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OPENING STATEMENTS

Overview

Effective representation of accused before courts-martial depends in part upon the trial defense counsel's ability to assess the lawfulness of military regulations. The lead article presents an analytic framework designed to assist attorneys in this regard; the author not only discusses the manner in which regulations may be challenged, but also describes situations in which invocation of regulations may be advantageous to the defense. In a thought provoking article, Professor Fredric Lederer explores his thesis that recently-enacted Federal Rule of Criminal Procedure 26.2 invalidates the Jencks Act.

The Advocate encourages the submission of articles in response to Professor Lederer's controversial position. In the "Proposed Instruction" feature, the staff summarizes the current law regarding jury instructions on eyewitness identifications and presents the Model Special Instruction on Identification sanctioned in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). In the installment of "Search and Seizure: A Primer," we explore the "emergency" and "open fields" doctrines. In the "Ethics Roundtable" we explore ethical considerations which attend defense counsel's decision to impeach the credibility of witnesses whom defense counsel believes is testifying truthfully.

Preview

An upcoming issue of The Advocate will contain articles concerning the rape shield law, and prosecutorial vindictiveness.

REGULATIONS IN THE COURTROOM
by Major James F. Nagle*

In addition to the Constitution and federal statutes, military regulations comprise a "third level" of the law with which defense counsel must be intimately familiar. Indeed, regulations affect the entire military justice system by criminalizing certain conduct, imposing requirements on police investigators, and restricting the admissibility of documentary evidence.¹ In order to assist trial defense counsel in using regulations in the courtroom, this article will explore ways to attack the particular regulation or invoke it and thereby compel the government to comply with its own regulatory provisions.

Attacking Regulations

Defense counsel may attack a regulation by showing that it is nonpunitive, if the regulation is the basis of an Article 92 violation; by demonstrating that it was improperly promulgated or published; by proving that it contravenes a higher authority; or by arguing that it was not a regulation which the accused had a duty to obey.

Nonpunitiveness

The issue of whether a particular regulation is punitive or merely hortative and advisory was frequently litigated from 1958 to the early 1970's. By 1975, the law had been fairly well settled, and commentators could essentially catalogue a list of "do's and don'ts" for drafters of regulations.² The relatively settled nature of the law in this area,

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1. The importance of government regulations as a source of law was recognized as early as 1842. See United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

2. See Di Chiara, Article 92: Judicial Guidelines for Identifying Punitive Orders and Regulations, 17 A.F.L.Rev. 61 (Summer 1975); Holmes, Punitive vs. Nonpunitive Regulations: The Emasculation of Article 92, The Army Lawyer, August 1975, at 6. These articles remain remarkably current and should be consulted by trial defense counsel.

coupled with dicta in appellate decisions urging staff judge advocates to modify local regulations in accordance with case law,³ has led to a virtual dearth of appellate decisions on the subject since then. The courts have fashioned various rules for determining whether a regulation is punitive, but the presence or absence of any one of these factors is not dispositive. Basically the test devolved into two general sections.

a. Words of Prohibition.

The clearest example of a punitive regulation is one which prominently announces that violation of its provisions will subject the transgressor to criminal prosecution under the Uniform Code of Military Justice. The prohibitive words must state that certain conduct is clearly forbidden and that the conduct is subject to criminal prosecution. Difficulties arise unless both elements are clearly present.⁴ The language itself should be distinctly prohibitive. Certainly the words "prohibited", "forbidden", or "barred" convey the idea that certain conduct amounts to a transgression of regulatory intent. However, even the word "prohibited" may not be enough if the regulation as a whole does not demonstrate its punitive nature.⁵ Words which are ordinarily permissive, such as "may," normally will not connote a punitive intent, although the regulation may still be punitive depending on the context in which the words are used.⁶

The prohibition should also be direct rather than implicit. For example, in one case a regulation stated that certain listed personnel "may carry" weapons. The accused, who was not a member of this class, was convicted for violating the regulation by carrying a weapon. On appeal, the Army Court of Military Review reversed because the regulation did not sufficiently convey a prohibition against military personnel who were not

3. See United States v. Wright, 48 CMR 319 (ACMR 1974).

4. Id. See United States v. Edell, 49 CMR 65 (ACMR 1974); United States v. Branscomb, 49 CMR 767 (ACMR 1974).

5. United States v. Jackson, 46 CMR 1128 (ACMR 1973); United States v. Wright, supra note 3.

6. See United States v. Upchurch, 26 CMR 860 (AFBR 1958).

listed in the class which was permitted to carry weapons.⁷ Merely because some personnel are specifically authorized to perform certain acts, in other words, does not necessarily mean that other personnel are criminally prohibited from committing the same actions.⁸ Even if the regulation contains prohibitive words, its language must, as a whole, indicate that it is punitive.

b. Punitive Nature of the Regulation.

If the title states that the regulation is a "guide"⁹ for certain personnel, or if it establishes a standard operating procedure¹⁰ or program,¹¹ it is not meant to be punitive in toto. Conversely, if the stated purpose is to impose standards of conduct on personnel and to subject violators to criminal sanctions, the regulation is intended to be punitive, although it may not be for other reasons.¹² If the regulation is directed to commands rather than individuals, it must be implemented

7. United States v. Thomas, 43 CMR 691 (ACMR 1971); see also United States v. Sweltzer, 14 USCMA 39, 33 CMR 251 (1963). This situation differs from that in which certain exceptions to a specific prohibition exist, i.e., regulations prohibiting possession of cocaine unless authorized by proper authority. See Trant and Harders, Burdens of Proof, Persuasion and Production: A Thumb on the Scale of Justice?, 13 The Advocate 24 (1981).

8. But see United States v. Upchurch, supra note 6, a case dealing with a regulation stating that local foreign currency could be acquired "only in the following manner" (emphasis added). Although it reversed the conviction for other reasons, the Board in dicta said the regulation was "one of specific authorization with residual prohibition" and was therefore sufficiently punitive. The word "only", coupled with specific examples of legal conduct, was apparently viewed as marginally sufficient to show that any other methods of financial conversion were prohibited.

9. See, e.g., United States v. Hogsett, 8 USCMA 681, 25 CMR 185 (1958); United States v. Louder, 7 M.J. 548 (AFCMR 1979).

10. United States v. Nardell, 21 USCMA 327, 45 CMR 101 (1972).

11. United States v. Scott, 22 USCMA 25, 46 CMR 25 (1972).

12. See United States v. Hogsett, supra note 9, in which a regulation clearly containing punitive sections was rendered nonpunitive by its intermingling of punitive and nonpunitive sections. But see notes 19-21, infra and accompanying text.

by appropriate commanders before it can be punitively applied to individuals. This need for further implementation almost conclusively shows that the regulation is not punitive.¹³ If the regulation defines a code or standard of conduct, counsel must determine if it is merely hortative.

For example, in United States v. Henderson,¹⁴ the accused was convicted of violating an Air Force regulation, entitled "Ethical Standards of Conduct," by not avoiding the appearance of a conflict of interest. The board concluded that, considering the title of the violated section and the vagueness and generality of the principles involved, the regulation announced standards to which servicemembers were ethically and morally, but not necessarily legally, bound to adhere.¹⁵ If the regulation is written in vague, general terms, it will usually be interpreted as nonpunitive. Servicemembers subject to punitive regulations are entitled to a specific forewarning of what conduct is criminal, and the provisions should be understandable to soldiers of ordinary sense and understanding to ensure that violators are accorded due process.¹⁶ The presence of vague generalities in a regulation, in sum, indicates the drafters' intent not to impose penal sanctions but rather to state broad codes of moral conduct.¹⁷

Because regulations are rarely designed to reflect the punitive nature of every paragraph, they must be examined as a whole before they can be properly categorized. Army Regulation 600-50, Standards of Conduct, for

13. United States v. Nardell, supra note 10; United States v. Perkins, 50 CMR 377 (AFCMR 1975); United States v. Bala, 46 CMR 1121 (ACMR 1973).

14. 36 CMR 854 (AFBR 1965).

15. The Coast Guard Board of Review apparently recognizes a general exception to this rule if the hortative language constitutes a reminder of how to perform a pre-existing duty. United States v. Kobler, 37 CMR 763 (CGBR 1966). But see United States v. Barker, 26 CMR 838 (CGBR 1958).

16. United States v. Wright, supra note 3, at 320, quoting United States v. Calley, 46 CMR 1131 (ACMR 1973). See also United States v. Branscomb, supra note 4; United States v. Sweney, 48 CMR 479 (ACMR 1974).

17. A regulation is overbroad if, while prohibiting conduct subject to government regulation, it also proscribes constitutionally protected activities. See United States v. Sweney, supra note 16. Cf. United States v. Connor ___ M.J. ___ (ACMR 30 April 1982) (in which the court implied a scienter requirement in a vague or overbroad regulation).

example, is the quintessential example of a punitive regulation, yet not all of its paragraphs are penal. Chapter Five, which deals, inter alia, with dangerous drugs, is specifically and prominently punitive. Other chapters, however, deal with general principles or are totally procedural, and criminality would not attach under existing case law. The converse situation, in which a clearly penal paragraph was included within a non-punitive regulation, was addressed in United States v. Stewart.¹⁸ The accused was convicted of violating a paragraph of a regulation which prohibited "carrying dangerous weapons except as lawfully provided. While the subject provision clearly contained words of prohibition and dealt with a subject normally proscribed, the court invalidated the conviction. The regulation as a whole only provided general guidelines for military functions, and therefore did not qualify as punitive.

In United States v. Hogsett,¹⁹ the Court of Military Appeals held that a regulation which combines advisory instructions with punitive sections is not intended as a general order or regulation under Article 92 of the Code. Twelve years later, however, in United States v. Brooks,²⁰ the Court ruled that a regulation which combined advice with commands was not thereby excluded from being punitive. Defense counsel must therefore determine whether a regulation is basically punitive with some nonpunitive provisions, or nonpunitive with some punitive provisions. Any doubt should be resolved in the accused's favor since, as the Court in Brooks noted, a regulation "may so indiscriminately combine precept and pedagogics as not to provide fair notice of its penal nature to those subject to its terms[.]"²¹

Servicemembers cannot be convicted under Articles 92(1) or 92(2) if the regulation they allegedly violated is nonpunitive. Normally²² the specification will be dismissed because there is no lesser-included

18. 2 M.J. 423 (ACMR 1975). See also United States v. Scott, supra note 16; United States v. Nardell, supra note 10; United States v. Benway, 19 USCMA 345, 41 CMR 345 (1970).

19. See United States v. Hogsett, supra note 9; United States v. Louder, supra note 9.

20. 20 USCMA 281, 42 CMR 220 (1970).

21. Id. at 283, 42 CMR at 222.

22. See, e.g., United States v. Hogsett, supra note 9; United States v. Scott, supra note 11.

offense.²³ However, if the conduct averred in the specification constitutes an offense under a different article, any reference to a nonpunitive regulation may be regarded as mere surplusage, and the accused may be convicted of the other charge.²⁴

Promulgation

If the defense counsel concludes that the subject regulation is punitive, he must determine whether there are any other infirmities which would bar conviction, such as defects in the promulgation of the regulation. Article 92 proscribes violations of two types of regulations. General orders and regulations provide the bases for conviction under Article 92(1), and, under Article 92(2), servicemembers may be punished for violating all other orders, including regulations. A general order or regulation must be generally applicable to an armed force and properly published by the President, Secretary of Defense, or service secretary, or generally applicable to the command of the officer issuing it throughout the command or subdivision thereof, and issued by (1) a general or flag officer in command; (2) an officer having general court-martial jurisdiction, or (3) a commander superior to one of these.²⁵ In prosecutions under Article 92(1), the accused's duty to obey the regulation must be shown, but actual knowledge of the

23. See United States v. Haracivet, 45 CMR 674 (ACMR 1972); but see United States v. Green, 47 CMR 727 (ACMR 1973).

24. United States v. Midgett, 31 CMR 481 (CGBR 1962).

25. Paragraph 171a, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter MCM, 1969 or MCM, 1951]. The prior version of the Manual permitted a commander to promulgate general orders generally applicable to his command, see para. 171a, MCM, 1951, without specifying the level of command. The Court of Military Appeals, however, decreed that this did not include all commanders but only those occupying positions of "substantial importance" or "only one step removed" from the Department of Army. See Birnbaum, Violations of Regulations - Article 92(1) or 92(2)?, 8 AF JAG L.Rev. No. 5, 5 (Sept-Oct 1966). The current Manual eliminates the confusion. See DA Pamphlet 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition (1970)).

regulation is not an element of the offense.²⁶ The maximum punishment is a dishonorable discharge, two years of confinement, and total forfeitures. Article 92(2) prohibits the violation of any other lawful orders, including regulations not within the ambit of Article 92(1). Regulations providing the basis for conviction under this subsection may therefore be issued by individuals who do not exercise general court-martial jurisdiction or who are not general officers in command. In a court-martial under Article 92(2), the government must prove both the accused's duty to obey and his actual knowledge of the order.²⁷ The maximum imposable punishment is a bad-conduct discharge, six months of confinement at hard labor, and forfeiture of two-thirds pay per month for six months. Because of the disparities in maximum punishment and burdens of proof between the offenses tried under these two subsections, the defense counsel should specifically investigate the following matters in any prosecution under Article 92(1) of the Code:

a. Was the regulation promulgated by a general officer? Insure that the promulgating commander, who may be wearing a star and announcing himself as "Brigadier General Smith" is not merely "frocked" pending his actual promotion to that rank. Similarly, if a colonel is permanently or temporarily assigned to a command position normally reserved for a general

26. Paragraph 171a, MCM, 1969. The 1951 Manual provided that either actual or constructive knowledge must be shown for regulation of commands inferior to the department, territorial, theatre or similar area command, see para. 154a(4), MCM, 1951. See also Kellam, Mens Rea and Article 92, JAG J. 13 (1957); Meagher, Knowledge in Article 92 Offenses - When Pleaded, When Proven, 5 Mil.L.Rev. 119 (1959). Even though lower-level commanders could issue general regulations, proof of the accused's knowledge was therefore required. See note 27, infra.

27. The 1951 Manual stated that either actual or constructive knowledge was required under Article 92(2) for general orders issued at lower-level commands. See paragraphs 154a(4) and 171b, MCM, 1951. The Court of Military Appeals ruled, however, that constructive notice was not sufficient under Article 92, although actual notice could be proven by circumstantial evidence. United States v. Curtin, 9 USCMA 427, 26 CMR 207 (1958). This rule was incorporated into the present Manual. See paragraphs 154a(4) and 171b, MCM, 1969.

officer, his position does not, in itself, vest him with a general's authority to issue general regulations.²⁸

b. Was the general officer in command? In Army commands, senior level staff officers will often be general officers. For example, the Army G-2 may be a general officer exercising operational authority over the intelligence officers throughout the command. If that general were to issue a mandatory regulation addressing all intelligence officers within the command, it would clearly be within the ambit of Article 92(2), but would still not be a general regulation under Article 92(1).

c. Was the issuing official a general court-martial convening authority? Many colonels are general court-martial convening authorities, while many general officers are not. If a general in command is not a general court-martial convening authority, he may only issue general regulations in his role as general in command. Consequently, if, in his absence, a colonel becomes acting commander and issues regulations, they would presumably not be general regulations.

d. Is the regulation generally applicable to the command? One other aspect of general regulations issued by authorities subordinate to service secretaries is that they must be generally applicable "to the command" of the issuing officer.²⁹ This requirement is linked to the prosecution's burden of demonstrating that the accused has a duty to obey the subject regulation. This duty to obey is expressed in two meanings of the phrase "in the command." One meaning is "within the command" and applies to the unit structure. Clearly, a soldier assigned to the 1st Armored Division must obey the regulations of the commanding general of that Division. The other aspect of this requirement, which is particularly applicable to installation commanders,³⁰ refers to the geographic command

28. United States v. Bunch, 3 USCMA 186, 11 CMR 186 (1953). The validity of delegating the power to issue general regulations depends on the powers delegated and the authority to delegate. See United States v. Kalscheuer, 11 M.J. 373 (CMA 1981); United States v. Kelson, 3 M.J. 139 (CMA 1977); United States v. Allen, 6 M.J. 633 (CGCMR 1978); United States v. Neloms, 48 CMR 703 (ACMR 1974).

29. This is an essential element of a Article 92(1) offense. United States v. Koepke, 18 USCMA 100, 39 CMR 100 (1969).

30. In the 1951 Manual, reference was specifically made to commanders of areas such as territories and theatres. Paragraph 154a(4), MCM, 1951.

rather than the unit structure. Installation commanders frequently have tenant units stationed on their posts which, while not within their chain-of-command, are subject to regulations promulgated by them.³¹

In United States v. Leverette,³² the accused was en route from his former duty station in Korea to his new assignment at Fort Stewart, Georgia. He entered Fort Campbell carrying an unregistered, privately owned firearm in violation of a Fort Campbell regulation which applied to "all individuals physically on the installation." He pleaded guilty to violating a lawful general regulation. On appeal, he contended that the plea was improvident "because, not being assigned to the command, he (a) had no duty to obey the regulation, and (b) his knowledge of the regulation could not be presumed."³³ In discussing the government's burden of demonstrating the accused's duty to obey the regulation, the court interpreted the Manual to mean that "a command relationship in the organizational sense is not fundamental to the application of a general regulation to an individual member of the service,"³⁴ and held that the accused had a duty to obey Fort Campbell regulations when he entered that installation.³⁵ The court seemed to equate the Fort Campbell regulation to a municipal ordinance, which is binding on all individuals passing through the municipality's jurisdiction.

Presumably the court could easily have disposed of the lack of knowledge claim by stating the rule that Article 92 does not require the government to prove the accused's knowledge of general regulations. The court cited this principle but proceeded to note that the accused knew he was in Fort Campbell and that the existence of the regulation could reasonably be expected since it was necessitated by Army regulations and dealt with a

31. United States v. Chunn, 15 USCMA 550, 36 CMR 48 (1965). Often the chain of command and area command are intertwined because of the accused's temporary attachment to a unit. See United States v. Brousseau, 32 CMR 858 (AFBR 1962).

32. 9 M.J. 627 (ACMR 1980).

33. Id. at 630 (footnote omitted).

34. Id.

35. This rationale apparently applies even when members of a different armed service enter Fort Campbell.

matter notoriously subject to control. The court therefore concluded that "in instances such as here" soldiers may be required to obey general regulations without regard to whether they actually knew of the regulation. The Court's elaboration of this conclusion may have been prompted by Lambert v. California,³⁶ in which the Supreme Court invalidated a Los Angeles Municipal Code provision requiring convicted felons in Los Angeles to register with the police because the evidence established that the defendant had neither actual knowledge nor the probability of such knowledge. Although ignorance of the law is no excuse, due process in some instances will require proof of knowledge, especially where the accused's violation was wholly passive. The court in Leverette obviously believed that the case required a due process inquiry beyond the ignoratio legis non excusat rationale. That inquiry revealed to the court's satisfaction that Leverette knew or probably knew of the regulation's existence.

Publication of Regulations

In his brief to the Court of Military Appeals, Leverette unsuccessfully raised an issue not presented to the Army Court of Military Review: since the regulation was meant to apply to unassigned personnel entering Fort Campbell, was its lawfulness conditioned upon prior publication in the Federal Register?³⁷ The Freedom of Information Act requires that certain information be published in the Federal Register "for the guidance of the public."³⁸ One specifically enumerated type of information subject to this requirement is a substantive rule of general applicability.³⁹ The Code of Federal Regulation states that "documents having general applicability and legal effect" must be published in the Federal

36. 355 U.S. 225 (1957). See also United States v. Lindsay, 7 CMR 587 (AFBR 1952) (proof of knowledge required when violation occurred three days after issuance of regulation). A similar issue is pending before the Court of Military Appeals in United States v. Tolkach, AFQM 24826, pet. granted, 10 M.J. 189 (CMA 1980).

37. See Schempf and Eisenberg, Publish or Perish: An Analysis of the Publication Requirement of the Freedom of Information Act, The Army Lawyer, August 1980 at 1; Luedtke, Open Government and Military Justice, 87 Mil.L.Rev. 7, 61-67 (1980).

38. 5 U.S.C. §552(a)(1) (1976).

39. Commentators have traced the development of this publication requirement through the Administrative Procedure Act and the Federal Register Act. See Schempf and Eisenberg, supra note 37; Luedtke, supra note 37.

Register.⁴⁰ Such documents must be issued under proper authority and prescribe a penalty or course of conduct applicable to the general public or to persons in a particular locality.⁴¹ Similar requirements have been adopted in paragraph VI B4, DOD Directive 5400.9, Publication of Proposed and Adopted Regulations Affecting the Public (25 Dec. 1974) and paragraph 2-2d, Army Regulation 310-4, Publication in the Federal Register of Rules Affecting the Public (22 July 1972). This requirement was observed by the drafters of the Manual, where, in the analysis, they noted that some regulations would have to be published in the Federal Register.⁴² Apparently a punitive regulation is a substantive rule in that it prescribes specific conduct for affected personnel. By definition,⁴³ general orders and regulations have general applicability through a specific area or unit. The primary issue, therefore, is whether the rule is "for the guidance of the public."

While no appellate decision squarely addresses this issue, the commentators have noted that in the few cases that have arisen, agency personnel have been differentiated from the public-at-large.⁴⁴ This conclusion is persuasive. If agency personnel were assumed to be the "public", all regulations would have to be published in the Federal Register, even those affecting only a small number of agency employees. The issue then focuses on the definition of an "agency" under the Freedom of Information Act. The definition contained in the Act is expansive and has been so broadened by the courts that units within executive departments are deemed to be agencies.⁴⁵ Therefore, major commands and major subordinate com-

40. 1 CFR §5.2 (1981).

41. 1 CFR §1.1 (1978). See also Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977); Noel v. Green, 376 F.Supp. 1095, (S.D.N.Y. 1974), aff'd, 508 F.2d 1023.

42. See Dept. of Army Pamphlet 27-2, supra note 25, at para. 171a.

43. Paragraph 171a, MCM, 1969.

44. See Schempf and Eisenberg, supra note 37, at 3; see also United States v. Bryant, 44 CMR 573 (AFCMR 1971).

45. See, e.g., Crooker v. Office of Pardon Attorney, 614 F.2d 825 (2d Cir. 1980) (office of Department of Justice is agency under Act); Message, DAJA-AL 1977/5572, 11 October 1977 (CINCUSAREUR regulations having a substantial and direct impact on the public are subject to the provisions of AR 310-4. See also Message, DAJA-AL 1977/3856, 16 March 1977.

mands, such as Fort Campbell, should follow the procedures set forth in Army Regulation 310-4, Publication in the Federal Register of Rules Affecting the Public (22 July 1977), since they appear sufficiently independent and important to qualify as agencies. Consequently, if Fort Campbell is an agency, then a Fort Campbell regulation which applies only to that installation's personnel need not be published since it does not apply to the public. However, if, as in Leverette, it applies to all personnel who enter Fort Campbell, then it arguably would apply to the public and must be published. If a rule required to be published in the Federal Register is not published, it normally is null and void,⁴⁶ although it may still be applied against those who have actual notice of its provisions.⁴⁷ Since the regulation in Leverette never appeared in the Federal Register, it could only be applied against the accused if the government could prove he had actual notice of it.⁴⁸

The allegation that a regulation is void because of the government's failure to publish it in the Federal Register was raised in at least three published military appellate decisions in 1971. It received substantive treatment, however, only in United States v. Bryant,⁴⁹ which involved a challenge to an Air Force regulation prohibiting the possession of illicit drugs. The defense contended that, absent publication in the Federal Register, the charge must fail because actual knowledge was not alleged. The Court concluded that because it was an Air Force regulation applicable only to Air Force personnel, it did not apply to the general public and publication was not required.

46. Hall v. Equal Employment Opportunity Commission, 456 F.Supp. 695 (N.D. Cal. 1978); City of New York v. Diamond, 379 F.Supp. 503 (S.D.N.Y. 1974); Kelly v. United States Dept. of Interior, 339 F.Supp. 1095 (E.D. Cal. 1972). See also In Re Pacific Far East Line, Inc., 314 F.Supp. 1339 (N.D. Cal. 1970), aff'd, 472 F.2d 1382 (Navy port regulation not published in Federal Register is invalid).

47. Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963); United States v. Aarons, 310 F.2d 341 (2d Cir. 1962); United States v. Messer Oil Corp., 391 F.Supp. 557 (W.D. Pa. 1975).

48. In such a situation, the culpability of Fort Campbell personnel who might not have actual notice of the subject regulation is unclear.

49. United States v. Bryant, supra note 44.

In United States v. Stovall,⁵⁰ the Court reviewed a local punitive supplement to an Air Force regulation. The supplement prohibited the consumption of alcohol on the streets of the base, but the court did not state whether it applied only to personnel assigned to the base or to anyone entering the installation. This distinction would be significant in determining whether the supplement under review applied to the general public. Instead, the Court simply affirmed the accused's conviction on the basis of Bryant. The Army Court of Military Review confronted a similar theory of defense in United States v. Hillman.⁵¹ That case, however, involved an Army regulation which apparently applied only to Army personnel. While such a defense would fail under Bryant, the Army court summarily dismissed it as being without merit. This trilogy of cases seems to have convinced appellate defense attorneys not to raise the error for nine years.⁵² While the issue was raised before the Court in Leverette, that tribunal did not grant further review on the question,⁵³ and a definitive resolution must await a future case.

The Manual provision pertaining to general orders and regulations defines the first class of general regulations as those which are generally applicable to an armed force and are properly published by the President, Secretary of Defense, or service secretary. Those words were not in the 1951 edition of the Manual, and apparently they were inserted in response to the Federal Register Act.⁵⁴ The absence of this provision from the

50. 44 CMR 576 (AFQMR 1971).

51. 44 CMR 616 (ACMR 1971).

52. It should be emphasized that this publication requirement need not apply only to general orders and regulations under Article 92(1), UCMJ. If the regulation under review is punitive and applies to the general public, the same publication requirement would apply when the accused is charged under Article 92(2), UCMJ. Consequently, it is unlikely that during the nine year hiatus no case existed in which such an issue could have been raised, absent the contrary precedent.

53. 9 M.J. 280 (CMA 1980). The Court's refusal to grant further review on this issue is not necessarily an indication that it views the issue as meritless. United States v. Mahan, 1 M.J. 303, 307 n.9 (CMA 1976). The Court may have believed that the lower tribunal's resolution of the due process issue showed that the accused was subject to the regulation even absent publication. See note 36, supra and accompanying text.

54. See Dept. of Army Pamphlet 27-2, supra note 25, at para. 171a.

second class of general regulations -- those promulgated by a general in command, for example -- is more curious. Apparently the drafters did not believe that general regulations promulgated by commanders subordinate to the service secretary must be published, since by definition they are not generally applicable to an armed force but only to a portion thereof. Conversely, the drafters concluded that regulations generally applicable to the armed force must be properly published. Unfortunately, that term was not defined. Regardless of the drafters' intent, however, defense counsel should argue that the term mandates publication in accordance with law and regulation, including the Federal Register Act and the Freedom of Information Act, and applies to all classes of regulations.

Duty to Obey

Any accused must, of course, have a duty to obey the regulation he is charged with violating. Certainly a soldier in the 3d Infantry Division in Germany has no duty to obey a regulation of the 2nd Infantry Division in Korea, since the regulation is not issued within his chain-of-command and is not applicable to the area in which he is located.⁵⁵ Because punitive regulations, like penal statutes, must be strictly construed, and because any doubts must be resolved in the accused's favor,⁵⁶ a punitive regulation specifically applicable to noncommissioned officers should not apply to an accused who is a specialist or an acting sergeant.⁵⁷ Furthermore, a regulation may be punitive as to one type of military occupational speciality but not as to others.

In United States v. Webber,⁵⁸ the accused wrongfully appropriated an airplane by taxiing onto an active runway, taking off without clearance, and operating the plane with less than the prescribed minimum air crew. He was found guilty of three violations of an Air Force regulation. The Court of Military Appeals ruled that the regulation in question dealt only with pilots and that the accused did not fit within that classification.⁵⁹ Trial defense counsel should therefore scrutinize the "purpose

55. See United States v. Brousseau, supra note 31, for a discussion of attachment orders.

56. United States v. Snyder, 48 CMR 163 (AFQMR 1973).

57. Cf. United States v. Lumbus, 49 CMR 248 (ACMR 1974).

58. 13 USCMA 536, 33 CMR 68 (1963).

59. See United States v. Pravitz, 41 CMR 578 (ACMR 1969).

and applicability" clause and the promulgation signature block of the regulation under review to insure that the accused did, in fact, have a duty to obey it.

Lawfulness

Regulations are presumed to be lawful,⁶⁰ and in the event of a challenge to this presumption, the trial judge resolves this question of law.⁶¹ Regulations have the force and effect of law⁶² only to the extent that they do not conflict with higher authority such as the Constitution,⁶³ statutes,⁶⁴ or regulations issued by superior commanders.⁶⁵ If they do con-

60. Paragraph 171a, MCM, 1969.

61. Paragraph 57b, MCM, 1969.

62. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942); United States v. Hutchins, 4 M.J. 190 (CMA 1978); United States v. Quirk, 39 CMR 528 (ABR 1968). For a perceptive discussion of the legality of regulations, see Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring).

63. See United States v. Hise, 20 USCMA 3, 42 CMR 195 (1970), in which the Court of Military Appeals declared that a portion of the 1969 Manual, as applied, violated the ex post facto clause of the Constitution. The Manual is a regulation properly issued by the President pursuant to Article 36, UCMJ. United States v. Smith, 13 USCMA 105, 32 CMR 105 (1962); United States v. Dykes, 6 M.J. 744 (NOMR 1978).

64. Hamilton National Bank v. D.C., 156 F.2d 843 (D.C. Cir. 1946); United States v. Hutchins, supra note 62 (accused claiming protection of regulation which was invalid because it was inconsistent with statute); United States v. Quirk, supra note 62. In United States v. Douglas, 1 M.J. 354 (CMA 1976), the Court declared inoperative a portion of the Manual because it exceeded the President's authority under Article 36 and was inconsistent with the UCMJ. See United States v. Calley, supra note 16; United States v. Bailey, 11 M.J. 730 (AFCMR 1981) (Air Force regulation voided because it conflicted with Article 2, UCMJ).

65. In United States v. Kelson, supra note 28, the court ruled that a Uniform Rule of Practice before Army Courts-Martial contrary to the Manual is inoperative. See also United States v. Cowan, 47 CMR 519 (ACMR 1973); United States v. Patton, 41 CMR 572 (ACMR 1969); United States v. Whatley, 20 CMR 614 (AFBR 1955).

flict, the lower regulation is inoperative. One caveat to this involves the accused's standing to attack the regulation: if it properly proscribes his conduct, he may not contend that it is unlawful as to the conduct of hypothetical parties.⁶⁶

Conflicts with higher authorities may arise in either of two manners. First, a higher authority may directly restrict a lower commander's ability to issue particular regulations. For example, a now outdated version of Army Regulation 600-50 specifically prohibited supplementation by lower commands. If a commander nevertheless supplemented the regulation and an accused were charged with violating this supplement, he could convincingly argue that such a supplement, issued in direct violation of a clear directive from a higher command, was unlawful. In such a case, the accused would, in effect, be a third party beneficiary of the higher directive.⁶⁷ In some situations, the accused may be a direct beneficiary of rights conferred by the higher regulations. For example, moustaches are specifically permitted by Army regulation.⁶⁸ If a lower commander published a regulation prohibiting his troops from having moustaches, they would be deprived of a right established by higher authority, and unless the commander had received an exception to policy, the lower regulation would be unlawful.

A difficult issue to resolve is whether the regulation actually conflicts with higher authority or is instead an acceptable variation of it. For example, courts often review regulations which require drivers to report motor vehicle accidents,⁶⁹ or mandate that servicemembers report contacts with foreign agents,⁷⁰ or that military personnel in overseas commands prove that controlled items they previously owned have not been

66. United States v. Hoard, 12 M.J. 563 (ACMR 1981); United States v. Sweney, supra note 16.

67. Army Regulation 600-50, Standards of Conduct (6 Mar. 1972); United States v. Bunch, 3 USCMA 186, 11 CMR 186 (1953).

68. Army Regulation 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Nov. 1981).

69. United States v. Smith, 9 USCMA 240, 26 CMR 20 (1958).

70. United States v. Kauffman, 14 USCMA 283, 34 CMR 63 (1963); United States v. De Champlain, 1 M.J. 803 (AFCMR 1976).

subsequently black-marketed.⁷¹ Assertions that these regulations violate the constitutional and statutory privilege against self-incrimination normally fail because the regulations address specific matters which are of particular concern to the military unit. If the regulations are more general, however, they may be invalid. In *United States v. Tyson*,⁷² the accused was convicted of violating a regulation which required Navy personnel to report "all offenses committed by persons in the naval service which may come under their observations." Since this regulation would have required Tyson to report that he was receiving stolen property, it would have required him to incriminate himself. Although the court did not hold that the regulation was invalid, it determined that it was improperly applied to the accused and dismissed the charge.

Similarly, allegations that military regulations violate the equal protection clause because of differences between provisions applicable to the various armed services will normally fail, since there is no requirement that the services be consistent.⁷³ Problems will exist within an armed service, however, if individual commanders have the option of prosecuting identical conduct -- drug possession, for example -- as a violation of either Article 134 or Article 92.⁷⁴ In *United States v. Thurman*,⁷⁵ the same conduct was punishable as either an Article 92(1) violation of a general regulation, or as an offense under the third clause of Article 134 for committing a U.S. Code violation, with a one year maximum punishment. The Court ruled that this was error because it enabled the commander to punish the identical offense more severely. Defense counsel should there-

71. *United States v. Lindsay*, 11 M.J. 550 (ACMR 1981).

72. 2 M.J. 583 (NCOMR 1976).

73. *United States v. Thurman*, 7 M.J. 26 (CMA 1979); *United States v. Hoelsing*, 5 M.J. 355 (CMA 1978).

74. *United States v. Courtney*, 1 M.J. 438 (CMA 1976). To avoid the problem discussed in *Courtney*, the Army and Air Force issued consistent guidance, see *United States v. Hoelsing*, supra note 73. See also *United States v. Thurman*, supra note 73.

75. *United States v. Thurman*, supra note 73.

fore raise disparities such as those which exist between Articles 92 and 134(3).⁷⁶

Defense counsel have been successful in attacking regulations which infringe on their ability to prepare for courts-martial. In United States v. Enloe,⁷⁷ the Court reviewed an Air Force regulation which conditioned the granting of permission for defense counsel to interview OSI agents upon the presence of designated third parties at the interview. The Court invalidated these rules, concluding that they amounted to unwarranted restrictions on the defense counsel's right to meet the charges against the accused and were inconsistent with the Code and the Manual.⁷⁸

Several cases address the servicemember's privacy rights and interests⁷⁹ and the degree to which they may be restricted. Generally, the military may impose restrictions on these interests, provided the restrictions are justified by military need and are not arbitrary and capricious.⁸⁰ Restrictions imposed in overseas commands are more readily upheld, and defense counsel will find it particularly difficult to show that the

76. Regulations which mandated the discharge of pregnant personnel were also attacked on equal protection grounds. Current regulations addressing the severance of pregnant personnel do not provide for mandatory discharges, and foster little litigation. See Beans, Sex Discrimination In the Military, 67 Mil.L.Rev. 19, 33-36 (1975).

77. 15 USCMA 256, 35 CMR 228 (1965).

78. See also United States v. Aycock, 15 USCMA 158, 35 CMR 130 (1964). This protection seems to extend to sentenced prisoners if undue punishment is authorized by a regulation. See United States v. Robinson, 3 M.J. 65 (CMA 1977); United States v. Kato, 50 CMR 19 (NCOMR 1974).

79. Rights and interests may be difficult to distinguish. See United States v. Wheeler, 12 USCMA 387, 30 CMR 287 (1961) (Ferguson, J., dissenting).

80. See Alley, The Overseas Commander's Power to Regulate the Private Life, 37 Mil.L.Rev. 57 (1967); Murphy, The Soldier's Right to a Private Life, 24 Mil.L.Rev. 97 (1964).

subject regulation is not reasonably related to a military need in a foreign situs.⁸¹

One particular interest which has generated substantial litigation is the soldier's desire to marry.⁸² A study of case law pertaining to this issue will clarify the appellate courts' view of such privacy restrictions. In United States v. Nation,⁸³ the accused had been convicted of violating a general regulation promulgated by the Commander, U.S. Naval Forces, Phillipines, by marrying without the Commander's written consent. The regulation established a detailed plan for submitting appropriate documents and information, and imposed a six-month waiting period between the submission of the application and the earliest date of approval. The Court of Military Appeals observed that a regulation which does not transgress higher authority is lawful if it is "reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command," and is "directly connected with the maintenance of good order in the services."⁸⁴ The Court never determined whether the military may restrict a servicemember's right to marry, since it concluded that the regulation was "so broad and unreasonable that it cannot be used as a basis for this prosecution."⁸⁵ The Court focused on the six-month waiting period, which it found to be an unreasonable and arbitrary, if paternalistic, interference with the sailor's personal affairs which could not be supported by the claim that the command's morale, discipline, and good order depended upon control of overseas marriages.

81. See Alley, supra note 80, for an extensive review of the overseas commander's prerogatives in such matters. See also Webster, The Citizen Soldier In the Age of Aquarius: Does He Have a Private Life?, 27 JAG. J. 1, 13-20 n.71 (1972).

82. See Murray, supra note 80, at 107-108 for a brief history of the military's efforts to restrict marriage. See also United States v. Jordan, 30 CMR 424 (ABR 1960); Drobac, Regulation of Marriage Overseas, 15 JAG. J. 183 (1961).

83. 9 USCMA 724, 26 CMR 504 (1958).

84. Id. at 506. The Court cited United States v. Martin, 1 USCMA 674, 5 CMR 102 (1952), and United States v. Milldebrandt, 8 USCMA 635, 25 CMR 139 (1958). For a discussion of United States v. Martin, see Webster, supra note 81, at 13-15.

85. Id.

In United States v. Jordan,⁸⁶ the Army Board of Review discussed both the Court of Military Appeals' and the Navy Board of Review's opinions in Nation, distinguished them, and validated a similar regulation of the U.S. Army, Carribbean. The Board concluded that the Army regulation did not include the various offensive sections which concerned the Navy Board and Judges Quinn and Ferguson, the Court of Military Appeals majority, and opined that it should not lightly overrule the decisions of field commanders as to what was necessary for their commands. It stated that the regulation was reasonably necessary to achieve the goals of morale, discipline, and good order cited in Nation, and was not issued by "a desire to impose a sumptuary restriction, or by whim or personal bias" and could not be characterized as arbitrary, unreasonable, and illegitimate.⁸⁷

The Navy Board of Review next faced the marriage issue in United States v. Levinsky,⁸⁸ which also involved a regulation by the Commander, U.S. Naval Force, Phillipines, promulgated a month after the Nation decision was announced. This regulation either eliminated the offensive passages or showed that they were imposed by Phillipine law,⁸⁹ and the Board proceeded to decide whether marriage was subject to military control at all. The Board reviewed the problems arising from marriages in overseas commands, especially those involving aliens (although the regulation was not limited to marriages with aliens), and concluded that such regulations were reasonably necessary for the protection of the morale, discipline and "usefulness" of the troops and were directly related to good order. The Court of Military Appeals confronted this revised regulation

86. 30 CMR 424 (ABR 1960).

87. Id. at 429. Jordan was not granted review by the Court of Military Appeals, and the lower court's distinction of Nation (six months waiting period is impermissible but three months is permissible) was not subjected to scrutiny. The Army Board of Review had earlier considered a marriage regulation in United States v. Reese, 22 CMR 612 (ABR 1956). Although extremely critical of its content, the court did not reach a determination of its validity.

88. 30 CMR 641 (NBR 1960).

89. Cf. United States v. Upchurch, supra note 6; United States v. Hogsett, supra note 9. See Holmes, supra note 2, at 9.

in United States v. Wheeler,⁹⁰ and also concluded that overseas marriages are a legitimate matter for reasonable command control and, unless that control becomes unreasonable as in Nation, regulatory restrictions are lawful. Judge Ferguson vigorously dissented on the fundamental principle that the services had no justification for interfering with a serviceman's desire "to marry the woman of his choice." These cases demonstrate the extreme to which commanders — especially those located overseas — may lawfully go to regulate even the most personal rights and interests. If the regulation is reasonably necessary for the protection of legitimate military interests and is not overly broad or arbitrary and capricious, its lawfulness will be upheld.

Another issue which illustrates the distinctions between lawful and unlawful regulations involves loans between servicemembers. In United States v. Smith,⁹¹ the Court of Military Appeals reversed a conviction based on a regulation which prohibited all loans for profit or benefit of any kind between servicemembers without the consent of the lender's commander. The Court noted that this regulation was too restrictive and unnecessarily broad. While the military has a legitimate interest in prohibiting usurious⁹² loans and loans between subordinates and superiors,⁹³ the all-encompassing prohibition under review surpassed any legitimate military need.⁹⁴ It is unnecessary to recite the lengthy list of regulations which control private rights and interests; suffice it to note that courts have upheld regulations which restrict freedom to travel,⁹⁵ freedom

90. 12 USCMA 387, 30 CMR 387 (1961); see also United States v. Smith, 12 USCMA 564, 31 CMR 150 (1961); United States v. Parker, 5 M.J. 922 (NCOMR 1978).

91. 1 M.J. 156 (CMA 1975).

92. United States v. Giordano, 15 USCMA 163, 35 CMR 135 (1964); United States v. Sims, 34 CMR 570 (ABR 1964).

93. See United States v. McClain, 10 M.J. 271 (CMA 1981).

94. See United States v. Hill, 5 CMR 665 (AFBR 1952) (regulation properly prohibited hospital personnel from borrowing money from patients). See Alley, *supra* note 80, at 106-108 for a discussion of restrictions on loans and other economic enterprises. See also United States v. Lehman, 5 M.J. 740 (AFCMR 1978) (regulation lawfully prohibited importation of goods into Korea for personal profit).

95. United States v. Porter, 11 USCMA 170, 28 CMR 394 (1960).

of speech,⁹⁶ freedom of association,⁹⁷ and even hair length⁹⁸ and the right to wear a wig.⁹⁹ The breadth of these previously upheld regulations places a particularly heavy burden on counsel who attempt to show that a regulation is unlawful.

Regulations are presumed to be lawful¹⁰⁰ and the defense normally bears the burden of going forward with the evidence to show unlawfulness.¹⁰¹ In some instances, however, the regulation may be so suspect on its face as to negate the presumption. For example, although a regulation prohibiting female servicemembers and dependents from becoming pregnant while stationed at an overseas command could conceivably be justified by the need to avoid overloading hospital facilities and to lessen the burden of removing noncombatants in the event of hostilities, the regulation, on its face, is so restrictive of intimate personal rights that presumably any judge would require proof of its necessity.¹⁰² Since such situations will be rare, the defense counsel should be prepared to present evidence and arguments to overcome this presumption.¹⁰³

96. United States v. Voorhees, 4 USCMA 509, 16 CMR 83 (1954), discussed in Nevtze, Yardsticks of Expressions in the Military Environment, 27 JAG. J. 180, 194-196 (1973); Bishop, Justice Under Fire - A Study of Military Law, 149-152 (1974). Freedom of expression is discussed in Frazer, Flag Desecration, Symbolic Speech and the Military, 62 Mil.L.Rev. 165, 209-210 (1973), discussing United States v. Toomey, 39 CMR 969 (AFBR 1968); and Foreman, Religion, Conscience and Military Discipline, 52 Mil.L.Rev. 77 (1971).

97. United States v. Hoard, 12 M.J. 563 (CMA 1981).

98. United States v. Young, 1 M.J. 433 (CMA 1976). See also Kelly v. Johnson, 425 U.S. 238 (1976).

99. United States v. Verdi, 5 M.J. 330 (CMA 1978).

100. Paragraph 171a, MCM, 1969. See United States v. Smith, 21 USCMA 231, 45 CMR 5 (1972).

101. See Smith, supra note 100; Alley, supra note 80, at 89-91.

102. See Alley, supra note 80, for a discussion of those circumstances which would lessen the defense's need to go forward with evidence.

103. The prosecution then must prove lawfulness beyond a reasonable doubt. United States v. Tiggs, 40 CMR 352 (ABR 1968).

Although the defense normally has the duty to attack the regulation, the government must introduce it since it is an element of the offense. Normally this is done by judicial notice, but often trial counsel will forget to ensure that the record reflects that the judge took notice of the regulation. Previously, appellate courts could assume that in a trial by judge alone, the judge would have sub silentio taken judicial notice.¹⁰⁴ However in United States v. Williams,¹⁰⁵ which involved a prosecution under Article 92(1), the trial counsel neither introduced a copy of the subject regulation nor requested the judge to take judicial notice of it. Government appellate counsel argued that the appellate court could presume that the military judge properly noticed the regulation.

The Court rejected that argument, stating that the government cannot establish its case through such presumptions, and that "[a]bsent clear indication on the record that the trial judge properly judicially noticed" the needed fact, "the judge did not have before him any evidence that what the accused did was a crime."¹⁰⁶ The Court specifically relied on Mr. Chief Justice Warren's opinion in Garner v. Louisiana¹⁰⁷ that:

To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to the Court what it is required by due process to do at the trial and would be "to turn the doctrine into a pretext for dispensing with a trial."

104. United States v. Levesque, 47 CMR 285 (AFCMR 1973).

105. 3 M.J. 155 (CMA 1977).

106. Id. at 157.

107. 368 U.S. 157 (1961).

(Citation omitted). Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deduction drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process (citation omitted).¹⁰⁸

This rule would obviously apply with even greater force in a trial before members.

The rules of statutory construction generally apply to regulations.¹⁰⁹ The regulation must be strictly construed, and any doubt as to its applicability or punitive nature should be resolved in the accused's favor.¹¹⁰ This rule is based on the obvious need to insure that the accused has adequate notice of the prohibited conduct.¹¹¹ In interpreting particular regulatory provisions, every integral part of the regulation must be considered in light of the regulation as a whole.¹¹²

108. Id. at 173. See also Mil.R.Evid.201.

109. See Sutherland, Statutes and Statutory Construction (4th ed. 1972); United States v. Voorhees, supra note 96.

110. United States v. Louder, supra note 9. But see United States v. Cannon ___ M.J. ___ (ACMR 30 April 1982).

111. United States v. Mabazza, 3 M.J. 973 (AFCMR 1977), decision on further review, 5 M.J. 660 (AFCMR 1978). See notes 16-17, supra and accompanying text.

112. United States v. Louder, supra note 9. The need for adequate notice affects the punitive nature of a regulation and whether it was properly published.

Invoking Regulations

There is considerably less case law addressing the defense counsel's invocation of a regulation. If an order or regulation contradicts higher authority, the lower order or regulation is unlawful, and the defense counsel should invoke the superior regulation. For example, in United States v. Cowan,¹¹³ the accused's conviction for violating an order was overturned because the order contravened a post regulation. A similar situation occurred in United States v. Forrest.¹¹⁴ In that case, the accused had submitted an application for discharge as a conscientious objector. The post commander erroneously rejected the application and failed to forward it to the Department of the Army, as required by regulation. The accused was then ordered to "board the vehicle" en route to Vietnam. He disobeyed the order and was convicted of willful disobedience. The court concluded that the erroneous processing of his application rendered the order unlawful: violations of the procedures established by a higher authority can therefore invalidate "follow-up" orders.¹¹⁵

Defense counsel may also consider invoking a regulation where the government issues regulations which, if followed, would arguably benefit the accused. From 1954 to 1967, the Supreme Court decided several cases clearly articulating the principle that once an agency establishes rules, it must follow them.¹¹⁶ Such situations arise even if the secretary limits, by regulation, discretion granted to him by statute¹¹⁷ or if there are other means by which the secretary could have accomplished the same results.¹¹⁸ These cases were apparently premised on the idea that the

113. United States v. Cowan, supra note 65.

114. 44 CMR 692 (ACMR 1971).

115. Once the defense produces a regulation which conflicts with the order, the prosecution must prove the order's lawfulness beyond a reasonable doubt. United States v. Whatley, supra note 65.

116. Yellin v. United States, 374 U.S. 109 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 U.S. 260 (1954).

117. Service v. Dulles, supra note 116; See Roberts v. Vance, 343 F.2d 236 (D.C. Cir. 1964) (court would not assume that secretary had, sub silentio, authorized exception for himself).

118. Vitarelli v. Seaton, supra note 116.

regulation's underlying purpose was to protect personal liberties and interests.¹¹⁹ The major debate therefore centers on whether certain regulations were promulgated for purely governmental purposes or to protect personal liberties and interests.

Regulations governing pretrial confinement are normally promulgated to protect personal liberties, and a failure to comply with these regulations will consequently render confinement illegal¹²⁰ unless the violations only amount to procedural irregularities.¹²¹ Similarly, a failure to follow the regulations governing the extension of a soldier's term of service will deprive the government of court-martial jurisdiction over him.¹²² Counsel should therefore determine whether preliminary rules of this type are conditions precedent to trial or are essentially hortative paragraphs suggesting optimal behavioral guidelines.¹²³

In 1979, the Supreme Court decided United States v. Caceres,¹²⁴ which involved an Internal Revenue Service regulation requiring prior Justice Department approval of electronic monitoring of nontelephonic conversations. The IRS agents had not received the necessary approval, and the accused moved for exclusion of the conversation. The Court noted that the regulation was not mandated by the Constitution or federal law.

119. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970); United States v. Russo, 1 M.J. 135 (CMA 1975).

120. United States v. Malia, 2 M.J. 963 (ACMR 1976).

121. United States v. Grubbs, 37 CMR 527 (ACMR 1966). The holding in Grubbs is highly questionable since the regulation itself mandated that violation of its terms required release of the prisoners. The court therefore viewed as merely procedural something which the promulgator obviously regarded as sufficiently substantive to require release.

122. United States v. Simpson, 1 M.J. 608 (ACMR 1975). On the related issue of activation from the National Guard and Reserve, see Twiss, An Attack on Court-Martial Jurisdiction: Activation from the Army National Guard and Army Reserve, 12 The Advocate 2 (1980).

123. See, e.g., United States v. Bell, 46 CMR 726 (AFCMR 1972) (regulation required examination of accused and medical recommendation in crimes involving drug use).

124. 440 U.S. 741 (1979).

Consequently, the exclusionary rule, the judicially adopted method of deterring constitutional violations, need not apply. In addition, the privacy interests established by the regulation were not so important as to warrant adoption of the exclusionary rule. The Court therefore rendered the "remedy" question unclear.

The Court of Military Appeals addressed Caceres in United States v. Hood,¹²⁵ a case in which it invalidated a search based on an affidavit presented to a military judge. Contrary to a regulation, the judge questioned the CID agent without putting him under oath or reducing his answers to writing. The Court disposed of Caceres in a lengthy footnote. It pointed out that, without the unsworn information, probable cause was absent. The remedy of exclusion was therefore mandated by paragraph 152 of the Manual, and the problem faced in Caceres — the absence of any constitutional violation upon which to base the exclusionary rule — was not present. Judge Cook concurred in the result for other reasons and stated that he need not address the issue in Caceres. Judge Cook did address that question less than a month later, in United States v. Holsworth,¹²⁶ a case involving a gate search conducted ten minutes before the time prescribed in local directives. The Court acknowledged that a regulation had been violated but, relying on Caceres, ruled that the "good faith" mistake by the police did not invade any greater expectation of privacy created by the regulation, and the exclusion remedy was not invoked. The case is clearly distinguishable from Hood since a search lacking probable cause was not in issue; the case involved a mistaken, but good-faith extension of an administrative inspection, and paragraph 152 of the Manual was therefore inapplicable.¹²⁷

In United States v. Dillard,¹²⁸ the Court returned to the Caceres issue. In that case, a search authorization was not written as required by a European command regulation. The Court noted that the government must abide by its own regulations where "the underlying purpose" is the protection of personal liberties or interests, and then significantly broadened that rule by saying that, whatever administrative benefit

125. 7 M.J. 128 (CMA 1979).

126. 7 M.J. 184 (CMA 1979).

127. Judge Cook relied on United States v. Samora, 6 M.J. 360 (CMA 1979), which involved a regulation which did not affect a privacy right.

128. 8 M.J. 213 (CMA 1980).

accrues to the government from the regulations, they also benefit the servicemember in Europe. Consequently, the sole purpose of the regulation need not be to protect personal liberties as long as this is one of the benefits. The Court then reversed, relying on United States v. Hood; Judge Cook dissented based on United States v. Holsworth. While military appellate courts have not returned to this issue since Dillard, it remains an important tool for defense counsel.¹²⁹ Post and command regulations often establish numerous procedures with which officials must comply before conducting searches or line-ups or effecting pretrial confinement, and counsel should thoroughly examine these regulations.¹³⁰

The third area in which compliance with regulations is important is the presentation of sentencing evidence from the accused's personnel files. Courts have ruled that records of nonjudicial punishment,¹³¹ letters of reprimand,¹³² civilian convictions,¹³³ and bars to reenlistment¹³⁴ are inadmissible if they are not kept in accordance with regulations. Compliance with government regulations is also important with regard to the admissibility of government documents as official records on the merits. This situation normally arises in AWOL cases when either morning reports or SIDPERS forms are used to prove the inception and

129. See United States v. Anderson, 12 M.J. 539 (AFCMR 1981) (Article 15 imposed in violation of Air Force regulation is invalid).

130. A violation of enlistment regulations, however, would not normally deprive a court-martial of jurisdiction. United States v. Buckingham, 11 M.J. 184 (CMA 1981); United States v. Lightfoot, 4 M.J. 262 (CMA 1978). See Article 2, UCMJ, Act of Nov. 9, 1979, Pub.L.No. 96-107, Title VIII, §801(a), 93 Stat. 810 (amending 10 U.S.C. §802 (1976)).

131. United States v. Brown, 11 M.J. 263 (CMA 1981); United States v. Molina, 47 CMR 753 (ACMR 1973).

132. United States v. Boles, 11 M.J. 195 (CMA 1981).

133. United States v. Cook, 10 M.J. 138 (CMA 1981).

134. United States v. Brown, supra note 131.

termination dates of an unauthorized absence. In order to be admissible as official or public records, such documents must be prepared in accordance with the applicable regulation.¹³⁵

Conclusion

A thorough knowledge of the law dealing with regulations is indispensable to the defense counsel. All aspects of the regulation -- its promulgation, publication, purpose, and relationship to other regulations and laws -- should be carefully reviewed since, in its haste to regulate, the government may hoist itself on its own petard.

135. Even if the document fails as an official record, it still may qualify as a business entry under Mil.R.Evid. 803(6). The rules regarding public records are adequately set forth in Rule 803(8) and its commentary. See Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 352-370 (1981); for earlier cases, see Muenster and Larken, Military Evidence, 216-223 (2d ed. 1978); Selby, Official Records and Business Entries: Their Use As Evidence in Courts-Martial and the Limitations Thereon, 11 Mil.L.Rev. 41 (1961). Articles dealing with AWOL include Gallant, SIDPERS: The Army's New Personnel Accounting System and Its Effect Upon Military Justice, The Army Lawyer, February 1975, at 5; O'Meara, Official Records of AWOL Cases: Does the Exception Destroy the Rule?, The Army Lawyer, November 1976, at 1.

NOW YOU SEE IT; NOW YOU DON'T - IMPLICIT REPEAL OF THE JENCKS ACT*

*By Fredric I. Lederer***

Since its enactment in 1957,¹ the Jencks Act² has been a valuable discovery device for the defense. In relevant part, the Act declares:

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in possession of the United States which relates to the subject matter as to which the witness has testified³

Although amended in 1970,⁴ the basic thrust of the Act has remained fixed: it provides the defense with the right to obtain statements made previously by government witnesses for defense use in cross-examination and protects

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1. Act of September 2, 1957, Pub. L. No. 85-269, 71 Stat. 595.
2. 18 U.S.C. § 3500 (1976).
3. 18 U.S.C. § 3500(b) (1976).
4. Act of October 15, 1970, Pub. L. No. 91-452, § 102, 84 Stat. 926. The 1970 amendments to the Act expanded its scope by deleting the prior requirement that to be disclosable the statements in government possession had to have been "made . . . to an agent of the government" and by including statements made before a grand jury within the ambit of the Act.

the government from what it would view as premature and unduly expansive disclosure of government information.⁵ The substantial quantum of litigation which has surrounded the Act has concerned the manner of its application⁶ with no changes in its overall direction until the decision of the United States Supreme Court in United States v. Nobles.⁷ In Nobles, the Court held that the federal district courts had inherent authority to require the defense to produce prior statements of its witnesses for use in cross-examination by the prosecution.⁸ As a result of the Court's decision in Nobles, the Advisory Committee on Criminal Rules of the Judicial Conference of the United States drafted amendments to the Federal Rules of Criminal Procedure with the intent of incorporating Nobles into the Federal Rules.⁹ These amendments were ultimately effective on 1 December 1980.¹⁰ Although highly controversial within the

5. The Jencks Act was enacted in response to the decision of the United States Supreme Court in Jencks v. United States, 353 U.S. 657 (1957). Prosecutors were particularly concerned that the Court's decision permitting trial judges to order disclosure of prior statements made by testifying government witnesses would compromise government files, permit harassment of government witnesses and aid in the fabrication of testimony. The Act attempted to strike a compromise between the defense and prosecution positions by limiting disclosure to defined "statements" after the completion of the direct testimony of the witness. See generally [1957] U.S. Code Cong. & Ad. News 1861.

6. See generally, Kesler, The Jencks Act: An Introductory Analysis, 13 The Advocate 391 (1981).

7. 422 U.S. 225 (1975) [hereinafter cited as Nobles].

8. Id. at 241.

9. See e.g., Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess., at 79-80 (1980) (Statement of Judge Walter E. Hoffman, Chairman, Advisory Committee on Criminal Rules).

10. Because of the controversial nature of the amendments, their effective date was delayed until 1 December 1980 in order for Congress to consider modifying them. Act of July 31, 1979, Pub. L. No. 96-42, 93 Stat. 326. Congress failed to take action, however, and the amendments automatically became effective on December 1, 1980.

civilian legal community,¹¹ the amendments went virtually unnoticed in the armed forces, no doubt because of the inapplicability of the Federal Rules of Criminal Procedure to courts-martial.¹² This is unfortunate because it is the thesis of this article that the promulgation of the amendments resulted in the repeal of the Jencks Act by operation of law.

Amendments to the Federal Rules of Evidence and the Federal Rules of Criminal Procedure are promulgated by the Supreme Court via express Congressional authority known generally as the Rules Enabling Acts.¹³ In relevant part, 18 U.S.C. § 3771 provides that when amendments to the Federal Rules of Criminal Procedure are made, "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Thus, 18 U.S.C. § 3771 constitutes an express repealer of any statute in conflict with the Federal Rules of Criminal Procedure the efficacy of which has been recognized by the Supreme Court.¹⁴ The threshold question then is whether the amendments to the Federal Rules of Criminal Procedure are "in conflict with" the Jencks Act. Resolution of this issue requires closer examination of the amendments and the Jencks Act.

Insofar as relevant to this topic, the critical amendment to the Federal Rules of Criminal Procedure was the recent promulgation of Rule 26.2, Production of Statements of Witnesses.¹⁵ The key provision of the Rule is paragraph (a), which provides that:

11. See, e.g., Hearings on H.R. 7473 and 7817, supra n.9; H.R. Rep. 96-1302, 96th Cong. 2d Sess. (1980).

12. Article 36(a), Uniform Code of Military Justice, 10 U.S.C. § 836(a) (1976). See n.29 infra.

13. 18 U.S.C. §§ 3771, 3772 (1976).

14. Davis v. United States, 411 U.S. 233, 241 (1973).

15. A new rule, Rule 17(h), was also created providing that statements of potential witnesses may not be subpoenaed from the parties except as permitted by Rule 26.2. Inasmuch as Rule 17(h) is dependent on Rule 26.2, primary attention must be focused on Rule 26.2.

After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.¹⁶

16. The remainder of Rule 26.2 is:

(b) PRODUCTION OF ENTIRE STATEMENT. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) PRODUCTION OF EXCISED STATEMENT. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) RECESS FOR EXAMINATION OF STATEMENT. Upon delivery of the statement to the moving party the court, upon application of that party may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

The most distinctive feature of Rule 26.2(a) is its expansion of the disclosure requirement of the Jenck's Act. Unlike the Jenck's Act which requires the prosecution to disclose to defense counsel statements relating to the subject matter of the testimony of a government witness, Rule 26.2(a) requires mandatory disclosure by both government and defense counsel of "any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified," even when the witness has been called sua sponte by the court. By expanding the disclosure requirement to defense counsel the rule arguably codifies Nobles into civilian criminal procedure,¹⁷ and significantly alters the scope of the Jenck's Act. In addition, Rule 26.2(a) raises a most interesting question of timing. The Jencks Act was enacted soon after the Supreme Court's decision in Jencks v. United States¹⁸ as a result of tremendous prosecution concern about the Court's

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(e) SANCTION FOR FAILURE TO PRODUCE STATEMENT.

If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) DEFINITION. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however, taken or recorded, or a transcription thereof, made by the witness to a grand jury.

17. Critics maintain that Rule 26.2 goes far beyond what was necessary to codify the court's position in Nobles. See, e.g. note 39 infra.

18. 353 U.S. 657 (1957) [hereinafter cited as Jencks].

holding that the defense had the right to examine prior statements of government witnesses in order to effectively cross-examine them. Although the nucleus of Jencks was retained in the subsequent statute, the prosecution was protected by 18 U.S.C. § 3500(a),¹⁹ which, as subsequently amended,²⁰ now states that:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.²¹

19. Congress determined that legislation was necessary to "clarify" Jencks in order to avoid general disclosure of government files and premature disclosure of material otherwise subject to disclosure. See e.g., [1957] U.S. Code Cong. & Ad. News 1864-68.

20. See n.4, supra.

21. The remainder of the Jencks Act, 18 U.S.C. § 3500, declares:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United

This prohibition is not duplicated in Rule 26.2. Rather, the Rule simply declares that after a witness testifies, "the court, on motion of a party who did not call the witness, shall order the attorney . . . to

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States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

produce . . . any statement of the witness"22 New Rule 17(h) declares that:

Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

Thus the Rule contains a mandatory disclosure provision of an ambiguous nature. It clearly mandates disclosure after direct examination, but does not necessarily prohibit earlier disclosure by court order.²³ Notwithstanding numerous declarations by its authors and critics to the effect that the Rule would simply incorporate the Jencks Act into the

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(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means -

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

22. Fed. R. Crim. P. 26.2(a).

23. Fed. R. Crim. P. 17(h) only prohibits the use of subpoenas rather than generally prohibiting early disclosure. Indeed it contemplates "production" of statements under Rule 26.2. Interestingly, 18 U.S.C. § 3500(a) (1976) prohibits early "subpoena, discovery, or inspection" of statements, while Rule 17(h) only prohibits use of subpoenas.

Federal Rules of Criminal Procedure, albeit with the Nobles expansion,²⁴ because the substance of the Act was better dealt with in the Rules, the omission of the Act's express prohibition on earlier release appears to permit that release.²⁵ One federal district court has in fact found that Rule 26.2(a) permits the court to order disclosure of statements before

24. Hearings on H.R. 7473 and H.R. 7817, supra n.9 at 87, 151; 217-19 H.R. Rep. 96-1303, 96th Cong., 2d Sess. 8 (1980). Note especially that Professor LaFave, Reporter of the Criminal Rules Committee, stated in a January 6, 1978, memorandum to that committee that:

I have not made any change regarding the time when the motion may be made. I would note, however, that the committee has discussed on prior occasions the desirability of moving the time forward to the outset of trial, which as I understand it, is often what actually occurs in practice.

Hearings on H.R. 7473 and H.R. 7817, supra n.9 at 215. See also H.R. Rep. 96-1303, 96th Cong., 2d Sess. 14 (1980).

25. Federal district court judges have ordered earlier release notwithstanding the Act. See e.g. Ogden v. United States, 303 F.2d 724 (9th Cir. 1962); United States v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980), rev'd, 667 F.2d 569 (6th Cir. 1982); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1976); United States v. Fine, 413 F. Supp. 740 (W.D. Wisc. 1976); United States v. Garrison, 348 F. Supp. 1112 (E.D. La. 1972); United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967). Cf. United States v. Holman, 490 F. Supp. 755 (E.D. Pa. 1980); United States v. Goldberg, 336 F. Supp. 1 (E.D. Pa. 1971). They would thus prefer that the Act's limitation on early disclosure be modified. The general weight of appellate authority, however, supports the proposition that 18 U.S.C. § 3500(a) does not permit earlier disclosure. See e.g. United States v. Algie, 667 F.2d 569 (6th Cir. 1982) and cases cited therein.

completion of direct examination.²⁶ If the Rule is so construed, that aspect of it alone may be sufficient to make the Rule "in conflict with" the Jencks Act. In summary, it appears clear that taken as a whole Rule 26.2 is "in conflict with" the Jencks Act. This conclusion is buttressed by a memorandum authored by Professor Wayne LaFave, Reporter to the Criminal Rules Committee, in which he indicated that what are now Rules 17(h) and 26.2 were intended as amendments to then pending Congressional legislation which was to expressly repeal the Jencks Act.²⁷

Once Federal Rule of Criminal Procedure 26.2 is found to be in conflict with the Jencks Act, that statute is repealed by operation of law.²⁸ In civilian life, that result is of little consequence because of the applicability of the Federal Rules of Criminal Procedure to civilian federal cases. The result in the armed forces is, of course, far different because Federal Rules of Criminal Procedure are not appli-

26. United States v. Algie, 503 F. Supp. 783, 799-810 (E.D. Ky. 1980), rev'd on other grounds, 667 F.2d 569 (6th Cir. 1982). In Algie, the trial court held that the Federal Rules of Evidence permitted earlier disclosure than permitted in 18 U.S.C. § 3500(a) (1976) and then, subsequent to the effective date of Rule 26.2 and the issuance of the opinion, included an "Addendum" stating that Rule 26.2(a) supported the court's result as Rule 26.2 had amended or repealed the Jencks Act. 503 F. Supp. at 796

27. Hearings on H.R. 7473 and H.R. 7817, supra n.9, at 215.

28. See 18 U.S.C. § 3771 (1976); See also note 26 supra.

cable to courts-martial²⁹ and certainly the statute, which was enacted without specific concern for the military, can hardly be retained in the armed forces solely because of the inapplicability of its successor to courts-martial.

29. Uniform Code of Military Justice, Article 36(a), 10 U.S.C. § 836(a) (1976) reads:

Pretrial, trial and post-trial procedures including modes of proof . . . may be prescribed by the President by regulations which shall so far as he considers practicable, apply principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Although the President has prescribed that amendments to the Federal Rules of Evidence are to become automatically applicable to courts-martial in the absence of action to the contrary by the President, Mil. R. Evid. 1102, the Federal Rules of Criminal Procedure are applicable to courts-martial only to the degree that the President so directs under Article 36. They are not self-executing. Similar result, however, could be reached by judicial incorporation of Rule 26.2. Thus, the Court of Military Appeals in *United States v. Weaver*, 1 M.J. 111, 117 (CMA 1975), applying then proposed Fed. R. Evid. 609(b) directly to courts-martial, stated that:

"As repeatedly held by this court, federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment."

(citing *United States v. Nivens*, 45 CMR 194 (CMA 1972); *United States v. Knudson*, 16 CMR 161 (CMA 1954); *United States v. Fisher*, 15 CMR 152 (CMA 1954)). To the degree that the court's language suggests automatic incorporation of the Federal Rules of Criminal Procedure absent express military justification to the contrary, it seems overbroad. The statement has its origins in *United States v. Fisher*, 15 CMR 152 (CMA 1954), in

Given both that the Jencks Act has been repealed, and that Rule 26.2 is not per se applicable to courts-martial, the substantial body of case law interpreting the Jencks Act is now technically obsolete and the Act is no longer binding on courts-martial. Thus the immediate question must be as to the effect of the repeal. With the repeal of the Act, it seems reasonable to conclude that the Supreme Court's original decision in Jencks³⁰ is now applicable to courts-martial.³¹ Although Jencks tech-

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which the court followed the federal waiver rule applicable when defense counsel failed to raise a confession issue at trial. None of the judges, two of whom concurred in the result only, ever suggested that the federal rule was considered binding as a matter of law. Although the court spoke in Nivens, 45 CMR at 197, and Knudson, 16 CMR at 164-65, as if the Fisher decision were being used as a holding, the result in both cases would have been reached simply by using federal practice as persuasive precedent. Even Weaver itself can be viewed as an exercise of the court's usual power based upon federal precedent. In short, notwithstanding the court's language, there appears to be no reason to believe that the court has declared that the Federal Rules of Criminal Procedure will automatically apply to courts-martial. The opinions do make it clear that the court could, in normal circumstances, incorporate civilian federal law into military practice as, indeed, it often has. Given the nature of military law, see note 38 infra, the degree of opposition to Rule 26.2 in the civilian legal community, and the significant legal questions rule raises in both the civilian and military context, however, it is questionable whether the court should incorporate Rule 26.2. See notes 41-43 infra and accompanying text.

30. 353 U.S. 67 (1957).

31. Although Congress limited the scope of the Jencks decision in the Jencks Act, 18 U.S.C. § 3500 (1976), it did not disturb the basic holding of the case - that the defense receive the prior statements of government witnesses for use in defense cross-examination. Consequently, it cannot be said that Congress rejected the Court's decision in Jencks; rather, it clarified its reach. See e.g., [1957] U.S. Code Cong. & Ad. News 1862.

nically dealt with the power of a federal district court,³² the Court of Military Appeals applied Jencks to courts-martial in 1958 in United States v. Heinel³³ indicating its acceptance of the Court's holding. Inasmuch as Jencks itself was a potentially wide-ranging decision, perhaps far more advantageous to the defense than either the statute or rule,³⁴ the real question must be how the Court of Military Appeals will interpret and apply Jencks. The court has indicated that it will normally follow federal practice in such a case unless it is "incompatible with military law or with the special requirements of the military establish-

32. The narrow holding of Jencks was that when the defense demanded specific documents for use in impeachment, the defense did not need to make an initial evidentiary showing that the documents were in fact inconsistent with the testimony of the witnesses, 353 U.S. at 666-67; and that the documents had to be given directly to the defense rather than initially submitting them to the trial judge for an initial judicial determination of relevancy and materiality, 353 U.S. at 668-69. The latter portion of the holding was modified by 18 U.S.C. § 3500(b) (1976). The Court in Jencks never used Constitutional authority, and the case has generally been viewed as an exercise of the Supreme Court's supervisory authority over the civilian Federal Courts; see e.g. United States v. Augenblick, 393 U.S. 348, 356 (1969); Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure 1235 n.j (4th Ed. 1974). Nevertheless, the Court's opinion has strong due process and confrontational overtones, and the Senate Committee on the Judiciary when reporting the Jencks Act seems to have viewed the nucleus of Jencks as being based upon due process. [1957] U.S. Code Cong. & Ad. News 1962.

33. 26 CMR 39, 49 (CMA 1958).

34. The very reason for the Jencks Act itself was to protect the government against judicial "misunderstandings" of the Court's decision in Jencks. According to the legislative history of the Act, there were enough such holdings to severely threaten the integrity of government files. See generally [1957] U.S. Code Cong. & Ad. News 1861-70. Given these opinions, it may well be that judicial application of Jencks, unrestrained by the Jencks Act or Rule 26.2, might well be invaluable to the defense in any specific case. Given the scope of the broad discovery that is commonplace in the armed forces, it is doubtful that application of Jencks proper would create systemic effects.

ment."³⁵ Because the Court is not bound by Rule 26.2 or any applicable Jencks Act precedents, and room exists for alteration in the present civilian rule when applied to courts-martial. To determine the effects of the Jencks Act repeal, therefore, the court must first construe the Rule and then determine whether it should be adopted in whole or in part in view of the unique nature of the military criminal legal system. The need for speedy trials should weigh heavily in any such decision.

At the very least, military judges should have the power to require government disclosure by the government of witness statements prior to the actual testimony of the witness, a conclusion supported not only by the text of the Rule but more importantly by the fact that the authors of Military Rule of Evidence 612³⁶ deliberately omitted the Jencks Act limitation found in Federal Rule of Evidence 612³⁷ because that limitation "would have shielded material from disclosure to the defense . . . [and] [s]uch shielding was considered to be inappropriate in view of the general military practice and policy which utilizes and

35. See e.g., *United States v. Weaver*, 1 M.J. 111, 117 (CMA 1975). See generally n.29 *supra*.

36. Writing Used to Refresh Memory.

37. Rule 612 permits an adverse party to inspect a writing used by a witness to refresh memory while testifying. Mil. R. Evid. 612(2) permits disclosure of a writing used to refresh memory "before testifying, if the military judge determines it is necessary in the interests of justice." This clearly involves statements subject to the Jencks Act, and the Federal Rule conditions the application of Fed. R. Evid. 612 upon compliance with 18 U.S.C. § 3500 (1976).

encourages broad discovery on behalf of the defense."³⁸ The defense may also argue that although Rule 26.2 and Jencks Act precedents may be persuasive, in view of military discovery policy they no longer represent a limit on defense discovery but rather a minimum requirement. Interview notes, for example, which would not qualify for disclosure under either the Act or the Rule, may now be disclosable to the defense. The repeal of the Jencks Act should not be regarded as an unmixed defense blessing, however. Although Rule 26.2 per se is inapplicable to courts-martial, the Supreme Court recognized in Nobles the power of a federal district court to order disclosure to the government of statements by defense witnesses. While Nobles is arguably applicable to courts-martial in any event even if the substance of Rule 26.2 is not adopted, it should particularly apply when Jencks is invoked on behalf of the defense. Thus, added impetus may have been given to prosecution discovery of defense evidence by the repeal of the Jencks Act. In so suggesting, however, it is important to recognize that Nobles has been interpreted by many commentators to be a very limited decision, and Rule 26.2 should not be considered its analogue.³⁹ Furthermore, defense disclosure under Rule 26.2 could delay trials, and raises troubling legal questions under both civilian and military law.

The sub silentio repeal of the Jencks Act can be expected to be the subject of a significant amount of litigation. Though unavoidable in one sense,⁴⁰ perhaps the most effective solution is the immediate amendment of the Manual for Courts-Martial. The solution, however, may

38. Analysis of the 1980 Amendments to the Manual for Courts-Martial, MCM, 1969 (Rev. ed) A18-93.

39. See e.g., Pulaski, Federal Rule 26.2 and the New Mutuality of Discovery: Constitutional Objections and Tactical Suggestions, 17 Crim. L. Bull. 285, 288-95 (1981) [hereinafter cited as Pulaski].

40. The Military Rules of Evidence were effective on 1 September 1980, and Congress was expected to modify then proposed Fed. R. Crim. P. 26.2. Consequently, the Military Rules of Evidence, Change 3 to the Manual for Courts-Martial, would have been too early to encompass aspects of Rule 26.2. Further, the Jencks Act, although evidentiary in scope, is a discovery matter which would customarily be considered during revision of the discovery portions of the Manual.

not be the simple adoption of Rule 26.2. Although space does not permit an extended discussion of the potential problems with Rule 26.2, the Rule engendered incredible opposition and came close to Congressional rejection.⁴¹ Indeed, Judge Hoffman, Chairman of the Criminal Rules Advisory Committee, stated that in his opinion if the Committee had been aware of the degree of opposition, the Rule would never have been promulgated.⁴² Numerous constitutional objections have been raised to the Rule's requirement for defense disclosure including, among others, self-incrimination, confrontation, compulsory process, due process, and effectiveness of counsel concerns.⁴³ Within the military context, some of these concerns, particularly those dealing with effectiveness of counsel, may be particularly compelling, and aspects of Rule 26.2 may thus be "impracticable" within the meaning of Article 36 of the Code.⁴⁴

The demise of the Jencks Act can hardly be expected to make substantial changes in military legal practice. It does, however, open some avenues of interest for both defense and trial counsel, as well as the military judge,⁴⁵ while at the same time illustrating the need for continuous monitoring of changes in civilian criminal law.

41. See generally Hearings on H.R. 7473 and H.R. 7817, supra n.9; H.R. Rep. No. 96-1302, supra n.9; Pulaski, supra n.39. Both the American Bar Association and the Federal Public and Community Defenders opposed Rule 26.2.

42. Hearings on H.R. 7473 and H.R. 7817, supra n.9 at 100.

43. See n.41 supra.

44. See n.29 supra.

45. With the demise of the Jencks Act, the trial judiciary may now anticipate "Jencks Act" demands and may require disclosure in advance of the direct testimony thus eliminating the time consuming recesses usually required for counsel to read the material supplied and determine how best to use it.

SEARCH AND SEIZURE: A PRIMER

Part Nine: "Open Fields" and Bona Fide Emergency

Two of the "few specially established and well-delineated exceptions" to the rule that searches conducted without a search warrant are per se unreasonable under the Fourth Amendment¹ involve "open fields" and bona fide emergencies. They shall be considered seriatim.

"Open Fields": The Rule of *Hester v. United States*²

In what had been aptly described as a "rather laconic decision by Justice Holmes,"³ *Hester v. United States* held that the protections of the Fourth Amendment do not extend to observations or seizures made while a defendant is in "open fields." In *Hester*, revenue officers trespassed on the property of defendant's father, apparently having received information that "moonshine" whiskey was being illegally distilled on the premises. The officers did not have a search warrant. They concealed themselves some 50 to 100 yards from the house, a vantage point which allowed them to observe the defendant come out of the house and hand one Henderson a quart bottle. An alarm was given. The defendant went to a car standing nearby, took a gallon jug from it and both he and Henderson fled, with a revenue officer in pursuit. The defendant dropped his jug and Henderson threw away his bottle. The officers recognized the contents of each container as illegal "moonshine" whiskey. Another jar also containing whiskey was found outside the house. The Court found that no unconstitutional search and seizure had occurred and stated that:

1. *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978). In fact, the exceptions seem to be ever increasing "and the contents of the established exceptions are more amorphous than absolute." *United States v. Smeal*, 23 USCMA 347, 350, 49 CMR 751, 754 (1975).

2. 265 U.S. 57 (1924). The "open fields" exception is to be distinguished from the "plain view" doctrine. The "open fields" exception deals with a law enforcement official's right to be in a location which arguably is protected by the Fourth Amendment. The "plain view" doctrine, however, deals with the officer's right to seize that which he sees in plain view when he is in a location where he has a right to be. For a more detailed discussion of "plain view" see 13 *The Advocate* 357.

3. *United States v. Gustavo Diaz-Segovia*, 457 F. Supp. 260, 269 (D. Md. 1978).

The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers and effects," is not extended to open fields. The distinction between the latter and the house is as old as the common law (citation omitted).⁴

"Open fields" vis a vis Curtilage

Hester has been widely interpreted to prohibit the warrantless search of a residence and curtilage, while authorizing such a search of any area outside the curtilage.⁵ "Open fields" are thus defined in a negative fashion, i.e., any portion of the defendant's property which is not encompassed within his residence and curtilage. Curtilage has been defined "as the area immediately surrounding the residence, usually that portion of land commonly referred to as the 'family yard'."⁶ Whether a particular portion of the premises to be searched is within or without the curtilage is a question of fact. The facts to be considered include: "its proximity or annexation to the dwelling, its inclusion

4. Hester v. United States, 265 U.S. at 59.

5. United States v. Oliver, 657 F.2d 85, 86-87 (6th Cir. 1981); United States v. Hassell, 336 F.2d 684, 685 (6th Cir. 1964).

6. United States v. Oliver, 657 F.2d at 87. Curtilage has also been defined as "[t]he inclosed space of ground and buildings immediately surrounding a dwellinghouse A piece of ground commonly used with the dwelling house. A small piece of land, not necessarily inclosed, around the dwelling house, and generally includes the buildings used for domestic purposes in the conduct of family affairs For Search and Seizure purposes it includes those out buildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic enjoyment." Black's Law Dictionary, 346 (5th ed. 1979).

within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family."⁷

Some courts have applied a seemingly artificial, mechanical test to determine whether a warrantless search and seizure was conducted within or without the curtilage. In United States ex rel. Saiken v. Bensinger,⁸ the issue was whether a "goosehouse" located 400 feet from a farm dwelling was within the constitutionally protected curtilage. The court canvassed the Hester progeny in various jurisdictions and collected 13 cases which recited distances between the point of search and the dwelling house on the premises. It noted that in one case a search 80 to 90 feet away from the house was outside the curtilage,⁹ while in another case a search 210 to 240 feet away was held to be within the protected area.¹⁰ Bensinger dismissed the latter case as an aberration and extracted the following conclusion:

[T]he cases display a perfect symmetry and enunciate a clear rule: any outbuilding or area within 75 feet of the house is within the curtilage and any outbuilding or area further than 75 feet is outside the curtilage.¹¹

7. Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956), cert. denied, 76 S.Ct. 788 (1956). The Care guidelines have been fairly well accepted for ascertaining the curtilage. United States ex. rel. Saiken v. Bensinger, 546 F.2d 1292, 1296 (7th Cir. 1976).

8. 546 F.2d at 1292-1293. In Bensinger the defendant's farm contained 20 acres with all the residential and agricultural structures located on the south 5.5 acres. A house and some 14 outbuildings, including the "goosehouse" were located 400 feet from the house. The entire farm was surrounded by a fence. The "goosehouse" itself was enclosed with its own fence "for the purpose of containing the geese, and obviously not for the privacy of the dwellers in the house." Two portions of the farm driveway, a trailer parking area, a gate and at least one fence were between the dwelling house and the "goosehouse." Id. at 1297. The victim's body was found near the "goosehouse."

9. United States v. Minton, 488 F.2d 37 (4th Cir. 1973).

10. Walker v. United States, 225 F.2d 447 (5th Cir. 1955).

11. United States ex rel. Saiken v. Bensinger, 546 F.2d at 1297.

Trespass on "Open Fields"

Prior to 1967 the "original unlawful trespass on the [defendant's premises] was immaterial."¹² This was because the court's focal point was property, not people, and since the Fourth Amendment's protection did not extend to any area outside of the curtilage, trespassing in such area was of no concern to the court.¹³ For example, in United States v. Sims,¹⁴ agents stationed in an open field outside the curtilage made observations through binoculars of activity within the curtilage. The court held that "[i]nformation gained as a result of a civil trespass may lawfully be used as a basis for obtaining a search warrant so long as the trespass is limited to areas not a part of the defendant's curtilage."¹⁵

Katz v. United States,¹⁶ changed the focus of the Fourth Amendment and recognized that its protection against unreasonable searches and seizures extends to people and not simply "areas."¹⁷ The Court wrote:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹⁸

12. United States v. Salli, 115 F.2d 292 (2d Cir. 1940). See, e.g., United States v. Preisen, 96 F.2d 138 (2d. Cir. 1938).

13. Hester v. United States, 265 U.S. at 58-59.

14. 202 F. Supp. 65 (E.D. Tenn. 1962).

15. Id. at 66.

16. 389 U.S. 347 (1967).

17. Id. at 353.

18. Id. at 351-352 (citations omitted).

The expectation of privacy doctrine of Katz¹⁹ substantially modified the open fields exception. Katz established a two-prong test:

. . . there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'.²⁰

Perhaps no cases better illustrate the impact of Katz on the "open fields" exception than United States v. Oliver, and United States ex rel Gedko v. Heer, *supra*. In Oliver, the defendant was growing marijuana on a very remote area of his large farm. The government agents trespassed upon the defendant's property, detected the marijuana, and arrested the defendant. The civil trespass and search of the "open fields" were not prohibited under Hester; however, the court noted that the defendant had locked the gate which closed the private road to his property and had posted "No Trespassing" signs. The defendant's expectation of privacy was found to be both subjectively and objectively reasonable and the

19. United States v. Perez, 440 F. Supp 272, 287 n.4 (N.D. Ohio 1977). Compare United States v. Oliver, 657 F.2d 85, 87 (6th Cir. 1981) (Katz shifted the emphasis from common-law property distinctions to an inquiry in which the individual's reasonable expectations of privacy are the focal point) and United States ex rel. Gedko v. Heer, 406 F. Supp. 609, 614-615 (W.D. Wis. 1975) (Katz abolished reliance upon common law property concepts, including "open fields," and curtilage in search and seizure cases; Hester no longer has any independent meaning except to show that "open fields" were not areas in which one traditionally could have expected privacy) with United States v. Gustavo Diaz-Segovia, 457 F.Supp. 260, 269 (D.Md. 1978) (the "cases seem to indicate that despite the admonition in Katz that the Fourth Amendment protects people not places, property concepts have not been entirely ruled out of consideration by the courts in determining the legality of governmental intrusion into individual's property") and United States v. French, 414 F. Supp. 800, 805 (W.D. Okla. 1976) (Katz did not overrule Hester; "The doctrine of Hester retains its vitality").

20. Katz v. United States, 389 U.S. 347, 361 (1975) (Harlan, J. concurring).

conviction was reversed.²¹ The evidence would have been admissible had not Katz modified the doctrine.²²

In Heer²³ the defendant owned 160 acres of wooded, hilly land. It was enclosed by a fence which contained "No Trespassing" signs. Governmental agents, without consent, entered the property by climbing over the fence. They crossed open fields and concealed themselves about 300 to 400 feet from the house, where they were able to see and listen to the defendant and his wife make incriminating statements in their backyard. When the defendant was seen gathering marijuana bushes, the agents moved in and made an arrest. The government argued the applicability of the Hester "open fields" exception. The argument was rejected, the court concluding that the defendant's actions reflected an expectation of privacy on his land and that, objectively viewed, such an expectation was reasonable.²⁴ Katz, the court continued, should not be read restrictively.²⁵

Conclusion re the "Open Fields" Exception

Katz has modified the Hester decision significantly. Government agents may no longer trespass with impunity on a defendant's property.²⁶ Even the most restrictive reading of Katz holds that agents may not search dwellings or vehicles and, indeed, may not even peer into such structures or vehicles from "open fields" without first obtaining a search warrant.²⁷ The location of the intrusion by governmental agents is now one of several factors to be considered in evaluating the reasonableness of a defendant's expectation of privacy as to the activities

21. United States v. Oliver, 657 F.2d 85, 87 (6th Cir. 1981).

22. Id.

23. United States ex rel. Gedke v. Heer, 406 F. Supp. 609, 612 (W.D. Wis. 1975).

24. Id. at 614-615.

25. Id. at 614.

26. See note 19, supra, and accompanying text.

27. United States v. Gustavo Diaz-Segovia, 457 F.Supp. at 270.

carried on by the defendant in that place.²⁸ The determination whether an "open field" is within or without the protection afforded by the Fourth Amendment requires a careful examination of all the facts, and must be made on a case by case basis.²⁹

II. Bona Fide Emergency Exception

The bona fide emergency exception to the warrant requirement has its genesis in dictum found in a 1947 United States Supreme Court decision: "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."³⁰ Shortly thereafter, the Supreme Court suggested that such a circumstance might occur "where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law."³¹ Over the years, the doctrine has been expanded and applied in numerous circumstances.³²

In United States v. Smeal,³³ the Court of Military Appeals held that policemen who received a telephone call that the accused's wife had

28. United States ex rel. Gedke v. Heer, 406 F.Supp. at 615.

29. Id.

30. Johnson v. United States, 333 U.S. 10, 14-15 (1947).

31. McDonald v. United States, 335, U.S. 451, 454 (1948).

32. See, e.g., United States v. Barone, 330 F.2d 543 (2d. Cir. 1964), cert. denied, 377 U.S. 1004 (1964) (policemen entered a room in a boarding house because they heard screams emanating therefrom; the screams were from a man, and the policemen were justified in entering and investigating even though two females who answered the door assured them that nothing was wrong); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), cert. denied 375 U.S. 860 (1963) (forcible entry permitted as it may have been to aid an unconscious or dying woman); People v. Neulist, 43 App. Div. 2d. 150, 350 N.Y.S. 2d 178 (1973) (police called to home of defendant and victim, because latter found dead in bed; police remained at the house after body removed; within an hour the police were informed that the decedent was a homicide victim; they then seized items in the bedroom where the victim was initially found).

33. 23 USCMA 347, 49 CMR 751 (1975).

shot herself could, as an exception to the rule that entry without a warrant is per se unreasonable: (1) enter the home without a warrant, and (2) remain at the home even after the emergency which had authorized their entry was terminated by the wife's removal to a hospital. Further, the court held that other investigators could enter the house without a warrant, and investigate the possibility that the shooting of the accused's wife may have been a criminal act.³⁴ Evidence found during the course of that investigation was held admissible.

Not only may a police officer properly on the scene investigate the circumstances on behalf of an apparent victim, it has been stated that an affirmative obligation to do so exists.³⁵ The existence of a bona fide emergency³⁶ justifying the warrantless entry is less difficult to establish than either the extent or timing of the investigation made subsequent

34. Id. at 351-356; 49 CMR at 755-760. The investigator in Smeal testified that during the course of his investigation he observed blood in the bathtub. He was informed that blood was also seen in other parts of the house, including on a telephone in the bedroom. He went into the bedroom and observed spots on the floor "that appeared to be blood that had been wiped up." A security policeman, hearing about the spots, went into the bedroom to look at them. While there, he observed a typewriter through the open door of a closet; he could distinguish the characteristics of the typewriter and knew they matched those of typewriters which had been reported stolen. The policeman moved the machine in order to expose its serial number. The policeman then left the bedroom and told an OSI agent about his observations. The agent went into the bedroom, looked at the typewriter and made a note of the serial number. It was subsequently determined that the typewriter was stolen and Sergeant Smeal was charged with and convicted of its theft. Id. at 348-350; 49 CMR at 752-754.

35. United States v. Rodriguez, 8 M.J. 648, 653 (AFCMR 1979); United States v. Barone, 330 F.2d 543 (2d. Cir. 1964); People v. Neulist, 43 App. Div. 2d. 150, 350 N.Y.S. 2d. 158 (1973).

36. The existence of a bona fide emergency is apparently dependent on whether there are any exigent circumstances. See United States v. Hoffman, 607 F.2d. 280 (9th Cir. 1979). In Hoffman police officers entered appellant's trailer and seized a shotgun after being told by firemen, who had just extinguished a fire there, that they had found the weapon. The court ruled the entry improper inasmuch as the police did not enter to aid in extinguishing the blaze, which was already under control, and the evidence was not in danger of being destroyed.

to entry. While government agents need not shut their eyes to items which are in plain view and may make a reasonable investigation into an apparent crime,³⁷ they may not rummage about the premises hoping to turn up contraband or incriminating evidence.³⁸ Further, the time which elapses between entry and investigation is of importance: officials may secure the area, have the victim removed, and continue with the investigation,³⁹ but they may not depart the premises and subsequently re-enter to conduct a delayed search.⁴⁰

Conclusion re Bona Fide Emergency Exception

It has long been the rule that "police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance."⁴¹ A forcible entry is permissible even if the person in distress is not on the premises, so long as the officers reasonably believe that the person is in the dwelling and in need of assistance.⁴² However, entry may not be made without a warrant if the officers know

36. (Continued)

Although the term "emergency" was not used, the court's holding equated to a finding that no emergencies existed.

In *Mincey v. Arizona*, 437 U.S. 385, 393 (1978), the Supreme Court held that a search which continued for four days after a homicide investigation began could not be justified as an emergency search.

37. *United States v. Rodriguez*, 8 M.J. 648, 652 (AFCMR 1979).

38. *United States v. Gray*, 484 F.2d 352 (6th Cir. 1973).

39. *United States v. Smeal*, 23 USCMA 347, 49 CMR 751 (1975); *People v. Neulist*, 43 App. Div. 2d. 150, 350 N.Y.S. 2d. 158 (1973).

40. *Preston v. United States*, 376 U.S. 364 (1964).

41. *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971); accord, *United States v. Rodriguez*, 8 M.J. 648, 652 (AFCMR 1979).

42. *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963).

for a fact that the victim is not in the dwelling.⁴³ Once entry is properly made, the officers may remain on the premises and conduct an investigation. The failure to maintain a continuing presence at the scene subsequent to a proper entry will preclude government officials from re-entering and conducting a delayed investigation.

43. In *Root v. Gauper*, 438 F.2d. at 365, the victim called the telephone operator, stated that his wife had shot him, and requested an ambulance. An ambulance driver and two law enforcement officials were notified, and each headed for the victim's house separately. The ambulance driver arrived first, removed the victim from the house and placed him in the ambulance, and was on his way to the hospital when he saw the law enforcement officials driving toward the victim's house. The ambulance driver informed them by radio that he had removed the victim from the house and was on his way to the hospital. The law enforcement officials proceeded to the house and entered it by an unlocked door. Inside they found a shotgun and some shells. The evidence should have been excluded because the officers in fact had no reasonable belief that an emergency existed at the time they entered the house. Id.

ETHICS ROUND TABLE

In this installment of Ethics Round Table, the staff of The Advocate examines the ethical responsibilities attending the impeachment of prosecution witnesses known to be testifying truthfully.

Facts

As defense counsel for Private Jones, you have discovered that an important government witness, Specialist Four Smith, was convicted in a civilian court several years ago for embezzlement. This information would certainly be useful when cross-examining Smith because of its tendency to show the witness to be dishonest. Its impact is even more beneficial, however, because you are certain that the witness is emotionally unstable and would break down if questioned about the incident. You are uncertain, however, whether you can use the evidence, inasmuch as your client has told you that Smith's expected testimony is the truth. Moreover, Smith has concealed his conviction during the course of his enlistment from his fellow service members, friends and most of his family. Revelation of this information would have a detrimental impact on Smith's personal life and on his future in the military.

Discussion

A defense counsel's knowledge that a prosecution witness is testifying truthfully has always been a factor to be considered when both determining whether to impeach the witness and determining which method is to be used. Concern with the witness' veracity is especially important where the method of impeachment would have a detrimental impact on the witness. Professional standards have always urged the attorney to avoid needlessly harassing or degrading a witness in the process of providing a zealous defense. See Model Code of Professional Responsibility, [hereinafter cited as Model Code] DR 7-102(A)(1), DR 7-106(C)(2), and EC 7-25. An attorney should be cognizant of the rights of third parties. See Model Rules of Professional Conduct, Rules 3.4 and 4.4.

In the past it was generally felt that it was improper to use cross-examination to destroy truth, or to seek to confuse or embarrass a witness. See ABA Standards Relating to the Defense Function, Section 7.6 commentary (1976); The Army Lawyer, page 4 (December 1977). Public policy, it was argued, required that truthful witnesses be encouraged to testify without fear of public embarrassment. Id. The relevant standard, therefore, originally read that defense counsel "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully."

ABA Standards for Criminal Justice: The Defense Function [hereinafter cited as The Defense Function or ABA Standards] Standard 4-7.6 (2nd Edition 1980) (history of standard).

Under the recently promulgated ABA Standards, the relevant section now provides:

- (b) A lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into account. (emphasis added).

The Defense Function, Standard 4-7.6.

Although the factors discussed above are still relevant, the original standard was changed to make it clear that "it is permissible, if necessary, for defense counsel to cross-examine vigorously witnesses who are believed or known to be testifying truthfully." See The Defense Function Standard 4-7.6 and related commentary (emphasis added). Under this standard, counsel are to vigorously cross-examine a truthful witness, bearing two ethical considerations in mind: (1) it should be done only if necessary to the defense, and (2) if possible, the advocate should avoid confusing and embarrassing the witness.* Where the defense's alternatives are limited and the defendant nevertheless wishes to put the prosecution to its burden, the decision not to attack a witness' credibility would essentially deny the defendant an effective defense. Such a failure has been cited as a factor in finding that a defense counsel was ineffective. See Moore v. United States, 432 F.2d 730 (3d Cir. 1970). Additionally, where the defense counsel has learned of the truth of the witness' testimony solely because of the defendant's statement, his failure to use it would violate ethical considerations since he would in effect be using the statements against the client. See Model Code EC 4-5.

*ABA Standard for Criminal Justice: The Prosecution Function, Standard 3-5.7 (2d edition 1980) imposes a stricter standard on the prosecutor and cautions him to "not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." Cf. United States v. Logan, 12 M.J. ____ (ACMR 1982) (rehearing required by prosecutor's efforts to support the credibility of a government witness regarding testimony he knew was false).

Under the facts of this case, the defense counsel must impeach Smith if not doing so would jeopardize the defense. The defense counsel would have to evaluate the contribution Smith will make to the truth-finding function of the trial in light of the damage to the witness. From the commentary accompanying the new standard it appears that a direct balancing is not appropriate and that the attorney's duty to his client is the paramount consideration. Any attack on Smith should, of course, take into account the tactical consequences of the members' adverse reaction to undue humiliation of the witness.

PROPOSED INSTRUCTION

Eyewitness Identification

In a previous "Side Bar" feature, the staff of The Advocate endorsed the use of the Model Special Instructions on Identification proposed in United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972). See 13 The Advocate 437 (1981); see also Brower, Attacking the Reliability of Eyewitness Identification, 12 The Advocate 62 (1980). That instruction is set forth below, and where identification is an issue, defense counsel should request that it be presented to the court members:

One of the most important issues in this case is the identification of the accused as the perpetrator of the crime. The government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the accused before you may convict him. If you are not convinced beyond a reasonable doubt that the accused was the person who committed the crime, you must find the accused not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness saw or knew the person in the past.

[In general, a witness bases any identification he makes on his perception through use of his senses. Usually the witness identifies an offender by the sense of sight - but this is not necessarily so, and he may use other senses.]*

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the accused was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the accused, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the accused out of a group of similar individuals is generally more reliable than one which results from the presentation of the accused alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of the accused, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness. Consider whether he is truthful and whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

*Sentence in brackets ([]) to be used only if appropriate. Instructions may be inserted or modified as appropriate to the proof and contentions.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the accused as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the accused not guilty.

Several circuits now require special jury instructions on identification testimony when the defense counsel requests them or when the evidence indicates a danger of misidentification. See United States v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1975) (trial court required to instruct jury concerning dangers of mistaken identity and failure to give instructions substantially equivalent to District of Columbia Circuit model instructions viewed with grave concern); United States v. Barber, 442 F.2d 517, 528 (3d Cir. 1971) (requiring jury instruction that identification testimony be received with caution and scrutinized with care unless witness had good opportunity to observe accused and identification was positive, was not weakened by prior failure to identify or prior inconsistent identification, and remained positive and unqualified after cross-examination), cert. denied, 404 U.S. 958 (1971); cf. United States v. Dodge, 538 F.2d 770, 784 (8th Cir. 1976) (court will closely scrutinize failure to give cautionary instructions when identification based solely or substantially on eyewitness testimony; Telfaire model instructions not expressly adopted), cert. denied, 429 U.S. 1099 (1977); United States v. Holly, 502 F.2d 273, 275 (4th Cir. 1974) (substantial equivalent of Telfaire model instructions required when only evidence identifying defendant is eyewitness testimony). But cf. United States v. Scott, 578 F.2d 1186, 1191 (6th Cir.) (model instruction not required when identification corroborated by nonidentification evidence), cert. denied, 439 U.S. 870 (1978).

Other circuits have declined to impose such a requirement, or have made it less stringent. See, e.g., United States v. Kavanaugh, 572 F.2d 9, 12-13 (1st Cir. 1978) (model instruction not required even when appropriate and failure to give instruction not reversible error when independent evidence connected defendant with crime); United States v. Amaral, 488 F.2d 1148, 1151 (9th Cir. 1973) (jury instruction that

identification testimony be received with caution or suggesting inherent unreliability of eyewitness identification not required); United States v. Evans, 484 F.2d 1178, 1188 (2d Cir. 1973) (refusal of request for special instructions not error when full opportunity afforded to develop all facts relevant to identification); McGee v. United States, 402 F.2d 434, 436 (10th Cir. 1968) (jury instructions that prosecution must prove defendant's guilt beyond reasonable doubt sufficiently address issue of mistaken identification). Nevertheless, the decisions requiring special instructions on identification reflect a developing perception of the crucial role eyewitness testimony often plays in criminal trials.

SIDE BAR

Speedy Trial: Novel Prejudice

In the March - April 1981 issue of The Advocate, Major Nagle addressed the issue of demonstrating prejudice in "speedy trial" cases. See Nagle, Demonstrating Prejudice In "Speedy Trial Cases", 13 The Advocate 2 (1981). In a recent court-martial, the military judge granted a defense motion for dismissal on 6th Amendment grounds. The accused was charged with the possession and use of marijuana. Charges were preferred on 22 April 1981, but the accused wasn't brought to trial for five months. There was no pretrial confinement or restriction. During the Article 32 investigation and on several occasions thereafter, the defense counsel requested expeditious disposition of the case, and later, submitted a written request for speedy trial. Upon raising the motion at trial, the defense counsel was unable to demonstrate any prejudice in terms of trial preparation. Instead, through the testimony of the accused and his wife, the following aspects of personal prejudice to the accused were demonstrated in specific detail:

(1) Family life hardship: Due to his pending ETS, the household goods of the accused were shipped to the U.S. prior to trial. Consequently, the accused's children had to sleep on the floor, and encountered considerable disruption in their personal lives.

(2) Financial hardship: The accused also faced a rent increase after the expiration of his normal lease, since he could not rotate, thus necessitating a loan. Due to staying beyond his ETS, a short term extension on his auto insurance at a higher rate was also necessary.

(3) Psychological damage: The accused's wife testified that the accused's mental and physical health had deteriorated while waiting trial, and that their conjugal relationship had suffered.

In opposition to the motion, the government relied on United States v. Shy, 10 M.J. 582 (ACMR 1981); United States v. Rachels, 6 M.J. 232 (CMA 1979); United States v. Amundson, 49 CMR 598 (CMA 1975); and United States v. Nelson, 5 M.J. 189 (CMA 1978). However, these government cases may be distinguished on the following grounds:

- (1) No prejudice to the accused was occasioned by the delay;
- (2) No demand for speedy trial had been made prior to trial;
- (3) There were extraordinary difficulties encountered by the government in preparing for trial (overseas witness problems, etc.)

In dismissing the charges the military judge found that the length of the delay was inordinate, that the accused had consistently asserted his right to a speedy trial and that he had been prejudiced. It should also be added that the government was unable to demonstrate any cogent reason for the delay.

The aggressive demonstration of prejudice at trial will establish a record for appeal, and may result in immediate relief at the trial level.

Post Conviction Remedies

Clients at all levels of courts-martial are often interested in what happens to them after the military justice system is through with them, how they can get out of the system sooner, or how they can alleviate certain aspects of their sentences.¹

Virtually all clients receive the following information if their case is appealed to the Court of Military Review. The advice may often be more timely — and of greater assistance to the client -- if it is rendered immediately after sentencing at all levels of courts-martial. Needless to say, not all post-conviction remedies will be applicable to every client.²

a. All individuals confined in the Disciplinary Barracks, or in other federal correctional facilities as a result of a court-martial sentence, may request clemency from the Commandant of the USDB or from the Army Clemency Board. Restoration to duty will be considered only upon written application.³ Clemency requests to the Commandant should be addressed and sent directly to:

1. For a more detailed review of many post-conviction remedies, attorneys should see Reardon and Carroll, *After The Dust Settles: Other Modes of Relief*, 10 *The Advocate* 274 (1978).

2. Paragraph 6-19, Army Regulation 190-47, Military Police - The United States Army Correctional System (Cl, 1 Nov. 80) outlines Army policy pertaining to mitigation, commutation, remission and suspension of sentences adjudged by courts-martial; paragraph 6-19c outlines the powers of the Secretary of the Army; paragraph 6-19d governs the powers of the Judge Advocate General, the Commandant of the USDB, and the powers of commanders of various levels.

Attorneys should also familiarize themselves with Chapter 6, Section IV, AR 190-47, regarding clemency and temporary parole.

3. Id.

Commandant
U.S. Army Disciplinary Barracks
U.S. Army Combined Arms Center
Fort Leavenworth, Kansas 66027

No particular form or format is required for such a request, and letters or other supporting documentation from ministers, family, friends, or employers, may be attached.

Clemency requests to the Army Clemency Board are governed by Army Regulation 15-130. This request for clemency should be addressed and sent to:

Department of the Army
ATTN: Army Clemency Board
Washington, D.C. 20310

The Army Clemency Board is located in the Pentagon, Room 1E486, and may be contacted at (202) 697-7775.

b. For individuals seeking to appeal further a special court-martial in which a punitive discharge was adjudged, the Army Discharge Review Board (ADRB) may review the case to determine if an error or injustice has occurred. To present the case to the ADRB, a DD Form 293 must be filled out completely in accordance with Army Regulation 15-180 (see especially Appendix B-2(1)), and forwarded through USARCPAC if the punitive discharge has been issued, and directly to the Discharge Review Board, if it has not. The addresses of these organizations are:

U. S. Army Reserve Components Personnel and
Administration Center
St. Louis, Missouri 63132

Department of the Army
ATTN: Army Discharge Review Board
Washington, D.C. 20310

The Discharge Review Board is located in the Pentagon, Room 1E489, and may be contacted at (202) 695-4682.

c. For individuals tried by general court-martial, or if their application to the ADRB has been denied, a petition may be filed with the Army Board for Correction of Military Records. An application for review to the ABCMR must be made on a DD Form 149, which must be filled out in accordance with the instructions in Army Regulation 15-185 (see especially Section III, para. 6). This application should be addressed and sent to:

Department of the Army
ATTN: Army Board for the Correction of Military
Records
Washington, D.C. 20310

This board is located in Room 1E512 at the Pentagon, and may be contacted at (202) 695-4298.

d. Relief may be requested directly from the Secretary of the Army under the provisions of Article 74, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §874 (1976), either seeking a suspension of all or part of the sentence (Art. 74(a)), or substitution of an administrative discharge for the punitive discharge (Art. 74(b)).

Applications for relief to the Secretary of the Army do not require any particular form or format, and like applications to the Commandant of the USDB, may include any forms of documentation, with as much favorable information as possible. If your client is requesting this type of relief, he should include the following: "Under the provisions of Article 74, UCMJ, I am requesting . . ." The letter, along with any attachments should be sent directly to:

Secretary of the Army
Department of the Army
Washington, D.C. 20310

e. Finally, after the expiration of three years from release from confinement, a client may wish to apply for the highest form of clemency available, the Presidential Pardon. The President has the constitutional power to grant pardons for federal offenses. While the pardon signifies forgiveness for an offense, it does not change the nature of a discharge, nor will it expunge a record of conviction. A presidential pardon does, however, relieve the recipient of legal disabilities attached to a conviction by reason of federal law. Whether or not an accused has lost any state civil rights as a consequence of a federal conviction depends entirely upon the laws of the state in which he resides or attempts to exercise such rights. The presidential pardon may, however, be compelling evidence when a client petitions state authorities to restore such rights.

The basis on which a pardon is usually granted is the demonstrated good conduct of the petitioner for a certain period of time after release from confinement. Among the factors considered are any subsequent arrest record, financial and family responsibilities, and reputation in the community. These and other relevant considerations are carefully reviewed to

determine whether the petitioner has become and is likely to continue to be a responsible, law-abiding person. An information packet concerning a petition for Presidential Pardon may be obtained from:

Pardon Attorney
United States Department of Justice
Office of the Pardon Attorney
Washington, D.C. 20530

Upgrading of Military Administrative Discharges

Available from the Veterans' Education Project is a looseleaf manual on the upgrading of military discharges. Of particular interest to counsel in the field are the chapters which discuss post-discharge appellate practice, with very useful information as to how the best record may be developed at the administrative board hearing level.

For instance, counsel are frequently confronted with hearsay evidence at an elimination hearing. Some courts have held that written witness statements deny the servicemember's right to confront and cross-examine a witness. An objection to the proposed statement's admission prior to the convening of the board and a request for the production of the witness will preserve the issue for appeal. This is but an isolated example as to how the manual, which is replete with regulatory and case citations, could be of assistance to the defense counsel in the field.

Requests for this manual should be addressed to:

Veteran's Education Project
Department M
1346 Connecticut Ave. N.W.
Washington, D.C. 20036

The price of the manual is \$75.00 for government offices.

CASE NOTES

Synopses of Selected Military, Federal, and State Court Decisions

COURT OF MILITARY REVIEW DECISIONS

SENTENCE: Death Penalty, Forfeitures

United States v. Matthews, ___ M.J. ___, CM 439064 (ACMR 17 March 1982).
(ADC: CPT Russelburg)

The accused was sentenced to death for premeditated murder and rape. The court found Article 118, UCMJ and the system of sentencing and appeal in the military to be sufficient to allow capital punishment under Furman v. Georgia, 408 U.S. 238 (1972). The eight judge majority found the military system substantially similar to that approved in Jurek v. Texas, 428 U.S. 262 (1976). Concluding that Jurek required no finding of aggravating circumstances other than those pleaded and proved during the case-in-chief, the majority held the court-martial's finding of premeditation to be a sufficient limitation on the murders for which capital punishment is authorized. It analogized the process of review by the convening authority and the courts to the expedited procedures in those states which have constitutional statutes.

Four judges dissented. The principle dissent reasoned the court members' attention was not focused on the aggravating factor during their deliberation on sentence, and that this defect prevents the appellate authorities from determining whether the death sentence was the result of arbitrary or freakish decisions. Another dissent concluded that premeditation was not such a concrete or meaningful factor that it should distinguish between who should die and who should live.

However, an eight judge majority also disapproved the convening authority's action applying the adjudged total forfeitures as of the date of action, since confinement at hard labor was not adjudged. Confinement is part of a death sentence only as a necessary incident to the execution of that sentence and not as a punishment unto itself. Since forfeitures may not be applied to a servicemember not confined under Article 57, UCMJ, they may not be applied to a person confined only because of a death sentence.

This case will be subject to mandatory review by the Court of Military Appeals under Article 67(b)(1), UCMJ.

JURISDICTION: Discharge and Reenlistment

United States v. Horton, CM 439334 (ACMR 15 March 1982) (unpub.).
(ADC: CPT Castle)

The accused reenlisted prior to his ETS, completing all the necessary incidents by 28 August 1979. He was given prospective effective dates of discharge and reenlistment of 29 and 30 August 1979, respectively. The discharge was given only for the purpose of reenlistment and the prospective dating of the orders was purely administrative. The court relied on United States v. Noble, 13 USCMA 413, 32 CMR 413 (1962) and United States v. Solinsky, 2 USCMA 153, 7 CMR 29 (1953) holding that there had been no actual return to a civilian status, and thus that military jurisdiction continued for offenses committed during the earlier enlistment. United States v. Ginyard, 16 USCMA 512, 37 CMR 132 (1967) was distinguished as there the accused was discharged and subsequently reenlisted without having completed the incidents of reenlistment prior to his discharge. The offenses involved did not qualify under Article 3(a), UCMJ.

POST-TRIAL REVIEW: Improper Matters

United States v. McCray, CM 440167 (ACMR 26 February 1982) (unpub.).
(ADC: CPT Brower)

In an addendum to his Post-Trial Review, the staff judge advocate mentioned that the accused had failed a polygraph examination, taken voluntarily after he made conflicting statements to CID. The court directed a new review and action, holding that it is permissible for a convening authority to consider the results of a polygraph examination to insure that no injustice is done to the accused, but such evidence may not be used to bolster findings of guilty. What may be used in favor of an accused may not always be employed against him. Since this error was committed in an addendum to the post-trial review submitted in response to a Goode rebuttal, the waiver rules of United States v. Goode, 1 M.J. 3 (CMA 1975) are inapplicable.

EVIDENCE: Relevance of Prior Conviction

United States v. Saxon, NMCM 81-1298 (NMCMR 22 February 1982) (unpub.).
(ADC: LCDR Warden, USN)

To prove that Saxon was a deserter, the government showed that he had escaped from lawful confinement by introducing documents reflecting his conviction and sentencing by general court-martial. The documents

revealed that Saxon had been convicted of AWOL, wrongful appropriation of a motor vehicle, and voluntary manslaughter. The defense had no objection to the court members learning the accused was in confinement at the beginning of his absence (he pleaded guilty to AWOL as a lesser included offense and to escape from confinement), but did object to their being aware of the specific offenses for which that confinement was imposed. The court agreed that these portions of the exhibits should have been kept from the court, citing Mil.R.Evid. 403 and United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976).

FEDERAL COURT DECISIONS

APPREHENSION: Probable Cause

United States v. Morin, 665 F.2d 765 (5th Cir. 1982).

Morin aroused police attention through his actions in purchasing a plane ticket from Miami to Dallas/Ft. Worth; he fit a drug courier profile used by agents to identify drug traffickers. A background check revealed previous narcotics convictions. At the Dallas/Ft. Worth airport, a drug detection dog failed to provide probable cause for a search of Morin's luggage, and Morin declined to consent to a search. He proceeded to Austin where he was approached in a men's room. Morin "was literally caught with his pants down in an otherwise empty public bathroom." While Morin stood before a urinal, he was surrounded by four agents, one of whom told him he was a suspect, confiscated his airline ticket and asked for his identification. The court held that "successive stops of an individual based on the same information strongly indicate a finding that an arrest has taken place." Since the arrest was unsupported by probable cause, all fruits thereof had to be suppressed.

EVIDENCE: Relevance of Co-Conspirator's Conviction

United States v. Jimenez-Diaz, 659 F.2d 562 (5th Cir. 1981).

In a conspiracy trial, the prosecutor called a co-conspirator who had previously pleaded guilty to the conspiracy. Cross-examination created the impression that this co-conspirator had bought his freedom by agreeing to testify. The judge then informed the jury that this co-conspirator had previously pleaded guilty. The court held that the guilty plea of a co-conspirator is admissible where the defense itself has created the false impression that the co-conspirator went completely free from prosecution, that such evidence was not more prejudicial than probative under the circumstances, and that the judge did not stray from his neutrality by disclosing the clarifying information himself.

WITNESS: Waiver of Confrontation Rights

United States v. Thevis, 30 Crim.L.Rep. 2373 (5th Cir., 11 January 1982).

The defendant murdered a key government witness prior to trial, but after that witness had testified at a grand jury proceeding. The murder was demonstrated by clear and convincing evidence and was held to operate as a waiver of any objection to the admission of the testimony on hearsay or Sixth Amendment grounds. The testimony from the grand jury proceeding was admitted even though it may not have met the foundational requirements of Fed.R.Evid. 804(b)(5). The court reasoned that both the hearsay rule and the Sixth Amendment's Confrontation Clause were designed to protect the same interest: the defendant's need to confront witnesses against him. Since it was the defendant who prevented the witness from testifying, he waived the right to confront that witness.

STATE COURT DECISION

SEARCH AND SEIZURE: Exigent Circumstances

People v. Riegler, 179 Cal.Rptr. 530 (Cal. Ct. App. 30 Dec. 1981).

Interpreting New York v. Belton, ___ U.S. ___, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the court held that, even where a sealed opaque container could have been opened lawfully at the time it was seized, a delay of five hours before opening it can render the search invalid. Riegler received packages which were known by investigators to contain hashish. A search warrant had been issued for the seizure of the packages if they were found at a specific location, but when the warrant was executed the package had been removed to another place by Riegler. He was stopped about 100 miles away and arrested. The packages were seized and taken to a police office where they were opened without a warrant. The court concluded that Belton permits the warrantless search of containers found within the passenger compartment of an automobile only if it is contemporaneous with the arrest of the automobile's occupants. Neither the fact that the police could have lawfully searched at the time of seizure nor their having obtained a warrant for the search of the original location of the packages was found to effect this result.

Notice

Readers who desire copies of unpublished military decisions in case notes, may obtain them by writing Case Notes Editor, The Advocate, Defense Appellate Division, United States Army Legal Services Agency, Nassif Building, 5611 Columbia Pike, Falls Church, VA 22041, or by telephoning Autovon 289-2247 during duty hours or 289-2277 during off duty hours.

USCMA WATCH

Synopses of Selected Cases in Which The Court of Military Appeals Granted Petitions for Review or Entertained Oral Argument

During March and April 1982, the Court granted petitions for review on a wide variety of issues ranging from whether the existence of prior non-judicial punishment can be proved by testimony of a CID Investigator, United States v. McGill, ACMR 440661, pet. granted, ___ M.J. ___ (CMA 7 April 1982), to whether a supervising authority's 321-day delay in approving a conviction violates military due process, United States v. Sutton, NCMR 81-1944, pet. granted, ___ M.J. ___ (CMA 15 March 1982).

The Court also continued to grant petitions for review in cases involving cocaine offenses, United States v. Logan, AFCMR S25324, pet. granted, ___ M.J. ___ (CMA 18 Mar 1982) and failure to assign errors before the courts of Military Review, United States v. Riggs, AFCMR S25232, pet. granted, ___ M.J. ___ (CMA 15 March 1982) and United States v. Hullum, NCMR 81-0112, pet. granted, ___ M.J. ___ (CMA 11 March 1982).

SUMMARY DISPOSITIONS

MULTIPLICITY

The Court continues to dismiss multiplicitous charges summarily, even where there was no objection or motion at trial, and where the military judge considered the offenses multiplicitous for sentencing purposes. In United States v. Tusing, NCMR 79-1856, pet. granted with summary disposition, ___ M.J. ___ (CMA 1 March 1982), damaging government property in violation of Article 108, UCMJ, was held, under the facts of that case, to be multiplicitous with the offense of hazarding a vessel in violation of Article 110, UCMJ. In United States v. Terrell, ACMR 441483, pet. granted with summary disposition, ___ M.J. ___ (CMA 12 April 1982) an assault and battery was deemed "so united in time, circumstance and impulse" as to be a part of the aggravated assault alleged in a separate specification. The Court's actions dictate that a motion on multiplicity for sentencing purposes should routinely be followed by a motion for dismissal of the lesser charge.

FAILURE TO INSTRUCT

Appellant was charged with conspiracy to commit aggravated assault and with aggravated assault in United States v. Buckroth, NCMR 81-0250, pet. granted, ___ M.J. ___ (CMA 8 March 1982), summary disposition ___ M.J. ___ (CMA 11 March 1982). The military judge failed to instruct on the element of aggravation in each offense and the Court required the findings of guilty as to aggravated assault in each specification to be set aside, and remanded the case with orders to approve only the lesser included offenses of assault and conspiracy to commit assault. No sentence relief was directed.

GRANTED ISSUES

CHARGES: Variance

In United States v. Foster, ACOMR 440218, pet. granted, ___ M.J. ___ (CMA 10 March 1982), the appellant was charged with larceny of liquor from an officer's club warehouse as larceny of government property. At trial the proof established that the liquor was the property of a non-appropriated fund instrumentality, and not the property of the United States Government. The Court has agreed to examine the issue of whether alleging larceny of property of the United States government and proving larceny of property of an instrumentality of the United States government constitutes a fatal variance of proof.

DUE PROCESS: Post-Trial Delay

In United States v. Sutton, NCMR 81-1944, pet. granted, ___ M.J. ___ (CMA 15 March 1982), the court will consider whether an unexplained 321-day delay in approval of a conviction by a supervisory authority is a denial of military due process. Appellate defense counsel are arguing, inter alia, that such a delay is a violation Article 98, UCMJ, which makes it an offense to unnecessarily delay the disposition of the case of a person accused of an offense under the UCMJ.

JURISDICTION: Speedy Trial
EVIDENCE: Rape Shield Statute

In United States v. Colon-Angueira, ACMR 440537, pet. granted, ___ M.J. ___ (CMA 18 March 1982), the Court will decide whether a 54-day delay for a government-requested psychiatric examination should be chargeable to the government absent some rebuttal by the government showing exceptional circumstances. The Court will also examine the question of whether the refusal of the military judge to allow the defense counsel to question the complainant in a rape case about the consensual sexual intercourse with men other than her husband which occurred after the alleged offense was constitutionally permissible in light of the sixth amendment's confrontation clause. The defense argued that the testimony was relevant to the issue of consent.

EVIDENCE: Search and Seizure

In United States v. Thrower, CM 441048, pet. granted, ___ M.J. ___ (CMA 12 April 1982), the Court will decide whether marijuana discovered in the common area of a barracks room should have been suppressed where an NCO performing a post-field exercise health and welfare inspection for pyrotechnic devices had been told that the appellant was seen in his room on the morning of the inspection cutting up a white powder. After a cursory inspection of the room, the NCO was told that the appellant probably kept his "stuff" in the common area of the room and the marijuana was then found in the seat cushion of a chair.

In United States v. Law, NCMR 79-1011, pet. granted, ___ M.J. ___ (CMA 2 March 1982), the appellant is challenging the admission of evidence procured during an administrative inventory of the contents of his personal baggage by unit personnel. The inventory was conducted without locally required written authorization and with the assistance of an NIS agent who was investigating the larceny for which the appellant was subsequently convicted. Counsel should be aware that the Court is willing to examine those cases where a facially valid inventory inspection may have been used as a justification for a prosecutorial search.

CONVENING AUTHORITY: Promise of Clemency

The Court will consider whether a convening authority abused his discretion in making a promise to grant clemency contingent on completing the trial within 15 days of referral in United States v. Mitchell, ACRM 16222, pet. granted, ___ M.J. ___ (CMA 29 March 1982). Defense appellate counsel are arguing, inter alia, that the condition is an improper delegation of clemency power to the trial counsel, who has the discretion to deny clemency by delaying the trial beyond the 15 days.

OFFENSES: Felony Murder

EVIDENCE: Statements Remote in Time

INSTRUCTIONS: Premeditation

SENTENCING: Statements by Accused

Several issues growing out of a rape-murder trial will be examined by the Court in United States v. Teeter, 12 M.J. 716 (1981), pet. granted, ___ M.J. ___ (CMA 18 March 1982). The court will decide whether sexual fantasies by the appellant, described during a drinking bout which was remote in time from the charged offense, should have been admitted at trial. The court will also examine the validity of the felony murder rule in the military and whether an accused can be found guilty of both felony murder and premeditated murder arising out of the same homicide. The standard instruction on premeditation will be examined to determine if it sufficiently distinguishes between premeditated and unpremeditated murder. Finally, the Court will decide whether the prohibition on statements by the accused during the sentencing portion of the trial which extend to legal justification or excuse, paragraph 75c(2), MCM, 1969, encompasses statements made by the appellant relating to the defense of alibi, or in the alternative, whether paragraph 75c(2) of the Manual for Courts-Martial violates the Fifth Amendment.

Sentencing: Proof of Prior Non-Judicial Punishment

During the sentencing portion of trial the military judge rejected a proffered DA Form 2627, Record of Proceedings under Article 15, UCMJ because the signatures were illegible. During rebuttal the trial counsel recalled a CID agent to testify that he was aware that the appellant had received prior non-judicial punishment for sodomy. In United States v. McGill, ACRM 440661, pet. granted, ___ M.J. ___ (CMA 7 April 1982) the Court will determine whether such testimony may be used to abrogate the procedural protections enumerated in United States v. Mack, 9 M.J. 300 (CMA 1980) and United States v. Cross, 10 M.J. 34 (CMA 1980).

Court Members: Independent view of the scene of the crime

Whether the prejudice caused by the admittedly improper, independent examination of the scene of the alleged crime by a court member can be nullified by the fact that the information he acquired was already within the general knowledge of the other court members will be decided in United States v. Witherspoon, ACMR 439581, pet. granted, ___ M.J. ___ (CMA 12 April 1982).

Jurisdiction: Kidnapping

In United States v. Williams, ACMR 440077, pet. granted, ___ M.J. ___ (CMA 12 April 1982), the Court will decide whether a kidnapping on Fort Hood, charged under 18 United States Code § 1201(a)(2), alleging that the act was done within the special maritime and territorial jurisdiction of the United States, requires the government to prove the basis of federal jurisdiction at Fort Hood as an element of the offense.

REPORTED ARGUMENTS

Sentencing: Convening Authority's Action
Special Writs: Jurisdiction

In United States v. Bullington, 12 M.J. 570 (ACMR 1981) (denial of Writ of Mandamus), Writ Appeal filed 14 December 1981, argued 23 March 1982, a bad-conduct discharge had been held to be improperly imposed because the military judge failed to instruct the court members that the discharge was authorized only because the appellant had been found guilty of two offenses authorizing confinement in excess of six months. On remand the convening authority changed the discharge to two additional months of confinement. When this was challenged by a special writ, the Army Court of Military Review endorsed the new sentence. Appellate counsel argued that Article 64, UCMJ, paragraph 88 MCM, and prior case law limited the convening authority to either authorizing a rehearing on sentence or approving only those remaining portions of the original sentence that had been legally adjudged. Government counsel argued that the approved sentence was correct because it was less severe than the adjudged sentence and within the jurisdictional limits of a properly instructed court.

Government counsel also argued that the Court did not have jurisdiction to hear the writ appeal because no discharge remained and, absent the discharge, Article 69, UCMJ, was the appellant's sole avenue of review. Appellate defense counsel responded that the Army Court decision being challenged had not been rendered pursuant to Article 69 jurisdiction and once the Army Court of Military Review accepted jurisdiction to hear a case under any provision except Article 69, the court could exercise its supervisory authority under Article 67 to examine the propriety of the lower court's decision.

Judge Fletcher wanted to know what limits were placed on the convening authority's discretion if he did have the authority to change the bad-conduct discharge to some other punishment. Judge Everett and Judge Cook each inquired how the additional confinement could be justified if the convening authority did not first treat the discharge as correct in law.

Exit Gate Searches

In United States v. Alleyne, CM 439423, pet. granted, 11 M.J. 162 (CMA 1981), argued 21 April 1982, a military policeman testified that some unidentified commander had authorized complete searches of all persons and vehicles entering or leaving a United States base in Korea. No further evidence as to the necessity for or scope of the search was admitted, although the military policeman did admit that in practice most of the searches were rather perfunctory checks for identification and passes. Appellate defense counsel challenged the search on the grounds that insufficient facts were in the record to establish a predicate for the search, see United States v. Hayes, 11 M.J. 249 (CMA 1981), and even if the predicate for the search was sufficiently established, too much discretion as to the scope of the search had been vested in the personnel conducting the search. The government defended the search procedures either as a command-directed inspection or as an overseas gate search. The Court expressed concern that developing technical rules for gate searches would unduly burden commanders with an infinite variety of practical problems.

Sentencing: Announcement of Sentence

In United States v. Lee, ACOMR 14567, pet. granted, 11 M.J. 170 (CMA 1981), argued 25 March 1982, the military judge sealed the sentence worksheet which he later read aloud in the absence of court members. The military judge had adopted this procedure to avoid postponing trial while the appellant sought administrative review of the USAREUR, 45-day speedy trial rule. Appellate defense counsel maintained that the procedure precluded the court members from detecting clerical error in preparation of the sentence worksheet and also delayed the effective date of the sentence. Appellate defense counsel further argued that the military judge had no discretion to violate the Article 53, UCMJ, requirement that the president read the sentence aloud in open court. The government disputed this "plain error" argument, noting that the defense had not objected to the judge's procedure. Judge Fletcher pointed out that under United States v. Dunks, 1 M.J. 254 (CMA 1976), the better procedure would have been to grant a continuance before commencing a trial on the merits.

ON THE RECORD

or

*Quotable Quotes from Actual
Records of Trial Received in DAD*

MJ: [I]t is my duty as military judge to inform you that this court sentences you:

To be reduced to the grade of E-1, to be separated from the service with a dishonorable discharge, a total forfeiture of all pay and allowances, and to be confined at hard labor for 7 years.

You may be seated.

There being no other cases to be tried at this time - - -

TC: Pardon me, Your Honor. The court that is convened here today is a special court-martial.

MJ: Oh, I'm sorry.

MJ: Okay, let's have that marked as an appellate exhibit.

DC: What number are we up to?

MJ: One.

(Alibi witness under cross-examination by TC):

WIT: It was no special day . . . the 15th of December was -- we had a party, just basically laughing around.

TC: You had a party? Now, didn't you just tell us you watched the Muppets and had a couple of beers and went to sleep?

WIT: That was a party to me. I'm not used to big things.

TC: I see.

(Military Judge questioning witness to disrespect offenses).

Q: Did he address anyone that night that was not an officer as, "sir?"

A: No, sir, I don't think - I don't recall hearing any.

Q: Were there any NCOs around?

A: Yes, sir, there was.

Q: How was he addressing the NCOs?

A: Usually, by swinging his fist at them.

(Question to accused during sworn statement during sentencing).

Q: Have you enjoyed your military life?

A: Yes, sir, I have, up until today.

(Psychiatrist testifying on behalf of accused who attempted to murder his wife).

[H]e was somewhat hurt that, after bestowing watches and mink coats on his wife, his wife had given him a pair of tweezers for Christmas.

(TC argument on sentencing).

The government is not trying to be an ogre. [We] are not trying to be reminiscent of Les Miserables where we sentenced people to 20 years at the gallows for stealing a loaf of bread to feed a starving family.

