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and the New Article 120?**  
*Major Joel P. Cummings*

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## Is Article 125, Sodomy a Dead Letter in Light of *Lawrence v. Texas* and the New Article 120?

Major Joel P. Cummings\*

“[Y]our friend here is only mostly dead. There’s a big difference between mostly dead and all dead. . . .  
Now mostly dead, he’s still slightly alive.”<sup>1</sup>

### I. Introduction

Is Article 125, Sodomy a dead letter? Like Miracle Max’s patient in *The Princess Bride*, maybe Article 125 is only mostly dead thus still slightly alive? Since the inception of the Uniform Code of Military Justice (UCMJ) in 1950,<sup>2</sup> the military has used Article 125 to prosecute consensual and non-consensual sexual conduct.<sup>3</sup> Since its creation and until recently, sodomy law has remained relatively unchanged and full of life.<sup>4</sup>

Sodomy is an unnatural carnal copulation with another person or animal: including fellatio, cunnilingus, or anal sex.<sup>5</sup> Sodomy is a general intent crime punishable regardless of the consent or the age of the parties.<sup>6</sup> There are three kinds of sodomy. The first kind, forcible sodomy, is done by force and without consent of the other person.<sup>7</sup> The second kind, underage sodomy, has two variations. It is done either with a child under the age of twelve or with a child between twelve and sixteen.<sup>8</sup> For purposes of this discussion, nonconsensual sodomy constitutes the first two categories, forcible and underage. Finally, the third kind, consensual or non-forcible sodomy, is all other sodomy that is not done by force and not done with someone under sixteen years old.<sup>9</sup>

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<sup>1</sup> THE PRINCESS BRIDE (20th Century Fox 1987) (quoting actor Billy Crystal playing the role of Miracle Max).

<sup>2</sup> SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 17–24 (Feb. 2005), available at [http://www.defenselink.mil/dodgc/php/docs/subcommittee\\_reportMarkHarvey1-13-05.doc](http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc) (discussing the history of sexual assault crimes in the military). With the adoption of the Uniform Code of Military Justice (UCMJ) in 1950 and with the publication of the *Manual for Courts-Martial (MCM)* in 1951, the military criminalized sodomy which is in essentially the same form today. *Id.* at 20. Until 1951, the *MCM* and Articles of War did not specifically prohibit sodomy. *Id.* at 24. The first Articles of War adopted in 1775 contemplated that commanders would turn over Soldiers accused of crimes to the local civil authorities. *Id.* at 17. Prior to 1951, a servicemember could still be punished for sodomy provided the commander delivered the accused over to the civil authorities or prosecuted under a more general article. *Id.* With the adoption of the UCMJ, commanders now had criminal jurisdiction over their servicemembers regardless of whether or not the civil authorities had the capacity to prosecute. *Id.* at 21. The 1950 UCMJ adopted many common law crimes existing at the time including the crime of sodomy. *Id.* at 24. See *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991) (discussing the history of military sodomy crimes).

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51c (2008) [hereinafter *MCM*].

It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

*Id.* ¶ 51c. “Penetration, however slight, is sufficient to complete the offense.” *Id.* at pt. IV, ¶ 51a.

<sup>4</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”) (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)); *United States v. Henderson*, 34 M.J. 174 (1992) (upholding Article 125 based upon *Bowers*, 478 U.S. 186).

<sup>5</sup> *MCM*, *supra* note 3, pt. IV, ¶ 51c.; *Henderson*, 34 M.J. 174 (holding Article 125(a) included heterosexual fellatio).

<sup>6</sup> See *id.* pt. IV, ¶ 51a (the general intent crime is complete upon unnatural carnal copulation with another person or animal and only the slightest penetration is sufficient).

<sup>7</sup> *Id.* pt. IV, ¶ 51b(4) (“That the act was done by force and without the consent of the other person.”).

<sup>8</sup> *Id.* pt. IV, ¶ 51b(2), (3).

<sup>9</sup> *Id.* pt. IV, ¶ 51b, e. Sodomy has one essential element of carnal copulation with another certain person or with an animal and three aggravating elements to be added as appropriate. *Id.* pt. IV, ¶ 51b. All sodomy crimes allow the possibility of a dishonorable discharge and total forfeiture of all pay and allowances. *Id.* pt. IV, ¶ 51e. The presence of an aggravating element would increase the maximum confinement allowable. *Id.* Without an aggravating element (meaning adult, non-forcible, unnatural carnal copulation), the maximum amount of confinement is five years. *Id.* If the sodomy victim is under twelve

In the last six years, two developments call into question the vitality of Article 125. First, the Supreme Court invalidated a state statute criminalizing consensual sodomy.<sup>10</sup> In the 2003 decision of *Lawrence v. Texas*, the Supreme Court found a right to privacy protecting consensual sexual relations in the home which was outside of the Government's power to criminalize.<sup>11</sup> This seems to wipe out consensual sodomy.

The second development began in 2004 when Congress ordered a study into reforming military sexual assault crimes including sodomy.<sup>12</sup> As a result of the study, Congress enacted significant reforms to sexual assault prosecutions in the military.<sup>13</sup> As of 1 October 2007, nonconsensual, underage or forcible sex crimes are punishable under the new Article 120, UCMJ.<sup>14</sup> Article 120 seems to replace forcible and underage sodomy.

Understanding what is alive or dead in Article 125 requires separating its goals of punishing both consensual and non-consensual conduct. In order to punish consensual sodomy, practitioners must understand when military interests trump privacy rights. In order to punish non-consensual (meaning forcible or underage) sodomy, practitioners must understand the impact of the new Article 120. Taking these two influences together, military justice practitioners should relegate Article 125 to consensual, adult sodomy which is prejudicial to good order and discipline, and let the new Article 120 do the heavy lifting on forcible or underage sex crimes.

This article separately examines consensual and non-consensual sexual misconduct and then explores the intersection of the two. For consensual sodomy, Section II shows how judges in providence inquiries or trial counsel in contested cases should be able to meet the low constitutional threshold for an Article 125 conviction. For Article 125's non-consensual sodomy, Section III argues that the new Article 120 replaces forcible sodomy and underage sodomy through the canons of statutory interpretation. Section IV discusses the intersection between the remainder of Article 125 and the new Article 120.

## II. Article 125's Consensual Sodomy Is Mostly Alive

### A. Background on Consensual Sodomy Before 2003

Prior to 2003, sodomy prosecutions presented little constitutional concern. The Supreme Court resolved the issue in its 1986 decision, *Bowers v. Hardwick*.<sup>15</sup> The *Bowers* case involved two homosexual adults who engaged in a private act of consensual sodomy.<sup>16</sup> The opinion held that the U.S. Constitution did not prevent a state from criminalizing consensual sodomy, even in the privacy of a home.<sup>17</sup> The *Bowers* Court upheld a law similar to Article 125 which punished sodomy regardless of the parties' gender even if the act was private and consensual.<sup>18</sup>

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years of age or if the sodomy is done by force and without consent, the maximum punishment is life without parole. *Id.* If the victim is over twelve but under sixteen years of age, the maximum punishment is twenty years confinement. *Id.* All other cases of sodomy (non-forcible and adult) allow a maximum sentence of five years confinement. *Id.*

<sup>10</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>11</sup> *Id.*

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government.

*Id.*

<sup>12</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 1 (discussing the genesis of the reform movement).

<sup>13</sup> UCMJ art. 120 (2005), amended by National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256. Article 120 was formerly known as "Rape and carnal knowledge" and only addressed forcible and underage vaginal intercourse. *Id.* Article 120 now has fourteen enumerated offenses intended to cover all non-consensual or underage sexual misconduct. *Id.*

<sup>14</sup> See § 552, 119 Stat. 3256 (expanding the nature of the physical act punished by Article 120 from narrowly-defined sexual intercourse to broadly-defined "sexual act" and "sexual contact"); Exec. Order No. 13,447, 3 C.F.R. 278 (2008) (repealing several sex crimes in Article 134 such as assault-indecent, indecent acts or liberties with a child and indecent acts with another since those are now covered in Article 120).

<sup>15</sup> 478 U.S. 186, 188 (1986).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 192-94.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. . . . Against this background, to claim that a right

Since the UCMJ sodomy statute is similar to the state statute upheld in *Bowers*, the Court of Appeals for the Armed Forces (CAAF) easily upheld the constitutionality of Article 125.<sup>19</sup> In *United States v. Henderson*, the CAAF relied on *Bowers* to uphold Article 125 as applied to heterosexual consensual sodomy.<sup>20</sup> The *Henderson* court upheld a sodomy conviction based on consensual, adult, heterosexual fellatio between a Marine recruiter and a high school student.<sup>21</sup> At least until 2003, Article 125 prohibited private, non-adulterous, noncommercial fellatio, cunnilingus, or anal sex regardless if it was a homosexual or heterosexual act based on the *Bowers-Henderson* line of cases.<sup>22</sup>

In 2003, *Lawrence v. Texas* overruled *Bowers v. Hardwick* and in doing so created a constitutional right to engage in consensual, private, adult sexual conduct.<sup>23</sup> *Lawrence* involved two men convicted of violating a Texas statute prohibiting two persons of the same sex from engaging in certain sexual conduct.<sup>24</sup> The petitioners were engaging in anal sodomy when police entered their home in response to a reported weapons disturbance.<sup>25</sup> The Supreme Court ruled that two consenting adults, either homosexual or heterosexual, had a right to sexual conduct in the privacy of a home free from criminal penalty.<sup>26</sup> This right is in apparent conflict with Article 125's prohibition of private, consensual sodomy.

## B. *Lawrence-Marcum* Cases; Privacy Rights Limit Article 125

### 1. *The Lawrence Court Giveth and It Taketh Away*

In order to understand the effect of *Lawrence* on Article 125, one has to first understand what the *Lawrence* liberty interest is. The *Lawrence* Court uses sweeping, broad language in defining this liberty interest<sup>27</sup>

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making private sexual conduct a crime. Their right to liberty under the Due Process clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>28</sup>

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to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

*Id.* (citing Apasu-Gbotsu et al., *supra* note 4, at 524–25).

<sup>18</sup> Aside from the inclusion of bestiality in the Article 125, the Georgia statute effectively criminalized the same conduct that is unnatural carnal copulation (sodomy) in Article 125. Compare *id.* at 188 (quoting GA. CODE ANN. § 16-6-2 (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.")), with MCM, *supra* note 3, pt. IV, ¶ 51c.

<sup>19</sup> *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) (holding no right to privacy in the federal constitution that invalidated UCMJ Article 125, which included heterosexual fellatio); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992) (relying on *Bowers* and holding UCMJ Article 125, sodomy is constitutional).

<sup>20</sup> *Henderson*, 34 M.J. at 178 (ruling on broader grounds than *Bowers*, which limited itself to homosexual sodomy, not heterosexual sodomy).

<sup>21</sup> *Id.*

<sup>22</sup> *United States v. Gates*, 40 M.J. 354 (C.M.A. 1994) (ruling that a conviction for engaging in private, non-adulterous, non-commercial, consensual, heterosexual fellatio does not violate penumbral rights reserved in Ninth Amendment or due process and equal protection guaranteed in Fifth Amendment); *United States v. Hall*, 34 M.J. 695 (C.M.A. 1991) (holding that Article 125 does not unconstitutionally infringe on right to privacy by criminalizing consensual acts of heterosexual anal intercourse).

<sup>23</sup> 539 U.S. 558, 578 (2003) (overruling *Bowers*, 478 U.S. 186).

<sup>24</sup> *Id.* at 563 (invalidating a conviction under TEX. PENAL CODE ANN. § 21.06(a) (2003) which punished same-sex deviate sexual intercourse defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or anus of another person with an object").

<sup>25</sup> *Id.* at 562.

<sup>26</sup> *Id.* at 575, 578.

<sup>27</sup> *Id.* at 578; see *id.* at 575 (holding that the liberty interest is founded on grounds broader than the Equal Protection clause in order to protect both homosexual and heterosexual sodomy).

<sup>28</sup> *Id.* at 578 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

The opinion specifically extends the liberty interest to both homosexual and heterosexual sodomy if done in private between two consenting adults.<sup>29</sup>

In order to contain the use of precedent, the *Lawrence* Court was careful to list the situations to which the liberty interest might not extend:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.<sup>30</sup>

In sum, the constitutional right in *Lawrence* is apparently limited to circumstances similar to the facts of the case: private, consensual sodomy between two adults. Because this was a civilian case, the *Lawrence* court did not address any limits as specifically applied to the military.

## 2. Marcum Finds a Right to Non-prejudicial Sodomy

Prior to *Lawrence*, in the case of *Parker v. Levy*, the Supreme Court recognized that constitutional rights may apply differently in the military context.<sup>31</sup> The CAAF has limited the application of certain constitutional rights to servicemembers.<sup>32</sup> The CAAF had its first opportunity to apply *Lawrence* to Article 125 in *United States v. Marcum*.<sup>33</sup> Thus, when the CAAF chose the *Marcum* case, the court had the benefit of a history of balancing constitutional rights with military interests.<sup>34</sup>

On 21 May 2000, a court-martial found Technical Sergeant (TSgt) Marcum not guilty of forcible sodomy but guilty of non-forcible (consensual) sodomy in violation of Article 125.<sup>35</sup> The trial established that TSgt Marcum often socialized with airmen from his flight at parties involving alcohol.<sup>36</sup> After these parties, these airmen often spent the night at TSgt Marcum's off base home.<sup>37</sup> After one such party, a subordinate of TSgt Marcum, Senior Airman (SrA) Harrison, spent the night on TSgt Marcum's couch.<sup>38</sup> During the night, SrA Harrison awoke to find TSgt Marcum orally sodomizing him.<sup>39</sup>

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<sup>29</sup> *Id.*; see *id.* at 575 (holding that the liberty interest is protects both homosexual and heterosexual sodomy).

<sup>30</sup> *Id.* at 578 (excluding from the right cases involving minors, persons who may be injured or coerced, persons situated in relationships where consent might not easily be refused, public conduct, prostitution, or same sex marriage). After using broad language to establish the right, the exceptions swallow the rule.

<sup>31</sup> 417 U.S. 733, 743 (1974).

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.

*Id.* (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

<sup>32</sup> In these cases, the court balances constitutional rights with the military interest in maintaining disciplined armed forces. *United States v. McCarthy*, 38 M.J. 398, 400 (C.M.A. 1993) (holding a warrantless entry into a military barracks to effectuate an apprehension did not violate the Fourth Amendment); *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972) (holding that the right to free speech in the armed services is not unlimited and must be brought into balance with the greater interest of defense of the country).

<sup>33</sup> *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

<sup>34</sup> *Id.* at 205.

[T]his Court has consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite.

At the same time, these constitutional rights may apply differently to members of the armed forces than they do to civilians.

*Id.* (citations omitted).

<sup>35</sup> *Id.* at 201.

<sup>36</sup> *Id.* at 200.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

The court-martial panel convicted TSgt Marcum of sodomy but did not find the element of “force or without consent.”<sup>40</sup> Using a consent defense at trial, TSgt Marcum testified that the conduct was “equally participatory.”<sup>41</sup> The defense showed that after the incident, SrA Harrison continued his friendship with TSgt Marcum. Furthermore, the two went salsa dancing together and exchanged numerous emails.<sup>42</sup> On appeal, TSgt Marcum argued that his conviction for consensual sodomy in the privacy of his home must be set aside in light of *Lawrence v. Texas*.<sup>43</sup>

In *Marcum*, the CAAF held that *Lawrence v. Texas* requires a case by case review of constitutionality rather than a facial attack on Article 125 itself.<sup>44</sup>

This as-applied analysis requires consideration of three questions. First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior of factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?<sup>45</sup>

In other words, the *Marcum* court reads the *Lawrence* right to privacy as broad, but with many exceptions.<sup>46</sup>

According to the first prong of the *Marcum* test, if the sodomy is consensual, then it is within the *Lawrence* liberty interest.<sup>47</sup> Even if the conduct is within the interest, the general exceptions stated in *Lawrence* may apply under the second prong.<sup>48</sup> Furthermore, under the third prong, military interests may justify criminalizing conduct not criminalized in the civilian world.<sup>49</sup>

In effect, the *Marcum* court reserved the right to find military-specific exceptions based upon the history of applying constitutional rights in the military environment. This article defines a general exception as one based on the second prong of *Marcum*. In other words, the general exception is grounded in the *Lawrence* opinion and applies to both civilian and military personnel. This article defines a military-specific exception as one based the third prong of the *Marcum* opinion and only applying to military personnel.

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<sup>39</sup> *Id.*

<sup>40</sup> MCM, *supra* note 3, pt. IV, ¶ 51b. Sodomy has one essential element of unnatural carnal copulation with another certain person or with an animal and three aggravating elements to be added as appropriate. *Id.* One of the three aggravating elements is if the sodomy was done by force and without consent. *Id.* If a court-martial does not find this element beyond a reasonable doubt but so finds that the act occurred, then the court-martial may convict on consensual sodomy based on the essential element. *Id.*

<sup>41</sup> *Marcum*, 60 M.J. at 201 (quoting the appellant’s testimony at trial).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 202.

<sup>44</sup> *Id.* at 206 (“Therefore, we consider the application of *Lawrence* to Appellant’s conduct. However, we conclude that its application must be addressed in context and not through a facial challenge to Article 125.”).

<sup>45</sup> *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

<sup>46</sup> *Id.* at 203–05 (discussing *Lawrence*, 539 U.S. at 578). The CAAF addressed the hybrid nature of the principles underlying the liberty interest. *Id.* at 204. The Supreme Court supported the right to sodomy with cases establishing a fundamental right. *Id.* However the Court did not declare sodomy a fundamental right. *Id.* Nor did it use a strict scrutiny standard of review similar to other fundamental rights. *Id.* The CAAF held that the appropriate standard of review was a searching constitutional inquiry. *Id.* at 205. Without clear guidance, the CAAF found that the Supreme Court held the door open for lower courts to further develop the right to commit sodomy. *Id.*

<sup>47</sup> *But see id.* at 212–15 (Crawford, C.J., concurring in the result); *United States v. Stirewalt*, 60 M.J. 297, 305 (C.A.A.F. 2004) (Crawford, C.J., concurring in part and in the result on a similar consensual sodomy case). Chief Judge Crawford would narrowly define the *Lawrence* right to privacy in the first prong, which presumably would mean less need for many exceptions. *Marcum*, 60 M.J. at 212. She distinguished *Marcum* from *Lawrence* because the *Marcum* case had probable cause to allege force whereas the *Lawrence* case was clearly consensual. *Id.* at 212–13. In other words, if there is probable cause to allege force, then Chief Judge Crawford would answer “No” to the *Marcum* test’s first question of whether “the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?” *See Stirewalt*, 60 M.J. at 304 (quoting *Marcum*, 60 M.J. at 206). However no lower court has advanced Chief Judge Crawford’s reasoning further. This reasoning stems from ambiguity in the *Lawrence* opinion. The *Lawrence* court did not explicitly state whether this right to privacy was broad with many exceptions or this right was narrow because many things did not apply. *Marcum*, 60 M.J. at 203–05.

<sup>48</sup> *Marcum*, 60 M.J. at 206.

<sup>49</sup> *Id.*

In *Marcum*, the court assumed that the conduct in question was within the *Lawrence* liberty interest under the first prong, but found that a general exception applied under the second prong.<sup>50</sup> The appellant was the supervisor of the other sodomy participant. Because of the supervisory relationship, the other sodomy participant was in a position where freely given consent was difficult to discern, unlike the parties in *Lawrence*.<sup>51</sup> The court did not reach the issue of whether any military-specific exceptions applied under the third prong.<sup>52</sup>

Although it did not reach the military-specific exception, the *Marcum* court essentially added to Article 125 the element of prejudice to good order and discipline from Article 134.<sup>53</sup> The third prong of the *Marcum* test asks if the conduct is impermissible for servicemembers even though it may be permissible for civilians.<sup>54</sup> As the offspring of *Marcum* will show, the evidence supporting the military-specific exception looks similar to evidence that would support the element of prejudice to good order and discipline in Article 134.<sup>55</sup>

### 3. *Marcum's Offspring Finds a Military-Specific Exception When Prejudice Exists*

Approximately one month after the *Marcum* decision, the CAAF found a military-specific exception for a consensual sodomy conviction in *United States v. Stirewalt*.<sup>56</sup> The enlisted appellant engaged in sodomy with an officer assigned to the same Coast Guard cutter.<sup>57</sup> The court assumed, without deciding, that the conduct was within the *Lawrence* liberty interest (first prong) and that no general exceptions applied (second prong).<sup>58</sup> The CAAF did not find a situation where consent might not easily be refused.<sup>59</sup>

Instead, the court found that a military-specific exception applied to the *Lawrence* liberty interest in prohibiting consensual sexual conduct between officers and enlisted who are assigned to the same ship.<sup>60</sup> The opinion cited Coast Guard regulations prohibiting such relationships because they undermine good leadership and military discipline.<sup>61</sup> In other words, such conduct was prejudicial to good order and discipline, and therefore, outside the *Lawrence* liberty interest under the military-specific exception.

Since *Marcum* and *Stirewalt*, military service courts have also upheld some consensual sodomy convictions as military-specific exceptions to the *Lawrence* liberty interest. In *United States v. Bart*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) applied a military-specific exception when the appellant's sodomy with a junior Sailor impacted unit

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<sup>50</sup> *Id.* at 208.

<sup>51</sup> *Id.* (finding SrA Harrison, the other sodomy participant, "was a person 'who might be coerced' or who was 'situated in [a] relationship[] where consent might not easily be refused'" (alteration in original) (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

<sup>52</sup> *Id.* Arguably, the *Marcum* court could have found a military-specific exception at the same time it found that a general exception applied. The appellant's conduct may have violated a punitive regulation governing senior-subordinate relationships. See *id.* at 207 (citing U.S. DEP'T OF THE AIR FORCE, INSTR. 36-2909, PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS paras. 2.2, 3.1 (1 May 1996)).

<sup>53</sup> MCM, *supra* note 3, pt. IV, ¶ 60b(2) ("That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces . . ."); see *United States v. Foster*, 40 M.J. 140, 143 (C.A.A.F. 1994) (holding that Article 134 is implicitly a lesser included offense of the enumerated articles like Article 125, however the Government must prove the extra Article 134 element beyond a reasonable doubt).

<sup>54</sup> *Marcum*, 60 M.J. at 207.

<sup>55</sup> MCM, *supra* note 3, pt. IV, ¶ 60c(2)(a).

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

*Id.*

<sup>56</sup> 60 M.J. 297 (C.A.A.F. 2004).

<sup>57</sup> *Id.* at 303-04 (affirming the conviction of consensual sodomy pursuant to a re-trial where the appellant was originally convicted of rape and forcible sodomy).

<sup>58</sup> *Id.* at 304.

<sup>59</sup> *Id.* The other participant was actually the superior commissioned officer to the appellant. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (citing U.S. DEP'T HOMELAND SECURITY, COMDTINST 1000.6A, PERSONNEL MANUAL para. 8.H.2.f (C26, 1988) (Unacceptable Romantic Relationships)).

morale.<sup>62</sup> The *Bart* court noted that regulations prohibited this type of relationship between people of different rank in order to prevent harm to good order and discipline.<sup>63</sup> The adulterous relationship was intertwined with other crimes such as false official statement, obstruction of justice, and murder.<sup>64</sup> The NMCCA applied the military-specific exception since this conduct in this context was prejudicial to good order and discipline.

The Air Force Court of Criminal Appeals (AFCCA) also based a military-specific exception on the existence of prejudice. In *United States v. Christian*, the AFCCA applied a military-specific exception where the appellant gave the other sodomy participant alcohol knowing she was under the legal drinking age.<sup>65</sup> The appellant broke dormitory rules in giving an underage person alcohol prior to engaging in sodomy.<sup>66</sup> Since the sodomy undermined good order and discipline in the dormitory, the military-specific exception applied.

#### 4. Unpublished Cases Find a Military-Specific Exception When Prejudice Exists

In addition to the military-specific exception, some unpublished sodomy cases also find a general exception to *Lawrence* when the parties hold unequal status. In senior to subordinate sodomy, the convictions may be sustained under both the general and military-specific exceptions.<sup>67</sup> Military subordinates who engage in sodomy with an accused are “situated in relationships where consent might not easily be refused,” the general exception found in *Lawrence*.<sup>68</sup> At the same time, as a military-specific exception, good order and discipline requires that senior personnel refrain from relationships with subordinates that could create an appearance of partiality.<sup>69</sup> Regardless of which exception applies, the discussion remains whether the conduct is prejudicial to good order and discipline.

Similar to senior-on-subordinate sodomy, appellate courts found both exceptions applied to public or three party sex acts.<sup>70</sup> Public sexual acts are a general exception to the *Lawrence* privacy right.<sup>71</sup> Public sex acts could be construed broadly

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<sup>62</sup> 61 M.J. 578 (N-M. Ct. Crim. App. 2005); cf. *United States v. Tate*, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005) (finding sodomy conviction constitutional where appellant killed his wife in order to continue the adulterous affair which included sodomy). These are companion cases.

<sup>63</sup> *Bart*, 61 M.J. at 582 (quoting U.S. NAVY REGS., ch. 11, General Reg., art. 1165 (1990)).

<sup>64</sup> *Id.*

<sup>65</sup> 63 M.J. 714, 716 (A.F. Ct. Crim. App. 2006); see also *United States v. Diebel*, No. 35824, 2006 CCA LEXIS 129 (A.F. Ct. Crim. App. May 31, 2006).

<sup>66</sup> *Christian*, 63 M.J. at 715.

<sup>67</sup> *United States v. Habian*, No. 200600753, 2007 CCA LEXIS 352 (N-M. Ct. Crim. App. Sept. 18, 2007) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where victim was drunk and subordinate to appellant); *United States v. Bonner*, 64 M.J. 638 (A. Ct. Crim. App. 2007) (finding no legal error in conviction for sodomy for a sergeant who subsequently raped the other sodomy participant, a junior Soldier); *United States v. Hurst*, No. 200401383, 2007 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 8, 2007) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where victim was subordinate to appellant); *United States v. Albaaj*, No. 20000121 (A. Ct. Crim. App. Aug. 1, 2006) (unpublished) (affirming consensual sodomy conviction between senior and subordinate during the duty day); *United States v. McClelland*, No. 200101300, 2006 CCA LEXIS 6 (N-M. Ct. Crim. App. Jan. 24, 2006) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where the officer appellant was the treating psychiatrist to the enlisted sodomy partner); *United States v. Tate*, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where the appellant was senior to other participant and their relationship violated military regulations); *United States v. Pyles*, No. 20010967 (A. Ct. Crim. App. Oct. 8, 2004) (unpublished) (affirming consensual sodomy conviction between commander and his enlisted medic during a field exercise).

<sup>68</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the *Lawrence* liberty interest “does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused”); *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004); see *United States v. Ritter*, No. 20010528 (A. Ct. Crim. App. Mar. 4, 2005) (unpublished) (affirming conviction for consensual sodomy during duty hours between married prison cadre and former inmate on the day of his release).

<sup>69</sup> U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-14 (18 Mar. 2008) [hereinafter AR 600-20] (prohibiting relationships between Soldiers of different rank); U.S. DEP’T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS para. 1-5c (21 Feb. 2000).

The authority or influence one soldier has over another is central to any discussion of the propriety of a particular relationship between soldiers of different rank. Abuse of authority and appearance of partiality are the major sources of problems. Limiting the potential for actual or perceived abuse of authority or partiality is a primary purpose of the policy on relationships.

*Id.*

<sup>70</sup> *United States v. Taylor*, No 200300876, 2006 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb 28, 2006) (finding a consensual sodomy conviction constitutional under a general exception and under a military-specific exception to *Lawrence* when done on board a ship in a *ménage à trois*); *United States v. Teague*, No 200202276, 2005 CCA LEXIS 292 (N-M. Ct. Crim. App. Sept. 15, 2005) (finding a consensual sodomy conviction constitutional under a general exception and under a military-specific exception to *Lawrence* when in a patrol car on duty in public).

to include any incident in which someone is present besides the two participants and that person is cognizant of the act.<sup>72</sup> Public sex acts would also arguably include a three person sex act or a *ménage à trois*, even if done in the privacy of a home.<sup>73</sup> The key to prosecuting a private *ménage à trois* would not only be establishing the presence of a third party, but also how the third party's presence creates prejudice.

##### 5. Without Prejudice, Lawrence May Negate a Lesser Included Offense

If a case lacks prejudice to good order and discipline, *Lawrence* may nullify a consensual sodomy conviction which results from a failed forcible sodomy prosecution.<sup>74</sup> In these types of cases, the Government prosecutes forcible sodomy but only convicts on consensual sodomy.<sup>75</sup> In other words, the accused succeeds on either a defense of consent or mistaken consent. In these cases, the defense may argue that the consensual sodomy conviction is unconstitutional under *Lawrence*. If the record does not establish a general exception listed in *Lawrence*, or if the record does not indicate a military-specific exception suggested in *Marcum*, then that consensual sodomy is arguably not a crime.<sup>76</sup> Post-*Lawrence*, a successful mistake of fact as to consent or a consent defense may negate the crime.

The situation is more complicated when dealing with a failed underage sodomy prosecution. The two variations of underage sodomy involve either a child who is under twelve years old or a child who is between the ages of twelve and sixteen years of age. In either case, underage sodomy does not have a mistaken age or consent defense.<sup>77</sup>

In *United States v. Wilson*, the CAAF recently held that a mistake of fact as to age defense does not apply to Article 125's underage sodomy.<sup>78</sup> Prior to this, the CAAF allowed this defense to the child element in Article 134, Indecent Acts with a Child, in *United States v. Zachary*.<sup>79</sup> After *Zachary*, several service courts extended the defense in Article 134 to the child element in Article 125's underage sodomy.<sup>80</sup>

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<sup>71</sup> *Lawrence*, 539 U.S. at 578. As discussed above, the *Lawrence* case involves private, not public conduct. The opinion does not say whether public conduct (and other listed conduct) is an exception to the privacy interest or simply not part of the privacy interest. This semantic issue is unresolved. See *Marcum*, 60 M.J. at 203-05.

<sup>72</sup> *Lawrence*, 539 U.S. at 564, 578 (finding that only the two participants were present at the time the police interrupted the sex act and holding public sex acts outside the liberty interest); see *United States v. Cotti*, No. 20021210 (Army Ct. Crim. App. June 16, 2006) (unpublished) (affirming sodomy conviction based on the fact a third person was present).

<sup>73</sup> This is the potential dilemma of a sex act which is public as a matter of law but done in private as a matter of fact. Although the application of *Lawrence* liberty interest is currently limited to two party sex acts, a defense counsel may make a good faith argument to extend this right to three party sex acts done in the privacy of a home absent prejudice to good order and discipline.

<sup>74</sup> MCM, *supra* note 3, R.C.M. 916(j)(1) ("If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances."); U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-51-2 n.12 (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK] (describing mistake of fact as to consent in complete forcible sodomy). A similar impact occurs under the new Article 120 where the accused has a successful defense as to consent, mistaken consent or mistaken age. This impact is discussed below in Section IV.

<sup>75</sup> BENCHBOOK, *supra* note 74, para. 3-51-2, Note 20 (explaining that consensual sodomy is a lesser included offense of forcible sodomy with a reasonable doubt as to force or consent but beyond a reasonable doubt proof that the sodomy occurred).

<sup>76</sup> *United States v. Humphreys*, No. 200300750, 2005 CCA LEXIS 401 (N-M. Ct. Crim. App. Dec. 29, 2005) (finding a conviction for non-forcible sodomy unconstitutional when in a private barracks room); *United States v. Meno*, No. 20000733 (A. Ct. Crim. App. June 22, 2005) (unpublished) (holding conviction for consensual sodomy, the lesser included offense of the charged forcible sodomy, is not punishable); *United States v. Parker*, No. 9600945 (A. Ct. Crim. App. May 17, 2005) (unpublished) (holding consensual sodomy conviction not punishable after earlier appellate decision modified forcible sodomy conviction to consensual sodomy).

<sup>77</sup> *United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008); BENCHBOOK, *supra* note 74, para. 3-51-1d (explaining that lack of force and consent are not defenses).

<sup>78</sup> *Wilson*, 66 M.J. at 39.

<sup>79</sup> See 63 M.J. 438 (C.A.A.F. 2006) (holding an honest and reasonable mistake of fact as to age may negate the child element in Article 134, Indecent acts with a child).

<sup>80</sup> See *United States v. Knepper*, No. 200401159, 2007 CCA LEXIS 25 (N-M. Ct. Crim. App. Jan. 31, 2007) (affirming the conviction for consensual sodomy but not for the period past the other participant's sixteenth birthday); *United States v. Jaeger*, No. 36127, 2006 CCA LEXIS 353 (A.F. Ct. Crim. App. Dec. 14, 2006) (rejecting the appellant's mistake of fact as to age defense because the record established appellant knew the other sodomy participant was fifteen years old); *United States v. Cotti*, No. 20021210 (A. Ct. Crim. App. June 16, 2006) (unpublished) (affirming consensual sodomy conviction because of a third party presence but after mistake of fact as to age negated the child element).

In *Wilson*, the CAAF held that the *Zachary* defense in Article 134 did not extend to Article 125's underage sodomy.<sup>81</sup> In this case, a girl who was between the ages of twelve and sixteen years of age performed fellatio on the accused on many occasions.<sup>82</sup> These acts violated Article 125 with the underage aggravating element.<sup>83</sup> Even though the accused honestly and reasonably believed the girl to be at least sixteen, the accused was still guilty of underage sodomy.<sup>84</sup>

In light of *Wilson*, the accused has a harder time reaching the safe harbor of the *Lawrence* liberty interest with young sodomy partners. Since the accused does not have a mistaken age defense to underage sodomy, the accused would not be able to subsequently raise the *Lawrence* argument. In Section V, this article will revisit the *Wilson* case after discussing the new Article 120 in Section IV. After this discussion, the impact of *Wilson* is arguably moot.

Regardless of the impact of the new Article 120, the key to sustaining a consensual sodomy conviction is establishing prejudice to good order and discipline. An adulterous connection may support a military-specific exception if the adultery is proven to be prejudicial to good order and discipline.<sup>85</sup> Likewise, violating regulations close in time to sodomy may prejudice good order and discipline removing the protection of *Lawrence*.<sup>86</sup>

The *Marcum* court could have, but did not, simply state prejudice to good order and discipline removes conduct from the *Lawrence* liberty interest. The *Marcum* court only created a place holder in the *Lawrence* privacy right for a military-specific exception.<sup>87</sup> In practice, prejudice to good order and discipline is the key factor in establishing the military-specific exception.<sup>88</sup> With all the cases that apply the military-specific exception, the court's discussion is really about the existence or absence of such prejudice. In effect, the *Marcum* court made consensual sodomy like an Article 134 offense requiring an element of prejudice to good order and discipline.<sup>89</sup>

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<sup>81</sup> *Wilson*, 66 M.J. at 41 n.4.

<sup>82</sup> *Id.* at 40.

<sup>83</sup> MCM, *supra* note 3, pt. IV, ¶ 51b, e. Sodomy has one essential element of unnatural carnal copulation with another certain person or with an animal and three additional elements to be added as appropriate. *Id.* One additional element is if the victim is over twelve but under sixteen years of age. *Id.* This element does not have a mens rea which would allow a mistaken age defense. *Wilson*, 66 M.J. at 47.

<sup>84</sup> *Wilson*, 66 M.J. at 47.

<sup>85</sup> *United States v. Stephens*, No. 200602368, 2007 CCA LEXIS 428 (N-M. Ct. Crim. App. Oct. 11, 2007) (affirming the consensual sodomy conviction where the other participant was married to a deployed service member); *United States v. Johns*, No. 36406, 2007 CCA LEXIS 274 (A.F. Ct. Crim. App. May 25, 2007) (affirming the consensual sodomy conviction resulting from a notorious affair with the dependant spouse of a deployed service member); *United States v. Avery*, No. 200400665, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (affirming a consensual sodomy conviction resulting from an open, notorious and adulterous affair which impacted good order and discipline); *United States v. Myers*, No. 200201623, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (affirming a consensual sodomy conviction where the other participant was married to another service member and the sodomy occurred prior to adultery in military housing).

<sup>86</sup> *United States v. Barrera*, No. 200400371, 2006 CCA LEXIS 215 (N-M. Ct. Crim. App. Aug. 28, 2006) (affirming consensual sodomy conviction where appellant admitted the sodomy was prejudicial to good order and discipline in the providence inquiry and a standing order in the barracks prohibited all sexual activity); *United States v. Diebel*, No. 35824, 2006 CCA LEXIS 129 (A.F. Ct. Crim. App. May 31, 2006) (affirming a consensual sodomy conviction where the appellant smuggled sixteen year old girl into his barracks room and gave her alcohol); *see United States v. Humphreys*, No. 200300750, 2005 CCA LEXIS 401 (N-M. Ct. Crim. App. Dec. 29, 2005) (finding a conviction for non-forcible sodomy unconstitutional when in a private barracks room without regulations prohibiting the conduct or the visitor); *United States v. Bullock*, No. 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (unpublished) (finding a conviction for consensual sodomy in the barracks unconstitutional); *United States v. Barber*, No. 20000413 (A. Ct. Crim. App. Oct. 7, 2004) (unpublished) (finding a conviction for consensual sodomy in the barracks unconstitutional).

<sup>87</sup> *United States v. Marcum*, 60 M.J. 198, 208 (C.A.A.F 2004) (finding a general exception to *Lawrence* so it did not reach the issue of the military-specific exception); *see United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F 2004) (assuming that no general exceptions applied but finding that a military-specific exception removed the appellant's conduct from the *Lawrence* liberty interest).

<sup>88</sup> It is unresolved whether service discrediting conduct alone is a sufficient military interest to remove consensual sodomy from the *Lawrence* right to privacy. The *Marcum* cases focus on actual prejudice to good order and discipline rather than on a tendency to bring the service into disrepute or on a tendency to lower the service in public esteem. *See MCM, supra* note 3, pt. IV, ¶ 60c(3).

<sup>89</sup> *Id.* pt. IV, ¶ 60b ("That, under the circumstances, the accused's conduct 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."); *see United States v. Foster*, 40 M.J. 140, 143 (C.A.A.F 1994) (holding that Article 134 is implicitly a lesser included offense of the enumerated articles like Article 125, however the Government must prove the extra Article 134 element beyond a reasonable doubt).

### C. The *Lawrence* Privacy Interest Does Not Significantly Prevent Sodomy Prosecutions

With the application of the *Marcum* test, the *Lawrence* privacy interest prevents few sodomy prosecutions. In other words, the military historically has not focused on prosecuting the conduct that *Lawrence* now protects. According to *Marcum*, the *Lawrence* liberty interest has no effect on sodomy which is prejudicial to good order and discipline.<sup>90</sup>

With that in mind, what is the goal of prosecuting the conduct that *Lawrence* protects? A purpose of UCMJ prosecutions is to maintain good order and discipline.<sup>91</sup> Logically then, commanders would focus UCMJ prosecutions on conduct which affects a unit's good order and discipline. Before and after the 2003 *Lawrence* opinion, a commander has little incentive to prosecute consensual sodomy that does not prejudice good order and discipline.

In cases of non-prejudicial, homosexual sodomy, commanders may pursue administrative separation from service in lieu of court-martial.<sup>92</sup> If the petitioners in *Lawrence* were subject to the UCMJ, their commander could have administratively separated them. Only their commander could convene court-martial proceedings.<sup>93</sup> However, if the sodomy is non-prejudicial or if separation is an option, why prosecute it?

In the past, the Government may have charged non-prejudicial sodomy when it is collateral to some other serious misconduct.<sup>94</sup> In other words, this type of non-prejudicial conduct is rarely the gravamen or heart of the case. Even if *Lawrence* prevents charging non-prejudicial sodomy, the prosecution for the more serious conduct will still proceed.

#### 1. A Survey of Appellate Cases to Test the Hypothesis

A survey proves that *Lawrence* has little effect on what cases are brought to trial even if some charges are no longer sustainable. The survey excludes cases of consensual sodomy resulting from a failed nonconsensual sodomy prosecution. The issue is the ability of the trial counsel to charge consensual sodomy, not the ability to charge nonconsensual sodomy. By its terms, *Lawrence* does not affect the Government's ability to prosecute forcible or underage sodomy.<sup>95</sup>

The survey will start in 1992. This is when the CAAF decided *United States v. Henderson*<sup>96</sup> and is shortly before Congress enacted the law relating to homosexuals in the military.<sup>97</sup> After these two developments, military sodomy law remained relatively stable until the *Marcum* decision in 2004.<sup>98</sup>

The survey has two categories of consensual sodomy cases. The first category involves consensual sodomy convictions that courts have actually overturned under the *Lawrence-Marcum* rationale. The time period for this search is 2004 to the

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<sup>90</sup> See *Marcum*, 60 M.J. at 206-07.

<sup>91</sup> MCM, *supra* note 3, pt. I, ¶ 3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

<sup>92</sup> *Loomis v. United States*, 68 Fed. Cl. 503, 521 (2005) (finding that *Lawrence* does not invalidate a non-punitive discharge for homosexual conduct under service regulations); *Grant v. United States*, 162 Ct. Cl. 600, 611 (1963) (finding no right to court-martial when administratively discharged for sodomy); see U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 15-2 (6 June 2005) (describing the Army's homosexual conduct policy in relation to enlisted separations); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-22 (12 Apr. 2006) (describing the Army's homosexual conduct policy in relation to officer discharges).

<sup>93</sup> MCM, *supra* note 3, R.C.M. 407 (showing that only convening authorities decide who is prosecuted); *Grant*, 162 Ct. Cl. at 611 (finding no right to court-martial when administratively discharged for sodomy).

<sup>94</sup> If the conduct would not be a civilian crime and the conduct is not prejudicial to good order and discipline, military criminal investigators would have little practical incentive to pursue such cases. Theoretically, those investigators could get search authorizations for midnight raids of married couples' homes. The probable cause would be based on the reasonable likelihood that consensual sodomy may be presently occurring therein. More likely, non-prejudicial consensual sodomy would likely come to light pursuant to an investigation for some other serious misconduct.

<sup>95</sup> *Marcum*, 60 M.J. at 207 ("Clearly, the *Lawrence* analysis is not at issue with respect to forcible sodomy.").

<sup>96</sup> 34 M.J. 174 (C.M.A. 1992) (holding no right to privacy for heterosexual fellatio). The case of *Henderson* relatively settled the right to privacy issue with consensual sodomy crimes in the military post-*Bowers* and up until *Marcum* in 2004.

<sup>97</sup> 10 U.S.C. § 654 (2000). This law is the basis for the controversial policy for homosexuality in the armed forces commonly known as "Don't Ask, Don't Tell."

<sup>98</sup> Although the Supreme Court decided *Lawrence* in 2003, the CAAF did not apply this privacy right to the military until the *Marcum* decision on 23 August 2004. See *United States v. Abdul-Rahman*, 59 M.J. 924, 925 (C.G. Ct. Crim. App. 2004) (upholding a consensual sodomy conviction done onboard a Coast Guard cutter in the presence of other people but declining to apply *Lawrence* until the CAAF did so).

present. Presumably, trial counsels have adjusted their charging decisions in consideration of the *Marcum* test. However, shortly after the *Marcum* decision, the appellate history has several cases brought to trial apparently without this test in mind.

The second category of cases involves the *Henderson* line of consensual sodomy cases finalized prior to the *Marcum* opinion. The survey will examine the appellate opinions for evidence of prejudice to good order and discipline. If this is present, these opinions would show that the Government would still have charged the consensual sodomy. In other words, *Marcum* would have little effect on the charging decision when consensual sodomy is prejudicial to good order and discipline. If the prejudice is not apparent in the opinion, then the trial counsel would probably be prevented from charging the consensual sodomy had *Lawrence* been the law at the time.

Even if past consensual sodomy is likely unsustainable today, the survey will look for other serious misconduct which may have been the gravamen of the case. In these cases, the Government apparently had an independent reason to bring the accused to trial notwithstanding the consensual sodomy. To caveat, appellate opinions do not necessarily discuss the reasons trial counsel charge non-prejudicial, consensual sodomy in addition to other serious misconduct.<sup>99</sup> After these cases are eliminated, however, the survey will show that the military rarely prosecutes non-prejudicial, consensual sodomy as the gravamen of the case. If true, the limits on Article 125 from *Lawrence* have little practical impact on military prosecutions generally.

## 2. The Survey Indicates Lawrence Only Prevents Rare Prosecutions

The first category of recent cases does not produce an example of non-prejudicial consensual sodomy which is the gravamen of the case. Again, this survey excludes sodomy as a lesser included offense which eliminates a substantial number of cases. Since the Government is not prevented from prosecuting sodomy which is prejudicial to good order and discipline, it is irrelevant whether or not such sodomy is the gravamen of the case. Even so, the appellate courts have upheld many prejudicial, consensual sodomy convictions under *Marcum*.<sup>100</sup>

When the Government convicts on consensual sodomy, the appellate courts have reversed some of those sodomy convictions under *Marcum*.<sup>101</sup> These cases are the best examples of what conduct the trial counsel may no longer charge. In these cases, however, the overturned convictions were collateral to some other serious misconduct. Although trial counsel are now more limited in charging consensual sodomy, the survey shows that trial counsel generally do not charge non-prejudicial sodomy as the gravamen or heart of a case.

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<sup>99</sup> MCM, *supra* note 3, R.C.M. 307(c)(4) (“Charges and specifications alleging all known offenses may be preferred at the same time.”). Although trial counsel are not required to charge every known offense, a reasonable tactic may be to include all offenses supported by reasonable grounds as allowed under this rule. See *id.* R.C.M. 601(e)(2) discussion (“Ordinarily all known charges should be referred to a single court-martial.”).

<sup>100</sup> *United States v. Stephens*, No. 200602368, 2007 CCA LEXIS 428 (N-M. Ct. Crim. App. Oct. 11, 2007) (upholding consensual sodomy conviction where participants were married to other people and the other person’s husband was deployed); *United States v. Johns*, No. 36406, 2007 CCA LEXIS 274 (A.F. Ct. Crim. App. May 25, 2007) (upholding consensual sodomy conviction done in notorious affair with the wife of another service member); *United States v. Hurst*, No. 200401383, 2007 CCA LEXIS 56 (A.F. Ct. Crim. App. Feb. 8, 2007) (upholding consensual sodomy conviction done with a subordinate); *United States v. Barrera*, No. 200400371, 2006 CCA LEXIS 215 (N-M. Ct. Crim. App. Aug. 28, 2006) (upholding consensual sodomy conviction done in violation of a barracks policies prohibiting all sexual activity); *United States v. Albaaj*, No. 20000121 (Army Ct. Crim. App. Aug. 1, 2006) (unpublished) (upholding consensual sodomy conviction between senior and subordinate during the duty day); *United States v. Christian*, 63 M.J. 714 (A.F. Ct. Crim. App. 2006) (upholding consensual sodomy when appellant gave the other participant alcohol knowing she was underage); *United States v. Banker*, 63 M.J. 657 (A.F. Ct. Crim. App. 2006) (upholding consensual sodomy conviction where appellant groomed his babysitter twenty years his junior); *United States v. Cotti*, No. 20021210 (Army Ct. Crim. App. June 16, 2006) (unpublished) (upholding sodomy conviction based on the presence of a third party); *United States v. Diebel*, No. 35824, 2006 CCA LEXIS 129 (A.F. Ct. Crim. App. May 31, 2006) (upholding consensual sodomy conviction done after violating post regulations and involving underage drinking); *United States v. Taylor*, No. 200300876, 2006 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb. 28, 2006) (upholding consensual sodomy done during a *ménage à trois* aboard a warship); *United States v. McClelland*, No. 200101300, 2006 CCA LEXIS 6 (N-M. Ct. Crim. App. Jan. 24, 2006) (upholding consensual sodomy conviction between officer and an enlisted person who was also a patient of the appellant); *United States v. Tate*, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005) (upholding consensual sodomy conviction with subordinate which also led to appellant murdering his wife); *United States v. Bart*, 61 M.J. 578 (N-M. Ct. Crim. App. 2005) (upholding consensual sodomy which was prejudicial to good order and discipline and which encouraged the other participant to kill his wife); *United States v. Ritter*, No. 20010528 (Army Ct. Crim. App. Mar. 4, 2005) (unpublished) (upholding consensual sodomy between prison guard and former inmate during duty hours); *United States v. Avery*, No. 200400665, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (upholding consensual sodomy conviction done in an open and notorious adulterous affair impacting his unit’s activities); *United States v. Myers*, No. 200201623, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (upholding consensual sodomy conviction done with the wife of another service member as a precursor to adultery); *United States v. Pyles*, No. 20010967 (Army Ct. Crim. App. Oct. 8, 2004) (unpublished) (upholding consensual sodomy conviction between a commander and his enlisted medic).

<sup>101</sup> *United States v. Bullock*, No. 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (reversing consensual sodomy conviction for conduct preceding an indecent assault several hours later); *United States v. Barber*, No. 20000413 (A. Ct. Crim. App. Oct. 7, 2004) (unpublished) (reversing two consensual sodomy convictions done while videotaping the acts without the other person’s consent in violation of state law in a case also involving extortion and indecent assault).

As an illustration, the Army Court of Criminal Appeals (ACCA) reversed two consensual sodomy convictions in *United States v. Barber* which were not the gravamen of the case.<sup>102</sup> The appellant secretly videotaped females performing sodomy with him in his private barracks room.<sup>103</sup> One sodomy specification involved a Soldier married to another person.<sup>104</sup> The providence inquiry did not establish that the sodomy was prejudicial despite the secret videotaping and extramarital connection.<sup>105</sup>

Despite the reversed convictions, the ACCA upheld convictions for adultery, secretly taping nude females, extortion and indecent assault.<sup>106</sup> This case shows how trial counsel may be limited in charging consensual sodomy but also that trial counsel may have independent reasons to bring the accused to trial. Therefore, if *Barber* represents recent practice in charging non-prejudicial, consensual sodomy, the inability to charge this sodomy will not be missed. Under the first category of the survey, the unsustainable sodomy is best understood as an “add-on” to a case focused on other misconduct.

Similar to the first, the second category of cases from 1992 to 2004 has many examples of sodomy convictions that would probably be affirmed under the *Marcum* test.<sup>107</sup> The majority of surveyed cases involved prejudicial sodomy which, according to *Marcum*, *Lawrence* does not affect.

On the other hand, the survey also found an abundance of consensual sodomy convictions which courts would likely overturn under the *Marcum* test. Overall, these convictions were collateral to more serious misconduct.<sup>108</sup> The survey found only one case of non-prejudicial, consensual sodomy where the Government would probably be prevented from trying the case at all in light of *Lawrence*.

In *United States v. Allison*, the Government prosecuted consensual sodomy as the gravamen of the case without any evidence of prejudice in the record.<sup>109</sup> In *Allison*, the appellant videotaped several acts of consensual sodomy with his future wife in the privacy of their home.<sup>110</sup> The videotaping was also consensual and the participants kept the videotape private.<sup>111</sup> In addition, the Government charged the appellant with other crimes apparently connected to the underlying sodomy.<sup>112</sup> The

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<sup>102</sup> No. 20000413 (A. Ct. Crim. App. Oct. 7, 2004).

<sup>103</sup> *Id.* (noting that appellant pled guilty to two specifications of sodomy, three specifications of adultery and three specifications of a Missouri statute prohibiting the secret taping of nude females, furthermore, the judge found the appellant guilty, contrary to his pleas, of extortion and indecent assault as a lesser included offense to rape).

<sup>104</sup> *Id.* at 10–11.

<sup>105</sup> *Id.* at 12 (“There were no facts admitted by the appellant during the providence inquiry which demonstrated any military necessity to circumscribe appellant’s liberty interest in engaging in private, consensual behavior with another adult.”).

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *United States v. Barrow*, 45 M.J. 478 (C.A.A.F. 1997) (upholding consensual sodomy between superior and subordinate in the same unit); *United States v. Gates*, 40 M.J. 354 (C.M.A. 1994) (upholding consensual sodomy done in a three party sex act to which the appellant was accused of raping the third person); *United States v. Baker*, No. 9802013, 2000 CCA LEXIS 319 (N-M. Ct. Crim. App. July 24, 2000) (upholding consensual sodomy between officer and enlisted); *United States v. Dinges*, No. 32122, 1997 CCA LEXIS 15 (A.F. Ct. Crim. App. Jan. 8, 1997) (upholding consensual sodomy with sixteen year old who was emotionally disabled and the appellant was his boy scout master); *United States v. Thompson*, No. 31803, 1996 CCA LEXIS 260 (A.F. Ct. Crim. App. Aug. 8, 1996) (upholding consensual sodomy done in order to distract appellant from murdering the other participant, his wife); *United States v. Oehlecker*, No. 31228, 1995 CCA LEXIS 331 (A.F. Ct. Crim. App. Dec. 1, 1995) (upholding consensual sodomy conviction between officer and an enlisted person who was also a patient of the appellant); *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991) (upholding consensual sodomy conviction between the civilian wife of enlisted person and the appellant who was an officer married to another officer).

<sup>108</sup> *United States v. Moore*, 38 M.J. 490 (C.A.A.F. 1994) (involving consensual sodomy convictions probably not sustainable today however the sodomy is collateral to extortion and indecent assault); *United States v. Austin*, 38 M.J. 578 (C.M.R. 1993) (involving consensual sodomy convictions probably not sustainable today but collateral to aggravated assault of appellant’s former lesbian partner); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992) (involving one consensual sodomy conviction probably not sustainable today but collateral to a carnal knowledge conviction with another person).

<sup>109</sup> 56 M.J. 606 (C.G. Ct. Crim. App. 2001). Food Service Specialist First Class (E-6) Allison pled guilty at a judge alone general court-martial. *Id.* at 606. Pursuant to his pleas, the judge convicted him of two specifications of heterosexual sodomy (fellatio) with his future wife as well as one specification of an indecent act for videotaping the same acts. *Id.* In addition, the court convicted him of two specifications of failure to obey a lawful order and one specification of attempting to destroy evidence. *Id.* On appeal, the appellant claimed his pleas were improvident because the video taped acts were not indecent. *Id.* at 607. The appellant and his fiancée committed the consensual sodomy and the consensual videotaping of it in private. *Id.* at 608. Both persons maintained the video in the privacy of their home without showing it to anyone else. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 606–07. The opinion does not examine the underlying conduct to the specifications of failure to obey a lawful order and the attempted destruction of evidence. *Id.* Arguably, both crimes are not the gravamen or heart of the case. It is possible that these crimes flowed out of the Government’s investigation and prosecution of the acts of sodomy. Ultimately, it is unknown whether the Government would have tried the appellant but for the video taped sodomy.

trial court sentenced the appellant to eighteen months of confinement, reduction to the pay grade E-1, and a bad conduct discharge.<sup>113</sup> Even though the court's sentence was within the terms of the pre-trial agreement, the convening authority reduced the sentence to twelve months.<sup>114</sup>

Although this examination is limited to the appellate opinion, the reason for a general court-martial in *Allison* is tenuous under current law. In light of the *Marcum* test, it is unlikely the accused would be found guilty of committing a crime if prosecution occurred today. If the justification for a conviction and a twelve month sentence is unclear, *Lawrence* is arguably justifiable to prevent such a prosecution in the first place. It is unclear what goal the prosecution of the *Allison* case served given the purpose of the UCMJ.<sup>115</sup>

So if *Marcum's* application of *Lawrence* only protects sodomy that is generally not prosecuted, the CAAF cleverly sidestepped a constitutional right. If the *Marcum* court held *Lawrence* generally inapplicable to the military, the Supreme Court arguably may have been more willing to grant a writ of certiorari. Instead, the *Marcum* court held that *Lawrence* generally applied but then reserved room for a loophole which swallows the rule.

In effect, *Lawrence* applies to the military as a matter of law, but *Lawrence* has minimal effect on the military as a matter of practice. *Lawrence* does limit the availability of a lesser included offense in nonconsensual sodomy prosecutions. The case may limit additional charges when the Government prosecutes other serious misconduct. *Lawrence* also prevents sodomy prosecutions which arguably do not serve the purpose of the UCMJ. Since *Lawrence* does negate some sodomy law, Article 125 is not as alive as it was prior to 2003.

### III. Article 125's Forcible and Underage Sodomy is Mostly Dead

In contrast with *Lawrence's* limited effect on consensual sodomy, the new Article 120 has a profound effect on Article 125's forcible sodomy and underage sodomy. Part IV will show how conduct that is forcible sodomy or underage sodomy in Article 125 also violates Article 120. Conduct simultaneously violating two statutes presents an interesting dilemma. Before addressing this dilemma, it is necessary to discuss a short history of the new Article 120.

#### A. Background on Nonconsensual Sodomy; the New Article 120

The new Article 120 is the culmination of an effort to reform the way the military prosecutes sexual assaults.<sup>116</sup> Pursuant to the National Defense Authorization Act for Fiscal Year 2005, the Joint Service Committee on Military Justice (JSC) studied how the military prosecutes sex crimes.<sup>117</sup> The JSC consists of Judge Advocates from all branches of service who perform studies and provide advice to the President on matters related to military justice.<sup>118</sup>

The JSC published a report in 2005 with six options for reforming sexual assault crimes in the military.<sup>119</sup> Option 1 was unanimously recommended by the JSC and purported not enacting any reform to the military's sexual assault statutory scheme.<sup>120</sup> The report found that the system in effect at the time captured all types of sexual assaults.<sup>121</sup> Furthermore, the

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<sup>113</sup> *Id.* at 607.

<sup>114</sup> *Id.*

<sup>115</sup> MCM, *supra* note 3, pt. I, ¶ 3.

<sup>116</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 1-4.

<sup>117</sup> *Id.*

<sup>118</sup> U.S. DEP'T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE 3 (May 3, 2003).

<sup>119</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 1-4 (discussing the six options the Joint Service Comm. recommends to Congress). Option 1 is no change. *Id.* Option 2 proposed not changing the articles of the UCMJ but revising the MCM. *Id.* Options 3 and 4 would have changed the law of rape to match federal law but left the definitions of "force" and "consent" up to the courts to decide. *Id.* Options 5 and 6 included the changes of Options 3 and 4 but included the definitions of terms. *Id.* Option 5 and 6 also eliminated the element of "without consent" from rape and proposed consolidating all sex crimes together with rape into Article 120. *Id.* Of all the options, Option 5 would make military law the most similar to federal law. *Id.*

<sup>120</sup> *Id.* at 1.

<sup>121</sup> *Id.* at 1-4.

report noted that any benefit of reform would be outweighed by potential confusion created with a new statutory scheme.<sup>122</sup> The JSC listed five other reform options in case Congress did not accept Option 1.<sup>123</sup>

As an alternative to Option 1, the JSC recommended Option 5.<sup>124</sup> This option proposed consolidating all sex crimes together with rape into Article 120.<sup>125</sup> Furthermore, Option 5 would move consensual sex crimes into Article 134.<sup>126</sup> Of all the options, Option 5 would make military crimes the most similar to federal law.<sup>127</sup>

Congress enacted Option 5, for the most part.<sup>128</sup> This plan proposed creating a new, comprehensive sex crime statute in Article 120 modeled after federal law.<sup>129</sup> Under Option 5, the new Article 120 would punish conduct that was once forcible or underage sodomy in Article 125.<sup>130</sup> The plan called for repealing the sodomy statute.<sup>131</sup> The President would then create a new Article 134 paragraph to punish conduct that was once consensual sodomy in Article 125.<sup>132</sup>

Contrary to the JSC recommendation, Congress did not repeal the sodomy statute.<sup>133</sup> Without any explanation why, Congress enacted Article 120 as recommended but left Article 125 untouched.<sup>134</sup> As a result, conduct that is forcible or underage sodomy under Article 125 is also punishable in the new Article 120. Consequently, two criminal statutes overlap in punishing the same conduct.<sup>135</sup>

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<sup>122</sup> *Id.* at 1.

<sup>123</sup> The five other options commonly proposed updating military sex crimes but varied in the amount of change necessary to achieve that result. *Id.*

<sup>124</sup> *Id.* at 1.

<sup>125</sup> *Id.* at 3–4.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 27 (identifying Option 5 as the general basis for the new Article 120).

<sup>129</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 4 (“Option 5 incorporates all the statutory prohibitions of 18 U.S.C. §§ 2241–2244, 2246 into the UCMJ.”); Johnson, *supra* note 128, at 27.

The categories for rape, sexual assault, and other sexual misconduct under the new Article 120 include: (a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure.

Johnson, *supra* note 128, at 27.

<sup>130</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 251 (“[Article 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct.”).

<sup>131</sup> *Id.* at 302 (recommending deleting Article 120, rape and carnal knowledge and deleting Article 125, sodomy then replacing both with the new Article 120). Congress did not enact the step to repeal Article 125 as listed in Option 5. Johnson, *supra* note 128, at 28.

<sup>132</sup> *Id.* at 318–24 (recommending the creation of a comprehensive art. 134 offense for all offenses that are manifested through consensual sexual activity).

<sup>133</sup> Johnson, *supra* note 128, at 28.

[Implementing Article 120] is further complicated by two other factors. First, the legislative history and committee notes do not specifically cite “Option 5” as the source for the legislation, although this is generally accepted to be the case. Second, Congress did not adopt several recommendations contained within “Option 5,” including the recommendation that forcible sodomy be addressed under rape or that consensual sodomy be placed within a category of sexual misconduct punishable if prejudicial to good order and discipline or service discrediting. Clearly, certain portions of “Option 5” do not represent the intent of Congress.

*Id.* (citations omitted).

<sup>134</sup> H.R. REP. NO. 109-89, at 332 (2005) (Conf. Rep.); H.R. REP. NO. 109-360, at 703 (2005) (Conf. Rep.); S. REP. NO. 109-69, at 316 (2005) (Conf. Rep.); 151 CONG. REC. H3912-28 (daily ed. May 25, 2005); 151 CONG. REC. S12811-12 (daily ed. Nov. 15, 2005); 151 CONG. REC. H12739 (daily ed. Dec. 18, 2005); 151 CONG. REC. H12199 (daily ed. Dec. 18, 2005); 151 CONG. REC. S14014 (daily ed. Dec. 19, 2005); 151 CONG. REC. S14256 (daily ed. Dec. 21, 2005). No record of discussion exists concerning the new Article 120 and its relation to other criminal statutes. This could mean that Congress intended no change to Article 125.

<sup>135</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 251–53. Option 5 recommended redefining Article 125 sodomy in terms of either sexual assault or prejudicial relationships involving sexual activity. *Id.* Since Congress did not repeal Article 125, four of the fourteen Article 120 offenses could potentially punish the same conduct that Article 125 still punishes. These four Article 120 offenses all require a “sexual contact,” as well as different aggravating circumstances to reflect degrees of seriousness. MCM, *supra* note 3, pt. IV, ¶ 45a. The four Article 120 offenses which overlap with Article 125 are: aggravated sexual contact, aggravated sexual contact with a child, abusive sexual contact and abusive sexual contact with a child. SEX CRIMES AND THE UCMJ, *supra* note 2, at 251–53.

## 1. Sexual Contact Definition

The discussion of the overlap begins with the definition of “sexual contact.” Article 120’s sexual contact captures a broad range of conduct:

The term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.<sup>136</sup>

There are five sexual contact offenses: (1) aggravated sexual contact, (2) abusive sexual contact, (3) aggravated sexual contact with a child, (4) abusive sexual contact with a child, and (5) wrongful sexual contact.<sup>137</sup> Each offense is distinguished with attendant circumstances to reflect degrees of seriousness.<sup>138</sup> But the underlying *actus reus*, sexual contact, remains the same. Together with the nine other Article 120 offenses, the five sexual contact offenses constitute a radical departure from the old common law regime.

## 2. Sodomy versus Sexual Contact

It is important to understand where the definition of sexual contact in Article 120 overlaps with the definition of sodomy in Article 125. The mental state needed for sodomy is only the intent to do the act, a general intent crime.<sup>139</sup> The mental state needed for a sexual contact is the specific intent to abuse, humiliate, degrade, arouse or sexually gratify some person, a specific intent crime.<sup>140</sup> While sodomy requires a person’s genitals to penetrate the mouth or anus of another person,<sup>141</sup> sexual contact only require a person to contact the genitalia, anus, groin, breast, inner thigh or buttocks of another.<sup>142</sup>

Because the *actus reus* of a sexual contact is broader, it is possible for conduct to qualify as an Article 120 sexual contact without meeting the definition of Article 125 sodomy.<sup>143</sup> For example, if a fully clothed frotteur<sup>144</sup> rubs his groin on the buttocks of a stranger on the subway, this may be a wrongful sexual contact but not an act of sodomy.<sup>145</sup> Although many

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<sup>136</sup> MCM, *supra* note 3, pt. IV, ¶ 45a(t)(2).

<sup>137</sup> *Id.* pt. IV, ¶ 45a(e), (g), (h), (i), (m).

<sup>138</sup> *Id.* pt. IV, ¶ 45a. Aggravated sexual contact is committed under one of the five circumstances required for rape but the conduct only rises to the level of a sexual contact. *Id.* pt. IV, ¶ 45a(e). The five rape circumstances are: (1) using force against that other person; (2) causing grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) rendering another person unconscious; or (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct. *Id.* pt. IV, ¶ 45a(a). Aggravated sexual contact with a child is a sexual contact with a child under twelve years of age. It is also a sexual contact with a child over twelve but less than sixteen years of age under one of the five rape circumstances. *Id.* pt. IV, ¶ 45a(a), (g). Abusive sexual contact is committed under one of the five circumstances required for aggravated sexual assault but the conduct only rises to the level of a sexual contact. *Id.* pt. IV, ¶ 45a(h). The two circumstances for aggravated sexual assault are: (1) threatening or placing that other person in fear less than required for rape or causing bodily harm; or (2) when the other person is substantially incapable of appraising the nature of the conduct, declining participation in the conduct or communicating an unwillingness to engage in the conduct. *Id.* pt. IV, ¶ 45a(c). Abusive sexual contact with a child is a sexual contact with a child over twelve but under sixteen years of age. *Id.* pt. IV, ¶ 45a(i). Wrongful sexual contact is a sexual contact without legal justification or lawful authorization without the other person’s permission. *Id.* pt. IV, ¶ 45a(m).

<sup>139</sup> *Id.* pt. IV, ¶ 51c.

<sup>140</sup> *Id.* pt. IV, ¶ 45a(t)(2) (defining the mental state required for sexual contact as done “with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.”).

<sup>141</sup> *Id.* pt. IV, ¶ 51c (defining unnatural carnal copulation as the joining of the mouth or anus of one person with the sexual organs of another person or animal).

<sup>142</sup> *Id.* pt. IV, ¶ 45a(t)(2).

<sup>143</sup> Compare *id.* pt. IV, ¶ 51c, with *id.* pt. IV, ¶ 45a(t)(2).

<sup>144</sup> WEBSTER’S NEW WORLD DICTIONARY 543 (3d ed. 1988) (*frottage* n. 1. sexual gratification from rubbing against the body of another person, 2. an artistic rubbing or tracing from a surface that is textured or raised, etc.); see Brian Shealy, *It’s Not Easy Being a Frotteur*, ONION, Oct. 24, 2007, available at [http://www.theonion.com/content/opinion/its\\_not\\_easy\\_being\\_a\\_frotteur?utm\\_source=EMTF\\_Onion](http://www.theonion.com/content/opinion/its_not_easy_being_a_frotteur?utm_source=EMTF_Onion).

<sup>145</sup> MCM, *supra* note 3, pt. IV, ¶ 45a(m) (“Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person’s permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.”).

more acts could be a sexual contact, sexual contact requires a higher mental state to ensure the actor has a criminal intent. In sum, an act constituting a sexual contact is not necessarily an act of sodomy.

On the other hand, any act of sodomy under Article 125 would also meet the definition of sexual contact under Article 120. Even though sexual contact requires a higher mental state, any act of sodomy would likely have the specific intent of a sexual contact. When someone puts their mouth on another person's genitals, it is hard to infer a specific intent other than sexual gratification. Even though sodomy is a general intent crime, the explicit sexual nature of the acts of sodomy creates an inference of intent for sexual gratification. Considering sexual contact's expansive *actus reus*, any act of sodomy is most likely a sexual contact.

Unfortunately, the structural differences of Article 120 and Article 125 complicate an element by element comparison. The JSC created attendant circumstances to each sexual contact offense designed to more specifically describe the same misconduct that could be forcible or underage sodomy.<sup>146</sup> On the other hand, forcible sodomy only requires that "the act was done by force and without the consent of the other person."<sup>147</sup> The meaning of this phrase is developed in case law as opposed to being in the statutory text.<sup>148</sup>

Comparing the definitions of forcible sodomy to sexual contacts attendant circumstances, what was once forcible sodomy is now either an aggravated sexual contact or an abusive sexual contact. The attendant circumstances for aggravated sexual contact are:

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct.<sup>149</sup>

The attendant circumstances for abusive sexual contact are:

- (1) causes another person of any age to engage in a sexual [contact] by—
  - (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
  - (B) causing bodily harm; or
- (2) engages in a sexual [contact] with another person of any age if that other person is substantially incapacitated or substantially incapable of—
  - (A) appraising the nature of the sexual [contact];
  - (B) declining participation in the sexual [contact]; or
  - (C) communicating unwillingness to engage in the sexual [contact].<sup>150</sup>

Between the two offenses, this exhaustive list of circumstances captures all of the case law doctrines concerning forcible sodomy. The JSC expressly intended this result.<sup>151</sup> In order to see how forcible sodomy is either aggravated or abusive sexual contact, the *Military Judge's Benchbook* instructions on Article 125 may be compared to the respective attendant circumstances in Article 120.

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<sup>146</sup> *Id.* pt. IV, ¶ 45a.

<sup>147</sup> *Id.* pt. IV, ¶ 51b(4).

<sup>148</sup> BENCHBOOK, *supra* note 74, para. 3-51-2 (describing doctrines in sodomy law such as constructive force which are based in case law).

<sup>149</sup> MCM, *supra* note 3, pt. IV, ¶ 45a(a)(1)–(5); *id.* pt. IV, ¶ 45a(e) ("Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact . . .").

<sup>150</sup> *Id.* pt. IV, ¶ 45a(c). The attendant circumstances for abusive sexual contact incorporate those of aggravated sexual assault. *Id.* pt. IV, ¶ 45a(h). The word "contact" is substituted for the word "act" in the text above.

<sup>151</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 251 ("[Art. 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct."); *id.* at 252 ("Definitions for terms such as force, consent, mistake of fact, and the like are derived from military and federal caselaw, as well as from state statutes and incorporated into the new [art. 120]").

If forcible sodomy involves the actual use of force,<sup>152</sup> then the conduct is also either an aggravated sexual contact (causing grievous bodily harm) or an abusive sexual contact (causing bodily harm). If the forcible sodomy involves threat of force or intimidation,<sup>153</sup> then the conduct is also either an aggravated sexual contact (threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping) or an abusive sexual contact (threatening or placing that other person in some other fear). If the forcible sodomy involves a victim with an impaired ability to consent,<sup>154</sup> then the conduct is also either an aggravated sexual contact (rendering unconscious or administering a drug) or an abusive sexual contact (when the other person is substantially incapacitated or incapable of giving consent).

Using the same comparison formula, Article 120 criminalizes the same misconduct covered in Article 125's two variations of underage sodomy. The child element in both articles is the same.<sup>155</sup> In Article 125, sodomy with a child under twelve equates to aggravated sexual contact with a child.<sup>156</sup> Similarly, sodomy with a child between the ages of twelve and sixteen-years old is the same as abusive sexual contact with a child in Article 120.<sup>157</sup>

Ultimately, any conduct that is forcible sodomy or underage sodomy is also one of four sexual contact offenses. Not only did Congress create overlapping crimes, but they created lesser punishments for the same conduct.<sup>158</sup> The end result is that most of Article 125 is also punishable, though less severely, under the new Article 120.

## B. The Overlap Effect; Charging Conduct Violating Both Articles 120 and 125

So what is one to do when confronted with conduct that violates both a newer, more specific criminal statute as well as an older, more severe criminal statute? This situation raises four questions. First, may a court-martial convict a person of both for the same misconduct? Two convictions for the same conduct raises multiplicity or double jeopardy concerns. Second, may a person be charged with both Article 120 and Article 125 for the same misconduct? Even if double charging is not multiplicitous, charging both may be an unreasonable multiplication of the charges. Third, does the Government have the option of choosing one statute over the other? How much weight should a court give to the fact that Congress chose not to repeal Article 125? Fourth and finally, does Article 125 still exist in whole or in part? In this regard, forcible sodomy and underage sodomy may be repealed by implication through the revision of Article 120 according to the canons of statutory interpretation.

### 1. Double Jeopardy and Teters

As to the first question, when a person faces multiple punishments for the same criminal act, the constitutional issue of double jeopardy arises. Double jeopardy is not just a prohibition on a second prosecution for the same criminal act.<sup>159</sup> The Supreme Court has held that it is also a prohibition on courts issuing a greater punishment than the legislature intended for

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<sup>152</sup> BENCHBOOK, *supra* note 74, para. 3-51-2 n.4 (“An act of sodomy occurs ‘by force’ when the accused uses physical violence or power to compel the victim to submit against his/her will.”).

<sup>153</sup> *Id.* para. 3-51-2 n.5 (“Where intimidation or threats of death or physical injury make resistance futile, it is said that ‘constructive force’ has been applied, thus satisfying the requirement of force.”); *id.* n.6 (describing abuse of military power as constructive force); *id.* n.7 (describing constructive force through parental or in loco parentis situations).

<sup>154</sup> *Id.* n.10 (“When a victim is incapable of consenting because she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.”); *id.* n.11 (describing sodomy without consent when the victim was asleep, unconscious or intoxicated).

<sup>155</sup> Compare MCM, *supra* note 3, pt. IV, ¶ 45a(o), with *id.* pt. IV, ¶ 51b (defining, in both, a child as under sixteen years of age but allowing for aggravation when the child is under twelve years of age).

<sup>156</sup> Compare *id.* pt. IV, ¶ 51b(2), with *id.* pt. IV, ¶ 45a(g).

<sup>157</sup> Compare *id.* pt. IV, ¶ 51b(3), with *id.* pt. IV, ¶ 45a(i).

<sup>158</sup> Sexual contacts are punished less severely as their sodomy equivalents. Compare *id.* pt. IV, ¶ 51e, with *id.* pt. IV, ¶ 45f. Aggravated sexual contact and aggravated sexual contact with a child both have a maximum sentence of twenty years. *Id.* pt. IV, ¶ 45f. Abusive sexual contact carries a maximum sentence of seven years. *Id.* Comparatively, forcible sodomy and sodomy with a child under twelve have a maximum sentence of life without parole. *Id.* pt. IV, ¶ 51e. Abusive sexual contact with a child has a sentence maximum of seven years. *Id.* pt. IV, ¶ 45f. Looking to its counterpart, sodomy with a child between twelve and sixteen has a twenty year maximum sentence. *Id.* pt. IV, ¶ 51e. Wrongful sexual contact, which has no direct sodomy comparison, only has a maximum sentence of one year. *Id.* pt. IV, ¶ 45f.

<sup>159</sup> U.S. CONST. amend. V, § 2 (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb, . . .”); *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (“[T]he Double Jeopardy Clause ‘protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the offense after conviction. And it protects against multiple punishments for the same offense.’”) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

one act.<sup>160</sup> The law presumes that Congress ordinarily intends only one punishment when the same act or transaction violates two distinct statutory provisions.<sup>161</sup> The Double Jeopardy Clause is not a protection if Congress intended for multiple punishments at a single trial for the same act.<sup>162</sup>

In *United States v. Teters*, the CAAF analyzed the question of congressional intent for multiple convictions for the same act or transaction.<sup>163</sup> In *Teters*, the appellant was convicted of both larceny and forgery.<sup>164</sup> The appellant committed forgery in order to complete the larceny.<sup>165</sup> The CAAF had to resolve “whether Congress intended appellant at a single court-martial to be convicted of both forgery under Article 123 and larceny under Article 121.”<sup>166</sup>

In *Teters*, the CAAF found a congressional intent for multiple convictions for both forgery and larceny.<sup>167</sup> To determine this, the CAAF first looked to the text of both statutes for express evidence of congressional intent.<sup>168</sup> The forgery and larceny statutes did not expressly prohibit multiple convictions and punishments in the appellant’s case.<sup>169</sup> Next, the CAAF examined the legislative histories of the statutes for guidance.<sup>170</sup> The legislative history was silent on the interplay of forgery and larceny.<sup>171</sup>

In the absence of express legislative guidance, the CAAF had to determine if Congress intended to create two offenses allowing for separate punishment or one offense allowing for only one punishment.<sup>172</sup> The CAAF employed the *Blockburger* rule of construction in order to discern congressional intent.<sup>173</sup> “The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.”<sup>174</sup> If “the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.”<sup>175</sup>

Using the *Blockburger* rule of construction, the CAAF presumed Congress intended for forgery and larceny to be separate offenses.<sup>176</sup> Unlike forgery, larceny “requires as an element a wrongful taking, obtaining, or withholding ‘by any means’ of ‘money, personal property, or article of value.’”<sup>177</sup> Unlike larceny, forgery “requires the false making or altering of any signature on any writing which, ‘if genuine, apparently imposes a legal liability on another or chanc[es] his legal right

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<sup>160</sup> *Rutledge v. United States*, 517 U.S. 292, 296 (1996) (“Courts may not ‘prescrib[e] greater punishment than the legislature intended.’”) (alteration in original) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

<sup>161</sup> *Rutledge*, 517 U.S. at 297; *Ball v. United States*, 470 U.S. 856, 861 (1985); *Whalen v. United States*, 445 U.S. 684, 692 (1980); *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>162</sup> *Albernaz*, 450 U.S. at 344 (“[Where] ‘consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.’”) (alteration in original) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

<sup>163</sup> 37 M.J. 370, 376–77 (C.M.A. 1993).

<sup>164</sup> *Id.* at 373.

<sup>165</sup> *Id.* at 376.

<sup>166</sup> *Id.* (citations omitted).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 377.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Ball v. United States*, 470 U.S. 856, 861 (1985).

<sup>175</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>176</sup> *Teters*, 37 M.J. at 377–78.

<sup>177</sup> *Id.* at 377.

or liability to his prejudice.”<sup>178</sup> The CAAF found larceny and forgery each requiring an element that the other does not.<sup>179</sup> This created a presumption that Congress intended larceny and forgery to be separate offenses.<sup>180</sup>

## 2. *Would Convictions for Both Sodomy and Sexual Contact Be Multiplicious?*

The *Teters* analysis will help determine congressional intent on how to punish conduct that is both sexual contact and sodomy.<sup>181</sup> If Congress intended separate offenses, then one act may be subject to separate punishments. The Double Jeopardy Clause limits a court from exceeding its authority as granted by the legislature.<sup>182</sup>

When interpreting this grant of authority, the *Teters* analysis guides the discussion. The first place to find legislative intent is the text of the statute.<sup>183</sup> Neither Article 120 nor Article 125 directly address a relationship between the two.<sup>184</sup> The next step is to look at the legislative history to see if the drafters addressed this issue.<sup>185</sup> In 1950, the drafters of Article 125 could not possibly address another statute to be enacted in 2005. The congressional record of Article 120 is silent on its relationship to Article 125.<sup>186</sup>

Despite the silence on the congressional record, the JSC report upon which the statute is based states that a person should not be prosecuted under Article 125 when Article 120 is available.<sup>187</sup> The JSC report addresses the issue of when the same conduct violates two different statutes:

[I]f Option 5 were enacted, preemption [by Article 120] is desirable. For example, a service person should not be prosecuted under Article 125's sodomy provision or the MCM's indecent assault provision (implementing Article 134), when a much more specific offense will be available under the new Article 120, UCMJ. Option 5 proposes elimination of those paragraphs in the MCM that overlap with the new Article 120 so that there will be no preemption issue.<sup>188</sup>

The drafters of Option 5 intended Article 120 to replace Article 125 if the two statutes overlapped. Congress chose Option 5.<sup>189</sup>

Since Congress adopted Option 5, one may presume Congress similarly intended Article 120 to replace Article 125's nonconsensual sodomy. The overall scheme of Option 5 consolidated all nonconsensual sex crimes in Article 120.<sup>190</sup> By the overall consolidation, Article 120 is a substitute for Article 125 and other sex crimes listed elsewhere.<sup>191</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 377–78.

<sup>180</sup> After presuming larceny and forgery to be constitutionally separate offenses, the CAAF also looked for “any other indications of contrary intent on Congress’ part which can overcome the *Blockburger* presumption of separateness.” *Id.* at 378. The CAAF examined the rule of lesser included offenses in Article 79 searching for evidence of contrary intent. *Id.* The CAAF found no evidence of Congressional intent elsewhere in the UCMJ, like in Article 79, which was contrary to the presumption created by the *Blockburger* rule. *Id.*

<sup>181</sup> *Id.* at 376–77.

<sup>182</sup> *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

<sup>183</sup> *Teters*, 37 M.J. at 376; see 2A SUTHERLAND STAT. CONST. § 45:1 & 46:1 (7th ed. 2007) (discussing the text of the statute as the first place to look and that plain meaning rule applies to the text).

<sup>184</sup> Compare MCM, *supra* note 3, pt. IV, ¶ 45a, with MCM, *supra* note 3, pt. IV, ¶ 51a. But see MCM, *supra* note 3, pt. IV, ¶ 45a(t)(12)(B). The definition of Article 120, Indecent Conduct, references Article 125, Sodomy. This supports the argument that Congress intended both statutes to live in full force.

<sup>185</sup> *Teters*, 37 M.J. at 376–77.

<sup>186</sup> No record of discussion exists concerning the new Article 120 and its relation to other criminal statutes. H.R. REP. NO. 109-89, at 332 (2005) (Conf. Rep.); H.R. REP. NO. 109-360, at 703 (2005) (Conf. Rep.); S. REP. NO. 109-69, at 316 (2005) (Conf. Rep.); 151 CONG. REC. H3912-28 (daily ed. May 25, 2005); 151 CONG. REC. S12811-12 (daily ed. Nov. 15, 2005); 151 CONG. REC. H12739 (daily ed. Dec. 18, 2005); 151 CONG. REC. H12199 (daily ed. Dec. 18, 2005); 151 CONG. REC. S14014 (daily ed. Dec. 19, 2005); 151 CONG. REC. S14256 (daily ed. Dec. 21, 2005).

<sup>187</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 77 (discussing the issue of preemption as it relates to the relationship between different statutes).

<sup>188</sup> *Id.*

<sup>189</sup> Johnson, *supra* note 128, at 27 (identifying Option 5 as the general basis for the new Article 120).

<sup>190</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 251 (“[Article 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct.”).

After examining the text and history, further evidence of intent may be found using the *Blockburger* rule of construction.<sup>192</sup> Applying the above comparison of Articles 120 and 125 to the *Blockburger* test, forcible and underage sodomy offenses fit into one of four sexual contact offenses.<sup>193</sup> This arguably creates a presumption that Congress intended someone to commit only one offense when violating both Article 120 and Article 125.<sup>194</sup>

If so, a conviction on both articles for the same misconduct creates serious multiplicity concerns. Convictions under Articles 120 and 125 for the same misconduct would likely violate the Double Jeopardy Clause. This answers this section's first of four questions regarding the charging of conduct violating both articles. Congress did not intend for Articles 120 and 125 to be separate offenses allowing for dual convictions for the same misconduct.

### 3. *Would Charging Both Be an Unreasonable Multiplication of the Charges?*

Regardless of whether Congress intended for separate convictions, charging both articles for the same conduct would also likely be an unreasonable multiplication of the charges. In *United States v. Quiroz*, the CAAF held that unreasonable multiplication of the charges is a distinct concept from the multiplicity.<sup>195</sup>

The prohibition against multiplicity is necessary to ensure compliance with the constitutional and statutory restrictions against Double Jeopardy . . . .

By contrast, the prohibition against unreasonable multiplication of the charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. . . .

In short, even if offenses are not multiplicitous as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.<sup>196</sup>

In *Quiroz*, the CAAF endorsed a five part test to see whether charges are unreasonably multiplied.<sup>197</sup> Using this test, a military judge may dismiss charges found to be unreasonably multiplied even if the charges are not multiplicitous.<sup>198</sup>

In *United States v. Paxton*, the CAAF recently reviewed whether or not charges were unreasonably multiplied.<sup>199</sup> A general court-martial convicted TSgt Paxton of raping and sodomizing his daughter as well as indecent acts by touching his daughter's breasts and genital area.<sup>200</sup> The CAAF applied the *Quiroz* five-part test to determine whether the Government unreasonably multiplied the charges.

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<sup>191</sup> *Id.*

<sup>192</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>193</sup> Compare MCM, *supra* note 3, pt. IV, ¶ 51b(2), (3), (4), with *id.* pt. IV, ¶ 45a(e), (g), (h), (i).

<sup>194</sup> The counter argument is that Congress did not intend for only one offense because it rejected the recommendation to repeal Article 125. See Johnson, *supra* note 128, at 28 (describing certain portions of Option 5 that do not represent the intent of Congress).

<sup>195</sup> 55 M.J. 334, 338 (C.A.A.F. 2001). The appellant had pled guilty to four charges involving the receipt and sale of C-4 explosives. *Id.* The CAAF affirmed the lower court's decision that two of the four charges of concerning the C-4 constituted an unreasonable multiplication of the charges. *Id.*

<sup>196</sup> *Id.* at 337–38.

<sup>197</sup> *Id.* at 338.

<sup>198</sup> *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006) (“Dismissal of unreasonably multiplied charges is a remedy available to the trial court.”).

<sup>199</sup> 64 M.J. 484, 491 (C.A.A.F. 2007).

<sup>200</sup> *Id.* at 490.

The offensive conduct underlying these specific charges took place on the same evening. As recounted by the testimony of the victim, the offending conduct occurred as follows: Paxton watched his daughter urinate and then wanted to tuck her into bed. He sat at the end of her bed and asked her if she wanted him to take her virginity. She said no. After “a while” he asked if he could touch her breasts. After touching her breasts, he asked if she would like him to finger her. She said no, but he put his finger into her vagina. Then he told her that he would teach her to do “blowjobs” and “hand jobs” and asked her to give him a “blowjob.” She had her mouth on his penis for a few seconds. Then he asked for a “hand job” and she put her hands on his penis. After that, he took off his shirt, got on top of her and put his penis inside her vagina.

*Id.*

(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?<sup>201</sup>

The CAAF did not find that the charges against TSgt Paxton were unreasonably multiplied.<sup>202</sup> The CAAF only found the first criterion in favor of the appellant in that his defense counsel objected at trial to an unreasonable multiplication of the charges.<sup>203</sup> The CAAF found that the multiple charges were each based upon separate and distinct acts.<sup>204</sup> The number of charges did not exaggerate or misrepresent the appellant's criminality.<sup>205</sup> Since the rape charge was potentially punishable by death, the number of other charges did not unreasonably increase the appellant's punitive exposure.<sup>206</sup> Finally, the CAAF found no evidence of prosecutorial overreaching or abuse in drafting the charges.<sup>207</sup> As the *Paxton* case shows, the test for unreasonable multiplication of the charges is a fact-intensive analysis.

Despite the case by case analysis, charging both Article 120 and Article 125 for the same conduct would fail in most circumstances. The Government will fail the first part of the test if the defense counsel objects at trial. The Government flunks the second question to the extent that Article 120 and Article 125 punish the same conduct as shown above. Charging both articles for the same conduct would exaggerate or misrepresent the accused's criminality because the sodomy crimes punish severely.<sup>208</sup> The accused's criminal exposure is greatly increased when using the sodomy counterparts to the four sexual contact offenses.<sup>209</sup> The last issue of prosecutorial overreaching or abuse would depend on the facts of each case.

After reviewing the *Quiroz* test, combining non-consensual sodomy with a sexual contact would likely constitute an unreasonable multiplication of the charges. When consensual sodomy is involved, Section V will discuss the possibility of charging both articles when consent is an alternative theory of the case. Consensual sodomy aside, it is likely prosecutorial abuse to charge both Articles 120 and 125 for the same misconduct. The next question is whether the prosecution may choose one over the other.

#### 4. *May the Prosecution Choose Sodomy When Sexual Contact Also Applies?*

Recalling the four questions from the overlap of Articles 120 and 125, the third question is whether the Government may ignore a newer, more specific statute and use the older, more severe statute. The answer to this question implicates prosecutorial discretion and judicial deference. Although problematic, this answer favors allowing a choice in one statute over the other when both apply.

##### a. *Yes, the Prosecution May Choose Either Article 120 or Article 125*

Perhaps Congress did not repeal Article 125 because it wanted to provide more choices for charging. So by declining to repeal Article 125, Congress may have intended two courses of action. For the first option, the Government could charge either Article 120 or Article 125. As the second option, the prosecution could charge both but only convict on either Article 120 or Article 125. Since Congress specifically declined to repeal Article 125, courts should still give that statute effect.

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<sup>201</sup> *Id.* at 491 (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> MCM, *supra* note 3, pt. IV, ¶ 51e. Forcible sodomy and sodomy with a child under twelve carry a maximum sentence of life without parole. *Id.* Sodomy with a child over twelve but under sixteen years of age carries a maximum sentence of twenty years. *Id.*

<sup>209</sup> Compare *id.* pt. IV, ¶ 51e, with *id.* pt. IV, ¶ 45f; see *supra* note 159.

Using similar logic, a California federal district court upheld the Government's choice of one criminal statute over another in *United States v. Sapp*.<sup>210</sup> Ramon Sapp was charged, in part, of two counts of attempting to kill persons assisting federal officers in the performance of their duties.<sup>211</sup> Sapp attempted to kill two state police officers when they tried to execute a federal arrest warrant on him.<sup>212</sup> The Government chose to prosecute Sapp under a statute punishing whoever kills or attempts to kill any person assisting a federal officer in the performance of duty.<sup>213</sup>

Sapp argued that the Government chose the wrong statute.<sup>214</sup> He asserted that the Government must use a statute specifically addressing the killing of a state police officer.<sup>215</sup> The statute the defense favored did not have a provision for an attempted killing.<sup>216</sup> Since he did not kill a federal agent, Sapp did not violate his proposed statute.<sup>217</sup>

The district court held that the Government may choose either of two overlapping criminal statutes for the same act.<sup>218</sup> The Government may choose this so long as the statutory text and legislative history show the intent that each statute applies independently.<sup>219</sup> The district court relied on the Supreme Court case of *United States v. Ball* which upheld the Government's broad discretion in selecting charges.<sup>220</sup>

In *Ball*, the Government charged the defendant with both possessing and receiving a firearm based on the same underlying facts.<sup>221</sup> The Supreme Court found the statutory language and legislative history to indicate that the provisions applied independently.<sup>222</sup> The Government may simultaneously prosecute for both possession and receipt of the same firearm but may only convict on one offense.<sup>223</sup>

Relying on *Ball*, the district court upheld the Government's choice of statute.<sup>224</sup> The district court did not find text in either statute indicating one must be used over another.<sup>225</sup> Where conduct violated both statutes, the punishment was the same.<sup>226</sup> Since the punishment scheme was identical, the *Sapp* court found congressional intent for two separate crimes.<sup>227</sup> Neither statute wholly replaced the other. Both crimes punished some conduct the other did not.<sup>228</sup> The district court did not find evidence in the legislative history to indicate that one statute should be used over the other.<sup>229</sup> Since the text and history of the statutes did not indicate a contrary intent, the court upheld the Government's choice of statute.<sup>230</sup>

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<sup>210</sup> 272 F. Supp. 2d 897 (N.D. Cal. 2003) (dismissing the charges on other grounds).

<sup>211</sup> *Id.* at 898.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 901.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 902.

<sup>216</sup> *Id.* at 902 n.2.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 904 (citing *United States v. Ball*, 470 U.S. 856, 860 (1985)).

<sup>219</sup> *Id.*

<sup>220</sup> *Ball*, 470 U.S. at 859 (“This Court has long acknowledged the Government’s broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case.”).

<sup>221</sup> *Id.* at 858.

<sup>222</sup> *Id.* at 860.

<sup>223</sup> *Id.* at 864.

<sup>224</sup> *Id.* at 905.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 905–06.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 902–05.

<sup>230</sup> *Id.* at 906.

Applying *Sapp* and *Ball*, the Government may choose to prosecute under Article 125, Article 120, or both, unless the text and history of Article 120 states otherwise. The text of Article 120 does not address a relationship to Article 125.<sup>231</sup> If Congress wanted Article 120 to have precedence over Article 125, they could have repealed Article 125.<sup>232</sup> Presented with this recommendation, Congress chose not to do so.<sup>233</sup> If they wanted Article 120 to replace Article 125 to the extent of the overlap, Congress could have included instructions on this point. The argument to allow a choice in prosecution rests on a judicial deference to both prosecutorial discretion and legislative authority.

*b. No, the Prosecution Must Choose Article 120 When It Applies*

On the other hand, the legislative history may support the exclusive use of Article 120 to the extent it overlaps with conduct punished under Article 125. Looking to Article 120's purpose, its JSC creators gave Congress an option to move sexual assault crimes away from the common law and towards the modern codified system.<sup>234</sup> Adopting this option, Congress chose to make military justice more similar to federal law. Furthermore, the comprehensive nature of Article 120 may indicate Congress's preference for this statute for all non-consensual sexual crimes.

Congress also may have indicated a preference when it downgraded the punishment scheme for conduct covered under both statutes. Where Article 120 and Article 125 punish the same conduct, Article 120 punishes less severely.<sup>235</sup> A similar punishment scheme would show that Congress intended to give the Government a choice in prosecution. The district court in *Sapp* found the similar punishment scheme as evidence of intent for such use.<sup>236</sup> The opposite is true here. The less severe punishment of Article 120 is evidence of intent to provide a replacement, not to provide a choice.

The *Wilson* case from Part II is further evidence of congressional intent for trial counsels to use Article 120 when it applies.<sup>237</sup> In *Wilson*, the CAAF held that Congress never intended for the availability of a mistaken age defense in Article 125.<sup>238</sup> The Article 120 offense of abusive sexual contact with a child is the equivalent of the sodomy crime at issue in *Wilson*.<sup>239</sup> This Article 120 offense has a mistaken age defense.<sup>240</sup>

The inconsistency in defenses is further evidence that Congress did not intend for a choice between Articles 120 and 125 when both apply. If Congress wanted to provide a choice, the statutory scheme would be more consistent on punishments and defenses in both articles.<sup>241</sup> This makes the affirmative answer to the third question more problematic. However, these issues do not conclusively distinguish this situation from one where the prosecution has a choice between two applicable statutes.

The precedent from *Ball* allowing for a choice in prosecution outweighs the precedent requiring the use of Article 120.<sup>242</sup> Although problematic, a court could still theoretically convict on the Article 125 offense used in *Wilson* even though a defense may be available under Article 120. The theory permitting this prosecution to occur would require the court to place

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<sup>231</sup> MCM, *supra* note 3, pt. IV, ¶ 45d, e. Sodomy is not listed as a lesser included offense. *Id.* However, the definition of "Indecent Conduct" in Article 120 includes sodomy as an act that a person cannot observe or visually record without that other person's consent. *Id.* pt. IV, ¶ 45a(t)(12)(B).

<sup>232</sup> See *United States v. Wilson*, 66 M.J. 39, 45 (C.A.A.F. 2008) (holding that the new Article 120 has no effect on the availability of a mistaken age defense in Article 125 where Congress or the President could have, but did not, provide this defense). This case supports the argument that Article 120 did not affect Article 125.

<sup>233</sup> Johnson, *supra* note 128, at 27.

<sup>234</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 1–4.

<sup>235</sup> Compare MCM, *supra* note 3, pt. IV, ¶ 51e, with *id.* pt. IV, ¶ 45f; see *supra* note 159.

<sup>236</sup> *United States v. Sapp*, 272 F. Supp. 2d 897, 905–06 (N.D. Cal. 2003).

<sup>237</sup> *Wilson*, 66 M.J. at 45 n.10. The *Wilson* court did not address the viability of Article 125 when Article 120 is available. *Id.*

<sup>238</sup> *Id.* at 47 ("We decline to redraft Article 125, UCMJ, to include a defense that Congress might have added, but did not.")

<sup>239</sup> MCM, *supra* note 3, pt. IV, ¶ 45a(i).

<sup>240</sup> *Id.* pt. IV, ¶ 45a(o)(2).

<sup>241</sup> *Contra Wilson*, 66 M.J. at 46 ("The parties argue, from respective histories of Articles 120 and 125, UCMJ, that Congress intended to harmonize the legislative scheme, but overlooked Article 125. After reviewing the history of both statutes, we fail to see support for this position.")

<sup>242</sup> *United States v. Ball*, 470 U.S. 856, 859 (1985); see *Wilson*, 66 M.J. at 45 n.12 (noting that if the controversial policy concerning homosexuals in the military is the reason elected officials failed to act, it did not justify the court in making a public policy determination by judicial fiat).

great weight on the meaning derived from what Congress does not do. To allow such a conviction, a court would be operating at the height of judicial deference to the discretion of the trial counsel and to the significance of legislative inaction.

##### 5. Did Article 120 Partially Repeal Article 125 by Implication?

Similarly examining this inaction, the fourth question asks whether Congress repealed Article 125 even though it specifically chose not to do so. If the answer to the third question allows for a choice in prosecution, this would be the height of judicial deference to congressional inaction. If the answer to the fourth question favors implied repeal, this would be the height of judicial activism. Both questions seek to derive congressional intent from what Congress does not say about what it does not do.

What did Congress intend when, without discussion, it enacted Article 120 without repealing Article 125? The canon of implied repeal is instructive:

Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute or covers the subject of a prior act or section and is a substitute act. The latest declaration of the legislature prevails. The inconsistent provisions of the prior statute, or the whole prior statute if the later act is intended as a substitute, are treated as repealed.<sup>243</sup>

The Supreme Court recently re-articulated the theory of implied repeal in *National Association of Home Builders v. Defenders of Wildlife*.<sup>244</sup> The case concerned the interplay of two federal environmental statutes: the Clean Water Act (CWA) and the Endangered Species Act (ESA).<sup>245</sup> The CWA mandated that the Environmental Protection Agency (EPA) must turn over certain permitting powers to state authorities upon a showing of nine listed criteria.<sup>246</sup>

The ESA, a later act, mandated that every federal agency, like the EPA, ensure that any action it takes not jeopardize the continued existence of endangered or threatened species.<sup>247</sup> The nine CWA criteria which triggered mandatory permit authority transfer did not include a “no jeopardy” factor.<sup>248</sup> Under a theory of implied repeal, the Supreme Court addressed whether the ESA added a tenth criterion that the EPA must find before transferring permit authority to a state.<sup>249</sup>

The Supreme Court held that “‘repeals by implication are not favored’ and will not be presumed unless the ‘intention of the legislature to repeal is clear and manifest.’”<sup>250</sup> “‘An implied repeal will only be found where provisions in two statutes are in ‘irreconcilable conflict’ or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.’”<sup>251</sup> The Supreme Court did not find irreconcilable conflict between the two statutes. The Court interpreted the ESA to apply to only discretionary actions of the EPA.<sup>252</sup> When the CWA mandates a certain action under specific circumstances, the ESA does not require an additional finding that the action will not jeopardize any endangered or threatened species.<sup>253</sup>

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<sup>243</sup> 1A SUTHERLAND STAT. CONST. § 22:22 (7th ed. 2007) (discussing implied repeals); see *Nat’l Assoc. of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007); *Watt v. Alaska*, 451 U.S. 259 (1981); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Posadas v. Nat’l City Bank*, 296 U.S. 497 (1936); *Chase v. United States*, 256 U.S. 1 (1921).

<sup>244</sup> *Nat’l Assoc. of Home Builders*, 127 S. Ct. at 2532.

<sup>245</sup> *Id.* at 2525.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 2526.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 2532 (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

<sup>251</sup> *Id.* (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

<sup>252</sup> *Id.* at 2534. The court did not reach the issue of whether the Endangered Species Act was intended to replace the Clean Water Act. The two statutes have different purposes and were passed only one year apart. *Id.* at 2525–26.

<sup>253</sup> *Id.* at 2534–35.

The Supreme Court found that the lower appellate court construed the ESA to effectively repeal the nine listed criterion in the CWA. The lower court modified the CWA by requiring a tenth factor prior to the EPA's transfer action.<sup>254</sup> In reversing the lower court, the Supreme Court reiterated a presumption against implied repeals.<sup>255</sup>

The doctrine of implied repeal helps answer the question of the previous section. Did Congress give trial counsel a choice in either Article 120 or Article 125?<sup>256</sup> Or did Article 120 repeal nonconsensual sodomy by implication leaving only consensual sodomy in Article 125? If the doctrine of implied repeal applies, the prosecution cannot choose nonconsensual sodomy because it no longer exists. The inquiry starts with a presumption against implied repeal as reiterated in *Home Builders*.

Even with this presumption in mind, the doctrine of implied repeal arguably makes nonconsensual sodomy a dead letter. According to *National Association of Home Builders*, implied repeal happens under either of two circumstances; irreconcilable conflict or clear substitution.<sup>257</sup> In applying this doctrine, courts should give effect to both Article 120 and Article 125 unless it creates an irreconcilable conflict or unless Article 120 is clearly intended as a substitute.

In this situation, however, implied repeal cannot be based on the irreconcilable conflict. If a trial counsel ignores Article 120 and charges only Article 125, the court avoids the potential conflicts of multiplicity and multiplication. This interpretation to allow one article or the other gives effect to both Article 120 and Article 125. As discussed in the previous section, this is well grounded in judicial deference. Since an interpretation is possible which gives effect to both statutes, one of the required circumstances is not present. Grounds based on irreconcilable conflict do not overcome the presumption against implied repeal.

Even in the absence of an irreconcilable conflict, implied repeal may occur if Article 120 is clearly intended as a substitute.<sup>258</sup> Even though Congress left Article 125 on the books, the overall intent of Article 120 is to replace the old regime. Congress rejected the first JSC recommendation to keep the old regime. As their second preference, the JSC drafters of Option 5 expressed the intent to substitute federal law for the common law.<sup>259</sup>

In taking this recommendation, Congress arguably adopted the JSC's intent for Article 120's substitution for all nonconsensual sex crimes.<sup>260</sup> The intent for substitution would extend only so far as the actual substitution of Article 120 over Article 125. In other words, Congress may have intended to replace forcible and underage sodomy, but not consensual sodomy.<sup>261</sup>

Even without this intention on the record, the intent to substitute in Option 5 is arguably clear enough to overcome the presumption against implied repeal.<sup>262</sup> Recalling the legislative history of Article 120, the drafters of Option 5 intended to substitute Article 120 for all sexual assault crimes.<sup>263</sup> When Congress enacted Option 5, it adopted the intent of the JSC.

To the extent Congress did not enact Option 5, the intent to substitute is not contradicted. Perhaps Congress did not want to re-open the 1993 debate over sexual orientation in the military.<sup>264</sup> Such a debate may have risked derailing the effort to

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<sup>254</sup> *Id.* at 2533.

<sup>255</sup> *Id.*

<sup>256</sup> Congress arguably wanted prosecutors to have a choice in prosecution. The definition of Article 120, Indecent Conduct, references Article 125, Sodomy. MCM, *supra* note 3, pt. IV, ¶ 45a(t)(12)(B).

<sup>257</sup> *Nat'l Assoc. of Home Builders*, 127 S. Ct. at 2532.

<sup>258</sup> *Id.*

<sup>259</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 251.

<sup>260</sup> *Id.* (“[Article 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct.”). Given the context of this list, Article 120 does not replace consensual sodomy.

<sup>261</sup> The cross reference to Article 125, Sodomy in the definition of Article 120, Indecent Conduct, does not undermine this theory. Congress intended consensual sodomy to continue to be prohibited. This may be why sodomy is referenced in the new Article 120. See MCM, *supra* note 3, pt. IV, ¶ 45a(t)(12)(B).

<sup>262</sup> *Nat'l Assoc. of Home Builders*, 127 S. Ct. at 2532.

<sup>263</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 1–4, 251.

<sup>264</sup> See *United States v. Wilson*, 66 M.J. 39, 50 (C.A.A.F. 2008) (Effron, C.J., dissenting).

reform sexual assault crimes. This debate may have been reopened if Congress took the JSC recommendation to repeal Article 125. Whatever the reason, this silence does not contradict the intent of Option 5 to substitute all sexual assault crimes elsewhere with Article 120.

#### IV. The Intersection of Article 120 and of Article 125

##### A. Understanding Implied Repeal in Light of *Marcum*'s Effect

The case for implied repeal of nonconsensual sodomy is stronger after considering the vitality of consensual sodomy crimes. As discussed above, recent developments in privacy rights have little effect on the military prohibition of prejudicial sexual conduct. In 2005, Congress may be presumed to know that the CAAF limited the impact of *Lawrence* through *Marcum* the year prior. The JSC report, as noted earlier, recommended capturing these developments by reforming consensual sex crimes.<sup>265</sup> Recall that despite the recommendation to reform both, Congress only acted on the part of Option 5 dealing with a substitute set of sexual assault crimes.

Understanding that Article 125 also punished consensual conduct, Congress limited its reform to nonconsensual sex crimes. Since Article 120 is clearly intended to replace all sexual assaults, courts should only give effect to Article 125's consensual sodomy. Although an act of judicial activism, this defers to congressional intent for the new Article 120 to reform sexual assault prosecutions with a substitute set of laws.<sup>266</sup> Congress stopped short of reforming consensual sex crimes when it declined to repeal Article 125. In giving only consensual sodomy effect, courts would be consistent with the scope of the reform.

In summary, a reconcilable answer to last section's four questions concerning the overlap is that Congress understood Article 125 included both consensual and nonconsensual crimes but only sought to reform the latter.<sup>267</sup> If charging forcible or underage sodomy, the Government would have difficulty arguing that Congress intended its sexual assault reforms to be ignored. Thus despite the presumption against implied repeal, Article 120 repeals by implication Article 125's nonconsensual sodomy, but not consensual sodomy.

##### B. The Consensual Sodomy Alternative

In addition to the legal reasons for choosing Article 120 over Article 125, practical reasons also dictate abandoning underage and forcible sodomy prosecutions under Article 125. By disregarding nonconsensual sodomy crimes, trial counsels may avoid the issues of multiplicity, unreasonable multiplication and implied repeal. However, military justice practitioners cannot simply ignore Article 125 when charging under Article 120.

Consensual, adult sodomy which is prejudicial to good order and discipline is still a crime under Article 125.<sup>268</sup> Practitioners must understand the intersection of Article 120 and Article 125 if a case involves a defense of consent, mistaken consent or mistaken age. These defenses may convert the charged nonconsensual misconduct into consensual misconduct.

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When we are dealing with an article of the code in which age is not an element of the offense, such as Article 125, we should exercise great caution in drawing substantive inferences from congressional inaction. The problem with such speculation, particularly in the absence of legislative history setting forth a reason for the inaction, is that there are many reasons why Congress may not act on a particular aspect of a legislative proposal. If one were to speculate with respect to Article 125, UCMJ, for example, such speculation could include the possibility that congressional inaction resulted from concern that amending the sodomy statute would run the risk of reopening the highly contentious debate that occurred in 1993 regarding sexual orientation in the military. *See* H.R. Rep. No. 103-200, at 287-90 (1993). In the circumstances of the present case, however, we need not rely on speculation about this or any other reason for legislative inaction. The majority opinion does not establish that the legislative record provides a sufficient foundation to permit reliance on congressional inaction as a basis for deciding the case before us.

*Id.*

<sup>265</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 289.

<sup>266</sup> *Id.* at 251.

<sup>267</sup> *Id.* at 1-4.

<sup>268</sup> *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

If these defenses to Article 120 are successful, the accused may still violate Article 125. Article 120 does not list sodomy as a lesser included offense<sup>269</sup> nor does it punish consensual, adult, private conduct.<sup>270</sup> The prosecution may have an alternate theory of the case involving consent of the alleged victim. For these reasons, Articles 120 and 125 may still be on a charge sheet for the same conduct.

This alternative theory of the case based on the victim's consent (or the perception of consent) is generally not an unreasonable multiplication of the charges under the *Quiroz* test mentioned earlier.<sup>271</sup> The above discussion of unreasonable multiplication of the charges did not address when the Government is only charging Article 125 in the alternative to Article 120. In this situation, the Government would move to dismiss the consensual sodomy charge if the fact-finder convicted the accused of sexual contact. If the accused successfully defended the sexual contact offense, then the Government would be able to prove that the conduct was still a crime.

Without charging consensual sodomy in the alternative, the Government would risk decriminalizing conduct when using Article 120. Prior to Article 120's reform, the accused may still have committed a crime even if he or she had a defense to nonconsensual sodomy. Recall that since consensual sodomy is a lesser included offense of nonconsensual sodomy, the Government did not have to charge it separately as an alternate theory of the case. When charging under the new Article 120, however, Government should consider charging consensual sodomy in the alternative. If consent, mistaken consent or mistaken age is a possibility with Article 120, the prosecution must charge Article 125 to prevent prejudicial misconduct escaping punishment.

### C. Missed Opportunity for Reforming Consensual Sex Crimes

Despite the need for a lesser included offense, practitioners should embrace the new Article 120. When Congress enacted comprehensive reform of sexual assault crimes, it intended for those new offenses to be used. Unfortunately, Congress passed on reforming consensual sexual misconduct.<sup>272</sup> In silently doing so, lawyers have the dilemma of speculating on the significance of what Congress does not do.<sup>273</sup>

This dilemma would have been avoided had Option 5 been fully implemented. After repealing Article 125, Option 5 called for the President to create a new Article 134 offense. This new offense would capture all consensual sexual conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.<sup>274</sup> Consensual sodomy still punishable after *Lawrence* and *Marcum* would have been incorporated into "Prejudicial Sexual Relationships" in the proposed Article 134 offense.<sup>275</sup>

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<sup>269</sup> MCM, *supra* note 3, pt. IV, ¶ 45d, e.

<sup>270</sup> *Id.* pt. IV, ¶ 45a(o)(2) ("[I]t is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years."); *id.* pt. IV, ¶ 45a(r) ("Consent and mistake of fact as to consent . . . are an affirmative defense for the sexual conduct in issue in a prosecution under . . . subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).").

<sup>271</sup> MCM, *supra* note 3, R.C.M. 307(c)(4) discussion ("There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses.").

<sup>272</sup> Like a gorilla in the living room that no one wants to talk about, the military's prosecution of consensual sodomy touches near the political topic of homosexuals in the military. It is possible that Congress avoided Article 125's repeal to prevent a distraction to reforming sexual assault crimes. *See* 10 U.S.C. § 654 (2000).

<sup>273</sup> This dilemma may remind some of the dog that did not bark in the Sherlock Holmes story, *Silver Blaze*. SIR ARTHUR CONAN DOYLE, *SILVER BLAZE, IN THE MEMOIRS OF SHERLOCK HOLMES*, 7–34 (Penguin Books 1950) (1894). In this detective story, Silver Blaze is a race horse who is missing and whose trainer has been killed out on the moor under suspicious circumstances. *Id.* During the night of the crime, the guard dog in the barn does not bark. *Id.* Holmes then deduces the dog knew the horse thief. *Id.* Holmes uses this fact, in part, to solve the crime. *Id.* Lawyers must be like Sherlock Holmes and deduce the significance of congressional silence.

<sup>274</sup> SEX CRIMES AND THE UCMJ, *supra* note 2, at 318–24 (recommending in Option 5 replacing Article 125, in part, with a new Article 134 offense called "Prejudicial Relationships Involving Sexual Activity").

<sup>275</sup> *Id.* at 318. "Prejudicial Sexual Relationships" proposed seven crimes including one catch all crime.

(1) Prejudicial sexual act (includes sodomy), sexual contact, or lewd act.

(a) That the accused engaged in a sexual act (includes sodomy), sexual contact or lewd act with a certain person; and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

*Id.*

“Prejudicial Sexual Relationships” also would have captured consensual sexual conduct that does not rise to the level of an act of sodomy but is still prejudicial or service discrediting.<sup>276</sup> Since sodomy requires copulation of the mouth and genitals or genitals and anus, any other consensual sexual act is not directly punishable under Article 125.<sup>277</sup> Based on other authorities, relationships resulting from the conduct may still be punishable.<sup>278</sup> The proposed consolidation would have allowed a person to look in one place and have a better understanding of what conduct was punishable. The military missed an opportunity to codify the development of privacy rights from case law.<sup>279</sup>

Even without reforming consensual sodomy, the President may still correct the current problem by removing nonconsensual sodomy from Article 125. Under Articles 36 and 56 of the UCMJ, the President may set different maximized punishments for an offense based on specific facts.<sup>280</sup> Under this authority, the President created forcible sodomy, sodomy with a child under age twelve and sodomy with a child over twelve but less than sixteen years old.<sup>281</sup> Using this same authority, the President may eliminate these sentence enhancing elements. Such an action would prune the dead branches from Article 125 or at least eliminate any debate on that issue.

## V. Conclusion

Since Article 120 did not affect consensual sodomy, Article 125 is “only mostly dead.”<sup>282</sup> However until officially addressed, the implied repeal of non-consensual sodomy is an open question. In contrast, consensual sodomy is alive to the extent the charged conduct is prejudicial to good order and discipline. As shown in the survey above, the *Lawrence* right to privacy only reaches conduct which is generally not the gravamen of the case. Since only prejudicial sodomy is typically prosecuted, the consensual sodomy prohibition is mostly alive.

Even though Congress meant for Article 120 to replace most of Article 125, military justice practitioners should expect to see sodomy charged in the alternative to many sexual contact offenses. Absent evidence of physical force in sexual assaults, trial counsel may want to preserve the lesser included offense of consensual sodomy. If a consent defense is successful, would the conduct still be prejudicial to good order and discipline? If so, trial counsel risk decriminalizing conduct without charging Article 125 in the alternative to Article 120.

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<sup>276</sup> *Id.* at 253 (recommending the Article 120 definitions be incorporated into “Prejudicial Relationships Involving Sexual Activity” which expands the zone of punishable conduct).

<sup>277</sup> Article 134, UCMJ clause 1 or clause 2 may potentially capture consensual sexual conduct which is prejudicial to good order and discipline or of a nature to discredit the armed forces but does not rise to the level of an act of sodomy. See MCM, *supra* note 3, pt. IV, ¶ 60b. For example, it is not settled if it is unnatural carnal copulation when a person uses his or her tongue to penetrate into another person’s anus. If this consensual act is not sodomy, then it is possible to be punished under the General Article, Article 134 assuming it is also prejudicial. As another example, if a subordinate used her hand to masturbate a superior, Article 134 may reach the conduct but not Article 125.

<sup>278</sup> See *id.* pt. IV, ¶ 83b (criminalizing officer and enlisted fraternization); AR 600-20, *supra* note 69, para. 4-16 (punishing certain relationships under Article 92, UCMJ for violation of a lawful general regulation).

<sup>279</sup> Trial counsels should consider charging consensual sodomy to include the element of criminality:

Sample specification. In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_, wrongfully commit sodomy with \_\_\_\_\_.

Here the word “wrongfully” is added to Article 125 to allege prejudice to good order and discipline as suggested by RCM 307. See MCM, *supra* note 3, R.C.M. 307 discussion (c)(3)(G)(ii).

If the alleged act is not itself an offense but is made an offense either by applicable statute (including Article 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as “wrongfully,” “unlawfully,” or “without authority” (depending on the nature of the offense) should be used to describe the accused’s acts.

*Id.*

<sup>280</sup> UCMJ arts. 36, 56 (2008).

<sup>281</sup> Compare MCM, *supra* note 3, pt. IV, ¶ 51a, with *id.* pt. IV, ¶ 51b (showing the elements for forcible and underage sodomy are not in the statute but are created by the President).

<sup>282</sup> “[Y]our friend here is only mostly dead. There’s a big difference between mostly dead and all dead. . . . Now mostly dead, he’s still slightly alive.” THE PRINCESS BRIDE (20th Century Fox 1987) (quoting actor Billy Crystal playing the role of Miracle Max). I chose this quote, in part, because the phrase “mostly dead” is a contradiction in terms which underscores the complicated state of Article 125.

After sorting through this confusion, the Government should let Article 120 do the work Congress intended for all sexual assaults. Article 125 remains only to punish consensual conduct prejudicial to good order and discipline. If charging Article 125, trial counsels should be prepared for the *Marcum* analysis. Such a prepared trial counsel will then understand the difference between mostly dead and all dead.

## Lesson Learned from an Attempt to Limit Collective Bargaining in the Federal Workplace; What Is the Takeaway from NSPS?

Major Michael D. Mierau Jr.\*

### I. Introduction

Within the realm of public sector collective bargaining, there has been a substantial amount of litigation in the last several years. This is, in great part, due to the establishment of the Department of Homeland Security (DHS) and the permission from Congress to create a new personnel system within the Department of Defense (DoD). The clash between the unions and the federal government is the result of these two departments' contention that they cannot efficiently transform their personnel systems with the constraints they perceive are imposed upon them by collective bargaining.

To fully grasp the issues in contention between these forces, one must understand the definition of collective bargaining in the federal workplace. The Federal Sector Labor Management Relations Act (FSLMRA) defines collective bargaining as:

the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.<sup>1</sup>

Both the new DoD system (known as National Security Personnel System (NSPS)) and the new DHS system (known as MAXHR) attempted to abrogate collective bargaining as outlined by the FSLMRA.<sup>2</sup> The unions mounted attacks against this action. The National Treasury Employees Union<sup>3</sup> (NTEU) secured decisions by the judiciary that an abrogation of collective bargaining by DHS in MAXHR was impermissible under its own implementing statute.<sup>4</sup> The American Federation of Government Employees<sup>5</sup> (AFGE) did not have the same success in the courts against the NSPS.<sup>6</sup>

This article addresses reasons behind the disparate court decisions, but its primary purpose is to comprehend the lesson that can be learned from this attempt to limit collective bargaining. When the Government attempts to make significant changes to systems that affect labor relations, the affected unions should be consulted and subjectively included in the decision making process. To ignore this inclusion is to risk a significant waste of time, energy, and resources. More importantly, it is to risk a loss of trust with the very employees affected by the new policy. To arrive at this conclusion, it is

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<sup>1</sup> 5 U.S.C. § 7103(a)(12) (2000).

<sup>2</sup> Nat'l Treasury Employees Union v. Chertoff (*Chertoff II*), 452 F.3d 839 (D.C. Cir. 2006); Am. Fed'n of Gov't Employees v. Rumsfeld (*Rumsfeld*), 422 F. Supp. 2d 16, 41, 43 (D.D.C. 2006), *rev'd sub nom.* Am. Fed'n of Gov't Employees v. Gates (*Gates*), 486 F.3d 1316 (D.C. Cir. 2007).

<sup>3</sup> There were actually five unions that brought suit against DHS: (1) the National Treasury Employees Union, (2) American Federation of Government Employees, (3) National Federation of Federal Employees, (4) National Association of Agricultural Employees, and (5) Metal Trades Department of the AFL-CIO. Nat'l Treasury Employees Union v. Chertoff (*Chertoff I*), 385 F. Supp. 2d 1, 6 (D.D.C. 2005), *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839. To avoid confusion in, this article will refer to the lead plaintiff in this case, the NTEU. Both the NSPS case and the MAXHR case have multiple unions as plaintiffs. .

<sup>4</sup> *Chertoff II*, 452 F.3d 839; *Chertoff I*, 385 F. Supp. 2d 1, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

<sup>5</sup> There were thirteen unions, representing a combined 350,000 employees of the DoD, that brought suit against the DoD. *Rumsfeld*, 422 F. Supp. 2d at 21, *rev'd sub nom. Gates*, 486 F.3d 1316. To avoid confusion, this article will refer to the lead plaintiff in this case, the AFGE.

<sup>6</sup> *Gates*, 486 F.3d 1316.

helpful to review the history of collective bargaining in the federal sector. From this snapshot of history, one sees how and when collective bargaining came to the federal worker, and what influences the unions held prior to and subsequent to the right to bargain collectively. This article will then look at how these union influences were affected by the inception of MAXHR and NSPS. Subsequently, this article will review the unions' responses as seen through the lawsuits challenging the two personnel systems, and how the AFGE responded to its losses in the court battle against NSPS. Ultimately, this article will attempt to discern how the unions achieve their endstate in today's federal labor relations. An overview of the progression of the new labor relations policies under both MAXHR and the NSPS lays a foundation for understanding this journey.

## II. MAXHR Under the DHS

The DHS was established after the terrorist attacks of 11 September 2001.<sup>7</sup> This institution brought together twenty-two federal agencies with approximately 170,000 employees.<sup>8</sup> This consolidation of different organizations also placed "17 different unions, 77 existing collective bargaining units, 7 payroll systems, [and] 80 different personnel management systems"<sup>9</sup> under the direction of this new department. Merging such a large and diverse group necessitated Congress to authorize a new personnel system to provide a contemporary yet flexible system that would adequately accommodate the needs of the new department's mission.<sup>10</sup>

The DHS published its final rule implementing MAXHR on 1 February 2005.<sup>11</sup> The DHS provided its proposed rule to the unions,<sup>12</sup> and accepted comments from the unions regarding the proposed rule. The DHS considered the unions' comments,<sup>13</sup> and ultimately determined that any further consultation with the unions regarding the personnel system were unlikely to produce agreement.<sup>14</sup> As such, DHS published its final rule.

This final rule expanded management rights and simultaneously restricted collective bargaining.<sup>15</sup> Moreover, the final rule allowed management to reject terms of collective bargaining agreements if they were found to be inconsistent with a directive, policy, or regulation of the DHS.<sup>16</sup> From a practical perspective, the existence of a binding contract as a result of a collectively bargained agreement would be illusory, as DHS could always promulgate a policy or directive that would negate terms within the contract.<sup>17</sup>

Immediately after DHS published its final rule implementing MAXHR, the affected unions sued to enjoin its implementation.<sup>18</sup> The unions were successful and the DHS appealed the decision.<sup>19</sup> The DHS lost its appeal and its personnel system was ultimately determined to violate its own implementing statute which required it to bargain collectively.<sup>20</sup>

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<sup>7</sup> 6 U.S.C. §§ 101–557 (Supp. IV 2004).

<sup>8</sup> *Chertoff I*, 385 F. Supp. 2d at 7 n.1, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

<sup>9</sup> *Id.* (alteration in original).

<sup>10</sup> 5 U.S.C. § 9701(a) (Supp. IV 2004).

<sup>11</sup> Department of Homeland Security Human Resources Management System, Final Rule, 70 Fed. Reg. 5272 (Feb. 1, 2005) (codified at 5 C.F.R. ch. XCVII and pt. 9701 (2008)) [hereinafter DHS Final Rule].

<sup>12</sup> *Chertoff I*, 385 F. Supp. 2d at 7, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> See generally *Chertoff I*, 385 F. Supp. 2d at 17, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Chertoff II*, 452 F.3d 839.

<sup>20</sup> *Id.* at 844.

### III. NSPS Under the Department of Defense

In the National Defense Authorization Act for Fiscal Year 2004, Congress required the DoD to transition to a new civilian personnel system.<sup>21</sup> This civilian force transformation was to be a part of the DoD's overall transformation plans under then Secretary of Defense, Donald Rumsfeld.<sup>22</sup> The goal was to create a flexible personnel system "designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded."<sup>23</sup>

Secretary Rumsfeld's contention was that the new threats and missions around the world required not only changing the work of the uniformed services, but also changing the work of the 700,000 civilians employed by the DoD.<sup>24</sup> To develop this transformation, the DoD collaborated with the civilian employees and their representative unions.<sup>25</sup> Approximately 450,000 DoD employees and more than 1,500 separate bargaining units were represented by forty-three unions.<sup>26</sup> The DoD met with these unions on a dozen occasions to collaborate on the design of NSPS.<sup>27</sup>

The DoD published proposed regulations on 14 February 2005 (just two weeks after the DHS published its final regulations), and opened a thirty-day period for public comment.<sup>28</sup> The DoD also entered another period of at least thirty days to "meet and confer" with the unions regarding the proposed regulations.<sup>29</sup> The DoD made several revisions to the proposed regulations as a result of public comments and the "meet and confer" process.<sup>30</sup> These revisions did not resolve the major differences between the unions' position and that of the DoD:

Significant differences with many of the labor organizations remain over such issues as the scope of bargaining, implementing issuances that supersede conflicting provisions of collective bargaining agreements, the specificity of the regulations, the ability to grieve pay decisions, the use of behavior as part of performance evaluation and the use of performance in a reduction in force. These differences cannot be reconciled with the need for a contemporary and flexible system of human resource management as DoD seeks to transform the civilian part of the Total Force of military personnel, civilian employees, and DoD contractors.<sup>31</sup>

The DoD determined that further consultation was not likely to produce agreement on these issues, and the final rule was implemented on 1 November 2005.<sup>32</sup> The affected unions filed suit against the DoD, and, like the unions involved in the DHS MAXHR lawsuit, they were successful at the district court level in enjoining the implementation of several aspects of NSPS.<sup>33</sup> Conversely however, the union victory against NSPS was short-lived. The U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court ruling, and held that the NSPS implementing statute granted DoD "temporary authority to curtail collective bargaining for DOD's civilian employees."<sup>34</sup>

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<sup>21</sup> Pub. L. No. 108-136, 117 Stat. 1392 (2003); *Rumsfeld*, 422 F. Supp. 2d 16, 21 (D.D.C. 2006), *rev'd sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

<sup>22</sup> Department of Defense Human Resources Management and Labor Relations Systems, Final Rule, 70 Fed. Reg. 66,116, 66,117 (Nov. 1, 2005) (codified at 5 C.F.R. ch. XCIX and pt. 9901) (2008) [hereinafter DoD Final Rule].

<sup>23</sup> *Id.* at 66,118.

<sup>24</sup> *Id.* at 66,117.

<sup>25</sup> *Id.* at 66,118.

<sup>26</sup> *Id.* at 66,120.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 66,121.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 66,122.

<sup>31</sup> *Id.* at 66,123.

<sup>32</sup> 5 U.S.C. § 9902(m)(3)(C)(ii) (Supp. IV 2004) (current version at 5 U.S.C.S. § 9902 (LexisNexis 2008)); *see also Rumsfeld*, 422 F. Supp. 2d 16, 35-36 (D.D.C. 2006), *rev'd sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007)

<sup>33</sup> *Rumsfeld*, 422 F. Supp. 2d 16, *rev'd sub nom. Gates*, 486 F.3d 1316.

<sup>34</sup> *Gates*, 486 F.3d at 1318.

#### IV. Overview of the History of Union Activity in the Federal Sector

To better grasp the differences in outcome of the unions' assaults on the MAXHR system of DHS and the NSPS of DoD, it is helpful to consider the history of collective bargaining in the federal sector. Understanding when and how the federal sector employees achieved the right to collectively bargain, and what actions unions took to achieve their workplace goals prior to and subsequent to this milestone, can shed light on how and why the unions have attacked these two personnel systems.

The existence of unions in the federal workplace dates back to the 1830's when skilled craftsmen joined unions already in existence in the private sector.<sup>35</sup> Today, public sector workers enjoy the constitutional right to join a union.<sup>36</sup> This protection is found in their right to freedom of association.<sup>37</sup> Yet, there exists no commensurate constitutional right to bargain collectively.<sup>38</sup> Moreover, because public employees were not covered by the National Labor Relations Act of 1935,<sup>39</sup> until 1962, federal workers, also lacked a statutory or regulatory right to collectively bargain. In 1962, President John F. Kennedy signed Executive Order 10,988 which provided limited rights to collective bargaining for federal workers.<sup>40</sup> In 1969, President Richard Nixon further defined and enhanced these collective bargaining rights when he issued Executive Order 11,491.<sup>41</sup> These actions led to the Federal Service Management Relations Act of 1978 which is the main labor law for the federal sector today.<sup>42</sup>

If unions existed for approximately 130 years in the federal workplace without the right to bargain collectively, how did they support their members? The unions provided support to public employees through three primary means: they engaged in politics, they represented individual workers in civil service hearings, and they engaged in bargaining on an informal level.<sup>43</sup>

The political engagements surrounding NSPS and MAXHR should come as no surprise. Employee associations and unions, both public and private, have participated in politics for virtually their entire existence.<sup>44</sup> This is especially true in the federal sector where issues such as wages are set by statute,<sup>45</sup> and are, therefore, not negotiable in the collective bargaining process.<sup>46</sup> As such, to seek a wage increase, unions typically lobbied Congress to statutorily grant a pay raise. Unions used this lobbying process to achieve goals prior to having the ability to collectively bargain, and they continued to engage in such practices even after they achieved collective bargaining rights.<sup>47</sup> In some cases, a union would negotiate to give up something in the workplace in order to gain advantage in the bargaining process, but subsequently persuade the legislature to statutorily grant back to the worker that very thing given away during collective bargaining.<sup>48</sup>

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<sup>35</sup> HARRY T. EDWARDS ET AL., LABOR RELATIONS LAW IN THE PUBLIC SECTOR 1 (4th ed. 1991) (quoting *Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887, 893–96 (1972)). There is much discrepancy in scholarly work on when exactly unions were permitted in the public sector. Many courts refused to permit public employees to organize until the late 1950's. Joseph E. Slater, *The Court Does Not Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 990 (2000) [hereinafter Slater, *The Court Does Not Know*]. However, there is evidence of their existence in some capacity as far back as the 1830's. EDWARDS ET AL., *supra*. By 1912, the Loyd-LaFollette act gave federal employees the right to organize (although not to bargain). Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 302 (2004) [hereinafter Slater, *Homeland Security*]. The goal of this article is not to determine at what juncture official union representation was permitted. Rather, the point is to simply acknowledge that federal employees have been organizing in some fashion, and struggling for greater rights to organize since at least the 1830's.

<sup>36</sup> *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1676, 1678 (1984).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also DONALD H. WOLLETT ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 2 (4th ed. 1993).

<sup>39</sup> *Developments in the Law—Public Employment*, *supra* note 36, at 1676.

<sup>40</sup> Slater, *Homeland Security*, *supra* note 35, at 302.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 303.

<sup>43</sup> *Id.* at 345–46.

<sup>44</sup> See generally WOLLETT ET AL., *supra* note 38, at 6; EDWARDS ET AL., *supra* note 35, at 49 (quoting Rehmus, *Labor Relations in the Public Sector*, Paper prepared for the 3d World Congress, Int'l Indus. Relations Ass'n, London, Eng. (Sept. 3–7, 1973)).

<sup>45</sup> Slater, *Homeland Security*, *supra* note 35, at 303.

<sup>46</sup> *Id.*

<sup>47</sup> WOLLETT ET AL., *supra* note 38, at 6.

<sup>48</sup> EDWARDS ET AL., *supra* note 35, at 49 (quoting Rehmus, *supra* note 44); WOLLETT ET AL., *supra* note 38, at 6.

Aside from political involvement, unions represented members who appeared before civil service hearings and other legal entities. In more recent times, unions have represented members appearing before legal frameworks enforcing various employment laws such as Title VII of the 1964 Civil Rights Act.<sup>49</sup> Unions have filed lawsuits challenging decisions by government officials, such as the decision by the Transportation Security Administration to ban collective bargaining.<sup>50</sup>

The methods of litigation and politics were complemented by the unions' third approach when prohibited from formal collective bargaining: that of informal collective bargaining. In such a practice, unions would negotiate agreements with government agencies, which could serve as a type of substitute for a formal contract.<sup>51</sup>

Given the lack of collective bargaining rights for all but the last forty years, and the ability of unions to devise imaginative means to support their members prior to the right to collectively bargain in any real sense, why was there such a fight to ensure that collective bargaining rights were not eviscerated? In the opinion of some commentators, the human resource systems in existence at that time were not effective in spite of union attempts to simulate a negotiation strategy.<sup>52</sup>

Union representation rates strongly coincide with the union's ability to bargain collectively. "[T]he proportion of federal employees not working for the postal system and represented by unions climbed from 13 percent in 1961 to 60 percent in the mid-1970's."<sup>53</sup> As public sector union representation increased, private sector union representation decreased. From approximately the time President Kennedy authorized collective bargaining in the public sector through the 1990's, private sector "union density declined from more than 33% to less than 12%,"<sup>54</sup> while "public sector union density rose from less than 13% to around 40%."<sup>55</sup>

Collective bargaining is viewed as an essential component for an efficient personnel system in the public sector. The increases in union representation of federal workers since the authorization of collective bargaining are impressive. These two factors combine to help one understand why the unions will not allow any curtailment of their right to bargain collectively, at least not without a serious fight. The DHS and the DoD apparently underestimated the importance of collective bargaining in the eyes of the public sector union, and certainly the voracity with which they will fight to keep the ability to collectively bargain.

## V. How Do MAXHR and NSPS Affect Collective Bargaining?

Both the DHS and the DoD expanded management rights when they designed their new personnel systems. The DHS asserted that it was central to their mission that the agency is able to act quickly.<sup>56</sup> Quick action was deemed necessary not only in response to an emergency, but also to proactively "prepare for or prevent emergencies."<sup>57</sup> To that end, the DHS determined that it should revise management rights found in 5 U.S.C. chapter 71.<sup>58</sup>

[The DHS] expanded the list of management rights that are prohibited from negotiation to include numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work . . . [The DHS] also excluded from mandatory negotiations the procedures that the Department would follow in exercising these expanded management rights.<sup>59</sup>

<sup>49</sup> Slater, *Homeland Security*, *supra* note 35, at 349.

<sup>50</sup> *Id.* at 348. The Transportation Security Administration (TSA) prohibited collective bargaining. This is separate from the overall policies of MAXHR. As such, the unions have been fighting a separate battle within the TSA for the right to bargain collectively.

<sup>51</sup> *Id.* at 346.

<sup>52</sup> *Id.*

<sup>53</sup> EDWARDS ET AL., *supra* note 35, at 15 (quoting Sar A. Levitan & Frank Gallo, *Can Employee Associations Negotiate New Growth?*, MONTHLY LABOR REV., July 1989, at 5-13)).

<sup>54</sup> Slater, *Homeland Security*, *supra* note 35, at 300.

<sup>55</sup> *Id.*

<sup>56</sup> DHS Final Rule, *supra* note 11, at 5278.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 5279.

<sup>59</sup> *Id.*

A mere nine months later, the DoD published its final rule for NSPS.<sup>60</sup> Like the DHS, the DoD asserted that it was vital to its mission to be able to act quickly.<sup>61</sup> The importance of this ability to act expeditiously was not just required in emergency situations, but was “necessary even in meeting day-to-day operational demands.”<sup>62</sup> Presumably, to maintain management rights within the scope of those found in the FSLMRA would hinder the DoD’s ability to effectively and efficiently execute its mission subsequent to the terrorist attacks of 2001. As a result, through the NSPS, the DoD

expanded the list of management rights that are excluded from bargaining, including the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work—rights that deal directly with the Department’s national security operations. In addition, [the DoD] excluded from bargaining the procedures that the Department would follow in exercising these expanded operational management rights.<sup>63</sup>

Not only did DHS and DoD expand management rights when they devised their new personnel systems, both agencies also curtailed collective bargaining rights. The DoD declared that “collective bargaining is prohibited on such critical matters as procedures observed in making work assignments and deployments unless the Secretary, in his or her sole, exclusive, and unreviewable discretion, elects to bargain.”<sup>64</sup> This virtually mirrored the action by the DHS.<sup>65</sup> The DHS acknowledged that the FSLMRA required bargaining on these topics, and that the unions still requested to bargaining on these issues.<sup>66</sup> Moreover, the unions offered to allow the suspension of collective bargaining on these issues “under exceptional circumstances.”<sup>67</sup> Yet, the DHS declared that “[t]his is too high a bar.”<sup>68</sup> The DHS reasoned that “[i]n today’s operational environment, the exceptional has become the rule.”<sup>69</sup> The DHS went on to maintain, “the Department’s managers and supervisors must be able to make split-second decisions to deal with operational realities free of arbitrarily imposed standards.”<sup>70</sup>

Expansion of management rights and restriction of traditional elements of collective bargaining were not the only impact the new rules set forth by the DHS and the DoD had on collective bargaining. Arguably, the most serious restriction affecting the overall right to bargain collectively was found in these two Departments’ declaration that new “issuances” would supersede collective bargaining agreements.<sup>71</sup> The DoD pointed out that labor organizations “took strong exception to the provisions in the proposed regulations that would allow issuances to supersede conflicting provisions of any collective bargaining agreement and limit bargaining to only those matters that are not inconsistent with the issuances.”<sup>72</sup>

So, what did it mean that issuances by the Departments would supersede collective bargaining agreements, and why did the unions make a “strong objection” to this? It meant that all of the collective bargaining agreements agreed to in good faith by all parties and in place at the time of the new regulations would find any provision that conflicted with the new regulations void. Rather than abide by the then existing contract between the union and the Departments until the contract ended, and then implement the new regulations, the new regulations would instead very quickly override any conflicting provisions in the existing labor contract.<sup>73</sup>

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<sup>60</sup> DoD Final Rule, *supra* note 22.

<sup>61</sup> *Id.* at 66,119 & 66,128.

<sup>62</sup> *Id.* at 66,128.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 66,119.

<sup>65</sup> DHS Final Rule, *supra* note 11, at 5279.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* It is no wonder that the unions became somewhat incensed by these new rules set forth by the DHS and the DoD. The DHS establishes in this very quote that it believes that mutually agreed upon procedural rules established through a collective bargaining process are “arbitrary.” It is not the point of collective bargaining to formulate “arbitrary standards.” Collective bargaining does not require a party to make concessions or agree to proposals. Rather the parties are to make a good faith effort to reach agreement. It is somehow unjust that a Department should declare what they have mutually agreed upon to somehow be an “arbitrary standard.”

<sup>71</sup> DoD Final Rule, *supra* note 22, at 66,211, 66,212; DHS Final Rule, *supra* note 11, at 5333.

<sup>72</sup> DoD Final Rule, *supra* note 22, at 66,128.

<sup>73</sup> *Id.* at 66,212; DHS Final Rule, *supra* note 11, at 5333.

Even more troubling from a union perspective was the idea that not only had the new regulations superseded collective bargaining agreements, but also any issuance that implemented these new regulations also potentially superseded a collective bargaining agreement. This meant that contracts that were bargained after the new regulations were in effect could be superseded. As Judge Collyer reasoned in *National Treasury Employees Union v. Chertoff*,<sup>74</sup> this ensured that any concept of a binding contract resulting from true collective bargaining was merely illusory.

Both the DoD and the DHS argued that all of these restrictions were needed in light of the requirement to transform their otherwise inefficient personnel systems into flexible systems, which were capable of responding to the threats faced by these agencies.<sup>75</sup> The DoD asserted that the personnel system in place prior to NSPS “encourage[d] a dispute-oriented, adversarial relationship between management and labor,” and that this “systematic inefficienc[y] detract[ed] from the potential effectiveness of the Total Force.”<sup>76</sup> The DoD’s bottom line was that it believed that these restrictions on collective bargaining would “ensure that the Department can act as and when necessary.”<sup>77</sup>

The DoD acknowledged that the unions made “good faith” efforts, during the meet and confer process, to propose solutions in an attempt to meet the needs of the DoD.<sup>78</sup> However, in the end, the DoD determined that any differences between the unions and the DoD could not “be reconciled with the need for a contemporary and flexible system of human resource management.”<sup>79</sup>

## VI. The Unions Sue the Department of Homeland Security

### A. MAXHR at the District Court

In *National Treasury Employees Union v. Chertoff (Chertoff I)*, five unions representing approximately 60,000 DHS employees, brought suit against the DHS when the DHS published its Final Rule that implemented MAXHR.<sup>80</sup> The NTEU claimed that the DHS failed to comply with the following requirements as set forth in the DHS implementing statute: that the new human resource system “be flexible, contemporary, and ensure the ability of the employees to bargain collectively.”<sup>81</sup> The focus of the complaint, for purposes of this article, was that MAXHR did not ensure collective bargaining for the DHS employees.

The NTEU argued that:

every system of collective bargaining ever established by Congress has had three critical components: 1) a requirement that labor and management bargain in good faith over conditions of employment for purposes of reaching an agreement; 2) a provision that the agreements reached as a result of bargaining are binding on both parties equally; and 3) the establishment of a neutral forum for resolving disputes.<sup>82</sup>

The NTEU further argued that none of these components were present in MAXHR.<sup>83</sup> The DHS responded that they were not bound by the standard collective bargaining principles of Chapter 71.<sup>84</sup> The *Chertoff I* court agreed that, in formulating the implementing statute for DHS as it had, Congress provided that DHS was free from the requirements of Chapter 71.<sup>85</sup> Yet,

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<sup>74</sup> *Chertoff I*, 385 F. Supp. 2d 1, 25 (D.D.C. 2005), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

<sup>75</sup> DoD Final Rule, *supra* note 22, at 66,123, 66,128–66,129; DHS Final Rule, *supra* note 11, at 5279.

<sup>76</sup> DoD Final Rule, *supra* note 22, at 66,118.

<sup>77</sup> *Id.* at 66,119.

<sup>78</sup> *Id.* at 66,128.

<sup>79</sup> *Id.* at 66,123.

<sup>80</sup> *Chertoff I*, 385 F. Supp. 2d 1 (D.D.C. 2005), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839 (D.C. Cir. 2006); *see supra* note 3 and accompanying text.

<sup>81</sup> *Chertoff I*, 385 F. Supp. 2d at 6, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

<sup>82</sup> *Id.* at 25 (citing Plaintiffs’ Memorandum at 13).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* Chapter 71 refers to Chapter 71 of Title 5 of the United States Code. This is used in many instances interchangeably with the term “FSLMRA” and is the statutory provision that binds most of the Federal Government in labor management. *See* 5 U.S.C. ch. 71 (2000).

<sup>85</sup> *Chertoff I*, 385 F. Supp. 2d at 9, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

the *Chertoff I* court also noted that, in the implementing statute for DHS, Congress nonetheless required that the DHS ensure its employees could organize and bargain collectively.<sup>86</sup>

Accordingly, one of the central questions became: what did it mean to “bargain collectively”? The FSLMRA defined collective bargaining<sup>87</sup> and the DHS adopted the definition into its regulations for MAXHR,<sup>88</sup> and the court in *Chertoff I* also recognized the factors outlined in the formal definition.<sup>89</sup> Regardless of the implied agreement by all parties on definition, the DHS argued “that they had to reconcile the competing requirements that [MAXHR] be ‘flexible,’ ‘contemporary,’ and ‘ensure . . . collective bargaining.’”<sup>90</sup> The DHS went on to argue, “[b]ecause [their] construction of these provisions is at the very least a reasonable interpretation, it must be upheld under [*Chevron*].”<sup>91</sup>

In *Chertoff I*, the U.S. District Court for the District of Columbia examined the requirements Congress set forth in the DHS implementing statute.<sup>92</sup> The pivotal issue, for purposes of this article, was that Congress required the DHS to permit collective bargaining. The court in *Chertoff I* agreed that Congress did not require the DHS to conform to all the requirements of Chapter 71, but also reasoned that “collective bargaining” is a term of art, and that said term was defined in Chapter 71.<sup>93</sup> So, although the DHS was not bound by the requirements of Chapter 71, it was bound by the definition of collective bargaining as found in Chapter 71.

The DHS accepted this obligation when it adopted Chapter 71’s definition, in its entirety, into MAXHR.<sup>94</sup> After determining the definition of collective bargaining included the term “collective bargaining agreement,” the *Chertoff I* court endeavored to define this term.<sup>95</sup> The court determined that “[w]hile a collective bargaining agreement is a specialized form of contract, it retains the essential features of all contracts: ‘A contract is a promise or a set of promises, for breach of which the law gives a remedy, or performance of which the law in some way recognizes a duty.’”<sup>96</sup> The court in *Chertoff I* ultimately determined that “[t]he *sine qua non* of good-faith collective bargaining is an enforceable contract once the parties reach agreement.”<sup>97</sup>

The DHS did not provide for an enforceable contract with MAXHR. The court in *Chertoff I* stated that the enforceability of any collectively bargained agreement under MAXHR was “illusory.”<sup>98</sup> This was true because DHS “retain[ed] numerous avenues by which [it could] unilaterally declare contract terms null and void, without prior notice to the Unions or employees, and without bargaining or recourse.”<sup>99</sup>

The court in *Chertoff I* stated this as follows: “Under [MAXHR], the final results of collective bargaining would be essentially the same as the results of conferring: the Department would retain the sole and exclusive right to ignore the terms of its collective bargaining agreements whenever it believed necessary . . . .”<sup>100</sup> The court went on to reason: “A contract

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<sup>86</sup> *Id.*

<sup>87</sup> The definition is found at 5 U.S.C. § 7103(a)(12) (2000). This definition is in “Chapter 71,” the very Chapter by which the DHS asserts it is not bound.

<sup>88</sup> DHS Final Rule, *supra* note 11, at 5332.

<sup>89</sup> *Chertoff I*, 385 F. Supp. 2d at 25, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

<sup>90</sup> *Id.* (quoting Defendants’ Memorandum at 36).

<sup>91</sup> *Chertoff I*, 385 F. Supp. 2d at 25 (quoting Defendants’ Reply. at 22), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839 (referencing *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984)). *Chevron U.S.A. Inc.* sets the standard for judicial interpretation of statute. The standard it sets is if “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chertoff I*, 385 F. Supp. 2d at 16 (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 842–43), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839. “But, if the statute is silent or ambiguous with respect to the issue at hand, then the Court must defer to the Agencies so long as their ‘answer is based on a permissible construction of the statute.’” *Id.* (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 843).

<sup>92</sup> *Chertoff I*, 385 F. Supp. 2d. at 23–28, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

<sup>93</sup> *Id.* at 24.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 25 (quoting SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1, at 1–2 (Walter H.E. Jaeger ed., 3d ed. 1957), *quoted in* BLACKS LAW DICTIONARY 341 (8th ed. 2004)).

<sup>97</sup> *Id.*, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839 (D.C. Cir. 2006).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 28.

that is not mutually binding is not a contract. Negotiations that lead to a contract that is not mutually binding are not true negotiations. A system of ‘collective bargaining’ that permits the unilateral repudiation of agreements by one party is not collective bargaining at all.”<sup>101</sup>

Accordingly, the *Chertoff I* court did not agree with the DHS argument that its reconciliation of the competing requirement to provide a flexible and contemporary personnel system that protected the employees’ right to collective bargaining were made reasonably. Nor did the *Chertoff I* court agree that the agencies “reasonable” balancing could be upheld under *Chevron*.<sup>102</sup> Rather, the court determined that “no deference is due to the [DHS] because ‘Congress has directly spoken to the precise question at issue’ and directed that the [DHS] ensure employees rights to engage in collective bargaining.”<sup>103</sup>

The *Chertoff I* court found that MAXHR “elevates flexibility above the equal statutory requirement that it ensure collective bargaining rights.”<sup>104</sup> Accordingly, *Chertoff I* enjoined the implementation of MAXHR.<sup>105</sup>

## B. MAXHR at the Appellate Court

The results of *Chertoff I* were ultimately appealed to the U.S. Court of Appeals for the District of Columbia by both the unions and the DHS.<sup>106</sup> The DHS claimed that the decision in *Chertoff I* went too far when it enjoined the implementation of MAXHR.<sup>107</sup> The unions argued that *Chertoff I* did not go far enough, because the lower court had not found that the expansion of management rights also violated the right to collectively bargain.<sup>108</sup>

The Court of Appeals took up these issues in the case of *National Treasury Employees Union v. Chertoff (Chertoff II)*.<sup>109</sup> Regarding the holding in *Chertoff I* that MAXHR did not ensure collective bargaining because it did not guarantee a mutually binding contract, the court in *Chertoff II* affirmed:

[W]e agree with the District Court that the Department’s attempt to reserve to itself the right to unilaterally abrogate lawfully negotiated and executed agreements is plainly unlawful. If the Department could unilaterally abrogate lawful contracts, this would nullify the Act’s specific guarantee of collective bargaining rights, because the agency cannot “ensure” collective bargaining without affording employees the right to negotiate binding agreements.<sup>110</sup>

Due to the limited scope over which MAXHR would permit collective bargaining, the ruling in *Chertoff II* reversed the ruling in *Chertoff I*.<sup>111</sup> The court in *Chertoff II* reasoned that “[t]he right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over.”<sup>112</sup>

The DHS continued to argue that as they were not bound by Chapter 71, they were therefore not bound by the content of its definitions.<sup>113</sup> The court in *Chertoff II* disagreed. Like the court in *Chertoff I*, the *Chertoff II* court embarked on a

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<sup>101</sup> *Id.*

<sup>102</sup> *See Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984)

<sup>103</sup> *Chertoff I*, 385 F. Supp. 2d. at 28 (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 842), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

<sup>104</sup> *Id.* at 17.

<sup>105</sup> *Id.*

<sup>106</sup> *Chertoff II*, 452 F.3d 839.

<sup>107</sup> *Id.* at 843–44.

<sup>108</sup> *Id.*

<sup>109</sup> *Chertoff II*, 452 F.3d 839. This case referred to the district court’s decision regarding the Government’s motion to alter and amend *Chertoff I* as *Chertoff II*. This article does not discuss the decision on the motion to alter and amend, and to lessen the confusion over the multiple cases, this article refers to the Court of Appeals decision as *Chertoff II*.

<sup>110</sup> *Id.* at 844.

<sup>111</sup> *Id.* at 861.

<sup>112</sup> *Id.* at 860.

<sup>113</sup> *Id.* at 863.

*Chevron* analysis of the implementing statute and determined that Congress did not “employ a term of art devoid of all meaning,” and that Chapter 71 provided the proper meaning to the term “collective bargaining.”<sup>114</sup>

The *Chertoff II* court pointed out that even under Chapter 71 the scope of bargaining was very narrow.<sup>115</sup> It went on to reason that although the DHS was given the ability to waive the provisions of Chapter 71, it must still comply with the core meaning of collective bargaining under Chapter 71, to include the scope of bargaining.<sup>116</sup> The *Chertoff II* court also reasoned that Chapter 71’s guidance in this area was not only narrow, but also flexible.<sup>117</sup> As such the court stated:

if the Department follows the core notion of “collective bargaining” in the federal sector in defining the scope of bargaining under [MAXHR], as the Act requires, DHS will have extraordinary “flexibility” to achieve the goals of the statute and, at the same time, “ensure” that the limited benefits flowing from a “contemporary” program of collective bargaining in the federal sector are made available to its employees.<sup>118</sup>

Accordingly, the *Chertoff II* court held:

that the Final Rule violates the Act in so far as it limits the scope of bargaining to employee-specific personnel matters. The regulations effectively eliminate all meaningful bargaining over fundamental working conditions (including even negotiations over procedural protections), thereby committing the bulk of decisions concerning conditions of employment to the Department’s exclusive discretion.<sup>119</sup>

The *Chertoff II* court rather damningly noted “DHS’s Final Rule defies the plain language of the Act, because it renders ‘collective bargaining’ meaningless; and it is utterly unreasonable and thus impermissible because it makes no sense on its own terms.”<sup>120</sup> Not surprisingly then, the *Chertoff II* court ruled against the DHS regarding both the expansion of management rights and the restrictions on collective bargaining as regulated in MAXHR.

## VII. The Unions Sue the DoD

As noted in section III of this article, the DoD regulations for NSPS came out a mere nine months after the DHS regulations covering MAXHR were put forth. Likewise the unions’ lawsuit attacking NSPS came only a matter of months after the lawsuits attacking MAXHR was filed.

Any comparison of the lawsuits against MAXHR and NSPS must first address the differences between the two original implementing statutes. Whereas the implementing statute for the DHS authorized the waiver of Chapter 71,<sup>121</sup> the original implementing statute for NSPS specifically stated that the DoD could not waive Chapter 71.<sup>122</sup> At the same time, the original implementing statute contained two sections that, notwithstanding the section that required compliance with Chapter 71, did permit the waiver of Chapter 71.<sup>123</sup>

To better understand the ensuing lawsuits, one must take a closer look at the confusing contradiction of these provisions. Section 9902(b) of the original NSPS implementing statute set forth the system requirements: several of which, to be flexible and to be contemporary, were identical to the implementing statute for the DHS.<sup>124</sup> The original section 9902(b)(3)(D) stated

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 844.

<sup>116</sup> *Id.* at 863–64.

<sup>117</sup> *Id.* at 863.

<sup>118</sup> *Id.* at 864.

<sup>119</sup> *Id.* at 844.

<sup>120</sup> *Id.* at 864.

<sup>121</sup> 5 U.S.C. § 9701(b), 9701(c) (Supp. IV 2004).

<sup>122</sup> *Id.* §§ 9902(b)(3)(D), 9902(d)(2), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. §§ 9902(b)(3)(d), 9902(d)(2) (LexisNexis 2008)).

<sup>123</sup> 5 U.S.C. §§ 9902(k)(1), 9902(m), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

<sup>124</sup> 5 U.S.C. § 9902(b), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)).

that the NSPS “shall . . . not waive, modify, or otherwise affect . . . any other provision of this part (as described in subsection (d)).”<sup>125</sup> One, therefore, was required to look to the original subsection (d), which stated that Chapter 71, among other things, was non-waivable.<sup>126</sup> When read together, these two original subsections provided that NSPS was to comply with the provisions of Chapter 71.

Yet the analysis cannot stop there. Subsection (k)(1) of the original NSPS implementing statute provided:

Notwithstanding subsection (d), the Secretary of Defense, in establishing and implementing the National Security Personnel System . . . shall not be limited by any provision of this title or any rule or regulation prescribed under this title in establishing and implementing regulations relating to—

(A) the methods of establishing qualification requirements for, recruitment for, and appointments to positions;

(B) the methods of assigning, reassigning, detailing, transferring, or promoting employees; and

(C) the methods of reducing overall agency staff and grade levels, except that performance, veterans’ preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate shall be considered in decisions to realign or reorganize the Department’s workforce.<sup>127</sup>

Accordingly, the DoD was not bound by the requirements of Chapter 71 when dealing with the three areas found in that subsection.

The other original subsection that must be addressed in the original NSPS copy implementing statute is subsection (m). The entirety of this rather large subsection exempted NSPS from the requirements of Chapter 71, in total contradiction to the requirement that NSPS comply with Chapter 71.<sup>128</sup> It provided that the Secretary of Defense could use a collaborative process, as opposed to the collective bargaining process required in Chapter 71, to build the NSPS.<sup>129</sup> Moreover, subsection (m) allowed for the abrogation of all existing collective bargaining agreements, along with subsequent collective bargaining agreements, until subsection (m) expired.<sup>130</sup>

In addition to these specific provisions relating to Chapter 71, the original NSPS implementing statute, much like the DHS implementing statute, had a general requirement that NSPS was to ensure that the DoD employees could bargain collectively.<sup>131</sup> This provision, like the requirement that NSPS be flexible and contemporary was found at the original section 9902(b)(4) within “system requirements.”<sup>132</sup>

#### A. NSPS at the District Court

Building on their victory in the series of *Chertoff* decisions against MAXHR, the AFGE made virtually the same argument;<sup>133</sup> that regardless of any right to waive Chapter 71, NSPS was still required to ensure collective bargaining, which it had not.<sup>134</sup> In *American Federation of Government Employees v. Rumsfeld (Rumsfeld)*,<sup>135</sup> the court addressed this issue.

<sup>125</sup> 5 U.S.C. § 9902(b)(3), (b)(3)(D), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349.

<sup>126</sup> 5 U.S.C. § 9902(d)(2), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(d)(2)).

<sup>127</sup> 5 U.S.C. § 9902(k)(1), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

<sup>128</sup> 5 U.S.C. § 9902(m)(1), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

<sup>129</sup> *Id.* § 9902(m)(2).

<sup>130</sup> *Id.* § 9902(m)(8).

<sup>131</sup> 5 U.S.C. § 9902(b)(4), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5)).

<sup>132</sup> *Id.*

<sup>133</sup> The NTEU also argued that subsection 9902(m) did not waive Chapter 71, except in the narrow application of two distinct parts of subsection 9902(m). The court, looking at the plain language of the statute, disagreed with the NTEU. The court determined that the language of the statute could not be plainer, and that Chapter 71 was waived. *Rumsfeld*, 422 F. Supp. 2d 16, 36–39 (D.D.C. 2006), *rev’d, sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

<sup>134</sup> *Rumsfeld*, 422 F. Supp. 2d at 21, *rev’d sub nom. Gates*, 486 F.3d 1316.

<sup>135</sup> *Id.*

The DoD argued that it was not required to bargain collectively due to the language contained in the original section 9902(b)(4).<sup>136</sup> This section stated that NSPS shall “ensure that employees may organize, bargain collectively as provided for in this chapter, and participate through labor organizations of their own choosing in decisions which affect them, subject to the provisions of this chapter and any exclusion from coverage or limitation on negotiability established pursuant to law.”<sup>137</sup> The DoD’s argument was that the language “as provided for in this chapter” meant that the original section 9902(b)(4) was subject to the requirements of section 9902(m), as this subsection would imply that collective bargaining was not provided for in this chapter.<sup>138</sup> Therefore, section 9902(m) completely waived not only the requirement to follow Chapter 71, but also any requirement to bargain collectively.

The pertinent element of section 9902(m) stated “[n]otwithstanding section 9902(d)(2).”<sup>139</sup> As noted *supra* on page thirty-eight, subsection (d)(2) stated that Chapter 71 was nonwaivable. The *Rumsfeld* court called this language “crystal clear.”<sup>140</sup> As a result, the *Rumsfeld* court further reasoned that “[t]he clarity of this language, however, is a double edged sword for defendants. Although there is no doubt that (d)(2) is overridden by (m)(1), there is just as little doubt that (b)(4) is not overridden.”<sup>141</sup>

The *Rumsfeld* court went on to further analyze the argument that if subsection (m) did not provide collective bargaining, then subsection (b)(4) was limited by this fact.<sup>142</sup> In terms of relevancy for this article, this is a pertinent part of both the decision and the appeal. The court’s reasoning is therefore quoted in full:

Defendants’ argument that “subject to the provisions of this chapter” means that the requirements of (b)(4) are limited by (m)(1) would render both provisions meaningless. First, as noted above, this reading ignores the specific language of (m)(1) that only (d)(2) is overridden. Second, even if the right to “bargain collectively” has a peripheral relevance to other parts of the statute, collective bargaining is a central issue to any labor relations system. It is difficult to understand the purpose of (b)(4) if it is inapplicable to the labor relations system.

The better reading, which gives meaning to all parts of the statute, is to interpret (b)(4) to acknowledge that chapter 71 may be modified but that despite the authorized modifications, the new system must ensure that the principles of collective bargaining are not totally eviscerated. By requiring that the NSPS retain the core components of collective bargaining, subsection (b)(4) acts as a qualifier to (m)(1)’s override of (d)(2).<sup>143</sup>

The *Rumsfeld* court then determined that, under this interpretation, the collective bargaining requirements of the original NSPS implementing statute and DHS implementing statute were very similar.<sup>144</sup> The *Rumsfeld* court found that the reasoning of *Chertoff I* was, therefore, applicable.<sup>145</sup> Accordingly, the *Rumsfeld* court determined that the DoD’s Final Rule implementing NSPS did not ensure collective bargaining in conformity with the requirements of the original implementing statute.<sup>146</sup> As with the result of *Chertoff I*, the decision in *Rumsfeld* enjoined the agency from implementation of the labor-management relations portions of the Final Rule.<sup>147</sup>

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<sup>136</sup> *Id.* at 40.

<sup>137</sup> 5 U.S.C. § 9902(b)(4), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5)).

<sup>138</sup> *Rumsfeld*, 422 F. Supp. 2d at 40.

<sup>139</sup> 5 U.S.C. § 9902(m)(1), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

<sup>140</sup> *Rumsfeld*, 422 F. Supp. 2d at 40, *rev’d sub nom. Gates*, 486 F.3d 1316.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Rumsfeld*, 422 F. Supp. 2d at 41, *rev’d sub nom. Gates*, 486 F.3d 1316.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 53.

## B. NSPS at the Appellate Court

The DoD appealed the *Rumsfeld* decision to the U.S. Court of Appeals for the District of Columbia in *American Federation of Government Employees v. Gates (Gates)*.<sup>148</sup> The main dispute in *Gates* revolved around the relationship of the then existing sections 9902(b)(4), (d)(2), and (m), and whether the *Rumsfeld* court properly interpreted that relationship.<sup>149</sup>

The *Gates* court set out several pages of its opinion to analyze the differences between Chapter 71 and the original NSPS implementing statute, in an effort to “piece together the statutory puzzle.”<sup>150</sup> The court agreed that an initial impression led one to believe that the relevant sections of the NSPS implementing statute were contradictory, but the court then stated upon closer consideration, one could see how “the pieces come together and form a relatively coherent whole.”<sup>151</sup>

Generally, the idea was that subsections (b)(3), (b)(4), and (d)(2) were the sections that provided a mandate that the DoD bargain collectively with its employees under the NSPS.<sup>152</sup> Yet, this requirement to bargain collectively existed only so long as nothing else in the original implementing statute took it away. Subsection (m) operated to take away the requirement to bargain collectively; at least through November of 2009.<sup>153</sup>

Looked at a little closer, the original subsections (b)(3) and (d)(2) provided that Chapter 71 was not waivable, unless something else in the original NSPS implementing statute waived subsection (d)(2).<sup>154</sup> Even the *Rumsfeld* court recognized that subsection (m) clearly waived subsection (d)(2).<sup>155</sup> As such, NSPS was not bound by the constraints of Chapter 71; leaving the same argument that appeared in the *Chertoff* decisions. That argument maintained that (b)(4) provided a general right to collective bargaining, and NSPS did not meet the minimum required in that sense.

The difference with the original NSPS implementing statute was that subsection (b)(4) contained the language “as provided for in this chapter.”<sup>156</sup> The *Gates* court disagreed with the *Rumsfeld* court’s analysis.<sup>157</sup> The *Gates* court looked at this to mean that the DoD employees only had a right to collective bargaining as it was provided for in the remainder of the original NSPS implementing statute.<sup>158</sup> Thus subsection (b)(4) derived its collective bargaining right, not from itself, but from other subsections; like subsection (d)(2).<sup>159</sup> As subsection (m) overrode subsection (d)(2), there could be no collective bargaining provided in any other subsection.<sup>160</sup> Accordingly, subsection (m), in practical effect, overrode subsection (b)(4).<sup>161</sup>

The AFGE made three arguments in opposition:<sup>162</sup> (1) the subsections providing for collective bargaining would have no purpose if subsection (m) simply overrode all of them;<sup>163</sup> (2) subsection (m) could not override all collective bargaining

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<sup>148</sup> *Gates*, 486 F.3d 1316.

<sup>149</sup> *Id.* at 1321–25.

<sup>150</sup> *Id.* at 1319.

<sup>151</sup> *Id.* at 1322.

<sup>152</sup> *Id.* at 1322–24.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Rumsfeld*, 422 F. Supp. 2d 16, 40 (D.D.C. 2006), *rev’d sub nom. Gates*, 486 F.3d 1316.

<sup>156</sup> Subsection (b)(4) read: “ensure that employees may organize, bargain collectively as provided for in this chapter, and participate through labor organizations of their own choosing in decisions which affect them, subject to the provisions of this chapter and any exclusion from coverage or limitation on negotiability established pursuant to law.” 5 U.S.C. § 9902(b)(4) (Supp. IV 2004), *amended by* Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008)). The *Rumsfeld* court, in its analysis of this subsection, referred to the part that says “subject to the provisions of this chapter.” *Rumsfeld*, 422 F. Supp. 2d at 40, *rev’d sub nom. Gates*, 486 F.3d 1316. The *Gates* court references that portion that says “as provided for in this chapter.” *Gates*, 486 F.3d at 1322.

<sup>157</sup> *Gates*, 486 F.3d at 1318–19. The *Rumsfeld* court’s analysis of this language is set out in detail in section VII.A.

<sup>158</sup> *Id.* at 1322.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1322–24.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1324.

<sup>163</sup> *Id.*

“because Congress does not ‘hide elephants in mouseholes;’”<sup>164</sup> and (3) a reliance on the precedent set by *Chertoff II*.<sup>165</sup> Regarding the contention that the subsections that provided a right to bargain collectively had no meaning, the *Gates* court disagreed.<sup>166</sup> The court in *Gates* reasoned that “the Act sets up a temporary, experimental period through November 2009 during which DoD has broad leeway to restructure its labor relations system. But after November 2009, . . . the Chapter 71 collective bargaining requirements . . . will apply and govern labor relations for DoD’s civilian workers.”<sup>167</sup> As for the idea that Congress would not “hide elephants in mouseholes,” the *Gates* court agreed that subsection (m) was an “elephant,” but stated that subsection (m) was not hidden.<sup>168</sup> This left only the idea that the *Gates* case was somehow bound by the precedent of *Chertoff II*. In this regard, *Gates* pointed out that even the AFGE “candidly (and correctly) acknowledged that the statutory language governing DoD’s labor relations system is quite different from the statutory language governing the DHS’s labor relations system.”<sup>169</sup> Subsection (m) being the main difference in the two statutes, the *Gates* court significantly noted “the DHS statute contains no provision remotely equivalent to subsection (m) of the DoD statute. . . . [W]ithout subsection (m) . . . this case would be decided the same way as *Chertoff*.”<sup>170</sup>

As a result, the *Gates* court held that the original NSPS implementing statute “authorizes DoD to curtail collective bargaining for DoD’s civilian employees through November 2009.”<sup>171</sup> *Gates*, therefore, reversed the decision of *Rumsfeld*,<sup>172</sup> and upheld DOD’s regulations implementing NSPS.

### VIII. Union Actions After Losing the NSPS Lawsuit

One of the first moves the AFGE made after the *Gates* court held that the DoD was permitted to curtail collective bargaining was to ask the same court for a rehearing, and then a stay of the decision while the AFGE prepared for a further appeal. The rehearing was denied on 10 August 2007,<sup>173</sup> and the stay was denied by the court on 5 September 2007.<sup>174</sup>

The next logical step after a loss at the Court of Appeals is usually an appeal to the Supreme Court of the United States. Yet, such an appeal carries its own dangers. The primary concern from the viewpoint of many of the involved unions was that if the appeal were lost, the Supreme Court’s decision might adversely affect the positive outcome achieved for the DHS employees in the *Chertoff* cases.<sup>175</sup> This was one of the reasons that all the unions involved in the NSPS lawsuits, except the AFGE, decided not to appeal to the Supreme Court.<sup>176</sup> Another concern for the AFGE was that any appeal to the Supreme Court might not be granted, as the Court rarely hears appeals of this nature.<sup>177</sup> Still, the AFGE expressed optimism that an appeal might be accepted as a result of the strong dissent in *Gates* and the decision in *Rumsfeld*.<sup>178</sup>

In August 2007, the AFGE announced in a press release that it would file an appeal to the Supreme Court.<sup>179</sup> In October 2007, AFGE requested, and was granted, an extension to file a petition for a writ of certiorari.<sup>180</sup> Press reports continued to

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<sup>164</sup> *Id.* at 1325 (citation omitted).

<sup>165</sup> *Id.* at 1326.

<sup>166</sup> *Id.* at 1324.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1325.

<sup>169</sup> *Id.* at 1326 (citing Transcript of Oral Argument, at 42–43).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1327.

<sup>173</sup> See Supreme Court Docket, <http://www.supremecourtus.gov/docket/07-909.htm> (last visited Jan. 28, 2009) [hereinafter Supreme Court Docket].

<sup>174</sup> Am. Fed’n of Gov’t Employees v. Gates, 2007 U.S. App. LEXIS 21553 (D.C. Cir., Sept. 5, 2007) (per curiam).

<sup>175</sup> Brittany R. Ballenstedt, *Union Weighs Solo Supreme Court Challenge to Defense Personnel System*, GOV’T EXECUTIVE, Sept. 12, 2007, available at [http://www.govexec.com/story\\_page.cfm?articleid=38000&sid=2](http://www.govexec.com/story_page.cfm?articleid=38000&sid=2).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Press Release, Am. Fed’n of Gov’t Employees, AFGE to Take Battle over DoD Employee Rights to the Supreme Court (Aug. 13, 2007), available at <http://www.afge.org/Index.cfm?page=PressReleases&PressReleaseID=780>.

state that an actual appeal would not be made in light of pending congressional action.<sup>181</sup> Yet, on 7 January 2008, the AFGE filed its petition for certiorari.<sup>182</sup>

Outside the courts, the AFGE and the other unions involved in the NSPS dispute continued to lobby Congress to address their concerns.<sup>183</sup> As noted above, many of the unions determined that this would be the most effective course of action, and withdrew from any appeal to the Supreme Court.<sup>184</sup> To maximize their effort in lobbying Congress, thirty-six unions formed a coalition to deal specifically with NSPS.<sup>185</sup> This coalition even provided a “NSPS Lobbying Toolkit” for all to use.<sup>186</sup>

In addition to lobbying Congress and continuing to appeal their cause in the courts, the unions have attempted to blunt the impact of NSPS by providing education about the new personnel system to their members.<sup>187</sup> This learning process should provide more information on the NSPS, and information on how to represent their members under this new system.<sup>188</sup>

On 28 January 2008 the President signed into law H.R. 4986, The National Defense Authorization Act for Fiscal Year 2008 (NDAA).<sup>189</sup> In section 1106 of the legislation, Congress amended the implementing legislation for the NSPS almost in its entirety.<sup>190</sup> This legislation, for all intents and purposes, mooted the AFGE’s petition for certiorari with the Supreme Court only three weeks after the petition was filed. As a result, on 4 February 2008, the AFGE filed a motion to dismiss its petition for certiorari.<sup>191</sup> On 6 February 2008, that motion was granted and the petition was dismissed.<sup>192</sup> Although the AFGE achieved its goals related to collective bargaining within the NSPS, the AFGE still does not see NSPS as a fair personnel system and will continue to seek more reform of the pay system of NSPS.<sup>193</sup>

## IX. The Way Ahead: What Will Become of NSPS?

During the formulation of this article, the way ahead for NSPS was an ever-changing target. There were prospects of court decisions, congressional action, status quo, and myriad other possibilities. Just prior to the passage of the NDAA, the most obvious impact on NSPS, appeared to be the “sunset provision” established within the original implementing legislation for NSPS itself. Section 9902(m)(9) of the original NSPS implementing statute stated: “Unless it is extended or otherwise provided for in law, the authority to establish, implement and adjust the labor relations system developed under this subsection shall expire six years after the date of enactment of this subsection, at which time the provisions of chapter 71 will apply.”<sup>194</sup> This was the provision within the original legislation that would allow a return of most collective bargaining rights

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<sup>180</sup> See Supreme Court Docket, *supra* note 173.

<sup>181</sup> See Brittany R. Ballenstedt, *FEATURES Freedom to Manage*, GOV’T EXECUTIVE, Jan. 1, 2008, available at <http://www.govexec.com/features/0108-01/0108-01s1.htm>; Ballenstedt, *supra* note 175.

<sup>182</sup> See Supreme Court Docket, *supra* note 173.

<sup>183</sup> See generally United Dep’t of Def. Workers Coalition Home Page, <http://www.uniteddodworkerscoalition.org/> (last visited Jan. 12, 2009) [hereinafter Workers Coalition Home Page].

<sup>184</sup> Ballenstedt, *supra* note 175.

<sup>185</sup> See generally Workers Coalition Home Page, *supra* note 183.

<sup>186</sup> United Dep’t of Def. Workers Coalition NSPS Lobbying Toolkit, available at <http://www.uniteddodworkerscoalition.org/toolkit.htm> (last visited Jan. 12, 2009).

<sup>187</sup> Press Release, Am. Fed’n of Gov’t Employees, AFGE Field Services Department Launches NSPS Training Program (Feb. 23, 2006), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=580>.

<sup>188</sup> *Id.*

<sup>189</sup> Public L. No. 110-181, 122 Stat. 349 (2008).

<sup>190</sup> *Id.* § 1106.

<sup>191</sup> See Supreme Court Docket, *supra* note 173; see also Press Release, Am. Fed’n of Gov’t Employees, Defense Authorization Bill Provides NSPS Fix (Jan. 30, 2008) [hereinafter Defense Authorization Bill Provides NSPS Fix], available at <http://www.afge.org/index.cfm?page=PressReleases&PressReleaseID=820>.

<sup>192</sup> See Supreme Court Docket, *supra* note 173.

<sup>193</sup> Defense Authorization Bill Provides NSPS Fix, *supra* note 191.

<sup>194</sup> 5 U.S.C. § 9902(m)(9) (Supp. IV 2004), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902 (LexisNexis 2008)).

to the affected DoD employees. Moreover, it was the one provision cited by the *Gates* decision as resurrecting collective bargaining after the experimental implementation of NSPS.<sup>195</sup>

Given the lobbying effort by the unions and the response by Congress, the chances of any legislation extending subsection (m) were virtually nonexistent when the *Gates* court set forth its decision. Thus, as the *Gates* court put it, the “experimental period” for implementing this new labor relations period would end at the close of November 2009.<sup>196</sup> This meant that, at the minimum, the full gamut of collective bargaining rights found throughout the majority of federal agencies would have been applicable to NSPS no later than December 2009.

Still, waiting for the sunset provision to activate could not be the only action by the Unions. On 7 January 2008, the AFGE petitioned for a writ of certiorari.<sup>197</sup> The majority of the unions pulled out of this appeal to the Supreme Court because they placed their emphasis on getting Congress to make legislative changes to NSPS.<sup>198</sup> The AFGE stated, on more than one occasion, that it too hoped it would not need to file the petition for a writ of certiorari because Congress would act to legislatively change NSPS prior to the deadline for the petitions filing.<sup>199</sup> In fact, Congress did act to legislatively change NSPS prior to AFGE’s filing deadline,<sup>200</sup> but the legislation was pocket-vetoed by the President.<sup>201</sup> Still, this legislation had a greater chance of impacting collective bargaining within NSPS than any appeal to the courts.

The NDAA contains a section designed specifically to amend the implementing legislation for NSPS.<sup>202</sup> Section 1106 of the NDAA, the new implementing legislation, significantly amended the implementing legislation for NSPS.<sup>203</sup> One of the most basic things it accomplished was that it removed subsection (m), in its entirety, from the NSPS legislation.<sup>204</sup> Remembering that the *Gates* court stated that but for subsection (m), the NSPS issue would be decided exactly as the MAXHR issue in *Chertoff II*,<sup>205</sup> this change alone to the NSPS implementing statute has a significant impact on collective bargaining within NSPS. In effect, if this were the only change made to the implementing legislation it would enjoin the DoD from implementing any of the labor relations sections of the NSPS implementing regulations.

In an effort to restore collective bargaining rights within NSPS, the NDAA goes further than removing subsection (m). The NDAA also removes the language “notwithstanding any other provisions of this part” from section 9902(a). Section 9902(b)(4) was renumbered as section 9902(b)(5), and similar language was removed from it. Section 9902(b)(5) now reads “ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusions from coverage or limitation on negotiability established pursuant to law.”<sup>206</sup>

The *Gates* court stated<sup>207</sup> that the old subsection’s language gave a right to collective bargaining “as provided for in this chapter.”<sup>208</sup> The *Gates* court interpreted this to mean that the old subsection derived its right to collective bargaining from other provisions of the implementing legislation such as the original subsection (d)(2) and that subsection (m) overrode all of

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<sup>195</sup> *Gates*, 486 F.3d 1316, 1323 (D.C. Cir. 2007).

<sup>196</sup> *Id.* at 1324.

<sup>197</sup> See Supreme Court Docket, *supra* note 173.

<sup>198</sup> Ballenstedt, *supra* note 175.

<sup>199</sup> See Ballenstedt, *supra* note 181; Ballenstedt, *supra* note 175.

<sup>200</sup> Pub. L. No. 110-181, § 1106, 122 Stat. 349 (2008).

<sup>201</sup> Memorandum of Disapproval, George W. Bush (Dec. 28, 2007) [hereinafter Memo of Disapproval], available at <http://merln.ndu.edu/archivepdf/iraq/WH/20071228-5.pdf>.

<sup>202</sup> Pub. L. No. 110-181, § 1106, 122 Stat. 349 (2008).

<sup>203</sup> National Security Personnel System NDAA Impact on NSPS Regulations and DOD Implementing Issuances (Feb. 1, 2008) [hereinafter NDAA Impact on NSPS Regulations], available at [http://www.afge.org/Documents/2008\\_02\\_05\\_NDAAImpactonNSPSforSrLeaders.pdf](http://www.afge.org/Documents/2008_02_05_NDAAImpactonNSPSforSrLeaders.pdf).

<sup>204</sup> Pub. L. No. 110-181, § 1106(a), 122 Stat. 349.

<sup>205</sup> *Gates*, 486 F.3d 1316, 1326 (D.C. Cir. 2007).

<sup>206</sup> 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008).

<sup>207</sup> *Gates*, 486 F.3d at 1322.

<sup>208</sup> 5 U.S.C. § 9902(b)(4) (Supp. IV 2004), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008)).

this.<sup>209</sup> With Congress' removal of the language "as provided for in this chapter" from the new subsection (b)(5), the subsection no longer derives its right to bargain collectively from any other source. The new subsection is clear that DoD employees within NSPS have a right to bargain collectively.

The *Gates* court also recognized that under the original implementing legislation for NSPS full collective bargaining rights would not be returned to DoD employees after the sunset provisions of subsection (m) took effect.<sup>210</sup> This was because subsection (k)(1) also had a limitation on collective bargaining, and this provision did not contain any sunset language.<sup>211</sup> Subsection (k)(1) provided limited circumstances under which the Secretary of Defense was not limited by collective bargaining. Here too Congress amended the implementing legislation in the NDAA.<sup>212</sup> The new implementing legislation changes the lettering of subsection (k) to subsection (i), and replaces the words "notwithstanding subsection (d)" with the words "subject to the requirements of chapter 71 and the limitations of subsection (b)(3)."<sup>213</sup> As such, the new subsection is opposite of the position taken by the old subsection; where the old subsection specifically excluded itself from chapter 71, the new subsection specifically subjects itself to chapter 71 and its right to bargain collectively.

With these changes Congress addressed each of the issues that the *Gates* decision found affected collective bargaining. Even so, Congress did not stop there. Presumably as a result of union lobbying, Congress made many more changes to the NSPS implementing legislation. As this article discusses collective bargaining rights under the NSPS, it is for another article to discuss the multitude of revisions made to the NSPS implementing legislation, and the potential issues these changes may raise.

Yet, one change and its resultant issue is worth noting for an illustrative purpose. The new implementing legislation for NSPS exempts all wage grade employees from NSPS.<sup>214</sup> This action may, in effect, make it more difficult for managers to supervise their departments. Currently, NSPS requires managers to spend a greater amount of time "coaching and rating" employees than was required under the general schedule (GS) system.<sup>215</sup> The "managerial workload" under NSPS is high.<sup>216</sup> Currently, some managers under NSPS are upset that the system requires them to manage employees under multiple systems.<sup>217</sup> Attempting to understand the different personnel systems and apply them appropriately to the various applicable workers can be difficult.<sup>218</sup> Even a supervisor that supports the new NSPS agrees that "what makes it so difficult is you can't be an expert in all the systems. . . . But if everyone comes under the same pay system, its going to be awesome."<sup>219</sup> Under the wage-grade exemption in the NDAA, there will not come a time of one system, and managers will continue to be called upon to spend more time and effort than was required of them prior to NSPS.

When Congress included the provisions regarding NSPS into the proposed legislation for the NDAA, the Executive Office of the President, Office of Management and Budget made it known that the President disagreed with these provisions, and that his senior advisors would recommend he veto any legislation that included them.<sup>220</sup> The policy statement said:

The Administration strongly opposes [the section] which would significantly change the National Security Personnel System (NSPS). These changes eviscerate our efforts to make civilians equal partners in a Department at war by removing most NSPS flexibilities and completely revoking . . . the labor relations portions of NSPS. . . . By retaining the meet and confer and continuing collaboration provisions, while also

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<sup>209</sup> *Gates*, 486 F.3d at 1322.

<sup>210</sup> *Id.* at 1320.

<sup>211</sup> *Id.*

<sup>212</sup> 5 U.S.C.S. § 9902(i) (LexisNexis 2008).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* § 9902(b)(4).

<sup>215</sup> Ballenstedt, *supra* note 181.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (quoting Elizabeth Waldron-Topp, president, FMA ch. 104, Ca.).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Statement of Administration Policy: H.R. 1585—National Defense Authorization Act for Fiscal Year 2008, Office of Mgmt. & Budget, Exec. Office of the President (May 16, 2007) [hereinafter Statement of Administration Policy], available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1585sap-h.pdf>.

. . . imposing chapter 71 obligations on the Department, the process becomes so administratively burdensome to design and operate that the effect of the bill is in essence a total revocation of the flexibilities Congress granted the department.<sup>221</sup>

Within days of this statement of displeasure to the House of Representatives, the Senate published its press release regarding the NDAA.<sup>222</sup> The press release informed the public that the Senate markup also included a repeal of the DoD's authority to establish a new labor relations system under NSPS.<sup>223</sup> Then again on 6 December 2007, as Congress prepared to send the NDAA to the President for signature, the Senate issued a press release stating, among other things, that the NDAA

[r]epealed the authority of DOD to establish a new labor relations system; restored collective bargaining and appeals rights; and allowed DOD to continue efforts to develop and implement a new pay-for-performance system, but only if the system is implemented in a manner that is consistent with existing labor relations requirements.<sup>224</sup>

President Bush did pocket-veto the bill, but he based this action on other grounds.<sup>225</sup> Although his advisors stated they would recommend a veto if the NSPS changes were included in the bill,<sup>226</sup> the President did not mention the NSPS changes in his Memorandum of Disapproval.<sup>227</sup> The President's objection to the NDAA was over section 1083, which would allow U.S. courts jurisdiction to hear individual lawsuits against terrorist states.<sup>228</sup> The President stated that he also had concerns over section 1079 relating to intelligence matter, but that if Congress fixed section 1083, the president would sign the NDAA into law.<sup>229</sup>

The new implementing legislation now requires that the DoD bargain collectively within NSPS.<sup>230</sup> Moreover the new implementing legislation ensures that no collective bargaining agreement is superseded by the NSPS implementing statute, regulations, or any issuances that come from the DoD. Furthermore, any future issuance must be collectively bargained between the parties.<sup>231</sup> In essence, the NDAA gives the unions everything they sought in the initial NSPS lawsuits against the DoD, and more.

## X. Conclusion

The DoD, in its NSPS implementing regulations, stated its belief in the importance of the employees' confidence in NSPS as follows:

A key to the success of NSPS is ensuring employees perceive the system as fair. In a human resources management system, fairness is the basis for trust between employees and supervisors. . . . [E]mployees will exercise personal responsibility and sustain a high level of individual performance and teamwork when they perceive that the human resources system and their supervisors are fair.<sup>232</sup>

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<sup>221</sup> *Id.* at 1.

<sup>222</sup> Press Release, U.S. S. Comm. on Armed Servs., Senate Armed Services Committee Completes Markup of National Defense Authorization Bill for Fiscal Year 2008 (May 25, 2007), available at <http://armed-services.senate.gov/press/08mark.pdf>.

<sup>223</sup> *Id.*

<sup>224</sup> Press Release, S. Comm. on Armed Servs., Senate Armed Services Committee Completes Conference of National Defense Authorization Bill for Fiscal Year 2008, at 2-3 (Dec. 6, 2007), available at <http://armed-services.senate.gov/press/Conference%2008%20Press%20Release.pdf>.

<sup>225</sup> Memo of Disapproval, *supra* note 204.

<sup>226</sup> Statement of Administration Policy, *supra* note 220.

<sup>227</sup> Memo of Disapproval, *supra* note 201.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008).

<sup>231</sup> National Defense Authorization Act for Fiscal Year 2008, Public L. No. 110-181 § 1106(b), 122 Stat. 349 (2008).

<sup>232</sup> DoD Final Rule, *supra* note 22, at 66,118.

It might be perceived as baffling that the DoD would place emphasis on the need for employees to trust the system, while at the same time refusing to bargain with the employees.

The unions represent the interest of the employees. If the DoD refuses to bargain with the unions, the DoD is, in effect, refusing to bargain with its employees. The unions voiced many serious reservations about the implementing regulations for NSPS. Yet, the DoD stated that the differences between the unions and DoD could not “be reconciled with the need for a contemporary and flexible system of human resource management.”<sup>233</sup> The DoD “recognized the good faith effort made by these labor organizations to meet the Department’s operational needs,”<sup>234</sup> but ultimately decided not to compromise or bargain over the differences. This series of events subsequently led to the unions’ suit against the DoD.

In the MAXHR cases as well as the NSPS cases, the Departments argued that these new systems required flexibility, and that the systems could not be flexible if the Departments were required to bargain collectively. Contrary to this argument, the *Chertoff II* court found that if the DHS followed the basic requirements of collective bargaining as it exists in the federal sector, the DHS would have “extraordinary ‘flexibility’ to achieve the goals of the statute.”<sup>235</sup>

It would therefore be logical to conclude that employee trust would come from a more serious effort to fully consider their needs in the design of a new personnel system. With no confidence from the unions, and no confidence from the courts that this inclusion is present, it does not seem possible that the DoD’s stated goal of employee trust could have been achieved. From this perspective, the DoD underestimated the extent to which the unions’ position, and a right to collective bargaining would have on individual worker’s trust in NSPS.

The DoD also misjudged Congress. Secretary Donald Rumsfeld testified to Congress that: “The National Security Personnel System we are proposing . . . will not end collective bargaining. . . . To the contrary, the right of defense employees to bargain collectively would be continued.”<sup>236</sup> The *Rumsfeld* court recognized that at least three senators believed that the NSPS implementing statute preserved the right to bargain collectively.<sup>237</sup> Even so, Secretary Rumsfeld’s final implementing regulations for NSPS did, in every practical way, end collective bargaining.

Making statements of intent to Congress, and discerning that some members of Congress understand their implementing statute to conform to those statements of intent cannot lead to confidence in a system that is fundamentally contrary to those perceptions. The unions lobbied Congress to redefine the labor relations system in NSPS and Congress in turn changed the labor relations system to conform to the unions’ requests due presumably to those significant contradictions.

The DoD had a great opportunity to formulate a system under NSPS that met its goals for flexibility in a timely fashion. Yet four years after the passage of the NSPS implementing statute, the DoD remains unable to fully implement the NSPS as it originally envisioned. The DoD will now have to revise much of the NSPS to conform to the new demands of Congress.<sup>238</sup> Were it not for the issues raised concerning collective bargaining at the outset, NSPS would be much further along toward implementing the perceived needs of the DoD.

The need for the union to bargain collectively and the union desire to protect that statutory privilege are not new elements to the DoD. The DoD underestimated these factors, and they underestimated the congressional reaction. It was a costly mistake in terms of effort, time, and resources in designing and implementing NSPS. If the DoD does not learn from this miscalculation moving forward, it may cost the DoD in the form of a total revocation of NSPS.<sup>239</sup>

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<sup>233</sup> *Id.* at 66,123.

<sup>234</sup> *Id.* at 66,128.

<sup>235</sup> *Chertoff II*, 452 F.3d 839, 864 (D.C. Cir. 2006).

<sup>236</sup> *Rumsfeld*, 422 F. Supp. 2d 16, 26 (D.D.C. 2006) (quoting *Transforming the Department of Defense Personnel System: Finding the Right Approach: Hearing Before the S. Comm. On Government Affairs*, 108th Cong. 21 (2003) (statement of Donald Rumsfeld, Secretary of Defense)), *rev’d sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

<sup>237</sup> *Id.* at 26–27.

<sup>238</sup> *See generally* NDAA Impact on NSPS Regulations, *supra* note 203.

<sup>239</sup> The unions intend to continue to seek changes to the NSPS pay system. Defense Authorization Bill Provides NSPS Fix, *supra* note 191. Moreover the new implementing statute for NSPS requires the Comptroller General to conduct annual surveys of employee satisfaction with NSPS, and report the findings to Congress. NDAA Impact on NSPS Regulations, *supra* note 203. Both NSPS and MAXHR are experimental personnel systems. Congress became so wary of MAXHR as an experiment that after the court decisions eviscerating the implementing regulations for that program, the House of Representatives proposed totally rescinding the implementing statute for the program. H.R. 1684, 110th Cong. § 511 (2007). Moreover, John Gates, president of AFGE, stated that a top priority for the union during President Obama’s administration is the death of NSPS. Alyssa Rosenberg, *Union Outlines Legislative*

Labor relations are a collaborative process that involves both management and workers alike. It seems that any labor counselor at the installation level should understand that inclusion of the unions in the decision making process is not only required by law but also a practical necessity. It allows for the trust former Secretary Rumsfeld sought between management and workers. Moreover, involving the unions early in negotiations seems to save time, money, and precious other resources.

The DoD at the macro level (along with DHS in its implementation of MAXHR) did not focus properly on this tenet that many labor counselors at the micro level are taught to follow. This oversight cost a great deal in the years wasted trying to implement policy under a new personnel management system.

Public sector unions are still very politically strong in our society. In treating the unions as an opponent instead of a collaborator in the formulation of this new personnel management system, the DoD missed an opportunity to save time and resources and also seriously miscalculated the will of the unions.

In any event, whether one is pro-union or pro-management, whether one is at the installation level or the Department level, one must understand that labor relations is a process that requires varying levels of cooperation and trust between the parties. The initial process to implement NSPS stands as an example of a failure to achieve that trust or cooperation.

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*Agenda*, GOV'T EXECUTIVE, Feb. 4, 2009, *available at* [http://www.govexec.com/story\\_page.cfm?articleid=41966&sid=59](http://www.govexec.com/story_page.cfm?articleid=41966&sid=59). In light of these factors, DoD could conceivably lose its ability to function under NSPS if it does not demonstrate to Congress that this is a worthy personnel system.

## Note from the Field

### Getting to Court: Trial Practice in a Deployed Environment

Captain A. Jason Nef\*

#### Introduction

Delay is a persistent enemy to the administration of justice in the deployed environment. Failure to recognize this can result in the violation of an accused's right to speedy trial under Rule for Courts-Martial (RCM) 707<sup>1</sup> or the Uniform Code of Military Justice (UCMJ), Article 10.<sup>2</sup>

Delay comes to us in many forms. Too often it comes to us by invitation, by placing a case on the "back burner" and telling ourselves that we are waiting for the Criminal Investigation Command to conclude some investigatory minutia. Trial counsel can eliminate this inertia-born delay by moving their cases forward, deliberately. But even the most diligent counsel cannot reasonably expect to always avoid delay, or even anticipate it. However, knowing where delay is most likely to ambush your case, and preparing to meet it there, can spare you many unwelcomed distractions from trial preparation.

This article highlights a few causes of trial delay in the deployed environment, and proposes ways to deal with them. First, this article emphasizes how to mitigate delay associated with witness production. Second, this article presents, practical advice on handling the burden of classified information in a case. Finally, this article concludes with a brief introduction to the *Kastigar* challenge and ways to overcome it.

Trial counsel in a deployed environment may find that even a little practical advice can go a long way.

#### The Impact of Redeployment

One matter in expediting cases that merits consideration is the redeployment schedule of deployed units. The Multinational Divisions (MNDs) of Operation Iraqi Freedom consist of a division headquarters and multiple brigade combat teams (BCTs). The BCTs may not be on the same redeployment schedule as the division headquarters. Consequently witnesses, units, and convening authorities can change between the discovery of misconduct and the imposition of punishment. As units approach their redeployment date, defense counsel may perceive a stronger bargaining position as pressure to dispose of outstanding military justice actions increases. Government counsel must be vigilant in prosecuting cases and avoiding delay so the redeployment timeline does not drive disposition.

Commanders typically want to close all actions before redeployment. The reintegration and block leave period following redeployment routinely creates delay and redeployment often involves losing witnesses due to a change of station or separation. Once a witness leaves a command, recalling him becomes costly in both time and money. These factors work against the swift administration of justice and ultimately compromise a commander's ability to promote justice and maintain good order and discipline. For the accused Soldier, unnecessary delay frustrates his right to a speedy trial. These issues can quickly lead to a speedy trial problem for the Government, particularly when charges are preferred within thirty days of redeployment.

#### Civilian Witnesses and Interlocutory Matters

Witness availability in the deployed environment is a constant concern, particularly for witnesses outside of the theater of operations. The live testimony of a civilian witness is wholly voluntary in a deployed location.<sup>3</sup>

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 707 (2008) [hereinafter MCM] ("The accused shall be brought to trial within 120 days after . . . preferral of charges.").

<sup>2</sup> UCMJ art. 10 (2008) (If an accused is placed in pretrial confinement, "immediate steps shall be taken to inform him" of the charges "and to try him").

The amount of time a witness is required to commit for one day of live testimony is considerable. For example, in the U.S. Central Command theater of operations, a witness can reasonably expect to spend a total of eight days (or more) away from work and family to provide one day of live testimony.<sup>4</sup> This may mean lost income and additional expenses for a civilian witness.

Consider the demands placed on any witness, particularly civilian witnesses, when requesting their presence in a deployed location.<sup>5</sup> If their testimony is relevant and necessary for interlocutory matters<sup>6</sup> the parties can agree, or the military judge can order, remote testimony. This option eases the burden placed on an out-of-theater witness.

In April 2007, President Bush authorized testimony by remote means on interlocutory matters over a party's objection.<sup>7</sup> This does not solve witness production issues on the merits but improves the rate at which interlocutory matters are settled by the court, thus minimizing pretrial delay. Consider also that the military judge has sole discretion to authorize remote testimony on interlocutory matters.<sup>8</sup> A party petitioning the court to authorize testimony by remote means must present evidence that circumstances warrant this option.<sup>9</sup> The evidence should show that there is justification beyond mere convenience for one party.

If the military judge authorizes remote testimony, he also determines the procedures used to take testimony via remote means.<sup>10</sup> At a minimum, all parties shall be able to hear each other, those in attendance at the remote site shall be identified, and the accused shall be permitted private, contemporaneous communication with his counsel.<sup>11</sup> When utilizing testimony via remote means, military justice practitioners are encouraged to consult<sup>12</sup> the procedure used for the case of *In re San Juan Dupont Plaza Hotel Fire Litigation*<sup>13</sup> and also to read the case of *United States v. Gigante*.<sup>14</sup> Parties should consult with their

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<sup>3</sup> MCM, *supra* note 1, R.C.M. 703(e)(2)(A) discussion ("A subpoena may not be used to compel a civilian to travel outside the United States and its territories."). Even when a civilian witness is willing to present live testimony in theater, the process of bringing them is not a simple one. The administrative and fiscal details of such travel are beyond the knowledge and expertise of most trial counsel. Trial counsel must consult with their legal administrators and senior noncommissioned officers when arranging for witness travel. Another key player in bringing witnesses into theater is your unit's liaison noncommissioned officers (LNOs) at the transition point in Kuwait. Good communication and a strong working relationship with these personnel is essential for the smooth administration of witness travel.

<sup>4</sup> This calculation is based on the author's personal observations and experience. The author was directly involved in bringing fourteen witnesses and two civilian defense counsel into Iraq for courts-martial. Seven of the witnesses were either civilians or demobilized reservist. Five of the military witnesses were stationed outside of the continental United States (OCONUS). In general, one day of travel is required to move a witness from the continental United States to Kuwait, but OCONUS witnesses may require additional travel time. Upon arrival in Kuwait, a witness will spend between twenty-four and forty-eight hours at a transition point before traveling into Iraq or Afghanistan. If the witness must travel in-country to reach their final destination, you can reasonably expect to add another twelve to twenty-four hours of travel time just to get a witness where they need to be. Add a day of witness preparation, at least one day of live testimony, and then reverse the process.

<sup>5</sup> In addition to any personal or financial burdens, civilian witnesses must possess a valid passport to enter Kuwait for transition into Iraq or Afghanistan. For civilian witnesses who do not already possess a passport, acquiring one on short notice is costly and time consuming. If your witness possesses a U.S. Passport, a visa may also be required to enter Kuwait. The author knows of one instance where Kuwaiti authorities refused entry to a witness who was a citizen of Mexico and possessed an official passport from that country.

<sup>6</sup> Interlocutory matters are those matters that require the military judge to rule on a question of law before the parties can move forward with a court-martial. The ruling can be revisited during the court-martial or reviewed on appeal. For example, the defense moves to exclude an incriminating pretrial statement on the basis that it was involuntary. The defense presents their evidence and the military judge rules that the pretrial statement was voluntary and not the product of government coercion and allows the statement into evidence. The defense may attack the reliability of the government's evidence at trial, but the question of law (application of the exclusionary rule) is settled. If additional facts supporting the accused's motion aught during the court-martial, the accused may raise their motion again.

<sup>7</sup> Exec. Order 13,430, 72 Fed. Reg. 20,213 (Apr. 23, 2007) (2007 Amendments to the Manual for Courts-Martial, United States).

<sup>8</sup> MCM *supra* note 1, R.C.M. 703(b)(1) ("Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance . . .").

<sup>9</sup> *Id.* ("Factors to be considered include, but are not limited to, the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training . . .").

<sup>10</sup> *Id.* R.C.M. 703(b)(1).

<sup>11</sup> *Id.* R.C.M. 914B.

<sup>12</sup> *Id.* R.C.M. 914B(b) discussion.

<sup>13</sup> *Dupont*, 129 F.R.D. 424 (D.P.R. 1990). Plaintiffs requested that the court order witnesses employed by the defendants, but beyond the subpoena power of the court, to testify through satellite transmission. *Id.* at 425. The Federal Rules of Civil Procedure neither authorized nor prohibited such procedures. The court found that the benefits of satellite testimony outweighed any disadvantage to the defendants. *Id.* at 426. The court ultimately adopted a set of

legal administrators and court reporters for technical and administrative support when equipping the courtroom with proper video teleconference or conference-call equipment.

When neither live nor remote testimony is a viable option for a particular witness, the parties may stipulate to a witness's expected testimony.<sup>15</sup> Although the decision to stipulate is customarily left to the parties, the military judge may reject a stipulation.<sup>16</sup> If a stipulation is rejected, the parties may be entitled to a continuance.<sup>17</sup>

Before submitting a stipulation to the court, both parties should independently verify the content of the witness's testimony.<sup>18</sup> Once a stipulation has been accepted by the court, any withdrawal from it is within the discretion of the military judge.<sup>19</sup>

While stipulating saves time and expense, parties should consider what is lost by using stipulated testimony. By stipulating, one party surrenders the opportunity to cross-examine an adversary's witness; the other surrenders the opportunity to have the court see and hear their evidence presented live and in person. However, the contents of a stipulation may be challenged or explained in the same way as if the witness had actually testified.<sup>20</sup>

### Classified Cases

Classified cases present unique administrative challenges to the parties. The Government is faced with invoking the privilege to prevent disclosure of classified information, or seeking an alternative disposition.<sup>21</sup> Prior to Military Rule of Evidence (MRE) 505, the threat of disclosure was an additional challenge to manage at courts-martial.<sup>22</sup>

Government counsel do not possess an inherent right to assert the privilege, but must take specific steps to assert the privilege on behalf of the original classification authority.<sup>23</sup> Trial counsel must submit a written request to assert the

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procedures that would permit all members of the court and the remote witness to fully observe each other during testimony as though all parties were in the same courtroom. *Id.* at 429. The court required a 30-inch screen on witness stand (witness screen) facing the podium and jury box that provided a full torso frontal image on witness screen at all times. *Id.* at 429-30. The questioning attorney addressed the screen as if the witness was on the stand. *Id.* at 430. The studio transmitting the remote testimony was staffed with a courtroom clerk. *Id.* at 427. Documents available at the studio were handed to witness by the courtroom clerk in the studio. *Id.* Other documents or evidence was shown to the witness on the screen or sent by telecopier. *Id.*

<sup>14</sup> 166 F.3d 75 (2d Cir. N.Y. 1999). Mr. Gigante appealed a jury verdict convicting him of racketeering and multiple conspiracy charges. *Id.* at 78. The basis of his appeal was that the court violated his right to confrontation by allowing witness testimony by the use of a two-way closed circuit television. *Id.* The Court of Appeals for the Second Circuit found no violation of Gigante's right to confrontation and affirmed the judgment because the witness could see the courtroom, and the defendant and jury could see the witness during testimony. *Id.* at 81-82.

<sup>15</sup> MCM, *supra* note 1, R.C.M. 811(a).

<sup>16</sup> *Id.* R.C.M. 811(b) ("The military judge may, *in the interest of justice*, decline to accept a stipulation." (emphasis added)). The military judge will inquire into accused's understanding of the stipulation and the consequence of stipulating to that fact, content or expected testimony. *Id.* R.C.M. 811(c) discussion. In addition, the military judge will independently review the stipulation for clarity; an unclear or ambiguous stipulation will be rejected. *Id.*

<sup>17</sup> *Id.* R.C.M. 811(b) discussion.

<sup>18</sup> The parties should also consider stipulations of fact. Although stipulations of fact are different from stipulations of expected testimony, both can serve the same purpose of moving a case forward without a particular witness. When there is no dispute regarding the facts a witness will testify to, parties should consider a stipulation of fact over a stipulation of expected testimony. The court can weigh veracity of and motive behind expected testimony in the same way it weighs the testimony of any other witness. But if a military judge permits parties to stipulate to a particular fact, the court is "bound by the stipulation and the stipulated matters are facts in evidence to be considered . . . with all the other evidence in the case." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-4-1 (15 Sept. 2002) (C2, 1 July 2003).

<sup>19</sup> MCM, *supra* note 1, R.C.M. 811(d).

<sup>20</sup> *Id.* R.C.M. 811(e).

<sup>21</sup> *Id.* MIL. R. EVID. 505(a) ("Classified information is privileged from disclosure if disclosure would be detrimental to national security. As with other rules of privilege this rule applies to all stages of the proceedings.").

<sup>22</sup> *Id.* MIL. R. EVID. 505 analysis, at A22-41.

Rule 505 . . . was . . . a response to what is known as the "graymail" problem in which the defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. . . . The rule attempts to balance the interests of an accused who desires classified information for his . . . defense and the interests of the government in protecting that information.

*Id.*

privilege to the appropriate department or agency head.<sup>24</sup> This request should include the facts of the case and how the classified information is at risk of disclosure.<sup>25</sup> When the department or agency head grants the request the trial counsel should ensure this in writing, preferably in an affidavit presented to the military judge. The affidavit will provide the trial counsel a means to assert the privilege on behalf of the agency and should state the nature of the classified information and the impact of disclosure. Trial counsel should then submit the affidavit to the military judge for review and move for in camera proceedings to assert the privilege.<sup>26</sup>

Cases that risk exposing classified information are infrequent. Counsel will save a great deal of time by promptly engaging the original classification authority requesting authorization to assert the privilege on their behalf. The longer counsel waits to take the steps required to assert the privilege, the greater the risk of exposure of classified information or the delay of proceedings.

### The *Kastigar* Challenge: Testimonial Immunity and Subsequent Prosecution

When cases involve multiple accused, the Government may be in a position where a grant of testimonial immunity<sup>27</sup> for co-accused is necessary to prosecute.<sup>28</sup> The current staffing of trial counsel at the BCTs and MNDs<sup>29</sup> require deliberate steps prior to granting immunity to co-accused that the Government intends to prosecute at a later date. The Government is subjected to a high level of scrutiny when prosecuting an accused who has provided immunized testimony. This calls for deliberate prophylactic measures to meet legal requirements and prevent delay or dismissal.<sup>30</sup> The challenge the Government

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<sup>23</sup> *Id.* MIL. R. EVID. 505(c) analysis.

The privilege may be claimed only “by the head of the executive or military department or government agency concerned” and then only upon “a finding that the information is properly classified and that disclosure would be detrimental to the national security.” Although the authority of a witness or trial counsel to claim the privilege is presumed in the absence of evidence to the contrary, neither a witness nor a trial counsel may claim the privilege without prior direction to do so by the appropriate department or agency head. Consequently, expedited coordination with senior headquarters is advised in any situation in which Rule 505 appears to be applicable.

*Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* MIL. R. EVID. 505(i)(3)

<sup>27</sup> *Id.* R.C.M. 704(a)(2) (“A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.”).

<sup>28</sup> *Id.* R.C.M. 704(a) discussion.

**Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.**

*Id.*

<sup>29</sup> The BCTs are staffed with one trial counsel and the MNDs typically have one or two trial counsel on staff. When the Government prosecutes an accused who testified under a grant of immunity in a companion case, a heavy burden rests upon government counsel to demonstrate to the court that no new evidence against the accused has been directly or indirectly gained from their immunized testimony. One of the best ways to demonstrate this is to prosecute the accused using government counsel who has not been exposed to the immunized testimony. If the multiple accused number two or three individuals, finding separate counsel for each prosecution is manageable under the current staffing.

<sup>30</sup> MCM, *supra* note 1, R.C.M. 704(a) discussion.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person’s statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person’s testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

*Id.*

invites from defense is based on *Kastigar v. United States*.<sup>31</sup> In that case, the Court held that the Government must demonstrate that an accused's statements given under a prior grant of immunity are not now being used against him, either directly or indirectly.<sup>32</sup>

Surviving a *Kastigar* challenge rests upon the Government's ability to demonstrate appropriate responses to the following questions:

1. Did the accused's immunized statement reveal anything "which was not already known to the Government by virtue of the [accused's] own pretrial statement"?
2. Was the investigation against the accused completed prior to the immunized statement?
3. Was "the decision to prosecute" the accused made prior to the immunized statement? and,
4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?<sup>33</sup>

The living and working conditions for most deployed Judge Advocates result in an almost total lack of privacy for counsel. In this environment, one critical step that must be taken is to seal any and all evidence known to the Government before granting immunity. By sealing and securing multiple copies of all known evidence prior to the grant of immunity, the Government eases the burden of demonstrating to the court that the immunized statement revealed nothing "which was not already known to the Government"<sup>34</sup> and that "the investigation against the accused [was] completed prior to the immunized statement."<sup>35</sup> This is most effective where the Government has conducted a thorough and complete investigation into the alleged misconduct *prior* to making any charging decisions.

A separate copy of the evidence should be prepared for the counsel assigned to prosecute the immunized co-accused. This provides assigned counsel with everything necessary to prepare his case independent of evidence that may come from the immunized testimony. It is important that the assignment of counsel be made prior to the grant of immunity. By assigning counsel and preferring charges prior to the grant of immunity, and banning that counsel from any exposure to the immunized testimony,<sup>36</sup> the Government can further demonstrate to the court that no improper advantage was gained from the immunized testimony.

Preparing for, and defending against, a *Kastigar* challenge is complex and the burden is on the Government. Taking deliberate steps in anticipation of a *Kastigar* challenge places the Government in a position to carry that burden and prevent further delay or dismissal.

## Conclusion

Moving cases in a timely manner is essential to the fair administration of justice. However, trying cases in a deployed environment presents fresh challenges and complicates old ones.

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<sup>31</sup> 406 U.S. 441 (1972). Petitioners were given a grant of immunity and subpoenaed to testify at federal grand jury but invoked their Fifth Amendment right against compulsory self-incrimination. *Id.* at 442. Petitioners contended that the privilege against self-incrimination was broader than a grant of immunity. *Id.* The court held that the immunity was sufficient to replace the privilege; therefore the petitioners could be compelled to testify. *Id.* But, "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 460 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)).

<sup>32</sup> *Id.* at 462.

<sup>33</sup> *United States v. England*, 33 M.J. 37, 38–39 (C.M.A. 1991) (alteration in original). These are the factors a court considers when "deciding whether the Government's evidence against appellant was obtained from a source wholly independent of appellant's immunized testimony." *Id.* at 38.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 39.

<sup>36</sup> Of the factors a court considers, preventing exposure to immunized testimony requires the greatest amount of vigilance and deliberate effort in the deployed environment. Clear guidance should be given to assigned counsel banning all conversations about the case with other counsel who are exposed to the immunized testimony. If the case attracts media attention, assigned counsel must not read, hear or view any news stories related to their case or companion cases. The court should not be left with any doubt as to whether or not the Government has met their burden.

Witness availability and production is a potential cause for trial delay regardless of venue. But the probability of witness related delay increases when multiple units within a jurisdiction have different redeployment schedules. Moving cases to trial in a timely manner does much to avoid this kind of delay. However, when a case requires bringing witnesses into theater, consider alternatives. Witnesses for interlocutory matters can be heard by remote means at the discretion of the court. Parties should also consider stipulating to expected testimony where they can agree. If a out-of-theater witness must be produced, be aware of the forward planning required and the burden on that witness.

The introduction of classified information into your case creates an unusual challenge for trial counsel. Identifying and engaging the original classification authority is essential to asserting the privilege under MRE 505 and limiting exposure of the classified information. Failure to do this correctly at the earliest stages of a case will create many unwelcomed distractions and ultimately delay the Government in bringing their case to trial.

Trial counsel should be able to anticipate a *Kastigar* challenge long before trial. By taking the steps recommended above, the Government will be in a strong position to overcome the challenge. Failure to do so will result in unnecessary delay and the risk of dismissal.

It is not realistic to expect that all delay can be avoided; however, most delay is avoidable with proper coordination and planning. Employing the measures presented above will minimize distractions for trial counsel and facilitate the speedy administration of justice.

**Office of the Judge Advocate General**  
*International and Operational Law Division*

**International and Operational Law Practice Note**

**Law of War Treaties Pass the Senate**

*Dick Jackson\**

At the end of September, the Senate provided its advice and consent for five law of war treaties, many of which have been languishing in the Senate for years. The 1954 Hague Cultural Property Convention,<sup>1</sup> which had been recommended by President Clinton for ratification,<sup>2</sup> was approved with four understandings and a declaration.<sup>3</sup> Four protocols of the Certain Conventional Weapons (CCW) Convention,<sup>4</sup> including an extension of the CCW to all non-international armed conflicts,<sup>5</sup> Protocol III (Incendiaries),<sup>6</sup> Protocol IV (Blinding Lasers),<sup>7</sup> and Protocol V (Explosive Remnants of War (ERW)),<sup>8</sup> were also approved with a reservation and several declarations and understandings.<sup>9</sup> These treaties were significant in number (the most at any one time since the Hague Conventions were ratified in 1907<sup>10</sup>), but also because they represent a renewed effort to assert U.S. leadership in the international community on law of war matters. They are also an example of the U.S. Government's public diplomacy efforts to portray the U.S. military as a law-abiding member of the international community.<sup>11</sup> When the President prepares instruments of ratification, the treaties will be filed with the UN Educational Scientific and Cultural Organization (UNESCO),<sup>12</sup> in Paris, and the UN Office at Geneva (UNOG) for Disarmament.<sup>13</sup>

All of the Senate actions emphasize that the treaties are self-executing, with the exception of the requirement in the 1954 Hague Convention on penal sanctions<sup>14</sup> and the ERW Protocol, which requires appropriations for assistance to nations

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<sup>1</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAW OF WAR 374 (2001) [hereinafter 1954 Hague Convention].

<sup>2</sup> Letter of Transmittal from President Clinton to the Senate Committee on Foreign Relations, Treaty Doc. 106-1 (Jan. 6, 1999), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_documents&docid=f:td001.106.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:td001.106.pdf).

<sup>3</sup> 154 CONG. REC. S9439, 9555 (daily ed. Sept. 25, 2008).

<sup>4</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW], *reprinted in* ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAW OF WAR 515 (2001).

<sup>5</sup> *Id.* art. 1, *reprinted in* ROBERTS & GUELF, at 521.

<sup>6</sup> *Id.* Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), *reprinted in* ROBERTS & GUELF, at 533.

<sup>7</sup> *Id.* Protocol on Blinding Laser Weapons (Protocol IV), *reprinted in* ROBERTS & GUELF, at 535.

<sup>8</sup> *Id.* Protocol on Explosive Remnants of War (Protocol V), *reprinted in* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 428 (2008) [hereinafter LOW DOCUMENTARY SUPP.].

<sup>9</sup> See 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008); 154 CONG. REC. S9439, 9555 (daily ed. Sept. 25, 2008); 154 CONG. REC. S.9559, 9850 (daily ed. Sept. 26, 2008).

<sup>10</sup> See ROBERTS & GUELF, *supra* note 4, at 67.

<sup>11</sup> See, e.g., John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Remarks at the Hague, Netherlands: The United States and International Law (June 6, 2007) (transcript available at <http://www.state.gov/s/rls/86123.htm>).

<sup>12</sup> See United Nations Educational Scientific and Cultural Organization, Protection of Cultural Property in the Event of Armed Conflict [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35261&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35261&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Jan. 13, 2009).

<sup>13</sup> See United Nations Office at Geneva, The Convention on Certain Conventional Weapons, [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument) (last visited Jan 13, 2009).

<sup>14</sup> 1954 Hague Convention, *supra* note 1, art. 28; 154 CONG. REC. S9439, 9555 (Sept. 25, 2008). Penal sanction for serious crimes covered by the convention has already been provided for in the War Crimes Act, 18 U.S.C. § 2441 (2000) (wanton destruction of property) and the Uniform Code of Military Justice, Article 109 (2008) (willful or reckless destruction of property).

removing ERW.<sup>15</sup> They also emphasize the long-standing U.S. position that law of war treaties do not create a private right of action.<sup>16</sup> Several of the resolutions included the understanding that the application of the law of war standards will be based on the information “reasonably available . . . at the [relevant] time.”<sup>17</sup> This understanding is similar to those asserted by U.S. allies during their ratification processes for targeting provisions of Additional Protocol I, which require similar proportionality analyses, conducted in situations where commanders may have “imperfect information.”<sup>18</sup>

The Senate action on the 1954 Hague Convention reiterated the U.S. and allied position that the convention does not apply to nuclear weapons, nor does it change the customary international law standard to protect cultural property from harm, unless it is used by the opposing military or unless military necessity demands it be attacked.<sup>19</sup> The Senate understanding interprets the “special protection” of Chapter II of the Convention as codifying “customary international law in that it, first, prohibits the use of any cultural property to shield any legitimate military targets from attack and, second, allows all property to be attacked using any lawful and proportionate means, if required by military necessity and notwithstanding possible collateral damage to such property.”<sup>20</sup> In addition, the Senate included an understanding that the burden of establishing cultural property protections lies on the State that controls the property, to “ensure that it is properly identified and that it is not used for an unlawful purpose.”<sup>21</sup> These points emphasize the reciprocal obligations of attacking and defending forces that were codified in Additional Protocol I to the Geneva Conventions.<sup>22</sup> These understandings all comport with U.S. practice and are consistent with allied nations’ understandings and practice.<sup>23</sup>

The Amendment of Article 1 to the CCW extends the provisions of the convention and its protocols to non-international armed conflicts, covered by Common Article 3 to the Geneva Conventions.<sup>24</sup> The extension of the CCW to non-international armed conflicts was originally a U.S. proposal<sup>25</sup> and is consistent with the U.S. approach of applying the LOW for all armed conflicts and military operations across the conflict spectrum, no matter how the military operations are characterized.<sup>26</sup> It is also consistent with other recent changes to the CCW, including the extension of Amended Mine Protocol II and the ERW Protocol V to non-international armed conflicts, to protect victims of all conflicts from the ravages of war and the effects of military weaponry left on the battlefield.<sup>27</sup>

The Senate action on Protocol III (Incendiaries) included a reservation to use incendiaries in populated areas only when their use would result in fewer civilian casualties (e.g., against a chemical plant) and it could be done with all feasible precautions.<sup>28</sup> This reservation is consistent with the intent of Article 2 of Protocol III, which allows attack against military objectives located within “concentrations of civilians,” with “other than air-delivered incendiary weapons” if the objective is clearly separated from the civilians and all feasible precautions have been taken to limit civilian casualties and collateral

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<sup>15</sup> Protocol on Explosive Remnants of War (Protocol V), art. 7, *reprinted in* LOW DOCUMENTARY SUPP., *supra* note 8, at 430; 154 CONG. REC. S9559, 9850 (daily ed. Sept. 26, 2008).

<sup>16</sup> 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008). *Compare id.*, with Military Commissions Act § 5 (2000) (clarifying that the Geneva Conventions do not provide a private right of action for alien unlawful enemy combatants).

<sup>17</sup> 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008).

<sup>18</sup> Declarations and Understandings by Various Governments, *reprinted in* ROBERTS & GUELF, *supra* note 4, at 499–512.

<sup>19</sup> 154 CONG. REC. S.9439, 9555 (daily ed. Sept. 25, 2008).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), arts. 57, 58, June 8, 1977, 1125 U.N.T.S. 608, 26 I.L.M. 1391 (1977), *reprinted in* ROBERTS & GUELF, *supra* note 4, at 423.

<sup>23</sup> *See, e.g.*, Declarations and Understandings by Various Governments, *reprinted in* ROBERTS & GUELF, *supra* note 4, at 499–512.

<sup>24</sup> CCW, *supra* note 4, amend art. 1, *available at* [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/B20A03F9D7163A5BC12571DC0064F843/\\$file/AMENDED+ARTICLE+1.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/B20A03F9D7163A5BC12571DC0064F843/$file/AMENDED+ARTICLE+1.pdf). The terms of the amendment emphasize that non-international armed conflicts do not include “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.” *Id.* para. 2.

<sup>25</sup> *See* U.S. CCW Declaration, *reprinted in* LAW OF WAR DOCUMENTARY SUPPLEMENT, *supra* note 8, at 412 (2008).

<sup>26</sup> U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (May 9, 2006).

<sup>27</sup> *See, e.g.*, CCW, *supra* note 4, Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1996 Amended Protocol II), art. 1.2, *reprinted in* ROBERTS & GUELF, at 536.

<sup>28</sup> 154 CONG. REC. S9223, 9333 (daily ed. Sept. 23, 2008).

damage.<sup>29</sup> In an article published in the International Review of the Red Cross that has served as the *travaux preparatoire* for the Incendiaries Protocol, Hays Parks noted that there was significant controversy regarding the prohibition on use of air-delivered incendiaries in populated areas and some delegations were concerned that commanders may be “forced to employ artillery fire or an air-delivered high explosive munition that would be less accurate or more destructive than an air-delivered incendiary weapon, resulting in greater collateral civilian casualties or damage to civilian objects.”<sup>30</sup> The reservation, though partly in contravention of the ban on air-delivered incendiaries in concentrations of civilians, reflects the concern expressed by some nations that air-delivered incendiaries may be delivered more accurately, with less collateral damage, than artillery in certain circumstances.<sup>31</sup>

The United States has followed these treaties, as a matter of practice, since they were signed.<sup>32</sup> This approach is consistent with the Vienna Convention on the Law of Treaties, which urges nations to “refrain from acts which would defeat the object and purpose of a treaty” when the nation has signed a treaty, subject to ratification.<sup>33</sup> So why ratify these treaties now? Other than being consistent with current practice, John Bellinger, the Legal Advisor to Department of State has noted that “ratification would promote U.S. international security interests in vigorously supporting, along with our friends and allies, both the rule of law and the appropriate development of international humanitarian law.”<sup>34</sup> Even though the U.S. military has followed these treaty provisions, as a matter of policy, since the U.S. signed each treaty, their ratification is a symbol of U.S. application of the rule of law in armed conflict and helps restore U.S. leadership in the law of war.

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<sup>29</sup> CCW *supra* note 4, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), art. 2, *reprinted in* ROBERTS & GUELF, at 534.

<sup>30</sup> W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT’L REV. OF THE RED CROSS 535, 548 (Nov.–Dec. 1900).

<sup>31</sup> *See, e.g.*, UK Understanding of Protocol III, *reprinted in* ROBERTS & GUELF, *supra* note 4, at 559.

<sup>32</sup> *Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (Apr. 15, 2008) (statement of John Bellinger, Legal Advisor for Dep’t of State), *available at* <http://foreign.senate.gov/testimony/2008/BellingerTestimony080415p.pdf> [hereinafter Bellinger Statement].

<sup>33</sup> Vienna Convention on the Law of Treaties, art. 18, 8 I.L.M. 679 (1969).

<sup>34</sup> Bellinger Statement, *supra* note 32, at 2–3.

# FINAL SALUTE: A STORY OF UNFINISHED LIVES<sup>1</sup>

REVIEWED BY MAJOR JENNIFER B. FARMER<sup>2</sup>

*The curtains pull away. They come to the door. And they know. They always know. . . . You can almost see the blood run out of their body and their heart hit the floor. It's not the blood as much as their soul.*<sup>3</sup>

## I. Introduction

In *Final Salute: A Story of Unfinished Lives*, Jim Sheeler vividly tells of the pain and suffering Families and casualty notification officers experience after loved ones serving in the military are killed in action. From the first-hand stories that display the sacrifices Families make, to the emotional toll casualty notification officers experience, Sheeler provides leadership and legal lessons applicable to Judge Advocates (JAs).

Sheeler does what few authors have done before him: he chronicles the aftermath of a casualty notification by “bear[ing] witness to the ways in which casualties from Iraq are shielded from sight.”<sup>4</sup> The thesis of the book is to show the true cost of war to those with no personal stake in the war through the eyes of five Families who lost loved ones to the war in Iraq. The book is not a political piece; it does not advocate for or against the war. It simply explains the aftermath Families and notification officers experience after a servicemember’s death. “Ultimately, *Final Salute* is about the price being paid by the men, women, and children of the military. It’s not a statement about the war, but it is a statement about the sacrifice and how we all need to feel it more than we are.”<sup>5</sup>

## II. The Author

Jim Sheeler graduated with a degree in journalism from Colorado State University (CSU) and a master’s degree in journalism from the University of Colorado.<sup>6</sup> He has received numerous national writing awards including the Pulitzer Prize for feature reporting for his series of articles published in the *Rocky Mountain News* that served as the basis for *Final Salute*.<sup>7</sup> He is currently a scholar in residence at the University of Colorado.<sup>8</sup>

After graduating from CSU, Sheeler worked as a general assignment reporter at the *Rocky Mountain News*. In 2003, he was assigned to cover the funeral of Lance Corporal Thomas Slocum, the first casualty from Colorado.<sup>9</sup> He never stopped covering the war from this point forward. As a journalist, he has an innate ability to see what few others are able to see. Sheeler spent numerous hours as a silent observer at countless military funerals; he “started seeing things . . . that nobody else was seeing, from the gravediggers in the cemeteries, to the old veterans who turned up, to the Marines themselves who were carrying the[] caskets for the last time.”<sup>10</sup> This was the birth of *Final Salute*.<sup>11</sup> Sheeler first met Major Steve Beck, a Marine Corps’ casualty notification officer,<sup>12</sup> at a funeral at Fort Logan National Cemetery in Denver, Colorado.<sup>13</sup> He told Major

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<sup>1</sup> JIM SHEELER, *FINAL SALUTE: A STORY OF UNFINISHED LIVES* (2008).

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<sup>3</sup> SHEELER, *supra* note 1, at 9 (quoting Major Steve Beck).

<sup>4</sup> Janet Maslin, *Bearing Witness to the Fallen and the Grieving*, N.Y. TIMES, June 5, 2008 (reviewing SHEELER, *supra* note 1), available at <http://www.nytimes.com/2008/06/05/books/05maslin.html>.

<sup>5</sup> Eric Barnedsen, *Final Tribute: An Appreciation for Jobs Done Well Under the Most Difficult Conditions*, BYLINES (Univ. of Colo. at Boulder), Fall 2007, available at <http://www.colorado.edu/journalism/bylines/fall07/features/sheeler.html>.

<sup>6</sup> SHEELER, *supra* note 1, at inside back cover.

<sup>7</sup> *Id.*

<sup>8</sup> See Verna Noel Jones, *A Final ‘Salute’ to Sacrifice*, ROCKY MOUNTAIN NEWS, May 1, 2008, available at <http://www.rockymountainnews.com/news/2008/may/01/a-final-salute-to-sacrifice/>.

<sup>9</sup> See Barnedsen, *supra* note 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Jones, *supra* note 8. Major Beck has since been promoted to lieutenant colonel. *Id.*

<sup>13</sup> SHEELER, *supra* note 1, *Author’s Note*, at 276.

Beck he “wanted to follow him, to learn the resonance of the knock.”<sup>14</sup> Major Beck agreed, but only after he grilled Sheeler to confirm he had no hidden agenda and received the blessing of the Families.<sup>15</sup>

### III. Organization and Content

Sheeler takes the reader on an emotional journey in four chapters structured in the same order as the steps taken after a servicemember’s death—The Knock; Reverberations; Bringing Them Home; and After the War, Stories. He tracks the stories of five Families: Marine Lance Corporal Kyle W. Burns, Navy Corpsman HM3 Christopher “Doc” Anderson, Marine Second Lieutenant James J. Cathey, Marine Lance Corporal Brett Lee Lundstrom, and Army Private First Class Jesse A. Givens.

Sheeler weaves Major Beck’s story throughout the book to fully explain the emotions experienced by Major Beck while serving as a notification officer. Parts one and four, the key parts of the book, focus on the full circle of emotions experienced by Families after the notification. Parts two and three focus primarily on the emotions felt by strangers and fellow servicemembers.

Part one describes the emotional turmoil that notification officers experience before making the initial notification. “For Major Steve Beck, it starts with a knock or a ring of the doorbell—a simple act, really, with the power to shatter a soul.”<sup>16</sup> There is no turning back as he approaches the door, he “pick[s] himself up, gather[s] his thoughts, and ring[s] the bell.”<sup>17</sup>

Military Families live their lives praying that they never receive the knock. However, for every second Major Beck waits to make the knock, it is “one more tick of his wrist-watch that, for the family inside the house, everything remain[s] the same.”<sup>18</sup> For every notification, Major Beck has “to walk up to someone else’s mother, carrying the name of someone else’s son.”<sup>19</sup> Major Beck describes his angst at being the source of intense pain for the family: “that’s what hurts me the most: that because I’m standing in front of them, they’re feeling as bad as they’re ever going to feel.”<sup>20</sup>

As Sheeler points out, not all Families receive the notification calmly. Some Families scream or curse at the notification officer blaming him for being the bearer of bad news, while others physically strike.<sup>21</sup> Major Beck’s job is to “catch the family while they’re falling”—“literally and figuratively.”<sup>22</sup>

In part two, Sheeler briefly discusses the pain and suffering felt by those whose voice typically goes unspoken—family members and fellow servicemembers. Sheeler shows how the death of a servicemember affects even those who see death every day. Sheeler describes how Andy Alonzo, a grounds keeper at Fort Logan National Cemetery, takes great pride preparing the headstones and gravesites for two Marines killed on Veteran’s Day.<sup>23</sup> Sheeler walks the reader through Mr. Alonzo’s emotions as he prepares headstones to place them on the graves after the funeral. His job allows him “to honor men and women he never knew.”<sup>24</sup>

In part three, Sheeler delicately explains how notification officers react when asked the toughest question: when is the body coming home? The most painful account of a homecoming is Marine Second Lieutenant James J. Cathey. A photograph shows passengers peering out windows from their seats to the tarmac below waiting for Lieutenant Cathey’s

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<sup>14</sup> *Id.* at 277.

<sup>15</sup> See Jones, *supra* note 8; see also SHEELER, *supra* note 1, *Author’s Note*, at 277.

<sup>16</sup> SHEELER, *supra* note 1, at 6.

<sup>17</sup> *Id.* at 48.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 40.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.* at 41–46.

<sup>24</sup> *Id.* at 43.

body to be escorted off the plane.<sup>25</sup> The passengers cannot see a group of Marines preparing Lieutenant Cathey's flag draped casket for departure; they can only see a hearse and "a Marine extending a white-gloved hand into a limousine."<sup>26</sup> The passengers can't hear Lieutenant's Cathey's wife's screams.<sup>27</sup> "It's a sound no one should have to hear, but, in a way, it's a sound that everybody should hear."<sup>28</sup>

In part four, Sheeler tells the stories of how friends and Families left behind must continue living their lives after losing a loved one who served in the military and made the ultimate sacrifice. The notification process is "not a period at the end of their lives. It's a semicolon. The story will continue to be told."<sup>29</sup>

Typically as months pass, Families want and need to hear stories about their loved ones from close friends and fellow servicemembers. This not only gives Families a chance to grieve, it gives friends a chance to grieve as well. Sheeler describes how Families reach out to fellow servicemembers for answers to lingering questions notification officers often cannot answer. A young Soldier, Corporal Barker tells Lance Corporal Kyle W. Burns' mother, "[y]ou can ask us anything. We need to get it out. We've been holding it in for so long. . . . That's why we're here."<sup>30</sup> Melissa Givens asks her husband's fellow Soldiers the question no one else could answer: how did my husband die? She needed them to tell her everything about her husband's death in Iraq.<sup>31</sup> Mrs. Givens took her quest one step further; she sat in the exact tank where her husband drowned to try to experience what he went through moments before he died.<sup>32</sup>

Sheeler also describes the guilt experienced by survivors. Sheeler's dedication to the story and his constant presence with the families appears to have earned the trust of Sergeant Gregory Edwards, convincing him to tell the story of what happened the day Navy Corpsman HM3 Christopher "Doc" Anderson saved his life in Iraq.<sup>33</sup> Before being interviewed, Sergeant Edwards "lied when asked about it, saying he couldn't remember anything. The problem was he could remember almost everything."<sup>34</sup> Sergeant Edwards was alive because Doc Anderson saved his life. Doc Anderson later told "friends and parents that it was the most terrifying day of his life, that he constantly second-guessed himself, wondering if he had done everything he could have and should have."<sup>35</sup> At Doc Anderson's funeral, Sergeant Edwards told Doc Anderson's Family to be proud of their son: "He did everything right."<sup>36</sup>

#### IV. Strengths and Weaknesses

The book's greatest strength is it sheds light on the impact notification officers have on fallen servicemembers' Families. Sheeler displays how Major Beck is often the glue that holds together Families throughout the grieving process. Sheeler's success should be attributed partly to the fact that he chose the right notification officer to shadow. Major Beck's ability to connect with the Families is truly remarkable. Additionally, unlike many notification officers, Major Beck remains in close contact with Families for many years after the initial notification.<sup>37</sup>

Next, Sheeler's work gives Families a chance to continue to tell the stories of their loved ones. It "does more than honor those killed and the families left behind. . . . It also tells of the many ways that a nation, when confronted with the almost

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<sup>25</sup> *Fresh Air: A 'Final Salute' to Fallen Marines* (NPR radio broadcast Apr. 30, 2008) (Interview by Terry Gross with Lieutenant Colonel Steve Beck and Jim Sheeler), available at <http://www.npr.org/templates/player/mediaPlayer.html?action=1&t=1&islist=false&id=90065224&m=90067153>.

<sup>26</sup> SHEELER, *supra* note 1, at 100.

<sup>27</sup> *Id.*

<sup>28</sup> See Jones, *supra* note 8.

<sup>29</sup> *Id.* SHEELER, *supra* note 1, *Epilogue*, at 243 (quoting Steve Beck).

<sup>30</sup> *Id.* at 164.

<sup>31</sup> *Id.* at 178.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 181–82. Marine Sergeant Gregory Edwards lost both of his legs in an explosion in Iraq. *Id.*

<sup>34</sup> *Id.* at 181.

<sup>35</sup> *Id.* at 182.

<sup>36</sup> *Id.* at 214.

<sup>37</sup> See *Fresh Air*, *supra* note 25. Lieutenant Colonel Beck has remained in contact with Lieutenant Cathey's wife for four years since Lieutenant Cathey's death. *Id.*

unacceptable deaths of loved ones in uniform, finds ways to give healing and meaning to the loss.”<sup>38</sup> Sheeler gives a voice and name to servicemembers who would otherwise remain nameless. By giving Families a chance to share their grief with an absolute stranger, Sheeler evokes a deeper understanding of the true tragedies of war to Americans who don’t have a personal stake in the war.

Finally, Sheeler avoids politicizing the book by telling the first-hand accounts of Families through monologues. Use of the monologue method of writing allows Sheeler to refrain from inserting his personal political views on the war. It also allows Sheeler to solely focus on the Families involved. It isn’t a “book about leaders or government; it’s a book about leadership, principle, and sacrifice.”<sup>39</sup> Sheeler avoids making a political statement by leaving out editorial or political bias.

While the book vividly displays the gut wrenching account of the grieving process, it has several weaknesses. The book’s greatest weakness is that it is written from only one notification officer’s point of view. The reader could be misled to assume that all notification officers are as trained, professional, and caring as Major Beck. Sheeler breezes over the lack of formal standardized training for notification officers. He briefly explains “[d]espite the public’s perception, there is no group of service members whose primary task is death notification.”<sup>40</sup> “Successful casualty assistance is not the rule; it is quite the exception. Not only is there a significant lack of continuity, but casualty assistance is a ‘learn as you go’ for officers that otherwise have jobs that need to be done . . . .”<sup>41</sup> Sheeler appears not to focus on the lack of standardized training or duty performance because this would take away some of the impact of the book.

Next, Sheeler writes in a disjointed and random manner often leaving the reader confused. While the chapters of the book are written in chronological order of the notification process, individual chapters bounce back and forth between different Families’ stories, Major Beck’s thoughts and emotions, and fellow servicemembers’ stories. To some readers, this method of writing might help keep the book from being too painful to read because Sheeler has the ability to change topics at the most painful point of each story. For others, it can be frustrating and difficult to follow the individual stories.

Finally, *Final Salute* only documents the stories of five Families who lost male servicemembers. Some readers might also criticize Sheeler for not including stories of female servicemembers.<sup>42</sup> Sheeler recognizes this weakness by admitting “there are still not enough names in this book. For each of the service members listed, there are thousands more names . . . who have helped them . . . .”<sup>43</sup> It would be impossible to include stories from all the Families who have lost loved ones and Sheeler gives a face to the name of the servicemembers that would otherwise remain anonymous.

#### IV. Leadership Principles

*Final Salute* is relevant to all JAs working in administrative law, legal assistance, and brigade judge advocate (BJA) positions because it offers a glimpse into the complexities involved in combat death cases. It also serves as a valuable tool to educate JAs on possible questions Families might ask months after the Soldier’s death.

Administrative law JAs can learn invaluable lessons from reading *Final Salute*. Administrative law JAs serve as final gatekeepers to death investigations; their legal review is the final check before forwarding the investigation to the final approving authority.<sup>44</sup> *Final Salute* affirms the importance of ensuring investigations into death cases are thorough and complete enough to withstand scrutiny from Families, higher levels of the chain of command, outside agencies, and media months after the investigations are complete. Administrative law JAs must also keep in mind investigations can be released

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<sup>38</sup> Daniel Zantinger, *Deep Wounds: Book Delves Into Lives of Dead Soldiers’ Families*, May 9, 2008, <http://www.dailycamera.com/news/2008/may/09/deep-wounds-book-delves-into-lives-of-dead/>.

<sup>39</sup> Paul Robichaux, *Final Salute (Sheeler)*, Paul’s Down Home Page, June 11, 2008, <http://www.robichaux.net/blog/2008/06/final-salute-sheeler.php>, (reviewing SHEELER, *supra* note 1).

<sup>40</sup> SHEELER, *supra* note 1, at 48.

<sup>41</sup> *Id.* at 146 (citing *Hearing on S.109-32 Before the S. Comm. on Veterans Affairs*, 109th Cong. 13 (2005) (statement of Jennifer McCollum, surviving spouse of Captain Dan McCollum, U.S. Marine Corps), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:20729.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:20729.pdf)).

<sup>42</sup> See iCasualties.org, Iraq Coalition Casualty Count, available at <http://icasualties.org/oif/> (follow “Statistics: Female Fatalities” hyperlink) (last visited Jan. 14, 2009). There have been 109 female deaths since the war began. *Id.*

<sup>43</sup> SHEELER, *supra* note 1, *Epilogue*, at 280.

<sup>44</sup> See U.S. DEP’T OF DEFENSE, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (4 Sept. 2008).

to Families through a freedom of information act request.<sup>45</sup> Armed with this knowledge, administrative law JAs should ensure they properly advise investigating officers on how to conduct investigations correctly.

*Final Salute* is relevant to legal assistance JAs because it shows the many legal assistance issues Families could possibly face after losing a loved one. Legal assistance JAs could find themselves probating wills, unraveling complicated estates, advising on child custody, to name but a few legal assistance issues. Both legal assistance and claims JAs are now working with casualty assistance officers more than ever handling claims for damaged personal effects on behalf of the surviving spouse or next of kin. In these cases, special accommodations can and should be made to ensure Families are handled with the utmost respect and dignity.

Finally, Sheeler's work is relevant to BJAs because it shows the importance of taking a proactive role rather than a reactive role in death cases. Being proactive will help military units avoid issues months down the road by ensuring that they take responsive action in death cases such as properly appointing summary courts-martial officers to handle the deceased's last personal effects.<sup>46</sup> The book is also relevant because it sheds light on possible questions Families might ask when briefed by the chain of command in training and non-combat accident deaths.<sup>47</sup> Finally, it serves as a reminder to BJAs that all death investigations should be thorough and complete. Brigade Judge Advocates should also work closely with the Public Affairs Office to ensure they handle media requests properly.

## V. Conclusion

*Final Salute* is an exceptionally well researched book based on hundreds of interviews conducted over a two-year period with countless Families, friends, and fellow servicemembers. Sheeler did an exceptional job showing the true cost of war to those with no personal stake in the war. *Final Salute* will inspire and have an emotional impact on all that read it. Casualty notification officers and JAs should be required to read *Final Salute* to understand the significance of the notification process and to understand the impact the process has on surviving Families. Finally, *Final Salute* serves as an inspiration for anyone who has loved ones serving in the military and to anyone who has lost a loved one in action.

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<sup>45</sup> See U.S. DEP'T OF DEFENSE, DoD 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM (Sept. 1998).

<sup>46</sup> See U.S. DEP'T OF ARMY, REG. 638-2, CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS (22 Dec. 2000).

<sup>47</sup> See U.S. DEP'T OF THE ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO NEXT OF KIN (2 Jan. 2003). Surviving family members of deceased Soldiers killed in fatal training or operational accidents are entitled to a desk-side brief. *Id.* at 3.

# CONTRACTOR COMBATANTS: TALES OF AN IMBEDDED CAPITALIST<sup>1</sup>

REVIEWED BY MAJOR PATRICIA K. HINSHAW<sup>2</sup>

*“The United States this year will have spent \$100 billion on contractors in Iraq since the invasion in 2003, a milestone that reflects the Bush administration’s unprecedented level of dependence on private firms for help in the war. . . .”*<sup>3</sup>

## I. Introduction

Security contractors in Iraq are a dime a dozen. It is therefore disappointing that Mr. Address hides his valuable insight into the commercial challenges of operating a successful business in a combat zone and attempts to portray himself as one of these “gunslingers”<sup>4</sup> rather than the skilled entrepreneur that he actually is. The book’s main theme of building positive relationships with the Iraqis and the author’s dedication to reversing the economic “degradation that Saddam brought on the country”<sup>5</sup> is frequently pushed aside when he muses about how Iraq would become *his* war, where he could serve “not as a soldier but as an armed businessman, a contractor combatant.”<sup>6</sup>

The author’s self-aggrandizing style only distracts from his message about the business challenges contractors face in Iraq, the tragedy of losing friends, and the value of using local nationals to help resupply and rebuild their own country. Throughout *Contractor Combatants*, Address continually and incorrectly refers to himself as a “combatant,”<sup>7</sup> even though his company’s primary mission is to provide life support to the local Iraqi police and security forces.<sup>8</sup> Address chooses to highlight the danger of the job and habitually refers to his military and security credentials in an attempt to either bolster his credibility or to impress the reader.

## II. Background

Mr. Address received his Bachelor of Arts from the University of the South (Sewanee, Tennessee)<sup>9</sup> and holds a master’s degree in history from American University, Washington D.C.<sup>10</sup> He briefly served as a U.S. Army infantry officer and graduated from the U.S. Army Ranger School.<sup>11</sup> Mr. Address left the Army in 1990<sup>12</sup> and spent the next decade as an entrepreneur importing designer vodka from the Ukraine.<sup>13</sup> He began working for the defense contractor Custer Battles in January 2004,<sup>14</sup> but a mere two months after his arrival in Iraq, the company was investigated for fraud.<sup>15</sup> Several employees,

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<sup>1</sup> CARTER ADDRESS, *CONTRACTOR COMBATANTS: TALES OF AN IMBEDDED CAPITALIST* (2007).

<sup>2</sup> U.S. Army. Student, 57th Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

<sup>3</sup> James Risen, *Use of Iraq Contractors Costs Billions, Report Says*, N.Y. TIMES, Aug. 11, 2008, available at <http://www.nytimes.com/2008/08/12/washington/12contractors.html>.

<sup>4</sup> ADDRESS, *supra* note 1, at 65.

<sup>5</sup> *Id.* at 92.

<sup>6</sup> *Id.* at 75.

<sup>7</sup> Contractor employees are neither combatants nor noncombatants. Under international agreement, they are considered civilians authorized to accompany the force in the field. U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD para. 1-6 (Jan. 2003); see also JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV. REPORT, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES, RL32419 (2008), available at <http://www.fas.org/sgp/crs/natsec/RL32419.pdf>.

<sup>8</sup> ADDRESS, *supra* note 1, at 208. The author defines life support as “meals, kitchens, sewage and refuse collection and disposal, electrical power, water supply, latrines, and possibly—depending on the contract—housing, armory operations and supply, barbershops, road maintenance, a bakery, and laundry ops. *Id.*”

<sup>9</sup> American-Iraqi Solutions Group, Carter Address, Chief Executive & Principal Owner, <http://www.aisiraq.com/index.php?id=51> (last visited Jan. 14, 2009) [hereinafter American-Iraqi Solutions Group].

<sup>10</sup> ADDRESS, *supra* note 1, at inside back cover.

<sup>11</sup> *Id.* at 12, 292, inside back cover.

<sup>12</sup> *Id.* at 292.

<sup>13</sup> *Id.* at 35, inside back cover. See generally Heather Solerno, *Spicing Up U.S. Vodka Sales in the Spirit of Ukraine*, WASH. POST, June 16, 1997, available at <http://www.highbeam.com/doc/1P2-723902.html>.

<sup>14</sup> ADDRESS, *supra* note 1, at 7.

including the author, left Custer Battles during the investigation to create the American-Iraqi Solutions Group (AISG).<sup>16</sup> Mr. Andress spent the next eighteen months working for AISG in Iraq, helping it to grow from a small start-up into a prime contractor specializing in construction and logistical support for the Iraqi security services.<sup>17</sup>

### III. Analysis

*Contractor Combatants* is written as a memoir and opens with Andress's initial arrival into Iraq in January 2004 and ends with him until his departure a year and a half later. Many of his observations relate to the challenges common to any international business. He deals with the hardships of working with a multinational workforce, overcoming foreign language obstacles, operating within the confines of a foreign legal system, and experiencing different cultures.<sup>18</sup> Andress supplements his story with other aspects unique to a combat zone, like insurgent violence and the occasional threat of friendly fire from Allied military forces.<sup>19</sup>

The author presents a favorable opinion of working with different sects of the Iraqi population, and he has an atypical perspective to draw from because ninety percent of AISG's work force is comprised of Iraqi citizens.<sup>20</sup> He personalizes one particular relationship when he introduces the reader to his first Iraqi friend, Namir, one of the founders of AISG. The most poignantly written portion of the book is when the author recounts their memorable "seven-month long discussion about democracy"<sup>21</sup> which is tragically cut short when Namir is killed by a car bomb.<sup>22</sup>

Andress presents several professional principles during this portion of the book. First, he seeks to understand both the culture and a foreign viewpoint on developing a democracy in Iraq. He tactfully respects Namir's opinions during their discussions, even when the Namir unwisely suggests that the United States should just install an authoritarian leader to replace Saddam Hussein because Iraqi people are not "ready" for democracy.<sup>23</sup> Second, he refuses to allow tragedy to be manipulated by opportunists. For example, while Andress is grieving Namir's death, he is forced to refute unsubstantiated rumors among his workforce that the Iraqi contractor was killed by American bullets.<sup>24</sup> He decisively tackles these rumors and quells the growing anti-U.S. sentiment among his employees, which could have predictably undermined the company.<sup>25</sup> Diffusing this particular situation illustrates the complex reality that few managers working outside the combat zone will ever encounter. It was a powerful example of Andress's leadership as he worked to preserve Namir's memory and ultimately step up to run the company.<sup>26</sup>

The strongest part of this book was certainly the author's main theme of Iraqis being capable of rebuilding their own country.<sup>27</sup> Andress fairly contrasts overall the success of using local sub-contractors with plenty of examples of their shortcomings and the frustrating challenges that he encountered along the way. Yet in the end, the reader is left with an optimistic message. Andress's reasons for supporting a local workforce are practical-minded, and they go beyond the usual public policy rationale of allowing them to take ownership of their country. For example, in a country where maps are often outdated or useless,<sup>28</sup> the local workers' first-hand knowledge of the area made the difference between success and failure when getting to a project site or trying to avoid the danger of the insurgency.

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<sup>15</sup> *Id.* at 35; American-Iraqi Solutions Group, *supra* note 9. *But see* Dana Hegpeth, *Judge Clears Contractor of Fraud in Iraq Case*, WASH. POST, Feb. 9, 2007, at D1.

<sup>16</sup> ANDRESS, *supra* note 1, at 38–39.

<sup>17</sup> *Id.* at 42, 206, 277.

<sup>18</sup> *Id.* at 278.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 130; *see also* American-Iraqi Solutions Group, <http://www.aisgiraq.com/index.php> (last visited Jan. 14, 2009).

<sup>21</sup> ANDRESS, *supra* note 1, at 149.

<sup>22</sup> *Id.* at 151.

<sup>23</sup> *Id.* at 50.

<sup>24</sup> *Id.* at 151.

<sup>25</sup> *Id.* at 155.

<sup>26</sup> *Id.* at 156.

<sup>27</sup> *Id.* at 287.

<sup>28</sup> *Id.* at 220.

The author also responsibly portrays some of the inherent pitfalls of employing a local workforce. He explains how he was forced to double order time-sensitive key items so AISG would not end up defaulting on its contracts whenever the Iraqi subcontractors were unable to perform.<sup>29</sup> He also faced incredible challenges finding relatively basic, but essential construction equipment on the local economy.<sup>30</sup> In the end though, the reader is left with the message that while the predictability of supplies and manpower might fall below what we would normally expect from a business operating within the United States, the benefits for the local economy and pride of the Iraqi people outweigh these challenges.

Throughout this memoir, Andress presents a chronological account of his time in Iraq. This helps to show his personal progression and mistakes, as well as the growth of AISG. However, in nearly every chapter Andress attempts to portray himself as the infallible hero whose expertise will save the day.

Most notably, Andress frequently and needlessly mentions his military training as a former Army infantry officer and Ranger.<sup>31</sup> His use of military jargon within the narrative is not surprising in itself, especially given the amount of time he spent in Iraq or the number of former military personnel employed by AISG. However, his qualifications are not as strong as he would like the reader to believe, and he assumes that the reader will simply accept that he is a skilled tactician among the myriad of former career Special Forces personnel working in Iraq. To further his ruse, the author uses several methods. He focuses the reader on the strong military resumes of the security men around him,<sup>32</sup> he tries to draw parallels between himself and a cavalry squadron commander by pointing out that they each have similar dates of commissioning,<sup>33</sup> and he brazenly claims that his experience “seasoned” the young soldiers in Iraq.<sup>34</sup>

Throughout the book, it almost appears as if the author is hiding the real extent and length of his military experience to mislead the reader into thinking that he is a battle hardened warrior, rather than a strong, forward-thinking businessman. His pretext of toughness begins with the cover of the book<sup>35</sup> and continues as he inanely boasts about his marksmanship skills<sup>36</sup> and how he drew on his “training as a field officer planning military maneuvers.”<sup>37</sup> If the author was a seasoned military officer or had any combat experience, these examples and references would not sound so pretentious. Instead, the author waits until the last twelve pages of the book to admit that he left the military in 1990, after only a few years of service.<sup>38</sup>

There are number of other obvious contradictions within the book, many of which seem to similarly derive from the author’s self-assuredness and ego. Despite touting his own very limited military experience, the author passes up no opportunity to refer to current Army officers as “some of the most ill-trained for their mission in Iraq.”<sup>39</sup> He blames their lack of training, specifically on Ranger tactics, for his friend Namir’s death.<sup>40</sup> In one situation, he willingly sidles up close to Army vehicles and uses them for protection when he is stopped in traffic waiting for the military to detonate an improvised

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<sup>29</sup> *Id.* at 189.

<sup>30</sup> *Id.* at 199.

<sup>31</sup> *Id.* at 2, 7, 12, 74–75, 175, 213, 266.

<sup>32</sup> *Id.* at 227; *see also id.* at 236 (describing Tony’s experience); *id.* at 279 (describing Van’s resume).

<sup>33</sup> *Id.* at 245–46. Of course, the obvious difference between his credentials and those of the commander is that the military officer actually served on continuous active duty developing his military skills, while the author spent the prior decade importing vodka. *Id.* at inside back cover.

<sup>34</sup> *Id.* at 278.

Most of the Pentagon contractors out on the ground were old enough to be the fathers of the soldiers patrolling the country and manning the checkpoints. So the contractor combatants provided the kind of “seasoning” essential to the success of the overall mission of our troops, which was to subdue the insurgency and reconstruct Iraq.”

*Id.* The author’s argument about age automatically equaling “seasoned” experience would only seem to hold true for those contractors who actually possess extensive military experience, not just any contractor old enough to have fathered a servicemember in Iraq.

<sup>35</sup> In the title the author declares himself a “combatant” and he poses on the cover wearing a bulletproof vest and holding an AK-47. *Id.* at front cover,

<sup>36</sup> *Id.* at 113.

<sup>37</sup> *Id.* at 213.

<sup>38</sup> *Id.* at 292.

<sup>39</sup> *Id.* at 150.

<sup>40</sup> In the book, the author admits that Namir got out of his vehicle to find out why the military stopped traffic on the bridge and he was subsequently killed as a taxi approaching the military vehicle exploded. *Id.* Had Namir stayed inside the vehicle, like his driver did, he would have likely escaped unscathed—regardless of whether Ranger tactics were being used by the Soldiers targeted in the attack.

explosive device.<sup>41</sup> But he later faults Namir for doing the same thing, even alleging that Namir misplaced his faith in the Army before he was killed.<sup>42</sup>

Although not uncommon in memoirs, the author's objectivity is generally lacking throughout the book. He devotes different chapters to a number of important issues in Iraq, including corrupt contractors, the need to blend into his surroundings for survival, and developing associates and local allies. Unfortunately, each of these various situations just seems to serve as a backdrop for the author to try to subjectively portray himself as more skilled, more adept, or more intelligent than everyone else around him. It is unclear throughout the book, what audience the author is hoping his message will reach. The most logical demographic with interest in this subject matter is naturally going to be servicemembers or other contractors serving and working in Iraq. However, because of the author's impudent tone, that particular audience is more likely to perceive the book as a critical attack upon of their professionalism, rather than an opportunity to glean from the author's business or leadership lessons.

As expected with a memoir, the author uses very few outside resources to support his main points. He lightly sprinkles the book with citations to newspaper articles, but they generally restate the underlying factual events,<sup>43</sup> and do not add any insight to his observations. In the twelfth and final chapter, however, the author significantly departs from that style.

In the last chapter the author states his personal political views on the war. He strongly supports a continued U.S. presence in Iraq, and provides numerous citations that provide legal justification for the initial invasion and occupation of Iraq.<sup>44</sup> He alleges that journalists covering the war are biased and intentionally misrepresenting the progress in Iraq.<sup>45</sup> He further claims that terrorists are exploiting the media broadcasts of car bombs and carnage, merely to manipulate American fear and motivate a troop withdrawal.<sup>46</sup> Of course, it's important to note that the author returned to Iraq in November 2006 and is now the CEO and principal owner of AISG,<sup>47</sup> so his arguments supporting a continued U.S. presence in Iraq certainly are not without their own underlying bias.

One final stylistic criticism of this book is that Andress fails to present any supplementary materials. Most memoirs contain photos to give the reader a flavor for the people or the environment. The author may have deliberately refrained from publishing pictures to protect people who are still working in Iraq from becoming targets. However, it certainly would be helpful if he included at least one general map of Iraq in the book as a reference. More than once, the author described the difficulty of getting to remote job sites and the tactical decision to use detours or avoid certain areas of Iraq.<sup>48</sup> A reader who has not visited Iraq will have a more difficult time envisioning the impact of these detours without a frame of reference.

#### IV. Conclusion

Overall, the author's first-hand account of building business in a combat zone is noteworthy because it focuses on a different topic than most recently published books on Iraq. If the author had concentrated his focus on the business aspects of his Iraqi experience, and abstained from portraying himself as a paramilitary commando, it certainly would be a far more enjoyable book to read. Instead, his memoir is interspersed with enough egotistical musings and attempts to bolster his credentials that the substance of his message is frequently lost. In light of his relatively limited military and security experience, the author should have more narrowly focused the book on his primary theme of developing a thriving commercial business dedicated to utilizing the Iraqi citizens and rebuilding Iraq.

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<sup>41</sup> *Id.* at 71–73.

<sup>42</sup> *Id.* at 150.

<sup>43</sup> *Id.* at 34, 37, 53–55, 261.

<sup>44</sup> *Id.* at 296–300.

<sup>45</sup> *Id.* at 285.

<sup>46</sup> *Id.* at 285, 288–89.

<sup>47</sup> American-Iraqi Solutions Group, *supra* note 9.

<sup>48</sup> ANDRESS, *supra* note 1, at 212.

## CLE News

### 1. Resident Course Quotas

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

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

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

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

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

### 2. TJAGLCS CLE Course Schedule (2008 - September 2008) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	12 – 29 May 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09

512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
<b>WARRANT OFFICER COURSES</b>		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
<b>ENLISTED COURSES</b>		
512-27D/20/30	20th Law for Paralegal NCO Course	23 – 27 Mar 09
512-27D-BCT	11th BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09

5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-DL12	3rd Distance Learning Fiscal Law Course	19 – 22 May 09
<b>CRIMINAL LAW</b>		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F47	51st Operational Law of War Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

### 3. Naval Justice School and FY 2008 Course Schedule

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

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060)	2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy)

	Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (030) BOLT (030) BOLT (040) BOLT (040)	30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (020)	27 – 28 Apr 09 (Naples, Italy)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	11 – 15 May 09 (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (020)	6 – 10 Apr 09 (San Diego)

525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	12 Jan – 27 Mar 09 11 May – 24 Jul 09
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (020)	4 – 15 May 09
7485	Classified Info Litigation Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09

NA	Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	5 Jan – 3 Apr 09 25 Aug – 31 Oct 09

**Naval Justice School Detachment  
Norfolk, VA**

0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070))	2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09

<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

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

<b>Air Force Judge Advocate General School, Maxwell AFB, AL</b>	
<b>Course Title</b>	<b>Dates</b>
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09

Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

### 5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225
- ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600
- APRI: American Prosecutors Research Institute  
99 Canal Center Plaza, Suite 510  
Alexandria, VA 22313  
(703) 549-9222
- ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990

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

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

**CLESN:** CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

**ESI:** Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

**FBA:** Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

**FB:** Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

**GICLE:** The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

**GII:** Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

**GWU:** Government Contracts Program  
The George Washington University  
National Law Center  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

**IICLE:** Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

**LRP:** LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

LSU: Louisiana State University  
Center on Continuing Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

NCDA: National College of District Attorneys  
University of South Carolina  
1600 Hampton Street, Suite 414  
Columbia, SC 29208  
(803) 705-5095

NDAA: National District Attorneys Association  
National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(703) 549-9222

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 in (MN and AK)  
(800) 225-6482

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

PBI: Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(717) 233-5774  
(800) 932-4637

PLI: Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

TBA: Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

**TLS:** Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

**UMLC:** University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

**UT:** The University of Texas School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

**VCLE:** University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

## **6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010**

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is ***NLT 2400, 1 November 2009***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to submit Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail [jeffrey.sexton@hqda.army.mil](mailto:jeffrey.sexton@hqda.army.mil)

## **7. Mandatory Continuing Legal Education**

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

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

The Judge Advocate General’s Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students.

Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

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

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

## Current Materials of Interest

### 1. The Judge Advocate General's Fiscal Year 2009 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POC
6-8 Mar 09	NCR	Ft. Belvoir Officer's Club (Bldg. 20) 5500 Schulz Rd. Ft. Belvoir, VA 22060	151st LSO 10th LSO 153d LSO	Course: JAO-1 Class: 005	MAJ Mark Vetter (703) 870-1024 mark.vetter@yahoo.com SSG Waskewich (703) 960-7393, ext. 7420 michael.waskewich@usar.army.mil
13-15 Mar 09	Western	Sheraton Carlsbad Resort & Spa 5480 Grand Pacific Drive Carlsbad, CA 92008	78th LSO 75th LSO 87th LSO	Course: JAO-1 Class: 003	Ms. Antonia Roman, 714 229 3701; antonia.roman@usar.army.mil SFC Willie Watkins 714 229 3703: willie.watkins@usar.army.mil
3-5 Apr 09	Midwest	Cincinnati, OH	9th LSO 91LSO 139th LSO	Course: JAO-1 Class: 006	CPT Steve Goodin (910) 396-7014 (office) Steven.Goodin@us.army.mil SSG Williams 614-692-7593 adrian.m.williams@usar.army.mil
17-19 Apr 09	Heartland	New Orleans, LA	8th LSO 1st LSO 2d LSO 214th LSO	Course: JAO-1 Class: 007	MSG Larry Barker larry.r.barker@us.army.mil SSG Dale Herman 816.836.0005 x2156 dale.herman@usar.army.mil
19-25 Apr 09	Southeast Functional Exercise	Ft. Jackson, SC	7th LSO (Lead) 12th LSO 174th LSO (Support)	TBD	TBD
15-19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO	TBD	TBD

### 2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at [www.dtic.mil/dtic/current.html](http://www.dtic.mil/dtic/current.html).

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to [bcorders@dtic.mil](mailto:bcorders@dtic.mil).

**Contract Law**

		AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.	AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95.	AD A360700	Tax Information Series, JA 269 (2002).
AD A265777	Fiscal Law Course Deskbook, JA-506-93.	AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

**Legal Assistance**

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).	AD A350514	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).	AD A329216	Legal Assistance Office Administration Guide, JA 271 (1997).
AD A326002	Wills Guide, JA-262 (1997).	AD A276984	Legal Assistance Deployment Guide, JA-272 (1994).
AD A346757	Family Law Guide, JA 263 (1998).		

- AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).
- AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).
- AD A282033 Preventive Law, JA-276 (1994).

**Administrative and Civil Law**

- AD A351829 Defensive Federal Litigation, JA-200 (2000).
- AD A327379 Military Personnel Law, JA 215 (1997).
- AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).
- AD A452516 Environmental Law Deskbook, JA-234 (2006).
- AD A377491 Government Information Practices, JA-235 (2000).
- AD A377563 Federal Tort Claims Act, JA 241 (2000).
- AD A332865 AR 15-6 Investigations, JA-281 (1998).

**Labor Law**

- AD A360707 The Law of Federal Employment, JA-210 (2000).
- AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

**Criminal Law**

- AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).
- AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).
- AD A274413 United States Attorney Prosecutions, JA-338 (1994).

**International and Operational Law**

- AD A377522 Operational Law Handbook, JA-422 (2005).

\* Indicates new publication or revised edition.  
 \*\* Indicates new publication or revised edition pending inclusion in the DTIC database.

**3. The Legal Automation Army-Wide Systems XXI—JAGCNet**

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

b. Access to the JAGCNet:

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

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

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

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

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

“Password” in the appropriate fields.

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

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

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

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

#### **4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

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

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

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

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

#### **5. TJAGSA Legal Technology Management Office (LTMO)**

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

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

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

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

#### **6. The Army Law Library Service**

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

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

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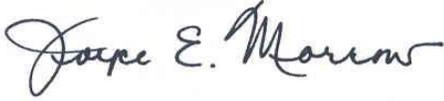
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