Summer 2008

Secret Justice:

OFF BASE

Fighting for Access to Military Court Dockets and Proceedings

The charges had been sitting there for months: sexual misconduct, sodomy, aggravated assault. But by the time Lt. Cmdr. John Thomas Matthew Lee was court-martialed in early December, after admitting he'd lied about his HIV-positive status and had sex with an officer, word of the allegations was just getting out.

Military prosecutors had pieced together a stunning case, that the Catholic Navy chaplain had engaged in a string of sexual dalliances and potentially jeopardized the health of untold numbers of service members — including two Naval Academy midshipmen. In the civilian world, reporters would have been crawling over the case. They'd have kept up-to-date through the docket system and shown up regularly in court.

continued inside

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

AP PHOTO

Lt. Com. John Thomas Matthew Lee, shackled and hidden beneath a jacket, is escorted from his court-martial on Dec. 6, 2007.

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But Lee was tried in the system of military justice, and as such his case almost made it through unnoticed. It was only because a *Marine Corps Times* editor bumped into an old source who tipped him off to the story that it became public at all.

The article ran two days before Lee's court-martial. Most of the charges were four months old.

The Marine Corps, like every other military branch, does not require its courts-martial schedules to be released through a public docket. Lee's case illustrates the alarming potential consequences of denying journalists and the public access to any sort of case-calendar system. But the issue is hardly a new one.

Despite the fact that the highest military courts ruled more than a decade ago that the public has a First Amendment right of access to both military courts-martial and "Article 32" preliminary hearings, military public affairs officers still routinely reject reporters' requests for court dockets.

Even when dockets are released, the information is often so general and devoid of meaningful detail that the public is still left in the dark. When it comes to public access to military court proceedings, a constitutional key can be essentially useless if one cannot find the gate.

Lee's attorney, who helped secure the plea deal that would ensure his client will likely spend just 19 months behind bars, praised the Marine Corps "because their primary interest here was to protect people," according to a newspaper report.

But was it really? While some victims in the case were reportedly notified that Lee is HIV-positive, it remains unclear if Lee actually identified all of the victims preyed upon during his 12-year military career. Other victims who may not have been notified directly by the Marine Corps earlier in the investigation had to wait more than a month from the time the Corps brought Lee's HIV-related charges to the time the case was first publicized in the newspaper.

During that period, not only were potentially unidentified victims denied treatment for HIV exposure, they may have unknowingly spread the disease.

As an editorial in the *Marines Corps Times* and *Navy Times* put it just after Lee's court-martial: "It might not sound like much, but ask the victims whether they would like that time back. More important, ask anyone who's had sex with the victims since then."

The Background

The public right of access to military court proceedings, including Article 32 hearings and courts-martial, is well established. There has long been a right of access to civilian criminal trials, which the U.S. Supreme Court enhanced in 1980 as a First Amendment right through its landmark precedent, *Richmond Newspapers, Inc. v. Virginia*. Military courts adopted this same right of access through their own decisions, including *United States v. Hershey*, soon after *Richmond Newspapers* was decided.

Those same military courts have not reached similar conclusions regarding access to court dockets, in part because there is no guiding Supreme Court precedent on the issue comparable to *Richmond Newspapers*. Most civilian courts have long relied on standardized and relatively ubiquitous docketing systems that are publicly available, pre-empting the need to sue for docket access. While critics have argued that a secret docketing system undercuts the public right of access to the judiciary, military courts have continued to treat docketing as an administrative issue instead of a constitutional one.

"What it does is turn the right of access into a hollow promise," said attorney Eugene Fidell, a partner at Feldesman Tucker Leifer Fidell LLP in Washington, D.C. Fidell specializes in military law and is president of the National Institute of Military Justice (NIMJ).

Congress passed the Uniform Code of Military Justice (UCMJ) in 1950 as the primary statutory authority for military criminal law. More specific regulations in military justice procedure are found in the Manual for Courts-Martial, created through a presidential Executive Order in 1984. The Army, Air Force and Coast Guard each have branch-specific regulations that supplement the manual, while the Marine Corps and Navy share a version of similar regulations.

Publicly available docketing within the military judicial system appears to derive from base-specific policies that are often only found in practice rather than in published regulations or guidelines.

Two Marine Corps bases in particular illustrate the disparities that exist within branches. The docketing system at the

Acknowledgements

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The Reporters Committee releases this guide in conjunction with a White Paper further examining the legal issues involved surrounding access to military court proceedings and dockets. Both are available online at www.rcfp.org.

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Corps' Camp Pendleton in California is relatively extensive, posting a spreadsheet on its base Web site that includes the defendant's name, rank and unit; the date, time and type of proceeding; and the courtroom where it will be held.

But a public docketing system at the Corps' Air Station New River in Jacksonville, N.C.? None exists, even though the base has held relatively high-profile general courts-martial, including the 2003 trial of a Gulf War veteran who disobeyed orders and refused an anthrax vaccination.

In 2006, the NIMJ engaged the docketing issue head-on, sending letters to the Judge Advocates General of each of the five military branches requesting support for a centralized online docketing system to be managed by the NIMJ. Responding collectively in a letter, the Army, Air Force, Navy and Marines JAGs rejected the idea, arguing that "teaming" up with a private entity such as the NIMJ would be inappropriate for a government agency, and that such a docketing system would otherwise trigger privacy concerns.

"We recognize that this is not the response that you desired," the JAGs wrote. "We are committed to increasing the public's understanding and awareness of the military justice system in a manner consistent with our obligation to protect the privacy and dignity of our service members."

AP PHOTO

Navy Petty Officer 3rd Class Ariel Weinmann, here reading letters from school children to military service personnel, was held for four months before his Article 32 hearing on espionage charges.

The Tully Center Survey

Critics of the military justice system point out there is no provision in the UCMJ or Manual for Courts-Martial requiring the nation's military bases to create a public court docketing system. As a result, the policies and practices for providing information about pending criminal cases at the nation's military posts are inconsistent and confusing.

Reporters are therefore left with a veritable mishmash of docketing information disclosed on a case-by-case basis, if at all. At many bases, what little information that is online omits any detail that might alert a reporter to an important case.

"It's hit-or-miss whether or not the cases show up on the Web sites," Fidell said. Also, "the Court of Appeals for the Armed Forces, they do have a functioning Web site, but it's down for surprising periods of time."

The Reporters Committee for Freedom of the Press worked with Syracuse University's Tully Center for Free Speech at the S.I. Newhouse School of Public Communications to analyze the need for a centralized and standardized military docketing system, available to the public.

In a random survey of just more than one-fourth of U.S. military installations world-wide, the Tully Center asked military base personnel for basic docketing information. Of the 75 bases that responded to the Tully Center call, 45 percent refused to provide any information on scheduled Article 32 hearings. Some 37 percent declined to disclose courts-martial schedules.

(The Tully Center's methodology, and additional details on the survey, can be found in the sidebar on page 7.)

The Tully survey also found that more than one-third of the bases that who agreed to provide docketing information still withheld basic details, such as the defendant's name or the criminal charge.

Another discrepancy uncovered by the Tully Center survey: several officers inaccurately represented their bases' policies on disclosure.

For example, a number of Army officers never mentioned the U.S. Army Trial Judiciary docketing site when asked for court schedules. The site began posting a branch-wide docketing system in early September 2007 after at least 10 months of deliberations on the subject, according to email messages obtained by the Reporters Committee through a Freedom of Information Act request.

While the information disclosed within the Army system is rudimentary and lacks virtually any detail related to the charges against the defendant service member, it's a goldmine for reporters compared to what bases in other service branches offer.

And yet, Army personnel at Redstone Arsenal, Ala., Fort Carson, Colo., Fort Campbell, Ky., Fort Meade, Md., and Fort Jackson, S.C., neglected to mention the docketing site to the Tully Center. In some instances, the survey shows, those contacted at the Army bases either directly rejected the caller's request or otherwise admitted they didn't know if the public was entitled to court docketing information.

Some officers also instructed the Tully Center caller to file FOIA requests to obtain court dockets. While military courts are a subset of the Defense Department and are therefore arguably part of a federal agency subject to FOIA, legal experts generally agree that access to military courts and the documents they produce is a constitutional issue as opposed to a FOIA issue.

To the degree that military court docketing information can be accessed through FOIA, it's typically not a practical solution for reporters on deadline.

"The problem with [FOIA] is that it takes forever," Fidell said. "It's totally incompatible with the needs of daily journalism or even monthly journalism."

Deficiencies

In their day-to-day jobs, military court reporters around the world say they often experience a sense of personal conflict. On the one hand, the institutional challenges that encumber military reporting at nearly every turn test journalistic skill and allow reporters to prove their mettle: the old-school, pavement-pounding stuff. The adversarial element within the military beat heightens the sense of purpose for reporters and beyond that, is a thrill.

On the other hand, these same reporters will acknowledge that the unusual obstacles they face can stymie their work as the public's eyes and ears. For every scoop ferreted out using a confidential source, there's often the nagging feeling that 10 more stories that would have been easy to get through the civilian court system got away. In the end, when all the jousting between a military reporter and a base public affairs officer (PAO) is done, the public remains underserved.

In deconstructing their frustrations with the military justice system, most reporters interviewed for this report said they felt powerless, that reporters are "at the mercy" of base PAOs and commanders. In contrast to the civilian judicial system, where court dockets exhibit a relatively detailed format and are routinely available weeks in advance,

the military system typically puts the burden on the reporters to find upcoming cases.

"If I could just walk into the local JAG office each week and look at the docket for myself, life would be a lot simpler," said *Stars and Stripes* reporter John Vandiver. "It works for the justice system in the civilian universe. I don't see why it should be any different in the military."

Covering the U.S. Army Garrison in Baumholder, Germany, Vandiver recently wrote stories on the case of Army Capt. Robert Przybylski, who was charged in November 2007 with desertion. Przybylski's subsequent Article 32 hearing was inexplicably put on hold for months. In one story, Vandiver quoted an official's curt accounting for the delay: "The Article 32, it's still pending. It takes as long as it takes."

Sourcing Above and Beyond

Public awareness of the military judicial system is therefore greatly dependent on backchannel sources. Sometimes these sources have an ulterior motive for bringing publicity to a particular case. Sometimes a reporter stumbles upon a crucial tip. Either way, the story often comes out with little or no help from base officials.

At least, not help they intended to give. One recent military crime story came to light after Tim McGlone, a reporter for *The (Norfolk) Virginian-Pilot*, introduced himself to a uniformed Navy attorney shortly after starting the military beat in 2006. In a conversation McGlone believes the attorney later regretted, the attorney let on that there were a couple of pending espionage cases the newspaper hadn't heard about.

Following up on that general tip, McGlone said he hounded Navy officials at Norfolk Naval Station and elsewhere for about three months, desperately trying to learn more about any pending espionage cases. Eventually, after months of denying any such cases existed, Norfolk officials released the name, rank and charges of the officer involved.

After McGlone and fellow *Pilot* reporter Kate Wiltrout wrote stories critical of the base's disclosure policy, the Navy released more information about Petty Officer 3rd Class Ariel J. Weinmann and the espionage charges he faced. The reporters ultimately learned Weinmann had been held in custody for four months before his Article 32 hearing.

"The bottom line is, they never would've released this, and we never would've found out about it if it wasn't for the tip — or at least not before it was all over," said McGlone, who is protecting the identity of his original military source so the attorney will not be reprimanded.

Weinmann accepted a plea bargain in December 2006, under which he was dishonorably discharged and sentenced to 12 years in prison.

Similarly, the Navy chaplain case was one of great public interest that only came out after C. Mark Brinkley — managing editor of the Springfield, Va.-based *Marine Corps Times* — ran into an old, reliable source who said, "Hey, I think you guys need to know about this," according to Brinkley.

Lee, the chaplain, pleaded guilty to sexual misconduct, aggravated assault and other charges in his Dec. 6 court-martial. He admitted to having sex with sailors of inferior rank, knowing he was HIV-positive. The Marine Corps only acknowledged the charges on Dec. 5 — seemingly forced to do so after the newspaper followed up on Brinkley's tip.

So what to do?

Rather than amend the UCMJ, military law experts interviewed for this article said the most effective way to implement a better multi-branch, standardized docket system would be for the Department of Defense to enact an administrative rule creating one.

A public docket-production effort would not be labor intensive, because military judges and their staff already produce dockets that are regularly distributed to attorneys involved in court proceedings, said Neal Puckett, a civilian defense attorney who once served as a military trial judge in Okinawa, Japan.

"It's a couple of keystrokes nowadays," Puckett said. "In other words, transmitting what they already do every week."

A pervasive complaint by military courts reporters is that the list of charges filed in current docketing systems typically names only the general UCMJ "article" provision. Because some provisions, such as Article 134, include a wide variety of offenses ranging from voluntary manslaughter to abusing a public animal — such as a horse — journalists and members of the public often can't glean much about the alleged offense, Puckett said.

As a remedy, Fidell suggested that entire charging sheets be attached to docketed case listings, with the parts that arouse privacy concerns redacted.

The most formidable impediment to change may be a military culture that is resistant to criticism outside the chain-of-command.

"It may just be that [openness] doesn't come naturally" to the military, Fidell said. "Maybe this is all an artifact of the fact that we have a command center system that is highly decentralized with a multitude of convening authorities, each of whom basically has its own jurisdiction."

Puckett noted that the military court system was initiated as an in-house disciplinary process, not a "justice" system operating to ensure the overall public welfare. With no regulations in place to force disclosure, he said, military officials have little incentive to shine a light on criminal offenses that are potentially embarrassing.

But those officials need to update their thinking, Fidell said. They should shore up public confidence in a justice system that has been viewed historically as "second-rate," prone to abuses stemming, in part, from secret World War II military commissions.

"This is not something that any military service is going to want to advertise," Fidell said. "You don't hire the Goodyear Blimp to talk about how many people you've court-martialed. But [transparency] is part of running an armed force in a democratic society committed to the rule of law." ◆

Common military court terms

Article 32 Hearing: preliminary hearing where a convening authority determines whether enough evidence is present to merit a court-martial.

Court-Martial: general term for the military court system that hears criminal charges against members of the military. Heard by a judge or a panel of officers; a member of the JAG Corps serves as prosecutor and an appointed military lawyer (or privately hired lawyer) represents the accused.

Docket: a schedule of a court's proceedings, including party names, nature of charges and other information. A case docket contains the same infomration for one case, and a listing of every event in the case, including documents filed and hearings held.

JAG: Judge Advocates General; military attorneys.

Manual for Courts-Martial: created by a presidential Executive Order, it sets out procedures governing all court-martial proceedings.

NIMJ: National Institute for Military Justice; non-profit non-government organization formed to advance fair administration of military justice and further public understanding of the military's courts.

PAO: Public Affairs Officer; the military's spokesperson for a particular court with whom a civilian must arrange any base visits to attend court proceedings.

UCMJ: Uniform Code of Military Justice; congressional code of military criminal law that applies to all members of the military.

Survey shows tendency to withhold dockets

By Barbara Fought and Colleen Keltz, Tully Center

At one-third of the military installations surveyed by researchers for a comprehensive study on public access to military justice information, military base personnel just said "No." Schedules of military courts-martial are not public.

Surveyors had slightly better luck at another 20 percent of the military installations, finding that some details of their military justice cases were available. But even then a civilian typically couldn't get more than the date and time of the proceeding — never mind the name of the service member or the general charge.

Taken together, that's more than half of the military installations surveyed by the Tully Center for Free Speech at Syracuse University in a study on military justice and transparency. Meaning a journalist looking to piece together what's scheduled to happen at a court-martial on many U.S. military installations could very likely be out of luck.

For preliminary hearings, known as Article 32 hearings, the results were worse. Nearly half the installations reported they could not give any information on military justice cases. Another quarter gave partial information.

These results of a phone survey conducted over the last year by the Tully Center, at the S.I Newhouse School of Public Communications, show that many military personnel accused of crimes are denied the basic constitutional right of a public trial — even though they have sworn to protect and defend that same Constitution.

Historically, civilian trials have been open — a crucial factor for public trust in the justice system.

In light of the waves of troop deployments to Iraq and Afghanistan in the last seven years, and questions about whether the Uniform Code of Military Justice applies to military contractors in a combat zone, secrecy in the military justice system is increasingly worrisome. The Tully Center survey found that even if reporters find out about a court-martial, actually getting to attend in some places may be difficult.

The Tully Center undertook this research in conjunction with The Reporters Committee for Freedom of the Press after hearing anecdotal reports that journalists and citizens were not able to access dates for military hearings. Indeed, some reported they could not attend proceedings even when they did find out about them.

The survey results undercut what Judge Advocates General from the Army, Air Force, Marines and Navy wrote in a letter to the National Institute for Military Justice in November 2006, that an "established process for disseminating information, including court-martial scheduling information, to the public . . . currently exists."

The survey found at dozens of military installations, that's not the case.

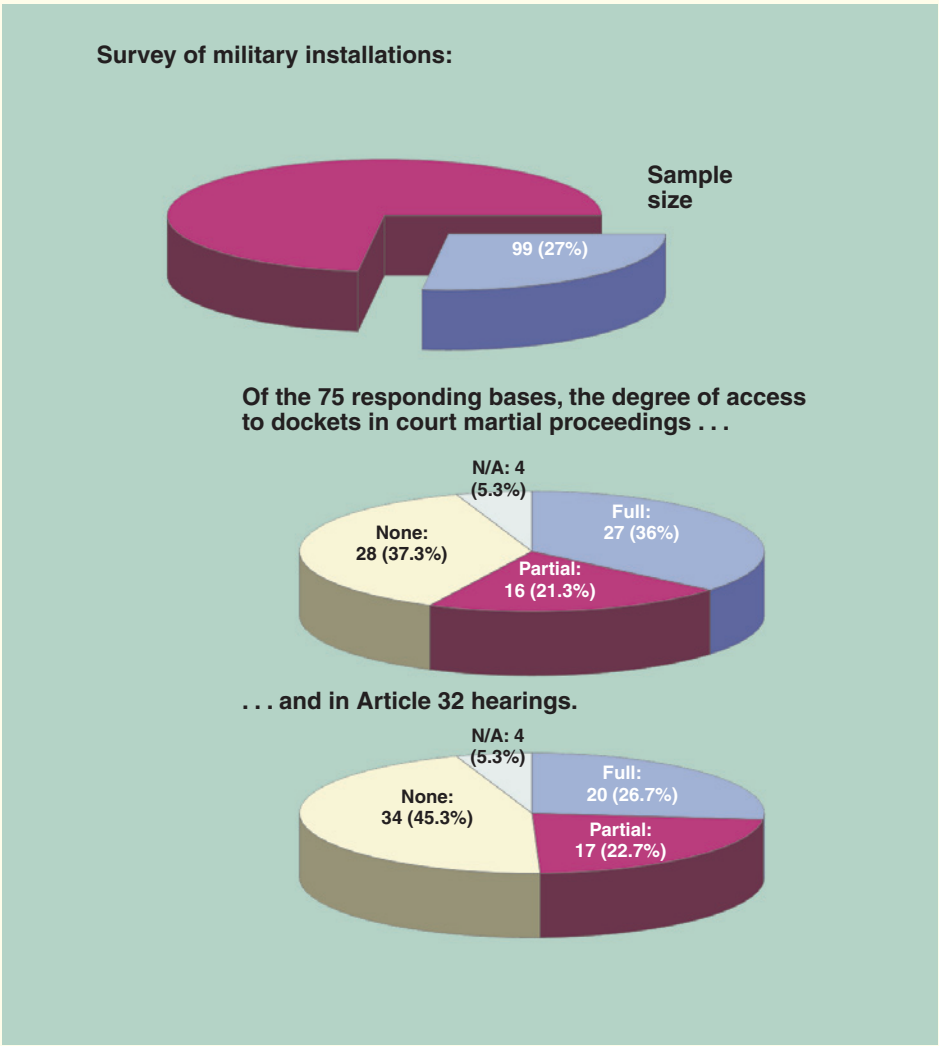
Access Denied

Reasons given by military officials for withholding basic charging information at the military installations contacted for the study ranged from outrageous to almost laughable.

A marine at Camp Foster in Okinawa, Japan, said information about a court-martial probably couldn't be given out to the public for security reasons. He said public knowledge of a court-martial could create a "potential target for something."

In the legal office at a Navy facility in Hawaii, an official said he could not give out information on a court proceeding over the phone. Doing so, he said, might violate the Privacy Act (which protects private information the government maintains about citizens.) He suggested contacting the U.S. Navy Office of Information at the Pentagon.

Other reasons military officials cited for withholding information on proceedings included:



AP PHOTO

Marine military police officers provide security for an April 2005 Article 32 hearing in a murder case at Camp Lejeune, N.C.

• the respondent did not have that information and did not know where to find it.

• the commanding officer or judge controlled the information and gave it out on a case-by-case basis.

• a formal Freedom of Information Act (FOIA) request had to be filed first.

The survey showed that of the five military branches, the Navy most frequently limited access to information on courts-martial — more than half of the Navy survey respondents refused any public access to case docket information. This compares to 22 percent for the Coast Guard, 25 percent for the Army, 31 percent for the Air Force and 42 percent for the Marines.

While a complete court schedule was available to the public less than 40 percent of the time, some military installations at least offered bits of information on upcoming court proceedings.

For example, a major in the legal department at Anderson Air Force Base in Guam said while the base didn't publish courts-martial information for the broader public, the details did appear in the base newspaper. He said he would readily give that information over the phone to a civilian.

A staff judge advocate at the Army's Fort Jackson, S.C., post said while they kept no formal schedule at the office for release to the public or the press, they would give out selected information over the phone. But without a policy or protocol, it is difficult to judge whether complete or consistent information is released.

Getting on Base

Even when civilians find out about military court proceedings, they may still en-

Access findings by service branch

	Air Force	Army	Coast Guard	Navy	Marine Corp	International
Court-Martial						
Information Available	63%	65%	78%	42%	43%	67%
No Information Available	32%	25%	22%	58%	43%	33%
Survey not applicable to installation	5%	10%	0%	0%	14%	0%
Impediment for public to attend proceeding	26%	5%	11%	21%	14%	20%
Article 32						
Information Available	38%	50%	78%	42%	71%	67%
No Information Available	58%	40%	22%	58%	15%	33%
Survey not applicable to installation	5%	10%	0%	0%	14%	0%
Impediment for public to attend proceeding	26%	5%	11%	21%	14%	20%

counter hurdles getting into the courtroom. Security is tight; most installations require civilians to provide a name and driver's license, and perhaps even car registration papers, to get inside.

Sixteen percent of the installations surveyed said they required even more of civilians, including a reason for attending the court event, or a military sponsor. A major at Sheppard Air Force Base in Wichita Falls, Tex., said it would be hard to get a military member to sponsor a civilian, as the sponsor would be responsible for that person during his or her entire visit.

Confusion

About one in 10 military installation respondents suggested the researchers file a FOIA request for the court-related information. FOIA does not apply to the civilian courts system and it is unclear what its applicability is to the military courts though it would not seem to have a place as case law and court rules mandate openness.

In many cases those answering the phone appeared uncertain about which cases require a FOIA request, or how FOIA might apply. One employee at the Altus Air Force Base in Oklahoma said the researcher needed to file a FOIA request for the court docket. He said he could give the information it contained over the phone, but not the docket itself.

Online Dockets

During its research and surveying, the Tully Center found or was referred to seven docketing calendars online.

An officer in the Judge Advocate office at Miesau Army Depot in Miesau, Germany, walked the caller through the Army's comprehensive Web site. Naval offices in Virginia Beach and Saratoga Springs, N.Y., directed researchers to the publicly accessible online docket of the Navy Region Mid-Atlantic Public Affairs Office in Norfolk, Va. The Naval Air Station in Fallon, Nev., referred researchers to the regional legal services office in San Diego where researchers were told that court proceedings are posted on Camp Pendleton's Web site.

Additionally, one officer at Marine Corps Base Camp Lejeune, N.C., was particularly helpful in telling the caller about its Web site. "We post to the Web site just so that it is available to the public," the officer said.

However, unsolicited tips to the online sites were the exception; most officials failed to refer to online dockets or schedules that are readily available to the public. ◆

Methodology Used

To determine the degree of public access to military court proceedings, the Tully Center for Free Speech at Syracuse University's Newhouse School for Public Communication surveyed a quarter of the military installations in each of the five branches. Ninety-nine locations were contacted between October 2007 and March 2008. They were selected by random interval from a master list of U.S. military installation worldwide published by the *Army Times*.

While this sample size is not statistically significant, researchers determined that surveying approximately one-fourth of the installations would provide an accurate snapshot of the larger population. Researchers tried at least three times on different days to contact each installation, and eventually heard from 75 bases. That translates to a 76 percent response rate, well above the norm for telephone surveys.

The researchers' protocol included asking whether schedules for Article 32 hearings and courts-martial are made public, and if so, how civilians can attend them. In every call the researchers initially asked to speak with someone in "military justice" or the "legal department." The callers explained they were researchers from Syracuse University and that the installation had been randomly selected among U.S. military bases worldwide for a survey.

The results were placed into one of four categories indicating whether the schedules were totally available for inspection; the schedules were partially open (such as the date or time was public, but not the defendant's name or charge); no information was available to civilians; or the survey was not applicable. The latter category encompassed the few bases that for one reason or another do not conduct court proceedings on site.

Researchers did not include units of the National Guard because their structure and governance are not comparable to the five main military branches.

Online Military Dockets

Military officials were not able to provide a comprehensive list of all online military dockets. These Internet docketing sites were discovered by researchers while working on this project.

Branch	Area Covered	Web site
Air Force	None.	No known publicly accessible docket online.
Army	Army dockets worldwide, divided into six circuits	https://jagcnet.army.mil/85257345005031B1/(JAGCNETDocID)/HOME?OPENDOCUMENT
Marine Corps	Camp Pendleton: includes the Corps' Sierra, Northwest and Southwest Regions	http://www.pendleton.usmc.mil/base/judges/sjc.asp
	Eastern Judicial Circuit	http://www.lejeune.usmc.mil/easterncircuit/circuit_forms.htm
	Iraq Investigations	http://192.156.19.109/lapa/Iraq-Investigations.htm
Navy	Mid-Atlantic Region	http://www.cnrma.navy.mil./newsroom/docket.htm
Misc	Court of Appeals for the Armed Services	Calendar: http://www.armfor.uscourts.gov/Calendar.htm Daily Journal: http://www.armfor.uscourts.gov/Calendar.htm

The Reporters Committee for Freedom of the Press is committed to helping journalists understand the laws that affect newsgathering. And we have a wide array of publications that can help.

We've got special reports like **Homefront Confidential**, an examination of access and information policy issues in a post-September 11 world.

Our **Reporter's Privilege Compendium** offers a detailed look at each state's shield laws and court decisions that affect the ability of reporters to keep their sources and information confidential.

For help with gaining access to government records and meetings, we've got **How to Use the Federal FOI Act**. Or for state law help, there's the **Open Government Guide**, a complete guide to each state's open records and meetings acts. Also, **Access to Electronic Records** tracks developments in the states regarding computerized release of data.

And of course, there's the **First Amendment Handbook**, a guide to almost every aspect of media law with practical advice for overcoming barriers encountered every day by journalists.

For these and many more publications, visit our Web site. Read these guides online — for no charge — or purchase a copy to read in print.

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