final modifications of the Privacy Rule, the DoD published its own health information privacy regulation, DoDR 6025.18-R. The lengthy DoD regulation closely mirrors the federal Privacy Rule as it pertains to the military healthcare system. Given the breadth of the DoD regulation, trial counsel are advised to pay particular attention to the following chapters: Chapter 5.3, The Core Elements of an Authorization; Chapter 7, Uses and Disclosure of PHI without an Authorization; Chapter 8.2, The Minimum Necessity Rule; and Chapter 8.9, Rules for Alcohol and Drug Abuse Program Patient Records. Judge advocates who are analyzing a medical privacy issue are advised to consult both DoDR 6025.18-R and AR 40-66.

Army Regulation 40-66: Medical Record Administration and Healthcare Documentation

The Department of the Army published AR 40-66 to provide "procedures for the preparation, disposition, and use of Army electronic and paper medical records."[18] The regulation separates the release of PHI into two categories: (1) the release of information when the patient consents to the disclosure, and (2) the release of information without the consent of the patient.[19] Judge advocates should begin their HIPAA analysis by determining whether or not they will be able to obtain the consent of the individual.

When a court-martial witness consents to the release of information, trial counsel should draft a valid authorization on DD Form 2870. However, when the individual does not consent, the trial counsel will need to rely on an exception found in DoDR 6025.18-R to access the PHI.

Army Regulation 40-66 outlines the procedures for the Patient Administration Department (PAD) at an Army Medical Treatment Facility (MTF) to follow when processing requests for PHI.[20] The MTF is encouraged to seek legal guidance from its servicing judge advocate before releasing PHI to ensure the request or authorization is legally sufficient.[21] Typically, each Army Medical Center has at least one field grade judge advocate and several civilian attorneys who provide HIPAA–related guidance to the hospital commander and staff. Trial counsel should be aware that their requests will be reviewed by experienced judge advocates or civilian attorneys for regulatory compliance.[22]

[17] DoD REG. 6025.18-R, *supra* note 10, para. C7.11.1.1; AR 40-66, *supra* note 9, para. 2-4(a)1.*(k)*.

[18] AR 40-66, *supra* note 9, para. 1-1.

[19] *Id.* paras. 2-3, 2-4.

[20] *Id.* para. 2-5.

[21] *Id.* para. 2-5e.

[22] *See id.* para. 2-5e.

The Nuts and Bolts of a Trial Counsel's Request for Medical Records

The Department of the Army requires PHI of both living and deceased persons to remain confidential unless otherwise authorized.[23] "Individually Identifiable Healthcare Information" (i.e., PHI) is defined as

> information that [i]s created or received by a healthcare provider, health plan, or employer; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of healthcare to an individual; or the past, present, or future payment for the provision of healthcare to an individual; and [t]hat identifies; or [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.[24]

Accordingly, nearly any medical record that a trial counsel will need to prepare for trial or to comply with a discovery request will qualify as PHI. Trial counsel can use one of three methods to request access to PHI maintained at a MTF: (1) consent and authorization; (2) request for a law enforcement purpose; or (3) a court order during a judicial or administrative proceeding.

Three Ways for a Trial Counsel to Access PHI for Military Justice

Consent and Authorization

Military treatment facilities are authorized to disclose PHI to a third party, such as a judge advocate, if that party has obtained the prior written consent of the patient.[25] The patient's consent may authorize an oral or written release of PHI to a judge advocate. When possible, a trial counsel should utilize DD Form 2870 to document the authorization.[26] Because the PAD staff in the MTF regularly process requests in this format, using this form will likely reduce miscommunication and overall processing time.

If the trial counsel is unable to use DD Form 2870, any written authorization will be valid, provided it contains the following information: (1) a description of the specific information to be used or disclosed; (2) the name of the person authorized to make the disclosure; (3) the name of

[23] *Id.* para. 2-2.

[24] DoD REG. 6025.18-R, *supra* note 10, para. DL1.1.20 (internal sub-divisions omitted).

[25] *Id.* para. C5.1; AR 40-66, *supra* note 9, para. 2-3.

[26] AR 40-66, *supra* note 9, para. 2-3b(1). A sample DD Form 2870 is enclosed at Appendix A.

the individual or entity who may receive the disclosure; (4) a description of the purpose of the disclosure; (5) an expiration date; and (6) a dated original signature.[27] Judge advocates are advised to pay particular attention to the date of the signature on the authorization. Authorizations more than one year old are invalid.[28]

Consent and authorization is a useful method for cooperative witnesses. For example, victims of sexual assaults may be willing to consent to the release of their PHI to prove the extent of their injuries. The personal representatives of a homicide victim will likely consent to the release of relevant medical records for cause of death evidence.[29] Authorizations may not be so practical for the accused or other noncooperative witnesses who may not want to release sensitive medical or psychiatric records to satisfy a discovery request. When an authorization is not available, counsel in need of medical records must draft an administrative request as a law enforcement official or seek a court order.

Law Enforcement Purposes

A military medical treatment facility is authorized to disclose PHI for law enforcement purposes to a law enforcement official.[30] A law enforcement official includes an employee of the agency who has the authority to "prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of the law."[31] Absent an authorization, trial counsel and criminal investigators should use this exception to obtain PHI when needed.[32]

When requesting PHI for law enforcement purposes, trial counsel must submit a proper request to the PAD at the MTF which maintains the records.[33] The request may be in the form of (1) a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer; (2) a grand jury subpoena; or (3) an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law.[34] The administrative request involves fewer administrative hurdles and is generally the simplest method for trial counsel to obtain PHI from an MTF.[35]

Court Order (Judicial or Administrative Proceeding)

Finally, an MTF will release information without the consent of the patient to comply with a court order for a judicial or administrative proceeding.[36] "Any order from a military judge in connection with any process under the Uniform Code of Military Justice" is considered a court order.[37] Court orders can be useful when requesting records from a non-cooperative military or civilian facility. If a court order is necessary, only the PHI expressly described in the court order will be released.[38] Therefore, a trial counsel's petition for a court order should list the specific medical records requested.[39]

Protected Health Information may also be released in response to a subpoena, discovery request, or other lawful process, provided specific assurances are provided by the requestor.[40] Trial counsel are likely to find this method of accessing PHI more burdensome than drafting an administrative request as a law enforcement officer.[41]

---

[27] DOD REG. 6025.18-R, *supra* note 10, para. C5.3.1; AR 40-66, *supra* note 9, para. 2-3b(1).

[28] AR 40-66, *supra* note 9, para. 2-3b(1)*(c)*.

[29] The Federal Privacy Rule and the DoD Privacy Regulation apply to both living and deceased individuals. Generally, a third party who can legally act on behalf of the deceased individual or the estate can consent to the release of protected health information. DOD REG. 6025.18-R, *supra* note 10, paras. C1.2.1, C8.7.4.

[30] *Id.* para. C7.6.

[31] *Id.* para. DL1.1.22.

[32] The DoD health information privacy regulation grants patients the right to receive an accounting of most PHI disclosures made by a covered entity in the last six years. Upon request by a law enforcement official, the MTF may temporarily suspend an individual's right to receive an accounting for HIPAA disclosures made to law enforcement. The request should include a written statement that the information, if provided to the individual, "would be reasonably likely to impede the agency's activities." *Id.* paras. C13.1.1.6, C13.1.2.1

[33] *See* AR 40-66, *supra* note 9, para. 2-4a(4) (requiring use of DA Form 4254 for such requests).

[34] DOD REG. 6025.18-R, *supra* note 10, para. C7.6.1.2.

[35] *See infra* text accompanying notes 43–51 for additional information on drafting an administrative request.

[36] DOD REG. 6025.18-R, *supra* note 10, para. C7.5.1.1.

[37] *Id.* para. C7.5.4.

[38] *Id.* para. C7.5.1.1.

[39] The "minimum necessary" rule (requiring the MTF to limit its disclosures to the minimum necessary to accomplish the purpose of the disclosure) does not apply to court orders or other disclosures required by law. *Id.* para. C8.2.2.6. That is to say, the order of the military judge is sufficient to require the disclosure, without fear that the MTF will further restrict the disclosures based on its own independent judgment. However, counsel will still be required to demonstrate to the military judge that the requested protected health information is relevant. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 402 (2008) [hereinafter MCM].

[40] DOD REG. 6025.18-R, *supra* note 10, para. C7.5.1.2.

[41] The requesting counsel is required to document in writing that reasonable efforts have been made to notify the subject of the information of the request for PHI, that the party made a "good faith attempt to provide written notice to the individual," that the "notice included sufficient information about the litigation or proceeding . . . to permit the individual to raise an objection," and that enough time has passed and "no objections were filed, or all objections filed by the individual have been resolved by the court or administrative tribunal." *See id.* paras. C7.5.1.2, C7.5.1.3. In the alternative, the requesting counsel may provide the treatment facility with satisfactory assurance that reasonable efforts have been made to secure a qualified protective order. *Id.* para. C7.5.1.2.2.

Drafting the Request for PHI

Once a trial counsel has determined that he has the authority under DoDR 6025.18-R to request PHI, he should draft and submit a valid written request to the PAD at the treatment facility where the records are located. The request must be submitted on a DA Form 4254, Request for Private Medical Information.[42]

When drafting a request for PHI, the trial counsel must comply with several requirements under DoDR 6025.18-R.[43] First, the trial counsel must demonstrate why the request is "relevant and material to a legitimate law enforcement inquiry."[44] Second, the trial counsel must show in writing that the request is "limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought."[45] Third, the trial counsel must attest that "de-identified information [i.e., information that does not identify an individual] could not reasonably be used" instead of the PHI.[46] Fourth, the trial counsel must document the official purpose of the request, specify which medical records are being requested, and list the dates of treatment that are relevant.[47] Finally, the trial counsel must present his official credentials to the PAD when submitting the request for PHI.[48] These administrative requirements help ensure compliance with the principle of disclosing only the minimum amount of PHI necessary to satisfy the authorized request.[49]

When drafting the DA Form 4254, trial counsel should pay particular attention to the specificity and relevance of the request. One of the most frequent errors law enforcement officials make is requesting a patient's entire medical record either because they did not take the time to draft a narrow request or because they are unsure which exact records will be relevant to the case.[50] Fishing expeditions will not only aggravate the hospital staff but lead to a total denial of the request for release. For example, a trial counsel's request for a ten-year-old medical record of an accused charged with vehicular homicide will likely be denied as overly broad. The medical treatment facility is only authorized to release the minimum amount of PHI necessary to satisfy the purpose of the request.[51]

Additional Issues

Requesting PHI of a Minor or Declared Incompetent Individual

Minors and individuals who have been declared mentally incompetent are generally unable to consent to the release of their medical records.[52] A minor is defined as someone who "has not attained the age of 18 years and who has not been emancipated as determined by the law of the state in which the MTF is located."[53] If the victim or witness is a minor or has been declared mentally incompetent by a court, the DD Form 2870 generally must be signed by a parent or legal guardian.[54] If a trial counsel encounters an uncooperative parent, for example in a child molestation case where the parent is the accused, the trial counsel will need to draft an administrative request as a law enforcement official on DA Form 4254 or obtain a court order.[55]

Requesting Mental Health Records and Alcohol and Drug Records

Psychotherapy Notes

Trial counsel should be aware that psychotherapy notes are generally subject to more protection and fewer exceptions under HIPAA and DoDR 6025.18-R.[56] Psychotherapy notes are defined as

---

[42] Although the DoD Privacy Regulation permits an administrative request to be drafted in any format provided the content complies with regulatory requirements discussed below, AR 40-66 requires DoD personnel to request PHI on DA Form 4254. DOD REG.6025.18-R, *supra* note 10, para. C7.6.1; AR 40-66, *supra* note 9, para. 2-4a(4). A sample DA 4254 appears in Appendix B.

[43] DOD REG. 6025.18-R, *supra* note 10, para. C7.6.1.2.

[44] *Id.* para. C7.6.1.2.3.1.

[45] *Id.* para. C7.6.1.2.3.2.

[46] *Id.* para. C7.6.1.2.3.3.

[47] AR 40-66, *supra* note 9, para. 2-4a(4). DA Form 4254 requires requesters to submit the dates of the hospitalization or clinic visits and diagnosis, if known.

[48] AR 40-66, *supra* note 9, para. 2-4a(4). Trial counsel will usually be required to present their military identification cards when requesting medical records in person. There is no specific written guidance on the verification process, so local patient administration division policies may differ. Advance coordination is recommended. Telephone Interview with Charles Orck, Attorney Advisor, U.S. Army Med. Command (Jan. 7, 2010) [hereinafter Orck Telephone Interview].

[49] DOD REG. 6025.18-R, *supra* note 10, para. C8.2.4.2.1.

[50] Orck Telephone Interview, *supra* note 48.

[51] DOD REG. 6025.18-R, *supra* note 10, para. C8.2.1; AR 40-66, *supra* note 9, para. 2-4a(4).

[52] *See* AR 40-66, *supra* note 9, para. 2-3b.

[53] *Id.* para. 2-3b(1)*(b)1*.

[54] *Id. But see* DOD REG. 6025.18-R, *supra* note 10, para. C8.7.3.2.; AR 40-66, *supra* note 9, para. 2-6a(1) (referring the reader to state law to determine when a teenager can act on his or her own behalf and when parents may not be notified, especially with respect to records of drug and alcohol abuse, venereal disease control, birth control, and abortion). In Texas for example, a child may consent to the medical, psychological, or surgical treatment related to pregnancy (other than abortion) or the diagnosis and treatment of an infectious, contagious, or communicable disease. TEX. FAM. CODE ANN. § 32.003(a)(3), (4) (West 2003).

[55] *See* DOD REG. 6025.18-R, *supra* note 10, paras. C7.5, C7.6; *see supra* text accompanying notes 43–51 and Appendix B for further guidance on using DA Form 4254.

[56] *See* DOD REG. 6025.18-R, *supra* note 10, para. C1.2.3.1.

> Notes recorded (in any medium) by a healthcare provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.[57]

Except under limited circumstances, the MTF is required to obtain a valid authorization from the patient or the guardian before releasing psychotherapy notes.[58] Medical treatment facilities are authorized to release psychotherapy notes as required by law, which includes court orders and authorized investigative demands.[59] Trial counsel can use an administrative request for law enforcement purposes to obtain a summary of the accused's or witness's "diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date," as well as dates of treatment and prescription information.[60] However, psychotherapy notes, or medical records which detail the content of the conversations during a counseling session, will generally be redacted absent a court order or authorization. If, for example, defense counsel wants to compel the production of the alleged victim's psychotherapy notes and does not have the consent of the alleged victim, defense counsel should request an in-camera review of the records. The military judge will then make a ruling pursuant to Military Rule of Evidence 513(e)(2).[61]

ASAP Records

The release of drug and alcohol records from the Army Substance Abuse Program (ASAP) is strictly protected by statute and regulation.[62] The release of "the identity, diagnosis, prognosis, or treatment of a patient maintained in connection with a Federal substance abuse program" is prohibited unless the patient consents in writing,[63] the disclosure is directed pursuant to a court order, or the disclosure is made to medical personnel in limited treatment circumstances.[64]

In preparation for a court-martial, a trial counsel may seek a court order directing the release of ASAP records. However, the disclosure will be restricted to factual information such as dates of enrollment, discharge, attendance, and medication. The court order will not permit the disclosure of the accused's communications to the ASAP staff.[65] Alternatively, the ASAP patient may consent in writing to have his or her records released to defense counsel.[66] If the defense intends to enter relevant portions of the ASAP record into evidence during the merits or sentencing case, the records must be disclosed to the trial counsel in compliance with discovery rules.[67]

Requesting Access to Civilian Medical Records

Trial counsel will likely find that accessing medical records from MTFs with a DA Form 4254 is a relatively simple process.[68] However, the procedure becomes increasingly complex if the witness or accused has received medical treatment at a civilian medical facility. DoDR 6025.18-R, AR 40-66, and DA Form 4254 are not binding on civilian medical facilities.[69] When requesting PHI from a

---

[57] *Id.* para. DL1.1.29.

[58] *Id.* para. C5.1.2 (noting the limited exceptions in which a medical treatment facility may release psychotherapy notes: (1) to carry out certain treatment, payment, or healthcare operations, (2) to comply with activities of the Department of Health and Human Services, (3) as required by law, (4) for health oversight activities, (5) to coroners and medical examiners regarding a decedent, or (6) to avert a "serious and imminent threat to health or safety of a person or the public, which may include a serious and imminent threat to military personnel or members of the public or serious or imminent threat to a specific military mission or national security under circumstances which in turn create a serious and imminent threat to a person or the public").

[59] *See id.* para. DL1.1.31 (defining "required by law").

[60] *Id.* para. DL1.1.29 (defining "psychotherapy notes").

[61] Major Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW., Sept. 2003, at 8.

[62] *See* 42 U.S.C. § 290dd-2 (2006); AR 40-66, *supra* note 9, ch. 8; DoD Reg. 6025.18-R, *supra* note 10, para. C8.9; U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM paras. 6-8, 10-15 (2 Feb. 2009) (RAR, 2 Dec. 2009) [hereinafter AR 600-85].

[63] In the Army, this may be accomplished using DA Form 5018-R, Army Drug Abuse and Prevention Control Program (ADAPCP) Client's Consent Statement for Release of Treatment Information.

[64] AR 40-66, *supra* note 9, para. 8-3b.

[65] AR 600-85, *supra* note 62, para. 10-26.

[66] *Id.* para. 10-19.

[67] *See* MCM, *supra* note 39, R.C.M. 701(b)(1)(B)(ii), 701(b)(3), 1001(c)(1)(B). In practice, if the defense is trying to show that the client has seriously participated in treatment, a letter or testimony from the Army Substance Abuse Program (ASAP) counselor may prove more beneficial than the "raw" ASAP records. Defense counsel should use the opportunity afforded by the client's release of information to talk to the client's actual counselors. Of course, if the defense counsel calls them as witnesses, the government will then be entitled to equal access under Rule for Court-Martial 701(e), and may, if necessary, request a court order on that basis.

[68] *See supra* text accompanying notes 42–51.

[69] DOD REG. 6025.18-R, *supra* note 10, para. C1.1.2. Civilian facilities typically have their own forms, which may be obtained from their records departments. Trial counsel are encouraged to use DoD and DA policies and

civilian facility, trial counsel must rely on HIPAA, and hopefully, a cooperative civilian records department.

HIPAA generally permits, but does not require, a covered entity to disclose PHI when authorized by the patient or his guardian. A covered entity is required to disclose PHI in two limited situations: (1) when an individual requests his own records or an accounting of disclosures, and (2) in compliance with a HHS investigation.[70] Various other provisions of HIPAA authorize a covered entity to disclose PHI at its own discretion.[71]

The most practical method for requesting PHI from a civilian medical facility is for trial counsel or CID to submit an administrative request for law enforcement purposes.[72] The written request must explain how the information sought is "relevant and material to a legitimate law enforcement inquiry," be precise and "limited in scope to the extent reasonably practicable," and state that "de-identified information could not reasonably be used" to accomplish the same purpose.[73] Because civilian covered entities are permitted, but not required, to honor a law enforcement request, military justice sections are encouraged to establish professional relationships with their local facilities prior to submitting requests for medical records.[74]

Article 32 Investigating Officer Access to PHI

An Article 32 investigating officer (IO) has the authority to request access to PHI under several sections of HIPAA and the DoD Privacy Regulation. The status of the individual whose medical records are being requested and the location of the medical records determine the appropriate provision of HIPAA to authorize a release of PHI to an Article 32 IO.[75]

If the individual patient is a Soldier, the IO is authorized to request the pertinent records under paragraph C7.11.1. of DoDR 6025.18-R.[76] This provision recognizes that the IO was appointed by the commander to conduct an Article 32 investigation to execute the mission of the armed forces.[77] Specifically, Article 32 of the Uniform Code of Military Justice (UCMJ) requires a "thorough and impartial investigation" prior to a charge being referred to a general court-martial.[78]

The reach of the commander under paragraph C7.11.1 does not extend to the medical records of a civilian patient.[79] If the individual is not a member of the armed forces and the records are within the control of the MTF, as when a civilian dependent is a victim of an assault, the Article 32 IO is not authorized to receive PHI as an arm of the command.[80] Instead, the IO could request the records as a law enforcement official acting pursuant to a process "required by law" under paragraph C7.6.1.[81] The request must specify that the information sought is relevant, material, and necessary.[82]

Finally, DoDR 6025.18-R does not apply if the individual is not a member of the armed forces and the medical records are not within control of the DoD, such as a civilian victim of a DUI accident.[83] However, HIPAA, like the DoD Regulation, authorizes a covered entity to release PHI to an Article 32 IO pursuant to an administrative request

---

regulations as persuasive support for their request for PHI from a civilian medical facility.

[70] 45 C.F.R. § 164.502(a)(2) (2010); HHS HIPAA SUMMARY, *supra* note 5.

[71] 45 C.F.R. § 164.502(a)(1); HHS HIPAA SUMMARY, *supra* note 5.

[72] 45 C.F.R. § 164.512(f); Orck Telephone Interview, *supra* note 48. A covered entity may also disclose the PHI of armed forces personnel for activities deemed necessary by command authorities to assure the proper execution of the military mission, provided notice has been published in the *Federal Register*. 45 C.F.R. § 164.512(k)(1)(i); DoD Health Information Privacy Program, 68 Fed. Reg. 17,357-02 (Apr. 9, 2003) (listing the purposes for which PHI may be used or disclosed to appropriate military command authorities. Although the execution of courts-martial is not expressly listed, the *Federal Register* does include the broad purpose of carrying out any other activity necessary for the proper execution of the mission of the armed forces).

[73] 45 C.F.R. § 164.512(f)(1)(ii)(C). A sample request attached to this article at Appendix C provides guidance on how to request PHI from a civilian medical treatment facility.

[74] 45 C.F.R. § 164.512(f); HHS HIPAA SUMMARY, *supra* note 5; Orck Telephone Interview, *supra* note 48.

[75] Memorandum from the Office of Gen. Counsel, Dep't of Def. to Dir., Tricare Mgmt. Activity Privacy Office, subject: Applicability of HIPAA Regulations to Article 32 Investigations (22 Sept. 2004) [hereinafter Article 32 HIPAA Memo] (on file with OSJA MEDCOM).

[76] *Id.*

[77] *Id.* *See* DOD REG. 6025.18-R, *supra* note 10, para. C7.11.1 (noting that the command has authority to access PHI to execute the mission. This authority, however, is limited to the records of servicemembers and does not apply to civilians, retirees, or family members).

[78] 10 U.S.C. § 832(a); MCM, *supra* note 39, R.C.M. 405(a).

[79] *See* DOD REG. 6025.18-R, *supra* note 10, para. C7.11.1; Policy Memorandum 10-042, Office of the Surgeon Gen./MEDCOM, subject: Release of Protected Health Information (PHI) to Unit Command Officials (30 June 2010) [hereinafter Command Release PHI Memo], *available at* http://www.armyg1.army.mil/hr/suicide/docs/Protected_Health_information.pdf.

[80] *See* DOD REG. 6025.18-R, *supra* note 10, para. C7.11.1.

[81] Article 32 HIPAA Memo, *supra* note 75, para. 4. *See* DOD REG. 6025.18-R, *supra* note 10, paras. DL1.1.31, C7.6.1 (defining "required by law" to include DoD Regulations); DOD REG. 6025.18-R, *supra* note 10, para. DL1.1.9 (defining "DoD Regulation" to include the *Manual for Courts-Martial*); MCM, *supra* note 39, R.C.M. 405 (documenting that unless privileged "[e]vidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available").

[82] DoD Reg. 6025.18-R, *supra* note 10, paras. C7.6.1.2.3.1 to C7.6.1.2.3.3. *See supra* text accompanying notes 44–48.

[83] DOD REG. 6025.18-R, *supra* note 10, para. C1.1.2.

which is authorized by law.[84] The Article 32 IO's request must meet the same three restrictions of C7.6.1.2.3.[85] Because HIPAA does not require a covered entity to release records, it may be preferable for a more traditional law enforcement official, such as a CID agent, to request records from civilian facilities who are unfamiliar with Article 32 hearings.[86]

Knowing Where to Find Help

Trial counsel struggling with HIPAA and the DoD Privacy Regulation should seek assistance from individuals trained in medical privacy law. Each MTF has a HIPAA Privacy Officer who can provide guidance on how to properly request PHI.[87] Due to the magnitude and complexity of the DoDR 6025.18-R, trial counsel will likely find that each MTF has its own way of processing requests. Therefore, military justice offices will benefit if they network with PAD to ensure requests are submitted properly.[88]

In addition, a prudent trial counsel will develop a solid working relationship with the medical treatment facility's legal advisor. Requests for PHI without the patient's consent will likely be reviewed by the servicing judge advocate to determine the legitimacy of the request, whether on DD Form 2870 or DA Form 4254.[89] Advance coordination with the facility's servicing judge advocate will help create a seamless procedure for requesting records through PAD.

Advising Commanders on HIPAA Compliance

Command Access to PHI

HIPAA generally prohibits healthcare entities from releasing protected health information to a third party without consent.[90] However, HIPAA and DoDR 6025.18-R recognize the unique nature of the military and grant commanders limited access to a Soldier's PHI without their consent.[91] Accordingly, judge advocates must know the limitations of command authority to help prevent abuse and overreaching by commanders.

The DoD authorizes the release of certain medical information which has been deemed necessary for commanders, or their designees, to properly execute the military mission.[92] For example, commanders have unrestricted access to results of drug tests, medical readiness information, profiles, Medical Evaluation Board or Physical Evaluation Board data, line of duty investigation determinations, medical situations causing a change in duty status such as appointments or hospitalizations, Army Weight Control Program data, threats to life or health such as suicidal or homicidal behavior, and information necessary to carry out other activities in accordance with applicable military regulations or procedures.[93]

While the privacy rule recognizes that commanders and their designees need access to PHI in order to make informed decisions regarding the mission, a commander's access to medical information is not unlimited. Commanders may receive only the minimum information necessary to properly execute the mission.[94] Commanders do not have access to medical information which describes the purpose for a medical appointment, states a Soldier's diagnosis or medication prescribed, or pertains to the Soldier's Family members unless the information relates to readiness, fitness for duty, or the Exceptional Family Member Program.[95]

Commanders and their representatives may request authorized PHI from the MTF through various methods. They may contact a provider directly or communicate through the unit surgeon.[96] All requests should be documented on DA Form 4254.[97]

The AR 15-6 Investigating Officer's Access as a Command Designee

Army Regulation 15-6 Investigating Officers are empowered as command designees to request access to PHI

[84] Article 32 HIPAA Memo, *supra* note 75, para. 7. *See* 45 C.F.R. § 164.512(f)(1)(ii)(C) (2010); DoD REG. 6025.18-R, *supra* note 10, para. C7.6.1.2.3.

[85] Article 32 HIPAA Memo, *supra* note 75, para. 7. *See supra* text accompanying notes 44–48.

[86] *See* Memorandum for Record from Captain Dan Maurer, subject: Requesting Access to Medical Records from Military and Civilian Healthcare Providers by Trial Counsel in the Performance of Official Duties (2 Nov. 2010) [hereinafter Trial Counsel Request Memo] (on file with author).

[87] AR 40-66, *supra* note 9, para. 1-4*a*.(6).

[88] Orck Telephone Interview, *supra* note 48.

[89] AR 40-66, *supra* note 9, para. 2-3b(2).

[90] *See* 45 C.F.R. § 164.502(a) (2010).

[91] 45 C.F.R. § 164.512(k)(1)(i); DoD REG. 6025.18-R, *supra* note 10, para. C7.11.

[92] DoD REG. 6025.18-R, *supra* note 10, para. C7.11; AR 40-66, *supra* note 9, para. 2-4*a*.(1)*(k)*.

[93] DoD Health Information Privacy Program, 68 Fed. Reg. 17357-02 (Apr. 9, 2003); DoD Reg. 6025.18-R, *supra* note 10, para. C7.11.1.3; Message, 282049Z May 10, U.S. Dep't of the Army, subject: ALARACT VCSA Sends on Protected Health Information (PHI) para. 3 [hereinafter DA PHI Message].

[94] DA PHI Message, *supra* note 93, para. 2.

[95] *Id.* para. 4.

[96] Command Release PHI Memo, *supra* note 79, para. 5b.

[97] AR 40-66, *supra* note 9, para. 2-3a(4).

in order to execute their mission. The command's authority to investigate is necessary for the proper execution of the mission of the Army, and therefore an AR 15-6 IO does not need the consent of the Soldier to access PHI.[98] When seeking access to PHI, IOs should use DA Form 4254, request only the minimum records necessary for the investigation, and provide their credentials and a written justification of their official need to know.[99]

Commander's Authority to Release PHI to Third Parties

Once a commander or commander's designee receives PHI from the medical treatment facility, he or she is now responsible for safeguarding that information under the Privacy Act of 1974.[100] In general, PHI is considered personally identifiable information under the Privacy Act if it pertains to a living U.S. citizen or alien admitted for permanent residence. Personally identifiable information may not be released to families or even members of the commander's own staff except as allowed under the Act.[101] Commanders should avoid releasing PHI during staff calls, in situation reports, and on lists of non-deployable Soldiers. The commander is prohibited from releasing PHI without a need to know recognized under the Privacy Act or the written consent of that Soldier.[102]

Conclusion

By understanding the basic requirements of DoDR 6025.18-R and using the sample requests in the appendices, judge advocates will be able to properly and efficiently access medical records for the administration of military justice and provide practical guidance to the command regarding their access to PHI. Requesting medical records does not need to be a stressful event for new counsel. If the judge advocate arms his paralegal with a legally sufficient request or authorization, the paralegal will not come back from the hospital empty-handed. However, the counsel must first know which specific records they want, why those records are relevant to the case, and under which authority the government is authorized to request them. Although medical records are often a critical piece of evidence at trial, the government's access to PHI is not without limitations. Judge advocates must understand HIPAA and the applicable DoD requirements to be effective litigators and trusted advisors to the command.

---

[98] E-mail from Charles Orck, Attorney Advisor, U.S. Army Med. Command (Jan. 1, 2011, 9:13 EST); DoD REG. 6025.18-R, *supra* note 10, para. C7.11.1 (authorizing disclosure when required by a commander to carry out the military mission); *id.* DL 1.1.31.1 (defining "required by law" to include "authorized investigative demands"). The investigating officer is not bound by most of the Military Rules of Evidence and may consider the records obtained without the need for authenticating witnesses. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 3-7a (2 Oct. 2006). Although there is currently no written legal authority, parallel analysis could be used to support a position that administrative separation board members could access relevant medical records on behalf of the command. *See* U.S. DEP'T OF ARMY, REG. 600-35, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-10g (6 June 2005) (RAR, 27 Apr. 2010) (stating that the provisions of AR 15-6 apply to separation boards unless otherwise modified by the regulation).

[99] DoD REG. 6025.18-R, *supra* note 10, para. C8.2.1 (providing that only the minimum necessary records to accomplish the official purpose will be provided); AR 40-66, *supra* note 9, para. 2-4a(4).

[100] U.S. DEP'T OF ARMY, REG. 340-21, THE PRIVACY ACT PROGRAM paras. 1-5b, 1-5d, 3-1 (5 July 1985) (forbidding the Army to disclose such records except as provided by that regulation, and requiring that released information be safeguarded against unauthorized disclosure or use). Once released by a covered entity to an individual within the DoD, PHI is protected by the Privacy Act rather than HIPAA, and can only be disclosed pursuant to a need to know. Command Release PHI Memo, *supra* note 79, para. 6d.

[101] DoD REG. 6025.18-R, *supra* note 10, para. C1.1.5.

[102] Command Release PHI Memo, *supra* note 79, para. 6d.

Appendix A

Sample DA Form 2870

AUTHORIZATION FOR DISCLOSURE OF MEDICAL OR DENTAL INFORMATION

PRIVACY ACT STATEMENT

In accordance with the Privacy Act of 1974 (Public Law 93-579), the notice informs you of the purpose of the form and how it will be used. Please read it carefully.
AUTHORITY: Public Law 104-191; E.O. 9397 (SSAN); DoD 6025.18-R.
PRINCIPAL PURPOSE(S): This form is to provide the Military Treatment Facility/Dental Treatment Facility/TRICARE Health Plan with a means to request the use and/or disclosure of an individual's protected health information.
ROUTINE USE(S): To any third party or the individual upon authorization for the disclosure from the individual for: personal use; insurance; continued medical care; school; legal; retirement/separation; or other reasons.
DISCLOSURE: Voluntary. Failure to sign the authorization form will result in the non-release of the protected health information.
This form will not be used for the authorization to disclose alcohol or drug abuse patient information from medical records or for authorization to disclose information from records of an alcohol or drug abuse treatment program. In addition, any use as an authorization to use or disclose psychotherapy notes may not be combined with another authorization except one to use or disclose psychotherapy notes.

SECTION I - PATIENT DATA

1. NAME *(Last, First, Middle Initial)*	2. DATE OF BIRTH *(YYYYMMDD)*	3. SOCIAL SECURITY NUMBER
Snuffy, John, P.	19830626	111-11-1111

4. PERIOD OF TREATMENT: FROM - TO *(YYYYMMDD)*	5. TYPE OF TREATMENT *(X one)*
20100101-20100601	[ ] OUTPATIENT [ ] INPATIENT [X] BOTH

SECTION II - DISCLOSURE

6. I AUTHORIZE William Beaumont Army Medical Center TO RELEASE MY PATIENT INFORMATION TO:
(Name of Facility/TRICARE Health Plan)

a. NAME OF PHYSICIAN, FACILITY, OR TRICARE HEALTH PLAN	b. ADDRESS *(Street, City, State and ZIP Code)*
CPT Joseph Smith, Trial Counsel	Office of the Staff Judge Advocate Fort Bliss, Texas
c. TELEPHONE *(Include Area Code)* (123) 456-7890	d. FAX *(Include Area Code)*

7. REASON FOR REQUEST/USE OF MEDICAL INFORMATION *(X as applicable)*
[ ] PERSONAL USE [ ] CONTINUED MEDICAL CARE [ ] SCHOOL [ ] OTHER *(Specify)*
[ ] INSURANCE [ ] RETIREMENT/SEPARATION [X] LEGAL

8. INFORMATION TO BE RELEASED
All orthopedic paper or electronic records to include chronology of care, imaging, radiological reports, laboratory reports, surgical reports, and prescription information during the period of treatment described in section 4 above. This authorization also permits medical professionals to verbally disclose and discuss the specified protected health information to the person or entity listed in paragraph 6.a.

9. AUTHORIZATION START DATE *(YYYYMMDD)*	10. AUTHORIZATION EXPIRATION DATE *(YYYYMMDD)*	[ ] ACTION COMPLETED

SECTION III - RELEASE AUTHORIZATION

I understand that:
a. I have the right to revoke this authorization at any time. My revocation must be in writing and provided to the facility where my medical records are kept or to the TMA Privacy Officer if this is an authorization for information possessed by the TRICARE Health Plan rather than an MTF or DTF. I am aware that if I later revoke this authorization, the person(s) I herein name will have used and/or disclosed my protected information on the basis of this authorization.
b. If I authorize my protected health information to be disclosed to someone who is not required to comply with federal privacy protection regulations, then such information may be re-disclosed and would no longer be protected.
c. I have a right to inspect and receive a copy of my own protected health information to be used or disclosed, in accordance with the requirements of the federal privacy protection regulations found in the Privacy Act and 45 CFR §164.524.
d. The Military Health System (which includes the TRICARE Health Plan) may not condition treatment in MTFs/DTFs, payment by the TRICARE Health Plan, enrollment in the TRICARE Health Plan or eligibility for TRICARE Health Plan benefits on failure to obtain this authorization.
I request and authorize the named provider/treatment facility/TRICARE Health Plan to release the information described above to the named individual/organization indicated.

11. SIGNATURE OF PATIENT/PARENT/LEGAL REPRESENTATIVE	12. RELATIONSHIP TO PATIENT *(If applicable)*	13. DATE *(YYYYMMDD)*

SECTION IV - FOR STAFF USE ONLY *(To be completed only upon receipt of written revocation)*

14. X IF APPLICABLE:	15. REVOCATION COMPLETED BY	16. DATE *(YYYYMMDD)*
[ ] AUTHORIZATION REVOKED		

17. IMPRINT OF PATIENT IDENTIFICATION PLATE WHEN AVAILABLE	SPONSOR NAME: SPONSOR RANK: FMP/SPONSOR SSN: BRANCH OF SERVICE: PHONE NUMBER:

DD FORM 2870, DEC 2003 Adobe Professional 8.0

Appendix B

Sample DA Form 4254[103]

REQUEST FOR PRIVATE MEDICAL INFORMATION For use of this form, see AR 40-66; the proponent agency is the OTSG	1. Date *(YYYYMMDD)*
2. Patient's Name and SSN. Snuffy, John P. 111-11-1111	3. Medical Treatment Facility *(Name and Location)* William Beaumont Army Medical Center, El Paso, Texas

4. Reason for Request.
IAW AR 40-66, para. 2-4a(1)(a), I have an official need to access Protected Health Information (PHI) of the above named patient. I am requsting the PHI in perfomance of my duties as Trial Counsel in [the investigation of _____] [US v. _____]. This request is made in preparation or anticipation of a [law enforcment investigation] [judicial proceedings for Court -Martial under the Uniform Code of Military Justice, 10 U.S.C. 801 et seq.]. The PHI requested below is material, relevant, and limited in scope to the extent reasonably practicable. De-identified information can not reasonably be used in place of the requested PHI.

I authorize [NAME OF YOUR PARALEGAL] to physically retrieve these records from your office as part of [his/her]

5. Private Medical Information Sought (*Specify dates of hospitalization or clinic visits and diagnosis, if known)*
All medical records, files, reports for [name of individual] between the dates of [enter date range] maintained at [name of medical facility] and/or associated clinics on Fort [name], to include:

o chronologoical record of medical care
o nurse screening reports and notes
o handwritten, typed, or electronic notes from the treating physician and/or surgical team
o patient lab inquiries and reports
o prescription history
o medical record reports, including ambulatory and surgical proecures and reports
o medical record-supplemental medical data forms
o print-outs of electronic, web-based data entry related to admittal, treatment, diagnosis, discharge, or follow-up care
o liability release forms
o patient registration forms
o Imaging records and radiology reports to include X-ray, CT, MRI, or similar photographic evaluative or diagnostic tools
o social work and behavioral health clinic records, if applicable

6. Requestor's Name, Title, Organization and SSN.
[NAME], CPT, Judge Advocate, Trial Counsel, [UNIT] [phone number and email address]

FOR USE OF MEDICAL TREATMENT FACILITY ONLY

7. Check applicable box.
☐ Approved ☐ Disapproved *(State reason for disapproval)*

8. Summary of Private Medical Information Released.

9. Signature of Approving Official.	10. Date *(YYYYMMDD)*

DA FORM 4254, FEB 2003 DA FORM 4254-R, NOV 91, IS OBSOLETE. APD PE v1.02ES

[103] Trial Counsel Request Memo *supra* note 86.

Appendix C

Sample Request for Civilian Covered Entity[104]

Name of civilian "covered entity"/addressee
Address
City, State XXXXX-XXXX

Dear [Name of Addressee],

Under the provisions of the Health Insurance Portability and Accountability Act (Pub.L. 104-191) and the Code of Federal Regulations, the undersigned requests access to certain "Protected Health Information" (PHI) related to [Name of individual whose records you seek to obtain], specifically the following records, files, and information maintained by your facility and its employees:

[list the specific dates and documents or files you want on the specified individual].

Pursuant to 45 C.F.R. part 164.512, para. (f)(1)(ii)(C), this request fulfills an official need in the performance of the prosecution and law enforcement investigation duties of the office of the undersigned. The intended use of the PHI is [identify your intended use of the PHI (e.g., "to aid in the discovery of relevant, material, and probative evidence of the medical status of _____, a Government witness in this prosecution under the Uniform Code of Military Justice, 10 U.S.C. 846 and Rule for Court-Martial 701 (Manual for Courts-Martial, 2008 ed.")].

The undersigned has a good faith and reasonable belief that the information sought will be relevant and material to the PICK ONE: [investigation] [court-martial prosecution]. Furthermore, the scope of requested PHI is the "minimum necessary" under the circumstances to accomplish its intended use. 45 C.F.R. parts 164.502(b) and 164.514(d).

"De-identified" information cannot be reasonably be used to satisfy the request.

If this request is part of the Discovery process, add the following statements:

The undersigned has made reasonable written attempts over a [time] period to request the consensual disclosure of this PHI from [name of individual whose records you're seeking], to provide sufficient notice of the timing and nature of the pending court-martial, and to provide [name] reasonable time to submit an objection to disclosure. 45 C.F.R. part 164.512, para. (e)(1)(iii). The time in which to object has lapsed [state the court rules or pre-trial decision by the court with respect to a filed objection]. (enclose supporting documentation if available)

This request is for PICK ONE or BOTH: [the purpose of conducting a legitimate military law enforcement investigation under the Uniform Code of Military Justice (10 U.S.C. 801, *et seq*., and pursuant to 45. C.F.R. part 164.512, para. (f)(1)(ii)(C)] [for the purpose of Discovery proceedings in the case of United States v. _____, prosecuted under the Uniform Code of Military Justice (10 U.S.C. 801, *et seq*., and pursuant to 45 C.F.R. part 164.512, para. (e)(1)(ii)].

Inquiry for additional information or clarification related to this request can be directed to the undersigned at [phone number, email address].

Sincerely,

NAME
Captain, U.S. Army
Trial Counsel

---

[104] *Id.*

Working with Proximate Cause: An "Elements" Approach

Captain Daniel D. Maurer[*]

All causes are beginnings.[1]

—Aristotle

I never blame myself when I'm not hitting. I just blame the bat and if it keeps up, I change bats. After all, if I know it isn't my fault that I'm not hitting, how can I get mad at myself?[2]

—Yogi Berra

Introduction

A lieutenant colonel (LTC) returns to his forward operating base, steps out of his Mine-Resistant Armor-Protected (MRAP) vehicle and strides confidently toward a weapons clearing barrel. As he retrieves the M9 pistol from the holster on his Improved Outer Tactical Vest (IOTV), he fails to see that the selector switch is now in the "up" or "fire" position, as indicated by the small red dot on the right side of the pistol's upper assembly. Unknown to the LTC, this particular selector switch routinely slips northward at the slightest touch, a mechanical defect noted three days earlier by the company's supply clerk filling in as unit armorer. With the late afternoon sun sinking behind the palm groves, the senior officer also fails to notice the rock-strewn path to the barrel he now walks. Just as he approaches the barrel to begin clearing procedures, he turns his ankle on a large stone, painfully lurching to one side. As he stumbles, he loses his grip on the weapon. The officer reflexively stretches out his hand to grab the falling weapon—despite his age and pain, he's just fast enough to grip the handle tightly. Unfortunately, he is also able to squeeze the trigger with just enough pressure to discharge the chambered round into the tire of a nearby parked MRAP, and one more into his foot.

In the scene above, both the line-of-duty officer (LD) and the financial liability investigations of property loss (FLIPL) officer assigned to investigate these facts must resolve whether certain actions were negligent, and whether that negligence formed the proximate cause of the officer's self-inflicted wounds and property damage to the MRAP.[3] But, as judge advocates know well, working with the concept of "proximate cause"—in particular, helping investigating officers (IOs) apply it in the field—can be frustratingly difficult. This article proposes that these challenges lie primarily in the regulatory definitions of "proximate cause" relied on by IOs and their legal advisors. While the official guides provided by the Department of the Army[4] and various installation Staff Judge Advocate offices[5] are helpful, this article proposes a different solution: explaining the concept, and then reviewing the IO's analysis, from an "elements" perspective. This elemental approach is consistent with the regulatory definition, but provides an improved emphasis on key aspects of "proximate cause," like the foreseeability of harm, materiality, contribution, and predominance, that are often missed by IOs in part because they are inadequately described or ignored completely by the guides and sources we provide to them.[6] Finally, I offer a

---

[*] Judge Advocate, U.S. Army. Presently assigned as Appellate Government Counsel, U.S. Army Legal Services Agency, Fort Belvoir, Virginia. Previous assignments include Brigade Judge Advocate and Trial Counsel, 36th Engineer Brigade, Fort Hood, Texas; Sapper Platoon Leader, Battalion Support Platoon Leader, and Battalion S-4, 4th Engineer Battalion, 4th Infantry Division, Fort Carson, Colorado. Special thanks to Lieutenant Colonel Craig Merutka, then the Chief of Administrative Law, Office of the Staff Judge Advocate, U.S. Forces–Iraq, for invaluable assistance and review of an earlier draft of this article, as well as Major Tonya Jankunis, Captain Madeline Gorini, and Captain Joseph Wilkinson for their patience and astute editing.

[1] ARISTOTLE, *Metaphysics, Book V, in* THE BASIC WORKS OF ARISTOTLE 752 (Richard McKeon ed., 1941).

[2] Baseball Almanac, *Yogi Berra Quotes*, *available at* http://www.base-ball -almanac.com/quotes/quoberra.shtml (last visited Feb. 15, 2012).

[3] Financial Liability Investigations of Property Loss (FLIPLs) are governed by Army Regulation (AR) 735-5, *Policies and Procedures for Property Accountability*. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY ch. 13 (28 Feb. 2005) [hereinafter AR 735-5]. Line-of-Duty investigations are governed by AR 600-8-2, *Line of Duty Policy, Procedures, and Investigations*. U.S. DEP'T OF ARMY, REG. 600-8-2, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (4 Sept. 2008) [hereinafter AR 600-8-2].

[4] U.S. DEP'T OF THE ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER'S GUIDE ch. 7 (9 Apr. 2007) [hereinafter DA PAM. 735-5].

[5] *See* OFFICE OF THE STAFF JUDGE ADVOCATE, FORT SAM HOUSTON, FINANCIAL LIABILITY OFFICER GUIDE (Oct. 2005) [hereinafter FT. SAM HOUSTON FLO GUIDE], *available at* http://www.samhouston.army.mil/sja/adm_law.asp; OFFICE OF THE STAFF JUDGE ADVOCATE, FORT LEE, GUIDE TO FINANCIAL LIABILITY INVESTIGATIONS [hereinafter FT. LEE FLO GUIDE], *available at* http://www.cascom.lee.army.mil/staff/sja/Info%20papers/AdLaw/735-5guide.pdf; OFFICE OF THE STAFF JUDGE ADVOCATE, FORT CARSON, FINANCIAL LIABILITY OFFICER GUIDE [hereinafter FT. CARSON FLO GUIDE], *available at* http://www.carson.army.mil/LEGAL/InfoPapers/FLIPL.pdf. A similar guide appears in Major Thomas Keith Emswiler's *Improving the Report of Survey Process*, ARMY LAW., Aug. 1993, at 20, 23–31.

[6] For example, DA Pam 735-5, the Army's primary guidebook for Financial Liability Investigations, tells IOs to use "common sense" and then defines proximate cause indirectly through a series of short hypothetical fact-patterns, all the while warning that "what appears to be the proximate cause may not be the case." DA PAM 735-5, *supra* note 4, para. 7-2*d* and *e*. These fact patterns depict realistic (though simplified) scenarios, but fail to explain *why*—in those situations—the proximate cause determination comes out the way it does. Investigating officers are left to either glean what rules of logic or law they may from the list of examples, or fall back on them as rudimentary models and apply them as loose analogies to their

model worksheet and decision-tree methodology, applying this elements-based definition, which both the IO and legal advisor could employ to assist in their analysis of the facts.

Defining Proximate Cause

Primary. Leading. Contributing. Continuous. Linking. Direct. Material. Natural. Cause. Effect. Proximate. These words are frustratingly familiar to any judge advocate faced with explaining the concept of "proximate cause" to IOs and commanders, who are often tempted to focus on negligence alone, and treat proximate causation as "obvious" or ignore it altogether.

Financial Liability Investigations

A financial liability officer (FLO) must proceed through a three-step analysis before recommending financial liability for the loss, damage, or destruction (LDD) of government property. First, he must find that government property was lost, damaged or destroyed. Second, he must find that the individual was negligent or engaged in willful misconduct. Third, he must find that the person's negligence or willful misconduct was the proximate cause of the LDD to government property—that is,

> [t]he cause which in a natural and continuous sequence, unbroken by a new cause, produced the LDD, and without which the LDD would not have occurred.[7]

It is further defined as:

> the primary moving cause, or the predominate cause, from which the loss or damage followed as a natural, direct, and immediate consequence.[8]

The first two steps of the proximate cause analysis are relatively straightforward. To the extent that the FLO must interview witnesses or the respondent to determine whether "negligence" occurred, FLOs rarely seem to struggle, especially if they have relevant experience. Without regular and clear advice from their legal advisors, these FLOs tend to struggle or ignore the third and final step: the element of causation.[9]

Thus, in the hypothetical presented at the beginning of this article, where should a novice IO begin to analyze the cause-and-effect relationship? With the Lieutenant Colonel's absent-mindedness as he left his vehicle? With the rocky, unstable terrain beneath the officer's boots? With the untrained and distracted supply clerk that who provided him with the weapon? With the pistol's mechanical fault itself? The relevant definition of proximate cause—and how legal advisors explain the concept to lay investigators—muddies their efforts in resolving these questions.[10] Investigating officers can conflate proximate cause with their earlier findings of responsibility, negligence or misconduct. Reading the different types of responsibility in AR 735-5, they can be tempted to create a form of strict liability, and force Soldiers to pay for the LDD based solely on their duty positions (i.e., the scale of their responsibility) or the name listed on a hand receipt.[11]

Consider the following scenario: A toolbox is found to be missing right before a unit deploys. A hasty FLIPL occurs a few weeks after deployment. The FLO is able to locate a year-old hand receipt, the last one in unit records for the item. He is not able to determine when the loss actually occurred, who actually possessed the item, or how it disappeared from the motor pool. He can determine only that the loss occurred, and the identity of the last hand receipt holder. The IO's temptation is to avoid further analysis, and declare the receipt holder liable in the absence of further evidence. In doing so, however, he neglects his duty to make findings to a preponderance of the evidence. He has not found sufficient evidence to establish that anyone was negligent, let alone how such negligence "in a natural and continuous sequence, unbroken by a new cause, produced the LDD, and without which the LDD would not have occurred." The hand receipt holder *might* be liable—if, say, his negligence in failing to hand-receipt the toolbox to the next recipient made the item's further history impossible to track[12]—but more facts are needed.

---

own facts, even at the expense of nuanced details that may undermine the analysis.

[7] AR 735-5, *supra* note 3, para. 13-29c.

[8] DA PAM 735-5, *supra* note 4, para. 2-1d. The definition is mandated by the Department of Defense Financial Management Regulation. U.S. DEP'T OF DEF. REG. 7000.14-R, Vol. 12, ch. 7, at 7-4, 7-30 (Mar. 2007).

[9] Emswiler, *supra* note 5, at 20-21.

[10] The Army installation-specific guides are no more expressive or detailed than the Department of the Army's guide. For example, the guides published by Fort Carson and Fort Sam Houston restate the definition of proximate cause from AR 735-5, then provide a series of example fact-patterns. FT. SAM HOUSTON FLO GUIDE, *supra* note 5, at 6; FT. CARSON FLO GUIDE, *supra* note 5, at 5–6. Fort Lee's guide does the same, despite the preliminary caveat that proximate cause has a "fairly complex legal meaning." FT. LEE FLO GUIDE, *supra* note 5, at 6.

[11] *See* AR 735-5, *supra* note 3, para. 13-29a (listing different types of responsibility that can lead to liability, including "direct responsibility" for property receipted to the Soldier).

[12] *See* FT. LEE FLO GUIDE, *supra* note 5, at 5; FT. CARSON FLO GUIDE *supra* note 5, at 6. In such a case, the "loss"—the loss of accountability—occurred when the item became untrackable due to the receipt holder's negligence, rather than the day the item actually left military control. FT. SAM HOUSTON FLO GUIDE, *supra* note 5, at 3. Installation guides often cover this issue under the heading of "presumed negligence"—stating that a person who had exclusive access and control of an item which is now lost may be presumed negligent, *if* all other causes for the loss may be ruled out. FT. SAM HOUSTON FLO GUIDE, *supra* note 5, at 6; FT. LEE FLO GUIDE, *supra* note 5, at 5; Emswiler, *supra* note 5, at 28.

Line of Duty Investigations

A LD inquiry is conducted to determine whether a Soldier's intentional misconduct or willful negligence was to blame for his death or injury. A finding that it was can jeopardize his entitlements and his beneficiaries'.[13] The LD analysis is straightforward in principle, but messy in application. First, there is a rebuttable presumption that the Soldier was "in the line of duty" when his injury, disease, or death occurred. This presumption can only be refuted by "substantial evidence." If a preponderance of the evidence shows that (a) the Soldier deliberately engaged in misconduct or demonstrated willful negligence, and (b) this was the proximate cause of the injury, disease, or death, then he or she is not in the line-of-duty.

Assuming the IO finds willful negligence or misconduct, he faces the question of proximate causation, to which the LD Regulation offers a definition more expansive than that which guides FLOs during FLIPLs:

> A proximate cause is a cause which, in a natural and continuous sequence, unbroken by a new cause, produces an injury, illness, disease, or death and without which the injury, illness, disease, or death would not have occurred. A proximate cause is a primary moving or predominating cause and is the connecting relationship between the intentional misconduct or willful negligence of the member and the injury, illness, disease, or death that results as a natural, direct and immediate consequence that supports a "not line of duty—due to own misconduct" determination.[14]

Even so, the IO can easily be confused, or be tempted to ignore the concept of proximate causation altogether.[15]

Consider this scenario: two sergeants are working just after dusk in an unlit motor pool on a Forward Operating Base in a combat theater. Their platoon leader is supervising their attempt to connect a truck cab with its flatbed trailer in preparation for a logistical support mission early the next morning. Usually, this hook-up process is operated through a mechanical reeling system situated on the back of the cab, essentially pulling the two vehicles together. When this system fails to align the two vehicles correctly, and the platoon leader looks away and begins writing notes in his field book, the operators begin maneuvering the cab and the trailer together, actually driving the cab backwards into the trailer and snapping the two together like Lego blocks (the standard procedure). While one sergeant sits in the driver's seat of the truck, the other steps between the cab and trailer, turns his back to the cab to make some adjustments, even though he has recently taught a class on motor pool safety, warning his enlisted Soldiers about the dangers of working between vehicles. The cab moves backward, pinning the sergeant between the vehicles and killing him. A LD investigation ensues.

These circumstances make for a "proximate cause" nightmare, implicating legal doctrines like superseding causation, foreseeability, and recklessness in the context of a service-member's death while deployed. The IO, in making his findings, needs to address the victim's choice to stand between the two vehicles while the truck's engine is on, his experience and knowledge, the recent class (not only attended, but taught, by the deceased), the inattention of the officer present, the command's decision to have the work continue under low visibility conditions, and the possibility of mechanical brake failure. Some factors relate to negligence, but not causation. The sergeant's actions and experience suggest that his actions may have been willfully negligent, but did other possible causes "break the sequence," or was another cause "predominating?" Rather than perform the analysis, the IO may be tempted to make a perfunctory finding that the injury was in the line of duty, or go straight from a finding of willful negligence to a "not LD" finding, without examining proximate causation at all.

Common Concerns

"Proximate cause" is tricky for IOs to apply and for legal advisors to communicate,[16] especially if they do not discuss the matter before the IO has formed conclusions and drafted a report. Legal advisors should approach IOs early and often during investigations with advice on properly thinking about whether the facts demonstrate the required degree of causation. Doing so is a challenging task for legal advisors. Can it be made easier?

Standard guides for FLOs do discuss proximate cause, but only by reciting the regulatory definition and providing illustrative examples, which may not relate to the investigation at hand. Guides for LD IOs do not provide even this. Case law might be helpful, if it comes from a

[13] AR 600-8-4, *supra* note 3, para. 2-1.

[14] *Id*. (glossary).

[15] Installation guides for Line of Duty Investigating Officers typically say little or nothing about proximate causation. *See* OFFICE OF THE STAFF JUDGE ADVOCATE, FT. CARSON, A GUIDE FOR LINE OF DUTY INVESTIGATING OFFICERS (Sep. 2002), *available at* www.carson.army.mil/LEGAL/InfoPapers/Line_of_Duty.pdf (not even mentioning proximate cause); OFFICE OF THE STAFF JUDGE ADVOCATE, FT. SAM HOUSTON, A GUIDE FOR THE LINE OF DUTY INVESTIGATING OFFICER 3, *available at* www.samhouston.army.mil/sja/doc/2004LODGUIDE.DOC (last visited Feb. 14, 2012) (giving definition of proximate cause but providing no further explanation or helpful examples).

[16] Emswiler, *supra* note 4, at 21.

jurisdiction that uses a similar definition, but finding a situation analogous to the one being investigated may prove difficult, and the search cannot take place until after the facts are known. Advisors can use metaphors to try to clarify the concept, but the picture that works for one IO may confuse another. [17]

A Way Ahead: Focus on the "Elements"

The Approach

To simplify the task, this article recommends a generic, element-based explanation of "proximate cause" to cover both FLIPLs and LD investigations. Such an explanation should avoid ambiguity and should not contradict the regulatory definitions because its sole purpose is to aid the IO in understanding the legal meaning and effect of causation and apply it to the set of facts before her. It should avoid words that imply anything other than the "totality of the circumstances" being the pool of available facts to analyze. It should keep the IO from falling into a "path of least resistance." For a convenient analogy, this article adopts an approach akin to how the Manual for Courts-Martial defines the statutory requisites for each criminal offense under the Uniform Code of Military Justice.

Elements of proximate cause.

> (1) that a reasonable person would anticipate the harm or loss as a natural and probable consequence of the act or omission;
> (2) that the act or omission was a dominant factor in the sequence of events that contributed to the harm or loss; and
> (3) that the harm or loss would not have occurred in the absence of act or omission

Explanation.

> In order for an act or omission to be a *proximate* cause of the undesired harm or loss, the harm or loss *must* first be the natural and probable result of the act or omission. In other words, it was a **foreseeable** consequence of the act or omission. Second, that act or omission *must* be a **predominate** factor linking a chain of events to the harm or loss. Though this factor need not be the triggering event, nor need it be the last-in-time event directly preceding the harm or loss, this factor *must* be both **material and contributing** to the harm or loss in order for it to be considered "proximate." Material means relevant or related to the harm or loss—that is, a predictable connection between the fact and the consequence. If, in light of independent and intervening factors, the harm or loss was unforeseeable by a reasonable person in similar circumstances at the time of the act or omission, then the act or omission was not "material." Contributing means the factor was a keystone—without that act or omission, the harm could not have occurred at all. There may be more than one "proximate cause" leading to the undesired harm or loss. The necessary features of predominance, materiality, contribution, and foreseeability are assessed by looking at all available facts and circumstances.

This explanation includes the full definition from AR 735-5. The concept of a "natural and continuous sequence" is covered by the exposition of the terms "predominate" and "material," and by the first element. The concept that this sequence is "unbroken by a new cause" is covered by the exposition of the term "material." The concept of negligence "without which the LDD would not have occurred" is covered by the third element. The concept of a "primary moving or predominating cause" is conveyed by the second element, and the concept of a "natural, direct, and immediate consequence" is covered by the first and second elements.

Thus, this explanation captures all the key concepts that distinguish proximate cause. By expanding upon the published definitions, it helps to ensure the IO does not determine proximate causation based only on the fact that the harm was foreseeable, or only because the subject's negligence figured substantially in the fact pattern. If used in addition to the standard definitions, it will force the FLO to actively consider whether, and to what extent, other independent, intervening factors contributed to the harm or loss. Finally, it prompts the IO to think of the problem of causation linearly and sequentially, helping to overcome natural and convenient presumptions (based on the subject's degree of responsibility) that lead a confused or frustrated IO toward findings of *de facto* strict liability. This is a measured response to a definite practical problem—but clearly, based on the scope of this article, not offered as an argument in favor of replacing the current published definitions. It is merely a suggested work-around for a potentially frustrated IO and legal advisor, in light of the

[17] Some judge advocates use a nautical theme: think of a "proximate cause" as a link in a chain connecting a triggering act (or failure to act) at one end of the chain (the dock) with an outcome, consequence, or effect on the other end (the ship). If a particular fact or circumstance is arguably *a* "cause," then it is a link in that chain. Whether that fact is the *proximate* cause, however, is a function of both its hold on the other links (other causes) and how close it is to the outcome mooring the other end of the chain.

current definitional ambiguities and natural challenges with so thorny a subject.

A worksheet could also assist the IO to apply the concept of proximate cause to a given fact-pattern. A suggested worksheet, applying the elements approach, is provided in the Appendix.

Application

We can now re-consider the three hypothetical situations described in this paper. The third, involving a sergeant crushed between a truck cab and trailer, presented several possible causes for the Soldier's death: the command's decision to continue work in low visibility conditions, the platoon leader's failure to supervise or observe the situation, the possibility of a mechanical failure in the truck, and the NCO's dangerous decision to step between the cab and trailer. (Given the NCO's experience and ability to teach a class on the subject, there is no omission in his own training that has to be considered.) Ultimately, the NCO's decision is the one under analysis. If it is *both* "willful negligence" and a proximate cause of his death, then his death was not in the line of duty. Applying these facts to the "elements" delineated above, the IO has a more easily navigable path through the proximate cause analysis:

> (1) Would a reasonable person anticipate the harm or loss as a natural and probable consequence of the act or omission? Certainly. Knowing that two Soldiers were maneuvering the cab and trailer together, with an inattentive ground guide and little adequate lighting, a reasonable person would anticipate that someone stepping in between them would probably be struck.
>
> (2) Was the act or omission *a* dominant factor in the sequence of events that contributed to the harm or loss? Again, yes. Stepping between the two vehicles under those conditions was a "material" factor in the sense that it had a relevant role in the series of discrete events, even if it did not trigger the events themselves.
>
> (3) Would the harm or loss have occurred in the absence of act or omission? No. Had the NCO not placed himself between the two vehicles, he would not have been crushed.

Thus, under the "elements" approach, analyzing the proximate cause in that scenario becomes more straightforward. Consequently, the only difficult issue is whether the NCO's decision to step between the two vehicles, under those conditions, was truly "willful negligence."

The second hypothetical, involving a missing toolbox, is complicated by the problem of missing evidence. In order to use the "elements" test, the IO must identify the "act or omission" that led to the loss of accountability. Since this is quite impossible without further investigative work, this test forces the IO to look for further evidence, to see whether the most recent hand receipt holder actually did, or failed to do, something that would have preserved accountability.

Finally, looking back at the opening hypothetical, it is clear how challenging it would be for an IO to appropriately gauge the relative weight of each Soldier's actions (or omissions) and their connectivity or relation to the resulting wounds and damage. A reasonable person could conclude that each of them "contributed" or were related to the final effect. But see now how the "elements" approach resolves the question of whether the officer's own negligence proximately caused his injury and the damage to the MRAP.

Consider the officer who fired the bullet. Take it as given that he would not be expected to see the rock-strewn path in the late afternoon gloom, or to see the rotated selector switch on a weapon he has not drawn. His negligent act, if there is any, is his decision to draw the pistol while still walking. The question then shifts to proximate cause:

> (1) Would a reasonable person anticipate the harm or loss as a natural and probable consequence of the act or omission? No, considering the circumstances. The officer had properly set his pistol to "safe" in this scenario (a fact that might be evidenced by statements collected from other members of the patrol in the MRAP with him), and had no way of knowing the switch would reset itself to "fire." Had the switch been on safe, the weapon would never have fired.
>
> (2) Was the act or omission a dominant factor in the sequence of events that contributed to the harm or loss? Yes, though the point is arguable. The rotated selector switch and the rock-strewn path had to work together to cause the damage, but neither would have led to the weapon going off without the officer's decision to draw while walking.
>
> (3) Would the harm or loss have occurred in the absence of the negligent act or omission? No. Had he waited until he reached the clearing barrel, he would have fallen without setting off the weapon, or perhaps caught himself with his empty hand and not fallen at all.

This situation meets two of the three elements; but it does not meet one of them (the first—the foreseeability prong). Failure to meet any one element means there is no proximate cause; therefore, the officer's negligence should not lead to financial liability or a non-LD determination, even if the IO finds that he was negligent (or willfully negligent) in drawing the pistol while walking. A similar

analysis can be done for the other negligent parties in the scenario.[18]

Thus, this framework helps answer the question of whether a reasonable person would anticipate the errant bullet and the resulting harm under those environmental conditions and what the officer was likely to expect from a weapon provided to him from a unit arms room. It forces the IO to look at which decisions and which actions were material and contributing to the harm, to balance them, and to search for which factor, if any, was the "keystone" but-for cause of the property damage and physical injury.

Conclusion

This essay's intent, in light of observed practical challenges in applying and explaining "proximate cause" across a wide swath of administrative investigations, was to offer an alternative definition that helps overcome those challenges. This much more expansive definition captures the key elements of foreseeability, materiality, predominance, and contribution—elements that are often ignored or inconsistently described in the library of current definitions of "proximate cause." As an additional tool for both the legal advisor and IO, this essay provided a step-by-step framework that prompts the user to consider, assess, weigh, and screen many of the facts (and preconceptions) that make proximate cause such a slippery and shifty target to acquire. This article has met its objective if it assists legal advisors to communicate across the legal language barrier for the greater good of producing warranted, appropriate, and fair findings during investigations.

[18] Of course, one aspect of the legal advisor's role is to help the IO identify other mitigating solutions or appropriate individual "counter-measures" when financial liability is unwarranted in light of the negative proximate cause determination.

Appendix

Proximate Cause Worksheet for Investigating Officers (FLIPL)

Was the negligent act or omission the <u>Proximate Cause</u> of the loss?

<u>Assuming</u> the FLO has found a preponderance of the evidence to show that a loss to the government occurred and that the subject Soldier is negligent based on their degree of responsibility and the other factors listed in AR 735-5, para. 13-29a and 13-29b(4):

Step 1: What <u>KNOWN</u> event or decision "triggered" or initiated the sequence of events that led to the harm or loss? (*i.e.*, "known" means that a preponderance of the evidence supports it)

Step 2: What was the last <u>KNOWN</u> discrete, discernable factor or cause immediately preceding the harm or loss? (*i.e.*, "known" means that a preponderance of the evidence supports it)

Step 3: Itemize your facts and circumstances you think are relevant to the question (many of these facts may be drawn from your analysis of negligence but must be supported by preponderance of the evidence). **Step 3A**: Label any fact that is an ACT or OMISSION (failure to act) by an identifiable Soldier by CIRCLING it.

-Human errors (by whom):

-Human decisions (by whom):

-Mechanical or electrical failures:

-Terrain or environmental considerations:

-Policies, SOPs, or other rules regulating one or more of the actions of the subject(s):

-Relevant training or experience of the subject(s) prior to the harm or loss:

-Relevant supervision or oversight of the subject(s):

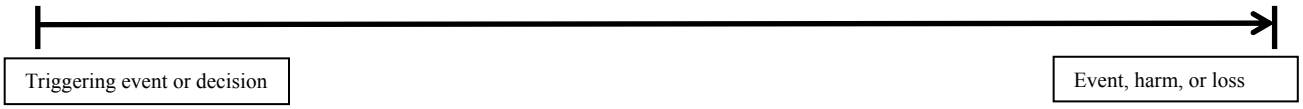
-Lapse of time between the triggering event and the harm or loss:

Step 4: Would the consequence (harm or loss) have occurred *anyway* if one or more of these factors had *never* occurred? If so, which factor(s)?

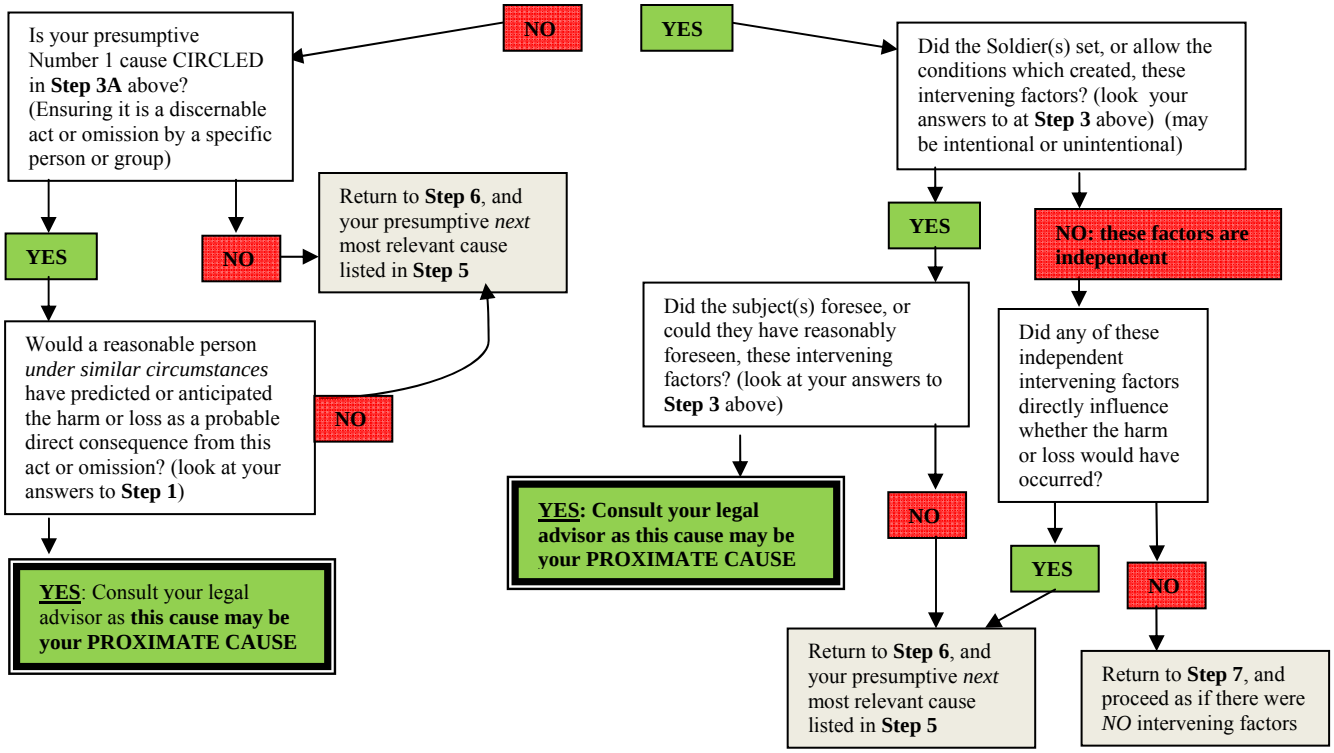
Step 5: Based on your experience, judgment, and common sense, rank the factors listed in Step 3, ***MINUS the factors listed in Step 4***, in terms of ***relevance to the harm or loss*** (Number 1 being the most relevant, Number 2 being the next most relevant, etc.). These are your "presumptive causes."

1.
2.
3.
4.
Etc.

Step 6: Starting with your presumptive Number 1 cause, place it on the timeline below:



Step 7: Do any of your other ranked factors/causes (regardless of their "relevance rank") *intervene* (on the timeline above) between your presumptive Number 1 cause and the harm or loss?



Speedy Trial Demands

Captain Joseph D. Wilkinson II[*]

Introduction

Often, a new Judge Advocate possesses a limited understanding of military speedy trial law. He knows there is a 120-day clock that starts with preferral or pretrial confinement (PTC). If he is going to be prosecuting, he resolves to get his cases tried within 120 days. If he is destined for defense, he resolves to count the days and move to dismiss if the Government is too slow. Such an understanding is dangerously incomplete. To use the speedy trial provisions of the Rules for Courts-Martial (RCM), the Uniform Code of Military Justice (UCMJ), and the Constitution, defense counsel must understand the role of demands for speedy trial. Trial counsel must understand how to act in the face of such demands.

I. *Barker v. Wingo*—Why Speedy Trial Demands Are Made

The Sixth Amendment to the U.S. Constitution gives the accused "the right to a speedy and public trial." The leading Supreme Court case interpreting this right is *Barker v. Wingo*. In that (civilian) case, the accused, Barker, and his co-accused, Manning, were indicted in September 1958. The Government believed it could not convict Barker without the testimony of Manning. Manning was first tried in October 1958, but due to hung juries and appellate reversals, he was not finally convicted until December 1962.

Throughout this period, the Government requested and was granted sixteen continuances of Barker's trial. The defense did not object at all until February 1962, when it moved to dismiss the indictment (on grounds that do not appear in the record). The defense did not start opposing the Government's requests for continuance until March 1963 (when Manning's conviction became final). The defense did not explicitly invoke Barker's right to a speedy trial until October 1963, when it moved to dismiss the case on that basis. The trial court denied the motion and Barker was tried that month.[1] The case came to the Supreme Court on appeal from a habeas corpus denial. At oral argument, defense appellate counsel conceded that Barker "probably did not want to be tried" at any point. Appellate counsel agreed that Barker was hoping for Manning to be acquitted, in which case Barker would never have been convicted.[2]

In deciding the case, the court listed four factors to be considered in determining whether a case should be dismissed for speedy trial violations: (1) the length of the delay, (2) the reasons for the delay, (3) the accused's assertion of his right, and (4) the prejudice suffered by the accused on account of the delay. None of these factors was a *sine qua non* for relief; all were to be considered in light of the circumstances of each individual case.

In Barker's case, the third factor was fatal to the defense, as the Court explained:

> We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.[3]

In describing the virtues of its four-part test, the Court gave helpful guidance to defense counsel in making such demands effective:

> [The rule] allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.[4]

---

[*] Judge Advocate, U.S. Army. Currently assigned as Editor, The Army Lawyer. Previously assigned as Defense Counsel, USATDS-West, Fort Richardson, Alaska and as Trial Counsel, Task Force 49, Joint Base Balad, Iraq and Trial Counsel, 122d Corps Support Group, LSA Adder, Iraq.

[1] Barker v. Wingo, 407 U.S. 514, 517–18 (1972).

[2] *Id*. at 534–35.

[3] *Id.* at 536. Despite the Court's use of the words "due process," the case deals strictly with Sixth Amendment speedy trial issues. The Fifth Amendment is not mentioned.

[4] *Id.* at 528–29.

A defense counsel (DC) hoping to get speedy trial relief for his clients would do well to demand speedy trial, and demand it with "frequency and force," to incline the courts his way.

II. Military Speedy Trial Doctrines and the Relevance of Demands to Each

The 120-day clock set by RCM 707 is not the only source of speedy trial law in the military. The Government may violate a Soldier's other speedy trial rights even while complying with that rule. In most cases, explicit speedy trial demands improve the defense's chance of obtaining speedy trial relief.

A. Rule for Courts-Martial 707.

In general, RCM 707 requires the Government to bring a Soldier to arraignment within 120 days of preferral.[5] Between preferral and referral, the convening authority may grant delay, excluding periods of time from consideration (he typically delegates this authority to the Article 32 investigating officer, who may exclude the time taken for the investigation and the preparation of his report). After referral, the military judge may grant delay.[6] Delays after arraignment do not count toward the 120 days, and if the Government dismisses charges and reprefers, the clock starts anew.[7]

If the Government nonetheless fails to bring the accused to arraignment within 120 days, and the defense moves to dismiss, the judge must grant that motion. However, the judge may dismiss with or without prejudice, and has extremely broad discretion in deciding which type of dismissal to grant.[8] Naturally, if the judge dismisses without prejudice, the Government can reprefer and bring the case to trial again, often leaving the defense no better off than it was before dismissal.

While a military judge's discretion to choose dismissal with or without prejudice is in general unfettered, RCM 707 directs him to consider four factors in deciding which to grant: (1) the seriousness of the offense, (2) the facts and circumstances of the case that led to dismissal, (3) the impact of a re-prosecution on the administration of justice, and (4) any prejudice to the accused resulting from the denial of a speedy trial.[9]

A speedy trial demand is not listed among these factors. However, the Court of Appeals for the Armed Forces has at least once considered the accused's "interest in a speedy trial" in weighing the trial judge's decision to dismiss without prejudice.[10] Furthermore, well-crafted speedy trial demands can assist the defense in establishing prejudice, often the most contentious point in RCM 707 litigation.

B. The Sixth Amendment.

Rule for Court-Martial 707 is designed to enforce the Sixth Amendment.[11] It does not, and cannot, limit the protections of the Sixth Amendment itself. If the Government's conduct violates the Sixth Amendment right to speedy trial, the Military Judge must dismiss with prejudice, whether or not RCM 707 has been violated.[12]

In courts-martial, the Government's accountability under the Sixth Amendment begins with preferral, just as it does under RCM 707.[13] Neither the convening authority, the military judge, nor anyone else has the power to suspend the operation of the Sixth Amendment. In general, a longer delay period (five months or more) is needed to make a good case for dismissal under the Sixth Amendment,[14] but

---

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(a) (2008) [hereinafter MCM]. The clock also begins to run if the accused is restricted in lieu of arrest, arrested, placed in pretrial confinement (PTC) or brought onto active duty for Uniform Code of Military Justice (UCMJ) purposes. The question of whether a restriction is severe enough to be "in lieu of arrest" is beyond the scope of this article. *See* United States v. Muniz, No. 20000668, 2004 WL 5862921, at *1-2 (A. Ct. Crim. App. Mar. 25, 2004).

[6] MCM, *supra* note 6, R.C.M. 707(c).

[7] *Id.* R.C.M. 707(b)(3). However, a "sham" or "subterfuge" dismissal and repreferral—designed solely to avoid the strictures of Rule for Court-Martial (RCM) 707—will be treated as a nullity and can lead to dismissal. *See* United States v. Robison, No. 20110758, 2011 WL 6135093, at *2 (A. Ct. Crim. App. Dec. 2, 2011); United States v. Robinson, 47 M.J. 506, 510 (N-M. Ct. Crim. App. 1997). If the Government reprefers charges for the same offense *without* dismissing the old ones, the clock continues to run. For example, in an extended absence without leave (AWOL) case, the Government often prefers charges in order to get a "deserter warrant" for the accused's arrest. If the Government never dismisses those charges when the accused is captured, it can violate RCM 707 without knowing it. United States v. Young, 61 M.J. 501, 504 (A. Ct. Crim. App. 2008).

[8] Unless the speedy trial violation is of constitutional dimension, in which case the military judge must dismiss with prejudice. United States v. McClain, 65 M.J. 894, 897–98 (A. Ct. Crim. App. 2008).

[9] *Id.* at 897. Rule for Court-Martial 707 is the only speedy trial doctrine that depends on the severity of the offense.

[10] *Id.* at 898 (court upheld dismissal without prejudice; fact that accused showed little interest in a speedy trial weighed against him).

[11] MCM, *supra* note 6, app. 21, at A21-41 (analysis of RCM 707).

[12] *See id.* R.C.M. 707(d)(1); *McClain*, 65 M.J. at 897; United States v. Novelli, 544 F.2d 800, 803 (5th Cir. 1977) (citing Strunk v. United States, 412 U.S. 434, 439–440 (1973)); United States v. McLemore, 447 F. Supp. 1229, 1239 (D. Mich. 1978) (citing United States v. Mann, 304 F.2d 395, 397 (D.C. Cir. 1962)).

[13] In a case with multiple preferrals, Sixth Amendment accountability can be measured from the *first* preferral, even if the accused is ultimately brought to trial on different charges. United States v. Grom, 21 M.J. 53, 56 (C.M.A. 1985).

[14] *See id.* at 56 ("Delays of as little as five or six months have caused the federal courts to inquire into the remaining *Barker* factors.") In *United States v. Robison*, No. 20110758, 2011 WL 6135093, at *1–2 (A. Ct. Crim. App. Dec. 2, 2011), the Government's delays were such that the defense might have secured dismissal on Sixth Amendment grounds, or at least forced the court to conduct a *Barker v. Wingo* analysis (eight months passed

dismissals and repreferrals do not necessarily start things over, and delays after arraignment are considered for Sixth Amendment purposes.

Sixth Amendment cases in the Armed Forces are decided using the *Barker v. Wingo* factors, including the accused's "assertion of his right." A speedy trial demand is exactly that, and is highly important in a Sixth Amendment case.

C. Article 10, UCMJ.

Article 10 of the UCMJ requires that "[w]hen any person subject to [the UCMJ] is placed in arrest or confinement prior to trial, immediate steps shall be taken to . . . try him or to dismiss the charges and release him."[15] Sufficiently serious restrictions may count as "arrest" and trigger the article.[16] As read by the appellate courts, this requires the Government to exercise "reasonable diligence" at all stages in bringing the accused to trial.[17] The sole remedy for a Governmental violation is dismissal with prejudice.[18]

Article 10 is stricter than either the Sixth Amendment or RCM 707.[19] Courts can dismiss a case under Article 10 before the 120-day speedy trial clock runs out.[20] The time exclusions of RCM 707 do not apply (though they may be relevant to the reasonableness of Government delays). Post-arraignment delays are considered and may violate Article 10.[21] An unconditional guilty plea, which waives the accused's speedy trial rights under RCM 707 and the Sixth Amendment, does not waive Article 10 rights.[22]

Although the military judge's primary inquiry in Article 10 cases is whether the Government has proceeded with reasonable diligence, the Court of Appeals for the Armed Forces considers it "appropriate" for the judge to consider the *Barker v. Wingo* factors in deciding whether to dismiss.[23] If the military judge denies dismissal, the appellate courts will certainly consider those factors in deciding whether to overrule the trial judge. Thus, speedy trial demands are important in cases involving pretrial confinement.

D. The Fifth Amendment.

The Fifth Amendment, as interpreted by the military appellate courts, guarantees a speedy trial as an element of due process. The Fifth Amendment protects the accused against delays that prejudice the accused's ability to mount an effective defense, especially if such delays are deliberate, "tactical" delays by the Government.[24] Delays before preferral can violate the Fifth Amendment. Prejudice is necessary but not sufficient to require dismissal, and the military judge must examine the Government's reasons for delay in deciding whether to dismiss.[25]

Fifth Amendment speedy trial case law is sparse. Speedy trial demands have not arisen in this case law. Fifth Amendment speedy trial doctrine is concerned with whether the accused can still mount an effective defense, and whether the Government has misbehaved in denying him that chance, not with whether he wants to be tried speedily (or at all).

E. Speedy Post-Trial Processing.

Military courts have held that the Sixth Amendment guarantees speedy processing after trial as well as before. Speedy post-trial cases apply the *Barker v. Wingo* factors, but focus primarily on prejudice. The lack of a defense demand for speedy post-trial processing does not appear to carry much weight.[26] However, it does carry some.[27]

---

between the accused's return to military control, with charges already preferred, and his trial). But the defense raised only RCM 707 grounds in its motion to dismiss, and the Government's dismissal and repreferral eliminated those issues. This author once made a similar mistake. In an RCM 707 case, the defense should always consider whether Sixth Amendment grounds exist for dismissal, and raise the constitutional argument in addition to the RCM 707 argument when the facts justify it. A Sixth Amendment motion, if successful, leads to dismissal with prejudice.

[15] 10 U.S.C. § 810 (2006).

[16] *See* United States v. Schuber, 70 M.J. 181, 186–87 (C.A.A.F. 2011).

[17] United States v. Birge, 52 M.J. 209, 211 (C.A.A.F. 1999) (citing United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993)).

[18] *Kossman*, 38 M.J. at 262.

[19] United States v. Thompson, 68 M.J. 308, 312 (C.A.A.F. 2010); United States v. Cooper, 58 M.J. 54, 60 (C.A.A.F. 2003) (citing *Kossman*, 38 M.J. at 259).

[20] United States v. Hatfield, 44 M.J. 22, 23 (C.A.A.F. 1996) (upholding trial court that granted dismissal when 106 days would have passed between entry into pretrial confinement and trial, based on trial court's finding that 48 days of that delay were unreasonable).

[21] *Cooper*, 58 M.J. at 60.

[22] United States v. Mizgala, 61 M.J. 122, 124-27 (C.A.A.F. 2005); MCM, *supra* note 5, R.C.M. 707(e).

[23] United States v. Birge, 52 M.J. 209, 211 (C.A.A.F. 2001).

[24] United States v. Vogan, 35 M.J. 32, 33–34 (C.M.A. 1992) (citing United States v. Lovasco. 431 U.S. 783, 795 n.17 (1977) ("[A] tactical delay . . . incurred in reckless disregard of circumstances, known to the prosecution, that there exists an appreciable risk that delay would impair the ability to mount an effective defense" can violate the Fifth Amendment) (internal quotes omitted)).

[25] United States v. Reed, 41 M.J. 449, 452 (C.A.A.F. 1995).

[26] *See* United States v. Moreno, 63 M.J. 129, 139 (C.A.A.F. 2006) (applying the *Barker v. Wingo* factors to post-trial delay, but holding that the failure of the accused to assert his right does not weigh heavily against him in post-trial delay cases). *See also* Major Andrew D. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4, 13 (concluding that the Court of Appeals for the Armed Forces does, and should, decide post-trial delay cases entirely on the question of prejudice), *but see* United States v. Scott, No. 20091087, 2011 WL 6778538, at *1–2 (A. Ct. Crim.

III. Defense Counsel: How to Make Speedy Trial Demands

The following tips are for defense counsel in deciding whether and how to file a speedy trial demand. Sample demands are provided at the end of this article.

A. Make Sure Your Client Wants a Speedy Trial, and Get His Explicit Permission.

Under *Barker*, speedy trial demands serve primarily to demonstrate that the client himself wants a speedy trial.[28] If the client does not in fact want a speedy trial, making such a demand is counterproductive. The client need not sign the demand himself—that is a decision for the defense counsel—but the defense has to be ready to assert in good faith that the accused himself wants a speedy trial.

Not every case is right for speedy trial demands. Sometimes time is on the defense's side, as anger fades, units redeploy, hostile leaders PCS, or well behaved clients improve their own positions. For example, a client facing BAH theft charges may be able to raise the money and pay off the entire debt before trial – the strongest mitigation imaginable. If the client needs time to do that, rushing the case may not be in his interest. In a case based on minor military misconduct (short-term AWOL, disrespect, etc.), a few months of "good soldiering" can go a long way toward mitigating the punishment. If the client is behaving himself, Government delays can help the defense. In a slow post-trial situation, the client is on involuntary excess leave, and he and his family are receiving health care and other benefits while waiting for his appeal to be decided. Keeping those benefits for as long as possible may matter more than uncertain relief from the appellate courts. The decision to assert the client's speedy trial rights is an artistic one that must be made in light of the individual case.

B. Make the Demand in Writing, in a Document Written for That Purpose.

In *Barker*, the Supreme Court stated that courts can "weigh the frequency and force of the objections [to slow trial processing] as opposed to attaching significant weight to a purely pro forma objection."[29] A memo plainly requesting speedy trial on behalf of the client will have some force. A line of boilerplate buried in a standard discovery request will carry little weight.[30]

Since the demand serves primarily to demonstrate the accused's own wish, there is no set rule as to where the demand should be addressed. Logical addressees are the commander who "owns" the case or the Office of the Staff Judge Advocate. Whoever the addressee is, the trial counsel (TC) should receive a copy. If the defense ends up filing a motion to dismiss on speedy trial grounds, the demand(s) should be an attachment to the stipulated timeline.

C. Include the Prejudice Being Suffered by Your Client in the Demand.

Sixth Amendment and RCM 707 cases often turn on the subject of prejudice. The relevant prejudice is pretrial restriction or confinement, anxiety, and "disruption of life."[31] Thus, a Soldier who is not allowed to do his usual job while pending charges is suffering recognizable prejudice. So is a flagged Soldier who wants to take courses or was close to promotion before he was flagged. So is a leader who is not allowed to supervise Soldiers. To some extent, so is anyone who is anxious to learn his fate. If you litigate a speedy trial motion, you will have to ask your client about the prejudice he suffered, and convince the Military Judge he suffered it. If you demonstrably made a note of it long before filing the motion, your proof will carry more credibility. And a particularized demand that includes the prejudice being suffered by a specific client is the

---

App. Dec. 23, 2011) (granting relief for excessive post-trial delay in the absence of prejudice).

[27] United States v. Brandt, No. 20100294, 2011 WL 6760358, at *2 (A. Ct. Crim. App. Dec. 23, 2011) (denying relief for post-trial delay, in part because the accused did not explicitly request speedy post-trial processing); United States v. Garman, 59 M.J. 677, 678 (A. Ct. Crim. App. 2003) (denying relief for slow post-trial processing in part because "trial defense counsel's objection to slow post-trial processing was dilatory").

[28] *See* United States v. Grom, 21 M.J. 53, 57 (C.M.A. 1985) ("The third *Barker* factor weighs in the accused's favor, as he did demand trial. This indicates that he actually desired a speedy trial, unlike the situation in *Barker* where the defendant, for tactical reasons or otherwise, did not.").

[29] Barker v. Wingo, 407 U.S. 514, 529 (1972).

[30] In *United States v. Schuber*, 70 M.J. 181, 191 (C.A.A.F. 2011) (Erdmann, J., and Effron, C.J., concurring in part and dissenting in part), the Army Court of Criminal Appeals gave little weight to *six* speedy trial demands by the accused because they were included in discovery requests instead of being separate documents. (The concurring judges at the CAAF thought the demands should have been given more weight.)

[31] United States v. MacDonald, 456 U.S. 1, 8 (1982):

> The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

See also Strunk v. United States, 412 U.S. 434, 438 (1973); United States v. Dooley, 61 M.J. 258, 260 (C.A.A.F. 2005) (accused suffered prejudice under RCM 707 because he was a photographer's mate who was not permitted to work in his rating and a second class petty officer who was not allowed to supervise Sailors). However, prejudice to the accused's ability to try a case can be the basis for a Sixth Amendment motion to dismiss. *Moreno*, 63 M.J. at 141 n.19.

opposite of *pro forma*, so that the military judge and the appellate courts have an extra reason to take it seriously.

Other good reasons exist for explicitly informing the Government of the prejudice your client is suffering. The problem may be something the Government can fix. If they do, your speedy trial motion may be weakened, but your client has meaningful relief right away. If the Government can fix the problem, but fails to, their delays will look all the less reasonable, and the Military Judge will have all the more reason to find sufficient prejudice and grant speedy trial relief. And if the prejudice your client suffers amounts to Article 13 punishment, explicitly complaining about it to the Government increases your chance for relief under that article.[32] In these areas, military law favors open communication over secrecy and ambush.

Before committing a client's tale of woe to writing, it is often wise to check the story independently, whether in person or through a trustworthy paralegal.

D. Make Demands Early and Often.

If a speedy trial demand is appropriate, the first one cannot be made too soon. It can be made before any charges are preferred.

In *Barker*, the Supreme Court stated that courts could "weigh the frequency and force of the objections [to trial delays] as opposed to attaching significant weight to a purely pro forma objection."[33] Thus, repeated demands are better than a single demand.

The case law does not set down any specific "frequency" for demands. One demand per month should be enough to satisfy the most stringent of military judges.[34] If the client starts suffering new prejudice, it may well be time for a new demand.

E. Conform Your Conduct of the Case to the Demand.

The defense's monthly demands for speedy trial are supposed to demonstrate the client's eagerness to be tried speedily. Defense counsel's *conduct* will be examined to see if it demonstrates that eagerness.[35] If you are demanding speedy trial, your response to the electronic docketing notice should be consistent with that wish – ask for trial on the earliest date practicable (consistent with your duty to prepare for the case).[36] File your discovery requests early, or in an appropriate case, file no discovery request at all.[37] Before requesting a sanity board under RCM 706, consider whether you can get what you need in some other way.[38]

---

[32] *See* United States v. McCarthy, 47 M.J. 162, 166 (C.A.A.F. 1997) (when accused did not complain about conditions of PTC, that was evidence he was not being punished); United States v. Starr, 53 M.J. 380, 382 (C.A.A.F. 2000) (accused did not complain to his command about pretrial conditions later claimed as punishment, and therefore could not establish punitive intent on their part as required for Article 13, UCMJ, relief); United States v. Combs, 47 M.J. 330, 332 (C.A.A.F. 1997) (citing United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985) ("[T]he failure to voice a contemporaneous complaint of the alleged mistreatment is powerful evidence that it was not unlawful")). Of course, if a defense counsel believes his client's rights are being violated, he ought to be making other efforts to end the violation, such as communicating with the trial counsel or helping his client request redress under Article 138, UCMJ. See Major M. Patrick Gordon, *Sentencing Credit: How to Set the Conditions for Success*, ARMY LAW., Oct. 2011, at 7, 16 & n.85, for further discussion.

[33] *Barker*, 407 U.S. at 529.

[34] The author recommends less frequent demands—one every two to three months—in post-trial situations, as a matter of taste. Under *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the Government is supposed to process the case to action within 120 days of trial, so the first demand should precede that deadline by two or three months, to give the Government reasonable time to meet it. The second one should come after the Government fails to meet it. *See* United States v. Garman, 59 M.J. 677, 678 (A. Ct. Crim. App. 2003) ("dilatory" post-trial objection of defense counsel led to court denying relief for slow post-trial processing). Even the first demand should be enough to establish that the client is more interested in speedy post-trial processing than in keeping the benefits of his involuntary excess leave status. This is the most important point.

[35] *See* United States v. Titcombe, No. 37618, 2011 WL 6026907, at *2 (A.F. Ct. Crim. App. Dec. 1, 2011) (defense counsel's demands for speedy trial held to be *pro forma* "in light of contemporaneous statements of defense counsel's unavailability").

[36] *See* United States v. Simmons, No. 20070486, 2009 WL 6835721, at *15 (A. Ct. Crim. App. Aug. 12, 2009). In that Article 10 case, the defense made no explicit demand for speedy trial, but did request "immediate" trial in the docketing notice. The court held that the third *Barker* factor weighed neither in the Government's nor the defense's favor (i.e., the defense's conduct partly substituted for a speedy trial demand, since it at least suggested that the accused wanted to be tried speedily). A docketing request, even one that explicitly notes the defense's intent to raise speedy trial issues, is not itself a speedy trial demand. United States v. Arab, 55 M.J. 508, 513 n.6 (A. Ct. Crim. App. 2001).

[37] In a typical AWOL or drug use case, the Government has probably handed over all its evidence up front. What will discovery add? (It may well add something, but defense counsel should think about it before filing the request.) In a rape case, the alleged victim often has a serious legal, psychological, or chemical background that the Government is reluctant to investigate or help the defense investigate. Discovery may be vital in such a case. Responding to discovery can help a trial counsel to organize his thoughts and prepare his case; if the trial counsel is lazy or overwhelmed, the defense may want to take advantage of that fact by demanding no discovery. Defense counsel must decide whether the advantages of demanding (and litigating) discovery outweigh the advantages of foregoing it. No right should **ever** be exercised just to make the Government work harder, to make the case more expensive, or to avoid an ineffective assistance claim.

[38] If the client is already undergoing psychiatric treatment, defense counsel should routinely ask the client for a release of information (DD Form 2870), so that the defense counsel can talk to the client's providers and examine his records. This may provide counsel with everything he needs to know about whether the client is competent to stand trial or has psychiatric care issues that need to be raised at trial. Before giving the Government weeks of "reasonable" delay by invoking the RCM 706 process, the defense counsel must ask himself why he needs it. *See* United States v. Colon-Angueira, 16 M.J. 20, 22 (C.M.A. 1983) (51 days delay for a 706 board held reasonable); *Arab*, 55 M.J. at 512 (140 days reasonable); United States v. Freeman, 23 M.J. 531, 535-36 (A. Ct. Crim. App. 1986) (43 days reasonable).

Consider waiving the Article 32 investigation. Sometimes the Article 32 serves important purposes for the defense. It can commit a Government witness to testimony the defense needs. It can convince the command to drop a weak case, or increase their willingness to deal away some of the charges. Sometimes, however, the Article 32 gives nothing to the defense. It alerts the Government to weaknesses it can fix (such as fatal drafting errors on the charge sheet), and forces them to interview witnesses and prepare their case well before trial—which the defense does not always want them to do. Defense counsel should always think carefully before deciding whether to have an Article 32 hearing or to waive it.[39]

Exercising the accused's right to an Article 32 investigation will not be held against the defense in a speedy trial case. However, an intelligent waiver of that right may enhance the defense case for relief—especially in an Article 10 case. Government delays pursuant to an Article 32 may be held reasonable. If there is no investigation, there is one less excuse for delay. In the RCM 707 context, waiving the Article 32 also deprives the Government of the opportunity to exclude large swaths of time from the 120-day window.

Avoid asking for continuances and extensions of time (this applies to the post-trial context as well).

IV. Trial Counsel: How to Forestall and Respond to Speedy Trial Demands.

If the TC receives a speedy trial demand, it may signal that the defense anticipates a speedy trial issue in that case. How should the TC respond? Even before receiving such demands, how should a TC prevent such issues?

A. Don't Panic.

A defense speedy trial demand does not lay any additional duty on the Government. The TC need not respond explicitly, either orally or in writing. If the Government is carrying out its duty to provide the accused with a speedy trial, and to move the case forward with reasonable speed, defense speedy trial demands can be taken in stride.

B. In Non-PTC Cases, Do Not Prefer Early.

In cases without PTC, speedy trial accountability under RCM 707 and the Sixth Amendment usually begins with preferral.[40] The Government controls the date of preferral. Why prefer early? The TC can interview witnesses, study evidence, prepare a case, line up an Article 32 investigating officer, and even conduct the investigation itself before preferring charges.[41] If the TC is ready for trial on the day of preferral, because he did not prefer until he was ready, he will be well armed against speedy trial issues, no matter how many demands his opponent files.

If the accused is AWOL and charges are preferred to secure a warrant, the TC should make sure those charges are dismissed or acted upon as soon as the accused is returned to military control.[42]

C. Give PTC Cases High Priority.

In cases involving PTC, early preparation is not possible. Typically, the TC learns about the case on the day of the crime. Pretrial confinement follows immediately. The DC, if he is wise, makes his first speedy trial demand within a few days of PTC. In the event of litigation, the military judge is going to examine every delay under the most rigorous speedy trial standards that exist in military law. To win this litigation, the TC should give these cases the highest priority, and push to try them as soon as possible. He will have to justify every delay. Telling the judge, "my caseload was very heavy," is unlikely to help. The blame in speedy trial cases attaches to the *Government*, not to the individual TC, and if the TC was too busy to move the case along to the judge's satisfaction, the Government may be held responsible for understaffing the military justice office.[43] If the TC's caseload really is heavy, he may need to

[39] Defense counsel may be tempted to have an Article 32 investigation (and demand large numbers of witnesses) to make a case difficult to try, or to give the Government a chance to make errors that will justify later relief. Such strategies are ethically dubious and not effective. In fact, meaningful relief for Article 32 errors is extremely difficult to obtain. *See* Major John A. Maloney, *Litigating Article 32 Errors After* United States v. Thomas, ARMY LAW., Sept. 2011, at 4, 12. It would ill serve a client in PTC to sacrifice a solid Article 10 issue for an Article 32 will-o'-the-wisp.

[40] United States v. Grom, 21 M.J. 53, 56 (C.M.A. 1985). As noted above, accountability can also begin with arrest, restriction in lieu of arrest, the entry onto active duty of a reserve component Soldier for UCMJ purposes, or the return to military control of an AWOL Soldier against whom charges have been preferred.

[41] *See* 10 U.S.C. § 832(d) (2006) (crimes may be investigated under Article 32 even if the accused has not yet been charged).

[42] The TC should remember that "military control" can begin even while the accused is in civilian confinement, once the military is made aware of his arrest. United States v. Mullins, No. 20090821, 2010 WL 3620239, at *1–2 (A. Ct. Crim. App. Mar. 25, 2010). If the command is not going to get him out of civilian confinement right away, this triggers the formal requirements of RCM 305.

[43] *See* United States v. Simmons, No. 20070486, 2009 WL 6835721, at *10 (A. Ct. Crim. App. Aug. 12, 2009). In that case, the inexperienced prosecutor (brand new both to his command and to military justice) had twenty-eight open cases at the time of trial, though only four or five had been preferred. The appellate court did not find the trial counsel's inexperience or his heavy caseload to be sufficiently mitigating—in fact, it refused to consider his inexperience at all. Even delays by the military judge (in docketing the case) counted against the Government for Article 10 purposes. *Id.* at *12–13.

work extra hours and sacrifice some weekends to move the PTC cases along. His reward will be seeing these cases tried on the merits.

To avoid being overloaded with "priority one" PTC cases, the TC, as first-line legal advisor to his company commanders, must educate them on the true standards and purposes for PTC. Some commanders are tempted to use PTC as an especially effective punishment (both faster and more severe than an Article 15), or to get an irritating Soldier out of the way. If this becomes routine, the TC will be overwhelmed with PTC cases.

D. Track Your Case Progress

Military Justice Online (MJO) tracks some aspects of case progress, at least the parts handled by the Government's paralegal staff. Case analysis software such as CaseMap or Case Notebook will also track (with verifiable dates) various actions taken by counsel in preparing a case. The logged actions can be printed and used as evidence of reasonable diligence.

Less formal tools can also be used. The author once worked for a chief of justice who provided a blank "time sheet" for every TC for every court-martial. Each day, each TC had to write the date and what actions he took on that case. Counsel were admonished to "touch every case every day," even if only to reread some evidence. Had that office ever had to litigate a speedy trial issue (and under that chief's leadership, it did not), these sheets would have been useful evidence. Even if the TC does not do this for every case, he should do something like it when he sees speedy trial issues on the horizon – especially if the accused is in PTC.

The history of the Government's efforts will be easier to reconstruct, and justify, if it was being written down as it happened. When the DC explicitly lists prejudice in his speedy trial demands, he avoids the appearance that he cooked up the prejudice while preparing his motion. When the TC tracks his actions on a case, even in an informal way, he avoids the appearance that he cooked up his "reasonable diligence" while preparing his answer. (And he will not have to struggle with his memory when the judge questions him about it.)

E. If the Defense Is Claiming Prejudice, Learn the Truth of the Matter, and Consider Fixing It.

Ongoing prejudice that can spell speedy trial relief overlaps with pretrial punishment that can justify Article 13 credit. As advisor to the accused's commander, the TC should candidly advise him of the limits of his authority, and periodically ask about the accused's status. If the defense is claiming some kind of ongoing prejudice, the TC should check into the truth of the matter, and consider whether the issue ought to be fixed.[44]

For example, a command may decide not to let the accused work, because the command no longer trusts him. This is not unlawful Article 13 punishment, but it is prejudice for Sixth Amendment and RCM 707 purposes. It may be the right answer for that Soldier and that unit. But perhaps another unit on post has an opening, a job that Soldier can do, to the mutual benefit of all concerned. In a combat zone where most Soldiers carry weapons, the commander may take away the accused's weapon, out of concern that the Soldier will "snap" and do something dangerous. The accused may complain that he is somehow "stigmatized" by this. Perhaps the commander can accomplish his true purpose by taking the bolt and ammunition, but letting the Soldier keep the rest of the weapon.[45]

V. Conclusion

The speedy trial regime created by the Constitution, the UCMJ, and the RCM, as interpreted by the military courts, strongly encourages straight play. Defense counsel are most likely to get relief if they say openly, often, and in writing, that their clients *want* speedy trial, and show themselves ready to try a case speedily. A defense counsel who demands speedy trial should conduct the case accordingly. He should press for early trial. He should avoid unnecessary actions that excuse Government delays.

The Government's duty to provide the accused with a speedy trial is the same regardless of whether the defense demands speedy trial or not. Speedy trial demands improve the defense's chance for relief, but only if the Government has denied the accused a speedy trial in the first place. By simply ensuring that each accused gets a speedy trial within the meaning of the law, the Government can avoid all such dismissals, and see cases tried on the merits.

---

[44] As a matter of professional courtesy, the trial counsel should follow up with the defense afterwards, to explain how the problem is being addressed (if it is), or why the defense's allegations are not true. This kind of communication should be going on between trial and defense counsel all the time, regardless of whether speedy trial issues have arisen.

[45] *See* Gordon, *supra* note 32, at 13 & n.65.

Example A—Pretrial Demand without PTC

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
JOINT BASE ELMENDORF-RICHARDSON BRANCH OFFICE
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

REPLY TO ATTENTION OF:

APVR-RJA-TDS 6 January 2012

MEMORANDUM FOR Office of the Staff Judge Advocate, U.S. Army – Alaska, Joint Base Elmendorf-Richardson, Alaska

SUBJECT: Request for Speedy Trial by SPC Purity Driven-Snow, HHC, 3rd Maneuver Enhancement Brigade

1. I am a defense counsel with USATDS – JBER Field Office, and I represent SPC Driven-Snow with respect to her pending court-martial. Charges were preferred against her two days ago. Through me, she is requesting that these charges be forwarded and brought to trial as speedily as is practicable.

2. SPC Driven-Snow has been flagged since September 2011 based on the pending allegations. She previously intended to attend the Warrior Leader Course and compete for promotion to E-5, but has been unable to do so because of her flag. She has been unable to take online courses in ammunition handling for the same reason. During the same time, her pass privileges have been revoked, and her season tickets to the Anchorage Opera have been rendered valueless.

3. Furthermore, because of the pending charges, SPC Driven-Snow has been removed from her MOS-specific duties in the S-3 shop, and will not be allowed to join the unit in field exercises next month. She has no duties at all except for occasional ice scraping details. Her professional development is at a standstill, and is likely to remain so until her trial is complete.

4. Like every Soldier and every citizen, SPC Driven-Snow has the right to a speedy trial if she is going to be tried at all. She is eager to get this trial over and done with, so she can go back to doing meaningful work and building her career.

5. Accordingly, through me, SPC Driven-Snow requests that the command process her charges and trial with all speed, or else drop charges, unflag her, and let her go back to work.

6. POC is the undersigned at 907-384-xxxx.

EDWARD MARSHALL-HALL
CPT, JA
Defense Counsel

Example B—Pretrial Demand with PTC

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
JOINT BASE ELMENDORF-RICHARDSON BRANCH OFFICE
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

REPLY TO
ATTENTION OF:

APVR-RJA-TDS 25 December 2011

MEMORANDUM FOR Commander, Warrior Transition Battalion, Joint Base Elmendorf-Richardson, Alaska

SUBJECT: Request for Release or Speedy Trial, PVT Eustache Dauger, Warrior Transition Battalion, Joint Base Elmendorf-Richardson, Alaska

1. PVT Dauger was placed in pretrial confinement today and was immediately moved to civilian confinement in the Anchorage Correctional Complex. No charges have been preferred against him as of yet, and he has not been informed of the accusations that form the basis of his pretrial confinement. Now, through me, he requests that he be released or tried as soon as possible.

2. PVT Dauger is assigned to the Warrior Transition Battalion due in part to issues that require medication (see attached medical records and medication list). The Alaska Department of Corrections does not permit a confinee's unit (or anyone else) to bring him medication. Instead, they require proof that the person has the prescription, and that the medication meets their standard for "emergency care," at which point they issue the medication themselves. The civilian authorities have refused to provide this medication to PVT Dauger.

3. Furthermore, PVT Dauger has a wife and child in the area, and being separated from them is very painful. He is not planning to leave town and abandon his family, or forego the medical care provided by the Army (or, upon his departure from the Army, the Veteran's Administration). If he is to be tried, he has every reason to stay in town and face trial.

4. PVT Dauger is anxious to see his case tried speedily, if it is to be tried at all, especially if he has to wait for trial in jail. He wants the benefit of his right to a speedy trial.

5. For these reasons, through me, PVT Dauger requests that he be released from confinement or else tried with all speed.

6. POC is the undersigned at 907-384-xxxx.

Encl
as

VERITABLE LOHENGRIN
CPT, JA
Defense Counsel

Example C—Post-Trial Demand

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
JOINT BASE ELMENDORF-RICHARDSON BRANCH OFFICE
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

REPLY TO ATTENTION OF:

APVR-RJA-TDS 3 January 2012

MEMORANDUM FOR Office of the Staff Judge Advocate, United States Army – Alaska, Joint Base Elmendorf-Richardson, Alaska

SUBJECT: Request for Speedy Post-Trial Processing by PV2 Jean Splash.

1. On 2 November 2011, then-SGT Splash was convicted of one specification of abusing a public animal and six specifications of jumping from vessel into the water. His sentence to confinement is complete, but his record of trial is not. Through me, he is requesting that the record of trial be prepared as quickly as possible.

2. In anticipation of his upcoming separation, PV2 Splash has been contacting potential employers in the area. Two of these have refused him employment because he does not yet have a DD 214 (see attached employer's letters). He cannot get a DD 214 until his case goes through appellate review, and this cannot happen until the GCMCA acts on the sentence.

3. Also, PV2 Splash is anxious to know what the final result of his court-martial will be, and whether he can continue to serve.

4. Therefore, through me, PV2 Splash requests that post-trial processing of his case take place swiftly. I also request that this request itself be made part of the record of trial.

5. POC is the undersigned at 907-384-xxxx.

Encl
as

SAMR BJARNISON
CPT, JA
Defense Counsel

Administrative & Civil Law

Veterans' Benefits Act of 2010 Amends Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act

In its final months, the 111th U.S. Congress passed the Veterans' Benefits Act of 2010 (VBA).[1] The VBA made four substantive amendments to the Servicemembers Civil Relief Act (SCRA),[2] effective 13 October 2010. The VBA also made two clarifying amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA);[3] both USERRA amendments are effective retroactively. Additionally, the 111th Congress also passed the Helping Heroes Keep Their Homes Act of 2010,[4] which extended the "sunset" provision of a portion of the SCRA related to stays of proceedings and adjustment of obligations related to mortgages.

Amendments to the SCRA

The VBA amends the SCRA in four ways that significantly benefit servicemembers. The amendments provide servicemembers with additional or clarified rights in terminating residential leases, terminating telephone service contracts, seeking attorney general enforcement of the SCRA, and enforcing SCRA rights via a private cause of action. Also, just before the end of calendar year 2010, the Helping Heroes Keep Their Homes Act of 2010 extended until 31 December 2012, the provision of the SCRA that created a nine-month period following active duty during which a servicemember may seek a stay of proceedings involving a mortgage or trust deed.

Terminating Residential Leases

A servicemember's right to terminate a residential or motor vehicle lease under the SCRA is governed by 50 U.S.C. App. § 535.[5] The VBA amends this section to make clear that the lessor of a premises may not charge an early termination fee to a servicemember or dependent who terminates a residential lease under the SCRA.

Formerly, § 535(e) did not state whether an early termination fee could be imposed for residential lease terminations. It did state that no early termination fee could be charged for a motor vehicle lease terminated under the SCRA. A reasonable argument could have been made that such a fee was authorized for residential leases, under the rule of *expressio unius est exclusio alterius*.[6] The VBA amendment to § 535(e) ends the ambiguity, unequivocally declaring that an early termination fee is not authorized for residential lease terminations under the SCRA.

Terminating Telephone Service Contracts

The portion of the SCRA providing telephone service contract termination rights to servicemembers was first enacted in 2008.[7] This section (50 U.S.C. App. § 535a), provides termination rights to servicemembers who receive "orders to deploy outside the continental United States for not less than 90 days or for a permanent change of duty station within the United States . . . ." Under a technical reading of the 2008 version, servicemembers who received permanent change of station orders for overseas assignments such as Germany or Korea were not entitled to invoke these rights. Additionally, the 2008 version of § 535a applied only to cellular telephone service, provided no relief to servicemember dependents (or servicemembers using phones on dependents' contracts), and provided no right to regain a telephone number after returning from a deployment.

The VBA amendment to § 535a simplifies the circumstances under which a servicemember may invoke § 535a. Section 535a now applies when a servicemember "receives military orders to relocate for a period of not less than 90 days to a location that does not support the contract." It now applies to "land line," as well as cellular phone contracts.

For cellular phone contracts, a dependent may terminate a contract under § 535a if the servicemember is a beneficiary of the contract and could terminate it, if the contract were the servicemember's.[8] Similarly, a servicemember may terminate a cellular phone contract for all members of the servicemember's contract plan who relocate with the servicemember to an area unsupported by the contract.

---

[1] Pub. L. No. 111-275, 124 Stat. 2865 (2010) [hereinafter VBA].

[2] 50 U.S.C. App. §§ 501–597b (2006).

[3] 38 U.S.C. §§ 4301–4335 (2006).

[4] Pub. L. No. 111-346, 124 Stat. 3622.

[5] The word "residential" was and remains defined in a manner that includes premises occupied or intended to be occupied by a servicemember or a servicemember's dependents for residential, professional, business, agricultural, or similar purposes. *See* 50 U.S.C. App. § 535(b) (2006).

[6] "The expression of one thing is the exclusion of another," a traditional canon of statutory construction. *See* United States v. Holt, 22 M.J. 553, 556 n.2 (A.C.M.R. 1986).

[7] Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145 (codified at 50 U.S.C. App. § 535a (2006)).

[8] Presumably most, if not all, land line contracts do not include an early termination fee. For a land line phone contract that includes an early termination fee, the contract should be in the servicemember's name to ensure a right to terminate under § 535a without an early termination fee.

The new § 535a provides a servicemember who terminates a telephone contract because of relocation to an unsupported area the right to regain the terminated telephone number, per a request made within ninety days of return, if the relocation is for three years or less. The new § 535a also provides additional information regarding the termination process. Termination requires a written or electronic request to the service provider, including the termination date and a copy of the servicemember's orders. The termination notice is to be delivered "in accordance with industry standards for notification of terminations . . . ."

Attorney General Enforcement of the SCRA

The VBA added a new section to the SCRA, codified at 50 U.S.C. App. § 597, explicitly authorizing the Attorney General to commence a civil action in U.S. District Court against any person who engages in a pattern or practice of violating the SCRA or who violates the SCRA in a way that raises an issue of significant public importance. Section 597 authorizes equitable and declaratory relief regarding the violation. It also authorizes all other appropriate relief, including money damages, to a person aggrieved by the violation. A court also may assess a civil penalty of up to $55,000 for a first violation and up to $110,000 for a subsequent violation.

Section 597 also offers an aggrieved person the opportunity to seek intervention in an action brought by the Attorney General. An aggrieved person who intervenes may obtain the relief that would be available in a private civil action. If the aggrieved person prevails, an award of costs and a reasonable attorney fee also is expressly authorized.

The Department of Justice has already brought lawsuits against large mortgage lenders for violating the SCRA by failing to obtain judicial approval for foreclosures.[9] The Department of Justice has settled two lawsuits for a total of over $22 million for the servicemembers who were foreclosed upon without court approval.[10]

Private Right of Action

The VBA also added a new section to the SCRA, codified at 50 U.S.C. App. § 597a, explicitly stating that any person aggrieved by an SCRA violation may bring a civil action to obtain appropriate equitable, declaratory, or other relief, including damages. Before the VBA amendment, courts routinely had found an implied private right of action existed under the SCRA, but the issue often led to extensive litigation, delaying proceedings on the merits and likely increasing attorney fees for the servicemember.[11] Section 597a settles the matter.

The private right of action set forth in § 597a is buttressed by new § 597b, also created by the VBA. Section 597b clarifies that the creation of sections 597 and 597a does not preclude or limit remedies otherwise available under other law, including consequential and punitive damages. Thus, § 597b unambiguously preserves existing case law based on the implied right of action. Additionally, § 597b makes it clear that consequential and punitive damages awards for SCRA violations are not inconsistent with congressional intent behind the SCRA.

Extension of Enhanced Post Active Duty Mortgage Stays and Adjustments

Section 533 of the SCRA provides for stay of proceedings, adjustment of obligations, and court orders as a condition precedent to foreclosures for pre-service mortgages and deeds of trust under certain conditions. Protections afforded by § 533 originally extended through military service and for actions filed within ninety days thereafter.[12] As of 30 July 2008, the protections afforded by § 533 were extended to include actions filed within nine months following service.[13] The extension from ninety days to nine months was set to expire on 31 December 2010, at which time the protections afforded by § 533 would have reverted to actions filed during or within ninety days following service.[14]

On 29 December 2010, Congress extended the sunset provision of § 533 through 31 December 2012. Thus, a servicemember seeking the protections afforded by § 533 may continue to do so by filing his action up to nine months following service.

---

[9] *See* Press Release, U.S. Dep't of Justice, Justice Department Settles with Bank of America and Saxon Mortgage for Illegally Foreclosing on Servicemembers (May 26, 2011), *available at* http://www.justice.gov/usao/txn/PressRel11/SCRA_Settlement_pr.html.

[10] *Id*.

[11] *See, e.g.*, R. CHUCK MASON, CONG. RESEARCH SERV., R40456, THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): DOES IT PROVIDE FOR A PRIVATE CAUSE OF ACTION? (2009), *available at* http://www.fas.org/sgp/crs/misc/R40456.pdf. The one decision cited in the Congressional Research Service report finding no private cause of action, *Hurley v. Deutsche Bank Trust Co.*, ultimately was vacated by the district court after extensive litigation of the issue including a motion for reconsideration and a motion for certification to take an interlocutory appeal. *See* Hurley v. Deutsche Bank Trust Co., No. 1:08-CV-361, 2009 WL 701006 (W.D. Mich. Mar. 13, 2009).

[12] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2203, 122 Stat. 2654.

[13] *Id*.

[14] *Id*.

Amendments to USERRA

The VBA amended two USERRA definitions. It also created a test program under which the Secretary of Labor will refer some USERRA claims against federal executive agencies to the Office of Special Counsel (OSC) for investigation and enforcement, as appropriate.

Section 701 of the VBA amends 38 U.S.C. § 4303(2) which defines "benefit," "benefit of employment," and "rights and benefits." Formerly, these benefit-related terms did not include wages or salaries. Now they do.[15]

Section 702 of the VBA amends 38 U.S.C. § 4303(4), which defines "employer." The USERRA definition of employer already included a successor in interest. The VBA amendment adds an additional subsection providing six factors to consider in determining whether an entity is a successor in interest to an employer. These six factors are: substantial continuity of business operations; use of the same or similar facilities; continuity of work force; similarity of jobs and working conditions; similarity of supervisory personnel; and similarity of machinery, equipment and production methods. The VBA amendment specifies that an entity's notice or awareness of a pending claim is irrelevant. This amendment may have been prompted by the experiences of mobilized servicemembers employed by government contractors.[16]

The VBA refers to sections 701 and 702 as each being a "clarification." Section 701 is titled "Clarification that USERRA Prohibits Wage Discrimination against Members of the Armed Forces," and § 702 is titled, "Clarification of the Definition of Successor in Interest." Because Congress viewed sections 701 and 702 as providing clarification of existing statutory definitions, rather than new substantive rights, both provisions are retroactive. Both provisions "apply to—(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act; and (2) all actions or complaints filed under such chapter 43 that are pending on or after the date of the enactment of this Act."[17]

Section 105 of the VBA creates a three-year test program for referring some USERRA claims by federal government employees to the OSC. Under the test program, OSC will receive and investigate all claims arising under federal executive agencies in cases where the OSC has jurisdiction over related claims. Additionally, the Secretary of Labor will refer half of the USERRA claims against federal executive agencies to the OSC.[18]

Conclusion

The VBA amendments to the SCRA provide important new substantive and procedural rights to servicemembers and their dependents, as well as clarifying some preexisting SCRA rights. The VBA amendments to USERRA provide clarification in certain cases, and will potentially expedite cases filed with the Department of Labor for investigation and enforcement. Congress has repeatedly shown its willingness to amend the SCRA to extend and clarify servicemembers' and dependents' rights. Amendments to USERRA are far less common than are SCRA amendments, but as the VBA illustrates, Congress will amend USERRA, as well as the SCRA, if it perceives the need. Legal assistance attorneys should continue to note means by which the SCRA and USERRA might best be improved and provide recommendations for future legislation through their technical chains of command.[19]

—Lieutenant Colonel Baucum Fulk
Professor, Administrative and Civil Law Department

[15] The purpose of this amendment is unclear, but it may have been to clarify the accepted principle that USERRA prohibits wage discrimination against servicemembers and prospective servicemembers. *See Veterans' Benefits Act of 2010: Summary of Provisions* 8, U.S. SENATE COMM. ON VETERANS' AFFAIRS, *veterans.senate.gov/upload/final_bennies_summary.docx* (last visited Feb. 13, 2012).

[16] *See* Captain Samuel F. Wright, *Law Review 1075: Congress Clarifies the Application of USERRA to Successors in Interest*, RESERVE OFFICER ASS'N, http://www.roa.org/site/PageServer?pagename=law_review_1075 (last visited Feb. 13, 2012).

[17] VBA, *supra* note 1, §§ 701(b) and 702(b).

[18] The Office of Special Counsel (OSC) will receive all Uniformed Services Employment and Reemployment Rights Act (USERRA) claims filed by federal executive agency employees where the final digit of the complainant's social security number ends with an odd digit. For federal executive employees who lack social security numbers, OSC will receive those in which the Department of Labor's case file ends with an odd digit.

[19] Legal assistance attorneys are reminded that they should not take action which could be viewed as legal representation of a servicemember when the servicemember desires to pursue relief pursuant to USERRA. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6e(2)(a) (21 Feb. 1996) (pointing out that taking such action could prevent the Department of Justice from taking action on behalf of the servicemember).

Court-Martial at Parris Island: The Ribbon Creek Incident[1]

Reviewed by *Major Paul Welling*[*]

Whatever may have been its causes, the decision itself can never be justified. . . . That he did not intend the consequences does not excuse McKeon's negligence in exposing seventy-five young men, many of them there precisely because they were undisciplined, to a number of foreseeable hazards.[2]

I. Introduction

In the summer of 1956, a drill instructor in the Marine Corps led his platoon on a nighttime march into the swamps of Parris Island, South Carolina, resulting in the deaths of six recruits in his charge.[3] While this event may have faded even from the memories of Americans who were living at the time, during the spring and summer of 1956 it seized the headlines and the attention of Congress, demanding a meaningful response by Marine Corps leadership.[4]

In *Court-Martial at Parris Island*, Stevens investigates the drowning deaths in Ribbon Creek, focusing closely on the court-martial of the drill instructor involved, Staff Sergeant Matthew McKeon. Supporting his record with personal interviews of nearly all the survivors of the incident as well as an examination of the record of trial and news media reports, he provides an up-close look at the people and places involved.

Stevens' central purpose is to tell the story of the events at Parris Island objectively and in their entirety.[5] In so doing, he supplies an authoritative analysis of the legal and public relations maneuvering from the saga's beginning to its end.[6] This review compares the facts of the events as presented by Stevens with other published works and then examines the lessons to be learned on the impact of publicity on the military justice system.

II. Background

John C. Stevens III enlisted in the Marine Corps and passed through boot camp at Parris Island in 1957, one year after the Ribbon Creek incident.[7] He received an honorable discharge in 1963 and graduated from Suffolk University Law School in 1969. Since that time, Stevens has practiced law as an attorney, judge, and mediator.[8]

III. Comparisons with Other Published Accounts

The tragedy at Ribbon Creek in 1956 was widely and intensely covered in the national media immediately after the incident, during and after the court-martial, and in books and news articles appearing decades later.[9] Stevens distinguishes this book from other accounts, in part, by focusing on the human aspect and by examining the backgrounds of those involved.[10] Even more importantly to the judge advocate, Stevens provides a perceptive breakdown of the legal proceedings.[11]

Stevens takes pains to clear up misconceptions and misreported facts found in other accounts relating to the incident. He expends significant effort analyzing the facts surrounding the allegations that McKeon was under the influence of alcohol during the march into the swamp.[12] One prominent record of the event relates that "Medical tests showed [McKeon] had been drinking."[13] Stevens' detailed analysis shows this may not have been the case.[14]

Although McKeon admitted to drinking some amount of alcohol earlier in the day,[15] none of the medical tests performed after the incident confirmed he was under the influence of alcohol.[16] The confusion of fact came about

---

[*] Judge Advocate, U.S. Air Force. Currently assigned as Chief of General Law and International Claims, Headquarters Fifth Air Force, Yokota Air Base, Japan.

[1] JOHN C. STEVENS III, COURT-MARTIAL AT PARRIS ISLAND: THE RIBBON CREEK INCIDENT (1999).

[2] *Id.* at 169.

[3] *Id.* at 56.

[4] *See, e.g.*, *id.* at 37–39, 62–63, 158–59, 162–64, 181–82 (detailing reactions by Marine Corps leadership, Congress, and the media).

[5] *Id.* at ix.

[6] *Id.* at 69–70, 151–54 (summarizing the effects of publicity on the legal outcome).

[7] *Id.* at xiv.

[8] Profile of John C. Stevens III, http://jstevensaccord.com/profile.htm (last visited Jan. 22, 2012).

[9] STEVENS, *supra* note 1, at 181, 182.

[10] KEITH FLEMING, THE U.S. MARINE CORPS IN CRISIS: RIBBON CREEK AND RECRUIT TRAINING, at xi, xii (1990) (describing that the purpose of his book was to recount the response of the Marine Corps to the tragedy and to place the events of 8 April 1956 in a "military, political, and social history" context).

[11] *See generally* STEVENS, *supra* note 1, at 79–141 (recounting the events of the court-martial).

[12] *Id.* at 52, 56, 57, 63, 100, 102, 109, 110, 142, 147, 149, 150 (analyzing at length the facts surrounding McKeon's alcohol consumption).

[13] ALLAN R. MILLETT, SEMPER FIDELIS: THE HISTORY OF THE UNITED STATES MARINE CORPS 528 (1980).

[14] STEVENS, *supra* note 1, at 29–30, 43–44, 109–10.

[15] *Id.* at 121.

[16] *Id.* at 110.

because the military physician who ran the tests on McKeon testified before the court of inquiry that there was clinical evidence of intoxication. Unfortunately for the court of public opinion, this erroneous statement was not corrected until the physician was cross-examined at the court-martial nearly four months later, whereupon he testified that "Sergeant McKeon was not clinically under the influence of alcohol."[17]

Another misconception clarified by Stevens was whether McKeon had violated regulations by taking the Marines into the swamp in the first place.[18] Other published accounts relate that marches into the swamp were in violation of an established general order.[19] Once again, as Stevens points out, the truth was more complex. Stevens examines trial testimony and the language of the order in question, which prohibited only swimming and bathing in the swamp, and shows that no order prohibiting marches into the swamp actually existed.[20] While the difference between swimming and marching may seem trivial in this context, the distinction is significant taken in light of the proceedings as a whole. McKeon, who was charged with "culpable negligence," had a much stronger defense once evidence at trial showed that he had not acted in violation of an order, and that, in fact, nighttime marches into the swamp were common practice among drill instructors.[21]

Stevens' characterization of a "swarming" national news media response is borne out by the abundance of published articles from the period.[22] For example, *Time* magazine ran three in-depth articles, publishing the first shortly after the incident and the last on 15 October 1956,[23] after Navy Secretary Charles Thomas took action reducing McKeon's sentence. Stevens describes the impact excessive media attention had on the pre-trial, trial, and post-trial processes, on the strategies of the defense team, and on decisions by the military commanders.[24]

IV. Lessons in Public Relations: Trying a High-profile Case

Know your audience. This tenet is fundamental for any public affairs professional and should also be understood by trial attorneys. This is a concept the defense team in this case, particularly the well-known lead counsel Emile Berman, understood well.[25]

Berman understood that the audience was not merely the members of the court, but also the Marine Corps leadership and ultimately the public.[26] As history has shown, in high-profile cases where the facts are well known to the public, military leadership at the highest levels is influenced by public perceptions on matters of military justice and clemency.[27] Stevens points out how widespread, negative publicity at the outset affected the decisions of Marine Corps leadership with regard to McKeon's court-martial.[28] The lesson for the judge advocate is not to underestimate the influence of public attitudes, real or perceived, toward a high-profile proceeding.[29]

Just as importantly, Stevens accurately emphasizes the importance of keeping commanders out of trouble when discussing legally sensitive issues with the media. Stevens' account shows that right at the start, the Commandant of the Marine Corps, General Randolph Pate, was caught off guard by the media attention and committed a blunder that would affect the entire legal proceeding.[30] Failing to follow the advice of his legal officer and chief of staff, General Pate publicly stated that the accused appeared to be guilty, and would be punished to the full extent of the law.[31] As the author correctly surmises, this preemptive declaration of guilt disqualified General Pate and anyone under him from convening the court-martial.[32] Together with the subsequent remark about punishment, it may have affected the court members during sentencing.[33]

---

[17] *Id.* at 48.

[18] *Id.* at 54, 59.

[19] *E.g.*, MILLETT, *supra* note 13, at 530 (describing these swamp marches as "illegal"); *see also* JOSEPH DI MONA, GREAT COURT MARTIAL CASES 134 (1972) (stating that it was a violation of a general order to take men on marches into the swamp).

[20] STEVENS, *supra* note 1, at 94.

[21] *Id.* at 118, 119, 125, 136, 137 (supplying testimonial evidence of drill instructors taking recruits on marches into the swamp on other occasions).

[22] *Id.* at 59 (referring to the publicity as a "Media Feast").

[23] *Death in Ribbon Creek*, TIME, Apr. 23, 1956; *The Trial of Sgt McKeon*, TIME, July 30, 1956; *The Road Back*, TIME, Oct. 15, 1956.

[24] STEVENS, *supra* note 1, at 152–54.

[25] *Id.* at 69–70, 75–76.

[26] *Id.*

[27] *See id.* at 70; *see also* DI MONA, *supra* note 19, at 283–86.

[28] *See* STEVENS, *supra* note 1, at 37–39 (describing how Marine Corps leadership took measures to deal with the threat to its continued existence in the aftermath of the tragedy).

[29] FLEMING, *supra* note 10, at xii (describing how the trial of Sgt McKeon illustrated the "complex nature of the justice system in America, and how public opinion can play a role in the ultimate outcome").

[30] STEVENS, *supra* note 1, at 37–38.

[31] *Id.* at 37 (General Pate was asked by a reporter if Sgt McKeon was guilty of breaking regulations, he said, "It would appear so.").

[32] *Id.* at 37–38.

[33] *See id.* at 37, 133, 149.

Just as troubling to the judge advocate is what occurred during the trial when General Pate was called to testify. Stevens relates that Berman successfully persuaded General Pate to testify on behalf of the accused.[34] Berman elicited a recommendation from General Pate that the accused should receive a relatively minor sentence, a position contrary to his earlier recommendation for a harsh penalty.[35] Once again, the Commandant of the Marine Corps had made a public declaration—this time while on the witness stand during the trial—recommending a punishment.

The media attention affected the final outcome of the proceedings as well. Stevens describes how the publicity surrounding the trial played a role in Berman's ability to persuade the Commandant of the Marine Corps and Lt. Gen. (retired) Lewis B. "Chesty" Puller to testify on behalf of the accused.[36] Berman was able to use the possibility of a retrial—and all the publicity that would surely accompany such an event—against the Marine Corps in order to negotiate a reduction in McKeon's sentence.[37] In sum, the defense team was able to reverse the effects of the negative publicity against their client, and then shape the proceedings to his benefit.

V. Conclusion

Stevens' account is thoroughly researched and provides a number of lessons on advocacy for the judge advocate. With his background as an attorney, judge, and Marine, Stevens is exceptionally suited to tell this story.

The book is not without its flaws, however. The storyline is at times disorganized, making his account difficult to follow. During the first half of the book, Stevens frequently skips forward and back along the timeline of events, breaking the flow of narration. While this narrative technique works well in some books, here it is perplexing. Overall, this flaw is minor. Stevens constructs the record well and resolves it conclusively with his final assessments of the legal issues and the lasting impact of the tragic events on the participants.[38] This story warrants the careful examination given to it by the author. The lessons for the judge advocate and military commander are as relevant now as they were then.

[34] *Id.* at 128–33.

[35] *Id.* at 133.

[36] *Id.* at 129, 137 (describing Lieutenant General Puller as the most decorated Marine living at the time).

[37] *Id.* at 152.

[38] *Id.* at 155–73.

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 2011–September 2012) (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	187th JAOBC/BOLC III (Ph 2)	17 Feb – 2 May 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	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-F52	42d Staff Judge Advocate Course	4 – 8 Jun 12
5F-F52-S	15th SJA Team Leadership Course	4 – 6 Jun 12
5F-F70	43d Methods of Instruction	5 – 6 Jul 12

NCO ACADEMY COURSES		
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	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
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	6 Feb – 23 Mar 12
512-27DC5	38th Court Reporter Course	30 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	6 Aug – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12
512-27DC7	16th Redictation Course	9 – 13 Jan 12
	17th Redictation Course	9 – 13 Apr 12

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F24	36th Administrative Law for Military Installations & Operations	13 – 17 Feb 12
5F-F24E	2012 USAREUR Administrative Law CLE	10 – 14 Sep 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-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

CRIMINAL LAW		
5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F33	55th Military Judge Course	16 Apr – 5 May 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2012 Brigade Judge Advocate Symposium	7 – 11 May 12
5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
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	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 2011–2012 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 (020) Lawyer Course (030)	23 Jan – 30 Mar 12 30 Jul 12 – 5 Oct 12
900B	Reserve Legal Assistance (010 Reserve Legal Assistance (020)	18 – 22 Jun 12 24 – 28 Sep

850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	23 Apr – 4 May 12 (Norfolk) 9 – 20 Jul 12 (San Diego)
786R	Advanced SJA/Ethics (010)	23 – 27 Jul 12
850V	Law of Military Operations (010)	4 – 15 Jun 12
NA	Litigating Complex Cases (010)	4 – 8 Jun 12
961J	Defending Sexual Assault Cases (010)	13 – 17 Aug 12
525N	Prosecuting Sexual Assault Cases (01)	13 – 17 Aug 12
4048	Legal Assistance Course (010)	2 – 6 Apr 12
03TP	Basic Trial Advocacy (010) Basic Trial Advocacy (020)	7 – 11 May 12 17 – 21 Sep 12
748A	Law of Naval Operations (010) Law of Naval Operations (020)	12 – 16 Mar 12 (San Diego) 17 – 21 Sep (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	23 Jul – 3 Aug 12
0258 (Newport)	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	12 – 16 Mar 12 7 – 11 May 12 28 May – 1 Jun 12 13 – 17 Aug 12 24 – 28 Sep 12
2622 (Fleet)	Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (100) Senior Officer (110)	9 – 12 Apr 12 (Pensacola) 21 – 24 May 12 (Pensacola) 9 – 12 Jul 12 (Pensacola) 30 Jul – 2 Aug 12 (Pensacola) 30 Jul – 2 Aug 12 (Camp Lejeune) 6 – 10 Aug 12 (Quantico) 10 – 13 Sep 12 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	2 – 6 Apr 12
03RF	Legalman Accession Course (030)	11 Jun – 24 Aug 12
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	25 Jan – 16 May 12 22 May – 6 Aug 12 31 Aug – 20 Dec 12
932V	Coast Guard Legal Technician Course (010)	6 – 17 Aug 12
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 12

08XO	Paralegal Ethics Course (020) Paralegal Ethics Course (030)	5 – 9 Mar 12 11 – 15 Jun 12
08LM	Reserve Legalman Phases Combined (010)	TBD
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	9 – 20 Apr 12 23 Jul – 3 Aug 12
627S	Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100)	27 – 29 Mar 12 (San Diego) 30 May – 1 Jun 12 (Norfolk) 30 May – 1 Jun 12 (San Diego) 17 – 19 Sep 12 (Pendleton) 19 – 21 Sep 12 (Norfolk)
NA	Iraq Pre-Deployment Training (020)	26 – 28 Jun 12
	Legal Specialist Course (020) Legal Specialist Course (030)	25 Jan – 5 Apr 12 3 May – 20 Jul 12
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	9 Jan – 6 Apr 12 10 Jul – 5 Oct 12
NA	Information Operations Law Training (010)	19 – 23 Mar 12 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	19 – 23 Mar 12
NA	TC/DC Orientation (010) TC/DC Orientation (020)	30 Apr – 4 May 12 10 – 14 Sep 12

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	27 Feb – 16 Mar 12 2 – 20 Apr 12 7 – 25 May 12 11 – 29 Jun 12 9 – 27 Jul 12 12 – 31 Aug 12
0379	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 Mar 12 9 – 20 Apr 12 14 – 25 May 12 16 – 27 Jul 12 20 – 31 Aug 12
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050)	26 Mar – 30 Mar 12 4 – 8 Jun 12 10 – 14 Sep 12

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	5 – 23 Mar 12 7 – 25 May 12 11 – 29 Jun 12 23 Jul – 10 Aug 12 20 Aug – 7 Sep 12
947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	26 Mar – 6 Apr 12 14 – 25 May 12 18 – 29 Jun 12 27 Aug – 7 Sep 12
3759	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	2 – 6 Apr 12 (San Diego) 30 Apr – 4 May 12 (San Diego) 4 – 8 Jun 12 (San Diego) 17 – 21 Sep (Pendleton)

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 11-02	10 Jan – 2 Mar 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 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 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) 2012 RC On-Site Legal Training Conferences

Date	Region, LSO & Focus	Location	Supported Units	POCs
18 – 20 May	Midwest Region 9th LSO Focus: Expeditionary Contracting & Fiscal Law	Cincinnati, OH	8th LSO 91st LSO	CPT Steven Goodin steven.goodin@us.army.mil (513) 673-4277
15 – 17 Jun	Western Region 78th LSO Focus: Rule of Law	Los Angeles, CA	6th LSO 75th LSO 87th LSO 117th LSO	CPT Charles Taylor charles.j.taylor@us.army.mil (213) 247-2829
20 – 22 Jul	Mid-Atlantic Region 139th LSO Focus: Rule of Law	Nashville, TN	134th LSO 151st LSO 10th LSO	CPT James Brooks james.t.brooks@us.army.mil (615) 231-4226
17 – 19 Aug	Northeast Region 153d LSO Focus: Client Services	Philadelphia, PA (Tentative)	3d LSO 4th LSO 7th LSO	MAJ Jack F. Barrett john.f.barrett@us.army.mil (215) 665-3391

2. Brigade Judge Advocate Mission Primer (BJAMP)

Dates: 12 – 15 Mar 12; 4 – 7 Jun 12

Location: Pentagon

ATTRS No.: NA

POC: PDP@conus.army.mil

Telephone: (571) 256-2913/2914/2915/2923

3. 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.

4. 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.

5. 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.

Author Index

-A-

Alcala, Captain Ronald T.P., *Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development*, Mar. 2011, at 5.

-B-

Blair, Major Cindie, *Solutions for Victims of Identity Theft: A Guide for Judge Advocates to Assist Servicemembers in Deterring, Detecting, and Defending Against This Growing Epidemic*, June 2011, at 24.

-C-

Carpenter, Lieutenant Colonel Eric, *An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses*, July 2011, at 16.

Carpenter, Lieutenant Colonel Eric, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, May 2011, at 6.

Carpenter, Lieutenant Colonel Eric, *Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases*, Jan. 2011, at 31.

Chudd, Daniel & Damien Specht, *Not the Third Wheel: Intervenors in Government Accountability Office Protests*, Aug. 2011, at 17.

Clark, James G., *"A Camel is a Horse Designed by Committee": Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses*, July 2011, at 3.

-E-

Everett, Major Daniel J., *Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial*, Apr. 2011, at 6.

-F-

Felicetti, Captain Gary E., *Surviving the Multiplicity/LIO Family Vortex*, Feb. 2011, at 46.

Flor, Major Andrew D., *Post-Trial Delay: The Möbius Strip Path*, June 2011, at 4.

Fredrikson, Lieutenant Colonel Christopher T., Lieutenant Colonel Wendy P. Daknis & Lieutenant Colonel James L. Varley, *Annual Review of Developments in Instructions*, May 2011, at 25.

-G-

Gordon, Major M. Patrick, *Sentencing Credit: How to Set the Conditions for Success*, Oct. 2011, at 7.

-H-

Hanes, Major Jeri, *Fight for Your Country, Then Fight to Keep Your Children: Military Members May Pay the Price . . . Twice*, Feb. 2011, at 4.

Howard, Captain Ryan, *The Triple Threat Trial Counsel*, Aug. 2011, at 22.

-M-

Maloney, Major John R., *Litigating Article 32 Errors After* United States v. Davis, Sept. 2011, at 4.

Martins, Mark, *Rule of Law in Iraq and Afghanistan?*, Nov. 2011, at 21.

McMaster, Brigadier General H.R., *Lecture to the U.S. Army 58th Judge Advocate Officer Graduate Course: The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War*, May 2011, at 35.

Maurer, Captain Daniel D., *Working with Proximate Cause: An "Elements" Approach*, Dec. 2011, at 16.

-O-

O'Brien, Edward J., *Rehabilitative Potential Evidence: Theory and Practice*, Aug. 2011, at 5.

Ohlweiler, Lieutenant Colonel John N., *Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response*, Jan. 2011, at 9.

-P-

Paschal, Major Marlin, *Knowing When to Say No and Providing a Way Forward: The Commander's Emergency Response Program (CERP) and the Advising Judge Advocate*, Sept. 2011, at 13.

Pede, Colonel Charles N., *Military Justice, the Judge Advocate and the 21st Century*, Apr. 2011, at 32.

Petraeus, Hollister (Holly) K., *The Office of Servicemember Affairs at the Consumer Financial Protection Bureau: The Twenty-Ninth Charles L. Decker Lecture in Administrative and Civil Law*, Oct. 2011, at 23.

-R-

Radio, Major Kristy, *Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information*, Dec. 2011, at 4.

-T-

Tutterow, Major John, *Copyright Issues at the Unit Level: Seeing Through the Fog of Law*, Aug. 2011, at 26.

Thoman, Major Jay, *Advancing Advocacy*, Sept. 2011, at 35.

Thoman, Major Jay, *Conquering Competency and Other Professional Responsibility Pointers for Military and Civilian Appellate Practitioners*, Nov. 2011, at 4.

-W-

Wilkinson, Captain Joseph D. II, *Speedy Trial Demands*, Dec. 2011, at 24.

Subject Index

ADMINISTRATIVE AND CIVIL LAW

Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response, Lieutenant Colonel John N. Ohlweiler, Jan. 2011, at 9.

Fight for Your Country, Then Fight to Keep Your Children: Military Members May Pay the Price . . . Twice, Major Jeri Hanes, Feb. 2011, at 4.

Knowing When to Say No and Providing a Way Forward: The Commander's Emergency Response Program (CERP) and the Advising Judge Advocate, Major Marlin Paschal, Sept. 2011, at 13.

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, June 2011, at 24.

Working with Proximate Cause: An "Elements" Approach, Captain Daniel D. Maurer, Dec. 2011, at 16.

-C-

CONTRACT AND FISCAL LAW

Not the Third Wheel: Intervenors in Government Accountability Office Protests, Daniel Chudd & Damien Specht, Aug. 2011, at 17.

CRIMINAL LAW

Advancing Advocacy, Major Jay Thoman, Sept. 2011, at 35.

Annual Review of Developments in Instructions, Lieutenant Colonel Christopher T. Fredrikson, Lieutenant Colonel Wendy P. Daknis, & Lieutenant Colonel James L. Varley May 2011, at 25.

"A Camel is a Horse Designed by Committee": Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses, James G. Clark, July 2011, at 3.

Conquering Competency and Other Professional Responsibility Pointers for Military and Civilian Appellate Practitioners, Major Jay Thoman, Nov. 2011, at 4.

Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial, Major Daniel J. Everett, Apr. 2011, at 6.

Litigating Article 32 Errors After United States v. Davis, Major John R. Maloney, Sept. 2011, at 4.

An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses, Lieutenant Colonel Eric Carpenter, July 2011, at 16.

An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility, Lieutenant Colonel Eric Carpenter, May 2011, at 6.

Post-Trial Delay: The Möbius Strip Path, Major Andrew D. Flor, June 2011, at 4.

Rehabilitative Potential Evidence: Theory and Practice, Edward J. O'Brien, Aug. 2011, at 5.

Sentencing Credit: How to Set the Conditions for Success, Major M. Patrick Gordon, Oct. 2011, at 7.

Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases, Lieutenant Colonel Eric Carpenter, Jan. 2011, at 31.

Speedy Trial Demands, Captain Joseph D., Wilkinson II, Dec. 2011, at 24.

Surviving the Multiplicity/LIO Family Vortex, Captain Gary E. Felicetti, Feb. 2011, at 46.

The Triple Threat Trial Counsel, Captain Ryan Howard, Aug. 2011, at 22.

Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information, Major Kristy Radio, Dec. 2011, at 4.

-I-

INTERNATIONAL & OPERATIONAL LAW

Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development, Captain Ronald T.P. Alcala, Mar. 2011, at 5.

MISCELLANEOUS

Copyright Issues at the Unit Level: Seeing Through the Fog of Law, Major John Tutterow, Aug. 2011, at 26.

Lecture to the U.S. Army 58th Judge Advocate Officer Graduate Course: The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War, Brigadier General H.R. McMaster, May 2011, at 35.

Military Justice, the Judge Advocate and the 21st Century, Colonel Charles N. Pede, Apr. 2011, at 32.

The Office of Servicemember Affairs at the Consumer Financial Protection Bureau: The Twenty-Ninth Charles L. Decker Lecture in Administrative and Civil Law, Hollister (Holly) K. Petraeus, Oct. 2011, at 23.

Rule of Law in Iraq and Afghanistan?, Mark Martins, Nov. 2011, at 21.

Book Reviews Index

Court-Martial at Parris Island: The Ribbon Creek Incident, Reviewed by Major Pau Welling, Dec. 2011, at 37.

Dogface Soldier: The Life of General Lucian K. Truscott, Jr., Reviewed by Major John J. Gowel, Oct. 2011, at 36.

The Fourth Star: Four Generals and the Epic Struggle for the Future of the United States Army, Reviewed by Major Evan R. Seamone, Apr. 2011, at 38.

The Godfather: Seven Lessons on Providing Effective Counsel, Reviewed by Major Candace M. Besherse, July 2011, at 32.

How We Decide, Reviewed by Major Keith A. Petty, Nov. 2011, at 33.

The Last Stand, Reviewed by Major Bradford D. Bigler, May 2011, at 42.

Operation Mincemeat: How a Dead Man and a Bizarre Plan Fooled the Nazis and Assured an Allied Victory, Reviewed by Major Richard E. Gorini, Mar. 2011, at 39.

The Secrets of Abu Ghraib Revealed: American Soldiers on Trial, Reviewed by Major Eric J. Lawless, Feb. 2011, at 58.

The Uniformed Services Employment and Reemployment Rights Act, Reviewed by Lieutenant Colonel (Retired) Gary R. Brown, Aug. 2011, at 39.

War, Reviewed by Major Jacob D. Bashore, Jan. 2011, at 61.

TJAGLCS Practice Notes Index

2010–2012 Tax Update, Lieutenant Colonel Samuel W. Kan, Jan. 2011, at 44.

Congressional Research Service, Heather M. Enderle, Mar. 2011, at 34.

Reporting Requirements Incident to Breaches of Personally Identifiable Information, Major Scott E. Dunn, Apr. 2011, at 37.

Researching Biomedical Literature on Pub Med, Heather M. Enderle, Feb. 2011, at 57.

Researching Current and Historical Legislation Using THOMAS, Heather M. Enderle, Jan. 2011, at 58.

U.S. Army Claims Service Report Index

Career Claims Award, Colonel R. Peter Masterton, Aug. 2011, at 37.

Affirmative Claims Notes

2009 Agreement with TRICARE, Tom Kennedy, Sept. 2011, at 40.

Claims Office Management Notes

Claims Office Management, Colonel R. Peter Masterton, Sept. 2011, at 48.

Personnel Claims Disaster Response: Lessons Learned from the Fort Leonard Wood Tornado, Henry Nolan, Oct. 2011, at 28.

Tort Claims Notes

New National Guard Missions and the Federal Tort Claims Act, Walter E. Parker, IV, Jan. 2011, at 59.

U.S. Army Legal Services Agency Report Index

Trial Judiciary Notes

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, June 2011, at 44.

A View from the Bench: Immunizing Witnesses, Colonel R. Peter Masterton, Nov. 2011, at 28.

A View from the Bench: The Overlooked Art of Conducting Void Dire, Colonel Mark A. Bridges, Mar. 2011, at 35.

A View from the Bench: The Proper Use of Prior Statements, Lieutenant Colonel Jeffery R. Nance, July 2011, at 27.

Lore of the Corps Index

Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I, Fred L. Borch, III, Oct. 2011, at 1.

A Battlefield Promotion and "Jumping JAG" Too: The Amazing Story of Nicholas E. Allen in World War II, Fred L. Borch, III, Sept. 2011, at 1.

A Butler in FDR's White House, Combat Infantryman in Italy, and Judge Advocates in the Corps: Rufus Winfield Johnson (1911–2007), Dec. 2011, at 1.

Colonel Walter T. Tsukamoto: No Judge Advocate Loved America or the Army More, Fred L. Borch, III, May 2011, at 1.

Crossed Sword and Pen: The History of the Corps' Branch Insignia, Fred L. Borch, III, Apr. 2011, at 3.

A "Fragging" in Vietnam: The Story of a Court-Martial for Attempted Murder and Its Aftermath, Fred Borch, III, Nov. 2011, at 1.

"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917, Fred L. Borch, III, Feb. 2011, at 1.

The "Malmedy Massacre" Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath, Fred L. Borch, III, Jan. 2011, at 1.

Military Legal Education in Virginia: The Early Years of The Judge Advocate General's School in Charlottesville, Fred L. Borch, III, Aug. 2011, at 1.

A Remarkable Judge Advocate By Any Measure: Colonel Hubert Miller (1918–2000), Fred L. Borch, III, Mar. 2011, at 2.

Theft of Crown Jewels Led to High Profile Courts-Martial, Fred L. Borch, III, July 2011, at 1.

Who Is Where and What Are They Doing? A History of the JAGC Personnel Directory, Fred L. Borch, III, June 2011, at 1.

New Developments Index

Administrative & Civil Law

The Army Safety Program, Major Derek D. Brown, Nov. 2011, at 32.

Deactivation of Army Family and Morale, Welfare, and Recreation Command and Transition to Installation Management Command G-9 at Fort Sam Houston, Lieutenant Colonel Jerrett Dunlap, Oct. 2011, at 35.

The Death of Exemption "High 2" of the Freedom of Information Act, Major Scott E. Dunn, Apr. 2011, at 1.

Don't Ask Don't Tell Repeal Act of 2010, Major Todd A. Messinger, Mar. 2011, at 1.

New Personnel Claims Procedure for Catastrophic Losses, Colonel R. Peter Masterton, January 2011, at 1.

Summary of Thompson v. North American Stainless, First Lieutenant Megan Mueller, Mar. 2011, at 1.

Veterans' Benefits Act of 2010 Amends Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act, Lieutenant Colonel Baucum Fulk, Dec. 2011, at 34.

United States Postal Service

Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
The Army Lawyer	0 3 6 4 – 1 2 8 7	October 1, 2011
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Monthly	Twelve	Domestic: $50.00 Foreign: $70.00

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*

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

600 Massie Road, Charlottesville, VA 22903-1781

Contact Person: Charles J. Strong

Telephone: (434) 971-3396

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*

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

2200 Army Pentagon, Washington, DC 20310-2200

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*

Colonel David N. Diner

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Editor *(Name and complete mailing address)*

Captain Joseph D. Wilkinson II

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

Managing Editor *(Name and complete mailing address)*

Captain Joseph D. Wilkinson II

The Judge Advocate General's School, 600 Massie Road, Charlottesville, VA 22903-1781

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

Full Name	Complete Mailing Address
Office of The Judge Advocate General, U.S. Army	2200 Army Pentagon, Washington, DC 20310-2200

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☐ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:

☐ Has Not Changed During Preceding 12 Months

☐ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

13. Publication Title	14. Issue Date for Circulation Data Below
The Army Lawyer	December 2011

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			4,957	4,797
b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)*	2,425	2,410
	(2)	Paid In-County Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)*	0	0
	(3)	Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	2,532	2,387
	(4)	Other Classes Mailed Through the USPS	0	0
c. Total Paid and/or Requested Circulation *[Sum of 15b. (1), (2),(3),and (4)]*			4,957	4,797
d. Free Distribution by Mail *(Samples, complimentary, and other free)*	(1)	Outside-County as Stated on Form 3541	0	0
	(2)	In-County as Stated on Form 3541	0	0
	(3)	Other Classes Mailed Through the USPS	0	0
e. Free Distribution Outside the Mail *(Carriers or other means)*			0	0
f. Total Free Distribution *(Sum of 15d. and 15e.)*			0	0
g. Total Distribution *(Sum of 15c. and 15f)*			4,957	4,797
h. Copies not Distributed			0	0
i. Total *(Sum of 15g. and h.)*			4,957	4,797
j. Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)*			100	100

16. Publication of Statement of Ownership

☒ Publication required. Will be printed in the December 2011, The Army Lawyer ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner — Date

Editor, The Army Lawyer — October 1, 2011

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

Instructions to Publishers

1. Complete and file one copy of this form with your postmaster annually on or before October 1. Keep a copy of the completed form for your records.
2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

Individual Paid Subscriptions to *The Army Lawyer*

Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

When your subscription is about to expire, the Government Printing Office will mail each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.

ARLAWSMITH212J ISSUE0003 R 1
JOHN SMITH
212 MAIN STREET
SAN DIEGO, CA 92101

The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you renew.

You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing Code: **5937**

Easy Secure Internet: **bookstore.gpo.gov**

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐☐ — ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.
General, United States Army
Chief of Staff

Official:

JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
1206505