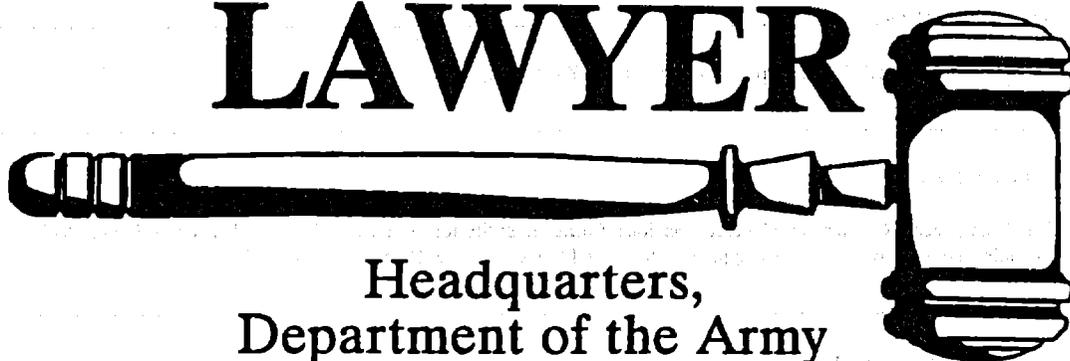


THE ARMY LAWYER



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Tips and Observations from the Trial Bench: The Sequel¹

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Overview

As time passes, counsel gain experience in courts-martial procedure and advocacy. With the continual introduction of new counsel, however, the trial bench often sees repeated blunders, albeit by different counsel. Before becoming a judge advocate, a commander instructed a newly commissioned second lieutenant (the author) that he expected mistakes to occur, but he also suggested that only a fool or an idiot makes the same mistake twice. His point was that people need to learn from their mistakes. In a continuing effort to assist both trial and defense counsel, this article offers suggestions and highlights some mistakes committed by counsel during courts-martial.² I hope that this article not only will help counsel refrain from making the mistakes, but also will provide opposing counsel with issues and insights for which they should be alert.

Law Enforcement Coordination

Trial and defense counsel must strive to develop a working relationship with the local military law enforcement agencies. While law enforcement agencies usually provide the cases that result in courts-martial, the trial counsel, who desires a smooth prosecution, must ensure law enforcement officials fully investigate these cases. The investigation must focus on developing facts and not merely on perfecting a case against a suspect. Military judges observe that some law enforcement officials are too readily content to close out the investigation if the suspect confesses to the crime. A confession in court is of little use unless it is corroborated. Trial counsel should not allow law enforcement to close an investigation until the case is fully investigated to the satisfaction of the trial counsel or the chief of justice, which should include the collection of sufficient facts to corroborate a purported confession.

Confronted at trial with an inadequate or apparently biased criminal investigation, defense counsel should promptly remind law enforcement agents and the fact finder that military law enforcement investigations must be impartial and thorough.³ The defense should use any appearance of a "rush to judgment" by

criminal investigators to their advantage in attempting to establish reasonable doubt. However, defense counsel must be careful not to antagonize law enforcement agents outside the courtroom. If the working relationship between defense counsel and law enforcement agents is hostile, defense counsel often will have difficulty in achieving desired investigative assistance from agents. To foster cooperation with law enforcement agents, defense counsel must have law enforcement agents understand that lawyers' actions are taken to fulfill their professional responsibilities and do not represent a personal attack on, or affront to, the agents.

One mistake by law enforcement personnel, especially by drug suppression teams, often leads to potentially unjustified acquittals. The mistake is the failure to have an undercover agent present when a confidential registered source initially approaches a target individual as a source of illegal drugs. Law enforcement officials seem content to allow the registered source to make arrangements with the suspect. Law enforcement officials then become involved only when the registered source consummates the drug transaction. Even then, law enforcement officials sometimes do not actually observe the drug transaction. They only know the source went into a house and came out with drugs. This scenario invites defense allegations of entrapment and raises unnecessary credibility concerns about the registered source. Without a law enforcement agent present at the initial meeting with the suspect, it becomes too easy for the accused to contend that he obtained and sold the drugs only because the registered source threatened him or persisted in the attempts to obtain the drugs. This issue, when coupled with the usually questionable reputation of an uncorroborated registered source, often generates sufficient reasonable doubt to preclude a conviction. This situation could easily be avoided by having the law enforcement official present as a friend or relative of the registered source when the source initially meets the suspect. If this is not possible because of a complicated situation of introducing the agent as a friend or relative, agents should consider other measures; for example, conducting prompt pre-initial and post-initial meeting frisks, use of marked money (.015 Criminal Investigation Division funds), and conducting a urinalysis of the registered source.

¹ For the initial article on the same subject, see Gary J. Holland, *Tips and Observations from the Trial Bench*, ARMY LAWYER, Jan. 1993, at 9.

² The author is indebted to Colonel Peter E. Brownback III, Colonel Keith H. Hodges, and Colonel Robert F. Holland, United States Army Trial Judiciary, for providing specific examples for use in this article. The opinions and suggested guidance expressed herein, however, represent solely the opinions of the author, not those of any other person or the United States Army Trial Judiciary.

³ See DEP'T OF ARMY, REG. 195-1, CRIMINAL INVESTIGATION: ARMY CRIMINAL INVESTIGATION PROGRAM, para. 5a (1 Oct. 1974) An objective of each Army Criminal Investigation Division (CID) element is to ensure that crimes are "thoroughly and impartially investigated by CID special agents." *Id.*

Ideally, the law enforcement official should be present at the actual distribution. The law enforcement official's testimony at trial about the accused's ready acceptance of the offer normally would be sufficient to overcome any entrapment issue. While prosecutors must work with what is given to them by law enforcement, coordination with, and instruction to, local military law enforcement officials by chiefs of military justice should provide a stronger case to prosecute.

Drafting of Charges

Judges continue to see charge sheets containing specifications that omit necessary elements of offenses. Because the trial counsel should be drafting the specifications according to the model specifications contained in the *Manual for Courts-Martial*,⁴ ensuring their accuracy before referral, the omission of essential elements is totally inexcusable for offenses that have undergone a Article 32(b),⁵ Uniform Code of Military Justice investigation. The function of the Article 32 investigating officer is to "inquire into the truth and form of the charges."⁶ If the convening authority refers the case to a general court-martial with a defective specification, the staff judge advocate (SJA) also fails in his or her duty. The SJA's pretrial advice must include a statement that "each specification alleges an offense."⁷ An all too common occurrence is the omission of the spousal element in an indecent assault⁸ specification. The victim must be a "person not the spouse of the accused."⁹ Without this spousal element, the specification arguably alleges only the lesser included offenses of an indecent act¹⁰ or an assault consummated by a battery.¹¹ What also disturbs military judges is defense counsel's oversight in not moving to dismiss defective specifications. The court obviously wants closer attention to detail by all parties.

At the other extreme, judges sometimes wonder why counsel draft charges with superfluous, specific details. For example, counsel need to realize that if a drug is specifically listed within

Article 112a,¹² Uniform Code of Military Justice, no need exists to allege in the specification the schedule of controlled substances on which it can be found. Therefore, if the alleged drug is marijuana, cocaine, LSD, heroin, amphetamine, methamphetamine, opium, phencyclidine, barbituric acid "and any compound or derivative of any such substance,"¹³ the specification should not contain the phrase "a Schedule ____ controlled substance." Another common scenario is alleging a detailed description of stolen items—such as, model number, serial number, color—when a general description such as "stereo equipment" would be sufficient. Trial counsel are expected to prove all matters contained in a specification. The more specific the information, the more detailed the proof must be. Defense counsel should insist that the prosecution prove what it charges. In one case, a defense theme was the inattention to detail by the government in rushing to identify the perpetrator. As further evidence of such a careless attitude in prosecuting the case, the defense pointed to the incorrect street address alleged in the specifications for the location of the crimes. By alleging too much unnecessary information, which later proved incorrect, the prosecution helped the defense articulate its theory of the case.

In some specifications, specific details may become relevant. For example, judges often see conspiracy specifications alleging only the consummated offense as the overt act (for example, conspiracy to commit larceny by stealing a multimeter). A better approach would be to plead the individual steps the co-conspirators took in completing the offense. If, for some reason, the prosecution cannot prove the consummated offense, the prosecution still may be able to prove the conspiracy by proving the underlying agreement and that at least one of the alleged overt acts occurred in furtherance of the object of the conspiracy.

Trial counsel could avoid many drafting problems by following the model specifications in part IV of the *Manual for Courts-Martial*. Two further examples from actual trials are:

⁴ MANUAL FOR COURTS-MARTIAL, United States, pt. IV (1995 ed.) [hereinafter MCM].

⁵ 10 U.S.C. § 832(b) (1988).

⁶ MCM, *supra* note 4, R.C.M. 405(e).

⁷ *Id.* R.C.M. 406(b)(1).

⁸ *Id.* pt. IV, ¶ 63.

⁹ *Id.* ¶ 63b(1).

¹⁰ *Id.* ¶ 90.

¹¹ *Id.* ¶ 54.

¹² *Id.* ¶ 37.

¹³ *Id.* ¶ 37(b)(1).

- (1) False official statement violation: the model specification¹⁴ indicates "make to _____." If trial counsels draft the specification to state "make a statement that she was entitled to 24 hours quarters in DA Form _____," they are inviting unnecessary issues.
- (2) Sale of military property violation: the model specification¹⁵ states "military property of the United States." It does not state "property of the United States military" or "property of the United States Army."

Judges also see problems in drafting charges under the Assimilative Crimes Act.¹⁶ The *Manual for Courts-Martial* does not contain a sample or model specification for charging a violation of an assimilated statute under Article 134,¹⁷ Uniform Code of Military Justice; however, the *Military Judges' Benchbook*¹⁸ provides appropriate model specifications for violations of the Assimilative Crimes Act and non-capital federal offenses. If trial counsel would follow the Assimilative Crimes Act model specification, two common mistakes could be avoided: (1) omitting the allegation that the offense occurred at a location under exclusive or concurrent federal jurisdiction; and (2) failing to allege the federal statute that assimilates the state statute.

At trial, counsel typically are unprepared to prove the exclusive or concurrent federal jurisdiction. While this is usually the subject of judicial notice, counsel are remiss in not providing necessary information to the court on which to base the judicial notice.¹⁹

Requirements for Referral

Referral to trial requires that the convening authority find probable cause that a crime was committed and that the accused committed it.²⁰ One recent case presided over by the author involved

numerous derelictions of duty occurring over several specific dates. While the court-martial referral packet contained witness statements on some offenses, apparently some charges stemmed merely from conversations that the trial counsel had with witnesses. These conversations were not reduced to writing. Neither the SJA nor the convening authority were privy to the trial counsel's conversations, yet the convening authority referred the charges to trial. To preclude motions for dismissal of charges for an improper referral, the prosecution should ensure that the court-martial packet going to the convening authority has statements (handwritten ones are sufficient) supporting the factual allegations for each charge and specification on the charge sheet.

When charges are referred to trial, the trial counsel has the duty to ensure that charges are served on the accused.²¹ "Trial Counsel should comply with this rule immediately upon receipt of the charges."²² The promptness requirement is imperative in these days of a reduced number of military judges. Judges, who may visit an installation only once a month, sometimes are unable, due to untimely service of charges, to arraign an accused during a previously scheduled trip and thereby stop the speedy trial clock.²³ Counsel must recognize that formal service is necessary before an accused can be required to participate in any court-martial proceeding. Trial counsel, who are aware of the status of their cases, know when the case will be referred. Counsel need to plan for the service of charges. Just as trial counsel should not await referral to plan the prosecution of the case, they should not await referral to plan for service of charges. To fulfill the spirit of Rule for Courts-Martial 602²⁴ and to preclude unnecessary delay in processing the case, trial counsel should have the accused standing by at counsel's office on the SJA's return from the commanding general referring the charges to trial. If the accused is in pretrial confinement at some other installation, trial counsel should telefax a copy of the referred charged sheets to the prison personnel and have someone at the correctional facility immediately serve the accused on behalf of the trial counsel. Untimely service of charges is but one example of counsel's needing to develop a sense of urgency in the processing of their cases.

¹⁴ *Id.* ¶ 31f.

¹⁵ *Id.* ¶ 32(f)(1).

¹⁶ 18 U.S.C. § 13 (1988).

¹⁷ MCM, *supra* note 4, pt. IV, ¶ 60.

¹⁸ DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-125A (1 May 1982).

¹⁹ MCM, *supra* note 4, MIL. R. EVID. 201.

²⁰ *Id.* R.C.M. 601(d)(1), 406(b)(2).

²¹ *Id.* R.C.M. 602.

²² *Id.* R.C.M. 602 discussion.

²³ *Id.* R.C.M. 707(b)(1).

²⁴ *Id.* R.C.M. 602.

Relations with Court Reporter

Judges try to maintain cordial relations with court reporters. Counsel need to do likewise. What is upsetting to court reporters is the feeling of being left out. Court reporters typically belong to the office of the staff judge advocate; they are not assigned to the judge. When the judge arranges a trial session with counsel, the trial counsel has the responsibility to arrange for the court reporter.²⁵ The trial counsel should immediately inform the court reporter of the time and date for the session. Although court reporters may be the last to know of the session, they should not be informed at the last minute!

Before the trial commences, the court reporter should be provided with the original court-martial file so that a counsel does not misplace original documents or disorganize the file's contents. When any exhibit has been marked and counsel is not using it with a witness who is testifying, the exhibit should be given to the court reporter or placed on an exhibit table; counsel should not have the exhibit. Counsel tend to misplace exhibits and the court wastes time while counsel attempt to locate them.

Defense Counsel and Guilty Pleas

An accused may plead guilty to a named lesser-included offense.²⁶ While some named lesser-included offenses are easily understood without any further factual explanations, others are not. For example, a plea of guilty to the lesser-included offense of indecent acts with another when the charged offense is rape does not provide the judge with sufficient factual data to conduct a proper providence inquiry.²⁷ In such situations, the defense counsel should prepare a rewritten specification that accurately reflects the plea and provide a copy to the judge and trial counsel.²⁸ To make pleas simple, before trial the defense counsel should attempt to have the prosecution amend the specification to conform to the plea, especially when the plea changes specific allegations as to amounts, dates, places, and other particulars. The intent should be to keep pleas as simple and accurate as possible—minimizing the risk of an improvident plea.

Unquestionably, defense counsel must prepare their clients thoroughly for the guilty plea inquiry. Counsel also should prepare the judge for the guilty plea and providence inquiry. If the theory of the accused's culpability is based on vicarious liability as a principal or conspirator, counsel should not only ensure that the accused understands the concept of vicarious liability,

but also should inform the judge of the theory of liability before the guilty plea inquiry. It is somewhat disconcerting for a judge to learn halfway through the providence inquiry that the accused was not the actual perpetrator of the crime. If the guilty plea is to an attempted offense, the judge also needs to know what the overt act was and what prevented the offense from being completed (these items of information are not normally alleged in an attempt specification, but they are elements of the offense). If counsel have a stipulation of fact that the judge can use during the providence inquiry, the stipulation should set forth the specifics of the accused's liability and what the accused did (or did not do) to satisfy each element.

Detailing of Members

Recurrent problems occur with courts-martial convening orders and the proper detailing of court members to a case. Unless unavoidable (which is unlikely in peacetime), no accused may be tried by a court member junior in grade or rank to the accused.²⁹ This problem most often occurs when the accused is a senior non-commissioned officer, and the panel contains enlisted membership. Counsel and staff judge advocates must ensure that detailed members are senior in grade and rank to the accused.

In many jurisdictions, convening authorities have automatic detailing instructions in place in the event that a court member is excused prior to trial. Once the convening authority or the SJA, pursuant to a delegation of authority, excuses a member before trial, the standing instruction is that another member, who has been selected by the convening authority, is automatically detailed to the court. This procedure ensures that the panel composition is always at a certain number to begin the trial. While nothing is wrong with such a procedure, trial and defense counsel must not forget that the procedure is in place if a member is excused at the last minute before trial. Often, a court member has a valid excuse, but the excuse does not surface until about thirty minutes before trial. If the automatic detailing procedure is in place, any excusal of that member before trial will require the notification of another member, and the court will be delayed until the new member arrives. To preclude this last minute notification of members and possible delay in the case, chiefs of military justice and SJAs may want to consider having the convening authority make an exception to the automatic detailing procedure if a member is excused, for example, within twenty-four hours of the court's being assembled or the members being sworn.

²⁵ *Id.* R.C.M. 502(d)(5).

²⁶ *Id.* R.C.M. 910(a).

²⁷ *Id.* pt. IV, ¶¶ 90, 45.

²⁸ *Id.* R.C.M. 910(a) discussion.

²⁹ 10 U.S.C. § 825(d)(1) (1988). See *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993) (an accused being tried by a junior member, however, is not a jurisdictional defect). Additionally, this ground for challenge maybe waived if not raised. See MCM, *supra* note 4, R.C.M. 912(4).

Voir Dire and Challenging of Court Members

In most locations, panel members complete questionnaires when they are initially selected by the convening authority. These questionnaires are available to counsel; therefore, counsel ordinarily need not ask questions concerning where the members went to school, how many children they have, what job they have, and similar background informational questions. Counsel should not explain the purpose of voir dire. The judge has already done so before counsel ask the members any questions; thus, no need exists for trial or defense counsel to state: "I want to ensure that SPC Jones can receive a fair trial" or "I want to see if you can be impartial." If counsel feel that they must state why they are asking questions of the members, they should merely state words to the effect of "I want to get to know you better," or "I'd like to ask you some questions not contained in the questionnaires which you completed."

Trial counsel must be intelligent in exercising peremptory challenges and be aware of the "numbers game" when the accused has requested at least one-third enlisted membership. A representative example illustrates the point: A general court-martial had nine members (five officer and four enlisted members); the only challenge for cause was by the defense counsel against an enlisted member; the trial counsel objected to the challenge; the judge denied the challenge for cause; the trial counsel exercised his peremptory challenge against one of the other enlisted members; and the defense counsel then exercised his peremptory challenge against the enlisted member against whom the judge had denied the causal challenge. The challenges left the panel below quorum for enlisted members because only two of the seven members were enlisted soldiers. An astute trial counsel would have recognized that the defense counsel might exercise a peremptory challenge against the member against whom the judge had denied the causal challenge; therefore, the trial counsel might not have challenged another enlisted member. By allowing the defense counsel to "bust" the court, the trial counsel caused unnecessary delay and wasted the other members' time.

Pretrial Agreement Cases and Stipulations of Fact

Pretrial agreements commonly require the accused to enter into a stipulation of fact with the government concerning the circumstances of the offenses to which the accused is pleading guilty. While judges find themselves unnecessarily delaying the start of cases while counsel work out the details of the stipulations or make last minute changes to them, judges often find the stipulations ultimately lacking in substantive content. Typically, the stipulation rehashes the elements of the offenses but goes into no specific details. The stipulation could easily provide aggravation, as well as extenuation and mitigation, evidence to preclude the necessity of live testimony during sentencing. During a judge alone trial, in which the accused pled guilty to attempted premeditated murder, the stipulation did an admirable job of explain-

ing the circumstances of the offense but it totally neglected to mention the extent of injuries suffered by the victim. Instead, the court heard almost three hours of complex medical testimony regarding the extent of the injury to the victim's spinal cord. The result of the testimony was that the victim was permanently paralyzed and would never walk again. The medical testimony easily could have been placed into the stipulation, along with a video of "a day in the life" of the victim incorporated into the stipulation by reference.

Proving the Case

Both trial and defense counsel sometimes attempt to have the judge rule on motions without having sufficient facts. Whether counsel is the moving or the opposing party to a motion involving factual issues, counsel need to be prepared to present evidence on the motion. Judges cannot rule solely from offers of proof. Counsel, as well as judges, should incorporate into the practice the following guidance:

Trial judges should not let the litigants lapse into a procedure whereby the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called. The other party then counters with his/her own argument and offers of proof Do not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation.³⁰

The keys to success as a trial advocate consist of knowledge, preparation, and luck. Counsel have control over the first two areas. It is luck, indeed, when success occurs within the courtroom despite the lack of pretrial preparation. After a thorough investigation into the facts of the case, both trial and defense counsel should develop a theme for their cases before trial. Counsel should be able to describe the essence of the case in a few short sentences. The theme should be the focal point that counsel constantly should have in mind and refer to during trial. For example, the theme for the trial counsel in a rape case may be that when a female says "no" she means "no," and "no" means the intercourse occurred without her consent. In the same case, the theme for the defense counsel could be that although the female may have said "no," her accompanying actions spoke louder than her words, and no one in the accused's position would have thought that the alleged victim was doing anything but consenting. Having a theme will also allow counsel to focus their evidence and examination of witnesses, and should allow counsel to begin thinking about what instructions should be requested at trial. A theme, in effect, will generate organization in the case from counsel's voir dire through closing argument.

³⁰ United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987) (citing 18 *The Dicta* 77 (10 Aug. 1986), cert. denied, 484 U.S. 846 (1987)).

Evidentiary Foundations and Associated Matters

Counsel have been known to try to prove a forgery case without trying to admit into evidence the forged writing and have attempted to prove a drug possession case without offering into evidence the bag of drugs, or without offering proof of the nature of the drug either through lay testimony, laboratory analysis, or stipulation. The use of an elements checklist for each charged offense is indispensable for trial counsel. Counsel need to consult the checklist before resting their case. Before trial, chiefs of military justice need to have trial counsel review how they intend to prove the case.

In a similar vein, if defense counsel plan to rely on an affirmative defense at trial, they need to ensure all elements of the defense are present. Defense counsel should consult with senior or regional defense counsel about expected defenses. For example, defense counsel must understand that for the defense of accident to apply, the accused must have been acting lawfully and free of negligence at the time of the offense. The meaning of accident in the legal sense, therefore, is much narrower than the meaning of accident in everyday usage (an unintended, unplanned and unforeseen result).³¹

Uncharged Misconduct

The trial bench continues to see needless issues surrounding uncharged misconduct. In many instances, the issues would be moot if counsel prepared more thoroughly prior to referral so that the uncharged misconduct could become charged misconduct. If trial counsel intends to offer uncharged misconduct, counsel must ensure that reasonable notice of the uncharged misconduct is given to the defense prior to trial.³² Counsel also need to understand: "The worse the act, the greater the chance that court members may decide against [the accused] because [the accused] is a bad person—something that the law does not allow."³³ Usually, the admission of the uncharged misconduct ultimately depends on the government showing two items: (1) that the evidence is offered for some other purpose than to show that the accused has criminal propensities; and (2) that the evidence will not unfairly prejudice the accused under Military Rule of Evidence 403.³⁴ Counsel, therefore, should concentrate their arguments before the judge on these issues. Both trial and defense counsel should include specific examples, rather than a general, conclusory argument or objection about why the evidence is being offered and the prejudicial or nonprejudicial effect of the evidence.

Both trial and defense counsel have great difficulty in laying foundations for the business record exception to the hearsay rule.³⁵ No valid excuse exists for this failure. The following series of questions to the appropriate witness should accomplish the foundational requirements for any business record, which is prepared and kept in the regular course of an activity's business:

(1) "I now hand you (Prosecution) (Defense) Exhibit ___ for identification. Do you recognize what this exhibit is?"

(2) "What is it?"

(3) "How are you familiar with such documents?"

(4) "How is this document used?"

(5) "When are the entries placed on the document?"

(6) "Who places the entries on the document?"

(7) "(Is)(Are) the (person)(people) who prepare(s) this document supposed to have personal knowledge about the entries they are recording on the document?"

(8) "How routine is the practice of preparing this document?"

(9) "Is it prepared in the regular course of business of (military law enforcement) (criminal investigations within the Army) (_____)?"

(10) "Where is this document kept?"

(11) "Is the document kept in the regular course of business of (military law enforcement) (criminal investigations within the Army) (_____)?"

³¹ See MCM, *supra* note 4, R.C.M. 916(f); *United States v. Curry* 38 M.J. 77 (C.M.A. 1993); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993).

³² MCM, *supra* note 4, MIL. R. EVID. 404(b).

³³ STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL*, 461 (3d ed. 1991).

³⁴ MCM, *supra* note 4, MIL. R. EVID. 403.

³⁵ *Id.* MIL. R. EVID. 803(6).

- (12) After counsel receive the appropriate answers to these questions, counsel should immediately offer the document into evidence.

A common mistake by both trial and defense counsel is permitting opposing counsel to have a witness read aloud from an exhibit not yet admitted into evidence. For example, the time and date from a rights warning waiver certificate should not be read aloud by a witness until the exhibit is admitted into evidence. Because the rights waiver certificate, signed by an accused, represents an admission of a party-opponent if offered by the government, the document is not hearsay.³⁶ The procedure for admitting the rights waiver certificate is so simple that counsel should seek its introduction before specific questions are asked about the rights warning procedure or the date and time. Typically, the trial counsel should present the waiver certificate to the law enforcement official who either read the rights to the accused, or witnessed the rights being read, by stating: "I now hand you Prosecution Exhibit ____ for identification. Do you recognize it?" "What is it?" "How do you recognize it?" "Whose signatures appear on the document?" "Did you see the accused sign the document?" Counsel should then move for its admission into evidence. After such a document is admitted into evidence, witnesses may freely read aloud from the document.

Another error regarding exhibits is when counsel testify about an exhibit before it is received into evidence. This most commonly occurs when counsel give an oral description of the evidence as they hand it to the witness. For example, counsel typically state, "I'm handing you Prosecution Exhibit 2 for identification, which is the rights warning waiver certificate," or "I'm handing you this bag of cocaine recovered from the accused's car." Counsel should state only, "I'm handing you Prosecution Exhibit ____ for identification, what is it?;" and "How do you recognize it?" Another example of improper testimony from counsel is when, for example, the defense counsel cross-examines a witness and states: "I'm looking at my copy of the testimony you gave at the Article 32, and it says something different than what you just stated."

The trial judiciary often hears defense counsel begin to impeach a witness with a prior inconsistent statement by stating words to the effect of "Do you remember my speaking with you yesterday?"

A more effective way of impeaching by a prior inconsistent statement is to direct the witness's attention to the point trying to be made; for example, "Isn't it true that the car you saw was a convertible?" If the witness agrees, the point is made, and the answer becomes substantive evidence even though the answer may conflict with the witness's testimony on direct. If the witness disagrees, then counsel should impeach the witness with the prior statement by asking a series of questions along the following lines: "Isn't it a fact that you had a conversation with me in my office yesterday in the presence of Sergeant Smith?"³⁷ "Isn't it true that the conversation was about your knowledge of this case?" "Isn't it true that you told Sergeant Smith and myself yesterday that the car you saw was a convertible?" If the witness agrees with the last question, the impeachment is complete.³⁸ If the witness disagrees, counsel should seek introduction of extrinsic evidence.³⁹

Counsel need to be aware that prior inconsistent statements are not substantive evidence, unless they were "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."⁴⁰ While an authenticated, verbatim transcript of a person's inconsistent statements provided at the Article 32 investigation may qualify as substantive evidence, prior inconsistent statements contained in a sworn statement given to law enforcement officials would not. Counsel, therefore, need to remember that although the witness's sworn statement may contain inconsistent statements, the sworn statement itself is not admissible, substantive evidence. The written sworn statement containing the prior inconsistent statement(s) may be marked for identification but should not be admitted into evidence unless the witness denies making the statement.⁴¹ In all cases, opposing counsel should request a limiting instruction regarding the prior inconsistent statement(s).

Some documentary evidence can be authenticated simply by having an attesting certificate attached to the document.⁴² Some counsel, however, do not appear to be reading the attesting certificates. Recent examples at courts-martial reflect certificates being signed "for" the custodian without any indication of the signer's position or authority to sign the document; the attesting certificate's misidentifying the attached document; and the attesting certificate's being conditioned upon the document being used for "administrative elimination proceedings only." A court-martial is not an administrative proceeding!

³⁶ *Id.* MIL. R. EVID. 801(d)(2).

³⁷ Two points are noteworthy about the presence of a third party. First, the presence of a third party adds credence to the conversation occurring and implicitly informs the court members that counsel probably was professional (i.e., not engaging in trickery) in interviewing the witness. Second, if the witness denies the prior inconsistent statement, the third party can be a witness without counsel being put in the awkward position both ethically and legally of being a witness in the case.

³⁸ See *United States v. Button*, 34 M.J. 139 (C.M.A. 1992) (if a witness admits making a prior inconsistent statement, extrinsic evidence of the statement is inadmissible).

³⁹ See MCM, *supra* note 4, MIL. R. EVID. 613(b) (two methods of obtaining admissible extrinsic evidence of inconsistent statements are: (1) have the testifying witness sign a sworn statement, and (2) call a witness, Sergeant Smith in this example, to the testifying witness's statement).

⁴⁰ *Id.* MIL. R. EVID. 801(d)(1)(A).

⁴¹ *Id.* MIL. R. EVID. 613(b); *United States v. Rodko*, 34 M.J. 980 (A.C.M.R. 1992).

⁴² See MCM, *supra* note 4, MIL. R. EVID. 902.

If an exhibit is to be offered at trial, counsel must examine and read the exhibit thoroughly! One "war story" involves the larceny of night vision goggles in which the accused then pawned. The defense theory was abandonment, and the defense made an issue about how candid the accused was with everyone about the goggles, to include the pawn shop owner. The judge admitted the pawn ticket into evidence. Apparently unknown to counsel, the ticket contained a fictitious name, unit, and phone number. The data on the pawn ticket, in effect, destroyed the defense assertions that the accused acted consistent with someone who had found abandoned property.

Judges observe counsel, in essence, seeking witnesses to make closing argument for counsel. It is not uncommon at trial to hear questions by counsel along the lines of: "Do you agree your memory of the events were fresher the day after this incident than it is now?" or "Do you agree that we can conclude from what you stated that?" Counsel should be extracting facts from witnesses from which counsel can make argument. Once the facts are obtained from the witness, counsel should sit down! Avoiding questions that allow a lay witness to express conclusions will eliminate lengthy examination, prevent the witness testifying as to a potentially plausible explanation for not agreeing with counsel's conclusion, deter opposing counsel from being alerted to the conclusion, and possibly preclude opposing counsel from defusing the desired conclusion. If the facts are in evidence, counsel may argue all reasonable inferences from the evidence in support of their theory.⁴³

Judges too often hear counsel object on the grounds that "the witness did not write that document" when opposing counsel shows an exhibit to a witness in hopes of refreshing the witness' memory. Counsel need to be aware that any document may be used to refresh a person's recollection; the author of the document is unimportant.⁴⁴ In contrast to documents used to refresh memory, the hearsay exception for recorded recollection *does* require the witness to have made or adopted the writing when the matter was fresh in the witness's memory.⁴⁵ While documents used merely to refresh memory are not admitted into evidence, documents qualifying for the past recorded recollection hearsay exception may be admitted into evidence, but are only read to the trier of fact unless offered by an adverse party.⁴⁶

Cross-Examination

Cross-examination often seems disorganized. An effective cross-examination should begin with extracting those general

concepts with which the witness agrees; for example, "The accused was cooperative during the interview, correct?" Counsel should next focus on more detailed questions to draw out specific information necessary to tie into the theory of the case; for example, "He agreed that he pulled Jane's underwear down, correct?" "He agreed that he fondled her, correct?" "He was agreeing with everything you told him about the case, correct?" "You have described his cooperation with you as child-like, correct?" "You were not aware whether the accused had a mental problem at the time of the interview, correct?" Once the cross-examiner elicits the details, then the final focus should be on any issues, if present, of bias or motive to misrepresent or fabricate; for example, "You are a probationary agent with the CID, correct?" "One of the factors your supervisors will consider in determining if you should become a full-fledged agent is your handling of this case, correct?" Too often, the order of cross-examination seems backwards. By the time the cross-examiner asks questions with which the witness ordinarily would have agreed, the witness is reluctant or qualifies their agreement.

Counsel should have cross-examination (as well as direct examination) documents readily available to confront the witness. Too often, counsel must ask opposing counsel if he or she has an appropriate document so that the counsel can confront the witness with the document. This practice is inexcusable. Each counsel should have clean copies of all documents so, if needed, counsel may remove the document from counsel's file, mark it as an exhibit, show it to opposing counsel, and finally confront the witness with the document.

Sentencing

This judge has frequently heard defense counsel argue on sentencing that the court members should not adjudge any forfeitures or confinement. The defense counsel then specifies why and sits. The defense counsel fails to mention any other aspect of a potential sentence, so the members are left with the impression that the defense is conceding that a punitive discharge is appropriate. Before making such an argument, the defense counsel should have the consent of the accused and inform the judge.

Trial counsel should recognize the current "watering down" of rehabilitative potential evidence found in Rule for Courts-Martial (R.C.M.) 1001.⁴⁷ "Rehabilitative potential refers to the accused's potential to be restored . . . to a useful and productive place in society."⁴⁸ By having such an expansive definition of rehabilitative potential, the rule severely limits the prosecution's

⁴³ *Id.* R.C.M. 919(b).

⁴⁴ STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL*, Rule 612 editorial comment (3d ed. 1991).

⁴⁵ See *MCM*, *supra* note 4, MIL. R. EVID. 803(5).

⁴⁶ *Id.*

⁴⁷ *Id.* R.C.M. 1001.

⁴⁸ *Id.* R.C.M. 1001(b)(5).

ability to introduce such evidence. Almost anyone can satisfy the rule's definition, so the credibility of a prosecution witness is questionable when that witness indicates the accused has no rehabilitative potential. Trial counsel also must remember that while R.C.M. 1001 limits what evidence the government may introduce on sentencing, similar limitations are not in existence for defense counsel. For example, unlike for the trial counsel, arguably, the rules do not prohibit the defense counsel from introducing evidence that the accused has the potential to become a productive member of the military.⁴⁹

Although defense counsel have great leeway in introducing evidence on sentencing, they need to be aware of what evidence they do present. For example: the accused pled guilty to arson and the defense counsel presented an excellent case in extenuation and mitigation, to include a packet of materials of outstanding ratings. However, contained within the packet was a statement by a rater, who indicated that the "Only problem we ever had with [the accused] was when he burned up a Dempsey Dumpster." (The dumpster incident was not the charged incident at trial!). In another situation case example, the accused pled guilty to an absence without leave. The accused provided a handwritten, rambling, unsworn statement containing a potential defense to the unauthorized absence. The subsequent reopening of the providence inquiry overcame the potential defense, but it also elicited much more derogatory information about the accused. In both situations, the defense counsel could have avoided aggravating the crimes by closely reading the exhibits being offered.

Defense counsel also must realize that court members do not enjoy being told that they erred in arriving at their findings. It is upsetting to the court when, in sentencing, the accused or a spouse testifies that the accused did not commit the offense. Defense counsel should try to avoid witnesses testifying along these lines. The court members usually have spent several hours or days listening to evidence, argument, and instructions. They made their

decision and, as humans, naturally become perturbed when they are told they are wrong. The defense does not gain anything from testimony that attempts to impeach the court's findings.

The court also becomes disturbed when a character witness on sentencing states that he or she does not know the offenses for which the accused was being tried or on which offenses the accused was convicted. Defense counsel should ensure the character witnesses know this information. If the defense counsel is unable to inform the witnesses of what the accused stands convicted during a recess before the sentencing phase begins, defense counsel should do so in a question by stating words to the effect of: "Informing you that this court has convicted _____ of _____, what is your opinion regarding _____?" The weight of the character witness's testimony certainly is lessened when a trial counsel on cross-examination elicits that the witness is unaware of what crimes the accused committed.

Conclusion

When read with *Tips and Observations from the Trial Bench*,⁵⁰ this article should provide both trial and defense counsel with sufficient tips to avoid making mistakes in a trial by court-martial. The key to long-term success in any endeavor is preparation and experience. With a reduced criminal caseload in the military, counsel today often must obtain their experience outside the courtroom. One way to acquire this experience is to read and incorporate into practice the contents of articles such as this one. Other ways include: attending formal seminars; holding informal discussions with experienced counsel, court reporters, and judges; and attending "in-house" training sessions given by supervisors. Extensive preparation or experience will not eliminate mistakes. Mistakes undoubtedly will always occur. Judges recognize this fact of life. Judges only hope that trial and defense counsel will learn from their mistakes and do better the next time.

⁴⁹ *Id.* R.C.M. 1001(b)(5)(D). "A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit." *Id.* See also *United States v. Ramos*, 42 M.J. 392, 396 (1995) (citing and quoting *United States v. Ohrt*, 28 M.J. 301, 304-05 (CMA 1989) for the proposition "what the *Ohrt* Court had in mind when it explicitly stated that 'a witness—be he for the prosecution or the defense—should not be allowed to express an opinion whether an accused should be punitively discharged.'").

⁵⁰ See *supra* note 1.

Summary Judgment Motions in Discrimination Litigation: A Useful Tool or a Waste of Good Trees?

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Introduction

One of the greatest thrills for any defense attorney is hearing the jury foreperson announce in open court, "Judgment for defendant." A surprisingly equal thrill, however, is receiving that final order that states, "Summary judgment granted; case dismissed; costs awarded to defendant." This order achieves success for the client without the great expense and time required in preparing for and conducting a jury trial. Litigators, therefore, easily recognize the inherent value in properly researched and written summary judgment motions for disposing of meritless yet costly claims. Reality, however, often plays out differently in practice.

For example, many employment litigators are faced with an action brought by a plaintiff who claims some form of intentional discrimination, whether under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Rehabilitation Act of 1973. Those defending these actions will likely review the legal issues and factual evidence and contemplate the propriety of filing a motion for summary judgment. Thoughts of a quick and successful motion may end, however, when the applicable case law reveals such phrases as: "Courts have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain."¹ "Discrimination cases present difficult issues for the trier of fact, . . . thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage."² "[V]ery little additional evidence is required to raise a genuine issue of fact regarding motive."³ These type of phrases tend to elicit a sense of futility in preparing summary judgment motions in employment discrimination cases and cause the advocate to look forward with anxiety to countless witness interviews, burdensome discovery requests, and hours of trial preparation. To further add to the preexisting notion that summary judgment is futile in discrimination cases,

the plaintiffs' bar has frequently asserted that summary judgment is no longer available in discrimination cases⁴ since the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.⁵

This article is intended to provide hope for the employment discrimination litigator. Summary judgment is not only a possibility in employment discrimination litigation; it actually can be the means to overwhelming success. Indeed, summary judgment is a viable and useful tool and can be used to great advantage in defense of federal employment discrimination cases. This article highlights the basic rules and general theory behind grants of summary judgment and explores techniques for raising the probability of success in federal employment discrimination summary judgment motions.⁶

The Summary Judgment Standard

Normally, when a plaintiff desires to take an employment discrimination case to the next higher level, review begins anew in the next higher forum. A plaintiff in an employment discrimination case is ordinarily⁷ entitled to a *de novo* hearing on the claims at issue in district court.⁸ However, a plaintiff is not entitled to a new hearing on the merits if summary judgment is appropriate.

Rule 56(c), *Federal Rules of Civil Procedure*, provides in pertinent part, that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.⁹

¹ *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993).

² *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

³ *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985).

⁴ See *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994); *Schultz v. General Elec. Capital Corp.*, 37 F.3d 329, 333 (7th Cir. 1994).

⁵ 113 S. Ct. 2742 (1993).

⁶ This article only deals with claims of intentional discrimination or disparate treatment. It does not address claims of employment practices that result in a disparate impact on a protected class.

⁷ In a mixed case involving an alleged improper personnel action and a claim of discrimination, only the claim of discrimination is entitled to *de novo* review. 5 U.S.C. § 7703(b)(2) (West 1995).

⁸ *Chandler v. Roubush*, 425 U.S. 840, 863-64 (1976).

⁹ Fed. R. Civ. P. 56.

On its face, the rule appears clear. The difficulty for practitioners of employment discrimination cases lies in determining when, and under what circumstances, summary judgment is appropriate.

In the past, despite the clarity of Rule 56, it was easy to determine that summary judgment was rarely appropriate. For many years, circuit courts viewed summary judgment as a "disfavored procedural shortcut," applicable to only a limited class of cases.¹⁰ Many of these courts were hesitant to grant summary judgment for fear that trial judges would use it as "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial."¹¹

In 1986, to the delight of many litigators, summary judgment began its rise from the ashes of oblivion through a trilogy of cases decided by the United States Supreme Court: *Celotex Corp. v. Catrett*,¹² *Anderson v. Liberty Lobby, Inc.*,¹³ and *Matsushita Electric Industry Co. v. Zenith Radio Corp.*¹⁴ The Supreme Court made it clear in these three cases that the circuit courts' earlier restrictive approach to motions for summary judgment was wrong because it was inconsistent with the plain language of Rule 56.¹⁵

The essence of the summary judgment trilogy is that a plaintiff who fails to present evidence to support an essential element of his case will fall to an opposing motion for summary judgment. As the Supreme Court noted:

In our view, the plain language of Rule 56(b) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a

complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.¹⁶

In *Celotex*, the Supreme Court further instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"¹⁷

In an opinion issued the same day as *Celotex*, the Supreme Court refined what it meant by a genuine issue: "If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted. . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."¹⁸

In the third case of the trilogy, the Supreme Court described the burden of production on the non-movant. The Supreme Court held that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts."¹⁹ The non-movant must present factual issues which, in order to be considered genuine, must have a real basis in the record.²⁰ Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'"²¹

Despite the resurgent validity of summary judgment motions through the Supreme Court's trilogy of cases, courts are still generally cautious in granting summary judgment when motivation and intent are at issue, as in discrimination cases. While recognizing the Supreme Court's view of summary judgment, some circuits have commented that grants of summary judgment and

¹⁰ *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993).

¹¹ *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

¹² 477 U.S. 317 (1986).

¹³ 477 U.S. 242 (1986).

¹⁴ 475 U.S. 574 (1986).

¹⁵ *Fontenot*, 780 F.2d at 1197.

¹⁶ *Celotex*, 477 U.S. at 322-23.

¹⁷ *Id.* at 327 (quoting Fed. R. Civ. P. 1.). See also *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988).

¹⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986).

¹⁹ *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

²⁰ *Id.* at 586-87.

²¹ *Id.* at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

discrimination cases seem to be mutually exclusive. For example, the United State Court of Appeals for the Eleventh Circuit has stated that "the granting of summary judgment in employment discrimination cases, 'which usually necessarily involve examining motive and intent, . . . is especially questionable.'"²²

Nevertheless, each of the circuits, while noting that summary judgment should be used cautiously, still affirm district court grants of summary judgment where no genuine issues of material fact remain for trial.²³ The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof at trial.²⁴ The trick then for the litigator is advocating, through the presentation of admissible evidence, that a trial is unnecessary because either the facts are undisputed, or if disputed, the factual dispute is of no consequence to the ultimate dispositive question.

A Genuine Issue of Material Fact?

The advocate's first hurdle in preparing a successful motion for summary judgment is developing a clear statement of facts. The statement of facts must be clear, concise, and structured to eliminate any argument over their validity or accuracy. While advocacy skills are essential in formulating the statement of facts, argument should be avoided; the time for argument will come later.

Much to the relief of those litigators with an established agency administrative procedure, extensive discovery is not essential to development of a useful and supportive statement of facts. To the contrary, motions for summary judgment in discrimination cases

are granted on facts developed during the administrative proceedings, the pleadings, and supplemental affidavits.²⁵ This gives federal litigators an advantage because they can rely on the pre-existing agency record, which often includes affidavits or plaintiff's testimony under oath. The administrative record allows the litigator to develop and state facts already admitted by the plaintiff. In relying on the agency record and avoiding the discovery process, which invariably confuses the issues and muddies the facts, the litigator can almost always find sufficient material to advocate a clear statement of undisputed facts.²⁶

The importance of this first step cannot be overemphasized. Anything less than a concerted effort to develop essential, undisputed facts will often result in failure because the plaintiff's standard in opposing motions for summary judgment is fairly light. A plaintiff who opposes a motion for summary judgment and endeavors to establish the existence of a factual dispute need not conclusively establish a material issue of fact. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."²⁷

In motions for summary judgment, courts must construe the evidence and reasonable factual inferences drawn from them in the light most favorable to the party who opposes the motion.²⁸ All ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought.²⁹ However, as is often the case in claims of discrimination, unsupported speculation is not enough to defeat a summary judgment motion; the plaintiff must show the existence of specific material evidentiary facts.³⁰ Where the facts are such that no rational jury could find in favor of plaintiff because the evidence to support the case is so slight, no genuine issue of material fact exists.³¹

²² *Batey v. Stone*, 24 F.3d 1330, 1336 (11th Cir. 1994) (quoting *Hayden v. First Nat'l Bank*, 595 F.2d 994, 997 (5th Cir. 1979). See also *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991) ("Summary judgment should seldom be used in cases alleging employment discrimination.").

²³ While all of the circuits have affirmed grants of summary judgment at the district court level, some circuits are far more conservative in their view of summary judgment. For example, the United States Court of Appeals for the Ninth Circuit, although still affirming summary judgment on occasion, has stated:

"Besides an overall more particularized factual inquiry, a trial provides insight into motive, a critical issue in discrimination cases. The existence of an intent to discriminate may be difficult to discern in depositions compiled for purposes of summary judgment, yet it may later be revealed in the face-to-face encounter of a full trial."

Lam v. Univ. of Haw., 40 F.3d 1551, 1564 (9th Cir. 1994).

²⁴ *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993).

²⁵ See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990); see also, *Chalk v. Secretary of Labor*, 565 F.2d 764, 767 (D.C. Cir. 1977), cert. denied, 435 U.S. 945 (1978).

²⁶ In some cases, discovery will be unavoidable. Plaintiff's counsel may move to extend the response deadline in order to adequately develop the facts through discovery. In those instances, the advocate can depose the plaintiff with an aim towards making a stronger case for summary judgment; for example, asking the plaintiff directly why he believes he has been a victim of discrimination.

²⁷ *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

²⁸ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Warren v. Crawford*, 927 F.2d 559, 561 (11th Cir. 1991).

²⁹ *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1223 (2d Cir. 1994).

³⁰ *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986) (applying principle in context of union grievance issue).

³¹ *Gallo*, 22 F.3d at 1224.

The Shifting Burdens of Proof

In developing the statement of facts and attempting to establish to the court that no genuine issue of material fact exists, the litigator must analyze the available evidence and determine which elements the plaintiff can and cannot prove. As in any case, two types of evidence will be available, direct and circumstantial.

While direct evidence is obviously preferred, direct evidence of discrimination is difficult to find "precisely because its practitioners deliberately try to hide it."³² Employers are rarely so cooperative as to include a notation in the personnel file that their actions are motivated by factors expressly forbidden by law.³³ If the plaintiff has direct evidence of discrimination, settlement rather than summary judgment will be the rule.

A plaintiff lacking direct evidence of discriminatory conduct must rely on circumstantial evidence. In cases involving circumstantial evidence, a plaintiff attempts to prove discrimination³⁴ through the special evidentiary framework set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*.³⁵

The Supreme Court's *McDonnell Douglas* analysis requires a plaintiff to establish the employer's intent to discriminate.³⁶ This intent must be shown through an allocation of burdens, which shift from one party to the next as each side presents its evidence. The shifting of burdens is important because it provides the framework on which the advocate builds a motion for summary judgment. A plaintiff who fails to present sufficient credible evidence to meet the burden of proof during any of the stages of the analysis cannot avoid an opposing summary judgment motion.

To prevent a grant of summary judgment, or ultimately prevail on a discrimination claim, the plaintiff must first establish a *prima facie* case of discrimination. This is done by presenting evidence sufficient to create an inference that the adverse action complained of was more likely than not motivated by discrimination.³⁷ The central inquiry in this stage is whether the available circumstantial evidence is sufficient to create the required inference of prohibited discrimination.³⁸

The *prima facie* case is not intended to be "rigid, mechanized, or ritualistic."³⁹ Rather, the contours of a *prima facie* case are flexible and dependent on the factual circumstances in each case.⁴⁰ As a general matter, the plaintiff can establish a *prima facie* case of discrimination using circumstantial evidence by proving:

- (1) the plaintiff is a member of a protected class;⁴¹
- (2) the plaintiff, while qualified, suffered some adverse employment action—for example, removal from service, not promoted, denial of a within grade increase, or not selected for a position; and
- (3) another employee outside of the protected class was not treated in a similar adverse manner under circumstances from which discrimination could be inferred.⁴²

While the plaintiff's *prima facie* burden is "not onerous,"⁴³ the plaintiff must still come forward and point out "specific facts

³² *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (quoting *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988)).

³³ *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (quoting *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985)).

³⁴ *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1122 (11th Cir. 1993).

³⁵ 411 U.S. 792 (1973).

³⁶ *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct 2742, 2749 (1993).

³⁷ *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

³⁸ *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1306 (1983).

³⁹ *MacDonald v. Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir. 1991).

⁴⁰ *See Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir. 1994).

⁴¹ Membership is a matter of degree for cases involving age discrimination, unlike race discrimination cases where membership within a protected group is measured dichotomously. Unlike race or sex (gender), age "is not a discrete and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group. Rather, age is a continuum along which the distinctions between employees are often subtle and relative ones." *Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1519 (11th Cir. 1990) (quoting *Goldstein v. Manhattan Indust., Inc.*, 758 F.2d 1435, 1442 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985)). Thus, a plaintiff's inability to show that he was replaced by someone under the protected group age of forty is not an absolute bar to the establishment of a *prima facie* case.

⁴² *See Luna v. City & County of Denver*, 948 F.2d 1144, 1147 (10th Cir. 1991) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

⁴³ *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 15 n.4 (1st Cir. 1994).

detailed in affidavits and depositions--that is, names, dates, incidents, and supporting testimony--giving rise to an inference of discriminatory animus."⁴⁴ If the plaintiff fails to present sufficient evidence to establish a *prima facie* case of discrimination, summary judgment is routinely granted.⁴⁵

Should the plaintiff establish a *prima facie* case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action taken.⁴⁶ The defendant's burden of production in rebutting the *prima facie* case is "exceedingly light."⁴⁷ Because the burden is one of production and not proof, the defendant need not litigate the merits of its proffered reason, but must merely state it specifically and clearly.⁴⁸ At this stage of the analysis, the court will not look behind the proffered reason to determine the real intent or motivation behind the reasons for the action.⁴⁹ Instead, the court only satisfies itself that a legitimate, nondiscriminatory reason has been put forth.

Once the defendant articulates a legitimate, nondiscriminatory reason for the contested action, the defendant is entitled to summary judgment unless the plaintiff can introduce significantly probative evidence showing that the asserted reason is merely a pretext for discrimination.⁵⁰ At the same instant the burden of proof shifts back to the plaintiff to prove pretext, "the *McDonnell Douglas* framework--with its presumptions and burdens--is no longer relevant."⁵¹ Instead, the sole inquiry becomes "whether [the] plaintiff has proven 'that the defendant intentionally discriminated against' him."⁵² Stated differently, the plaintiff's obligation "merges with the ultimate burden of persuading the court that he has been the victim of intentional discrimination."⁵³ What this means in the summary judgment context is that a discrimination plaintiff must establish a genuine issue of material fact: (1) as to whether the employer's reason is false; and (2) as to whether

it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision.⁵⁴

The Application of Summary Judgment Standards

The crux of any summary judgment motion in a discrimination case is applying the standards for summary judgment to each specific step in the *McDonnell Douglas* analysis. The advocate must first develop a clear and concise statement of facts, and then review the available evidence for each step of the plaintiff's burdens. The successful litigator then ties the two together by showing the court that the plaintiff has not established a *prima facie* case or has not come forward with sufficient evidence to permit the court to find that a discriminatory reason motivated the action.

A detailed assessment of the actual "facts" presented by plaintiff is essential at this stage of the summary judgment process. In most instances involving allegations of discrimination proven through circumstantial evidence, the plaintiff rarely has specific facts to prove discrimination. In virtually every case, the plaintiff's feeling, conjecture, or belief motivates the allegation of discrimination. As far as the courts are concerned, when it comes to deciding a motion for summary judgment with such "facts," "resolving actual disputes of material facts in favor of the nonmoving party is a world apart from assuming that general averments embrace the specific facts needed to sustain the complaint."⁵⁵

Analyzing a plaintiff's claims and statements in the course of administrative processing is crucial. The successful advocate will highlight a plaintiff's claims that are nothing more than unsubstantiated assertions or facially neutral comments. The various legal conclusions that by themselves only create a "scintilla of

⁴⁴ *Hoepfner v. Crooked Mountain Rehabilitation Ctr.*, 31 F.3d 9, 14 (1st Cir. 1994).

⁴⁵ See *Torre v. Casio, Inc.*, 42 F.3d 825 (3d Cir. 1994); *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292 (5th Cir. 1994).

⁴⁶ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

⁴⁷ *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1019 (quoting *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983)).

⁴⁸ *Equal Employment Opportunity Comm'n v. Flasher*, 986 F.2d 1312, 1316 (10th Cir. 1992).

⁴⁹ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

⁵⁰ *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (10th Cir. 1992).

⁵¹ *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

⁵² *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

⁵³ *Id.* at 2749.

⁵⁴ *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1225 (2d Cir. 1994).

⁵⁵ *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

evidence"⁵⁶ are insufficient "evidence" to withstand summary judgment. For factual issues to be considered genuine for the purposes of summary judgment, they must have a real basis in the record.⁵⁷ Otherwise, summary judgment is the only appropriate result where the plaintiff "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."⁵⁸

Plaintiff's Initial Burden--A Prima Facie Case

Although the presentation of a *prima facie* case is a relatively easy task, the plaintiff must still introduce sufficient evidence to support an inference of discrimination. He must do so by establishing each of the required elements in a typical *prima facie* case. A plaintiff who is not in a protected group, was not qualified for the position or action in question, did not suffer any adverse impact from the contested action, or was not treated differently from other similarly situated employees, fails to establish a *prima facie* case.⁵⁹

Normally, the first element of a *prima facie* case is difficult to contest. People are generally aware of their race, religion, sex (gender), or national origin, and usually have sufficient documentation to substantiate their awareness. However, for some bases of discrimination, it is possible that the plaintiff will not fall within the protected group; for example, a twenty-four year old claiming age discrimination when he was nonselected and an older person selected, or a homosexual claiming discrimination on the basis of sexual orientation.⁶⁰

The second element of a *prima facie* case is easier to contest. For actions involving selections, terminations, or similar personnel actions, it may be possible to present undisputed facts from personnel records, as well as previous statements by the plaintiff, that the plaintiff was not qualified for the position at issue. If it is

undisputed that the plaintiff was not qualified, his claims of discrimination, no matter how egregious, cannot succeed.⁶¹ Moreover, if it can be shown that the plaintiff's claims of discrimination do not involve specific actions or conduct by the defendant, but merely vague and generalized complaints of conflicts with other employees, the plaintiff has not met the burden. Similarly, if no nexus between the alleged discriminator and the personnel action is present, the plaintiff's case fails. For example, the biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.⁶² In both instances, the plaintiff has failed to establish the second element of a *prima facie* case of discrimination.

One of the most successful means of undermining the *prima facie* case is to argue that the plaintiff has failed to establish the third element--presenting evidence to prove that the plaintiff is not similarly situated with those individuals outside the protected group who were allegedly treated differently. A plaintiff alleging disparate treatment must prove that he was similarly situated in all relevant respects with individuals outside his class who were treated more favorably.⁶³ A plaintiff who cannot prove that he was similarly situated, cannot present sufficient evidence to raise the required inference of discriminatory animus, and has failed to establish a *prima facie* case. Accordingly, summary judgment is warranted.

Plaintiff's Ultimate Burden--Proving Discrimination

A plaintiff cannot defeat a motion for summary judgment simply by making out a bare *prima facie* case.⁶⁴ Such a proposition would require a trial in virtually every discrimination case, even where no genuine issue of material fact exists concerning the legitimacy of the defendant's nondiscriminatory reasons.⁶⁵

⁵⁶ Davis v. Chevron U.S.A., Inc., 14 F.3d 1082 (5th Cir. 1994) quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

⁵⁷ Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993).

⁵⁸ LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993) (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)).

⁵⁹ See Luna v. City & County of Denver, 948 F.2d 1144, 1147 (10th Cir. 1991) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

⁶⁰ Presently, homosexuals as a class are not a protected group and therefore are not protected by anti-discrimination laws.

⁶¹ See Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1087 (5th Cir. 1994).

⁶² Smith v. Stratus Computer, Inc., 40 F.3d 11, 18 (1st Cir. 1994).

⁶³ Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994).

⁶⁴ Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994).

⁶⁵ *Id.*

Summary judgment is appropriate when the plaintiff fails to rebut the defendant's production of a legitimate, nondiscriminatory reason for the contested action with sufficient evidence to cast doubt on the defendant's articulation. The plaintiff must raise a genuine factual question as to whether the defendant's reasons are pretextual.⁶⁶ "The plaintiff may show discrimination 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"⁶⁷ Plaintiff's mere conjecture that his employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.⁶⁸ If no facts related to the pretext of the defendant's action remain in dispute, summary judgment is proper.⁶⁹

In most instances, claims of discrimination arise in the context of personnel actions or decisions on the part of management. When arguing for summary judgment in actions such as these, the successful advocate will point out the legitimacy of personnel actions in general and the weight such decisions should be accorded by the courts. The courts have invariably held that "[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . [r]ather, [the] inquiry is limited to whether the employer gave an honest explanation of its behavior."⁷⁰ The laws prohibiting discrimination are not intended to grant relief to a plaintiff who has been treated unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision.⁷¹ Put differently, a decision can be based on a good reason, a bad reason, or no reason at all as long as that reason is not discriminatory.⁷² By putting forth the contested personnel actions as legitimate business decisions, the effective litigator emasculates almost any circumstantial claim of pretext. In doing so, the chances of a favorable ruling on the summary judgment motion increase greatly.

The plaintiff's burden to show pretext merges with the ultimate burden to show intentional discrimination. To survive a summary judgment motion, the plaintiff must show pretext and present sufficient evidence to create a genuine issue of material fact regarding a showing of intentional discrimination. The plaintiff must prove not only that the defendant's stated reason was a pretext, but also that it was a pretext for illegal discrimination.⁷³ A reason cannot be proved to be a pretext for discrimination unless it is shown that the reason was false and that discrimination was the real reason.⁷⁴

By attacking the plaintiff's case directly in the area of his required burdens of proof, the advocate forces the issue of a lack of any dispute in the material facts. By showing that the plaintiff has a deficiency of proof in establishing a *prima facie* case or in proving pretext and intentional discrimination, the advocate paves the way for the court to grant summary judgment to the defendant.

Conclusion

The effective advocate must take the initiative and force the plaintiff to come forward with some minimally sufficient evidence to support a finding that he has met his burden of proof. "Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuitions, or rumors, and discrimination law would be unmanageable if disgruntled employees could defeat summary judgment by affidavits speculating about the defendant's motives."⁷⁵ The defensive litigator must ensure that the material creating the claimed factual dispute consists of definite, competent evidence.⁷⁶

Rules on summary judgment, as clarified by the Supreme Court in its trilogy of cases, find support in principles of fairness and

⁶⁶ *Lowe v. City of Monrovia*, 775 F.2d 998, 1008 (9th Cir. 1985), modified, 784 F.2d 1407 (9th Cir. 1986).

⁶⁷ *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 798 (10th Cir. 1993) (quoting *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

⁶⁸ *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994) (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir. 1988)).

⁶⁹ *Hooks*, 997 F.2d at 798.

⁷⁰ *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994) (quoting *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)).

⁷¹ *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994).

⁷² *Local 28, Sheet Metal Workers v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 462 n.35 (1980).

⁷³ *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994). *But see* *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (If a plaintiff presents a *prima facie* case and a showing of pretext, there will always be a question for the factfinder as to whether the employer's explanation for its action is true.). *Id.*

⁷⁴ *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993).

⁷⁵ *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1146 (7th Cir. 1994).

⁷⁶ *Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 479 (1st Cir. 1993).

judicial economy. Summary judgment should not be overlooked by the zealous advocate, even in discrimination cases. Without attempts at summary judgment, "trial would be a bootless exercise, fated for an inevitable result but at continued expense for the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judicial queue, and a burden on the court and the taxpayers."⁷⁷

⁷⁷ Fontenot v. Upjohn Co., 780 F.2d 1190, 1195 (5th Cir. 1986).

In light of the continuing stream of cases from the circuit courts, summary judgment remains a viable and useful tool in the defense of federal employment discrimination cases. By using the rules, theory, and techniques for drafting motions for summary judgment as detailed above, summary judgment can be more than a mere waste of good trees; it can lead to the thrill of having the motion granted and an otherwise burdensome and baseless case dismissed.

A Military Look into Space: The Ultimate High Ground

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Introduction

From the childhood game of king of the hill, to the great battles of military history, the high ground has always been militarily critical.¹ It is axiomatic to military commanders that possession of the high ground usually means the difference between victory and defeat. Although the high ground remains important to military tacticians, technology advances have changed its venue. Initially, the high ground was converted from the terra firma to the skies above. Now, and for the foreseeable future, the ultimate high ground has been converted from the skies above to the outer space beyond.² Therefore, military operations in and from outer space must be considered by today's military planners who have a vision for tomorrow's military conflicts. Correspondingly, judge advocates must be ready to advise commanders on the legal limits of outer space activity.

Of all the international treaties and agreements governing activities in outer space, the Outer Space Treaty of 1967³ is arguably the one treaty with the greatest potential impact on military use of space. This is true for three reasons. First, unlike other international agreements, such as the Anti Ballistic Missile Treaty⁴ and the Limited Test Ban Treaty,⁵ the Outer Space Treaty focuses exclusively on activity in outer space. Second, the broad scope of the Outer Space Treaty makes it the treaty with the widest application of any other international agreement relating to space. Finally, the Outer Space Treaty's requirement for peaceful purposes in space makes it susceptible to restrictive interpretation that could undermine national security of the United States.

So what does the Outer Space Treaty have to do with the average judge advocate? One of the many lessons learned from Operation Desert Shield/Storm was the integral part that space

¹ Many would say that the Union gained victory at Gettysburg, the climactic battle of the Civil War, by successfully defending the high ground on the outskirts of town. The Pulitzer Prize winning book *The Killer Angels* refers to the recognized importance of the high ground by Major General John Buford, the Union cavalry leader who led the first of the Union troops to arrive at the scene. "The whole damn Reb army's going to be here in the morning. They'll move right through town and occupy those damned hills—" Buford pointed angrily — "because one thing Lee ain't is a fool, and when our people get here Lee will have the high ground and there'll be the devil to pay." MICHAEL SHAARA, *THE KILLER ANGELS* 38 (37th prtg. 1993).

² The former Secretary of the United States Air Force, Donald B. Rice, in his white paper "The Air Force and U.S. National Security: Global Reach—Global Power," referred to outer space as the high ground that must be militarily controlled. Lieutenant General Thomas S. Moorman, Jr., United States Air Force, *Space, a New Strategic Frontier*, *AIRPOWER J.*, Spring 1992, at 14, 17 [hereinafter Moorman]. See also Lieutenant Colonel Steven J. Bruger, United States Air Force, *Not Ready for the First Space War, What About the Second?*, *XLVIII NAVAL WAR COLLEGE REV.*, Winter 1995, at 73, 82 [hereinafter Bruger].

³ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967) [hereinafter Outer Space Treaty].

⁴ Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503 (effective Oct. 3, 1972) (specific limits to outer space are contained in art. IV, which prohibits the development, testing, or deployment of ABM systems, which are sea-based, air-based, space-based, or mobile land-based).

⁵ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (effective Oct. 10, 1963).

assets played in achieving operational success for Coalition forces on the ground, in the water, and in the skies. Space assets will likely play an even greater role in future military operations. For these reasons, judge advocates seeking to effectively advise operational commanders no longer can afford to ignore space law and must become familiar with space law in general and the Outer Space Treaty in particular. In an effort to assist the judge advocate in advising operational commanders, this article focuses on the permissible military use of space pursuant to the one treaty with the widest application to that topic: The Outer Space Treaty.

This article will look at how effective the military use of space has been and the anticipated military needs of space in the future. This article also will examine the legal limits of military use of space under the Outer Space Treaty, with particular emphasis on the peaceful purposes language of Article IV. This article will conclude with an analysis of how military uses of space are affected.

Importance of Outer Space to the Military

Use of space systems for military purposes is nothing new. The United States has had a military space program for more than thirty-five years.⁶ It was not until June 19, 1992, that the space mission was first proposed to be included in the United States Air Force mission statement.⁷ It was appropriate that General Merrill A. McPeak, former Chief of Staff of the United States Air Force, would make the proposal because he first described the recently concluded Gulf War as "the first space war."⁸

How important is outer space to the military? General Colin Powell, while Chairman of the Joint Chiefs of Staff, said that the Gulf War taught us that the United States must "achieve total con-

trol of space if [it is] to succeed on the modern battlefield."⁹ If General Powell was correct, the future of our military mission depends on the successful military control of space.

Use of Space Systems in Military Operations

Even before the Gulf War, space systems made an enduring impression on some military leaders. General Carl Steiner, the Joint Task Force Commander in Panama, became very familiar with the military capabilities of space systems while working with the XVIII Airborne Corps at Fort Bragg, North Carolina. When reflecting on the operation in Panama, General Steiner stated that "space doesn't just help . . . I cannot go to war without space systems."¹⁰ In December 1988, the United States Air Force Chief of Staff, General Larry D. Welch, enunciated not only that the future of the Air Force is inextricably tied to space, but that space power will be as decisive in future combat as air power is today.¹¹

As more military leaders recognized the importance of space power, the need for a command structure to integrate the wide variety of space missions became obvious. Hence, the unified command, the United States Space Command (USSPACECOM), was created in 1985.¹² The USSPACECOM included three service component commands—the Air Force Space Command created in 1982, the Naval Space Command created in 1983, and the Army Space Command created in 1988.¹³

Although military space capabilities were highly regarded before the Gulf War, Operation Desert Shield/Storm was the real high-water mark for military use of space systems.¹⁴ In terms of rapid power projection alone, the results were unprecedented. In 1991, the speed at which modern air power could project itself into a theater of operation anywhere in the world was only a mat-

⁶ Captain James R. Wolf, United States Air Force, *Toward Operational-Level Doctrine for Space*, AIRPOWER J., Summer 1991, at 29 (citing PAUL B. STARES, THE MILITARIZATION OF SPACE: US POLICY, 1945-1984, 22 (1985)).

⁷ "USAF MISSION: Our mission—the job of the forces we bring to the fight—is to defend the United States through control and exploitation of air and space." Lieutenant Colonel Suzanne B. Gehri, United States Air Force, *The Air Force Mission (Singular)*, AIRPOWER J., Winter 1992, at 17, 18 (quoting the remarks of General Merrill A. McPeak, former Chief of Staff of the United States Air Force).

⁸ Moorman, *supra* note 2, at 18.

⁹ Dr. Colin S. Gray, *Space Power Survivability*, AIRPOWER J., Winter 1993, at 27.

¹⁰ Moorman, *supra* note 2, at 18.

¹¹ *Id.* at 16-17. This view is a complete reversal from earlier views of space operations. Prior to the launch of the first Sputnik into orbit by the former Soviet Union, a British Astronomer Royal remarked that: "Space travel is bilge." Shortly thereafter, the Archbishop of Canterbury made a similar statement: "The only people who are interested in this space business are people who have nothing better to think of, poor fellows." D. Goedhuis, *Some Observations on the Efforts to Prevent a Military Escalation in Outer Space*, 10 J. SPACE L. 13, 26 (1982).

¹² The USSPACECOM was given four operational missions in space: (1) space control (consisting of space surveillance, space force survivability, negation operations, and battle management, command, control, and communications); (2) space support (consisting of launch and satellite control); (3) space force enhancement (consisting of warning, navigation, communication, and weather); and (4) space force application (consisting of offensive and defensive activities in support of ground operations). The USSPACECOM was also charged with the role of ballistic missile defense planning. See Bruger, *supra* note 2, at 16.

¹³ Moorman, *supra* note 2, at 18.

¹⁴ *Id.* at 14. See also General Charles A. Horner, United States Air Force, *Space Systems Pivotal to Modern Warfare*, DEFENSE 22, Issue 4 (1994) [hereinafter Horner].

ter of hours. Such rapid power projection is impressive for any military force, but it pales in comparison to the potential of space force. Within moments of Iraq's invasion of Kuwait, space surveillance systems were already "on the scene" recording every move.¹⁵ That kind of quick and reliable response was essential to the effective operations of the Coalition forces. However, surveillance was only one of a wide array of military contributions made by space forces during the Gulf War.

Navigation

The global positioning system (GPS), an array of navigation satellites, was invaluable to Coalition forces operating in the vast indistinguishable terrain of the Arabian Desert.¹⁶ Air Force fighters and bombers, Army tanks, Navy ships, and cruise missiles all used GPS receivers to pinpoint their position, speed, and when needed, altitude.¹⁷ While Iraqi troops generally were limited to troop movements along main roads, the GPS enabled Coalition troops to traverse the featureless desert, which greatly enhanced the element of surprise. Even food supply trucks used GPS receivers to locate the troops in the desert.¹⁸ According to Squadron Leader Alexander Smyth, Commander of the 33d Air Rescue Squadron, the "[GPS is] essential now, especially for night flying in the desert . . . I am sure with GPS we will lose fewer helicopters."¹⁹ The GPS capabilities improved reconnaissance efforts, assisted in mine field clearance, aided search and rescue operations, and kept fighting units out of each other's fire zones. The GPS was credited with increasing the accuracy of Coalition force weapons fire, which resulted in fewer civilian casualties and friendly fire shootings. In turn, this helped to maintain United States public support for the campaign.²⁰

Communication

Communication satellites also were instrumental in this conflict. The demand for additional communication channels was so

great that the Air Force Space Command moved another defense satellite communications system (DSCS) satellite from coverage over the Pacific to the Indian Ocean. This marked the first time that a Department of Defense satellite was repositioned to augment combat operations, and the move effectively met extensive communication needs.²¹ At one point, Coalition communications systems supported over 700,000 telephone calls and 152,000 messages each day with satellite systems handling eighty-five percent of the total load.²² The DSCS did the job so well that General Colin Powell proclaimed that "satellites were the single most important factor that enabled us [the Coalition forces] to the build command, control, and communications networks for Desert Shield."²³ This was also the first time that intratheater satellite communications were used to support a theater-level commander in actual combat.²⁴

Weather

Coalition forces routinely used weather information provided by the defense meteorological satellite program (DMSP). Theater commanders received weather data updates four times a day and relied on it for mission planning.²⁵ Through the use of photographic quality prints, Coalition forces were able to plan their aircraft sorties, select targets, determine when to use precision-guided weapons, and decide on appropriate aircraft for the mission. General Norman Schwarzkopf's "left hook" maneuver into Iraq in late February 1991 was assisted by DMSP microwave imagery that showed, based on moisture content of the soil, which routes would support the heavy armored vehicles that would lead the attack.²⁶

Warning

Timely warning is imperative for any theater combat commander to accurately assess the threat presented by enemy forces. Through the use of space systems, a Coalition force commander

¹⁵ Moorman, *supra* note 2, at 18.

¹⁶ The GPS was effective despite the full complement of twenty-four GPS satellites, which were not yet in orbit and the system was not fully operational in August 1990 when Iraq invaded Kuwait. At that time, only thirteen GPS satellites were in orbit. See Bruger, *supra* note 2, at 77.

¹⁷ Moorman, *supra* note 2, at 20.

¹⁸ *Id.* at 18-19.

¹⁹ *Id.* at 19 (citing the quote in Captain Mark Brown, *British Totally Sold on GPS*, *SPACE TRACE: THE AIR FORCE SPACE COMMAND MAG.*, Apr. 1991, at 7)).

²⁰ Bruger, *supra* note 2, at 78.

²¹ Moorman, *supra* note 2, at 19.

²² Bruger, *supra* note 2, at 75.

²³ Moorman, *supra* note 2, at 19.

²⁴ Bruger, *supra* note 2, at 78.

²⁵ *Id.* at 77.

²⁶ Moorman, *supra* note 2, at 19.

had more accurate data on the nature and scope of the enemy threat than perhaps any commander before. For instance, the defense support program (DSP) satellites detected the locations of Scud missile launches by using infrared sensors that recorded the heat plumes of the ballistic missiles.²⁷ This information was relayed from the satellite to ground monitoring stations, to the North American Aerospace Defense Command (NORAD) in Colorado Springs, Colorado, and then back to the theater commanders. Transfer of vital warning information was measured in minutes, giving military and civilian authorities in Saudi Arabia and Israel precious time to sound emergency alarms warning of the incoming missiles.²⁸ This early warning capability was likely its greatest contribution. At least one writer speculated that the DSP early warning, along with the Patriot Missile Batteries, may have been the compelling reason Israel resisted the temptation to be drawn in the war.²⁹

Currently, satellites perform a variety of essential military missions that have become both routine and expected. From communications to reconnaissance and surveillance, to navigation, to meteorology, to early warning, and even to arms control verification monitoring, the high ground of space gives a fighting force a marked advantage.

Future Military Uses of Space

Aerospace capabilities continue to progress. With new technological advances, military applications expand.³⁰ Following the Gulf War, nations with space capabilities began to actively pursue space-based technology to improve their war fighting abili-

ties. Nations without space capabilities began seeking to obtain them on the open market.³¹ The Scud missile system and its more sophisticated progeny are now in the inventory of approximately sixteen countries.³² Included among them is North Korea, with a new, longer-range ballistic missile system in place since 1993.³³

Similarly, the GPS navigational system, now under the control of the Department of Transportation, is available to civilian users.³⁴ Commercial reconnaissance availability also is expanding through such systems as the French SPOT satellite, a surveillance system with highly accurate resolution.³⁵ Had Iraq been able to purchase just one satellite photo from a commercial source, the Coalition forces's surprise "left hook" maneuver might have been discovered.³⁶

In light of changing world conditions—the dissolution of the major powers and the expansion of interest and increased availability of space-based technology—one area of growth will be ballistic missile defense.³⁷ Current advances have expanded the use of ballistic missile technology in a new forum—space.

President Ronald Reagan's Strategic Defense Initiative (SDI) in the early 1980s provided a measure of legitimacy to many ideas that were formerly seen as impossible. On March 23, 1983, President Reagan announced his decision to "embark on a program to counter the awesome Soviet missile threat with measures that are defensive."³⁸ The focus of the SDI program was "to intercept and destroy strategic ballistic missiles before they reach our own soil or that of our allies."³⁹ In 1991, President George Bush streamlined the scope of SDI, renaming the program Global Protection

²⁷ Bruger, *supra* note 2, at 78.

²⁸ *Id.* General Charles A. Horner, the air component commander during the Gulf War had this to say about DPS, "I was already aware of the danger from Scuds before we went to the Gulf, but it never occurred to me to use DSP to provide warning of Scud attacks . . . But shame on me . . . I should have known." *Id.* at 79 (referencing James W. Canan, *Space Support for the Shooting Wars*, AIR FORCE MAG., Apr. 1993, at 32).

²⁹ Bruger, *supra* note 2, at 79.

³⁰ SEEKING STABILITY IN SPACE: ANTI-SATELLITE WEAPONS AND THE EVOLVING SPACE REGIME 45 (Joseph S. Nye, Jr., & James A. Schear eds., 1987).

³¹ See Commander Dale R. Hamon and Lieutenant Colonel Walter B. Green, III, *Space and Power Projection*, MIL. REV., Nov. 1994, at 61, 65.

³² Horner, *supra* note 14, at 22.

³³ *Id.*

³⁴ Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look at the Outer Space Treaty and "Peaceful Purposes,"* 60 AIR LAW & COMM. 276 (1994) [hereinafter Morgan]. The GPS receivers are now available through *Soldier of Fortune Magazine*; see Horner, *supra* note 14, at 22.

³⁵ Bruger, *supra* note 2, at 80.

³⁶ *Id.*

³⁷ Initial efforts by the United States to develop a ballistic missile defense system were made in 1956 with the United States Army's Nike-Zeus program. See Major John E. Parkerson, Jr., *International Legal Implications of the Strategic Defense Initiative*, 116 MIL. L. REV. 67, 73 (1987) [hereinafter Parkerson, Jr.].

³⁸ *President Ronald Reagan's speech*, N.Y. TIMES, Mar. 24, 1983, at A20.

³⁹ *Id.*

Against Limited Strikes (GPALS).⁴⁰ While Secretary of Defense Les Aspin announced on May 13, 1993, the "end of the Star Wars era," President William Clinton changed the name of the Strategic Defense Initiative Office (SDIO) to the Ballistic Missile Defense Office (BMDO),⁴¹ but the gist of the original idea focusing on the need for a space-based defense system was maintained.⁴² As recently as April 1994, General Horner, the Commander in Chief of USSPACECOM, testified before the Senate Armed Services Committee that theater missile defense is our "top priority."⁴³

The United States anti-satellite (ASAT) program initiated under SDI has been limited by budget constraints, but it continues to be the essential component of space-based technology. According to the United States Arms Control and Disarmament Agency (ACDA), space-based anti-satellite weaponry technology covers a wide array of technology—including high-energy laser microwave and charged particle beams, rather than projectiles or traditional BMD missiles.⁴⁴ The former Soviet Union is the only nation that currently possesses ASAT capability.⁴⁵ However, at the rate that the former Soviet Union is selling their military technology in exchange for much needed Rubles, it may not be long before other nations possess ASAT capability.

Another program under development is called "Brilliant Eyes," a space-based missile tracking system for tracking longer-range tactical and strategic ballistic missile warheads through their entire trajectory.⁴⁶ The focus of Brilliant Eyes is to enhance the performance of ballistic missile defenses and improve space surveillance capabilities.

Other initiatives include the Follow-on Early Warning System⁴⁷ to respond to the theater missile warning problems; the Theater High Altitude Air Defense interceptor⁴⁸ for theater ballistic

missile defense; and the Over The Horizon-Backscatter radar for longer range tracking ability.⁴⁹

As with other military operations, space operations are shedding the old strategic Cold War myopia and focusing instead on theater war. General Charles A. Horner, Commander in Chief of USSPACECOM, reflected on this new paradigm shift.

What we have to do is change our emphasis from strategic war to theater war. We have to get over the cold war and make sure that we're equipping and training and organizing to fight the kind of war that's probably going to be thrust upon us. All of us in the space community must concentrate our thinking on how we can directly support the warfighters.⁵⁰

All indications show a rapidly expanding role of space-based systems in support of military operations. Assessments of their legality under international law generally, and under the Outer Space Treaty specifically, will be important, and not simply for legal reasons. Legal advice in this arena, if accepted by military and government leaders, can affect, at least indirectly, our nation's security. Whatever the future holds for military use of space, it must be balanced against applicable legal constraints, primarily those contained in the Outer Space Treaty.

Legal Restrictions to Military Use of Outer Space Under the Outer Space Treaty

The extent to which the Outer Space Treaty permits military activity in space has been greatly debated. Most of the debate culminated in 1967 with the first international agreement which dealt exclusively with outer space. The Outer Space Treaty⁵¹ has

⁴⁰ Lieutenant Colonel Charles Shorwell, United States Air Force, Major Joginder Dhillon, United States Air Force, and Captain Deborah C. Pollard, United States Air Force, *Ballistic Missile Defense for the Twenty-First Century*, AIRPOWER J., Special Ed. 1994, at 47.

⁴¹ *Id.* at 44.

⁴² *Id.* at 47.

⁴³ Horner, *supra* note 14, at 24.

⁴⁴ Pamela L. Meredith, *The Legality of a High-Technology Missile Defense System: The ABM and Outer Space Treaties*, 78 AM. J. INT'L L. 418 n.8 (1984).

⁴⁵ Bruger, *supra* note 2, at 80.

⁴⁶ Horner, *supra* note 14, at 24.

⁴⁷ This program, strongly advocated by General Charles A. Horner, Command in Chief of USSPACECOM, also has been limited by budget constraints in 1994. *Id.* at 25.

⁴⁸ *Id.* at 22.

⁴⁹ *Id.* at 23.

⁵⁰ Bruger, *supra* note 2, at 81.

⁵¹ The Outer Space Treaty, *supra* note 3.

been described as the Magna Carta of international agreements pertaining to outer space.⁵² Signed by over one hundred nations,⁵³ including the United States and the former Soviet Union, the Outer Space Treaty placed restrictions on military activity in space. It also provided the principles on which subsequent outer space treaties were drafted.

Within the preamble of the Outer Space Treaty are several phrases that indicate a desire that space activities be carried out peacefully. For instance, it recognizes the "common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes," and that the use of outer space should be carried out "for the benefit of all peoples."⁵⁴ However, because a preamble is not legally binding, these phrases only can be used as persuasive evidence of the drafter's intent.⁵⁵

Articles I, II, and III of the Outer Space Treaty are not particularly helpful to this debate because they merely set forth broad general principles. Nonetheless, both Articles I and III have particular relevance and will be examined later in this article.

Article IV Provisions Affecting Military Activity

Article IV of the Outer Space Treaty contains the key provisions relating to military activity. Its provisions are set forth below:

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be

forbidden. The use of military personnel for scientific research or for any other peaceful purpose shall not be prohibited. The use of any equipment or facility necessary for peaceful explorations of the moon and other celestial bodies shall also not be prohibited.

Prohibition on Weapons of Mass Destruction

Paragraph 1 of Article IV of the Outer Space Treaty prohibits states from orbiting, installing on celestial bodies, or stationing in outer space any nuclear weapons or any other weapons of mass destruction. This paragraph has received surprisingly little controversy. It is viewed by most commentators as only a limited disarmament provision. The phrase "weapons of mass destruction" is generally accepted to include nuclear, chemical and biological weapons.⁵⁶ The weapons of mass destruction provision is designed to prevent use of weapons that have an indiscriminate effect on large populations or geographical areas.⁵⁷ It does not apply to conventional weapons, nor does it apply to land-based intercontinental ballistic missiles because their flight trajectory does not include orbiting the earth.

Under this broadly accepted interpretation, none of the exotic future weapons systems currently being proposed or researched by the United States would violate this provision of the Outer Space Treaty. For instance, laser beam weapons are intended to destroy their targets by delivering a high impulse shock that causes structural collapse of the rocket booster or by remaining on the target until a hole is burned through the missile.⁵⁸ These weapons would not be considered weapons of mass destruction and the provisions in the first paragraph of Article IV of the Outer Space Treaty do not preclude orbiting of the earth, installing on celestial bodies, or stationing in outer space other traditional conventional weapons.⁵⁹

However, violations would occur if any of the weapon systems included a nuclear explosion to propel them or as a means of destroying a target. The same is true of any weapons we devised

⁵² Opening remarks by Ambassador Peter Jankowitsch of Austria, Chairman of the United Nations Committee on the Peaceful Uses of Outer Space (UN-COPUS), to the Committee on its twenty-fifth anniversary, U.N. Coc. A/AC. 105/PV. 230, p. 7, 8 (1982); reprinted in 10 J. SPACE L. 41. See also, Morgan, *supra* note 34, at 296.

⁵³ Parkerson, Jr., *supra* note 37, at 67.

⁵⁴ The Outer Space Treaty, *supra* note 3, preamble.

⁵⁵ See Marko G. Markoff, *Disarmament and "Peaceful Purposes" Provisions in the 1967 Outer Space Treaty*, 4 J. SPACE L. 3, 11 (1976).

⁵⁶ See Robert L. Bridge, *International Law and Military Activities in Outer Space*, 13 AKRON L. REV. 649, 656 (1980) (referencing the Senate Foreign Relations Committee hearings on the Outer Space Treaty and the testimony of United Nations Ambassador Goldberg in response to a question by Senator Carlson that weapons of mass destruction "is a weapon of comparable ability of annihilation to a nuclear weapon, bacteriological. . . [i]t does not relate to a conventional weapon.") [hereinafter Bridge].

⁵⁷ Captain Michael G. Gallagher, United States Army Reserve, *Legal Aspects of the Strategic Defense Initiative*, 111 MIL. L. REV. 11, 41 (1986).

⁵⁸ Parkerson, Jr., *supra* note 37, at 76.

⁵⁹ Bridge, *supra* note 56, at 664.

that carried chemical or biological warheads. Such weapons are clearly outlawed under the first paragraph of the Outer Space Treaty.

Military Limitations Contained in Article IV, Paragraph Two, of the Outer Space Treaty

Article IV, paragraph two, is the setting for much greater controversy. It provides for two separate legal regimes for military activity in outer space: (1) activity conducted on the moon and other celestial bodies, and (2) activity conducted in outer space itself. This provision requires all party states to use the moon and other celestial bodies exclusively for peaceful purposes. There can be no military bases, installations or fortifications established on a celestial body and weapons testing and conducting military maneuvers on a celestial body is prohibited. These provisions do not apply to any man-made space stations—only to natural bodies.⁶⁰ Military personnel can be used, but only if conducting scientific research or any other peaceful purposes.

It is this "peaceful purposes" phrase that created the greatest debate in two primary areas. First, did it include activities in outer space away from celestial bodies; and second, did the meaning of peaceful include nonmilitary or just nonaggressive activity?

Even before the ink was dry on the Outer Space Treaty, international lawyers and government leaders have been trying to reach agreement on this seemingly simple question. There appears to be two primary opinions. According to the strict constructionists view, the language in the treaty is narrowly applied. Strict constructionists rely on the precept that "if an act is not specifically prohibited, then international law permits it."⁶¹ Because the phrase peaceful purposes is only mentioned in reference to the moon and other celestial bodies, arguably the limitation is not applicable to outer space. Had the drafters wanted to apply the peaceful purposes language to outer space, they would have done so. This narrow view also recognizes that when the Outer Space Treaty was signed, outer space was already being used for military purposes by the two primary drafters; the United States and the former Soviet Union. It seemed unlikely, therefore, that the Outer Space

Treaty was intended to proscribe current practice by the two space powers.⁶²

However, those favoring a broad interpretation also have some arrows in their quiver. Their claim is based on a review of other clauses in the Outer Space Treaty that proponents say demonstrate a broader intent of peaceful purposes. Phrases such as "common interest of all mankind," the "benefit of all peoples," and "having regard for the interests of all States," clarify that the intent was to reserve all activities in outer space for peaceful purposes.⁶³

The United States has consistently taken the position that the peaceful purposes language does not apply to activities in outer space.⁶⁴ Initial United States policy was set forth in the National Aeronautics and Space Act,⁶⁵ passed in 1958 at the behest of President Dwight Eisenhower. The language of section 103 of the National Aeronautics and Space Act was very similar to phrases that later appeared in the Outer Space Treaty.

The Congress hereby declares that it is the policy of the United States that activities in space shall be devoted to peaceful purposes for the benefit of all mankind.⁶⁶

The former Soviet Union also has accepted the view that the peaceful purposes language of Article IV of the Outer Space Treaty applies to outer space as well as to the moon and other celestial bodies. Moreover, both the United States and the former Soviet Union have consistently maintained that all of their space missions have been for peaceful purposes.⁶⁷

Defining the Term "Peaceful Purposes"

Once it is determined that the peaceful purposes language applies to outer space activities, only half of the problem is solved. The second half of the equation involves defining the term. While there is little controversy that the phrase applies to outer space activities, there is much controversy as to what the phrase means.

On one extreme of the debate is the idea that the Outer Space Treaty served to completely demilitarize space. One particular

⁶⁰ *Id.*

⁶¹ Morgan, *supra* note 34, at 300.

⁶² *Id.* at 299.

⁶³ Bridge, *supra* note 56, at 664.

⁶⁴ See Major General Walter D. Reed & Colonel Robert W. Norris, *Military Use of the Space Shuttle*, 13 AKRON L. REV. 665, 674 (1980) [hereinafter Reed & Norris].

⁶⁵ National Aeronautics and Space Act of 1958, 42 U.S.C. § 2451(a) (1976).

⁶⁶ *Id.*

⁶⁷ S. HOUSTON LAY & HOWARD J. TAUBENFELD, *THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE* 98 (1970) [hereinafter LAY & TAUBENFELD].

proponent of this idea is Professor Mark G. Markoff, Professor of International Law, University of Fribourg, Switzerland. To reach the conclusion that the Outer Space Treaty completely demilitarizes space, he focuses on the "common interests" language contained in Article I of the Outer Space Treaty. Article I provides that the exploration and use of outer space "shall be carried out for the benefit and in the interests of all countries, . . . and shall be the province of all mankind." Professor Markoff argues that this provision precludes *any* military use of outer space.

All forms of military, and not only "warlike," uses of outer space, including defensive activities, are in conflict with the clearly established principle set forth in Article I(1) of the Space Treaty. Nonaggressive, or defensive, uses of outer space cannot be lawful since most all existing states have agreed on that principle. Such uses are still legally permissible under the international law relating to earthly, sea, or air activities, but they are prohibited by the law of outer space.⁶⁸

In Professor Markoff's analysis, all parties to the Outer Space Treaty have agreed, pursuant to Article I not to engage in any space activity that is not in the common interest of all other nations. Therefore, because any military activity, even for self-defense or other nonaggressive purposes, cannot be for the benefit of all nations, the Outer Space Treaty does not authorize any military use.

However, Article I must be read in its proper context.⁶⁹ Article I cannot be read without reference to the rest of the Outer Space Treaty. Specifically, Article III provides that states shall conduct their space activity in a manner consistent with the United Nations Charter. The United Nations Charter, Article 51, specifically recognizes a nation's right of self-defense as an inherent

military activity. Therefore, Article III of the Outer Space Treaty clarifies that this right to military activity is applicable in outer space.⁷⁰ Moreover, absent Article III's reference to the United Nations Charter, the right of self-defense would apply to outer space because international law has customarily recognized this inherent right and it is, arguably, implied in every treaty.

Professor Markoff's argument does not address whether any conceivable use of outer space has military application.⁷¹ In the early days of space exploration, astronauts on Gemini V in August 1965 took photographs of Cuba. Were those photographs for a military purpose, or just scenic shots?⁷² Arguably, any photograph of earth from space could be used for civilian and military purposes. In referring to such activity by a Soviet cosmonaut photographing the United States, one observer noted that, "(w)e do not know whether Gagarin's camera looked up, astronomically, or straight out, navigationally, or inward, clinically, or downward, curiously."⁷³ While some have argued that the phrase in Article I means non-military,⁷⁴ most experts conclude that the Outer Space Treaty does not demilitarize space.⁷⁵

Originally, the former Soviet Union also interpreted the peaceful purposes language to mean no military use whatsoever. However, as their military satellite program gained momentum, the former Soviet Union must have agreed that some weapons could be considered "peaceful" because they were the only nation to actually deploy an antisatellite weapons system.⁷⁶

The United States position has been that the term "peaceful purposes" merely means nonaggressive.⁷⁷ In 1962, then Senator Albert Gore emphasized this point before the United Nations General Assembly. He urged that the "test of any space activities must not be whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of law."⁷⁸ The position of the United States now appears consistent with that of the world community.⁷⁹

⁶⁸ Markoff, *supra* note 55, at 19.

⁶⁹ Article 31 of the Vienna Convention on the Law of Treaties requires that a treaty shall be read in its proper context. Article 3 of that Convention states that it is applicable only to treaties concluded after its enactment. The Vienna Convention on the Law of Treaties entered into force 27 Jan. 1980, U.N. Doc. A/CONF. 38/27, reprinted in 8 I.L.M. 679 (1969).

⁷⁰ Gallagher, *supra* note 57, at 39-40.

⁷¹ LAY & TAUBENFELD, *supra* note 67, at 100.

⁷² *Id.* at 26 n.101.

⁷³ *Id.* at 26.

⁷⁴ See generally Markoff, *supra* note 55. Professor Markoff also refers to the views of the Swiss government who preferred the phrase "for non-military purposes" instead of "for any other peaceful purposes," as currently set forth in the third sentence of Article IV (2). *Id.* at 18.

⁷⁵ *Id.* at 26.

⁷⁶ Major William A. Hill, Jr., United States Air Force, *Permissible Scope of Military Activity in Outer Space*, 24 A.F.L. REV. 157, 164 (1984) [hereinafter Hill].

⁷⁷ Bridge, *supra* note 55, at 658.

⁷⁸ *Id.* at 304.

⁷⁹ Parkerson, *supra* note 37, at 82.

Regardless of the difference between the public pronouncements of the two space powers,⁸⁰ recent practice of both nations are in line with the view that "peaceful" means nonaggressive.⁸¹ A good description of this view was made by Alex Meyer, a German air and space law expert, who noted:

[a]ny use of space which does not itself constitute an attack upon, or stress against, the territorial integrity and independence of another State, would be 'permissible.' Military maneuvers in peacetime, the issue of reconnaissance satellites, the testing of weapons, the establishment of military Orbiting Laboratories (MOLs), etc., would therefore be also permissible in Outer Space. These activities belong to the so-called 'peaceful military activities.'⁸²

Some scholars have argued that the determination of a peaceful use of space depends on the purpose of the activity.⁸³ This fits within the Vienna Convention treaty interpretation rules. Moreover, "purpose" is often defined as "an intended or desired result; end, aim; goal."⁸⁴ Applied to the SDI program, even though it included nonpeaceful and aggressive uses of space, the stated purpose of the program was to advance the self-defense of the United States, a "peaceful purpose."⁸⁵

Another application is the use of satellites for military reconnaissance. Here the desired result is to monitor compliance with arms control agreements although the activity also has a military function. President Jimmy Carter referred to this peaceful side of satellite reconnaissance activity in his October 1978 speech at the Kennedy Space Center as:

Photo reconnaissance satellites have become an important stabilizing factor in world affairs in the monitoring of arms control agreements. They make an immense contribution to the security of all nations. We shall continue to develop them.⁸⁶

When read in reference to the United Nations Charter, other General Assembly resolutions and international law, the United States interpretation recognizes the goal of aspiring to use space for "peaceful purposes" without eliminating the military use completely. Military use of space can be in the common interest of all nations and can always be used in self-defense. Fortunately, a consensus has developed within the United Nations that the Outer Space Treaty does not prohibit military use of space.⁸⁷

Clearly, a traditional military function can have a "peaceful purpose." By defining "purpose" by the intended result of the activities, the Outer Space Treaty includes a "rightful intent" test.⁸⁸ This test can be extremely helpful to a judge advocate advising a commander on a military use of space that otherwise contains a lawful purpose.

Passive Uses of Space

Communications satellites that transport civilian communications for civilian purposes also can transport military communications in times of armed conflict, as in the Gulf War. Does the intent to aid a military purpose render the activity as aggressive and contrary to the peaceful purpose language of the Treaty? Aid for military purpose is not aggressive in an unlawful sense under the United Nations Charter if it is pursuant to a United Nations Security Council Resolution or done in self-defense. If an activ-

⁸⁰ *Id.* at 82.

⁸¹ The variance agreement between the United States and the former Soviet Union may not have been as great as many people have believed. Citing Mentor, Committee on Aeronautical and Space Sciences, Analysis and Background Data of the Outer Space Treaty, Major Hill presents the following illumination:

In a United States Senate Committee review of the "Negotiation of Treaty Provisions" of the [Outer Space Treaty], note was made of a problem of translation to resolve different meaning and construction of key terms in the Russian and English languages. It recites: "In Russian, the word for 'military' essentially means warlike rather than pertaining to the armed services of a country; in the United States, 'peaceful' is not regarded as the opposite of 'military' — we think of 'peaceful' as 'nonaggressive.' It would appear from the above that both powers are agreed nonaggressive armed services employment falls within the concept of 'peaceful uses.'"

Hill, Jr., *supra* note 76, at 163-64.

⁸² Bridges, *supra* note 55, at 658.

⁸³ *Id.* at 658.

⁸⁴ Morgan, *supra* note 34, at 305.

⁸⁵ *Id.*

⁸⁶ Reed & Norris, *supra* note 64, at 670.

⁸⁷ Morgan, *supra* note 34, at 303.

⁸⁸ *Id.* at 307.

ity does not violate the United Nations Charter, then arguably it does not violate the peaceful purpose of the Outer Space Treaty. The same dilemma arises with the use of satellites for mapping, weather, navigation, early warning and reconnaissance when the activity aids a military conflict.

Judge advocates must distinguish the military conflict based on unlawful aggression from the military conflict that is based on lawful aggression; for example, use of force for legitimate self-defense or pursuant to a proper United Nations Security Council Resolution. In today's military operations other than war, the distinctions can be difficult to define. Peaceful use of space is not equivalent to nonmilitary use. Passive military use included in satellite mapping, reconnaissance, gathering of weather data, early warning radar, and navigational assistance measures, should stir little legal debate.

Self-Defense

Each state has an inherent right to self-defense, and Article III of the Outer Space Treaty, references Article 51 of the United Nations Charter, expressly preserves the right to use space in self-defense. However, Article 51 of the United Nations Charter authorizes self-defense only in circumstances of an armed attack. Some narrowly interpret this to mean only those situations "resulting from an instant overwhelming necessity leaving no choice of means and no moment for deliberation."⁸⁹ This view requires an armed attack before self-defense measures can be invoked. In light of the rapid and massive destructive capabilities of modern weaponry, this view may leave insufficient time to effectively exercise the self-defense option from space. The more realistic approach is to recognize the need of nations to anticipate the threat of armed attack and react defensively to the threat without waiting for the actual attack.⁹⁰

Under the Outer Space Treaty, while the principle of self-defense remains intact, the method of that defense is limited. Even for self-defense purposes, the Outer Space Treaty prohibits the use of nuclear, chemical, biological, or other weapons of mass destruction. Thus, the Outer Space Treaty limits the self-defense principle.

With this precept in mind, a wide range of military activity can still fit under the self-defense umbrella. The United States is currently developing means to equip satellites with warning or

impact sensors to signal when a satellite is being approached or has been attacked.⁹¹ Satellites designed with weapons, other than weapons of mass destruction, to sense and preemptively destroy other "killer satellites" seeking to attack are lawful under the self-defense exception to the peaceful purpose of the Outer Space Treaty.⁹²

Space control measures to preemptively deny other nations from gaining space superiority in a future armed conflict poses a more difficult problem. In this scenario, judge advocates must consider the type of weapon to be used and the nature of the underlying armed conflict. If the space-based system is used in support of an unlawful conflict of aggression, in violation of the United Nations Charter or other recognized international law, then the space control measure is likewise unlawful. However, if the space control measure serves a United Nations sanctioned defensive response to aggression, as in the Gulf War, and no weapons of mass destruction are used, then it likely would fit within accepted activity under Article III of the Outer Space Treaty. Proper advice to a commander in this situation must also include consideration of potential political ramifications, and of course, close coordination with the policy makers.

Specific Weaponry

One of the weapons that had been considered under President Reagan's SDI program was a nuclear powered X-ray laser. It would have been powered by a small nuclear explosion that produced a pulse of intense X-rays.⁹³ Therefore, the weapon could not be placed in orbit, installed on a celestial body, or station in space under the Outer Space Treaty. Even if the United States could use such a weapon without it being orbited, installed, or stationed in space, and thus not subject to the literal Article IV prohibitions, the United States still would have to show the world community that the spirit of the Outer Space Treaty was not violated. Like the preemptive space control strike, certain weapons may have an adverse political impact and should be considered.

Conclusion

Military applications in space are no longer visionary dreams. Space-based systems now provide the critical high ground edge to military commanders. In the Gulf War conflict, the Coalition space-based assets were unopposed, but future conflicts may not be so kind. Many nations, other than the traditional space

⁸⁹ *Id.*

⁹⁰ Reed & Norris, *supra* 64, at 683. Mr. Sune Danielson, Counsellor, Permanent Mission of Sweden to the United Nations has implied that an attack by a military space system can be justified on self-defense grounds. See Parkerson, Jr., *supra* note 37, at 80 n.71.

⁹¹ Reed & Norris, *supra* note 64, at 671.

⁹² *Id.* at 685.

⁹³ Parkerson, Jr., *supra* note 37, at 87. The SDI Organization requested an additional one-hundred million dollars in December 1985 to perform underground testing of the X-ray laser to determine its feasibility.

powers, are rapidly acquiring advanced weaponry such as ballistic missiles that increases the need to seize and control space in a defensive posture. Judge advocates will inevitably have to wrestle with force application issues of space assets never considered before. Judge advocates must understand the general principles

of space law established by the Outer Space Treaty and recognize that "[t]he quest for international cooperation in the peaceful use of outer space must not jeopardize national defense responsibilities."⁹⁴

⁹⁴ Lieutenant Colonel George D. Schrader, United States Air Force, *Defense in Outer Space*, 49 MIL. L. REV. 157, 161 (1970). At the time he wrote this article, Lieutenant Colonel Schrader was an assistant staff judge advocate for the Southern Command.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times and Nonjudicial Punishment Rates

Court-martial processing times and nonjudicial punishment rates for the third quarter of fiscal year 1995 are shown below.

Rates Per Thousand

Third Quarter Fiscal year 1995; April-June 1995

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.42 (1.66)	0.38 (1.51)	0.66 (2.63)	0.56 (2.24)	0.68 (2.73)
BCDSPCM	0.18 (0.72)	0.17 (0.70)	0.25 (1.01)	0.21 (0.83)	0.17 (0.68)
SPCM	0.02 (0.08)	0.02 (0.67)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.14 (0.57)	0.17 (0.57)	0.05 (0.20)	0.15 (0.58)	0.00 (0.00)
NJP	18.38 (75.53)	19.43 (77.70)	17.14 (68.56)	20.04 (80.17)	12.14 (48.54)

Note: Based on average strength of 523,678. Figures in parenthesis are the annualized rates per thousand.

Litigation Division Notes

E Pluribus Unum—Maybe: The Ninth and Tenth Circuits Conflict on Bankruptcy Setoff Rights Involving More Than One Government Agency

Like a pointillist masterpiece, the various agencies of the United States government, as a legal entity, appear as an integrated picture within the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) but resolves into a series of discrete dots within the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). Congress or the United States Supreme Court, the ultimate arbiter of legal taste, may have to resolve these conflicting interpretations.

The right of setoff in settling bankruptcy claims can be extremely important to a government agency, especially when the only asset of the bankrupt party is another government agency's debt. The Ninth and Tenth Circuits recently split on whether a bankrupt party's debt to one government agency could be setoff by another government agency's debt to the bankrupt party.

One of the essential elements of setoff is the "mutuality requirement," which dictates that the debt to be setoff must be owed between the same parties acting in the same capacity.¹ When the government is involved in a setoff, compliance with the mutuality requirement is not clear. For example, suppose that the Department of Transportation owes ABC Trucking an equitable adjustment on a contract, but ABC Trucking also owes the Army excess procurement costs from a default on an Army contract. Should the Army be allowed to setoff the debt by intercepting the equitable adjustment to satisfy its claim for procurement costs in violation of the mutuality requirement?

A large body of case law seems to support this type of setoff when the government is involved, despite violation of the mutuality requirement.² Various courts have traditionally narrowly construed the mutuality requirement in bankruptcy setoff actions involving more than one government agency.³ These courts consider the government a single entity. However, two recent cases in the bankruptcy field are divided over the issue.

The Tenth Circuit, in the case of *Turner v. Small Business Association*,⁴ is the first court to find that the government is not a

single entity for setoff purposes in the bankruptcy context. In *Turner*, a family farmer was attempting to reorganize his business under Chapter 12 of the Bankruptcy Code.⁵ The Turners owed the Small Business Administration (SBA) almost \$200,000, and at the same time, they were receiving payments from the Agricultural Stabilization and Conservation Service (ASCS). The government setoff several ASCS payments against the Turner's delinquent SBA loan before the Turners filed for bankruptcy. After filing for bankruptcy, the Turners brought an action in the bankruptcy court to undo the setoff on the grounds that it was a voidable preference because it favored the ASCS over other creditors, and it took place less than ninety days before bankruptcy was filed. The Turners won at the bankruptcy and the district court levels.

On appeal, the Tenth Circuit rejected the government's argument that it was merely exercising a common law right of setoff preserved by Section 553 of the Bankruptcy Code. Finding that the SBA and ASCS were not the same party, the Tenth Circuit reasoned that setoff was not authorized because it violated the mutuality requirement.

The Tenth Circuit took pains to distinguish precedent dating from 1954, which holds that the government is a unitary creditor in bankruptcy for purposes of setoff. The Tenth Circuit noted, among other points, that the earlier cases were decided under the Bankruptcy Act, not the current Bankruptcy Code, and involved liquidation rather than reorganization of debts.⁶ The Tenth Circuit seemed to be strongly influenced by the equitable policy of reorganization that seeks to give the debtor a fresh start.

The Tenth Circuit further supported its conclusion by noting that corporate subsidiaries are treated as separate entities for purposes of setoff, and like separate entities, the Tenth Circuit noted that government agencies occasionally sue each other. The Tenth Circuit also noted that the various claims of the agencies may be classified differently in bankruptcy; for instance, one agency may hold a secured claim while another holds an unsecured claim.

Just days before the Tenth Circuit's *Turner* decision, the Ninth Circuit issued an opinion in *Doe v. United States*,⁷ addressing the same issue in a slightly different context. In *Doe*, a confidential informant for the Federal Bureau of Investigation (FBI) sued under the Federal Tort Claims Act alleging that the FBI had tortiously violated its promise to protect Doe's identity by revealing it to

¹ See *In re Davidovich*, 901 F.2d 1533, 1537 (10th Cir. 1990).

² See *Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946); *Luther v. United States*, 225 F.2d 495, 498 (10th Cir. 1954); *In re Butz*, 154 B.R. 541, 544 (S.D. Iowa 1993).

³ See *Turner v. Small Business Association*, 64 U.S.L.W. 2049 (10th Cir. July 10, 1995) (cases cited therein).

⁴ 64 U.S.L.W. 2049 (10th Cir. July 10, 1995).

⁵ 11 U.S.C. §§ 101 to 1010 (1988).

⁶ See *Luther v. United States*, 225 F.2d 495 (10th Cir. 1954).

⁷ 58 F.3d 494 (9th Cir. 1995).

other members of a drug cartel in an attempt to recruit them as informants. Doe owed the Internal Revenue Service (IRS) substantial sums in taxes. Doe filed for bankruptcy and tried to take advantage of Section 106(b) of the Bankruptcy Code. This section waives sovereign immunity to the extent that it allows the debtor to setoff the government's claim against the debtor's own claim against the government. Doe asserted that he would setoff his tax debt against his potential recovery against the FBI in his tort action.

To do this, Doe argued that the FBI and the IRS were the same entity, namely the United States Government. The government conceded that it should be treated as a single entity for purposes of Doe's setoff action since it seeks to be treated as a single entity when asserting setoff against debtors. The Ninth Circuit agreed, relying on a long line of cases establishing that the government ought to be treated as a single entity for purposes of setoff under Section 106(b) of the Bankruptcy Code. Ironically, one of the cases relied on by the Ninth Circuit was *Luther v. United States*,⁸ a Tenth Circuit opinion, which that circuit was, at that very moment, distinguishing for the purpose of finding government agencies to be separate entities for setoff in bankruptcy.

Although the Ninth Circuit's decision in *Doe* only addresses the sovereign immunity issue under Section 106(b) of the Bankruptcy Code, it is difficult to argue that the government is a single entity for that purpose, but it is not a single entity for purposes of setoff under Section 553 of the Bankruptcy Code. *Doe* plainly requires treatment of the government as a single entity for both purposes, especially since *Doe* expressly sought to harmonize the two sections. One district court in the Ninth Circuit has already expressly recognized this.⁹

These two cases create a dilemma that will not be easily resolved. A detailed analysis of each case is beyond the scope of this note, but a few points should be noted. In *Turner*, the Tenth Circuit strained to distinguish what appeared to be controlling precedent. In support of their finding that the government should be considered separate entities, the Tenth Circuit's observation that the government through its agencies may have several classifications of claims, secured and unsecured, is faulty because this can be true of any claimant. Arguably, the classification of claims has no bearing on the nature of the claimant.

Also, some of the other arguments advanced by the Tenth Circuit in *Turner* seem directly counter to the Supreme Court's decision of *Cherry Cotton Mills*¹⁰ and its progeny. On the other

hand, the Ninth Circuit's *Doe* decision records very little analysis because the government conceded the issue. In *Doe*, the government recognized, no doubt, that it always profits from setoffs that reduce its debts on a dollar for dollar basis rather than relegating it to whatever recovery the bankruptcy process would otherwise provide.

It is uncertain if either the Supreme Court or Congress will take action to resolve the conflict between *Doe* and *Turner*. Regardless of how the practical policy choices are ultimately made, on a theoretical plane, one might view the *Doe—Turner—Luther* interplay as supporting the view of some jurists that, not unlike the determination of what constitutes art, the law consists of the decisions of those who are empowered to decide.

In the interim, agency counsel are advised to note the position held by the Tenth Circuit when seeking a setoff of funds to satisfy a concurrent bankruptcy action. The majority of circuits treat the government as a single entity and will allow for setoffs against the debtor in bankruptcy claims. The *Turner* decision gives debtors and existing creditors a novel argument against this treatment. Mr. Avery.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue is reproduced below:

Clean Air Act: "Major Source" Defined

The United States Court of Appeals for the District of Columbia (D.C. Circuit) recently upheld the Environmental Protection Agency's (EPA) definition of "major source" for purposes of the hazardous Air Pollutant (HAP) program¹¹ in the case of *National Mining Association v. United States*.¹² In determining whether a site is a "major source" for the HAP program, the D.C. Circuit held that the EPA may include emissions from all facilities on a contiguous plant site that are under common control, and is not required to count emissions only from sources within the same

⁸ 225 F.2d 495 (10th Cir. 1954).

⁹ *WestAmerica Bank v. United States*, 178 B.R. 493 (N.D. Cal. 1995).

¹⁰ 327 U.S. 536 (1946).

¹¹ Clean Air Act § 112, 42 U.S.C. § 7412 (1991).

¹² No. 95-1006, 1995 U.S. App. LEXIS 18104 (D.C. Cir., July 21, 1995).

source category or within the same standard industrial classification code. In addition, the D.C. Circuit upheld the EPA's policy of counting "fugitive emissions" for purposes of determining aggregate emissions.

The D.C. Circuit, however, questioned the EPA's assertion that only "federally enforceable" controls can be considered as limiting a source's potential to emit under section 112(a)(1).¹³ The D.C. Circuit agreed to review whether effective controls by state and local authorities can be used to limit a source's potential to emit.

Installations should continue to argue that tenant activities under the control of different services, or leased commercial and retail activities, should be treated as separate sources under the EPA's definition of "major source" under the HAP program.¹⁴ Major Olmscheid.

Report on The Department of Defense's Management of Clean Air Act Requirements

The Department of Defense (DOD) Inspector General's report on the DOD's management of Clean Air Act (CAA) requirements was released on 29 June 1995. The goal of the study was to assess the adequacy of the DOD's planning and implementation of CAA requirements at military installations.

While the study found many positive actions being taken by the DOD, the report made the following five recommendations to improve DOD planning and implementation:

- (1) The DOD should clearly define roles, responsibilities, and authorities that implement the CAA. For example, the report found the Services Steering Committee (SSC) managing the CAA efforts for the DOD was without an approved charter and that the Services had a different view on the role of the SSC.
- (2) The DOD should obtain additional Standard Industrial Classification (SIC) codes for military installations. This would likely allow multiple permits for air emissions on military installations and fewer military installations qualifying as "major sources" under the HAP and Title V programs.
- (3) The DOD should issue guidance that clearly defines the reporting requirements of the A-

106 report, to ensure standard and consistent reporting by all DOD components. The A-106 report is used by the DOD to plan future environmental actions, including future costs. The report found that the military services report clean air projects on the A-106 report differently.

- (4) The DOD should issue guidance regarding notices of violation (NOV). The report found the military services' guidance for reporting NOVs was inconsistent.
- (5) The DOD should issue guidance relating to obtaining, selling, transferring, or disposing of emission credits. The report found few installations participate in emission reduction credits programs. One of the reasons cited was the absence of such guidance.

Major Olmscheid.

Handling Environmental Protection Agency Requests For Information

Citing authority under the Comprehensive Environmental Response, Compensation, and Liability Act, section 104(e),¹⁵ the Environmental Protection Agency (EPA) has been requesting information from Army installations. Typically, the purpose of the request is to determine whether an installation contributed to contamination at some site the EPA is investigating.

Because of the litigation implications associated with these requests, it is essential that the Litigation Branch, ELD, be the focal point for responding to the EPA. If your installation receives a section 104(e) request, the request and the information collected in response to the request should be sent to the Litigation Branch in a timely manner. Lieutenant Colonel Lewis.

Unexploded Ordnance Surveys and National Historic Preservation Act Compliance

The Advisory Council on Historic Preservation (ACHP) recently opined that an unexploded ordnance (UXO) survey may be an "undertaking" for purposes of section 106 of the National Historic Preservation Act (NHPA).¹⁶ Accordingly, installations should consult with the state historic preservation officer (SHPO) prior to undertaking UXO surveys.

¹³ 42 U.S.C. § 7412(a)(1).

¹⁴ *Id.* See ELD Bulletin, July 1995.

¹⁵ 42 U.S.C. § 9604(e).

¹⁶ 16 U.S.C. § 470f.

Section 106 of the NHPA mandates that all federal agencies take into account the effect of an undertaking that may alter historic properties. The ACHP's regulations, "Protection of Historic Properties,"¹⁷ implementing section 106, define an undertaking as "any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects."¹⁸

When recently considering an UXO survey, the ACHP found that it is not necessary to know in advance whether any such properties exist, only that the nature of the project is such that it "can" affect such properties if they are present in the project area. Therefore, ground disturbing activities, such as UXO surveys, may be considered as undertakings because they have the potential to affect archeological properties.

If the installation determines that the undertaking, or the UXO survey in this case, will have no effect on historic properties, the installation must notify the SHPO and make the determination available for public inspection.¹⁹ Unless the SHPO objects within 15 days of receiving the determination, no further steps are required prior to the undertaking. If the SHPO objects²⁰ and finds an effect, the installation must notify the ACHP and consult with the SHPO. MAJ Ayres.

Removal of Legally Obsolete or Redundant Rules

On 29 June 1995, the Environmental Protection Agency (EPA) issued a final rule removing from the Code of Federal Regulations a number of obsolete or redundant regulations pertaining to

the EPA's water programs.²¹ The removed regulations dealt with the National Pollutant Discharge Elimination System, pretreatment, public water supply, underground injection control, state and local assistance programs, and effluent limitation guidelines and standards. Major Saye.

Air Force Environmental Law Courses

The schedule for the Air Force Environmental Law courses to be held at Maxwell Air Force Base, Montgomery, Alabama, is as follows:

Advanced Course 5-7 December 1995

Update Course 12-14 February 1996

Basic Course 13-17 May 1996

The Air Force provides the ELD with several slots for these courses. Please direct requests or inquiries to Mrs. Athey at DSN 426-1230 or facsimile number 426-2940. There is no registration fee; however, installations are responsible for travel and per diem. Mrs. Athey.

New Defense Systems Network Telephone Number

Please note a new Defense Systems Network (DSN) telephone number for the Environmental Law Division. The new number is 426-1230, facsimile number 426-2940. Mrs. Fedel.

¹⁷ 36 C.F.R. § 800.

¹⁸ *Id.* § 800.2(o).

¹⁹ *Id.* § 800.5(b).

²⁰ Timely objections must follow the procedures described in 36 C.F.R. § 800.5(c).

²¹ Installation environmental offices should be aware of the rule, which is located at 60 Fed. Reg. 33,926 (1995).

Contract Law Notes

New Simplified Acquisition Rule Issued

On July 3, 1995, the *Federal Register* published an interim rule¹ conforming several parts of the *Federal Acquisition Regulation*² to the 1994 Federal Acquisition Streamlining Act's³ guidance concerning simplified acquisitions (formerly small purchases). The substantive provisions of the proposed rule have been discussed previously.⁴ As a result, this note will focus on the major changes that the interim rule makes in simplified acquisitions.

Increased Purchasing Threshold

The interim rule follows the Federal Acquisition Streamlining Act's guidance by increasing the threshold for simplified acquisitions from \$25,000 to \$100,000, and by increasing the threshold for simplified acquisitions in support of overseas contingency operations⁵ to \$200,000.⁶ However, contracting officers may not use simplified acquisition procedures for acquisitions greater than \$50,000 until the Under Secretary of Defense for Acquisition and Technology certifies that the contracting office

has obtained an "interim capability" to use the new Federal Acquisition Computer Network (FACNET).⁷ By December 31, 1999, the agency must obtain "full" FACNET capability or agency contracting offices will lose their authority to use simplified acquisition procedures for acquisitions greater than \$50,000.⁸

Small Business Set-Asides

Under the interim rule, simplified acquisitions greater than \$2500 made in the United States⁹ are reserved for small businesses, unless the contracting officer determines that there is no reasonable expectation of obtaining competitive quotes from two or more responsible small business concerns.¹⁰ This amendment reflects the new "micropurchase" rules, which carve out an exemption from small business set-aside requirements for purchases of \$2500 or less.¹¹

Competition Requirements

The interim rule makes FACNET the preferred solicitation method for simplified acquisitions.¹² However, until interim FACNET implementation, the current competition rules remain unchanged. For acquisitions between \$2500 and \$25,000, con-

¹ 60 Fed. Reg. 34,791 (1995).

² GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (1 Apr. 1984) [hereinafter FAR].

³ Pub. L. No. 103-335, §§ 4001-4203, 108 Stat. 3243, 3342-3346 (1994) [hereinafter FASA].

⁴ For a discussion of the proposed rule that became the interim rule, see Hughes, *Simplified Acquisitions and Electronic Commerce: Where Do We Go From Here?*, ARMY LAW., June 1995, at 38.

⁵ See 10 U.S.C. § 101(a)(13) for the definition of "contingency operation."

⁶ 60 Fed. Reg. 34,748 (1995) (amending FAR 13.101 and implementing FASA § 1502).

⁷ *Id.* (amending FAR 13.103(b) and FAR 4.505-1 and implementing FASA § 4201). The Federal Acquisition Computer Network [hereinafter FACNET] is designed to allow agencies and prospective contractors to perform procurement functions electronically. See Hughes, *supra* note 4, at 42-43 for a discussion of FACNET.

⁸ The reader should note that "interim certification" is granted on an office-by-office basis. See FAR, *supra* note 2, 4.505-1. However, the FASA requires "full certification" on an agency-wide basis. See FASA, *supra* note 3, § 4201, FAR, *supra* note 2, 4.505-2. For purposes of the full certification requirement, the FASA treats the Department of Defense as a single agency. See FAR, *supra* note 2, 4.505-2 (a)(3).

⁹ The rule defines "United States" to include territories, possessions, and the Commonwealth of Puerto Rico. This is significant because the provision does not apply to purchases made overseas, such as purchases supporting contingency operations.

¹⁰ 60 Fed. Reg. 34,749 (1995) (amending FAR 13.105 and implementing FASA § 4004). The rule also states that "competitiveness" can be based in terms of not only price, but also quality and delivery.

¹¹ See FASA, *supra* note 3, § 4301 (exempts micropurchases from the Small Business Act (15 U.S.C. § 637); the Buy American Act (41 U.S.C. § 10a)); FAR, *supra* note 2, subpt. 13.6.

¹² 60 Fed. Reg. 34,749 (1995) (creating new FAR 13.106-1(2)).

tracting officers may continue to solicit quotations orally, allowing competition to the maximum extent practicable.¹³

For simplified acquisitions greater than \$25,000, the interim rule retains the requirement to synopsise the acquisition in the *Commerce Business Daily (CBD)*.¹⁴ As a result, oral solicitations for these acquisitions may be impractical or unusual.¹⁵ However, once the contracting activity acquires interim FACNET capability and conducts a simplified acquisition using FACNET, the interim rule exempts that acquisition from the *CBD* synopsis requirement.¹⁶

Finally, the minimum thirty-day response time for solicitations no longer applies to acquisitions greater than \$25,000 but less than \$50,000.¹⁷ Instead, contracting officers must set a reasonable time for prospective offerors to respond to solicitations. The interim rule requires contracting officers to consider the complexity, commerciality, availability, and urgency of the procurement when establishing response times.¹⁸

"Best Value" Simplified Acquisitions

For the first time, the interim rule clearly allows contracting officers to consider factors other than price (such as past performance and quality) in evaluating quotes and offers from prospective offerors.¹⁹ This allows contracting officers to conduct a type of "best value" simplified acquisition. If this method is used, the contracting officer must notify prospective offerors of the evalu-

ation criteria at the time of the solicitation.²⁰ Because of the inherent difficulty of properly conducting "best value" procurements, plus the general lack of experience of simplified acquisition contracting officers in evaluating factors other than price, the contract attorney must insure, at least at the outset, that the contracting officer receives proper assistance.

Additionally, although formal evaluation plans, discussions, or formal scoring of offers is not required,²¹ the contracting officer must document the file to support the final award decision.²² Finally, if an unsuccessful offeror requests information, the contracting officer must briefly explain the basis for the award decision.²³ Because the interim rule incorporates by reference provisions of part 15 of the *Federal Acquisition Regulations* concerning debriefing of unsuccessful offerors, the contract attorney must work closely with the contracting officer to ensure that the award decision is proper and that the file is properly documented.

Miller Act Exclusion

As required by the Federal Acquisition Streamlining Act,²⁴ the interim rule makes certain procurement statutes inapplicable to simplified acquisitions.²⁵ One of the more noteworthy exclusions is the Miller Act,²⁶ which requires construction contractors to provide performance and payment bonds to protect laborers and materialmen providing services and supplies on construction projects. The interim rule specifically makes the Miller Act inapplicable to simplified acquisitions, but does not address whether

¹³ 60 Fed. Reg. 34,749 (1995) (creating FAR 13.106-1(a)(3)). The rule provides that the contracting officer should solicit at least three sources. Additionally, the rule provides guidance concerning factors that the contracting officer should use in determining the proper number of quotes to obtain, including soliciting only one source in urgent circumstances.

¹⁴ 60 Fed. Reg. 34,746-34,747 (1995) (amending FAR 5.101 and FAR 5.205).

¹⁵ 60 Fed. Reg. 34,749 (1995) (creating FAR 13.106-1(a)(2)).

¹⁶ 60 Fed. Reg. 34,746-34,747 (1995) (amending FAR 5.202).

¹⁷ As previously discussed, the \$50,000 ceiling will increase to \$100,000 once the contracting office receives interim FACNET certification.

¹⁸ 60 Fed. Reg. 34,747 (1995) (amending FAR 5.203 and implementing FASA §§ 4101(c) and 4202(a)).

¹⁹ 60 Fed. Reg. 34,749-34,750 (1995) (creating FAR 13.106-1(a)(1) and (b)).

²⁰ *Id.*

²¹ 60 Fed. Reg. 34,750 (1995) (creating FAR 13.106-1(b)).

²² *Id.* (creating FAR 13.106-2(b)).

²³ *Id.* (creating FAR 13.106-2(c)). This rule also incorporates by reference FAR 15.1001(c) concerning the content of postaward notices. The FAR 15.1001(c) requires in part "in general terms, the reason the offeror's proposal was not accepted, unless the price information . . . readily reveals the reason."

²⁴ FASA, *supra* note 3, §§ 4101-4104.

²⁵ 60 Fed. Reg. 34,751 (1995) (creating new FAR 13.110).

²⁶ 40 U.S.C. § 270a (1988 and Supp. V 1993).

contracting officers may require bonds or other financial guarantees in simplified acquisition cases.²⁷ However, a recent interim *Defense Federal Acquisition Regulation Supplement* rule has addressed the issue for Department of Defense contracting officers.²⁸

Expanded Use of Standard Form 44

The interim rule provides for expanded use of Standard Form 44 (SF 44), which is used to make purchases in isolated locations, such as during contingency operations.²⁹ Normally, purchases made with an SF 44 are limited to \$2500, except under certain conditions.³⁰ Under the new guidance, agencies may use an SF 44 in support of contingency operations up to the simplified acquisition threshold.³¹

New Form of Purchase Order

To support the future use of FACNET, the *Federal Acquisition Regulation* provides for a new "unsigned electronic purchase order." This new type of purchase order can be used when: (1) the use is more advantageous to the government; (2) the supplier and the contracting officer approve its use; (3) the transaction does not require the supplier's written acceptance of the offer; and (4) the purchasing office also administers the resulting contract. The new guidance requires contracting officers to incorporate appropriate clauses by reference.³²

Conclusion

The interim rule creates new issues for contract attorneys. Once agencies acquire the ability to use simplified acquisition procedures for acquisitions up to \$100,000 (by obtaining interim FACNET capability), the vast majority of federal procurement actions will be in this area. Contract attorneys should closely monitor this developing area of the law and be prepared to assist simplified acquisition contracting officers in exercising the new authority that the rules provide. Major Hughes.

Administrative and Civil Law Notes

Military Personnel Law Note

Elimination of the Military Personnel Records Jacket

As the Army moves forward in the Information Age, yet another aspect of the "old Army" will go the way of the Sam Browne belt, the M-14 rifle, and the "P-38."³³ On 23 May 1995, the Commander of the United States Total Army Personnel Command (PERSCOM) announced a three-phase plan to eliminate the Military Personnel Records Jacket, DA Form 201,³⁴ known to many as the "201 File" or the Military Personnel Records Jacket (MPRJ). By the end of Fiscal Year 1998, the MPRJ is to be a thing of the past for all active duty Army soldiers, officers and enlisted soldiers.³⁵ Active duty Army officers will see their MPRJs disappear much sooner, by 1 September 1996.³⁶

²⁷ 60 Fed. Reg. 34,751 (1995) (creating FAR 13.110 and FAR 13.111). The omission of guidance concerning alternative financial guarantees is interesting because FASA § 4104(b) requires that the *Federal Acquisition Regulation* implementing guidance provide for alternative financial guarantees that contracting officers could require in lieu of bonds for contracts between \$25,000 and \$100,000. The proposed rule contained implementing guidance, but the drafters omitted the language from the interim rule.

²⁸ 60 Fed. Reg. 45,736 (1995) (effective Aug. 31, 1995) (creating DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 228.171 to 228.171-3 (1 Dec. 1991)) [hereinafter DFARS]. Under the DFARS interim rule, contracting officers must require contractors to furnish either: (1) a payment bond; (2) an irrevocable letter of credit; (3) a tripartite escrow agreement; (4) a certificate of deposit; or (5) certain securities listed in FAR 28.204 (Treasury bonds, Treasury notes, certified or cashier's checks, money orders, etc.) for all construction contracts between \$25,000 and \$100,000.

²⁹ FAR, *supra* note 2, 13.505-3.

³⁰ These conditions include unusual and compelling urgency, and in the case of DOD, aviation fuel and oil. DFARS, *supra* note 28, 213.505-3.

³¹ 60 Fed. Reg. 34,755 (1995) (amending FAR 13.505-3). The comparable DFARS provision has also been amended to include the contingency operation exception. DFARS, *supra* note 28, 213.505-3.

³² 60 Fed. Reg. 34,755-34,756 (1995) (amending FAR 13.506).

³³ The P-38 was the vernacular name for the tiny yet efficient folding can openers packed in every case of old "C Rations." When C Rations gave way to Meals, Ready-to-Eat, the folding can opener was no longer needed.

³⁴ Message, Commander, United States Total Army Personnel Command, TAPC-PDI, subject: Elimination of DA Form 201, Military Personnel Records Jacket (MPRJ) (231900Z May 95) [hereinafter MILPER Message 95-111].

³⁵ *Id.* para. 4c.

³⁶ *Id.* para. 4b; Message, Commander, U.S. Total Army Personnel Command, TAPC-PDI, subject: Elimination of DA Form 201, Military Personnel Records Jacket (MPRJ)—Phase II (Active Army Officers) para. 4d (230830Z Aug. 95) [hereinafter MILPER Message 95-201].

The Army's program to eliminate the MPRJ reflects the trend towards automating personnel records and reducing reliance on paper records. The Army is streamlining record keeping, cutting the cost of maintaining paper files, and making personnel records accessible electronically to speed access by personnel officials and career managers. As part of a larger program, all records maintained in soldiers' Official Military Personnel Files (OMPF) are being converted to digitized images to the Personnel Electronic Records Management System (PERMS).³⁷ The PERMS conversions are complete for all active Army officers, and are expected to be completed by March 1996 for active Army enlisted soldiers. The PERMS conversion for the Reserve Component will follow.

The PERMS enhances the ability of personnel officials to access soldiers' records. With the enhanced access, the need to maintain paper copies of many documents in local (or "field") MPRJs, with its associated cost, is reduced or eliminated.

Phase I of the Army's plan to eliminate the MPRJ began on 21 June 1995.³⁸ Forty-seven documents previously authorized for filing in the MPRJ (representing thirty-eight percent of the total number of documents authorized for filing) were removed from the authorized list. Among the forty-seven documents no longer authorized for filing are:

- * DA Form 268, Report to Suspend Favorable Personnel Actions (FLAG).
- * Weight control documents.
- * DA Form 1059, Service School Academic Evaluation Report.
- * DD Form 1172, Application for Uniformed Services Identification Card.
- * DD Form 1879, Request for Personnel Security Investigation.
- * DA Form 3349, Physical Profile.
- * Administrative reprimands, admonitions, and censures.
- * Pregnancy counseling checklist and statement of counseling.
- * Physical evaluation board letter of approval.

Most documents which are to be removed from the MPRJ will be returned to the soldier. Some documents will be transferred to the military personnel work centers which use them.

³⁷ See MILPER Message 95-111, *supra* note 34, at para. 3a.

³⁸ *Id.* para. 5b.

Phase II of the Army's plan to eliminate the MPRJ began on 30 September 1995 and is to be completed by 1 September 1996. All active Army officers' MPRJs are to be eliminated as follows:

- * Personnel records centers will maintain a local file containing only four documents: the Officer Record Brief (ORB); the Record of Emergency Data, DD Form 93; the Serviceman's Group Life Insurance Election and Certificate, SGLI 8286; and the Certificate of Clearance and/or Security Determination, DD Form 873. The Army expects to eliminate the DD Form 873 for both officers and enlisted soldiers during Fiscal Year 1996. Like the old MPRJ, these documents will move with an officer on permanent change of station.
- * All other documents, including the DA Form 201 jacket itself, are to be given to the officer during a joint records audit conducted with the servicing military records clerk. The purpose of the audit is to verify the accuracy of all data on the ORB. Once the audit is completed and ORB changes are posted to the Total Army Personnel Data Base, all data elements on the ORB will be presumed to be accurate unless proven otherwise.

The Army imposes no requirement for individuals to keep their own private file of personnel documents, but officers would be well advised to do so. Copies of documents in an officer's possession may be used if the accuracy of data on the ORB should be questioned. The only other source for "hard copy" documents to verify or change information in the ORB will be those documents filed on the "Service" section of the OMPF. Therefore, all officers should be advised to verify the accuracy and completeness of their "Service" fiche.

The ORB will become the main source document used to process personnel actions and for personnel management functions. Personnel records custodians should schedule joint records audits as local mission requirements dictate. Officials at PERSCOM suggests using normal in- and out-processing and birth-month and promotion records audits. All officer MPRJ eliminations must be completed by 1 September 1996.

Phase III of the Army's plan to eliminate the MPRJ, eliminating enlisted soldiers' MPRJs, will begin when the PERMS digitizing of enlisted records is complete and SIDPERS-3 is fielded Army wide. Currently, PERSCOM expects to begin Phase III late in Fiscal Year 1998.

Most provisions of the MPRJ elimination plan do not apply to the United States Army Reserve or National Guard.

The plan to eliminate the MPRJ has many implications for judge advocates. General officers and general courts-martial convening authorities (GCMCA) will likely expect advice on the disposition of administrative reprimands, admonitions, and censures. These documents still may be filed in the OMPF "performance" portion under AR 600-37, paragraph 3-4b. If a commander does not wish to direct such filing, the reprimand may be issued to the individual and a copy filed in the appropriate unit files.³⁹ These different filing practices may make previous infractions harder to document, because previous units must be consulted; on the other hand, the Modern Army Recordkeeping System retention policy may make documents from different GCMCA jurisdictions available which were not available under AR 600-37.⁴⁰ Administrative law attorneys reviewing separation actions may be required to work more closely with supported units to insure that actions meet legal requirements. Backup copies of documents relating to separations under AR 635-200, chapters 8 (Separation of Enlisted Women—Pregnancy) and 18 (Failure to Meet Body Fat Standards), will no longer be available from the MPRJ. Trial and defense counsel accustomed to obtaining information about the accused and witnesses in criminal justice actions from MPRJs will have that ability curtailed as documents are removed in compliance with Phases I and II. Some information can still be obtained from unit records, from the documents which remain in the MPRJ and by careful study of DA Forms 2A and 2-1, and by obtaining a copy of the OMPF. Major Garcia.

³⁹ See DEP'T OF ARMY, REG. 25-400-2, THE MODERN ARMY RECORDKEEPING SYSTEM (MARKS), tbl. B-91 (26 Feb. 1993). "Informational personnel files" (MARKS number 640a) may be maintained at "various command levels exercising administrative jurisdiction or as a result of routing correspondence through normal military channels." *Id.* These files shall be destroyed one year after transfer or separation of the soldier concerned. *Id.*

⁴⁰ Under Army Regulation 600-37, a reprimand filed in the MPRJ could remain there for up to three years or until the recipient was transferred to a different GCMCA jurisdiction. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, para. 3-4a(3) (19 Dec. 1986). If a soldier moved within a GCMCA jurisdiction, the reprimand would still be present in the MPRJ. If the soldier moved across GCMCA lines, however, the reprimand would be removed from the MPRJ, with no permanent record. Under the MARKS, if the reprimand is filed in unit file 640a, the reprimand would properly be retained by the losing unit for one year after the soldier's departure, regardless of whether the soldier moved across post or across the world. The proponent of Army Regulation 600-37 is considering changes to the regulation in response to the MPRJ elimination program, but no decision has been made at this time.

⁴¹ United States Dep't of Trans., Fed. Aviation Admin. New York TRACON, Westbury, NY and Nat'l Air Traffic Controllers Assoc., 50 FLRA 338 (1995).

⁴² 5 U.S.C. § 7114(b)(4)(A), (B) (1994). Section 7114(b)(4)(C) limits the requested information by excluding information which constitutes guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. *Id.* This information also is referred to as intramanagement guidance.

⁴³ *Id.* § 14(b)(4)(B).

⁴⁴ 50 FLRA 661 (1995).

Labor and Employment Law Note

When Is Information "Necessary" for a Union?

New Guidance from the Federal Labor Relations Authority

Introduction

The Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(b), requires agencies, as a part of the obligation to bargain in good faith, to provide requested information to unions. However, this statute contains several limitations on a union's right to receive information. For example, the release of the information cannot be prohibited by law. This provision has recently been interpreted to mean that the Privacy Act applies to union requests for information.⁴¹ The information also has to be "normally maintained by the agency" and be "reasonably available."⁴² Another limitation, and the subject of this note, is the requirement that the information be "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."⁴³ The Federal Labor Relations Authority (FLRA) recently decided a case in which established new guidance for determining whether information requested by a union is "necessary" within the meaning of 5 U.S.C. § 7114(b)(4).

Facts

In *Internal Revenue Service, Kansas City, and National Treasury Employees Union (IRS, Kansas City)*,⁴⁴ the union filed an

unfair labor practice charge after the Internal Revenue Service (IRS) refused to release information requested by the union. The union represented a grievant claiming disparate treatment on an evaluation and requested a copy of the employee evaluation report of an employee in a similar position to the grievant. The IRS denied the request for information because the evaluation report requested by the union covered a period when the employee worked in two different jobs. The IRS argued that it could not sanitize the requested evaluation information in a manner which would be useful to the union in fulfilling its representational duties. The union maintained that the information was necessary and relevant in pursuing the grievance. Both parties stipulated that the information was maintained in the regular course of business, reasonably available, and that release was not prohibited by law.⁴⁵ The only issue facing the FLRA was determining whether the information fell within the definition of "necessary" under the statute.

Prior Case Law

The United States Court of Appeals for the District of Columbia (D.C. Circuit) addressed the issue of how to determine whether the information is "necessary" in *National Labor Relations Board v. FLRA (NLRB v. FLRA)*.⁴⁶ In *NLRB v. FLRA*, the D.C. Circuit required the union to establish a particularized need for the information. The particularized need articulated by the union was then balanced against the countervailing antidisclosure interests of the agency.⁴⁷ The D.C. Circuit originally applied this particularized need test to requests for intramanagement information.⁴⁸ The FLRA concurred and adopted the test for intramanagement information.⁴⁹ Although the D.C. Circuit and other courts liberally applied the particularized need test to other types of information requested by unions, the FLRA never expanded the test beyond intramanagement information.⁵⁰

The FLRA has now decided to expand the application of the particularized need test. In so doing, the FLRA adopted one standard for determining whether information is necessary for a union under 5 U.S.C. § 7114(b)(4)(B). The FLRA also established the procedural framework for the parties to follow in requesting information and evaluating requests.

As an initial step, the union must establish that the information is necessary. To do this, the union must articulate a particularized need for the information.⁵¹ To establish a particularized need, the union must disclose:

- (1) why it needs the requested information;
- (2) the intended use of the information; and
- (3) the connection between the intended use and the union's representational responsibilities.

The union request must be sufficiently detailed to allow the agency to make a reasoned judgment as to whether disclosure of the information is required by the statute.⁵² The detail required in the disclosure must be more than conclusory, but need not be so specific that it reveals the union's strategies or compromises the identity of potential grievants who wish to remain anonymous.⁵³ Although the amount of detail required depends on the facts in each particular case, the FLRA will not require disclosure until the union establishes a particularized need.

Once the union makes the requisite showing, the agency must either: (1) disclose the information; or (2) establish a counter-

⁴⁵ *Id.* at 662.

⁴⁶ 952 U.S. 523 (D.C. Cir. 1992).

⁴⁷ *IRS, KC*, 50 FLRA, at 667 (internal cites omitted).

⁴⁸ *Id.* See *supra* note 2 for a definition of intramanagement information.

⁴⁹ *National Park Service, National Capital Region, United States Park Police*, 48 FLRA 1151 (1993).

⁵⁰ See Timothy J. Saviano, *Union Access to Information: The Particularized Need Test for Internal Management Information*, *ARMY LAW.*, July 1995, at 17, for a broader and more in-depth discussion of prior case law and the development of the particularized needs test.

⁵¹ *Internal Revenue Service, Kansas City, and National Treasury Employees Union*, 50 FLRA 661, at 669 (1995) (in footnote 11, the FLRA noted that the use of the term "particularized need" referred to the union's showing rather than a heightened level of need required for certain documents). *Id.*

⁵² *Id.* at 670.

⁵³ *Id.*

vailing antidisclosure interest, which would outweigh the union's established particularized need.⁵⁴ The agency must explain, with specificity, the basis for denying the request. The agency must make a good record of the agency's antidisclosure interest and why that interest outweighs the union's disclosure interest. This is the test that the FLRA ultimately will apply if the matter comes before it in an unfair labor practice proceeding.⁵⁵

The FLRA hopes that making each party state, in some detail, why the information should be disclosed or withheld will increase the likelihood that the parties will resolve their differences amicably. Knowledge of each others' positions should allow the parties to accommodate, compromise, or identify alternative forms of disclosures which will satisfy their respective interests.⁵⁶ The FLRA has clearly indicated that it expects the parties to settle disputes over release of information: "We expect the parties to consider . . . alternative forms and means of disclosure that may satisfy both a union's information needs and an agency's interests in information."⁵⁷

Applying the New Test

In *IRS, Kansas City*, the FLRA applied their new test when reviewing the union's stated reason for the information. The union requested the information to evaluate a potential grievance concerning a bargaining unit member's evaluation. To determine if the employee was evaluated unfairly because of her union activities, the union made a strong disclosure argument in favor of seeing the evaluation of a nonunion employee performing similar duties. The FLRA then considered the agency's argument against disclosure and found that the agency failed to articulate any specific antidisclosure interests. The FLRA rejected the agency's assertion that the employee appraisal contained information from two different positions and could not be used effectively in representational duties.⁵⁸

Applying the new "particularized need" test, the FLRA found that the union had established a need for the information and the agency failed to assert an antidisclosure interest. The FLRA ruled that the requested information was "necessary" and the agency's failure to disclose the information was an unfair labor practice.⁵⁹

Conclusion

The FLRA provides practitioners with a framework for evaluating requests for information. Just as it did in cases applying the Privacy Act to union requests for information,⁶⁰ the FLRA has adopted one standard to apply to all requests. Only time will tell whether this attempt to develop uniform standards is successful.

Major Keys.

Legal Assistance Items

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

Tax Notes

Update for 1995 Federal Income Tax Returns

Legal assistance attorneys around the world preparing for the 1995 federal income tax filing season may find this update useful in publicizing many of the numbers of most concern to military taxpayers.⁶¹

⁵⁴ There is no presumption against disclosure except for intramanagement information. *Id.*

⁵⁵ *Id.* at 671.

⁵⁶ *Id.* at 670-71.

⁵⁷ *Id.* at 671.

⁵⁸ *Id.* at 672.

⁵⁹ *Id.* at 673.

⁶⁰ See TJAGSA Practice Notes: Administrative and Civil Law Notes, *The FLRA Expands Application of Privacy Act Protections*, *ARMY LAWYER*, Sept. 1995, at 38, for a discussion of the FLRA's application of the Privacy Act to union requests for information.

⁶¹ This update will be included in JA 269, *Tax Information Series*, a handbook of tax information flyers published annually in January by The Judge Advocate General's School. This publication contains a series of camera-ready tax information handouts that may be reproduced for use in local preventive law programs. This update also has been uploaded in ASCII format on the Bulletin Board of the Legal Automation Army-Wide Systems as 95FTAXUP.ZIP. The 1995 edition of JA 269 will be uploaded before the end of January 1996.

Key Changes for 1995

Earned Income Credit

The earned income credit is available for the first time for service members stationed overseas.⁶² The earned income credit is available if the soldier (and spouse, if applicable) earned less than:

\$ 9230	0 children
\$24,396	1 child
\$26,673	2 children

Because the majority of service members, to include privates E-1, earn more than \$9230 a year, most service members will not be eligible unless they have one or more children. As a general rule, most service members who have children and are sergeants E-5 and below will be eligible to receive at least some earned income credit.

A service member's earned income will generally consist of base pay, Basic Allowance for Quarters (BAQ), and Basic Allowance for Subsistence (BAS). The Variable Housing Allowances (VHA) and Cost of Living Adjustment (COLA) allowances are *not* included. Earned income will be reported separately on each service member's Form W-2. This will make it easier to determine the correct amount of earned income.⁶³

Moving Expenses

The Internal Revenue Service (IRS) has issued final treasury regulations⁶⁴ clarifying that Dislocation Allowances (DLA), Temporary Lodging Allowances (TLA), Temporary Lodging Expenses (TLE), and Move In Housing Allowances (MIHA) are not taxable income. To deduct moving expenses, however, a service member's total direct moving expenses must exceed the total of direct reimbursements (for example, per diem and moving of household goods) and the amount of DLA, TLA, TLE, and MIHA. Thus, it is unlikely that a service member will be able to deduct any out-of-pocket moving expenses.

Which Form Must Be Used?

The tax form that you should use depends on your filing status, income level, and the type of deductions and credits you claim. The IRS has established the following guidelines for choosing tax forms:

- * Use Form 1040EZ⁶⁵ if you meet the following conditions *during the tax year*: (1) you are single or married filing jointly; (2) you (and your spouse, if married) were under 65 on 1 January 1996; (3) you (and your spouse, if married) were not blind at the end of 1995; (4) you do not claim any dependents; (5) your taxable income is less than \$50,000; and (6) your taxable interest income was \$400 or less. If you use this form, you may not itemize deductions, claim credits, or take adjustments.
- * Use Form 1040A⁶⁶ if your taxable income from wages, salaries, tips, interest, and dividends is less than \$50,000. If you use this form, you may not itemize deductions. You can claim credits and take adjustments.
- * If you intend to itemize deductions, have any capital gains, or have gross income over \$50,000, you must use Form 1040.⁶⁷

When to File?

Tax returns must be postmarked by 15 April 1996. If you are living outside the United States and Puerto Rico on 15 April 1996, you have until 15 June 1996 to file your return. If you owe the IRS any money, however, you will have to pay interest on the amount you owe from 15 April 1996 until the IRS receives your payment. If you are living outside the United States and Puerto Rico and want to take advantage of this extension, you should indicate either on your return, or by an attached statement, that you were overseas on 15 April 1996.

⁶² Rev. Proc. 94-72, 1994-2 C.B. 811.

⁶³ I.R.C. § 6051(a)(10) (RIA 1995).

⁶⁴ T.D. 8607.

⁶⁵ Internal Revenue Serv., Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents (1995).

⁶⁶ Internal Revenue Serv., Form 1040A, Income Tax Return for Single and Joint Filers (1995).

⁶⁷ Internal Revenue Serv., Form 1040, Income Tax Return for Single and Joint Filers (1995).

If you need additional time to file your return, you can request an extension to file until 15 August 1996. You must file Form 4868 before 15 April 1996 (or 15 June 1996 if you are stationed overseas) to receive this extension. The IRS will automatically approve timely requests for extensions. While extensions provide additional time to file, do not delay your obligation to pay taxes because you will be subject to late payment penalties. If you owe taxes, you must pay them by 15 April (15 June if overseas) or you will be subject to late payment penalties. Additionally, interest will run on

all taxes due from the required payment date (15 April or 15 June if overseas) until they are paid.

If you still need additional time to file, you may request an additional extension until 15 October 1996. This request is made by filing Form 2868 prior to 15 August 1996. The IRS normally disapproves such a request, unless there is sufficient justification for needing the extra time.

What Are the 1995 Tax Rates?

The tax rates for 1995 are 15%, 28%, 31%, 36%, and 39.6%. The following tables⁶⁸ show the adjusted tax rates by filing status for 1995:

Married Individuals Filing Jointly and Surviving Spouses

If taxable income is:

Not over \$39,000

Over \$39,000, but
not over \$94,250

Over \$94,250, but
not over \$143,600

Over \$143,600, but
not over \$256,500

Over \$256,500

The tax is:

15% of the taxable income

\$5850 plus 28% of the
excess over \$39,000

\$21,320 plus 31% of the
excess over \$94,250

\$36,618.50 plus 36% of the
excess over \$143,600

\$77,262.50 plus 39.6% of the
excess over \$256,500

Heads of Household:

If taxable income is:

Not over \$31,250

Over \$31,250, but
not over \$80,750

Over \$80,750, but
not over \$130,800

Over \$130,800, but
not over \$256,500

Over \$256,500

The tax is:

15% of the taxable income

\$4687.50 plus 28% of the
excess over \$31,250

\$18,547.50 plus 31% of the
excess over \$80,750

\$34,063 plus 36% of the
excess over \$130,800

\$79,315 plus 39.6% of the
excess over \$256,500

⁶⁸ Rev. Proc. 94-72, 1994-2 C.B. 811.

Unmarried Individuals Other Than Surviving Spouses or Heads of Household:

If taxable income is:	The tax is:
Not over \$23,350	15% of the taxable income
Over \$23,350, but not over \$56,550	\$3502.50 plus 28% of the excess over \$23,350
Over \$56,550, but not over \$117,950	\$12,798.50 plus 31% of the excess over \$56,550
Over \$117,950, but not over \$256,500	\$31,832.50 plus 36% of the excess over \$117,950
Over \$256,500	\$81,710.50 plus 39.6% of the excess over \$256,500

Married Individuals Filing Separate Returns:

If taxable income is:	The tax is:
Not over \$19,500	15% of the taxable income
Over \$19,500, but not over \$47,125	\$2925 plus 28% of the excess over \$19,500
Over \$47,125, but not over \$71,800	\$10,660 plus 31% of the excess over \$47,125
Over \$71,800, but not over \$128,250	\$18,309.25 plus 36% of the excess over \$71,800
Over \$128,250	\$38,631.25 plus 39.6% of the excess over \$128,250

What Are 1995 Standard Deductions?

The following table shows the standard deduction⁶⁹ amounts for 1995:

<u>Filing Status</u>	<u>Amount</u>
Joint Return or Surviving Spouse	\$6550
Heads of Household	\$5750
Unmarried Individuals (other than surviving spouses and heads of households)	\$3900
Married Individuals Filing a Separate Return	\$3275

⁶⁹ *Id.*

The IRS allows the elderly and the blind to claim a higher standard deduction.⁷⁰ A minor child claimed as a dependent on another taxpayer's return is entitled to a standard deduction. A minor child's standard deduction is limited to the greater of \$650 or the child's earned income.⁷¹ Thus, if a minor child did not work and had only investment income, the child would take a standard deduction of \$650. On the other hand, if the child worked and had income of \$2500, the child would take a standard deduction of \$2500. The child's standard deduction would never exceed the standard deduction for a similar taxpayer. Thus, if the minor child was unmarried and earned \$5000, the child would take a standard deduction of \$3900.

What is the 1995 Personal Exemption?

The personal exemption amount has increased to \$2500 for 1995.⁷² Social Security numbers are required for dependents born prior to 1 November 1995.⁷³ The personal exemption begins to phase out at \$172,050 for taxpayers filing a joint return; \$143,350 for heads of household; \$114,700 for unmarried taxpayers (other than surviving spouses or heads of households); and \$86,025 for married filing separately.⁷⁴

Selected New Developments

Involuntary Conversions

When selling a principal residence, a taxpayer is entitled to roll any gain over into a new principal residence.⁷⁵ A taxpayer is also entitled to roll over the gain from property that is involuntarily converted.⁷⁶ Involuntary conversion includes destruction, theft, seizure, and condemnation.⁷⁷ Generally, a taxpayer has two

years to replace the involuntarily converted property with similar property.⁷⁸ In 1993, Congress enacted additional relief for taxpayers suffering losses in a Presidentially declared disaster area.⁷⁹ Taxpayers in such areas have four years to replace their principal residence and any personal property that is scheduled property (for example, items of jewelry, computers, paintings, etc., specifically enumerated in an insurance policy).⁸⁰ Further, the IRS has recently ruled that taxpayers in a Presidentially declared disaster area who receive insurance proceeds for unscheduled personal property are not required to replace the property and will not have to report any gain.⁸¹ Thus, a taxpayer in a Presidentially declared disaster area can do whatever he or she wants with the insurance proceeds received for the loss of unscheduled personal property.

Replacing Your Principal Residence

A taxpayer is entitled to roll over the gain on the sale of his or her principal residence so long as a new principal residence of the same or greater cost is purchased within the allowed replacement period.⁸² Divorced taxpayers must use caution in purchasing a replacement home. A divorcee must purchase a new home which exceeds his or her share of the adjusted selling price of the principal residence.

A recent tax court case demonstrates the potential problem. In *Snowa v. Commissioner*,⁸³ the petitioner and her husband sold their principal residence for \$380,000. The adjusted selling price was \$356,112. Thus, her share of the adjusted selling price of her principal residence was \$178,056. The petitioner subsequently divorced, remarried, and purchased a replacement home with her new husband for \$180,668. They filed a joint return in which they rolled over the gain from the petitioner's first house to her

⁷⁰ I.R.C. § 63(c)(3) (RIA 1995).

⁷¹ *Id.* § 63(c)(5).

⁷² Rev. Proc. 94-72, 1994-2 C.B. 811.

⁷³ I.R.C. § 6109 (RIA 1995).

⁷⁴ Rev. Proc. 94-72, 1994-2 C.B. 811.

⁷⁵ I.R.C. § 1034 (RIA 1995).

⁷⁶ *Id.* § 1033.

⁷⁷ *Id.* § 1033(a).

⁷⁸ *Id.* § 1033(a)(2)(B)(i).

⁷⁹ *Id.* § 1033(h).

⁸⁰ *Id.* § 1033(h)(1)(B).

⁸¹ Rev. Rul. 95-22, 1995-12 I.R.B. 4.

⁸² I.R.C. § 1034 (RIA 1995).

⁸³ 70 T.C.M. 163 (CCH 1995).

second house. The IRS disallowed the rollover because the petitioner's share of the purchase price of the replacement home was only \$90,334 (one-half of the \$180,668).

Loss on the Sale of Rental Property

A taxpayer cannot deduct a loss on the sale of his or her principal residence because it is a nondeductible personal loss.⁸⁴ A taxpayer cannot deduct such a loss in the value of a principal residence by simply converting it to rental property prior to sale. Although a loss on the sale of a principal residence converted to rental property is allowed,⁸⁵ the basis in the rental property for loss purposes is the lesser of the taxpayer's adjusted basis prior to conversion or the fair market value at the time of conversion.⁸⁶ Thus, if a taxpayer purchases a principal residence for \$150,000 and subsequently converts it to rental property when its fair market value is only \$130,000, the taxpayer's basis in the property for purposes of recognizing a loss is \$130,000.

In the case of *Adams v. Commissioner*,⁸⁷ the United States Tax Court (Tax Court) recently ruled that while the selling price of a house very close to the time of conversion to rental property is highly reflective of fair market value it is not conclusive. The taxpayer in *Adams* purchased the house in 1987 for \$124,000 and made \$15,908 in improvements. Thus, his basis was \$139,908. In 1989, the taxpayer moved out of the house and rented it to another party. The taxpayer subsequently sold the house during the same year for \$130,000. The IRS disallowed the loss claiming that the fair market value at the time of conversion was \$130,000; so, the taxpayer suffered no deductible loss. The Tax Court disagreed with the IRS and determined that the fair market value at the time of the conversion was more than \$130,000. The Tax Court considered the fact that the taxpayer was in arrears in his mortgage, he owed back taxes, he was unemployed, and the purchaser purchased the house subject to a six-month lease. These factors led the court to conclude that the fair market value of the house was higher than what the taxpayer received in the sale. Thus, the taxpayer was allowed to deduct some of his loss.

⁸⁴ I.R.C. § 163 (RIA 1995).

⁸⁵ Treas. Reg. § 1.165-9(b)(1) (as amended in 1964).

⁸⁶ *Id.* § 1.165-9(b)(2).

⁸⁷ 69 T.C.M. 2297 (CCH 1995).

⁸⁸ I.R.C. § 71(b)(1)(D) (RIA 1995).

⁸⁹ *Commissioner v. Hoover*, 69 T.C.M. 2466 (CCH 1995).

⁹⁰ 28 U.S.C. § 1346(a)(1) (1984).

⁹¹ *United States v. Williams*, 115 S. Ct. 1611 (1995).

Alimony

Payments made to a spouse or former spouse must end at the payee's death to be considered alimony.⁸⁸ The Tax Court has ruled that even if a divorce decree calls the payments alimony they are not alimony for federal income tax purposes if they do not end upon the death of the payee.⁸⁹ The Tax Court considered the following factors in concluding that the payments were not alimony: (1) the decree stated that the payments had to be made in full; (2) the decree required that a security fund be maintained until the payments were made in full; and (3) the parties removed language from the original draft that stated payments would terminate on the death of the payee. As a result, the payments did not end on the death of the payee spouse and were not alimony. Thus, the payments were not deductible by the payer nor included in the income of the payee.

Suing the IRS for a Refund

Generally, a taxpayer can only sue the IRS for a tax refund of the taxes that he or she has paid to the IRS.⁹⁰ The United States Supreme Court recently ruled that a taxpayer who pays the taxes of another taxpayer under protest to remove a lien on her property can file a claim for refund.⁹¹ In that case, the IRS assessed a tax against Jerrold Rabin and placed a lien on all of his property, to include his residence, which he owned jointly with his wife, Lori Williams. Rabin subsequently transferred his interest in the house to Williams in contemplation of divorce. Williams paid the taxes Rabin owed to remove the IRS tax lien on the house. Williams then filed suit for a refund in federal district court. The Supreme Court held that she could file the suit because she paid the taxes under protest to remove a lien against her property. This decision leaves open the issue of whether a taxpayer who voluntarily pays the taxes of another taxpayer can file a suit for refund. Major Henderson.

International Law Note

International Criminal Tribunal for the Former Yugoslavia

Background

On 22 February 1993, United Nations (UN) Resolution 808 directed the establishment of the International Criminal Tribunal for the Former Yugoslavia (Tribunal) to prosecute serious violations of humanitarian law.⁹² Three months later, the UN Security Council (UNSC) unanimously passed Resolution 827 to establish the Tribunal because the Balkan conflict continued to threaten international peace and security.⁹³ The UNSC justified this exercise of power by citing the UN Charter Article 41 provision for use of nonmilitary means to give effect to its decisions. International condemnation,⁹⁴ negotiations, sanctions, publication of atrocities, and appointment of a commission of experts to investigate and document war crimes had little to no effect on the warring parties.⁹⁵ With no other recourse, the members of the UNSC resolved to investigate and seek the prosecution of suspected war criminals.

The Tribunal's statute authorizes the Tribunal to prosecute serious violations of humanitarian law that occurred in the territory of the former Yugoslavia between 1 January 1991 and some

later date. The UNSC will determine the jurisdictional end date on restoration of peace in the area.⁹⁶ The UN directed the Tribunal to create its own rules of evidence and procedures. Recommendations from all states were welcomed.

General Provisions

The Tribunal's statute requires all states to cooperate fully with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of humanitarian law.⁹⁷ The Tribunal will sit in the Hague,⁹⁸ and expenses for the Tribunal shall be borne by the UN.⁹⁹ An annual report of the Tribunal's activities is to be provided to the UNSC and to the General Assembly.¹⁰⁰ The official languages of the Tribunal are English and French.¹⁰¹ In cases where those languages are inappropriate, the accused will be provided documents interpreted in his or her own language.¹⁰²

Personnel

Articles 11 through 18 of the Tribunal's statute relate to personnel appointed or elected to the Tribunal. Justice Richard Goldstone, a South African Judge who is internationally renowned for his work in human rights, was selected to be the Chief Prosecutor.¹⁰³ The UNSC appointed him for a four-year term, subject to reappointment.¹⁰⁴ Justice Goldstone also serves as the Chief Prosecutor to the International Criminal Tribunal for Rwanda.¹⁰⁵

⁹² S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

⁹³ S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203.

⁹⁴ Application of the Convention on the Prevention & Punishment of the Crime of Genocide., Provisional Measures, Order of 13 Sept. 1993, I.C.J. Reports 1993, p. 325, reprinted in 32 I.L.M. 1599 (1993).

⁹⁵ Decision on the Defense Motion on Jurisdiction, Prosecutor v. Dusko Tadic a/k/a "Dule," International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-T, at 8 (10 Aug. 1995) [hereinafter Decision on Defense Motion].

⁹⁶ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, U.N. Doc. S/25704 (1993) reprinted in 32 I.L.M. 1159 (1993) [hereinafter Report of the Secretary-General].

⁹⁷ *Id.* at 47 (art. 29).

⁹⁸ *Id.* (art. 31).

⁹⁹ *Id.* at 48 (art. 32).

¹⁰⁰ *Id.* (art. 34).

¹⁰¹ *Id.* (art. 33).

¹⁰² Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, Seventh Session, The Hague, U.N. Doc. IT/32/Rev 5, (June 15, 1995), (Rule 3) [hereinafter The Rules].

¹⁰³ S.C. Res. 936, U.N. SCOR, U.N. Doc. S/RES/936 (1994); Biography of the Honorable Justice Richard J. Goldstone, Int'l Crim. Trib., Yugo. Press and Information Office, (July 8, 1995).

¹⁰⁴ Report of the Secretary-General, *supra* note 96, at 22 (art. 16).

¹⁰⁵ S.C. Res. 955, U.N. SCOR, Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994); reprinted at 33 I.L.M. 1598 (1994).

Eleven judges are assigned to the Tribunal. No two judges can be citizens of the same state.¹⁰⁶ The judges are divided between three courts, two trial chambers consisting of three judges each and an appellate chamber made up of five judges.¹⁰⁷ The judges select who serve as the President Judge. The President Judge assigns the remaining judges to their respective chambers. The President Judge serves as the senior justice in the Appeal Chamber.¹⁰⁸ Gabrielle Kirk McDonald, a former Texas Federal District Court Judge, represents the United States.¹⁰⁹ She sits as the Presiding Judge in the matter of Dusan Tadic, also known as Dusko Tadic, the only proceedings currently before the Tribunal.¹¹⁰

Several assistant trial counsel and investigators assist Justice Goldstone. The United States has contributed approximately thirty individuals from the Departments of State, Justice, and Defense. Only seven of the attorneys are paid by the United States, while the others are UN employees. There are two judge advocates assigned to the Tribunal.¹¹¹ Most of the United States personnel assigned to assist Justice Goldstone act as investigators, even though they are attorneys. The investigators interview witnesses, gather evidence, and draft indictments.¹¹² The staff is appointed by the UN Secretary-General upon nomination by the Chief Prosecutor.¹¹³ This staff is substantially smaller than that which was provided to assist in the prosecutions brought by the International Military Tribunal at Nuremberg.¹¹⁴

Pretrial Procedures

Rules established by the Tribunal provide protection similar to those guaranteed United States citizens charged with federal

offenses in federal courts. Suspects are provided counsel and an interpreter if subjected to questioning on the acts at issue.¹¹⁵ Once an investigator acquires what he feels is sufficient evidence of a *prima facie* case, the Chief Prosecutor presents that evidence to a Trial Chamber for approval and issuance of an indictment. If the Trial Chamber finds a *prima facie* case, it will approve the proposed indictment. The Trial Chamber may issue one or more of the following: a warrant for arrest; an order for transfer; an order for detention; or order an indictment sealed until further order by the Chamber.¹¹⁶

Once an accused has been arrested, he or she is brought before the Trial Chamber for arraignment. At arraignment, the Trial Chamber will notify the accused of the charges against him, his right to counsel and the date set for trial. The accused will be required to enter a plea at that time.¹¹⁷ A limited provision in the Rules of Procedure, 2d Evidence, provides for bail. "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."¹¹⁸

Deferral

The members of the UN and the Tribunal have concurrent jurisdiction to prosecute serious violations of humanitarian law in the former Yugoslavia. However, the Tribunal has jurisdictional primacy.¹¹⁹ The Trial Chamber may request deferral¹²⁰ to the Tribunal at any stage of the state proceedings. The Chief Prosecutor makes a request for deferral through a Trial Chamber. If a Trial Chamber finds that deferral is appropriate, it will request

¹⁰⁶ Report of the Secretary-General, *supra* note 96, at 20 (art. 13).

¹⁰⁷ *Id.* at 19 (art. 12).

¹⁰⁸ *Id.* at 21 (art. 14).

¹⁰⁹ Annex to 1994 Annual Report of the Tribunal, U.N. Doc. A/49/242 and S/1994/1007 (1994).

¹¹⁰ Decision on Defense Motion, *supra* note 95, at 13.

¹¹¹ Lieutenant Colonel Brenda Hollis (United States Air Force) and Major Mike Keegan (United States Marine Corps) are the two judge advocates assigned to the Tribunal.

¹¹² Telephone Interview with Major Mike Keegan, Asst. Trial Counsel, Int'l Crim. Trib.-Yugo., (Sept. 18, 1995) [hereinafter Keegan].

¹¹³ Report of the Secretary-General, *supra* note 96, at 23 (art. 16).

¹¹⁴ Rick Atkinson, *Nazi Hunters are Still at War, Fighting a Losing Battle*, WASH. Post, Aug. 27, 1995, at A1. Approximately 170 staff personnel are working this tribunal as compared to a staff of more than 2000 for the Nuremberg Tribunal.

¹¹⁵ Report of the Secretary-General, *supra* note 96, at 25 (art. 18); *see also* The Rules, *supra* note 102, at 21 (Rule 42).

¹¹⁶ Report of the Secretary-General, *supra* note 96, at 25 (art. 19); *see also* The Rules, *supra* note 102, at 28 (Rules 52-53).

¹¹⁷ This entire paragraph is reflective of Rule 62. *See* The Rules, *supra* note 102, at 33.

¹¹⁸ *Id.* at 34 (Rule 65).

¹¹⁹ Report of the Secretary-General, *supra* note 96, at 16 (art. 9).

¹²⁰ Deferral is the prosecutor's formal request made to a Trial Chamber that a state defer to the Tribunal's jurisdiction and pass the results of its inquiries in the matter considered to the Office of the Prosecutor. If such a request were issued, the Office of the Prosecutor would incorporate the investigations from the national authorities with its own, and the persons under investigation would become subject to prosecution solely before the Tribunal. *See* The Rules, *supra* note 102, at 6-8.

from that state a deferral on behalf of the Tribunal. A state must respond to a deferral request within sixty days. A deferral request is not an indictment, it merely reflects that the accused, in that state, is a suspect in criminal activity being investigated by the Tribunal.¹²¹

The prosecution has already sought deferral for investigations and cases arising out of the Lasva River Valley Investigation,¹²² and for the investigation and cases arising out of the Bosnian-Serb Leadership Investigation.¹²³ These investigations resulted in the indictments issued in February and July 1995. Those indictments are summarized later in this note.

Deferral to the competence of the Tribunal can be requested if one or more of three standards are met. The first standard is that the acts involved are ordinary crimes under that state's laws. Second, if the prosecutor alleges the state court lacks impartiality and/or the state proceedings are really only an attempt to shield the accused from process by the Tribunal, then the Trial Chamber may request deferral to the Tribunal. Finally, if the issues in the state court are closely related to or identical to the facts and/or legal questions before the Tribunal, a deferral request is appropriate.¹²⁴ To date, the Tribunal has not alleged an attempt by a state court to shield an accused. It would not be difficult to envision a situation in which Serbia tried to conduct a trial for Radovan Karadzic and Ratko Mladic, the two most senior military commanders of the Bosnian-Serb Army. Serbia, which has militarily supported these leaders, could then attempt to keep them from the jurisdiction and punishment of the Tribunal.

Deferral proceedings do not prohibit future state actions against the same individual for different acts not under investigation and prosecuted by the Tribunal; for example, strictly a state violation involving a separate set of facts. Further, the Tribunal can try an individual for violations of international law even if a state tried him using similar facts.¹²⁵

Rules of Court

The Tribunal's Rules clearly reflect a strong American influence. Articles 19 through 24 of the Tribunal's statute set forth basic principles and protections to be applied throughout the trial proceedings. Those provisions require, among other protections, that the accused be provided open discovery; a right to counsel, a right not to testify or give evidence against himself; a fair, expedient and public trial; and the right to be presumed innocent until proven guilty. Proof of guilt must be beyond a reasonable doubt.¹²⁶ The accused is not to be tried in absentia¹²⁷ and the decision on guilt shall be by a majority of the court.¹²⁸ The death penalty is not authorized. Imprisonment will reflect the amount of time the accused may have received under court sentences in the former Yugoslavia.¹²⁹

Incarceration of the convicted will be, subject to the approval of the Tribunal, in a prison of a state that volunteers and all costs and expense will be borne by that state.¹³⁰ The confining state's imprisonment rules will apply.¹³¹ However, the Tribunal possesses ultimate decision-making authority on issues of pardon or commutation of sentence.¹³²

¹²¹ *Id.* at 6-8 (Rules 8-13).

¹²² Application by the prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings respecting crimes against the population of the Lasva River Valley, Int'l Crim. Trib.-Yugo. since 1991, Case No. IT-95-4-D (April 21, 1995). Bosnia had already opened an investigation, ordered custody, and issued warrants of arrest against twenty-seven known Bosnian-Croatian individuals. None of the individuals have thus far been accessible to Bosnia-Herzegovina authorities.

¹²³ Application by the prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings in Respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic, Int'l Crim. Trib.-Yugo. since 1991, Case No. IT-95-5-D, (April 21, 1995). Bosnia-Herzegovina had already initiated an investigation into violations of criminal law, including genocide and war crimes. Some allegations implicated senior Bosnian-Serb political and military leaders such as Radovan Karadzic, president of the Bosnian Serb administration in Pale; Ratko Mladic, the military commander of the Bosnian Serb armed forces; and Mico Stanisic, the former Minister of Internal Affairs of that administration.

¹²⁴ See The Rules, *supra* note 102, at 6-8 (Rules 9-13).

¹²⁵ Report of the Secretary-General, *supra* note 96, at 17 (art. 10).

¹²⁶ *Id.* at 27 (art. 21).

¹²⁷ *Id.* at 26 (art. 20).

¹²⁸ *Id.* at 29 (art. 23).

¹²⁹ See The Rules, *supra* note 102, at 56 (Rule 101).

¹³⁰ *Id.* at 58 (Rule 103).

¹³¹ Report of the Secretary-General, *supra* note 96, at 31 (art. 27).

¹³² The Rules, *supra* note 102, at 68 (Rules 123-24).

An appeal can be taken by the prosecution or the defense to the Appeal Chamber in two instances: (1) an error on a question of law; or (2) an error of fact resulting in a miscarriage of justice.¹³³ Either party may raise an issue for review to the Appeal Chamber regarding newly discovered evidence within one year of a final adjudication.¹³⁴

Indictment

The Tribunal has issued forty-seven indictments against forty-three persons since 25 May 1993. The first indictment came in November 1994, charging Dragan Nikolic with crimes against humanity, grave breaches, and violations of laws or customs of war in connection with crimes committed at the Susica Camp.¹³⁵

In February 1995, the Tribunal issued twenty-one additional indictments alleging that Bosnian-Serbs had participated in war crimes at prison camps throughout the Lasva River Valley and at

the Omarska camp.¹³⁶ Dusan Tadic, the only individual in the Tribunal's custody, was indicted in this series of indictments. He is charged with crimes against humanity, grave breaches, and violations of the customs or laws of war.¹³⁷

The Tribunal handed down twenty-four more indictments in July 1995. These indictments alleged Bosnian-Serb leaders had committed war crimes. The two most senior Bosnian-Serb leaders, Radovan Karadzic and Ratko Mladic, were jointly charged with three counts of crimes against humanity, seven counts of violations of laws or customs of war, five counts of grave breaches and a count of genocide.¹³⁸ Criminal conspiracy and command responsibility were the legal theories used to indict these two leaders.¹³⁹ The indictment does not allege that either leader committed or ordered the acts. The accused have given the press at least one defense for their acts, alleging that the atrocities, if committed, were done by paramilitary groups beyond the control of the Bosnian-Serb leadership.¹⁴⁰ This appears to be the same defense raised by commanders in the case of General Yamashita,¹⁴¹ the

¹³³ Report of the Secretary-General, *supra* note 96, at 30 (art. 25).

¹³⁴ See The Rules, *supra* note 102, at 66 (Rule 119).

¹³⁵ Indictment, The Prosecutor of the Tribunal v. Dragan Nikolic a/k/a Jenki Nikolic, Case No. IT-94-2-I, Int'l Crim. Trib.-Yugo. since 1991, (Nov. 7, 1994). In the summer of 1992 Nikolic was the commander of a camp at Susica in northeast Bosnia-Herzegovina. The camp operated from April 1992 until September 1992. The camp was run by the military and local militia. At times, population of the camp exceeded 500 detainees. Approximately 8000 Muslim civilians are said to have passed through Susica. The detainees were guarded by 12 soldiers commanded by Nikolic. The prohibited acts Nikolic is alleged to have committed personally or through others include killing detainees, torture of detainees, inhumane treatment of detainees, plunder of property, deportation, persecutions, and like acts against civilians (70 counts).

¹³⁶ The International Tribunal for the Former Yugoslavia Charges Twenty-one Serbs With Atrocities Committed Inside and Outside the Omarska Death Camp, Int'l Crim. Trib.-Yugo. Since 1991 Press and Information Office, CC/PIO/004-E, The Hague, (Feb. 13, 1995). In two indictments, 21 Serbs, camp commanders, camp guards and camp visitors to Omarska camp were accused of serious violations of humanitarian law. The violations are said to have been committed on Muslims and Croats during the summer of 1992. The first indictment charges the camp commander and his subordinates with killings, rapes, beatings and other mistreatment of prisoners at Omarska. Dusan Tadic and Goran Borovnica were charged in a separate indictment with similar crimes. From about 25 May to 30 August 1992, Serb forces, which had seized power in the Prijedor district, collected and confined more than 3000 Bosnian Muslims and Bosnian Croats from the area in the center of an iron ore mine a few kilometers from the Serb village of Omarska. The Omarska camp housed many of the Muslim and Croat elite, including political, administrative and religious leaders, academics and intellectuals, business leaders and others, who led and influenced the non-Serb population. The prisoners were held under armed guard in brutal conditions. They were murdered, raped, sexually assaulted and severely beaten. Several prisoners entered but did not leave the "red house," one of four buildings in the camp. This was called the Omarska "Death Camp."

¹³⁷ Indictment, Prosecutor v. Dusan Tadic a/k/a "Dule", Case No. IT-94-1-T, Int'l Crim. Trib.-Yugo. Since 1991 (Feb. 13, 1995) [hereinafter Tadic Indictment]. Tadic is charged with the collection and mistreatment, including the killing and raping of civilians within and outside the Omarska Camp during the summer of 1992. See *supra* note 136, discussion and reference to the Omarska Death Camp.

¹³⁸ Indictment, The Prosecutor of the Tribunal against Radovan Karadzic and Ratko Mladic, Case No. IT-95-5-I, Int'l Crim. Trib.-Yugo. (July 24, 1995).

¹³⁹ *Id.* at 2. "Article 7, Individual criminal responsibility, Section 3. That any of the acts referred to in articles 2 through 5 of the present statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Report of Secretary-General, *supra* note 96, at 15.

¹⁴⁰ Marlise Simons, *War Crimes Panel Indicts Serb Leaders*, N.Y. TIMES, July 26, 1995, at A1.

¹⁴¹ *In re Yamashita*, 327 U.S. 1 (1946). General Yamashita was commanding general of the 14th Army Group of the Imperial Japanese Army in the Philippine Islands during October and November 1945. He also served as the Governor of the occupied Philippine Islands during this same time period. More than 25,000 men, women, and children, unarmed civilians, were mistreated and killed. Villages and religious monuments were destroyed. General Yamashita was charged

"while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the U.S. and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war."

Id. at 14.

The military commission which tried General Yamashita found the charges to meet the requirements of a violation of the law of war.

The law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and he may be charged with personal responsibility for this failure to take such measures when violations result.

Id. at 14, 16.

High Command case,¹⁴² and the Hostages case.¹⁴³ This defense, of not being aware of the atrocities, not ordering that atrocities be committed, and not being present and participating in the atrocities, failed in those cases and is likely to be unsuccessful here. As in General Yamashita's case, the Bosnian-Serb atrocities were so numerous, so gruesome, conducted at the direction of or by officers in the area occupied and controlled by the Bosnian-Serbs, and in a calculated pattern with respect to those selected for violence and the means of violence used, that if they did not order the atrocities, they should have known about them and taken action to stop them.

On 5 September 1995, the first indictment against a Croatian was made public by the Tribunal.¹⁴⁴ Ivica Rajic, Commander of the Croatian Defense Council (HVO), was charged with one count of grave breaches and one count of violations of the laws or customs of war. The charges stem from an unlawful attack on the village of Stupni Do of Central Bosnia in October 1993.¹⁴⁵ Although Rajic was arrested, Bosnia-Herzegovina has refused to release him to the Tribunal. Bosnia-Herzegovina has charged Ivica Rajic with five counts of murder under their national law.¹⁴⁶

Subject Matter Jurisdiction

Article I of the Tribunal's statute defines personal jurisdiction, and Articles 2-5 define subject matter jurisdiction. Article 2 authorizes the Tribunal to prosecute persons for "committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949 . . ." The Article then lists those commonly cited grave breaches contained in *Field Manual 27-10, The Law of Land Warfare*, paragraph 502.¹⁴⁷ Article 3 gives the Tribunal jurisdiction over violations of laws or customs of war considered customary law of war violations as well as those included

in the Hague Convention, which lists five such violations, specifically stating the list is illustrative and not limiting.¹⁴⁸

Genocide is included as a war crime in Article 4 of the Tribunal's statute. The crime of genocide includes the direct commission of acts listed in paragraph 2 of Article 4, as well as attempt, conspiracy, and incitement to commit genocide. Whether committed in time of peace or war, genocide is a crime under international law for which individuals can be tried and punished.¹⁴⁹

The final category of war crimes in the Tribunal's statute is crimes against humanity. Article 5 lists nine specific acts which constitute crimes against humanity.¹⁵⁰ The elements required to establish a crime against humanity are: (1) that armed conflict exists; (2) that the conflict is either international or internal; and (3) the acts are systematic and widespread against the civilian population. These acts include acts of "ethnic cleansing."¹⁵¹ Unlike the Nuremberg Tribunal, which allowed for prosecution of crimes against humanity whether before or during armed conflict, the Tribunal's statute requires the act to be committed "in armed conflict."¹⁵²

The Case of Dusan Tadic

The only accused to be brought before a Trial Chamber of the Tribunal is Dusan Tadic, whom the Tribunal indicted in February 1995. The charges against him involve rape, sexual mutilation, torture, and murder. He is charged with three separate charges, each with forty-four counts, alleging crimes against humanity, grave breaches, and violations of the laws or customs of war. Totalling 132 counts, each charges a single act against a particular victim.¹⁵³

¹⁴² 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 2-5 (1949).

¹⁴³ 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1949).

¹⁴⁴ Indictment, The Prosecutor for the Tribunal v. Ivica Rajic, Case No. IT-95-12-I, Int'l Crim. Trib.-Yugo. Since 1991 (Aug. 23, 1995).

¹⁴⁵ *Id.* at 1.

¹⁴⁶ Telephone Interview with Tom Muehleck, Asst. Trial Counsel for the Tribunal (DOJ civilian employee, but also Army Reservist), Int'l Crim. Trib.-Yugo. (Sept. 20, 1995).

¹⁴⁷ Report of the Secretary-General, *supra* note 96, at 10; see also DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 502 (July 1956) [hereinafter FM 27-10].

¹⁴⁸ Report of the Secretary-General, *supra* note 96, at 11.

¹⁴⁹ *Id.* at 12; see also, Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, 78 U.N.T.S. 277, reprinted in 45 A.J.I.L. 7 (Supp. 1951); United States ratification was given advice and consent by the Senate in the Genocide Convention Implementation (Proxmire) Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091).

¹⁵⁰ Report of the Secretary-General, *supra* note 96, at 13-14 ("(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.").

¹⁵¹ *Id.* at 13 (art. 5).

¹⁵² *Id.*

¹⁵³ Tadic Indictment, *supra* note 137.

Tadic was residing in Germany at the time of his arrest, and the Germans began procedures to bring him to trial there. The Tribunal requested that Germany defer to it pursuant to the principle of primacy. The Germans agreed, then adopted legislation allowing the transfer of Tadic to the Tribunal. Tadic has been in the custody of the Tribunal since April 1995.¹⁵⁴

Tadic has raised the defense of superior orders, which is prohibited by Article 7 of the statute, and asserted that the Tribunal lacks authority and jurisdiction to try him. Pretrial motions filed by Tadic raised issues concerning jurisdiction, duplicity in the multi-count indictment, double jeopardy because Germany began to process him for trial, and suppression of his videotaped and written statement, and letters confiscated by German prison authorities.¹⁵⁵ The defense has subsequently withdrawn its suppression of evidence motion.¹⁵⁶

The prosecution also filed a pretrial motion seeking protection of witnesses and victims who are anticipated to testify against Tadic.¹⁵⁷ This motion sought to withhold the identity of some witnesses from the public, the press, and the accused. Additionally, the prosecution sought to protect other witnesses by using closed-circuit television, blurred video procedures, and live testimony without revealing the identity of the witness. The prosecution also moved that other witnesses not appear in court at all, but would submit affidavits of their testimony. The Tribunal granted most of the requested relief, directing the prosecution wherever possible to use the means most advantageous for cross-examination by the accused. The Chamber also granted the prosecution's request that the press be instructed not to photograph, sketch, or interview witnesses or victims appearing before the Tribunal.¹⁵⁸

The pretrial motion of the defense addresses three issues: (1) improper establishment of the International Tribunal by the UNSC; (2) the improper grant of primacy to the Tribunal; and (3) challenges to the subject-matter jurisdiction of the Tribunal.¹⁵⁹

The accused also alleged that the UNSC had no authority to establish the Tribunal. Tadic alleged there is no threat to international peace and security, a threshold question to be addressed by the UNSC. Second, he argued there was no treaty establishing the Tribunal, and that there are no "exceptional circumstances" to warrant creation of a Tribunal by the UNSC. Finally, Tadic challenged the Tribunal's independence from the UNSC.¹⁶⁰

On 10 August 1995, the Trial Chamber issued its decision. The Trial Chamber found that Article 41 of the UN Charter clearly permits the creation of an organic body as part of its available means to obtain international peace and security.¹⁶¹ The UN members are parties to a treaty which creates the UN, and the UN in turn gives authority to the UNSC; therefore, the Trial Chamber reasoned that a treaty established the Tribunal and is binding on all member states.¹⁶² Furthermore, the Trial Chamber stated that a threat to international peace need not be by international conflict, but can result from an internal conflict.¹⁶³

As to Tadic's argument concerning separation between the Tribunal and the UNSC, the Trial Chamber cited enabling statute provisions and rules calling for a fair trial, due process protection, and an appeal chamber as evidence of independence. Additionally, the Trial Chamber noted no review authority by the UNSC for any of the Tribunal's actions.¹⁶⁴ The Trial Chamber stated,

¹⁵⁴ *Id.* at 2.

¹⁵⁵ Motion and Brief to Support the Motion on Jurisdiction of the Tribunal, Motion on the Principle of NE BIS IN IDEM, and Motion on the Form of the Indictment, Case No. IT-94-1-T, Int'l Crim. Trib.-Yugo. (June 23, 1995) [hereinafter Jurisdiction Motion of the Defense].

¹⁵⁶ Telephone Interview with Major Mike Keegan, Assistant Trial Counsel, Int'l Crim. Trib.-Yugo. (Oct. 19, 1995).

¹⁵⁷ Motion and Supporting Brief Requesting Protective Measures for Victims and Witnesses, The Prosecutor v. Dusan Tadic, Case No. IT-94-1-T, Int'l Crim. Trib.-Yugo. (May 18, 1995).

¹⁵⁸ Decision on the Prosecutors Motion Requesting Protective Measures for Victims and Witnesses, The Prosecutor v. Dusan Tadic, Case No. IT-94-1-T, Int'l Crim. Trib.-Yugo. (Aug. 10, 1995).

¹⁵⁹ Jurisdiction Motion of Defense, *supra* note 155.

¹⁶⁰ *Id.* at 3.

¹⁶¹ *Id.* at 15.

¹⁶² *Id.* at 8.

¹⁶³ *Id.* at 10.

¹⁶⁴ *Id.* at 5-7.

"National legislatures, with greater or lesser ease, depending upon their powers under their respective constitutions or governing laws, may abolish courts previously created but this in no way detracts from the status of those courts as entities established by law."¹⁶⁵ After citing these factors to justify the Tribunal, the Trial Chamber ruled that it lacked the competence to review the decisions of the UNSC.¹⁶⁶

Tadic's jurisdiction motion also alleged that the Tribunal was interfering with the state's sovereignty to prosecute and that the UNSC was improperly engaged in enforcing humanitarian law. The accused lost on both of these issues as well, as the Trial Chamber ruled "the accused cannot claim the rights that have been specifically waived by the states concerned."¹⁶⁷

In his final, and most important, challenge to the Tribunal's jurisdiction, the accused alleged the Tribunal had no authority to charge Articles 2 through 5 violations because there exists no international armed conflict.¹⁶⁸ As to the ability of the Tribunal to charge grave breaches offenses, the Trial Chamber noted that the statute refers to the Geneva Convention protection, but does not delegate jurisdiction relating to grave breaches to only those times and places where the Geneva Convention applies. The Trial Chamber stated that the only limitations in the statute relate to territory and time.¹⁶⁹ The Trial Chamber made no decision on whether or not an international armed conflict existed.¹⁷⁰ Prosecutors in the Tadic case have indicated they will submit testimony and evidence at trial to establish that an international armed conflict existed between 24 May and 30 August 1992.¹⁷¹

The accused alleged that an international armed conflict must exist before a law of war violation can occur. The Trial Chamber

responded by simply stating that the Tribunal's statute gives it the authority,¹⁷² and that "[t]he term 'laws or customs of war' applies to international and internal armed conflicts . . . [t]he minimum standards of common Article 3 apply to the conflict in the former Yugoslavia and the accused's prosecution for those offenses does not violate the principle of '*nullum crimen sine lege*.'"¹⁷³ The Trial Chamber found that Article 3 of the Tribunal's statute lists examples of acts equating violations of laws or customs of war, but this is not an exhaustive list.¹⁷⁴ The Trial Chamber also cited the Army's *Law of Land Warfare Field Manual, Field Manual 27-10*, as authority that, in some non-international conflicts, the law of war is applicable due to "recognition of belligerents."¹⁷⁵

In response to the defense's allegation that an international armed conflict must exist for crimes against humanity to be chargeable, the Trial Chamber once again ruled that the words of the statute creating it determined its jurisdiction, which applies "whether international armed conflict or internal armed conflict."¹⁷⁶ The defense asserted that a nexus must exist between a crime against humanity and a war crime. This requirement would, in turn, call for an international armed conflict. This assertion is similar to arguments and actions defendants posited during the Nuremberg Tribunal proceedings.¹⁷⁷ The Trial Chamber found that the crimes against humanity are a self-contained category, independent of any war crime charges.¹⁷⁸

The Trial Chamber ruled on all subject matter jurisdiction motions without deciding whether an international armed conflict or an internal armed conflict existed.¹⁷⁹ The accused filed an interlocutory appeal on these issues to the Appeal Chamber. Argument was held 7 September 1995, and on 2 October 1995, the Appeal Chamber decided the defense motion for interlocutory

¹⁶⁵ *Id.* at 10.

¹⁶⁶ *Id.* at 11.

¹⁶⁷ *Id.* at 18.

¹⁶⁸ *Id.* at 19, 22, 30.

¹⁶⁹ *Id.* at 19.

¹⁷⁰ *Id.* at 22.

¹⁷¹ Keegan, *supra* note 112.

¹⁷² Decision on Defense Motion, *supra* note 95, at 23.

¹⁷³ *Id.* at 29. This principle requires that in order to prosecute an individual, the act he is accused of committing must have been a designated crime at the time of the commission of the act.

¹⁷⁴ *Id.* at 25.

¹⁷⁵ *Id.* at 24.

¹⁷⁶ *Id.* at 32.

¹⁷⁷ *Id.* at 30.

¹⁷⁸ *Id.* at 31.

¹⁷⁹ *Id.* at 33.

appeal. The Appeal Chamber held that the Tribunal did possess power to rule on the challenge of legality of establishment of the Tribunal, but decided to dismiss the plea. The Appeals Chamber also decided that the primacy challenge of the Tribunal over national courts should be dismissed, and that the Tribunal has subject matter jurisdiction over the current case.¹⁸⁰

Trial is set for May, 1996. Witnesses will be called to testify to establish that: (1) the war crimes were systematic and widespread, which forms the basis for crimes against humanity; (2) an international armed conflict existed, which will attempt to avoid jurisdictional arguments on appeal; (3) the offenses alleged, such as torture and murder, were in fact committed (this testimony will be offered by victims and witnesses to the events); and finally (4)

the facts relating to the elements necessary to establish that victims were not combatants, that military necessity did not justify the acts, and that the principle of proportionality was not applied.¹⁸¹

Conclusion

More indictments are forthcoming. Little documentary evidence exists in these cases, but with peace negotiations ongoing, more evidence of war crimes will likely soon become available. The evidence consists of testimony and supporting physical evidence such as mass graves and medical tests. Regardless of the prospects for peace, it appears that those assigned to the Tribunal will continue moving forward, investigating alleged crimes against all parties to the conflict. Major Mills.

¹⁸⁰ Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-AR72, Int'l Crim. Trib.-Yugo. (Oct. 2, 1995).

¹⁸¹ Keegan, *supra* note 112.

Claims Report

United States Army Claims Service

Personnel Claims Notes

Recent Comptroller General Decisions

The following digests of Comptroller General decisions are provided to assist attorneys and adjudicators respond to carrier denials of liability for loss and damage to household goods.

Internal Damage to Electronic Items

In *Allied Intermodal Forwarding, Inc.*, B-258665, 6 April 1995, the service member noted that his television worked at pick up. The item did not work at delivery and there were no visible signs of external damage. The carrier maintained there was lack of proof that the item worked at pick up and the damage was due to normal vibrations of the truck. The repairman indicated the shadow mask had loosened inside the television, which was consistent with the television being dropped or stress applied to the face of the tube. Because normal truck vibrations would not cause the damage, the Comptroller General upheld the offset.

In *Carlyle Van Lines, Inc.*, B-257884, 25 January 1995, carrier liability was upheld for internal damage to a television without signs of external damage. The claimant's statement established that the television worked at pick up. At destination the claimant turned on the television and it failed to work. The

repair estimate noted the damage was due to a broken main circuit board caused by mishandling or dropping. The Comptroller General upheld the offset indicating the type of damage was consistent with the item having been dropped.

In *Andrews Forwarders, Inc.*, B-257515, 1 December 1994, even though the claimant failed to note external damage to the television on DD Forms 1840/1840R, the Comptroller General held the carrier liable for internal damage because the repair estimate described visible impact damage to the rear panel.

In *Department of the Army Reconsideration*, B-255777.2, 9 May 1994, the General Accounting Office (GAO) Claims Group held for the carrier because there was no proof that the video cassette recorder (VCR) worked at origin and there was no external damage to the VCR. The Comptroller General reversed the GAO settlement certificate citing the service member's personal statement that stressed the VCR worked at origin and the broken circuit card was consistent with an item having been dropped.

Missing Items

In *Andrews Van Lines, Inc.*, B-257398, 29 December 1994, the Comptroller General upheld an offset for a trumpet missing from a carton of games. Ownership of the trumpet was established because the trumpet was damaged on a prior move and noted on DD Form 1844. The claimant's detailed statement de-

scribing how the carrier packed the trumpet in a carton of games established proof of tender. The Comptroller General indicated it would not be unusual to pack a trumpet with other entertainment items.

In *Senate Forwarding, Inc.*, B-256695, 8 December 1994, a down vest and jacket were missing from a carton identified as "living room items." The service member signed a standard printed statement of loss indicating that he owned the items, he had searched the house after the packers finished, and nothing was left behind. The Comptroller General held for the carrier because the claim lacked a sufficient personal rendition of facts by the service member establishing the items were tendered and how they came to be packed with living room items.

In *Caisson Forwarding Company, Inc.*, B-256686, 7 November 1994, the carrier picked up shipment from nontemporary storage (NTS). The claimant noted on DD Form 1840 that a riding lawn mower was missing. The claimant was paid for the item five months later. Three months after that, the carrier found the lawn mower at the NTS firm and offered to deliver it to the claimant. The claimant refused to accept delivery because he had replaced the lawn mower. The Comptroller General upheld the offset on the grounds that the carrier failed to conduct a prompt and reasonable search at the time of delivery and failed to note an exception on a rider.

In *American Van Pac Carriers*, B-256688, 2 September 1994, three items were missing from cartons that normally do not contain such items. A telephone was missing from a carton of kitchen glass and a remote control and a camera were missing from a carton of lamps. The claimant's detailed statement described where these articles were at the time of packing and why they were packed in those cartons. The Comptroller General found there was sufficient personal information to establish tender.

The GAO recently issued a settlement certificate on a case involving missing jewelry. The case involved a missing engagement and wedding ring packed in a jewelry box. The jewelry box was noted on the inventory, but the contents were not. The wife was not wearing the rings because they were from a former marriage, and she was saving them for her son from that marriage. Even though there was a personal statement describing the situation, the GAO felt the claimant should have hand carried the expensive jewelry. A refund was awarded to the carrier.

Carrier Inspection Rights

In *Stevens Worldwide Van Lines, Inc.*, B-251343, 19 April 1993, the carrier's agent attempted to inspect the damaged items but was unable to contact the service member. The carrier requested assistance from the Air Force. The Air Force investigated and found that the service member had moved from Alabama to Florida, and the Air Force provided the carrier a new telephone number and address. The Air Force sent a letter to the service member indicating the carrier's request to inspect. The carrier contacted the service member who told the carrier that all items, except the waterbed, had been moved to Florida. The ser-

vice member gave the waterbed to a neighbor in Alabama, but the neighbor had not been able to repair the bed and had thrown it out.

The carrier denied liability contending that it had vigorously pursued its inspection rights and was denied the right to inspect. The carrier also maintained that moving items after delivery renders an inspection useless. The Comptroller General held that a carrier cannot usually avoid being held liable merely because circumstances prevent an inspection. The Comptroller General also noted nothing in the memorandum of understanding indicates that a case against the carrier is lost because of movement after delivery. The Comptroller General indicated that the carrier could have inspected in Florida. The Comptroller General upheld offset on all items except the waterbed. In the case of the waterbed, the carrier vigorously pursued its inspection rights but was denied its right to inspect because the claimant had disposed of the item.

Notice to Carrier

In *Department of the Army*, B-255795, 3 June 1994, the Comptroller General concluded that the carrier had waived its right to notice when the carrier handed the service member a blank DD Form 1840 without the carrier's name, address, SCAC code, or any other vital carrier identification. The Army did not dispatch the DD Form 1840R. The General Accounting Office Claims Group held for the carrier, indicating that the Army should have made a reasonable effort to identify the carrier by asking the service member the carrier's name. The Army appealed. The Comptroller General found that handing the service member a blank DD Form 1840 was tantamount to no notice. The Comptroller General agreed with the Army that the memorandum of understanding indicates that when the carrier fails to provide a DD Form 1840 it waives its right to notice, and that when the carrier provided a blank DD Form 1840 it was equivalent to no notice.

In *Senate Forwarding, Inc.*, B-249840, 1 March 1993, the Air Force dispatched a DD Form 1840R to the carrier on the seventy-fifth day after delivery. The envelope was postmarked on the seventy-sixth day. The carrier denied liability contending the notice was not timely. The Comptroller General held for the Air Force, noting that the date on the DD Form 1840R, not the postmark date on the envelope, controls for the purpose of dispatch.

Items Reasonably Related to the Inventory

In *American Van Lines, Inc.*, B-257887, 27 April 1995, the carrier denied liability for damage to packed items because they were not specifically listed on the inventory. The Comptroller General held for the government, indicating that it would not be unusual for the damaged items to be packed in the boxes described on the inventory, such as a damaged skillet packed in a carton of dishes.

In *American Van Services, Inc.*, B-249966, 4 March 1993, the Comptroller General upheld offset for packed damaged items where the inventory description bore a reasonable relationship to the item. The Comptroller General did not uphold offset for a

broken wicker basket packed in a carton of games. The Comptroller General noted no personal observations by the shipper describing the packing process and how the basket and games were packed together.

Agency's Calculation of Value of Damages

In *American Van Services, Inc.*, B-259198, 5 May 1995; *Andrews Forwarders, Inc.*, B-257613, 25 January 1995; and *Midwest Moving and Packing*, B256603.2, 3 May 1995, the Comptroller General held that it will not question the agency's calculation of the value of damages to items in a shipment of household goods without clear and convincing evidence from the carrier that the agency's calculation was unreasonable. Ms. Schultz.

Carrier Liability for Overseas Shipments

For all overseas household goods shipments and hold baggage shipments occurring on or after 1 October 1995, field claims offices will calculate carrier recovery liability at \$1.25 times the net weight of the shipment.

This liability does not apply to local moves, direct procurement method moves, or nontemporary storage. Be sure to check the appropriate documents. For example, the government bill of lading, the basic ordering agreement, or the contract, to ascertain the correct liability for these carriers/contractors. Lieutenant Colonel Kennerly.

Unearned Freight Packets—Revisited

The new claims policy regarding unearned freight packets was reviewed in the June 1995 issue of *The Army Lawyer*.¹ Subsequently, the claims offices has received suggestions to further assist field claims offices in preparing these packets.

Field claims offices do not have to prepare unearned freight packets on overseas shipments weighing forty-two pounds or less or on "within states" shipments of one hundred pounds or less. To determine whether a packet should be prepared, claims personnel must calculate weights of the items in question. Consult-

ing various catalogs to determine the weights may be required. The Defense Finance and Accounting Service, Indianapolis, Indiana, follows this procedure. Weights should be rounded to the nearest pound.

Additionally, field claims offices may identify the items which require an unearned freight deduction by circling in red ink the line number of the corresponding item on the DD Form 1844, List of Property and Claims Analysis Chart. This method of identification is in addition to the method discussed in the June 1995 note. Care should be taken not to mark over the information contained on the DD Form 1844. Lieutenant Colonel Kennerly.

Tort Claims Note

Law of Damages Applicable to the Military Claims Act Outside the United States

The determination of damages under the Military Claims Act² (MCA) for claims arising outside of the United States, its territories and possessions, has been a continuing problem over the years. The problem arises from a lack of a uniform standard of damages. Due to rapid development in tort law, it is nearly impossible to apply a constant and fair standard of general United States law. As a result, the most recent change to Army regulations (AR) sets forth a uniform standard.³

From the inception of the MCA in 1943⁴ until it was amended on 2 September 1968,⁵ injury and death claims were limited to payment of medical bills, hospital bills, and funeral expenses actually incurred. Following the 1968 change, the applicable law for damages was the "place of occurrence" or, if the claim arose outside the United States, the "place of residence in the United States of the injured party."⁶ Because application of the MCA outside the United States was limited to claimants not normally residents in a foreign country, such as United States civilian employees, family members, and off-duty service members, this policy provided damages similar to those applicable in the United States. Other claims were, and still are, processed under the Foreign Claims Act,⁷ which utilizes the foreign law, usually that of the country of occurrence.

¹ Claims Report, *Personnel Claims Note: Unearned Freight Packets: The Need to Substantiate the Loss or Destruction*, ARMY LAWYER, June 1995, at 61-63.

² 10 U.S.C. § 2733 (West 1995).

³ See DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 3-8 (1 Aug. 1995) [hereinafter AR 27-20].

⁴ 57 Stat 372, chap. 189 (3 Jul. 1943).

⁵ Pub. L. 85-861, 82 Stat 875 (2 Sept. 1968).

⁶ See AR 27-20, *supra* note 3, para. 11 (20 May 1966).

⁷ 10 U.S.C. § 2734 (West 1995).

The use of the law of the "place of residence in the United States of the injured party" provided a wide variation in the amount of damages recoverable, particularly in incidents involving multiple injuries or death. A 1970 solution provided that damages would be determined in accordance with general principles of United States law as stated in standard legal publications.⁸ As tort law underwent radical changes during the 1970s and 1980s, this standard became more difficult to apply. The standard in personal injury claims was therefore changed again in 1987 to limited items.⁹ Wrongful death damages were limited to those payable under the Death on High Seas Act (DOHSA).¹⁰

In 1989, the standard for personal injury damages was changed back to the general principles of United States law.¹¹ Because the DOHSA provisions for wrongful death claims applied mainly to seamen, few cases were reported concerning women and children, which constituted the majority of MCA claimants. As a result, general maritime law was adopted to analyze wrongful death claims.¹²

In 1990, the standard for personal injury claims was changed once again, this time to "established principles of maritime law."¹³ Where certain types of damage, such as emotional distress, were not recoverable under maritime law, general United States law would still be followed. The standard of maritime law principles for wrongful death claims remained the same.

The changes adopted between 1987 and 1990 did little to alleviate criticisms of unfairness. During revision of AR 27-20, a solution was sought that would require minimal reference to case law in other than continental United States jurisdictions would be applied uniformly in places where there is little or no reference library. The significant changes set forth in AR 27-20, chapter 3, apply to claims accruing on or after 1 August 1995, the effective date of the revised AR 27-20.¹⁴

The type of damages payable under the 1995 AR 27-20 applies to all MCA claims within and outside the continental United States. This requirement insures uniformity and precludes application of widely varying recoveries to military families. The new provisions are comprehensive by including doctrines not previously enunciated. For example, the collateral source doctrine is inapplicable to all MCA claims. This means that subrogated claims for medical expenses and lost earnings are not payable.¹⁵ Subrogated claims for property damage also are not payable.¹⁶ This conforms to the original purpose of the MCA, which was to assist commanders in the performance of their mission. The MCA was never intended to serve as a waiver of sovereign immunity and place the Uniformed Services in the position of being liable as a private person similar to the Federal Torts Claim Act. Joint and several liability is inapplicable; thus, limiting the amount payable to the percentage of negligence attributable to the United States. Contributory negligence also applies in accordance with the law of the place of occurrence.¹⁷

Another example of the change in the 1995 MCA policy is the definition of the type of payable emotional distress damages, which varies greatly among the various jurisdictions of the United States. Payment under AR 27-20 is limited to "zone-of-danger" claims that result in physical manifestation of emotional distress.¹⁸ While this does not require an actual impact, payment requires more than merely a subjective contention of such distress. Moreover, claimants are limited to members of the immediate family of the injured party. Only *spousal* loss of consortium is payable in a personal injury claim.¹⁹ This limitation avoids the pitfalls of defining nontraditional family relationships.

These changes proved to be difficult to apply. As in the 1987 regulation, economic damages for personal injury claims are precisely listed and limited by the listing.²⁰ The type of proof required is also set forth. Absence of such proof may provide a

⁸ See AR 27-20, *supra* note 3, para. 3-11d (18 Sept. 1970).

⁹ *Id.* para. 3-11 (10 July 1987).

¹⁰ *Id.* para. 3-12.

¹¹ *Id.* para. 3-11 (15 Feb. 1989).

¹² *Id.* para. 3-12.

¹³ *Id.* para. 3-11 (28 Feb. 1990).

¹⁴ *Id.* para. 3-8 preface (1 Aug. 1995).

¹⁵ *Id.* para. 8b(1)(d).

¹⁶ *Id.* para. 3-8d(2).

¹⁷ 10 U.S.C. § 2733(b)(4) (West 1995).

¹⁸ See AR 27-20, *supra* note 3, para. 3-8a(3)(g) (1 Aug. 1995).

¹⁹ *Id.* para. 3-8b(1)(b).

²⁰ *Id.* para. 3-8a(1)(b).

basis for full or partial denial. This applies equally to other types of damages.²¹ The need to place this provision in the regulation arose from the pursuit of nonmeritorious claims through the MCA appellate procedures. These claims sought to involve the designee of the Secretary of the Army even though the claimant did not submit documentation or opinions in support of the claim. The provision should not be used for automatic denial and the avoidance of investigation. In appropriate cases, investigation must be conducted if for no other reason than to process the appeal.

²¹ *Id.* para 3-8c.

The foregoing attempts to highlight unusual features on the provisions for damages in personal injury and wrongful death claims arising overseas under the MCA. The changes established by AR 27-20 contain many new policies and interpretations, which claims judge advocates and personnel should familiarize themselves. The Commander, United States Army Claims Service, has the delegated authority to interpret the applicable law. Requests for interpretations should be directed to: Chief, Tort Claims Division, United States Army Claims Service, DSN: 927-7009 extension 211 or 212.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Continuing Legal Education On-Site Schedule

Following is a current schedule of The Judge Advocate General's Continuing Legal Education On-Sites. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend each year the On-Site training within their geographic area. All other USAR and Army Na-

tional Guard judge advocates are encouraged to attend the On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Eric Storey, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380. Major Storey.*

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION ON-SITE TRAINING, AY 96

<u>DATE</u>	<u>CITY, HOST UNIT, AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
18-19 Nov	New York, NY 77th RSC/4th LSO Fordham University School of Law 160 West 62d Street New York, NY 10023	LTC Myron J. Berman 77th RSC Bldg. 637 Fort Totten, NY 11359 (718) 352-5703
6-7 Jan 96	Long Beach, CA 78th LSO	LTC Andrew Bettwy 10541 Calle Lee, Suite 101 Los Alamitos, CA 90720 (702) 876-7107
20-21 Jan	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 782205	LTC Matthew L. Vadnal 6th LSO, Bldg. 572 4505 36th Ave., W. Seattle, WA 98199 (206) 281-3002

**THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTINUING LEGAL EDUCATION ON-SITE TRAINING, AY 96**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
24-25 Feb	Denver, CO 87th LSO Doubletree Inn 13696 East Iliff Pl. Aurora, CO 80014	MAJ Kevin G. Maccary 87th LSO Bldg. 820, Fitzsimons AMC McWethy USARC Aurora, CO 80045-7050 (303) 977-3929
24-25 Feb	Salt Lake City, UT UTARNG National Guard Armory 12953 South Minuteman Dr. Draper, UT 84020	LTC Michael Christensen HQ, UTARNG P.O. Box 1776 Draper, UT 84020-1776 (801) 576-3682
24-25 Feb	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	MAJ George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
2-3 Mar	Columbia, SC 12th LSO/120th RSG	LTC Robert H. Uehling 12th LSO 5116 Forest Drive Columbia, SC 29206-4998 (803) 790-6104
9-10 Mar	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
16-17 Mar	San Francisco, CA 75th LSO	LTC Joe Piasta Shapiro, Galvin, et. al. 640 Third St., Second Floor P.O. Box 5589 Santa Rosa, CA 95402 (707) 544-5858
23-24 Mar	Chicago, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Rd. Rolling Meadows, IL 60008	LTC Tim Hyland P.O. Box 6176 Lindenhurst, IL 60046 (708) 688-3780
27-28 Apr	Columbus, OH 9th LSO Clarion Hotel 7007 N. High St. Columbus, OH 43085 (614) 436-0700	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION ON-SITE TRAINING, AY 96

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>ACTION OFFICER</u>
26-28 Apr Note: 2.5 days	St. Louis, MO 89th RSC/MO ARNG	LTC John O'Mally 8th LSO ATTN: AFRC-AMO-LSO 11101 Independence Ave. Independence, MO 64054
4-5 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	LTC Eugene E. Stoker Counsel, MS JW-10 Boeing Defense Space Group Missiles Space Division P.O. Box 240002 Huntsville, AL 35806 (205) 461-3629 FAX: 3209
18-19 May	Tampa, FL 174th LSO/65th ARCOM	LTC John J. Copelan, Jr. Broward County Attorney 115 S Andrews Ave, Ste 423 Fort Lauderdale, FL 33301 BPN: (305) 357-7600

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have a confirmed reservation. 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, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys 5F-F10

Class Number—133d Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1996

January 1996

- 8-12 January: 1996 Government Contract Law Symposium (5F-F11).
- 9-12 January: USAREUR Tax CLE (5F-F28E).
- 22-26 January: 48th Federal Labor Relations Course (5F-F22).
- 22-26 January: 23d Operational Law Seminar (5F-F47).

31 January - 2d RC Senior Officers 20-24 May: 49th Federal Labor Relations Course
2 February: Legal Orientation Course (5F-F3). (5F-F22).

February 1996

5-9 February: 134th Senior Officers' Legal Orientation Course (5F-F1).

5 February - 139th Basic Course (5-27-C20).
12 April:

12-16 February: PACOM Tax CLE (5F-F28P).

12-16 February: 62d Law of War Workshop (5F-F42).

12-16 February: USAREUR Contract Law CLE (5F-F18E).

26 February - 38th Legal Assistance Course
1 March: (5F-F23).

March 1996

4-15 March: 136th Contract Attorneys' Course (5F-F10).

18-22 March: 20th Administrative Law for Military Installations Course (5F-F24).

25-29 March: 1st Contract Litigation Course (5F-F102).

April 1996

1-5 April: 135th Senior Officers' Legal Orientation Course (5F-F1).

15-19 April: 1996 Reserve Component Judge Advocate Workshop (5F-F56).

15-26 April: 5th Criminal Law Advocacy Course (5F-F34).

22-26 April: 24th Operational Law Seminar (5F-F47).

29 April- 3 May: 44th Fiscal Law Course (5F-F12).

29 April- 3 May: 7th Law for Legal NCOs' Course (512-71D/20/30).

May 1996

13-17 May: 45th Fiscal Law Course (5F-F12).

13-31 May: 39th Military Judge Course (5F-F33).

June 1996

3-7 June: 2d Intelligence Law Workshop (5F-F41).

3-7 June: 136th Senior Officers' Legal Orientation Course (5F-F1).

3 June - 12 July: 3d JA Warrant Officer Basic Course (7A-550A0).

10-14 June: 26th Staff Judge Advocate Course (5F-F52).

17-28 June: JATT Team Training (5F-F57).

17-28 June: JAOAC (Phase II) (5F-F55).

July 1996

1-3 July: Professional Recruiting Training Seminar

1-3 July: 27th Methods of Instruction Course (5F-F70).

8-12 July: 7th Legal Administrators' Course (7A-550A1).

8 July - 13 September: 140th Basic Course (5-27-C20).

22-26 July: Fiscal Law Off-Site (Maxwell AFB) (5F-12A).

24-26 July: Career Services Directors Conference.

29 July - 9 August: 137th Contract Attorneys' Course (5F-F10).

29 July - 8 May 1997: 45th Graduate Course (5-27-C22).

30 July - 2 August: 2d Military Justice Managers' Course (5F-F31).

August 1996

12-16 August: 14th Federal Litigation Course (5F-F29).

12-16 August: 7th Senior Legal NCO Management Course (512-71D/40/50).

19-23 August: 137th Senior Officers' Legal Orientation Course (5F-F1).

19-23 August: 63d Law of War Workshop (5F-F42).

26-30 August: 25th Operational Law Seminar (5F-F47).

September 1996

4-6 September: USAREUR Legal Assistance CLE (5F-F23E).

9-13 September: 2d Procurement Fraud Course (5F-F101).

9-13 September: USAREUR Administrative Law CLE (5F-F24E).

16-27 September: 6th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

1995

December 1995

4-6, ALIABA: Environmental Laws and Regulations Compliance Course, Williamsburg, VA.

4-8, GWU: Construction Contract Law, Washington, D.C.

4-8, ESI: Accounting for Costs on Government Contracts, Washington, D.C.

4-8, ESI: Federal Contracting Basics, Las Vegas, NV.

8, ALIABA: Habitat, Seattle, WA.

11, GWU: Contract Award Protests: GAO, Washington, D.C.

11-14, ESI: Source Selection: The Competitive Proposals Contracting Process, San Diego, CA.

11-14, ESI: Contract Pricing, Washington, D.C.

12, GWU: Contract Award Protests: GSBGA, Washington, D.C.

14-15, ALIABA: Wetlands, Portland, OR.

14-16, ALIABA: Civil Practice and Litigation Techniques in the Federal..., Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

ALIABA: American Law Institute-
American Bar Association Committee
on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

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 22041-3203
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

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, N.W., Room 2107
Washington, D.C. 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 of Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482 (612) 644-0323 in (MN and AK)

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

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
(800) 932-4637 (717) 233-5774

PLI: Practising 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

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially

<u>Jurisdiction</u>	<u>Reporting Month</u>
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a

report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers

assigned by DTIC and must be used when ordering publications. These publications are for government use only.

Contract Law

*AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

*AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance, JA-261(93) (293 pgs).

AD A281240 Office Directory, JA-267(94) (95 pgs).

AD B164534 Notarial Guide, JA-268(92) (136 pgs).

AD A282033 Preventive Law, JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide, JA-260(93) (206 pgs).

AD A297426 Wills Guide, JA-262(95) (517 pgs).

AD A268007 Family Law Guide, JA 263(93) (589 pgs).

AD A280725 Office Administration Guide, JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide, JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide, JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide, JA 265(94) (613 pgs).

*AD A289411 Tax Information Series, JA 269(95) (134 pgs).

AD A276984 Deployment Guide, JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide, January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook, ACIL-ST-290.

AD A285724 Federal Tort Claims Act, JA 241(94) (156 pgs).

*AD A301061 Environmental Law Deskbook, JA-234-1(95) (268 pgs).

*AD A298443 Defensive Federal Litigation, JA-200(95) (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA 231-92 (89 pgs).

*AD A298059 Government Information Practices, JA-235(95) (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment, JA-210(94) (358 pgs).

*AD A291106 The Law of Federal Labor-Management Relations, JA-211(94) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook, JA 337(94) (191 pgs).

AD A274541 Unauthorized Absences, JA 301(95) (44 pgs).

AD A274473 Nonjudicial Punishment, JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation, JA 320(95) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA 310(95) (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication also is available through DTIC:

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

- (1) The United States Army Publications Distribution Center (USAPDC) at Baltimore, Maryland, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

- (2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12 7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms

through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road,

Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

- (4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, Maryland 21220-2896. You may reach this office by telephone at (410) 671-4335.

3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community by providing the Army and other Department of Defense (DOD) agencies access to the LAAWS BBS. Whether you have Army access or DOD-wide access, all users may download The Judge Advocate General's School, United States Army (TJAGSA), publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

- (a) Active duty Army judge advocates;
- (b) Civilian attorneys employed by the Department of the Army;
- (c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;
- (d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);
- (e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);
- (f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;
- (g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);
- (h) Individuals with approved, written exceptions to the access policy. Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to all DOD personnel dealing with military legal issues (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791).

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation.

d. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours.

e. *The Army Lawyer* will publish information on new publications and materials available through the LAAWS BBS.

4. Instructions for Downloading Files from the LAAWS BBS

a. Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

b. If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

- (1) When the system asks, "Main Board Command?" Join a conference by entering [j].
- (2) From the Conference Menu, select the Automation Conference by entering [12] and press the enter key when asked to view other conference members.
- (3) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.
- (4) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.
- (5) If prompted to select a communications protocol, enter [x] for X-modem protocol.
- (6) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].
- (7) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-mo-

dem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(8) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(9) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(10) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

c. To download a file, after logging onto the LAAWS BBS, take the following steps:

(1) When asked to select a "Main Board Command?" enter [d] to Download a file.

(2) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(3) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(4) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(5) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(6) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(7) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

d. To use a downloaded file, take the following steps:

(1) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(2) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF All States Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	<i>Army Lawyer/Military Law Review Database</i> ENABLE 2.15. Updated through the 1989 <i>Army Lawyer Index</i> . It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.	JA262.ZIP	April 1994	Legal Assistance Wills Guide.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.	JA263.ZIP	August 1993	Family Law Guide, August 1993.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.	JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
FOIAPT2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.	JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.	JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.	JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.	JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.	JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.	JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations Programmed Instruction.	JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act Outline and References.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.	JA275.ZIP	August 1993	Model Tax Assistance Program.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.	JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.	JA281.ZIP	November 1992	15-6 Investigations.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.	JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.	JA290.ZIP	March 1992	SJA Office Manager's Handbook.
			JA301.ZIP	November 1995	Unauthorized Absences Programmed Text, August 1995.
			JA310.ZIP	November 1995	Trial Counsel and Defense Counsel Handbook, May 1995.
			JA320.ZIP	November 1995	Senior Officer's Legal Orientation Text, November 1995.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA330.ZIP	November 1995	Nonjudicial Punishment Programmed Text, August 1995.	JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA337.ZIP	November 1995	Crimes and Defenses Deskbook, July 1994.	JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA422.ZIP	May 1995	OpLaw Handbook, June 1995.	JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.	1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.	1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.	1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.	1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.	JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.	JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.	JAGSCHL.WPF	March 1992	JAG School report to DSAT.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.	YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.	YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.	YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.	YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.	YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.			

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781.

3. Requests must be accompanied by one 5 1/2-inch or 3 1/4-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. TJAGSA Information Management Items

a. Thanks to design and funding of a new *Novell* local area network (LAN) by the Office of the Judge Advocate General Information Management Office, TJAGSA is nearly finished upgrading and installing more than 200 faculty, staff, and classroom computers on the LAN. With the installation of a T-1 circuit, planned for November 1995, TJAGSA will be connected to the Office of the Judge Advocate General wide area network (WAN) and subsequently to the rest of the Department of Defense and the Internet. Electronic mail addresses for the TJAGSA staff and faculty will be published as soon as we are up on the WAN. Training on the new *Microsoft Office Software* has been conducted and users are supportive of the transition. Future plans include moving into CD-ROM technology, continuing hardware upgrades, and adding fax server capability for all users.

b. In November, TJAGSA will install an electronic multimedia imaging center (EMIC). This system will greatly enhance our ability to produce photographic imaging products and will provide the platform for integrating multimedia into traditional visual information operations. The imaging will be in a digital format on a Pentium 90 computer, which will produce presentation graphics. This system will be able to accommodate and share large (90 to 120 megabyte) files with other EMIC facilities. The system will also allow photo manipulation with compact disc read and write capability.

c. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the

appropriate department or division. The Judge Advocate General's School also has a toll free number: 1-800-552-3978. Lieutenant Colonel Godwin (ext. 435).

7. Articles

The following may be useful to judge advocates.

* James T. Richardson, Gerald P. Ginsburg, Sophia Gatowski, and Shirley Dobbin, *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995).

* International Committee of the Red Cross, 304 INT'L REV. RED CROSS, Jan-Feb 1995 (containing a variety of articles dealing with the protection of war victims and the implementation of international humanitarian law).

8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nell Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

* Military Justice Reporter, Vols 1 through 40, 3 Sets.

Office of the Judge Advocate General
2200 Army Pentagon
Attn: Christine M. Balog
Washington, D.C. 20310-2200
COM (703)695-5468
DSN 225-5468/6433

* USCA, Title 42 2011-2700, 2701- 3700, and 3701-4540, and 1995 Pocket Parts for Titles 19-50

HQ, U.S. Army
Special Operations Command
Attn: AOJA (CW2 Teresa A. Sicinski)
Fort Bragg, N.C. 28307-5200
COM (910)432-5058
DSN 239-5058

* Courts-Martial Reports, Vols 1 - 50 (1 set)

* Military Justice Reporter, Vols 1-32, (1 set)

* US Tax Cases

Vols 58-1, 58-2 Vol 75-2
Vols 59-1, 59-2 Vols 76-1, 76-2
Vols 60-1, 60-2 Vol 77-1
Vols 61-1, 61-2 Vols 78-1, 78-2
Vols 62-1, 62-2 Vols 79-1, 79-2
Vols 63-1, 63-2 Vol 80-1
Vols 64-1, 64-2 Vols 81-1, 81-2
Vols 65-1, 65-2 Vols 82-1, 82-2
Vols 66-1, 66-2 Vols 83-1, 83-2
Vols 67-1, 67-2 Vol 84-1

Vols 68-1, 68-2

Vols 85-1, 85-2

Vols 69-1, 69-2

Vols 86-1, 86-2

Vols 70-1, 70-2

Vols 87-1, 87-2

Vols 71-1, 71-2

Vol 88-1

Vols 72-1, 72-2

Vol 90-1

Vols 73-1, 73-2

Vol 91-1

Vol 74-1

Vol 92-1

Vol 93-1

Yongsan Law Center
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Unit #15322
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