



# THE ARMY LAWYER

Headquarters, Department of the Army

**Department of the Army Pamphlet 27-50-339  
February 2001**

**Article**

**NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo:  
Unlawful Aggression or Legitimate Exercise of Self-Determination**

*Lieutenant Colonel Michael E. Smith*

**TJAGSA Practice Notes**

Legal Assistance Note (Payday Loans: The High Cost of Borrowing Against Your Paycheck; Gulf War Syndrome Sub Judice)  
Reserve Component Note (New Rights for Reserve and National Guard Soldiers Suffering Heart Attack or Stroke)

**The Art of Trial Advocacy**

**USALSA Report**

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*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for \$29 each (\$36.25 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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ed. 2000) and *Military Citation* (TJAGSA, July 1997). Manuscripts will be returned upon specific request. No compensation can be paid for articles.

*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil>.

*Address changes for official channels distribution:* Provide changes to the Editor, *The Army Lawyer*, TJAGSA, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or electronic mail to charles.strong@hqda.army.mil.

Issues may be cited as ARMY LAW. [date], at [page number].

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# NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?

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## Introduction

Operation Allied Force, the recent North Atlantic Treaty Organization (NATO) intervention in the Federal Republic of Yugoslavia (FRY), relied solely on air power to force Slobodan Milosevic's troops out of Kosovo. No NATO ground forces were used. There were, however, ground troops deployed in Kosovo that were fighting the FRY forces; the Kosovo Liberation Army (KLA) was fighting for an independent Kosovo.

This article examines the KLA and its relationship with NATO during the two months of fighting. On several occasions during the war, NATO forces apparently supported, either directly or indirectly, the KLA in its battles with FRY forces. If NATO forces provided assistance to the KLA, a rebel force within the sovereign state of Yugoslavia, it may have violated traditional understandings of the United Nations (UN) Charter and committed unlawful aggression against Yugoslavia.

Customary international law permitted unilateral humanitarian intervention to protect nationals and even non-nationals, under some circumstances. The majority view is that the UN Charter replaced this customary law and now prohibits such intervention. Some believe that humanitarian intervention is still permitted and will not run afoul of Article 2(4), so long as the intervention does not affect the "territorial integrity" or "political independence" of the state against which the humanitarian intervention is directed.<sup>1</sup> The intervention in Kosovo is unique in that it was not a unilateral action, but action initiated by a regional organization, after the UN had addressed the matter and failed to authorize the use of force. Further, while NATO's primary purpose was humanitarian, it *de facto* supported the KLA's fight for independence from the FRY.

This article begins by examining the history of the KLA and why it sought to secede from Yugoslavia. It next discusses NATO's legal basis for intervening in Kosovo and the conduct of the war, focusing on NATO's relationship with the KLA. The article then provides a legal analysis of intervention in civil wars, starting with an examination of the traditional rule of non-

intervention, to include a look at the International Court of Justice's decision in the *Nicaragua* case. It discusses self-determination and Article 2(4) of the UN Charter and, after demonstrating that a right of self-determination exists under the UN Charter, the article explores the following issues: when the right to secede arises; whether the situation in Kosovo justified the KLA's demand for secession; whether it was lawful for NATO to assist the KLA in its fight for independence; the role that the humanitarian crisis in Kosovo played in NATO's intervention; and, finally, the enduring impact of NATO's intervention in Kosovo.

This article posits that NATO—acting without UN authorization—did not violate the UN Charter by using force against Yugoslavia. NATO's tenuous military support to the KLA, which was fighting for an independent Kosovo, was perfectly legitimate. However, NATO's refusal to characterize honestly its actions actually undermined the rule of law, exacerbated the suffering of the very people it was trying to help, and set a damaging precedent for intervention in future civil wars. From the beginning, NATO should have stated that the government of Yugoslavia illegally and systematically denied the Albanian Kosovars their right of self-determination. As a result of NATO's failure to make such a statement early on, the Albanian Kosovars, through the KLA, rebelled, fought for independence, successfully captured substantial territory in Kosovo and freely elected their own government. It was not until this point that NATO intervened and came to the Albanian Kosovars' assistance in their pursuit of the UN Charter's bedrock principle of self-determination. NATO's biggest mistake was its failure to provide the KLA with more support, more quickly. Doing so could have greatly reduced the suffering of the Albanian Kosovars.

## The Kosovo Liberation Army: Background and Beliefs<sup>2</sup>

For 800 years, since the beginning of the Ottoman Empire, control of Kosovo has shifted back and forth between the Albanians and the Serbs.<sup>3</sup> This continued until 1913 when the Serbs

1. JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 152-53 (1990).

2. In January 1999, weeks before NATO's intervention in Kosovo, Professor Julie A. Mertus of Ohio Northern University Law School completed a timely and scholarly history of Kosovo. Her book successfully dispels many myths about the roots of conflict in Kosovo and clarifies some misconceptions. The central myth is that: "Although tensions between Serbs and Albanians have long existed, the war in Kosovo was not preordained by ancient hatreds. Rather, the war was ignited by more recent storytelling." JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR XXI (1999). "[T]he conflict was propelled through media propaganda and political hate speech. These orchestrated efforts were successful at instilling a sense of fear and victimization." *Id.* at 262.

proclaimed Kosovo their fatherland.<sup>4</sup> The Serbs initially lost their foothold in Kosovo in 1689 when they failed to free themselves from Ottoman rule:

Fearing murderous reprisals, the Serbian archbishop of Pec led some 30,000 Serbian families into exile in Hapsburg-ruled southern Hungary, where their descendents live to this day. Henceforth the Albanians in Kosovo (as the region is known in their language), favored by the Ottomans as loyal Muslims, rose to demographic predominance.<sup>5</sup>

It was not until the Balkan War of 1912 that the Serbs successfully conquered and annexed Kosovo.<sup>6</sup> The Serbs wreaked terrible violence on the Muslim Albanians.<sup>7</sup> The Albanians got their revenge during World War II, however, when the Nazi's

raised a Waffen SS division of Kosovar Muslims whereby "[m]urderous attacks on Serbs were carried out . . . ."<sup>8</sup>

Having lost their fight to remain independent from Yugoslavia after World War II, some 250,000 Albanians fled Kosovo to escape the discriminatory, colonial Serb rule.<sup>9</sup> Finally, in 1968, after violent Albanian demonstrations, Tito granted Kosovo wide-ranging autonomy.<sup>10</sup> The stage was then set for the rise of Serb nationalists in the 1980s and the arrival of Slobodan Milosevic.<sup>11</sup>

Until 1989, Kosovo was one of two autonomous provinces in the Federal Republic of Yugoslavia.<sup>12</sup> This autonomy ended in 1989 when the newly-elected Serbian leader Slobodan Milosevic<sup>13</sup> established virtual martial law in Kosovo, changed the constitution, and took away Kosovo's autonomy.<sup>14</sup> In 1991, with the break up of Yugoslavia, the Kosovar assembly saw an opening and voted for independence.<sup>15</sup>

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3. See Michael P. Scharf & Tamara A. Shaw, *International Institutions*, 33 INT'L LAW. 567, 573-75 (1999) (citations omitted); see also William W. Hagen, *The Balkans' Lethal Nationalisms*, FOREIGN AFFAIRS, July/Aug. 1999, at 53. "[T]he Balkan states were all born in the nineteenth and early twentieth centuries as irredentist nations—that is, as nations committed to the recovery of their 'unredeemed' national territories. Their legitimacy rested entirely on their ability to embody the national 'imagined community.'" *Id.*

4. See Scharf & Shaw, *supra* note 3, at 573-75; see also Hagen, *supra* note 3, at 56 (describing Kosovo as the "cradle of the medieval Serbian monarchy").

5. Hagen, *supra* note 3, at 57.

6. *Id.* at 57-58.

7. *Id.* at 58.

8. *Id.*

9. *Id.*

10. *Id.*

11. See MERTUS, *supra* note 2, at 29-46 (discussing the 1981 student demonstrations). What started as a small demonstration for better cafeteria food spread across Kosovo and turned into demands for better conditions for Albanians in Kosovo. As the unrest grew larger, allegations of outside influences and conspiracies abounded and the confrontations grew violent. "According to both Kosovo Serbs and Albanians, 1981 was the year in which many previously harmonious relationships between members of different groups grew sour or broke off completely." *Id.* at 41. Professor Mertus concluded: "[O]ver the next eight years, 584,373 Kosovo Albanians—half the adult population—would be arrested, interrogated, interned or remanded. Albanians would not only lose their demand for a Kosovo republic—they would lose their status under the 1974 Constitution. And Yugoslavia would be lost altogether." *Id.* at 46.

12. See Kathleen Sarah Galbraith, *Moving People: Forced Migration and International Law*, 13 GEO. IMMIGR. L. J. 597, 599-600 (1999) (noting that "[u]ntil 1991, six republics (Serbia, Slovenia, Croatia, Bosnia-Herzegovina, Macedonia and Montenegro) and two autonomous provinces (Kosovo and Vojvodina) made up the Socialist Federal Republic of Yugoslavia.").

13. Slobodan Milosevic was elected President of Serbia on 9 December 1990. MERTUS, *supra* note 2, at 299.

14. Galbraith, *supra* note 12, at 601.

15. See Hagen, *supra* note 3, at 59; see also MERTUS, *supra* note 2, at xviii ("The break-up of Yugoslavia, [the Kosovo Albanians] contend, threw open all questions of sovereignty within Yugoslavia, and Albanians living in Kosovo have voted for autonomy and established their own government."). Professor Mertus ties these critical events together:

After the Serbian Constitution of 1990 revoked the autonomous status of Kosovo, Albanians protested the changes as illegal acts, arguing further that since the old Yugoslavia no longer existed, Kosovars could choose their fate. In 1991, in a popular referendum not recognized by Serbia, Kosovars voted to separate from Serbia. Ibrahim Rugova was elected president of an independent Kosova, but the elections were branded illegal by the Serbian regime and went unrecognized by any government other than Albania's.

*Id.* at 269.

## NATO Enters the War

### *Legal Basis*

Around this time, Ibrahim Rugova, the popular leader of the Albanian Kosovars, promoted a pacifist, non-violent response to Serbian repression.<sup>16</sup> This approach was not shared by all in Kosovo because, beginning in 1996, the KLA emerged and claimed responsibility for a series of bomb attacks against Serbs.<sup>17</sup>

The political views of the KLA have been described as having “hints of fascism on one side and whiffs of communism on the other.”<sup>18</sup> Beginning in January 1997, the KLA stepped up its bombing campaign<sup>19</sup> and, during the summer of 1998, it grew stronger.<sup>20</sup> Originally, the group’s numbers were small, “but by July 1998, the KLA enjoyed wide popular support across Kosovo and controlled roughly one third of the territory.”<sup>21</sup>

In May 1998, U.S. envoy Richard Holbrook brought Milosevic and Rugova together for peace talks, but the fighting continued.<sup>22</sup> The presence of the KLA and their violent attacks on Serbian police gave Milosevic the justification he needed for the ensuing vicious attacks on Albanian Kosovars. In the summer of 1998, Milosevic repeated history and used the Yugoslav Army and the Interior Ministry to force over 800,000 ethnic Albanians from Kosovo into Albania, The Former Yugoslav Republic of Macedonia (FYROM), and Montenegro.<sup>23</sup> In June 1998, however, UN Secretary General Kofi Annan warned NATO that it must obtain a Security Council mandate prior to any military intervention in Kosovo.<sup>24</sup>

On 24 March 1999, NATO began its bombing campaign and Operation Allied Force was underway. The following discussion outlines the legal theory upon which NATO relied to justify its use of force against Yugoslavia.

Article 1 of the North Atlantic Treaty mirrors Article 2(4) of the UN Charter in that it obligates member states “to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.”<sup>25</sup> The heart of the Treaty is contained in Article 5, which mirrors Article 51 of the UN Charter.<sup>26</sup> Although Article 5 provides for the collective self-defense of all member states, the only NATO member state even close to Kosovo is Greece,<sup>27</sup> and it is separated from Kosovo by FYROM. Therefore, NATO did not rely on collective self-defense to justify its use of force.

At the same time NATO warplanes were bombing Yugoslavia, the 50th Anniversary NATO Summit was taking place in Washington, DC. On 24 April 1999, NATO released the “Alliance’s Strategic Concept,”<sup>28</sup> Paragraph 6 of which states: “Based on common values of democracy, human rights and the rule of law, the Alliance has striven since its inception to secure a just and lasting peaceful order in Europe.”<sup>29</sup> However, Paragraph 11 states: “the Alliance will continue to respect the legitimate security interests of others . . . .”<sup>30</sup> While Paragraph 6 seems to provide a rationale for NATO’s action in Kosovo, such action also appears to violate Paragraph 11.

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16. On 24 May 1992, Ibrahim Rugova was elected President of the Republic of Kosova with ninety-five percent of the vote. See Joseph S. Nye, Jr., *Redefining the National Interest*, FOREIGN AFFAIRS, July/Aug. 1999, at 33; see also MERTUS, *supra* note 2, at 301.

17. See Nye, *supra* note 16, at 33; see also MERTUS, *supra* note 2, at 307.

18. See Nye, *supra* note 16, at 34 (quoting journalist Chris Hedges).

19. See MERTUS, *supra* note 2, at 307-08 (providing a chronology of key KLA attacks and Serbian responses).

20. See Ted Baggett, *Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT’L & COMP. L. 457, 462 (1999).

21. *Id.* at 462 (citation omitted); see also MERTUS, *supra* note 2, at 308.

22. MERTUS, *supra* note 2, at 308.

23. See Galbraith, *supra* note 12, at 598 (postulating additional motivating factors) (“The prospect of removing ethnic Albanian civilians from areas containing mineral wealth and Orthodox Christian religious sites at least partially motivated the assault.”).

24. *Id.*

25. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

26. *Id.*

27. The other NATO members are: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, United Kingdom, and the United States. North Atlantic Treaty Organization, *NATO Member Countries*, at <http://www.nato.int/structur/countries.htm> (last modified Dec. 19, 2000).

28. NATO Press Release, *The Alliance’s Strategic Concept*, Apr. 24, 1999, available at <http://www.nato.int/docu/pr/1999/p99-065e.htm>.

Former Secretary-General of the North Atlantic Treaty Organization, Javier Solana, characterized the NATO operation in Kosovo as follows:

For the first time, a defensive alliance launched a military campaign to avoid a humanitarian tragedy outside its own borders. For the first time, an alliance of sovereign nations fought not to conquer or preserve territory but to protect the values on which the alliance was founded.<sup>31</sup>

Arguably, NATO bombed Yugoslavia to enforce its values against a non-member of NATO.

Russia and China made it clear that they would oppose any military action in Kosovo.<sup>32</sup> On 26 March 1999, Russia drafted a resolution that was supported by India and Belarus (only Russia, China and Namibia subsequently voted for the resolution) urging NATO to stop its use of force.<sup>33</sup> At least one state opposing the resolution felt NATO had the authority to use force.

The representative of Slovenia, which was among the states opposing the resolution, made the key point that the Security Council does not have a monopoly on decision-making regarding the use of force. It has “the primary, but not exclusive, responsibility for maintaining international peace and security.”<sup>34</sup>

A few days before NATO started its bombing campaign in Kosovo, Mr. Douglas Dworkin, Principal Deputy Department of Defense (DOD) General Counsel, speaking at a Pacific Command (PACOM) Conference, outlined the U.S. justification for NATO’s use of force in Kosovo.<sup>35</sup> While acknowledging that no U.N. resolution expressly authorized the use of force, and no traditional legal justification appeared to support the use of force, Mr. Dworkin instead provided a list of factors supporting the use of force:

- (1) The United Nations Security Council (UNSC) might not be able to act effectively;
- (2) There were some similar precedents for use of force by regional defense-type organizations (the Organization of American States during the Cuban Missile Crisis by concurring in the quarantine, and the Organization of Eastern Caribbean States approval of U.S. action in Grenada);
- (3) There was, in fact, a threat to regional peace and security;
- (4) The UN Security Council recognized this threat in UN Security Council Resolution 1199;
- (5) NATO had a unique role to play in the Balkans, given its current involvement in Bosnia and general interest in peace and security in that region of the world;
- (6) The decision to use force would be a multilateral one (by NATO), not unilateral;
- (7) There was a tremendous threat for human catastrophe in Kosovo, which calls out for humanitarian intervention; and
- (8) All of these factors coalesced in the Balkans, a very unique area representing a tinderbox which could explode and spread instability, insecurity, and conflict throughout the adjoining areas.<sup>36</sup>

On 23 March 1999, the day before the bombing campaign began, Samuel R. Berger, Assistant to the President for National Security Affairs, sent a letter to Senator Trent Lott, the Senate Majority Leader, outlining the President’s legal authority for using force:

The United States’ national interests are clear and significant. As the President stated in his October 6 letter to you, “Kosovo is a tinderbox that could ignite a wider European war

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29. *Id.*

30. *Id.*

31. Javier Solana, *NATO’s Success in Kosovo*, FOREIGN AFFAIRS 114 (Nov./Dec. 1999).

32. Adam Roberts, *NATO’s “Humanitarian War” over Kosovo*, SURVIVAL, Autumn 1999, at 104.

33. *Id.* at 105.

34. *Id.* (citation omitted).

35. E-mail from Colonel Michael W. Schlabs, Chief, International and Operations Law (Air Force), to Major General William Moorman, The Judge Advocate General of the Air Force, summarizing Mr. Dworkin’s comments at the PACOM Conference (Mar. 18, 1999) (on file with author).

36. *Id.*

with dangerous consequences to the United States.” *This concern lies at the core of our analysis.* As the President stated as recently as Friday, March 19, “this is a conflict with no natural boundaries. If it continues it will push refugees across borders, and draw in neighboring countries.” The special historical significance of the Balkans provides additional urgency for our concerns. The House reached this same conclusion on March 12, 1999, when it passed H. Con. Res. 42 finding that “[t]he conflict in Kosovo has caused great human suffering and, if permitted to continue, could threaten the peace of Europe.” The threat is particularly acute for neighboring NATO Allies, and NATO has also concluded that the use of force in this case would be justified. Not acting will undermine the credibility and effectiveness of NATO, on which the stability of Europe depends . . . .

. . . .

. . . NATO would be acting to deter unlawful violence in Kosovo that endangers the fragile stability of the Balkans and threatens a wider conflict in Europe, to uphold the will of the international community as expressed in various U.N. Security Council resolutions, as well as to prevent another humanitarian crisis, which itself could undermine stability and threaten neighboring countries . . . .<sup>37</sup>

This justification appears to be a combination of self-defense and the fact-based factors provided by Mr. Dworkin. While Mr. Berger mentioned humanitarian intervention in passing, he still tied it directly to the resulting instability it would cause in the region, rather than arguing that it provided an independent moral basis for using force.

In June 1999, the Honorable Judith A. Miller, General Counsel of the Department of Defense, provided this justification for NATO’s use of force in Kosovo: “It was designed to terminate unlawful attacks on the civilian population, to defeat FRY’s threats to regional peace and stability, and to restart diplomatic and political efforts to resolve the crisis.”<sup>38</sup> It is interesting to

note that, unlike Mr. Berger, she listed humanitarian intervention first.

The British apparently believed that humanitarian intervention alone provided a sufficient justification for using force in Kosovo. In a June 2000 report to Parliament, *Kosovo: Lessons from the Crisis*, the Ministry of Defence wrote:

The nineteen NATO democracies had made every effort to find a diplomatic solution to the crisis, but NATO now had no choice but to act if a humanitarian catastrophe was to be prevented.<sup>39</sup>

The report went on to state:

The UK was clear that the military action taken was justified in international law as an exceptional measure and was the minimum necessary to prevent a humanitarian catastrophe. All NATO Allies agreed that there was a legal base for action.<sup>40</sup>

And finally, the British made it clear that they believed NATO could have acted with or without the UN approval:

We would have welcomed the express authorisation of the UN Security Council through a resolution before the NATO air campaign. This would have represented the strongest possible expression of international support. But discussions at the United Nations in New York had shown that such a resolution could not be achieved. Nevertheless, the UK and our NATO Allies, and many others in the international community, were clear that as a last resort, all other means of resolving the crisis having failed, armed intervention was justifiable in international law as an exceptional measure to prevent an overwhelming humanitarian catastrophe in Kosovo.<sup>41</sup>

German Foreign Minister, Klaus Kinkel, relied on a “cluster of conditions,” which taken together, supported the use of force.<sup>42</sup> Mr. Kinkel’s argument was similar to that of Secretary General Solana, who relied on the following relevant factors as justification:

37. Letter from Samuel R. Berger, Assistant to the President for National Security Affairs, to Trent Lott, Senate Majority Leader 2-3 (Mar. 23, 1999) (on file with author).

38. JUDITH A. MILLER, 21 A.B.A. NAT’L SEC. L. REP. 4 (1999).

39. U.K. MINISTRY OF DEFENSE, *KOSOVO: LESSONS FROM THE CRISIS* ch. 2 (2000), available at <http://www.kosovo.mod.uk/lessons/>.

40. *Id.* ch. 3.

41. *Id.* ch. 5.

(1) The failure of Yugoslavia to fulfill the requirements set out by [Security Council] Resolutions 1160 and 1199, based on Chapter VII of the UN Charter;

(2) The imminent risk of a humanitarian catastrophe, as documented by the report of the UN Secretary-General Kofi Annan on 4 September 1998;

(3) The impossibility to obtain, in short order, a Security Council resolution mandating the use of force; and

(4) The fact that Resolution 1199 stated that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region.<sup>43</sup>

French President Chirac somewhat relied on Resolution 1199 and its reference to Chapter VII action, but declined to emphatically state a position.<sup>44</sup> The Italian's at first seemed to argue that collective self-defense warranted the use of force, then later appeared to insist that Security Council approval was required.<sup>45</sup>

Clearly, the mere mention of Chapter VII in a UN resolution does not imply that force is authorized. This holds especially true when two permanent members of the Security Council—Russia and China—“accompanied their votes by legally valid declaratory statements spelling out that the resolutions should not be interpreted as authorising the use of force.”<sup>46</sup> At least two authors, however, support NATO's position that Resolution 1199 opened the door for the use of force, simply because it was based on Chapter VII:

Technically, the resolution can be interpreted to open the door for the use of military force because, while its text does not specifically address the threatening of force or set a deadline for compliance, it was adopted under Chapter VII of the U.N. Charter which permits military action to enforce compliance.<sup>47</sup>

Responding to an author critical of NATO's intervention, James B. Steinberg, Deputy Assistant to the President for National Security Affairs, apparently relied on humanitarian intervention, rather than Resolution 1199 and its Chapter VII implications:

Since NATO fought on behalf of the [Albanian Kosovars] while embracing the Serb-backed view that Kosovo should remain part of Serbia, [Michael Mandelbaum] claims that NATO's effort was an incoherent failure.

But NATO did not go to war in Kosovo over any principle of sovereignty. NATO fought to end Serb repression in Kosovo and to protect southeastern Europe from its consequences.<sup>48</sup>

One author further argued that Kosovo, which combined civil war and genocide, illustrates the intersection of international human rights law and humanitarian law.<sup>49</sup> She asserted that “increasingly, they [humanitarian interventions] give primacy to human rights over the sovereignty of states when the two principles conflict.”<sup>50</sup>

42. See Catherine Guicherd, *International Law and the War in Kosovo*, 41 INT'L INST. FOR STRATEGIC STUD. 20, 27 (1999). Mr. Kinkel's conditions were:

[T]he inability of the Security Council to act in what was an emergency situation; the fact that a military threat was in the “sense and logic” of Resolutions 1160 and 1199 [although, he conceded, the latter did not provide direct legal ground]; and the particular high standards for the protection of human rights reached by European states in the [Organization for Security and Cooperation in Europe] context, in particular regarding the protection of minorities.

*Id.* (citation omitted).

43. *Id.* at 27-28.

44. *Id.* at 28.

45. *Id.* Eventually, the Italians simply stopped raising any objections and essentially acquiesced.

46. See *id.* at 26.

47. Michael P. Scharf & Tamara A. Shaw, *International Institutions*, 33 INT'L LAW. 567, 575 (1999) (citation omitted).

48. James B. Steinberg, *A Perfect Plemic: Blind to Reality on Kosovo*, FOREIGN AFFAIRS, Nov./Dec. 1999, at 132, responding to Michael Mandelbaum's, *A Perfect Failure*, FOREIGN AFFAIRS, Sept./Oct. 1999, at 2.

49. Guicherd, *supra* note 42, at 21. Catherine Guicherd is Deputy for Policy Coordination to the Secretary General at the NATO Parliamentary Assembly (formerly North Atlantic Assembly), Brussels.

50. *Id.* at 21-22.

As the previous discussion reveals, there was no single justification for NATO's use of force in Yugoslavia upon which everyone could agree. Of particular note, not one NATO member ever argued that intervention was justified to help the Albanian Kosovars regain their right of self-determination from Yugoslavia.

### *Support to the KLA*

In an interview with Azen Sylja, a founding member of the KLA who sits on its central council, journalist Peter Finn of *The Washington Post* wrote less than a week after the start of the bombing campaign that the KLA "is facing imminent military defeat unless NATO airdrops heavy weaponry to help the guerrillas survive . . ." <sup>51</sup> NATO apparently ignored the rebel pleas for arms, reflecting U.S. skepticism of the KLA: "U.S. officials have said repeatedly that they do not want NATO warplanes to become 'the KLA's air force,' even as they support the rebel group's resistance to government repression." <sup>52</sup>

NATO was in a very delicate position. Its premise for starting the war was to stop the humanitarian crisis in Kosovo. The bombing campaign, however, had served to aggravate the suffering of ethnic Albanians in Kosovo. The only forces capable of stopping the Serbian attacks were the KLA. <sup>53</sup> Once the Albanian government saw that the KLA was winning widespread support among Albanian Kosovars, it began to put pressure on the U.S. and NATO to supply arms to the KLA. <sup>54</sup>

NATO's hesitancy to embrace the KLA was based on several legitimate concerns. The KLA started as a terrorist organization, at times receiving support from Islamic fundamentalists in the Middle East. <sup>55</sup> The U.S. Drug Enforcement Administration believed that "Turkish [drug] trafficking groups are using Albanians, Yugoslavs and elements of criminal groups from Kosovo to sell and distribute their heroin . . . . These groups are believed

to be a part of the financial arm of the [KLA's] war against Serbia." <sup>56</sup> The KLA's radical political views and desire to unify "Albanians in Kosovo, Albania and Macedonia in a greater Albanian state" <sup>57</sup> also concerned NATO leaders. Further, if Western countries started supplying the KLA with arms, they might start a conventional arms race with the Russians supplying weapons to the Serbs. There was also evidence that the KLA was forcibly conscripting Albanian refugees into its Army. <sup>58</sup>

As NATO contemplated the introduction of ground forces, it was being drawn into a closer relationship with the KLA, while publicly continuing to keep the KLA at arms length.

KLA officials have denied receiving any significant assistance from NATO countries or from undercover Western special forces teams believed to be operating in Kosovo. But an indirect relationship between the two forces is emerging. Rebel officials conduct regular satellite telephone discussions with designated contacts about tactical and strategic military matters, and these contacts in turn relay helpful information to NATO's target planning staff. <sup>59</sup>

NATO's reluctance to openly cooperate with the KLA and fully integrate them into its battle planning process frustrated the KLA leadership, apparently resulted in many lost targeting opportunities, and possibly prolonged the campaign.

The principal impediment to closer military cooperation at this stage, sources report, is that NATO continues to use a cumbersome process for selecting its targets, involving advance planning and complicated logistical support. That fact, more than anything else,

51. Peter Finn, *Guerrilla Force Near Collapse: Kosovo Rebels Appeal to NATO for Airborne Supplies*, WASH. POST, Apr. 1, 1999, at A1, A18.

52. *Id.* But see Roberts, *supra* note 32, at 118 (revealing the results of *de facto* coordination between NATO air strikes and KLA ground offensive) ("KLA forces push Yugoslav soldiers out into the open [and] 7 June NATO attack achieved largest, single kill.").

53. See Peter Finn, *Albania Asks West to Arm Rebels: Government Shifts Position to Support Kosovo Guerrillas*, WASH. POST, Apr. 20, 1999, at A20 ("In Kosovo, the only force that protects civilians is the KLA, but they do not have enough arms.").

54. See *id.* ("[A]lbanian President Rexhep Mejdani is prepared to raise the subject when he meets with President Clinton during the NATO summit in Washington this week, a senior adviser to the Albanian leader said today.").

55. See Peter Finn & R. Jeffrey Smith, *Rebels with a Crippled Cause: Kosovo Guerrillas, NATO Share a Common Enemy-and Little Else*, WASH. POST, Apr. 23, 1999, at A01, A32.

56. *Id.* at A32.

57. *Id.*

58. See James Rupert, *Kosovo Rebel Army Not All-Volunteer: Some Refugees Conscripted by Force, Say Aid Workers, Evacuees* WASH. POST, Apr. 26, 1999, at A14 ("An official of the rebel movement's political wing said Saturday that force has been used only in isolated cases and that an order had been issued to halt the practice.").

59. Finn & Smith, *supra* note 55, at A32.

is preventing KLA members from acting as spotters for Western warplanes. “Sometimes,” [Sokol] Bashota [a top official of the KLA’s political directorate] said, “they are doing the right thing and going to the right place, and sometimes not.”<sup>60</sup>

On 25 April 1999, the normally secretive KLA took the unusual step of holding a press conference to “plead anew for a battle-field alliance with NATO.”<sup>61</sup>

As the campaign moved into late May, the KLA appeared to be gaining ground against FRY forces. More recruits, weapons and ammunition were reaching KLA troops. One KLA official speculated that NATO countries were “closing one eye” to the rebels’ black market weapons purchases.<sup>62</sup> Lieutenant General John W. Hendrix, commander of U.S. forces in Albania, stated: “They seem to have an endless supply of weapons and ammunition.”<sup>63</sup> Officially, NATO continued to deny they were cooperating with the KLA.<sup>64</sup>

The subject of NATO’s cooperation with the rebels is sensitive, and details are not volunteered. But sources say that NATO war planners have been relying on scouting reports by KLA rebels inside Kosovo to direct air-strikes, and that members of the alliance have ignored some recent arms shipments to the KLA.<sup>65</sup>

NATO commanders knew from their experiences in a previous Balkan bombing campaign that, to be successful, they must rely on ground observers for critical intelligence and infantry-to-infantry engagements.

The real lesson of those 1995 events [Operation Deliberate Force, the NATO bombing campaign against Serb targets in Bosnia] might be a very different one: that if NATO wants to have some effect, including through air-power, it needs to have allies among the local belligerents, and a credible land-force component to its strategy.<sup>66</sup>

Additionally, NATO erred in ruling out the use of ground troops at the beginning of the campaign.

The initial exclusion of the option of a land invasion was the most extraordinary aspect of NATO’s resort to force . . . . [T]he initial exclusion of even the threat of a land option had adverse effects: in Kosovo, the FRY forces could concentrate on killing and concealment rather than defence, while in Belgrade the Yugoslav government could hope simply to sit out the bombing. Within the Alliance, creating at least a credible threat of

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60. *Id.*

61. James Rupert, *Guerrillas Go Public with Pleas: Kosovo Rebels Seek Arms, NATO Troops*, WASH. POST, Apr. 26, 1999, at A14.

62. R. Jeffrey Smith, *Training, Arms, Allies Bolster KLA Prospects*, WASH. POST, May 26, 1999, at A25. Mr. Smith also notes that “here in Kukes there is ample evidence that the KLA’s recruitment activities, training and field operations are receiving at least tacit allied military assistance.” *Id.*

63. *Id.*

64. See generally General Wesley K. Clark, Supreme Allied Commander, Europe, Press Conference on the Kosovo Strike Assessment (Sept. 16, 1999), available at <http://www.fas.org/man/dod-101/ops/docs99/p990916a.htm>. Hartwig Nathe asked, “how can you explain the role of the KLA during the air campaign?” General Clark replied:

In conducting the air campaign against the forces in the field in Kosovo, we used every conceivable bit of information we could find. But we never had direct information from, cooperation or coordination with the KLA. We just kept our eyes and ears open, and what information was made available, what targets appeared, those we struck.

*Id.*

65. Smith, *supra* note 62, at A25; see also INTERNATIONAL CRISIS GROUP, WAR IN THE BALKANS: CONSEQUENCES OF THE KOSOVO CONFLICT AND FUTURE OPTIONS FOR KOSOVO AND THE REGION (1999) (revealing NATO cooperation with the KLA), available at <http://www.crisisweb.org/projects/sbalkans/reports/kos20main.htm>.

Although NATO troops are already stationed in Macedonia, and KLA spotters near the border are already providing NATO with intelligence critical to a safe deployment [of NATO ground troops] . . . NATO is in close consultation with KLA commanders, who are providing NATO with some of the only on-the-ground information on the situation in Kosovo that the alliance receives . . . . The combination of increased NATO air strikes and the possibility of the KLA marking individual Serbian units on the ground—either to help guide NATO’s strikes, or to fight against them with anti-tank weapons and ammunition it has procured on its own—may serve to reduce the number of Serb military units still in Kosovo . . . .

*Id.*

66. Roberts, *supra* note 32, at 110-11.

a land option proved to be one of the most important and difficult tasks.<sup>67</sup>

The drastic increase in violence against ethnic Albanians in Kosovo after the bombing started put even more pressure on NATO commanders to do something to stop the killing. Without eyes and ears in Kosovo, it was obvious they could not stop the FRY forces with aerial bombing alone.

During a 27 May 1999 Pentagon briefing, Rear Admiral Thomas Wilson, the top intelligence officer for the Joint Chiefs of Staff, stated: "NATO warplanes are targeting Yugoslav mechanized armor and heavy weapons on the ground in part to 'level the playing field' between the secessionist militia and its adversaries."<sup>68</sup> Admiral Wilson reiterated that the "KLA is not a partner in the war . . ."<sup>69</sup> Pentagon spokesman Kenneth Bacon clarified that Admiral Wilson was not implying a new relationship with the KLA:

He just stated the obvious, which is that after 64 days of pounding, the [Serb forces] have been diminished in their capability . . . . [O]ur goal has never been to empower the KLA to create more fighting. Our goal has been to end fighting in Kosovo.<sup>70</sup>

Mr. Bacon's statement seems to contradict the statement by the Chairman of the Joint Chiefs of Staff concerning the mission of the Kosovo campaign:

Diplomacy and deterrence having failed, we knew that the use of military force could not stop Milosevic's attack on Kosovar civilians, which had been planned in advance and already was in the process of being carried out. The specific military objectives we set were to attack his ability to wage combat operations in the future against either Kosovo or Serbia's neighbors. *By weakening his*

*ability to wage combat operations, we were creating the possibility that the military efforts of the [Albanian Kosovars], which were likely to grow in intensity as a result of Milosevic's atrocities in Kosovo, might be a more credible challenge to Serb armed forces.*<sup>71</sup>

A plain reading of the Chairman's comments reveals a specific intent to assist the KLA in their war against the Yugoslav Army. There was no mention of humanitarian intervention. It appears that the intent was indeed "to empower the KLA to create more fighting."

On 2 June 1999, in a front page story, *The Washington Post* revealed that, contrary to Admiral Wilson's assertion above, the KLA and NATO were in fact partners in the war. Dropping all previous pretexts, NATO warplanes provided coordinated air support to a massive KLA offensive called Operation Arrow.<sup>72</sup>

NATO and the Clinton administration have denied helping the KLA directly . . . . But U.S. intelligence officials said NATO responded last week to "urgent" KLA pleas for air support to rebuff a Serb counterattack on Mount Pastrok just inside Kosovo. The bombings marked the first known air support by NATO aircraft for the Kosovo rebels.<sup>73</sup>

The Pentagon continued to deny a direct link between NATO's air strikes and the KLA, but KLA official Visa Reka, when asked whether NATO and the KLA were coordinating strategies replied: "I wouldn't say coordination. I would say that NATO is following with much more care and interest [in] what is happening."<sup>74</sup> The story noted that NATO and KLA forces routinely talked to each other on the telephone, NATO regularly monitored KLA communications, and the KLA kept NATO informed of its positions.<sup>75</sup>

67. *Id.* at 112.

68. William Claiborne, *KLA Improving Its Status, Pentagon Says: Training, Leadership, Equipment, Number of Kosovo Guerrillas on the Upswing* WASH. POST, May 28, 1999, at A31.

69. *Id.*

70. *Id.*

71. See Press Release, Prepared Joint Statement on the Kosovo After Action Review Presented by Secretary of Defense William S. Cohen and General Henry H. Shelton, Chairman of the Joint Chiefs of Staff, Before the Senate Armed Services Committee (Oct. 14, 1999) at 1 (emphasis added), available at [http://www.defenselink.mil/news/Oct1999/b10141999\\_bt478-99.html](http://www.defenselink.mil/news/Oct1999/b10141999_bt478-99.html).

72. Dana Priest & Peter Finn, *NATO Gives Air Support to Kosovo Guerrillas: But Yugoslavs Repel Attack From Albania*, WASH. POST, June 2, 1999, at A1, A17.

73. *Id.*

74. *Id.*

75. *Id.*

The decisive battle of the war occurred on 7 June 1999 on Mount Pastrik. Two days after this devastating NATO air strike, Yugoslav generals signed an agreement that eventually ended the campaign.<sup>76</sup> The KLA had been fighting its way down Mount Pastrik for several days, attempting to establish a new supply line.<sup>77</sup> Serbian forces were massed on the Kosovo side of the mountain, successfully stalling the KLA assault. The KLA called in the Serbian positions to NATO, and U.S. B-52 and B-1 bombers delivered the decisive blow.<sup>78</sup>

It seems fairly clear that NATO provided indirect and direct military support to the KLA in its war for independence from Yugoslavia. Whether the KLA used NATO or NATO used the KLA, the result was a victory for the KLA and another messy, long-term Balkan entanglement for NATO and the United States.

### Intervention in Civil Wars

#### *Traditional Rule v. Intervention: The Nicaragua Case and Other Civil War Examples*

*[T]he combined right of victims to assistance and the right of the Security Council to authorize humanitarian intervention with military means do not amount to a right of humanitarian intervention by states, individually or collectively. Indeed, the overwhelming majority of international lawyers consider that such a right cannot be recognized because it would violate the [UN] Charter's prohibition of the use of force. This prohibition would hold even in the case in which international law recognizes most clearly the absolute character of the rights protected, that is humanitarian law.*<sup>79</sup>

—This quote succinctly states the traditional rule regarding the use of force to intervene in a civil war setting like Kosovo. It is

prohibited. The Charter prohibition referred to in the quote is contained in Article 2(4), which states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes<sup>80</sup> of the United Nations.<sup>81</sup>

In Kosovo, NATO used force to intervene in the internal affairs of a sovereign nation. Whether intended or not, NATO's intervention assisted ethnic minority fighting for independence.<sup>82</sup> It appears to have violated the traditional rule.

Javier Solana, the Secretary-General of NATO at the time, recognized this was a violation of Article 2(4), but felt that an exception was in order:

The ACTORD<sup>83</sup> of October 1998 had already raised the difficult issue of whether NATO could threaten the use of force without an explicit Security Council mandate to do so. The allies agreed that NATO could—for it had become abundantly clear that such a step was the only likely solution. It was equally clear, though, that such a step would constitute the exception from the rule, not an attempt to create new international law.<sup>84</sup>

It would appear that no further analysis is required. The UN Charter clearly prohibits the unauthorized use of aggression to intervene in the affairs of a sovereign state. There exists in the Charter, however, another equally important purpose: respect for human rights and the self-determination of peoples.<sup>85</sup>

The UN expanded on these principles in the form of two important resolutions. In 1970, the UN General Assembly released the Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance

76. John Ward Anderson, *NATO's Most Lethal Airstrike Ended a Battle, Perhaps a War: In Mid-Struggle with Rebels, Serbs Took Decisive Hit*, WASH. POST, June 26, 1999, at A01, A18.

77. *Id.*

78. *Id.*

79. Guicherd, *supra* note 42, at 23.

80. "Purposes" is capitalized because it refers to the four "Purposes" contained in Chapter I, Article 1 of the Charter. In summary, they are: (1) To maintain international peace and security; (2) To develop friendly relations among nations; (3) To achieve international cooperation in solving problems; and, (4) To be a center for harmonizing the actions of nations in the attainment of these common ends. *Id.* For purposes of this article, Purpose 1 contains the important phrase "suppression of acts of aggression." The illusive definition of aggression will be discussed later.

81. U.N. Charter, *reprinted in* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW DOCUMENTS 90 (1995).

82. See John T. Correll, *The Doctrine of Intervention*, A.F. MAG. (Feb. 2000).

83. ACTORD refers to the North Atlantic Council's Activation Order for air operations against Yugoslav military assets. See Solana, *supra* note 31, at 116.

84. *Id.* at 118.

with the Charter of the United Nations (Resolution 2625).<sup>86</sup> Considered to be the authoritative statement of the right to self-determination, Resolution 2625 states that “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development . . . .”<sup>87</sup> Resolution 2625 imposes a duty on every state to “promote, through joint and separate action, realization”<sup>88</sup> of self-determination and authorizes the subjugated peoples to “seek and to receive support in accordance with the purposes and principles of the Charter.”<sup>89</sup> As one author notes:

The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case. Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter.<sup>90</sup>

It would appear that Resolution 2625 supports NATO’s intervention in Kosovo. What once was a general principle contained in the UN Charter, has now been elevated to the level of a fundamental human right, that is, “self-determination and the correlative prohibition of States using force to deprive peoples of that right.”<sup>91</sup> The problematic prohibition of unlawful aggression, however, remains.

In 1974, the UN General Assembly issued its “Definition of Aggression,” Resolution 3314.<sup>92</sup> Resolution 3314, Article 3, prohibits “[t]he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts

of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”<sup>93</sup> This language seemingly prohibited Operation Allied Force. Article 7 of Resolution 3314, however, states that nothing in Article 3 “could in any way prejudice the right of self-determination . . . of peoples forcibly deprived of that right . . . nor the right of these peoples to struggle to that end and to seek and receive support . . . .”<sup>94</sup> One author sums up the conflict this way:

An apparent inconsistency therefore exists under Resolutions 3314 and 2625. Certain peoples have the right to overthrow repressive regimes and to receive some degree of external assistance in achieving self-determination, as viewed from the perspective of those peoples. Yet such external “support” provided by a state must conform to the general prohibition on interfering with the territorial integrity and political independence of another state. The apparent inconsistency really can only be resolved by returning to the basic Charter purposes that originally contemplated self-determination and state sovereignty as being mutually reinforcing principles. Any other formulation would effectively embrace one of the principles to the exclusion of the other. Therefore, if the right to receive support in seeking self-determination is to retain any meaning under Resolutions 3314 and 2625, certain forms of external assistance that are otherwise defined as direct or indirect aggression may be permissible if they are provided in support of a people struggling for self-determination.<sup>95</sup>

85. See U.N. CHARTER art. 1, para. 2; see also Captain Benjamin P. Dean, *Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model*, 122 MIL. L. REV. 149, 151 (1988) (noting that: “In light of the Charter’s stated purposes, these two principles were designed to be mutually reinforcing. In the context of insurgencies and national liberation movements, striking the balance between these has become a continuing source of controversy within the international legal community.”).

86. G.A. Res. 2625, GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/2625 (1970), reprinted in MOORE, *supra* note 81, at 144-52.

87. *Id.*

88. *Id.*

89. *Id.*

90. Dean, *supra* note 85, at 153-54 (footnotes omitted).

91. MICHAEL A. MEYER & HILAIRE MCCOUBREY, REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 185 (1998).

92. G.A. Res. 3314, GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3314 (1974). The resolution was adopted without a vote on December 14, 1974. *Id.*

93. *Id.*

94. *Id.*

95. Dean, *supra* note 85, at 166 (footnotes omitted).

In light of these two resolutions, one might ask if there is in fact a traditional rule of non-intervention. As this article will demonstrate, intervention in civil wars on the side of rebel insurgents has a long history of acceptance in international law.<sup>96</sup>

### *Civil War*

*Americans should be very wary about intervention in civil wars over self-determination. The principle is dangerously ambiguous; atrocities are often committed by activists on both sides and the precedents can have disastrous consequences.*<sup>97</sup>

This warning concerning our involvement in Kosovo went unheeded for many reasons. The primary reason was the natural affinity of Americans for helping people fight off the yoke of oppression and win independence.<sup>98</sup> American history promotes this belief.<sup>99</sup> There is a valid concern, however, that anarchy will reign if every ethnic minority within every sovereign state fights for independence.<sup>100</sup> How does one determine which civil wars are legal and which are not? When, if ever,

can a third state use force to intervene on behalf of a rebel insurgent group? There is no clear-cut test.

Some authors have developed criteria for determining when a third-party state can use force to support a rebel insurgency.<sup>101</sup> Others have proposed standards for the initiation of hostilities in support of governments facing rebel insurgents.<sup>102</sup> One author identifies the central problem as follows:

This issue of who is a proper subject for protection as a “people” paradoxically has become an obstacle to constructive efforts at ensuring self-determination and humane treatment of peoples. As the law struggles to distinguish between popular democratic movements and radical opposition groups, the labels “freedom fighter” and “terrorist” have become interchanged carelessly. The same 1985 General Assembly resolution that reaffirmed the right of self-determination also purported to condemn all acts of terrorism as criminal conduct. The Resolution is widely viewed, however, as permitting an exception for terrorist violence in national

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96. See MOORE, *supra* note 1, at 122 (noting that the Organization of African Unity and the Arab League openly support national liberation movements, believing that regional assistance to insurgent groups for the purpose of restoring self-determination is not “enforcement action” requiring Security Council authorization. Professor Moore, however, states that “the prevailing view seems to be that, absent United Nations authorization, assistance to insurgent groups is unlawful.”).

97. Nye, *supra* note 16, at 33.

98. See Baggett, *supra* note 20, at 457.

99. See TOWNSEND HOOPES & DOUGLAS BRINKLEY, *FDR AND THE CREATION OF THE U.N.* 104 (1997) (writing about FDR’s discussions with Stalin regarding a Baltic states plebiscite) (“He [FDR] wanted Stalin to understand the great importance the American people attached to the idea of self-determination.”).

100. See Nye, *supra* note 16, at 30-31.

It is true that old-fashioned state sovereignty is eroding—both *de facto*, through the penetration of national borders by transnational forces, and *de jure*, as seen in the imposition of sanctions against South Africa for apartheid, the development of an International Criminal Court, and the bombing of Yugoslavia over its policies in Kosovo. But the erosion of sovereignty is a long-term trend of decades and centuries, and it is a mixed blessing rather than a clear good. Although the erosion may help advance human rights in repressive regimes by exposing them to international attention, it also portends considerable disorder. Recall that the seventeenth-century Peace of Westphalia created a system of sovereign states to curtail vicious civil wars over religion. Although it is true that sovereignty stands in the way of national self-determination, such self-determination is not the unequivocal moral good it first appears. In a world where there are some two hundred states but many thousands of often overlapping entities that might eventually make a claim to nationhood, blind promotion of self-determination would have highly problematic consequences.

*Id.*

101. See Dean, *supra* note 85, at 162.

As to the status of entities other than states that might be able to assert rights under international law, a group in armed opposition to an established government traditionally could rise to the status of belligerent only if it met certain defined criteria. Thus, classified, it could then assert an international status that imposed a legal requirement of neutrality on third states in their relations with the two combatants. These prerequisites for belligerent status included: (1) a well-organized opposition group; (2) conventional military operations conducted in compliance with the law of war; and, (3) *de jure* or *de facto* control over an identifiable portion of the territory or population.

*Id.* (citations omitted).

102. See MOORE, *supra* note 1, at 140-44. Professor Moore provides standards for various factual scenarios. For example: military assistance to a widely recognized government—both prior to insurgency and after insurgency is reached; intervention for the protection of human rights; impermissible assistance to a faction challenging the authority structure of a state; and assistance to offset impermissible assistance to insurgents.

liberation struggles against colonial domination, alien occupation, and racist regimes.<sup>103</sup>

The question remains: Could NATO have intervened with force in Kosovo solely to assist the KLA in its fight for an independent Kosovo?

The Montevideo Convention on Rights and Duties of States, written in 1933 and adopted by the Seventh International Conference of American States, lists four requirements that are considered the customary characteristics of statehood in modern international law: “a permanent population, a defined territory, [a] government, and a capacity to enter into relations with other States.”<sup>104</sup> Ted Baggett argued that the Albanian Kosovars met all four of the requirements and that the UN or NATO should have intervened to help them win independence.<sup>105</sup>

Mr. Baggett relied on two distinguished international legal scholars, Bryan Schwartz and Susan Waywood, to support his argument. Schwartz and Waywood posed fourteen criteria for determining whether repressed minorities can assert their right to self-determination.<sup>106</sup> Mr. Baggett concluded that Kosovo satisfied most of the requirements under the Schwartz-Waywood analysis.<sup>107</sup> The Schwartz-Waywood concept of self-determination is based on a belief that “individuals do not exist to serve the state, but governmental structures exist to serve individuals.”<sup>108</sup> They proposed the following standard:

In general, the population of part of an existing state only has a unilateral right to self-determination in the form of sovereign statehood when it is clear that the existing state has engaged in the serious denial of these basic rights, and there is no realistic possibility that these rights can be honored within a reasonable time frame by less drastic means

such as limited self-government within the existing state.<sup>109</sup>

Kosovo satisfied the standard articulated by Schwartz and Waywood. In March 1989, Serbia rewrote its constitution, stripping Kosovo of its autonomy.<sup>110</sup> In December of the following year, Milosevic was elected president of Yugoslavia.<sup>111</sup> Thus began years of oppression, violence and subjugation. The Albanian Kosovars had tried “less drastic means” of regaining their self-determination for over eight years. Finally fed up with the situation, the KLA began to implement more drastic means. They gained support, got stronger, and eventually forced Milosevic to resort to all out war in Kosovo. Applying the Schwartz-Waywood standard, the Albanian Kosovars were fully justified in exercising their right to fight for an independent Kosovo under these circumstances. This conclusion is further supported, noted Mr. Baggett, by the way Kosovo was treated following the Yugoslavia breakup:

The question that needs to be asked is why Kosovo was treated differently from other provinces in the former Yugoslavia. The other provinces, now states, asserted similar claims to the right of self-determination. Intervention was utilized for every other former province of Yugoslavia that has now been established as a separate nation. Why is it that Slovenia, Croatia, FYROM, and Bosnia and Herzegovina are entitled to nationhood and Kosovo is not?<sup>112</sup>

While the Albanian Kosovars may have been justified in exercising their right to fight for an independent Kosovo, popular support for the KLA quickly eroded after the war.<sup>113</sup> If an election was held in the fall of 1999, Ibrahim Rugova, the moderate Albanian leader who led the passive resistance campaign against the Serbs, would have won with ninety-two percent of

103. Dean, *supra* note 85, at 161. The resolution referred to is Resolution 2625.

104. Baggett, *supra* note 20, at 471 (citing P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW* 32 (1994)).

105. *Id.* at 471-72.

106. *Id.* at 472-73 (citing Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Succession*, 11 N.Y. INT'L L. REV. 1 (1998)).

107. *Id.* at 474.

108. *Id.* at 472-73.

109. *Id.* at 473 (citation omitted).

110. See MERTUS, *supra* note 2, at 295-96.

111. *Id.* at 297.

112. Baggett, *supra* note 20, at 474 (citations omitted). Mr. Baggett notes that the most common argument against an independent Kosovo is the fear of a “Greater Albania.” The KLA announced at one point that they were “fighting for the liberation of all occupied Albanian territories . . . and their unification with Albania.” *Id.* at 475. He makes the valid point that there is no evidence that all ethnic Albanians in the surrounding Baltic countries support this idea.

113. See Peter Finn, *Support Dwindles for Kosovo Rebels: Ethnic Albanians Dismayed by KLA's Violence, Arrogance*, WASH. POST, Oct. 17, 1999, at A1.

the vote against Hashim Thaqi, the political leader of the KLA.<sup>114</sup> The KLA's arrogant power grabs after the war, to include installing their people in local leadership positions, angered and alienated many Albanians.<sup>115</sup>

If the KLA did not have widespread support among Albanian Kosovars, then arguably they were just a terrorist organization, and NATO's de facto military support for the KLA, therefore, would have been illegal. However, before and during the bombing campaign the KLA did have widespread support. Its forces held up to one third of the Kosovo territory, and Kosovo Albanians had declared their independence and even held their own elections.<sup>116</sup> Clearly, the KLA had risen to the level of a legitimate rebel force and they met the standards to be considered an insurgent group, rather than a mere terrorist organization.

### *The Nicaragua Case*

*The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. . . . "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."*<sup>117</sup>

This is the International Court of Justice's (ICJ) statement of the traditional view of non-intervention in *Nicaragua v. United States*. The ICJ went on to find that:

[T]he support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the contras in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention.<sup>118</sup>

By a twelve to three vote, the ICJ rejected the U.S. collective self-defense justification for its intervention.<sup>119</sup> In his dissent, Judge Schwebel disagreed with the majority holding that the U.S. unlawfully intervened in Nicaragua.<sup>120</sup> Nevertheless, applying Judge Schwebel's rationale to the Kosovo scenario, customary international law would prohibit NATO's intervention in Kosovo. Judge Schwebel wrote:

In contemporary international law, the right of self-determination, freedom and independence of peoples is universally recognized. [T]he right of peoples to struggle to achieve these ends is universally accepted; but what is not universally recognized and what is not universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion. This is true whether the struggle is or is proclaimed to be in pursuance of the process of decolonization or against colonial domination.<sup>121</sup>

At least one author, Anthony D'Amato, has caustically criticized the ICJ's *Nicaragua* opinion for its analysis of customary international law:

[T]he Nicaragua case was not forged out of the heat of adversarial confrontation. Instead, it reveals the judges of the World Court deciding the content of customary international law on a *tabula rasa*. Sadly, the Judgment reveals that the judges have little idea about what they are doing.<sup>122</sup>

Instead of starting with state practice and the resulting customary international law, Mr. D'Amato notes that the ICJ begins

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114. *Id.* at A26.

115. *Id.*

116. MERTUS, *supra* note 2, at 295-97.

117. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27) (Merits) (citation omitted).

118. *Id.* at 124 (Merits) (citation omitted).

119. *See id.* at 146. The United States, however, never argued on the merits because it declined to submit to the jurisdiction of the court.

120. *See id.* at 381-85 (dissenting opinion of Judge Schwebel).

121. *Id.* at 351. One must remember that Judge Schwebel is referring to Nicaragua's actions with respect to El Salvador, not United States actions with respect to the Contras.

with a disembodied rule, that is, non-intervention, and finds that state acceptance of this rule in various treaties is *opinio juris*:

The Court thus completely misunderstands customary law. First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, *opinio juris* has nothing to do with “acceptance” of rules in such documents. Rather, *opinio juris* is a psychological element associated with the formation of a customary rule as a characterization of state practice.<sup>123</sup>

If one follows the logic of the ICJ, Mr. D’Amato contends, then state practice carries no authority if it conflicts with a treaty rule.<sup>124</sup>

After listing several examples of state interventions directly contrary to the ICJ’s non-intervention theory of customary international law—for example, humanitarian intervention, antiterrorist reprisals, individual as well as collective enforcement measures, and new uses of transboundary force such as the Israeli raid on the Iraqi nuclear reactor<sup>125</sup>—Mr. D’Amato states:

The process of change and modification over time introduces a complex element that is missing from the Court’s handling of Article 2(4). It is true that when 2(4) was adopted as part of the UN Charter in 1945, it had a major impact upon customary law. But Article 2(4) did not “freeze” international law for all time subsequent to 1945 (no more than an equivalent customary-law incident would have done). Rather, the rule of Article 2(4) underwent change and modification almost from

the beginning. Subsequent customary practice in all the categories mentioned above has profoundly altered the meaning and content of the non-intervention principle articulated in Article 2(4) in 1945.<sup>126</sup>

The facts of the *Nicaragua* case are sufficiently distinguishable from the Kosovo conflict to render it of little use in analyzing whether NATO properly used force against Yugoslavia. Further, because the ICJ’s analysis of the customary international law concerning non-intervention virtually ignored state practice, it seriously undermined the decision’s precedential value. A more useful exercise would be to examine actual situations in which third states intervened in civil wars and the reaction of the international community to these interventions.

#### *Other Civil War Intervention Examples*

*It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.*<sup>127</sup>

An examination of civil wars resulting in intervention by foreign states reveals a consistent theme. When states intervene on one side or the other in a civil war, a legal justification is rarely offered by the intervening state or demanded by the international community. One author, A. Mark Weisburd, concludes that: “Almost none of the intervening states encountered sanctions from third states.”<sup>128</sup> After examining nineteen examples of civil wars with international involvement, from the Greek Civil War (1946-1949) to the Liberian Civil War (1989-1997), Mr. Weisburd states:

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122. Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 101-02 (1987). *But see* Tom J. Farer, *Drawing the Right Line*, 81 AM. J. INT’L L. 112 (1987). Mr. Farer praises one aspect of the ICJ opinion in the *Nicaragua* case: “While this is not an inevitable interpretation of contemporary international law, in my judgment it is the one that most effectively reconciles the international system’s preeminent interests: conflict containment and national sovereignty (expressed in terms of territorial integrity and political independence).” *Id.* at 113. Mr. Farer’s support for the opinion, however, does not conflict with the faults noted by Mr. D’Amato. For purposes of this article and the argument that NATO’s use of force to support the KLA was lawful, Mr. Farer notes that:

In the colonial context and in the name of national self-determination, the United Nations has gone behind the political institutions established by metropolitan governments to locate sovereignty in the people of the territory. There is, therefore, some precedent at the global level for regarding people, not governments, as the ultimate locus of sovereignty.

*Id.* at 115. This recognizes the trend, discussed above, that international law supports the rights of individuals and minorities at the expense of state sovereignty. *See* Guicherd, *supra* note 42, at n.40.

123. D’Amato, *supra* note 122, at 102.

124. *Id.*

125. *Id.* at 103 (citations omitted).

126. *Id.* at 104.

127. *Military and Paramilitary Activities (Nicar. v. United States)*, 1986 I.C.J. 14, 97 (June 27) (Merits) (citation omitted).

Taking all these events together, then, it appears that interventions in civil strife are frequent and that there seems to be a high degree of international acceptance of such interventions. Applying the obey-or-be-sanctioned standard, it would appear that interventions of this type should not be considered unlawful.<sup>129</sup>

All of these conflicts occurred after the creation of the United Nations—and after adoption of Article 2(4). This article briefly examines three of these conflicts and compares them to NATO's intervention in Kosovo.

In the Laotian May 1958 elections, the Communist Lao Patriotic Front (LPF) handily defeated the opposition, rightist military officers backed by the United States, giving rise to the Laotian Civil War (1959-1975). During this civil war, Weisburd asserts, the United States provided military equipment and civilian-clothed advisors, organized various "irregular" units, and even began bombing targets in Laos at the same time it was bombing targets in Vietnam.<sup>130</sup> The Democratic Republic of Vietnam (DRV) was also providing assistance to the LPF.<sup>131</sup> The United States initially tried to conceal its activities, but after it admitted bombing communist targets in Laos, it justified its use of force by pointing to communist activities in Laos.<sup>132</sup> In summary, Mr. Weisburd concludes:

This case, then, involved support of internal factions by outside states, which included active participation in combat. To the extent that they justified their actions, the outside states did so by reference to one another's activities. Their motives were ideological . . . Third states reacted very little to the situ-

ation, apparently seeing it, understandably, as inseparable from the larger problem of the Second Indochina War.<sup>133</sup>

In the Chadian Civil Wars (1969-1972, 1975-1993), as in Kosovo, a Muslim minority rebelled against the oppression of non-Muslim President Tombalbaye. France supported President Tombalbaye. Libya supported the Muslim rebels. Mr. Weisburd notes that: "The conflict attracted little third-state interest and no sanctions."<sup>134</sup> Further, the "United Nations played almost no role in this crisis."<sup>135</sup> Even after Libya became a combatant in the conflict and occupied substantial areas of Chad, "no UN organ made any serious effort to address the conflict, preferring to leave it to the [Organization of African Unity] with its traditionally mediational approach."<sup>136</sup>

Finally, in the Liberian Civil War (1989-1997), the National Patriotic Front of Liberia revolted against the government of President Samuel Doe. The fighting between ethnic groups was extremely brutal and many civilians were caught in the middle.<sup>137</sup> Eight months into the civil war, the Economic Community of West African States (ECOWAS) deployed a peace-keeping force in Liberia "citing the danger to nationals of member states then in Liberia and the refugee problem the war was creating for the region."<sup>138</sup> The fighting continued for several years and President Doe was eventually assassinated. Most third-party states supported the ECOWAS intervention, and the UN Security Council adopted a resolution commending the work of ECOWAS.<sup>139</sup>

The Liberian Civil War most resembles the Kosovo intervention, "a civil war in which a regional organization intervened."<sup>140</sup> The UN failed to condemn ECOWAS's non-UN-authorized use of force; in November 1992, more than two years after ECOWAS deployed its forces, the UN actually

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128. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 207 (1997).

129. *Id.*

130. *Id.* at 180-81.

131. *Id.*

132. *Id.* at 181.

133. *Id.* at 181-82.

134. *Id.* at 190.

135. *Id.* at 195.

136. *Id.* at 196.

137. *Id.* at 204.

138. *Id.* at 204-05.

139. *Id.* at 205.

140. *Id.* at 206.

blessed the ECOWAS operation with a resolution.<sup>141</sup> Owing to this example, Mr. Weisburd concludes “it would appear that such multilateral interventions may be considered affirmatively lawful.”<sup>142</sup>

*Self-Determination and the Need for a New Interpretation of Article 2(4)*

*Invocations of state sovereignty to justify gross human rights abuses is unequivocally contrary to international law. Moreover, in 1989 Serbian politicians illegally stripped Kosovo of its autonomous status in old Yugoslavia, shortly before that country was torn apart. This calls the legal status of Kosovo within Serbia into question and exposes the fallacy of claims that it is an internal Serbian problem.*<sup>143</sup>

At least three authors argue for a new interpretation of UN Charter Article 2(4).<sup>144</sup> The argument is that humanitarian intervention “is not directed against the territorial integrity or political independence of the state in which it takes place . . . .”<sup>145</sup> Further, while the Charter does not specifically authorize unilateral or collective humanitarian intervention, “neither does it specifically abolish the traditional doctrine.”<sup>146</sup> What happens when humanitarian intervention is combined with a civil war in which the victims are fighting for self-determination? In other words, could NATO intervene both to prevent human rights abuses and to assist the KLA regain self-determination for Albanian Kosovars? If self-determination is a recognized

“right” under international law, then assisting the KLA in its fight for self-determination is still humanitarian intervention. The problem is that self-determination can lead to independence, which is in fact “directed against the territorial integrity or political independence of the state in which it takes place . . . .”<sup>147</sup>

Most scholars would agree that the legal concept of self-determination did not qualify as a rule of international law at the creation of the UN Charter.<sup>148</sup> Self-determination is not mentioned in the 1948 Universal Declaration of Human Rights.<sup>149</sup> Self-determination gradually moved from a general “principle” to a “right” that was formalized in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>150</sup> The question remained, however, whether the right existed outside of the decolonization context:<sup>151</sup>

A continuing debate among international lawyers is whether or not there exists a *right* to self-determination in customary international law, and, if so, whether or not it is limited to colonial situations. Professors Brownlie and Gros Espiell submit that the right to self-determination constitutes *jus cogens*, a peremptory norm of international law, while Professor Verzijil represents the other extreme in holding that self-determination is “unworthy of the appellation of a rule of law.”<sup>152</sup>

It is clear that the right of self-determination “exists for peoples under colonial and alien domination, that is to say, who are not

141. *Id.* at 205.

142. *Id.* at 208; *see also* Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F.L. REV. 235, 258 (1997) (citation omitted):

ECOWAS has never requested [UN Security] Council approval of the operation, nor has the Council ever passed judgment on its legality. This suggests either that in “commending” ECOWAS the Council was authorizing future ECOMOG [ECOWAS Monitoring Group] activities in Liberia, or that the Council decided ECOWAS needed no formal authorization.

*Id.*

143. MERTUS, *supra* note 2, at 279.

144. *See* Guicherd, *supra* note 42, at 24; *see also* MOORE, *supra* note 1, at 149.

145. Guicherd, *supra* note 42, at 24.

146. MOORE, *supra* note 1, at 152.

147. Guicherd, *supra* note 42, at 24.

148. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 33 (1996).

149. *See id.*

150. *See id.* (citing G.A. Res. 1514, UN GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960)).

151. *See* HANNUM, *supra* note 148, at 34, 44.

152. *Id.* at 44-45 (citations omitted) (emphasis in original).

living under the legal form of a State.”<sup>153</sup> But for the exception of Bangladesh, however, “no secessionist claim has been accepted by the international community since 1945.”<sup>154</sup>

*Secession: When Does the Right to Secede Arise?*

Why did Yugoslavia rewrite its constitution and take away Kosovo’s autonomy? Among other reasons, it probably feared that autonomy would lead to outright secession. Recent examples, however, do not support this fear. One author found that negotiated autonomy does not lead to secession.<sup>155</sup> In fact, ethnic states that won some form of independence in the 1990s “did so in the absence of negotiations, not because of them.”<sup>156</sup> Further, “[i]n most recent wars of self-determination, fighting usually began with demands for complete independence and ended with negotiated or *de facto* autonomy within the state.”<sup>157</sup>

The restrictive view of secession under the UN Charter is that the right of self-determination is consistent with the Charter “only insofar as it implied the right of self-government of peoples and not the right of secession.”<sup>158</sup> The expansive view of secession holds “the right of peoples everywhere to establish any regime they chose . . . .”<sup>159</sup> To date, no author asserts that international law currently recognizes a right of secession.<sup>160</sup> There is a common string running through the debate, however, which may justify the right to secede: the violation of fundamental rights by the state.<sup>161</sup> One author contends that the “only reliable test for determining the reasonableness of self-determination has to be the nature and extent of the deprivation of human rights of the subgroup claiming the right.”<sup>162</sup> Arguably, the Albanian Kosovars had more than sufficient grounds to support a legitimate demand for secession.

Prior to initiating its bombing campaign in Kosovo, NATO should have followed the example of the Organization of American States (OAS) in 1979. In a bold and principled move the OAS withdrew recognition of the Somoza government in Nicaragua on human rights grounds, declaring *inter alia* “[t]he inhuman conduct of the dictatorial regime governing the country . . . . [i]s the fundamental cause of the dramatic situation faced by the Nicaraguan people.”<sup>163</sup> Was the situation in Kosovo any less “dramatic” than that in Nicaragua?

In the fall of 1999, just months after the campaign in Kosovo ended, it became clear that U.S. officials privately considered Kosovo independence a foregone conclusion. On 24 September 1999, *The Washington Post* reported that: “Senior U.S. officials have privately dropped their opposition to Kosovo’s independence from Yugoslavia and say the Clinton administration increasingly sees the province’s secession as inevitable.”<sup>164</sup> While continuing to publicly declare it had not changed its policy, one official stated off the record: “Our attitude before the war was, it’s better if it doesn’t happen. Now, we know it’s clearly on the way . . . . [I]t’s the mostly unspoken assumption [of all U.S. policy-makers.]”<sup>165</sup> Had Yugoslavia not taken away Kosovo’s autonomy in 1989, the KLA probably never would have surfaced, the civil war could have been avoided, and perhaps the province’s secession would not have been inevitable.

*The Humanitarian Intervention Factor*

Did the presence of human rights abuses by Yugoslavia against the Albanian Kosovars tip the scales in favor of using force to intervene on behalf of the KLA? Prior to the creation of the UN, the notion of humanitarian intervention was recog-

153. *Id.* at 46 (citation omitted).

154. *Id.*

155. See Ted Robert Gurr, *Ethnic Warfare on the Wane*, FOREIGN AFFAIRS, May/June 2000.

156. *Id.* at 56.

157. *Id.* at 57.

158. Jane E. Stromseth, *Self-Determination, Secession and Humanitarian Intervention by the United Nations*, in PROCEEDINGS OF THE 86TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 370 (1992).

159. *Id.*

160. See HANNUM, *supra* note 148, at 471; see also Stromseth, *supra* note 158, at 374. The international community may not be willing to recognize a right to secede, but it may be willing to shine the spotlight of world scrutiny on struggles for self-determination, and—at least today—the principle of domestic jurisdiction is unlikely to stand in the way.

161. See HANNUM, *supra* note 148, at 471.

162. *Id.* at 472 (citation omitted).

163. *Id.* at 470.

164. R. Jeffrey Smith, *U.S. Officials Expect Kosovo Independence: Secession Increasingly Is Seen as Inevitable*, WASH. POST, Sept. 24, 1999, at A01, A24.

165. *Id.*

nized where the “the treatment of a state to its nationals shocks the conscience of mankind.”<sup>166</sup> Most authors agree that the Charter replaced these self-help measures and now precludes unilateral humanitarian intervention.<sup>167</sup>

Post-UN Charter, humanitarian intervention without UN approval is still recognized but strictly limited.<sup>168</sup> Generally, it should be used as a last resort, have a limited duration, and should not be aimed at a permanent transformation of pre-existing legal arrangements—for example, the secession of a province.<sup>169</sup> To these “classical conditions,” one author adds two additional criteria:

(1) [A]ny humanitarian military intervention should be carried out by a group of states—whether they act in the context of an alliance, a regional organisation, or a “coalition of the willing”—so as to dispel the suspicion that intervention is undertaken for the sake of narrow national interest.

(2) [T]he participating states should act in close coordination with the UN, demonstrate a clear readiness to obtain *post facto* legitimisation by the Security Council and, when possible, to hand the matter back to the UN.<sup>170</sup>

It is well established in international law that state sovereignty may be subordinate to the self-determination goals of an oppressed group.<sup>171</sup> The rationale being that the inviolability of a state from external interference is based on the assumption that the state is meeting its international human rights obligations to its citizens. Kosovo was not simply a civil war. It was a unique situation in which well-established autonomy had been stripped away and brute force used to oppress and brutalize an ethnic minority.

The clear trend is that the protection of human rights, minority rights, and self-determination are no longer considered internal, domestic problems, off limits to outside interference.<sup>172</sup> This is especially so when the conflict spills over into neighboring states.

### Intervention’s Ramifications

NATO would have taken criticism and suffered repercussions no matter what justification it formulated for intervening in Kosovo. That does not mean it should not have acted. Taking a leadership role in a volatile situation is never easy. The problem for NATO is that it relied on a politically correct, questionable, and at times, non-existent legal bases for using force against Yugoslavia. If it had taken an aggressive but sound legal position, it still would have angered some states, but in the end the criticism would be about its aggressiveness and not its lack of clarity and legal indecisiveness. Smoothing over the

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166. MOORE, *supra* note 1, at 147 (citing R. Lillich, *Forcible Self Help Under International Law*, in 62 READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 134-37 (R. Lillich & J. Moore eds. 1980)) (for example, the treatment of the Jews in Russia and various Christians in Turkey during the last century).

167. *See id.* at 148. *But see* Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT’L & COMP. L.J. 333, 333-34 (1998) (citations omitted).

Although a role for regional organizations in humanitarian intervention has been established, until the advent of the Economic Community of West African States (ECOWAS) missions in Liberia and Sierra Leone, states’ practices suggested that prior approval by the Security Council was a prerequisite to any humanitarian intervention. However, for the first time the ECOWAS Cease-fire Monitoring Group (ECOMOG) missions in Liberia and Sierra Leone provide two clear examples of unilateral humanitarian intervention by a regional actor that enjoyed support from the whole of the international community.

*Id.*

168. *See generally* Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185-201 (Damrosch & Scheffer, eds., 1991); Guicherd, *supra* note 42; Levitt, *supra* note 167; Roberts, *supra* note 32, at 102.

169. *See* Guicherd, *supra* note 42, at 24 (citation omitted).

170. *Id.* (emphasis in original).

171. *See* Dean, *supra* note 85, at 153-54.

The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case. Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter (quoting *Western Sahara (Spain v. Mauritania v. Morocco)*, 1975 I.C.J. 12, 31 (Advisory Opinion) (citing the *Namibia* decision, held that self-determination as expressed in Resolution 2625 is an established principle under international law with respect to peoples in non-self-governing territories)).

*Id.*

172. *See* Stromseth, *supra* note 158, at 372.

fall-out from Operation Allied Force would have been much easier for NATO and the individual countries involved had NATO taken the aggressive but legitimate position advocated by the authorities discussed herein.

No one will dispute that NATO's intervention alienated both China and Russia.<sup>173</sup> By entering the campaign without stating a coherent legal position, however, NATO's critics, like predators, sensed the weakness of NATO's conviction and pounced accordingly. China and Russia made the most of NATO's mistakes and missteps and won concessions to strengthen their bargaining position on future, unrelated disputes. This inevitable posturing could have been reduced had NATO entered the campaign from a position of strength, rather than of weakness.

One of the most damaging criticisms is that the bombing made things worse for those NATO sought to protect—the Albanian Kosovars.<sup>174</sup>

Before NATO intervened on March 24, approximately 2,500 people had died in Kosovo's civil war between Serb authorities and the ethnic Albanian insurgents of the Kosovo Liberation Army (KLA). During the 11 weeks of bombardment, an estimated 10,000 people died violently in the province, most of them Albanian civilians murdered by Serbs.

An equally important NATO goal was to prevent the forced displacement of the [Albanian Kosovars]. At the outset of the bombing, 230,000 were estimated to have left their homes. By its end, 1.4 million were displaced.<sup>175</sup>

This, too, could have been avoided. Had NATO stated from the outset that its goal was to restore Kosovo's autonomy, and or gain its independence, then it could have outwardly and aggressively supported the KLA with arms, troops, and air support. The KLA was in the best position to stop the reign of terror in Kosovo. Granted, the KLA did not have clean hands, but it had earned the right under international law to speak for the Albanian Kosovars in their fight for independence.

State actors, especially developed democratic states,<sup>176</sup> are responsible for promoting the rule of law. If a group of states, like the members of NATO, are perceived to have violated international law, why should less-developed, emerging democracies follow the law?<sup>177</sup> As one author notes, legal advisors bear a substantial burden for promoting the rule of law:

[W]e as lawyers need to be concerned about the integrity of international law, particularly as practiced in the diplomacy and military arenas. It has been said that the "real lesson in Kosovo is that 'international law' in political and military matters is increasingly exposed as an academic sham . . . [and this crisis gives] us a more realistic sense of the limits and inadequacies of the chimera of international legal theorizing. We can and should do better."<sup>178</sup>

Another common criticism leveled at NATO questions why it intervened in Kosovo, but not in Africa or Chechnya.<sup>179</sup> Arguably, Africa is not within NATO's area of concern, and Africa has ECOWAS, a regional organization with a proven track record on humanitarian intervention.<sup>180</sup> As for Chechnya, no mass of refugees was spilling over into neighboring coun-

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173. See Correll, *supra* note 82; see also Peter Rodman, *The Fallout from Kosovo*, FOREIGN AFFAIRS, July/Aug. 1999, at 49-50. Rodman warned that if the outcome of the war is viewed as a failure:

Sino-American relations will suffer thanks to the nasty Chinese overreaction after the accidental U.S. bombing of the Chinese embassy in Belgrade. America's relationship with Russia may pay a price for Moscow's coddling of Milosevic . . . . The American people and military are likely to be gun-shy about any future interventions. And leaders around the world, from Baghdad to Beijing, will draw their conclusions about America's credibility, staying power, and competence.

*Id.*

174. Roberts, *supra* note 32, at 113.

175. Mandelbaum, *supra* note 48, at 3.

176. See Roberts, *supra* note 32, at 107 (arguing that the massive multilateral support among the nineteen member states in NATO represented "an international-community interest, and not just the interests of one single state," and that a "further element was sometimes woven into the argument, namely the claim that democratic states have a greater right to engage in military interventions than do autocracies; or at least have a greater claim to international support when they do so.").

177. See John F. Murphy, *Introduction: International Legal Developments in Review: 1998*, 33 INT'L LAW. 229, 230 (1999). "The United States has also been sharply criticized for actions that allegedly violate international legal standards, most recently for the NATO bombing in Kosovo and Serbia. At a minimum these allegations raise serious issues regarding the U.S. commitment to the rule of law in international affairs." *Id.*

178. Byard Q. Clemmons, *Might Makes Right?*, 46 FED. LAW. 40, 41 (1999) (citation omitted).

179. See Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 219-20 (1999).

180. See WEISBURD, *supra* note 128.

tries. Without some direct impact on neighboring countries, it would be difficult to stretch the aggressive theory of humanitarian intervention all the way to Chechnya. The background and circumstances of the Muslim minority in Chechnya is also substantially different than that of the Albanian Kosovars. NATO could lead by example and pressure Russia to do the right thing in Chechnya, but the circumstances would not allow the same intervention in Chechnya that was legally defensible in Kosovo.<sup>181</sup>

The Albanian Kosovars accounted for ninety percent of the population of Kosovo. For over nine years they lived under substantial autonomy. It was not until this autonomy was stripped away and they were subjected to extreme and consistent brutality by the Milosevic government that the KLA surfaced and began to fight back. When taken together, the revocation of autonomy, the accompanying human rights abuses, and the direct impact of refugees on neighboring countries, provided the legal justification for the Albanian Kosovars to take up arms in the pursuit of self-determination. These factors also allowed them to seek assistance in their fight for self-determination. NATO cannot address all of the world's ills, but it had the power and authority to help the Albanian Kosovars.

"Kosovo is not ready for independence. Pernicious influences from northern Albania—organized crime, political intimidation, and lawlessness—are threatening to take root."<sup>182</sup> This quotation, while true, takes a myopic view of the future of Kosovo. Do the problems now facing Kosovo mean NATO should

not have intervened? The problems in Kosovo are difficult ones,<sup>183</sup> but they are now Kosovar Albanian problems.<sup>184</sup> Animosity between the Serbs and the Albanians run deep.<sup>185</sup> It will take years to undo what rabid nationalism and state-sponsored hatred has created.

## Conclusion

NATO's justification for intervention in Kosovo was tortured and disingenuous. Instead of dancing on the head of a pin about whether Resolution 1199 authorized the use of force, the Alliance should have argued from the beginning that intervention was justified because: Yugoslavia illegally withdrew Kosovo's autonomy, it denied the Albanian majority in Kosovo its fundamental right to self-determination; and it continued to trample on numerous other basic human rights guaranteed under the UN Charter. In so doing, Yugoslavia forfeited its right to Kosovo. These egregious Yugoslav violations of international law gave NATO sufficient legal grounds for using force to assist the KLA in its fight for an independent Kosovo.

Kosovo was the only autonomous province with the former Yugoslavia that did not win independence at the break up in 1991.<sup>186</sup> Whether due to racism, oversight, or pressure from Russia, the Albanian Kosovars were left under the boot of a repressive regime. Some commentators persuasively argue that the only winner in Operation Allied Force was the KLA.<sup>187</sup> It

181. Although some might argue that the only real difference between the two situations is that might makes right. NATO could stand up to Serbia but not Russia.

182. David Rohde, *Kosovo Seething*, FOREIGN AFFAIRS, May/June 2000, at 76.

183. See *id.* at 66. "One year on, NATO's largest-ever military intervention appears to be creating a 'new Kosovo' that is the polar opposite of the alliance's stated goals. The province remains widely corrupt, lawless, intolerant of both ethnic and political minorities, and a source of instability." *Id.*

184. *Id.* at 72. On the political level, the cause that once unified Albanians—their struggle against Belgrade—has largely disappeared. The Democratic League of Kosovo, the group headed by Ibrahim Rugova that ran the shadow government during the Serb crackdown, remains popular but disorganized. The KLA itself has splintered into various groups—some criminal, others not. *Id.*

185. *Id.* at 71, "An unreleased public-opinion survey of [Albanian Kosovars] conducted last October by the U.S. State Department illustrated the depth of the animosity. Of those surveyed, 91 percent said there had been too much damage in Kosovo for ethnic Albanians and Serbs to live together peacefully." *Id.*

186. See Baggett, *supra* note 20, at 474 (citation omitted). "Intervention was utilized for every other former province of Yugoslavia that has now been established as a separate nation. Why is it that Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina are entitled to nationhood and Kosovo is not?"

187. Richard Cohen, *And the Winner Is . . . the KLA*, WASH. POST, June 17, 1999, at A35.

Say what you will about the KLA, it has been the one player in the current Balkan drama that has known from the start precisely what it wanted and how to get it. . . . The KLA had a simple, but effective, plan. It would kill Serb policemen. The Serbs would retaliate, Balkan style, with widespread reprisals and the occasional massacre. The West would get more and more appalled, until finally it would—as it did in Bosnia—take action. In effect, the United States and much of Europe would go to war on the side of the KLA.

*Id.* Other commentators share this view, believing that NATO and the United States were duped by the KLA into entering the war with Yugoslavia.

The KLA's guerrilla campaign was a deliberate attempt to provoke Belgrade into reprisals that would attract the West's attention. Knowing it could not defeat Yugoslavia without NATO's military support, the KLA waged a nasty insurgency that included assassinations of Serbian political and military officials. The KLA calculated—accurately—that a violent Yugoslav retaliation would pressure Washington and its allies to intervene. Although U.S. intelligence warned the Clinton administration of the KLA's intentions, Clinton and his advisers took the bait: Washington placed the blame for events in Kosovo on Belgrade and absolved the KLA.

Christopher Layne & Benjamin Schwarz, *We Were Suckers for the KLA*, WASH. POST, Mar. 26, 2000, at B1, B5.

is hard to argue with these commentators who dramatically illustrate the risks associated with intervening in a nasty civil war on the side of rebel forces. The risks, however, were warranted in the case of Kosovo. NATO should have exercised intellectual integrity and relied on the Albanian Kosovars' fight

for self-determination to justify intervention, rather than on the amorphous argument that Resolution 1199 authorized its use of force. If it had, the criticism outlined in this article would have been avoided and the respect for the rule of law promoted.

## Gulf War Syndrome Sub Judice

After ten years, 192 studies, and hundreds of millions of public and private research dollars, the jury is still out as to whether there is a Gulf War Syndrome or merely a collection of unrelated illnesses, let alone definitive answers as to a cause or a cure.<sup>32</sup> Nevertheless, the lack of definitive answers has not stopped a variety of litigation and legislative efforts to compensate Persian Gulf War veterans and their families. This article examines the more prominent of these efforts designed to aid those suffering from Gulf War Syndrome, why litigation will most likely fail, and why relief, if any, will probably have to come from the United States government.

One of the first targets for litigation by ill veterans and their families was the federal government. In *Minns et al. v. United States of America*,<sup>33</sup> three families sued the United States for negligence under the Federal Tort Claims Act (FTCA),<sup>34</sup> alleging that their respective children's birth defects were the result of experimental and defective vaccinations given to the servicemen fathers.<sup>35</sup> The district court dismissed their claims for lack of subject matter jurisdiction.<sup>36</sup> Almost any claim filed by a service member or their family member would meet with a similar fate due to the *Feres* Doctrine.<sup>37</sup> In *Feres v. United States*, the Supreme Court held that the United States has not waived its sovereign immunity for service members "where the injuries arise out of or are in the course of activity incident to [military] service."<sup>38</sup> The Court stated that civilian courts should not second-guess military decisions. Not only does the *Feres* Doctrine prevent suits by service members, but also derivative suits by their family members arising out of a service member's injuries.<sup>39</sup>

Applying the *Feres* Doctrine bar in Gulf War Syndrome cases follows a long list of precedents. Claims by family members for injuries were likewise barred in the Vietnam era Agent Orange defoliant cases and the atomic bomb test radiation exposure cases; cases in which the government's culpability was clearer than with the potential Gulf War Syndrome.<sup>40</sup> Any result other than dismissing these plaintiffs' claims would result in judicial review of the military's determination to inoculate, how, and with what.

In dismissing the plaintiff's claims, the *Minns* court found that the government's decision to vaccinate service members, and to not warn them or their family members of any potential side effects of these vaccinations, were "discretionary" functions.<sup>41</sup> Discretionary functions of the government are specifically excluded from the FTCA waiver of federal sovereign immunity.<sup>42</sup> Just as the *Feres* Doctrine is in part designed to prevent judicial second-guessing of military decisions, the discretionary function exception to the FTCA is also designed to prevent judicial review of the policy decisions of the executive and legislative branches of government. The district court's opinion was upheld on appeal, and the Supreme Court refused to hear the case on certiorari.<sup>43</sup>

The lawsuits on behalf of veterans and their families, however, have not been aimed solely at the federal government. *Marshall Coleman et al. v. Alcolac et al.*<sup>44</sup> involves a current class action of potentially 100,000 veterans claimed to have been injured by exposure to chemical and biological weapons allegedly used during the Persian Gulf War.<sup>45</sup> Filed in a Texas state court against twenty-seven companies, the plaintiffs allege that the defendant corporations were negligent in con-

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32. *Hearing on Gulf War Illness Before the Senate Comm. on Appropriations, Subcomms. on Labor, Health and Human Services, Education and related Agencies*, 106th Cong. (2000).

33. 974 F. Supp. 500 (D. Md. 1997).

34. 28 U.S.C. §§ 2671-2680 (2000).

35. *Minns*, 974 F. Supp. at 502.

36. *Id.* at 508.

37. *Feres v. United States*, 340 U.S. 135 (1950). For an overview of the *Feres* Doctrine and its application to the Gulf War Syndrome, see Kevin J. Dalton, *Comment: Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?*, 25 U. BALT. L. REV. 179 (1996); Claire Alida Milner, *Comment: Gulf War Guinea Pigs: Is Informed Consent Optional During War?*, 13 J. CONTEMP. H.L. & POL'Y 199 (1996); and William Brook Lafferty, *Comment: The Persian Gulf War Syndrome: Rethinking Government Tort Liability*, 25 STETSON L. REV. 137 (1995).

38. *Feres*, 340 U.S. at 146.

39. *Minns*, 974 F. Supp. at 503.

40. *Id.*

41. *Id.* at 506.

42. *Id.* at 505.

43. 155 F.3d 445 (4th Cir. 1998), *cert. denied*, 525 U.S. 1106 (1999).

44. 888 F. Supp. 1388 (S.D. Tx. 1995).

structing, manufacturing, and selling to Iraq chemical components or equipment used to make Iraqi chemical and biological weapons.<sup>46</sup> Begun in 1995, the litigation continues today.

In all likelihood, however, this attempt will fail just as the attempts against the federal government have failed. In the litigation dealing with Agent Orange, Vietnam veterans and their families claimed that the military's use of the defoliant caused injuries and sued the companies that produced it for, among other things, their failure to warn of the dangers of exposure to the chemical.<sup>47</sup> Those plaintiffs that did not accept a settlement offer lost in federal district court, in part because they were unable to prove successfully that their injuries were caused by exposure to Agent Orange.<sup>48</sup> In the case of Gulf War Syndrome, it is also likely, with the research to date, that the plaintiffs would be unable to prove, by a preponderance of the evidence, that the chemicals or equipment sold by the defendant corporations are responsible for the various illnesses they or their family members experience. It is more likely that the plaintiffs anticipate a settlement similar to that in the Agent Orange litigation, in which the defendant corporations created a 180 million-dollar fund for the sick veterans and their families.<sup>49</sup> The nexus between the hazards of Agent Orange and the manufacturer's failure to warn of its dangers is stronger, however, than that of the chemicals and equipment produced and sold by the defendant corporations and the existence, or foreseeability, of a Gulf War Syndrome.

Both avenues of litigation against the government and private corporations are therefore likely to fail. As stated in the appellate court decision of *Minns et al. v. United States*, while

the court recognized that the parents of the disabled children were without a judicial remedy, it felt that it was up to Congress to provide the relief to these and other veterans and families suffering from the effects of the Gulf War Syndrome.<sup>50</sup> Congress has taken some steps in this direction. In 1992, Congress passed the Persian Gulf War Veterans' Health Status Act, creating a database of Gulf War veterans' health information to facilitate later research.<sup>51</sup> In 1994, Congress gave the Veteran's Administration the authority to pay disability payments to Persian Gulf War veterans suffering from chronic illness manifesting itself in any of thirteen symptoms, including fatigue, muscle pain, and sleep disturbances.<sup>52</sup> Reportedly, however, over ninety-three percent of the claims have been denied.<sup>53</sup> Congress also passed The Persian Gulf War Veterans Act<sup>54</sup> of 1998, establishing a presumption of a service-connection, and therefore a means of compensation and treatment, for illnesses associated with exposure to one or more of over thirty toxic agents present in the Persian Gulf War, much like the Agent Orange Act of 1991.<sup>55</sup> The Act will apply, however, only after a link is established between one of the toxins and the Gulf War Syndrome, a connection that has not yet been made.

Other legislative initiatives have been proposed. The Persian Gulf War Syndrome Compensation Act of 1999<sup>56</sup> would recognize Gulf War Syndrome as a war-related injury, and would make it easier for veterans and their families to receive disability and death benefits, even if the veteran's symptoms did not arise during their military service.<sup>57</sup> The bill has remained in committee since its introduction in August of 1999.<sup>58</sup> The Gulf War Veterans' Iraqi Claims Protection Act of 1999 is another legislative initiative to aid veterans.<sup>59</sup> It pro-

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45. *Id.* at 1394.

46. *Id.*

47. *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984).

48. *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (appellate court affirmed motion to dismiss on basis of Government Contractor Defense).

49. *Hercules, Inc. v. United States*, 516 U.S. 417, 420 (1996).

50. *Minns v. United States*, 155 F.3d 445, 453 (4th Cir. 1998).

51. Pub. L. No. 102-585, 106 Stat. 4975 (1992).

52. Compensation for Certain Disabilities due to Undiagnosed Illnesses, 38 C.F.R. § 3.317 (2000).

53. Don Manzullo, *Manzullo Unveils Legislation to Help Veterans with Gulf War Syndrome* (1999), at <http://www.house.gov/manzullo/pr092799.htm>.

54. Pub. L. No. 105-277, 112 Stat. 2681 (1998).

55. Pub. L. No. 102-4, 105 Stat. 11 (1991).

56. H.R. 2697, 106th Cong. (1999).

57. *Id.*

58. H.R. 2697, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 2697.

59. H.R. 618, 106th Cong. (1999).

poses to authorize the Foreign Claims Settlement Commission of the United States to process claims of Gulf War veterans against the billions of dollars of Iraqi assets frozen in United States banks. Veterans would have priority of awards and would be eligible to receive up to \$100,000 each. The Act was passed by the House and is now before a Senate committee.<sup>60</sup>

While no legislation can cure ill veterans or their families, Congress has at least taken initial steps towards helping them. As stated in *Minns et al. v. United States*, there is unlikely to be any judicial remedy for these plaintiffs. If there is to be any relief for the victims of Gulf War Syndrome, it will have to be provided by Congress. Captain (Retired) Swank.

### ***Reserve Component Note***

#### **New Rights for Reserve and National Guard Soldiers Suffering Heart Attack or Stroke**

A fifty-year-old sergeant first class in the United States Army Reserve reports for inactive duty “drill” weekend on Saturday at 0700. He feels fine. In fact, he has always enjoyed excellent health. At 1500, he departs on a formation run with his unit. At 1510, he remarks to the soldier next to him that his left arm feels “funny.” At 1513, he collapses. The emergency room diagnosis is quick and certain: the soldier suffered a serious, permanently disabling heart attack. Until recently, this sergeant first class would not have been eligible for veterans’ benefits.

Congress recently amended Title 38 of the United States Code to correct this problem by expanding eligibility for veterans’ benefits. Legal advisors involved in line of duty investigations need to understand the scope—and limitations—of this change.

Section 301 of the Veterans Benefits and Health Care Improvement Act of 2000<sup>61</sup> now defines any period of service in which an individual was disabled or died from an acute myocardial infarction (heart attack), a cardiac arrest, or cerebrovascular accident (stroke) as “active military, naval, or air service” for purposes of veterans’ benefits laws.<sup>62</sup> The reason for the change appears clear from the legislative history. The provision was enacted to render heart attacks or strokes suffered during any type of military duty as “service-connected.”<sup>63</sup>

The Department of Veterans Affairs (VA) is implementing the law in accord with that intent. The director of the VA recently disseminated written guidance establishing entitlement to service connection for heart attacks and strokes incurred while performing (or in transit to or from) inactive duty for training.<sup>64</sup>

Neither the statutory change nor the VA guidance address the question of whether a heart attack or stroke which is the natural progression of long-term disease, as opposed to an acute injurious event, is now covered. Line of duty (LOD) officers often struggle with this question. The September 1986 version of *Army Regulation 600-8-1*<sup>65</sup> states that medical evidence of natural progression overcomes the normal presumption that military service aggravates a medical condition.<sup>66</sup> Courts have drawn the same conclusion, determining that heart attacks during periods of short duty were the manifestations of disease existing prior to the duty—that is, existing prior to service (EPTS)—rather than injuries or aggravation of injuries suffered during duty.<sup>67</sup>

The new law authorizes no change to this process in military line of duty investigations. If an EPTS condition is not aggravated by military service, *Army Regulation 600-8-1* directs a finding of “not in line of duty—not due to own misconduct.”<sup>68</sup>

Line of duty officers may still have to make a “not in line of duty” finding for heart attacks or strokes incurred during short

60. H.R. 618, 106th Cong. (1999), LEXIS 1999 Bill Tracking H.R. 618.

61. Pub. L. 106-419, 114 Stat. 1822 (2000).

62. *Id.* § 301, 114 Stat. 1822, 1852 (amending 38 U.S.C. § 101(24) (2000)).

63. See 146 CONG. REC. H 9944 (2000) (statement Rep. Stupak). “My bill closes an exceptionally problematic loophole . . . My bill would consider heart attacks and strokes suffered by Guard and Reserve personnel while on ‘inactive duty for training,’ to be service-connected for the purpose of VA benefits.” *Id.*

64. Fast Letter 00-90 from Director, Department of Veterans Affairs to All VBA Regional Offices and Centers (Dec. 4, 2000) [hereinafter Fast Letter] (directing VA examiners to obtain LOD determination or other supporting documentation to verify that disease or injury occurred while on duty)(copy on file with the author).

65. U.S. DEP’T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1 (1986)], *superseded by* U.S. DEP’T OF ARMY, REG. 600-8-1, PERSONAL AFFAIRS: ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994). Practitioners should note that although AR 600-8-1 (1986) was replaced with the 1994 version, the later does not address Line of Duty (LOD) investigations. At present, there is no current regulation addressing LOD investigations, and practice has been to rely on the 1986 regulation as non-binding guidance.

66. AR 600-8-1 (1986), *supra* note 65, para. 41-9(e), (f).

67. See *Stephens v. United States*, 358 F.2d 951 (Ct. Cl. 1966); *Gwin v. United States*, 137 F. Supp. 737 (Ct. Cl. 1956).

68. AR 600-8-1 (1986), *supra* note 65, para. 41-9 (e).

periods of military duty. However, they should remember that the VA uses the LOD factual record to help make its own determination of eligibility for veteran's benefits.<sup>69</sup> This makes an accurate and complete LOD investigative record critically important.

Line of duty investigating officers might be inclined to articulate a simple finding that a heart attack or stroke occurring during a short period of military duty is an EPTS condition, and leave it at that. However, the LOD record must accurately

reflect the timing and progression of symptoms in these cases, in relation to both the period of duty and the period of travel to and from the duty. This will allow the fairest possible determination of the facts and entitlement by the VA.

The new liberalized law may also provide recourse for veterans previously ineligible for VA benefits as the result of heart attack or stroke suffered during short periods of military duty.<sup>70</sup> Affected veterans may want to consider reapplying for benefits. Major Culver.

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69. Fast Letter, *supra* note 64.

70. See 38 C.F.R. § 3.114 (2000). If a "liberalizing" law is passed, this regulation lays out rules for calculating retroactive entitlement.

# The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

## Effective Motions Practice

You are the trial counsel on your first contested case, a barracks larceny. You are confident of victory because you have an eyewitness who saw the accused taking the stereo equipment out of the victim's room. The day before trial you are looking over the latest defense witness list (given to you last week) and you notice a name you do not recognize, "Dr. Forize." A quick call to Dr. Forize reveals that he is a self-styled expert in eyewitness identification, and he is prepared to testify that your star witness's identification of the accused is severely flawed. It is panic time. You do some cursory research and quickly realize that you must somehow prevent Dr. Forize from testifying. The next morning, as the members are assembling, you tell the judge and opposing counsel that you have a motion to prevent Dr. Forize from testifying. The judge does not look pleased as he calls the Article 39(a)<sup>1</sup> session to order and asks you for the basis of your motion.

Now is your chance. You launch into a long oration about how it is not fair for the defense to spring this witness on you at the last minute, how your research shows that these experts are really defense "hired guns," and how Dr. Forize will become a human lie detector for the defense. After you get all of that off your chest you feel pleased with your performance, until the judge starts asking you some questions. First he asks you exactly what relief you want because it sounds to him like you want a delay (something you definitely do not want because the unit is deploying next week). Next he asks you which party has the burden of persuasion and what the standard of proof is (something you had not thought about). He also asks you if you have any witnesses to call on the motion (you were hoping that your brilliant argument would be enough to sway the judge and you have no witnesses). Finally, the judge asks you when you gave the notice of your motion to the defense counsel and if it was in compliance with the local rules (you never even knew there were any local rules). Instead of responding to these tough questions, you decide to run through your argument one more time, hoping that if you argue forcefully enough, the judge will decide in your favor. After a few minutes the judge stops you and says that your motion is denied. Needless to say, the trial heads down hill from there.

Hopefully, no one has experienced this scenario other than in a nightmare. This vignette, however, does point out some of the most common errors that trial attorneys make when raising and arguing motions before military judges. This article discusses the components of a proper motion, how to avoid some

of the common errors, and how to effectively prepare and present a motion to the military judge.

## Components of a Proper Motion

In order to present an effective motion, we first need to understand the components of a proper motion. A motion, either written or oral, has three primary parts. First, it should be a request for *particular relief* from the military judge. Second, the motion should state the specific legal basis for the relief sought. Third, the motion should set forth an offer of proof summarizing the pertinent facts that you are relying on in support of the motion. Each of these components is addressed in more detail below.

## Request for Relief

Rule For Courts-Martial (RCM) 905(a) states that a motion is an application to the military judge for particular relief.<sup>2</sup> That seems simple and obvious enough, yet counsel often struggle with this in practice. In our vignette, the trial counsel seemed to be concerned with the defense witness because of the substance of the witness's testimony and because of the late notification by the defense. These two complaints, however, may warrant different remedies. One remedy would be to exclude the witness's testimony altogether. If the real problem, however, is late notification, a different remedy may be to grant a delay. It is not clear from the trial counsel what particular relief he wants. This kind of confusion is not uncommon when counsel include several complaints in the same motion and fail to clarify what relief they are really requesting.

To avoid this problem, begin your motion by telling the judge exactly what you want. For example: "The defense respectfully requests that you suppress the knife seized from Sergeant Jones's wall locker because the commander conducted a search without probable cause." Put your bottom line up front so everyone knows why you are bringing this motion and what you hope to achieve. This will keep the litigation focused and keep everyone on track. This should not, however, prevent you from arguing for alternative remedies. For example, if you are litigating the admissibility of an expert witness, your first requested remedy might be to exclude the witness's testimony all together. You may also want to tell the judge that if he does not grant that request, you would at least ask that he place certain limitations on the expert's testimony, coupled with appropriate limiting instructions to the panel. By making the

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1. UCMJ art. 39(a) (2000).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(a) (2000) [hereinafter MCM].

requested relief clear, and placing it at the beginning of your motion, you are much more likely to include only the information that is really relevant to the issues you are litigating. You will also be complying with the rules and helping the judge determine exactly what you want.

### Legal Authority

After setting forth the request for particular relief, a proper motion next needs to tell the judge the legal authority the party is relying on to support the request. Research the rules, statutory authority, and relevant case law on the issue you are litigating and explain how the law supports your position. Consider a few pointers. First, include not only the case cites to relevant cases, but also copies of the actual cases for your military judge and opposing counsel. Many judges will appreciate the time you save everyone by having copies available of the cases and other materials you are relying on. Also, do not ignore the unfavorable cases. If those cases are controlling authority, you may have an ethical obligation to disclose them.<sup>3</sup> Even if the unfavorable cases are not controlling, you should be aware of them and be able to distinguish them from your case. This will prevent you from being blind-sided, and your ability to deal with and distinguish unfavorable opinions will enhance your credibility and your persuasiveness.

You also need to know and set forth which party has the burden of persuasion. In our vignette, the trial counsel had not given this any thought. You cannot ignore this important point. Generally the burden of persuasion on any factual issue is on the moving party.<sup>4</sup> However, there are a number of situations where the burden may shift from one party to another. For example, if the defense alleges unlawful command influence and introduces some evidence sufficient to render a reasonable conclusion in favor of the allegation, the burden shifts to the government to prove beyond a reasonable doubt that either the unlawful command influence did not occur or, if it did occur, it will not impact on the findings or sentence.<sup>5</sup> It is vital that you know and clearly set forth who has the burden of persuasion so that the judge and all parties will know what their responsibilities are during the litigation. You simply cannot effectively present or argue a motion without this understanding.

The third component of a proper motion is an offer of proof summarizing the pertinent facts that you are relying on in support of the motion. Once you know what relief you want, have a good understanding of the law, and know who has the burden of persuasion, presenting an offer of proof should be much easier. Armed with this understanding, you need to marshal all of the facts relevant to your issue and show how the law and the facts merge together to support the relief you are seeking. There are some additional pointers you need to understand about the offer of proof.

Just as it is important to know who has the burden of persuasion, it is also critical that you understand and set forth what the standard of proof is for your particular motion. Generally the standard of proof is a preponderance of the evidence.<sup>6</sup> There are some motions, however, where the standard is higher. For example, if the defense claims that an inspection conducted by the government was really a subterfuge for a search without probable cause, the government must prove by clear and convincing evidence that the examination was an inspection.<sup>7</sup> You must know the standard in order to know how much evidence is needed to support the motion. As with the other components of a proper motion, you should clearly set out the standard of proof.

Another important point that you must understand is that your offer of proof is not evidence, and is not sufficient standing alone to meet the factual standard of proof. In our vignette, the trial counsel had not planned to call any witnesses to support his claim that Dr. Forize was not qualified to testify. If you do not call witnesses, use stipulations, or introduce relevant documents or other physical evidence, you have not given the military judge a factual basis on which to decide the issue. As one appellate court put it, litigants should not lapse into a procedure where the moving party will state the motion and then launch right into argument without presenting any proof. Trial judges must force counsel to call witnesses, provide valid real and documentary evidence, or provide a stipulation. This procedure will save time and grief and provide a solid record.<sup>8</sup>

It is true that the rules of evidence do not generally apply at the motions stage of the trial.<sup>9</sup> This, however, does not relieve counsel of the responsibility to put on evidence and develop a

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3. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, para. 3.3(a)(3) (1 May 1992).

4. MCM, *supra* note 2, R.C.M. 905(c)(2).

5. *United States v. Biagase*, 50 M.J. 143, 150-51 (1999).

6. MCM, *supra* note 2, R.C.M. 905(c)(1).

7. MCM, *supra* note 2, MIL. R. EVID. 313(b).

8. *United States v. Stubbs*, 23 M.J. 188, 195 (C.M.A. 1987).

9. MCM, *supra* note 2, MIL. R. EVID. 104(a).

record. Most motions involve factual disputes, and the mere claim as to what the facts are, is insufficient. The military judge has the responsibility to determine preliminary questions and he needs facts in order to do this and to develop a complete record. If you are unprepared to call witnesses or introduce other necessary facts, this is an almost certain guarantee that you will fail to meet the standard of proof.

### **Other Tips for Success**

Along with understanding the proper components of a motion, there are some other basic pointers that you should keep in mind in your motions practice. First, when litigating a motion before the military judge, listen carefully to the judge's questions and do your best to answer them head on. If the question calls for a yes or no answer, first answer the question and then provide any explanation that you think is necessary. Do not do what the trial counsel did in our vignette, and ignore the tough questions in the mistaken belief that the force of your argument will somehow convince the judge. Questions from the judge provide you an important insight into what the judge is thinking and what issues are most important to him. Look at these questions as opportunities to focus your argument and address these important issues. If it is important to the judge, it better be important to you. Good oral argument requires thorough preparation and an ability to think on your feet. One way to better prepare yourself is to get other lawyers in your office to help you conduct a mock argument. This will give you an opportunity to think on your feet and to practice answering questions.

The other aspect of motions practice that you must be sensitive to are issues of timeliness and waiver. Rules for Courts-

Martial 905, 906, and 907 set forth the timeliness requirements of the most common motions. The rules state that if a party fails to make the motion before the established deadline, the motion is waived unless the military judge grants relief from waiver for good cause. You must also be sensitive to the requirements of the local rules. The local rules cannot conflict with the *Manual for Courts-Martial*, but they often establish other requirements and procedures that you should comply with.

There are, of course, times when you are unable to raise the motion in a timely manner due to circumstances beyond your control. These circumstances should be the exception, not the rule. A failure by the trial counsel to look at the defense witness list until the day before trial, in most cases will not constitute good cause for a late motion. A successful motion will take some preparation and if it involves complex factual and legal issues, it will require a great deal of preparation. Habitually throwing together motions at the last minute after the deadlines have passed will probably only win you the anger and frustration of the military judge.

Understanding the key components and including them in your motion will make you a more effective trial attorney. If you put time and effort into your preparation you will be a more successful litigator, and you will avoid the pitfalls of the trial counsel in our vignette. In some instances, the case may be won or lost depending on the outcome of the motion. In any case where motions are litigated, they can have a significant impact on your case. Developing the skills to effectively litigate motions is an important component of your success as a trial attorney. Major Hansen.

# USALSA Report

United States Army Legal Services Agency

## *Environmental Law Division Notes*

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at <http://www.jagcnet.army.mil>.

### **DOD Range Rule Withdrawn With a View Towards Reproposal**

During the Department of Defense's (DOD) Environmental Cleanup Stakeholders Forum in St. Louis, Missouri, in November 2000, the Deputy Under Secretary of Defense (Environmental Security), Ms. Sherri Goodman, announced that she had withdrawn the Range Rule<sup>1</sup> from the Office of Management and Budget (OMB), with the intent to repropose the Rule.<sup>2</sup>

As Ms. Goodman pointed out, she withdrew the rule from the OMB for several reasons. First, DOD and the Environmental Protection Agency (EPA) must resolve difficult issues, especially the role of explosives safety. Second, as the Environmental Council of the States and National Association of Attorneys General pointed out to DOD, after several years of sorting through and refining the draft range rule, it is time to step back and hear from all the stakeholders and state regulators. Third, all the parties involved must achieve a greater understanding and consensus regarding the processes, tools, techniques, and end goals of the unexploded ordnance cleanup

program. Keeping the Range Rule at OMB excludes further input from our community and state stakeholders. Finally, as DOD develops the major initiative of defining a range sustainment program, Ms. Goodman wants to be sure that everyone's concerns are included in that process.

In the interim, DOD will issue a DOD Directive (DODD) and DOD Instruction (DODI) to provide consistent guidance regarding how to proceed with a closed, transferred, and transferring range response program. The *DOD Policy for Closed, Transferred, and Transferring Ranges Containing Military Munitions Fact Sheet*<sup>3</sup> and the outlines for the proposed DODD and DODI were provided for public comment at DOD's Environmental Clean-up Stakeholders Forum.

Environmental law specialists should continue to use DOD and EPA's interim final guidance for implementing response actions<sup>4</sup> until DOD issues the DODD and DODI. Lieutenant Colonel Schenck.

### **New Executive Order on Tribal Consultation**

On 6 November 2000, President Clinton signed Executive Order (EO) 13,175, *Consultation and Coordination with Indian Tribal Governments*.<sup>5</sup> Consistent with the Presidential Memorandum of 29 April 1994, *Government-to-Government Relations with Native American Tribal Governments*, EO 13,175 recognizes the following fundamental principles: (1) Indian tribes, as domestic dependent nations, exercise inherent sovereignty over their lands and members; (2) the United States government has a unique trust relationship with Indian tribes and deals with them on a government-to-government basis; and, (3)

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1. Closed, Transferred and Transferring Ranges Containing Military Munitions, 62 Fed. Reg. 50,796 (proposed 26 Sept. 1997) (to be codified at 32 C.F.R. pt. 178). The proposed rule is summarized as follows:

The Department of Defense (DoD) is proposing a rule that identifies a process for evaluating appropriate response actions on closed, transferred, and transferring military ranges. Response actions will address safety, human health, and the environment. This rule contains a five-part process that is not inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and is tailored to the special risks posed by military munitions and military ranges. All closed, transferred, and transferring military ranges will be identified. A range assessment will be conducted in which a site-specific accelerated response (various options for protective measures, including monitoring) will be implemented. If these measures are not sufficient, a more detailed site-specific range evaluation will be conducted. Recurring reviews will be conducted, and an administrative close-out phase also is included.

*Id.*

2. The full text of Ms. Goodman's remarks is available at <http://www.denix.osd.mil/denix/Public/ES-Programs/Speeches/speech-68.html>.

3. U.S. DEP'T OF DEFENSE, FACT SHEET, DOD POLICY FOR CLOSED, TRANSFERRED, AND TRANSFERRING RANGES CONTAINING MILITARY MUNITIONS (Nov. 2000), available at <http://www.denix.osd.mil/denix/Public/ES-Programs/Cleanup/RangeFact/forum1.html> (containing outlines for the proposed DODD and DODI).

4. Memorandum, DOD and EPA Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred (CTT) Ranges (7 Mar. 2000), available at <http://www.dtic.mil/envirodod/UXO-Mgt-Principles.pdf>.

5. 65 Fed. Reg. 67,249 (6 Nov. 2000) (superseding Exec. Order No. 13,084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998)).

Indian tribes have the right to self-government and self-determination.<sup>6</sup>

When developing and implementing “policies that have tribal implications,”<sup>7</sup> section 3 of EO 13,175 directs federal agencies to adhere to the fundamental principles listed above in order to “respect Indian tribal self-government and sovereignty, to honor tribal treaty rights and other rights, and to strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”<sup>8</sup> In addition, federal agencies are required, when developing such policies, to encourage tribal development of policies to meet the agency’s program objectives, to defer to tribally established standards, and to consult with tribes to consider the need for federal standards and alternatives that would preserve tribal authority and prerogatives.<sup>9</sup>

The EO also imposes significant new responsibilities on federal agencies that promulgate regulatory policies or rules that impact tribes or tribal governments. By February 2001, each federal agency must designate an official responsible for implementing the order.<sup>10</sup> By March 2001, the designated agency official must submit documentation to the OMB describing the agency’s process for ensuring timely and meaningful consultation with tribes early in the rule-making process.<sup>11</sup>

Prior to going forward with any regulation that imposes substantial direct compliance costs on a tribal government<sup>12</sup> or any regulation that preempts tribal law, an agency must meet several cumbersome procedural requirements. The agency must consult with affected tribes early in the promulgation process, prepare a tribal summary impact statement as part of the regulation’s preamble, and submit to the Director, OMB, any written communications from tribal officials.<sup>13</sup> When transmitting

a draft final regulation with tribal implications to OMB, the agency must certify that “the requirements of EO 13,175 have been met in a meaningful and timely manner.”<sup>14</sup>

How will this impact the Army in its day-to-day operations? Initially, it is important to note that EO 13,175 is not limited to natural and cultural resource actions; it applies to any regulations or policies that have the potential to directly impact tribes, tribal governments and tribal resources. At Headquarters, Department of the Army (HQDA), EO 13,175 imposes several new responsibilities. Headquarters, Department of the Army must designate an agency official responsible for implementing EO 13,175 and forwarding a tribal consultation procedure to OMB. In addition, HQDA and the secretariat will need to ensure that proposed regulations and policies are reviewed early in the developmental process for potential impacts to tribes, tribal resources or tribal governments. Where such impacts are identified, HQDA and the secretariat must determine whether any of the requirements of EO 13,175 apply.

At the local installation level, EO 13,175 will apply to “policy statements or actions that have substantial direct effects on one or more tribes.”<sup>15</sup> This term is not defined in EO 13,175, and will be subject to interpretation by local decision makers. Management plans that impact tribally protected resources are the types of “actions” most likely to trigger section 3 of EO 13,175.<sup>16</sup> For all practical purposes, section 3’s requirements can be met by consultation with federally recognized Indian tribes in accordance with the principles and procedures set forth in the *Department of Defense American Indian and Alaskan Native Policy*,<sup>17</sup> and *Department of the Army Pamphlet 200-4’s Guidelines for Army Consultation with Native Americans*.<sup>18</sup>

6. Exec. Order. No. 13,175, § 2, 65 Fed. Reg. 67,249.

7. The EO broadly defines “policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” *Id.* § 1(a), 65 Fed. Reg. at 67,249.

8. *Id.* § 3, 65 Fed. Reg. at 67,249-50.

9. *Id.* § 3(c), 65 Fed. Reg. at 67,250.

10. *Id.* § 5, 65 Fed. Reg. at 67,250.

11. *Id.*, 65 Fed. Reg. at 67,250.

12. These requirements only apply to proposed regulations that are not mandated by statute.

13. Exec. Order. No. 13,175, § 5, 65 Fed. Reg. at 67,250.

14. *Id.* § 7, 65 Fed. Reg. at 67,251. Similar certification requirements apply to proposed legislation with tribal impacts submitted to OMB.

15. *Id.* § 1, 65 Fed. Reg. at 67,249.

16. Master Plans, Integrated Cultural Resource Management Plans, Integrated Natural Resource Management Plans and Range Management Plans are the types of planning documents that might trigger compliance requirements.

17. Memorandum, The Secretary of Defense, to Secretaries of the Military Departments, et al., subject: American Indian and Alaska Native Policy (20 Oct. 1998), available at <http://www.aec.army.mil> (Homepage/Publications).

Environmental law specialists (ELS) should work with cultural resource managers and the designated Coordinator for Native American Affairs to identify federally recognized tribes affiliated with their installation, and land impacted by installation activities. Environmental law specialists can then assist in identifying installation plans and policies with the potential to impact tribal governments or tribal resources protected by law or treaty.<sup>19</sup> Where development and implementation of installation plans and policies<sup>20</sup> may directly effect tribal governments or resources, ELSs should ensure that early tribal consultation occurs on a government to government basis in a manner consistent with Army policy and the principles discussed above. Mr. Farley.<sup>21</sup>

### NEPA and Cumulative Impacts Analysis

Army environmental law practitioners should be well familiar with the requirements of the National Environmental Policy Act of 1969 (NEPA).<sup>22</sup> Requirements involving the use of categorical exclusions,<sup>23</sup> and the merits of using an Environmental Assessment<sup>24</sup> or an Environmental Impact Statement<sup>25</sup> are generally well known and regularly applied by environmental lawyers. An area that can be overlooked in NEPA practice, however, is the analysis of the cumulative impacts of a federal action.<sup>26</sup> This section will highlight the area of cumulative impacts analysis under NEPA and provide an example of a scenario where the need for cumulative impacts analysis may not be readily apparent.

The Council on Environmental Quality (CEQ) defines cumulative impact as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.<sup>27</sup>

*Army Regulation 200-2* requires consideration of cumulative impacts at all levels of NEPA analysis. The screening criteria of *Appendix A* dictate that categorical exclusions may only be used if “[t]here are minimal or no individual or cumulative effects on the environment as a result of this action.”<sup>28</sup> Paragraph 5-2 states that “[a]n [Environmental Assessment] is required when the proposed action has the potential for . . . [c]umulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration.”<sup>29</sup> The considerations above also apply to Environmental Impact Statements. In sum, cumulative impacts must be considered in the analysis of Army actions under NEPA.<sup>30</sup>

Environmental attorneys must be cognizant of cumulative impacts in rendering advice on NEPA issues. Environmental Assessments and Environmental Impact Statements will include a section analyzing cumulative impacts. However, situations may arise where cumulative impacts might be overlooked. Consider a set of facts where there are several building projects on an Army installation either recently completed or where construction is ongoing. Assume that all of these

18. U.S. DEP'T OF ARMY, PAM. 200-4, CULTURAL RESOURCES MANAGEMENT, app. F (1 Oct. 1998), available at <http://www.aec.army.mil> (Homepage/Publications).

19. Protected tribal resources usually involve cultural resources such as those covered by the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (burial of ancestral human remains), and the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000) (properties of traditional religious and cultural importance), or access to natural resources on traditional hunting areas guaranteed by treaty.

20. For example, an installation may develop a policy that restricts access to a site that is significant to a tribe for practice of traditional religion and culture.

21. Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

22. 42 U.S.C. §§ 4321-4370 (2000).

23. See U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, paras. 4.0-.4, app. A (23 Dec. 1988) [hereinafter AR 200-2].

24. Council on Environmental Quality, Terminology and Index, 40 C.F.R. § 1508.9 (1999).

25. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.

26. See 40 C.F.R. § 1508.7.

27. *Id.*

28. See AR 200-2, *supra* note 23, app. A-31(b).

29. *Id.* para. 5-1(a).

30. The methodology for examining the cumulative impacts of Army actions under NEPA is beyond the scope of this article. For those interested in the technical aspects of such analysis, see COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), available at <http://www.ceq.eh.doe.gov/nepa/nepanet.gov>.

projects are in the same general area, within two or three miles of one another. Now consider a proposal for the construction of another building on the same installation and in the same general area. Assume further that the proposed building is relatively small and no extraordinary circumstances are raised by its plans. It might be understandable to conclude, after analyzing the environmental impacts of the project itself, that there would be no significant impact on the environment. However, it is important to include in the analysis the cumulative impacts of the project in conjunction with the “past, present, and reasonably foreseeable future actions in the area.”<sup>31</sup> This would include all of the recent building projects and any other reasonably foreseeable actions to be taken in the area. The CEQ regulations require consideration of whether “a project’s environmental effects may be cumulatively significant in conjunction with other environmental conditions that are reasonably foreseeable, even if they are not significant by themselves.”<sup>32</sup> Analysis of the direct and indirect environmental effects of the project along with analysis of the cumulative impacts could, of course, still result in a finding of no significant impact (FNSI),<sup>33</sup> but the cumulative impacts clearly must be considered.<sup>34</sup>

Cumulative impact analysis raises a number of factual questions, such as: What geographic area should be considered in the analysis? What are foreseeable future actions? Is there a good baseline from which to base the analysis of cumulative impacts? The answers to these questions are rarely clear and

will depend upon the facts and conditions existing on and around the installation in question. What is clear is that a good faith attempt to analyze cumulative impacts is required for compliance with NEPA.

These facts also arguably raise the related but slightly different issue of the improper segmentation of projects. “Significance cannot be avoided by terming an action temporary or by breaking it down into small components.”<sup>35</sup> The courts have held that “agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without ‘significant’ impact.”<sup>36</sup> Segmentation issues require analysis of the degree to which the actions are related and connected to each other. The CEQ regulations provide definitions and some factors to consider in making such determinations.<sup>37</sup> Under our facts above, it would have been ideal to analyze all of the building projects in a single NEPA document. However, this is not always possible as new projects are not always foreseeable. Assuming good faith on the part of the agency, our facts more properly raise the issue of cumulative impacts as opposed to segmentation.

The importance of a proper cumulative impacts analysis under NEPA cannot be overemphasized. Awareness of cumulative impacts issues is vital to compliance with NEPA and should be understood by the environmental attorney. This note provides the environmental practitioner with a starting point for

31. Council on Environmental Quality, Terminology and Index, 40 C.F.R. § 1508.7 (1999).

32. *Roanoke River Basin Ass’n v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991).

33. A finding of no significant impact (FNSI) means:

a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.13.

34. *See generally* *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987); *Hudson*, 940 F. 2d 58.

35. 40 C.F.R. § 1508.27(b)(7).

36. *Coalition on Sensible Transp.*, 826 F. 2d at 68.

37. In the context of defining the scope of an action, “connected actions” are defined as those which are:

closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements[;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[;] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). “Cumulative actions” are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. *Id.* § 1508.25(a)(2). “Similar actions” are those:

which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

*Id.* § 1508.25(a)(3).

spotting cumulative impacts issues and some basic references to begin legal research into this important issue. Major Tozzi.

### **Army Environmental Center Prepares Guidance on Fuel Tanker Trucks**

The Army Environmental Center (AEC) is preparing compliance guidelines regarding fuel tanker trucks. In connection with this effort, AEC's Office of Counsel (OC) has prepared a legal analysis of some of the issues associated with the tanker trucks.<sup>38</sup> According to the opinion, if a fuel tanker truck leaves post (that is, it is not used exclusively within the confines of the installation), it is subject to Department of Transportation (DOT) spill regulations,<sup>39</sup> and not EPA's Spill Prevention Control and Countermeasures (SPCC) regulations.<sup>40</sup> On the other hand, if the tanker truck is used exclusively within the confines of the installation, and the other prerequisites for the SPCC regulations are met, the SPCC regulations would apply, and secondary containment is required unless it can be shown to be impracticable. The AEC legal opinion provides some recommendations as to Army policy for fuel tanker trucks, including tanker trucks used during training exercises. Most importantly, AEC OC recommends that secondary containment be avoided for tanker trucks used in connection with training exercises, either because it is not required or because it is impracticable. Other fuel tanker trucks that serve in more of a storage role should be protected with some form of secondary containment. Ms. Rathbun.

## ***Litigation Division Note***

### **Changes to the Federal Rules of Civil Procedure and Federal Rules of Evidence**

#### **Introduction**

On 17 April 2000 the Supreme Court of the United States transmitted to Congress<sup>41</sup> amendments to both the Federal Rules of Civil Procedure (FRCP)<sup>42</sup> and Federal Rules of Evidence (FRE)<sup>43</sup> which took effect on 1 December 2000.<sup>44</sup> These amendments could have a significant impact on judge advocates in the field who compile discovery in Army civil lawsuits, prepare litigation reports for use by Litigation Division and Department of Justice (DOJ) attorneys, and advise federal officials who are sued for acts occurring in the performance of their official duties. The changes to the FREs will likely impact military criminal practice as they foreshadow commensurate future changes to the Military Rules of Evidence.<sup>45</sup> This article will discuss the changes to the FRCPs and FREs and their possible impact on military practice.

#### **Amendments to the Federal Rules of Civil Procedure**

The amendments to the FRCP focus primarily on the discovery process to expedite litigation, reduce costs of discovery, and allow for earlier and more extensive judicial intervention. The principle change makes the disclosure requirements universally mandatory by eliminating the local "opt out" provisions. Other significant changes appear in the scope of mandatory disclosure. The specific changes are discussed below.

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38. Memorandum, Command Counsel, The Army Environmental Center, Office of Counsel, SFIM-AEC-JA, to Chief, Environmental Quality Division, ATTN: Mr. Michael Worsham, subject: Department of Transportation (DOT) Regulations for Fuel Tanker Trucks that Transport Oil (24 Oct. 2000), available at <http://www.jagc-net.army.mil> (Databases/Civil Law/Environmental Law/Clean Water Act).

39. DOT Oil Spill and Prevention Response Plans, 40 C.F.R. §§ 130.1-.33 (2000).

40. EPA Oil Pollution and Prevention, 40 C.F.R. §§ 112.1-.21.

41. See 28 U.S.C. § 2072 (2000) (conferring on the Supreme Court the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts and courts of appeals).

42. Amendments to the Federal Rules of Civil Procedure, Federal Rules of Evidence, Federal Rules of Criminal Procedure and Federal Rules of Bankruptcy Procedure, 192 F.R.D. 340-341 (2000) (adopted April 17, 2000, effective December 1, 2000, to be published at 529 U.S. 1157 (2000)) [hereinafter Amendments to the Federal Rules]. Included in the amendments to the FRCPs are changes to: Rule 4, Summons; Rule 5, Service of Process; Rule 12, Defenses and Objections; Rule 26, Disclosures; Rule 30, Depositions; and Rule 37, Sanctions.

43. *Id.* at 398-99 (to be published at 529 U.S. 1191 (2000)). The amendments to the FREs include changes to: Rule 103, Rulings on Evidence; Rule 404(a), Character Evidence; Rule 701, Opinion Testimony by Lay Witnesses; Rules 702 and 703, Testimony by Experts; Rule 803(6), Hearsay Exceptions and Rule 902, Self-Authentication.

44. *Id.* at 341, 398. The amendments to the FRCPs and FREs govern all proceedings in civil and criminal cases commenced after 1 December 2000 and, insofar as just and practicable, all proceedings in civil and criminal cases pending on that date. *Id.* at 341, 398-99.

45. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (2000) (stating that all amendments to the FREs shall apply to the Military Rules of Evidence (MRE) eighteen months after the effective date of the amendments unless the President takes action to the contrary).

## Rule 4—Summons

Prior to amendment, FRCP 4 stated only that “[s]ervice upon an officer, agency, or corporation of the United States, shall be effected by serving” the United States and by sending a copy of the summons and complaint by registered or certified mail to the officer, agency, or corporation.<sup>46</sup> The rule was silent as to whether service on the United States was required if an officer or employee was sued in his individual capacity, and courts provided inconsistent guidance on this point.<sup>47</sup> As a result, the United States often did not learn of suits in a timely manner to the prejudice of both the United States and the named individual. The amendment now requires a party to serve the United States when an officer or employee of the United States is sued individually for “acts or omissions occurring in connection with the performance of duties on behalf of the United States – whether or not the officer or employee is sued also in an official capacity. . . .”<sup>48</sup> The rule also requires the court to allow a reasonable time to cure improper service or lack of service on the United States, “if the plaintiff has served an officer or employee of the United States sued in an individual capacity.”<sup>49</sup> In light of these changes, judge advocates should educate federal employees of the need to notify supervisors or legal offices if they are sued for activities that occurred in connection with their federal employment.

## Rule 5—Service and Filing of Pleadings and Other Papers

As amended, FRCP 5 prohibits the filing of discovery materials “until they are used in a proceeding or the court orders filing.”<sup>50</sup> Before this amendment, filing of discovery materials

with the court was not uniform.<sup>51</sup> Some jurisdictions, through local rules, opted for filing discovery with the court, while others did not.<sup>52</sup> The amendment mandates uniformity in all jurisdictions. However, only the portions of the materials actually used in the proceedings need to be filed, although any party is free to file other pertinent portions of the materials and the court is free to order further filings.<sup>53</sup> Pretrial disclosures, however, still must be filed with the court as now provided in FRCP 26(a)(3).<sup>54</sup>

## Rule 12—Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

The amendments to FRCP 12 relate to the changes to FRCP 4.<sup>55</sup> Officers and employees of the United States, whether sued in their official or individual capacities, now have sixty days after service to answer the complaint or the cross-claim, or to reply to a counterclaim,<sup>56</sup> as opposed to the twenty days provided for in the pre-amendment rule.<sup>57</sup> This change will give the United States more time to consider the officer or employee’s request for representation and to investigate the allegations in the complaint or counterclaim.<sup>58</sup> This provision may mean that the United States’ answer is due earlier than the officer or employee’s answer since the government’s response date will begin running when the United States Attorney’s office is served, which could occur before service on the officer or employee.

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46. FED. R. CIV. P. 4(i)(2) (2000) (amended by FED. R. CIV. PROC. 4(i)(2)(A),(B) (2000)).

47. See, e.g., Vaccaro v. Dobre, 81 F.3d 854, 856-57 (9th Cir. 1996); Armstrong v. Sears, 33 F.3d 182, 185-87 (2d Cir. 1994); Ecclesiastical Order of the Ism of Am v. Chasin, 845 F.2d 113, 116 (6th Cir. 1988); Light v. Wolf, 816 F.2d 746 (D.C. Cir. 1987).

48. FED. R. CIV. P. 4(i)(2)(B).

49. *Id.* 4(i)(3)(B).

50. *Id.* 5(d).

51. See Amendments to the Federal Rules, *supra* note 42, at 381-82 (Committee Note to Rule 5 amendments).

52. *Id.*

53. *Id.* With the growing use of electronic filing, the restriction should help protect material covered by the Privacy Act, 12 U.S.C. §§ 3401-3422 (2000), although the issue of whether unfiled discovery is accessible by the public will undoubtedly be argued in the courts.

54. See *infra* notes 86-87 and accompanying text.

55. See *supra* notes 46-49 and accompanying text.

56. FED. R. CIV. P. 12(a)(3)(B) (2000).

57. *Id.* 12(a)(1)(A).

58. Amendments to the Federal Rules, *supra* note 42, at 364 (Committee Notes to Rule 12 amendments).

**Rule 26—General Provisions Governing Discovery; Duty of Disclosure**

*Rule 26(a)(1)(A)&(B)*

*Rule 26(a) Required Disclosures: Methods to Discover Additional Matter*

In response to widespread support for developing a nationally uniform initial disclosure rule,<sup>59</sup> the local opt out provisions of FRCP 26(a)(1) have been eliminated.<sup>60</sup> The old rule allowed local jurisdictions to use a variety of discovery procedures that were implemented as part of the Civil Justice Reform Act,<sup>61</sup> with the expectation that allowing local systems to use their own specialized procedures would help refine the need for national uniformity and identify classes of cases in which the disclosure requirements were unnecessary.<sup>62</sup> This goal was never achieved. The amended rule removes the authority to alter or opt out of the national initial disclosure requirements by either local rule or standing orders of individual courts or judges.<sup>63</sup> Judges still may issue case specific orders that alter or eliminate the initial disclosure requirements, and the parties still may stipulate to avoid initial disclosure.<sup>64</sup> Judges may not, however, issue standing orders altering the initial disclosure requirements.<sup>65</sup>

The amendment to FRCP 26(a) eliminates the need to find and learn multiple local rules on initial discovery and should therefore make litigation report preparation easier. Still, judge advocates must be prepared to meet disclosure requirements in all cases.

In addition to providing for needed uniformity, the amendments to FRCP 26 also narrow the scope of the initial disclosure requirements.<sup>66</sup> The old rule required a party to disclose all information, whether favorable or unfavorable, whether it intended to use the information or not, so long as the information was relevant to the proceedings, as well as to disclose all witnesses and documents “relevant to disputed facts alleged with particularity in the pleadings.”<sup>67</sup> Now, parties must disclose only witnesses and documents “that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”<sup>68</sup> “Use” includes use at a pretrial conference, to support a motion, or at trial; it also includes intended use in discovery, such as using a document to question a witness during a deposition.<sup>69</sup> Parties are no longer obligated to disclose witnesses or documents they do not intend to use.<sup>70</sup>

Unchanged is FRCP 26(e)(1)’s requirement to supplement disclosures when additional information is later discovered. A party must therefore supplement its required disclosures when it determines that it may use a witness or document that it did not previously intend to use.<sup>71</sup> Failure to supplement required disclosures is now a basis for FRCP 37 sanctions.<sup>72</sup>

While Litigation Division and Department of Justice attorneys must ultimately decide issues of relevancy and whether or not evidence will be used, judge advocates who prepare litigation reports must continue to deliver all the discoverable evi-

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59. See Amendments to the Federal Rules, *supra* note 42, at 384-85. (Committee Note to Rule 26 amendments, citing T. WILLGING ET AL., FEDERAL JUDICIAL CENTER, DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997)).

60. The “opt out” provision refers to FRCP 26’s former disclosure requirement which permitted local rules directing that disclosure would not be required or that altered its operation. The opt out provision “reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure.” *Id.* at 384.

61. 28 U.S.C. §§ 471-482 (2000).

62. See Amendments to the Federal Rules, *supra* note 42, at 384-85 (Committee Note to Rule 26 amendments).

63. *Id.* at 385.

64. FED. R. CIV. P. 26(a)(1); Amendments to the Federal Rules, *supra* note 42, at 385 (Committee Note to Rule 26 amendments).

65. Amendments to the Federal Rules, *supra* note 42, at 385.

66. *Id.*

67. FED. R. CIV. P. 26(a)(1)(A)-(B) (amended by FED. R. CIV. P. 26(a)(1)(A)-(B) (2000)).

68. FED. R. CIV. P. 26(a)(1)(A)-(B) (2000).

69. Amendments to the Federal Rules, *supra* note 42, at 385 (Committee Note to Rule 26 amendments).

70. *Id.* Note, however, that the disclosure obligation does extend to witnesses and documents that the party intends to use if “the need arises.” FED. R. CIV. P. 26(a)(3); Amendments to the Federal Rules, *supra* note 42, at 385.

71. Amendments to the Federal Rules, *supra* note 42, at 385 (Committee Note to Rule 26 amendments).

72. Rule 37 was amended to subject a party to sanctions for failure to amend discovery responses to interrogatories, requests for production or requests for admissions as required by FRCP 26(e)(2). FED. R. CIV. P. 37(c)(1).

dence in a case, and should identify that evidence particularly related to claims and defenses.

*Rule 26(a)(1)(E)*

In addition to narrowing the disclosures required under FRCP 26(a)(1)(A) and (B), FRCP 26 was also amended to exempt eight categories of cases from the initial disclosure requirements. The exempted categories are:

- (i) an action for review on an administrative record; (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect on a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.<sup>73</sup>

The Federal Judicial Committee exempted these eight categories because these cases generally require little, if any, discovery, or are cases in which initial disclosure would be unlikely to contribute to the effective development of the case.<sup>74</sup>

The exempted categories are meant to be “generic” and “are intended to be administered by the parties—and, when needed, the courts—with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories.”<sup>75</sup> The eight categories are exclusive, however, and local rules or standing orders creating other general exemptions are invalid.<sup>76</sup> The Federal Judicial Center estimates that these

eight categories comprise approximately one-third of all civil filings.<sup>77</sup> Notwithstanding the exemption of these eight categories of proceedings from the disclosure requirements, judge advocates in the field should continue to forward all documentary evidence with litigation reports. While the documents may not be subject to initial disclosure requirements, the information may be needed for subsequent discovery requests and preparing litigation strategy.

The time for the initial disclosures now required under amended FRCP 26(a) is extended to fourteen days. The rule states that “unless a different time is set by stipulation or court order, or unless a party objects during the [FRCP 26(f)] conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan,” parties must make disclosures at the Rule 26(f) conference, or within fourteen days thereafter.<sup>78</sup> While the enlargement of time from ten to fourteen days will make it somewhat easier to meet the initial disclosure deadline, the DOJ recommended an enlargement to thirty days. Although on its face the rule provides more time for disclosure, it changes the way days are counted.<sup>79</sup> Consequently, the rule does not always result in an extended deadline. For example, under the old rule, a ten-day limit starting on 2 April 2001 would require that the disclosure be made no later than 16 April 2001.<sup>80</sup> However, under the new rule, a fourteen-day limit starting 2 April 2001, would require disclosure on the same day, 16 April 2001.

The disclosure date does not apply if a party objects to initial disclosure during the FRCP 26(f) conference and states its objection in the Rule 26(f) discovery plan.<sup>81</sup> This provides a party an opportunity to raise objections to the court in cases where a party believes that disclosure would be “inappropriate in the circumstances of the action.”<sup>82</sup> In a case where a party raises an objection to initial disclosure, the court must then rule on the objection and determine what disclosures, if any, should be made.<sup>83</sup> Disclosure is stayed until such time that the court rules on the objections raised. This minor change will have lit-

73. FED. R. CIV. P. 26(a)(1)(E).

74. See Amendments to the Federal Rules, *supra* note 42, at 386 (Committee Note to Rule 26 amendments).

75. *Id.*

76. *Id.* at 387.

77. *Id.* at 386.

78. FED. R. CIV. P. 26(a)(1).

79. *Id.* 6(a) (excluding intermediate Saturdays, Sundays, and legal holidays for deadlines less than eleven days).

80. Because the intermediate Saturdays, Sundays, and legal holidays are not excluded. See *id.* The new fourteen-day time limit seems only to lessen the burden of figuring out which days are excluded from a ten-day count.

81. FED. R. CIV. P. 26(a)(1).

82. *Id.*

83. *Id.*

tle impact on judge advocates. However, judge advocates should expeditiously forward all evidence for which disclosure is required.

Absent court order or stipulation, a new party added after the FRCP 26(f) conference has thirty days in which to make its initial disclosures.<sup>84</sup> However, “it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.”<sup>85</sup> This change may allow only a limited time to respond in third-party actions.

As described above, the amendments to FRCP 5(d) remove the requirement to file disclosures under Rule 26(a)(1) and (2) until they are used in the proceeding. Under the new rule, FRCP 26(a)(4) simply provides that, unless the court orders differently, all disclosures under FRCP 26(a)(1) through (3) must be made in writing, signed, and served.<sup>86</sup> Additionally, the filing of pretrial disclosures under Rule 26(a)(4) is now required by Rule 26(a)(3). Pretrial disclosures must be provided to other parties and “promptly file[d] with the court.”<sup>87</sup> In order to ensure compliance with this change, judge advocates must provide all evidence available with the litigation report.

#### *Rule 26(b) Discovery Scope and Limits*

As amended, FRCP 26(b) limits discovery to “any matter, not privileged, that is relevant *to the claim or defense of any party*.”<sup>88</sup> Formerly, discovery extended as far as any matter “relevant *to the subject matter* involved in the pending action.”<sup>89</sup> Under the new rule, discovery may extend as far as matters “relevant to the subject matter involved in the action,”

*only* if ordered by the court “[f]or good cause.”<sup>90</sup> “The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”<sup>91</sup>

Although the amendments to FRCP 26(b) narrow the scope of discovery, they do not change the requirements of judge advocates preparing litigation reports. Litigation Division and DOJ still require any matter relevant to the subject of the pending litigation. Judge advocates must help identify information relevant to the claims or defenses of the parties.

The modifying word “relevant” has been added to the sentence in FRCP 26(b)(1) to clarify that information sought in discovery need not be admissible at trial if reasonably calculated to lead to the discovery of admissible evidence.<sup>92</sup> The new rule now reads: “Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>93</sup> The word “relevant” was added to avoid the possibility that the sentence otherwise would be misinterpreted to undercut the amended rule’s newly added limitation on discovery to matters relevant to the parties’ claims or defenses.<sup>94</sup> Thus, “relevant” information is discoverable, meaning information within the scope of discovery as defined elsewhere in the subdivision, whether or not the information is admissible, so long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.<sup>95</sup>

The amended rule also states that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii),” which have not been altered.<sup>96</sup> “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”<sup>97</sup>

84. *Id.*

85. Amendments to the Federal Rules, *supra* note 42, at 387 (Committee Note to Rule 26 amendments).

86. FED. R. CIV. P. 26(a)(4).

87. *Id.* 26(a)(3).

88. *Id.* 26(b)(1)(emphasis added).

89. FED. R. CIV. P. 26(b)(1) (amended by FED. R. CIV. P. 26(b)(1) (2000) (emphasis added)).

90. FED. R. CIV. P. 26(b)(1).

91. Amendments to the Federal Rules, *supra* note 42, at 389 (Committee Note to Rule 26 amendments).

92. *See id.* at 389-90.

93. FED. R. CIV. P. 26(b)(1).

94. Amendments to the Federal Rules, *supra* note 42, at 389-90 (Committee Note to Rule 26 amendments).

95. *Id.*

96. FED. R. CIV. P. 26(b)(1).

97. Amendments to the Federal Rules, *supra* note 42, at 389-90 (Committee Note to Rule 26 amendments).

The amendments to FRCP 26(b)(2) remove the ability of courts to implement local rules or standing orders that change presumptive limits on depositions and interrogatories, or the presumptive limit on the length of depositions under amended FRCP 30.<sup>98</sup> These discovery activities can still be modified by court order or agreement of the parties in a particular case.<sup>99</sup> Because there are no presumptive limits on the use of requests for admission, the new rule continues to allow courts to limit such requests by local rule.<sup>100</sup> The amended rule should standardize most discovery tools. Judge advocates, however, must continue to check local rules and seek additional limits on discovery as needed.

#### *Rule 26(d) Timing and Sequence of Discovery*

Like other provisions in FRCP 26, the amendments to FRCP 26(d) eliminate the opt-out provision for pre-amendment Rule 26(d). Courts no longer have the authority to issue local rules or standing orders that allow parties to begin discovery before the FRCP 26(f) conference.<sup>101</sup> Thus, the discovery moratorium now applies to all categories of cases, unless ordered otherwise by the court in a particular case or agreed to by the parties, with the exception of the eight categories of cases that are exempt from initial disclosure under FRCP 26(a)(1)(E).<sup>102</sup>

With regard to the eight categories of exempt proceedings, discovery can begin at any time. “Although there is no restriction on the commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases.”<sup>103</sup> Defendants can seek additional time to respond to discovery in exempted actions by bringing a motion under FRCP 26(c).<sup>104</sup> In cases that are in litigation, judge advocates should instruct

potential witnesses that plaintiffs’ attorneys have no authority to seek information or other discovery prior to the discovery conference.

#### *Rule 26(f) Meeting of the Parties; Planning for Discovery*

The amended rule removes the ability of courts to exempt cases from the FRCP 26(f) discovery planning conference requirement by local rule or standing order.<sup>105</sup> This change standardizes the requirement to have the parties confer about their discovery plans early in the litigation process. The eight categories of cases exempted from initial disclosure under FRCP 26(a)(1)(E), however, are also exempted from the requirement of the FRCP 26(f) conference.<sup>106</sup> All other categories of cases are subject to the requirement, although a court may order that the conference not occur in a particular case, or order that it *should* occur in a case exempted under FRCP 26(a)(1)(E).<sup>107</sup>

The parties must now hold the FRCP 26(f) conference at least twenty-one days, instead of fourteen days, before the FRCP 16 scheduling conference or a FRCP 16(b) scheduling order is due.<sup>108</sup> Additionally, parties must submit to the court the written report outlining their discovery plan within fourteen days, instead of ten days, after the FRCP 26(f) conference.<sup>109</sup> These time periods may be shortened by local rule “[i]f necessary to comply with [a court’s] expedited schedule for Rule 16(b) conferences.”<sup>110</sup> The court may also allow the parties to report orally on their discovery plan at the FRCP 16(b) conference in lieu of submitting a written plan.<sup>111</sup> The discovery conference need not be held face-to-face, although, in a particular case, “[a] court may order that the parties or attorneys attend the

98. *Id.* at 391.

99. *Id.*

100. *Id.*

101. *Id.* at 392.

102. *Id.*

103. *Id.* at 389 (Committee Note).

104. *Id.*

105. *Id.* at 392-93.

106. FED. R. CIV. P. 26(f) (2000).

107. Amendments to the Federal Rules, *supra* note 42, at 393 (Committee Note to Rule 26(f) amendments).

108. FED. R. CIV. P. 26(f).

109. *Id.*

110. *Id.*

111. *Id.*

conference in person.”<sup>112</sup> In light of these changes, extensions to provide litigation reports will be harder to obtain.

### Rule 30—Depositions Upon Oral Examination

The amendments to FRCP 30 limit depositions to one day of seven hours unless otherwise authorized by the court<sup>113</sup> or stipulated by the parties.<sup>114</sup> Reasonable breaks for lunch or other reasons do not count for the seven-hour period.<sup>115</sup> The deposition of each person designated under FRCP 30(b)(6) counts as a separate deposition for purposes of the time limit.<sup>116</sup> Courts may no longer limit the time for depositions by local rule, although they may do so by order in particular cases.<sup>117</sup>

Rule 30(d)(1) now requires “[a]ny objection during a deposition,”<sup>118</sup> as opposed to “[a]ny objection to evidence during a deposition,”<sup>119</sup> to be stated concisely and in a non-argumentative, non-suggestive manner. Similarly, the witness may be instructed not to answer to enforce “a limitation directed by the court,”<sup>120</sup> as opposed to “a limitation on evidence directed by the court.”<sup>121</sup> These changes are intended to avoid disputes about what constitutes “evidence,” and whether an objection is to, or a limitation is on, “evidence,” or merely discovery more broadly.<sup>122</sup> The requirements of the rule thus “apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition.”<sup>123</sup> Based on these changes, unnecessarily

long depositions should cease. Agency counsel participating in depositions should have more leeway in raising objections to matters beyond “evidence.” Practitioners should note, however, that the standard for what is objectionable has not changed.

Consistent with the changes to Rule 5(d), the amendment to Rule 30(f)(1) deletes the requirement that deposition transcripts be filed with the court.<sup>124</sup>

### Rule 37—Failure to Make Disclosure or Cooperate in Discovery: Sanctions

The amendment to FRCP 37 adds the failure to supplement a prior discovery response<sup>125</sup> to the list of failures to disclose that, unless harmless, will prevent a party from using the non-disclosed information or witnesses or justify other court-imposed sanctions.<sup>126</sup> Department of the Army and DOJ litigation attorneys concerned about sanctions will want assurances that all discovery responses are complete and timely supplemented. All newly found information must be coordinated through the litigation attorneys as soon as possible. This will have a significant impact on agency counsel in the field who will be the primary providers of documents.

112. See Amendments to the Federal Rules, *supra* note 42, at 393 (Committee Note to Rule 26(f) amendments).

113. A party seeking a court order to extend the seven-hour time limit must show good cause. *Id.* at 395-96 (Committee Note to Rule 30 amendments). Factors for the court to consider when asked for an extension include whether the deposition will be prolonged because of the need for an interpreter, whether the deposition will cover events occurring over a long time period, whether the deponent’s own lawyer will want to examine the witness, and whether the deponent is an expert witness. *Id.* If multiple parties will need to examine the witness, additional time may be appropriate, although the examinations should not duplicate one another and parties with similar interests should try to designate one lawyer to ask questions about areas of common interest. *Id.*

114. *Id.* The parties and witnesses are expected to make reasonable accommodations to avoid the need for court intervention, and may agree to alter the deposition schedule to best suit their mutual convenience. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 396.

118. FED. R. CIV. P. 30(d)(1) (2000).

119. FED. R. CIV. P. 30(d)(1) (amended by FED. R. CIV. P. 30(d)(1) (2000)).

120. FED. R. CIV. P. 30(d)(1).

121. FED. R. CIV. P. 30(d)(1) (amended by FED. R. CIV. P. 30(d)(1) (2000)).

122. See Amendments to the Federal Rules, *supra* note 42, at 395 (Committee Note to Rule 30 amendments).

123. *Id.*

124. *Id.* at 396.

125. See FED. R. CIV. P. 26(e)(2) and discussion *supra* notes 71-72 and accompanying text.

126. FED. R. CIV. P. 37(c) (1).

## Amendments to the Federal Rules of Evidence

As noted in the introduction, the proposed amendments to the FRE also became effective on 1 December 2000.<sup>127</sup> While the amendments will affect both civil and criminal cases in the Army, we will only address the impact on civil cases in this article.

### Rule 103—Rulings on Evidence

A party that unsuccessfully objects to the admission or exclusion of evidence will no longer need to renew its objection at trial in order to preserve the issue on appeal.<sup>128</sup> Before the recent amendment, the requirement of renewing objections at trial varied among federal jurisdictions.<sup>129</sup> In an effort to establish uniformity, the amendment added a sentence at the end of FRE 103(a) which provides that, “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”<sup>130</sup> An analysis of the term “definitive ruling” is key to determining whether counsel must renew its objection at trial. If counsel has any doubts as to whether or not the court has reserved judgment on the ruling, counsel has an obligation to clarify the issue with the court.<sup>131</sup> However, even if the court makes a definitive advance ruling, the amendment does not preclude the court from reviewing its decision once a party offers the evidence.<sup>132</sup> As the committee note highlights, “[i]f the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal.”<sup>133</sup> The same holds

true where the material facts and circumstances at trial differ from those proffered at the advance hearing.<sup>134</sup>

The amendment to FRE 103(a) is not boundless. The amendment does not override FRCP 72(a)<sup>135</sup> and its requirement to appeal, in writing, any adverse evidentiary decisions of a federal magistrate within ten days of receiving a copy of the order.<sup>136</sup> One issue not addressed by the amendment to FRE 103(a) is whether a party who loses a motion in limine and who then offers the evidence in an attempt to minimize its prejudicial impact, waives the right to appeal the trial court’s ruling.<sup>137</sup> Litigation attorneys should maintain a checklist of prior objections in a case and note those on which the court has definitively ruled.

### Rule 701—Opinion Testimony by Lay Witnesses

The amendment to Rule 701 adds an additional clause that prevents counsel from using lay witnesses to provide expert opinions. In its entirety, amended Rule 701 provides:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.<sup>138</sup>

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127. See *supra* notes 43-44 and accompanying text. With regard to FRE 404, Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes, the amendment to Rule 404(a)(1) expands the government’s ability to introduce evidence of the accused’s negative character in certain circumstances. The amendment inserts an additional clause at the end of Rule 404(a)(1), such that it now allows for evidence of a pertinent trait of character of an accused to be admitted if:

offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution . . .

FED. R. EVID. 404(a)(1) (2000) (emphasis added). Because this change only effects criminal cases, it will not be discussed in this article.

128. See Amendments to the Federal Rules, *supra* note 42, at 411-14 (Committee Note to Rule 103 amendments).

129. *Id.*

130. FED. R. EVID. 103(a).

131. See Amendments to the Federal Rules, *supra* note 42, at 412 (Committee Note to Rule 103 amendments).

132. *Id.* at 412.

133. *Id.*

134. *Id.*

135. FED. R. CIV. P. 72(a) (2000).

136. Amendments to the Federal Rules, *supra* note 42, at 413 (Committee Note to Rule 103 amendments).

137. *Id.* at 413-14.

Under the amendment, the true test of admissibility focuses on the nature of the testimony rather than the job title or description of the witness.<sup>139</sup> The court must examine testimony “under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>140</sup> Even with the amendment, it is possible for one witness to give both lay and expert testimony in the same case.<sup>141</sup> As to those portions of a witness’s testimony qualifying as the latter, the amendment requires parties to lay the proper foundation under FRE 702.<sup>142</sup> Furthermore, the amendment prevents a party from evading the disclosure requirements for expert witnesses set forth in FRCP 26.<sup>143</sup> As such, FRE 701(c) should limit the number of surprise experts disguised as lay witnesses.

### Rule 702—Testimony by Experts

The amendment to FRE 702 is a response to recent cases addressing expert witness testimony.<sup>144</sup> As amended, the rule adds a new clause to the end that allows a witness to provide an expert opinion, “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>145</sup>

Recognizing that the circumstances surrounding each trial will differ, the amendment does not include procedural requirements instructing courts on how to exercise their gatekeeper function over expert testimony.<sup>146</sup> Instead, courts will likely continue to rely on the list of factors recognized in *Daubert* and later cases in assessing whether or not expert testimony is sufficiently reliable to be heard by the trier of fact.<sup>147</sup> As noted by

the Rules Committee, “[c]ourts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, it is contemplated that this will continue under the amended Rule.”<sup>148</sup> Thus, the trial court retains leeway in determining which opinion testimony meets the substantive requirements under the amended rule. This leaves considerable room for advocacy in addressing the issues of reliability. While proffered expert testimony need not rely upon scientific method, it must be properly grounded, reasoned, and explained according to an accepted body of learning or experience in the expert’s field.

### Rule 703—Bases of Opinion Testimony by Experts

The presumption underlying the amendment to FRE 703 emphasizes the general notion that when an expert relies upon inadmissible information, such as hearsay, that information may not be brought before the trier of fact via the expert’s testimony.<sup>149</sup> The amended rule does so by stating that “[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”<sup>150</sup>

In essence, the amendment created a reverse FRE 403<sup>151</sup> balancing test. Under amended FRE 703, inadmissible evidence upon which the expert reasonably relies in formulating the expert opinion is barred unless the probative value outweighs the prejudicial effect.<sup>152</sup> As the Rules Committee specifically states, “when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying informa-

138. FED. R. EVID. 701 (2000 amendment noted in italics).

139. Amendments to the Federal Rules, *supra* note 42, at 416-17 (Committee Note to Rule 701 amendments).

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

145. FED. R. EVID. 702 (2000).

146. Amendments to the Federal Rules, *supra* note 42, at 423 (Committee Note to Rule 702 amendments).

147. *Id.* at 418-19 (listing five non-exhaustive factors).

148. *Id.*

149. Amendments to the Federal Rules, *supra* note 42, at 424 (Committee Note to Rule 703 amendments).

150. FED. R. EVID. 703 (2000).

151. FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”).

tion is not admissible simply because the opinion or inference is admitted.”<sup>153</sup>

The amendment to FRE 703 addresses only the disclosure of the inadmissible information to the trier of fact. “The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert’s opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.”<sup>154</sup> The language of the amended rule is limited to information offered by the proponent of the expert. Data or facts underlying the expert’s testimony may be offered by an adverse party on cross-examination, and such an attack may open the door allowing the proponent of the expert to disclose otherwise inadmissible information to the finder of fact in rebuttal.

**Rule 803—Hearsay Exceptions; Availability of Declarant Immaterial and Rule 902—Self-Authentication**

The amendment to FRE 803(6), Records of Regularly Conducted Activity, allows parties to meet the foundational requirements of the rule, “without the expense and inconvenience of producing time-consuming foundation witnesses.”<sup>155</sup> The amendment is a welcome change to the rule. Previously, courts required foundation witnesses to testify unless the parties agreed to a stipulation of expected testimony.<sup>156</sup>

The amendment to FRE 902, Self-authentication, adds two subsections (11) and (12).<sup>157</sup> Rule 902(11) addresses certified domestic records of regularly conducted activity and provides for their self-authentication. Domestic records shall be self-authenticating where:

[t]he original or a duplicate of a domestic record of regularly conducted activity that

would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.<sup>158</sup>

Rule 902(12) addresses certified foreign records of regularly conducted activity.<sup>159</sup> The amendment uses language that mirrors FRE 902(11) and provides for self-authentication of foreign records.<sup>160</sup> However, the amendment regarding certified foreign records places an additional burden on the declarant. Regarding foreign records, “[t]he declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed.”<sup>161</sup>

If a party intends to offer a domestic record into evidence under Rule 902(11) or a foreign record under 902(12), the party must provide all adverse parties with written notice of that intention. Further, the offering party must make the record and the supporting declaration available for inspection far enough in advance to provide the adverse party with a fair opportunity to challenge both.<sup>162</sup> Because of these requirements, judge advocates will need to obtain all documents and have them paginated and certified much earlier in the discovery process.

152. See Amendments to the Federal Rules, *supra* note 42, at 424-25 (Committee Note to Rule 703 amendments).

153. *Id.* at 424.

154. *Id.*

155. Amendments to the Federal Rules, *supra* note 42, at 426 (Committee Note to Rule 803 amendments).

156. *Id.*

157. FED. R. EVID. 902(11), (12).

158. *Id.* 902(11). To assist practitioners a sample declaration is provided at Appendix A.

159. *Id.* 902(12).

160. *Id.*

161. Amendments to the Federal Rules, *supra* note 42, at 427-28 (Committee Note to Rule 902 amendments).

162. FED. R. EVID. 902 (11), (12).

### **Conclusion**

The changes to the FRCP and the FRE will have an immediate impact on federal civil litigation. Taken together, the amendments to both the FRCP and FRE should create more uniform practice in the federal courts. It remains to be seen

whether the discovery changes will serve their intended purposes to expedite litigation, reduce costs of discovery, and allow for earlier and more extensive judicial intervention. Major Amrein, Major King, Captain Ryan, and Captain McCoy.

**Appendix A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

NAME , )  
 )  
 Plaintiff )  
 )  
 v. ) Civil Action No.  
 )  
 NAME , )  
 )  
 Defendant )

DECLARATION

1. I hereby certify that the document attached hereto consisting of \_\_\_\_\_ pages, is a true and exact copy of the \_\_\_\_\_ (e.g., the in-patient records of Jane Doe, regarding her hospitalization from \_\_\_\_ to \_\_\_\_), an official document in the custody of the \_\_\_\_\_.
2. The records attached hereto were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
3. The records attached hereto were kept in the course of the regularly conducted activity at \_\_\_\_\_. (TAMC, etc.)
4. The records were made by the regularly conducted activity as a regular practice.
5. I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746. (Use this language if the declaration is executed within the United States. If executed outside the United States, use "I declare (or certify, verify, or state) under penalty of perjury under the laws of the \_\_\_\_\_ (country where declaration will be signed) that the foregoing is true and correct.

Executed on: \_\_\_\_\_

NAME  
Duty position

# Note from the Field

## A Practitioner's Note on Physical Evaluation Boards

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### Introduction

The Army's disability system, in particular the Physical Evaluation Board (PEB), relies on a unique and complex body of law not readily understood<sup>1</sup> by members of the military to include many judge advocates.<sup>2</sup> This note is intended to help attorneys in the field who do not work directly with PEBs on a daily basis, but who may find themselves representing soldiers undergoing the process.<sup>3</sup> The first part offers practitioners a step-by-step explanation of the PEB process, highlighting its most important aspects.<sup>4</sup> The second part offers practitioners some useful suggestions to assist in case preparation. After

reading this note and examining the applicable regulations, practitioners should have the tools necessary to guide clients through the PEB system.

### Step One: Starting The PEB Process—The MEB

All PEBs begin with a Medical Evaluation Board (MEB).<sup>5</sup> A treating physician, commander or Military Occupational Specialty (MOS) Medical Retention Board (MMRB)<sup>6</sup> may refer a soldier to the MEB to determine if he meets retention standards.<sup>7</sup> If the MEB finds that the soldier meets retention

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1. The PEB process is not necessarily an intuitive one. For example, in the world of the PEB's 100% "Whole Person Concept,"  $30\%+20\%+10\%=50\%$ . How can that be? If a soldier is found to have three different unfit medical conditions rated at 30%, 20%, and 10% respectively, the aggregate of those conditions results in a 50% rating. This is so because the whole person is reduced proportionally by the first, and each subsequent rating, as illustrated in the following example:

1. The soldier starts as a 100% whole person. Applying the first percentage rating to this figure yields 30% with a new baseline figure of 70%. ( $100\% \times 30\% = 30\%$ )( $100\% - 30\% = 70\%$ ).
2. The soldier is now only a 70% whole person. Applying the second percentage rating to this new baseline figure yields 14% with a new baseline figure of 56%. ( $70\% \times 20\% = 14\%$ )( $70\% - 14\% = 56\%$ ).
3. The soldier is now only 56% whole. Again, applying the third percentage rating to this new baseline figure yields 5.6%. Since there are three ratings, no new baseline is needed. ( $56\% \times 10\% = 5.6\%$ ).
4. All the percentages are added together, yielding 49.6%. ( $30\% + 14\% + 5.6\% = 49.6\%$ ).
5. The resultant percentage is rounded to the nearest number divisible by 10, yielding 50%.

As stated earlier,  $30\%+20\%+10\%=50\%$ . Simple!

2. Currently the Army conducts PEBs at three locations, Fort Lewis, Fort Sam Houston, and Walter Reed Army Medical Center. Each location has at least one judge advocate assigned to represent soldiers before the PEB. In addition, the United States Army Physical Disability Agency (USAPDA) the higher headquarters for the three PEBs, has its own legal counsel.

3. In fiscal year 2000, USAPDA processed over 10,000 soldiers.

4. For more information on the Army's disability system to include the PEB process, see U.S. ARMY MEDICAL COMMAND, OTJAG, THE 1999 MEDICAL-LEGAL DESK-BOOK, Vol. I, 25-1 (Aug. 1999); Captain James R. Julian, *What You Absolutely, Positively Need to Know About the Physical Evaluation Board*, ARMY LAW., May 1996, at 31; Captain Eva M. Novak, *The Army Physical Disability System*, 112 MIL. L. REV. 273 (1986); Major Chuck R. Pardue, *Military Disability in a Nutshell*, 108 MIL. L. REV. 149 (1985); Dennis E. Brower & Lieutenant Colonel Arthur Reynolds, Service as Service Members' Counsel: Advocacy Before the Physical Evaluation Board (Apr. 1999) (unpublished information paper), available at <http://www.jagcnet.army.mil/> (Databases/LegalAssistance) [hereinafter Service as Service Members' Counsel].

5. U.S. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION, paras. 2-8, 2-9 (1 Sept. 1990) [hereinafter AR 635-40]. The medical standards applied in MEBs are covered by U.S. DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS (30 Aug. 1995) [hereinafter AR 40-501].

6. For a more complete discussion of the MMRB process, see Major Sheila E. McDonald, *The Military Occupational Specialty/Medical Retention Board: An Introduction and Practical Guide*, ARMY LAW., Jul. 1998, at 74.

7. The practitioner must understand that although the MEB and PEB address similar issues, they serve different functions. The PEB, which falls under U.S. Army Personnel Command (PERSCOM), makes a determination of *fitness* for duty and applies a disability rating if applicable. AR 635-40, *supra* note 5, paras. 4-17, 4-19. The MEB, which falls under U.S. Army Medical Command (MEDCOM), determines whether a soldier does or does not meet *retention* standards. *Id.* para. 4-10. The MEB, as opposed to the PEB, is a very informal process with minimal attorney-client involvement, if any. Although slight, the difference between the MEB and the PEB is very important and will be raised again later.

standards, the soldier is returned to his assignment.<sup>8</sup> However, if the MEB finds that the soldier does not meet retention standards, the soldier's file is forwarded to one of three PEBs for a fitness determination.<sup>9</sup>

### Step Two: Informal Board vs. Formal Board

Once the PEB receives a soldier's file from the MEB, the board conducts an informal adjudication, which is a record review of the MEB proceedings and findings, as well as applicable personnel documents to include the soldier's medical records.<sup>10</sup> The soldier does not appear in person before the informal board.<sup>11</sup> After an informal decision is made, the soldier consults with his Physical Evaluation Board Liaison Officer (PEBLO) at the Medical Treatment Facility (MTF) for assistance in determining what action to take regarding the PEB's informal findings.<sup>12</sup> If the soldier concurs with the findings, the case is forwarded to the U.S. Army Physical Disability Agency (USAPDA) for final disposition.<sup>13</sup>

#### *Non-Concurrence*

If the soldier non-concurs with the informal findings, he may submit a rebuttal for reconsideration and elect a formal board.<sup>14</sup> This is normally the point where the judge advocate

gets involved. When electing a formal board, the soldier may also: decide to appear or not appear; request an enlisted, female or minority representative on the board; and choose to be represented by the regularly appointed military counsel or counsel of choice at no expense to the government.<sup>15</sup> In addition, the soldier may contact the Disabled American Veterans and inquire about potential representation.<sup>16</sup>

#### *De Novo Review*

While it is the soldier's absolute right to request a formal board,<sup>17</sup> there are certain hazards associated with having a formal board. The formal board is not bound by decisions made during the informal board process, as it is a "de novo" proceeding.<sup>18</sup> Therefore, if the soldier elects a formal board, he may have his disability rating raised, lowered or maintained.<sup>19</sup> In addition, the formal board may find the soldier fit and return him to duty or recommend further tests at the MTF.<sup>20</sup>

#### *Formal Hearing*

The hearing begins with the president of the board reading a script addressing the soldier's rights and other administrative data.<sup>21</sup> At this time the soldier elects to give either sworn or

8. *Id.* para. 4-13.

9. *Id.*

10. *Id.* para. 4-20. The soldier's medically disabling condition(s) should be listed on the MEB Narrative Summary (NARSUM) or an official addendum. *Id.* para. 4-11. Any unlisted diagnosis may not be considered. *See id.* para. 4-18, app. D-8b. Therefore, if the soldier has a diagnosed condition not listed he should attempt to get a physician to write an addendum.

11. *Id.* para. 4-20.

12. The soldier has four election options: (1) Concurrence with the findings and recommendations and waiver of a formal hearing; (2) Nonconcurrence with the findings and recommendations; submission of a rebuttal explaining the soldier's reasons for nonconcurrence; and waiver of a formal hearing; (3) Demand for a formal hearing with or without personal appearance; and (4) Choice of counsel if a hearing is demanded. *Id.*

13. *Id.* para. 2-4 (e)-(f). Authority to act as final approving authority for all cases except those involving general officers and medical corps officers has been delegated to USAPDA from the Secretary of the Army. *Id.* para. 3-13. While not frequently exercised, USAPDA retains inherent supervisory authority to review and revise PEB findings, make informal determinations, or to refer the case to a formal board. *Id.* para. 4-22. The president of a PEB may reconsider an informal decision or direct a formal board *sua sponte* if the soldier's case has not been adjudicated by USAPDA. *Id.* para. 4-21r(2).

14. *Id.* para. 4-20. Due to personnel constraints, the same individuals generally adjudicate both the formal and informal boards.

15. *Id.* paras. 4-20c(d), 4-21h(1).

16. *Id.* para. 4-21h(1).

17. The request does not have to be granted if the soldier has been found fit for duty at the informal board. U.S. DEP'T OF DEFENSE, INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION, para. E.3.P1.3.3.1.2 (14 Nov 1996) [hereinafter DODI 1332.38].

18. AR 635-40, *supra* note 5, para. 4-21r(2).

19. *Id.*

20. *Id.*

21. *Id.* para. 4-21. *See* Service as Service Members' Counsel, *supra* note 5, para. IVD5.

unsworn testimony.<sup>22</sup> Once the soldier is sworn, he or his counsel presents the case-in-chief,<sup>23</sup> which normally consists of a brief opening statement and direct examination of the soldier and any available witnesses.<sup>24</sup> Next, the board members may question the soldier or witnesses.<sup>25</sup> After the board members finish their questions, the soldier (or counsel) may offer a closing statement.<sup>26</sup> The hearing is then closed for deliberation.<sup>27</sup> When a majority of the board members reach an agreement, which typically requires twenty to thirty minutes of deliberation depending on the complexity of the case, both the soldier and the attorney return to the hearing room for the decision.<sup>28</sup> A full hearing ordinarily lasts only sixty to ninety minutes, necessitating a well-organized and succinct presentation of matters.

### *Appeal Rights*

The soldier has ten days to concur or non-concur with the formal board decision.<sup>29</sup> If the soldier agrees with the findings of the formal board, the case is sent to USAPDA for final disposition.<sup>30</sup> If the soldier does not agree with the findings of the formal board and he submits the non-concurrence within the

allotted time, the case will be reconsidered by the PEB without the presence of either the soldier or his attorney and is then forwarded to USAPDA for final disposition.<sup>31</sup> If a USAPDA review confirms the PEB's findings, the soldier's case is finalized.<sup>32</sup> If a USAPDA review modifies the PEB findings, the revised findings are forwarded to the soldier for his concurrence or non-concurrence.<sup>33</sup> If the soldier non-concurs with the modified findings or provides a statement of rebuttal<sup>34</sup> and the rebuttal does not result in a reversal of the USAPDA modification, the case will be forwarded to the U.S. Army Physical Disability Appeal Board for a final decision.<sup>35</sup> If the soldier remains dissatisfied, he may appeal to the Army Board for Correction of Military Records.<sup>36</sup> In addition, the soldier may bring suit in the Court of Federal Claims.<sup>37</sup>

### **Step Three: What Is The PEB Looking For?**

The PEB, composed of a president, personnel management officer and medical member,<sup>38</sup> has two purposes: to decide whether or not the soldier is fit for duty and to determine disability compensation, if applicable.<sup>39</sup> However, the PEB cannot determine disability compensation until the soldier is first

22. AR 635-40, *supra* note 5, para. 4-21. For all practical purposes, only sworn testimony carries any weight.

23. *Id.* para. 4-21e(1)(c). Documentary evidence may be submitted at any time during the hearing. *Id.*

24. *Id.* On occasion, board members will interrupt counsel's presentation prior to completion to ask questions.

25. *Id.* para. 4-21e(1)(b).

26. *Id.* para. 4-21e(1)(d). Recommended practice is to have the soldier deliver the closing statement if he wants to be found fit for duty. However, the soldier must be capable of giving a closing and the practitioner should review any statement the soldier plans to offer the board.

27. *Id.* para. 4-21q.

28. The decision need not be unanimous. *See id.* para. 4-19m. If a board member disagrees with the majority, he may file a minority report—which is akin to a dissenting opinion and requires a review by USAPDA. *Id.* para. 4-22a(4).

29. *Id.* para. 4-21s(1).

30. *Id.* para. 4-24.

31. *Id.* paras. 4-21t, 4-22.

32. *Id.* para. 4-21t(4)(a).

33. *Id.* para. 4-21t(4)(b).

34. *Id.* para. 4-21t. The regulation states that a rebuttal must be based upon one or more of the following factors and must provide a rationale in support thereof: "(a) The decision of the PEB was based upon fraud, collusion, or mistake of law; (b) The soldier did not receive a full and fair hearing; (c) Substantial new evidence exists and is submitted which, by due diligence, could not have been presented before disposition of the case by the PEB." *Id.* para. 4-21t(1).

35. If the modification occurs during the informal findings, the soldier will be offered the opportunity to appear before the formal board and present his case pursuant to 10 U.S.C. § 1214 (2000).

36. *See* AR 635-40, *supra* note 5, para. 2-12.

37. The soldier can bring suit in the Court of Federal Claims after the formal board stage. *Pomory v. United States*, 39 Fed. Cl. 213 (1997) (citing *The Tucker Act*, 28 U.S.C. § 1491(a)(1) (2000); 10 U.S.C. § 1201 (2000)).

38. AR 635-40, *supra* note 5, para. 4-17b. Board membership may increase or decrease if one of the board members is challenged for cause or the soldier elects minority, female or enlisted membership on the board. *Id.* para. 4-21b.

found unfit for duty.<sup>40</sup> The judge advocate should make the soldier aware of this fact and determine whether the client wants to be found fit or unfit prior to entering the boardroom. Equivocating between the two will cause both the soldier and the attorney to lose credibility. That is to say, the judge advocate should not request that the formal board find his client either “unfit with a 100% rating<sup>41</sup> or fit and returned to duty.”<sup>42</sup>

### *The Standard*

The standard the PEB applies in determining fitness is whether the soldier can reasonably perform the duties of his office, rank, grade, or rating.<sup>43</sup> The PEB is best described as a *performance evaluation board* as opposed to a *physical evaluation board* because the PEB will only find the soldier unfit for duty if he cannot reasonably perform his specific MOS due to a medical condition which fails medical retention standards.<sup>44</sup> While the inability to qualify with a weapon, take the Army Physical Fitness Test (APFT), perform basic soldier skills, or deploy worldwide may impact on the fitness determination, each category does not by itself make the soldier unfit for duty. For example, if the soldier is unable to take the APFT, he may still be found fit for duty if able to perform his MOS.<sup>45</sup> To determine whether the soldier is fit, the PEB compares the nature and severity of the soldier’s medical condition to the requirements and duties he may reasonably be expected to perform in his primary MOS.<sup>46</sup> As a reference, the PEB uses *Army Regulation 611-1*<sup>47</sup> to determine what duties the soldier

performs in his MOS and the physical requirements of those duties.<sup>48</sup> Therefore, while a certain medical condition may make an infantryman unfit, the same condition may not make a doctor unfit. As the soldier’s advocate, you must also remember that this determination is based on the soldier’s rank.<sup>49</sup> Consequently, a certain condition may make a lieutenant unfit, but not a colonel, due to the nature of the MOS.

### *Retention vs. Unfitness*

To determine whether the soldier is unfit, the PEB will establish the medical condition(s) that ended the soldier’s career. It is possible for a soldier to be found unfit based on only one medical condition, even though he fails to meet medical retention standards in many different areas.<sup>50</sup> As the soldier’s advocate, you must remind the soldier that even if he has more than one diagnosed condition that fails medical retention standards, the PEB will only rate those conditions which fail medical retention standards and make him unfit for duty.<sup>51</sup> Remember the difference between the MEB and the PEB.<sup>52</sup> For the board to consider disability compensation, the soldier’s condition must fail not only retention standards but make him unfit for duty as well.<sup>53</sup>

### **Step Four: Determining Disability Compensation**

The second function of the PEB is to determine possible disability compensation.<sup>54</sup> If the soldier is found unfit, the PEB

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39. See *id.* paras. 4-17a, 4-19a, 4-19i.

40. See *id.* paras. 4-19f, 4-19i.

41. Disability ratings range from 0% to 100%. In dealing with approximately 200 clients, the author has had only one receive a 100% rating.

42. This type of argument is illogical and may prove detrimental to the client’s case.

43. AR 635-40, *supra* note 5, para. 4-19a(1).

44. See AR 40-501, *supra* note 5.

45. DODI 1332.38, *supra* note 17, paras. E3.P3.4.1.2, E3.P3.4.4.

46. *Id.*

47. U.S. DEP’T OF ARMY, REG. 611-1, MILITARY OCCUPATIONAL CLASSIFICATION AND STRUCTURE (1 Jul. 1994).

48. The board members rely heavily on their own experience and knowledge of the Army to determine whether a soldier can function in a particular MOS.

49. AR 635-40, *supra* note 5, para. 4-19a(1).

50. *Id.* para. 3-1.

51. AR 635-40, *supra* note 5, para. 3-1c.

52. See note 7 *supra* and accompanying text.

53. AR 635-40, *supra* note 5, para. 4-19i.

54. *Id.*

will next determine whether the medical condition was caused or permanently aggravated by military service.<sup>55</sup> If the PEB finds that the soldier's military service neither caused nor permanently aggravated his condition, he will be separated without benefits. However, if the PEB reaches the opposite conclusion, it will assign a disability rating based on the diagnosed condition and its severity.<sup>56</sup>

### Severance Pay

The soldier is entitled to severance pay if he receives a disability rating of less than 30%.<sup>57</sup> Severance pay is calculated by multiplying the soldier's most recent monthly base pay by two, then multiplying the resulting number by the total number of years on active duty up to twelve years (six months or more counts as a whole year).<sup>58</sup> Financially, there is no difference between a 0%, 10%, or 20% rating. Under limited circumstances, both severance and disability retirement pay may be non-taxable.<sup>59</sup>

If the soldier receives a disability rating of 30% or more, he will be placed on either the permanent or temporary disabled retired list (PDRL/TDRL).<sup>60</sup> Soldiers placed on the TDRL are temporarily retired, but must undergo periodic medical re-examinations to see if their condition changes or stabilizes.<sup>61</sup> After each re-examination the results are forwarded to the PEB for disposition.<sup>62</sup> If the PEB determines that the soldier's condition has improved sufficiently, the PEB can find the soldier fit for duty.<sup>63</sup> The soldier then has a statutory right to return to active duty.<sup>64</sup> If the PEB determines that the soldier's condition has improved but not to such an extent that the soldier is fit for duty, the soldier may be removed from the TDRL and offered severance pay.<sup>65</sup> In addition, the board may permanently retire the soldier or keep him on TDRL.<sup>66</sup> While on TDRL, the soldier receives at least 50% of his retirement base pay.<sup>67</sup> If the soldier is placed on TDRL with a rating above 50%, his pay will be based on the higher rating.<sup>68</sup>

55. *Id.* para. 4-19f.

56. The PEB relies on a number of regulations and directives to determine the disability rating. See Department of Veterans Affairs, Schedule for Rating Disabilities, 38 C.F.R. §§ 4.1-150 (2000); U.S. DEP'T OF DEFENSE, DIR. 1332.18, SEPARATION OR RETIREMENT FOR PHYSICAL DISABILITY (4 Nov 1996); DODI 1332.38, *supra* note 17; U.S. DEP'T OF DEFENSE, INSTR. 1332.39, APPLICATION OF THE VETERANS ADMINISTRATION SCHEDULE FOR RATING DISABILITIES (14 Nov 1996); AR 635-40, *supra* note 5.

57. AR 635-40, *supra* note 5, app. B-15, A-2, C-12.

58. 10 U.S.C. § 1212(a) (2000).

59. A soldier may receive all or a portion of his disability or retirement pay tax free if:

- (1) he was a member of the Armed Forces, National Oceanic and Atmospheric Administration or U.S. Public Health Service or was under binding written agreement to become such a member on 24 September 1975; (2) the injury is a direct result of armed conflict or directly caused by an instrumentality of war, during a period of war; or (3) on application to the VA the soldier is entitled to receive compensation.

26 U.S.C. § 104(a)(4) (2000).

60. AR 635-40, *supra* note 5, ch.7. Most soldiers are placed on TDRL as opposed to PDRL unless the unfitting medical condition involves an amputation or the soldier has over twenty years of military service. Under limited circumstances, a soldier with twenty years of service may be placed on TDRL with a rating below 30%. *Id.* para. 3-9.

61. *Id.* para. 7-4. The maximum allowable time on TDRL is five years. *Id.* para. 7-9d.

62. *Id.* para. 7-19.

63. *Id.* para. 7-11a(3).

64. 10 U.S.C. §§ 1211(a), 1210(f)(1)(B) (2000) (giving the soldier the option of returning to duty).

65. AR 635-40, *supra* note 5, para. 7-11(2). At this stage, the soldier can opt for another formal board. *Id.* para. 7-21.

66. *Id.* para. 7-11a(1).

67. 10 U.S.C. §§ 1402, 1406, 1407. See also AR 635-40, *supra* note 5, apps. C-10, C-12.

68. A soldier's maximum disability retirement pay, like regular retirement pay, is capped at 75% of his monthly base pay. Consequently, even if the soldier receives a 100% rating he will not receive more than 75% of his monthly base pay. 10 U.S.C. § 1401.

## Case Preparation

As the soldier's advocate you must provide him advice and guidance to ensure that he makes an informed decision. Depending on caseload,<sup>69</sup> judge advocates may need to rely on the soldier to take an active role in case preparation, such as getting statements from witnesses, gathering important documents, and following up on medical consultations.

While nothing replaces a personal in-depth consultation, focused instructions, if provided to the soldier early enough in the process, may lead to a more favorable rating before the formal board.<sup>70</sup> While the soldier's testimony alone may change the outcome, it is generally insufficient. The following checklists are offered to assist judge advocates in providing guidance to their clients and developing their cases.

### Checklist To Obtain Higher Disability Rating

(1) Additional medical evidence demonstrating that his condition is more severe than originally diagnosed or described in his NARSUM. The soldier should attempt to have this new evidence drafted in an addendum to his MEB.

(2) Documentation of hospital or emergency room visits, sick call slips, and physical therapy records incurred after the MEB was dictated.

(3) Copies of all medical treatment records (civilian and military) to include VA disability award letter(s), if applicable.

### Checklist for Seeking Fit for Duty Determination

(1) Letters of recommendation from commanders and supervisors indicating that he performs in his MOS and participates in unit Physical Training, Common Tasks Test, field exercises and deployments.

(2) An Army Physical Fitness Test (APFT) card or a copy showing that he has recently passed the APFT.

(3) His latest Non Commissioned Officer Evaluation Report/Officer Evaluation Report, if applicable.

### Checklist for Attorneys Appearing Before the Formal Board

Finally, the judge advocate representing a soldier before a PEB should run through the following questions to ensure they are adequately prepared to present the soldier's case:

1. Am I familiar with applicable regulations and the Veterans Administration Schedule for Rating Disabilities (VASRD)? Do I know which VASRD codes are applicable? Have I checked Appendix B of AR 635-40, DODIs, and USAPDA Policy Memorandums to see if there are modifications? Do I understand how the soldier's symptoms and test results should be rated? Does the soldier understand this? Am I prepared to address the issue of fitness, even if the informal board found the soldier unfit? Do I understand the soldier's MOS? What tasks can the soldier not accomplish in his MOS? Are supporting documents available?

2. If the soldier is on TDRL, have I looked at previous TDRL packets? Do I understand how the soldier's condition has or has not changed since being placed on TDRL? Have I advised the soldier to obtain copies of all medical records from VA and civilian doctors?

3. If I have doubts about the value of a formal board, have I given the soldier the benefit of my opinion and advised him of the option to waive the hearing?

4. Are the soldier's claims realistic and provable, in light of all the available evidence?

5. Have I advised the soldier that the formal board is "de novo"?

6. Have I adequately prepared the soldier and witnesses for direct and cross-examination? Can I deal effectively with "questionable" matters?

7. Am I sure that the soldier does not have any last minute questions?

8. Are my questions for the soldier simple to follow? Does the soldier understand the questions that he will be requested to answer during the hearing? Am I prepared to summarize the expected answers into a short narrative if the soldier is unable to provide adequate responses?

69. Based on the author's experience, the soldiers' legal counsel assigned to Walter Reed Army Medical Center normally presents two cases daily before the PEB, depending on additional duties.

70. Keeping in mind that the soldier's best opportunity to change the decision made at the informal board rests with producing new evidence, with medical evidence normally proving the most persuasive. See *supra* note 5 and accompanying text.

9. Do I fully understand what the soldier wants from the hearing?

10. Does the soldier understand that the PEB cannot address issues such as lack of treatment or mistreatment by medical personnel, reclassification to another MOS, or changing a finalized line of duty determination?

11. Do I know how the soldier's injury or disease affects his ability to perform? Regardless of medical records, do I know what the soldier is feeling? Is the discrepancy between the soldier's complaints and records so great that I should request that his case be returned to the MTF?

12. Does the soldier have the basic information regarding uniform, reporting, and the procedures to be followed in the hearing room?

13. Does the soldier understand that the formal board findings are subject to review by USAPDA?

14. Does the soldier have any additional appointments, treatments or surgeries scheduled which will change his level of disability? Can the board be delayed by the board president or recalled by the MTF?

15. Did I discuss available VA options with the soldier?

### Helpful Hints

The PEBs place a great deal of weight on credibility. The soldier should answer questions honestly and consistently. The board will compare the soldier's testimony to medical or personnel records. As the soldier's advocate, you must remember that many soldiers never interact with high-ranking members of the Army and thus may be nervous during the formal board. In addition, the decisions rendered by the formal board hold long-term consequences. Going through a brief question and answer session before the actual formal board helps prepare the soldier so that he will be more at ease during the hearing. These sessions should stress the need for honest responses before the board and should not be used to coach the soldier or craft his responses. The following are some typical questions posed by board members during proceedings:

*What do you want the board to do for you?*

This question may mean that the particular board member is not sure what he is going to do.

*How much work or school have you missed because of your medical condition?*

*When was the last time you saw a doctor or went to the emergency room?*

*What medication did you take today? What did you take yesterday?*

*When did you obtain your last prescription?* The board is looking to see how much medication the soldier takes. If the soldier states "I take three pills a day" and the prescription has not been refilled in months, he places his credibility in question and demonstrates that his condition is not severe.<sup>71</sup>

*Is the pain constant? Rate the pain on a scale of one to ten.* Pain is very rarely constant. There are usually times that are better or worse. Therefore, the soldier could state that he "always has pain, but activities such as running, lifting, or bending make it worse."

*What are you doing to improve your condition, such as physical therapy or rehabilitation?* This normally applies to orthopaedic injuries. The board wants to see a concerted effort at rehabilitation. The soldier should be able to describe specific activities. If the soldier cannot describe them then it shows the board that the soldier may not actually be doing the stretches or exercises.

*What are you going to do when you leave the Army?* The board will want to see if the soldier's post-Army plans are inconsistent with the injuries or pain he claims to have.

*Have you ever injured your back, knee, leg before?* This relates to credibility.

*What kind of car do you drive?* This usually arises in orthopaedic cases. The board is looking to see if the soldier drives a standard or automatic.

*Do you shop at the mall?* The board wants to know if the soldier can stand and walk for long periods. If the soldier does shop, have him tell the board how long he can stand, how far he can walk, and how often he needs to rest while shopping.

*Do you participate in household chores? Who does the grocery shopping?* The board wants to know how the condition affects the soldier outside of the workplace. Be aware,

71. Remember that military hospital visits, prescriptions, dates of examinations, and other medical information may be checked electronically.

the board may ask a soldier suffering from a cold injury such as frost bite whether he goes into the frozen foods section of the grocery store.

*Are you married and do you have children?* Does your medical condition limit your interactions with your family?

*Describe a typical workday by the hour?*

*Is your driver's license restricted?* If the soldier's condition is severe, the Army or state may restrict or revoke driving privileges.

*Do you get along with superiors? Do you enjoy the Army?* The board may be looking for ulterior motive. The board does not like

to hear that superiors are out to get the soldier. When did you become unfit?

*What is your VA rating?* If the soldier has a rating, use it to compare the severity. This normally only applies to those soldiers already on TDRL or in the Reserves.

### **Conclusion**

This note provides a basic road map on how to represent soldiers during the PEB process. It is intended as a guide to give the attorney in the field a better understanding of one portion of the Army's Physical Disability System. It is offered as a starting point, to be used along with all of the governing statutes and regulations, so that judge advocates can provide the best possible representation to soldiers faced with this complex process.

# 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 confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, 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 nonunit reservists, through the 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 Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's 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.

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

## 2. TJAGSA CLE Course Schedule

### 2001

#### February 2001

2 February- 6 April	154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
5-9 February	75th Law of War Workshop (5F-F42).

12-16 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26 February- 2 March	59th Fiscal Law Course (5F-F12).
26 February- 9 March	35th Operational Law Seminar (5F-F47).

#### March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

#### April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
9-13 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).

30 April- 11 May	146th Contract Attorneys Course (5F-F10).
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#### May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

#### June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).

4 June- 13 July	8th JA Warrant Officer Basic Course (7A-550A0).	13 August- 23 May 02	50th Graduate Course (5-27-C22).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).	20-24 August	7th Military Justice Managers Course (5F-F31).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	20-31 August	36th Operational Law Seminar (5F-F47).
6-8 June	Professional Recruiting Training Seminar	<b>September 2001</b>	
11-15 June	31st Staff Judge Advocate Course (5F-F52).	10-14 September	2d Court Reporting Symposium (512-71DC6).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).	10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).	10-21 September	16th Criminal Law Advocacy Course (5F-F34).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).	17-21 September	49th Legal Assistance Course (5F-F23).
25-27 June	Career Services Directors Conference.	18 September- 12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
29 June- 7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).
<b>July 2001</b>		<b>October 2001</b>	
8-13 July	12th Legal Administrators Course (7A-550A1).	1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).	1 October- 20 November	6th Court Reporter Course (512-71DC5).
16-20 July	76th Law of War Workshop (5F-F42).	12 October- 21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
16 July- 10 August	2d JA Warrant Officer Advanced Course (7A-550A2).	15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
16 July- 31 August	5th Court Reporter Course (512-71DC5).	23-26 October	2001 USAREUR Legal Assistance CLE (5F-F23E).
30 July- 10 August	147th Contract Attorneys Course (5F-F10).	29 October- 2 November	61st Fiscal Law Course (5F-F12).
<b>August 2001</b>		<b>November 2001</b>	
6-10 August	19th Federal Litigation Course (5F-F29).	12-16 November	25th Criminal Law New Developments Course (5F-F35).
		26-30 November	55th Federal Labor Relations Course (5F-F22).

26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).	4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).	25 February-1 March	62d Fiscal Law Course (5F-F12).
<b>December 2001</b>		25 February-8 March	37th Operational Law Seminar (5F-F47).
3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).	<b>March 2002</b>	
3-7 December	2001 Government Contract Law Symposium (5F-F11).	4-8 March	63d Fiscal Law Course (5F-F12).
		18-29 March	17th Criminal Law Advocacy Course (5F-F34).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).	25-29 March	4th Contract Litigation Course (5F-F103).
	<b>2002</b>	25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).
<b>January 2002</b>		<b>April 2002</b>	
2-5 January	2002 Hawaii Tax CLE (5F-F28H).	1-5 April	26th Admin Law for Military Installations Course (5F-F24).
7-11 January	2002 PACOM Tax CLE (5F-F28P).	15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).	15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
7 January-26 February	7th Court Reporter Course (512-71DC5).	22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	29 April-10 May	148th Contract Attorneys Course (5F-F10).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).	29 April-17 May	45th Military Judge Course (5F-F33).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).	<b>May 2002</b>	
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).	13-17 May	50th Legal Assistance Course (5F-F23).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).	<b>June 2002</b>	
<b>February 2002</b>		3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
4-8 February	77th Law of War Workshop (5F-F42).	3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).

4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

**July 2002**

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

**August 2002**

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

**September 2002**

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

**3. Civilian-Sponsored CLE Courses**

9 February ICLE	Motion Practice Marriott Center Hotel Atlanta, Georgia
16 February ICLE	Advocacy & Evidence Sheraton Colony Square Hotel Atlanta, Georgia
22 February ICLE	Electronic Discovery (PM) Atlanta, Georgia

**4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates**

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September 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	South Carolina**	15 January annually
Idaho	December 31, Admission date triennially	Tennessee*	1 March annually
Indiana	31 December annually	Texas	Minimum credits must be completed by last day of birth month each year
Iowa	1 March annually	Utah	31 January
Kansas	30 days after program	Vermont	2 July annually
Kentucky	30 June annually	Virginia	30 June annually
Louisiana**	31 January annually	Washington	31 January triennially
Maine**	31 July annually	West Virginia	30 June biennially
Michigan	31 March annually	Wisconsin*	1 February biennially
Minnesota	30 August	Wyoming	30 January annually
Mississippi**	1 August annually	* Military Exempt	
Missouri	31 July annually	** Military Must Declare Exemption	
Montana	1 March annually	For addresses and detailed information, see the March 2000 issue of <i>The Army Lawyer</i> .	
Nevada	1 March annually		
New Hampshire**	1 August annually		
New Mexico	prior to 30 April annually		
New York*	Every two years within thirty days after the attorney's birthday		
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		
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December		
Rhode Island	30 June annually		

#### 5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2000**, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group **NLT 2400, 30 November 2000**. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact Lieutenant Colonel Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. Lieutenant Colonel Goetzke.

## Current Materials of Interest

### 1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

<b><u>DATE</u></b>	<b><u>TRAINING SITE AND HOST UNIT</u></b>	<b><u>AC GO/RC GO</u></b>	<b><u>SUBJECT</u></b>	<b><u>ACTION OFFICER</u></b>
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU	BG Romig COL(P) Walker	Civil/Military Operations; Administrative Law; Contract Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO	MG Altenburg COL(P) Pietsch	Criminal Law; International Law	POC: MAJ James Schaefer (513) 946-3038 jschaefer@prosecutor.hamilton-co.org ALT: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com
10-11 Feb	Seattle, WA 70th RSC, 6th MSO	MG Huffman COL(P) Arnold	Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG	BG Barnes COL(P) Arnold	Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Francisco, CA 63rd RSC, 75th LSO	MG Huffman COL(P) Pietsch	RC JAG Readiness (SRP, SSCRA, Operations Law)	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com
10-11 Mar	Washington, D.C. 10th LSO			POC: MAJ Silas Deroma (202) 305-0427
24-25 Mar	Charleston, SC 12th LSO	BG Barnes COL(P) Walker	Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsibility	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	
28-29 Apr	Newport, RI 94th RSC	MG Huffman COL (P) Walker	Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Military Justice	POC: LTC Bill Kumpe (314) 991-0412, ext. 1261

## **2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)**

For a complete listing of the TJAGSA Materials Available Through DTIC, see the September 2000 issue of *The Army Lawyer*.

## **3. Regulations and Pamphlets**

For detailed information, see the September 2000 issue of *The Army Lawyer*.

## **4. TJAGSA Legal Technology Management Office (LTMO)**

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's

web page at <http://www.jagcnet.arm.mil/tagjsa>. Click on directory for the listings.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

## **5. The Army Law Library Service**

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: [lullnc@hqda.army.mil](mailto:lullnc@hqda.army.mil).

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