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Article

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The Principle of Distinction: Probing the Limits of its Customariness

Lieutenant Colonel Mark David "Max" Maxwell[*]

Major Richard V. Meyer[**]

Introduction

In the spring of 2004, frenzied crowds dragged and dismembered the bodies of four U.S. civilian contractors through the streets of Fallujah.[1] The crowds hung two of the bodies from a bridge. This depravity and callousness sent tremors throughout the American landscape.[2] The ghosts of Mogadishu from more than a decade ago came crawling back into the public consciousness.[3] Fallujah quickly became the centerpiece for Phase IV[4] of Operation Iraqi Freedom, and this city of 250,000 became the center of gravity for the organized insurgency movement in Iraq. In November 2004, 15,000 Marines and Soldiers, with their Iraqi counterparts, retook the city in fierce door-to-door fighting not seen by American troops since the Vietnam War.[5]

Widespread reports of "large civilian casualties," however, tarnished the victory.[6] The reports, although unconfirmed by most news accounts, exposed and reinvigorated a debate about civilians in war. Fallujah brought to light the blurring of the line between civilians and combatants by both sides to the conflict at opposite ends of the spectrum. For the State powers, like the United States, civilian employees and contractors now flood the battlefield. For the non-State powers, like the insurgents in Iraq, any attempts to identify oneself publicly as a member of an armed force have been totally abandoned. Never before has it been so difficult for the Soldier to distinguish between the targeted and the protected—the combatant and the civilian. Compliance with this concept of distinction is the fundamental difference between heroic Soldier and murderer.

The Law of War, including the concept of distinction, exists first and foremost for the benefit of the combatant, although the protected are an obvious beneficiary.[7] It is the Law of War that permits the combatant to commit acts that would otherwise be prohibited. For example, under the concept of distinction a Soldier who limits his intentional attacks to the targetable (e.g., insurgent forces) is immune from prosecution for the results of those attacks.

Distinction is the cornerstone of the Law of War.[8] It is fundamental: combatants are lawful targets during times of war while civilians are protected. Like all legal concepts, however, distinction must be constantly refined and updated to remain relevant and practicable to the modern Soldier. Towards that end, the International Committee of the Red Cross (ICRC) has published an impressive study on the rules governing the Law of War, beginning with a detailed discussion on distinction.[9] The study goes beyond those rules codified by international treaties, such as the 1907 Hague Regulations[10] and the 1949

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[1] Robert D. Kaplan, *Five Days in Fallujah*, ATLANTIC MONTHLY, July/Aug. 2004, at 116.

[2] Martha A. Sandweiss, Editorial, *Death on the Front Page*, N.Y. TIMES, Apr. 4, 2004, § 4, at 13.

[3] *Id.*

[4] Phase IV refers to the period following the cessation of major hostilities, sometimes called post-conflict or transition operations.

[5] James T. Cobb, et al., *The Fight for Fallujah: TF 2-2 IN FSE AAR: Indirect Fires in the Battle of Fallujah*, FIELD ARTILLERY MAG., Mar./Apr. 2005, at 23.

[6] Dexter Filkins & James Glanz, *The Conflict in Iraq: The Insurgency; Rebels Routed in Falluja; Fighting Spreads Elsewhere*, N.Y. TIMES, Nov. 15, 2004, at 1; Richard A. Oppel, Jr. & Robert F. Worth, *The Conflict in Iraq: Insurgency; G.I.'s Open Attack to Take Falluja from Iraq Rebels*, N.Y. TIMES, Nov. 8, 2004, at 1.

[7] Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 FLETCHER FORUM OF WORLD AFFAIRS 55, 57 (2003).

[8] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 82 (2005).

[9] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWARD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005) [hereinafter 1 ICRC RULES].

[10] Regulations Concerning the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631 [hereinafter Hague Regulations].

Geneva Conventions,[11] and attempts to identify developments that are customary international law—rules that through State practice should be accepted as law.[12] Of the 161 rules enumerated by the ICRC Study, the first twenty-four focus on the principle of distinction. These rules are subcategorized into the following six areas: distinction between civilians and combatants, distinction between civilian objects and military objectives, indiscriminate attacks, proportionality in attack, precautions in attack, and precautions against the effects of attacks.[13]

This article analyzes the rules that grapple with the principle of distinction for the *individual* in war.[14] Next, this article examines whether the proposed ICRC rules are customary in international armed conflict, as well as non-international armed conflict. The article provides commentary throughout concerning whether the rules analyzed are actually customary international law or an aspiration of what the law should be according to the ICRC.[15] The article concludes that the over 5,000 pages of rules and practice is extraordinarily impressive and a useful resource for every judge advocate. Judge advocates, however, should be aware of the treatise's shortcomings and should not treat the document as an authoritative source of international law.

Distinction in International Armed Conflict

The General Rule

The first ICRC rule is a restatement of the core concept for the principal of distinction: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."[16] The term attack, although not discussed by the ICRC, is defined by Additional Protocol I, Article 49(1), to mean "acts of violence against the adversary."[17] The ICRC's rule follows Article 48 of Additional Protocol I, "the Parties to the conflict shall at all times distinguish between the civilian population and combatants;"[18] Article 51(2), "civilians . . . shall not be the object of attack;"[19] and Article 52(2), "[a]ttacks shall be limited strictly to military objectives," which has been argued to include personnel.[20]

The origin of this rule dates back to the middle of the nineteenth century. Article 22 of the 1863 Lieber Code, the laws for war governing the Union Army during the United States Civil War, stated that there exists a "distinction between the private individual belonging to a hostile country and the hostile country itself, with it is men in arms."[21] Five years later, the

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[11] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[12] 1 ICRC RULES, *supra* note 9.

[13] All of the rules discussing the principle of distinction in international law armed conflict flow directly from Articles 48 through 58 of the 1977 Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol I].

[14] Although very important to any discussion on the Law of War, this article will not discuss the distinction between civilian objects and military objective, which are closely analogous to civilians and combatants; bombardment (a subset of indiscriminate attacks); and a state's obligation to take precautions against the effects of attacks.

[15] The ICRC has been accused of attempting to disguise its positions on issues under debate as dispassionate legal analysis. "One can only wonder if the *Customary Law Study* is a dispassionate legal analysis or a brief for past and future ICRC agenda items." *See* W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, Presentation at the 99th Annual Meeting of the American Society of International Law, Washington, D.C., Apr. 1, 2005, at 9 [hereinafter Parks Presentation] (unpublished presentation) (on file with authors).

[16] 1 ICRC RULES, *supra* note 9, at 3.

[17] Additional Protocol I, *supra* note 13, art. 49.

[18] *Id*. art. 48.

[19] *Id.* art. 51(2).

[20] *Id*. art. 52(2). The U.S. Air Force doctrine on the use of air power is based upon a broad interpretation of "military objectives" that would include such objectives as the will of the enemy populace. For a detailed discussion on this, see Major Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 43 (2001).

[21] 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWARD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE 4 n.4 (2005) [hereinafter 2 ICRC PRACTICE].

Saint Petersburg Declaration set forth the clearest articulation of the principle of distinction to date: "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[22] These early efforts were mainly centered on military force; there were few rules aimed at protecting civilians. That focus changed with the promulgation of the Geneva Conventions of 1949.

Violence Aimed at Spreading Terror

The second ICRC rule—"acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited"—expands on the third clause of the first rule prohibiting attacks against civilians.[23] This rule is taken verbatim from Additional Protocol I, Article 51(2)[24] and stems from Article 33 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War,[25] "all measures of intimidation or of terrorism are prohibited."[26] For example, the intentional bombing of a civilian population is illegal.[27] The first two ICRC rules are established through State practice in international armed conflicts—they are black letter law.

Delineating Civilians from Combatants

The uncertainty within the principle of distinction emerges when probing the critical delineation between what constitutes a civilian and what constitutes a combatant. The next four rules dissect the differences between these two categories. The third ICRC rule states "[a]ll members of the armed forces of a party to the conflict are combatants, except medical and religious personnel."[28] The fourth rule, in turn, defines who is a member of the armed forces: "The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates."[29] Rules 5 and 6 follow Rules 3 and 4, except they apply to civilians. Civilians are defined in the negative: "persons who are not members of the armed forces."[30] Rule 6 asserts that civilians lose their protection from attack when "and for such time as they take a direct part in hostilities."[31] Like the first two rules, the definitions of combatants, armed forces, and civilians and the loss of protection from attack are taken almost verbatim from the Additional Protocol I.[32]

Who Are Combatants?

There is no contrary practice to the fundamental rule that members of the armed forces of a party to the conflict are combatants and non-members of the armed forces are civilians.[33] A split in custom emerges when a hostile force is not a member of their country's armed force but part of a militia, a paramilitary force, or a volunteer corps, to include organized resistance movements.[34] Under Article 1 of the Regulations Annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land, if hostiles 1) are commanded by a person responsible for his subordinates; 2) have a fixed distinctive emblem recognizable at a distance; 3) carry their arms openly; and 4) conduct their operations in accordance with

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[22] 1 ICRC RULES, *supra* note 9, at 3 (citing the St. Petersburg Declaration, pmbl.).

[23] *Id*. at 3.

[24] Additional Protocol I, *supra* note 13, art. 51(2).

[25] Geneva Convention IV, *supra* note 11, art. 33.

[26] *Id*..

[27] 2 ICRC PRACTICE, *supra* note 21, paras. 481-85.

[28] 1 ICRC RULES, *supra* note 9, at 11.

[29] *Id.* at 14.

[30] *Id*. at 17.

[31] *Id.* at 19.

[32] *See* Additional Protocol I, *supra* note 11, art. 43 (addressing armed forces); *id.* arts 50 & 51 (defining civilians and the civilian population as well as announcing protections for the civilian population).

[33] 1 ICRC STUDY, *supra* note 9, at 12, 18.

[34] *Id.* at 15.

the laws and customs of war, then they are combatants.[35] Rule 4, however, eliminates the two middle prongs aimed at the requirement of visibility—fixed distinctive emblem and open arms.[36] The ICRC commentary acknowledges this elimination but notes that "[t]he requirement of visibility is relevant with respect to a combatant's entitlement to prisoner-of-war status."[37] In other words, these types of hostile persons are combatants for definitional purposes but receive none of the benefits of being a combatant—garnering combatant immunity for their war-like actions during hostilities and securing prisoner of war status, if captured.[38]

Although the language of the ICRC's fourth rule mirrors Additional Protocol I, Article 43(1), and despite the ICRC's claim that state practice "establishes this rule as a norm of customary international law,"[39] the elimination of visibility requirements is not the accepted practice of States. A number of States—Israel,[40] Burkina Faso,[41] Cameron,[42] Canada,[43] Mali,[44] the United Kingdom,[45] and the United States[46]—mandate that all four prongs be present to establish non-members of the armed forces as combatants. The reality is that the difference in the two approaches—a civilian versus a combatant without any of the combatant protections—is one of labels. Those labels in today's military campaigns, especially in information operations, can be extremely important. If someone is a combatant, even though they appeared in civilian clothing and were not a member of an armed force when captured, then certain expectations within the international community could be triggered, namely, a demand for prisoner of war status, including combatant immunity.

The ICRC's Rule 4 analysis subtly blurs the contours of Rule 6—civilians cannot take direct part in hostilities—and in turn, the entire concept of distinction. If it is not clear what a combatant looks like, then who can be sure of the delineation between civilians and combatants? On a related plane, do individuals who directly participate in hostilities and meet the first and fourth prong of the Hague Regulations (under a uniform command and adhere to the Law of War) transform themselves from civilian status to that of a combatant? The root of making a demarcation between these two groups must be visibility.

Loss of Protection from Attack

As Rule 6 foreshadows, civilians at some level will inevitably take a direct part in hostilities. When they do, they lose their protection from targeting and then may be legally and intentionally targeted. The issues under customary international law are twofold: first, is the term "direct part in hostilities" the acid test for determining if a civilian has crossed the line; and second, regardless of how customary "direct part in hostilities" is viewed, what does that term really mean?

The term "direct part in hostilities" comes from Additional Protocol I, Article 51(3).[47] The term did not appear in the original Geneva Conventions. Instead, common Article 3 of the Conventions protects "persons taking no *active* part in the hostilities."[48] The issue of whether there is a substantive difference between the words direct and active is ignored by the ICRC commentary. In a report prepared by the ICRC in 2003, some members of the Committee conceded that these two terms were distinct when discussing children in armed conflict: direct participation referred to combat operations while

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[35] Hague Regulations, *supra* note 10, art. 1. The regulations actually use these qualifications to identify "belligerents." *Id.*

[36] 1 ICRC RULES, *supra* note 9, at 14.

[37] *Id.* at 15.

[38] *Id.* at 15-16.

[39] *Id.* at 14. The ICRC makes this claim for all 161 of it rules in relation to international armed conflict. These assertions have been criticized as relying on "statements to the exclusion of acts." Parks Presentation, *supra* note 15, at 5.

[40] 2 ICRC PRACTICE, *supra* note 21, at 91 n.650 (citing Israel's *Manual on the Laws of War*) (citations omitted).

[41] *Id.* at 89 n.640 (citing Burkina Faso's *Disciplinary Regulations*) (citations omitted).

[42] *Id.* (citing Cameroon's *Disciplinary Regulations*) (citations omitted).

[43] *Id.* at 89-90 (citing Canada's *Laws of Armed Conflict Manual*) (citations omitted).

[44] *Id.* at 91-92 (citing Mali's *Army Regulations*) (citations omitted).

[45] *Id.* at 93 (citing the United Kingdom's *Laws of Armed Conflict Manual*) (citations omitted).

[46] *Id.* (citing U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 61 (1956); U.S. DEP'T OF THE AIR FORCE, PAM. 110-31 INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 3-2 (1976)).

[47] Additional Protocol I, *supra* note 13, art. 51(3).

[48] Geneva Convention I, *supra* note 11, art. 3; Geneva Convention II, *supra* note 11, art. 3; Geneva Convention III, *supra* note 11, art. 3; Geneva Convention IV, *supra* note 11, art. 3.

active participation referred to military activities linked to combat. [49] The Committee, however, concluded that such a distinction, regardless of the context, would be virtually impossible to implement.[50] Additionally, the International Criminal Tribunal for Rwanda concluded that the two terms were synonymous.[51]

Overall, the weight of authority confirms that every State uses the direct part in hostilities standard as an acid test to determine whether a civilian loses his protection against attack. What is not clear, however, is what the term "direct" really means. The commentary to Additional Protocol I, Article 51(3), states that "'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[52] The commentary goes on to clarify that "[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort."[53] Most States have agreed and have attempted to draw a line between direct participation and indirect participation: "indirect participation . . . does not involve acts of violence which pose an immediate threat of actual harm to the adverse party" while direct participation includes "anyone who personally tries to kill, injure, or capture enemy persons or objects."[54]

The demarcation of direct participation is particularly important when States, like the United States, use a multitude of contractors and civilian government employees in an area of combat operations. Contractors and civilian government employees are not combatants; therefore, they are civilians. W. Hays Parks, a Law of War scholar and lawyer serving in the Department of Defense Office of General Counsel, concludes that it is a "fairly high threshold" for civilians to lose protection by crossing over from indirect to direct participation.[55] Professor Michael Schmitt, a professor of international law, agrees.[56] He cites the commentary of Additional Protocol I as substantiation: "direct participation in hostilities implies a direct casual relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[57] Professor Schmitt outlines the following test for determining direct participation: "[it] seemingly requires 'but for' causation (in other words, the consequences would not have occurred but for the act), casual proximity (albeit not direct causation) to the foreseeable consequences of the act, and a mens rea of intent."[58] Other commentators have devised similar tests.[59]

Professor Schmitt, like most every other law of war commentator, readily admits that "direct participation determinations are necessarily contextual, typically requiring a case-by-case analysis."[60] Even the ICRC in their 2003 report on direct participation conceded that "a unanimous interpretation of th[e] legal concept [of direct participation] does not exist and that much work is needed."[61] The U.S. position that the "decision as to the level at which civilians may be regarded as combatants. . . .and thereby subject to attack generally has been policy rather than a legal matter" seems to be valid and correct.[62] This ICRC rule, although extremely important to crystallize the extremes—what behavior is beyond the pale for

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[49] INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 2 (Sept. 2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf [hereinafter ICRC DIRECT PARTICIPATION REPORT].

[50] *Id.*

[51] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 649 (Sept. 2, 1998).

[52] YVES SANDOZ, CHRISTOPHE SEIMARSKI, & BRUNO SIMMERMAN, COMMENTARY TO THE FIRST PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICT, 8 JUNE 1977, at 619 (1987).

[53] *Id.*

[54] 1 ICRC RULES, *supra* note 9, at 22-23.

[55] Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating The Rule of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 533 (2005) (citing W. Hays Parks, *Air Law and the Law of War*, 32 A.F. L. REV. 1, 133 (1990)).

[56] *Id.*

[57] *Id.* (quoting SANDOZ ET AL., *supra* note 52, at 516-17).

[58] *Id.*

[59] Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, A.F. L. REV. 51, 132 (2001).

[60] Schmitt, *supra* note 55, at 534.

[61] ICRC DIRECT PARTICIPATION REPORT, *supra* note 49, at 11 (conclusion section).

[62] 2 ICRC PRACTICE, *supra* note 21, at 122, para. 851 (citing W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4).

civilians—is not black letter law. Instead, the rule is an important *consideration* for commanders to weigh before potentially subjecting a civilian to attack for a military purpose.[63]

Indiscriminate Attacks and Proportionality

The ICRC Report accurately states that the principles of indiscriminate attacks and proportionality in attack are customary international law. Rule 11—Indiscriminate attacks are prohibited[64]—and Rule 12, which defines indiscriminate attacks, have global acceptance and are taken, once again, almost verbatim from Additional Protocol I, Article 51(4).[65] The ICRC commentary even notes that non-parties to Additional Protocol I, like the United States and India, consider these tenants to be set in stone.[66] As the United States has voiced in an official statement: "it is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of [war]."[67]

The rule addressing proportionality also flows from Additional Protocol I, Article 51(5)(b)[68] and correctly states a norm of customary international law applicable to international armed conflicts. Rule 14 reads: "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct advantage anticipated, is prohibited."[69]

The one interpretive issue for many States, to include the United States, is the meaning and scope of the term "military advantage." Specifically, should the advantage anticipated from the military attack be considered as a whole or segmented into isolated or particular parts of the attack?[70] New Zealand's Military Manual clearly articulates the meaning and the scope of military advantage: "In deciding whether the principle of proportionality is being respected, the standard of measurement is the contribution to the military purpose of an attack or operation considered as a whole, as compared with other consequences of the action, such as the effect upon civilians or civilian objects."[71] In other words, proportionality is a balancing of collateral damage against military gains; this holistic approach has received international approval.[72] Even the recent statute of the International Criminal Court used the phrase "concrete and direct *overall* military advantage anticipated."[73] Just as distinction is the cornerstone of the law of war, proportionality and preventing indiscriminate attacks are the pillars of distinction; they are also black letter law.

Precautions in Attack

The last section on distinction from the perspective of the attacker's responsibilities is precautions in attack. This section, although divided into seven distinct rules, is in large measure a restatement of Additional Protocol I, Article 57.[74] Article 57 is reflective of State practice, providing the attacker's "obligation to take constant care and/or to take precautions

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[63] Rule 6 also limits the ability to target civilians who have directly participated in hostilities only for such time as they continue to be directly involved. The United States has come under criticism for violating this concept when the Central Intelligence Agency used a predator unmanned aerial vehicle to attack and kill six members of al-Qaida on 4 November 2002. The ICRC critics have argued that since the individuals were not taking a direct part in hostilities at the time of the attack, despite having done so previously, the legality of the attack is questionable. *See* Rona, *supra* note 7, at 63.

[64] 1 ICRC RULES, *supra* note 9, at 37.

[65] Additional Protocol I, *supra* note 11, art. 51(4).

[66] 1 ICRC RULES, *supra* note 9, at 41.

[67] 2 ICRC PRACTICE, *supra* note 21, para. 186 (citing U.S. Letter Annexed to UN Doc. A/C.6/47/3, 28 Sept. 1992)).

[68] Additional Protocol I, *supra* note 11, art. 51(5)(b).

[69] 1 ICRC RULES, *supra* note 9, at 46.

[70] *Id.* at 49-50.

[71] 2 ICRC PRACTICE, *supra* note 21, para. 171 (citing *New Zealand Military Manual*) (citations omitted).

[72] *Id*. at 326-31.

[73] Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1988, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute] (emphasis added). It has been argued that a narrow viewing of the concepts of military objective and proportionality could result in greater risk of civilian casualties. *See* Meyer, *supra* note 20.

[74] Additional Protocol I, *supra* note 11, art. 57.

to avoid or minimize incidental civilian losses."[75] The general principle outlined in Rule 15, also known as the collateral damage rule, is simple: "In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects."[76] All States, led by the United States, purport to adhere to this principle.[77]

Rule 15, however, adds the following language that does not appear in Additional Protocol I: "All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects."[78] This language tracks closely the language of ICRC Rule 17, which is taken from Additional Protocol I: "Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[79] The difference in language is of great import, and although Rule 17 is clearly a customary international norm, the second clause of Rule 15 is not. Rule 17 hones in on the attacker's choice of means and methods of warfare with the stated intent to minimize civilian suffering. The second clause of Rule 15 includes no such governor that the intent is to minimize civilian suffering; instead it is a mandate. No State could adhere to such a high standard.

As the United States articulated in 1991, "[a]n attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force."[80] Unless "all feasible precautions," as a term of art, is permitted to mean something different to every commander, thereby eviscerating its intended plain meaning, the second clause of Rule 15, although humane, is not customary.

The customariness of the remaining rules in the precautions in attack section—Rule 16 on target verification,[81] Rule 18 on the assessment of the probable effects of attacks,[82] Rule 19 on control during the execution of attacks,[83] and Rule 20 on advance warning[84]—is strongly supported. Rule 21 on target selection—"[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects"—has a minor wrinkle, however.[85] The ICRC commentary notes that "[t]he United States has emphasized that the obligation to select an objective the attack on which may be expected to cause the least danger to civilian lives . . . is not an absolute obligation, as it only applies 'when a choice is possible.'"[86] Thus, the provisions of ICRC Rule 21 are not mandatory. Instead, a commander must always consider mission accomplishment and allowable risk. This position gives the commander on the ground great discretionary power. In the end, this nuance encapsulates the tension flowing throughout the principle of precautions in attack: the discretion of the attackers versus the protections accorded to civilians.[87] It is clear Article 57 of Additional Protocol I and ICRC Rules 15 through 21 weigh in favor of the latter; that is, protecting civilians. State practice, on the other hand, does not.

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[75] 1 ICRC RULES, *supra* note 9, at 53.

[76] *Id.* at 51.

[77] 2 ICRC PRACTICE, *supra* note 21, at 351, para. 120 (stating "hostilities must be conducted in a manner so as to minimize injury to civilians") (citing U.S. diplomatic note to Iraq in 1991) (citation omitted).

[78] 1 ICRC RULES, *supra* note 9, at 51.

[79] *Id.* at 56.

[80] 2 ICRC PRACTICE, *supra* note 21, para. 121 (citing the U.S. Department of Defense's Report to Congress on the Conduct of the Gulf War) (citations omitted).

[81] 1 ICRC RULES, *supra* note 9, at 55. Rule 16 reads, "Each party to the conflict must do everything feasible to verify that targets are military objectives." *Id.*

[82] *Id*. at 58. Rule 18 states, "Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.*

[83] *Id.* at 60.

> Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. at 60 (R. 19).

[84] *Id*. at 62. This rule states that "Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit." *Id.*

[85] *Id.* at 65.

[86] *Id.* at 67.

[87] 2 ICRC PRACTICE, *supra* note 21, para. 539.

Non-International Armed Conflict

Distinction Generally

Most discussions on the principle of distinction center on international armed conflicts. Importantly, the ICRC also analyzes each customary rule in the context of non-international armed conflicts.[88] This commentary is extremely helpful because it dissects the 1977 Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II),[89] a document that does not have wide circulation among U.S. judge advocates. The first ICRC rule—parties to the conflict must at all times distinguish between civilians and combatants—and the second—prohibition on violence aimed at spreading terror among civilians—both stem from Additional Protocol II, Article 13(2).[90] In addition to Additional Protocol II, the ICRC commentary assembles an impressive array of international documents to support the proposition that both rules are customary in the non-international armed conflict context: the International Criminal Court Statute, [91] the Ottawa Convention,[92] Protocol III to the Convention on Certain Conventional Weapons,[93] and the Statute of the International Criminal Tribunal for Rwanda.[94]

When determining if an ICRC rule is customary, however, unlike the rules commentary, the ICRC fails to track which documents support the establishment of customary law in international armed conflicts and which support customary law in non-international armed conflict. Therefore, when the ICRC cites a military's Law of War regulation, for example, it is not clear whether the regulation is proffered to support the international law context, the non-international law context, or both.

Definition of Combatants

This lack of tracking—which documents support which type of conflict—becomes critical when considering the customariness of the ICRC's third rule in non-international armed conflict—all members of the armed forces of a party to the conflict are combatants. The commentary admits that "the lawfulness of direct participation in hostilities in non-international armed conflicts is governed by national law."[95] It further states that "[c]ombatant status . . . exists only in international armed conflicts."[96]

The ICRC does not cite one national law that would offer combatant status to persons taking a direct part in hostilities in non-international armed conflicts.[97] Even Additional Protocol II, the very treaty relating to the Protection of Victims of Non-International Armed Conflict, falls short of labeling dissident armed forces as combatants.[98] Hostiles fighting the State might be called fighters, insurgents, or any other term of art, but not combatants. The third rule not only falls short of being customary in the non-international setting, but it also has no currency in the non-international scenario. Therefore, it follows that there is no customary definition of armed forces, ICRC Rule 4, in non-international armed conflicts. The ICRC in their commentary concedes this finding; in fact, there is no section on non-international armed conflict within the commentary of the fourth ICRC Rule.

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[88] The ICRC study claims that State practice has established eighteen out of twenty-four rules as customary international law in non-international armed conflicts. *See generally* 1 ICRC RULES, *supra* note 9. Rules 3 and 5 concede that State practice is "ambiguous." *Id.* at 12-13, 19. Rules 21, 23 and 24 claim "arguable" customary law status in non-international armed conflicts. *Id.* at 66, 72-73, and 75. Rule 4 does not address the issue. *Id.* at 14-17.

[89] 1977 Protocol II Additional to the Geneva Conventions, opened for signature Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter Additional Protocol II].

[90] *Id.* art. 13(2).

[91] Rome Statute, *supra* note 73, art. 8(2)(e)(i) (stating "intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities" constitutes a war crime in non-international armed conflicts).

[92] Ottawa Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction pmbl., Sept. 18, 1997, 36 I.L.M. 1507 (stating "a distinction must be made between civilians and combatants").

[93] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980 Protocol III) to the 1980 UN 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, art. 2(1), 1342 U.N.T.S. 171, 19 I.L.M. 1534 (stating that "it is prohibited in all circumstances to make the civilian population as such [or] individual civilian. . . . the object of attack . . . . ").

[94] Statute of International Criminal Tribunal for Rwanda art. 4(d), S.C. Res. 955, U.N. Doc. S/RES/955 (1994) (prohibiting acts of terror against civilians).

[95] 1 ICRC RULES, *supra* note 9, at 13.

[96] *Id.* at 11.

[97] *Id.* at 12-13.

[98] *Id.* at 12.

Definition of Civilians

The fifth ICRC rule—the definition of civilians—suffers the same fate as the third rule: there is little, if any, practice to support the proposition that this rule is customary in non-international conflicts. The commentary highlights this lack of support: "th[e] definition [of civilians] was dropped at the last moment of the [Additional Protocol II] conference. . . ."[99] Since additional Protocol II does not provide a definition of civilian, the only evidence the ICRC can muster is a Colombian military manual stating that "civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict)."[100] One military manual, however, cannot establish customary international law.[101]

Direct Participation

Although there is no definition of what constitutes a civilian in non-international armed conflicts, Article 13(3) of Additional Protocol II mandates that "[c]ivilians shall enjoy . . . protection . . . unless and for such time as they take a direct part in hostilities."[102] Common Article 3 of the Geneva Conventions protects "persons taking no active part in the hostilities," regardless of their label, i.e., combatants who have laid down their arms or civilians.[103] Thus, in non-international armed conflict scenarios, the ICRC's sixth rule—loss of protection from attack for direct participation—focuses on an individual's conduct, not on their inherent status. But like the other ICRC rules, Rule 6 fails to rise to the level of being customary international law when the conflict is not international. This failure becomes clear with the ICRC's lack of citation germane to this point.

Indiscriminate Attacks

Failure to define indiscriminate attacks in the non-international armed conflict setting also plagues Rule 11: Indiscriminate Attacks.[104] Like Rule 5, which defines civilian status, the draft of Additional Protocol II had a definition of indiscriminate attacks but, "at the last moment as part of a package aimed at the adoption of a simplified text," it was dropped.[105] The ICRC offers some examples of State's military manuals, national legislation, and official statements defining indiscriminate attacks; but, in the end, the list is scant.[106] Indiscriminate attacks might be a violation of national law,[107] but their prohibition has not gained international currency and has not risen to the level of customary international law in non-international armed conflicts.[108]

Proportionality

Although proportionality—ICRC Rule 14—is not defined by Additional Protocol II, there are numerous official statements, national legislation, and military manuals by States, not to mention the jurisprudence of several international tribunals that provide "evidence of the customary nature of this rule in non-international armed conflicts."[109]

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[99] *Id.* at 19.

[100] *Id*. (citing 1999 Colombian *Instructors' Manual*) (citation omitted).

[101] The ICRC concedes that State Practice is "ambiguous" as to the application of Rule 5 to non-international armed conflicts.

[102] Additional Protocol II, *supra* note 89, art. 13(3).

[103] Geneva Convention I, *supra* note 11, art. 3; Geneva Convention II, *supra* note 11, art. 3; Geneva Convention III, *supra* note 11, art. 3; Geneva Convention IV, *supra* note 11, art. 3.

[104] 1 ICRC RULES, *supra* note 9, at 38-39.

[105] *Id.* at 38.

[106] *Id*. at 39 nn.15-17. While it is doubtful, in the information age, that any State would be so brazen as to publish policy that sanctions indiscriminate attacks, States continue to employ them, (e.g., the indiscriminate use of land mines during the Balkans conflicts).

[107] *Id.* at 42 n.35 (discussing the draft legislation of El Salvador and Nicaragua).

[108] The significance of this for U.S. judge advocates, however, is nominal. Discrimination is a precept of the Law of Armed Conflict under U.S. policy. Indiscriminate attacks are *per se* prohibited.

[109] 1 ICRC RULES, *supra* note 9, at 49.

Although the ICRC commentary fails to show that the United States has officially stated the principle of proportionality applies to non-international armed conflicts, the Department of Defense's (DoD) longstanding policy, through directives,[110] instructions,[111] and operational rules of engagement,[112] "ensure[s] [service members] comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."[113] Proportionality is a cornerstone principle of the Law of War. The principle transcends conflict categorization. Consider, for example, the following phrase in a recent DoD Directive: "during all armed conflict, however such conflicts are characterized."[114] Unlike the discussion of indiscriminate attacks, the international commentary on proportionality is far more extensive and mature and less contradicted by State practice. Proportionality from the U.S. perspective, among other States, is customary international law regardless of designation of the armed conflict as international.[115]

Precautions in Attack

The fundamental nature of proportionality in non-international armed conflict does not follow for the principle of precautions in attack. The ICRC commentary concedes that even Additional Protocol II—the primary international treaty on internal armed conflicts—does not include an explicit reference to the principle of precautions in attack.[116] The most persuasive authority that the ICRC Study provides is Article 13(1) of Additional Protocol II, which states that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."[117] There are a smattering of military manuals and official statements of States that support the ICRC's position, but for the most part, support is scant.

There is no customary international law, with the possible exception of the overarching general rule requiring armed forces to take constant care to spare civilian life, governing precautions in attack. This conclusion, albeit weak, could be defended based on the language of the following international instruments: Article 13(1) of the Additional Protocol II; Article 3(10) of Amended Protocol II to the Convention on Certain Conventional Weapons;[118] and Article 7 of the Second Protocol to the Hague Convention for the Protection of Cultural Property.[119] Each instrument cited cannot be read without the assumption that "it would be difficult to comply with th[ese] requirement[s] without taking precautions in attack."[120] The number of States that have explicitly agreed to this general rule, however, are limited.

ICRC Methodology Shortcomings

Regardless of how an armed conflict is viewed, the ICRC Study's single biggest shortcoming when discussing the principle of distinction is its lack of cited practice, particularly in the context of non-international armed conflict. The volume of footnotes in this Herculean effort are fascinating: text from the International Court of Justice; Law of War manuals and handbooks from around the world; and United Nation reports and studies. These resources are extremely helpful in understanding and dissecting issues from an academic perspective, but this type of information falls short of demonstrating actual practice. Within the distinction sections, the ICRC rarely cites State's rules of engagement—the tactical

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[110] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.1 (9 Dec. 1998).

[111] CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

[112] *See generally* INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 5 (2006).

[113] DOD INSTR. 5100.77, *supra* note 110, para. 5.3.1.

[114] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (9 May 2006).

[115] *See* International Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54.

[116] 1 ICRC RULES, *supra* note 9, at 52, 56, 57, 59, 61, 63, and 66.

[117] *Id*. at 52; Additional Protocol II, *supra* note 89, art. 13(1).

[118] Amended Protocol II to the 1980 UN 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, S. Treaty Doc. No. 105-1, art. 3(10) (1997) (stating that "[a]ll feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies.").

[119] Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, art. 7, 38 I.L.M. 769 (1999) (protecting cultural property in an attack).

[120] 1 ICRC RULES, *supra* note 9, at 52 (citing Additional Protocol II, *supra* note 89, art. 13(1)).

directives issued to guide military forces on the use of force.[121] Only twice within the distinction section does the ICRC commentary provide actual examples of these rules; and never does the ICRC show what a commander did in compliance with customary international law.

The importance of this gap in supporting data cannot be overstated. It is the actual conduct in war that gives birth to the practice. Customary international law is based on State practice, not policy, and rules of engagement are the paragon of State practice with respect to discrimination. Rules of engagement are the bridge between national policy and real world application. Absent evidence of State practice through employment of rules of engagement, national policy should be viewed merely as ideals and not statements of intended practice.

However, this criticism, in part, is unfair. It would be a virtual impossibility to comb through every rule of engagement, every operational order of every command, and every written order issued by a commander to determine custom. The ICRC simply limited their citations to national level documents. But even there, for example, the ICRC seldom cites a Department or Ministry of Defense policy, memorandum, or instruction. The U.S. Naval Commander's Handbook, which is often cited by the ICRC, although certainly helpful, is not U.S. policy and, therefore, not entirely reflective of U.S. practice.

Despite these flaws, the ICRC Report is necessary for every judge advocate's library because it provides a wealth of information on the development of distinctions by legal scholars. The ICRC culls through recent records to find documents and policy positions supporting their proposed rules. While these are excellent rules, they are not rules that should take the weight of law, particularly in non-international armed conflicts. The ICRC, in its pursuit to forge new ground in the Law of War, has not separated the wheat from the chaff. And in failing to do so, it has undercut the very value of the wheat it aims to sell.

Conclusion

Let us return to the fight for Fallujah. Assuming this battle was an international armed conflict, the killing of the four U.S. civilians by the enemy raises the specter of violating a core principle of distinction: protection of civilians. If the civilians were participating directly in hostilities then these civilians were no longer immune from attack. These civilians, like combatants, can be targeted and killed or captured. If on the other hand, they were merely supporting the war effort and were not taking a direct part in the hostilities, then they never lost their protected status and the intentional killing of these civilians was a crime.[122] Difficulties arise when the conduct of the civilians is questionable, e.g., the civilian is repairing a weapon system on the front lines that will, in turn, destroy the enemy. In these grey areas, the conduct of the combatant will be a matter of national policy in interpreting customary international law, not an acid test of what customary international law mandates.

If the reports of "large civilian casualties" were accurate and a result of the commander intentionally targeting civilians, then he crossed the line; the commander is a war criminal. But absent that intent, the commander must balance mission accomplishment and the risks involved to civilians. His determination to use force has both a subjective aspect and an objective one. In other words, great deference will be given to the commander's decision as long as it was reached "on the basis of [the commander's] assessment of the information from all sources which is available to them at the relevant time."[123] Even though a commander kills civilians, that alone is not a crime.

The focuses, as so aptly noted by Professor Schmitt, are on the intent and the common sense of the commander to know reasonable consequences of his unit's actions. If the commander attacked an area that was known to be dense with civilians, absent a very significant military advantage, customary international law weighs against the commander and shifts to the side of protecting the civilian. The Monday morning quarterbacking of what a commander or Soldier did is difficult,[124] but a rigorous examination of the facts will meet the intent of what ICRC set out to do with these rules. "It will ensure greater protection of war victims."[125]

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[121] JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 465 (as amended 31 Aug. 2005).

[122] Regardless of this finding, the dragging of the four bodies through the streets of Fallujah would violate Article 17 of Geneva Convention I, *supra* note 11.

[123] 1 ICRC RULES, *supra* note 9, at 71.

[124] The commander should be presumed to have acted lawfully in the wake of civilians deaths during an engagement absent evidence to the contrary.

[125] 1 ICRC RULES, *supra* note 9, at xi (foreword of Dr. Jakob Kellenberger).

Notes from the Field

Mentoring Afghan National Army Judge Advocates: An Operational Law Mission in Afghanistan and Beyond[1]

Lieutenant Colonel Daniel J. Hill[2]
Oregon National Guard
Staff Judge Advocate
Task Force Phoenix V

Lieutenant Colonel Kevin Jones[3]
Staff Judge Advocate
Combined Security Transition Command
Afghanistan

On 4 July 2006 the 41st Brigade Combat Team (41st BCT), Oregon National Guard, assumed the mission of training the Afghan National Army as Task Force Phoenix V, from the 53rd Brigade, Florida National Guard, at Camp Phoenix, Kabul, Afghanistan.[4]

Introduction

Task force or brigade operational law team (BOLT) judge advocates (JAs) plan to conduct typical legal operations in the deployed environment. The 41st BCT BOLT arrived in Afghanistan ready for military justice, administrative law,[5] legal assistance, and operational law including rules of engagement and the law of armed conflict . In Afghanistan,[6] the mission of Task Force Phoenix V (Phoenix) was to mentor and train the Afghan National Army (ANA) and the Afghanistan National Police (ANP). Particular emphasis was placed on training the newly developed Afghanistan National Auxiliary Police (ANAP) who had significant requirements[7] for JA legal support.

Morphing the Mission

Initially, the Phoenix BOLT was advised by the earlier JAs at Combined Security Transition Command – Afghanistan (CSTC-A) that mentoring the ANA JAs was not on the task list for Phoenix. Upon arrival, it became very apparent that the CSTC-A[8] was understaffed with only two JAs.[9] The JAs there were assigned to mentor the ANA JAs throughout five Corps,

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[1] This article is intended to build on the good work and article of: Major Sean M. Watts & Captain Christopher E. Martin, *Nation Building in Afghanistan: Lessons Identified in Military Justice Reform*, ARMY LAW., May 2006, at 1.

[2] Brigade Judge Advocate, 41st BCT, Oregon Army National Guard, and Staff Judge Advocate (SJA), TF Phoenix V. Lieutenant Colonel (LTC) Hill has over nineteen years in service with more than three years on active duty, and the balance with the Oregon Army National Guard. Lieutenant Colonel Hill has been a judge advocate stationed at Fort Bliss for the U.S. Army Air Defense Artillery Center (USAADC) & Fort Bliss, deployed on REFORGER (Return of Forces to Germany) '88 with the 3d Armored Calvary Regiment, and among other training exercises, has participated in annual training at the National Training Center with the 116th Cavalry (IDARNG). He has been deployed in support of Operation Southern Relief, Task Force Ponchartrain, New Orleans with the 41st BCT. Lieutenant Colonel Hill is an elected State Court Circuit Judge in Pendleton, Oregon for Umatilla and Morrow counties.

[3] Staff Judge Advocate, CSTC-A, and previously the Deputy SJA, CFC-A. Lieutenant Colonel Jones has over nineteen years in service, most recently having been an Associate General Counsel at the Defense Logistics Agency, Fort Belvoir, Virginia, and SJA for USACIDC, Fort Belvoir, Virginia.

[4] To the best of known history, the original Phoenix mission was located at Bagram Air Field, under the 10th Mountain Division. The Special Forces established Camp Phoenix in the International Joint Stock Transportation & Forwarding Company (AFSOTR) trucking facility in Kabul, Afghanistan. Subsequently, Headquarters, Department of the Army (HQDA) approved and directed rotations to perform the PHOENIX mission, which officially started with the 4/31st Infantry, 2d Brigade, 10th Mountain Division and the 2/124th, 53d BCT (FL) from May - Nov. 2003. Subsequently, HQDA directed the Army National Guard Headquarters elements to act as the command and control element for the task force, including the 45th Brigade (OK) from Nov. - Sept. 2004, 76th Brigade (IN) from Sept. 2004 - July 2005, the 53d Brigade (FL), and now the 41st BCT (OR) from July 2006 - June 2007. Now in its fifth iteration, Phoenix is locally established operationally as a Combined Joint Task Force (CJTF) though current operational documents maintain Phoenix as a task force, with plans to seek CJTF designation pending.

[5] Among other administrative matters, the Phoenix SJA worked extensively on joint operations issues within the U.S. forces assigned and attached to the CJTF Phoenix, and the nuances of command and control (C2).

[6] The Islamic Republic of Afghanistan. CONST. OF AFGHANISTAN art. 1 (2004).

[7] In the fall of 2006, attention turned to assisting the ANP, while still maintaining the ANA mentoring roll in conjunction with International Security Assistance Force (ISAF) Operational Mentoring and Liaison Teams (OMLTs) working under the Regional Corps Advisory Group (RCAGs), which may be under U.S. command (the Regional Corps Assistance Command – Provisional (RCAC)) or under command of a ISAF coalition partner.

[8] Office of Security Cooperation – Afghanistan (OSC-A) was replaced by CSTC-A.

their brigades, the Kabul Military Training Center (KMTC), and the Ministry of Defense (MOD) JAs. These mentoring duties were in addition to their primary task of mentoring establishment of the military court system[10] and mentoring the MOD and the Head of Legal, Department for the General Staff, ANA (Head of Legal).[11] The 41st BCT arrived with three JAs and two paralegal 27D's which were adequate to address Phoenix issues, but insufficient to engage in ANA mentoring, counseling, and training of ANA and ANP mentors and trainers.[12] The JAs at CSTC-A recognized a need for more legal staff to perform the broad range of mentoring duties. Prior to the 41st BCTs arrival, CSTC-A JAs established a mentoring program for the ANA Legal Corps by seeking to use Phoenix Regional Corps Advisory Group (RCAG) officers as legal liaison officers (LNO) for each Regional Corps Assistance Command (Provisional) (RCAC) (Prov.).[13] Fortunately, Phoenix received an additional three JAs from the Utah National Guard.[14] With the permission of the Phoenix Commander,[15] the Phoenix Staff Judge Advocate (SJA) assigned these additional JAs as command judge advocates (CJAs) for three of the six provisional Afghan Corps commands. As CJAs, they advise and counsel the RCAC commander, assist the CSTC-A JAs with mentoring, and work alongside the RCAC commander and mentors on resolution of all legal issues arising within the Afghan Corps, ANA. The Training Assistance Group Command (TAGC or TAG) assigned the final JA to Phoenix although he was also assigned as the legal advisor for the 207th and 209th RCACs.[16] At the earlier request of the Phoenix SJA, the RCAC commanders assigned Navy officers as legal LNO's to the 207th and the 209th RCACs. In the late fall, another surprise arrived in the form of a sergeant first class (SFC) 27D from another RFF who was assigned to the 209th RCAC.[17]

International Security Assistance Force's Role in the Combined Joint Operational Area (CJOA)

The International Security Assistance Force (ISAF) assumed "control" of the Afghanistan CJOA on 5 October 2006. The ISAF had not developed a plan to provide the ANA with ISAF JA mentors.[18] The ISAF has assumed operational command of the RCAGs in the 207th and 209th Corps areas.[19] There the Coalition Forces Operational Mentoring and Liaison Teams (OMLTs) have reduced the need for U.S. Embedded Training Teams (ETTs). However, with the U.S. priority

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[9] The CSTC-A has generally had only two JAs assigned to conduct mentoring. At this writing the JAs were Commander Adrian Rowe and Lieutenant Commander (LCDR) Scott Johnson.

[10] The CSTC-A JA mentors successfully guided the MOD and assisted them in creating the ANA military courts in the five corps.

[11] Described in the Law of Military Courts, and is comparative to the U.S. Army, The Judge Advocate General (TJAG).

[12] The BCT Modified Tables of Organization and Equipment (MTOE) carries two JAs and one paralegal 27D. The "notional" joint manning document for Phoenix carried this same number. Phoenix is not a MTOE or a Table of Distribution and Allowances (TDA) organization as is commonly understood. Each iteration of Phoenix is manned by using a Joint Manning Document, which is similar in nature to both an MTOE and TDA organization, with specific positions to fill, yet allows "commanders choice" positions to be filled to manage the mission to the commanders intent. In the case of Phoenix, with the surprise addition of the Utah National Guard JA's, the Phoenix commander chose to assign them as JA as well as use commander's choice options to make a more robust judge advocate general (JAG) section for the anticipated mission. Due to the nature of Phoenix, flexibility is critical to meet the needs, and opportunity must be taken when available. Both The Office of the Judge Advocate General and Headquarters Department of the Army G3 were largely unaware of the nuances to Phoenix manning as a hybrid organization. Due to clear operational requirements of a BCT in this environment, a third JA was critical at Phoenix to perform legal assistance and claims services to leave the operational law/trial counsel free to perform those duties and the staff judge advocate free of conflicts. Moreover, the third JA was determined to be critical to provide independent legal advice to summary courts-martial officers.

[13] The RCAGs continue to be the entity responsible for training and mentoring and may be commanded by a U.S. or International security Assistance Force (ISAF) commander. Where U.S. commanders command the RCAG, they are dual-hatted as the RCAC commander. The Phoenix SJA was tasked to prepare the requesting documents to create the six provisional commands in CJTF Phoenix V.

[14] The Utah National Guard JAs arrived in response to a request for forces (RFF) augmentation to the notional joint manning document (JMD). The Phoenix JMD was created for each Phoenix mission and is a skeleton essentially setting minimums for manning and allowing the commander to add to functional areas by commander's choice options, and to be able to fill out future mission needs with RFFs and unit requests for forces (URFs).

[15] Brigadier General Douglas A. Pritt, Commander, 41st BCT and CJTF Phoenix V.

[16] First Lieutenant (1LT) Scott Delius, Georgia ARNG. Note that these RCACs were only the RCAC with the RCAG function now vested with the Operational Mentoring and Liaison Teams (OMLT).

[17] Legal liaison officer's in Phoenix are LCDR Beltran and LCDR Edwards. The LNO's cannot give "legal advice" and are instead the eyes and ears for the legal mentors who provide guidance from afar. Sergeant First Class Tiona Harrison joined the 209th as their legal Non-Commissioned Officer (NCO) in November 2006.

[18] The ISAF has three legal advisors at the ISAF headquarters and generally one legal advisor at each regional corps (RC) headquarters, mostly all on short tours. There has been some interest in developing legal support for the ANA JAs by ISAF, the Canadian Expeditionary Forces Command, Senior Legal Advisor.

[19] The RCAG is the term used to describe the training and mentoring function of the Coalition command, whereas the RCAC, was created as provisional command U.S. units to provide for UCMJ authority in the RCACs. A U.S. commander, therefore, can be dual hated as both the RCAC commander and the RCAG commander.

of reconstruction effort now being on the ANP, including development of the ANAP, the ETTs in the Corps areas were fully engaged in ANP reconstruction mission.[20]

The ISAF RCAGs and ISAF OMLTs are located in U.S. camps under the training control (TRACON) of Phoenix. While the OMLTs are assuming mentoring missions, when they arrive the teams do not include a legal advisor or JA.[21]

Mentoring the ANA JA

The mission of mentoring ANA legal officers and counseling their U.S. mentors is a new task for JAs. Dealing with legal issues that arise with their ANA counterparts is not a task covered in the *2006 Operational Law Handbook*.[22] The task of mentoring rather than teaching the ANA JA in the recently adopted military code, trial process,[23] and in the application and effective use of these processes, is difficult. Even the translation from Dari to English has proven to be a challenge due in part to translation errors and difficulties in interpretation of the Dari intent. Moreover, the role is to mentor, not truly teach, and certainly not to take actions for them, as they need to make decisions and act for themselves.

The Afghan Law of Military Courts

The ANA military code, the "Afghan National Army Law of Military Courts" or "Law of Military Courts" is commonly referred to as the AUCMJ.[24] The AUCMJ is less than a year old and consists of a mere eighty-five pages[25] whereas the United States Uniform Code of Military Justice (UCMJ) and *Manual for Courts-Martial* (MCM)[26] is over fifty years old and has over 900 pages. In part due to its recent adoption, and also due to significant challenges in communication within the organizational structure of the ANA, many ANA Soldiers and commanders did not understand the applicability of the AUCMJ. There is evidence that some commanders in the ANA are still applying the Soviet system of military justice which they understand.[27]

The AUCMJ was drafted by CSTC-A JAs and was largely based on the UCMJ. The AUCMJ was approved by the Afghan President and Parliament after some changes by the Government of Afghanistan. The AUCMJ is clearly Afghan in application with punitive articles that address issues specific to Afghan culture and standards of conduct. The AUCMJ is not strictly based in Shari'a law as it pertains to military offenses; however, the AUCMJ provides the ability to incorporate other non-military offenses covered by other Afghan laws when the offense is not included in the AUCMJ.[28] This allows for the addition of elements of Shari'a law. Jurisdiction between civilian and military courts is concurrent. When the victim is a civilian and the offense is not specifically listed in the AUCMJ, one can expect jurisdiction of the Soldier to be assumed by the Afghan civilian authorities even though assimilation of civil penal law is available as well as prosecution for the offense within the military courts.[29] In those instances where assimilation might take place, the offense will have most likely taken place outside of the Soldier's military duty with civilian victims. Assimilation generally involves the *Afghan Civil Penal*

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[20] The 207th RCAG ISAF element and the 209th RCAG are now being staffed by the Italians and the Germans under the Training Control (TRACON) of Phoenix.

[21] In particular the 207th Corps, Herat, Afghanistan and the 209th Corps, Mazar-e-Sharif (MeS), Afghanistan.

[22] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2006).

[23] Trials have not taken the course of a true adversarial system. *See also* ANA LAW ON MILITARY COURTS art. 12 (Sept. 25, 2005) [hereinafter ANA LAW ON MILITARY COURTS].

[24] The AUCMJ refers to the Afghan National Army Law of Military Courts (2005) (Law of Military Courts), consisting of the *Military Criminal Procedure Code*, the *Punitive Articles* and the *Nonjudicial Punishment Code* (for resolution of offenses without trial or nonjudicial punishment (NJP)).

[25] By presidential decree, the Military Courts Laws were effective 25 September 2005. Presidential Decree on the Approval of the Military Court Laws Decree No. 81 (25 Sept. 2005).

[26] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005).

[27] Report by Major Waldron, 205th RCAC CJA (19 Sept. 2006). This lingering acceptance may flow through to the highest levels of command.

[28] AUCMJ art. 47 (punitive articles).

[29] REPUBLIC OF AFGHANISTAN, PENAL CODE, AUCMJ art. 47 (7 Oct. 1976).

Code, which survived through several transitions of power and was resurrected after the fall of the Taliban.[30] The *Afghan Civil Penal Code* represents an amalgamation of Western, moderate Islam, and radical Marxist thought, and therefore creates some interesting twists in application of facts of any case to a given offender.[31]

Afghan law is generally based in the Islamic and Shari'a laws,[32] and is consistent with the beliefs and provisions of Islam because of specific provisions in the Afghan Constitution.[33] The written Afghan law unofficially coexists with the traditional law of the Jurga or Shura, which has greatly assisted in maintaining local social stability.[34]

The Afghan people's acceptance of other legal philosophies has made the development of the AUCMJ possible but does not displace Shari'a law which derived generally from the Quran, resulting in Quranic laws. The application of strict Shari'a legal concepts for punishment is counter productive to rehabilitation, which is required in a military justice system where the overall goal is to have Soldiers trained and ready to fight the nation's wars and defend it from all enemies.[35] The Taliban applied strict punishments to all, including flogging, amputation, and stoning.[36] However, the vast majority of Islamic nations currently no longer apply the traditional corporal punishments for violation of specific Quranic criminal laws.[37] Under the Afghan Constitution, and based on the application of Shari'a law, the punishment for offenses other than those established by written law is essentially prohibited.

Mentoring ANA JAs and counseling U.S. mentors (including U.S. ETTs,[38] U.S. Logistics Support Teams (LSTs),[39] and ISAF OMLTs) is exceptionally difficult given the complexity of the Afghan legal system and cultural contradictions within Afghan society.[40] Afghanistan's history of war as well as invasion and occupation has resulted over the centuries in the peoples' general acceptance of law of various foreign forces.[41]

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[30] For a historical perspective, this law was created during the period of power by Mohammed Daoud who took control in 1973 and who was considered a Soviet lackey by the West. Insurgents killed Daoud on 27 April 1978 and power turned over to the communists, which proclaimed the country to be the "Democratic Republic of Afghanistan." Even with this sea of change, the 1976 criminal code stayed in place, with punishments from the extreme death by hanging, to confinement, fines, forfeitures, and loss of privileges. STEPHEN TANNER, AFGHANISTAN, A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN 229 (2002).

[31] AFGHANISTAN'S DOMESTIC LEGAL FRAMEWORK 444 (2005). The Senlis Council, Drug Policy Advisory Forum (David Spivack & Professor Ali Wardak), *Feasibility Study on Opium Licensing in Afghanistan for the Production of Morphine and Other Essential Medicines* (2005), *available at* http://www.senliscouncil.net/modules/publications/008_publication/domestic_law_exec_summ..

[32] Shari'a law is based on offenses that are considered an affront to Allah and are mentioned in the Quran. SHARON OTTERMAN, ISLAM GOVERNING UNDER SHARIA, SHARIA LAW BACKGROUND AND OVERVIEW FROM THE COUNCIL ON FOREIGN RELATIONS, A NONPARTISAN RESEARCH ORGANIZATION (2005).

[33] *See* CONST. OF AFGHANISTAN art. 2 (2004).

[34] The Senlis Council, Drug Policy Advisory Forum (David Spivack & Professor Ali Wardak), *Feasibility Study on Opium Licensing in Afghanistan for the Production of Morphine and Other Essential Medicines* (2005).

[35] Some Quranic offenses punished under Shari'a law are counterproductive to military rehabilitation. Five such counter productive punishments are known as the Hadd offenses and include: wine-drinking and, by extension, alcohol-drinking, punishable by flogging; unlawful sexual intercourse, punishable by flogging for unmarried offenders and stoning to death for adulterers; false accusation of unlawful sexual intercourse, punishable by flogging; theft, punishable by the amputation of a hand; highway robbery, punishable by amputation of an appendage, typically a hand, or execution if the crime results in a homicide. OTTERMAN, *supra* note 32.

[36] *Id.*

[37] AFGHANISTAN CONST. art. 27.

[38] ETTs are U.S. service members. They train, coach, teach, and mentor the ANA.

[39] LSTs are U.S. service members. They work to sustain, assist and develop the ANA.

[40] For instance, alcohol and drugs, which are strictly prohibited by Afghan law (written and customary in Shari'a), are not only used in abundance but quietly tolerated, with Afghanistan currently producing the vast majority of the world's illicit opium supply.

[41] Acceptance of the AUCMJ has a caveat. It has been noted by the author that in accepting the AUCMJ, the Afghans will tell you what they think you want to hear, not ordinarily out of any intent to deceive, but out of intent to please and avoid the humiliation of failure. Further mentoring is usually required to assure that action takes place.

Training the ANA and Mentoring the Trainers

There is a multifaceted approach to military justice within the Afghanistan CJOA. Phoenix military justice instruction begins at the KMTC where the Afghan JAs must instruct in both Dari and Pashtu. There is little reliance on written instruction due to low literacy rates. The KMTC provides training at the unit level regarding the use of the AUCMJ by the chain of command, compliance with the LOAC, and ANA JA training of ANA troops at their level. Initially, the Phoenix SJA assisted the CSTC-A legal mentors with schedules and the establishment of courses for ANA training at KMTC. This includes the distribution of the AUCMJ to the field for U.S. mentors. In pursuing the implementation of the training activity, it was noted that at times, the ANA JAs would request U.S. JAs conduct the training for ANA troops even though the ANA JAs had been fully trained to conduct this training themselves. Given the chance, the Afghan Soldier or officer will allow the U.S. mentor to complete tasks that they should be performing for themselves.

Acceptance of the AUCMJ by the ANA would be a tremendous step forward for the rule of law. One more step would be the ANA's acceptance of the President's authority over the ANA under the Afghan Constitution.[42] Currently the ANA generally accepts the AUCMJ where the code is known. Reports from the field indicate that lower level ANA units doubt the existence of the AUCMJ and orders implementing it. These reports support the continuing need for a JA mentor for the ANA Corps SJA. There is also a continuing need for a U.S. mentor to mentor the corps commander, and where OMLTs are conducting the mentoring, coordination for JA support to mentor the ANA JA's. This effort will reinforce and facilitate the existence and use of the AUCMJ within the ANA.[43] Based on the influence of JA Mentors from CSTC and the RCACs,[44] the ANA has decreased the use of Taliban-type punishments and is beginning to use corrective training (liberally defined). There is evidence of limited use of the AUCMJ, including non-judicial punishment and courts-martial, to deal with ANA Soldier misconduct.

Military Courts in the Corps

Each of the five corps has a "basic" military court, which is presided over by three judges[45] (Qazi), and staffed by an SJA, a deputy SJA (DSJA), at least one prosecutor, and at least one defense counsel.[46] There is also an SJA and DSJA at the brigade level.[47] Interestingly, MOD has no separate court; therefore, issues within MOD would in theory be tried in the 201st Corps area, also referred to as the "central corps." Another jurisdictional problem has arisen with military organizations who are not part of the corps, yet are located in the corps area, but without the equivalent of a general courts-martial convening authority. Eventually, this problem may be reflected in MOD itself. Appeals from the basic military court are to the military court of appeals (MCA) by a panel of three judges.[48] Appeals can also be de novo depending on the type of case presented to the military court of appeals. Appeals from the MCA are to the civilian Supreme Court of Afghanistan (Stara Mahkama). The Supreme Court consists of the chief judge and nine senior judges. Records of trial on which to base appeals to either the MCA or the Supreme Court remain a significant problem due to poor recording methods at the lower court proceedings. For example, many trials use "recordings" recorded by a standard stereo cassette recorder and the record of trial is the government's file.[49]

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[42] AFGHANISTAN CONST. art. 122.

[43] Verbal Report to Phoenix SJA by Major Paul Waldron, 205th RCAC CJA, in Khandahar, Afghanistan (Sept. 2006).

[44] An August 2006 example at KMTC was the "corrective" training of ANA soldiers who had been fighting by having them hold large bricks during a training seminar rather than imposing NJP. This is radically different from earlier disciplinary methods which probably would have comprised of beating the culprit with a large stick.

[45] Judges are appointed by the President of Afghanistan as a separate authority beyond being the Commander in Chief of the Military. *See* AFGHANISTAN CONST. art. 64 (2004).

[46] If any ANA JA is a trained lawyer, it probably is the defense attorney. The ANA JAs are tested and then certified by the Head of Legal, but they are not usually trained lawyers. The ANA maintains a strict ethnic quota, allowing only certain percentages of ethnic populations to be within the ANA to maintain the ethnic balance, and this balance exists as a selection criterion to maintain the national ethnic balance within the legal department.

[47] Brigades have an MTOE for two JAs and an NCO. These personnel are now being placed at the brigade structure.

[48] ANA LAW ON MILITARY COURTS, *supra* note 23, art. 12. The court is composed of five judges.

[49] Trials in the ANA are really conducted in a modified adversary system. The defense counsel has all rights to attend all investigatory and trial proceedings and has all rights to see the government file. That file may include defense documents such as witness statements for both government and defense. In the absence of witnesses, ANA judges are "free" to consider the evidence contained in the file, consider the weight of such evidence, and convict or acquit on such evidence. The implied presumption being that both the government and defense counsel have had equal opportunity to develop their case, obtain statements, counter statements and address the other sides evidence by submission of matters into the government file. Essentially this process is the "discovery" process, as well as a winnowing of the evidence to theoretically acceptable relevant evidence. Currently CSTC-A Strategic Reform Directorate (SRD) JAG is introducing the concept that maybe the government and the defense can have separate files too, but under the concepts of Afghan law as

The Role and Responsibility of the ANA Head of Legal

The ANA Head of Legal, our equivalent of the Judge Advocate General, is responsible for all legal operations including the military judges within the ANA.[50] The Head of Legal conducts testing for applicants to the ANA Legal Corps. This testing is the primary means to determine who is qualified as an ANA JA. Few applicants for ANA JA assignments are actually legally trained, hence the reliance on the testing. The MOD is the final approval authority regarding the organization, structure, and personnel staffing of the ANA legal department. The MOD's authority is subject to the constitution and the military courts law, which established the ANA military court system.[51] The ANA military court system is separate and apart from the provincial court system (courts of appeal) which has jurisdiction of civilian cases.[52]

CSTC-A's Mentoring Program for ANA Head of Legal

The CSTC-A established a mentoring program for the ANA Head of Legal.[53] The CSTC-A Legal Mentor's role is to provide "top down" mentoring primarily to the Head of Legal, ensure legal training at KMTC, and assist in establishing the ANA Corps JAs, military judges, and basic courts. Phoenix JAs on the other hand, work to provide ANA JAs and officers mentoring from the bottom up, assisting with resolution of legal issues up to the corps and MOD levels.

Mentoring the ANA Judge Advocate and Counseling the U.S. Mentor

In addition to the many roles of the RCAC CJA's, they also assist with the application of non-judicial punishment under the AUCMJ by the commanders at the corps and subordinate ANA units.

The Phoenix SJA also established a mentoring and counseling program for U.S. mentors to facilitate reports of ANA and ANP crime and corruption through the CJ3 (operations). The mentors provide a legal channel for review, advice, and coordination to the appropriate ANA Commander for action or investigation. The Phoenix SJA and RCAC CJAs essentially provide advice and counsel to the U.S. mentor regarding the application of the AUCMJ by the ANA Commander. This advice includes initiating preliminary investigations at the lowest responsible command level. When a commander refuses to investigate, the matter is addressed to the next level commander until a matter warranting investigation is properly investigated. While the U.S. mentor is teaching and coaching his ANA commander counterpart, the CJA is mentoring the ANA SJA on the same issue. In addition, the interplay with the CJA and the RCAC commander should reflect the relationship that the corps commander should have with his ANA SJA, so that the ANA Corps commander views the ANA SJA as an invaluable part of the command team.

The JAs assistance to the U.S. mentor is crucial because the U.S. mentor typically assists the ANA commander (or senior staff officer) in the areas of operations, training, and logistics as well as in the areas of command responsibility. The U.S. mentor has little time to learn how to apply the law to all areas of command responsibility. Moreover, one cannot expect the ANA Corps commander and other subordinate commanders to have thoroughly read the AUCMJ or to have had anyone explain its use in depth to them. In many instances, the ANA commander would prefer to have the issue handled by the U.S. mentor and, if allowed, will generally avoid applying themselves to resolution of the issue. Experience has shown that if an Afghan commander can get the United States or any coalition force nation to do it for them, or buy it for them, the Afghan commander will do so, and avoid doing it for themselves with their own resources.[54] There may even be an effort by the ANA commander to get the United States to investigate the allegation of corruption or criminal activity. The U.S. mentor must instead mentor the ANA commander and teach them to use their investigative authority under the AUCMJ and the

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developed over time, this fact finding mission by government and defense counsels to seek the truth seems to have significant advantage in finding the truth, as opposed to endless discovery motions, objections and hearings, and trial by ambush. We American's tend to take shelter in the tactical shadows of technical legal process, whereas the Afghan JA seeks to cooperatively seek the truth with his counterpart. We should not force every nuance of the American legal system onto the Afghans as they will find their own way on the road to a functional military court system.

[50] At this writing Brigadier Shir is the ANA Head of Legal.

[51] ANA LAW ON MILITARY COURTS, *supra* note 23, arts. 11 and 12.

[52] *See* AFGHANISTAN'S DOMESTIC LEGAL FRAMEWORK 448 (2005).

[53] Commander Adrian Rowe (U.S. Navy), LCDR Scott Johnson (U.S. Navy), CSTC-A JAs.

[54] A common occurrence is a request from an ANA commander for more of anything, for instance, ammunition, saying they have none, when they have a full connex. This inclination to horde results at time with cross accusations between coalition partners of why one is not supporting the ANA when in fact they are more than fully supported and just want more.

punitive articles to address substantiated allegations. As part of the mentoring process, the U.S. mentor must follow up to ensure that something is actually done about the allegations. After a mentoring session on allegations, the ANA commander will often tell the U.S. mentor that they support the AUCMJ, that it is a great system, and that they will take action. However, just because the Afghan commander says they will do something does not mean that they will not find some reason to avoid taking any dispositive action.[55] For example, a corps commander referenced the end of Ramadan, (the Eid) as a reason to release a major military criminal from confinement. Fortunately, the CJA was able to mentor the ANA SJA, RCAC commander, and corps commander and dissuade them from releasing the prisoner.

The ANA SJAs and Corruption in the ANA and Government of Afghanistan

Serving as the SJA for an ANA corps or brigade is not only difficult, it is dangerous in Afghanistan. Senior ANA officers have been known to threaten SJAs and their families if the SJA advises or counsels others within the command to proceed with a corruption or criminal investigation. The investigative process is further hindered when the major suspects of corruption in the ANA are extended family or tribal members of individuals who are in power within the Government of Afghanistan. Even when corruption or criminal activity is addressed in the higher levels of the ANA or the Government of Afghanistan, the major suspects are often reassigned to another organization or ANA unit before evidence to support prosecution is obtained. Such reassignments occur even after an investigation is completed to avoid prosecution.

In Afghan culture, an individual's tribal or political position often trumps the results of an investigation (if one can even be initiated against the suspect) and prevents prosecution of the offender. Crimes that result in physical harm to victims are generally not tolerated in the Afghan culture, but economic "corruption," which takes resources out of the system,[56] or applies an extortion tax upon those providing or intended to receive the resources, is generally accepted as a way life in Afghanistan.[57] In short, reducing the amount of criminal activity is much easier than reducing economic corruption in the ANA and in Afghanistan in general. Economic corruption is accepted as a means of survival and many individuals have found success as a result of their corrupt actions.

Before one can mentor an ANA officer, and before the JA can advise and counsel the U.S. mentor, both the U.S. mentor and JA must discern if the ANA commander or officer can be trusted with information about allegations of corruption or criminal activity.[58] The ANA commander or officer may be related to the suspect or may be a member of the same tribe or village. Information regarding allegations shared with the suspect often leads to threats and other obstacles that interfere with the investigation. It is not uncommon for evidence to be destroyed or disappear when turned over to the ANA for investigation.

Humiliation is a significant issue in Afghan culture. So much so that several punitive Articles in the AUCMJ address humiliating acts.[59] Practically, throughout the mentoring process, JAs and U.S. mentors must look for ways to allow the commander or Soldier to save face and avoid humiliation when addressing crimes and corruption in the ANA. Afghans may refuse to provide evidence against a relative, or a person in a position of power, if the risk of humiliation is too great.

Where the ANA officer (or the family) is considered to be a risk, the U.S. mentor must report the allegations up the successive chain of command to address them at a higher level. Allegations must often be dealt with at the ANA Corps level because MOD has limited ability to conduct investigations. Unfortunately, some cases have established a clear need for a strong central investigative organization similar to the Army's Criminal Investigation Division Command (CID).[60] The use of ANA special prosecutors might also be useful to decrease or end personal threats against ANA SJAs, brigade JAs, and their prosecutors. The good news is that through U.S. JA mentoring, the ANA JA, and especially the ANA commanders, are seeking guidance, support, and direction from higher headquarters. Appropriate actions, that include some major

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[55] Common stated causes for inaction include: lack of resources, computers (that they cannot operate anyway, but it's a status symbol to have), lack of time, and that they are overworked. None of these reasons have appeared to be real causes for inaction.

[56] In particular, U.S. resources that presumptively the United States will replace.

[57] For instance, the ANA pay officer that requires "tips" to pay the troops, or the "commander" that requires the local nation contractor to pay money to continue to operate in his area.

[58] The Phoenix SJA tracks reports from the field on crime and corruption and seeks to push those reports back to the mentors for further action or uses them as an update for incoming mentors. The Phoenix SJA also tracks the "reassignment" of ANA officers based on their misconduct and the reassignment given by their superiors as a result, to provide general situational awareness for the mentors, and to see if the action has any effect.

[59] AUMCJ LAW OF MILITARY COURTS arts. 22 and 23 (2005).

[60] At this time efforts are being made to form up, select, train and employ ANA CID agents, but the concept is still in its infancy.

prosecutions are taking place within the ANA Military Justice System, such as the general officer who was placed in pre-trial confinement and prosecuted for assaulting one of his Soldiers so badly that the Soldier was hospitalized.[61] This trial of a general officer is a first in the history of the ANA and sends the strongest possible message to the ANA Soldiers regarding the use of the AUCMJ and the inception of the rule of law in Afghanistan.

Results of Investigations

Punishment of the accused does not always result even when there is a comprehensive investigation and prosecution resulting in a conviction. Afghan confinement facilities are limited to informal detention facilities on the ANA corps grounds, often with fencing on three sides and an open door without guards.[62] Owing to an agreement with MOD legal, civilian confinement facilities are typically used for military prisoners. Civilian confinement facilities are not a good option because there is no military oversight of the military prisoners.

The AUCMJ is not yet widely used within the ANA and is only minimally effective in addressing the long-standing problem of crime and economic corruption in Afghan culture. Similar to the United States Old West after decades of war, and changes in national authority, the rule of law is slowly being introduced to the Afghanistan people. Minor offenders engage in economic corruption in part because they see major offenders getting away with the same thing. Offenders are relatively few, but crime and corruption appears pervasive based on reports of criminal activity and corruption and from media sources. Corruption and abuse of Soldiers by ANA officers and senior NCOs discourages service in the ANA and is a major hindrance to recruiting and Soldier retention.

Application of the AUCMJ and enforcement of its provisions is a critical tool in reducing crime and corruption in the ANA. This is a time consuming task, often requiring major cases that involve powerful or politically connected officers to go directly to the highest levels of MOD for investigation and resolution.

Conclusion: JAG at the Tip of the Spear

The United States has significant strategic reasons for helping the ANA, the ANP,[63] and other Afghan security forces, become operational and better skilled at providing security and law and order for the people of Afghanistan. Strategic goals for U.S. foreign policy in Afghanistan include assisting Afghanistan in becoming a self-sufficient stable democracy, denying safe harbor to terrorists, and improving the friendship with the United States in the Middle East. The United States' best course of action in the short term is to address victim-based crime and accept that economic corruption within the Afghan culture will not disappear overnight and methods must be sought to address this issue over the long term. Still, crime and corruption adversely affect ANA soldiers (and the ANP), and detracts from recruiting and personnel retention. The issue needs to be forcefully addressed by U.S. mentors with the highest levels of U.S. command in the Afghan CJOA.

All coalition forces, including the United States, agree that the rule of law is critical for the development of the ANA, the ANP, and Afghanistan as a country. United States JAs are major contributing factors in establishing the rule of law in the ANA (and soon the ANP) through mentoring of the ANA JAs, counseling and training U.S., ANA, and ANP mentors in Afghan law; and more importantly, by assisting in the resolution of crime and corruption cases in the ANA. More recently, the JAs have begun to assist the Government of Afghanistan with ANP corruption issues as CSTC-A and Phoenix change the priority of effort to the reconstruction of the ANP.

In the Afghanistan CJOA, The Judge Advocate General's Corps Regiment through CSTC-A and Phoenix JA play an important role in the U.S. achievement of its strategic goals in Afghanistan. The U.S. JAs are not only the tip of the spear, they sharpen the tip of the spear and help the rule of law stick to the fabric of Afghanistan's developing democracy.

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[61] The particular ANA general officer also was probably one of the many ANA Officers who frocked themselves to a higher rank without objection by their superiors.

[62] At the 203rd Corps Detention B-Hut post trial confinees just walked away. Moreover, in September 2006, the 201st Corps ANA guards allowed a prisoner to escape.

[63] The 207th RCAC, Herat, played a key role in initiating the Phoenix mentoring for the ANP, with follow on missions now in the 209th (MeS) and 205th (Kandahar). Private contractors work the regional training facilities in conjunction with the Germans, but little is done with the police that are fielded for training and mentoring. In order to make the 62,000 (goal now 82,000) strong ANP an effective force, training, proper pay, and elimination of corruption is an essential task. At this time, the Phoenix SJA has assembled and developed legal materials to provide to the senior mentors for use in the field, as well as conducted initial legal training for ANP ETTs.

Note from the Field

A Question of Priority: Issues Impacting Priority of Payment under the Federal Medical Care Recovery Act

Captain David P. Lewen, Jr.[1]

In FY 06, the US Army asserted $32 Million in FMCRA claims, but recovered $16 Million.[2]

Introduction

You are the new medical affirmative claims (MAC) attorney assigned to a large military treatment facility (MTF). As such, you are charged with implementing a vigorous and robust MAC recovery operation, and you know that any such operation depends on a solid understanding of the statutory cornerstone upon which the authority for government recovery rests—the Federal Medical Care Recovery Act (FMCRA).[3]

As you read the statute, you understand that the FMCRA provides the government with an independent right to recover medical expenses furnished to an injured federal beneficiary if the injury occurred under circumstances creating tort liability upon some third person.[4] You also note that, in the case of a tortiously injured service member, the government may recover lost pay for the duration that the service member is unable to perform their regular military duties.[5] Using this statutory authority, you begin asserting government claims against tortfeasors and, more commonly, the tortfeasors' liability insurance carriers.[6]

After sending out a few demand letters, you begin to see a trend in the type of responses you receive from the insurance companies. The general theme of the responses essentially state the following: "We are in receipt of the federal government's notice of claim for medical expenses in this case; however, we are currently negotiating with the plaintiff's attorney, the government's claim will be addressed after settlement has been reached with the plaintiff's attorney."[7]

This raises concerns as to the priority of payment. Not happy being told, essentially, to sit on the sidelines and wait until a settlement is first reached with the plaintiff's attorney (and hope there is money left over to satisfy the government's claim), you immediately start researching the law to find ways to strengthen your argument that the government's claim should be paid first. In many cases, the question of priority of payment can have a direct and substantial impact on the nature and extent of recovery available to the government.

Priority under the FMCRA

You start your research by returning to the FMCRA to see if it sheds any light on the order and prioritization of claims made against the tortfeasor and his insurance company after a tort has been committed. After scrutinizing the statute, you

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[2] For FY 06, the total value of claims made was $32,457,982.59 with a total recovery of $16,214,647.09. Fiscal Year 2006 claims collection data provided by US Army Claims Service, Fort Meade, Md. (Feb. 26, 2007) (on file with author).

[3] 42 U.S.C. § 2651-2653 (2000).

[4] *Id.* § 2651(a).

[5] *Id.* § 2651(b).

[6] Sending a written demand to the tortfeasor and his insurance carrier is one way of asserting the government's right to recovery. There are a number of other procedural mechanisms by which the Recovery Judge Advocate (RJA) may assert the government's right. *See id.* § 2651(d). *See also* Captain Dominique Dillenseger & Captain Milo H. Hawley, *Sources of Medical Care Recovery in Automobile Accident Cases*, ARMY LAW., Oct. 1991, at 51-56. *See generally* Major Bruce E. Kasold, *Medical Care Recovery—An Analysis of the Government's Right to Recover its Medical Expenses*, 108 MIL. L. REV. 161, 167 (1985).

[7] This article assumes that no "attorney-representation agreement" is in effect, and that the RJA is personally pursuing the government's claim.

find that it is conspicuously silent on the issue of priority. This omission is puzzling because the issue of priority is so important in the world of liability insurance, where there is a finite source of recovery, yet there can be seemingly infinite claims made against that finite source of recovery.[8]

A few years after the FMCRA became law, a federal district court examined the FMCRA's legislative history to see if Congress had addressed the issue of priority of payment. In *United States v. Ammon*[9] the court looked specifically to a letter written by then Comptroller General of the United States, the Honorable Joseph Campbell, to the Chairman of the House Committee on the Judiciary, the Honorable Emanuel Celler.[10] The court observed:

> In Mr. Campbell's letter . . . , Mr. Campbell called to the Committee's attention that the bill did not specifically require an injured person who recovers damages from a third party tortfeasor through his own action, by suit or otherwise, to pay the United States out of such recovery, nor did the proposed bill *specify priorities* for distributing the proceeds thus obtained. Mr. Campbell stated that he had been informally advised that this matter would be covered by regulations to be issued by the President. However, it was his view that the inclusion of this matter in the bill itself would carry more weight and be less subject to possible further questions or attack than the same subject matter appearing solely in regulations.[11]

The court further noted that, despite the Comptroller General's recommendation to include a priority provision within the statute, Congress elected to refrain from including any specific priority language within the statute.[12] Instead, Congress delegated to the President the authority to prescribe the regulations to implement the law; the President then delegated to the Attorney General the authority to implement the regulations necessary to implement the law.[13] The Department of Justice[14] and the Department of Defense[15] both promulgated regulations which implement the FMCRA; however, neither set of regulations address the issue of priority of payment under the FMCRA.

Priority under FMCRA Addressed in Case Law

Despite the statutory and regulatory silence on the issue, some federal district courts and circuit courts of appeal have attempted to resolve issues related to priority of payment under the FMCRA.[16] As will be shown, it appears that the federal courts have determined that the federal government does not enjoy a priority of payment under FMCRA.

In *Commercial Union Insurance Company. v. United States*,[17] the United States Court of Appeals for the District of Columbia Circuit directly addressed the issue of priority of payment under the FMCRA. In this case, Commercial Union issued a $25,000 policy to Samir Mohamed Said Ahmed.[18] Mr. Ahmed negligently injured a federal healthcare beneficiary, William Scott,[19] who, along with the federal government, claimed the proceeds of the Commercial Union policy.[20]

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[8] These claims include special damages such as medical expenses, as well as general damages such as pain and suffering, in addition to the attorney's fees and costs.

[9] 242 F. Supp. 461 (N.D. Fla. 1966).

[10] *Id.* at 463.

[11] *Id.* (emphasis added).

[12] *Id.* at 464.

[13] *Id.*

[14] 28 C.F.R. §§ 43.1- 43.4 (2006).

[15] 32 C.F.R. §§ 537.21- 537.24 (2006).

[16] *See, e.g.*, Holbrook v. Andersen Corporation, et al., 996 F.2d 1339 (1st Cir. 1993) (holding that the government may not collect out of a previously negotiated settlement between the injured person and the tortfeasor, the government must invoke the FMCRA and proceed against the tortfeasor and seek to establish the tortfeasor's tort liability); Allen v. United States, et al., 668 F. Supp. 1242 (W.D. Wisc. 1987) (observing, in dicta, that the injured party be made whole before the government may be reimbursed under the FMCRA).

[17] 999 F.2d 581 (D.C. Cir. 1993).

[18] *Id.* at 583.

[19] The government's medical bills for Mr. Scott totaled $18,586. *Id.* at 584.

[20] *Id.* at 583.

Commercial Union offered policy limits to Mr. Scott; however, the government continued to demand payment for its medical expenses.[21] Consequently, Commercial Union filed a complaint for interpleader in the district court, asking the court to declare the disposition of the fund.[22]

The district court ruled that the government's claim had priority over the injured beneficiary, Mr. Scott.[23] However, the appellate court disagreed and reversed.[24] The case was then remanded so that the district court could divide the fund on a pro rata basis.[25] The court arrived at this decision by first finding that the FMCRA does not give priority to the government. The court, turning to the equitable principles governing interpleader, then addressed the question as to how to divide the insurance policy.[26]

In its analysis, the court first took up a detailed examination of the statutory language contained in the FMCRA. The court initially observed "that the Act does not speak to the issue of priority."[27] However, the court did find that § 2651(a) distinguishes two types of damages: "the medical expenses incurred by the Government on behalf of the injured employee and the damages the employee is entitled to receive, net of those expenses."[28] The court maintained that the statute grants to the United States the right to recover its medical expenses; however, "there is nothing in its language to suggest that the Government's claim has a *priority* over the employee's."[29] Indeed, the statute itself says the government's claim is subrogated to the injured employee's claim,[30] and as subrogee the government "does not secure rights superior to those of its employee."[31]

Finding that § 2651(a) provided no support for the government's contention that it has priority, the court turned its attention to § 2652(c), and further dismantled the government's priority argument. Section 2652(c) provides that, "No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of his damage not covered hereunder." Government counsel asserted that this section served to protect the injured person's right to recover damages.[32] However, the court found that the government could not reconcile its position that § 2652(c) protects the injured employee's right to recover damages, and simultaneously argue that the statute grants the government priority over its injured employee.[33] The court averred that since the government's construction of the FMCRA "would render § 2652(c) useless, and our reading gives it meaning, the Government's version cannot stand."[34] *Department of Army Pamphlet 27-162*, provides additional guidance as to how § 2652(c) impacts government recovery.[35]

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[21] *Id.* at 584.

[22] *Id.* at 583 (citing Commercial Union Ins. Co. v. United States, No. 89-1108, mem. op. at 5, 1991 U.S. Dist. LEXIS 14409 (D.D.C. Oct. 10, 1991)).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 586.

[28] *Id.*

[29] *Id.* (emphasis added).

[30] § 2651(a).

[31] *Commercial Union*, 999 F.2d at 587.

[32] *Id.*

[33] *Id.*

[34] *Id. See In re* Surface Mining Regulation Litg., 201 U.S. App. D.C. 360, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("Effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.") (quoting 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973)) (internal quotation marks omitted).

[35] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 14-11d (8 Aug. 2003) states:

> [§ 2652(c)] precludes a defendant from using an agency's administrative determination of nonliability or agreed percentage-of-damages compromise against the injured party. When the defendant's assets and insurance are insufficient to satisfy all claims, reference must be made to the Government's statutory authority to compromise or waive claims on grounds of hardship to the injured party.

Id. para 14-11d.

Finally, the government invoked § 2652(b)(2) to support its priority position.[36] The government argued that this section of the statute would be unnecessary if the government's claim did not enjoy priority over the injured employee, because the government could essentially waive its claim by deciding not to bring suit.[37] The court did not find this argument persuasive stating "a Government waiver is not the same as a decision not to sue."[38] The court further stated that, "because the FMCRA creates the possibility of multiple litigation, the waiver is necessary to encourage and/or allow settlements."[39] Consequently, the court held, this section of the FMCRA is necessary and serves a purpose, notwithstanding the fact that the FMCRA is silent as to priority.

Despite the holding that the FMCRA does not grant the government priority over the injured party/plaintiff, the court also found that, "As we read the statute, it does not grant priority to *either* claimant . . . ."[40] Therefore, plaintiffs' attorneys nor insurance companies may rely on *Commercial Union*[41] as support for the proposition that the FMCRA grants the injured party a priority over the government's claim.

Commercial Union serves as a definitive case on the issue of priority of payment under the FMCRA. Despite the result in *Commercial Union*, the RJA can and should work to find ways to leverage government claims so that a maximum recovery may be achieved. Below are ways the RJA can accomplish this endeavor.

Become a Special Assistant U.S. Attorney

At the outset, the RJA should follow the Army's guidance and seek an appointment as a Special Assistant United States Attorney (SAUSA).[42] Establishing a good working relationship with the civil division of your district's U.S. Attorney's Office is a crucial element in any successful MAC operation, as the U.S. Attorney's Office is ultimately responsible for enforcing compliance with federal statutes, such as the FMCRA.

A SAUSA appointment will provide the RJA with the necessary authority and clout to negotiate, settle, and collect federal medical claims quickly and efficiently. Additionally, a SAUSA appointment will have the added effect of increasing recoveries due to increased litigation or the credible threat of litigation.

Assert FMCRA Claims Personally

Once appointed as a SAUSA, there should be very few instances when an "Attorney-Representation Agreement"[43] is utilized. It is imperative that the SAUSA ensure that the injured party's attorney is not attempting to assert, negotiate, or settle the government's claim with the tortfeasor or the tortfeasor's insurance company, unless the attorney has received prior written authorization from the government.[44]

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[36] This section authorizes the head of the relevant agency to waive any claim for the convenience of the government, or if he determines that collection would result in undue hardship upon the injured party.

[37] *Commercial Union*, 999 F.2d at 587.

[38] *Id.*

[39] *Id. See generally* United States v. Housing Authority of Bremerton, 415 F.2d 239, 241 (9th Cir. 1969) (identifying the possibility of multiple litigation under the FMCRA); United States v. York, 398 F.2d 582, 585-87 (6th Cir. 1968) (recognizing that the FMCRA does not bar government from exercising its independent right of recovery, despite the fact that the injured beneficiary had settled within six months of treatment).

[40] *Commercial Union*, 999 F.2d at 589.

[41] It is noteworthy that the *Commercial Union* opinion did not discuss, or even cite *Allen*. Allen v. United States, et al., 668 F. Supp. 1242 (W.D. Wisc. 1987). It is reasonable to infer from this omission that *Allen* has limited precedential or persuasive value.

[42] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 14-18a (1 July 2003).

[43] 32 C.F.R. § 537.24(a)(2) (2006) authorizes agreements that allow the injured party's attorney to assert, on behalf of the government, the government's claim for medical expenses.

[44] *Id.*

The beginning of this article referenced a "typical" response received from the tortfeasor's insurance carrier.[45] Upon receiving this type of response, the SAUSA should immediately call the insurance carrier and draft a letter stating that, per 32 C.F.R. § 537.24, neither the injured party nor the injured party's attorney has authorization to assert, negotiate, or settle the government's FMCRA claim, and any settlement reached with the injured party and/or his attorney will not be binding on the government. This fact should also be communicated to the injured party's attorney. The SAUSA, not the plaintiff's lawyer, should personally and zealously assert the government's FMCRA claims on behalf of the government.

Case law further strengthens the SAUSA's ability to assert government FMCRA claims. The case of *McCotter v. Smithfield Packing Co.*[46] addressed the issue of whether an injured party may present evidence of government-furnished medical expenses, or whether the claim belonged solely to the United States pursuant to the FMCRA. Plaintiff McCotter, a Department of Agriculture food inspector, was injured when a hog carcass fell on her while she was inspecting defendant Smithfield's meat packing plant.[47] Ms. McCotter subsequently sued the defendant for, among other things, the cost of the medical treatment provided to her by the government as a result of her injuries caused by the falling hog.[48] The court, *sua sponte*, raised the question of whether, since the United States was not a party to the action nor had the United States authorized plaintiff to proceed on its behalf, the plaintiff could even present evidence of and recover for her government-furnished medical expenses.[49]

The court held that the FMCRA claim for medical expenses, along with the ability to put on evidence of said expenses, belonged solely to the United States.[50] The court unequivocally declared: "The *individual plaintiff has no claim whatsoever for these damages*, and should not be permitted to put on evidence of these damages unless the United States will recover those monies."[51] *McCotter* makes clear that FMCRA claims belong to the United States, and may be pursued only by the government.[52]

The case of *United States v. Guinn*[53] provides additional authority for the SAUSA when negotiating with insurance adjusters or counsel for the insurance company. *Guinn* is an excellent case because it articulates a principle that resonates within the insurance industry: double payment.

Defendant Guinn negligently caused a motor vehicle accident in which a service member was killed and his dependents injured.[54] Guinn's insurance company settled with and executed a release to the injured dependents, who were federal beneficiaries and received their accident-related medical care at Walson Army Hospital, Fort Dix.[55] The government initiated suit against Guinn after the injured beneficiary failed to pay the United States for the medical care furnished to her and her family as a result of the accident.[56]

The court ultimately held that Guinn and his insurance carrier were liable to the government under the FMCRA, despite the prior payment to the injured party.[57] In arriving at its decision, the court made several observations. First, the court found that insurance carriers are presumed to know about the FMCRA.[58] Second, the court stated that:

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[45] *See supra* note 7 and accompanying text.

[46] 868 F. Supp. 160 (E.D. Va. 1994).

[47] *Id.* at 161.

[48] *Id.*

[49] *Id.* at 162.

[50] *Id.* at 163.

[51] *Id.* (emphasis added).

[52] The court stated that the plaintiff's attorney may present the Government's claims for medical damages *if* the Government gives express permission to the plaintiff's attorney. *Id.*

[53] 259 F. Supp. 771 (D. N.J. 1966).

[54] *Id.* at 772.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 774.

[58] *Id.* at 773.

> Generally, insurance carriers investigate all the facets of a claimed injury prior to entering into settlement agreements. They know the length of time a claimant has spent in the hospital, the degree of injury, and the extent of treatment accorded claimant. In particular, in the instant case, it would seem of necessity that defendant's carrier knew of the fact of decedent's military status and his family's service dependency, and of the medical services rendered at the Fort Dix hospital.[59]

Finally, the court found that *federally-funded medical expenses are non-compensable* to tortiously injured government beneficiaries, and any payments to the injured party for these expenses are rendered at the insurance carrier's peril.[60] Consequently, the insurance carrier in *Guinn* was compelled to pay for the same medical expenses twice.

Conclusion

Even though *Commercial Union* held that the government does not enjoy the right to be paid first out of any insurance proceeds, the RJA can still aggressively assert FMCRA claims and achieve substantial recoveries for the government. First, the RJA should seek appointment as a SAUSA and, once appointed, assert claims personally on behalf of the government against tortfeasors and their insurance companies. Next, the SAUSA should take advantage of the FMCRA, the applicable CFRs and ARs discussed in this article, and the principles discussed in *McCotter* and *Guinn*, when negotiating the government's claim with insurance companies.

Utilizing these steps will have an end result of increasing government recoveries collected under the FMCRA—and these recoveries ultimately help to improve military healthcare for all military healthcare beneficiaries.[61]

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[59] *Id.*

[60] *Id.* at 774.

[61] The author thanks paralegals Mr. Keith DeBarge and Mr. Carl Garner for their input in this article. The author also extends thanks to Mr. Tom Jackson, USARCS, for his helpful suggestions in the development of this article. Finally, the author wishes to express gratitude to Assistant U.S. Attorney Rudy Renfer and his staff at the Civil Division, U.S. Attorney's Office, Eastern District of North Carolina.

Official Federal Representation Against State Restraining Orders Following the Armed Forces Domestic Security Act of 2002

Major Joshua M. Toman[*]

Any man is educated who knows where to get knowledge when he needs it, and how to organize that knowledge into definite plans of action.[1]

Introduction

Captain (CPT) Samuel Adams concludes the final pre-deployment formation for Headquarters and Headquarters Company (HHC) at 1530 on Thursday and heads to his office. Before reaching it, he notices a military policeman (MP) and a deputy from the sheriff's office coming up the sidewalk. Judging by their demeanor, it is obvious this is not a social visit. The deputy informs CPT Adams that he is being served with a temporary restraining order (TRO) from the local county court. Captain Adams reads the TRO which clearly states that he cannot disregard the order until the county court modifies or revokes it. The order also states there is a hearing at the local courthouse tomorrow, Friday, at 0900. The order specifically prohibits CPT Adams from contacting or approaching Private (PVT) Norman Bates, the protected party, or being within 500 feet of PVT Bates's residence or place of employment. Private Bates is assigned to the HHC and works in the supply room adjacent to CPT Adam's office; and PVT Bates lives in the barracks directly above CPT Adam's office.

Private Bates alleges several things in the request for the order: CPT Adams is stalking PVT Bates both on and off-post; CPT Adams is having third persons harass PVT Bates; CPT Adams is repeatedly visiting PVT Bates's place of employment without being invited; CPT Adams has verbally harassed and threatened PVT Bates in the presence of others; and CPT Adams has access to firearms. The TRO was sworn out today, which was the first day PVT Bates was allowed to use pass privileges in nearly a month. Private Bates had recently received both a company grade and a field grade Article 15 based on various acts of misconduct.[2]

The MP assures CPT Adams that the TRO is not a joke and then escorts him 500 feet away from the HHC, even though the company will be deploying at 0600 on Saturday, less than 40 hours away. As the MP and deputy leave, a bewildered CPT Adams calls the installation's office of the staff judge advocate (OSJA). When the non-commissioned officer in charge (NCOIC) of legal assistance answers the phone, CPT Adams hurriedly relays that he has been served with a county court TRO ordering him to stay away from one of his Soldiers, PVT Bates. Before CPT Adams can explain that PVT Bates is a disgruntled Soldier, the NCOIC interrupts. The NCOIC tells CPT Adams that state orders are not valid on federal installations, but if CPT Adams is worried about it, he will have to hire a civilian attorney because it is a state court issue on what appears to be a personal matter.

The NCOIC gives CPT Adams the telephone number for Chris Cox, a former Army judge advocate who has a civilian law office across from the county courthouse. Captain Adams makes the call and Mr. Cox patiently listens to all the details. Mr. Cox tells CPT Adams to bring his checkbook, the TRO, and PVT Bates's performances files, and come down to his office immediately. At the hearing the next morning, Mr. Cox argues that the allegations are unsubstantiated; CPT Adams has broad discretion "to maintain the order, security, and discipline"[3] in his unit; and that even federal judges are hesitant to interfere[4] with official military functions[5] as seen in this case. The judge rescinds the TRO, ruling that the basis of the TRO

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[1] NAPOLEON HILL, THINK AND GROW RICH 76-77 (Ballentine Books 1983) (1960).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 2, § 815, at A2-4 (2005) [hereinafter MCM]; *see also* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 3 (16 Nov. 2005).

[3] *See generally* Jennifer Heintz, *Safe at Home Base? A Look at the Military's New Approach to Dealing with Domestic Violence on Military Installations*, 48 ST. LOUIS L.J. 277, 281 (2003) (referencing commander's authority to exclude persons from military installations under *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973)).

[4] Directing the court's attention to *Orloff v. Willoughby*, 345 U.S. 83 (1953), which held:

> We know that from top to bottom of the Army the complaint is often made . . . that there is . . . objectionable handling of men. But judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

was unfounded and CPT Adams was performing official duties. Captain Adams deploys the next morning, but eventually hears that he may have been entitled to official representation because of the official nature of the circumstances surrounding the TRO. Regrettably, after numerous memorandums, requests, faxes, e-mails and phone calls, CPT Adams learns that he will not be reimbursed for his legal fees.

This article presents three issues relating to TROs: (1) Do state-issued protection orders have any force or effect on a military installation or upon official military functions performed off the installation?; (2) How do commanders, leaders, or supervisors get official Federal legal representation?; and (3) What must judge advocates (JAs) do to determine the scope of employment and assist in the request for representation process? A recent case addressed these issues when a company commander paid $1,000 to a civilian attorney to quash a TRO.[6] The commander later sought reimbursement from the U.S. Department of Justice (DoJ).[7] Since state protection orders must be enforced on military installations and may impact official duties off the installation, it is crucial for JAs to be familiar with the request for representation process.[8] As seen in the opening quote, the purpose here is to educate readers on the issue and mark the trail to the relevant regulations in order to prepare JAs for when these issues arise on the installation.

Background on Protection Orders

The Violence Against Women Act (VAWA)[9] requires states to give full faith and credit to all valid state protection orders, both civil and criminal, no matter where the order was issued. The rationale behind the VAWA was that persons who cross jurisdictions to pursue their victims are more likely to engage in violent behavior.[10] Congress, therefore, felt it was imperative that such persons would be arrested for violating the terms or conditions of a protection order anywhere in the United States. Protection orders are defined as "any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person."[11] These orders can be obtained ex parte in most jurisdictions and remain in effect until they are modified by the court or expire.[12] However, the VAWA, did not encompass the entire United States because many military bases fall under exclusive federal jurisdiction,[13] and therefore do not have the same enforcement obligations regarding state protection orders.[14]

Id. at 93-94.

[5] The United States and its agents or officials, if working within the scope of employment or their official capacity, are immune to suit unless Congress consents. *See generally* Hawaii v. Gordon, 373 U.S. 57 (1963); Dugan v. Rank, 372 U.S. 609 (1963).

[6] Phelps v. Sabo J-0205-CV-002003-0920 (Ariz. Justice Ct., 29 July 2003).

[7] *See* Information Paper, Major (MAJ) Louis Birdsong, Judge Advocate, Military Personnel Section, Litigation Division, U.S. Army, Arlington, Virginia, subject: Request for Representation Update (29 Sept. 2003) [hereinafter Information Paper] (on file with the author). The court determined the TRO claim was without merit but did not address whether the commander was acting in her official capacity. *Id.*

[8] In the actual case described herein, both the trial counsel and legal assistance attorney neglected to categorize the commander's actions as within the scope, and failed to pursue official representation. *See id*. Without addressing whether such omissions are legal or professional malpractice, the attorneys' actions should garner the reader's attention that such a claim may originate. *See generally* U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS paras. 7(c), (f) (1 May 1992). More importantly, whenever JAs shoot from the hip and guess because they do not know or do not properly research responses, such actions undermine the confidence in that individual attorney and in the Judge Advocate General's Corps as a whole. Colonel Sharon E. Riley, Director Combat Developments Directorate, The Judge Advocate General's Legal Center & School, U.S. Army, Remarks during Mentor Group Session (25 Oct. 2006). Individual JAs must recognize that "[d]uty extends beyond everything required by law, regulation, and orders" because "Army leaders commit to excellence in all aspects of their professional responsibility." U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE para. 4-15 (Oct. 2006) [hereinafter FM 6-22]. Likewise supervisors need to remember that inculcating a sense of duty, or any of the other Army Values, requires commitment, not mere compliance. E-mail from Lieutenant Colonel (LTC) (Ret.) Maurice A. Lescault, Assoc. Dean and Dir. of the Professionalism Development Program, The Judge Advocate General's Legal Center & School, U.S. Army (4 Dec. 2006) (on file with author). Since "[c]ommitment-focused influence generally produces longer lasting and broader effects. Whereas compliance only changes a follower's behavior, commitment reaches deeper—changing attitudes and beliefs, as well as behavior." FM 6-22, *supra*, para. 7-6.

[9] Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40001, 108 Stat. 1902; 18 U.S.C. §§ 2265-66 (LEXIS 2007).

[10] PROTECTING VICTIMS OF DOMESTIC VIOLENCE: A LAW ENFORCEMENT OFFICER'S GUIDE TO ENFORCING ORDERS OF PROTECTION NATIONWIDE 3, INT'L ASS'N OF CHIEFS OF POLICE (2002).

[11] 18 U.S.C. § 2266(5).

[12] *See, e.g.*, GA. CODE ANN. § 19-13-3 (2007). To justify the court issuing an order without notice to the defendant, the plaintiff must allege reasonable evidence of harassment and that serious harm may occur if the order is not issued immediately. *Id*. § 19-13-3(b). Temporary orders may last up to thirty days. *Id*. § 19-13-3(c).

[13] Major Stephen E. Castlen & LTC Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 116 (1997) (describing background, analysis and provisions of federal exclusive jurisdiction). *See also* U.S. DEP'T OF ARMY, REG. 608-18, PERSONAL AFFAIRS: THE ARMY FAMILY ADVOCACY PROGRAM app. D (30 May 2006) [hereinafter AR 608-18].

This jurisdictional gap, and several highly publicized instances of domestic violence and murder by military personnel,[15] led to the Armed Forces Domestic Security Act (AFDSA) of 2002.[16] The AFDSA mandated that: "[a] civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order."[17] Preventing domestic violence within the military became an even higher priority.[18] The Department of Defense (DoD) issued clear guidance that "Commanders and installation law enforcement personnel shall take all reasonable measures" to meet the mandate of the AFDSA on all DoD installations.[19] Further, no discretion or military necessity exception exists to ignore such orders because "[a]ll persons who are subject to a civilian order of protection shall comply with the provisions and requirements of such order whenever present on a military installation."[20] Lastly, *Army Regulation 27-40* rules that Army officials will not prevent or evade the service of restraining orders arising from their official duties.[21] In other words, even if service of the TRO was not proper, the terms and conditions[22] of the order are valid [23] by virtue of its existence.

The likelihood and potential impact[24] of these protection orders is significant because many state laws for harassment[25] or stalking[26] could easily be manipulated to encompass official duties. Recognizing there may be valid protection orders

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[14] Armed Forces Domestic Security Act of 2002, 148 CONG. REC. H7,917-20 (2002) (statement of Rep. John M. McHugh, Member, Subcomm. on Military Personnel, House Comm. on Armed Serv.).

> The Members have heard about the loophole. I happen to have been here in 1994 when I think the Congress took a very necessary, very bold, and a very appropriate step in passage of the Violence Against Women Act; but it did, as the speaker heard, create I think an unintentional, certainly a very unnecessary and very unworthy loophole, that of enforcement of civilian protection orders as issued outside the bases and their applicability on those military installations.

Id. at 7,919.

[15] *See* CBS WORLDWIDE INC., *4 Wives Slain In 6 Weeks At Fort Bragg*, CBS NEWS, July 26, 2002, http://www.cbsnews.com/stories/2002/07/31/national/main517033.shtml. Although these murders were the impetus for the Armed Forces Domestic Security Act (AFDSA) all four cases the spouses were murdered at their off-post residences. *Id. See also* Heintz, *supra* note 3, at 277 (citing Ron Martz, *Lawmakers Study Abuse in Military; Fatal Violence Spurs Search for Solutions*, ATL. J.-CONST., Oct. 1, 2002, at A3).

[16] Pub. L. No. 107-311, § 2, 116 Stat. 2455 (2002); 10 U.S.C. § 1561a.

[17] 10 U.S.C. § 1561a(a); *see also* 10 U.S.C. § 1561a(b) (defining that a civilian order of protection is the same as the term "protection order" under 18 U.S.C. § 2266(5)).

[18] *See, e.g.*, National Center on Domestic and Sexual Violence (NCDSV), *The Military's Response to Domestic and Sexual Violence*, http://www.ncdsv.org/ncd_militaryresponse.html (last visited 22 May. 2007) (providing an overview of Department of Defense (DoD) domestic violence and sexual assault programs with links to policies, initiatives, and statistics).

[19] Memorandum, The Under Secretary of Defense, U.S. Dep't of Defense, for Secretaries of the Military Departments, subject: Implementation of the Armed Forces Domestic Security Act (10 Nov. 2003).

[20] *Id.* The memorandum directs the Secretaries of the Military Departments to issue regulations that state:

> [P]ersons subject to the [Uniform Code of Military Justice (]UCMJ[)] shall comply with civilian and military orders of protection and that failure to comply with either may be prosecuted under Article 92, UCMJ . . . . A DoD civilian employee who violates a civilian order of protection while on a military installation is subject to appropriate administrative or disciplinary action . . . .

Id. Army regulations require unit commanders to "[p]rovide written military no-contact orders, as appropriate; counsel [S]oldiers: and take other actions, as appropriate, regarding compliance with civilian orders of protection for victims of spouse abuse." AR 608-18, *supra* note 13, para. 1-8b(8).

[21] U.S. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION para. 2-3a (19 Sept. 1994) [hereinafter AR 27-40].

[22] Recognizing the uniqueness of military life, courts may try to balance the need for protection with the need for military personnel to perform military duties. The result may be vague and confusing orders which commanders interpret at their own peril. *See, e.g.*, Phelps v. Sabo J-0205-CV-002003-0920 (Ariz. Justice Ct., 29 July 2003). An actual example of such dangerously vague terms appears in the Injunction Against Harassment issued prior to the in-court hearing. *Id.* (ordering the commander not to go near the Plaintiff's residence "except for military purposes.").

[23] Violating TROs could lead to arrest and prosecution for obstruction of justice because only the court can modify the order and nothing the plaintiff does can stop, change, or rescind the TRO. *See, e.g.*, *Phelps*, J-0205-CV-002003-0920 (appearing in the Notice portion of the Injunction Against Harassment).

[24] Plaintiffs seeking TROs are instructed to contact law enforcement personnel, not the court, if the order is violated. Consequently, the police are likely to arrest first and let the court sort out the matter. *Id.* (appearing in the Orders portion of the Injunction Against Harassment).

[25] As traditional marital relationships changed in society, domestic violence state laws were revised to encompass a wider range of recognized relationships. *See, e.g.*, N.C. GEN. STAT. § 50C-6 (LEXIS 2007) (Temporary Civil No-Contact Order). This order can apply to an acquaintance, as opposed to the personal relationship required for the domestic violence orders, and prohibits contact with the requester or entry into the requester's place of employment. *See also* WomensLaw.org, http://www.womenslaw.org (last visited 22 May 2007) (providing state-by-state legal information and resources for domestic violence).

[26] Just as societal relationships changed, technological advances had to be acknowledged to ensure the effectiveness of protection orders. *See also* GA. CODE ANN. § 16-5-90 (LEXIS 2007) (Stalking). A stalking protection order issues when someone—other than a relative or household member—allegedly conducts surveillance or harasses and intimidates another. *Id*. at (a)(1). Georgia recognizes stalking can occur by personal contact, or via numerous means of communication including computer or telephone. *Id*. Further, the increased frequency of stalking, once viewed as a problem solely for the rich and famous, forced states to draft appropriate anti-stalking laws. *See generally* United States Department of Justice, National Institute of Justice, *Domestic*

arising from actual instances of unofficial[27] and purely private stalking;[28] this note focuses solely on those orders originating from a commander's official duties.

Official Legal Representation to Quash a Protection Order

Before receiving official representation, a determination must be made that the TRO arises from actions encompassed within the individual's scope of employment.[29] Chapter 4 of *Army Regulation 27-40*,[30] provides clear and specific guidance on this point. After making the "official duty" determination, the servicing staff judge advocate (SJA) should forward the request to the Litigation Division, Office of the Judge Advocate General (LitDiv) for processing with DoJ. Simultaneously, the servicing Special Assistant U.S. Attorney[31] should contact the local U.S. Attorney's Office to apprise it of the situation and obtain its involvement as early as possible. As a matter of policy, DoJ will defend litigation against Department of the Army (DA) employees arising from official conduct.[32] Even though JAs are generally prohibited from directly contacting the main DoJ about legal proceedings;[33] "an installation SJA or legal advisor is expected to maintain a working relationship" and liaison with the local U.S. Attorney's Office.[34]

Thorough requests for legal representation are preferred, but vigilance and a sense of urgency are more essential than completeness in making the request. Since "[i]mmediate notice is particularly important when litigation involves . . . *a lawsuit against an employee in his or her individual capacity* . . . [or] *a motion for a temporary restraining order* . . . ,"[35] the following the steps below should be implemented expeditiously:

- Any person served with a TRO in which the United States has an interest[36] will provide copies to their supervisor.[37]

Violence, Stalking and Anti-Stalking Legislation, Annual Report to Congress under the Violence Against Women Act NCJ-160943 (Apr. 1996) (referencing government stalking statistics from the bulletin *The Crime of Stalking: How Big is the Problem*? and detailing history of Model Anti-Stalking Code); National Center for Victims of Crime, Stalking Resource Center, http://www.ncvc.org/src/Main.aspx (last visited Mar. 6, 2007) (providing links to state anti-stalking legislation).

[27] *See, e.g.*, CNN.com, *Astronaut Arrested on Attempted Kidnapping Charges*, http://www.cnn.com/2007/US/02/05/space.love/index.html (Feb. 6, 2007, 12:11 EST) (detailing the arrest of a U.S. Navy officer on battery and attempted kidnapping charges after allegedly trying to subdue a romantic rival of a fellow Navy commander with pepper spray and abduct her from a parking lot at Orlando International Airport).

[28] Potentially all such personal acts may be punishable under federal law. *See* MCM, *supra* note 2, UCMJ art. 120a (defining stalking as two or more occasions of repeated visual or physical proximity to a person or repeated conveyance of verbal, written or implied threats; where such conduct would cause a reasonable person to fear death or bodily harm, including sexual assault, to themselves or to an immediate family member); 18 U.S.C. § 2261(a) (LEXIS 2007) (Interstate Domestic Violence) (criminalizing travel across state, tribal, or international lines to stalk someone, where the stalker has the intent to kill, injure, harass, or intimidate the victim, the victim's family members, spouse, or intimate partners, who must be placed in reasonable fear of death or serious bodily injury).

[29] 28 U.S.C. § 2679(d) (LEXIS 2007). *See generally* ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 200, DEFENSIVE FEDERAL LITIGATION 1-2 (Jan. 2001) [hereinafter JA 200] (providing general overview of representation of government defendants). *See also* U.S. DEP'T OF JUSTICE, U.S. ATTY MAN. § 4 (2007).

[30] AR 27-40, *supra* note 21, at 9-11.

[31] *Id.* para. 1-4e(1). Army JAs and civilian attorneys appointed as Special Assistant U.S. Attorneys under 28 U.S.C. § 543 "will represent the Army's interests in either criminal or civil matters in Federal court" in specific circumstances. *Id.*

[32] *Id.* paras. 1-4a, 4-2b. *See also* 28 C.F.R. § 50.15(a) (2007). Federal employees may be provided representation in civil or criminal proceedings when sued or charged in their official capacity, "when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General . . . determines that providing representation would otherwise be in the interest of the United States." *Id.*

[33] AR 27-40, *supra* note 21, para. 1-5a. Other than a few exceptions the rule is that, "no Army personnel will confer or correspond with DOJ concerning legal proceedings in which the Army has an interest." *Id.* Generally, only attorneys from the LitDiv are authorized to appear with the DoJ on behalf of the U.S. Army. *See id.* para. 1-6a(4). *See also* 28 U.S.C. § 516 (LEXIS 2007) (stating that litigation in which agencies or officers of the United States are a party, or in which the United States has an interest, are reserved to the DoJ). Moreover, the Attorney General will supervise all litigation and direct all U.S. Attorneys, Assistant U.S. Attorneys, and Special Assistants in performance of their duties. 28 U.S.C. § 519.

[34] AR 27-40, *supra* note 21, para. 1-5b. When there is limited time to respond to the litigation, the local SJA may ask the local U.S. Attorney's Office to seek an extension or to provide representation until formal approval is obtained. *Id.* para. 4-4a(1).

[35] *Id.* para. 3-3a (emphasis added).

[36] *Id.* para. 3-1a. Such cases include: "[s]uits for damages, injunctive relief, or other action filed against the Government or against DA personnel in their official capacity," *id.* para. 3-1(a)(1); "[s]uits . . . arising from performance of official duties by DA personnel," *id.* para. 3-1(a)(2); or "[a]ctions affecting DA operations or activities or which may require official action by DA personnel," *id.* para. 3-1(a)(3).

[37] *Id*. para. 3-2a.

- The supervisor will ensure the defendant receives the original TRO and will forward a copy of the TRO and "other readily available information" to the SJA or legal adviser.[38]

- The legal adviser will telephonically notify the LitDiv of the TRO.[39]

- The legal adviser will use express mail or overnight delivery to expedite transmission of complete copies of "all process, pleadings, and related papers."[40]

- The legal adviser will investigate the actions surrounding the TRO and obtain statements if possible.[41]

- The legal adviser will advise individual defendants of the rights and conditions of representation,[42] and that if they desire representation, they should make a written request.[43]

- The legal adviser will assist the supervisor in completing a scope of employment declaration for the defendant.[44]

- The legal adviser will prepare a memorandum detailing their conclusions and a recommendation concerning representation to assist the LitDiv in making a proper representation determination.[45]

Like preparing a litigation report,[46] the legal adviser's investigation and memorandum will clarify the important facts.[47] The DoJ will not represent federal employees if: (1) "the conduct . . . does not reasonably appear to have been performed within the scope of [their] employment; or (2) "[i]t is otherwise determined . . . that it is not in the interest of the United States to provide representation to the employee.[48] The types of information that should be provided to assist in the "scope" or "interests" determination are not always obvious.[49] Therefore, legal advisers should focus on the "scope" issue because sometimes it is not "clear-cut; [and] the perimeters of official duties are often difficult to determine."[50]

The Chief, LitDiv, after reviewing the report and evidence, will forward a recommendation to the appropriate U.S. Attorney or the DoJ.[51] The default position is that the employee was acting within the scope of employment, but the DoJ uses the following criteria[52] to make representation decisions:

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[38] *Id*. para. 3-2b.

[39] *Id.* para. 3-3a (stating proper notice includes: "(1) Title or style of the proceeding; (2) Full names and address of the parties; (3) Tribunal in which the action is filed, date filed, docket number, when and on whom service of process was made, and date by which pleading or response is required; (4) Nature of the action, amount claimed, or relief sought; and (5) Reasons for immediate action."). *See also* 28 C.F.R. § 50.15(a)(1) (2007). "In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency." *Id. See, e.g.*, *infra* App. B (providing sample DoJ agency report for pending or threatened litigation).

[40] AR 27-40, *supra* note 21, para. 3-3b.

[41] *Id.* para. 4-4(a)(2).

[42] *Id.* para. 4-4(a)(3) (referencing 28 C.F.R. § 50.15).

[43] *Id.* para. 4-4(a)(4), fig. 4-1. *See infra* App. A.

[44] AR 27-40, *supra* note 21, para. 4-4(a)(4), fig. 4-2. *See infra* App. A.

[45] *Id.* para. 4-4(a)(5).

[46] *Id.* para. 3-9 (providing detailed guidance on the composition of a thorough litigation report). Analogous to the official representation request, litigation reports require a statement of facts, a memorandum of the local law, a proposed response, and compilation of exhibits and witness information. *Id.*

[47] The LitDiv has sample requests, declarations, memorandums, and recommendations on file for assistance which could be requested in advance to prepare the installation to respond to such actions. Interview with MAJ Louis Birdsong, Administrative and Civil Law Department (Admin. Law), The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army, in Charlottesville, Virginia (4 Jan. 2007).

[48] 28 C.F.R. § 50.15(b) (1)-(2) (2007).

[49] *See generally* JA 200, *supra* note 29, at 1-12 (noting that "[w]hat the 'interests' of the United States is unclear."). The background facts must be gathered quickly because the DoJ will not represent individual employees in an otherwise valid case if the case has progressed too far. *Id.*

[50] *Id.* at 9-40, para. 9.3b. Legal advisers should begin by examining the relief sought and the characterization of the defendant's actions. *Id*. at 9-2, para. 9.1c.

[51] AR 27-40, *supra* note 21, para. 4-4b.

[52] *See generally* 28 C.F.R. § 50.15.

1. Employee of the Federal government at the time of incident (current or former).

2. Acting within scope of office or employment at the time of the alleged incident.

3. The alleged incident is not related to any federal criminal proceeding or agency disciplinary action.

4. Representation is in the best interests of the United States.

If representation is approved but a U.S. attorney or a DoJ representative is unavailable, the DoJ may provide government personnel with private counsel at government expense;[53] however, this rarely occurs,[54]

Requests to employ private counsel are similar to requests for official representation, except the individual defendant must acknowledge they may have to pay the costs incurred "prior to proper authorization."[55] The regulations do not contemplate ex post facto repayment for private counsel and legal advisers should not assume the reimbursement obtained in the aforementioned case establishes any precedent.[56] Other costs associated with defeating the TRO, separate from any lawyer fees, may not be reimbursable either.[57] In any event, a federal employee seeking later reimbursement must prove they were acting in their official capacity and the representation by a private counsel would have been in the interests of the United States, as well as justify this exception "where overriding considerations of justice call for such [payment]."[58]

Conclusion

It is important to raise awareness of the AFDSA's legitimate purpose. However, that purpose should not be lessened by upset, angry, disgruntled, or deceitful Soldiers and civilian Federal employees. When someone attempts to use a TRO to retaliate, frustrate administrative and disciplinary proceedings, or to avoid mobilization or deployment, government representation should be sought from the outset.[59] Pre-command and mobilization legal training[60] is a good starting point[61] to address the AFDSA and the process for requesting official legal representation. Likewise, installation legal advisers must clarify jurisdictional issues[62] and emplace systems to properly screen TROs and determine if official representation is appropriate.[63] Commanders, leaders, and supervisors should be advised that they have to abide by valid orders until such

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[53] *Id.* § 50.16(a); *see also* AR 27-40, *supra* note 21, para. 4-5. Private counsel is usually provided where there are several employee defendants, a conflict exists between the interests of the United States and a defendant, or professional ethics may preclude government representation. *See* JA 200, *supra* note 29, at 1-13 (explaining 28 C.F.R. § 50.15(a)(2) and § 50.16(a)).

[54] *Id.* § 50.16(a). Private counsel is provided subject to the availability of funds and under the criteria stated in 28 C.F.R. section 50.15. *Id.*

[55] *Id.* para. 4-5b. A defendant has no right to expect reimbursement when employing private sector counsel. *Id.* para. 4-5a.

[56] *See* 28 C.F.R. § 50.16(c)(1). The DoJ "must approve in advance any private counsel to be retained." *Id.* In order "[t]o ensure uniformity in retention and reimbursement procedures" the DoJ Civil Division establishes these procedures to include the fee schedules. *Id.* § 50.16(b). Also, reimbursement is limited to only legal work related to official duties. *Id.* § 50.16(d)(1)-(2).

[57] *See generally* JA 200, *supra* note 29, at 10.7, para 10.3 (explaining costs are paid under authority of various provisions of Title 28 U.S. Code). *Id.*

[58] *See id.* at 10-11 (describing exceptions to costs for civil litigation and the corresponding case law, statues and Federal Rules of Civil Procedure).

[59] As a consequence of continued mobilizations and deployments, it is possible that more Reserve component Soldiers may seek TROs alleging that repeated contacts from their alerted units constitute harassment. Especially, if the Soldier is pursuing conscientious objector status, medical disqualification, or challenging their "STOP-LOSS" status by seeking release from active duty, voluntary separation, approval of a hardship exception to mobilization. *See generally* Message, 210002Z Nov 02, Headquarters, U.S. Dep't of Army, subject: Stop Loss-New Reserve Component (RC) Unit Stop Loss Policy.

[60] Training packet is on file with the author and is available upon request at Joshua.M.Toman@us.army.mil. Packet addresses the AFDSA and provides an overview of federal litigation and official representation; along with relevant Rules of Professional Conduct. This multifunctional packet can be used as part of pre-command, leadership development, and ethics training programs, or alternatively as part of the Family Advocacy Program.

[61] Active duty and reserve component officers attending the Judge Advocate Officer Basic Course and Graduate Course, at TJAGLCS, U.S. Army, Charlottesville, Virginia, have only recently begun to receive instruction on the AFDSA. The Senior Officer Legal Orientation Course and the General Officers Legal Orientation Course have also recently incorporated this instruction. Interview with MAJ John Frost, Admin. Law, TJAGLCS, U.S. Army, in Charlottesville, Virginia (6 Mar. 2007); interview with MAJ Louis Birdsong, Admin. Law, TJAGLCS, U.S. Army, in Charlottesville, Virginia (27 Feb. 2007).

[62] *See* Law Enforcement Reporting: Establishing domestic violence Memoranda of Understanding, 32 C.F.R. § 635.29(a) (2007) (emphasizing that coordination between military and local civilian law enforcement is essential and directing Provost Marshals to establish formal Memorandums of Understanding (MOU) with their civilian counterparts to clarify jurisdictional issues). Subsection (b) specifically directs that these MOUs should address procedures, "when a civilian order of protection is violated on military property (see 10 U.S.C. 1561a)." *Id.* § 635.29(b)(2).

time as the TRO is quashed or modified by the court. Moreover, they may have to attend a court hearing to quash the TRO even if the order expires shortly.[64] At the unit level, brigade combat team JAs must educate command teams to reflexively bring any such orders to their legal representative immediately. Potentially, if the commander violates the TRO by ignoring or incorrectly interpreting it, they may be led away in handcuffs. If JAs know where to find the process for requesting official legal representation when needed, and how to organize that knowledge into a plan of action, JAs will keep their commanders in the field and out of the courtroom.[65]

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[63] A likely provision for the MOU would be official civilian notification to the Administrative Law or Military Justice sections upon the issuance of a protection order. *See* 32 C.F.R. § 635.29(b)(5) (stating MOUs should address the "[p]rocedures for transmitting civilian protection orders (CPOs) issued by civilian courts or magistrates involving active duty service members from local law enforcement agencies to the installation law enforcement office."). *See also* Memorandum, The Under Secretary of Defense, U.S. Dep't of Defense, for Secretaries of the Military Departments, subject: Establishing Domestic Violence Memoranda of Understanding Between Military and Local Civilian Officials (29 Jan. 2004) (providing sample MOU).

[64] Staff judge advocates may also encourage their Victim Witness Liaisons (VWL) to educate local courts about the military protective order (MPO) and its use, applicability, and limitations. *See* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE ch. 18 (16 Nov. 2005) (stating that the VWL program is primarily a military justice function); U.S. Department of Defense, DD Form 2873, Military Protective Order (July 2004). The specific parameters of the MPO may provide more protection for victims, thereby causing courts to refrain from ex parte hearings in cases that may involve official duties. *See* AR 608-18, *supra* note 13, paras. 3-21, 3-22.

[65] *See* Litigation Division Mission Statement, https://jagcnet.army.mil (follow "US Army Legal Services Agency (USALSA)" hyperlink; then follow "Litigation Division" hyperlink). "To provide world-class, non-bureaucratic representation of the Army in all civil litigation; to creatively dispose of litigation at the earliest possible stage freeing the Army for warfighting; and to live Army values and do what is right." *Id*.

Appendix A

Sample Requests for Legal Representation

REQUEST FOR REPRESENTATION[66]

I request that the Attorney General of the United States, or his or her agent, designate counsel to defend me in my official and individual capacities in the case of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina. I have read the complaint filed in this case and I declare that all my actions were performed in my official capacity, within the scope of my official duties, and in a good faith belief that my actions conformed to the law. I am not aware of any pending related criminal investigation.

I understand the following: if my request for representation is approved, I will be represented by a U.S. Department of Justice attorney; that the United States is not required to pay any final adverse money judgment rendered against me personally, although I can request indemnification; that I am entitled to retain private counsel at my own expense; and, that the Army expresses no opinion whether I should or should not retain private counsel.

I declare under penalty of perjury that the foregoing is true and correct. (See 28 USC § 1746.)

Executed on: ***(Date)***

(Signature)
PAUL JONES
PRIVATE, U.S. ARMY

Figure 4-1. Format for a request for representation using an unsworn declaration under penalty of perjury executed within the United States.

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[66] AR 27-40, *supra* note 21, at fig. 4-1.

DECLARATION[67]

I am currently the Commander of HHC, 6th Armored Division, Bad Vilbel, Germany. I have read the allegations concerning Private Paul Jones in the complaint of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court of the Eastern District of North Carolina.

At all times relevant to the complaint, I was Private Jones' company commander. His actions relevant to this case were performed within the scope of his official duties as Assistant Charge of Quarters, Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 USC § 1746.)

Executed on: ***(Date)***

(Signature)
John Smith
Captain, Infantry

Figure 4-2. Format for scope of employment statement using an unsworn declaration under penalty of perjury executed outside the United States.

REQUEST FOR REPRESENTATION[68]

I am the President of the XYZ Corporation. I request the Attorney General of the United States designate counsel to defend me and my company in *Doe v. XYZ*, Inc., now pending in the U.S. District Court for the Eastern District of North Carolina.

I understand that the assumption by the Attorney General of the defense of this case does not alter or increase the obligations of the United States under U.S. Contract No. WP-70-660415.

I further agree that such representation will not be construed as waiver or estoppel to assert any rights which any interested party may have under said contract.

Executed on: ***(Date)***

(Signature)
D.D. TANGO
PRESIDENT, XYZ, INC.

Figure 4-3. Format for contractor request for representation

[67] *Id.* at fig. 4-2.

[68] *Id.* at fig. 4-3.

Appendix B

DoJ Legal Representation Request Form[69]

PENDING OR THREATENED LITIGATION

AGENCY/COMPONENT: _____

AGENCY'S MATERIALITY LEVEL FOR REPORTING: _____
(This is your agency threshold for materiality)

1. **Case Name.** *(Include Case Citation, Case Number, and other names by which the case or group of cases is commonly known.)*

2. **Nature of Matter.** *(Include a description of the case or cases and amount claimed, if specified.)*

3. **Progress of the Case to Date.**

4. **The Government's Response or Planned Response.** *(For example, to contest the case vigorously or to seek an out-of-court settlement.)*

5. **An Evaluation of the likelihood of Unfavorable Outcome.** *(Choose one.)*

_____ PROBABLE (An unfavorable outcome is likely to occur.)

_____ REASONABLY POSSIBLE (The chance of an unfavorable outcome is less than probable but more than remote.)

_____ REMOTE (The chance of an unfavorable outcome is slight.)

6. **An Estimate of the Amount or Range of Potential Loss.** *(For probable and reasonably possible complete one.)*

Estimated amount of potential loss: $_____
Estimated range of potential loss: $_____ - $_____
Estimated amount or range of potential loss is unknown: _____

7. **The Name and Phone Number of the Agency and DOJ Attorneys Handling the Case.** *(Also include any outside legal counsel/other lawyers representing or advising the government in the matter.)*

8. **The Sequence Number.** *(Based on the total number of Pending or Threatened cases your agency/component is submitting. e.g. Number ___ of ___.)*
(#) (total)

Attorney-Client Agency Work Product Privilege

[69] Department of Justice, Civil Division Forms, http://www.usdoj.gov/civil/forms/forms.htm (last visited 24 May 2007) (follow hyperlink to "Form for Pending or Threatened Litigation").

USALSA Report
United States Army Legal Services Agency

Trial Judiciary Notes

A View from the Bench

Military Rule of Evidence (MRE) 412 and Sentencing

Colonel Michael J. Hargis
Military Judge, 4th Judicial Circuit
U.S. Army Trial Judiciary, Fort Carson, Colorado

Introduction

Military Rule of Evidence (MRE) 412 covers the admission of evidence regarding a victim's sexual background, the so called "rape shield," and is primarily discussed during the merits phase of a courts-martial.[1] There appears to be some confusion whether MRE 412 applies to the sentencing phase of a court-martial. Bottom line up front—it applies.[2]

General Methodology

When analyzing the admissibility of any potential sentencing evidence, the starting point is always Rule for Courts-Martial (RCM) 1001(b) for the government and RCM 1001(c) for the defense.[3] No evidence is admitted during sentencing unless it first passes through the gates of RCM 1001.[4] However, once through the RCM 1001 gates, the evidence must also be admissible under the MRE, unless those Rules have been rendered inapplicable.[5] A typical example would be a defense objection to government evidence: "It may be aggravation under RCM 1001(b)(4), Judge, but it still inadmissible under MRE 403."

MRE 412 Methodology: RCM 1001

Clearly, the "pigeon holes" for the defense in RCM 1001(c) are much larger than the particularized government ones in RCM 1001(b). "Mitigation" is defined as anything that would serve to lessen the punishment—pretty broad.

Assume the accused has been convicted of an offense to which MRE 412 applies, for example, rape and carnal knowledge.[6] On sentencing, the defense seeks to offer evidence that prior to the offense of which the accused has been convicted, the victim was (extremely) sexually active. Admissible? It depends.

First, does it make it past the RCM 1001(c) gate? Likely not. The unchaste character of the victim is not a matter that might legitimately serve to lessen the punishment. For a nonconsensual offense like rape, the Court of Military Appeals in *Fox* said: "Certainly, an unchaste woman has just as much right to be protected from nonconsensual sexual assaults or abuse

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[1] MANUAL FOR COURTS-MARITAL, UNITED STATES, MIL. R. EVID. 412 (2005) [hereinafter MCM].

[2] United States v. Fox, 24 M.J. 110 (C.M.A. 1987); MCM, *supra* note 1, MIL. R. EVID 101(a), 1101; Rule for Courts-Martial (R.C.M.) 1001(b); R.C.M. 1001(c)(3). Note that the Navy-Marine Court of Criminal Appeals in *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006), litigated the application of MRE 412 to sentencing in a carnal knowledge case. Although factually different from the situation we address here, that they applied MRE 412 to sentencing in a carnal knowledge case is the point to be learned from that case.

[3] MCM, *supra* note 1, R.C.M. 1001(b), (c).

[4] *See* United States v. Tanner, 63 M.J. 445 (2006) (holding that on sentencing, admissibility is analyzed under RCM 1001 and not under MRE 404(b). Unless the evidence is first admissible under RCM 1001, it is not admissible on sentencing. *See id.* at 448.

[5] MCM, *supra* note 1, R.C.M. 1001(c)(3).

[6] Remember that although the heading to MRE 412 says "Nonconsensual sexual offenses", that Rule does apply to the "consensual" offense of carnal knowledge. *See* United States v. Banker, 60 M.J. 216, 220 (2004).

as a chaste woman."[7] A similar argument to that made in *Fox* would apply for a carnal knowledge offense as the reason consent is not a defense to carnal knowledge is because the victim, due to age, is legally incapable of consenting.[8]

MRE 412 Methodology: MRE 412

Assume that by some manner, the evidence survives the RCM 1001(c) screening. Does it pass MRE 412 muster? If the evidence offered by defense shows that the alleged victim "engaged in other sexual behavior" it is barred by MRE 412, unless it falls within one of the exceptions in MRE 412(b).[9]

Is the evidence offered to prove the accused is not "the source of semen, injury or other physical evidence?" No. So the evidence of the victim's sexual history is not admissible under MRE 412(b)(1)(A).

Is the evidence offered to prove consent? No. We are in the sentencing phase. For rape (where consent is a defense), the accused has been convicted and consent is no longer an issue. For carnal knowledge, consent was never an issue. Thus, the evidence is not admissible under MRE 412(b)(1)(B).

Is the evidence constitutionally required under MRE 412(b)(1)(C)? The defense will have to show that it is relevant, material and favorable, just like any other MRE 412 evidence.[10] Unless the government opens the door by either stating or

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[7] United States v. Fox, 24 M.J. 110, 112 (C.M.A. 1987).

[8] The court noted in *Fox* that the unchaste character of the victim *might* make it through the RCM 1001(c) gate if the government had argued the victim was somehow traumatized or injured by the sexual contact. *See id.* at 112. This would logically arise more in the carnal knowledge situation. Then, the evidence would not be considered mitigation, but would be rebuttal evidence under RCM 1001(c)(1): "[M]atters in rebuttal of any material presented by the prosecution . . . ." MCM, *supra* note 1, R.C.M. 1001(c)(1).

[9] MCM, *supra* note 1, MIL. R. EVID. 412. This is a rule of exclusion, rather than inclusion, subject to the three exceptions in MRE 412(b)(1). *See Banker*, 60 M.J. at 222.

[10] The framework for analysis under MRE 412 is clearly set forth by the Court of Appeals for the Armed Forces in *Banker*:

> [T]he military judge applies a two-part process of review to determine if the evidence is admissible. M.R.E. 412(c)(3). First, pursuant to M.R.E. 401, the judge must determine whether the evidence is relevant. . . . Where the military judge determines that evidence is relevant, the judge employs a second analytic step by conducting a balancing test to determine whether "the probative value of such evidence outweighs the danger of unfair prejudice[.]" M.R.E. 412(c)(3). . . .
>
> Although this two-part relevance-balance analysis is applicable to all three of the enumerated exceptions, evidence offered under the constitutionally required exception is subject to distinct analysis. Under M.R.E. 412(b)(1)(C), the accused has the right to present evidence that is "relevant, material, and favorable to his defense." While the relevancy portion of this test is the same as that employed for the other two exceptions of the rule, if the evidence is relevant, the military judge must then decide if the evidence offered . . . is material and favorable to the accused's defense, and thus whether it is "necessary."
>
> In determining whether evidence is material, the military judge looks at "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue."
>
> After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense. While the term "favorable" may not lend itself to a specific definition, we believe that based on Supreme Court precedent and our own Court's rulings in this area, the term is synonymous with "vital." (citation omitted)..
>
> . . . .
>
> Thus, M.R.E. 412(c)(3) requires the military judge to determine "on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice[.]" M.R.E. 412(c)(3). It would be illogical if the judge were to evaluate evidence "offered by the accused" for unfair prejudice to the accused. Rather, in the context of this rape shield statute, the prejudice in question is, in part, that to the privacy interests of the alleged victim.
>
> As a result, when balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim's legitimate privacy interests.
>
> . . . .
>
> In applying M.R.E. 412, the judge is not asked to determine if the proferred evidence is true; it is for the members to weigh the evidence and determine its veracity. Rather, the judge serves as gatekeeper deciding first whether the evidence is relevant and then whether it is otherwise competent, which is to say, admissible under M.R.E. 412.

implying the victim was somehow traumatized by the carnal knowledge, it will be difficult for the defense to carry this burden.[11]

Even if the defense is able to make it over those hurdles, the evidence must still clear MRE 412(c)(3) and MRE 403.[12]

Conclusion

Counsel should not assume MRE 412 does not apply in sentencing. However, there are many steps to satisfy before seeking admission of MRE 412 evidence on sentencing. Pretrial preparation and analysis is key to admitting MRE 412 evidence, as it is for all phases of the trial.

Banker, 60 M.J. at 222-4 (citations omitted). *Id.* at 223 n.3. "[Military Rule of Evidence] 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412."

[11] Thus, note 6 to Instruction 3-45-2 in *U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook* may be misleading. The circumstances under which the unchaste character of the victim would be admissible on sentencing would be limited. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 451 (15 Sept. 2002).

[12] MCM, *supra* note 1, MIL. R. EVID. 412 (c)(3) ("that the probative value of such evidence outweighs the danger of unfair prejudice"); MIL. R. EVID 403 ("probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

A View from the Bench

Using a Witness's Prior Statements and Testimony at Trial

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Introduction

A crucial component of trial preparation is reviewing witnesses' prior statements and planning to use those statements, if necessary, during trial. Most witnesses make multiple written and oral statements prior to trial to investigators, counsel, or other third parties. Many witnesses also provide prior testimony at Article 32 investigations or depositions. Counsel must know the evidentiary rules governing the use of prior statements for both impeachment and to enhance a witness's trial testimony. Counsel must also know the foundations for admissibility and the limits on the purpose for which the prior statements may be used. This note discusses the use of prior statements made by witnesses other than the accused and offers some practical tips to aid counsel in mastering this important skill.

Prior Statements and the Issue of Hearsay

The Supreme Court has made it clear that using out-of-court statements to prove facts will always raise 6th Amendment Confrontation Clause issues.[1] However, witnesses' pre-trial statements can be offered as evidence to impeach or to rehabilitate a witness once attacked.[2] The contents of prior statements used to confront a witness may be admitted either for the limited purpose of impeachment, under Military Rule of Evidence (MRE) 613(b), or as substantive evidence of fact if the requirements of MRE 801(d)(1) are met.[3] A key element in using prior statements is having a clear understanding of whether they are offered as substantive evidence (that is, for the truth of the matter asserted) or for the limited purpose of impacting witness credibility. This in turn will determine whether and how extrinsic evidence of the prior statement will be admitted.

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[1] Crawford v. Washington, 541 U.S. 36 (2004).

[2] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 613(b) and 801(d)(1) (2005) [hereinafter MCM].

[3] Military Rule of Evidence 613(b) requires that if extrinsic evidence of a witness's prior statement is offered to impeach, the witness must be afforded an opportunity to explain the inconsistency and be examined by opposing counsel on the statement. Under very limited circumstances, prior statements can be offered under MRE 613 "in the interests of justice." *See infra* note 14 and accompanying text. Military Rule of Evidence 801(d)(1) permits substantive use of a witness's prior testimony, made under oath at a prior proceeding, which is inconsistent with the witness's in-court testimony, or consistent and used to rebut allegations of recent fabrication. In either instance, under the 801(d)(1) exception, the witness must have testified and been subject to cross-examination before a party can seek to admit the prior statements. MCM, *supra* note 2, MIL. R. EVID. 613(b) and 801(d)(1).

If members are involved, counsel should anticipate what kind of limiting instruction the judge will provide,[4] and how counsel may use the prior statements in argument.[5]

Military Rule of Evidence 613

Military Rule of Evidence 613 deals only with prior statements used to impeach a witness's credibility although the title in the *Manual for Courts-Martial*, "Prior statements of witnesses," suggests a comprehensive rule.[6] Statements offered under MRE 613 are not substantive evidence.[7] Further, extrinsic evidence of these prior statements need not be offered, but may form the basis for questioning the witness.[8] Counsel might simply use intrinsic means by asking the witness whether they made a prior statement. For example, if a witness testifies in court that the accused forced open a door as part of a housebreaking, opposing counsel may pose the following question in examination: "In your 11 April statement to the Military Police you wrote that you opened the door for the accused, is that correct?"

If the witness admits the inconsistency, counsel may not seek to offer extrinsic evidence of the inconsistency since it would be cumulative of the intrinsic admission.[9] If the witness denies the inconsistency, counsel may seek to offer extrinsic evidence of the inconsistency. However, MRE 613(b) has essential foundational requirements to admit extrinsic evidence of inconsistency. It requires both that the witness be given an opportunity to explain and that the witness be examined by opposing counsel on the inconsistent statement.[10] Simply asking a witness if he made a prior inconsistent statement and receiving a denial is not evidence of the inconsistency. That is, a counsel's question is not evidence unless adopted by the witness. So, in addition to the earlier example, it would not be evidence of an inconsistency if counsel received a denial to the question, "Didn't you tell me in an interview earlier in my office that you opened the door for the accused?" Counsel must provide evidence of the inconsistency through either the witness's admission or through other competent evidence.

Provided MRE 613(b) requirements are met, there are several ways that the inconsistent statement might be offered as extrinsic evidence. After proper foundation, counsel may seek to have a cooperative witness read the inconsistent portion of statement verbatim. Or, counsel may have an investigator or another person, who witnessed the statement, testify as to the

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[4] Military Rule of Evidence 105 requires the military judge to give a proper limiting instruction. *Id.* MIL. R. EVID. 105. An unpublished interim change to *Department of Army Pamphlet 27-9, Military Judge's Benchbook,* further clarifies this issue. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 7-11-1 (Sept. 2002). The revision, reprinted below, seeks to make unambiguous the distinction being discussed.

> **7-11-1. PRIOR INCONSISTENT STATEMENT**
>
> **NOTE 1: <u>Using this instruction</u>. When evidence that a witness made a prior statement that is or may be inconsistent with the witness's testimony at trial is admitted and the prior statement is admitted only for the purposes of impeachment, the following limiting instruction should be given:**
>
> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with (his/her) (their) testimony here in court.
>
> If you believe that (an) inconsistent statement(s) (was) (were) made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.
>
> You may not consider the earlier statement(s) as evidence of the truth of the matters contained in the prior statement(s). In other words, you may only use (it) (them) as one way of evaluating the witness's testimony here in court. You cannot use (it) (them) as proof of anything else.
>
> (For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was red.)

[5] Counsel may only argue matters in evidence. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. A, R. 3.3 (1 May 1992). Notwithstanding paragraph 7-11-1 note 2 (5) of the current *Military Judges' Benchbook* (*see infra* note 28), it is most prudent, especially for trial counsel, not to argue prior inconsistent statements that are not clearly admissible as substantive evidence, as evidence of fact, even if not objected to.

[6] The rule against attempting to use a witnesses' prior consistent statements to bolster credibility before it has been attacked is both implicit and explicit in MRE 608(a), 801(d)(1)(B) and 403. MCM, *supra* note 2, MIL. R. EVID. 608(a), 801(d)(B) and 403.

[7] United States v. Jackson, 12 M.J. 163 (C.M.A. 1981) (holding that inconsistencies, other than those that meet the criteria of 801(d)(1) are not substantive evidence).

[8] MCM, *supra* note 2, MIL. R. EVID. 613(a). The sole requirement is that the statement must be disclosed to opposing counsel when requested.

[9] United States v. Gibson, 39 M.J. 319, 324 (C.M.A. 1994); *see also* United States v. Button, 34 M.J. 139 (C.M.A. 1992).

[10] The requirement does not need to be fulfilled before the statement is offered. *See infra* note 15 and accompanying text.

specific inconsistency. If, during an interview, the witness provided a supplemental written or oral statement, counsel can seek to admit the content of that statement.[11] However, written statements themselves are not given to members as tangible evidence of the inconsistent statement.[12] Typically, a statement offered to impeach a witness is simply read or testified to. In a members' case, relevant portions of an inconsistent statement may be published and retrieved, but will not go with the members as a tangible exhibit during deliberations pursuant to RCM 921(b).[13] Additionally, one or two inconsistencies in a larger statement do not necessarily permit extrinsic evidence of the entire statement, unless required in the interests of justice.[14] Some redactions will normally be appropriate.

How counsel use inconsistencies is a significant tactical decision. Simply asking a witness in good faith whether they made a specific, relevant prior inconsistent statement creates an impression with a fact-finder. This is true whether or not counsel then offers extrinsic evidence of the inconsistency. Being able to concisely specify the inconsistency in detail enormously improves advocacy. For example, saying, "In your 11 April written statement to Agent Smart on page 2, line 11 you stated . . ." is far more compelling than, "Didn't you say previously that . . . ?" Although MRE 613(a) does not require you to show the witness their written statement before using it to impeach, doing so is often effective in advocacy.

The following steps are excellent foundations for impeachment by inconsistency: providing a witness with their statement (after ensuring it has been properly marked for identification) and having them identify the statement and their signature in the affidavit portion; having the witness agree that they had an opportunity to review and correct the statement prior to signing it; and having the witness acknowledge the significance of making a statement to an official concerning a criminal investigation. These steps are also foundational to admitting prior statements as extrinsic evidence. By the same token, as a matter of timing, you are not obligated to confront the witness with the inconsistency before seeking to admit it as extrinsic evidence through a third party witness, so long as the impeached witness remains available to testify. Military Rule of Evidence 613(b) merely requires that a witness be given an opportunity to explain or deny the statement and to be examined by the opposing party. That may occur after it is offered as impeachment.[15] Often that may be the best practice when dealing with oral inconsistent statements. With either written or oral inconsistent statements, it may be tactically advantageous to let opposing counsel recall the witness to explain or affirmatively decline the opportunity to explain the inconsistency.

Most importantly, inconsistencies must relate to relevant and material issues that go to credibility whether or not you seek to offer extrinsic evidence. For example, whether a witness denies wearing sneakers when the accused allegedly committed the act of housebreaking might have theoretical relevance, but it is not likely to have significant impact on witness credibility. Focusing on collateral inconsistencies and minor points (or failing to demonstrate logical relevance) and then seeking to admit extrinsic evidence on such matters may not survive a MRE 403 challenge and will affect your credibility as an advocate. Equally important, the prior inconsistent statement rules cannot be used to bring in evidence counsel knows would be otherwise inadmissible, such as bad acts of a witness that do not relate directly to credibility.[16] Similarly, putting on a witness who recanted an allegation and admits to the inconsistency, solely to admit the prior inconsistent statement, which can only be used in impeachment, is improper.[17]

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[11] Any statements of witnesses that counsel obtain that relate to the testimony of the witness must be disclosed per the motion by opposing counsel once the witness has testified. *See* MCM, *supra* note 2, R.C.M. 914. Rule for Courts-Martial 701(a)(1)(C) and (b)(1)(A) requires both trial and defense counsel respectively to disclose witness's pretrial signed or sworn statements. Practically speaking, this should be done before trial, to avoid the inevitable delay such last minute disclosures will entail.

[12] United States v. Ureta, 44 M.J. 290, 299 (1996); *see also* United States v. Austin, 35 M.J. 271, 276 (C.M.A. 1992).

[13] *Ureta*, 44 M.J. at 298-9; United States v. Cannon, 33 M.J. 376 (C.M.A. 1991).

[14] Military Rule of Evidence 613(b) also authorizes extrinsic evidence of prior inconsistent statements if "the interests of justice otherwise require." MCM, *supra* note 2, MIL. R. EVID. 613(b). While not further defined or elaborated on, this provision might be applicable where the exact content of the prior statement has not been clearly articulated, is subject to multiple interpretations, is in response to a compound or confusing leading question, was taken out of context, or is not obviously inconsistent. The entire statement might also be admitted on opposing parties' motion under the so-called "rule of completeness" under MRE 106. However, counsel should be wary of this rule if the statement contains otherwise inadmissible evidence. *See Cannon*, 33 M.J. 376.

[15] United States v. Callara, 21 M.J. 259, 265 (C.M.A. 1986).

[16] United States v. Pollard, 38 M.J. 41 (C.M.A. 1993).

[17] United States v. Button, 34 M.J. 139, 140 (C.M.A. 1992).

An effective tool is to map out specific essential points of witnesses prior statements before trial so that they can quickly be compared with trial testimony.[18] A simple table, such as the one below, can be prepared by counsel or a sharp paralegal.

Essential Fact	*Military Police Statement (dated)*	*Art 32 Testimony (dated)*	*Trial Testimony*
Lawfulness of Entry	Witness opened door for accused. Page 2, line 5	Accused pushed open closed door. Page 17, line 9	

Not only will this method provide counsel significant preparation for examination of the witness, it will ensure that counsel is able to articulate proper grounds for admissibility of the statement.[19] This method will also prepare counsel to request the military judge provide specific instructions on prior statements in members' cases, both when introduced, and at the close of evidence. In requesting closing instructions, counsel may include his contentions as to specific inconsistencies for the judge to articulate.[20] Such instructions can be crucial, since members intuitively, if improperly, tend to view statements attributed to witnesses as fact, which is why the requirement for a limiting instruction in MRE 105 exists. Such instructions will also clearly define for counsel whether the prior statements may be admitted and argued as substantive evidence of fact, to which we now turn.

Military Rule of Evidence 801(d)(1) and Prior Statements as Evidence of Fact

Other major rules governing prior witness statements are found in MRE 801(d)(1) which outlines three types of prior witness statements admissible as non-hearsay, that is, as substantive evidence of fact. Military Rule of Evidence 801(d)(1) applies once a witness has testified and been subject to cross-examination[21] thereby apparently satisfying the Confrontation Clause. Under MRE 801(d)(1)(A), prior testimony under oath at an earlier proceeding or deposition may be admitted. A prior consistent statement under MRE 801(d)(1)(B), whether or not under oath, may be admitted to rebut alleged recent fabrication or motive to fabricate. Finally, under MRE 801(d)(1)(C), statements of a prior identification of a person (typically, physical or photo lineups) may be admitted.

Prior Inconsistent Testimony

Prior inconsistent testimony may be admitted under MRE 801(d)(1)(A) if the following three foundational elements are met: (1) inconsistent with the witness's trial testimony, (2) made under oath, and (3) done so in another "proceeding" or "deposition."[22] Failure to satisfy these requirements prohibits use of the prior inconsistent statement as substantive evidence, though it may still be offered as impeachment under MRE 613.[23] The rule does not require that the prior proceeding pertain to the accused or that the prior testimony included the right of cross-examination.[24] Prior written statements "adopted" by a

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[18] *See* Lieutenant Colonel Stephen Henley, The Art of Trial Advocacy, *Impeachment by Prior Inconsistent Statement*, ARMY LAW., Feb. 1998, at 35 (providing an excellent discussion of how to effectively prepare for and use inconsistent statements).

[19] United States v. Palmer, 55 M.J. 205 (2001). In this case, a defense counsel sought to offer a prior inconsistent statement of a witness as a then-existing mental state under MRE 803(3). The court found that though the statement may have been admissible under MRE 613(b), failure to articulate such grounds resulted in a deferential abuse of discretion review on the basis of the hearsay exception only. *Id.* at 207.

[20] Although the current instruction 7-11-1 in the *Benchbook* does not explicitly provide for it, counsel may request the judge to articulate the contentions of the parties regarding specific inconsistencies. However, counsel should not expect the judge to do that sua sponte. Being able to point to concise and specific inconsistencies—and better providing written contentions as a proposed instruction—may be enough to persuade a judge to summarize your view of the evidence as part of the judge's instructions.

[21] United States v. Owens, 484 U.S. 554 (1988).

[22] United States v. LeMere, 22 M.J. 61, 67 (C.M.A. 1986).

[23] United States v. Jackson, 12 M.J. 163, 164 (C.M.A. 1981).

[24] This leaves open the question of whether confrontation as to the prior testimony has been satisfied. Federal courts have rejected attacks on those grounds. *See* SALTZBURG, SCHINASI, SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL n.10, at 8-9 (5th ed. 2003) [hereinafter MRE MANUAL].

witness under oath at a prior hearing can fall within the scope of MRE 801(d)(1)(A).[25] However, the prior testimony itself must show that the witness specifically adopted the prior written statement as part of his testimony.[26]

Witnesses can also lay the three-part foundation for admission of prior inconsistent testimony. However, be aware that witnesses may decide not to cooperate in affirming prior testimony or its inconsistency with their current in-court testimony. Witnesses may also deny or claim a lack of knowledge that a prior statement was made under oath. Furthermore, Article 32 transcripts are not normally reviewed or signed by witnesses unlike typical witness statements made on a DA Form 2823,[27] Sworn Statement,. Furthermore, in most cases Article 32 testimony is summarized, not verbatim. It is best to have witnesses review and authenticate by signing and swearing to their Article 32 testimony prior to trial.[28] Alternately, if you expect prior inconsistent testimony to play a significant part in your case, and you do not have an admissible deposition or verbatim Article 32 transcript, you should be prepared to call the Article 32 investigating officer or hearing recorder to lay the foundation regarding the prior inconsistent testimony. This is best for uncooperative or hostile witnesses.

Once you have met the three foundational requirements, the prior inconsistent testimony of the witness is admissible as substantive evidence. In member cases, the military judge will instruct the members that the prior testimony is substantive evidence which may be used in their fact finding.[29] However, as with prior inconsistent statements, transcripts or copies of the prior testimony do not go with members as evidence for use as part of their deliberations pursuant to Rule for Court Martial 921(b).[30] Depositions are played or read to the court-martial members for their consideration in deliberations.[31]

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[25] United States v. Gibson, 39 M.J. 319 (C.M.A. 1994).

[26] United States v. Tiller, 41 M.J. 823 (N-M. Ct. Crim. App. 1995).

[27] U.S. Dep't of Army, DA Form 2823, Sworn Statement (Dec. 1998).

[28] *Department of the Army Pamphlet 27-17, Procedural Guide for Article 32(b) Investigating Officers* actually directs Article 32 investigating officers to have witnesses review, sign and swear to the summary of their Article 32 testimony if the transcript is not verbatim, "unless it would unduly delay" the report. In practice, this is rarely, if ever, done. U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICERS para. 4-1 (16 Sept. 1990). If, as counsel, you have a witness authenticate and swear to the accuracy of Article 32 testimony, be aware of your discovery obligations discussed in note 14, *supra*.

[29] *See supra* note 4 and accompanying text. An interim change to *Department of Army Pamphlet 27-9, Military Judge's Benchbook*, para. 7-11-1 note 2, reprinted below, is intended to advise members regarding use of prior inconsistent statements which may be considered as substantive evidence.

> **7-11-1 PRIOR INCONSISTENT STATEMENT**
>
> **NOTE 2: Inconsistent statement as substantive evidence. If an inconsistent statement is admitted as substantive evidence; as when (1) it is evidence of a voluntary confession of a witness who is the accused, (2) it is a statement of the witness which is not hearsay such as a prior statement made by the witness under oath subject to perjury at a trial, hearing, or other proceeding, or in a deposition, (3) it is a statement of the witness otherwise admissible as an exception to the hearsay rule, (4) the witness testifies that his inconsistent statement is true and thus adopts it as part of his testimony, or (5) it is admitted without objection and therefore may be considered for any relevant purpose; the judge should replace the preceding parenthetical with an explanation that the prior inconsistent statement may also be used for that additional purpose.**
>
> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with (his/her) (their) testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.
>
> You may also consider (that statement) (these statements) along with all the other evidence in this case.
>
> (For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red., as well as to determine what weight to give the witness's in-court testimony.)

DA PAM. 27-9, *supra* note 4, para. 7-11 n.2.

[30] United States v. Ureta, 44 M.J. 290, 299 (1996). While the Court of Appeals for the Armed Forces made this holding, they also held providing the transcript to the members was harmless error, since counsel did not object and significant other evidence substantiated the accused's guilt. *Id.*

[31] MCM, *supra* note 2, R.C.M. 702(g)(3).

Prior Consistent Statements as Rebuttal

When a witness testifies and is subject to cross-examination,[32] MRE 801(d)(1)(B) is designed to rehabilitate that witness's credibility if it has been attacked.[33] Evidence of a witness's prior consistent statements is permitted under MRE 801(d)(1)(B) to rebut an express or implied charge of recent fabrication or improper motive. Like prior inconsistent testimony, if the requirements of the rule are met, evidence of prior consistent statements under these circumstances is categorized as non-hearsay and is admissible as substantive evidence.[34] The military judge will instruct members on the use of prior consistent statements as substantive evidence.[35] Unlike prior testimony admissible under MRE 801(d)(1)(A), the statement need not be made under oath or at a prior proceeding. However, the prior statement consistent with the in-court testimony must have been made before the alleged fabrication, motive or influence arose.[36] This significant requirement is not stated in the rule.

Interpretive case law is used with MRE 801(d)(1)(B) to establish four foundational requirements to admit the prior statement as substantive evidence: (1) the witness must testify at trial and willingly answer questions; (2) the witness's credibility must be attacked, directly or by inference;[37] (3) the witness must have made a prior statement which is consistent with his in-court testimony and therefore rebuts alleged recent fabrication or motive; and (4) the prior statement must have been made before a bias or motive to fabricate existed.[38]

The presentation of evidence as a predicate to determining admissibility is required under MRE 801(d)(1)(B) because of its unique factual foundation. Evidence on the record needs to establish that the prior statement is consistent and that the statement was made prior to potential influence or motive to fabricate used to attack the witness.[39] Logically, that includes articulating what that motive or influence is. Where multiple motives or influence are involved, only the one to be rebutted has to come after the prior consistent statement.[40] Obviously, in a members' case this will likely require an Article 39(a) session to establish a foundation for admissibility before being offered as substantive evidence.

Even if the foundational requirements are met, prior consistent statements are not automatically admitted for the truth of the matter asserted. The scope of prior consistent statements is so broad, encompassing virtually any kind of statement—oral and written statements made to police, conversations with friends and family, prior testimony, diary entries—the balancing test of MRE 403 is mandated as part of the overall analysis.[41] If the prior consistent statement is ultimately admitted, it can be read, played, testified to, or published and collected. However, it should not go with the members as an exhibit during deliberations under RCM 921(b).[42]

Counsel should also be aware that a prior consistent statement that does not meet the foundational requirements of MRE 801(d)(1)(B) (or is found to be substantially more prejudicial as substantive evidence) may still be used legitimately to support the credibility of a witness who has been attacked.[43] However, it will not be substantive evidence, and a proper

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[32] United States v. Owens, 484 U.S. 554 (1988) (defining "subject to cross-examination" for purposes of the parallel Federal Rule of Evidence (FRE) 801(d)(1)(B) as willingly responding to questions).

[33] *Id.*

[34] United States v. Taylor, 44 M.J. 475 (1996).

[35] DA PAM. 27-9, *supra* note 4, para. 7-11-2.

[36] United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990); *see also* Tome v. United States, 513 U.S. 150 (1995) (establishing the timing requirement of the statement for FRE 808(d)(1)(B)).

[37] *See, e.g.*, United States v. Browder, 19 M.J. 988 (A.F.C.M.R. 1985); United States v. Waldrup, 30 M.J. 1126 (N.M.C.M.R. 1989). Both *Browder* and *Waldrup* were reversed due to lack of evidence demonstrating a charge of bias or motive to fabricate.

[38] United States v. Toro, 37 M.J. 313 (C.M.A. 1993).

[39] *Taylor*, 44 M.J. at 480. In *Taylor,* the issue of the timing of the statement in relation was not established. Because it was not raised until appeal, the court found waiver under MRE 920(f), where defense agreed to the admission of the statement at trial and only objected to the instruction on its use. *See also McCaskey*, 30 M.J. 188.

[40] United States v. Allison, 49 M.J. 54 (1998).

[41] *Toro*, 37 M.J. 313.

[42] *See supra* note 13 and accompanying text.

[43] *See* MRE MANUAL, *supra* note 24, at 8-12, discussion.

limiting instruction under MRE 105 would be required in a members' case. Military Rule of Evidence 608(b) may also limit extrinsic evidence of the statement to be admitted, since its relevance outside MRE 801(d)(1)(B) would be limited to credibility.

Prior Identification of a Person

The last provision of MRE 801(d)(1), sub-paragraph (C), permits statements of a witness's prior identification of a person as substantive evidence,[44] provided the witness first testifies and is subject to cross-examination. This provision cannot be used to bolster a witness whose identification has not been attacked, but it may be used when a witness can no longer identify a witness or refuses to do so.[45] Although not explicitly stated in MRE 801(d)(1)(C), at least one court restricts admission of this specific form of statement to identifications made as part of investigative lineup, show-up, or photographic identification procedures, rather than simply identifying a person by name as part of a statement.[46] If the foundational requirements are met, and the witness is attacked on an identification, a prior identification may also separately qualify as a prior consistent statement.[47]

Writings Used to Refresh Memory and Past Recollection Recorded

Finally, two other forms of prior statements merit brief mention. The first is a writing used to refresh recollection, addressed in MRE 612. The text of the rule contemplates that, if unable to independently recall facts, witnesses may use writings or other recorded sources to refresh their memory while testifying. Military Rule of Evidence 612 applies to any material used to refresh a witness's recollection and need not be a prior statement of the witness. It does not require the witness have made the statement or record.[48] A typical example would be an investigator using a report, summary of investigative activity, or even another witness's statement to refresh his memory as a witness while testifying. The document may not be admitted by the party whose witness uses the writing. Very importantly, MRE 612 does not otherwise permit a witness to testify as to matters which the witness does not have personal knowledge, as required by MRE 602 (except in the case of experts under MRE 703). The witness's lack of personal knowledge may be very effectively established by cross-examination using the document.

The text of MRE 612 provides the opposing party the right to production of the document, to cross-examine the witness on the document, and to introduce into evidence those portions which relate to the witness's testimony. However, documents sought to be admitted under MRE 612 should not be considered by a factfinder as substantive evidence unless they are admissible for the truth of the matter asserted on independent grounds. Unless independent grounds exist, the document will not be usable as an exhibit during deliberations.[49] In member cases, an appropriate limiting instruction by the judge under MRE 105 would be appropriate.

Past Recollection Recorded

An independent, though sometimes related rule, is found in MRE 803(5). If the witness is unable to recall facts while testifying, even after reviewing a record, MRE 803(5) permits admission of that record of the event. Unlike MRE 612, the record must reflect the witness's knowledge of an event made or adopted by the witness when the matter was fresh in the witness's memory. Also unlike MRE 612, the record involved must be written, not oral or some other form of record.[50] Obviously, if the record is a witness's prior written statement, and review does refresh the witness's recollection in order to testify, the requirements of MRE 612 apply.

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[44] United States v. Owens, 484 U.S. 554 (1988).

[45] United States v. Jones, 26 M.J. 197 (C.M.A. 1988).

[46] United States v. Thomas, 41 M.J. 732 (N-M. Ct. Crim. App. 1994).

[47] *Jones*, 26 M.J. at 200.

[48] MRE MANUAL, *supra* note 24, at 140.

[49] *See supra* notes 12 and 13 and accompanying text.

[50] MRE MANUAL, *supra* note 24, at 8-71.

There are four foundational requirements under MRE 803(5). One, the witness must be unable to recall, even after reviewing the record. Two, the record must have been made or adopted by the witness. Three, the record must have been made when the facts were fresh in the witness's mind. And four, the record must correctly reflect the witness's knowledge at the time it was made.[51] Other than the inability to recall, the foundational requirements may be made either by the witness who is unable to recall or another witness.[52] Once properly admitted, the record may be considered as substantive evidence.[53] The text of the rule makes clear that the prior statement is only read into evidence, unless offered by opposing counsel as an exhibit.

Conclusion

Prior witness statements and testimony are components of virtually every court-martial and are the building blocks of every case. Counsel need to understand the rules governing use of these statements at trial, when they can be offered as evidence, the foundations for offering these statements, and whether the statements constitute substantive evidence or are admissible only for impeachment or other limited purposes.

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[51] United States v. Gans, 32 M.J. 412 (C.M.A. 1991).

[52] *Id.* at 416-7.

[53] *Id*. at 417.

HIS EXCELLENCY: GEORGE WASHINGTON[1]

REVIEWED BY MAJOR ROBERT A. VEDRA[2]

[Tanacharison] stepped up to where Jumonville lay, in French declared, "Thou art not yet dead, my father," then sank his hatchet into Jumonville's head, split his skull in half, pulled out his brain, and washed his hands in the mixture of blood and tissue. His warriors then fell upon the wounded French soldiers, scalped them all, and decapitated one and put his head on a stake. All this happened under the eyes of the shocked and hapless commanding officer, Lieutenant Colonel Washington.[3]

Prefacing the above by saying, "there is good reason to believe that [Washington] found himself overseeing a massacre,"[4] George Washington biographer Joseph J. Ellis presents this grisly literary snapshot of Washington's first combat experience barely a dozen pages into the first chapter of *His Excellency: George Washington*.[5] Whether Ellis opens his story of one of America's most revered icons in such controversial fashion in order to set himself apart from the rest of Washington's biographers or for some other reason, he certainly grabs the reader's attention. Having done so, he embarks on an informative and entertaining journey through Washington's life that will likely satisfy a casual reader, but will probably frustrate a more serious student of history.

His Excellency has four major strengths. First, despite what the reader may think after reading the macabre depiction of Washington's first combat action described above and the implication that Washington was complicit in a heinous crime, the book is not merely Ellis's platform to attack Washington, but rather a balanced depiction of Washington and his life.[6] Although Ellis says in his preface that, "we should begin our quest looking for a man rather than a statue, and any statues we do encounter should be quickly knocked off their pedestals,"[7] he is careful to add that, "[o]ur goal should be to see Washington face-to-face—or, if you will, as grown-ups rather than children."[8] On the whole, he accomplishes both of his stated goals. The book is a balanced effort that does not hesitate to point out what Ellis sees as Washington's flaws and human failings, but also pays great tribute to the man, presenting him as "the Foundingest Father of them all."[9]

The second strength of *His Excellency* is Ellis's attempt to suggest linkages between the various points on the trajectory of Washington's life, thereby weaving the stages of Washington's life into a more coherent whole. Ellis starts down this path by positing that Washington's personal experiences with the British Empire led him to cast his lot with the colonists who advocated a break from Great Britain.

> While we cannot know, at least in the fullest and deepest sense, where that voice inside himself originated [condemning British measures as "repugnant to every principle of natural justice" in 1774], it does seem to echo the resentful voice of the young colonel in the Virginia Regiment, bristling at the condescending ignorance of Lord Loudoun and the casual rejection of his request for a regular commission in the British army. It harks back to the voice of the master of Mount Vernon, lured by Cary & Company [a London mercantile house] . . . into a mercantile system apparently designed to entrap him in a spiraling network of debt. . . . The voice also resonates with the same outraged frustration he felt whenever some distant and faceless British official, the most recent version of the vile breed being Earl Hillsborough, blocked his claim

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[1] JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON (2004).

[2] U.S. Army. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] ELLIS, *supra* note 1, at 14.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 14-15.

[7] *Id.* at xii.

[8] *Id.*

[9] *Id.* at xiv.

> for western lands, allegedly to protect Indian rights but more probably, he believed, to reserve the land for London cronies.[10]

Having chosen the colonists' side, Washington found himself the Continental Congress' unanimous selection as commander in chief of the fledgling Continental Army in 1775.[11] Ellis concludes that Washington was the obvious choice for the job because, "the appointment of a Virginian was politically essential in order to assure the allegiance of the most populous and wealthiest colony to the cause, and Washington was unquestionably the most eligible and qualified Virginian."[12] Ellis then connects two more dots when he argues that Washington's experiences with the Continental Army during the war shaped his thinking about the proper role of the federal government in America.

> In 1777 he began the practice of sending routine Circulars to the States requesting money, supplies, and fresh recruits, his implicit recognition that ultimate power over these essentials lay with the state governments. By 1780 his growing sense of desperation pushed him over the edge as he became an outspoken advocate for expanded powers at the national level. "Certain I am," he informed one Virginia delegate in the Congress, "that unless Congress speaks in a more decisive tone; unless they are vested with powers by the several States competent to the great purposes of War, or assume them as a matter of right . . . that our Cause is lost. We can no longer drudge on in the old way. I see one head gradually changing into thirteen." The Congress needed to do more than recommend; it needed to dictate. "In a word," he complained, "our measures are not under the influence and direction of one council, but thirteen, each of which is actuated by local views and politics." If the Congress failed to expand its mandate and become a true national government, he warned, "it will be madness in us, to think of prosecuting the War."[13]

At least partly as a result of these experiences, Ellis says, Washington decided to attend the Constitutional Convention as a member of the Virginia delegation.[14] He ended up chairing the Convention and became the "inevitable and unanimous selection as the first president of the United States."[15] In sum, although he never says so directly, Ellis appears to argue that Washington's experiences with the British Empire during his early years led directly to his experiences during the American Revolution, which led directly to his experiences during the formative years of the American republic. Whether or not the reader agrees with this line of reasoning or the connections that Ellis finds, this synthesizing feature of the book is one of its great strengths.

The third strength of *His Excellency* is Ellis's thoughtful reminders that that way we see events today is not necessarily the way they were seen at the time they occurred. For example, he says of Washington's life following the Revolution but before the Constitutional Convention, "[h]indsight permits us to regard Washington's postwar years at Mount Vernon as a mere interlude between two major chapters of active service . . . . But Washington himself experienced these years as an epilogue rather than an interlude. . . . His public career, he firmly believed, was over, his life nearly so."[16] An even better example occurs later: "Washington's core achievement as president, much as it had been as commander in chief of the Continental army, was to transform the improbable into the inevitable."[17] This simple yet eloquent sentence merits high praise. It is both a powerful tribute and a well-written reminder that the march of history is not inevitable; in fact, events now taken for granted as almost predestined could well have transpired differently under slightly different conditions. Both quoted passages invite the reader to reflect on the idea that hindsight, while it may not always be 20/20, is certainly a different prism than that of the period being studied. This idea is well worth a few moments' thought, and *His Excellency* illustrates it nicely.

The fourth strength of *His Excellency* is its presentation of lesser-known facts about Washington and his life and times. For example, Ellis writes, "Bache subsequently launched a direct assault on Washington's character by printing documents

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[10] *Id.* at 63-64.

[11] *Id.* at 67-68.

[12] *Id.* at 68.

[13] *Id.* at 127.

[14] *Id.* at 175.

[15] *Id.* at 171.

[16] *Id.* at 150.

[17] *Id.* at 188-189.

purporting to show that the president had accepted a bribe from the British early in the Revolutionary War, so that all along he had really been a British spy in the Benedict Arnold mode."[18] It is interesting to think, over two hundred years after the fact, that someone so widely respected in the modern era faced such a malicious attack in the press during his lifetime. Another interesting tidbit that Ellis chooses to illuminate involves Thomas Jefferson and his later relationship with Washington. "Even though Jefferson had been describing him in private correspondence as quasi-senile . . . ."[19] This development is arguably less well publicized than other facets of the relationship between Washington and Jefferson, but certainly an interesting revelation.

Despite the book's strengths, its weaknesses are significant and detract a great deal from the overall quality of the work. The first weakness is Ellis's tendency to draw historical conclusions without sufficiently explaining his support or rationale for those conclusions. For example, with regard to the events at Jumonville Glen (described in part in the opening quote), Ellis writes, "[t]hough the eyewitness accounts do not agree—as they seldom do—the most plausible version of the evidence suggests that the French troops, surprised and outgunned, threw down their weapons after the initial exchange and attempted to surrender."[20] Ellis makes no attempt to explain why he believes that this is the most plausible version of the evidence; furthermore, he cites none of the evidence upon which he presumably relied. Similarly, he writes later, "[Washington's] association with the Society of the Cincinnati clashed with his chief preoccupation, which was the courting of posterity's judgment . . . ."[21] Ellis again makes no attempt to explain why he believes that Washington's chief preoccupation at the time was the verdict of history and again cites no support. A final example: "[Washington] regarded his symbolic role as the core function of his presidency."[22] Again, Ellis provides no support for his conclusion. These examples are not all-inclusive, and Ellis's failure to explain the support for and reasoning behind his conclusions is a major flaw in this book. He may have excellent reasons and copious support for his conclusions, but he generally does not discuss either, and the reader is left to wonder.

The book's second major weakness is Ellis's occasionally suspect documentation practices. For example, in describing President Washington's policy toward Indian tribes in America, Ellis writes, "A more coercive policy of outright confiscation, Washington believed, would constitute a moral failure that 'would stain the character of the nation.'"[23] While the sentence construction may lead the reader to believe that the language suggesting a stain on the nation's character came from Washington, the endnote reveals that Henry Knox penned this phrase in a letter to Washington.[24] Another glaring example of questionable documentation is Ellis's use throughout the book of what he styles "sightings."[25] These "sightings" paint vivid and dramatic pictures of various events from Washington's life, like the following.

> Sighting: March 16, 1783[.] Washington has just entered the New Building at Newburgh, a large auditorium recently built by the troops and also called The Temple. About 500 officers are present in the audience. Horatio Gates is chairing the meeting, a rich irony since Gates is most probably complicitous in the plot to stage a military coup that Washington has come to quash. Everything has been scripted and orchestrated beforehand. Washington's aides fan out into the audience to prompt applause for the general's most crucial lines. Washington walks slowly to the podium and reaches inside his jacket to pull out his prepared remarks. Then he pauses—the gesture is almost certainly planned—and pulls from his waistcoat a pair of spectacles recently sent to him by David Rittenhouse, the Philadelphia scientist. No one has ever seen Washington wear spectacles before on public occasions. He looks out to his assembled officers while adjusting the new glasses and says: "Gentlemen, you will permit me to put on my spectacles, for I have not only grown gray, but almost blind in the service of my country." Several officers begin to sob. The speech itself is anti-climactic. All thoughts of a military coup die at that moment.[26]

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[18] *Id.* at 231.

[19] *Id.*

[20] *Id.* at 14.

[21] *Id.* at 160.

[22] *Id.* at 197.

[23] *Id.* at 212.

[24] *Id.* at 307 n.36.

[25] *See, e.g.*, *id.* at 119.

[26] *Id.* at 143-44.

The manner in which this "sighting" is written suggests that it was written by a single third-party observer who was present to witness the event. The endnote to the passage above cites only the text of Washington's address and a letter from Washington to David Rittenhouse, the scientist mentioned in the "sighting."[27] In other words, although the historical facts are apparently accurate, Ellis employs a misleading storytelling device in his quest to make an already compelling story even more so. This is not the only such flawed "sighting."[28] This literary artifice is unnecessary, and it seriously detracts from the quality of Ellis's work, as does the other poor documentation noted above.

The final weakness of *His Excellency* is its failure to answer the book's central question. In the preface, Ellis writes:

> I also began my odyssey with a question that had formed in my mind on the basis of earlier research in the papers of the revolutionary generation. It seemed to me that Benjamin Franklin was wiser than Washington; Alexander Hamilton was more brilliant; John Adams was better read; Thomas Jefferson was more intellectually sophisticated; James Madison was more politically astute. Yet each and all of these prominent figures acknowledged that Washington was their unquestioned superior. Within the gallery of greats so often mythologized and capitalized as Founding Fathers, Washington was recognized as *primus inter pares*, the Foundingest Father of them all. Why was that?[29]

Ellis never explicitly answers this thesis question, and the reader is left to speculate. He does refer repeatedly to Washington's willingness to surrender authority at the end of his various terms of service; for example, his retirement to private life at the end of the American Revolution and his refusal to accept a third presidential term.[30] However, Ellis never says directly that this practice of self-denial was what made Washington greatest among the Founding Fathers, and in fact, he argues at one point that "all the surrenders paved the way to larger acquisitions . . . ."[31] Although this last argument appears to weaken the proposition that Ellis discusses Washington's surrenders of power so often and in such detail because he believed that they were what made Washington the greatest of his generation, I could find no other plausible answer to the question. Even Thomas Jefferson, despite his apparent break with Washington toward the end of Washington's life, had no difficulty answering the question of why Washington was the greatest.[32]

> On the whole, his character was, in its mass, perfect, in nothing bad, in few points indifferent; and it may truly be said, that never did nature and fortune combine more perfectly to make a man great, and to place him in the same constellation with whatever worthies have merited from man an everlasting remembrance. For his was the singular destiny and merit, of leading the armies of his country successfully through an arduous war, for the establishment of its independence; of conducting its councils through the birth of a government, new in its forms and principles, until it had settled down into a quiet and orderly train; and of scrupulously obeying the laws through the whole of his career, civil and military, of which the history of the world furnishes no other example. . . .[33]

Perhaps Washington's repeated surrender of power is the reason that Ellis believes he was the greatest, and perhaps not, but the fact remains that Ellis does not clearly answer his central question, and that seriously detracts from the overall quality of his work.

His Excellency is highly readable, entertaining, and informative. Reading this book was an enjoyable experience and provided insight into several aspects of Washington's life and times that were novel to me. A casual student of history will likely find the book worthwhile, but a serious student should look elsewhere, because as a scholarly work, *His Excellency* suffers from several serious flaws. Ellis's failure to clearly answer his thesis question, his poor documentation, and his

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[27] *Id.* at 299 n.59.

[28] *See, e.g.*, *id.* at 103-104, 294 n.45.

[29] *Id.* at xiii-xiv.

[30] *See, e.g.*, *id.* at 139, 274.

[31] *Id.* at 274.

[32] *Id.* at 231-32.

[33] Letter from Thomas Jefferson to Dr. Walter Jones (Jan. 2, 1814), *in* THOMAS JEFFERSON, WRITINGS, at 1318-1321 (Merrill Peterson ed., 1984), *available at* http://www.pbs.org/georgewashington/father/qualities.html.

failure to explain the basis for many of his conclusions are serious scholarly lapses. These lapses are a dark cloud that cast a long shadow over the entire book.

TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN[1]

REVIEWED BY MAJOR AARON WAGNER[2]

But you have not told us a syllable about the greatest general and greatest ruler of the world. We want to know something about him. He was a hero. He spoke with a voice of thunder; he laughed like the sunrise and his deeds were as strong as the rock. . . . His name was Lincoln and the country in which he lived is called America, which is so far away that if a youth should journey to reach it he would be an old man when he arrived. Tell us of that man.[3]

Filled with anecdotes, humorous quips, and heart wrenching accounts of loss of life, *Team of Rivals: The Political Genius of Abraham Lincoln* is the illumination of Abraham Lincoln's emergence from a life of obscurity and relative disadvantage to achieve a legacy that has labeled him a "hero" and "incontestably the greatest man I ever knew."[4] Today, when the leadership of our nation is being evaluated daily due to the conflicts in Iraq and Afghanistan, *Team of Rivals* provides instructive insight into the leadership provided by Abraham Lincoln during our nation's most tumultuous period: the Civil War.[5] Using unique references, including diaries and personal letters, the author provides a fresh look at the minds and emotions of Lincoln and many of the men who comforted, influenced and challenged him while he faced the difficult propositions of slavery and dissolution of the Union.[6] The author's choice of format and use of private and personal correspondence, combine to bring into clear focus the greatness of Lincoln when compared to his peers. Additionally, the detail incorporated in the accounts of events contained in the book assist the reader in imagining the appearances, personalities, and mindsets of the characters involved. This insight provokes the reader to a near emotional attachment to many of the characters, as the heroes and villains are revealed. In the end, while the book is not without fault, it is an excellent summary of history and powerfully depicts the personality, ambition, and approach to leadership that set Lincoln apart from his peers.

Team of Rivals is excellent in many respects, beginning with its format. To tell her story of Lincoln, Pulitzer Prize winning author, Doris Kearns Goodwin,[7] uses a comparative or multi-biographical account of the members of his cabinet, who also happened to be his rivals for the 1860 Republican presidential nomination.[8] This comparative model, which along with Lincoln, includes Samuel Chase, the ambitious Ohio Governor; Edwin Bates, a content Missouri elder and statesman; William Seward, longtime New York Senator; and Edwin Stanton, a prominent lawyer; sets out to examine each of these men, using the characteristics of each as a mirror to reflect and compare the traits of the others. According to Goodwin, this comparison ultimately challenges the historical consensus that Lincoln's nomination in 1860 was a matter of "chance."[9] She contends, rather, that the comparative perspective demonstrates that Lincoln's nomination was not the result of chance as suggested by many historians, but rather the result of Lincoln being the "shrewdest and canniest" of the contenders.[10] While the reader may disagree with this ultimate conclusion, the author delivers an exceptionally informative historical narrative of the civil war and a behind the scenes look at the "extraordinary array of personal qualities" that made Lincoln great.[11] In the

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[1] DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005).

[2] U.S. Army. Written while assigned as a student, 55th Judge Advocate Graduate Course, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

[3] GOODWIN, *supra* note 1, at 747 (quoting Leo Tolstoy, THE WORLD, N.Y., Feb. 7, 1908 (quoting the tribal chief of the North Caucasus)).

[4] *Id.* (quoting Ulysses S. Grant) (citation omitted).

[5] *See* President William J. Clinton, Remarks at Cooper Union Commencement (May 23, 2006) (transcript *available at* www.cooper.edu/commencement/wjc_keynote_05232006.pdf); *see also* Editorial, *Players: Jay Forest Hain*, WASH. POST, Aug. 25, 2006, at A15 (providing a biography of Jay Forest Hain, Director of the White House Office of Faith-Based and Community Initiatives, which includes *Team of Rivals* as the latest book he has read).

[6] GOODWIN, *supra* note 1, at xviii (stating that her "story benefited from a treasure trove of primary sources" not generally used in Lincoln biographies).

[7] *See* DORIS K. GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II (1994). Kearns won the Pulitzer Prize for History in 1995 for this book. *See* The Pulitzer Board Presents The Pulitzer Prize Winners 1995, *available at* http://www.pulitzer.org (scroll across to the "1995" hyperlink on the upper timeline) (last visited 17 May 2007).

[8] GOODWIN, *supra* note 1, at xvi.

[9] *Id.*; *see also* Carl Schurz, *Abraham Lincoln: An Essay* (Houghton Mifflin & Co., 1891) (explaining how the nomination fell into Lincoln's hands).

[10] GOODWIN, *supra* note 1, at xvi; *accord* William H. Herndon, *A Letter from Herndon to Jesse Weik, February 24, 1887*, *in* HERNDON-WEIK PAPERS, group 4, reel 10, 2113-16 (stating Lincoln was not social but rather more inclined to attend events to simply "reap political advantage," if any was to be gained).

end, the format effectively illuminates Lincoln's character against the backdrop of his peers as Goodwin suggests. However, rather than concluding that Lincoln was shrewd or canny as Goodwin contends, most readers will be impressed by the manner in which Lincoln remained true to his character and unwavering in his devotion to the Union throughout his life of service, setting him apart from his peers.

Goodwin's chronological presentation of events allows her to logically describe events and then develop each participant's character using their personal correspondence from those time periods.[12] The book opens on May 18, 1860 with each main character awaiting the results of the Republican national convention.[13] The convention is a cleverly chosen beginning because it represents the point where these future teammates would first meet as "rivals." Here, Goodwin first presents the convention and then turns to the rivals' attitudes and circumstances as they await the news of the decision. She holds up Lincoln's humility in stark contrast to Seward's confidence and flair for extravagance.[14] Similarly, Chase's overconfidence, solitude, and meticulous attention to detail vividly set him apart from the often disheveled appearance and love for companionship that Lincoln embodied throughout his life.[15] Finally, Bates's anticipation was markedly suppressed as he was essentially brought out of retirement by the politically prominent Blair family to be their candidate in hopes of solidifying the contentious Republican party.[16] However, as Goodwin later illustrates, it was not Bates, but in fact Lincoln, that offered all that the Blairs had hoped for in their candidate—an "untainted" "conservative" "opposed to both the radical abolitionists in the North and the proslavery fanatics in the South."[17] This introduction places each man on the brink of success with different expectations and very different attitudes, each ready to assume the responsibilities as President.

From there, Goodwin steps back to trace each man's path to national recognition, tying in their common experiences in loss of loved ones, their prior campaigns, and significant personal events that had shaped the battlefield for the 1860 nomination. Using this approach, Goodwin again develops the event, and then turns to the diaries or letters.[18] She focuses extensively on their ambitions, motivations, and different backgrounds to bring the characters to life. Chase, the never satisfied;[19] Seward, the privileged;[20] and Bates, the aristocrat;[21] all suffered much less hardship and enjoyed much greater advantage than Lincoln.[22] Later in the book, the author uses the correspondence of these men to gain insight into Lincoln's impact on each of them.[23] Her use of the diaries and other personal correspondence also provides powerful and often emotional insight into how these other men, and often the women in their lives, felt, thought, and influenced each other and the President while in the White House.[24]

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[11] GOODWIN, *supra* note 1, at xvii.

[12] *See*, *e.g.*, *id.* at 297-99 (summarizing the conflict at Fort Sumter, then following up with personal correspondence to show the insights and thoughts of the participants).

[13] *Id.* at 1-28.

[14] *See id.* at 7-15.

[15] *Id.* at 16-17.

[16] *Id.* at 25.

[17] *Id.* at 24-25.

[18] *See*, *e.g.*, *id.* at 172-73 (recording Lincoln's emotions in a letter written after he had given up his seat in the U.S. Senate to Democrat Lyman Trumball in 1855 even though he had a majority of the votes) (citation omitted); *id*. at 25 (Bates recording his thoughts after being approached about the nomination) (citation omitted).

[19] *Id.* at 34-43.

[20] *Id.* at 29-34

[21] *Id.* at 43-46.

[22] *Id.* at 46.

[23] *See, e.g.*, *id.* at 518 (citing a letter from Abraham Lincoln to Anson G. Henry where Lincoln recognized that Chase's threat to resign was because "Chase's feelings were hurt" and so Lincoln moved to console Chase and retain him in the cabinet) (citation omitted); *but see* William H. Herndon, *Analysis of the Character of Abraham Lincoln*, I ABRAHAM LINCOLN Q. 413, 419 (Dec. 1941) (stating Lincoln "was not a social man . . . he was . . . abstracted . . . and gloomy").

[24] *See*, *e.g.*, GOODWIN, *supra* note 1, at 213 (citing references to letters and diary entries by Frances and Fanny Seward) (citations omitted); *id.* at 446 (citing letters from Seward to his daughter Fanny, as well as, correspondence from Chase to his daughter Kate) (citation omitted); *id.* at 540 (citing telegrams between Lincoln and his wife, Mary) (citations omitted); *id*. at 546 (citing multiple letters between William Seward and Frances Seward) (citations omitted).

Once inside the White House, Goodwin broadens the lens of her focus, offering insight into other notable figures at the time, such as General George McClellan, Ulysses S. Grant, George Meade, and Frederick Douglas. Using personal letters from McClellan to his wife, Goodwin methodically reveals McClellan's arrogance, selfishness, eagerness for glory, and unwillingness to take responsibility for his own failures, much less his subordinates, something that Lincoln would do over and over again.[25] In presenting Meade, Goodwin offers a letter found in Lincoln's personal archives that was labeled "To Gen. Meade, never sent, or signed."[26] This letter, penned by Lincoln after the Battle of Gettysburg, was a scathing indictment of Meade.[27] However, for Goodwin it tied together Meade's failure with a much more important lesson, which was Lincoln's ability to exercise restraint and "hold back" when tempted to lash out at subordinates or opponents.[28] As Goodwin points out, Lincoln consistently supported his commanders and used levity to survive failed moments.[29] She repeatedly uses events, followed by Lincoln's response, to distinguish his character from the others.[30] For example, unlike Chase and Seward, Lincoln was slow to make personal attacks, but quick to use logic to expose flaws and persuade a crowd.[31] The only recurring criticism of Lincoln, seemed best stated by Bates: "He lacks but one thing . . . the element of *will*."[32] It was often times in his dealing with these other, non-rival characters, such as McClellan and Meade, that Goodwin most successfully developed this trait in Lincoln.

Along the way, Goodwin also adds new insight into some of the key characters, particularly Samuel Chase and William Seward, who are often remembered for other accomplishments. William Seward, most notable for "Seward's Folly" or "Seward's Icebox," also played a critical role in our country's survival of the slavery issue as he consoled and provided much needed mentoring and friendship to Lincoln during this time. While Seward initially only accepted the position as Secretary of State because he believed he might yet still be able to control the nation, believing that Lincoln would surely be his puppet, he eventually became Lincoln's closest friend and most trusted confidant.[33] This role, as confidant, friend and advisor to Lincoln during this critical time, arguably may have accomplished more for this nation than the purchase of Alaska, and certainly puts a different shine on William Seward as history recalls his name. However, Goodwin's most marked accomplishment in this area was her portrayal of Salmon Chase. Culminating in his efforts to undermine Lincoln and thereby secure his own nomination for President in 1864, in the midst of the Civil War, Chase's letters and diary entries will forever cast him as a villain. Goodwin presents this development in such a way that by the time Lincoln forgave Chase and begged him to stay on the cabinet, readers will be tempted to throw up their hands in frustration at Lincoln's graciousness. Later, after Lincoln finally accepts Chase's resignation (much to his surprise),[34] Goodwin returns to report to the reader that Lincoln was now going to offer him the position of Chief Justice of the Supreme Court![35] Goodwin's incorporation of the letters from Chase to his daughter Kate and others during this time, which exposed his dishonesty and selfish ambition, casts Lincoln's commitment to his country in a new light. While Lincoln was clearly aware of Chase's activities, it is the incorporation and use of the personal letters and correspondence that adds the real insight into Lincoln's selection of Chase for the position of Chief Justice because he believed "the decision was right for the country."[36]

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[25] *Id.* at 378, 447, 481 (citations omitted).

[26] *Id.* at 536.

[27] *Id.*

[28] *Id.*

[29] *Id.* (pointing out a time when Lincoln had begun to criticize the Union Generals for not moving against the enemy, but then quickly added that it was difficult to judge them when he himself had "not fully made up [his] mind how [he] should behave when minie-balls were whistling, and those great oblong shells shrieking in [his] ear. [He] might run away") (citations omitted).

[30] *See, e.g.*, *id.* at 190 (pointing out that unlike the others Lincoln never resorted to personal attacks, but stayed focused on the issues and allowed his opponents to retain their honor and dignity) (citations omitted).

[31] *Id.*

[32] *Id.* at 675 (citation omitted). Goodwin also uses Bates's recordings in his diary that he believed that Lincoln was too slow to remove many of his cabinet members and military leaders, and too weak when exercising his power of pardon, to illuminate the differing leadership styles of the two men. *Id*. (citations omitted).

[33] *Id.* at 668-69 (citations omitted).

[34] *Id.* at 633-34 (citations omitted).

[35] *Id.* at 676-81.

[36] *Id.* (citations omitted); *see also id.* at 635 (relaying Chittenden's comment that Lincoln "must move upon a higher plane") (citation omitted).

At other times, Goodwin's use of detail and first-hand accounts of the personal aspects of these events adds incredible insight into the passion that surrounds them. For example, her description of the caning of Senator Charles Sumner on the Senate floor by South Carolina's Preston Brooks,[37] just one week prior to the Republican National Convention in 1856, is skillfully placed to highlight the hatred and vilification of the opposing factions that was developing between the slavery and anti-slavery factions within that party at the time.[38]

The personal writings also provide insight into the cultural differences in those days, particularly the intimacy shared by men. The author uses letters between Stanton and Chase,[39] Lincoln and Speed, and the detailed accounts of Lincoln's friendship with Seward,[40] to demonstrate the degree to which these powerful men shared love and drew support from each other. She also includes several juicy letters between Chase and Stanton containing passages which would today cause most men to blush.[41] This intimacy is not quite the image one would have of President Bush and his cabinet today, but is instructive for understanding the events of that period as such relationships among men were apparently common during that time.

While the book does much to illuminate the characters, as well as to elicit emotional attachment on the part of the reader, it is not without fault. It appears that Goodwin cannot resist the urge to include every interesting fact that she has discovered. At times, she chases the tail of the stories too far exchanging humorous quips for the course of the main characters.[42] She also seems unable to resist the urge to incorporate anything that might hook the reader. For instance, at one point she pulls in a quote from Walt Whitman to describe the President's appearance and travel habits.[43] While the name is surely to ring a bell with most readers, it seems included for solely that value.

Additionally, despite all of her previous success and notoriety, the author's incidents involving plagiarism in 2002 cannot be ignored when reviewing this work.[44] Ironically, even with her prior rub with plagiarism, it still difficult at times to ascertain in *Team of Rivals* what she has taken from other sources and what she is providing as her own editorial.[45] A great example is the portrayal of the previously mentioned attack on Sumner by Preston Brooks. The author spends over two pages describing this event and cites many references.[46] Yet, as is common throughout the book, it is difficult to ascertain whether the intervening editorial comments are her own or pulled from the other sources. In this instance, she even omits support for the claim that Sumner spent three years out of the Senate as a result of this attack.[47] One can only presume that she read or learned this from some historical source but her citation clearly stops before and continues after this proclamation.[48] Although relatively minor, these ambiguities seem irresponsible given her history.

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[37] *Id.* at 184. Sumner's attacker was the young Congressman Preston Brooks, cousin of South Carolina Senator Andrew Butler. *Id*. Andrew Butler had been the target of vilifying anti-slavery remarks by Sumner on the Senate floor just two days earlier. *Id*. "You have libelled South Carolina and my relative, and I have come to punish you," and he did with several blows to Sumner's head with a cane. *Id*. (quoting BOSTON PILOT, May 31, 1856).

[38] *Id.* at 185. The author also includes the presentation of a silver goblet and walking stick by the Governor of South Carolina to Preston Brooks "in honor of his good work" to further tug at the emotions of the reader. *Id*. (citing CHARLESTON DAILY COURIER, May 28, 1856).

[39] *See id*. at 43 (citations omitted).

[40] *See id.* at 724 (describing how, as Seward laid in bed recovering from an attack on his life, Lincoln laid "side by side" with him as "they had done at the time of their first meting in Massachusetts many years before") (citations omitted).

[41] *Id.* at 117 (responding to Chase, Stanton wrote it "filled my heart with joy; to be loved by you, and be told that you value my love is a gratification beyond my power to express") (citation omitted). This letter followed earlier correspondence where Stanton informed Chase, "Since our pleasant intercourse together last summer . . . no living person has been oftener in my mind;—waking or sleeping,—for, more than once, I have dreamed of being with you." *Id*. at 116 (citation omitted).

[42] *See*, *e.g.*, *id.* at 697 (including a random reference from Noah Brooks at the 1864 Inauguration to an ambassador that "was so stiff with gold lace that he could not sit down except with great difficulty and had to unbutton before he could get his feet on the floor") (citation omitted).

[43] *Id.* at 546 (quoting WALT WHITMAN, SPECIMEN DAYS 26 (1971)).

[44] *See* George Mason University's History News Network, Editor's Note, *How the Goodwin Story Developed*, Oct. 6, 2005, http://hnn.us/articles/590.html. In 2002, Doris Kearns Goodwin was exposed for having plagiarized extensively in her book *The Fitzgeralds and the Kennedys*. DORIS KEARNS GOODWIN, THE FITZGERALDS AND THE KENNEDYS (1987).

[45] *See* GOODWIN, *supra* note 1, at 759-880.

[46] *See id.* at 789 (containing the citations for page 184-85).

[47] *Id.* at 184.

[48] *Compare id.* at 184 (claiming Sumner was out of Senate for three years), *with id*. at 789 (endnotes for this passage).

Aside from these distractions, the book is valuable to leaders and Judge Advocates alike. For the Judge Advocate, there are several references to international law, law of nations, and other legal issues inherent in the President's decision cycle.[49] These issues, confronted by Lincoln—a self trained lawyer—are not unlike some of the issues faced by Judge Advocates and commanders on today's battlefield. Additionally, Justice Taney's decision in Dred Scott[50] and the decision to suspend habeus corpus by Lincoln are also presented in a thought provoking manner.[51] The legal impact and response at the time is eerily reminiscent of the arguments being made by the President today and reviewed by many civil liberty groups, Congress, and potentially the courts.[52] As such, this book could serve as a catalyst for discussions on legal aspects of operations between commanders and judge advocates.

In conclusion, Doris Kearns Goodwin's "mirror" approach to examining Abraham Lincoln successfully magnifies his personality traits and leadership style. It also provides unique perspective and insight to the events during that time. The book does not assume too much on the part of the reader, thus making it a great teacher of history. Most compelling is the emotional investment that it requires of the reader as the story, with its heroes and villains, unfolds. Readers will finish the book inspired and refreshed, but also avowed to be more careful in their "Letters from War." If George McClellan had known that someday his letters to his wife would be in the hands of Doris Kearns Goodwin, he might have decided to fight the war, rather than write about it to his wife.

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[49] *See, e.g.*, *id.* at 550-51 (examining the Union Order of Retaliation, issued on July 30 1863, stating "that for every soldier of the United States killed in violation of the laws of war, a rebel soldier shall be executed; and for every one enslaved by the enemy or sold into slavery, a rebel soldier shall be placed at hard labor") (citations omitted); *id*. at 396-99 & 710-11 (describing the Trent Affair wherein Lincoln and his cabinet, primarily Seward, were forced to deal with delicate international legal questions created when a Union naval vessel forcibly removed Confederate emissaries from a British merchant ship, the *Trent*, bound for England) (citations omitted).

[50] *Id*. at 188-92, 204, 223.

[51] *See id.* at 354-55 (citations omitted). Bates penned a twenty-six page opinion supporting the President's decision. *Id*. at 355 (citations omitted).

[52] *Compare id.* at 355 (citing Lincoln's and Bates's justification for the actions of the President in times of urgency) (citations omitted), *with* Remarks, Richard Ben-Veniste, 9-11 Commissioner, Sept. 7, 2005, *Local Voices: Citizen Conversations on Civil Liberties and Communities Report Release*, http://www.lwv.org/AM/Templ*ate.cfm?Section=Home&CONTENTID=3458&TEMPLATE=/CM/ContentDisplay.cfm* (citing both Justice Thurgood Marshall in 1989 and Sandra Day O'Connor in 1995 to state that the challenge facing the 9/11 Commission is its the need to balance civil liberties with the need to protect America from terrorist attacks).

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 ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).
> Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee
		13 Jul – 26 Sep 07 (BOLC III) TJAGSA **(Tentative)**
5-27-C20 (Ph 2)	174th JAOBC/BOLC III	9-Nov 07 – 6-Feb 08
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F1	199th Senior Officers Legal Orientation Course	22 – 26 Oct 07
5F-F1	200th Senior Officers Legal Orientation Course	28 Jan – 1 Feb 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08

5F-F3	14th RC General Officer Legal Orientation Course	13 – 15 Feb 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
5F-F55	2008 JAOAC (Phase II)	7 – 18 Jan 08
5F-JAG	2007 JAG Annual CLE Workshop	1 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	16 – 20 Jul 07
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	2d BNCOC Common Core	4 – 25 Jan 08
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Ph 2)	6th Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D30 (Ph 2)	1st Paralegal Specialist BNCOC	2 Nov – 7 Dec 07
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	11 Jun – 13 Jul 07
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
512-27D40 (Ph 2)	1st Paralegal Specialist ANCOC	2 Nov – 7 Dec 07
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	31 Mar – 4 Apr 08
7A270A3	2008 Senior Warrant Officer Symposium	4 – 8 Feb 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07

512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC6	8th Court Reporting Symposium	29 Oct – 2 Nov 07
512-27DC7	3d Redictation Course	7 – 18 Jan 08
512-27DC7	4th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th BCT NCOIC Course	16 – 20 Jun 08
512-27D/40/50	16th Senior Paralegal Course	18 – 22 Jun 07
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08
512-27D-CSP	9th BCT NCOIC Course	18 – 22 Jun 07
5F-F58	2008 BCT Symposium	4 – 8 Feb 08
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F29	25th Federal Litigation Course	6 – 10 Aug 07
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F23E	2007 USAREUR Legal Assistance CLE	5 – 8 Nov 07
5F-F24	32d Administrative Law for Installations Course	17 – 21 Mar 08
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28	2007 Income Tax Law Course	10 – 14 Dec 07
5F-F28E	7th USAREUR Income Tax CLE	3 – 7 Dec 2007
5F-28H	8th Hawaii Income Tax CLE	14 – 18 Jan 08
5F-F28P	8th PACOM Income Tax CLE	7 – 11 Jan 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	158th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	23 Jul – 1 Aug 08

5F-F101	8th Procurement Fraud Course	26 – 30 May 08
5F-F103	8th Advanced Contract Law Course	7 – 11 Apr 08
5F-F11	2007 Government Contract Law Symposium	4 – 7 Dec 07
5F-F12	77th Fiscal Law Course	22 – 26 Oct 07
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
5F-F14	26th Comptrollers Accreditation Fiscal Law Course	15 – 18 Jan 08
5F-F15E	2008 USAREUR Contract Law CLE	12 – 15 Feb 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08

CRIMINAL LAW		
5F-F31	13th Military Justice Managers Course	15 – 19 Oct 07
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F34	29th Criminal Law Advocacy Course	4 – 15 Feb 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08
5F-F35	31st Criminal Law New Developments Course	5 – 9 Nov 07
5F-F35E	2008 USAREUR Criminal Law CLE	15 – 18 Jan 08
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	3d Intelligence Law Course	25 – 29 Jun 07
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F43	3d Advanced Intelligence Law Course	27 – 29 Jun 07
5F-F42	88th Law of War Course	9 – 13 Jul 07
5F-F42	89th Law of War Course	28 Jan – 1 Feb 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	2d Legal Issues Across the Information Operations Spectrum	16 – 20 Jul 07
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030) Lawyer Course (040)	4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (030) BOLT (030)	6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
900B	Reserve Lawyer Course (020)	10 – 14 Sep 07
850T	SJA/E-Law Course (020)	6 – 17 Aug 07
850V	Law of Military Operations (010)	11 – 22 Jun 07
0258	Senior Officer (050) Senior Officer (060)	23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07
3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)
3090	Legalman Course (020)	16 Apr – 29 Jun 07
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
5764	LN/Legal Specialist Mid Career Course (020)	17 – 28 Sep 07
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted (020)	TBD TBD
4040	Paralegal Research & Writing (030)	16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150)	23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego)

	Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07
0379	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07

947J	Legal Clerk Course (070) Legal Clerk Course (080)	11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008Course Schedule

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, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07
Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07

Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07
Judge Advocate Staff Officer Course, Class 08-A	9 Oct – 13 Dec 2007
Paralegal Apprentice Course, Class 08-01	10 Oct – 30 Nov 2007
Area Defense Counsel Orientation Course, Class 08-A	15 – 19 Oct 2007
Defense Paralegal Orientation Course, Class 08-A	15 – 19 Oct 2007
Paralegal Craftsman Course, Class 08-01	24 Oct – 7 Dec 2007
Advanced Environmental Law Course, Class 08-A (Off-Site Wash DC Location)	29 – 30 Oct 2007
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 Nov 2007
Deployed Fiscal Law & Contingency Contracting Course, Class 08-A	27 – 30 Nov 2007
Computer Legal Issues Course, Class 08-A	3 – 4 Dec 2007
Legal Aspects of Information Operations Law Course, Class 08-A	5 – 7 Dec 2007
Federal Employee Labor Law Course, Class 08-A	10 – 14 Dec 2007
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 2008
Trial & Defense Advocacy Course, Class 08-A	7 – 18 Jan 2008
Air National Guard Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Air Force Reserve Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 2008
Military Justice Administration Course, Class 08-A	28 Jan – 1 Feb 2008
Legal & Administrative Investigations Course, Class 08-A	4 – 8 Feb 2008
Total Air Force Operations Law Course, Class 08-A	8 – 10 Feb 2008
Homeland Defense/Homeland Security Course, Class 08-A	11 – 14 Feb 2008
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 2008
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 2008
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 2008
Interservice Military Judges' Seminar,Class 08-A	1 – 4 Apr 2008
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 2008
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 2008
Environmental Law Course , Class 08-A	21 – 25 Apr 2008

Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 2008
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 2008
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 2008
Reserve Forces Judge Advocate Course, Class 08-A	3 – 4 May 2008
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 2008
Operations Law Course, Class 08-A	12 – 22 May 2008
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 2008
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 2008
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 2008
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 2008
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 2008
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 2008
Law Office Management Course, Class 08-A	16 – 27 Jun 2008
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 2008
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 2008
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 2008
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 2008

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 (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2007*** , for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008, and is a prerequisite for most judge advocate captains to be promoted to major.

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 Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2007 will not be cleared to attend the 2008 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the 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

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	Local Official	CLE Requirements
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St., Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years, four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 00 - 31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 02 - 31 Jan 05 and every thirty-six months thereafter).
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http:// www.courts.state.co.us/cle/ cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.

Delaware	Executive Director Commission on CLE 200 W. 9th St., Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/ rules.htm	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/newflabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January.
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/ mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours overa three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.

Kansas	Executive Director CLE Commission 400 S. Kansas Ave., Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.kscle.org	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/ rule_xxx.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Maine	Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: July.
Minnesota	Director MN State Board of CLE 25 Constitution Ave., Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/ meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.

Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/ mobarcle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana.org	-Fifteen hours per year. -Reporting date: 1 March.
Nevada	Executive Director Board of CLE 295 Holcomb Ave., Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampshire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.
New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/ mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.

New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http:// www.courts.state.ny.us	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/ MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St., FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.

Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd., Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr. Group 2-31 Aug. Group 3-31 Dec.
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http:// www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.

Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http:// www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111-3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not practicing in state. -Reporting date: 31 January.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/ courts/	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St., Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 31 October.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, including six hours ethics. -Reporting date: 31 January.
West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http:// www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.

Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 http://www.wyoming.bar.org	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 January.

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

Date	Unit/Location	ATTRS Course Number	Topic	POC
23-24 Jun 07	94th RRC Boston/Devins, MA	Class: 013	International & Operational Law Administrative & Civil Law/Legal Assistance	CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGLCS 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 TJAGLCS receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGLCS does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (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.

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.

Contract Law

AD A301096 Contract Attorneys Course Deskbook Deskbook, Vol. I (Oct. 2006), 1175 pages.

AD A301095 Contract Attorneys Course Deskbook, Vol. II (Oct. 2006), 356 pages.

AD A265777 75th Fiscal Law Course Deskbook, (Oct. 2006), 654 pages.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), Vol. I, JA 270.

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

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 (2006).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2000).

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 (2006).

AD A399975 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. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS 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 TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. 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 TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3369, or e-mail at Dottie.Evans@hqda.army.mil.

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