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Editor

Captain Daniel P. Shaver

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Address to the JAG Regimental Workshop

Major General John L. Fugh
Acting The Judge Advocate General

Introduction

The Regimental Workshop, held at The Judge Advocate General's School in Charlottesville, Virginia, from 22 to 26 April 1991, provided our leadership with an important opportunity to meet and to discuss the direction of the Corps. The Workshop was especially significant because it marked the first time the senior members of the JAG family—both active and Reserve—sembled together since the Corps went through, and emerged from, the problems that led to the reports by the Department of Defense (DOD) Inspector General and the Senate Armed Services Committee.

I had copies of the Senate Armed Services Committee's Report circulated throughout the Corps. Without a doubt, judge advocates everywhere have discussed its contents. My purpose, however, is not to rehash those discussions. Rather, instead of dwelling on the past, my desire is to use the lessons we have learned to focus on the future of the Corps. Accordingly, I intend to tell you where we are and where we are going.

Where We Are

Judge Advocates in the Field

Although our Corps suffered wounds from the events described in the Senate Armed Services Committee and the DOD Inspector General reports, my perception is that the effects of these reports were more visible at the JAG leadership level than in the field. Actually, throughout this period, I have continued to receive plaudits and statements of confidence from field commanders about the work and performance of their lawyers.

In particular, the substantial role that judge advocates had in Operations Desert Storm and Desert Shield reinforced the confidence that field commanders have in our work. Over 270 lawyers were deployed in the Persian Gulf region, and one-third of them were from the Reserve component. In addition, the very first Army Reserve unit to be called up and assigned to Southwest Asia was "The Fighting 46th" International Law Team from Boston. Throughout the conflict, judge advocates deployed with their units and did their jobs with professionalism, in spite of austere conditions.

Likewise, back home and in Europe, the processes involved in making preparations for overseas movement, as well as taking care of family members left behind, placed great demands on many of you. The leadership of the Corps is enormously proud of all you and your subordinates for having risen to the challenges of this period. Even in the Washington area, several senior leaders have

told me that they expect the Corps to bounce back quickly.

Judge Advocate Leadership

One factor in bouncing back, however, is getting the Judge Advocate General's Corps' leadership in place. As most of you know, all four of the selectees from the September 1990 JAG Brigadier General Board have been confirmed and promoted. Reserve component promotions also are picking up. Brigadier General Compere was promoted effective 29 April 1991, and Colonel Morrison's nomination is pending before the Senate Armed Services Committee. We expect him to be promoted to Brigadier General in July or August. In addition, the President has submitted my nomination as The Judge Advocate General to the Senate. I subsequently went to Capitol Hill for an interview on 17 April, and expect to be confirmed in the near future. Finally, an advisory board will convene in early June to select a nominee for The Assistant Judge Advocate General and, if necessary, it will reconvene to select another brigadier general. Accordingly, we hope to have a full slate of general officers by mid-summer. Furthermore, once the results of these boards are announced, I will designate a brigadier general for United States Army Europe.

Areas of Study Directed by the Secretary of the Army

As a result of the Senate Armed Services Committee and the DOD Inspector General reports, the Secretary of the Army directed the General Counsel to review three areas: (1) unlawful command influence; (2) personnel management; and (3) professional responsibility.

Unlawful Command Influence

Deputy General Counsel Tom Taylor and Brigadier General Wayne Hansen studied the unlawful command influence issue. They looked at all recent allegations in this regard and considered ways of avoiding incidents in the future. One factor they identified as tending to increase the risk of unlawful command influence is the perception that military justice is not as important as it once was. In retrospect, as the Assistant Judge Advocate General for Civil Law, I may have been part of this problem by being so vocal about the importance of areas such as acquisition law, procurement fraud, and environmental law.

Lest anyone be mistaken, however, we are the keeper of the flame of fairness in the military justice system. Historically, securing the fairness of the justice system in the Army has been our principal reason for being. More-

over, the proper administration of that system is our priority. The Trial Defense Service and the Judiciary have done their jobs in this regard. We should be proud of them and their proper use of the system. Staff judge advocates, chiefs of justice, and trial counsel must do their jobs as well; that is, they must seek justice—not merely seek convictions. Why? Because commanders are responsible for fostering a neutral environment so as to earn every soldier's confidence in the military justice system. We must support them in accomplishing that mission.

To ensure that we fulfill our proper role in administering a fair military justice system, you must carry out your responsibilities in three areas.

First, I expect staff judge advocates to do the following:

- *Give proper advice to commanders.* This includes giving unwelcome advice when necessary. Never allow a commander to operate on the edge of the law.

- *Give proper pretrial advice.* For example, do not send an accused to trial when no case actually exists merely to frighten him into rehabilitation, or to appease a commander or the community.

- *Supervise trial counsel.* Stress to trial counsel that their job is to seek justice. Also stress the importance of a proper attitude toward the soldier. An accused soldier should not be referred to derogatorily and, as a soldier, should be treated with respect. Finally, stress to trial counsel that they have an obligation to uphold the highest standards of ethical conduct.

- *Deal fairly with the Trial Defense Service.* Staff judge advocates should be open to, honest about, and supportive of Trial Defense Service requirements for physical facilities and administrative support. Moreover, never expect or require a defense counsel to subvert the law or compromise his or her ethical principles to protect the "system," a commander, or yourself.

- *Conduct fair post-trial reviews.* Specifically, the system looks to the staff judge advocate to correct errors at his or her level.

Second, each staff judge advocate also should perform a self-check on his or her attitude, concentrating on the following indicia:

- If you see yourself as primarily a prosecutor, you are on the wrong track.

- If your commander sees himself as a prosecutor, he is on the wrong track. Specific indicia of the commander's misperceptions of his role include a strong interest in heavy sentences; anger at positive

extenuation and mitigation witnesses; frequent inquiries to subordinates regarding actions they are taking on blotter entries; and derogatory comments directed toward the accused, court members, defense counsel, trial counsel, and the military judge.

- If you find yourself in a position in which you feel as if you must protect a commander who has gone beyond the limits of the law, think again. Remember your responsibility to the system—your client is the Army, not your commander.

Third, staff judge advocates must exercise care in their public comments. In this regard:

- Every staff judge advocate must have a clear understanding of, and respect for, the military justice system. Commanders and staff judge advocates must never comment on the past or present performance of the military judge, court members, witnesses, defense counsel, or trial counsel.

- A staff judge advocate's comments and actions always should indicate a respect for soldiers' rights; ensure respect for the rules of evidence and code of ethics; ensure commanders adhere to the law and operate well within its bounds; avoid the recognition of a "we-they" syndrome; encourage respect for opposing counsel and military judges; and reflect the requirement to seek justice.

Our Corps has come a long way in eliminating the problem of unlawful command influence and in securing the fairness of the military justice system. In particular, we have established within the system two independent organizations: the Judiciary and the Trial Defense Service. The staff judge advocate, however, remains the key. The bottom line is that he or she must ensure that the system is treated with respect and that the system treats each accused soldier with fairness.

To reduce the risk of unlawful command influence, I expect staff judge advocates to do three things:

- *Have a heart-to-heart talk with your convening authority.* If you have not already done so, have a talk regarding unlawful command influence with your convening authority. Brigadier General Wayne Hansen sent a message urging every staff judge advocate to do so. In addition, it is now part of the Article 6 checklist.

- *Review all speeches, articles, and public comments before release.*

- *Use the technical chain of communication provided in accordance with Article 6.* The Corps has experienced and knowledgeable judge advocates throughout this chain. Staff judge advocates should use them in appropriate circumstances as a

sounding board for sensitive, unusual, or first-time occurrences.

Changes in Personnel Management

We addressed the Secretary of the Army's concerns about personnel management by reviewing our current practices in the areas of organization, procedure, and tenure of leadership. As a result of that review process, we have made several organizational changes. First, having concluded that the Executive to The Judge Advocate General was too busy to be involved in managing the assignments of JAG Corps colonels, I removed this responsibility from him. My intent is to make the Executive more substantive-law oriented. In addition, I have made the Chief of the Personnel, Plans, and Training Office a more senior colonel who is not competing for schools and assignments with his peers. He reports to me. Finally, my guidance to the Personnel, Plans, and Training Office is to make assignments on merit, to deal with people with candor, and to ensure the system is participative.

In addition to the organizational changes, some procedural changes have been made. For instance, we have arranged for greater participation by our brigadier generals in the assignments process. I also have reemphasized a change that already has taken place in recent months—that is, to spread duty on promotion boards among a larger number of senior officers. Finally, I believe the imposed requirement for line-officer majorities on JAG promotion boards goes too far. Accordingly, we are seeking to change the required composition to a 50-50 balance.

We also have looked at the problem of stagnation in the JAG Corps leadership. We have developed—and continue to develop—new policies to address this problem. In the active component, we already have adopted the policy of the previous administration with respect to brigadier generals. That is, they will retire at the later of either their reaching four years' time in grade or their not being selected for promotion to major general. For major generals, we are proposing to the Army leadership a policy that imposes a coextensive tenure of four years for The Judge Advocate General and The Assistant Judge Advocate General. The TAJAG may complete part of the TJAG's tenure if he departs early, but the TAJAG would not succeed to a full, four-year term of his own as TJAG.

The tenure of our active component general officers also poses one other issue. Filling all six of these positions in one year obviously raises the possibility of no changes in leadership for four years, and then another complete turnover all at once. We recognize this concern, and agree that upward mobility and phased turnovers in leadership are important. In addition, we agree that we have the responsibility for solving this potential problem to ensure that the Corps remains a vibrant, healthy organization. I am confident that we will be able to do that.

The issue of tenures for leadership in the Reserve component also is being examined and a policy to address it will be developed.

Professional Responsibility

We also have addressed the Secretary of the Army's concern about professional responsibility. Judge advocate officers and civilian attorneys under The Judge Advocate General's qualifying supervision have been ahead of the rest of the Army lawyers in resolving this concern. We have adopted the Army Rules of Professional Conduct for Lawyers and have Army Regulation 27-1 as our guide for investigating and resolving allegations of impropriety. All other Army lawyers, however, have followed less specific American Bar Association standards and have had no formal process for investigating and resolving allegations of impropriety. Accordingly, last August, the General Counsel convened a task force to address this inconsistency.

As a result of that task force, the General Counsel took several actions. In April, he approved the task force's recommendation to adopt the JAG rules for all Army lawyers. He also directed that the regulation governing employment of civilian attorneys be changed to make clear that compliance with those rules is a continuing condition of employment, and that failure to comply with the rules can result in disciplinary action, disqualification from employment as an Army attorney, or both.

Although we have been the leaders of the Army legal community on the issue of professional responsibility, perceptions of inequity exist and we always have room for improvement. Accordingly, we have directed a complete review of our professional disciplinary process. This review already has begun under the leadership of Colonel Fran Gilligan.

Management of Legal Services

Although the three areas of concern identified by the Secretary of the Army have been addressed, with his approval the General Counsel has decided to expand his charter to address the management of legal services within the Army in its broadest context. Accordingly, a task force has been assembled to study this issue. The task force's steering group consists of the General Counsel, The Judge Advocate General, the Chief Counsel of the Army Materiel Command, and the Chief Counsel of the Corps of Engineers. In addition, two consultants were named to guide the task force: Mr. Del Spurlock, former General Counsel and Assistant Secretary of the Army; and Colonel (retired) Barry Steinberg. The Office of The Judge Advocate General also has given three excellent attorneys to assist the task force: Colonel Bill McGowan; Lieutenant Colonel Ben Anderson; and Lieutenant Colonel Frank England.

The charter of this task force is to examine several areas of our management of legal services Army-wide. It will search for areas in which we duplicate our efforts, and it will examine our responsiveness and responsibility for advice. In addition, the task force will look down the road to determine where our priorities will be in the future. It also will evaluate our training needs. Finally, the task force will examine how the Army legal community will be affected—both in substance and in resources—by reductions in the size of the Army.

Where We Are Going

In anticipation of the challenges of the future, I met with the other general officers and some colonels in key positions for two days outside of the Pentagon in early April. We spent a portion of the time with a professor of behavioral science from the Defense Systems Management College. During that time, we focused our efforts on team building and group decision making. The preponderance of the time at the off-site, however, was spent with a management expert who facilitated our discussions of the strengths and weaknesses of the JAG Corps, the issues facing us, and the azimuth we want to follow as we get our ship back on course.

Mission

As a result of our discussions at the off-site, we will revise the mission statement contained in Army Regulation 27-1. As we see it, the mission of the JAG Corps is:

To support the Total Army mission by administering the military justice system and providing other quality legal services that meet the highest professional standards.

The change in our mission statement emphasizes the importance of military justice by singling it out among all other services we provide. The new mission statement also emphasizes the professional manner in which those services will be provided. Professionalism includes competence and ethics.

Vision

During the off-site, we also discussed our vision for the JAG Corps. In particular, we wanted a succinct statement that would inspire, be clear and challenging, be about excellence, stand the test of time as we proceed through a turbulent period, be a beacon to guide us, and empower our people. With these purposes in mind, we concluded that our vision should be—

For The Judge Advocate General's Corps to be the most competent, ethical, respected, and client-supportive group of legal professionals in public service.

For this vision to achieve the purposes intended, it must not be merely proclaimed. It must be lived and lived convincingly by me, by the rest of the leadership, and by each of you. Let it be your guide as you make your day-by-day decisions. Preach it to your subordinates and make appropriate references to it at promotion and award ceremonies, or in counseling sessions.

Goals

We also defined our goals for the JAG Corps at the off-site. In developing these goals, we considered several ends we want the Corps to achieve. We want to emphasize professionalism. We also want to emphasize ethics and the importance of being an honest broker.

Additionally, we want to stress the importance of good personnel management policies. The Corps needs to seek out quality people and do what it can to keep them. An important part of getting and retaining good people is ensuring that they develop and believe that they have fair opportunities to advance. We also recognize that we can foster the development and fair career progression of our officers only if we are competent, confident, and caring leaders. To meet these concerns, we need to ensure that our evaluations of our subordinates are fair and accurate. If they are not, we are not doing our jobs. Every officer in a leadership position should look at his or her senior rater profile. If you are like me, you may need to restart it.

As I noted above, we have a special responsibility in the area of military justice. We can avoid many problems if we use the technical channel of communication authorized by Article 6. We also noted that we cannot forget that we are dual professionals—that is, we are both lawyers and soldiers. In addition, we recognized that as budget and personnel cuts occur, the Corps will have to be more efficient and innovative. We also must work at ensuring that our facilities reflect the quality of our people and our work. Finally, we acknowledged that our recent experiences provide us an opportunity to look at our doctrine to ensure it makes sense.

With those ends in mind, we have defined the following goals for The Judge Advocate General's Corps:

- Understand and adhere to the highest professional standards.
- Allow no substitute for candor or moral courage when providing legal advice.
- Recruit and retain the best people.
- Ensure opportunity for development and advancement for all.
- Be competent, confident, and caring leaders.

- Administer a fair and impartial military justice system.
- Use the technical channel of communication in all appropriate circumstances.
- Ensure all military legal personnel maintain essential soldier skills.
- Foster continuous improvement and innovation in the provision of legal services.
- Provide a professional work environment that promotes pride in the military practice of law.
- Promulgate doctrine for the delivery of legal services in both war and peace.

These goals are the ends desired. To achieve them, however, we must do more than just identify and announce them. We must take many steps to accomplish them—steps that will take the form of meeting certain objectives. Significantly, all judge advocates must participate in the process of defining and achieving those objectives. Only through your participation can we expect you to become committed to the goals; and only through your commitment can we expect to achieve them.

Accordingly, leaders in every organization must give these goals some thought and must discuss them with their people. Each organization will develop its own

objectives to accomplish each goal. Field operating agencies and divisions in the Office of The Judge Advocate General will be forwarding lists of their individual objectives to the Executive. Similarly, other offices will be forwarding lists of their objectives to the staff judge advocates of their major commands. The major command staff judge advocates then will review the lists submitted by their offices and, by 26 July, they will submit to the Executive refined, consolidated lists that represent the objectives for their major commands. From your ideas, we then will publish the overall objectives for The Judge Advocate General's Corps.

Conclusion

Even as we refine our vision and our goals and objectives, the JAG Regiment only can reassume its role as the guardian of the Army's integrity and ethics if we—the JAG leadership—and you, as well as every other judge advocate, rededicate ourselves to the principles that set us apart from the rest of the Army. You must have absolute integrity, be above reproach, be models of fairness, and be courageous—that is, have the moral courage to just say no to commanders who want to break the law or do something unwise. You also must set the standards as a soldier, officer, and lawyer. In other words, you must "out-soldier" the other soldiers, "out-officer" the other officers, and "out-lawyer" the other lawyers. In sum, we always must take and defend the moral high ground, for we are the keepers of the flame.

The Persian Gulf War Crimes Trials¹

*Captain R. Peter Masterton
Chief of Military Justice
Aberdeen Proving Ground, Maryland*

Introduction

The war in the Persian Gulf has given rise to speculation about war crimes trials.² Now that the war is over, many have called for the prosecution of Saddam Hussein and others in Iraq. Iraq's acts of brutality toward Kuwaiti

civilians and its treatment of prisoners of war have been cited as war crimes.³ This article will examine whether Iraqi actions taken incident to the Persian Gulf War constitute war crimes and will discuss the procedures and penalties authorized at war crimes trials.⁴

¹This article was completed in February 1991, and is based on information available at that time.

²*To the Victors Go the Trials*, Newsweek, Feb. 4, 1991, at 52.

³*Under the Boot*, Newsweek, Oct. 15, 1990, at 36; *Torture and Torment*, Newsweek, Feb. 4, 1991, at 50; *Iraq's Horror Picture Show*, Time, Feb. 4, 1991, at 4.

⁴For purposes of this article, the term "war crime" includes not only violations of the law of war, but also crimes against peace, crimes against humanity, and other violations of international law related to armed hostilities.

Actions Constituting War Crimes

War crimes are defined by international law. Unfortunately, the definition is not always clear because one nation's understanding of international law not always is accepted by other nations.

International law derives from several sources. Treaties, for instance, are the most common source of international law.⁵ Treaties, however, generally apply only to nations that are signatories to them.⁶ Additionally, significant treaties that address the law of war typically are drafted only after a major conflict. Therefore, they often are out of date because they deal only with the problems incident to a particular conflict or war.⁷

Other sources of international law are international custom, the general principles of law, judicial decisions, and the teachings of publicists.⁸ International customs are longstanding practices of nations that have attained status as international law because of their general acceptance by the international community. Customary international law is applicable to all nations, regardless of whether they are signatories to any treaties.⁹ General principles of law are widely accepted, fundamental principles of municipal law, such as fairness and equity. General principles are borrowed from municipal law to fill gaps in international law.¹⁰ In addition, judicial decisions of international tribunals are used to clarify questions in

international law.¹¹ The teachings of highly qualified publicists also help to comprise the body of international law, even though they are used only when no other sources deal with a particular question.¹² Because, unlike treaties, these sources of international law are not accepted formally by nations and often are evaluated with relative subjectivity, they are more open to dispute.¹³

International law contains rules on armed aggression; rules regarding the treatment of diplomats, civilians, and prisoners of war; and rules regarding the weapons that may be used, as well as the targets that may be fired upon, during armed hostilities. Many of these rules are contained in international treaties to which Iraq and the other parties to the war in the Persian Gulf are signatories.¹⁴ Although many of the rules are clear, some are not.

Armed Aggression

On August 2, 1990, Iraq invaded Kuwait without warning. With its vastly superior army, Iraq quickly conquered Kuwait.¹⁵ The United Nations Security Council condemned the invasion and authorized the use of force to oust Iraq from Kuwait.¹⁶ On January 16, 1991, the United States and several allied nations began an aerial bombardment of Iraq and Kuwait pursuant to the Security Council's authorization.¹⁷ Soon thereafter, Iraq began missile attacks on Israel—a nation that was not involved in the conflict.¹⁸

⁵ Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter ICJ Statute].

⁶ North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.) 1969 I.C.J. 4. Although this decision held that Germany was not bound by a treaty to which it was not a signatory, it recognized that Germany might have been bound had the treaty received widespread acceptance and been in force for a long period of time. Treaties that receive longstanding and widespread acceptance may become customary international law and, therefore, become binding on nations that are not signatories to them. See *infra* notes 8, 9 and accompanying text.

⁷ One example of this is the Geneva Conventions of 1929 and the Geneva Conventions of 1949. Problems encountered during World War I led to the adoption of the Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, and the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847. These treaties, however, proved to be inadequate at dealing with the problems encountered during World War II. As a result, four new treaties were signed: (1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention Relative to the Wounded and Sick]; (2) the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention Relative to the Wounded and Sick at Sea]; (3) the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention Relative to Prisoners of War]; and (4) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention Relative to Civilians].

⁸ ICJ Statute, art. 38.

⁹ Dep't of Army Field Manual 27-10, The Law of Land Warfare, para. 4b (18 July 1956) [hereinafter FM 27-10].

¹⁰ Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (general principle of humanity required Albania to warn ships of existence of mine field).

¹¹ Although no rule of precedence exists in international law, judicial decisions may be used as guidance in determining what international law is. Article 58 of the Statute of the International Court of Justice states that decisions of the International Court of Justice have no binding force except between the parties to the particular case being decided. See ICJ Statute art. 58. Article 38, however, states that judicial decisions may be used as subsidiary means for the determination of international law, subject to the limitations in article 58. *Id.* art. 38.

¹² ICJ Statute, art. 38(1)(d).

¹³ Tunkin, *Coexistence and International Law*, 3 Recueil des Cours 1 (1958).

¹⁴ For example, Iraq, the United States, France, Italy, Canada, Egypt, Syria, Saudi Arabia, Kuwait, and Pakistan are signatories to the Geneva Conventions of 1949. See *Treaties in Force*, U.S. Dep't of State 369-70 (1990).

¹⁵ *Baghdad's Bully*, Newsweek, Aug. 2, 1990, at 16; *Iraq's Power Grab*, Time, Aug. 13, 1990, at 16.

¹⁶ *Deadline: January 15*, Time, Dec. 10, 1990, at 26.

¹⁷ *Desert Storm*, Newsweek, Jan. 28, 1991, at 12.

¹⁸ *'Keep Smiling' Israel*, Newsweek, Jan. 28, 1991, at 25.

Iraq's invasion of Kuwait was unlawful armed aggression. The Charter of the United Nations prohibits member nations from committing armed aggression against other nations.¹⁹ Because Iraq and all of the nations allied against it are signatories to that charter, all of them are bound by its prohibitions.²⁰

Whether the use of force constitutes unlawful aggression or proper self defense is not always clear. The General Assembly of the United Nations has passed a resolution that defines aggression.²¹ Although United Nations Security Council resolutions are not binding on member nations, they may be considered as evidence of customary international law.²² The General Assembly's resolution defines aggression to include attacks by armed forces or any annexations of territory accomplished through the use of force.²³ The resolution also states that no military, political, or economic consideration may justify aggression.²⁴ Under the Security Council's definition, Iraq's invasion of Kuwait qualifies as unlawful aggression. None of Iraq's justifications for the invasion, such as the desire for a better foothold in the Persian Gulf or control over Kuwait's oil fields, provide a proper excuse.²⁵

Iraq's invasion of Kuwait also violated international law because Iraq commenced it without warning. Under the 1907 Hague Convention Relative to the Opening of Hostilities,²⁶ a nation may not commence hostilities without a previous unequivocal warning, such as a declaration

of war or an ultimatum with a conditional declaration of war.²⁷ Although Iraq is not a signatory to this treaty and the state of Iraq did not exist when it was drafted,²⁸ the treaty's widespread and longstanding acceptance is evidence of its status as customary international law.²⁹ Consequently, because it began without any warning at all, Iraq's invasion was unlawful.³⁰

The attacks on Iraq by the United States and its allies, on the other hand, clearly were lawful because they were made pursuant to the United Nations Security Council authorization. The Charter of the United Nations grants the Security Council the power to authorize the use of force in response to aggression.³¹ In this case, the Security Council authorized the use of force if Iraq did not withdraw from Kuwait before January 15, 1991.³² The allied attacks on Iraq were lawful because they began only after Iraq had failed to withdraw from Iraq, and only after the Security Council's deadline had passed.³³

The legality of Iraq's missile attacks on Israel is less clear. Because the Palestinians often have depended upon Iraq to avenge actions taken against them by Israel, Iraq might try to justify these attacks as attempts to assist Palestinians who live in Israel in obtaining their autonomy.³⁴ The General Assembly resolution on aggression states that the use of force is lawful if it is in support of a struggle for independence from alien domination.³⁵ Iraq's missile attacks on Israeli cities, however, had little reasonable chance of aiding the Palestinians in their struggle for independence because the damage that the attacks

¹⁹Article 2(4) of the charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 [hereinafter U.N. Charter].

²⁰Iraq, the United States, France, England, Egypt, Canada, Syria, and Saudi Arabia were original parties to the Charter of the United Nations. Kuwait, Italy, and Pakistan subsequently became parties to the charter.

²¹"Definition of Aggression" Resolution, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) 2, U.N. Doc. A/9631, at 142 (1974) [hereinafter "Definition of Aggression" Resolution].

²²Advisory Opinion on Western Sahara, 1975 I.C.J. 12.

²³"Definition of Aggression" Resolution art. 3(a).

²⁴*Id.* art. 5(1).

²⁵Iraq's invasion of Kuwait also cannot be justified under Islamic law, which prohibits war to be used for material gain. The only type of war authorized is Jihad, or holy war, which is designed to propagate Islam. The Islamic holy book, the *Qur'an*, encourages peace and emphasizes the strict duty to observe treaties with the enemy. A. An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 Cornell Int'l L.J. 317 (1987).

²⁶Hague Convention No. III Relative to the Opening of Hostilities, Oct 18, 1907, 36 Stat. 2259, T.S. No. 538, 1 Bevans 619.

²⁷*Id.* art. 1.

²⁸Canada, France, Pakistan, England, and the United States are signatories; Iraq, Egypt, Italy, Kuwait, Saudi Arabia, and Syria are not. Treaties in Force, *supra* note 14, at 373.

²⁹*North Sea Continental Shelf Cases*, 1969 I.C.J. at 4.

³⁰*Baghdad's Bully*, *supra* note 15, at 16; *Iraq's Power Grab*, *supra* note 15, at 16.

³¹U.N. Charter chap. VII.

³²*Deadline: January 15*, *supra* note 16, at 26.

³³*Desert Storm*, *supra* note 17, at 12.

³⁴*Palestine: Muddle of the Middle*, Newsweek, Oct. 22, 1990, at 45.

³⁵"Definition of Aggression" Resolution art. 7.

inflicted was insignificant. In addition, Iraq's apparent aim in the conflict, and the most plausible explanation for its waging these missile attacks, was to draw Israel into the Persian Gulf War, thereby destabilizing the coalition forces.³⁶ Consequently, the missile attacks most probably were unlawful.

Detention of Diplomats and Other Foreigners

Soon after the invasion of Kuwait on August 2, 1990, many foreigners, including embassy personnel in Iraq and Kuwait, were not allowed to leave the country.³⁷ These foreigners were referred to as "hostages" and were not released until December 1990.³⁸ Subsequently, Iraq forced foreign embassies in Kuwait to close.³⁹

Iraq's treatment of embassy personnel was unlawful. The Vienna Convention on Diplomatic Relations⁴⁰ protects embassy personnel from any form of arrest.⁴¹ This convention also provides that embassy premises shall be inviolable.⁴² Because Iraq is a signatory, it is bound by this treaty.⁴³

Iraq's detention of embassy personnel also violated the prohibition on arrest of embassy personnel.⁴⁴ By forcing foreign embassies in Kuwait to close, Iraq breached the treaty provision making embassies inviolable. Although this treaty provision is aimed primarily at the host nation, it also can be applied to invading nations.⁴⁵ Because territorial acquisitions resulting from aggression are not recognized as lawful, however, Iraq cannot justify the closings simply by alleging that Kuwait has ceased to exist.⁴⁶

Iraq's detention of other foreigners also was unlawful. The 1949 Geneva Convention Relative to Civilians⁴⁷ provides that foreigners in a territory occupied by a belligerent must be allowed to leave unless their departure is contrary to the national interest of the belligerent.⁴⁸ Because Iraq is a signatory, it is bound by this treaty. In addition to allowing civilians to leave occupied areas, this convention specifically prohibits the taking of hostages.⁴⁹

Although the 1949 Geneva Convention Relative to Civilians does not define hostages, the International Convention Against the Taking of Hostages⁵⁰ defines this term as civilians held to compel another nation to perform or abstain from any act. Iraq is not a signatory to this convention.⁵¹ The convention's adoption by the United Nations General Assembly, however, is evidence that the terms of the convention in general, and its definition of hostage in particular, is accepted as customary international law.⁵² Iraq's detention of foreigners violated the 1949 Geneva Convention Relative to Civilians⁵³ because these foreigners posed no apparent threat to Iraq. Rather, the purpose for holding them was to use them as "human shields" that would prevent other nations from retaliating against Iraq for its invasion of Kuwait. Therefore, these foreigners were held illegally as hostages.

Treatment of Kuwaiti Civilians

After invading Kuwait in August 1990, Iraq began to crush resistance among Kuwaiti civilians. Iraqi troops reportedly tortured, raped, and executed many civilians.

³⁶Iraq hoped that Israel would retaliate for the missile attacks, which would have placed the Arab nations allied with the United States in the awkward position of being on the same side of the Persian Gulf War as Israel. See *'Keep Smiling' Israel*, *supra* note 18, at 25.

³⁷*Saddam's Strongest Card*, *Time*, Aug. 27, 1990, at 24; *War Path*, *Newsweek*, Aug. 27, 1990, at 19. A total of nearly 19,000 citizens of the United States, England, Japan, the Soviet Union, West Germany, France, Italy, and Australia were not allowed to leave Iraq and Kuwait. See *id.*

³⁸*Stick or No Stick*, *Newsweek*, Dec. 17, 1990, at 20.

³⁹*The Embassy Standoff*, *Newsweek*, Sept. 3, 1990, at 30.

⁴⁰23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (1964).

⁴¹Diplomats, their family members and embassy staff are all protected from any form of arrest. See Vienna Convention of Diplomatic Relations, Apr. 18, 1961, arts. 29, 37, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 [hereinafter 1961 Vienna Convention on Diplomatic Relations].

⁴²*Id.* art. 22.

⁴³*Id.*

⁴⁴*Id.* arts. 29, 37; Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 LCJ. 7.

⁴⁵1961 Vienna Convention on Diplomatic Relations art. 22.

⁴⁶"Definition of Aggression" Resolution art. 5(3).

⁴⁷See generally 1949 Geneva Convention Relative to Civilians.

⁴⁸*Id.* art. 35.

⁴⁹*Id.* art. 34.

⁵⁰Dec. 17, 1979, 18 I.L.M. 1456.

⁵¹Canada, Egypt, Italy, Kuwait, England, and the United States are signatories; France, Iraq, Pakistan, Saudi Arabia, and Syria are not.

⁵²G.A. Res. 146, U.N. GAOR 34 (1979).

⁵³1949 Geneva Convention Relative to Civilians arts. 34, 35.

Iraq also seized large amounts of private property owned by Kuwaiti civilians, sending much of it back to Iraq.⁵⁴

Iraq's treatment of Kuwaiti civilians violated international law.⁵⁵ The 1949 Geneva Convention Relative to Civilians prohibits rape,⁵⁶ corporal punishment, and torture of civilians of an occupied nation.⁵⁷ Although the occupying nation may punish individuals who commit sabotage and similar acts, they must be treated humanely and given a fair trial.⁵⁸ As a signatory to this treaty, Iraq is bound by these provisions.

Under the 1907 Hague Convention Respecting the Laws of War,⁵⁹ seizure or destruction of civilian property is forbidden unless required by the necessities of war.⁶⁰ Although Iraq is not a signatory to this treaty,⁶¹ and the Iraqi state did not exist when it was drafted, the treaty's longstanding and widespread acceptance is evidence of its status as customary international law.⁶² Under this convention, compensation must be made when seizure of private property is required by the necessities of war.⁶³ Furthermore, only private property that can be used directly in the war effort—such as weapons, vehicles, and radios—may be removed from the occupied country.⁶⁴

Iraq's torture and rape of civilians was clearly illegal.⁶⁵ Iraq's execution of civilians also was illegal to the extent these civilians were not granted fair trials.⁶⁶ Furthermore,

Iraq's seizures of private property were illegal because they were not justified by the necessities of war and no provision was made to compensate the owners.⁶⁷ Sending this property back to Iraq also was illegal because much of it could not be used directly in support of its war effort.⁶⁸

Treatment of Prisoners of War

Once the attack on Iraq began on January 16, 1991, several allied pilots were captured by Iraq. Shortly thereafter, these prisoners of war were interviewed on Iraqi television. The prisoners of war gave details about their mission and condemned the allied attacks on Iraq. Although speculation about coercion and torture of these prisoners arose, Iraq refused to allow the International Red Cross to examine them.⁶⁹ Subsequently, Iraq reportedly used the prisoners as "human shields" by placing them near allied bombing targets.

Iraq's treatment of prisoners of war was illegal. Under the 1949 Geneva Convention Relative to Prisoners of War,⁷⁰ members of regular armed forces who surrender to the enemy are entitled to protections as prisoners of war.⁷¹ Prisoners of war must be treated humanely and protected against acts of violence, intimidation, and public curiosity.⁷² The detaining nation also must allow a neutral party to have access to the prisoners.⁷³ Prisoners

⁵⁴ *Under the Boot*, *supra* note 3, at 36.

⁵⁵ Iraq's unlawful treatment of civilians cannot be justified under Islamic law. Under Islamic law, Muslims never may kill noncombatants, destroy property, or conduct war-like activities outside the battlefield. A. An-Na'im, *supra* note 25, at 317.

⁵⁶ 1949 Geneva Convention Relative to Civilians art. 27.

⁵⁷ *Id.* art. 32.

⁵⁸ *Id.* art. 5.

⁵⁹ Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 63 [hereinafter 1907 Hague Convention Respecting the Laws of War].

⁶⁰ *Id.* art. 23(g).

⁶¹ Canada, France, Pakistan, England, and the United States are signatories; Iraq, Egypt, Italy, Kuwait, and Saudi Arabia are not. Treaties in Force, *supra* note 14, at 373.

⁶² North Sea Continental Shelf Cases 1969 I.C.J. at 4.

⁶³ 1907 Hague Convention Respecting the Laws of War arts. 52, 53.

⁶⁴ Article 52 of the 1907 Hague Convention Respecting the Laws of War permits the requisition of private property for the needs of the Army of Occupation as the amount requisitioned is proportional to the resources of the country. Such property may not be removed from the occupied country. Article 53 of the 1907 Hague Convention Respecting the Laws of War permits the seizure of privately owned communication devices, means of transportation, arms, and ammunition. This type of property may be removed from the occupied nation. Dep't of Army Pamphlet 27-161-2, International Law, at 176-81 (23 Oct. 1962) [hereinafter DA Pam. 27-161-2].

⁶⁵ 1949 Geneva Convention Relative to Civilians arts. 27, 32.

⁶⁶ *Id.* art. 5.

⁶⁷ 1907 Hague Convention Respecting the Laws of War arts. 52, 53.

⁶⁸ 1907 Hague Convention Respecting the Laws of War art. 52; United States v. Krupp, 10 L.R.-Trials of War Criminals 88, 89 (1948); IX Trials of War Criminals Before the Nuremberg Military Tribunals 1950-1, at 1358-61 (1948) (German seizure of property during World War II violated Hague Convention).

⁶⁹ *Torture and Torment*, *supra* note 3, at 50; *Iraq's Horror Picture Show*, *supra* note 3, at 34.

⁷⁰ See generally 1949 Geneva Convention Relative to Prisoners of War.

⁷¹ *Id.* art. 4(A)(3).

⁷² Article 13 of the 1949 Geneva Convention Relative to Prisoners of War provides that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."

⁷³ Articles 8 and 10 of the 1949 Geneva Convention Relative to Prisoners of War provide for the establishment of a "protecting power," which is responsible for safeguarding the rights of prisoners of war. Although the protecting power is normally a nation to which the parties to the conflict have agreed, when no such nation is agreed upon, the detaining power may designate a neutral nation to fulfill this role. Furthermore, if the detaining power fails to designate a protecting power, the detaining nation must accept the offer of the International Commission of the Red Cross to act as the protecting power. Prisoners of war must be given unlimited access to the protecting power. *Id.* art. 78.

of war are bound to give only their name, rank, date of birth, and serial number,⁷⁴ and must be evacuated far enough from the combat zone to be out of danger.⁷⁵ Because Iraq is a signatory to the 1949 Geneva Convention Relative to Prisoners of War, it is bound by these provisions.

Any coercion or torture of allied prisoners of war is an obvious violation of international law. The airing of interviews with allied prisoners of war also violated international law because these broadcasts made the prisoners objects of public curiosity.⁷⁶ Iraq's refusal to allow the International Red Cross to examine the prisoners also violated the requirement to allow access to prisoners of war.⁷⁷ Additionally, Iraq's use of the prisoners as "human shields" violated the convention's requirement that they be evacuated to a safe area.⁷⁸

Nuclear, Chemical, and Biological Weapons

Since planning began to oust Iraq from Kuwait by force, commentators speculated about the type of weapons Iraq might have used. Some reports have alleged that Iraq might have nuclear weapons,⁷⁹ but Iraq's possession of, and propensity to use, chemical and biological agents is clear.⁸⁰

If Iraq had nuclear weapons, the lawfulness of their use would have been unclear. No general prohibition on the use of nuclear weapons exists under international law. Although the use of weapons calculated to cause unnecessary suffering is prohibited,⁸¹ this proscription does not prevent the use of atomic weapons.⁸²

The Treaty on Non-Proliferation of Nuclear Weapons⁸³ prohibits non-nuclear nations, such as Iraq, from manufacturing or acquiring nuclear devices. Iraq, and most of the nations allied against it, are signatories to this treaty.⁸⁴ The treaty, however, is aimed primarily at the development of nuclear weapons—not their use. Furthermore, Iraq may argue that it would be improper to prohibit it from obtaining and using nuclear weapons when its enemies—some of which are not signatories to the treaty—are free to do so.

The United Nations General Assembly also has passed a resolution prohibiting the use of nuclear weapons.⁸⁵ Because most western nations voted against the resolution, however, its force as international customary law is doubtful.⁸⁶ Therefore, no treaty or international custom specifically prohibits Iraq's use of nuclear weapons. Fortunately, this issue did not arise in the context of the Gulf War.

Even though Iraq would not have necessarily violated international law had it used nuclear weapons, its use of chemical weapons clearly would have been unlawful. Both Iraq and the nations allied against it are parties to the 1925 Geneva Gas Protocol,⁸⁷ which prohibits the use of chemical agents. Iraq, the United States, and many of the other nations involved in the Persian Gulf War have ratified this treaty subject to the reservation that chemical weapons may be used in retaliation if the enemy uses them first.⁸⁸ Neither Iraq nor any of the other parties to the war, however, lawfully can initiate the use of chemical weapons.

⁷⁴*Id.* art. 17.

⁷⁵*Id.* art. 19.

⁷⁶*Id.* art. 13.

⁷⁷*Id.* arts. 10, 78. In the Persian Gulf War, no protecting power has been agreed upon or designated by any of the parties. Therefore, the International Red Cross must be allowed to fulfill this role.

⁷⁸*Id.* art. 19.

⁷⁹*How Soon Will Saddam Have the Bomb*, Newsweek, Dec. 3, 1990, at 22.

⁸⁰*The Germ Warfare Alert*, Newsweek, Jan. 7, 1991, at 25; *The Germs of War*, Time, Dec. 10, 1990, at 39.

⁸¹1907 Hague Convention Respecting the Laws of War art. 23(e).

⁸²This is the position of the United States. See FM 27-10, para. 35. This position, however, is open to debate. See DA Pam. 27-161-2, at 42.

⁸³July 1, 1968, 21 U.S.T. 483, T.I.A.S. 6839, 729 U.N.T.S. 161.

⁸⁴Iraq, Canada, Egypt, Italy, Kuwait, Saudi Arabia, Syria, England, and the United States are parties to the treaty; France and Pakistan are not. *Treaties in Force*, *supra* note 14, at 357-58.

⁸⁵Declaration of the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. Res. 1653, 16 GAOR Supp. (No. 17), U.N. Doc. A/5100, at 4 (1961).

⁸⁶*Id.*

⁸⁷Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65 [hereinafter the 1925 Geneva Gas Protocol]. Canada, Egypt, France, Iraq, Italy, Kuwait, Pakistan, Saudi Arabia, Syria, England, and the United States are parties to this treaty. *Treaties in Force*, *supra* note 14, at 320-1.

⁸⁸Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para. 38d (18 July 1956) (C1, 15 July 1976) [hereinafter C1 to FM 27-10]. The United States unilaterally has renounced the first use of chemical herbicides except to control vegetation around United States installations and the first use of riot control agents except in defensive situations such as abatement of riots in areas under United States control, dispersal of civilians used to mask an attack, rescue missions, and protection of convoys in rear areas. *Id.* para. 38c; see Exec. Order No. 11,850, 40 Fed. Reg. 16,187 (1975).

Iraq's use of biological weapons also would have been unlawful because the 1925 Geneva Gas Protocol prohibits the use of biological agents as well.⁸⁹ Iraq's possession of biological weapons is not, however, illegal. Although a treaty prohibiting the stockpiling and development of biological weapons exists,⁹⁰ Iraq is not a signatory and is not bound by it.⁹¹ Accordingly, even though Iraq could have developed and stockpiled biological weapons, it lawfully could not have used them during the Gulf War.

Oil as a Weapon

After the commencement of aerial bombardments on Iraqi positions in Kuwait and Baghdad, Iraq attempted to use Kuwait's oil as a weapon by dumping millions of barrels of it into the Persian Gulf. A huge oil slick developed, polluting the Gulf and threatening water desalination plants on the Saudi Arabia coast. Although the oil slick may have had some effect on allied amphibious landings in Kuwait, the military advantage to Iraq was estimated to be minimal.⁹²

The lawfulness of using oil as a weapon by dumping it into the sea is unclear. Two treaties specifically prohibit the dumping of oil or other pollutants into the sea: (1) The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters;⁹³ and (2) The International Convention for the Prevention of Pollution of the Sea by Oil.⁹⁴ Unfortunately, Iraq is not a party to either treaty and, therefore, is not bound by them.⁹⁵ The United Nations Convention on the Law of the Sea⁹⁶ also

prohibits pollution of the sea.⁹⁷ Although Iraq has ratified this treaty, the treaty itself has not entered into force.⁹⁸ Therefore, no treaty specifically prohibited Iraq from dumping oil into the Persian Gulf.

The prohibition against using weapons in a manner likely to cause unnecessary suffering, however, could be applied to Iraq's dumping of oil.⁹⁹ Clearly, Iraq gained little or no military advantage by dumping oil into the Persian Gulf. Actually, ascertaining exactly in which direction the oil would migrate and what tactical effect it would have was impossible. The discharge of oil, therefore, was an apparently indiscriminate act that the Iraqis must have known would result in an environmental disaster of incredible proportions. Accordingly, when weighed against this great and clearly predictable ecological damage, the Iraqi oil dumping constituted a violation of the prohibition against using a weapon to inflict unnecessary suffering.¹⁰⁰

Targeting Cities

Soon after the attack on Iraq began on January 16, 1991, Iraqi missiles began landing in cities in Israel and Saudi Arabia, killing and injuring civilians.¹⁰¹ The allied bombing raids on Iraqi cities also resulted in civilian casualties.¹⁰² The lawfulness of Iraq's missile attacks on cities is unclear. Killing and injuring civilians who are taking no active part in hostilities is prohibited under the 1949 Geneva Convention Relative to Civilians.¹⁰³ The bombardment of military targets in cities is lawful, how-

⁸⁹The United States' reservation to the 1925 Geneva Gas Protocol does not reserve to the United States the right to use biological weapons in retaliation if the enemy uses them first. See C1 to FM 27-10, para. 38d.

⁹⁰Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, 1015 U.N.T.S. 163.

⁹¹Canada, France, Italy, Kuwait, Pakistan, Saudi Arabia, England, and the United States are parties to this treaty; Egypt, Iraq and Syria are not. Treaties in Force, *supra* note 14, at 292-3.

⁹²*Saddam's Ecoterror*, Newsweek, Feb. 4, 1991, at 36; *A War Against the Earth*, Time, Feb. 4, 1991, at 32.

⁹³Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165, 1046 U.N.T.S. 120 [hereinafter Convention on Prevention of Pollution by Dumping of Wastes].

⁹⁴May 12, 1954, 12 U.S.T. 2989, No. T.I.A.S. 4900, 327 U.N.T.S. 3 [hereinafter Convention for Prevention of Pollution by Oil].

⁹⁵Canada, France, Italy, England, and the United States are parties to the Convention on the Prevention of Pollution by Dumping Wastes; Iraq, Egypt, Kuwait, Pakistan, Saudi Arabia, and Syria are not. Canada, Egypt, France, Italy, Kuwait, Saudi Arabia, Syria, England, and the United States are parties to the Convention on the Prevention of Pollution by Oil; Iraq and Pakistan are not. Treaties in Force, *supra* note 14, at 341-3.

⁹⁶Oct. 7, 1982, U.N. Doc. A/C.62/122, reprinted in 21 I.L.M. 1261 (1982).

⁹⁷*Id.* arts. 207, 210, 211.

⁹⁸The treaty will not enter into force until at least 60 nations have ratified it. *Id.* art. 308. This has not yet happened. The predecessors to this treaty, the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, and the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 331, also contain provisions prohibiting marine pollution. Iraq, however, is not a signatory to these treaties. Treaties in Force, *supra* note 14, at 345-46.

⁹⁹1907 Hague Convention Respecting the Laws of War art. 23(e).

¹⁰⁰*Saddam's Ecoterror*, *supra* note 92, at 36.

¹⁰¹'Keep Smiling' Israel, *supra* note 18, at 25; *A Long Siege Ahead*, Time, Feb. 4, 1991, at 20.

¹⁰²*Hundreds of Iraqi Civilians Bombed in Air Raid Shelter*, The Baltimore Sun, Feb. 14, 1991, at 1, Col. 3.

¹⁰³Article 3(1)(a) of the 1949 Geneva Convention Relative to Civilians prohibits violence to life and person of individuals taking no active part in hostilities. The United States views attacks on civilians as prohibited by customary international law. C1 to FM 27-10, para. 40a. For a contrary view, see Stone, *Legal Controls on International Conflict* 621 (1954) (civilian morale is a lawful target).

ever, even though accidental injury to civilians may result.¹⁰⁴ Iraq's weapons systems are sufficiently crude that missiles intended for military targets might accidentally land on civilians.¹⁰⁵ In addition, Iraq's attacks on cities appear to have been designed to spread terror among civilians and to draw Israel into the war, destabilizing the allied forces.¹⁰⁶ Therefore, their attacks apparently were aimed unlawfully at civilians.

Iraq's missile attacks on cities also violated the 1907 Hague Convention Respecting the Laws of War. This treaty requires a warning before a bombardment of military targets located in areas where parts of the civilian population remain.¹⁰⁷ No requirement exists, however, to warn if an assault is imminent.¹⁰⁸ Iraq violated this requirement because its attacks began without warning and no assault was imminent.¹⁰⁹ As discussed above, Iraq's attacks on Israel also may be considered illegal acts of aggression.

On the other hand, the allied bombing raids that resulted in civilian casualties were lawful because the casualties were unintentional.¹¹⁰ The coalition forces lawfully were bombing military targets with extreme precision. If, as the allies alleged, Iraq had placed civilians near these military targets to "shield" the targets from attack, the Iraqis unlawfully would have violated the affected civilians' protected status.¹¹¹

Terrorism

In response to the threat posed by the coalition forces, Iraq also made repeated calls for terrorist attacks throughout the world. After the allied forces began their attack

on 16 January, terrorist activity increased markedly. Subsequently, Iraq was linked with at least two of the incidents resulting from these activities.¹¹²

The use of terrorists by Iraq violated international law. Although enemy terrorist forces may pose as civilians to travel into enemy territory,¹¹³ the use of terrorists posing as civilians to attack enemy targets is prohibited.¹¹⁴ In particular, the use of terrorists to attack enemy civilians not engaged in hostilities violates the prohibition on killing and injuring civilians.¹¹⁵

War Crimes Trials

War crimes trials provide a method of fixing responsibility for violations of international law. The best known examples of these proceedings are the war crimes trials held after World War II in Nuremberg and Tokyo. These trials undoubtedly will serve as models for any war crimes trials held as a result of the Persian Gulf War.¹¹⁶

If war crimes trials are held in the wake of the Persian Gulf War, the victorious allies must determine who to hold responsible for these crimes. Extensive investigations must be conducted to find the government officials, soldiers, and others who have violated international law. Once alleged war criminals have been identified, procedures must be established for trying and punishing these individuals.

Procedures

The victorious allied nations will have to agree on the procedures for any war crimes trials. Under international

¹⁰⁴United States v. Ohlendorf, IV Trials of War Crimes Before the Nuremberg Military Tribunals 1950-1, at 466-67 (1948) (allied bombings of German cities during World War II justified).

¹⁰⁵*The Dangerous Dinosaur*, Time, Jan. 28, 1991, at 23.

¹⁰⁶'Keep Smiling' Israel, *supra* note 18, at 25.

¹⁰⁷1907 Hague Convention Respecting the Laws of War art. 26.

¹⁰⁸*Id.*

¹⁰⁹*Id.* Iraq might argue that the United States and its allies gave no warning before beginning their aerial bombardment on 16 January 1991. The United Nations resolution authorizing the use of force if Iraq did not withdraw from Kuwait before January 15, 1991, however, was sufficient warning. Additionally, the allied targets were strictly military. The allies were not bombing targets where the civilian population was expected to be.

¹¹⁰*Ohlendorf*, IV Trials of War Crimes Before the Nuremberg Military Tribunals 1950-1, at 466-67.

¹¹¹1949 Geneva Convention Relative to Civilians art. 3.

¹¹²*A Tide of Terrorism*, Newsweek, Feb. 18, 1991, at 35.

¹¹³The use of the enemy's uniform to travel into enemy territory has been held lawful as long as it is not worn during actual combat. See United Nations War Crimes Commission, IX Law Reports of Trials of War Criminals 90-94 (1949) (use of allied uniforms by Germans in Ardennes offensive lawful because uniforms were not used in combat). The same principle should apply to the use of civilian clothes.

¹¹⁴The use of civilians to render military targets immune from attack is unlawful because it constitutes a misuse of their protected status as noncombatants. See 1949 Geneva Convention Relative to Civilians art. 3. By analogy, the use of civilians to attack military targets also would be a misuse of their protected status. See FM 27-10, para 504g.

¹¹⁵1949 Geneva Convention Relative to Civilians art. 3(1)(a).

¹¹⁶*To the Victors Go the Trials*, *supra* note 2, at 52.

law, the victors have an obligation to enact legislation to punish grave breaches of international law effectively.¹¹⁷ The United States may take a leading role in developing this legislation because it had a large number of troops committed to the conflict and a concomitantly large stake in the war.

The United States already has procedures in place to prosecute war crimes. Article 18 of the Uniform Code of Military Justice¹¹⁸ grants jurisdiction to the United States armed forces over any person subject to trial for a violation of the law of war. The 1984 *Manual for Courts-Martial* also states that military jurisdiction may be exercised over offenses charged as violations of the law of war.¹¹⁹

The procedures used would be the same procedures that are applicable to general courts-martial.¹²⁰ The accused would be charged with a specific violation of the law of war.¹²¹ The accused would be entitled to a pretrial investigation,¹²² trial by at least five members of the United States armed forces,¹²³ and representation by a military attorney or counsel of his or her own choice.¹²⁴ If the accused chooses an attorney not licensed in the United States, the attorney must have appropriate training and familiarity with the general principles of criminal law applicable in courts-martial.¹²⁵ The accused also is entitled to the production of witnesses and evidence.¹²⁶

Kuwaiti courts also could prosecute war crimes. In the case of atrocities alleged to have occurred in Kuwaiti territory, however, the government of Kuwait could charge war criminals not only with violations of international law, but also with violations of Kuwaiti law.

Rather than relying on the United States military or Kuwaiti courts, the coalition forces instead may desire to establish an international tribunal to hear war crimes trials. No permanent international tribunal designed to hear war crimes trials exists. The International Court of Justice in The Hague is a permanent court, but it hears only civil suits between nations.¹²⁷ Therefore, the United States and its allies will be responsible for convening separate tribunals to try war criminals.

The allies first must consider the composition of these tribunals. The tribunal at Nuremberg, for instance, consisted of one judge from each of the victorious nations—the United States, England, France, and the Soviet Union.¹²⁸ The Persian Gulf conflict war crimes tribunal probably would have a similar composition. Some have suggested that the tribunal should consist solely of Arab judges.¹²⁹ The United States and other western nations, however, understandably may want representatives on the tribunal.

The allies also will need to appoint attorneys to serve as prosecutors at the trials. At the Nuremberg trials, each of the victorious nations appointed attorneys to the prosecution team.¹³⁰ The American prosecutors were independent and answerable only to the President. Most had served in prestigious positions before their appointment to the prosecution team.¹³¹ Similar appointments might be made to compose a team to prosecute war crimes arising from the Persian Gulf conflict.

In addition to agreeing on the compositions of the tribunals and to appointing prosecutors, the victorious nations would have to develop specific procedures for

¹¹⁷This obligation applies to all nations involved in armed conflict. See 1949 Geneva Convention Relative to the Wounded and Sick art. 49; 1949 Geneva Convention Relative to the Wounded and Sick at Sea art. 50; 1949 Geneva Convention Relative to Prisoners of War art. 129; 1949 Geneva Convention Relative to Civilians art. 146.

¹¹⁸10 U.S.C. § 818 (1988).

¹¹⁹Manual for Courts-Martial, United States, 1984, Part I, para. 2(a)(4).

¹²⁰Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 201(f)(1)(B) [hereinafter R.C.M.].

¹²¹R.C.M. 307(c)(2).

¹²²R.C.M. 405.

¹²³R.C.M. 501(a); R.C.M. 502(a).

¹²⁴R.C.M. 501(b); R.C.M. 502(d).

¹²⁵R.C.M. 502(d)(3)(B).

¹²⁶R.C.M. 703.

¹²⁷ICI Statute arts. 34, 36.

¹²⁸Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 2, 59 Stat. 1544 (1945) (Charter of the International Military Tribunal).

¹²⁹*To the Victors Go the Trials*, *supra* note 2, at 52.

¹³⁰Tusa & Tusa, *The Nuremberg Trial* 70-74 (1984).

¹³¹*Id.* at 70. The American members of the prosecution team were Robert Jackson, Associate Justice, United States Supreme Court, and former Solicitor General and Attorney General; Robert G. Storey, a Texas law professor; Thomas J. Dodd; John Amen, former Special Assistant to the United States Attorney General; Sidney Alderman, General Solicitor to the Southern Railway Company; Francis Shea, United States Assistant Attorney General and former Dean, Buffalo Law School; and William Donovan, Director, Office of Strategic Services (the predecessor of the Central Intelligence Agency).

conducting the trials. After World War II, the procedures for war crimes trials were proposed by the United States. The procedures initially were developed by the War Department and subsequently were refined by the State Department and Justice Department before being presented to the other allied powers.¹³² A similar cooperative effort will be necessary to create procedures for the Persian Gulf conflict war crimes trials.

Some procedures for war crimes trials are mandated by international law. For instance, individuals charged with war crimes have the right to a proper trial and defense.¹³³ The legislation adopted to prosecute war crimes must grant the accused the right to qualified counsel of his or her own choice. Absent a choice by the accused, counsel must be appointed for him or her. Moreover, the accused's counsel must have at least two weeks to prepare a defense and must be afforded adequate facilities.¹³⁴

The defense counsel in the Nuremberg trials were primarily German attorneys who were paid by the allies. Although each accused was given a list of available defense attorneys, the defendants were allowed to choose any attorney they wished.¹³⁵ A similar arrangement would be required for defendants in war crimes trials arising from the Persian Gulf conflict. Presumably, Iraqi and other Arab attorneys will have to be enlisted to serve as defense counsel.

In addition to the right to counsel, the accused in a war crime tribunal has the right to call witnesses on his or her behalf and the defense counsel must have the right to interview witnesses prior to trial. The accused also must be provided with a competent interpreter, if necessary.¹³⁶ The accused must be advised of his or her rights prior to

trial. Finally, the accused must be informed of the charges in "good time" before trial.¹³⁷

At the conclusion of trial, the accused must be informed of any judgment and sentence. The accused would be given the right to appeal the sentence in the same manner as the soldiers of the occupying power.¹³⁸

Individuals Responsible

War criminals include not only individuals who personally violate international law, but also those who aid, abet, or encourage such violations.¹³⁹ For example, a military commander who orders subordinates to commit war crimes is responsible for those crimes. A commander also is responsible for war crimes of subordinates if he or she knew or should have known of the crimes, but did not take reasonable steps to prevent them.¹⁴⁰

Saddam Hussein and other Iraqi military leaders who ordered violations of international law may be held responsible for these crimes. Additionally, Iraqi commanders who knew, or should have known, of crimes committed by their subordinates, but who took no steps to prevent them, also may be held responsible.

Defenses

The defenses available to an accused at a war crimes trial are much the same as the defenses available to a defendant at any criminal trial. Self-defense,¹⁴¹ necessity,¹⁴² and duress¹⁴³ are proper defenses to a war crime. Mistake of fact also is a defense.¹⁴⁴ Although mistake of law ordinarily is not a defense under municipal law, it may be a defense at a war crime trial because international law is not as precise and well defined as municipal criminal law.¹⁴⁵

¹³²*Id.* at 56-60.

¹³³ 1949 Geneva Convention Relative to the Wounded and Sick art. 49; 1949 Geneva Convention Relative to the Wounded and Sick at Sea art. 50; 1949 Geneva Convention Relative to Prisoners of War art. 129; 1949 Geneva Convention Relative to Civilians art. 146. The basic rights afforded these persons will be at least as favorable as the rights delineated in the 1949 Convention Relative to Prisoners of War.

¹³⁴ 1949 Convention Relative to Prisoners of War art. 105.

¹³⁵ Tusa & Tusa, *supra* note 130, at 121-24.

¹³⁶ Geneva Convention Relative to Prisoners of War art. 105.

¹³⁷ *Id.*

¹³⁸ *Id.* art. 106.

¹³⁹ DA Pam. 27-161-2, at 240.

¹⁴⁰ FM 27-10, para. 501; *Re Yamashita*, 327 U.S. 1 (1950).

¹⁴¹ *Krupp*, IX Trials of War Criminals Before the Nuremberg Military Tribunals 1950-1, at 1435-9.

¹⁴² *United States v. Flick*, III Trials of War Criminals Before the Nuremberg Military Tribunals, 1950-1, at 1200-2 (1948).

¹⁴³ *Ohlendorf*, IV Trials of War Criminals Before the Nuremberg Military Tribunals 1950-1, at 480.

¹⁴⁴ *United States v. List*, XI Trials of War Criminals Before the Nuremberg Military Tribunals 1950-1, at 1296.

¹⁴⁵ Trial of Oberleutnant Grumpelt, I L.R.-Trials of War Criminals 69, 69-70 (1948).

On the other hand, certain defenses are not available to the accused at a war crimes trial. The accused may not raise the defense of obedience to superior orders unless he or she did not and could not reasonably have known that the controverted order was illegal.¹⁴⁶ That the accused committed a crime pursuant to official duties also is not a defense.¹⁴⁷ Additionally, the fact that an act is not punishable by domestic law is not a defense to a war crime.¹⁴⁸

Penalties

The types of penalties authorized for a war crime depends on whether the crime constituted a "grave breach."¹⁴⁹ In the United States' view, grave breaches of international law may be punished by death. Whether the allies would invoke the death penalty to punish grave breaches is uncertain. Many Western European nations do not use the death penalty and the Arab nations might not want to create martyrs.¹⁵⁰ Most of the parties to the Persian Gulf War, however, have laws authorizing the use of the death penalty against their own citizens.¹⁵¹

Grave breaches that would authorize the use of the death penalty include willful killing, torture, inhumane treatment, or otherwise willfully causing great suffering or injury.¹⁵² Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly is also a grave breach.¹⁵³ Denying a prisoner of war or civilian the rights of a fair and regular trial,¹⁵⁴ the taking of hostages, and the unlawful confinement of civilians constitute grave breaches as well.¹⁵⁵

Many of Iraq's actions were grave breaches of international law. Its invasion of Kuwait was a grave breach because it was a willful and unlawful act that caused great suffering and injury.¹⁵⁶ Iraq's subsequent detentions

of diplomats and other foreigners constituted grave breaches, because these actions were tantamount to the taking of hostages.¹⁵⁷ Iraqis' mistreatment, torture, and rape of Kuwaiti civilians also were grave breaches.¹⁵⁸ In addition, Iraq's appropriations of civilian property constituted grave breaches because they were excessive, unlawful, and not required by the necessities of war.¹⁵⁹ The Iraqis' coercing and torturing prisoners of war also would be considered grave breaches of law, as would Iraq's use of civilians and prisoners of war as "human shields."¹⁶⁰ Accordingly, as grave breaches, each of these crimes could be punished by the death penalty.

Other violations of international law, while not rising to the level of grave breaches, could result in imprisonment of the individuals responsible.¹⁶¹ For example, Iraq's use of illegal weapons,¹⁶² its attacks on cities,¹⁶³ and its use of terrorists¹⁶⁴ could be punished by imprisonment.

Conclusion

Many of Iraq's actions in the Persian Gulf War constituted war crimes. Punishing the individuals responsible for these crimes is extremely important. Although the use of war crimes tribunals is the most effective way to try perpetrators of these atrocities effectively, bringing the responsible individuals to trial may not be easy. Though not likely, the armistice or peace treaty that concludes the war also could allow Iraqi war criminals to escape responsibility.

Although war crimes trials would give the allied nations a sense of satisfaction and may help prevent future war crimes, the costs involved in seeking out and determining the individuals who actually were responsible for the many atrocities that occurred during the Persian Gulf War may be greater than the benefits derived

¹⁴⁶ See DA Pam 27-161-2, at 250-1; FM 27-10, para. 509.

¹⁴⁷ See DA Pam 27-161-2, at 249; FM 27-10, para. 510.

¹⁴⁸ XV L.R.-Trials of War Criminals 160 (1948); FM 27-10, para. 511.

¹⁴⁹ See *infra* notes 152-55 and accompanying text.

¹⁵⁰ *To the Victors Go the Trials*, *supra* note 2, at 52.

¹⁵¹ Egypt, France, Iraq, Kuwait, Pakistan, Saudi Arabia, and the United States have laws authorizing the death penalty and all of these nations have conducted executions recently. Canada, Italy, and England have laws prohibiting the use of the death penalty. Hartman, "Unusual Punishment": the Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. Cin. L. Rev. 665 (1983).

¹⁵² 1949 Geneva Convention Relative to the Wounded and Sick art. 50; 1949 Geneva Convention Relative to the Wounded and Sick at Sea art. 51; 1949 Geneva Convention Relative to Prisoners of War art. 130; 1949 Geneva Convention Relative to Civilians art. 147.

¹⁵³ 1949 Geneva Convention Relative to the Wounded and Sick art. 50; 1949 Geneva Convention Relative to the Wounded and Sick at Sea art. 51; 1949 Geneva Convention Relative to Civilians art. 147.

¹⁵⁴ 1949 Geneva Convention Relative to Prisoners of War art. 130; 1949 Geneva Convention Relative to Civilians art. 147.

¹⁵⁵ 1949 Geneva Convention Relative to Civilians art. 147.

¹⁵⁶ Charter of the United Nations art. 2(4); 1949 Geneva Convention Relative to Civilians art. 147.

¹⁵⁷ 1949 Geneva Convention Relative to Civilians art. 147.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ 1949 Convention Relative to Prisoners of War art. 130.

¹⁶¹ FM 27-10, para. 508.

¹⁶² Charter of the United Nations art. 2(4); 1907 Hague Convention Respecting the Laws of War art. 23(e).

¹⁶³ 1949 Geneva Convention Relative to Civilians art. 3(1)(a).

¹⁶⁴ *Id.*; FM 27-10, para. 504(g).

from the trials. Nonetheless, being prepared to conduct war crimes trials, now that the conflict apparently has concluded, is extremely important. Even if the coalition forces ultimately decide against convening war crime tribunals, the threat of these proceedings, as well as the

specter of the substantial penalties that these trials can impose for grave breaches, may persuade Iraq to improve its treatment of civilians and prisoners of war, to obey international law, and to conform its conduct to the expectations of the civilized world.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Follow All Leads: COMA Is Watching

When a coaccused who actually had sexual intercourse with a rape victim receives a sentence of twelve months' confinement, forfeiture of all pay and allowances, and reduction to private (E1), while the accused who was not even in the room when the rape occurred receives a sentence of twenty years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to private (E1), one has to wonder what went wrong. In *United States v. Polk*,¹ a case presenting that basic fact scenario, the Court of Military Appeals held the defense counsel provided ineffective assistance of counsel.

A military accused is guaranteed the effective assistance of counsel by Uniform Code of Military Justice (UCMJ) article 27² and the sixth amendment to the United States Constitution.³ To determine whether counsel has been ineffective, the Court of Military Appeals has held that the standard set forth by the Supreme Court in *Strickland v. Washington*⁴ applies.

In *Polk* the Court of Military Appeals used a three-question process to determine whether the defense counsel was truly ineffective:

(1) Are the allegations made by the accused true; and, if they are, does a reasonable explanation exist for counsel's actions in the defense of the case?

(2) If they are true, was the level of advocacy measurably lower than the performance ordinarily expected of fallible lawyers?

(3) If ineffective counsel is found to exist, was the accused prejudiced by it?⁵

To understand the court's decision in *Polk* a brief review of the facts is necessary. Private First Class Polk, driving Specialist Hunter's vehicle, transported Hunter and the alleged victim to a residence located on Fort Campbell. The government's theory at trial, supported by the testimony of the victim, was that Polk and Hunter kidnapped the victim by forcing her into the vehicle. Once they arrived at the residence, the parties were involved in an argument, but Hunter eventually had sexual intercourse with the victim. Polk, however, was not in the room at the time the sexual intercourse took place. The victim claimed that Hunter forced her to have sex against her will and that Polk had assisted by pulling off her underpants. Polk was convicted of kidnapping and rape.

The Court of Military Appeals reviewing the first question in their three-part analysis, considered whether Polk's allegations that his defense counsel was ineffective were true. The first allegation by Polk was that by failing to call the coaccused—Specialist Hunter—to testify at Polk's court-martial, his defense counsel was ineffective. Polk alleged that he told his defense counsel that Hunter could provide essential exculpatory evidence. Specifically, Hunter would have testified that: (a) for Hunter and the alleged victim to fight physically with each other one moment, then have sex with each other the next, was not unusual and Polk was aware of this; (b) Hunter alone placed the alleged victim in his car at the barracks; and (c) Hunter alone undressed the alleged victim and did so with her consent. In his second allegation, Polk alleged that he provided his defense counsel with the names of four witnesses whose testimony would have been helpful to his case. Two of the witnesses would have testified about statements made by the victim, exculpating Polk and providing a motive for the victim to lie. The other two witnesses would have testified on the

¹32 M.J. 150 (C.M.A. 1991).

²Uniform Code of Military Justice art. 27, 10 U.S.C. § 827 (1988) [hereinafter UCMJ].

³See *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

⁴466 U.S. 668 (1984).

⁵*Polk*, 32 M.J. at 151 (citing *United States v. McGillis*, 27 M.J. 462 (C.M.A. 1988) (summary disposition)).

victim's reputation for being sexually permissive and untruthful.

The Court of Military Appeals examined affidavits submitted by Polk and his former defense counsel, and concluded that the allegations were true and that no reasonable explanation existed for counsel's failure to call the witnesses.⁶ Polk's defense counsel stated in his affidavit, "From remarks made to me by P.F.C. Pope [sic], I came to the conclusion that both soldiers had gotten together and agreed to present a set of facts which would act to exculpate both men." The affidavit disclosed no evidence of any investigation by defense counsel to determine if his client's assertions about Hunter's testimony actually were true. In addition, defense counsel provided no explanation for not calling the other four witnesses except to say that he was unable to locate one.

Moving to the second question—whether the defense counsel's representation amounted to ineffective assistance—the court examined counsel's reason for not calling Hunter. The court found that defense counsel's explanation that "[i]t was my belief at the time that these facts would not have been truthful," was conclusory, self-serving, and inadequate to justify his failure to do everything legally and ethically required to obtain the testimony of Hunter and the other witnesses.⁷ Looking to the required standards, the court held that the defense counsel's actions were "measurably below" the actions necessary for effective assistance of counsel.⁸

Finally, looking at the third question—whether Polk had been prejudiced by the inadequacy of his representation—the court found that it could not say with any degree of certainty that Polk would have been convicted if Hunter's version of the events had been before the factfinder or if the question of the victim's veracity had been explored fully.⁹

The court's holding does not categorize the failure to call Hunter and the four witnesses as ineffective assistance per se. Rather, the holding places on counsel the duty to investigate and ascertain whether the testimony of witnesses, such as the witnesses proffered by Polk, actually would be truthful and helpful. Recognizing that

counsel have the ethical duty not to suborn perjury,¹⁰ the court held that counsel have a duty to investigate the facts and determine whether or not they are true. The court stated, "Counsel's failure to pursue appellant's defense, at least to a point where he could articulate his reasons for disbelieving his client, is not acceptable."¹¹

Defense counsel should recognize that they have a duty to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case. Be aware that the Court of Military Appeals appears to be requiring a defense counsel to be able to articulate the reasons why he or she did not pursue and present certain avenues. As shown by the *Polk* decision, when the defense counsel could not explain why he had not contacted all the witnesses or called them to testify, he was found to be ineffective. Captain Cynthia J. Rapp.

What Is a "Breaking"?

In *United States v. Thompson*¹² the Court of Military Appeals recently clarified what constitutes the element of "breaking" required to support a finding of guilty of the offense of burglary as set forth in UCMJ article 129.¹³ The accused in *Thompson* entered a barracks room through an open, screenless window that was covered by a fully extended venetian blind. To enter the room, the accused had to "shove the blinds aside" using his head and hands.

To be found guilty of the offense of burglary, the accused must "break and enter the dwelling house of another, the breaking and entering must be done in the nighttime and the act must be done with the intent to commit an offense punishable under [UCMJ] Articles 118 through 128 (except 123(a))."¹⁴

The court rejected the accused's more expansive view of the concept of breaking, which would require an examination of the intent of the victim in providing security for his dwelling, and which urged the court to find that a venetian blind is not the type of device that is intended as security against intrusion.¹⁵

⁶*Id.*

⁷*Id.* at 152.

⁸*Id.*

⁹*Id.*

¹⁰Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, rule 3.3(a)(4) (31 Dec. 1987).

¹¹*Polk*, 32 M.J. at 153.

¹²32 M.J. 65 (C.M.A. 1991).

¹³UCMJ art. 29.

¹⁴Manual for Courts-Martial, United States, 1984, Part IV, para. 55b [hereinafter MCM, 1984].

¹⁵*Thompson*, 32 M.J. at 67.

The court held that an accused is guilty of "breaking" under the common law and UCMJ article 129 if he "moves any obstruction" to enter. Furthermore, it held that an "obstruction" need have only some physical attribute that reasonably can be understood as providing some security for the dweller as a barrier to the burglar's free entry.¹⁶ The court reasoned that because the accused in *Thompson* pleaded guilty without challenging the physical attributes of the blinds, the government was entitled to the inference that the blinds obstructed entry and provided some physical security to the room. The court likened the venetian blinds to an unlocked door and found that if the set of blinds had not been an obstruction, the accused would not have had to "shove it aside" to enter the room.¹⁷

In view of this decision, defense counsel in the field should be alert for burglary cases in which the element of "breaking" can be challenged factually. Defense counsel should establish on the record the physical attributes of the "obstruction" that allegedly was "broken," as well as the act used to constitute a "breaking," to defend against the charge and to preserve the issue for appeal. Defense counsel still may find success in arguing that the obstruction, which supposedly was broken to gain entry, actually was not a security device and, therefore, was not intended as a protective measure by the occupant. Captain Deborah C. Olgin.

The Ever-Widening Scope of Fraternalization in the Military

In its recent decision in *United States v. March*,¹⁸ the Army Court of Military Review, sitting en banc, expanded the scope and impact of fraternization in the Army. The Army court held that fraternization by a non-commissioned officer with a subordinate is "closely related to the officer-enlisted fraternization described in Part IV, paragraph 83b of the Manual for Courts-Martial, United States, 1984, and is therefore punishable by a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances and reduction to the lowest enlisted grade."¹⁹ The decision relied upon a trend found in appellate court cases decided after the promulgation of the 1984 Manual for Courts-Martial.

In the *March* case, the accused was a noncommissioned officer and the military superior of Specialist L. The accused pleaded guilty and was convicted of fraternizing on terms of military equality with Specialist L by

kissing and fondling her in his barracks room. At trial, the military judge solicited briefs from counsel to assist him in determining the maximum punishment for enlisted fraternization. The military judge ruled that the charge against the accused was similar to a charge of fraternization involving an officer. It further found that no similar civilian offenses existed and that no other similar offenses were listed in the UCMJ. The military judge concluded the maximum punishment was a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to private (E1). The accused was sentenced to a bad-conduct discharge, restriction and hard labor without confinement for forty-five days, and reduction to private (E1).

The Army court addressed the issue of the maximum imposable punishment and ordered briefs by appellate counsel. The government argued that the maximum punishment was the one found by the military judge because the offense was related closely to the article 134²⁰ offense of fraternization between officers and enlisted members. Appellate defense counsel, however, argued that the maximum punishment for enlisted fraternization is not listed in the Manual for Courts-Martial and, therefore, a determination of the maximum punishment must be found elsewhere. Appellate defense counsel invited the Army court to examine Army Regulation 600-20.²¹ They argued that paragraphs 4-14 and 4-16 therein clearly reflected the position that fraternization between noncommissioned officers and their subordinates is not viewed as seriously as officer fraternization. Appellate defense counsel argued that enlisted fraternization is related most closely to the article 134 offense of disorderly conduct. Appellate defense counsel supported this assertion by pointing out that at trial, the government proceeded on the theory that the offense was a "clause one" UCMJ article 134 offense, the gist of which is a disorder to the prejudice of good order and discipline. Therefore, appellate defense counsel suggested that the maximum imposable punishment for enlisted fraternization should be confinement for four months, forfeiture of two-thirds pay per month for four months, and reduction to the lowest enlisted grade.

In its decision, the Army court focused on appellate court decisions concerning fraternization rendered since the 1984 Manual went into effect. Relying on those decisions²² and Rule for Courts-Martial (R.C.M.) 1003(c)(1)(b)(i),²³ the court then compared the elements

¹⁶*Id.*

¹⁷*Id.*

¹⁸CM 8903902, slip op. (A.C.M.R. 19 Mar. 1991).

¹⁹*Id.*, slip op. at 5.

²⁰UCMJ art. 134.

²¹Army Reg. 600-20, Personnel-General: Army Command Policies and Procedures (30 Mar. 1988).

²²See *infra* note 32.

²³That provision states that for an offense not listed in part IV of the Manual that is related closely to an offense listed therein, the maximum punishment shall be the same as the listed offense. If, however, an offense not listed is included in a listed offense, and is related closely to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(c)(1)(b)(i) [hereinafter R.C.M.].

of fraternization as set forth in part IV, paragraph 83b, of the Manual,²⁴ with the elements of the offense to which the accused pleaded guilty.²⁵ The Army court determined that these elements closely paralleled each other because both offenses "involve an improper superior-subordinate relationship which detracts from the authority of the superior, and thereby adversely affects good order and discipline."²⁶ While the court recognized that officers are "held to higher standards of conduct and subject to greater punishment than enlisted soldiers for violating certain standards,"²⁷ the court held that, upon applying R.C.M. 1003(c)(1)(B)(i), the accused's misconduct was related closely to the officer-enlisted fraternization described in part IV, paragraph 83b, of the Manual.²⁸

The Army court's decision in the case of *March* continues the trend to widen the scope and impact of fraternization as an offense in the military. The historical position in the military has been to treat fraternization as a violation of the customs of the service.²⁹ In 1984, the Manual for Courts-Martial acknowledged for the first time a specific criminal offense of fraternization for certain officer-enlisted relationships. Further, Department of the Army Letter 600-84-2³⁰ gave a definitive interpretation of the Army's administrative fraternization policy, distinguishing the administrative policy from the criminal offense of fraternization. Although not specifically proscribed in the 1984 Manual, the policy interpretation recognized that improper relationships between senior and junior officers—or between noncommissioned officers

and their subordinates—could constitute conduct prejudicial to good order and discipline.³¹ Appellate courts have followed that recognition and have established that fraternization between senior and junior officers, or between noncommissioned officers and enlisted soldiers, is a violation of UCMJ article 134 if it occurs under circumstances prejudicial to good order and discipline.³² In addition, fraternization between senior and junior officers or noncommissioned officers and their subordinates, while not specifically mentioned in the Manual, frequently have been proscribed in local punitive regulations that apply to improper superior-subordinate relationships between all soldiers of different ranks.³³ The maximum imposable punishment for violation of a lawful general regulation is the same as the maximum imposable punishment for fraternization.

Obviously, the trend in the military is to treat all forms of fraternization in the same manner as long as the targeted misconduct is prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Apparently, the only remaining issue to be resolved concerning fraternization in the military is what type of misconduct is actually prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Defense counsel should prepare their clients, whether officers or enlisted members, for the harsh reality that they are all facing basically the same maximum imposable punishment for a fraternization offense. Captain Michael P. Moran.

²⁴These elements of fraternization are:

- (1) that the accused was a commissioned or warrant officer;
- (2) that the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;
- (3) that the accused then knew the person(s) to be (an) enlisted member(s);
- (4) that such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and
- (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, 1984, Part IV, para. 83b.

²⁵The Army court listed these elements, to which the accused pleaded guilty, as follows:

- (1) that the accused was a non-commissioned officer and the military superior of Specialist L;
- (2) that the accused fraternized on terms of military equality with Specialist L by kissing and fondling her in his barracks room;
- (3) that the accused then knew that Specialist L was his military subordinate;
- (4) that such fraternization violated the custom of the Army that non-commissioned officers shall not fraternize with their subordinates on terms of military equality; and
- (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

March, slip op. at 4.

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*, slip op. at 5.

²⁹See generally *Carter, Fraternization*, 113 Mil. L. Rev. 61 (1986).

³⁰HQ, Dep't of Army, Letter 600-84-2, 23 Nov. 1984.

³¹MCM, 1984, part IV, para. 83, analysis at A21-101.

³²See, e.g., *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986) (fraternization between lieutenant colonel and second lieutenant); *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986), *petition for review dismissed*, 24 M.J. 229 (C.M.A. 1987) (fraternization between petty officer and enlisted sailor); *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989) (fraternization between noncommissioned officer and enlisted soldier).

³³See, e.g., *United States v. Adams*, 19 M.J. 996 (A.C.M.R. 1985) (Fort Jackson regulation); *United States v. Moorner*, 15 M.J. 520 (A.C.M.R. 1983) (Fort Gordon command policy letter).

National Biosystems and Corporate Jets: Jurisdiction "by Quantity" (Is Any Quantity Enough?)

Lieutenant Colonel Clarence D. Long

Since the enactment of the Competition in Contracting Act¹ in 1984, virtually all executive branch acquisitions of automatic data processing equipment (ADPE) have been subject to review and determination by the General Services Administration Board of Contract Appeals (the Board or GSBCA) pursuant to the Brooks Act.²

The consequences of assumption of jurisdiction by the Board can be extremely serious.³ The GSBCA tends to have a far higher rate of granted protests than the General Accounting Office (GAO). In addition, its discovery, fact-finding, and briefing requirements are far more onerous on the agency and the protester. It also grants protest and proposal preparation costs far more frequently than the GSBCA. Accordingly, compared to the GSBCA, rarely is an ADP acquisition protested before the GAO.

GSBCA jurisdiction includes non-ADPE acquisitions that require the significant use of ADPE.⁴ Rather than using a threshold approach—that is, testing for the existence of a *significant amount* of ADPE before exercising jurisdiction—the Board presumes the existence of jurisdiction by testing for *more than an insignificant amount* of ADPE. At first glance, the two standards seem to be merely different sides of the same coin. Operationally, however, they yield opposite results in close cases.

For example, in *National Biosystems, Inc.*,⁵ the GSBCA stated:

We confess that deciding whether this procurement is subject to the Brooks Act is not easy, for the question is very close. The Army and EER are certainly correct in saying that the procurement is primarily for something other than ADPE. They are also correct in suggesting that the use of computers in the preparation and assembly of FDA related documents does not bring this procurement under the Brooks Act.... [National Biosystems] overstates the case in alleging that a "heavy emphasis" on the provision of ADPE exists in the solicitation.

....

Nevertheless, although the requirement for an automated data management system is clearly secondary, it is a significant part of the procurement. It is of sufficient importance that the Army highlighted it in the solicitation's general statement of objectives and scope of work; set it out as a separate task; mandated that proposals show in detail that offerors are capable of performing the requirement... sufficiently important to the offerors that they addressed it fully in their proposals; in addition, the offerors proposed computer experts to perform this work, and showed that a *not insignificant amount of resources* would be devoted to the task.⁶

Although not cited in the decision, the "not insignificant amount" devoted to the ADPE system in the procurement by either vendor was less than two percent of the overall sum bid by the winning vendor.⁷ Nevertheless, this was held to be enough to make the procurement subject to the Board's jurisdiction. The number of pages devoted to ADPE in the lengthy responses to the solicitations prepared by the vendors was one and two, respectively.

The Board then added its previous comment from its decision in *Diversified Systems Resources, Ltd.*:⁸

[W]e do not mean to imply that [the agency] could not have separated the ADP functions from the other requirements of the solicitations and provided them separately. Were we to find, however, that a procurement with significant, but not predominant ADP aspect, is exempt from the Brooks Act, we would permit agencies to evade that Act's requirements simply by incorporating ADPE procurement into procurements for other items which are more costly than the ADPE.⁹

Was the Board sending a message to agencies to separate out all ADPE requirements from non-ADPE requirements? That probably was not the intention of the Board.

¹Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended at 40 U.S.C. § 759(f)(1988)).

²Pub. L. No. 89-306, 79 Stat. 1125 (codified at 40 U.S.C. § 759 (1988)).

³See Ad Hoc Subcommittee of the Bid Protest Committee of the American Bar Association, *The Protest Experience Under the Competition in Contracting Act* 32-36 (1989), for statistics comparing the rates at which the major bid protest forums sustain protests on the merits; see also Government Computer News, Feb. 4, 1991, at 3.

⁴40 U.S.C. § 759(a)(1) (1988).

⁵GSBCA No. 10332-P, 90-1 BCA ¶ 22,459 (1990).

⁶*Id.*, 90-1 BCA ¶ 22,459, at 112,755 (emphasis added).

⁷This was reflected in the rule 4 file that was compiled incident to this matter.

⁸GSBCA No. 9493-P, 88-3 BCA ¶ 20,897, 1988 BPD ¶ 119.

⁹*National Biosystems*, 90-1 BCA ¶ 22,459, at 112,756 (citing *Diversified Systems*, GSBCA No. 9493-P, 88-3 BCA ¶ 20,897, 1988 BPD ¶ 119).

The decision, however, could be the functional result of the Board's position.

The decision in *National Biosystems* is particularly troubling because it does not provide agencies procuring ADPE with a clear standard to determine whether they are subject to the requirements of the Brooks Act. Under *National Biosystems*, the standard remains indeterminate, if not enigmatic. The standard could be expressed as the percentage of cost of ADPE to the total cost of the contract, the number of line item deliverables, or perhaps the degree of criticality of the fulfillment of the agency need. No objectively determinable standard, however, is discernible from the decision. Accordingly, the decision leaves agencies in the position of deleting potentially useful ADPE features from a procurement to avoid risking the disruption resulting from GSBICA involvement.

Segregation of requirements is no answer. Substantially increasing the administrative cost of a procurement to avoid delaying a large procurement over a conflict involving two percent of the requirement effectively stands the Brooks Act on its head. By expanding coverage of the Brooks Act to virtually *all* procurements, the Board will encourage inefficient practices—such as multiple procurements for single, integrated needs—in contravention of the same act.¹⁰

For some time, the *National Biosystems* decision apparently represented the outer limits of the "not insignificant amount" doctrine, making the Board appear as if it might begin to back down somewhat. In *Norwood & Williamson, Inc.*¹¹ the Board declined jurisdiction over a solicitation for computer aided design (CAD) services for verification and input of existing facility drawings onto software. The solicitation also required the contractor to "input" existing space management data into a new database, but this requirement later was eliminated from the solicitation. Deliverables included check plots and drawing files on diskettes.¹²

Two-thirds of the effort involved verification, data gathering, and quality control efforts to ensure the accuracy of the data and the drawings. The remainder concerned the preparation of accurate drawings to be prepared in a commercially available software package.¹³ The solicitation also received a small business code indicating it was for custom computer programming serv-

ices. This code never was changed, despite the fact that the procurement itself was determined by the agency not to be for ADPE.¹⁴

Determining that the procurement was not subject to the Brooks Act, the Board held that:

professional drafting services, site verification, and drawings are what is being procured here. Although the drafters will necessarily use ADPE in generating the drawings and even produce them in diskette format, this cannot alter the basic nature of the instant procurement.

We note that this is not a case where the contractor was required to create a new data base or maintain or support an existing data base; rather, the contractor was expressly instructed in the course of discussions to use commercially available software as a medium to update the drawings after manually measuring the facilities. There is no indication in the RFP [(request for proposals)] that this work was to be incorporated into or from the basis of a facilities management data base; the winning vendor was expressly instructed in the course of discussions that the solicitation was not procuring such a [data base], and the contracting officer's memorandum of negotiations confirms that.¹⁵

The Federal Information Resource Management Regulation (FIRMR)¹⁶ has been revised recently to define "significant use" of federal information processing (FIP) ADP resources in what may be an attempt to resolve the problem presented by *National Biosystems*. The revised FIRMR requires that

- (A) The service or product of the contract could not reasonably be procured or performed without the use of FIP resources, and
- (B) The dollar value of FIP resources expended by the contract or to perform the services or furnished the product is expected to exceed \$500,000 or 20 percent of the estimated cost of the contract, whichever amount is lower.¹⁷

If this definition were to be used as a standard for the exercise of jurisdiction by the Board, it would remedy the confusion caused by *National Biosystems*. The Board

¹⁰ See 40 U.S.C. § 759(f)(5)(A) (1988).

¹¹ GSBICA No. 10717-P, 1990 BPD ¶ 217.

¹² *Id.*, 1990 BPD ¶ 217, at 2.

¹³ *Id.*, 1990 BPD ¶ 217, at 5.

¹⁴ *Id.*, 1990 BPD ¶ 217, at 8.

¹⁵ *Id.*, 1990 BPD ¶ 217, at 11.

¹⁶ 55 Fed. Reg. 53,386 (1990) (to be codified at 41 C.F.R. chap. 201).

¹⁷ *Id.* at 53,387 (to be codified at 41 C.F.R. §§ 201-1.002-1(b)(3)(i), 1.002-1(b)(3)(ii)).

likely will not follow this definition, however, having stated on previous occasions that it is not necessarily bound by either the Federal Acquisition Regulation or the FIRMR.¹⁸

Having had a year in which to consider its holding in *National Biosystems* carefully, the Board recently clarified, but did not relax, that holding. On February 13, 1991, the Board denied a motion to dismiss for lack of jurisdiction filed by the respondent, Department of State, in the protest of *Corporate Jets*.¹⁹ The decision, which may extend the Board's jurisdiction to all procurements that incorporate ADPE as a deliverable, has profound implications for a broad range of government procurements.

The State Department had issued a solicitation for aviation support services for its Bureau of International Narcotics Matters (INM). The INM seeks to prevent the flow of illicit drugs to the United States by reducing the production and processing of narcotics at the source. The INM has an air wing for drug interdiction, and the winning vendor was to fly and maintain aircraft, provide support and technical assistance to achieve readiness requirements, provide operations and maintenance training, and provide facilities within the continental United States for maintenance, training, and administration.²⁰

The air wing has fifty-one aircraft. Its operations are conducted in Central and South America, as well as in the Far East and India. The contractor was required to provide personnel to support a specified deployment schedule, and to maintain an eighty-percent readiness status, calculated by dividing "assigned aircraft hours" into total number of aircraft hours available for mission during the reporting period. The solicitation also required a "Contracting Maintenance Data Reporting System" (CMDRS) that would provide for a government-approved automatic data reporting system with on-line access.²¹

The Board found that the nature of the CMDRS system essentially required it to be custom designed. In addition, many thousands of hours had been spent by the incumbent contractor modifying the system to make it work.²²

The State Department argued that the procurement did not come under the Brooks Act because it was not pri-

marily for ADPE. Similarly, it argued that the ADPE was incidental to the contract.²³ The Board, however, held that the procurement actually did come under the Brooks Act because it contemplated the reporting system as a "major deliverable"—not merely an incidental to the performance of the contract. The Board further held that operational and readiness requirements for the air wing were to be met through the use of the system.²⁴ The Board stated:

It is true as respondent argues that the procurement is more than for ADPE. That is not the controlling question for determining the significance of the ADPE, however, for significance does not denote exclusivity, but importance. Even if the ADPE is secondary, if it is highlighted in the solicitation's scope of work, set out as a separate task in the solicitation, mandated as a capability to be demonstrated by the offerors, and evaluated on the basis of filling the requirement, then the ADPE is significant for purposes of the Brooks Act.²⁵

Judge Hendley's dissent, however, reveals the true extent of the decision:

All we have before us is a contract for aviation services with the additional requirement that the contractor maintain records relating to contract performance. *The respondent estimates that even if the ADPE hardware and software were purchased [rather than furnished by the government to the contractor], its cost would constitute less than one percent of the contract value.* I do not believe that the fact that those records are to be kept on ADPE meeting specified contractual standards converts the contract to a contract for ADPE or services involving Government ADPE.

I find the majority's conclusion disturbing because ADPE is rapidly becoming an integral feature of most advanced manufacturing techniques and record keeping systems. Such a conclusion could well result in including vast numbers of procurements under the umbrella of the Brooks Act when the only use of ADPE is for contract records keeping.²⁶

¹⁸ See L. Suchanek, *Perspective on the General Services Administration Board of Contract Appeals and Its Protest Functions* 9 (1990) (available from the Office of the Clerk, GSBICA).

¹⁹ GSBICA No. 11049-P (Feb. 13, 1991), *reissued to incorporate dissent*, (Feb. 28, 1991).

²⁰ *Id.*, slip op. at 2.

²¹ *Id.*, slip op. at 2-3.

²² *Id.*, slip op. at 4.

²³ *Id.*, slip op. at 7.

²⁴ *Id.*, slip op. at 8.

²⁵ *Id.*, slip op. at 8-9 (citing *National Biosystems, Inc.*, GSBICA No. 10332-P, 90-1 BCA ¶ 22,459, at 112,755; 1989 BPD ¶ 354, at 7) (emphasis added) (other citations omitted).

²⁶ *Id.*, slip op. at 11.

Both *National Biosystems* and *Corporate Jets* are disturbing because the Board found jurisdiction over non-ADPE procurements that included ADPE deliverables which, in terms of dollar values, constituted two percent or less of each of the procurements. The majority decision in both cases failed to reveal this fact, couching the amounts involved in vague terms. But for Judge Hendley's dissent in *Corporate Jets*, along with records retained by the Army trial attorneys in *National Biosystems*, ascertaining these amounts would have been impossible.

Given the increasing number of procurements that include delivery of a data base and some means of accessing it as contract requirements, the GSBGA may consider protests over many more non-ADPE procurements that previously would have been protested, if at all, to the GAO. Whether or not the *Corporate Jets* decision will stand is uncertain. It may, at some point, be reversed by the Federal Circuit, or addressed by Congress. Until then, however, procurement officials are well advised to avoid attaching ADPE requirements to non-ADPE procurements.

Clerk of Court Notes

Editor's Note—The following Clerk of Court Note is a corrected version of an item with the same title that appeared on page 41 of the January 1991 issue of The Army Lawyer. The original article contained three inadvertent references to the Court of Military Appeals. These erroneous references, which appeared in the second, fifth, and sixth paragraphs of the original item, were not caused by the Clerk of the Court. Actually, true to the attention to detail that we expect from the Clerk, he was the one who pointed them out.

The Army Court of Military Review in Fiscal Year 1990

In fiscal year (FY) 1990, the Army Court of Military Review received 1815 cases at issue, an increase of 1.2% over the previous year. The number of decisions issued—1902—also was an increase over FY 1989.

The Army Court of Military Review wrote opinions in 531 cases—an increase of twenty-four percent—and published 159 of those—fifty more than it published in FY 1989. The court issued a total of 1371 short-form affirmances, which occurred in ninety-three percent of the cases in which appellate defense counsel assigned no errors, and in thirty-eight percent of the cases in which appellate counsel had raised issues.

In FY 1990 getting a case through the court, from the Clerk's receipt of the record to the date of decision, took 173 days—three weeks longer than the 152-day average of FY 1989. Although the FY 1990 overall average of 173 days remains less than six months, the average conceals the fact that many cases take much longer. For example, a typical contested trial producing appellate

issues may take more than ten months to wind its way through the intermediate appellate level.

The average period for briefing on behalf of the appellant rose from an average of seventy-nine days to about 100 days. This increase apparently was due to the fact that, although the Defense Appellate Division is filing more briefs per attorney (6.7 per month) than at any time since the 1970's, the understrength division has been receiving more cases per attorney (6.8 in FY 1989 and 6.7 in FY 1990) than at any time since 1982.

Briefing time for the government increased only slightly, but the Court of Military Review's average decision time increased twenty-eight percent—from eighteen days to twenty-three days in cases decided with the short-form opinion, and from seventy-three days to ninety-four days in cases decided with memoranda or full opinions. This increase may be due in part to the increased number of opinions issued, which suggests an increased complexity in cases being presented to the court. In this connection, the Court of Military Review specified additional issues for briefing in forty-four cases—double the FY 1989 figure. Another factor may be the personnel turbulence caused by bringing several new judges to the court. Although four of the current eleven judges are serving a second tour of duty with the court, from Spring 1989 to Fall 1990 some fourteen losses and fourteen gains occurred.

As the fiscal year ended, the Army Court of Military Review had 171 submitted cases on hand. The appellate divisions were briefing another 555 cases, and the Clerk was awaiting some 235 additional trial records for submission to the court. Accordingly, as of 1 October 1990, the Army Court of Military Review had six months' work on hand or en route.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Mistake of Fact in Bad Check Cases

Introduction

The military's trial and appellate courts have, in recent years, repeatedly addressed how the mistake of fact defense¹ applies to a variety of offenses under the Uniform Code of Military Justice (UCMJ).² As these cases demonstrate, the mistake of fact defense can be complicated and even confusing.³

Bad check offenses require some of the more complex applications of the mistake of fact defense. *United States v. Barnard*⁴ is the most recent reported military case to consider the mistake of fact defense in the context of a bad check offense. Before discussing *Barnard*, a brief review of bad check offenses and the mistake of fact defense generally is appropriate.

Bad Check Offenses Generally

Three distinct bad check offenses are recognized under military law.⁵ UCMJ article 123a embraces two of the crimes: (1) intentionally writing a bad check to obtain a thing of value; and (2) intentionally writing a bad check to pay off a past debt.⁶ Article 134 reaches the third bad check offense: writing a check for which the accused negligently failed to maintain sufficient funds in his account.⁷ Each bad check offense requires a different *mens rea*.

The first offense listed above—intentionally writing a bad check to obtain a thing of value—is a specific intent offense.⁸ This crime requires that the accused have "an

intent to deceive." The Manual for Courts-Martial defines this intent as

an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.⁹

The second article 123a offense—intentionally writing a bad check to pay off a past debt—is also a specific intent offense.¹⁰ This crime requires that the accused have "an intent to defraud." The Manual for Courts-Martial defines this intent as "an intent to obtain, through misrepresentation, an article or thing of value and to apply it to one's own use and benefit, or to the use and benefit of another, either permanently or temporarily."¹¹

These two article 123a offenses, therefore, are distinct crimes.¹² Each requires a different state of mind.¹³ As noted above, however, both offenses require that the accused entertain a particular specific intent.

On the other hand, the article 134 bad check offense—writing a check for which the accused negligently failed to maintain sufficient funds in his account—is not a specific intent crime.¹⁴ This offense instead requires that the accused "dishonorably" fail to maintain sufficient funds, which constitutes a general criminal intent.¹⁵ "Dishonorable," in this context, means that the accused's actions were the result of bad faith, gross indifference, fraud, or deceit.¹⁶ Simple negligence or mathematical errors will not suffice.¹⁷

¹Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Rule for Courts-Martial 916(j) [hereinafter R.C.M.].

²Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1988) [hereinafter UCMJ].

³For a discussion and criticism of some of these decisions, see generally Milhizer, *Mistake of Fact and Carnal Knowledge*, The Army Lawyer, Oct. 1990, at 4; TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, The Army Lawyer, Feb. 1989, at 66.

⁴32 M.J. 530 (A.F.C.M.R. 1990).

⁵For a good discussion of bad check offenses, see Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, The Army Lawyer, Jan. 1990, at 3.

⁶See MCM, 1984, Part IV, para. 49b (elements of proof for these two offenses). For a good recent discussion of these offenses, see *United States v. Carter*, 32 M.J. 522 (A.C.M.R. 1990).

⁷See MCM, 1984, Part IV, para. 68b (elements of proof for this offense).

⁸See generally TJAGSA Practice Note, *Mens Rea and Bad Check Offenses*, The Army Lawyer, Mar. 1990, at 36.

⁹MCM, 1984, Part IV, para. 49c(15).

¹⁰See generally TJAGSA Practice Note, *supra* note 8, at 36.

¹¹MCM, 1984, Part IV, para. 49c(14).

¹²See generally Richmond, *supra* note 5, at 4.

¹³*United States v. Barnes*, 34 C.M.R. 347 (C.M.A. 1964); *United States v. Wade*, 34 C.M.R. 287, 289-90 (C.M.A. 1964) (and cases cited therein); *United States v. Elizondo*, 29 M.J. 798 (A.C.M.R. 1989).

¹⁴See generally Richmond, *supra* note 5, at 4; TJAGSA Practice Note, *supra* note 8, at 37. As the court in *Barnard* correctly explained, "'Dishonorableness' is not a specific state of mind, even though it's close." *Barnard*, 32 M.J. at 536 n.8. As the Court of Military Appeals similarly stated, "Indeed, the term 'dishonorable' involves a mental state closely allied to that of a specific criminal intent." *United States v. Groom*, 30 C.M.R. 11, 13 (C.M.A. 1960) quoted in *Barnard*, 32 M.J. at 536 n.8; see also *United States v. Brand*, 28 C.M.R. 3 (C.M.A. 1959); *United States v. Lightfoot*, 23 C.M.R. 150, 152-53 (C.M.A. 1957) (Latimer, J., concurring); *United States v. Downard*, 20 C.M.R. 254, 260 (C.M.A. 1955); *United States v. Smith*, 8 M.J. 779, 780 (A.F.C.M.R. 1980), cited in *Barnard*, 32 M.J. at 536 n.8.

¹⁵MCM, 1984, Part IV, para. 68b(4).

¹⁶*United States v. Brand*, 28 C.M.R. 3 (C.M.A. 1959); MCM, 1984, Part IV, para. 68c.

¹⁷*United States v. Silas*, 31 M.J. 829 (N.M.C.M.R. 1990); *Elizondo*, 29 M.J. at 800; *United States v. Bethea*, 3 M.J. 526 (A.F.C.M.R. 1977); *United States v. Gibson*, 1 M.J. 714 (A.F.C.M.R. 1975).

Mistake of Fact Generally

Ignorance or mistake of fact is recognized expressly as a special defense under military law.¹⁸ It operates as a failure of proof defense.¹⁹ More precisely, mistake of fact negates the mental state required for the particular element of the offense based upon a mistaken belief by the accused.²⁰ As one commentator has explained, "[w]hether a defendant's ignorance or mistake in any particular case will negate a required element depends, of course, on the nature of the mistake and the state of mind that the offense definition requires."²¹

The mistake of fact defense usually operates in one of two distinct ways. When certain special *mens rea* elements—premeditation, specific intent, willfulness, and knowledge—are required to prove an offense, an honest but unreasonable mistake of fact can constitute a defense to that element.²² For example, larceny and wrongful appropriation²³ require that the accused have a specific intent to do certain acts;²⁴ therefore, an honest but unreasonable mistake negating that intent can constitute a defense.²⁵ An honest mistake of fact likewise has been recognized as a defense for several other offenses having special *mens rea* requirements, such as robbery²⁶ and making a false or fraudulent claim.²⁷

When only a general criminal intent is required for the element of proof at issue, the accused's mistake must be both honest and reasonable to entitle him or her to the

mistake of fact defense. For example, an honest and reasonable belief that the accused had authority to be absent is a valid defense to an absence without authority (AWOL) charge;²⁸ when the belief ceases to be reasonable, however, the defense is no longer available.²⁹ Likewise, an accused's belief that he had a permanent shaving profile—if both honest and reasonable under the circumstances—could constitute a defense to failure to obey a general regulation to be clean shaven.³⁰

A few other crimes—such as carnal knowledge³¹ and improper use of a countersign³²—have strict liability elements of proof. A mistake of fact as to these elements, even if honest and reasonable, will not act as a defense. A detailed discussion of strict liability elements of proof is beyond the scope of this note.³³

Mistake of Fact and Check Offenses

As noted above, the article 123a bad check offenses are specific intent crimes. Accordingly, an honest mistake of fact that eliminates the pertinent *mens rea* element—intent to deceive or intent to defraud—is exculpatory.³⁴ The accused's mistake need not be objectively reasonable for him to be entitled to the defense.

The mistake of fact defense is more complicated when applied to the article 134 bad check offense. Although some decisions may suggest the contrary,³⁵ the accused's mistake of fact must satisfy both a subjective and an

¹⁸R.C.M. 916(j).

¹⁹See generally Milhizer, *supra* note 3, at 5; 1 P. Robinson, *Criminal Law Defenses* § 62 (1984):

"Failure of proof defenses consist of instances in which because of the conditions that are the basis for the 'defense,' all elements of the offense charged cannot be proven. They are in essence no more than a negation of an element required by the definition of the offense." Examples of this type of defense depend largely upon the elements of proof of the offenses as set forth under the system or code involved. Alibi and good character are classic examples of failure of proof defenses.

See also R.C.M. 916(a) discussion.

²⁰The Model Penal Code recognizes the mistake of fact defense in the following terms: "Ignorance or mistake as to a matter of fact or law is a defense if: ... the ignorance or mistake negates the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense." Model Penal Code § 2.04(1)(a) (proposed official draft 1962).

²¹1 P. Robinson, *supra* note 19, at 246-47. Under some circumstances, however, "[d]eliberate ignorance" of a fact can create the same criminal liability as actual knowledge thereof." *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983) (and the cases cited therein).

²²R.C.M. 916(j).

²³See UCMJ art. 121.

²⁴See MCM, 1984, Part IV, paras. 48b(1)(d), 48(2)(d).

²⁵*E.g.*, *United States v. Turner*, 27 M.J. 317 (C.M.A. 1988); *United States v. Greenfeather*, 32 C.M.R. 151, 156 (C.M.A. 1962); *United States v. Hill*, 13 C.M.R. 158 (C.M.A. 1962); *United States v. Malone*, 14 M.J. 563 (N.M.C.M.R. 1982); see also *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982). See generally *United States v. Sicley*, 20 C.M.R. 118 (C.M.A. 1955).

²⁶See UCMJ art. 122; *United States v. Mack*, 6 M.J. 598 (A.C.M.R. 1978).

²⁷See UCMJ art. 132; *United States v. Groves*, 23 M.J. 374 (C.M.A. 1987); *United States v. Ward*, 16 M.J. 341, 345 (C.M.A. 1983).

²⁸See UCMJ art. 86.

²⁹*United States v. Graham*, 3 M.J. 962, 965 (N.C.M.R. 1977).

³⁰See UCMJ art. 92; *United States v. Jenkins*, 47 C.M.R. 120 (C.M.A. 1973).

³¹See UCMJ art. 120(b); MCM, 1984, Part IV, para. 45.

³²See UCMJ art. 101; MCM, 1984, Part IV, para. 25.

³³See generally Milhizer, *supra* note 3 (discussing strict liability elements and the mistake of fact defense).

³⁴*Cf.* *United States v. Rowan*, 16 C.M.R. 4 (C.M.A. 1954) (honest mistake a defense to larceny by bad check).

³⁵*E.g.*, *United States v. Remele*, 33 C.M.R. 149 (C.M.A. 1963); *United States v. Dicus*, 33 C.M.R. 879 (A.F.C.M.R. 1963), cited in *Barnard*, 32 M.J. at 536 n.8.

objective test to constitute a defense to negligently failing to maintain sufficient funds.³⁶

One commentator aptly has explained how the mistake of fact defense applies to the article 134 bad check offense.

Application of the mistake of fact defense to this crime requires a two-part inquiry. First, did the mistake exist in the mind of the accused? Second, was the mistake reasonable under the circumstances? There appears to be an additional step in the reasonableness inquiry. The accused's actions could be unreasonable (that is, simply negligent) and yet not be so unreasonable (that is, culpably negligent) as to amount to a *dishonorable* failure to maintain sufficient funds.³⁷

The *Barnard* court described how the mistake of fact defense operates with respect to article 134 bad check offenses in similar terms. "The [accused's] mistaken belief must be honestly held and not held as the result of gross indifference. 'Gross indifference' is simply a way of describing a lack of 'reasonableness' so that lay triers of fact will not confuse it with simple negligence and convict wrongly."³⁸

Conclusion

Mistake of fact has become an increasingly favored defense. Courts-martial for bad check offenses are, unfortunately, commonplace.³⁹ Given these two facts, practitioners must understand fully how the mistake of fact

defense applies to the various bad check offenses recognized under military law. Major Milhizer.

Duty in the Persian Gulf Is "Important Service"

Article 85, UCMJ, proscribes desertion. Among the three forms of desertion enumerated in the statute⁴⁰ is "quit[ting one's] unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service."⁴¹ In the recent case of *United States v. Hocker*,⁴² the Army Court of Military Review considered the providence of the accused's guilty plea to desertion under this theory. Specifically, during the accused's providence inquiry, he acknowledged his intentionally avoiding hazardous duty and important service in the Persian Gulf as part of Operation Desert Shield.

The accused in *Hocker* pleaded guilty under the "avoidance and shirking" theory, as noted.⁴³ During the providence inquiry, the accused told the military judge that he initially had departed from his unit at Fort Campbell with authority.⁴⁴ The accused said that on the day he was due to return, he saw a newscast that showed his unit preparing to deploy to Saudi Arabia. The accused explained that he decided to wait until his unit had deployed overseas before returning to Fort Campbell. The accused also admitted to the military judge, during the providence inquiry, that the "overseas deployment was important service, and that going to Saudi Arabia in early August [1990] was hazardous duty in light of the potential for imminent hostilities."⁴⁵ The government apparently offered no independent evidence showing that the accused's duty was either hazardous or constituted important service.

³⁶Richmond, *supra* note 5, at 9; Milhizer, *supra* note 3, at 5.

³⁷Richmond, *supra* note 5, at 9 (citing R.C.M. 916(j); Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 5-11(III) (1 May 1982)).

³⁸*Barnard*, 32 M.J. at 536 n.8 (citations omitted).

³⁹See generally Richmond, *supra* note 5, at 3.

⁴⁰UCMJ article 85 provides in pertinent part:

(a) Any member of the armed forces who—

(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

The Court of Military Appeals, in *United States v. Huff*, 22 C.M.R. 37 (C.M.A. 1956), has concluded that subparagraph (3) above does not state a separate offense.

⁴¹UCMJ art. 85(a)(2). The Court of Military Appeals long has recognized that "hazardous duty and important service are not correlative, although they may exist at the same time and are chargeable under the same section of the Code." *United States v. Smith*, 39 C.M.R. 46, 49 (C.M.A. 1968). See generally *United States v. Aldridge*, 8 C.M.R. 130, 132 (C.M.A. 1953); *United States v. Hemp*, 3 C.M.R. 14 (C.M.A. 1952); *United States v. Roa*, 12 M.J. 210, 214 (C.M.A. 1982) (Cook, J., concurring). For a discussion of this form of desertion, see TJAGSA Practice Note, *Being An Accused: "Service," But Not "Important Service,"* The Army Lawyer, Apr. 1989, at 55.

⁴²32 M.J. 594 (A.C.M.R. 1991).

⁴³The single desertion specification in *Hocker* alleged that the accused was guilty under two theories: (1) that he was absent from his unit without authority with the intent of remaining away permanently; and (2) that he was absent without authority with the intent of avoiding hazardous duty and shirking important service. *Id.* at 595 n.1. The accused was convicted of desertion under the latter theory only. *Id.*

⁴⁴*Id.* at 595.

⁴⁵*Id.*

On appeal, the defense argued that the accused's plea of guilty to desertion was improvident. Specifically, the defense cited *United States v. Smith*⁴⁶ to support its contention that the government failed to show that the duty in question was hazardous.⁴⁷

The Manual for Courts-Martial defines hazardous duty and important service, in pertinent part, as follows:

"Hazardous duty" or "important service" may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power, in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily "hazardous duty or important service."⁴⁸

No recent reported decisions have addressed the meaning of "hazardous duty" when used in connection with desertion. Recently reported desertion cases addressing "important service" have focused on situations not involving actual or potential combat. In *United States v. Wolff*,⁴⁹ for example, the Navy-Marine Corps Court of Military Review concluded that a thirty-day sentence to the brig was not important service for purposes of desertion.⁵⁰ Similarly, in *United States v. Walker*,⁵¹ the

Air Force Court of Military Review held that being an accused at a special court-martial did not constitute important service under article 85.⁵²

Earlier military court decisions have considered whether combat-related activities were important service or hazardous duty in the context of desertion. Not surprisingly, participating in an attack upon enemy forces was found to constitute hazardous duty.⁵³ Hazardous duty and important service was not limited, however, to actual front-line combat.⁵⁴ For example, the courts have held that reporting to a unit in a combat area in Korea⁵⁵ or Vietnam⁵⁶ was hazardous duty or important service. Serving on the main line of resistance in the Korean War also constituted hazardous duty.⁵⁷ Similarly, reassignment to an overseas combat area during the Korean War was determined to be important service.⁵⁸ The Court of Military Appeals actually concluded that basic training could be important service—at least when the training was a prerequisite for an overseas assignment during the Korean War.⁵⁹

As the Manual for Courts-Martial instructs, "[w]hether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial."⁶⁰ Accordingly, in the *Smith* case, which was cited by the defense in *Hocker*, the Court of Military Appeals held that the evidence was insufficient to support the accused's conviction for desertion by intentionally avoiding important service. In particular, the court in *Smith* concluded that the accused's assignment to Saigon while soldiers assigned to that area

⁴⁶39 C.M.R. 46 (C.M.A. 1968).

⁴⁷*Hocker*, 32 M.J. at 595. Although not mentioned in the *Hocker* opinion, presumably the defense likewise contended on appeal that the government failed to prove that the service avoided by the accused was important.

⁴⁸MCM, Part IV, para. 9c(2)(a).

⁴⁹25 M.J. 752 (N.M.C.M.R. 1987).

⁵⁰*Id.* at 754.

⁵¹26 M.J. 886 (A.F.C.M.R. 1988).

⁵²*Id.* at 888-89.

⁵³*United States v. Squirrel*, 7 C.M.R. 22 (C.M.A. 1953).

⁵⁴*United States v. Cook*, 8 C.M.R. 23, 25 (C.M.A. 1953) (citing *United States v. Smith*, 7 C.M.R. 73 (C.M.A. 1953); *United States v. Sperland*, 5 C.M.R. 89 (C.M.A. 1952); W. Winthrop, *Military Law and Precedents* 623 (1920 Reprint)).

⁵⁵*Id.* at 24-25.

⁵⁶*United States v. Moss*, 44 C.M.R. 298 (A.C.M.R. 1971).

⁵⁷*United States v. Apple*, 10 C.M.R. 90 (C.M.A. 1953).

⁵⁸*United States v. Willingham*, 10 C.M.R. 88 (C.M.A. 1952); see *United States v. Shull*, 2 C.M.R. 83 (C.M.A. 1952).

⁵⁹*United States v. Deller*, 12 C.M.R. 165 (C.M.A. 1953); see *United States v. O'Neil*, 12 C.M.R. 172 (C.M.A. 1953); see also *United States v. Merrow*, 34 C.M.R. 45 (C.M.A. 1963) (serving aboard a ship performing icebreaker duty for an Antarctic task force found to be important service).

⁶⁰MCM, 1984, Part IV, para. 9c(2)(a). The 1969 Manual for Courts-Martial added the explanation that "whether a duty is hazardous or service important is a question of fact." *Walker*, 26 M.J. at 888 n.3 (citing Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 164a(2)). The prior edition of the Manual for Courts-Martial, as interpreted by the courts, considered some types of service to be important as a matter of law. See Manual for Courts-Martial, United States, 1951, para. 164a, discussed in *Deller*, 12 C.M.R. at 168. For example, foreign duty or sea duty once were considered to be important per se. *United States v. Wimp*, 4 C.M.R. 509 (C.G.B.R. 1952); *United States v. Herring*, 1 C.M.R. 264 (A.B.R.), petition denied, 1 C.M.R. 99 (C.M.A. 1951), discussed in *Walker*, 26 M.J. at 888 n.3.

were receiving hostile pay was not, standing alone, sufficient to prove that the service was important.⁶¹

As the court noted in *Hocker*, however, by pleading guilty, the accused relieved the government of the requirement to prove his guilt independently—that is, to prove that the accused's service was important or his duty hazardous.⁶² Accordingly, the *Hocker* court wrote that it was "limited to the facts stated in [the accused's] responses to the military judge during the providence inquiry."⁶³ Finding no apparent problems with the providence inquiry, the court in *Hocker* affirmed the accused's conviction for desertion.⁶⁴

Hocker is consistent with the recent Court of Military Appeal's decisions that refuse to examine *de novo* the facts that underlie a facially provident guilty plea. In *United States v. Thompson*,⁶⁵ for example, the court resolved all factual questions regarding the physical configuration of a venetian blind against the accused when the accused made a facially provident plea of guilty to burglary.⁶⁶ Therefore, the accused's posttrial contention that the blind did not constitute an adequate obstruction to his entry was rejected. Likewise, in *United States v.*

*Harrison*⁶⁷ the court refused to disturb the accused's facially provident plea of guilty to making a false official statement⁶⁸ based on his posttrial claim that the questioner was not acting pursuant to an official duty. The court in *Harrison* wrote that "[p]ost-trial speculation on the scope of the [questioner's] duties ... cannot be countenanced."⁶⁹ Major Milhizer.

Facts Relevant to Desertion

Among the various forms of desertion proscribed by article 85 of the Uniform Code of Military Justice,⁷⁰ the most common involves being absent without authority with the intent to remain away permanently.⁷¹ The recent case of *United States v. Horner*⁷² provides a useful compilation of the facts that are relevant to proving and disproving the specific intent required for this offense.⁷³

The military judge in *Horner* made special findings of fact that supported his determination that the accused intended to remain away permanently.⁷⁴ These facts were: (1) the 144-day duration of the accused's AWOL;⁷⁵ (2) the termination of the AWOL by apprehension;⁷⁶ (3) the accused's lacking an Armed Forces identification (ID)

⁶¹ *Smith*, 39 C.M.R. at 50.

⁶² *Hocker*, 32 M.J. at 595 (citing *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).

⁶³ *Id.* at 595 (quoting *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982) (citing *United States v. Joseph*, 11 M.J. 333 (C.M.A. 1981))).

⁶⁴ *Id.* at 596.

⁶⁵ 32 M.J. 65 (C.M.A. 1991).

⁶⁶ See UCMJ art. 129.

⁶⁷ 26 M.J. 474 (C.M.A. 1988).

⁶⁸ See UCMJ art. 107.

⁶⁹ *Harrison*, 26 M.J. at 476; see also *United States v. Gay*, 24 M.J. 304, 306 (C.M.A. 1987).

⁷⁰ See *supra* note 40 (delineating elements of pertinent portion of article 85 desertion).

⁷¹ UCMJ art. 85(a)(1); see Anderson, *Unauthorized Absences*, *The Army Lawyer*, Jun. 1989, at 3, 11. This form of desertion has four elements of proof:

- (1) That the accused absented himself or herself from his or her unit, organization, or place of duty;
- (2) That such absence was without authority;
- (3) That the accused, at the time the absence began or at some time during the absence, intended to remain away from his or her unit, organization, or place of duty permanently; and
- (4) That the accused remained absent until the date alleged.

MCM, 1984, Part IV, para. 9b(1).

⁷² 32 M.J. 576 (C.G.C.M.R. 1991).

⁷³ Desertion is a specific intent crime. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956). Accordingly, the government must prove the requisite specific intent—that is, an intent to remain away permanently—beyond a reasonable doubt. Even if the government fails to prove the specific intent required for desertion, the accused nevertheless may be convicted of AWOL in most cases. MCM, 1984, Part IV, para. 9d. Actually, "desert" and "desertion" are terms of art that have been held necessarily to include that the absence was without authority. *United States v. Lee*, 19 M.J. 587 (N.M.C.M.R. 1984).

⁷⁴ Note that the intent to remain away permanently need not coincide with the initial date of the AWOL; desertion occurs if this intent is formed at any point during the AWOL period. MCM, 1984, Part IV, para. 9c(1)(c)(i).

⁷⁵ See *United States v. Condon*, 1 M.J. 984 (N.C.M.R. 1976) (accused's desertion conviction affirmed when he remained AWOL for six years); MCM, 1984, Part IV, para. 9c(1)(c)(iii). Note, however, that the length of the AWOL alone is not dispositive of an intent to desert. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Desertion can be proven even if the AWOL was of a relatively short duration. *United States v. Maslanich*, 13 M.J. 611 (A.F.C.M.R. 1982) (the accused had been AWOL for only a few hours when apprehended).

⁷⁶ Courts historically have found that termination of the AWOL by apprehension is circumstantial evidence of an intent to remain away permanently. E.g., *Condon*, 1 M.J. at 984; *United States v. Balagtas*, 48 C.M.R. 339 (N.C.M.R. 1982); *United States v. Mackey*, 46 C.M.R. 754 (N.C.M.R. 1972); see MCM, 1984, Part IV, para. 9c(1)(c)(iii). If this additional fact is alleged and proved beyond a reasonable doubt, the accused is exposed to an enhanced maximum punishment. MCM, 1984, Part IV, paras. 9b(1), 9c(2); see *United States v. Nicaboine*, 11 C.M.R. 152 (C.M.A. 1953). See generally Anderson, *supra* note 71, at 11.

card⁷⁷ or any item of his uniform⁷⁸ when he was apprehended; (4) the accused's physical appearance when apprehended;⁷⁹ (5) the accused's failure to contact any Coast Guard unit during his AWOL;⁸⁰ (6) the accused's establishment of a residence about 3000 miles from his home of record and unit;⁸¹ and (7) the accused's stay in Canada while AWOL.⁸²

The defense in *Horner* urged that several facts concerning the accused's AWOL negated the conclusion that he intended to remain away permanently.⁸³ These facts were: (1) the accused never attempted to establish an alias;⁸⁴ (2) the accused made no attempt to misstate his date of birth; (3) the accused explained that he had inadvertently lost his ID card;⁸⁵ (4) although the accused had not returned to his home of record, he did return to his place of birth; (5) the nature of the accused's employment did not suggest that he had started a new career; and (6) the accused did not establish a residence having a permanent character.⁸⁶

The court of review in *Horner* considered all these facts and affirmed the accused's desertion conviction.⁸⁷ In doing so, the court correctly recognized that the

accused's intent may be evaluated only after considering all the relevant evidence and that no one factor is dispositive.⁸⁸ Counsel seeking to prove or negate the specific intent requirement of desertion should read and apply the analysis in *Horner*. Major Milhizer.

Obstructing Justice by Attempting to Influence a State Court Proceeding

Obstruction of justice under military law has been charged variously under the three clauses of article 134: (1) conduct prejudicial to good order and discipline in the armed forces; (2) conduct of a nature to bring discredit upon the armed forces; and (3) noncapital crimes or offenses that violate federal law, including law made applicable through the Federal Assimilative Crimes Act.⁸⁹ Obstruction of justice charges under the first two clauses of article 134 have been recognized to encompass a much broader scope of conduct⁹⁰ than charges coming under the third clause, which incorporates the federal civilian obstruction of justice statute.⁹¹

Several reported military cases have affirmed obstruction of justice convictions—principally under the first

⁷⁷ See generally *Balagras*, 48 C.M.R. 339 (N.C.M.R. 1972) (desertion affirmed even though the accused had retained his Armed Forces ID card when apprehended); *Condon*, 1 M.J. at 984 (fact that accused was not in possession of his military ID card when apprehended was circumstantial evidence that he intended to remain away permanently).

⁷⁸ See MCM, 1984, Part IV, para. 9c(1)(c)(iii).

⁷⁹ The court in *Horner* did not elaborate on this finding. Having a physical appearance incompatible with military service, however, reasonably could constitute circumstantial evidence of an intent to remain away permanently.

⁸⁰ See *Condon*, 1 M.J. at 984 (that the accused was close to a military installation, but did not attempt to turn himself in, was circumstantial evidence that he intended to remain away permanently); MCM, 1984, Part IV, para. 9c(1)(c)(iii).

⁸¹ See *Mackey*, 46 C.M.R. 754 (C.M.A. 1972). See generally *Maslanich*, 13 M.J. at 611 (accused's conviction for desertion affirmed even though he was apprehended only a few miles from his base).

⁸² See *Horner*, 32 M.J. at 577 (appellate court's recitation of the military judge's special findings). Other illustrative facts that may tend to support an inference that an accused intended to remain away permanently include

that the accused purchased a ticket for a distant point ...; that the accused was dissatisfied with the accused's unit, ship, or with military service; that the accused made remarks indicating an intention to desert; that the accused was under charges or had escaped from confinement at the time of the absence; that the accused made preparations indicative of an intent not to return (for example, financial arrangements); or that the accused enlisted or accepted an appointment in the same or another armed force without disclosing the fact that the accused had not been regularly separated [*sic*], or entered any foreign armed service without being authorized by the United States.

MCM, 1984, Part IV, para. 9c(1)(c)(iii).

⁸³ *Horner*, 32 M.J. at 577.

⁸⁴ Actually, the accused used his real, full name when questioned by law enforcement authorities. *Id.* See generally *Condon*, 1 M.J. at 984 (accused's use of an alias was one factor in finding an intent to remain away permanently).

⁸⁵ See generally *Balagras*, 48 C.M.R. at 339; *Condon*, 1 M.J. at 984.

⁸⁶ *Balagras*, 48 C.M.R. at 339; *Condon*, 1 M.J. at 984. Other illustrative circumstances that may tend to negate an inference that an accused intended to remain away permanently include "previous long and excellent service; that the accused left valuable personal property in the unit or on the ship; or that the accused was under the influence of alcohol or drugs during the absence." MCM, 1984, Part IV, para. 9c(1)(c)(iii).

⁸⁷ *Horner*, 32 M.J. at 578.

⁸⁸ See generally *United States v. Therasse*, 17 M.J. 1068 (A.F.C.M.R. 1984); MCM, 1984, Part IV, para. 9c(1)(c)(iii); *Anderson*, *supra* note 71, at 12.

⁸⁹ UCMJ art. 134; see MCM, 1984, Part IV, para. 96. For a discussion of article 134 offenses generally, including the different theories of prosecution, see TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66.

⁹⁰ See, e.g., *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Bailey*, 28 M.J. 1004 (A.C.M.R. 1989); *United States v. Kellough*, 19 M.J. 871 (A.F.C.M.R. 1985) (interfering with the administration of military justice during the investigation of the crime); *United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989) (interfering with the administration of nonjudicial punishment).

⁹¹ *United States v. Jones*, 20 M.J. 38 (C.M.A. 1985); *United States v. Cantor*, 42 C.M.R. 753 (A.C.M.R. 1970); see *United States v. Long*, 6 C.M.R. 60 (C.M.A. 1952) (obstruction of justice under the first two clauses of article 134 exists separate from the federal civilian statute). See generally 18 U.S.C. §§ 1503, 1505, 1511 (1982).

two clauses of article 134—which involved intimidating, improperly influencing, or interfering with witnesses.⁹² Each of these cases has concerned *military criminal justice* actions or investigations.⁹³ Actually, only two years ago, the Court of Military Appeals reiterated that “[o]ur case law clearly indicates that overriding concern of [the obstruction of justice] provision of military law is the protection of ‘the administration of justice in the military system.’”⁹⁴

In the recent case of *United States v. Smith*,⁹⁵ the Army Court of Military Review broke new ground. The accused in *Smith* was charged with obstructing justice, apparently under the theory that his conduct was service discrediting under clause 2 of article 134.⁹⁶ Specifically, the government alleged that the accused obstructed justice by attempting to alter or to interfere with the testimony of a witness at the accused’s civilian trial.⁹⁷ Acknowledging the military precedent discussed above,⁹⁸ the court in *Smith* nonetheless concluded that

We do not believe that the Court of Military Appeals ... in any way meant to preclude prosecution of obstruction of justice by a soldier in a state proceeding. Indeed, such a narrow reading would be inconsistent within the basic elements of the offense in the Manual for Courts-Martial.⁹⁹

The court in *Smith* observed further that because the accused’s conduct was service discrediting, it stated an

offense under article 134.¹⁰⁰ The *Smith* court also concluded that soldiers are on notice that an attempt to obstruct justice in a state court proceeding could result in prosecuting that misconduct in a military court. The court noted that the military is now able to pursue and deter misconduct, such as the misconduct at issue in *Smith*, as a consequence of the Supreme Court’s decision in *Solorio v. United States*.¹⁰¹

Whether other courts will reach the same conclusion as the Army Court of Military Review’s conclusion in *Smith* waits to be seen. At least for the present, practitioners must be aware of the important implications in *Smith* and be prepared to defend or attack its rationale. Major Milhizer.

How to Measure a Blade

The accused in *United States v. Deisher*¹⁰² was convicted, *inter alia*, of violating a lawful general regulation¹⁰³ by carrying a concealed weapon.¹⁰⁴ The weapon at issue was described as a folding “buck knife.”¹⁰⁵ The issue, as framed by the appellate court, was whether the blade of the knife was long enough to violate United States Air Forces Europe Regulation (USAFER) 125-39.

The pertinent provision of the USAFER 125-39 prohibited carrying concealed¹⁰⁶ “knives with blades larger than three inches.”¹⁰⁷ The parties stipulated at trial that the total length of the knife blade—that is, the entire

⁹² *E.g.*, *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989); *United States v. Rossi*, 13 C.M.R. 896 (C.M.A. 1952); *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984); *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983); *United States v. Caudill*, 10 M.J. 787 (A.F.C.M.R. 1981); *United States v. Delaney*, 44 C.M.R. 367 (A.C.M.R. 1971); *United States v. Darninger*, 31 C.M.R. 521 (A.F.B.R. 1951).

⁹³ See *supra* note 92 and authorities cited therein.

⁹⁴ *Guerrero*, 28 M.J. at 227 (quoting *Long*, 6 C.M.R. at 65).

⁹⁵ 32 M.J. 567 (A.C.M.R. 1991).

⁹⁶ See *id.* at 569.

⁹⁷ The accused was charged with sexually abusing his two daughters. One of the daughters was dating a soldier. They ultimately planned to marry. When the accused learned of this, he went to the soldier’s chain of command to try to stop the marriage. This resulted in ending the relationship. Later, the accused contacted the soldier and told him that he would consent to the marriage, provided the soldier could convince the daughter to change her testimony about the accused at the accused’s preliminary hearing in state court. *Id.* at 568.

⁹⁸ See *supra* notes 92-94 and accompanying text.

⁹⁹ *Smith*, 32 M.J. at 569 (citing MCM, 1984, Part IV, para. 96b).

¹⁰⁰ *Id.* at 569.

¹⁰¹ 483 U.S. 435, *reh’g denied*, 483 U.S. 1056 (1987), cited in *Smith*, 32 M.J. at 570.

¹⁰² 32 M.J. 579 (A.F.C.M.R. 1990).

¹⁰³ United States Air Forces Europe Regulation 125-39, *Control of Privately Owned Firearms and Other Weapons* (28 Apr. 1981) [hereinafter USAFER 125-39].

¹⁰⁴ UCMJ article 92 proscribes violations of lawful general regulations. See MCM, 1984, Part IV, para. 16.

¹⁰⁵ *Deisher*, 32 M.J. at 579.

¹⁰⁶ For a discussion of the meaning of “concealed,” see TJAGSA Practice Note, *The Meaning of “Concealed” in a Concealed Weapons Charge*, *The Army Lawyer*, Jan. 1991, at 44 (discussing *United States v. Taylor*, 30 M.J. 1208 (A.C.M.R. 1990)).

¹⁰⁷ USAFER 125-39, para. 3d(15)(b). This provision provides further that a knife having a blade in excess of three inches is not prohibited if “it is an openly displayed hunting knife where directly engaged in hunting activities or a government issued knife which has been authorized by the unit commander for use during the performance of duty.” *Id.* Apparently these exceptions to the regulation did not apply. See generally *United States v. Lavine*, 13 M.J. 150 (C.M.A. 1982); *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

metal portion of the knife that extended beyond the handle or hilt—exceeded three inches.¹⁰⁸ The parties further stipulated that the honed or sharpened portion of the blade was less than three inches long.¹⁰⁹ Thus, the question at trial¹¹⁰ and on appeal was whether both the sharpened and unsharpened metal portions of a knife constitute the blade within the meaning of the regulation.

In deciding the issue, the Air Force Court of Military Review did not provide any insight into its reasoning. Citing several civilian cases,¹¹¹ the court instead merely concluded that the “sharpened (honed) and unsharpened (unhoned) portion of the folding metal part of the knife, that extends from the handle or hilt, constitutes the blade of the knife in issue.”¹¹²

The touchstone for interpreting regulations is the drafter’s intent.¹¹³ Several factors suggest that the *Deisher* court has interpreted this intent correctly. First, the plain meaning of the word “blade” refers to the entire metal portion of a knife—both sharpened and unsharpened—which extends beyond the handle.¹¹⁴ Second, if the drafter had intended a more restrictive definition of the term “blade,” such as “the sharpened portion of the blade,” that intent could have been expressed unequivocally in the regulation. Third, the apparent intent of the regulation is to prohibit knives exceeding a certain length because of their ability to inflict especially dangerous wounds. Accordingly, because the entire length of the blade might enter the victim’s body if the knife were used in an assault, that length best describes the extent of the knife’s potential as a dangerous weapon.

Apart from the issues addressed by the appellate court, the regulation at issue in *Deisher* illustrates a common overbreadth problem. For example, many kitchen knives and other innocuous utensils would violate the letter of the cited regulatory paragraph. On some occasions, the military courts have salvaged these regulations by

including a scienter or *mens rea* requirement.¹¹⁵ Major Milhizer.

Communicating a “Conditional” Threat

Introduction

*United States v. Alford*¹¹⁶ is the most recent reported military case to consider the crime of communicating a threat.¹¹⁷ In *Alford* the Army Court of Military Review affirmed the accused’s conviction for communicating a threat to another inmate, even though the threat seemed to be conditional.¹¹⁸ Before discussing *Alford* in detail, a brief review of the offense of communicating a threat generally is appropriate.

Communicating a Threat Generally¹¹⁹

Communicating a threat is proscribed in the military by UCMJ article 134. Therefore, the crime is not addressed expressly in the UCMJ’s enumerated punitive articles.¹²⁰

The 1984 Manual for Courts-Martial includes communicating a threat as an enumerated article 134 offense.¹²¹ Its elements of proof, as set forth in the Manual for Courts-Martial, are as follows:

- (1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
- (2) That the communication was made known to that person or to a third person;
- (3) That the communication was wrongful; and
- (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.¹²²

¹⁰⁸ *Deisher*, 32 M.J. at 579.

¹⁰⁹ *Id.*

¹¹⁰ The military judge denied the defense motion for a finding of not guilty, based upon the defense’s contention that the “blade” of the knife was under three inches long and therefore did not violate the regulation as a matter of law. *Id.* at 580.

¹¹¹ See *Rainer v. State*, 763 S.W.2d 615 (Tex. App. 1989); *People v. Pickett*, 194 Colo. 178, 571 P.2d 1078 (1977); cf. *National Carloading Corp. v. United States*, 54 Cust. Ct. 178 (1965). But see *Bradvia v. State*, 760 P.2d 139 (Nev. 1988).

¹¹² *Deisher*, 32 M.J. at 580.

¹¹³ See generally *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1985).

¹¹⁴ Note that the plain meaning of “blade” nevertheless is subject to an alternative interpretation. E.g., *The Random House College Dictionary* 141 (Stein, rev. ed. 1982) (blade is defined as “the flat cutting part of a sword, knife, etc.”).

¹¹⁵ *United States v. Bradley*, 15 M.J. 843 (A.F.C.M.R. 1983) (*mens rea* required in regulation prohibiting possession of drug paraphernalia is that the item is intended to be used in connection with a controlled substance); *United States v. Cannon*, 13 M.J. 777 (A.C.M.R. 1982) (regulation prohibiting the possession of an instrument or device that might be used to administer or dispense prohibited drugs, except for household use or treatment of disease, construed to require that the instrument or device be possessed with the intent to administer prohibited drugs).

¹¹⁶ 32 M.J. 596 (A.C.M.R. 1991).

¹¹⁷ See UCMJ art. 134.

¹¹⁸ *Alford*, 32 M.J. at 597.

¹¹⁹ Much of the information for this section is taken from Criminal Law Division, The Judge Advocate General’s School, U.S. Army, Criminal Law: Criminal Law Deskbook, Crimes and Defenses 1-51 to 1-52 (Aug. 1990). Persons interested in obtaining a copy of this deskbook can order it through the Defense Technical Information Center. The procedures for ordering the deskbook are found in the Current Material of Interest section of *The Army Lawyer*.

¹²⁰ For a discussion of UCMJ article 134 offenses generally, see TJAGSA Practice Note, *supra* note 89, at 66.

¹²¹ MCM, 1984, Part IV, para. 110.

¹²² *Id.*, Part IV, para. 110b.

Communicating a threat has been recognized as an offense under military law at least since shortly after the adoption of the UCMJ.¹²³ The Court of Military Appeals has described the gist of communicating a threat as wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.¹²⁴ Its gravamen "relates to the potential violent disturbance of public peace and tranquility."¹²⁵ As indicated above, a threat to reputation¹²⁶ or property,¹²⁷ as well as threats of personal injury,¹²⁸ are sufficient for guilt. On the other hand, "a mere statement of intent to commit an unlawful act not involving injury to another" does not amount to communicating a threat.¹²⁹

The meaning of the requirement for "an avowed present intent or determination to injure" has been the subject of a great deal of appellate discussion and interpretation. For example, the Court of Military Appeals has held that a personal disclaimer does not necessarily cause a contemporaneous threat to fall outside the scope of communicating a threat.¹³⁰ Similarly, communicating a threat can occur even when phrased as a conditional threat, provided that the condition is possible, the accused had no right to impose the condition, and the circumstances of the threat express a clear and present determination to carry it out.¹³¹

Threats conditioned upon impossible variables, however, do not constitute communicating a threat.¹³² Like-

wise, idle jest, banter, and hyperbole are not within the scope of the offense.¹³³ Moreover, stating or describing an already completed act¹³⁴ does not amount to communicating a threat.¹³⁵ Threats that are neither directly prejudicial to good order and discipline, nor service discrediting, also fail to constitute the offense.¹³⁶ Accordingly, "threats" made for an innocent or legitimate purpose are not unlawful.¹³⁷ In all cases, the circumstances that surround the allegedly threatening words, as well as the manner in which the words were stated, must be evaluated in determining the sufficiency of the evidence.¹³⁸

Assuming that the communication is threatening within the analyses delineated above, it need not be communicated directly to the person who is subject to the threat to constitute the offense.¹³⁹ The threat, however, must be communicated to someone.¹⁴⁰

Communication of a threat is not a specific intent crime—at least in the sense that the accused must intend specifically to carry out the threat.¹⁴¹ As the Court of Military Appeals has stated, "[t]he intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant."¹⁴² The court further explained:

This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and

¹²³ See *United States v. Sturmer*, 1 C.M.R. 17 (C.M.A. 1951).

¹²⁴ *Id.* at 18.

¹²⁵ *United States v. Grembowicz*, 17 M.J. 720, 723 (N.M.C.M.R. 1983).

¹²⁶ *United States v. Frayer*, 29 C.M.R. 416, 420 (C.M.A. 1960) (threatening victim to accuse him falsely of committing offenses and having others do the same).

¹²⁷ *United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986) (threat to sell the victim's diamond ring).

¹²⁸ *E.g., Sturmer*, 1 C.M.R. at 18 (threat to commit a battery upon the victim).

¹²⁹ MCM, 1984, Part IV, para. 110c.

¹³⁰ *United States v. Johnson*, 45 C.M.R. 53 (C.M.A. 1972) ("I am not threatening you ... but in two days you are going to be in a world of pain," constituted an illegal threat when considered in light of all the circumstances).

¹³¹ *United States v. Holiday*, 16 C.M.R. 281 (C.M.A. 1954); see *United States v. Shropshire*, 43 C.M.R. 214 (C.M.A. 1971).

¹³² *Shropshire*, 43 C.M.R. at 214; see also *United States v. Gately*, 13 M.J. 757 (A.F.C.M.R. 1972).

¹³³ *United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963); see MCM, 1984, Part IV, para. 110c.

¹³⁴ An example of a threat concerning an already completed act might be, "I have just planted a bomb in the barracks."

¹³⁵ *Gilluly*, 32 C.M.R. at 461-62.

¹³⁶ *United States v. Hill*, 48 C.M.R. 6 (C.M.A. 1973) (lovers' quarrel).

¹³⁷ MCM, 1984, Part IV, para. 110c.

¹³⁸ *Johnson*, 45 C.M.R. at 54; *United States v. Schmidt*, 36 C.M.R. 213 (C.M.A. 1966); *United States v. Humphrys*, 22 C.M.R. 96 (C.M.A. 1956).

¹³⁹ *Gilluly*, 32 C.M.R. at 461; *United States v. Rutherford*, 16 C.M.R. 35, 36 (C.M.A. 1954).

¹⁴⁰ *Gilluly*, 32 C.M.R. at 461; see also *United States v. Jenkins*, 26 C.M.R. 161 (1958). In some cases, the Court of Military Appeals apparently has required that the communication be known to the victim as an element of communicating a threat. *E.g., United States v. Davis*, 19 C.M.R. 160 (C.M.A. 1955); *Humphrys*, 22 C.M.R. at 307. These cases, however, did not create an additional element of proof. Rather, they merely required that if the specification alleges that the communication was made to the person threatened, the government is required to prove this fact. *Gilluly*, 32 C.M.R. at 461. For a good discussion of pleading communicating a threat, see *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972).

¹⁴¹ *Gilluly*, 32 C.M.R. at 461; *Holiday*, 16 C.M.R. at 30.

¹⁴² *Gilluly*, 32 C.M.R. at 461; accord *Humphrys*, 22 C.M.R. at 97.

thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter."¹⁴³

The case of United States v. Alford

The accused in *Alford* was a posttrial prisoner when the alleged offense occurred.¹⁴⁴ While at the confinement facility, the accused punched another inmate and grabbed him around the throat. He then said to the other inmate, "[I]f [you] mention[] anything of this to any of the guards, about the incident, [I will put you] ... in a body bag at Evans Community Hospital."¹⁴⁵ These words served as the basis for the accused's conviction for communicating a threat.

The *Alford* court initially acknowledged that the threatening language at issue imposed a condition—that is, the threat of putting the victim in a body bag was conditioned upon the victim's mentioning the accused's prior assault upon him to a guard. The court nevertheless concluded that the quoted language constituted communicating a threat. Consistent with the case authority discussed above, the court observed that: (1) the accused "had no right to impose such a condition;" (2) "the condition was not hypothetical or impossible;" and (3) the threat "expressed a clear present determination to injure [and] consequently ... negated the conditional language."¹⁴⁶ The court found further that the accused's "actions at the time the words were spoken were sufficient to cause [the victim] to believe he was being threatened."¹⁴⁷ Accordingly, the court affirmed the accused's conviction for communicating a threat.

Conclusion

Communicating a threat is a relatively commonplace court-martial offense. It also is implicated in a number of

related and frequently encountered crimes.¹⁴⁸ Military practitioners, therefore, must have a working familiarity with communicating a threat and its many limitations and nuances. Major Milhizer.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

Serving Child Support Enforcement Orders on the Military Finance Centers

Once a child support obligation is established, it must be paid to be of any benefit to the minor child. A variety of methods are available to collect child support from soldiers or military retirees. These include garnishment,¹⁴⁹ automatic wage withholding,¹⁵⁰ the mandatory—or involuntary—allotment,¹⁵¹ and the withholding provisions of the Uniformed Services Former Spouses' Protection Act.¹⁵² While these mechanisms are implemented in various ways, all require that documents be served on the central finance office of the soldier's or retiree's service.

Recent efforts to consolidate military finance centers resulted in changed addresses for service of child support enforcement orders. These changes, however, are not yet reflected in the Code of Federal Regulations. To ensure that your clients' support orders are executed promptly, be certain that the orders are sent to the following addresses:

¹⁴³ *Gilluly*, 32 C.M.R. at 461 (citing *Humphrys*, 22 C.M.R. at 97).

¹⁴⁴ *Alford*, 32 M.J. at 597.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984); *United States v. Baur*, 10 M.J. 789 (A.F.C.M.R. 1981) (obstruction of justice); *United States v. Metcalf*, 41 C.M.R. 574 (A.C.M.R. 1969) (assault); MCM, 1984, Part IV, para. 110d(1) (provoking words).

¹⁴⁹ 42 U.S.C. §§ 659-662 (1988); 5 C.F.R. pt. 581 (1990).

¹⁵⁰ 5 C.F.R. pt. 581 (1990).

¹⁵¹ See 32 C.F.R. pt. 54 (1990).

¹⁵² The provision in the Uniformed Services Former Spouses' Protection Act that deals with child support is codified at 10 U.S.C. § 1408(a)(2)(B)(i) (1988); see also 32 C.F.R. pt. 63 (1990).

Army:
Defense Finance &
Accounting Service
Indianapolis Center
ATTN: DFAS-I-CG
Indianapolis, IN 46249
(317) 542-2155

Marine Corps:
Director
Defense Finance &
Accounting Service
Kansas City Center
Kansas City, MO 64197
(816) 926-7103

Coast Guard:
Commanding Officer (L)
U.S. Coast Guard Pay and Personnel Center
Federal Building
444 S.E. Quincy Street
Topeka, KS 66683-3591
(913) 295-2984

Air Force:
Defense Finance &
Accounting Service
Denver Center
ATTN: GL
Denver, CO 80279
(303) 676-7524

Navy:
Director, Family
Allowance Activity
Anthony Celebrezze
Federal Bldg.
Cleveland, OH 44199
(216) 522-5301

Because Congress allowed each state to develop its own guidelines, details of state guidelines vary widely.¹⁵⁸ To ensure that legal assistance attorneys have current information regarding these state guidelines, the Army Law Library Service (ALLS) has ordered copies of the National Center for State Courts' publication *Child Support Guidelines: A Compendium* for distribution to the field. The *Compendium* contains the current child support guidelines for all fifty states, the District of Columbia, Puerto Rico, and Guam.

Initially, each active duty legal assistance office currently receiving legal assistance mailout materials from The Judge Advocate General's School will receive a copy of the *Compendium*. Annual updates will be distributed similarly. Copies of the *Compendium* also may be purchased locally for fifty dollars per copy by contacting:

Publications Coordinator
National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23187-8798
(804) 253-2000.

As a result of the ALLS purchase of the *Compendium*, the portion of the *Legal Assistance Family Law Guide* (JA 263) that details state child support guidelines will be deleted when the *Guide* is republished this summer.

Adoption Reimbursement

Section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989¹⁵⁹ created an adoption reimbursement test program. Under the amended program,¹⁶⁰ soldiers who "initiated"¹⁶¹ adoption of a child between 1 October 1987, and 30 September 1990, are eligible to have reimbursed "qualifying expenses"¹⁶² of up to \$2000 per child, or \$5000 per calendar year. Adoptions must be final prior to any reimbursement being paid.¹⁶³ In addition, reimbursement must be applied for by 30 September 1991.

Current Child Support Guidelines

Traditionally, child support awards were the products of a judicial system virtually unrestrained by objective standards. The amount of support awarded in similar cases in the same jurisdiction often varied widely.¹⁵³ Moreover, the support awarded frequently was set at levels far below the amount necessary to meet the children's actual needs.¹⁵⁴

During the 1980's, Congress acted to require states to develop child support guidelines and update these guidelines at least every four years.¹⁵⁵ State courts and agencies are required to use these guidelines as rebuttable presumptions of adequate levels of child support.¹⁵⁶ Moreover, the reasons supporting deviations from the guidelines must be made a matter of record.¹⁵⁷

¹⁵³ See Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 U. Den. L. Rev. 21 (1979).

¹⁵⁴ *Id.* at 36 (noting that two-thirds of the fathers studied were ordered to pay less monthly child support than they were spending on monthly car payments).

¹⁵⁵ 42 U.S.C. § 667(a) (1988).

¹⁵⁶ *Id.* § 667(b).

¹⁵⁷ *Id.*

¹⁵⁸ Federal regulations require state guidelines to be quantitative in nature, providing "specific descriptive and numeric criteria and result[ing] in a computation of the support obligation." 45 C.F.R. § 302.56(c) (1990).

¹⁵⁹ Pub. L. No. 100-180, 101 Stat. 1106 (1987).

¹⁶⁰ See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352, § 662 (1989).

¹⁶¹ According to Department of Defense policy, proceedings are considered "initiated" on the date of the home study, or the date of the child's placement in the adoptive home, whichever is later.

¹⁶² These are "reasonable and necessary expenses," which specifically include adoption agency fees, placement fees, legal fees, court costs, medical expenses, expenses relating to the biological mother's pregnancy and childbirth, and temporary foster care. See Pub. L. No. 100-180, 101 Stat. 1106, § 638(g)(3) (1987).

¹⁶³ *Id.* § 638(c).

Soldiers seeking reimbursement under the adoption program should apply through their local installation finance office. If necessary, additional information may be obtained by contacting Mr. Bob Hill, Defense Finance and Accounting Service, Indianapolis Center, at DSN (autovon) 699-3242 or commercial (317) 542-3242. Major Connor.

Veterans' Benefits Notes

Congress Passes Persian Gulf Benefits Act

On 6 April 1991, the President signed into law the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Gulf Act).¹⁶⁴ This legislation provides significant benefits to active duty and Reserve component soldiers involved in Operations Desert Shield and Desert Storm. It also includes several measures that will benefit active duty soldiers who were not involved directly in the conflict.

The Gulf Act contains several provisions directing increases in certain forms of military pay. The amount of imminent danger pay increases from \$110 per month to \$150 per month. This is a temporary increase beginning on 1 August 1990, and ending on or after the date 180 days after the end of the Persian Gulf crisis.¹⁶⁵ The Gulf Act also directs a temporary increase in family separation pay from sixty to seventy-five dollars per month. Eligibility for the increased allowance begins on 15 January 1991, and will end 180 days after the end of the conflict.¹⁶⁶ Soldiers qualifying for these increases should receive retroactive payments by June 1991.

Several of the Gulf Act's provisions involving military pay will affect only Reserve component soldiers. For instance, it requires that variable housing allowances (VHA) paid to Reserve component soldiers be calculated using the rates to which the members are entitled in the areas of their principal place of residence.¹⁶⁷ Another provision requires the payment of basic allowance for quarters (BAQ) to reserve component members without dependents who are unable to occupy their principal residences because of their being called for active duty in

the Persian Gulf.¹⁶⁸ This provision applies from 2 August 1990 to 180 days after the end of the conflict.

The Gulf Act provides authority for paying special pay to optometrists, veterinarians, nurse anesthetists, and other nonphysician health care providers called or ordered to active duty during Operations Desert Shield and Desert Storm.¹⁶⁹ Special pay also is authorized for physicians, dentists, optometrists, veterinarians, nurse anesthetists, and other nonphysician health care providers who involuntarily are retained on or recalled to active duty, or who voluntarily extend for a period of less than one year.¹⁷⁰

Another provision of this act authorizes continued payment of board certification pay to physicians, dentists, or other health care providers who have completed residency and were scheduled for board certification, but were unable to complete the process because of Persian Gulf duty.¹⁷¹

The Persian Gulf legislation also contains several provisions addressing survivor benefits. The Gulf Act authorizes a temporary increase in the death gratuity to \$6000 for injury or illness incurred during the Persian Gulf conflict or during the 180-day period beginning at the end of the conflict.¹⁷² The legislation does not condition eligibility for the increased death gratuity on the death occurring in the Persian Gulf theater of operations. The Gulf Act also contains a provision authorizing payment of a supplemental death gratuity to the survivors of members who died after 1 August 1990, and before the effective date of the legislation, equal to the amount of Servicemen's Group Life Insurance (SGLI) coverage held by the member at the time of death.¹⁷³ This gratuity is payable only if the death was in conjunction with, or in support of, Operations Desert Shield or Desert Storm, or was attributable to hostile actions in the Persian Gulf. Survivors must apply within one year from the date of death to receive this death benefit.

A significant provision that will affect all active duty soldiers is the increase in the maximum amount of SGLI and Veterans' Group Life Insurance (VGLI) from

¹⁶⁴ Pub. L. No. 102-25, 105 Stat. 75 (1991) [hereinafter Gulf Act].

¹⁶⁵ *Id.* § 301.

¹⁶⁶ *Id.* § 302.

¹⁶⁷ *Id.* § 303.

¹⁶⁸ *Id.* § 310A.

¹⁶⁹ *Id.* § 304.

¹⁷⁰ *Id.* § 226.

¹⁷¹ *Id.* § 305. The payment is contingent upon completion of certification requirements within 180 days of release from duty assignment.

¹⁷² *Id.* § 307 (amending 10 U.S.C. § 1478(a) (1988)).

¹⁷³ *Id.* § 308.

\$50,000 to \$100,000.¹⁷⁴ This increase became effective on the date of the enactment of the legislation—6 April 1991. Although all soldiers automatically are insured in the maximum amount, the military service branches will notify service members of the increased maximum amount and give them an opportunity to decline the increased insurance. Active duty soldiers who agree to the increased coverage will pay eight dollars per month.

The Gulf Act also contains a provision that will increase the monthly educational benefits paid under the Montgomery GI Bill program¹⁷⁵ to \$350 per month for soldiers serving on active duty for three years or more and to \$275 for soldiers serving on active duty for two years.¹⁷⁶ The new amounts apply to fiscal years 1992 and 1993. The legislation authorizes the Secretary of Veterans' Affairs to make subsequent cost of living increases.

The legislation also increases Montgomery GI Bill payments to soldiers serving in the Reserves. The new monthly amounts for fiscal years 1992 and 1993 will be \$170 for full-time study, \$128 for three-quarter-time study, and \$72.50 for half-time study.¹⁷⁷

The Gulf Act also opens the way for those involved in Operations Desert Storm and Desert Shield to be entitled to a variety of veterans' benefits by declaring the Persian Gulf conflict a war for the purposes of determining eligibility for veterans' benefits. The legislation specifically designates the Persian Gulf conflict as a war for the purposes of determining pensions for nonservice connected disabilities, determining eligibility for dental benefits, and establishing the presumption of service-connection for psychosis. Another provision of the Gulf Act extends home loan eligibility to Persian Gulf War veterans who have served for ninety days or more.¹⁷⁸

Congress included several appropriations measures in the Gulf Act to help the families of service members involved in the Persian Gulf conflict. The legisla-

tion authorizes the appropriation of \$20 million to the Department of Defense to be available to families of service members ordered to active duty in connection with Operation Desert Storm for child care assistance.¹⁷⁹ Another appropriations provision in the Gulf Act authorizes the appropriation of \$30 million for fiscal year 1991 to be used for education and family support services to personnel serving on active duty so that they may meet needs arising from the Persian Gulf crisis.¹⁸⁰

The legislation includes several miscellaneous measures that will help soldiers involved in the operations and their families. The Gulf Act delays until 1 October 1991, the increase in the deductibles for CHAMPUS coverage for dependents of soldiers who served on active duty in the Persian Gulf theater.¹⁸¹ The legislation also directs transitional health care coverage for a period of thirty days after release from active duty, or until covered by an employer-provided plan, for all members called to active duty in connection with Operations Desert Shield and Desert Storm.¹⁸²

The Gulf Act amends the Veterans' Reemployment Rights Law to require employers to make reasonable accommodations for disabled veterans entitled to reemployment rights.¹⁸³ An employer is required under the Gulf Act to reemploy a veteran who can become qualified for a former position through reasonable efforts on the part of the employer.¹⁸⁴

Soldiers serving on active duty in connection with the Persian Gulf Conflict who are repaying student loans also may benefit under the Gulf Act. The legislation authorizes the Secretary of Education to waive any statutory or regulatory requirement that might apply adversely to these soldiers.¹⁸⁵

The Gulf Act contains several other miscellaneous provisions, including relief for farmer reservists,¹⁸⁶ establishment of a leave bank for federal employees,¹⁸⁷ and an encouragement to colleges to provide tuition refunds to students called to active duty.¹⁸⁸ The legisla-

¹⁷⁴ *Id.* § 336.

¹⁷⁵ 38 U.S.C. § 1415 (1988).

¹⁷⁶ Gulf Act § 337(a).

¹⁷⁷ *Id.* § 337(b).

¹⁷⁸ *Id.* § 341. Reservists also must meet the minimum service requirements of 38 U.S.C. § 3103A (1988).

¹⁷⁹ Gulf Act § 602.

¹⁸⁰ *Id.* § 602. The service secretaries are authorized to provide direct assistance to families through grants, contracts, or other forms of assistance.

¹⁸¹ *Id.* § 312.

¹⁸² *Id.* § 313.

¹⁸³ *Id.* § 339 (amending 38 U.S.C. § 2021 (1988)).

¹⁸⁴ *Id.* § 340.

¹⁸⁵ *Id.* § 371.

¹⁸⁶ *Id.* §§ 381-388.

¹⁸⁷ *Id.* § 361. This provision requires the Office of Personnel Management to establish a leave bank so that federal employees may donate leave to returning federal employees involved in Operations Desert Storm and Desert Shield.

¹⁸⁸ *Id.* § 373.

tion also extends the filing deadline for submitting reports under the Ethics in Government Act for soldiers serving in the combat zone.

Attorneys advising clients should avoid making generalizations concerning eligibility for benefits under the Gulf Act. Although some provisions will benefit all soldiers, most of the measures are limited to service members involved in the Persian Gulf conflict and some benefits are available for limited time periods only. Major Ingold.

Employment Rights Under the VRRL Extend to Successors in Interest

Veterans leaving active duty and reservists returning home from Operations Desert Shield and Desert Storm duty may be alarmed to learn that their former employer has been taken over by another business. A recent case, *Leib v. Georgia-Pacific Corp.*,¹⁸⁹ however, holds that the Veterans' Reemployment Rights Law (VRRL)¹⁹⁰ entitles returning veterans to their former positions even though another business has taken over operations.

Brian Leib served as a press helper at a St. Regis carton manufacturing plant in Dubuque, Iowa, before he entered the Air Force in 1983. While Leib was serving with the military, Georgia-Pacific assumed ownership of the Dubuque plant and began operations. Leib was discharged honorably from the Air Force in 1987 and sought reemployment with Georgia-Pacific. Georgia-Pacific refused to reinstate Leib, claiming it had purchased only the assets of St. Regis and was not obligated under the VRRL to provide reemployment.

Leib filed suit in district court. The district court granted Georgia-Pacific's motion for summary judgment, holding as a matter of law that it was not a "successor of interest" under the VRRL.

The VRRL obligates employers or an "employer's successor in interest" to reinstate employees returning from service in the armed forces to the veteran's former position or one of like seniority, status, and pay.¹⁹¹ The phrase "successor in interest" is not defined in the VRRL and courts have experienced difficulty in arriving at a consistent definition.

As the Supreme Court has noted "[t]here is, and can be, no single definition of 'successor' which is applicable in every context."¹⁹² The Supreme Court went on to admonish that:

[p]articularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate.¹⁹³

Most courts have followed the approach suggested by the Supreme Court and consider a variety of factors to determine successorship under the VRRL.¹⁹⁴ Some courts, however, have taken a more limited approach, restricting successor-in-interest liability to companies that have continuity of ownership or control with the veteran's former employer.¹⁹⁵ The court in *Leib* determined that the appropriate test for successor liability was a multifactor business continuity approach because it is consistent with the view that the VRRL should be construed liberally for the benefit of returning veterans. The court agreed with Leib that an approach that focuses only on continuity of ownership or control substantially curtails a veteran's rights and "allows 'a simple paper transaction' to rob returning veterans of the reemployment rights Congress sought to guarantee."¹⁹⁶ The court rejected the approach advocated by Georgia-Pacific that the totality of the circumstances test should apply only after a veteran's reemployment rights have vested—that is, when the veteran has been turned down by a former employer prior to a purchase of the former employer's business by another concern.

The court in *Leib* also expressed the view that it would be appropriate to determine the successorship question under the VRRL by analogy to factors used in establishing successor liability under the National Labor Relations Act and title VII. Courts deciding successorship questions for these purposes look at factors such as substantial continuity of the same business operations; use of the same plant; continuity of work force; similarity of jobs and working conditions; similarity of supervisory personnel; similarity in machinery, equipment, and production methods; and similarity in products or services.¹⁹⁷

¹⁸⁹*Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991).

¹⁹⁰38 U.S.C. §§ 2021-2026 (1988).

¹⁹¹*Id.* § 2021(a).

¹⁹²*Howard Johnson v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees*, 417 U.S. 249, 263 n.8 (1974).

¹⁹³*Id.* at 256.

¹⁹⁴*See, e.g., Chaltry v. Ollie's Idea, Inc.*, 546 F. Supp. 44 (W.D. Mich. 1982).

¹⁹⁵*See, e.g., Cox v. Feeders Supply Co.*, 344 F.2d 924 (6th Cir. 1965).

¹⁹⁶*Leib*, 925 F.2d at 245.

¹⁹⁷*Smegel v. Gateway Foods of Minneapolis, Inc.* 819 F.2d 191 (8th Cir.), *cert. denied*, 484 U.S. 928 (1987).

The court in *Leib* concluded that a test for successor of interest that includes consideration of all of these multiple factors best effectuates congressional intent under the VRRL. Although this broad test generally should produce a favorable result for veterans, the court also directed lower courts to consider whether rehiring the veteran would be "impossible or unreasonable" under the changed circumstances for the new employer. Major Ingold.

Court Holds Antidiscrimination Provision of VRRL Not Clear Enough to Bring Individual Suit

The VRRL was amended in 1986 to prohibit employers from denying hiring, retention in employment, or any other advantage of employment because of an applicant's participation in the Reserve component.¹⁹⁸ In *Boyle v. Burke*¹⁹⁹ three police officers sued the Portsmouth, New Hampshire, Board of Police Commissioners and several individuals for injunctive relief, declaratory judgment, and monetary damages, alleging that the officials violated the VRRL antidiscrimination provision by establishing and implementing a policy that precluded employees from joining the Reserves or National Guard.

Until 1988, the Portsmouth, New Hampshire, Police Department's (Department) policy restricted officers from engaging in outside employment. The Department interpreted the policy to preclude active participation in the Reserves. The Department changed its policy in 1988 by directing supervisors to make appropriate arrangements to allow employees to participate in military training and to resolve scheduling conflicts by contacting the employee's commanding officer in the event of a schedule conflict.

The plaintiffs in *Boyle* alleged that both the original and amended versions of the policy violated the VRRL. They contended that the original policy precluded participation in the Guard and Reserves as a condition of employment and that the amended policy impermissibly interfered with their rights to participate in military training by permitting negotiations over scheduling. Moreover, the officers alleged that the policy was used to discourage involvement in Reserve activities. In addition, the plaintiffs contended that the defendant's policy violated their first amendment, due process, and equal protection rights.

The defendants countered that they were immune from damages liability in their personal capacities because the Department's policy did not violate "clearly established

federal statutory or constitutional rights."²⁰⁰ Accordingly, the First Circuit found that the precise issue was to determine whether a "reasonable official" would have understood that the Department's policy violated the plaintiffs' rights.

The court concluded that, prior to 1988, neither the VRRL, nor its legislative history, clearly prohibited an employer from restricting membership in the Guard and Reserves or conditioning employment on nonparticipation. Accordingly, the court ruled that the individual defendants were immune from personal suit for actions taken by the Department prior to the 1988 amendment.

The court, however, determined that the 1988 amendment to the VRRL clearly established that an employer could not condition employment on nonparticipation in the Guard and Reserves. Nevertheless, the court went on to rule that a reasonable official would not have clearly understood case law²⁰¹ or the amended VRRL to preclude an employer from implementing a policy that permitted some negotiation between the military and the employer regarding scheduling. The court also ruled that the defendants were entitled to summary judgment granting them qualified immunity from damages because the plaintiffs' due process and equal protection claims were deficient "as a matter of law."²⁰²

Although the *Boyle* decision makes bringing suit against individual defendants for violating VRRL rights extremely difficult for Reserve and National Guard members, the court did not foreclose entirely the possibility that a suit for monetary damages for violating these rights could succeed. The court suggested that the defendants would not be protected by qualified immunity if they attempted to frustrate participation in military training under the guise of a negotiation policy. Accordingly, the case was remanded to determine whether the defendants violated the plaintiff's first amendment rights by engaging in retaliatory actions for participating in the Guard and Reserves. Major Ingold.

Tax Notes

IRS Makes Favorable Filing Deadline Determination for Operations Desert Shield and Desert Storm Soldiers

The Internal Revenue Service (IRS) has issued recent guidance²⁰³ explaining the filing deadlines for soldiers serving in the combat zone and clarifying several issues regarding the applicability of the combat zone exclusion.

¹⁹⁸Pub. L. No. 99-576, title III, § 331 (Oct. 28, 1986).

¹⁹⁹925 F.2d 497 (1st Cir. 1991).

²⁰⁰*Id.* at 499. The defendants' position relied on the test set forth by the Supreme Court in *Creighton v. Anderson*, 483 U.S. 635 (1987).

²⁰¹The court reviewed four prior decisions and concluded that they "articulated varying standards" regarding whether the VRRL allows the employer to make reasonable accommodations for military duty. See *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981); *Eidukonis v. Southeastern Pa. Transp. Auth.*, 873 F.2d 688 (3d Cir. 1989); *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987); *Kolkhorst v. Tingham*, 897 F.2d 1282 (4th Cir. 1990).

²⁰²*Boyle*, 925 F.2d at 505.

²⁰³I.R.S. News Release IR-91-46 (Mar. 26, 1991).

Soldiers serving in the combat zone, as well as soldiers directly supporting military activities within the zone, have at least 180 days from the date they leave the combat zone to file their federal income tax returns. The IRS has determined that this extension should run consecutively—not concurrently—with the tax filing season. Accordingly, soldiers serving in the combat zone may be entitled to up to 105 additional days—for a total extension of 285 days—to file their returns after leaving the zone.

The length of the extension period depends on when the soldier began serving in the combat zone. For example, a soldier serving in the zone from 1 October 1990, until 1 May 1991, will have the full 285 days to file the 1990 return. This extension equals the 180-day extension, plus the full 105 days in the tax filing season.

Soldiers beginning service in the combat zone after 1 January 1991, will not have the full extension period. For example, a soldier arriving in the zone on 1 February 1991, and serving until 1 May 1991, will have 254 days. This period is equal to the full 180-day extension, plus the seventy-four days remaining in the filing season since 1 February.

The IRS has indicated that it will be very flexible in applying the new filing extension rules. For example, spouses of soldiers entitled to the filing extension also qualify for the postponement, whether or not a joint return is filed. Moreover, soldiers entitled to a filing extension may make their individual retirement arrangement (IRA) contributions up to the date they are required to file.²⁰⁴ Soldiers who use the extension will be entitled to interest on any refund due beginning from 15 April 1991.²⁰⁵ Soldiers owing additional payments will not be charged interest or a late-payment penalty if they file by the postponed deadline.

Soldiers serving in the combat zone, or directly supporting military activities within the combat zone, are entitled to exclude military pay from federal income tax.²⁰⁶ Soldiers outside the combat zone supporting activities within the zone must be receiving hazardous duty pay to qualify for the exclusion. The exclusion consists of all military pay for enlisted soldiers and warrant officers, and up to \$500 per month for commissioned officers. The combat pay exclusion applies for the entire month's pay, even if the soldier served in the zone for only part of a month. Soldiers serving in the zone on temporary duty status also are entitled to the exclusion. The IRS has clarified that the combat zone exclusion

does not apply to military pay received by soldiers before January 1991. Soldiers receiving reenlistment bonuses while serving in the combat zone are entitled to exclude the full amount of the bonus from federal income tax.²⁰⁷

Soldiers entitled to tax relief measures should write "Desert Storm" at the top of their tax returns to alert the IRS. Soldiers receiving correspondence from the IRS concerning tax collection and examination issues also should mark "Desert Storm" on the correspondence before returning it to the IRS.

A new publication—IRS Publication Number 945, Tax Information for Members of the Armed Forces Serving in Operation Desert Storm—is available from the IRS. This publication may be obtained by calling 1-800-829-3676. Major Ingold.

Virginia Requires Nonresident Landlords to Register

Virginia has passed legislation that could affect service members who own property in the Commonwealth of Virginia and are leasing the property to third parties.²⁰⁸ The 1990 law requires nonresidents who rent real property in Virginia to register with the Virginia Department of Taxation. If a broker is involved in the rental arrangement, the law specifies that the nonresident landlord must provide a completed registration form to a broker within sixty days after a request.²⁰⁹

The legislation applies to corporations, partnerships, and individuals. Individual taxpayers should file Form R-5, Nonresident Real Property Owner Registration, to fulfill the requirement. For further information, contact the Virginia Department of Taxation, Taxpayer Assistance Section, P.O. Box 6-L, Richmond, Virginia 23282, or call (804) 367-2062. To request Form R-5, taxpayers should contact the Virginia Department of Taxation, Forms Request Unit, P.O. Box 1317, Richmond, Virginia 23210-1317, or call (804) 367-8055. Major Ingold.

Survivor Benefits

DIC Rate Increases

Monthly Dependency and Indemnity Compensation (DIC) rates were increased effective 1 January 1991. Under DIC a surviving spouse is entitled to a monthly payment based on the military spouse's grade on the date of death.²¹⁰ The new monthly amounts for a surviving spouse are as follows:

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ I.R.C. § 112 (West Supp. 1991).

²⁰⁷ Gen. Couns. Mem. 34,402 (Jan. 18, 1971).

²⁰⁸ Va. Code Ann. § 58.1-316 (1990)

²⁰⁹ *Id.* Brokers are required to file a registration form whenever they make payments to a nonresident payee. Brokers failing to file required registration forms may be fined up to \$50 for every month they fail to file.

²¹⁰ 38 U.S.C. § 411 (1988).

E9 — \$811	W4 — \$852	O10 — \$1,524
E8 — 776	W3 — 805	O9 — 1,389
E7 — 735	W2 — 782	O8 — 1,295
E6 — 701	W1 — 752	O7 — 1,181
E5 — 686		O6 — 1,094
E4 — 668		O5 — 969
E3 — 629		O4 — 879
E2 — 612		O3 — 831
E1 — 594		O2 — 776
		O1 — 752

An additional DIC payment of \$178 per month may be made to a disabled widow or widower.

The amounts of DIC paid to a widow or widower with children also have been increased. Surviving spouses caring for children under age eighteen will receive sixty-eight dollars per month. This amount increases to \$151 under the new rates if the child is between the ages of eighteen and twenty-three and in school full time. The new rate for disabled children is \$299 per month.

If a spouse is not eligible for DIC upon the death of a service member, DIC will be paid to the guardian of any minor children. The new amounts, which are based on the number of children surviving the service member, are as follows:

- 1 child — \$299
- 2 children — \$431
- 3 children — \$557

An additional payment of \$110 will be paid for each additional child. Moreover, additional amounts will be paid over these amounts if any of the children are disabled.

The minimum level of participation in the Survivor Benefit Plan (SBP) also has been increased to \$363. This amount will be increased in the future by the percentage increases in active duty military pay.

The monthly cost to participate in SBP depends on the minimum level of participation chosen by the retiree and the beneficiary insured under the plan. Two formulas are used to determine the cost to insure a spouse under the plan. Under the first formula, the initial monthly cost is 2.5% times the minimum participation amount of \$363, plus ten percent of the amount selected over the \$363. The second formula for determining cost for spouse-only coverage is to multiply the base amount times 6.5%.

To illustrate how cost is determined based on these formulas, assume a retiree selects spouse-only coverage and a participation amount of \$2000. Under the first formula, the initial \$363 of coverage is multiplied by 2.5% to

reach a cost of \$9.08. The amount over \$363 up to \$2,000—\$1637—is multiplied by ten percent to reach a cost of \$163.70. Adding these together produces a total monthly cost of \$172.78. Under the second formula, the base amount of \$2000 is multiplied by 6.5% to produce the monthly cost of \$130. The formula producing the least amount of cost will be used. Accordingly, the second formula would be applied in this example and the retiree would be assessed a monthly charge of \$130. Major Ingold.

Consumer Law Notes

Credit Repair Companies

Consumers regularly are assailed by advertisements from "credit repair firms" that claim to be capable of improving an individual's creditworthiness. Credit repair companies typically claim to be able to improve credit ratings and remove bankruptcies, liens, judgments, and other unfavorable information from their clients' credit records.²¹¹

As a practical matter, many of the remedies and capabilities of these organizations do not exist. If remedies do exist, they usually are set out in the Federal Fair Credit Reporting Act (FCRA)²¹² and may be invoked by an individual consumer or by an attorney. Contrary to credit repair company claims, the FCRA has no mechanism for independently "improving" a credit rating. Improvement, if any, comes from establishing a record of dependability in paying financial obligations. Similarly, a credit repair company cannot simply remove bankruptcies, liens, and judgments from a person's credit file.

The FCRA allows credit reporting agencies, which assemble and disseminate credit information, to release information under certain circumstances. Credit reporting agencies may release bankruptcy adjudications for up to ten years, and other adverse credit information for up to seven years, following occurrence of the underlying adverse event. In addition, when consumers apply for employment at salaries of \$20,000 or more, or credit or life insurance valued at \$50,000 or more, these time limitations are not effective to restrict the release of adverse information. Consequently, many claims by credit repair companies, extolling their ability to improve credit reports, are either misleading or simply false.

The Federal Trade Commission (FTC) recognizes the problems credit repair companies can cause. Judge advocates should contact the FTC when these companies are attempting to offer their illusory services to the military community. The FTC often will seek a permanent injunction of these activities. A recent default judgment taken

²¹¹ See, e.g., TTAGSA Practice Note, *Credit Repair Firms*, *The Army Lawyer*, Feb. 1990, at 78.

²¹² 15 U.S.C. §§ 1681-1681t (1988).

by the FTC against American Association of Credit, which was doing business in Southern California as Design Systems, is an example of appropriate corrective action.²¹³ The FTC charged Design Systems with falsely claiming to be capable of removing bankruptcies, liens, judgments, repossessions, and other evidence of delinquency. It also commingled and misused trust account funds that it had represented as being separate, and to be used only for paying clients' creditors. The United States District Court for the Central District of California issued a permanent injunction of Design Systems' credit repair activities and ordered payment of \$761,000 in consumer redress. Major Pottorff.

Tax Refund Anticipation Loans

During tax season, our soldiers are targets for organizations that wish to profit from consumers' federal income tax refunds. The typical scenario involves a refund anticipation loan (RAL). Soldiers are given the "opportunity" to receive a loan from these organizations in return for signing over the right to their income tax refund checks. While, on the surface, this arrangement may not appear particularly sinister, the common practice of many RAL companies is to charge a significant fee for their "services." A sixty-dollar fee for an advance or loan of \$600 in exchange for rights to an anticipated refund check of \$600 is essentially a ten-percent loan, if calculated on a yearly basis. The refund check, however, usually arrives within two to four weeks, making the actual cost of the sixty-dollar fee closer to, or in excess of, 100% annual interest. Consumer advocates should, and do, consider this arrangement to be usurious.²¹⁴ The Federal Trade Commission and state attorneys general have been successful in enjoining these practices in the past.

During the past tax season, Fort Ord employed a new method for protecting its soldiers and family members from the tactics of RAL companies. According to a recent memorandum prepared by a member of the Fort Ord Staff Judge Advocate's office,²¹⁵ Fort Ord personnel are given the opportunity to use a fair alternative to commercial RAL organizations. The credit union at Fort Ord has arranged to file returns electronically for its members and credits their accounts with the amount of their refunds. The total charge is approximately thirty dollars. This arrangement not only avoids sometimes expensive services offered by many income tax preparation organizations for electronic filing, but also allows service

members access to funds through a reputable on-post financial facility. In contrast, a local tax preparation organization charged approximately sixty dollars for simply filing returns electronically, and did not provide other services for this amount.²¹⁶

During future tax seasons, judge advocates should explore with on-post financial facilities the possibility of arranging alternatives similar to Fort Ord's. An innovative approach, such as the one used at Fort Ord, will meet the needs of the military community without sacrificing protection of the community from rip-offs. Major Pottorff.

Administrative and Civil Law Note

Federal Employees' Liability Reform and Tort Compensation Act of 1988—*United States v. Smith*

On March 20, 1991, the Supreme Court ruled in an eight-to-one decision that the Federal Employees' Liability Reform and Tort Compensation Act of 1988 (FELRTCA) immunizes government employees from suit in federal courts even when an exception to the Federal Tort Claims Act (FTCA) precludes recovery against the United States.²¹⁷ The Court's decision reverses the 1989 Ninth Circuit Court of Appeals ruling that the FELRTCA does not bar medical malpractice claims brought in federal courts against military personnel serving abroad.

The defendant worked in the Army medical facility in Vicenza, Italy. The plaintiffs alleged that the doctor's negligence during the birth of the plaintiffs' son caused massive and permanent brain damage to the child. The district court held that the Physicians' Immunity Act (Gonzalez Act) provided the doctor with absolute immunity. The court dismissed the complaint against the doctor, substituted the United States as the defendant, and then dismissed the action under the foreign claims exception to the FTCA.

Congress passed the FELRTCA while the case was pending on appeal. In the Ninth Circuit, the United States abandoned the argument that the doctor was entitled to immunity under the Gonzalez Act and, in supplemental briefs, relied upon the FELRTCA as a basis for affirming the district court's decision. In rejecting the government's argument, the Ninth Circuit found that because the foreign claims exception to the FTCA bars plaintiffs from recovering against the United States, the FELRTCA did not provide immunity to the doctor.

²¹³In the Matter of American Ass'n of Credit d/b/a Design Systems (FTC Release of June 21, 1990), reviewed by Report 578, *FTC Enforcement*, Installment Credit Guide, July 5, 1990, at 2.

²¹⁴See TJAGSA Practice Note, *Tax Refund Anticipation Loans*, *The Army Lawyer*, Jan. 1990, at 41.

²¹⁵Memorandum, Office of the Staff Judge Advocate, Fort Ord, Cal., 16 Apr. 1991, subject: Electronic Filing by Credit Union.

²¹⁶See, e.g., TJAGSA Practice Note, *Tax Refunds for H&R Block Customers*, *The Army Lawyer*, Aug. 1989, at 45 (Kentucky Attorney General sued H&R Block for failing to provide proper service to over 15,000 consumers who signed up for its "Rapid Refunds" electronic tax filing program and for failing to refund fees paid).

²¹⁷*United States v. Smith*, ___ S. Ct. ___ (1991).

The Ninth Circuit's opinion threatened the protections extended to federal workers by the FELRTCA because the decision was not limited to cases arising overseas. Rather, the court reasoned that when plaintiffs have no remedy under the FTCA against the United States, the FELRTCA was inapplicable. Under the Ninth Circuit's holding, all claims that are barred against the United States by the statutory exceptions to the FTCA would have deprived federal employees of immunity under the FELRTCA and would have exposed them to personal liability.

The Supreme Court's decision makes clear the broad reach of immunity provided by the FELRTCA. It also recognizes the continued vitality and importance of the Gonzalez Act and the protections from malpractice liability—including indemnification—that it extends to military medical personnel. Major Battles.

Contract Law Note

GAO Revises Bid Protest Rules

The General Accounting Office (GAO) published revisions to its bid protest rules on 31 January 1991.²¹⁸ The revised rules became effective on 1 April 1991.²¹⁹ The publication of the revisions to the bid protest rules completes a two-year effort to improve the GAO's bid protest process. On 11 April 1989, the GAO published an advance notice of proposed rulemaking.²²⁰ Proposed rules were published for public comment on 6 April 1990.²²¹ Throughout the rulemaking process, the GAO focused attention on the disclosure of government documents to protesters; defining the structure of the hearing proceedings that the GAO should use to resolve protests; the award of attorneys' fees and protest costs; and the timeliness of protests. The final rules make substantial changes in these areas, as well as the procedure used to award protest costs and attorneys' fees. This article discusses the new rules in each of these areas.

²¹⁸ 56 Fed. Reg. 3759 (1991).

²¹⁹ *Id.*

²²⁰ 54 Fed. Reg. 14,361 (1989).

²²¹ 55 Fed. Reg. 12,874 (1990).

²²² 4 C.F.R. § 21.3(i) (1991). The 1991 edition of the *Code of Federal Regulations* was revised as of 1 January 1991, prior to the publication of the revised rules on 31 January 1991. The revised rules will appear in the 1992 edition of the *Code of Federal Regulations*.

²²³ *Id.*

²²⁴ *Id.* § 21.3(d)(2); Fed. Acquisition Reg. 33.104(a) (3 Oct. 1990).

²²⁵ 18 U.S.C. § 1905 (1988). The Trade Secrets Act prohibits federal officials from releasing confidential business information to the general public. See, e.g., *United States Army Communications-Electronics Command Acquisition Instruction 33.104(a)(200)(1)(vii)* (5 Aug. 1988).

²²⁶ 5 U.S.C. § 552 (1988).

²²⁷ *Id.* §§ 552(b)(4), 552(b)(5).

²²⁸ 4 C.F.R. § 21.3(i) (1991).

²²⁹ *Id.* § 21.3(f).

²³⁰ 31 U.S.C. §§ 3551-3556 (1988).

²³¹ Cf. Hopkins, *The Universe of Remedies for Unsuccessful Offerors on Federal Contracts*, 15 Pub. Cont. L. J. 365, 403-404 (1985).

Changes Relating to the Production of Government Documents

Prior to the 1991 revisions to the GAO's Bid Protest rules (the old rules), the protester and all interested parties received copies of the agency's administrative report to the GAO.²²² Under the old rules, the copy of the administrative report furnished to the GAO contained all relevant documents.²²³ Protesters and other interested parties, however, did not receive copies of documents that were irrelevant, that might provide the protester or interested party with a competitive advantage, or that the protester or the interested party was not otherwise authorized by law to receive.²²⁴

The "not otherwise authorized by law to receive" exception has been interpreted to refer to the so-called Trade Secrets Act.²²⁵ As a practical matter, however, this exception was interpreted to refer to the Freedom of Information Act.²²⁶ Under the Freedom of Information Act, agency documents containing trade secrets and commercial or financial information, as well as documents containing predecisional opinions and recommendations, are exempt from release.²²⁷

The old rules required the agency to provide a complete copy of the administrative report to the GAO.²²⁸ The GAO, in turn, reviewed the withheld documents and determined whether the withholding was proper. If the GAO disagreed with the agency over the withholding of a document, the GAO could order its release to the protester and interested parties.²²⁹

Under the old rules, protesters and interested parties frequently received neither copies of proposals, nor the complete evaluation of the proposals. As early as 1985, shortly after the GAO was granted statutory authority to decide bid protests by the Competition in Contracting Act,²³⁰ this restriction on access to agency documents was perceived as restricting the ability of the protester or interested parties to present fully the merits of their respective positions.²³¹ This criticism continued to be

expressed throughout the rulemaking process that ultimately led to the 1991 revisions to the bid protest rules.²³²

Under the revised rules, the GAO has eliminated the agency's discretion to withhold documents that might constitute a competitive advantage or were otherwise exempt from release under other provisions of law.²³³ The GAO contended that full disclosure of all relevant documents was necessary. It therefore stated,

To assure that all sides of a protest are fully presented, a protester must be given full access to all information considered by the procuring agency in making the determination that forms the basis of the protest, unless some restriction on access is justified.²³⁴

The revised rules require that the agency include all relevant documents in the administrative report, including documents that were not releasable to the protester or interested parties under the old rules.²³⁵ The revised rules provide that the protester and all interested parties are entitled to receive copies of the administrative report submitted to the GAO.²³⁶ To balance the competing interests of protecting legitimate, confidential, commercial or financial information and trade secrets, with full access to all information that the agency used to make its decision, the GAO has created a process under which the agency, the protester, or any party may request the issuance of a protective order to limit access to sensitive information.²³⁷

Under the GAO's revised rules, if a protective order is issued, access to sensitive information will be limited to counsel and independent experts or consultants for the protester and interested parties. Additionally, the protective order will permit access to counsel only if they are not involved in the corporate decision-making process of their clients.²³⁸ These provisions are designed to ensure

that no party obtains a competitive advantage as a result of the protest process.²³⁹

Any party seeking a protective order must file a request with the GAO no later than twenty days after the filing of the protest. This requirement is designed to ensure that the protective order, if any, is in place by the time that the agency is required to submit the administrative report—that is, twenty-five days after the filing of the protest.²⁴⁰

The GAO contemplates enforcing violations of its protective orders by informing the bar association of an attorney who violates the terms of the protective order. Additionally, the GAO may consider barring an attorney who violates the terms of a protective order from further practice before the GAO.²⁴¹ If the agency fails to comply with the requirements to release all relevant documents, in accordance with the terms of any protective order, the GAO may provide the documents *sua sponte*, draw adverse inferences from the failure to provide the document, prohibit the agency from using or referring to the document or the argument it supports, or impose other appropriate sanctions.²⁴²

New Hearing Procedures Established

The GAO is replacing the bifurcated structure of the informal and fact-finding conferences of the old rules²⁴³ with a single hearing procedure.²⁴⁴ The revised rules permit the agency, protester, an "interested party,"²⁴⁵ or the GAO—on its own motion—to request a hearing.²⁴⁶ The request for a hearing must articulate the reasons why a hearing is considered to be necessary and should identify the factual disputes that the requester believes cannot be resolved without oral testimony. The decision to conduct a hearing in a particular protest is made by the GAO.²⁴⁷ The revised rules also provide for a prehearing conference to resolve litigation issues before the hearing.²⁴⁸

²³² Cf. 55 Fed. Reg. 12,834 (1990); 56 Fed. Reg. 3759 (1991).

²³³ See 4 C.F.R. § 21.3(d)(2) (1991).

²³⁴ 55 Fed. Reg. 12,834 (1990).

²³⁵ 56 Fed. Reg. 3759, 3763 (1991).

²³⁶ *Id.*

²³⁷ *Id.* at 3763 (to be codified at 4 C.F.R. § 21.3(d)).

²³⁸ *Id.* at 3760.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 3763 (to be codified at 4 C.F.R. § 21.3(d)(5)).

²⁴² *Id.*

²⁴³ See 4 C.F.R. § 21.5 (1991).

²⁴⁴ 56 Fed. Reg. 3,764 (1991) (to be codified at 4 C.F.R. § 21.5).

²⁴⁵ See 4 C.F.R. § 21.3(a) (1991) (definition of an interested party).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ In an advance text of the General Accounting Office Bid Protest Hearing Guidelines, dated 1 April 1991, the GAO listed a number of potential topics for the prehearing conference. Among these topics are the following: issues to be resolved, facts in dispute, proposed witness lists and anticipated testimony, use of expert witnesses, role of the GAO's own technical experts, scope of direct and cross-examination, use of demonstrations, use of affidavits and stipulations, time limits, identification of documents and resolution of document disputes, protective orders, time and place for the hearing, and method of transcription for the hearing.

In response to a perception that agencies were not sending knowledgeable persons to attend the informal and fact-finding conferences under the old rules, the GAO stated in the revised rules that all parties shall be represented by knowledgeable individuals.²⁴⁹ If the GAO designates a witness to appear at a hearing, and the individual fails to appear or refuses to answer questions, the GAO may draw unfavorable inferences from the failure to cooperate.²⁵⁰ Finally, the revised rules provide that hearings normally will be transcribed or recorded. The format for the recording of the hearing will be determined at the prehearing conference.²⁵¹

Historically, the GAO has conducted its bid protest proceedings in Washington, D.C. Under the revised rules, however, the GAO may conduct hearings outside of the Washington area. The decision to conduct hearings at another location is to be made by the GAO.²⁵²

The new hearing procedures, when coupled with the GAO's stated intention to scrutinize the knowledge of the individuals that appear on behalf of the agency more carefully, may have a significant impact on local installations. The revised rules probably mean that contracting officers, local contract attorneys, and technical experts will attend bid protest hearings. The temporary duty travel costs of these new rules may prove to be significant. Contract law advisors should advise their staff judge advocates and chief counsels of this potential drain on command operating budgets.

Award of Attorneys' Fees and Protest Costs

In proposing its revision to the rules, the GAO stated that it believed that "some agencies [took] longer than necessary to initiate corrective action in some meritorious cases, so that protesters expending time and resources had to make significant use of the protest process before obtaining relief."²⁵³ Accordingly, the proposed revisions to the bid protest rules provided that the GAO could award attorneys' fees and costs in a situation in which that agency initiates corrective action prior to the submission of the administrative report.²⁵⁴ The proposed rule represented a significant departure from well-established GAO decisional law, under which no attorneys' fees or costs would be awarded to the protester if corrective action was taken prior to the GAO's issuing its decision.²⁵⁵

The final revised rules provide that if an agency takes corrective action in response to a protest, the GAO may declare that the protester is entitled to an award of attorneys' fees and protest costs, irrespective of when the agency initiates corrective action.²⁵⁶

The revised rules also provide time frames for the submission of applications for the award of attorneys' fees and costs. Protesters seeking an award of attorneys' fees and protest costs are required to attempt to negotiate with the agency to stipulate to the amount of the award. Protesters are required to submit their claim to the agency within sixty days of the receipt of the decision either on the merits of the protest or on the entitlement to attorneys' fees and costs. Failure to file the claim within the sixty-day period shall result in the forfeiture of the protester's entitlement to attorneys' fees and protest costs.²⁵⁷

In the event that the protester seeks to recover attorneys' fees and protest costs on a protest upon which the agency takes corrective action, the protester must file a request with the GAO within ten days of being advised that the agency has taken corrective action. The agency is afforded a ten-day period to respond to the protester's request. Thereafter, the GAO will issue a declaration of entitlement to attorneys' fees and costs.²⁵⁸

The commentary that accompanies the final revised rules is unclear on whether the GAO intends to enforce this ten-day limit strictly by imposing forfeiture of entitlement to attorneys' fees and protest costs for a protester's failing to comply with the filing deadlines.

Timeliness of Protests

As part of the rulemaking process, several agencies commented that the GAO should seek to establish procedures that would allow protests that contained procedural defects to be dismissed as expeditiously as possible.²⁵⁹ Accordingly, the revised rules impose an obligation on the protester to include in the original protest sufficient information to allow for a determination that the protest is timely. Protests that do not contain this information may be dismissed. As a mechanism to enforce this requirement, the revised rules prohibit protesters from raising for the first time in a request for reconsideration information that demonstrates that the protest is timely.²⁶⁰

²⁴⁹ 56 Fed. Reg. 3764 (1991) (to be codified at 4 C.F.R. § 21.5(e)). This language does not relate to representation by parties in the attorney-client context, but rather to witnesses for the parties. See 55 Fed. Reg. 12,836 (1990).

²⁵⁰ See 55 Fed. Reg. 12,386 (1990).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 12,838.

²⁵⁵ A protester must prevail on the merits to receive protest costs, attorney's fees, or bid preparation costs. If agency action renders a protest academic, then it will be dismissed and no costs will be awarded. *H & H Envtl. Servs.—Claim for Costs*, Comp. Gen. Dec. B-235512.2, May 31, 1989, 89-1 CPD ¶ 524; *Pitney-Bowes, Inc.*, Comp. Gen. Dec. B-218241, June 18, 1985, 85-1 CPD ¶ 696.

²⁵⁶ 56 Fed. Reg. 3764 (1991) (to be codified at 4 C.F.R. § 21.6(e)).

²⁵⁷ *Id.* (to be codified at 4 C.F.R. § 21.6(f)(1)).

²⁵⁸ *Id.* (to be codified at 4 C.F.R. § 21.6(e)).

²⁵⁹ *Id.* at 3759.

²⁶⁰ *Id.* at 3762-63 (to be codified at 4 C.F.R. § 21.2(b)).

Conclusion

The revised GAO bid protest rules represent a continuation of a five-year trend towards increasing use of formal, quasi-judicial procedures for the resolution of bid protests. Now is too early to assess the impact on effi-

ciency of the bid protest process or on the quality of the decisions rendered by the GAO. The revised rules, however, clearly will require contract law attorneys to enhance their litigation skills in representing their commands in GAO bid protests. Major Dorsey.

Claims Report

United States Army Claims Service

The Use of National Guard Personnel for Counter-Drug Operations: Implications Under the Federal Tort Claims Act

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Introduction

The National Defense Authorization Act for Fiscal Year 1989 (1989 Act) established the Department of Defense as "the single lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States."¹ The 1989 Act amended chapter 18 of title 10, United States Code, to "expand the opportunities for military assistance [in drug interdiction operations] in a manner that is consistent with the requirements of military readiness and the historic relationship between the armed forces and civilian law enforcement activities."² It also recognized the enhanced role of the National Guard in performing drug interdiction operations and noted the unique circumstances surrounding National Guard involvement in those operations.³

As military participation in counter-drug operations becomes more prevalent, the probability of claims for personal injury and property damage arising out of these activities increases. The purpose of this article is to examine the consequences of torts committed by National Guard personnel performing drug interdiction operations

and to provide a methodology for evaluating whether the state government or federal government ultimately is responsible for the payment of tort damages.

Background

Although the 1989 Act established the role of the National Guard in drug interdiction operations, the National Defense Authorization Act for Fiscal Years 1990 and 1991⁴ actually codified the framework for National Guard involvement. This act amended title 32 of the United States Code to permit the Secretary of Defense to provide funds to states for "the pay, allowances, clothing, subsistence, gratuities, travel, and related expenses of personnel of the National Guard of that State used for" counter-drug operations. To qualify for this aid, a state governor must submit a plan to the Secretary of Defense that specifies how National Guard personnel will be used, certifies that the operations will be conducted at a time when the personnel involved are not in federal service, and certifies that participation by National Guard personnel is service in addition to training requirements under 32 U.S.C. section 502.⁵ This pro-

¹ Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 1918, 2042. This recognition of the military's role in drug interdiction operations subsequently was codified at 10 U.S.C. § 124(a) (Supp. 1990).

² H.R. Conf. Rep. No. 100-989, 100th Cong., 2d Sess. 217, 450, reprinted in 1988 U.S. Code Cong. & Admin. News 2503, 2578.

³ Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 1918, 2047. The 1989 Act recognized that military members of the National Guard are not subject to the Posse Comitatus Act when acting under the control of a state governor, but that they are subject to the Posse Comitatus Act when acting in federal service. Accordingly, the degree of permissible National Guard involvement in drug interdiction operations varies, depending upon the unit's status. H.R. Conf. Rep. No. 100-989, 100th Cong., 2d Sess. 217, 455, reprinted in 1988 U.S. Code Cong. & Admin. News at 2583.

⁴ Pub. L. No. 101-189, 1989 U.S. Code Cong. & Admin. News (103 Stat.) 1352.

⁵ 32 U.S.C. § 112 (Supp. 1990).

gram of federal funding may be used for National Guard personnel performing drug interdiction operations while the National Guard is in state active duty or is under title 32 status, but not while the Guard is in federal service under title 10.⁶

Accordingly, under current laws, three different situations exist in which National Guard personnel could become involved in drug interdiction operations: (1) serving in federal active duty status under title 10 of the United States Code; (2) serving in state active duty status; or (3) serving in title 32 status. Determining the status of an individual member of the Guard at the time of a tort is the first step in determining whether the state or the federal government ultimately is responsible for the loss caused.⁷

Guard Personnel in Federal Active Duty Status

Chapter 18 of title 10, United States Code, authorizes the Department of Defense to provide state and federal law enforcement agencies with certain types of support for counter-drug operations.⁸ Clearly, in most cases torts committed by a member of the Department of Defense acting under this provision would be cognizable under the Federal Tort Claims Act (FTCA).⁹

By definition, Guard personnel serving on federal active duty under title 10 of the United States Code are no longer under state control. The ability to direct and control their activities rests solely in the hands of the fed-

eral government. Consequently, Guard personnel participating in counter-drug operations in that status would be subject to the provisions of title 10, chapter 18, in the same manner as active duty soldiers. Accordingly, the FTCA would govern the United States' liability for any acts or omissions by them. Furthermore, because the Guard personnel would not have acted under state control, the state would not be jointly liable.

Guard Personnel in State Active Duty Status

If the negligent member of the Guard was in state active duty status at the time of his or her tort, the inquiry is simple. A National Guard member on state active duty is not an employee of the United States.¹⁰ Therefore, claims arising out of the acts or omissions of Guard personnel in this status would not be cognizable under the FTCA.

This outcome does not change if the federal government was paying the Guard member's salary and other expenses under 32 U.S.C. section 112. The legislative history of the 1989 Act states, "The National Guard will remain under state command and control when conducting any law enforcement activity with funds provided under this section. The provision of these funds does not place the National Guard in federal status for purposes of the Posse Comitatus Act, or for any other purpose."¹¹ Accordingly, the provision of federal funds for counter-drug operations does not operate as a waiver of sovereign immunity for FTCA purposes.

⁶See also H.R. Conf. Rep. No. 101-331, 101st Cong., 1st Sess. 357, 653, reprinted in 1989 U.S. Code Cong. & Admin. News 977, 1110. National Guard personnel probably will not participate in many counter-drug operations while in service under title 10. Nevertheless, active duty military personnel are authorized to perform certain drug interdiction missions. See *infra* notes 8, 9 and accompanying text. As a result, National Guard personnel in title 10 status could be assigned to perform the same missions.

⁷The types of activities permissible under the Posse Comitatus Act also will vary depending upon the status of the National Guard member. For an excellent discussion of the relationship between the Posse Comitatus Act and federal military involvement in counter-drug operations, see Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?*, *The Army Lawyer*, Dec. 1990, at 3.

⁸Department of Defense is authorized to share intelligence collected during military operations, make equipment and facilities available, assist in the training and advising of civilian law enforcement officers, and make personnel available for the maintenance and operation of equipment used by civilian law enforcement officers. 10 U.S.C. §§ 371-389 (Supp. 1990). The law prohibits military personnel from directly participating in searches, seizures, arrests, or other similar activities. *Id.* § 375. For a discussion of the history of these authorizations, see Bryant, *supra* note 7, at 6-8.

⁹28 U.S.C. §§ 1346, 2671-2680 (1988 & Supp. 1990).

¹⁰See *id.* § 2671 (defining "employee of the government" as including "members of the National Guard while engaged in training or duty under sections 315, 502, 503, 504, or 505 of title 32 (for claims arising on or after 29 December 1981)"). A National Guard member serving on state active duty does not fit within this definition. Furthermore, prior to the passage of this provision in 1981, National Guard personnel were not considered employees of the United States unless called into federal service. *Maryland v. United States*, 381 U.S. 46, vacated on other grounds, 382 U.S. 159 (1965). As a result, National Guard personnel are not federal employees unless serving on federal active duty under title 10 or serving under the enumerated sections of title 32.

¹¹H.R. Conf. Rep. No. 100-989, 100th Cong., 2d Sess. 217, 455, reprinted in 1988 U.S. Code Cong. & Admin. News at 2583 (emphasis added). See also *Maryland v. United States*, 381 U.S. at 48:

It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the State

....

Guard Personnel in Title 32 Status

The most complex situation for liability evaluation is a tort committed by Guard personnel acting under the provisions of 32 U.S.C. sections 315, 502, 503, 504, or 505. In 1981, Congress amended the FTCA to make the United States liable for torts committed by National Guard personnel on training duties under these sections if the Guard personnel were acting "in the line of duty."¹² Given the clear legislative recognition of the National Guard's role in drug interdiction operations, National Guard personnel performing a drug interdiction mission obviously could be found to have acted "in the line of duty." As a result, the United States is exposed to potential tort liability for the acts of Guard personnel performing drug interdiction operations while serving under the various enumerated sections of title 32—that is, while serving "in title 32 status."¹³ Unlike situations involving Guard personnel acting in state active duty status or federal status, however, the inquiry does not end here. Federal liability could be mitigated, or even avoided, depending on the law of the state in which the tort was committed.

Lee v. Yee: Sharing the Burden

In *Lee v. Yee*¹⁴ the United States District Court for the District of Hawaii considered a motion for contribution filed by the United States against the State of Hawaii. The underlying case was a lawsuit to recover damages for injuries received when a member of the Hawaii National Guard, serving in title 32 status, struck the plaintiffs' car in the rear with a National Guard jeep. The plaintiffs originally filed suit in state court against the guardsman individually and against the State of Hawaii. The United States certified that the guardsman was acting within the scope of his employment, and the case was removed to federal court. After some procedural posturing, all parties to the action entered into a settlement in which the United States agreed to pay the plaintiffs \$40,000 in return for a release of all parties, including the state. The United States subsequently petitioned the court for contribution from the state.¹⁵

In considering the United States' motion, the court first examined the state's waiver of sovereign immunity to discover if tort actions were permissible for acts or omissions of state employees.¹⁶ If the state had not waived sovereign immunity for torts committed by state employees, the United States would not be entitled to contribution because no valid cause of action against the state would have existed. Next, the court examined the state's statutory definition of "employee" to see if National Guard personnel were included.¹⁷ Again, if the waiver of sovereign immunity did not include acts or omissions of National Guard personnel, the United States would have no right to contribution.

After concluding that the torts of National Guard personnel were indeed cognizable under Hawaii's waiver of sovereign immunity, the court determined that the guardsman was also an employee of the federal government for FTCA purposes, holding that "[t]here is no reason why a member of the National Guard could not be acting in the line of duty pursuant to both the FTCA and the State Tort Liability Act."¹⁸ Furthermore, the court examined the 1981 amendments to the FTCA—which brought National Guard personnel serving in title 32 status within its purview—and determined that they did not extinguish the right to sue a state for torts committed by National Guard personnel serving in title 32 status.¹⁹

Consequently, the court was faced with a situation in which *both* the United States and the State of Hawaii were liable to the plaintiffs for their injuries. To apportion the damages, the court looked to Hawaii's law on joint tortfeasors.²⁰ Based upon its interpretation of Hawaii law, the court ruled that "where both tortfeasors are liable only as a result of the acts of a common employee, the court will examine the degree of control each exercised over the employee, and to [sic] consider whose interests the employee was furthering at the time of the accident."²¹ Based on the facts of the case, the court held that Hawaii was liable to the United States for ninety percent of the settlement, or \$36,000.²²

¹²28 U.S.C. § 2671 (Supp. 1990).

¹³Congress clearly anticipated that Guard personnel would perform drug interdiction missions under these enumerated sections. Congress actually feared that the passage of 32 U.S.C. § 112, which is not one of the sections which triggers FTCA liability, might make the Guard "less aggressive" in performing drug interdiction missions during "normal training periods." In response to this concern, Congress is considering adding a requirement that all missions funded under 32 U.S.C. § 112 be matched by similar missions under 32 U.S.C. § 502, which is one of the enumerated sections. H.R. Rep. No. 101-189, 101st Cong., 1st Sess. 1, 320, reprinted in 1989 U.S. Code Cong. & Admin. News 838, 941.

When faced with a tort involving a Guard member serving under one of the enumerated sections of title 32, the United States could challenge the decision to put the Guard member in that status in the first place, arguing that the member should have been in state active duty status instead. This argument probably would be of little avail, however, given the congressional recognition that National Guard personnel can perform counter-drug missions in title 32 status.

¹⁴643 F. Supp. 593 (D. Haw. 1986), *aff'd sub nom.*, *United States v. Hawaii*, 832 F.2d 1116 (9th Cir. 1987).

¹⁵*Id.* at 595. The United States specifically reserved the right to seek contribution in the settlement agreement. *Id.*

¹⁶*Id.* at 596; see also *Hill v. United States*, 453 F.2d 839 (6th Cir. 1972) (holding that the Tennessee waiver of sovereign immunity did not permit the United States to obtain contribution).

¹⁷*Lee*, 643 F. Supp. at 597.

¹⁸*Id.*

¹⁹*Id.* at 600.

²⁰Hawaii had adopted the Uniform Contribution Among Tortfeasors Act. See Haw. Rev. Stat. § 663-11 (1941).

²¹*Lee*, 643 F. Supp. at 601.

²²*Id.* at 601-02.

Practical Application of Lee

Although the *Lee* case involved a traffic accident, rather than a tort committed during a drug interdiction operation, the principles that it announced are useful in evaluating torts committed by National Guard personnel while on drug interdiction missions in title 32 status. In evaluating claims arising from these activities, the claims officer must look to the law of the state in which the tort occurred. First, the claims officer must examine the state's waiver of sovereign immunity to see if the state is exposed to liability for the torts of National Guard personnel. If the state is exposed, the claims officer must then look to the state's law concerning joint tortfeasors to evaluate how liability is apportioned. In many states, such as Hawaii, the inquiry will focus on the degree of dominion and control exercised by each sovereign and which sovereign's interests are being served by the mission.

In addition, the claims officer must be sure to check the state's position on the borrowed servant doctrine. Under this doctrine, a tortfeasor employed by one party may be found to have been placed under the dominion and control of another employer to such an extent that the original employer is relieved of responsibility for the employee's tort. This doctrine applies even though the employee may retain some indicia of employment by the original employer. Accordingly, even though a Guard member may be a federal employee acting in the line of duty for FTCA purposes, the nature of the mission may qualify the member as a "borrowed servant" under state law, thereby relieving the United States of all liability.²³

The Factual Investigation

Armed with the knowledge of what factors the state deems significant in its joint tortfeasor or borrowed servant jurisprudence, the claims officer should conduct a thorough and detailed investigation into the facts and circumstances surrounding both the drug interdiction mission and the resulting tort. The investigation should focus

on which sovereign had control of the mission and on which sovereign derived the greatest benefit from the program.

One of the first steps in conducting the investigation should be to identify all of the people and agencies involved. Some operations will involve National Guard support to one law enforcement agency only. Others may involve support to several different law enforcement agencies—both state and federal. Most likely, the agencies involved will have entered into a memorandum of understanding (MOU) that outlines the objectives of the operation and the roles each agency will play. Obtaining a copy of this MOU is essential. It should provide insight into who has ultimate control of the mission, the National Guard's role in the mission, and whether the state or federal antidrug program is the primary beneficiary of the mission.²⁴

In addition to obtaining copies of any MOU covering the mission, the claims officer also should obtain a copy of the operations plan and operations order produced by the National Guard that covers its involvement in the mission, as well as a copy of the individual orders given to Guard personnel involved in the tort. The operations plan should specify the mission objective, as well as the allocation of resources and responsibilities. The operations order should specify in detail what the Guard personnel may or may not do during the operation and the degree to which the Guard personnel involved are subject to the authority of civilian law enforcement officials. The individual Guard members' orders should specify what status they were in at the time of the incident.²⁵

The final documents to obtain and review are any regulations promulgated by the state's National Guard pertaining to drug interdiction operations or the ways in which Guard personnel and equipment may be utilized. These regulations, if they exist, may clarify—or even contradict—the MOU and the operations order, thereby providing further insight into the Guard personnel's role.

The investigation, however, should not stop with documentary evidence. The mission in action may differ radi-

²³The United States' ability to certify that an individual was acting within the scope of his federal employment for purposes of substitution and removal to federal court under the Federal Employees' Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d) (Supp. 1990), and then to argue that the individual was the borrowed servant of another entity, is hotly disputed in the courts. For a discussion of this issue in the context of military health care providers in training programs at civilian medical facilities, see Johnson & Richman, *The Borrowed Servant Doctrine and the Federal Tort Claims Act: Defending Physicians in Training*, 33 A.F. L. Rev. 171 (1990).

²⁴Another interesting issue posed by joint counter-drug operations involves tort liability for injuries suffered by state policemen during the operation. Under the provisions of 5 U.S.C. § 8191 (1982), the Secretary of Labor has the discretion to deem law enforcement officers injured while performing certain enumerated activities relating to the enforcement of federal laws eligible for benefits under the Federal Employees' Compensation Act (FECA). *Id.* §§ 8101-8150. An injured state policeman entitled to FECA benefits, however, is precluded from filing a claim against the United States. Army Reg. 27-20, Legal Services: Claims, para. 4-7s (28 Feb. 1990). Thus, faced with a claim by a civilian policeman alleging tortious injury at the hands of a National Guard member during a drug interdiction operation, the claims officer must consider the possibility of a defense under FECA as well as under the principles discussed in this article. Given that eligibility for FECA benefits is keyed to the mission having some federal purpose, a FECA defense may be mutually exclusive of the defenses discussed in this article, which hinge on state control of the mission.

²⁵Claims officers should view documents designating the particular status of an individual Guard member with a critical eye. In many cases the designation appearing on these documents may not be accurate. Therefore, some amount of "looking behind the document" may be necessary.

cally from the mission on paper. The claims officer therefore should interview all of the principal players involved. Were mission briefings conducted? If so, by whom? What was said? What were the events leading up to the tort? Who was present? Who did the individuals involved in the tort think was in charge? Did the mission fulfill any of the Guard member's yearly federal military training requirements? The answers to these and similar questions may provide the most accurate reflection of who really exercised control over the mission.

Once the detailed facts of the overall operation are collected, they should be evaluated in light of a given state's position on sovereign immunity, joint tortfeasors, and borrowed servants. Through this process, the United States' financial responsibility may be reduced greatly, or even eliminated.

Conclusion

As National Guard involvement in counter-drug missions matures, the federal claims system undoubtedly will

encounter claims alleging property damage and personal injuries resulting from these missions. The first step in evaluating the claims that arise from these missions is to determine the status of the individual tortfeasor. For claims involving National Guard personnel serving in state active duty status or serving on federal active duty under title 10, inquiry beyond the status of the actor is not necessary because each status involves only one sovereign—not both. In other words, if the tortfeasor is a Guard member serving on state active duty, the mission is purely a creature of the state. If the tortfeasor is serving under title 10, the nature of the mission is, by definition, purely federal. When the Guard member is serving in title 32 status, however, both the state and the federal government are involved. In these cases, a detailed investigation into the mission itself and thorough research of applicable state law are essential to resolving the claim in a manner that protects the interests of the Army and the United States.

Claims Policy Notes

Revised Delegations of Authority

This Claims Policy Note modifies the guidance found in paragraph 14-4b of Army Regulation 27-20 and paragraph 9-5 of Department of the Army Pamphlet 27-162. In accordance with paragraph 1-9f of Army Regulation 27-20, this guidance is binding on all Army claims personnel.

Public Law 101-552, passed 15 November 1990, increases agency settlement authority under the Federal Claims Collection Act, 31 U.S.C. section 3711, from \$20,000 to \$100,000. The Commander, United States Army Claims Service (USARCS), has increased field claims compromise and termination authorities for property damage claims to the same levels that field claims offices have for medical care claims. The discussion and table below summarize field claims compromise, termination, and waiver authorities.

Any claims authority authorized to assert affirmative claims may accept the *full* amount asserted on any claim.

Unless authority is withheld by the Commander, USARCS, or the staff judge advocate of a command having a command claims service, the head of an area claims office or his designee may:

a. Compromise up to \$15,000 of the amount asserted on any affirmative claim (medical care or property damage) asserted for \$25,000 or less.

b. Terminate collection action on any affirmative claim (medical care or property damage) asserted for \$15,000 or less.

c. Waive a *medical care* claim asserted for \$15,000 or less. (A property damage claim cannot be "waived").

In addition, the head of an area claims office may delegate authority to a claims processing office with approval authority, *see* Army Reg. 27-20, Legal Services: Claims, para 1-8c(2) (28 Feb. 1990) [hereinafter AR 27-20], to:

a. Compromise up to \$5000 of the amount asserted on any affirmative claim (medical care or property damage) asserted for \$25,000 or less.

b. Terminate collection action on any affirmative claim (medical care or property damage) asserted for \$5000 or less.

c. Waive any *medical care* claim asserted for \$5000 or less. (Again, a property damage claim cannot be "waived").

Rounding out delegations of authority, the United States Army Europe; Eighth United States Army Korea; United States Army Pacific; and United States Army South command claims services may compromise, waive (medical care claims only), or terminate collection action on any affirmative claim asserted for \$40,000 or less. The Judge Advocate General; The Assistant Judge Advocate General; the Commander, United States Army Claims Service; or the USARCS Commander's designee, may compromise or terminate collection action on any property damage claim asserted for \$100,000 or less. In addition, they may compromise, waive, or terminate collection action on any medical care claim asserted for \$40,000 or less.

The Department of Justice (DOJ) must approve compromise, termination, or waiver of any claim asserted in a greater amount than stated above. Additionally, the DOJ must approve settlement of a claim previously referred to the DOJ for litigation, or settlement of a claim when a third party files suit against the United States or the injured party for the same incident, regardless of the amount involved. Mr. Frezza.

Tort Claims Note

Submitting Tort Claims by Facsimile

Submitting tort claims to the United States Army by use of facsimile (FAX) machines is permissible. Paragraph 5-8a(2), Department of the Army Pamphlet 27-162, Legal Services: Claims (15 Dec. 89) [hereinafter DA Pam 27-162], actually suggests submission of claims by FAX when expeditious action is necessary to file within the statute of limitations.

Tort claims submitted by FAX must meet all statutory and regulatory requirements. Otherwise, they are not filed validly and will not toll the applicable statutes of limitations. For example, if tort claims submitted by FAX are signed by agents or legal representatives of claimants, the written evidence of authority required by AR 27-20, paragraph 2-10a(5), also must exist and should be presented with the claims.

Claims submitted by FAX to Army offices outside of regular business hours are not "filed" until the offices have opened on the next business day.

Claims offices should, if possible, examine claims submitted by FAX expeditiously for compliance with statutory and regulatory criteria. As a practical matter, tort claims sent by FAX are more likely to be submitted near the expiration of the statute of limitations than claims submitted by other methods. The suggestion to examine FAX claims expeditiously is not intended to imply that claimants submitting claims by FAX are relieved of any portion of their burden to file valid claims in a timely manner. Rather, it is a reflection of the Army claims system's philosophy of encouraging settlement of meritorious claims by fair actions that underscore the nonadversarial nature of the administrative claims settlement process. See DA Pam 27-162, para. 5-8d. Lieutenant Colonel Kirk.

Local Affirmative Claims Waiver/Compromise/Termination Authorities

	Amount of Assertion		
	Greater than \$25,000	Between \$15,000 and \$25,000	No more than \$15,000
1) Area Claims Offices	No authority to terminate, waive, or compromise.	May waive** or compromise up to \$15,000.	May waive,** compromise or terminate.

	Amount of Assertion		
	Greater than \$25,000	Between \$5,000 and \$25,000	No more than \$5,000
2) Claims Processing Offices	No authority to terminate, waive, or compromise.	May waive** or compromise up to \$5000	May waive,** compromise, or terminate.

** Only medical care claims may be waived. Because no injured victim exists, a property damage claim cannot be "waived."

Including DD Form 1840/1840R in Demand Packets

This Claims Policy Note updates paragraph 11-36a(1) of Army Regulation 27-20. In accordance with paragraph 1-9f of Army Regulation 27-20, this guidance is binding on all Army claims personnel.

After receiving demands, a number of carriers have written to USARCS or to field claims authorities requesting copies of DD Form 1840/1840R. The other military services routinely include copies of the DD Form 1840/1840R in demand packets, and representatives of the carrier industry have requested the Army to do the same.

To reduce the volume of unnecessary correspondence with carriers, field claims offices will include copies of the DD Form 1840/1840R in demand packets they prepare, and will mark the DD Form 1843, "Demand on Carrier/Contractor" accordingly. This new requirement will be incorporated into the next change to AR 27-20. Mr. Frezza.

Management Note

United States Army Japan/IX Corps, and 10th Area Support Group, Okinawa, Claims Offices

The United States Army Japan/IX Corps area claims office (P02) and 10th Area Support Group, Okinawa, claims processing office (PO3) are closer geographically to United States Armed Forces Claims Service, Korea (K01), than they are to the United States Army Pacific Command Claims Service (P01) in Hawaii. Accordingly, the United States Armed Forces Claims Service, Korea, can better supervise their activities. For this reason, the Commander, USARCS, has transferred offices PO2 and PO3 to the jurisdiction of United States Armed Forces Claims Service, Korea, with no changes to their current office codes. Mr. Frezza.

Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office,
and TJAGSA Administrative and Civil Law Division*

Civilian Personnel Law

Discrimination Complaint Is Not Whistleblowing

The Merit Systems Protection Board (MSPB or Board) reversed an earlier decision in which it had granted the appellant's stay request filed under the Whistleblower Protection Act. The Board had assumed jurisdiction based on its opinion that the appellant's filing of an equal employment opportunity (EEO) complaint constituted activity protected by 5 U.S.C. section 2302(b)(8), which protects disclosures of information showing activities such as violations of law, mismanagement—that is, "whistleblowing." The Board had reasoned that because discrimination violates title VII of the Civil Rights Act, a discrimination complaint alleges a "violation of law" protected under section 2302(b)(8). Only violations of that section entitle employees, under the Whistleblower Protection Act, to an individual right of action (IRA) before the Board to seek stays. After the Board's original decision, the Office of Personnel Management (OPM) intervened, arguing that EEO complaints are not covered by section 2302(b)(8) and that the Board was without jurisdiction to hear the appellant's stay request. The MSPB recognized that its earlier reading of the section rendered section 2302(b)(9), which prohibits reprisal for filing appeals and complaints, superfluous. It ruled that EEO activity is protected under section 2302(b)(9), but not under (b)(8), and that the Board lacked jurisdiction over the matter. *Williams v. Department of Defense*, 46 M.S.P.R. 549 (1991) (reversing 45 M.S.P.R. 146 (1990)).

Individual Right of Action

In *Knollenberg v. Department of the Navy*, 47 M.S.P.R. 92 (1991), the Board reemphasized that an employee must seek and exhaust remedies with the Office of Special Counsel (OSC) before pursuing an IRA if the allegedly retaliatory action is not independently appealable to the MSPB. See 5 C.F.R. section 1209.6(a). Knollenberg claimed that he was not selected for promotion because of prior whistleblowing activities. The administrative judge (AJ) dismissed the allegation for lack of jurisdiction because Knollenberg had not brought the allegation to OSC first. The Board affirmed, ruling that exhaustion was a jurisdictional prerequisite to an IRA appeal on a promotion claim.

Last-Chance Agreement

In another Postal Service case that will live on in infamy, labor counselors are reminded that "it ain't over 'til it's over." In *Stewart v. United States Postal Service*,

926 F.2d 1146 (Fed. Cir. 1991), an employee on his *second* last-chance agreement (LCA) promised to incur no more than forty-eight hours of unexcused absence during the year. Four months into the agreement, however, the employee was removed for fifty hours of absence without leave. The employee appealed to the Board, arguing that eight of the fifty hours should have been excused pursuant to the LCA because of medical emergency. The AJ issued a show-cause order and then, despite appellant's request for a hearing on the factual allegations, issued an initial decision dismissing the appeal because of waiver of appeal rights. The Board summarily accepted the AJ's decision.

The Federal Circuit held that when an employee raises a nonfrivolous factual issue of compliance with an LCA, the Board first must resolve the factual issue in dispute before addressing the scope and applicability of the appeal rights waiver. The lesson to be learned is that care should be taken in the administration of an LCA—not just in its formation. The first part of the court's test in this instance is substantially similar to the test used for probationary employees terminated for postemployment reasons who are appealing on the basis of partisan political or marital status discrimination. Labor counselors who may be involved in the removal of an employee under an LCA should look to these cases for persuasive authority.

Labor Law

Interview of Bargaining Unit Member for ULP Hearing

The Federal Labor Relations Authority (FLRA or Authority) rejected its Administrative Law Judge's (ALJ) recommended decision in ruling that the Air Force had violated 5 U.S.C. section 7116(a)(1) by attempting to force two union representatives to answer questions concerning an unfair labor practice (ULP). As part of his preparation for the ULP hearing, the agency counsel wished to interview the union chief steward. The agency labor relations officer called the steward to inform him that the agency counsel wished to interview him. Though he initially agreed to attend, the chief steward changed his mind and informed the labor relations officer that he would not attend nor would he answer any questions concerning the ULP complaint. The labor relations officer, however, informed the steward that he had no choice about attending the interview even though "what [he] did at the interview was another matter." The steward again refused to attend. The labor relations officer then called the steward's supervisor, who ordered the steward to attend. At the interview, the counsel advised the steward

that his participation was voluntary, but that he hoped the steward would cooperate. After the steward's refusal to answer any questions, the counsel repeated that the participation was voluntary, but that cooperation would help resolve the ULP. The steward again refused and the counsel allowed him to leave. The labor relations officer later called the union president to set up a similar interview. The president refused. After saying, "Look Joe, we can do this the easy way or the hard way ...," the labor relations officer dropped the matter. In finding no violation, the ALJ reasoned that no one had answered any questions against his will. He also concluded that the noncoercive safeguards required by *Internal Revenue Service and Brookhaven Service Center*, 9 F.L.R.A. 930 (1982), had been met. The Authority disagreed. *Brookhaven* requires more than that the interview itself be noncoercive. Rather, the inquiry into whether the interview was coercive also must include "whether the two Union officials were subjected to coercive measures in an attempt to assure their participation." The standard for that determination is not "based on the subjective perceptions of the employees or the intent of the employer[, but on] whether the employee could reasonably have drawn a coercive inference from the statement." It found that the attempts to coerce the presence of the two union representatives violated section 7116(a)(1). *United States Dep't of the Air Force, Griffiss Air Force Base, Rome, N.Y. and American Fed'n of Gov't Employees*, 38 F.L.R.A. 1552 (1991).

Appropriate Arrangements

In *National Treasury Employees' Union and United States Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service*, 39 F.L.R.A. 27 (1991), the FLRA decided a negotiability appeal addressing twenty provisions of a negotiated agreement disapproved by the Internal Revenue Service (IRS). One provision required the IRS to grant leave without pay to employees serving the union in elected or appointed capacities. The FLRA precedent clearly establishes that language requiring management to grant leave interferes with the right to assign work. In this case, however, the Authority concluded that the provision was a negotiable appropriate arrangement. In balancing the benefits to the union against the interference with the right to assign work, the Authority found that the employees' section 7102 rights to "act for a labor organization" prevailed over the harm to IRS.

The FLRA found other limitations on making management's rights appropriate arrangements. One disapproved section would prohibit a supervisor from considering in the performance appraisal process a document not furnished to an employee within forty-five days from when it came into the supervisor's possession. This limitation on management's right to appraise performance interferes with its rights to direct employees and assign work. The FLRA determined that this restriction did not interfere

excessively, however, when the benefit to employees of having a timely opportunity to be aware of and respond to matters affecting their performance ratings outweighed the limited restriction on management caused by requiring it to notify an employee within forty-five days of creating or obtaining a document.

Also disapproved was a section prohibiting management from rotating details to avoid paying employees for work at "higher level." The purpose of the provision was to mitigate adverse financial effects on employees when the agency curtails the length of details to avoid paying increased compensation. The Authority balanced management's interest in controlling the length of details against the interest of employees in receiving compensation commensurate with the level of work performed. It concluded that the benefit to employees outweighed the minimal impact on management's rights.

Of interest to Army attorneys in bargaining units are two of the Authority's rulings. One found language extending to excepted service employees the right to grieve adverse and disciplinary actions to be negotiable. FLRA reversed its earlier position in light of the changes effected by the Civil Service Due Process Amendments, Pub. L. No. 101-376 (1990). It also found negotiable a provision allowing the union to designate bargaining unit attorneys as employee representatives in hearings before Equal Employment Opportunity Commission (EEOC or Commission), MSPB, and arbitrators.

Unfair Hearing in Expedited Arbitration

The FLRA vacated an arbitration award because the arbitrator failed to conduct a fair hearing. Using their negotiated expedited arbitration process, the parties had presented to the arbitrator a grievance over a one-day suspension for failure to carry out assigned work. The parties had invoked their expedited arbitration procedure, which required the arbitrator to issue a written decision within three days. The arbitrator had refused to hear union evidence that grievant's performance standards were defective, reasoning that no time was available to hear the evidence. He sustained the suspension. The Authority found that the arbitrator's refusal to hear relevant evidence had limited the union's ability to present its case and had prejudiced its right to a fair hearing. It ruled for the first time that an arbitrator's failure to conduct a fair hearing justifies a finding that the award is deficient. It also found that the arbitrator's interpretation of the expedited arbitration article failed to draw its essence from the agreement. Either ground justified the vacation of the award. The Authority did suggest that it may have reached a different conclusion if the arbitrator had attempted to persuade the parties to agree to waive the requirements of the expedited arbitration process because of the complexities of the case. *United States Dep't of the Air Force, Hill Air Force Base, Utah, and American Fed'n of Gov't Employees*, 39 F.L.R.A. 103 (1991).

Equal Employment Opportunity Law

Procedural Issues Under ADEA

The Supreme Court, in *Stevens v. Department of Treasury*, No. 89-1821, 59 U.S.L.W. 4343 (U.S. Apr. 24, 1991), recently considered several longstanding disputes concerning the procedures for filing civil actions in federal employee age discrimination complaints. Unfortunately, because of the unusual posture of the litigants, the Court refused to resolve some of the major issues presented.

The Court did clarify the nature of the two routes under the Age Discrimination in Employment Act (ADEA) that a federal employee may pursue to get to federal district court. First, the Court noted that an employee may pursue the "administrative" route by invoking the EEOC's administrative process, see 29 C.F.R. pt. 1613, subpt. E (1990), and then file a civil action if he or she is not satisfied with the administrative result. On the other hand, the employee may pursue the statutory "direct" route. Under the "direct" route, an employee satisfies the requirements of 29 U.S.C. section 633a(d) by notifying the EEOC of his or her intent to file a civil suit (1) within 180 days of the alleged discriminatory act, and (2) not less than thirty days before filing suit. The Court observed that under the "direct" route, notice of intent to sue to the employee's agency constitutes notice to the EEOC.

In *Stevens* the employee filed an administrative complaint of age discrimination with his agency 176 days after the alleged discrimination. The administrative complaint contained the statement, "This is also my notice of intention to sue in U.S. Civil District Court if the matter is not satisfactorily resolved." The administrative complaint was dismissed as untimely. Six-and-a-half months after filing the administrative complaint, Stevens filed suit in district court. The district court dismissed the complaint because Stevens filed suit more than 180 days after the claimed discrimination. The Fifth Circuit found that this was not a problem, but affirmed the dismissal apparently because Stevens had not filed suit within thirty days of giving notice of intent to sue.

The Supreme Court pointed out, as the government had conceded, that both courts had misread the ADEA. The district court erred because the "direct" route only requires notice of intent to sue to the EEOC—which was satisfied by the statement in the administrative complaint to the agency—within 180 days of the alleged discrimination. It does not require that suit be filed within 180 days of the allegedly discriminatory act. The court of appeals erred in suggesting that suit must be filed within thirty days of the notice to the EEOC. The statute plainly provides that suit may be filed not earlier than thirty days after the notice to the EEOC. Therefore, the Court found that Stevens had satisfied the statutory requirements for

the "direct" route—he gave notice of intent to sue within 180 days after the alleged discrimination and he did not commence suit until more than thirty days after giving notice.

Following its discussion of the requirements under the "direct" route, the Court turned its attention to the split in the circuits over whether a federal employee who pursues the "administrative" route must exhaust administrative remedies before going to court. Compare *McGinty v. Department of the Army*, 900 F.2d 1114 (7th Cir. 1990); *White v. Frank*, 895 F.2d 243 (5th Cir.), cert. denied, 111 S. Ct. 232 (1990); *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985); *Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983) (exhaustion required) with *Langford v. United States Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988) (exhaustion not required). Although recognizing that the issue was "an important one," the Supreme Court refused to resolve the conflict because the Solicitor General, at the urging of the EEOC, abandoned the government's longstanding position that exhaustion was required before resorting to a civil action. Noting that the government may, in the future, reverse positions again, Justice Stevens would have resolved the conflict and found no exhaustion requirement. Rejecting that approach, the remaining justices simply stated, "We must assume, in view of the Solicitor General's concession here, that the Government no longer will defend its earlier litigation position."

The Court also refused to decide the appropriate statute of limitations in an ADEA case. Noting that Congress had failed to impose a limitations period on actions under 29 U.S.C. section 633a(c), the Court stated that the statute of limitations would be borrowed from a state statute or an analogous federal statute. The Court, however, declined to venture further. Lower courts that have considered this issue have come to very divergent opinions. See *Lavery v. Marsh*, 918 F.2d 1022 (1st Cir. 1990) (borrowing from title VII, 30 days from final administrative decision); *Lubniewski v. Lehman*, 891 F.2d 216 (9th Cir. 1989) (six-year "catch-all" statute of limitations); *Bornholdt v. Brady*, 869 F.2d 57 (2d Cir. 1989) ("unable to determine precisely," but not 30 days); *Coleman v. Nolan*, 693 F. Supp. 1544 (S.D.N.Y. 1988) (two or three years, and definitely not 30 days or six years); *Wiersema v. Tennessee Valley Auth.*, 693 F. Supp. 66 (E.D. Tenn. 1986) (two years borrowed from private-sector rule). In *Stevens* the government conceded that Stevens' suit, filed one year and six days after the alleged discrimination, was "well within whatever statute of limitation might apply to the action." Counsel should consider whether this language undercuts the *Lavery* thirty-day rule when the employee pursues the "administrative" route.

Procedural Issues in Title VII Litigation

In *Irwin v. Veterans' Administration*, 111 S. Ct. 453 (1990), the Supreme Court ruled that the thirty-day

period for filing a title VII suit against the government is not jurisdictional, but subject to equitable tolling in appropriate circumstances. In *Irwin* the employee filed a complaint with the EEOC, claiming that he had been unlawfully fired by the Veterans' Administration (VA) because of his race and disability. The EEOC dismissed the complaint on March 19, 1987, and mailed copies of the final decision to both Irwin and his attorney. The right-to-sue letter was delivered to the attorney's office on March 23rd. Irwin's attorney, a sole practitioner and Army reservist, was out of the country performing military duties at the time and did not receive actual notice of the final decision until April 10th. Irwin received the EEOC's letter on April 7th. Irwin filed a civil action in district court on May 6, 1987—forty-four days after the EEOC notice was received by the attorney's office, twenty-nine days after receipt by Irwin, and twenty-six days after actual receipt by Irwin's attorney. The district court dismissed the case for lack of jurisdiction because the complaint was not filed within thirty days of delivery of the right-to-sue notice to the office of Irwin's designated counsel. The Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court also affirmed, but on different grounds. First, although the Court agreed that Irwin's suit was untimely, it held that the employee's failure to meet the thirty-day filing deadline did not constitute a jurisdictional bar to suit. Rather, the Court ruled that a rebuttable presumption of equitable tolling arose in suits against the United States, absent a clear congressional statement to the contrary. The Court agreed with the lower courts, however, that notice to the attorney's office, which was acknowledged by a representative of the office, constituted constructive notice to the client and commenced the running of the suit-filing period. Further, the Court found that equitable tolling was not appropriate under the circumstances of this case because the plaintiff had established "at best a garden variety claim of excusable neglect."

In an EEOC decision that was rendered two months earlier, the Commission declined to apply the private-sector rule that time limitations begin to run on the date the document actually is received by either the claimant or the attorney representing him in a title VII action. In *Madison v. Department of Air Force*, 91 F.E.O.R. 3157 (1990), the Commission specifically declined to interpret its regulations as imposing constructive knowledge on a complainant of the contents of her representative's copy of the final agency decision. The Commission was aware of the Fifth Circuit's contrary decision on the thirty-day right-to-sue letter in *Irwin v. Veterans' Administration*, 874 F.2d 1092 (5th Cir. 1989), and the fact that the Supreme Court had granted certiorari. Nevertheless, the Commission decided that the private-sector rule placed too much of a burden on the Commission, which would have to distinguish between attorney representatives and nonattorney representatives.

In *McKenzie v. Equal Employment Opportunity Commission*, 749 F. Supp. 115 (W.D.N.C. 1990), the court granted the government's motion for summary judgment. The plaintiff failed to comply with the statutory requirement of naming the head of the agency as the defendant. See 42 U.S.C. § 2000e(16)(c). In addition, the plaintiff failed to serve any named defendant or the United States Attorney within the thirty-day period to commence the action. Therefore, he was not allowed to amend the complaint to name a proper defendant under rule 15(c) of the Federal Rules of Civil Procedure.

Settlements and Attorneys' Fees

Authority to Settle

At the request of the complainant in *Soliz v. United States Postal Service*, 91 F.E.O.R. 3171 (1990), the EEOC busted a settlement agreement that had been signed only by the agency's EEO counselor and on which the signature line for the "agency representative" had been left blank. The Commission noted that while "an EEO counselor has the authority to informally resolve EEO matters before a written complaint is filed, he/she has no authority to bind the agency to an agreement executed during or after the investigation unless he/she had been designated by the agency to act on its behalf."

Note that in Army cases, Army Regulation (AR) 690-600, paragraph 3-5, provides that the "activity labor counselor should be designated by the activity commander as the Army representative."

Settlement Agreements

When labor counselors are settling a case, monumental efforts should be made to ensure that all aspects of the case are being settled. Failure to do so may result in the employee filing suit in court with the concomitant expenditure of numerous man-hours in defending the case—including the local attorney preparing a litigation report. For instance, settlements should not leave open the issue of attorneys' fees, by incorporating terms such as a blanket promise to pay "reasonable attorneys' fees." Nor should they promise anything that is outside the authority of the activity involved.

As an example, under AR 690-600, paragraph 5-5, the installation does not have the authority to include within a settlement agreement a provision for \$5000 or more for attorney fees. Under these circumstances, the labor counselor should either: (1) process the settlement to Headquarters, Department of the Army, for approval; or (2) include within the settlement agreement a provision that the activity agrees to pay reasonable attorney fees not to exceed whatever sum certain has been agreed upon to be processed in accordance with AR 690-600.

Taxation of Settlements

In *Burke v. United States*, No. 90-5607 (6th Cir. Apr. 5, 1991), the court addressed the issue of whether or not damages received in a settlement agreement in a title VII action for sex discrimination are excludable as damages for "personal injury" under Internal Revenue Code section 104(a)(2). Section 104(a)(2) excludes from gross income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." The court went on to note that the analysis of whether the injury is personal is based upon the origin and character of the claim, and not the consequences that result from the injury. The court was unconvinced by the government's argument that title VII only provides for back pay, and not compensatory or punitive damages. Accordingly, the results merely compensate plaintiffs for taxable income rather than for tort or tort-like damages. The court stated that the government's analysis was flawed in looking at the "consequences of a Title VII violation (the payment of back pay for lost wages) rather than the personal nature of the injury (invidious discrimination)."

Labor counselors can use *Burke* in negotiating settlements with complainants. Settlements can be crafted explicitly to state that social security and other taxes will be withheld. Alternatively, counselors can attempt to get a complainant to agree to a lower amount in an agreement that provides the lump sum in a "tax free" manner. Either way, the important thing is to ensure that any settlement agreement addresses how any payments are to be treated by the Army—that is, whether or not the Army is to withhold taxes and social security.

Attorneys' Fees: Entitlement and Calculation

Many federal fee-shifting statutes exist and the labor counselor faced with an attorneys' fee issue will need to research carefully the applicable case law. For example, attorneys' fee cases before the MSPB under the Back Pay Act should not be confused with, and rarely should be treated the same as, cases under title VII and the EEOC. Two common issues, however, persistently arise throughout attorney's fees analyses: (1) whether the employee was a prevailing party; and if so, (2) what is a reasonable fee.

In *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989), the Supreme Court noted that technical victory does not equal prevailing party status, warranting entitlement to attorneys' fees. Justice O'Connor noted that an employee must receive some actual relief to be a prevailing party and the relief must have been more than *de minimus*. Nuisance settlements may not be enough.

The "lodestar" is the beginning point in calculating a "reasonable" attorneys' fee entitlement. Put simply, the

lodestar is the number of hours reasonably expended multiplied by a reasonable hourly rate. The lodestar may be subjected to adjustment for the degree of success. In addition, certain costs may be added to this amount.

In *Noble v. Herrington*, 732 F. Supp. 114 (D.D.C. 1989), the court was faced with deciding what the proper methodology is for reducing the lodestar fee to account for a plaintiff's limited degree of success. In *Noble* the court, following *Hensley v. Eckerhart*, 461 U.S. 424 (1983), rejected the Department of Energy's segregable claims analysis because of the interconnectedness of the employee's various discrimination and reprisal claims. Rather, the court exercised its "equitable judgment" and decided that the limited degree of success only warranted \$46,489 or twenty percent of the lodestar. The court went on to discuss what costs were available to the plaintiff under 29 C.F.R. section 1920. The attorneys requested \$17,247.37 for "duplicating and supplies, telephone, postage, federal express, local transportation, court costs, messengers, meals, information retrieval, secretarial and word processing overtime, experts' fees, witness and service fees, and deposition transcripts." The court first eliminated enumerated items that were unavailable or not sufficiently justified—that is, support staff overtime, witness fees, and deposition transcripts. The court then awarded costs of \$1,842.84. On the plus side for the plaintiff, the court noted in closing that she had had excellent lawyers, and then entered judgment for \$48,000 of a \$265,000 bill.

Interrelationship of Different Forums

The MSPB may not award attorneys' fees for work on a court appeal because the Board's authority is limited to Board proceedings. *Grubka v. Department of the Treasury*, 924 F.2d 1039 (Fed. Cir. 1991). In *Grubka* an employee successfully appealed his adverse Board decision to the Federal Circuit. The Board then awarded almost \$45,000 in attorneys' fees for work performed in the appeal before the Board and later to the Federal Circuit. The court noted that pursuant to its rule 20, it—and not the Board—has authority to award fees for matters that are brought before court.

In *Kean v. Department of the Army*, 926 F.2d 276 (3d Cir. 1991), the employee had filed a mixed-case appeal to the MSPB from his removal. The employee prevailed before the Board on the claim of handicap discrimination. See *Kean*, 41 M.S.P.R. 618. The employee then filed suit in district court, seeking review of the attorneys' fees awarded him by the Board. The district court dismissed for lack of jurisdiction under the rationale that the Court of Appeals for the Federal Circuit had proper jurisdiction to review the adequacy of an MSPB award of attorney fees. The Third Circuit reversed, holding that the discrimination issues did not "drop out" of the case just because the employee prevailed before the Board and that the employee was entitled to have his attorneys' fees calculated under title VII.

Criminal Law Division Notes

OTJAG Criminal Law Division

Supreme Court—1990 Term, Part II

Colonel Francis A. Gilligan

Lieutenant Colonel Stephen D. Smith

Peremptory Challenges: *Powers v. Ohio*

In *Powers v. Ohio*¹ seven members of the United States Supreme Court held that the equal protection clause prohibited a prosecutor from exercising peremptory challenges on racially motivated grounds and that a defendant had standing to contest the practice even though the defendant was not of the same racial group as the challenged juror. The decision eliminated any perception that *Batson v. Kentucky*² required some identity of race before a criminal defendant could challenge racially motivated peremptory challenges. Justice Scalia, joined by Chief Justice Rehnquist, dissented, urging that the "decision contradicts well established law in the area of equal protection and of standing."³

Larry Joe Powers, a white defendant, was tried for murder and attempted murder. He objected to the prosecutor's use of peremptory challenges to exclude seven prospective black venirepersons from the jury. Relying on *Batson*, Powers asked that the prosecutor be required to set forth racially neutral reasons for the challenges.⁴ In each instance, the trial court denied the request. Powers appealed his conviction contending, in part, that his race was irrelevant to the right to object to racially motivated peremptory challenges. The intermediate state appellate court affirmed and the Supreme Court of Ohio dismissed the appeal.⁵

Justice Kennedy, writing for the Supreme Court's majority, noted that while Power's petition for certiorari was pending, five members of the Court suggested that a defendant may be able to object on equal protection grounds when a racially motivated peremptory challenge is exercised against a juror of another race.⁶ Having then granted Powers' petition for certiorari on that precise issue, the majority used a two-step analysis to affirm a defendant's right to object to racially motivated peremp-

tory challenges regardless of racial identity between the defendant and the prospective juror.

Focusing first on racial discrimination and its effect on the judicial process, the majority found no place for discriminatory practices at any stage of the jury selection process. For over 100 years, the Court firmly has upheld the equal protection rights of defendants in instances in which members of their race have been excluded purposefully from the jury.⁷ The harm from discriminatory jury practices, however, is not limited to the defendant.⁸ In particular, the juror and that juror's perceptions of the judicial system are undermined, the remainder of the jury may lose confidence in a system tolerant of discriminatory challenges, and the community may suffer a diminished respect for the criminal justice system. Furthermore, federal law prohibits discrimination in the jury selection process.⁹ Thus, the Court concluded:

We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have the right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.¹⁰

Instead of going directly to the conclusion that discriminatory practices by the state infect a given defendant's trial, the Court's analysis of the equal protection issue focused on the prospective juror's right. Therefore, the Court was compelled to examine the accused's standing by examining the issue of whether an accused can object on equal protection grounds when a member of a different racial group is discriminated against by virtue of a

¹49 Crim. L. Rep. (BNA) 2003 (U.S. Apr. 1, 1991).

²476 U.S. 79 (1986).

³*Powers*, 49 Crim. L. Rep. at 2007 (Scalia, J., dissenting).

⁴*Batson* held that once a defendant makes a prima facie showing that peremptory challenges were motivated by race, the prosecution must set forth neutral reasons for the challenge. *Batson*, 476 U.S. at 98.

⁵*Powers*, 49 Crim. L. Rep. at 2004.

⁶See *Holland v. Illinois*, 46 Crim. L. Rep. (BNA) 2067 (U.S. 1990).

⁷*Powers*, 49 Crim. L. Rep. at 2004.

⁸*Id.*

⁹18 U.S.C. § 243 (1988).

¹⁰*Powers*, 49 Crim. L. Rep. at 2005.

peremptory challenge. Standing to assert the rights of a third party has three elements: "[1] the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; ... [(2)] the litigant must have a close relation to the third party; ... and [(3)] there must exist some hindrance to the third party's ability to protect his or her own interests."¹¹ The *Powers* Court addressed each of these requirements separately.

The Court first found that an accused suffers "cognizable injury" from discriminatory peremptory challenges.¹² This injury flows from the damage done to the perception of fairness and the underlying irregularity in the composition of the jury. Ultimately, "[t]he verdict will not be accepted or understood [as having been rendered in accordance with the law by persons who are fair] if the jury is chosen by unlawful means at the outset."¹³

Second, the Court concluded that "the relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases."¹⁴ This relation is established during voir dire and lasts throughout the trial. The loss of confidence in the trial system that is experienced by both the juror and the accused provided the commonality necessary for the Court to find the second element of standing. The Court noted that because the accused has so much at stake, he or she actually will prove to be an effective advocate for the challenged juror.¹⁵

Lastly, the Court addressed the challenged juror's ability to vindicate his or her own interests. While the individual juror may bring suit, the difficulties, burdens, and expense of such suits render legal action unlikely. The reality upon which the majority relies is that the challenged juror probably will leave the courtroom in humiliation and take little interest in pursuing his or her rights.¹⁶ Consequently, the Court concluded that the criminal defendant has standing to raise the equal protection claims of a juror challenged on the basis of race.

Perhaps the most telling motivation for the majority's ultimate conclusion appeared late in the opinion when it pointed out, "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system."¹⁷ That the justices of the Supreme Court would take steps to purge racial discrimination from the very system that they supervise is not surprising. Curiously, however, even though the Court found not only a "cognizable injury" to a criminal accused, but also a practice that the accused "has a concrete interest in challenging,"¹⁸ it still felt compelled to rely on third party standing to permit the accused to address his own injury. If, as the Court noted, discriminatory jury selection "'casts doubt on the integrity of the judicial process' ... [and] the fairness of a criminal proceeding,"¹⁹ the criminal accused logically has a strong individual interest to assert. Third party standing seems to be a tortured path to an otherwise proper end.

In dissent, Justice Scalia noted that no precedent whatsoever existed for equal protection claims arising from excluding jurors of another race. The dissent actually found "a vast body of clear statement to the contrary."²⁰ The dissent asserted that the peremptory challenge manifested no discrimination other "than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members."²¹ For this reason, Justice Scalia found no stigma or dishonor in being subject to a peremptory challenge. The dissent urged that the majority opinion and the *Batson* decision effectively had "abolish[ed] the peremptory challenge."²²

In addition to finding no improper discrimination, the dissent attacked the majority's use of perceptions and other abstract conclusions to establish the first element of standing—that is, injury-in-fact. A third person's illegally obtained confession, as well as evidence illegally seized from a third person, may result directly in a defendant's conviction, but the defendant cannot assert that third per-

¹¹*Id.* at 2006.

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* at 2007.

¹⁷*Id.* at 2006.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.* at 2009 (Scalia, J., dissenting).

²¹*Id.*

²²*Id.*

son's rights.²³ The *Powers* majority, however, conferred standing to challenge alleged discrimination that the dissent claimed only "speculatively produces the conviction." To Justice Scalia, the majority supplanted injury-in-fact with an "interest in challenging the practice" test.²⁴

One other comment by the dissent is significant: "the precise scope of the exception [that *Batson*] has created remains to be determined."²⁵ The procedures set forth in *Batson* for challenging racially motivated peremptory challenges and the effect of *Powers* raise numerous questions. Without a requirement for racial identity between the accused and the juror, how does the accused make the required prima facie showing of discrimination? Military cases seemingly suggest that the mere exercise of the single challenge against a member of a cognizable racial group and a timely objection trigger the requirement to set neutral reasons on the record.²⁶ Is this per se rule valid in cases in which the accused and the prospective court member are not of the same racial group?

Even if a per se rule applies or the accused otherwise makes a prima facie showing, what are "neutral reasons" for the challenge?²⁷ Can the challenge be exercised to obtain a more favorable number of members? How is the trial judge going to evaluate the proffered reasons for the challenge?²⁸ What remedy should be applied when a judge finds purposeful discrimination?²⁹ Finally, if purposeful discrimination is an evil that so infects the trial process, then should the government be permitted to object to racially—or other discriminatorily—motivated challenges by the defense? The reasoning of the *Powers* majority and its reliance upon perceptions of unfairness may suggest that the prosecution can object to discriminatory use of peremptory challenges by the defendant.³⁰

Arguably, peremptory challenges may be improper when based on discriminatory factors other than race—that is, factors such as sex, religion, age, or economic status. On the other hand, few can disagree that cases do occur in which these factors play a role in the prosecution's decision to exercise peremptory challenges. If peremptory challenges based on reasons other than race are susceptible to attack, however, then perhaps now is time to eliminate the peremptory challenge entirely—a step that can be taken easily in the military because each side has but one peremptory challenge.³¹ The most significant advantage to taking this step is that it would eliminate one more possibility of improper discrimination arising in the judicial process; any system purged of improper discrimination is desirable. In addition, the elimination of peremptory challenges in the military also may signal to individuals involved in the selection process that the only relevant factors are the criteria delineated in article 25 of the Uniform Code of Military Justice. The disadvantage, however, is that the absence of peremptory challenges may serve as incentive to inject inappropriate, discriminatory factors at other stages of the selection process.

Coerced Confessions and Harmless Error: *Arizona v. Fulminante*

On March 26, 1991, the Supreme Court decided *Arizona v. Fulminante*,³² an unusual case with three separate issues, having a separate majority composition on each issue. The three issues decided by the Court were: (1) was the defendant's confession coerced; (2) does the harmless error test apply to an involuntary confession; and (3) under the circumstances of the case, was the admission of the involuntary confession harmless? A

²³ *Id.* (citing *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Payner*, 447 U.S. 727 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978)); see also *Manual for Courts-Martial, United States*, 1984, Military Rule of Evidence 311(a)(2).

²⁴ *Powers*, 49 *Crim. L. Rep.* at 2011.

²⁵ *Id.*

²⁶ See *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

²⁷ Any effort to develop a consistent and clear definition of acceptable neutral reasons is only muddled by the cases. Compare, e.g., *State v. Butler*, 731 S.W.2d 265, 272 (Mo. Ct. App. 1987) (premise that juror who stares at floor is unfit is questionable) with *Williams v. State*, 507 N.E.2d 997, 999 (Ind. Ct. App. 1987) (court did not question justification that black social worker, because of her job, might have a liberal view of sexual behavior that would affect her fitness to decide a rape case); see also Hopper, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection*, 74 Va. L. Rev. 811, 826-31 (1988).

²⁸ The majority in *Batson* offered little guidance to trial judges other than negatives—that is, the prosecutor's intuition or mere affirmations of good faith are not sufficient. The *Batson* Court was confident that experienced trial judges would be able to determine when discriminatory circumstances existed. See *Batson*, 476 U.S. at 97.

²⁹ The Army Court of Military Review suggested that the discriminatory peremptory challenge should be disallowed and that the prosecutor should be permitted to exercise the challenge against another member. See *United States v. Moore*, 26 M.J. 692, 701 (A.C.M.R. 1988) (en banc), *reversed*, 28 M.J. 366 (C.M.A. 1989).

³⁰ See Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 104 *Harv. L. Rev.* 808 (1989) (arguing that *Batson* should not be extended to a defendant's peremptory challenges).

³¹ As noted by Judge Cox, the trial counsel at a military prosecution would seem to have scant need for peremptory challenges against court members properly selected by a convening authority in accordance with article 25. See UCMJ art. 25, 10 U.S.C. § 825 (1982); *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988).

³² 48 *Crim. L. Rep.* (BNA) 2105 (U.S. Mar. 26, 1991).

five-to-four vote decided the first³³ and second³⁴ issues, with Justices Scalia and Kennedy casting the key votes. A five-to-three vote decided the third³⁵ issue, with Justice Souter abstaining.

Fulminante was sentenced to death for murdering his eleven-year-old stepdaughter, Jeneane, in September 1982. Early on the morning of September 14, 1982, the defendant called the police department to indicate that Jeneane was missing. He had been caring for Jeneane while his wife was in the hospital. Two days later, Jeneane's body was found in the desert; she had been shot twice in the head and strangled. Her body was so decomposed that telling whether she had been assaulted sexually was impossible. Fulminante had given a number of conflicting statements to the police concerning Jeneane's disappearance. Subsequently, Fulminante left Arizona and went to New Jersey, where he was convicted for a firearms offense and incarcerated in a federal prison in New York. In prison, he became friends with another inmate, Anthony Sarivola, who was serving a sixty-day sentence for extortion.

Sarivola was a former police officer who had been involved with organized crime and then had become a paid informant for the Federal Bureau of Investigation (FBI). He heard rumors that the defendant had killed his stepdaughter and he passed this rumor on to the FBI, who asked him to obtain more information. Sarivola discussed these rumors with the defendant on several occasions. Sarivola offered to protect Fulminante from threats from fellow inmates if Fulminante told him about the offense.

One evening in October 1983, while Sarivola and Fulminante walked around the prison track, Fulminante admitted that he had driven Jeneane to the desert on his motorcycle, choked her, sexually assaulted her, and made her beg for her life before he shot her twice in the head. In his first report concerning the confession, Sarivola failed to hint at the numerous details of the sexual assault on Jeneane. These details were mentioned in June 1985,

during further interrogation, at which Sarivola also mentioned that Fulminante had confessed to his wife. Both confessions were admitted against the accused.

At trial, however, Fulminante moved to suppress both statements. The trial court denied the motion, finding on the basis of stipulated facts that the confessions were voluntary. He appealed the admission of the confession to Sarivola on the basis of a violation of the fifth and fourteenth amendments. The Arizona Supreme Court held that the confession was coerced, but initially determined that its admission was harmless error.³⁶ On reconsideration, the Arizona Supreme Court ruled that United States Supreme Court precedent precluded the use of the harmless error analysis for coerced confessions. It therefore reversed the conviction, ordering a new trial without the use of the first confession.³⁷ The Supreme Court granted certiorari.

In addressing the first issue—whether the confession was coerced—the Court's majority recognized that this was a "close" case, but it agreed with the holding of the Arizona Supreme Court.³⁸ The Court indicated that voluntariness is a legal question to be determined from the totality of circumstances.³⁹ In Fulminante's case, the Court determined that a credible threat of physical violence existed and the accused confessed based upon the protection that was offered from that threat. The majority agreed with the Arizona court that these circumstances served to overbear Fulminante's will and rendered the confession the product of coercion.⁴⁰

The *Fulminante* dissent disagreed, stressing the fact that Sarivola had told the defendant to tell the truth.⁴¹ At the suppression hearing, the defendant stipulated that he was not in fear of the other inmates, nor did he ever seek protection from Sarivola.⁴² Accordingly, the dissent asserted that the majority based its reversal on facts beyond those to which the parties had stipulated at the suppression hearing.⁴³ These other facts included Sarivola's statement which indicated that the defendant

³³ Justice White wrote for the majority on this issue, joined by Justices Marshall, Blackmun, Stevens and Scalia. Chief Justice Rehnquist wrote for the dissent on this issue, joined by Justices O'Connor, Kennedy, and Souter.

³⁴ Chief Justice Rehnquist wrote for the majority on this issue, joined by Justices O'Connor, Kennedy, Souter, and Scalia. Justice White wrote for the dissent on this issue, joined by Justices Marshall, Blackmun, and Stevens.

³⁵ Justice White wrote for the majority on this issue, joined by Justices Marshall, Blackmun, Stevens, and Kennedy. Chief Justice Rehnquist wrote for the dissent on this issue, joined by Justices O'Connor and Scalia.

³⁶ 161 Ariz. 237, 778 P.2d 602 (1988).

³⁷ *Id.* at 262, 778 P.2d 627.

³⁸ *Fulminante*, 48 Crim. L. Rep. at 2109.

³⁹ *Id.* at 2108-09.

⁴⁰ *Id.* at 2109.

⁴¹ *Id.* at 2113.

⁴² *Id.*

⁴³ *Id.* at 2113-14.

had been receiving rough treatment and needed protection. The trial court, however, also had before it a presentencing report which showed that Fulminante had six prior felony convictions and had been in prison three times. Chief Justice Rehnquist, who authored the dissent on this issue, was "at a loss to see how the Supreme Court of Arizona reached the conclusion that" the confession was involuntary.⁴⁴

Writing for the majority on the second issue, the Chief Justice stated that the harmless error test generally could be applied to constitutional errors. The majority pointed out that admission of an involuntary confession is a "classic trial error" that can be distinguished from a "structural defect[] in the constitution of the trial mechanism."⁴⁵ Examples of a structural defect, to which the harmless error test would not be applied, include a biased judge or a total lack of a right to counsel at trial.⁴⁶ The *Fulminante* majority on this issue, however, indicated that the admission of an involuntary confession was not more "fundamental" than other trial errors, particularly when, as in *Fulminante's* case, no allegation of physical violence by the police arose.⁴⁷

The dissenters on the second issue asserted that the majority overruled a vast body of precedent "without justification."⁴⁸ The dissenting justices indicated that in the past the Court had refused to apply the "harmless error rule to coerced confessions, for a coerced confession is fundamentally different from other types of erroneously admitted evidence."⁴⁹ Even the majority conceded that some constitutional rights are so basic to a fair trial that the harmless error test cannot be applied.⁵⁰ For instance, in *Chapman v. California*⁵¹ the Supreme Court "specifically noted three constitutional errors that could not be categorized as harmless: using a coerced confession against the defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge."⁵² The dissent also recognized that errors cannot be classified legally as either trial errors or structural defects. Rather, the only guiding principle that the court can follow is to look at the nature of the right at issue and determine the effect of an error upon the trial.

The dissent, however, pointed out that applying the harmless error test to coerced confessions overlooks the obvious fact that they may be untrustworthy. Admitting coerced confessions, therefore, distorts the truth-finding function of the trial.⁵³ Moreover, admitting coerced confessions offends a basic principle underlying the enforcement of criminal law—that is, one should not be convicted by his own confession obtained against his will. Permitting a coerced confession to be part of the evidence upon which a jury is free to base its verdict of guilty is inconsistent with the thesis that "ours is not an inquisitorial system of criminal justice."⁵⁴

On the third and last issue, the Court applied the harmless error test and held five-to-three that the erroneous admission of the confession in *Fulminante's* case could not be considered as harmless beyond a reasonable doubt.⁵⁵ Justice Souter did not join either the majority or the dissent on this issue.

In its initial opinion, the Arizona Supreme Court determined that the harmless error test could be applied because the second confession to Sarviola's wife rendered the first confession cumulative.⁵⁶ The Court relied upon the corroboration of the confession provided by the physical evidence of the wounds, the ligature around the victim's neck, the location of the body, and the presence of motorcycle tracks.

The majority of the Supreme Court, however, disagreed. First, both the trial and state court recognized that a successful prosecution depended upon the admissibility of both confessions.⁵⁷ In addition, the Court noted that absent the first confession, *Fulminante* making the second confession would have been unlikely.⁵⁸ Moreover, the Court entertained doubts about the reliability of the second confession, the circumstances under which it was made, and when it was revealed to the police. *Sarviola's* credibility also was questionable because he had worked for organized crime while he was a police officer.⁵⁹ Additionally, he admitted that he had fabricated a tape recording in connection with an earlier FBI investigation.⁶⁰ He had received immunity in connection with that

⁴⁴*Id.* at 2114.

⁴⁵*Id.* at 2115.

⁴⁶*Id.*

⁴⁷*Id.* at 2115-16.

⁴⁸*Id.* at 2109.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹386 U.S. 18 (1967).

⁵²*Fulminante*, 48 Crim. L. Rep. at 2109-10.

⁵³*Id.* at 2110.

⁵⁴*Id.*

⁵⁵*Id.* at 2111-13.

⁵⁶*Fulminante*, 161 Ariz. at 262, 778 P.2d at 627.

⁵⁷*Fulminante*, 48 Crim. L. Rep. at 2111.

⁵⁸*Id.* at 2112.

⁵⁹*Id.* at 2112 n.9.

⁶⁰*Id.*

information and was eager to stay in the Federal Witness Protection Program.⁶¹

The Court's resolution of the first issue presented in *Fulminante* is fact-dependent and introduced little if anything in terms of new law for application in the trial forum. The rule continues to be that when coercive pressures are created—or are capitalized upon—by the government, and those pressures overcome a subject's free will, subsequent confessions will be considered involuntary. Similarly, the Court's resolution of the third issue in *Fulminante*—that is, its application of the harmless error standard—is fact-specific.

On the other hand, the Court's resolution of the second issue in *Fulminante*, which clearly indicated the majority's willingness to apply the harmless error test, is more

significant. Even though the minority surely viewed this as a novelty and an abandonment of precedent, the majority opinion constitutes a clear statement of the standard to apply.

Perhaps more significant, however, is that adoption of a harmless error standard may reflect two things about the Court. First, a majority of the court seemingly views a trial as a truth-finding function. The harmless error test furthers this function in cases in which the trial court has arrived at the truth—or, at least, the truth as perceived by reviewing authorities. Second, the Court may be inclined to facilitate the finality of cases. The harmless error test obviates the necessity for retrial and affirms old convictions. This trend is consistent with the Court's action in the area of collateral attack on state convictions.⁶²

⁶¹*Id.*

⁶²See *Teague v. Lane*, 489 U.S. 933 (1989); *Saffle v. Parks*, 110 S. Ct. 1257 (1990); see also Gilligan & Smith, *Supreme Court—1989 Term, Part III*, *The Army Lawyer*, June 1990, at 79-80.

Victim-Witness Assistance

Major Warren G. Foote
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But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his donkey, took him to an inn and took care of him.¹

When he thus sins and becomes guilty, he must return what he has stolen or taken by extortion.... He must make restitution in full, add a fifth of the value to it and give it all to the owner on the day he presents his guilt offering.²

Introduction

An enduring concept achieved prominence when Congress passed the Victim and Witness Protection Act of

1982 (VWPA or 1982 Act).³ In compliance with the 1982 Act,⁴ the Department of Justice (DOJ) published "Guidelines for Victim and Witness Assistance."⁵ The goal of the DOJ published guidelines is to "set forth procedures to be followed in responding to the needs of crime victims and witnesses. They are intended to ensure that responsible officials, in the exercise of their discretion, treat victims and witnesses fairly and with understanding."⁶

The Attorney General subsequently sent the DOJ Guidelines to the Department of Defense (DOD) for use in developing its own guidelines for victim and witness assistance. The result was DOD Directive 1030.1, dated 20 August 1984. Subsequently, the Victim and Witness Protection Act of 1982 and DOD Directive 1030.1 were implemented by the Army in chapter 18 of Army Regulation (AR) 27-10.⁷

¹*Luke* 10:33-34 (New International Version).

²*Leviticus* 6:4-5 (New International Version).

³18 U.S.C. §§ 1501-1515, 3579-3580 (1982). The findings and purposes of the act are at Pub. L. No. 97-291, 96 Stat. 1248 (1982), amended by Pub. L. No. 98-473, 98 Stat. 2177 (1984), amended by Pub. L. No. 99-646, 100 Stat. 3614 (1986).

⁴Victim Witness Protection Act of 1982, Pub. L. No. 97-291 § 6(c), 96 Stat. 1248 (1982) [hereinafter VWPA 1982]: "The Attorney General shall assure that all Federal law enforcement agencies outside of the Department of Justice adopt guidelines consistent with subsection (a) of this section."

⁵48 Fed. Reg. 33,774 (1983).

⁶*Id.*

⁷Army Reg. 27-10, *Legal Services: Military Justice*, ch. 18 (1 July 1984).

The development of the law in the area of victim and witness assistance is not confined to statutory enactment or regulation. Federal and state courts have interpreted and applied victim assistance laws, particularly in the areas of sentencing and restitution.

This article traces the development of victim and witness assistance within the federal system.⁸ The VWPA will serve as the starting point, with special emphasis on the VWPA's implementation by the DOJ, the DOD, and the Army. The article then examines the development of case law in the areas of victim impact evidence, restitution, and potential liability for failure to warn victims of crime about the release of a prison inmate. Finally, the article turns to the most recent expression of the will of Congress—the Victims' Rights and Restitution Act of 1990 (1990 Act).⁹ The 1990 Act expands the scope of victim rights and directs all federal agencies involved in law enforcement to make their "best efforts" to ensure that identified victim rights are protected.¹⁰ As will be seen, all these areas impact on the military justice system within the Army.¹¹

Federal Statute

The VWPA provides the following protections and assistance:

Victim Impact Statement

Probation officers are directed to collect information on any loss attributable to the offense, to include financial, social, psychological, or physical harm suffered by any victim of the offense.¹²

⁸The development of victim rights is not confined to the federal sector. A majority of states have enacted victim rights legislation. See Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Disposition*, 77 Calif. L. Rev. 417, 424 (1989); see also Miner, *Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y.L. Sch. L. Rev. 757, 764 (1985).

⁹42 U.S.C. §§ 10606-10607 (1990).

¹⁰Pub. L. No. 101-647, § 502, 104 Stat. 4820 (1990).

¹¹Not all federal victim rights statutes apply to the military. For instance, the Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified at 42 U.S.C. § 10602 (1984)), excludes violations of the Uniform Code of Military Justice from coverage by the Crime Victim's Fund.

¹²Fed. R. Crim. P. 32(c)(2)(D). This rule was amended in 1987 to read, in part, "The report of the presentence investigation shall contain... (D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed."

¹³18 U.S.C. § 1512 (1982). The objectives the Attorney General must consider in implementing the guidelines are found in the section of the Victim Witness Protection Act of 1982 entitled "Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System." See VWPA 1982 § 6(a)(1), amended by Pub. L. 98-473, 98 Stat. 2177 (1984).

¹⁴See Pub. L. No. 98-473, § 1408(b), 98 Stat. 2177 (1984) (amending VWPA 1982 § 6(a)(4)):

Upon request, victims and witnesses (and relatives of victims and witnesses who are minors or relatives of homicide victims) should receive prompt advance notification, if possible, of—

(A) the arrest of an accused;

(B) the initial appearance of an accused before a judicial officer;

(C) the release of the accused pending judicial proceedings; and

(D) proceedings in the prosecution and punishment of the accused (including entry of a plea of guilty, trial, sentencing, and, where a term of imprisonment is imposed, a hearing to determine a parole release date and the release of the accused from such imprisonment).

¹⁵18 U.S.C. §§ 1512-1514 (1982).

¹⁶VWPA 1982 § 6(a)(5), amended by Pub. L. No. 98-473, 98 Stat. 2177 (1984); see also Welling, *Victim Participation in Plea Bargains*, 65 Wash. U.L.Q. 301 (1987).

¹⁷18 U.S.C. §§ 3579-3580 (1982) (recodified at 18 §§ 3663-3664 (1988)).

Services to Victims of Crime

Law enforcement personnel are directed to ensure that victims receive emergency social and medical services and are informed of the availability of victim compensation and community-based treatment programs. Victims also should be informed about their role in the criminal justice system.¹³

Notice to Victims

Victims of serious crimes should receive prompt notification of certain key events—including the subject accused's arrest, trial, and imprisonment—if they provide "the appropriate official with a current address and telephone number."¹⁴

Protection of Witnesses, Victims, and Informants

Criminal sanctions are available against anyone who knowingly uses intimidation, physical force, or retaliation against a witness, victim, or informant. A United States district court also may issue a temporary restraining order, prohibiting harassment of a victim or witness.¹⁵

The Victim's Role in Plea Bargaining

Victims should be consulted by the government's attorney to obtain their views about dismissal, release of the accused from pretrial confinement, plea negotiations, and pretrial diversion. Victims also have the right to be informed and to be present during any open hearing.¹⁶

Restitution

The court may order restitution for offenses that result in damage or loss of property, or result in bodily injury to a victim.¹⁷

Department of Justice Implementation

The guidelines established by the DOJ for victim and witness assistance implemented the statute, while incorporating victim assistance concepts developed within the DOJ.¹⁸ The guidelines are intended to be used by DOJ personnel. The guidelines build on the statute and expand the notification requirements to victims. For instance, with victim impact statements, victims "should be advised as to how to communicate directly with the Probation Officer if he or she so desires. Consistent with available resources and their other responsibilities, federal prosecutors should advocate the interests of victims at the time of sentencing."¹⁹ The section on information services states that victims and witnesses of serious crimes who provide a current address or telephone number should be advised in a timely manner of each major step in the criminal justice process that concerns the accused, to include the sentence imposed, the date the defendant may be eligible for parole, and prior notice of the defendant's release from custody. In the event of an escape, "such victim or witness shall be apprised as soon as possible."²⁰ In addition, "a victim should be notified in advance of any parole hearing."²¹

Department of Defense Implementation

Department of Defense Directive 1030.1 implements the VWPA. It provides guidance that encompasses the original terms of the statute. In the area of victim noti-

fication, DOD Directive 1031.1 provides general guidance: "All victims should be informed of ... [t]he stages in the military criminal justice process of significance to the victim, and the role that the victim plays in that process."²² As previously noted, the 1984 amendment to the VWPA expands the duty to provide notice to victims of serious crimes by requiring prior notice of an inmate's pending parole hearing or release from imprisonment. The 1984 amendment, however, has not been implemented by any subsequent DOD directive.²³

Development of Victim Assistance in Federal Case Law

Victim Impact Evidence

In the federal system, the judicially supervised probation service prepares a presentence report, which is served on counsel for the defendant and the government for comment. The probation officer prepares a victim impact statement as part of the presentence report.²⁴ The probation officer determines the sentencing classifications and sentencing guidelines applicable to the case.²⁵ Accordingly, victim impact statements may be relevant to punishment determinations. The use of victim impact statements for sentencing has been upheld for noncapital cases.²⁶ The Supreme Court decided in *Booth v. Maryland*,²⁷ however, that in the unique circumstance of a capital sentencing hearing, victim impact statements are irrelevant and violative of the eighth amendment. On the other

¹⁸48 Fed. Reg. 33,774 (1983).

¹⁹*Id.*

²⁰*Id.*

²¹*Id.* Procedures for victim and witness notification were published by the Bureau of Prisons at 49 Fed. Reg. 18,385 (1984) (codified at 28 C.F.R. § 551.150-153). The bureau requires that victims or witnesses of serious crimes who want to be notified of a specific inmate's release must make the request to the United States Attorney in the district where the prosecution occurred.

Institution [prison] staff shall promptly NOTIFY the victim and/or witness when his or her approved request for NOTIFICATION has been received. Staff shall advise each approved VICTIM or WITNESS of that person's responsibility for NOTIFYING the Bureau of Prisons of any address and/or telephone number changes.

Id.; see also 55 Fed. Reg. 6178 (1990); Federal Bureau of Prisons, Program Statement 1490.2, Victim and Witness Notification (Nov. 7, 1989). Program Statement 1490.2 provides in part that the United States Attorney's office will forward all requests for notification to the Victim-Witness Coordinator (VWC) in the Bureau of Prison's Central Office, which coordinates victim and witness notifications for the federal system. The VWC verifies the inmate's commitment to federal custody and forwards the request to the warden of the institution where the inmate is confined. Institution staff must prepare a letter informing the victim or witness within five days that the request for notification has been received. The staff is also responsible for notifying the victim or witness within 60 days prior to the inmate's release from custody. In the event of escape, the victim or witness should be notified by telephone.

²²Dep't of Defense Directive 1030.1, Victim and Witness Assistance, para. E.1.b (Aug. 20, 1984) [hereinafter DOD Dir. 1031.1].

²³The duty in DOD Dir. 1030.1 to inform victims of "the stages of the military criminal justice process" is broad enough to encompass posttrial events, to include parole, clemency action, and minimum release dates. The problem is that the directive fails to direct full implementation of the statute.

²⁴See Fed. R. Crim. P. 32(c)(2)(1); see also *United States v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990) (presentence interview of a convicted defendant by a probation officer, as a step in preparing a presentence investigation report, must include the defense counsel if requested by the defendant).

²⁵Fed. R. Crim. P. 32(a)(1); see also Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, The Army Lawyer, July 1988, at 26.

²⁶*United States v. Santana*, 908 F.2d 506 (9th Cir. 1990); *United States v. Monaco*, 852 F.2d 1143 (9th Cir. 1988), cert. denied, 109 S. Ct. 864 (1989); see also Kennard, *supra* note 8, at 428-31, and cases cited therein.

²⁷482 U.S. 496, 504-08 (1987).

hand, the Court held the door open for the limited admission of victim impact evidence.²⁸ In a footnote, the Supreme Court explained the exception to the general prohibition:

[o]ur disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime.... Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant.²⁹

Booth applies to trials by courts-martial.³⁰ Therefore, the introduction of victim impact evidence in military capital cases will be reviewed for compliance with *Booth*.³¹ Although prosecutors face practical problems in understanding when victim impact evidence may be admissible under the narrow exception articulated by the Supreme Court, help may be at hand. *Booth* was a five-to-four decision, with vigorous dissents. Subsequently, the composition of the Court has changed. After some hesitation, the Supreme Court appears ready to readdress *Booth*,³² and the time appears to be ripe for *Booth* to be distinguished or overruled.³³

Restitution

Restitution may be ordered only for offenses under title 18, United States Code, and for some offenses under title

49 involving air piracy.³⁴ When restitution is appropriate, it is included in the victim impact statement by the probation officer. A restitution award under the VWPA is authorized only for losses caused by the specific conduct underlying the offense of conviction.³⁵ Accordingly, an accused charged with multiple offenses, but convicted of only one, may not be ordered to make restitution for losses related to the other offenses.³⁶ The restitution amount must be definite and not in excess of the actual loss. In addition, each victim must be identified positively by the court and the amount of restitution must be judicially established, affording the defendant an opportunity to refute the amount ordered.³⁷ Finally, before accepting a guilty plea, a court must inform a defendant that a restitution order may be part of the sentence.³⁸

Development of Victim Assistance in Military Law

While the court procedures established in the VWPA and the Federal Rules of Criminal Procedure do not apply to trials by courts-martial, the military justice system, nevertheless, recognizes victim and witness rights.³⁹

Victim Impact Evidence

In trials by courts-martial, sentences are adjudged by a military judge or court members. Although the military

²⁸*Id.*; see also *Walton v. Arizona*, 110 S. Ct. 3047 (1990); *South Carolina v. Gathers*, 490 U.S. 805 (1989). *But see Post v. Ohio*, 108 S. Ct. 1061 (1990) (*Marshall and Brennan, JJ.*, dissenting) (victim impact statement should not have been introduced at a sentencing hearing in a capital murder trial before a three-judge panel).

²⁹*Booth*, 482 U.S. at 507 n.10.

³⁰*United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990); see also *United States v. Whitehead*, 30 M.J. 1066 (A.C.M.R. 1990).

³¹ Sentencing procedures for courts-martial referred capital are set forth in *Manual for Courts-Martial, United States*, 1984, R.C.M. 1004(b), (c) [hereinafter R.C.M.]. These procedures allow the trial counsel to present evidence in accordance with R.C.M. 1001(b)(4) to establish one or more aggravating factors. Among the aggravating factors is, "The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim" This opens the door to victim impact evidence. To be admissible under *Booth*, victim impact evidence must relate "directly to the circumstances of the crime." *Booth*, 482 U.S. at 507. Unfortunately, this language offers the practitioner little guidance as to the breadth of the exception.

³² See *Ohio v. Huertas*, 553 N.E.2d 1058 (1990); *cert. granted*, 111 S. Ct. 39 (1990); *cert. dismissed*, 111 S. Ct. 805 (1991). The court may have concluded that the Ohio decision rested on independent state grounds. See *Huertas*, 48 Crim. L. Rep. (BNA) 2079 (U.S. Jan. 23, 1991); see also *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990); *cert. granted*, 111 S. Ct. 1031 (1991); *Wash. Post*, Feb. 16, 1991, at A6 ("The Supreme Court announced yesterday that it would once again consider whether to overrule two recent decisions and allow juries in death penalty cases to hear testimony about the character of the victim and the impact of the murder on the victim's survivors.").

³³ In *South Carolina v. Gathers*, 490 U.S. 805 (1989), a five-justice majority applied the rationale in *Booth* to affirm the South Carolina Supreme Court's decision to reverse a capital sentence. Justice White, who dissented in *Booth*, concurred in *Gathers*, stating, "Unless *Booth* is to be overruled, the judgment below must be affirmed. Hence, I join Justice Brennan's opinion for the Court." *Booth* has been the subject of frequent criticism. See *Huertas*, 553 N.E.2d at 1058 (Douglas, J., dissenting):

The majority in *Booth*, *supra*, at 504, 107 S. Ct. at 2533, stated '[i]n such case, it is the function of the sentencing jury to express the conscience of the community on the ultimate question of life or death.' How can this be done without the sentencing authority knowing all the facts surrounding both the defendant and the victim? Further, the conscience of the community cannot be expressed if the sentencing authority lacks knowledge of the effect the defendant's crime had on the community and especially the family, friends and associates of the victim.

³⁴ See 18 U.S.C. § 3663(a) (1988); Dep't of Justice, *Manual for Special Assistant United States Attorneys Assigned to Criminal Matters and Cases*, vol. I, at 6 (July 2, 1990) (Fines and Restitution) [hereinafter DOJ Manual].

³⁵ *Hughey v. United States*, 110 S. Ct. 1979 (1990).

³⁶ *Id.*

³⁷ *United States v. Angelica*, 859 F.2d 1390, 1395 (9th Cir. 1988).

³⁸ Fed. R. Crim. P. 11(c)(1); DOJ Manual, *supra* note 34, at 10; see also *United States v. Pogue*, 865 F.2d 226 (10th Cir. 1989).

³⁹ See R.C.M. 1001 analysis, app. 21, at A21-63.

does not use probation officers, presentence reports, or sentencing classifications, much of the same information is presented to the court within the protections of an adversarial proceeding.⁴⁰ The discussion to Rule for Courts-Martial 1001(b)(4) states:

Evidence in aggravation may include evidence of financial, social, psychological, and medical impact or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.⁴¹

Generally, victim impact evidence has been admitted by military courts, within certain limits. This evidence has been determined to be relevant because it informs the military judge or court members of "the full measure of the loss suffered by all the victims, including the family and the close community."⁴² Examples of the types of victim impact evidence that have been admitted include the impact of drugs on the ability of a unit to perform its military mission,⁴³ testimony by the victim's parents about the effect of rape upon the victim and her family,⁴⁴ threats by an accused against the victim,⁴⁵ photographs of the murder victim,⁴⁶ diary entries from the victim,⁴⁷ and testimony from the victim's sister, describing the impact of the victim's untimely death on the family.⁴⁸

First, the evidence in aggravation should be related directly to one or more of the offenses for which the accused stands convicted.⁴⁹ Second, the evidence must be relevant.⁵⁰ Finally, the military judge should, upon timely objection, apply the Military Rule of Evidence 403 balancing test before admitting the evidence.⁵¹

In *United States v. Gordon*⁵² the Court of Military Appeals restrictively interpreted the standard for admission of evidence in aggravation. "[T]he aggravating circumstances proffered must directly relate to or result from the accused's offense."⁵³ In *Gordon* the accused was convicted of negligent homicide by diving off a boat and rocking it, causing it to take on water and sink. One soldier drowned as a result. As evidence in aggravation, the brigade commander testified that the accused's offense had an adverse impact on his soldiers' confidence in one another and had undermined the command's paramount concern for safety. The court reversed the sentence, noting that the offense occurred off duty and that two of the three soldiers concerned were from units outside of the brigade. The court, therefore, reasoned that the brigade commander's testimony did not relate directly to the offense. In addition, the court found that "the requirement of R.C.M. 1001(b)(4) that the adverse impact on the unit directly relate to or result from the accused's offense was also not satisfied in this case."⁵⁴ This restrictive interpretation of Rule for Courts-Martial 1001(b)(4) puts the burden on the trial counsel to show a

⁴⁰*Id.*:

Sentencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree This rule allows the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding, to which rules of evidence apply.

See *United States v. Pearson*, 17 M.J. 149, 152-153 (C.M.A. 1984); *United States v. Berger*, 23 M.J. 612 (A.F.C.M.R. 1986), *petition denied*, 25 M.J. 394 (C.M.A. 1987); *United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985), *petition denied*, 22 M.J. 240 (C.M.A. 1986).

⁴¹R.C.M. 1001(b)(4).

⁴²*Pearson*, 17 M.J. at 153.

⁴³*United States v. Fitzhugh*, 14 M.J. 595 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 165 (C.M.A. 1983) (evidence of the adverse impact on the mission was admissible evidence in aggravation when a missile crew commander was involved with drugs).

⁴⁴*United States v. Fontenot*, 29 M.J. 244 (C.M.A. 1989).

⁴⁵*United States v. Rinquette*, 29 M.J. 527 (A.F.C.M.R. 1989).

⁴⁶*United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990); see also *United States v. Mobley*, 28 M.J. 1024 (A.F.C.M.R. 1989).

⁴⁷*United States v. Groveman*, 25 M.J. 796 (A.F.C.M.R. 1988), *petition denied*, 28 M.J. 359 (1989).

⁴⁸*Id.*

⁴⁹*United States v. Witt*, 21 M.J. 637, 641 (A.C.M.R. 1985), *petition denied*, 22 M.J. 347 (C.M.A. 1986).

⁵⁰*Id.* at 641 n.4 ("Evidence is relevant within the meaning of R.C.M. 1001(b)(4) when it is 'important to the determination of a proper sentence.' *United States v. Arceneaux*, 21 M.J. at 572.").

⁵¹*Berger*, 23 M.J. at 612; *Witt*, 21 M.J. at 640; *United States v. Green*, 21 M.J. 633, 636 (A.C.M.R. 1985), *petition denied*, 22 M.J. 349 (C.M.A. 1986).

⁵²31 M.J. 30 (C.M.A. 1990).

⁵³*Id.* at 36.

⁵⁴*Id.* Other examples of restrictive interpretations of R.C.M. 1001(b)(4) include *Antonitis*, 29 M.J. at 217 (trial judge erred by admitting testimony that the accused would lose her security clearance if convicted and therefore, the soldier was of no use to the Army and should be punitively discharged); *Pearson*, 17 M.J. at 153 (trial counsel should avoid emotional appeals by aggrieved family members to the sentencing body—that is, do not "wave the bloody shirt" before the court members); *Groveman*, 25 M.J. at 796 (trial counsel improperly argued the impact of confrontation and cross-examination upon the victim prior to sentencing).

direct cause-and-effect relationship between the offense of which the accused stands convicted and the adverse impact on the victim, unit, or mission.

In capital cases, death may be adjudged only if the members unanimously find, beyond a reasonable doubt, at least one or more aggravating factors set forth in Rule for Courts-Martial 1004(c), and that the aggravating circumstances outweigh the evidence in extenuation and mitigation. The constitutionality of this rule is currently under review before the Court of Military Appeals.⁵⁵ As discussed previously, if *Booth* is not overruled or distinguished by the Supreme Court, military sentencing procedures in capital cases will undergo close scrutiny on appeal.⁵⁶

Restitution

Restitution may be included as a term or condition in a pretrial agreement⁵⁷ or imposed administratively pursuant to article 139 of the Uniform Code of Military Justice (UCMJ).⁵⁸ Criminal violations of the UCMJ specifically are excluded from coverage under the federal Crime Victims Fund.⁵⁹ Although restitution is not authorized specifically as part of a lawful sentence by courts-martial, the loss occasioned by the accused's offense is an acceptable method of determining the amount of the fine to be imposed by a court-martial.⁶⁰ Restitution also has been held to be a substantial matter in extenuation and mitigation.⁶¹ The mechanism to enforce restitution properly may be set forth in a conditional pretrial agreement. One such pretrial agreement provided for a bad-conduct discharge and six months of confinement if full restitution were made before arraignment; otherwise, the convening authority could approve a dishonorable discharge and twelve months of confinement.⁶² Without a built-in

enforcement mechanism, an accused might benefit from a windfall by neglecting or refusing to pay restitution after sentence is imposed. Nevertheless, any enforcement provision that imposes additional confinement will be subject to careful judicial scrutiny and constitutional challenge—particularly if the accused claims to be indigent.⁶³

Role of the Victim-Witness Liaison

The victim-witness liaison [VWL] is designated by the staff judge advocate and has the principle duty of being a facilitator.⁶⁴ The VWL assists victims in obtaining financial, legal, and other social services as appropriate. Some of these services include providing a victim information packet to any known victim, informing victims of the means to seek restitution, and informing them of the case status and appearances.⁶⁵

In addition to forms of assistance required by regulation, the VWL should be aware that other information may be of interest to certain victims and witnesses. Eligibility by the accused for parole, sentence deferment, and clemency frequently are misunderstood areas that the VWL should explain to the victim or witness.⁶⁶

After sentence is adjudged, crime victims may wish to submit their views on the possibility of parole or clemency to the Army Clemency and Parole Board (ACPB). The ACPB reviews the case files of all eligible convicted soldiers for clemency or parole pursuant to criteria established by regulation.⁶⁷ The ACPB considers each case for clemency or parole on its own merits to include, when applicable, six criteria. One criterion is a written statement from the victim—that is, the victim impact statement—together with any relevant evidence for consideration by the ACPB.⁶⁸

⁵⁵United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R.), petition granted, 31 M.J. 395 (C.M.A. 1990). In granting the petition for review, the court decided to consider two constitutional issues generic to the military justice system: "I. Whether the capital punishment process under which appellant was sentenced to death is invalid because it is an impermissible extension of presidential power[; and] II. Whether Rule for Courts-Martial 1004 is unconstitutional on its face." *Id.*; see also Sullivan, *The President's Power to Promulgate Death Penalty Standards*, 125 Mil. L. Rev. 143 (1989).

⁵⁶Military sentencing procedures in capital cases allow the introduction of victim impact evidence in aggravation. See R.C.M. 1004(b), (c).

⁵⁷R.C.M. 705(c)(2)(C); see also United States v. Gregory, 31 M.J. 236 (C.M.A. 1990).

⁵⁸10 U.S.C. § 939 (1982); see also Frezza, *Article 139 and the Victim and Witness Protection Act of 1982*, *The Army Lawyer*, Jan. 1988, at 40.

⁵⁹42 U.S.C. § 10601 (1985) (codifying Victims of Crime Act of 1984).

⁶⁰United States v. Robertson, 27 M.J. 741, 743 (A.C.M.R. 1988), petition denied, 28 M.J. 443 (C.M.A. 1989).

⁶¹United States v. Williams, 28 M.J. 736 (N.M.C.M.R. 1989), petition denied, 28 M.J. 337 (C.M.A. 1989).

⁶²United States v. Foust, 25 M.J. 647 (A.C.M.R. 1987); see also R.C.M. 1003(b)(3).

⁶³See United States v. Roscoe, 31 M.J. 544 (N.M.C.M.R. 1990). The *Roscoe* opinion questions the validity of R.C.M. 1003(b)(3) (fine) and R.C.M. 1113(d)(3) (confinement in lieu of fine).

⁶⁴Army Reg. 27-10, *Legal Services: Military Justice*, ch. 18 (22 Dec. 89) [hereinafter AR 27-10].

⁶⁵*Id.*

⁶⁶See Army Reg. 15-130, *Army Clemency and Parole Boards* (11 Sept. 1989) [hereinafter AR 15-130].

⁶⁷*Id.*

⁶⁸*Id.* para. 3-2a(6). Victim impact statements should be sent to the Army Clemency and Parole Board; 1941 Jefferson Davis Highway; Second Floor; Arlington, VA 22202-4508.

Victims who wish to be notified prior to a convicted soldier's release from confinement—or upon a prisoner's escape—face pragmatic difficulties with the military confinement system. Unlike the federal system, the military has no central office coordinator to manage requests by victims or witnesses for notification. To further complicate matters, often no systematic method exists to predict to which confinement facility a prisoner will go. Presently, the VWL can assist a victim best by determining where the convicted accused will be transferred. The victim, or the VWL on the victim's behalf, can then write the particular confinement facility, requesting notification prior to release of the prisoner.⁶⁹

Victim Consultation

Unlike the federal system, prosecutorial discretion within the military rests with commanders. Consequently, commanders are responsible to consult with victims of serious offenses on decisions to not prefer charges, to impose or release a soldier from pretrial restraint, to dismiss charges, or to negotiate a pretrial agreement.⁷⁰ Typically, the trial counsel is the logical choice to meet face-to-face with the victim as the designee of the commander.⁷¹

Protection of Victims and Witnesses

Obstruction of justice, intimidation, and threats against victims by persons subject to the UCMJ are punishable offenses under UCMJ article 134.⁷² Other means of protection specified by regulation include temporary attach-

ment or reassignment of victims and witnesses who are on active duty, providing a separate waiting area for witnesses, and the role of the VWL in arranging witness interviews to "ensure that witnesses are treated with dignity and respect."⁷³

Failure to Warn: Potential Liability for the Government?

A duty upon the government to warn potential victims of danger prior to the release, or upon the escape, of a convicted prisoner exists under limited circumstances. The source of this duty derives from common law as well as statute and regulation.

Common Law

Typically, suits in federal court alleging breach of a duty to warn have been brought under the Federal Tort Claims Act (FTCA).⁷⁴ The leading case establishing a duty to warn a third person is *Tarasoff v. Regents of University of California*.⁷⁵ The plaintiff in *Tarasoff* stated a cause of action by establishing that a patient told his psychotherapist of his intention to kill the victim. Two months later, the patient carried out his murderous design. The court found that the psychotherapist had an obligation to warn the victim of the threat, based on his special relationship with the patient.⁷⁶ A similar duty to warn has been found to apply to corrections officials and parole board members.⁷⁷

Under common law, no duty existed to warn or to control the conduct of another.⁷⁸ Nevertheless, an official

⁶⁹If the prisoner is at the United States Disciplinary Barracks, requests for notification may also be sent to the Command Judge Advocate, HQ, U.S. Disciplinary Barracks, Fort Leavenworth, KS 66027-5100. For prisoners sent to the Correctional Brigade, requests may be sent to the Office of the Staff Judge Advocate, U.S. Army Correctional Brigade, Fort Riley, KS 66442-5800. This facility, however, tentatively is scheduled for closure in the fourth quarter of 1992.

⁷⁰AR 27-10, para. 18-11.

⁷¹See *id.* para. 18-11b.

⁷²See *id.* para. 18-13.

⁷³*Id.*

⁷⁴See 28 U.S.C. § 1346(b) (1988):

... the district courts, together with the United States District Court for the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful acts or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

This provision does not create an independent cause of action or a substantive right enforceable against the United States. It only confers jurisdiction and waives sovereign immunity if a cause of action or substantive right exists. Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, *Defensive Federal Litigation* at 3-10 (Aug. 1985).

⁷⁵551 P.2d 334 (Cal. 1976); *Chrite v. United States*, 564 F. Supp. 341, 345 (E.D. Mich. 1983) (citing *Tarasoff*, 551 P.2d at 334). The law of the state where the alleged wrongful act or omission occurred governs negligence claims under the FTCA. See *Richards v. United States*, 369 U.S. 1 (1962); *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1952). Accordingly, state statutes and case law are relevant sources of law for causes of action filed under the FTCA.

⁷⁶*Tarasoff*, 551 P.2d at 334.

⁷⁷See *Massey v. Grant*, 679 F. Supp. 711 (W.D. Mich. 1988), *aff'd*, 875 F.2d 865 (6th Cir. 1989).

⁷⁸See *Tarasoff*, 551 P.2d at 343.

holding a position of trust relative to a prisoner, such as a prison warden, may be found to have a "special relationship" with the prisoner. This relationship can create a duty to warn a third person if the official knows that the prisoner has threatened to harm a specific third party. A special relationship may arise between a prisoner and corrections personnel, a counselor, a mental health professional, or even a lawyer.⁷⁹ Accordingly, an official with access to a prisoner should be alert to any information that may create a duty to warn. The test is whether the official has a reasonable basis to believe that certain persons are at greater risk than the general public. As a general rule, past victims and family members of a prisoner have not been construed to be at greater risk, absent evidence of a specific threat.⁸⁰

"Duty to warn" liability cases apply a common test—that is, if a "special relationship" is found to exist, a specifically foreseeable and readily identifiable victim will trigger a duty to warn.⁸¹ In the context of releasing a prisoner from confinement, liability will be imposed only when officials have good reason to believe that a particular person may be jeopardized by the release of a prisoner who has demonstrated the capacity for violence.⁸² An example of potential liability occurs when a prisoner who is known to be dangerous tells an official that he or she intends to injure or kill a particular person upon release. If the prisoner carries out the threat, the victim, or the victim's estate, could have a cause of action under the FTCA against the government and responsible officials of

the confinement facility.⁸³ The government would not, however, be liable merely for releasing or paroling a prisoner. The decision to release or parole is a discretionary function that insulates the government from liability under the FTCA.⁸⁴

A duty to warn also may be created when an official assumes a special duty, such as promising to notify a person prior to a prisoner's release from custody. Such a duty, however, does not continue into perpetuity. The existence of a duty to warn and the imposition of liability will depend upon the proximity in time between the promise to the victim and the injury suffered, as well as a showing of proximate cause.⁸⁵

Statute and Regulation

A statute or regulation creating a duty by the government to warn an identified victim or witness prior to a prisoner's release or parole may lead to a finding of negligence per se when the government fails to warn and an injury is suffered.⁸⁶ The effect of a finding of negligence per se is to relieve the plaintiff from pleading and proving foreseeability. The plaintiff still must prove that the government violated its duty, which was designed to protect the victim against the type of injury that occurred.⁸⁷ The enactment of the Victims' Rights and Restitution Act of 1990 would have created a standard of negligence per se for failure to comply with duties created by statute; the 1990 Act, however, expressly disavowed that liability.⁸⁸

⁷⁹Lawyers have an independent ethical obligation to reveal certain information. Dep't of Army, Pam. 27-26, Rules of Professional Conduct, rule 1.6(b) (31 Dec. 1987):

A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

⁸⁰*Massey*, 679 F. Supp. at 715.

⁸¹*Chrite*, 564 F. Supp. at 345; *Doyle v. United States*, 530 F. Supp. 1278 (C.D. Cal. 1982). *Doyle* was a suit brought against the Army under the FTCA based on the alleged negligence of an Army psychiatrist and officer. The officer discharged a soldier who later murdered a civilian. The court held that the victim was not foreseeable; therefore, no duty to warn existed. See also *Thompson v. Alameda*, 614 P.2d 728 (Cal. 1980).

⁸²*Ferree v. Utah*, 784 P.2d 149 (Utah 1989); *Sheerin v. Iowa*, 434 N.W.2d 633 (Iowa 1989); *Donahoo v. Alabama*, 479 So.2d 1188 (Ala. 1985).

⁸³The cause of action would not accrue, however, if the victim was a soldier. Members of the military are barred from bringing suit under the FTCA for damages sustained incident to their military service. *Feres v. United States*, 340 U.S. 135 (1950).

⁸⁴See *Graves v. United States*, 872 F.2d 133 (6th Cir. 1989); *Fitzpatrick v. Iowa*, 439 N.W.2d 663, 665 (Iowa 1989).

⁸⁵*Weissich v. Marin County, Cal.*, 224 Cal. App. 3d 1069 (1990) In *Weissich* a prosecutor was murdered by a convict who threatened to kill him throughout his 20-year prison term. The court held that state and county officials did not create a duty by the state to warn when they voluntarily promised to keep the prosecutor informed of any criminal conduct by the released inmate, but failed to do so.

⁸⁶*Doyle*, 530 F. Supp. at 1289:

We next consider whether defendant's alleged violation of various Army regulations constitutes defendant's negligence per se pursuant to section 669 of the California Evidence Code as claimed by plaintiff. To prevail upon this claim, plaintiffs must, among other things, establish that the regulation in question was violated; that the injury was the type the regulation sought to prevent; and that the person suffering the injury was among the class sought to be protected.

⁸⁷*Moody v. Boston and Maine Corp.*, ___ F.2d ___ (1st Cir. 1990); see also *Clark v. United States*, 660 F. Supp. 1164 (W.D. Wash. 1987), *aff'd*, 856 F.2d 1433 (9th Cir. 1988). In some states, however, violation of a statute is evidence only of negligence. See *Swift v. United States*, 866 F.2d 507 (1st Cir. 1989).

⁸⁸Section 502(c) of the Victims' Rights and Restitution Act states, "This section does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated in subsection (b)." See 42 U.S.C.A. § 10606 (West Supp. 1990).

The real question concerning victims' rights in the military is both moral and pragmatic. How are victims of serious crimes to know they can ask for prior notification of a prisoner's release when the military does not have a workable notification system and many practitioners are unaware that the right exists? The problem is complicated further by the number of correctional facilities in the Army system and by the difficulty of tracking a convicted soldier to a particular facility. In response, a VWL should be proactive in cases in which a victim of a serious offense expresses concern for personal safety, or in which a reasonable likelihood of that risk may arise upon the release of the accused.⁸⁹ A VWL can, in appropriate cases, facilitate notification by determining where the accused will be shipped and by providing the address of that correctional facility to the victim. The VWL also can assist the victim by writing to the appropriate facility on the victim's behalf, requesting notification.

Victims' Rights and Restitution Act of 1990

The Victims' Rights and Restitution Act of 1990⁹⁰ expresses the will of Congress that federal officials "shall make their best efforts to see that victims of crime are accorded [certain specified] rights."⁹¹ The 1990 Act designates each federal agency and department head as an official responsible for identifying the victims of crime and providing certain specified services. Many of these services already are being performed by the Army under chapter 18 of AR 27-10. Certain services required by the 1990 Act, however, are not provided routinely by the Army. These include informing the victim of the offender's eligibility for parole and providing the earliest possible notice of any parole hearing, escape, work

release, furlough, or any other form of release from custody.⁹² The victim also should be given general information about the corrections process.⁹³

The primary change made by the 1990 Act is to shift the burden from the victim—who previously had to ask for certain services to be provided—to the agency. Now, the responsible official must identify the victims and inform them of their rights under the statute.⁹⁴

The 1990 Act represents a significant increase in victim's rights that will require DOD and the military departments to implement new regulatory provisions.⁹⁵ Implementation of the 1990 Act by the Army will require restructuring victim and witness assistance procedures. The VWL—working with the staff judge advocate, commanders, chief of justice, and trial counsel—has a vital role to play. Every case will require screening to identify the victims of crime. Victims then must be contacted and advised of the services they are entitled to receive on request. The staff judge advocate, commanders, and government counsel must be careful to protect a victim's advisory role in pretrial considerations, to include pretrial agreements and chapter 10⁹⁶ requests. In addition, the VWL has an expanded advisory role after trial, to include providing general information about a convicted accused's eligibility for sentence deferment, clemency, and parole. The VWL also can help link the victim or requesting witness with the appropriate confinement facility. Once a convicted accused is shipped to the confinement facility, however, a VWL will find substantial difficulty in providing anything more than general advice to a victim or witness concerning a prisoner's early release date, furlough from prison, clemency, and parole.

⁸⁹An example of a reasonable likelihood of risk to a victim's or witness's personal safety is when a violent accused vows to wreak bodily harm upon a the victim or witness upon the accused's release from custody.

⁹⁰See 42 U.S.C.A. §§ 10606-10607 (West Supp. 1990).

⁹¹Pub. L. No. 101-647, § 502, 104 Stat. 4820 (1990) (Victim's Rights). Section 502(b) lists the rights of crime victims as follows:

- (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (2) The right to be reasonably protected from the accused offender.
- (3) The right to be notified of court proceedings.
- (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
- (5) The right to confer with attorney for the Government in the case.
- (6) The right to restitution.
- (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

⁹²*Id.* § 503(c)(5):

After trial, a responsible official shall provide a victim the earliest possible notice of—

- (A) the scheduling of a parole hearing for the offender;
- (B) the escape, work release, furlough, or any other form of release from the custody of the offender; and
- (C) the death of the offender, if the offender dies while in custody.

⁹³*Id.* § 503(C)(8).

⁹⁴*Id.* § 503(a):

DESIGNATION OF RESPONSIBLE OFFICIALS.—The head of each department and agency of the United States engaged in the detection, investigation, or prosecution of crime shall designate by names and office titles the persons who will be responsible for identifying the victims of crime and performing the services described in subsection (c) at each stage of a criminal case.

⁹⁵A new Department of Defense directive can be expected to supersede DOD Dir. 1030.1. Implementation by the Army will be done in chapter 18 of AR 27-10.

⁹⁶Army Reg. 635-200, Personnel Separations: Enlisted Personnel, ch. 10 (17 Oct. 1990) (discharge for the good of the service).

The Army's confinement system needs to develop a mechanism to provide the notice required by statute. The centralized system of victim and witness notification that currently exists in the federal system of prisons provides a useful model for emulation.

Conclusion

The development of victim and witness assistance in the federal system has its parallel in the military justice system. The victim-witness liaison, trial counsel, and com-

mander in the military fill the role of the United States Attorney in the federal system. Although the military does not use sentencing schedules, probation officers, or presentence reports, most of the information presented in these reports is admissible in the adversarial setting of a trial by court-martial. The lack of a workable notification procedure is a deficiency in the Army's system for victim and witness assistance. This deficiency will have to be remedied to comply with the Victims' Rights and Restitution Act of 1990.

Regimental News From the Desk of the Sergeant Major

Sergeant Major Carlo Roquemore

The Self-Development Test for Legal Noncommissioned Officers and Court Reporters

This article describes recent changes in the Army Individual Training Evaluation Program (ITEP), *see* Army Reg. 350-37, Army Individual Training Evaluation Program (29 Jan. 1986), as they apply to enlisted soldiers in The Judge Advocate General's Corps Regiment. Most significant of these is the Army's change in the method used to evaluate individual skill proficiency—that is, the Noncommissioned Officer (NCO) Self-Development Test (SDT).

Background

On 3 July 1990, the Chief of Staff of the Army (CSA) announced a tasking to eliminate the Skill Qualification Test (SQT) by development and implementation of a new self-development test for noncommissioned officers in the ranks of sergeant, staff sergeant, and sergeant first class. The initial goal for implementation within the active Army was 1 October 1991. On 3 August 1990, the CSA approved a development and implementation plan for the SDT presented by the Training and Doctrine Command (TRADOC). Subsequently, TRADOC requested immediate termination of the SQT and suspension of the SDT until fiscal year 1993, because of Operations Desert Shield and Desert Storm. The Department of the Army decision on that request was to continue implementation as planned for all nondeployed soldiers. Considering the situation in Southwest Asia, the Deputy Chief of Staff for Personnel will ensure that SDT results are not used for Enlisted Personnel Management System (EPMS) purposes until fiscal year 1993.

Testing Goals

The SDT was designed to evaluate and compare the proficiency of soldiers in the same military occupational specialty (MOS) and skill level, to provide an indicator for

use in EPMS decisions, and to provide commanders with objective information on individual soldier strengths and weaknesses. The goal of the SDT is not to discriminate between the proficient and less proficient NCO, but instead to discriminate between varying degrees of knowledge among NCOs. It is not a measure of either MOS or task proficiency, but more a measure of the soldier's general working knowledge of his or her MOS.

Test Development

The SDT will be administered by the existing training standards officer (TSO) network. Active component soldiers will test each year while Reserve component—that is, United States Army Reserve and Army National Guard—soldiers will test every two years. A pool of leadership and training questions were developed by the Combined Arms Command, Sergeants Major Academy, and the Center for Army Leadership. SDTs using these questions were drafted for the MOSs 11B, 12B, 55D, 88M, and 96B. The questions then were forwarded by TRADOC to the major Army commands for review. On 22 March 1991, the Army Training Support Center announced that the SDT will be administered using the same schedule as the SQT. Accordingly, the schedule will include a staggered three-month window for the active component and a twelve-month period for reserve component soldiers. An "SDT Notice" will be provided to all soldiers prior to testing.

Test Windows

Legal NCOs and court reporters—MOSs 71D and 71E—in skill levels 2, 3, and 4 will take their last SQT from August through October 1991. Note that the last SQT for legal specialists in skill level 1 was from August through October 1990. The first SDT for legal NCOs and court reporters will be administered from August through

October 1992 for active component soldiers, and from August 1993 through July 1994 for reserve component soldiers. Active Guard Reserve (AGR) soldiers stationed at active Army units or agencies, however, will be tested during the active component test window.

Test Contents and Administration

Each SDT will contain twenty leadership and twenty training questions, with progressive skill levels. The leadership questions will be taken from Department of the Army Field Manual (FM) 22-100, *Leadership*; FM 22-101, *Leadership Counseling*; and FM 22-102, *Soldier Team Development*. The training questions will be taken from FM 25-101, *Battle Focused Training*. The remaining questions will be taken from validated MOS question pools and will be based on *Soldier's Manual* performance measures with supporting references. The subject area, task number, task title, and supporting references from which the MOS-specific questions are taken will be indicated on each SDT Notice. A written test supplement will continue to be supplied, which will contain the appropriate portions of the references identified in the SDT Notice.

Studying for the SDT will be each soldier's individual responsibility. Although unit training time for SDT training will not be scheduled, chief legal NCOs should continue their SQT training programs in preparation for the 1991 SQT. Armywide, the SDT test time is not to exceed two hours. TRADOC, however, has approved a three-hour test time for 71D, 71E, and a few other MOSs based on their highly technical subject matter. The leadership and training questions are expected to account for thirty to forty minutes of test time, with the MOS questions taking the remaining 140 to 150 minutes. About forty percent of the soldier's score will be based on the leadership and training questions, and sixty percent on MOS knowledge. The Army Training Support Center will provide SDT feedback to the same individuals, units, and agencies that presently receive SQT results. How the SDT will be scored, however, has not yet been resolved.

SDT Publications

On 26 October 1990, the Department of the Army notified Army Staff and major commands (MACOM) that the United States Army Publications Distribution Center (USAPDC), Baltimore, Maryland, had assigned the nomenclature of "SDT PUBS" to the four field manuals identified above. The "SDT PUBS" are to be distributed as a set. Requests for the sets should have been submitted before 22 November 1990, using DA Form 4569, USAAGPC Requisition Code Sheet, mailed to USADPC, 2800 Eastern Boulevard, Baltimore, MD 21220. Units in the field should have received ordered sets by March 1991. The quantity ordered should have been based on the March 1991 unit assigned strength as reflected on the Table of Distribution and Allowances (TDA) or Table of

Organization and Equipment (TO&E or MTO&E). The chain of command ensures each NCO receives the initial set as a personal copy, for which the NCO will be personally responsible to maintain and retain. The hotline for critical requirements is AUTOVON 584-2533. The point of contact for "SDT PUBS" questions is Mrs. Balwinski, USAPPC, Alexandria, VA; AUTOVON 221-6289.

Soldiers Training Publications

The draft 1992 edition of the *Soldier's Manual and Trainer's Guide for Legal Specialists*, STP 12-71D15-SM-TG, and the *Soldier's Manual and Trainer's Guide for Court Reporters*, STP 12-71E24-SM-TG, was sent to thirty various MACOMs and staff judge advocate offices for review on 5 March 1991. These soldiers training publications (STP or *Soldiers Manual*) incorporate new tasks in the areas of legal assistance, claims (both affirmative and tort claims), and processing Reserve component jurisdiction. Tasks pertaining to the processing of court-martial and records of trial have been restructured and LAAWS automation has been integrated into task summaries where applicable.

Effective 1 April 1990, USAPDC ceased "pushing" *Soldiers Manuals* to units automatically. Publications clerks must use pinpoint distribution to identify enlisted STP requirements on the DA 12-series forms and send the information to USAPDC to "pull" the STPs to the unit. Department of the Army Pamphlet 25-33 (DA Pam 25-33), *The Standard Army Publications System (STAR-PUBS) Revision of the DA Form 12-Series Forms, Usage and Procedures*, contains the directions that must be followed. The appropriate regulation and block numbers for each STP required is located in DA Pam 25-30, *Consolidated Index of Army Publications and Blank Forms*, and entered on DA Form 12-99-R. The quantity ordered is based on the authorized MOS strength as shown on the unit's TDA, TO&E, or MTO&E, as mentioned above. For active component units, request STPs to support any soldiers who are not authorized, but will be assigned to the unit for more than three months. If orders are not received within eight weeks, contact USAPDC, Baltimore, MD, at AUTOVON 584-2533. Be sure to have the pinpoint account number ready.

Chief legal NCOs and supervisors should have their pinpoint accounts on-line. This is extremely important to ensure that all units receive the appropriate number of STPs to support their populations. Note that the 1992 STP, which will be fielded approximately January 1992, will be the primary reference for MOS-specific questions used on the first SDT.

The point-of-contact for the SDT is Sergeant First Class David R. Phelps, SQT/SDT Development, Legal Specialist Course, United States Army Soldier Support Center, Fort Benjamin Harrison, IN 46216; AUTOVON 699-7865.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Reserve Component Judge Advocate Survey

The Legal Assistance Task Force—Desert Storm Demobilization is compiling information on all Reserve component judge advocates. A packet was mailed to each Reserve component judge advocate on 1 May 1991. Recipients are requested to complete the survey form included in the packet and return the form to the Task Force as soon as possible. A *Reserve Component Legal Assistance Directory* then will be published.

Any Reserve component judge advocate not receiving a packet should contact Major Michael McCabe or Captain Karl Kadon, Legal Assistance Task Force—Desert Storm Demobilization, Nassif Building, Room 234, 5611 Columbia Pike, Falls Church, VA 22041-5013, or call (703) 756-0456 or -8361.

IDT Points: A Key for IMAs to Enhanced Retirement Value

Paragraph 2-1(b) of Army Regulation (AR) 140-185 provides that individual mobilization augmentees (IMAs) can earn a maximum of sixty retirement points annually for membership and inactive duty training (IDT). IMAs automatically receive fifteen points for membership in the Army Reserves. Accordingly, reservists have the opportunity to earn as many as forty-five additional points by performing IDT or assigned special projects approved in advance by their IMA organization.

The Army regulation provides a set of rules for IMAs to calculate the points earned for IDT. These provisions are termed the two-hour rule, the two/eight-hour rule, and the four-hour rule. Each rule covers a specific type of training by the IMA and table 2-1 of AR 140-185 matches the training with the corresponding rule.

The two/eight-hour rule specified in paragraph 2-4(b)(3) of AR 140-185 covers most of the training in which judge advocate IMAs participate, such as specially assigned projects. This rule authorizes one point when an individual performs two or more hours of training, and two points when he or she performs eight or more hours of training in one calendar day. Under the two/eight-hour rule, an IMA can earn a maximum of two points in one calendar day. The second rule—the two-hour rule—will apply less frequently to an IMA's training because it covers activities such as attending conventions and meetings of professional associations. The reservist receives one point for two hours or more of this kind of training. The maximum number of points that the two-hour rule allows is one point per day, in accordance with paragraph 2-4(b)(2) of AR 140-185. The principal differences between these two rules are the type of training activity

and the maximum number of points earned in one day. Although most judge advocate IDT periods fall under the two/eight-hour rule, the IMA should consult table 2-1 of AR 140-185 to identify the appropriate rule that pertains to his or her IDT.

In addition to the IMA unit of assignment, an IMA may be attached by ARPERCEN to another organization—either Reserve or active. The IMA is allowed to work without pay for the organization of attachment for IDT points. The type of work an IMA may do while attached includes the full array of judge advocate work. When the participation with the organization of attachment is attendance at a scheduled training assembly, paragraph 2-4(b)(1) of AR 140-185 provides a special rule for retirement points—the four-hour rule. Under this rule an IMA earns one IDT point for each four-hour period of scheduled assembly he or she performs with the attached organization. Scheduled assemblies include UTA, RST, ET, ATA or a make-up assembly. Reservists who want to earn points in this manner must be attached properly to the organization that conducts the scheduled assemblies.

To qualify for a "good" retirement year, an IMA must accumulate at least fifty points. Normally, the reservist earns these points in the following manner: fifteen membership points, twelve annual training (AT) points, and twenty-three IDT points. AR 140-185 permits the IMA to earn up to forty-five IDT points each year. Accordingly, if he or she performs no AT or other active duty, but earns the full forty-five IDT points each year, the IMA's retirement pay will be approximately twenty percent more than it would be if he or she only met the "good" year minimum of fifty points. If the IMA performs the average twelve-day AT and earns the full forty-five IDT points each year, his or her retirement pay will be approximately forty-four percent higher than if he or she gets only fifty points per year.

IMAs who want to earn extra IDT points should contact their IMA organizations for special projects. For convenience, or for other reasons, IMAs also may want to request that ARPERCEN attach them to another unit so that they may drill for points. Typical special projects assigned by IMA organizations include professional reading periods, research and writing assignments, and legal reviews of drafts of Army regulations and other publications. IMAs also are encouraged to present special projects to their IMA organizations for approval. The IMA, however, may earn IDT points from work on a special project only when the IMA organization has approved it in advance. Accordingly, IMAs should not begin work on special projects until their IMA organizations have approved them.

CLE News

1. Resident Course Quotas.

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule.

1991

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 10th Operational Law Course (5F-F47).

23-27 September: 4th Installation Contracting Course (5F-F18).

3. Civilian Sponsored CLE Courses.

September 1991

4-5: ESI, Terminations, Washington, D.C.

6-7: LSU, 1991 Recent Developments in Legislation and Jurisprudence, New Orleans, LA.

11-12: ESI, Claims and Disputes, Washington, D.C.

12-13: LSU, 1991 Recent Developments in Legislation and Jurisprudence, Shreveport, LA.

15-20: AAJE, Civil Trial Skills Workshop, Monterey, CA.

17-20: ESI, ADP/Telecommunications Contracting, Denver, CO.

19-20: EEI, Environmental Insurance Law Institute, Houston, TX.

19-20: EEI, Air Toxics Regulation Conference, Atlanta, GA.

20: NYSBA, Structured Settlements, New York, NY.

20-21: LSU, 1991 Recent Developments in Legislation and Jurisprudence, Baton Rouge, LA.

23-24: FP, Franchising, Washington, D.C.

23-25: FP, Changes and Claims in Government Construction, Washington, D.C.

23-25: FP, Practical Environmental Law, Williamsburg, VA.

23-27: ESI, Federal Contracting Basics, Denver, CO.

24-27: ESI, Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

26-27: LSU, 1991 Recent Developments in Legislation and Jurisprudence, Lake Charles, LA.

27: NYSBA, The Art of Cross Examination, Albany, NY.

27: NYSBA, Structured Settlements, Long Island, NY.

27: NYSBA, Alternate Dispute Resolution, New York, NY.

30-Oct 2: FP, Practical Construction Law, Santa Fe, NM.

30-Oct 2: FP, Government Contract Audits and Reviews, Washington, D.C.

30-Oct 2: FP, Export Control of Equipment and Technology, Washington, D.C.

30-Oct 2: FP, Pension Law Today, Boston, MA.

30-Oct 4: ESI, Accounting for Costs on Government Contracts, Vienna, VA.

For further information on civilian courses, please contact the institution offering the course. The addresses appear in the February 1991 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates.

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually of course
Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
North Carolina	28 February of succeeding year
North Dakota	31 July annually
Ohio	Every two years by 31 January
Oklahoma	15 February annually
Oregon	Initially date of birth—thereafter every three years except new admittees and reinstated members report an initial one-year period
South Carolina	15 January annually
Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1991 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center.

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per

hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified

and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).
 AD A229148 Government Contract Law Deskbook Vol 1/ADK-CAC-1-90-1 (194 pgs).
 AD A229149 Government Contract Law Deskbook, Vol 2/ADK-CAC-1-90-2 (213 pgs).
 AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
 AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).
 AD B135492 Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).
 AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).
 AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
 AD A226159 Model Tax Assistance Program/JA-275-90 (101 pgs).
 AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).
 AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).
 AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
 AD A229781 Legal Assistance Guide: Family Law/ACIL-ST-263-90 (711 pgs).
 *AD 230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).
 *AD 230991 Legal Assistance Guide: Wills/JA-262-90 (488 pgs).

Administrative and Civil Law

- AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).
 AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

- AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).
 AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
 AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

- AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).
 AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
 AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
 AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).
 AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
 AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
 AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).
 *AD A233-621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets.

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Armywide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDCs.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms are in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraph] above may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements are in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, one may be requested by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. They may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. *New publications and changes to existing publications.*

<u>Number</u>	<u>Title</u>	<u>Date</u>
DA Pam 27-30	Index of Publications and Blank Forms with change 1 dated 31 Jan 91	31 Jan 91

JFTR	Joint Federal Travel Regulations Vol. 2, Civilian Personnel, Change 306	1 Apr 91
JFTR	Joint Federal Travel Regulations—Uniformed Services, Change 50	1 Feb 91
	DOD Military Pay and Allowances, Change 21	2 Aug 90

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. Instructions for Downloading Files From the OTJAG Bulletin Board System.

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here, until you hear a beep, which signals that file transfer is complete. The file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed file, it will be usable on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{SPACE}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

<u>Filename</u>	<u>Title</u>
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
330XALL.ZIP	JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division

ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notarial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2

JA296C.ZIP Administrative & Civil Law Handbook
3
JA296D.ZIP Administrative & Civil Law Deskbook 4
JA296F.ARC Administrative & Civil Law Deskbook 6
YIR89.ZIP Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

“postmaster@jags2.jag.virginia.edu”

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to “crankc(lee)” for PROFS.

b. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, The Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are Autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

6. Literature and Publications Office Items.

a. The School currently has a large inventory of back issues of *The Army Lawyer* and the *Military Law Review*. Practitioners who desire back issues of either of these publications should send a request to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Not all issues are available and some are in limited quantities. Accordingly, we will fill requests in the order that they arrive by mail.

b. Volume 131 of the *Military Law Review* encountered shipping problems. If you have not received it, please write to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781.



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