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No Honor, No Glory
Labor Counsel's Guide to Employee Misconduct Interviews after *LaChance v. Erickson*

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Introduction

In 1998, the Supreme Court issued two decisions that made clear that individuals have no right to lie to the federal government. In *LaChance v. Erickson*,[1] the Court held that employees do not have a right to lie to federal agencies in their responses to agency charges.[2] In *Brogan v. United States*,[3] the Court held that individuals have no right to lie to federal law-enforcement agents during investigations.[4]

Misconduct exists in the federal workplace, as it does in the private sector. Thus, federal agencies investigate employee misconduct, just as employers do in the private sector. Prior to 1988, the law mandated that employees had a duty to cooperate, and provide truthful testimony, in agency investigations.[5] Also, agencies could discipline employees for making false statements during agency investigations.[6] In many cases, agencies disciplined employees for both the original misconduct, and for making false statements during agency investigations.[7] The Merit Systems Protection Board (MSPB) routinely upheld such agency disciplinary actions.[8]

This article traces the development of the law of false statements in pre-charge investigations, from the law prior to *Grubka v. Department of Treasury*,[9] through the Federal Circuit's line of cases holding that employees have a due process right to deny the agency's charges against them. The article then discusses the Supreme Court's decision in *LaChance v. Erickson*,[10] and concludes with a labor counselor's guide to employee misconduct investigations.

The Settled Law Prior to *Grubka*

Prior to 1988, when the Federal Circuit decided *Grubka*, the law was settled that agencies could discipline employees for lies they tell during investigations.[11] Lies in the federal workplace can be divided into lies related to misconduct actions and those unrelated to these actions. This article discusses only the first type. Lies that are related to misconduct actions can be further subdivided into lies that employees tell during agency investigations into misconduct (investigation stage), and lies that employees tell during the agency's adjudication of misconduct charges against them (adjudication stage).

One type of lie involves an employee who commits a crime and lies about it during an agency investigation. In *Rhoads*, the employee, a law-enforcement officer, used marijuana and lied about it during an agency investigation, through a simple denial.[12] The agency disciplined the employee for making a false statement. The MSPB sustained the disciplinary action.[13]

Another type of lie involves an employee who commits misconduct, which is short of a crime, and lies about it. In *Perez*,[14]

1. 118 S. Ct. 753 (1998).

2. *Id.* at 756.

3. 118 S. Ct. 805 (1998).

4. *Id.* at 809-10.

5. Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

6. *Id*.

7. *See, e.g.*, Rhoads, 12 M.S.P.B. 115, 116 (1982).

8. *Id.* Pursuant to 5 U.S.C.A. **§** 7701(b), the Merit Systems Protection Board (MSPB) reviews employee appeals from agency actions. 5 U.S.C.A. § 7701(b) (West 1998).

9. Grubka v. Department of Treasury, 858 F.2d 1570 (Fed. Cir. 1988).

10. 118 S. Ct. 753 (1998).

11. *Weston*, 724 F.2d at 949.

the employee attended a trade show during duty time and lied about it to agency investigators.[15] His lie went beyond a simple denial. In addition to denying the allegation, the employee stated that he spent only twenty to thirty minutes at the hotel where the trade show was held.[16] Investigators, however, uncovered other evidence indicating that Mr. Perez was at the hotel for about two hours.[17] The MSPB sustained the disciplinary action.[18]

Employees can also lie to agency investigators about whether they told other lies. In *Amann*,[19] an employee made false statements on his employment and security clearance applications.[20] He subsequently lied to agency investigators who were looking into the earlier false statements.[21] It was unclear, however, whether the later lies were simple denials or affirmative falsehoods. The MSPB sustained the disciplinary action.[22]

Finally, employees occasionally lie to agency investigators when they are interviewed as witnesses to misconduct by third parties. In *Cogman*,[23] the employee falsely told agency investigators that she did not know anything about misconduct by another employee.[24] Although she made only a simple denial, the MSPB sustained the disciplinary action against her.[25]

The above cases dealt with disciplinary actions for false statements that were made during agency investigations. Another category of lies related to misconduct cases involves employees who make false statements during the adjudicative stage, the period after an agency formally charges the employee. One of these cases, *Williams*,[26] involved an employee who submitted a false leave request.[27] The agency charged Williams with misconduct.[28] During the adjudication of that misconduct, Williams made some unspecified false statements.[29] The agency charged Williams with making those false statements.[30] The MSPB later sustained the agency's disciplinary action.[31]

12. *Rhoads*, 12 M.S.P.B. at 116.

13. *Id*.

14. 26 M.S.P.B. 546 (1985), *enforced*, 790 F.2d 92 (Fed. Cir.).

15. *Id.* at 547.

16. *Id*.

17. *Id*.

18. *Id.* at 549.

19. 19 M.S.P.B. 116 (1984).

20. *Id.* at 117.

21. *Id*.

22. *Id.* at 118.

23. 12 M.S.P.B. 569 (1982).

24. *Id.* at 569.

25. *Id*.

26. 34 M.S.P.B. 54 (1987).

27. *Id.* at 56.

28. *Id*.

29. *Id.* at 58.

30. *Id*.

31. *Id*. at 59.

The *Grubka-Erickson* Due Process Right to Lie

Grubka: Wrong as a Matter of Law to Charge False Statements

Prior to *Grubka*, agencies disciplined employees for making false statements related to the workplace, and the MSPB sustained the agencies' actions. The Federal Circuit, however, turned that body of law "upside down" with its decision in *Grubka*.[32] Mr. Grubka was a senior-level (GS-14) employee of the Internal Revenue Service.[33] The charges against him arose out of an after-hours party that a female trainee agent organized for other trainees, their instructors, and supervisors.[34] The agency charged Mr. Grubka with three charges of conduct unbecoming a manager, based on his actions with three female trainees.[35] The Federal Circuit set aside all three charges based on insufficient evidence.[36]

The agency also charged Mr. Grubka with making a false statement to its investigators.[37] Agency investigators interviewed Mr. Grubka about an incident that allegedly occurred in a stairwell.[38] During the questioning, Mr. Grubka admitted that he smelled a female employee's perfume, but denied the allegations that he leaned toward her and was sexually aroused.[39] The MSPB sustained the false statement charge against Mr. Grubka.[40] The Federal Circuit, however, reversed the MSPB.[41] The Federal Circuit held that the agency's evidence was insufficient. According to the court, there was no nexus between the allegations and the agency's mission. Additionally, the court held that Mr. Grubka had a due process right to deny the allegations.[42] Therefore, the false statement charge was erroneous "as a matter of law."[43]

Assuming that the Federal Circuit was correct about the other bases for its decision, the court's due process rationale appears to be wrong. Specifically, the court failed to distinguish between due process rights that exist at the investigation stage and those that exist at the adjudication stage. Regardless of the due process rights that exist at the adjudication stage, employees have no right to lie at the investigation stage.[44] Absent a Fifth Amendment privilege against self-incrimination, agency employees are required to fully cooperate in agency investigations and to answer truthfully.[45] The Federal Circuit was wrong because it stated a single rule that employees have a due process right to deny agency allegations.[46] It should have first decided whether Mr. Grubka lied at the investigation stage or at the adjudication stage.

Bradley: Did the Federal Circuit Backtrack from Grubka?

In *Bradley v. Veteran's Administration*,[47] the Federal Circuit wrote, in *dicta*, that agencies may impose discipline on employees who lie to agency investigators.[48] This was different from the court's holding in *Grubka*, two years earlier. In *Grubka*, the court held that the agency was wrong "as a matter of law" to discipline Mr. Grubka for lying to agency investigators.[49]

32. Grubka v. Department of Treasury, 858 F.2d 1579 (Fed. Cir. 1983).

33. *Id*. at 1571.

34. *Id*. at 1572.

35. *Id*.

36. *Id*

37. *Id*. at 1574.

38. *Id*.

39. *Id*. at 1573.

40. *Id*. at 1571.

41. *Id*. at 1574.

42. *Id*. at 1575.

43. *Id*.

44. Weston v. Department of Housing and Urban Dev., 724 F.2d 943 (Fed. Cir. 1983).

45. *Id.* at 948.

46. *Grubka*, 858 F.2d at 1575.

47. 900 F.2d 233 (Fed. Cir. 1990).

48. *Id.* at 237.

Bradley is notable for two reasons. First, the court recognized the different disciplinary standards for false statements at the investigation stage, as opposed to the adjudication stage, which it failed to do in *Grubka*.[50] Second, the court cited no authority for the *Bradley* rule. It was as if the court did not recognize its own precedent in *Weston v. Department of Housing and Urban Development.*[51]

The key language, however, was in the *dicta*.[52] In *dicta*, the court recognized that agencies do have the authority to discipline employees who make false statements to supervisors or investigators. As in *Grubka*, agency investigators interviewed the employee in *Bradley.*[53] Also, as in *Grubka*, the employee denied the allegations.[54] In *Grubka*, the Federal Circuit held that the false statement charge was *improper* as a matter of law.[55] In *Bradley*, however, the court held that the false statement charge would be *proper.*[56] This inconsistency is confusing. The only possible explanation for allowing a false statement in *Bradley*, but not in *Grubka*, is if the employee in *Grubka* made his statement after being charged (adjudication stage).[57] The problem with this explanation, however, is that the opinion did not state that Mr. Grubka made the false statements after he was charged. In fact, this scenario is unlikely because agencies typically investigate and interview employees prior to charges, not afterward.

Beverly: Federal Circuit Goes Out on a Limb

In 1990, the same year as *Bradley*, the Federal Circuit went further "out on a limb" in *Beverly v. United States Post Office*[58] by stating that an employee's lie, so long as it is a "mere denial" of an agency charge, is not a lie at all.[59] In *Bradley*, the Federal Circuit recognized the general rule that agencies may discipline employees for false statements that they make during agency investigations.[60] In *Beverly*, however, the Federal Circuit recognized a type of "exculpatory no," in that it made an exception to the general rule that allows "mere denials." In other words, the court allowed employees to lie to agencies during investigations, if the lie is a mere denial of agency allegations, and the employee did not tell additional affirmative lies beyond the denial.

Beverly made an exception to the general rule in *Weston v. Department of Housing and Urban Development* that, during pre-charge inquiries, employees must speak the truth.[61] Under the *Beverly* exception, employees could make false statements, so long as they were "mere denials." While this concept has similarities to the exculpatory no doctrine, discussed *infra*, the court did not explicitly adopt that doctrine in its opinion. In fact, the Federal Circuit did not cite any authority for its decision. It did not explain how "mere denials" are lawful exceptions to the general rule that agencies may discipline employees for making false statements during agency investigations.

How Did the MSPB React to the Federal Circuit's New Decisions?

For a time after *Grubka*, the MSPB fought to maintain agencies' rights to discipline employees for false statements. In many ways, the board is closer to the everyday work of federal agencies than the Federal Circuit. For example, it is only one step removed from the administrative judge who adjudicates an agency's adverse actions. Additionally, the MSPB reviews an agency's disciplinary actions.[62] By contrast, the Federal Circuit

49. *Grubka*, 858 F.2d at 1575.

50. *Bradley*, 900 F.2d at 233.

51. 724 F.2d 943 (Fed. Cir. 1983).

52. *Id*. The rule is *dicta* because the agency did not charge the employee with the offense of making false statements.

53. *Id.* at 236.

54. *Id*.

55. *Grubka*, 858 F.2d at 1575.

56. The agency chose not to charge the employee with the offense of making a false statement.

57. If the *Grubka* denial were made after charging, the court could excuse it as a denial made pursuant to its concept of a "due process right" to deny agency allegations.

58. 907 F.2d 136 (Fed. Cir. 1990).

59. *Id.* at 137.

60. Bradley v. Veteran's Administration, 900 F.2d 233, 237 (Fed. Cir. 1990).

61. Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

62. 5 U.S.C.A. § 7701(a) (West 1998).

is two steps removed from the agency, and it reviews a myriad of cases other than appeals from the MSPB's decisions.[63]

The Federal Circuit's decisions in *Grubka* and *Beverly* weakened agencies' abilities to discipline employees. The board recognized, however, that to operate efficiently, agencies need to discipline employees who make false statements. Thus, in *Greer*,[64] the board fought back for agency rights by sustaining a false statement charge. The board did so by making several strong arguments distinguishing *Grubka*.[65]

First, the board stated that Mr. Grubka's actions took place after hours, at a location away from the workplace.[66] In contrast, Mr. Greer's misconduct took place during work hours, at the agency work site.[67] Thus, the board held that, unlike the facts in *Grubka*, a nexus existed between the false statement and the agency's mission.

Second, the board reminded the Federal Circuit that, absent the possibility of self-incrimination, agency employees must cooperate in agency pre-charge investigations and provide truthful testimony.[68] According to the board, the privilege against self-incrimination did not exist, because there was no indication that the employee's acts were criminal in nature. Thus, the employee had a duty to cooperate and to speak truthfully to agency investigators.[69] The board also reminded the Federal Circuit that even if self-incrimination was possible in a case, the employee must cooperate and provide truthful answers to investigators. This duty of cooperation arises once investigators notify the employee that, under *Kalkines v. United States*, his answers would not be used in a criminal prosecution.[70]

Third, the board reminded the Federal Circuit that the court's own decisions had previously allowed agencies to discipline employees for making false statements at agency investigations.[71]

Fourth, the board addressed the Federal Circuit's due process rationale in *Grubka*.[72] In *Grubka*, the Federal Circuit noted that "the [Administrative Judge] denied Grubka his due process rights in that [the Administrative Judge] denied him the right to a trial on the charge without due process of law."[73] The court also stated in *Grubka* that it "has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge," and that "[o]therwise a person could never defend himself against a charge . . . for fear of committing another offense by denying the charge."[74] In *Greer*, the board pointed out that there was neither a charge, nor a case, at the time that Mr. Greer made the false statement(just an investigation.[75] The board implied that the due process concerns stated in *Grubka* did not apply to *Greer.*

Finally, the board relied on an old U.S. Supreme Court case that refused to recognize the right to make an exculpatory no type of statement.[76] The board quoted the Supreme Court's comment in *Bryson v. United States*[77] that "[o]ur legal system provides methods for challenging the government's right to ask questions; lying is not one of them. A citizen may *decline to answer* the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."[78]

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63. 28 U.S.C.A. § 1295 (West 1998).

64. 43 M.S.P.B. 180, 185 (1990), *overruled by* Walsh, 62 M.S.P.B. 586, 589 (1994).

65. *Greer*, 43 M.S.P.B. at 185.

66. *Id*.

67. *Id*.

68. *Id*. *See* Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

69. *Weston*, 724 F.2d at 949.

70. *Greer*, 43 M.S.P.B. at 180. *See* Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

71. *Greer*, 43 M.S.P.B. at 185. *See* Southers v. Veteran's Administration, 813 F.2d 1223, 1225 (Fed. Cir. 1987).

72. *Greer*, 43 M.S.P.B. at 184-86.

73. Grubka v. Department of Treasury, 858 F.2d 1570, 1575 (Fed. Cir. 1988).

74. *Id*.

75. *Greer*, 43 M.S.P.B. at 187 n.2.

76. *Id*. at 186.

77. 396 U.S. 64 (1969).

In this manner, the board boldly distinguished the *Greer* case from the Federal Circuit's decision in *Grubka.* In so doing, it supported federal agencies' rights to discipline employees who make false statements during agency investigations. Surprisingly, the employee never forwarded the case to the Federal Circuit for appellate review. Following *Greer*, the board continued to distinguish *Grubka* to uphold a number of other false statement cases.[79]

Walsh: The MSPB Misreads Grubka

In 1994, in *Walsh*,[80] the board finally yielded to the Federal Circuit's *Grubka* decision.[81] Unfortunately, in deciding *Walsh*, the board misread *Grubka*. *Grubka* held that *once charged*, employees have a due process right to deny agency charges.[82] Since Ms. Walsh lied during the agency investigation, *prior to charges*, even *Grubka* would have allowed the board to sustain agency discipline.[83]

In *Walsh*, the MSPB held that an agency may no longer charge a federal employee with making a false statement, if it has also charged him with the underlying conduct.[84] The board issued its decision with some regret. In his concurring opinion, Chairman Erdreich eloquently expressed grave reservations about the decision and its effects on ethical standards for federal employees.[85]

Chairman Erdreich made it clear that his vote was yielding to the weight, if not the wisdom, of the Federal Circuit precedent.[86] He noted the incongruity between the federal government having the authority to prosecute members of the general public who make false statements to federal agencies (under 18 U.S.C.A. § 1001), but lacking the authority to discipline its own employees who make similar false statements.[87] He also noted the incongruity between requiring federal employees to cooperate in agency investigations (unless they have the privilege against self-incrimination), but allowing them to lie during that cooperation without the fear of disciplinary action.[88]

Walsh Allowed Employees to Lie with Impunity

Practically, *Walsh* authorized employees to lie with impunity at agency investigations. Based on *Walsh*, the MSPB reversed agency discipline in a number of cases where the employee could have invoked the right to silence, but chose to lie instead. In those cases, the suspected misconduct was criminal in nature, and the employee could have invoked the right to silence.[89] Instead of invoking the Fifth Amendment, the employees chose to lie.[90]

In *Lowe*, the agency investigated Mr. Lowe for kissing a subordinate, a possible battery.[91] Mr. Lowe made two statements to investigators, first that he did not kiss the subordinate; second (two days later) that he did kiss her, but only to comfort her.[92] The administrative judge sustained the agency's disciplinary action.[93] The board reversed this decision on the basis of *Walsh*.[94]

78. *Greer*, 43 M.S.P.B. at 186 (quoting *Bryson*, 396 U.S. at 72 (1969)) (emphasis added). Of course, the board's reliance on *Bryson* was misplaced, as it admitted later in *Walsh*. Per *Weston*, federal employees cannot "decline to answer" questions during agency investigations. Absent the possibility of self-incrimination, federal employees must cooperate and provide truthful statements to agency investigators.

79. *See, e.g.*, Allen, 43 M.S.P.B. 192 (1990); Hill, 44 M.S.P.B. 607 (1990).

80. 62 M.S.P.B. 586, 589 (1994), *aff'd sub nom.* King v. Erickson, 89 F.3d 1575 (Fed. Cir. 1996), *rev'd sub nom.* LaChance v. Erickson, 118 S. Ct. 753, 756 (1998).

81. *Walsh*, 62 M.S.P.B. at 589

82. Grubka v. Department of Treasury, 858 F.2d 1570, 1575 (1990).

83. *Walsh*, 62 M.S.P.B. at 589.

84. *Id*. at 593.

85. *Id*. at 597-600.

86. *Id*. at 597.

87. *Id*.

88. *Id.* at 598.

89. *See, e.g.*, Lowe, 63 M.S.P.B. 73, 75 (1994); Gunn, 63 M.S.P.B. 513, 515 (1994).

90. *Lowe*, 63 M.S.P.B. at 76; *Gunn*, 63 M.S.P.B. at 515.

91. *Lowe*, 63 M.S.P.B. at 75.

92. *Id.* at 76.

In *Gunn*, the agency investigated Ms. Gunn for signing a third party's name to that person's leave form, a possible forgery.[95] Ms. Gunn told agency investigators that she met the third party in the building's lobby, and that the third party signed it.[96] She later admitted that she lied.[97] The administrative judge sustained agency discipline; however, the board, citing *Walsh*, reversed.[98]

Erickson: Federal Circuit Upholds the Right to Lie

King v. Erickson[99] was the Federal Circuit's decision on the appeals of *Walsh*, *Erickson*, *Barrett*, and *Kye*.[100] In *Erickson*, the Federal Circuit held that during agency investigations, employees must tell the truth. Once they are charged, however, employees have the right to respond to the charges, to include making false denials.[101] Unlike *Grubka*, the Federal Circuit laid out the correct law in *Erickson*, distinguishing the different due process rights in agency investigations and adjudications.[102] Yet, the court still erred in applying the law to the facts. The *Erickson* cases apparently involved lies during the investigation stage, not denials at the adjudication stage. Nevertheless, the court condoned the employees' making false denials to agency investigators.[103]

The court recognized that federal employees have a property interest in their employment and, under the Fifth Amendment, the government cannot deprive its employees of their property without due process of law.[104] Unlike in *Grubka*, the Federal Circuit distinguished between the *investigation* stage (before charges), and the *adjudication* stage (after charges).[105] The court stated that at the *investigation* stage, employees must tell the truth to investigators, and agencies can take disciplinary action against those who make false statements during investigations.[106] In other words, at the investigation stage, employees have no due process right to falsely deny allegations that the agency makes against them. At the later *adjudication* stage, however, the court reiterated that employees have a due process right to deny the charges and the underlying facts, to include false denials.[107]

The court claimed to limit denial rights. The court stated that "[b]eyond a denial . . . an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge. These falsehoods . . . are actionable by agencies as falsification."[108]

93. *Id.* at 75.

94. *Id.* at 76.

95. Gunn, 63 M.S.P.B. 513, 515 (1994).

96. *Id*. at 517.

97. *Id*. at 515.

98. *Id*. at 517.

99. 89 F.3d 1575 (Fed. Cir. 1996), *rev'd sub nom*. LaChance v. Erickson, 118 S. Ct. 753 (1998).

100. *See* Walsh, 62 M.S.P.B. 586 (1994); Erickson, 63 M.S.P.B. 80 (1994); Barrett, 65 M.S.P.B. 186 (1994); Kye, 64 M.S.P.B. 570 (1994).

101. *Erickson*, 89 F.3d at 1583.

102. *Id.*

103. *Id.*

104. *Id.* at 1580.

105. *Id.* at 1583-84.

106. *Id*. at 1583.

107. *Id.* at 1584.

108. *Id*. at 1583.

After setting out these statements of law, the court disregarded them in its decision. As discussed, *supra*, Ms. Walsh lied at the investigation stage.[109] She made statements to investigators that were internally inconsistent and contradictory to the accounts of other witnesses.[110] Characterizing her contradictory statements, however, the court stated that "she *consistently denied* having an intimate relationship with the patient while he was an inpatient at the facility." The court then upheld the dismissal of the false statement charge.[111] The court did not care that Ms. Walsh made the false statement at the investigation stage, and went beyond a mere denial by affirmatively making up dates on which the sexual affair started.[112]

Likewise, in *Barrett*, Mr. Barrett made a false statement at the investigation stage.[113] He told investigators that he was working on his own time when helping his supervisor build a fishpond.[114] The court chose to read Mr. Barrett's response as indicating that he "knew nothing about the events in question . . . *in essence* a denial . . . ."[115]

Similarly, in *Erickson*, Mr. Erickson lied at the investigation stage.[116] He denied to agency investigators that he made harassing (mad laughter) telephone calls to fellow employees and encouraged others to make similar calls.[117] The court held that Mr. Erickson's statements were proper denials.[118]

In *Erickson*, the Federal Circuit acknowledged that employees had a duty to tell the truth during agency investigations, and a due process right to deny charges at the adjudication stage; without making affirmative false statements.[119] In its application of the law to the facts, the court demonstrated that it was willing to go far to strike down false statement charges, to include condoning investigation stage lies and affirmative false statements.

The Exculpatory No Doctrine

The *Grubka-Erickson* doctrine, creating a due process right of employees to deny agency charges, has some similarities to the exculpatory no doctrine. This doctrine allows individuals to deny accusations by federal agents without the risk of a conviction for making a false statement under 18 U.S.C.A. § 1001.[120]

Courts fashioned the rule to protect individuals from government overreaching, and they provided two bases for the rule.[121] First, courts have held that Congress did not intend for the statute to include these denials within its scope.[122] Second, courts have held that punishing individuals for making false statements, where they would have had the right to remain silent, comes "uncomfortably close" to chipping away at the Fifth Amendment.[123]

Not all of the federal circuit courts, however, have accepted the exculpatory no doctrine.[124] Also, the Supreme Court, while not directly addressing the doctrine, held in *Bryson v. United*

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109. Walsh, 62 M.S.P.B. 586, 589 (1994).

110. *Id.* at 589-91.

111. *Erickson*, 89 F.3d at 1585 (emphasis added).

112. *Walsh*, 62 M.S.P.B. at 589.

113. Barrett, 65 M.S.P.B. 186, 200 (1994).

114. *Id.*

115. *Erickson*, 89 F.3d at 1586 (emphasis added).

116. *Id.* at 82.

117. *Id.*

118. *Erickson*, 89 F.3d at 1585 (Fed. Cir. 1996).

119. *Id.*

120. Under 18 U.S.C.A. § 1001, it is a crime to make a false statement to a government agency. The elements of the offense are that the accused made a statement, that the statement was false, that the statement was material, that the accused made the statement knowingly and willfully, and that the government agency had jurisdiction. 18 U.S.C.A. § 1001 (West 1998).

121. *See generally*, Nedra D. Campbell & Anne Gallagher, *False Statements*, 33 AM. CRIM. L. REV. 679 (1996); Giles A. Birch, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990); Sandra L. Turner, *Would I Lie to You? The Sixth Circuit Joins the "Exculpatory No" Controversy in United States v. Steele*, 81 KY. L.J. 213 (1992).

122. *See, e.g.*, Paternostro v. United States, 311 F.2d 298, 309 (5th Cir. 1962), *overruled by* Brogan v. United States, 118 S. Ct. 805 (1998).

123. *See, e.g.*, United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

States[125] that individuals do have a "right to silence," where appropriate, but that they do not have the right to lie.[126]

The court has since declared the exculpatory no doctrine dead.[127] In *Brogan*, a union officer lied to federal law-enforcement officers about whether he accepted cash or gifts from a company.[128] The Supreme Court held that "courts may not create their own limitations on legislation,"[129] that the Fifth Amendment does not provide a privilege to lie,[130] and that falsely denying guilt in a government investigation "pervert[s] governmental functions."[131]

Application of the Doctrine to Federal Labor Cases

For several reasons, the exculpatory no doctrine should not apply directly, or by analogy, to federal labor cases. First, federal labor cases involve agencies' rights to administratively discipline employees under the Civil Service Reform Act[132] (CSRA), not criminally under 18 U.S.C.A. § 1001.[133] Thus, the exculpatory no doctrine, which is a safeguard against government overreaching under 18 U.S.C.A. § 1001, should not apply in the federal labor sector.

Second, the doctrine is not needed because the CSRA itself protects against government overreaching by allowing agencies to take disciplinary actions only for "such cause as will promote the efficiency of the service" (the so-called "nexus" requirement).[134] In other words, the agency must prove that the misconduct diminishes the employee's work performance or the agency's mission performance Additionally, in certain egregious circumstances, reviewers may presume that a nexus exists.[135]

Third, although no explicit statement of congressional intent exists, at the time it enacted the CSRA, Congress believed that agencies could discipline employees who made false statements.[136] Also, after the board issued the *Walsh* decision, a member of Congress expressed disbelief that agencies could no longer discipline employees who make false statements during agency investigations.[137]

Finally, the federal employee does not need the exculpatory no doctrine to exercise his Fifth Amendment privilege against self-incrimination. Under *Weston* and *Kalkines v. United States*, employees have a right to silence under the Fifth Amendment in situations where they may incriminate themselves.[138] Otherwise, employees have a duty to provide information to agency investigators.[139]

The Supreme Court's Decision in *Erickson*

124. Campbell, *supra* note 121, at 691, n.77 (stating that among the federal circuits, only the Fourth, Eighth, Ninth, and Eleventh Circuits have explicitly adopted the "exculpatory no" doctrine).

125. 396 U.S. 64 (1969).

126. *Id.* at 72.

127. Brogan v. United States, 118 S. Ct. 805, 811 (1998).

128. *Id.* at 807.

129. *Id.* at 811-12.

130. *Id.* at 810.

131. *Id.* at 808.

132. 5 U.S.C.A. § 7513(a) (West 1998).

133. *See* 18 U.S.C.A. § 1001 (West 1998).

134. 5 U.S.C.A. § 7503(a), 7513(a); Merritt, 6 M.S.P.B. 585 (1981).

135. *See generally, Coleman*, 57 M.S.P.B. 537 (1993); *Ingram*, 53 M.S.P.B. 101, *aff'd* 980 F.2d 742 (Fed. Cir. 1992); Merritt, 6 M.S.P.B. 585.

136. STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERV., 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE CIVIL SERV. REFORM ACT OF 1978, at 1486 (Comm. Print 1979).

137. *Civil Serv. Reform II: Performance and Accountability. Hearing Before the Subcomm. on Civil Serv. of the House Comm. on Gov't Reform and Oversight*, 104th Cong., 1st Sess. 137 (1995) (Statement of Rep. Bass) ("The subcommittee's attention has recently been drawn to a decision in *Walsh v. Dep't of Veterans Affairs*, a 1994 decision where the Board held that federal employees cannot be punished for making false statement to agency investigators. One critical element of any investigator's job is an ability to be a credible witness in a trial. If that decision is applied to law enforcement agents, how could they possibly perform their job [sic]?").

138. *See generally,* Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 947 (Fed. Cir. 1983).

Because of its impact on the federal workplace, the Office of Personnel Management (OPM) petitioned the Supreme Court to review *Erickson*. The Supreme Court's decision in *Erickson* was unanimous and unequivocal: employees have no right to lie, whether based on statute or due process, in response to agency charges.[140]

Before the Supreme Court, the OPM argued that the Federal Circuit was wrong on the law, the facts, and on policy grounds.[141] Regarding legal error, the OPM argued that there is no due process right to lie. While due process may provide the employee with the opportunity to respond at the appropriate stage of adjudication, under *Bryson*, he has no right to lie in that response.[142] Factually, the OPM pointed out that the lies under review took place during pre-charge investigations.[143] Finally, from a policy standpoint, the OPM argued that adopting an exculpatory no rule would impede federal operations.[144]

In their responses, the employees echoed the grounds cited by the Federal Circuit in its decision. First, they claimed that due process allows them to deny an agency's allegations. Second, they argued that if the agency can charge them with false statements on the basis of their denials, this may chill their right to respond.[145]

The Supreme Court's decision was a complete rejection of the employees' position. Brevity and unanimity marked the opinion. In the opinion by the Chief Justice, the Court first restated its opinion in *Bryson* that individuals have no right to make false statements in response to government questions.[146] Second, the Court reviewed the statutory disciplinary procedures for federal employees, as well as the Fifth Amendment due process protections.[147] The Court concluded that neither allowed an employee to lie in his response to agency charges of misconduct.[148] Finally, the Court noted that where answering agency questions would expose them to criminal penalties, employees would have the Fifth Amendment privilege against self-incrimination.[149]

The Court's opinion, however, did not directly address two issues. First, the OPM had argued that due process rights should not exist in the cases under review because they involved lies at the investigation stage.[150] Although the Court did not directly address the issue, its answer is obvious; it noted that under *Bryson*, individuals may never lie in response to government questions.[151] They may invoke the right to silence, if available, but they may never lie. Regardless of whether it was at the investigation stage or the adjudication stage, the Court would have held that the employees in *Erickson* had no right to lie.

Second, the employees had argued on appeal that they had a due process right to deny agency charges.[152] The Court did not directly address whether employees always have the right to deny agency charges. The Court did state that under *Cleveland Board of Education v. Loudermill*,[153] due process provides an "opportunity to be heard."[154] The opportunity to be heard implies that the employee can state his disagreement with the agency's legal position. When does this due process right

139. *Id.* at 949.

140. LaChance v. Erickson, 118 S. Ct. 753, 756 (1998).

141. Petitioner's Brief at 14, *Erickson* (No. 96-1395).

142. *Id.*

143. *Id.*

144. *Id.* at 15.

145. Respondent Erickson's Brief at 4, *Erickson* (No. 96-1395); Respondent Walsh's Brief at 2-3, *id.*

146. *Erickson*, 118 S. Ct. at 755 (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)).

147. *Id.*

148. *Id.*

149. *Id.* at 756.

150. Petitioner's Brief at 14, *Erickson*, (No. 96-1395).

151. *Erickson*, at 755 (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)).

152. Respondent Erickson's Brief at 4, *Erickson* (No. 96-1395); Respondent Walsh's Brief at 2-3, *id.*

153. 470 U.S. 532, 542 (1985).

154. *Erickson*, 118 S. Ct. at 756.

arise? It appears to arise at the adjudication stage, not at the investigation stage. Under *Kalkines*, employees have a duty to cooperate at the investigation stage.[155] Once charged, however, *Grubka* holds that employees have the right to deny an agency's allegations.[156] An employee's disagreement with the agency's legal position must be distinguished from false denials of facts. For example, if an agency charges that an employee assaulted someone by hitting him with his fists, the employee can argue, at the adjudication stage, that he did not commit assault (legal argument), but he cannot falsely state that he did not hit the person with his fists (factual denial).

Even the *Brogan* decision would allow the employee to disagree with the agency's legal position at the adjudication stage. In *Brogan*, government agents asked the employee whether he took any cash or gifts from a company.[157] The employee falsely denied the allegations. The Supreme Court held that the false denial was improper. The defendant in *Brogan* falsely denied a question of fact. That denial was improper. If the government charged him with taking bribes, however, the defendant could clearly deny that allegation at the trial. The bottom line for agency investigators is that they should elicit facts, not conclusions of law, when questioning employees during agency investigations.

After *Erickson*, employees have a duty to cooperate and to tell the truth in agency investigations.[158] Similarly, employees have no right to lie to federal agencies, either at the investigation or the adjudication stage.[159]

In addition, agency powers are limited in three respects. First, once a case progresses beyond the investigation stage into the adjudication stage, agencies can only obtain employee interviews on a voluntary basis.[160] Since there is no longer an investigation, employees no longer have a duty to cooperate. Second, under the Supreme Court's decision in *Erickson* and the *Weston-Kalkines* line of cases, employees have the Fifth Amendment privilege against self-incrimination when their answers may incriminate them.[161] Finally, under *Grubka*, and 5 U.S.C.A. § 7513(a), when employees do lie, agencies can only impose discipline for lies that have a nexus to the efficiency of the service.[162]

Guide for Questioning Federal Employees

The pre-charge investigation, is a very powerful instrument for the agency in its search for the truth. As discussed, employees have a duty to cooperate with the agency during pre-charge investigations and to tell the truth at those investigations.[163] Used the wrong way, however, this powerful weapon can backfire on the agency. The Federal Labor Relations Authority (FLRA) and the MSPB have imposed a Byzantine set of rules on government agencies in their interviews with employees. Below is one road map through the labyrinth.

First, draw a "bright line" between agency investigations, which take place prior to the agency's proposing charges against the employee (pre-charge investigations), and agency interviews in preparation for litigation (fact-gathering sessions). Employees must cooperate with the agency during pre-charge investigations, but they need not cooperate at fact-gathering sessions in preparation for litigation.[164]

Second, the labor counselor should consult with the appropriate civilian personnel specialists to discuss strategy, prior to interviewing federal employees. This should include discussions about: (1) which employees to interview, (2) the order in which to interview them, (3) the areas of discussion with each employee, (4) the appropriate notice to the union, (5) the appropriate coordination with supervisors, (6) the location of the interviews, (7) the presence of agency investigators at the interviews, and (8) the involvement of agency law enforcement officers in the interviews.

Pre-charge Investigations

The agency need not provide the union with notice of the pre-charge investigation, or with an opportunity to attend the

155. Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

156. Grubka v. Department of Treasury, 858 F.2d 1570, 1575 (Fed. Cir. 1988).

157. Brogan v. United States, 118 S. Ct. 805, 806-07 (1998).

158. Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

159. *Erickson*, 118 S. Ct. at 756.

160. *See generally,* Griffis, 38 F.L.R.A. 1552, 1558 (1991).

161. *See generally,* Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

162. Grubka v. Department of Treasury, 858 F.2d 1570, 1574 (Fed. Cir. 1988).

163. *Weston*, 724 F.2d at 949.

164. *Id.* (discussing pre-charge investigations); American Fed'n Gov't Employees, Local 2354, 31 F.L.R.A. 541, 546 (1988) (discussing fact-gathering sessions).

interview sessions. Notification and rights only exist where the employee invokes his rights under *National Labor Relations Board v. Weingarten*,[165] or when the interview qualifies as a formal discussion.[166] Federal Labor Relations Authority (FLRA) decisions and 5 U.S.C.A. § 7114 (a)(2)(A) define formal discussions as discussions between management and one or more employees concerning grievances or personnel policies and practices affecting the general working conditions of bargaining unit employees.[167] In general, the FLRA finds fact-gathering sessions, but not pre-charge investigations, to be formal discussions.[168] The bottom line is that, for pre-charge investigations, the agency need not notify the union until the employee asks for a union representative under *Weingarten*.

When investigators call to request an interview, the first thing an employee wants to know is why the agency is asking him questions. Under *Alsedek*,[169] during pre-charge investigations, the agency need not inform an employee, even the target of an investigation, of his status as a suspect or the nature of the allegations.[170] The rationale is that the right to be informed of the charges is a due process right that does not attach at the pre-charge investigation.[171] Another rationale is that the agency is still in the investigation mode, and is not likely to have prepared specific charges.[172] As a practical matter, however, especially with third-party witnesses, it is generally a good idea to tell the employee the reason for the interview; this puts him at ease and establishes rapport. Also, where an agency did not inform the employee of the allegations, the MSPB has held that the employee's ignorance of the allegations excused a two-day refusal to cooperate.[173]

Employees will want to know whether they have the right to representation by counsel at the pre-charge investigation. Under *Ashford* and *Alsedek*, employees have no right to counsel at the investigation interview, unless the investigation may lead to a criminal prosecution and the interview is held in a custodial setting.[174] The key is the custodial setting. As long as agency personnel who conduct the investigation are not law enforcement officers, no custodial setting exists. Thus, the employee has no right to counsel.[175]

Next, employees will ask whether they have the right to have a union representative accompany them to the investigation. Under 5 U.S.C.A. § 7114(a)(2) and *Weingarten*, during pre-charge investigations, where the employee has a reasonable belief that the investigation may result in disciplinary action against him, the employee may request that a union representative attend the investigation.[176] The agency should heed even equivocal requests.[177] The agency, however, has no duty to inform the employee of this right during the investigation.[178] The agency is only required to give this notice annually.[179]

Even if the employee makes the request, the government need not delay the investigation to wait for the union representative.[180] The government has the following options: (1) wait for the representative, (2) stop the interview of the employee and proceed with the investigation without his input, or (3) pro-

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165. 420 U.S. 251 (1975).

166. *Id.* at 257 (holding that an employee must invoke); American. Fed'n Gov't Employees, Local 2567, 28 F.L.R.A. 1145, 1149 (1987); *American Fed'n Gov't Employees, Local 2354*, 31 F.L.R.A. at 550 (dealing with a formal discussion).

167. *See generally,* National Ass'n Gov't Employees, Local R1-25, 37 F.L.R.A. 747, 753 (1990).

168. *American Fed'n Gov't Employees, Local 2354*, 31 F.L.R.A. at 550.

169. 58 M.S.P.B. 229 (1993).

170. *Id.* at 240.

171. *Id.*

172. Ashford, 6 M.S.P.B. 458, 464 (1981).

173. Brown, 20 M.S.P.B. 524, 526 (1984).

174. *Ashford*, 6 M.S.P.B. at 464; *Alsedek*, 58 M.S.P.B. at 240.

175. *See generally,* Wilkes, 6 M.S.P.B. 732, 735 (1981).

176. National Labor Relations Bd. v. Weingarten, 420 U.S. 251, 267 (1975).

177. American Fed'n of Gov't Employees, Local 3148, 27 F.L.R.A. 874, 880 (1987).

178. 5 U.S.C.A. § 7114(a)(3) (West 1998); Sears v. Department of Navy, 680 F.2d 863, 865 (1st Cir. 1982); Anderson, 8 M.S.P.B. 686, 688 (1981).

179. *Anderson*, 8 M.S.P.B. at 688.

180. *American Fed'n of Gov't Employees, Local 3148*, 27 F.L.R.A. at 879.

vide the employee with the choice between proceeding with the investigation without the presence of the representative, or having no input into the investigation at all.[181]

Many times, the simplest option is the third option, due to the likelihood of complications when the union representative attends the investigation. If the agency allows the representative to attend, the agency must allow the representative to actively participate in the investigation interview.[182] The representative may assist the employee to present the facts.[183] The representative may also confer with the employee, although there is no right to interrupt the investigation to confer outside the hearing room.[184]

The agency must avoid one particular type of response, ignoring a *Weingarten* request. To do so is an unfair labor practice.[185] The FLRA's usual remedy for an unfair labor practice is to mandate that the head of the agency (usually the commanding general) issue a memorandum with his personal signature, for conspicuous posting around the installation, stating that the agency will no longer commit a similar unfair labor practice.[186] Needless to say, the labor counselor wants to avoid placing the commanding general in that position.

Regarding *Miranda* warnings, the agency has no duty to provide these warnings unless the investigation may lead to a criminal prosecution and the interviews were held in a custodial setting.[187] The key is the custodial setting. Where an investigator, who is not a law enforcement officer, conducts the interview, the MSPB has held that a custodial setting does not exist, and, therefore, the agency need not provide *Miranda* warnings.[188]

Regardless of whether the agency provided *Miranda* warnings, employees may invoke the right to silence in appropriate circumstances.[189] The employee must have a reasonable belief that the statement may be used against him in a criminal proceeding.[190] In reviewing the reasonableness of the invocation, the board will examine the reasonable possibility of criminal charges.[191] Where the witness invokes, he takes the risk that the agency will take final disciplinary action without his input. *Novak*[192] involved the indefinite suspension of an employee pending the outcome of a criminal case. The board allowed the agency to suspend the employee, where the employee invoked the privilege against self-incrimination.[193]

Once an employee invokes the privilege against self-incrimination, the agency must decide whether it intends to bring criminal charges against him. If the agency plans to make these charges, it has no option but to honor the right to silence. The investigators, however, may request another statement after giving the employee significant time to cool-off.[194] Where it does not plan to bring criminal charges, the agency can overcome the invocation by providing the employee with a *Kalkines* warning.[195] A *Kalkines* warning tells the employee both that his statement will not be used against him in a criminal prosecution, and that his failure to cooperate in the investigation will be grounds for removal.[196] Even in cases where the Fifth Amendment privilege against self-incrimination applies, the employee

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181. *Id.*

182. American Fed'n of Gov't Employees, Local 3434, 50 F.L.R.A. 601, 609 (1995).

183. American Fed'n of Gov't Employees, Local 171, 52 F.L.R.A. 421, 432-38 (1996).

184. *Id.*

185. American. Fed'n Gov't Employees, Local 2567, 28 F.L.R.A. 1145, 1150 (1987).

186. *Id.*

187. Gamber, 58 M.S.P.B. 142, 146 (1993); Chisolm, 7 M.S.P.B. 116, 120 (1981).

188. Wilkes, 6 M.S.P.B. 732, 735 (1981).

189. Ashford, 6 M.S.P.B. 458 (1981).

190. *Id.*

191. *Id.* at 466.

192. 12 M.S.P.B. 455, *enforced*, 723 F.2d 97 (D.C. Cir. 1983).

193. *Id.* at 457.

194. Michigan v. Mosley, 423 U.S. 96, 106 (1975).

195. Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

196. *Id.*

must cooperate with agency investigators once the agency provides the employee with a *Kalkines* warning.[197]

Once the agency passes these hurdles, it should place the employee in a position where he has the duty to cooperate with government investigators, as well as the duty to be truthful. At this point, the investigator should use both open-ended and leading questions to obtain information from the employee. Initially, the investigator should use open-ended questions to obtain narrative responses from the employee. Next, the investigator should use leading questions to "lock-in" the employee to his positions on the issues.

The investigator must prepare a record of the investigation to avoid "swearing contests" with the employee in front of a later tribunal. The best way is to obtain written responses. A tape-recording is an option, but preserving taped responses is more troublesome than preserving written responses.

Fact-Gathering Sessions

A different set of rules applies after the investigation is over, the agency has charged the employee with misconduct, and the agency's labor counselor wants to interview witnesses in preparation for litigation. Since the interview is not part of the investigation, employee witnesses have no duty to cooperate and attendance is voluntary.[198] In these fact-gathering sessions, management must: (1) inform the employee witness of the purpose of the questioning, that the employee's attendance is voluntary, and that there will be no reprisal for refusing to attend the interview; (2) ensure that the interview is conducted in an atmosphere that is not coercive; and (3) not ask questions that exceed the purpose of the interview.[199] The bottom line is that agency attorneys cannot coerce, directly or through the employee's supervisors, a reluctant employee to attend a pre-litigation interview. The agency's alternative in those cases is to depose the employee.[200]

The agency must notify the union of the fact-gathering session and provide the union with the opportunity to attend.[201] The FLRA has held that fact-gathering sessions are formal discussions.[202] The FLRA and 5 U.S.C.A. § 7114 (a)(2)(A) define a formal discussion as any discussion between management and one or more employees concerning grievances, or personnel policies and practices affecting the general working conditions of unit employees.[203] Failure to notify the union is an unfair labor practice; again, the FLRA's remedy would be to mandate that the agency head send out a notice over his personal signature, for conspicuous dissemination.[204]

Also, since their attendance at fact-gathering sessions is voluntary, employees can make their cooperation conditional upon having an attorney or a union representative present at the session. Because employees voluntarily attend, a custodial interrogation does not exist; therefore, *Miranda* warnings are not required. As long as the appropriate circumstances exist, the employee may invoke the privilege against self-incrimination, regardless of whether the agency has provided *Miranda* warnings.[205]

Conclusion

The Supreme Court's unanimous decision in *Erickson* highlights the pre-charge investigation's usefulness as a powerful tool for the agency in its search for the truth. The employee has no choice but to cooperate and to provide the truth to agency investigators. A tool, however, is only as good as its operator. Agency counsel and investigators must master the differences in the rules governing pre-charge investigations and fact-gathering sessions in order to take full advantage of the law.

The Supreme Court's *Erickson* decision made clear that federal employees have no right to lie to their federal agencies, either at the investigation stage or the adjudication stage of disciplinary actions. The only difference between the two stages is that employees have a duty to cooperate in agency investigations, but not in agency fact-gathering sessions.

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197. *Id.*

198. *See generally,* American Fed'n of Gov't Employees, Local 2612, 38 F.L.R.A. 1552, 1558 (1991).

199. Brookhaven Serv. Ctr., 99, 9 F.L.R.A. 930, 933 (1982).

200. 5 C.F.R. § 1201.75 (1998); FED. R. CIV. P. 30. *See generally,* Bromley, 46 M.S.P.B. 666, 680 n.10 (1991).

201. American Fed'n Gov't Employees, Local 2354, 31 F.L.R.A. 541, 550 (1988).

202. *But see* National Treasury Employees Union, Chapter 202, 15 F.L.R.A. 423, 425 (1984).

203. National Ass'n Gov't Employees, Local R1-25, 37 F.L.R.A. 747, 753 (1990).

204. American Fed'n of Gov't Employees, Local 2612, 38 F.L.R.A. 1552, 1560 (1991); American Fed'n of Gov't Employees, Local 2382, 52 F.L.R.A. 182 (1996).

205. Ashford, 6 M.S.P.B. 458, 465 (1981).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Family Law Notes

Uniform Interstate Family Support Act Long Arm Statute Interpreted

Among the major changes to child support enforcement under the Uniform Interstate Family Support Act[1] (UIFSA), are the broad long-arm jurisdiction provisions.[2] A court must have *in personam* jurisdiction over the obligor before it can order a support obligation.[3] If a state can meet one of the long-arm provisions under the UIFSA, it gains personal jurisdiction over a non-resident obligor and alleviates many of the cumbersome aspects of enforcing support interstate.

An interesting aspect of the UIFSA's long-arm provision is that it allows a state to assume personal jurisdiction based on the residence of the child in the state "as a result of the acts or directives of the non-resident obligor."[4] Only two cases have interpreted this particular long-arm provision. Both cases agree that this provision would be sufficient to establish jurisdiction and meet the Constitutional requirements of due process. The question becomes, what conduct is going to fall within the language of "acts or directives?"

In *Windsor v. Windsor*,[5] the Massachusetts Court of Appeals refused to find jurisdiction under this provision of the UIFSA. James Windsor and Beverly Windsor married at Otis Air Force Base in 1959.[6] The couple lived in several military locations, eventually ending up in Florida in 1975. Mrs. Windsor left Florida in June 1977, returning to Massachusetts where she delivered their fourth child in September 1977.[7] In 1995, she filed for divorce in Massachusetts based on cruel and abusive treatment by Mr. Windsor and requested child support for their youngest child.[8] Mr. Windsor, who lived in Florida since 1975, filed a special appearance challenging the jurisdiction of Massachusetts to award child support.[9]

The trial court found jurisdiction based on the UIFSA provision that Mrs. Windsor and the child lived in Massachusetts due to the "acts and directives" of Mr. Windsor.[10] On appeal, the court reversed the trial court's finding because the record did not allege sufficient facts to establish acts or directives by Mr. Windsor.[11] Specifically, the record did not set out any information that Mrs. Windsor and her children "fled" Florida for Massachusetts based on cruel treatment or the directives of Mr. Windsor.[12]

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1. 9 U.L.A. 229 (1993) (amended 1996). In 1998 all states adopted the UIFSA. Each state has it's own citation to their UIFSA depending into which state code the legislature passed the act. All references in this article are to the sections of the uniform act. Although the code citations will be different in each state, the provision will be the same as that in the Uniform Act as adopted by the National Conference of Commissioners on Uniform State Laws. You can obtain copies of the UIFSA and comments from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, and telephone (312) 915-0195.

2. UNIF. INTERSTATE FAMILY SUPPORT ACT § 201, 2 U.L.A. 229 (amended 1996). The UIFSA provides eight circumstances where a court can exercise personal jurisdiction over a non-resident including if: (1) the individual is personally served within the State, (2) the individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction, (3) the individual resided with the child in this State, (4) the individual resided in this State and provided prenatal expenses or support for the child, (5) the child resides in this State as a result of the acts or directives of the individual, (6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse, (7) the individual asserted parentage in the putative father registry maintained in this State by the appropriate agency, or (8) there is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction.

3. Windsor v. Windsor, 700 N.E.2d 838, 840 (Mass. App. Ct. 1998) (citing Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), Kulko v. Superior Court of California, 436 U.S. 84 (1978)).

4. UNIF. INTERSTATE FAMILY SUPPORT ACT § 201(5), 9 U.L.A. 229 (1993) (*amended* 1996).

5. 700 N.E.2d 838 (Mass. App. Ct. 1998).

6. *Id.* at 841.

7. *Id.*

8. *Id.* at 839-40.

9. *Id.*

10. *Id.*

11. *Id.* at 842.

In contrast, the Court of Appeals of Virginia affirmed a case based on the same long-arm jurisdiction provision in *Franklin v. Virginia*.[13] Mr. and Mrs. Franklin married in 1981 and had two children. Mr. Franklin took a job with John Snow, Inc., a Boston-based company with a field office in Arlington, Virginia. Mr. Franklin's job sent the family to Africa where they lived from 1991 to 1994.[14] Before leaving for Africa, the family resided for three brief months in Arlington, Virginia. While in Africa, the marriage deteriorated and, in January 1994, Mr. Franklin ordered his wife and children out of their home.[15] His company paid to return the family to Virginia.[16] Through several years of support and custody hearings, Mr. Franklin maintained that Virginia did not have personal jurisdiction over him.[17]

Mr. Franklin argued that the UIFSA's long-arm provision's plain meaning only confers jurisdiction if an individual takes an affirmative act, exerts power or influence, or gives instructions, orders or commands to his spouse or children to reside in a particular geographical location.[18] The court found that this reading of the UIFSA was far too restrictive. The court found that after several physical altercations, Mr. Franklin told his family to leave Africa. Mrs. Franklin reasonably returned to Virginia, the family's home immediately prior to their departure for Africa. Additionally, Virginia was Mr. Franklin's employer's field office that distributed his mail. Accordingly, the court found that the family resided in Virginia as a result of Mr. Franklin's acts.[19]

By their nature, jurisdiction questions revolving around the issue of "acts and directives" of the nonresident are fact specific. Marshaling the facts and articulating whether they establish "acts and directives" is a true test of advocacy skills. The facts in *Franklin* easily fit into a military setting where families find themselves far from traditional support groups when marriages get into trouble. The military may help pay travel expenses for the family, especially if they are living overseas. The court was not specific about whether any one fact was more persuasive than the others. Under a totality of the circumstances approach, *Franklin* indicates that very little is required to satisfy the UIFSA's "acts and directives" requirement.

The UIFSA significantly changes the "ground rules" for support awards. Consequently, legal assistance attorneys must understand its provisions. The long-arm provisions are particularly important because the old interstate support statutes did not contain such provisions. The long-arm provisions can enable a state that the client may never have set foot in to exercise jurisdiction over support issues. Military families may find themselves in this situation in a variety of ways given the mobility of our communities. Legal assistance attorneys need to consider all the options and facts before advising a client on the jurisdiction of a court to impose a support obligation. Major Fenton.

Washington Overrules Long-standing Law to Allow Innocent Spouse to Take Military Survivor Benefits

Washington's long standing law held that after the death of one of the parties the subject matter of a divorce proceeding abates, and the surviving spouse cannot move to challenge the dissolution.[20] This position is definitely the minority view. In *Himes v. Himes*,[21] the Supreme Court of Washington overruled this harsh and restrictive view.

Victor and Frances Himes married in 1960 while Victor was on active duty with the Navy.[22] Frances Himes, and the couple's two children, remained in the family home in Bethlehem, Pennsylvania in 1975 when Victor went to the state of Washington. For a brief time in 1982, Frances joined Victor in Washington.[23] In 1984, Victor retired after thirtyyears of service and

12. *Id.* at 842-43.

13. 497 S.E.2d 881 (Va. Ct. App. 1998). Virginia's Department of Social Services, Division of Child Support Enforcement is the party in the case because Mrs. Franklin received public assistance for herself and her children. In addition, she requested that this agency establish and enforce support. This agency was established under section IV-D of the Social Security Act. These agencies, known as IV-D agencies, are available to help clients in cases of child support regardless of whether the family receives public assistance.

14. *Id.* at 883.

15. *Id.*

16. *Id.*

17. *Id.* at 844.

18. *Id.* at 885.

19. *Id.* at 886.

20. Dwyer v. Nolan, 82 P. 746 (Wash. 1905).

21. 965 P.2d 1087 (Wash. 1998).

22. *Id.* at 1088.

remained in Washington.[24] Upon retiring, he elected for spousal coverage under the Survivor Benefit Plan (SBP).[25] In 1987, Victor filed for divorce in Washington alleging that he served Frances through publication because he could not locate her after reasonable and diligent attempts.[26] In reality, Frances lived in the same home that she and Victor had lived in together from 1960 until 1975. She lived next door to Victor's sister, who testified that Victor never contacted her to locate Frances. Victor remained in contact with his daughter and never mentioned the divorce action nor asked about Frances' whereabouts. Frances' address in 1994 was the same address that Victor put on his transfer papers in 1973.[27] Washington issued a divorce decree in December 1987 dissolving Frances' and Victor's marriage.[28] In 1993, Victor married Janana MacIntyre in Washington. He died thirteen months later and Janana began receiving SBP payments.[29] The Navy informed Frances that her medical coverage was terminated; this was her first notice that she and Victor were not married.[30]

In 1984, Frances filed a motion to quash the 1987 divorce decree. She claimed that the decree was void for lack of jurisdiction because Mr. Franklin obtained it fraudulently. The trial court granted the motion. Janana appealed and the Court of Appeals reversed the trial court relying on *Dwyer v. Nolan* and its progeny.[31] The Washington Supreme Court took advantage of the facts in this case to overrule *Dwyer*.[32] Part of the rationale behind *Dwyer* was the idea that dissolution of marriage was merely a termination of status and "nothing is sought to be affected but the marital status of the husband and wife."[33] In *Himes* the Washington Supreme Court found that the dissolution decree affected the entitlement to substantial survivor benefits from the Navy. Applying the principles of equity, the Washington Supreme Court found Frances Himes was unquestionably married twenty-two years, ostensibly married for twenty-seven years, and arguably married for thirty-four years to Victor.[34] Thus, the award of SBP benefits to Janana who was "married" to him for thirteen months was not conscionable. Therefore, the court voided the divorce decree and affirmed the trial court's ruling.[35] Major Fenton.

Consumer Law Notes

Sixth Circuit Issues Additional Guidance on Attorney Use of Credit Reports

> Information is power, as any good attorney knows. Those who hunger for information often need look no further than to a person's consumer report . . . .[36]

No profession has a greater hunger for information than the legal profession. When preparing for a case, an attorney wants all the information she can get about her client and her opponent. Two cases concerning attorney access to credit reports under the Fair Credit Reporting Act (FCRA)[37] have recently reached the federal circuit court level. The Consumer Law Note in the December 1998 issue of *The Army Lawyer* discusses the first case, issued by the Eighth Circuit.[38] Another case concerning accessing consumer reports during litigation

23. *Id.*

24. *Id.*

25. *Id.* Only if the retiree enrolls in and pays a premium for the SBP can his beneficiary continue to receive retirement pay after he dies.

26. *Id.* at 1090.

27. *Id.* at 1097.

28. *Id.* at 1090.

29. *Id.*

30. *Id.*

31. *Id.* at 1091-92.

32. *Id.* at 1101.

33. *Id.* at 1100.

34. *Id.* at 1101.

35. *Id.*

36. Duncan v. Handmaker, 149 F.3d 424 (6th Cir. 1998).

37. 15 U.S.C.A. §§ 1681 - 1681u (West 1998).

38. *See* Consumer Law Note, *Litigation is Not a "Legitimate Business Need" Under the Fair Credit Reporting Act*, ARMY LAW., Dec. 1998, at 15.

reached the Sixth Circuit with a similar result—litigation is not a "legitimate business need" permitting access to credit reports.

In *Duncan v. Handmaker*,[39] the lawyer accessed the plaintiff's credit report while preparing for a trial involving a property dispute between the plaintiff and the lawyer's client.[40] The FCRA limits the purposes for which a party can access a consumer report.[41] Among these legitimate purposes is when the user "otherwise has a legitimate business need for the information . . . ."[42] Attorney Handmaker and his firm asserted that the litigation was a "legitimate business need" justifying their use of the credit report. The court took a dim view of this proposition by stating:

> Unfortunately for Handmaker and his firm, we must reject their effort to shoehorn the use of the Duncans' consumer reports into § 1681b[].
>
> . . . .
>
> While a lawsuit occasionally may give rise to a "legitimate business need" for a consumer report . . . trial preparation generally does not fall within the scope of § 1681b.[43]

This case, and others like it, remind legal assistance attorneys that there are real and enforceable limits on access to credit reports. We must educate and equip our soldiers to protect themselves against these types of abuses. Further, legal assistance attorneys must help our soldiers assert the FCRA's protections. Particularly when the person misusing credit information is an attorney, legal assistance attorneys must interject themselves in the process to protect the client. The recent cases discussed here and in the December issue of *The Army Lawyer* provide good ammunition to help accomplish that task. Major Lescault.

Eleventh Circuit Clarifies What Constitutes a "Consumer Report" Under the Fair Credit Reporting Act

The Eleventh Circuit recently issued another Fair Credit Reporting Act decision. In *Yang v. Government Employees Insurance Co. (GEICO)*,[44] the court faced the fundamental issue of what constitutes a "consumer report" as that term is used in the FCRA.

Mr. Yang submitted a claim for bodily injury against GEICO based upon an automobile accident with one of GEICO's insurance customers.[45] The GEICO claims examiner referred the case to the Special Investigations Unit (SIU) because she suspected fraud.[46] As part of its investigation, an SIU agent acquired an "Inquiry Activity Report" (IAR) on Mr. Yang from an affiliate of Equifax Credit Information Services, Inc.[47] According to the Eleventh Circuit:

> IARs are preexisting, non-customized documents containing the subject's name, recent addresses, social security number, date of birth, and recent employers. IARs also contain a partially encoded list of all the entities that have inquired about the subject's credit history for the previous two years.[48]

39. 149 F.3d 424 (6th Cir. 1998).

40. *Id.* at 425. The Duncans purchased residential real estate and, within a year after the closing, found that the well on the property "was contaminated with fecal coliform." *Id.* They sued several people, including the mortgage company. "The Duncans alleged that Bankers Mortgage was negligent because it failed to ensure that the water supply had been inspected prior to extending the loan and closing the transaction." *Id.* The mortgage company hired Mr. Handmaker to defend them in the litigation. After learning that Mr. Handmaker had accessed their credit report, the Duncans sued him and his firm for violating the Fair Credit Reporting Act (FCRA).

41. 15 U.S.C.A. § 1681b (West 1998). Generally speaking, these purposes are for credit, insurance, employment, licensing, or other legitimate business transactions.

42. The actions under dispute in *Duncan* case were evaluated under an older version of the statute. Congress recently modified the FCRA. *See* Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (to be codified at 15 U.S.C. § 1681). These changes took effect on 30 September 1997. *See* Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, ARMY LAW., Aug. 1997, at 19. Among the changes were modifications to 15 U.S.C. § 1681b. Specifically, the "legitimate business need" purpose now allows release of a consumer report only when the user: "(F) otherwise has a legitimate business need for the information (i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account." 15 U.S.C.A. § 1681b(a)(3)(F) (West 1998).

43. *Duncan*, 149 F.3d at 427.

44. 146 F.3d 1320 (11th Cir. 1998).

45. *Id.* at 1321.

46. *Id.*

47. *Id.*

48. *Id.*

Mr. Yang sued Equifax and GEICO alleging a violation of the FCRA. The district court granted a motion for summary judgment, finding that the IAR was not a "consumer report" under the FCRA.

The FCRA defines a "consumer report" as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
> (B) employment purposes; or
> (C) any other purpose authorized under section 1681b of this title.[49]

From this statutory definition, the Eleventh Circuit stated that a consumer report for a credit-reporting agency (CRA) is a "consumer report" if it has three elements:

> The . . . definition indicates that a consumer report is made up of three fundamental elements. First, a "consumer reporting agency" must "communicat[e] . . . information[.] Second, the "communication of information" must "bear[] on" any one of a list of factors. Third, the "communication of information" must be "used or expected to be used or collected in whole or in part" for any one of several purposes.[50]

The court referred to the third element as the "purpose clause" and found this element to be outcome-determinative in the *Yang* case.[51]

When determining whether a report is a "consumer report" under the so-called purpose clause, the court identified three components to consider. First, whether the user ultimately used the report for one of the FCRA's listed purposes. Second, whether the CRA expects clients to use the reports for one of the purposes listed in the FCRA. Third, whether the CRA collects the information contained in the report for one of the purposes listed in the FCRA.[52] According to the Eleventh Circuit, if any of these components are satisfied, the report is a "consumer report" under the FCRA.[53]

In *Yang*, the court relied on the third component, Equifax's purpose for collecting the information, to find that IARs were "consumer reports" subject to the FCRA.[54] Interestingly, it was Equifax's own internal guide (which provided that IAR's "contain information 'placing [them] under the guidelines of the FCRA") and testimony from its representative (who testified "that the company would not knowingly allow a subscriber . . . to obtain IARs to evaluate insurance claims because that is not

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49. 15 U.S.C.A. § 1681a (West 1998). The permissible purposes for release referenced in subparagraph (C) of the definition include:

> [A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other:
> (1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.
> (2) In accordance with the written instructions of the consumer to whom it relates.
> (3) To a person which it has reason to believe—
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
> (B) intends to use the information for employment purposes; or
> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
> (E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or
> (F) otherwise has a legitimate business need for the information—
> (i) in connection with a business transaction that is initiated by the consumer; or
> (ii) to review an account to determine whether the consumer continues to meet the terms of the account.

Id. § 1681b.

50. *Yang*, 146 F.3d at 1323.

51. *Id.*

52. *Id.* at 1324.

53. *Id.*

54. *Id.* at 1325.

one of the permissible uses of 'consumer reports' under the FCRA") that were the critical facts.[55]

The court's systematic analysis of the definition of "consumer report" in *Yang* provides a logical framework for consumer advocates, like legal assistance attorneys, to better and more accurately counsel and negotiate on behalf of their clients in credit reporting cases. Additionally, the court's refusal to allow GEICO's actual use of the information to determine the report's status as a "consumer report" is an important decision for consumers. To allow the user to avoid the provisions of the FCRA simply by misusing the information for a purpose not listed in the FCRA would leave a gaping hole in this important consumer protection statute. The Eleventh Circuit's decision to avoid this outcome further demonstrates the trend in credit reporting cases and legislation to limit the use of credit information strictly to the purposes allowed by the FCRA. Major Lescault.

International and Operational Law Notes

United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters into Force

Introduction

The United Nations Convention on the Safety of United Nations and United Nations Associated Personnel[56] entered into force on 15 January 1999. Presently, forty-nine states have signed the Convention.[57] The treaty will formally enter into force because twenty-two states have submitted instruments of ratification, acceptance, approval, or accession to the Secretary General.[58] This note outlines the need for this new multilateral Convention, briefly describes its substance, discusses the primary problem with applying the Convention, and predicts some of the likely near-term impacts of this Convention.

The Need for a Multilateral Convention

The UN has conducted forty-nine peacekeeping operations since 1948. Of these, thirty-six began from 1988 to 1998.[59] During the same period, untold numbers of civilians, police, military personnel, and UN employees worked throughout the world to help solve international economic, social, and humanitarian problems. The UN Charter mandates that UN representatives seek to enhance international peace and security and assist the settlement of international disputes "in conformity with the principles of justice and international law."[60] In theory, UN personnel deploy to represent the interests of mankind and the entire international community. The Secretary-General praised UN efforts to "counter violence with tolerance, might with moderation, and war with peace" as being without precedent in human history.[61]

The fundamental goal of helping to maintain international peace and security requires personnel to deploy into situations that involve risks to their safety and security.[62] United Nations representatives have delivered humanitarian aid, assisted refugees, rebuilt infrastructure, and monitored cease-fire lines throughout the world. United Nations personnel require legal protection because they serve in many areas where the lines between hostile factions are unclear. As representatives of the international community, persons deployed under the authority of the United Nations are often in the midst of conflict though not as a party to the conflict. Accordingly, the UN Charter provides that UN personnel must enjoy "such privileges and immunities as are necessary for the independent exercise of their duties."[63]

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55. *Id.* at 1322, 1324-26.

56. Dec. 9, 1994, 34 I.L.M. 482 (1995), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 8-20 (1998)[hereinafter Safety Convention].

57. Prior to the entering an international agreement into force, a state that has signed the agreement must refrain from acts that would defeat the object and purpose of the agreement. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1986). At the time of this writing, the 19 nations have signed the Convention and not completed the domestic process for expressing their consent to be legally bound by its provisions are: Australia, Bangladesh, Belarus, Belgium, Bolivia, Brazil, Canada, Fiji, Finland, France, Haiti, Honduras, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Pakistan, Poland, Russian Federation, Samoa, Senegal, Sierra Leone, Togo, Tunisia, United States of America, and Uruguay. <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xviiiboo/xviii_8.html>.

58. Safety Convention, *supra* note 56, art. 27(1). The nations that have submitted instruments of acceptance to the Secretary General are: Argentina, Bulgaria, Chile, Czech Republic, Denmark, Germany, Japan, New Zealand, Norway, Panama, Philippines, Portugal, Republic of Korea, Romania, Singapore, Slovakia, Spain, Sweden, Turkmenistan, Ukraine, United Kingdom, and Uzbekistan. *See* <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xviiiboo/xviii_8.html>.

59. Bernard Miyat, Under-Secretary-General for Peacekeeping Operations, Press Conference in Observance of 50 Years of United Nations Peacekeeping (May 29, 1998) *available at* <http://www.un.org/Depts/DPKO/pk50_p.htm>.

60. U.N. CHARTER, art. 1, para. 1.

61. Kofi Annan, Secretary General of the United Nations, Address by the United Nations Secretary-General Before the Special Commemorative Meeting of the General Assembly Honouring (sic) 50 Years of Peacekeeping, U.N. Doc. SG/SM/6732 (Oct. 6, 1998).

62. U.N. CHARTER art. 1.

International law shields UN personnel from attack while they are deployed in non-belligerent roles.[64] For example, combatants who feign protected status by the use of signs, emblems, or uniforms of the UN commit unlawful perfidy.[65] According to the International Committee of the Red Cross, the protected status of neutral personnel deployed or employed on behalf of the UN is "not contestable."[66]

The existing framework of international law does not adequately protect UN forces. To date, non-belligerent personnel who were deployed to support UN mandates have suffered 1581 casualties.[67] The Security Council recently passed a unanimous resolution condemning the loss of six UN chartered aircraft over territory controlled by rebels in Angola.[68] Since 1992, the Secretary-General has highlighted the "pressing need to afford adequate protection to UN personnel engaged in life-endangering circumstances."[69] On 5 June 1993, Somalis killed twenty-four members of a UN operation and wounded another fifty-seven.[70] The General Assembly subsequently established an Ad Hoc Committee to determine responsibility for attacks on UN personnel and develop "measures to ensure that those responsible for such attacks are brought to justice."[71] During the first week of April 1994, a Rwandan mob murdered ten Belgian peacekeepers assigned to protect the Prime Minister of Rwanda. The mob subsequently assassinated the Prime Minister.[72] "Gravely concerned at the increasing number of attacks on United Nations and associated personnel," the General Assembly adopted The United Nations Convention on the Safety of United Nations and Associated Personnel (The Safety Convention), and opened it for signature on 9 December 1994.[73]

The Convention implements international law by making it a universal jurisdiction crime to attack neutral persons deployed on behalf of the UN. The Convention, however, does not change two underlying principles of international law. The law of war continues to apply to combatants in an international armed conflict regardless of the source of their mission, chain of command, or underlying legal authority. Forces that are deployed as combatants to enforce mandates of the UN Security Council become subject to the constraints of the existing law of war because they are lawful targets.[74] On the other hand, military or civilian personnel participating in international armed conflict benefit from the detailed protections codified in the law of war. The existing law of war framework, therefore,

63. U.N. CHARTER art. 105, para. 2.

64. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 8-16 (1998). *See also* Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(iii) and art. 8(2)(e)(iii), U.N. Doc. No. A/CONF. 183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998)(making attacks on United Nations personnel involved in humanitarian assistance or peacekeeping missions a war crime during both international and non-international armed conflicts).

65. Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 37(1), 16 I.L.M. 1391. The Protocol defines perfidy as acts "inviting the confidence of the adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." *Id.* Protocol I also prohibits misuse of the distinctive emblem of the United Nations, in essence equating the United Nations emblem with international protections accorded to the Red Cross. *Id*. art. 38(2).

66. CLAUDE PILLOUD, ET AL., INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 1508 (Yves Sandoz et al. eds., 1987).

67. *See* <http://www.un.org/Depts/dpko/fatalities/fatal2.htm>.

68. S.C. Res. 1221, U.N. SCOR, 54th Sess., 3965th mtg., U.N. Doc. S/ RES/1221 (1999). The Uniao Nacional para a Independencia Total de Angola (UNITA) has waged a war for control of Angola for 24 years. The United Nations Angola Verification Mission (UNAVEM) is in the country monitoring the implementation of the 1994 Lusaka Accords (S/PRST/1994/70). The crash killed the Secretary-General's Special Representative for Angola. Resolution 1221 affirms the Security Council's resolve to establish the truth about the downed aircraft, and to determine responsibility for the crashes.

69. *An Agenda For Peace: Preventative Diplomacy, Peacemaking, and Peacekeeping*. Report of the Secretary-General, Boutros Boutros-Ghali, U.N. Doc. A/47/277 S/2411, 68, June 17, 1992.

70. *Report of the Commission of Inquiry Established Pursuant to Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them*, U.N. Doc. S/1994/653, para. 117 (1994). The United Nations Operation in Somalia (UNOSOM II) received its expanded mandate on 26 March 1993. *See* S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg, U.N. Doc. S/RES/814 (1993). The day after the murder of the UNOSOM II members, the Security Council passed another resolution which authorized United Nations forces to "take all necessary measures against all those responsible for the armed attacks including to secure the investigation of their actions and their arrest and detention for prosecution." S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg., ¶ 5, U.N. Doc. S/RES/837 (1993).

71. G.A Res. 48/37, U.N. GAOR, 48th Sess., U.N. Doc. A/48/37 (1993).

72. GERARD PRUNIER, THE RWANDA CRISIS HISTORY OF A GENOCIDE 230 (1995).

73. *Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure That Those Responsible For Such Attacks Are Brought to Justice, Report of the Sixth Committee*, 49th Sess., Agenda Item 141, at 3, U.N. Doc. A/49/742 (1994).

continues to provide all of the protections needed by combatants in an international armed conflict. The implications of this legal distinction are discussed below.

At the same time, UN personnel who are deployed to internal armed conflicts under the legal authority of the UN retain their right of self-defense. Civilian and military personnel deployed in the vicinity of non-international armed conflicts are not participating in the hostilities. Combatants from any side of the dispute cannot lawfully target UN personnel, or interfere with their mission in any manner. International law recognizes that UN personnel have an inherent right to use force to defend themselves from threats. They do not become belligerents simply by using proportionate force in self–defense.[75]

The Convention fills a void in the existing structure of international law because it establishes a clear legal norm that applies to forces conducting non-combat operations on behalf of the UN.[76] The Convention extends the principle of universal jurisdiction over offenses directed against UN and associated personnel, and creates a legal regime for prosecution or extradition of the perpetrators. Thus, the Convention will operate with the law of war to "provide seamless protection for all UN and associated personnel across the entire spectrum of risk or conflict."[77]

Summary of the Main Convention Provisions[78]

This Convention is a significant development in the international legal regime because it codifies the principle that attacks directed against UN and associated personnel are criminal violations, punishable by all nations.[79] Article 9 is the core of the Convention. Each party must implement domestic legislation to punish the list of offenses contained in Article 9. Parties "shall make the crimes punishable by appropriate penalties which shall take into account their grave nature."[80] The Convention criminalizes the intentional commission of murder, kidnapping, or any other act against the person or liberty of any UN personnel. Article 9 includes threats to commit prohibited acts with the object of compelling UN personnel to do or to refrain from doing any act. The Convention also specifically addresses attempts to commit prohibited acts, participation as an accomplice, or organizing or ordering others to commit prohibited acts.

The Convention contains language requiring parties to "cooperate in the prevention of the crimes set out in Article 9."[81] Parties must enact provisions for establishing personal jurisdiction when the crime is committed on their territory, which includes on board a ship or aircraft registered in that state, or if the offender is a national of that state.[82] Any state that has information regarding the victim or circumstances of an Article 9 violation must "fully and promptly" inform the UN Secretary-General.[83] Article 14 models the familiar language of the grave breach provisions of the Geneva Conventions by establishing a legal obligation for states to either prosecute or extradite offenders.[84] To reinforce the obligation to cooperate with other states, any bilateral extradition treaty that does not include the Article 9 crimes as extraditable offenses "shall be deemed to be included as such therein."[85]

Aside from the list of substantive crimes, the Convention protects a broad class of persons. The dual structure of the final text is significant. The prohibitions of Article 9 apply to

74. The principle of military necessity allows "those measure not forbidden by international law, which are indispensable for the complete submission of the enemy as soon as possible." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 3 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].

75. Safety Convention, *supra* note 56, art. 21.

76. United States Mission to the United Nations, Press Release No. 217-94 (Dec. 9, 1994)(stating that the Convention represents an "important element" in protecting persons deployed on operations involving "exceptional risk.").

77. *Id.*

78. Extensive detail of the process of negotiating this treaty is beyond the scope of this note. *See* Antoine Bouvier, *Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis*, INT'L REV. OF THE RED CROSS, No. 309, 638 (1995); Walter Gary Sharp, *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93; Steven J. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, 18 HOUS. J. INT'L L. 359 (1996) (containing excellent insights into the diplomatic give and take, as well as exploration of the negotiating process).

79. In that sense, the Safety Convention follows the model set by other international conventions attempting to deter and regulate acts of terrorism. *See* Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 625 (referring the interested reader to a few of the numerous universal jurisdiction multilateral treaties such as The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec.14, 1973., 28 U.S.T. 1975; The International Convention Against the Taking of Hostages, Dec. 14, 1979, T.I.A.S. No. 11081, 18 I.L.M. 1456 (1979); The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (1971)).

80. Safety Convention, *supra* note 56, art. 9(2).

81. *Id.* art. 11.

82. *Id.* art. 10(1). A state party may also establish its jurisdiction over any such crime when it is committed: (a) by a stateless person whose habitual residence is in that State; or (b) With respect to a national of that State; or (c) in an attempt to compel that State to do or to abstain from doing any act. *Id.* art. 10(2).

83. *Id.* art. 12(2).

"United Nations operations" and "United Nations and associated personnel." [86] The Convention applies to UN operations established by the competent body of the United Nations to maintain or restore international peace and security. The "United Nations operation" must be conducted under "United Nations authority and control."[87] Finally, either the UN Security Council or General Assembly must declare that the operation presents "an exceptional risk to the safety of the personnel participating in the operation."[88]

Therefore, the Convention protects UN civilian or military representatives who enter host nations to implement UN mandates; the consent of the host nation is not required. The Convention defines "United Nations personnel" as those "members of the military, police, or civilian components" whom the Secretary-General engages to deploy on UN operations.[89] Thus, the Convention does not protect every non-governmental agency in the operational area because it requires a tight contractual nexus with the UN. Non-governmental organizations may, however, be considered "associated personnel" if they deploy under an agreement with the Secretary-General.[90]

Finally, the term "associated personnel" makes the Convention applicable to personnel who deploy on missions other than those strictly under UN command and control. This is an important point for practitioners because many United States forces deploy to support UN mandates as part of a unilateral or multinational operation that is not under direct UN command and control.[91] The United States' position is that the Convention protects United States forces that deploy to support a UN mandate.[92] Aside from the negotiating history underlying the Convention, the dual categories of "United Nations" and "associated personnel" would arguably compel the same conclusion.

The Primary Underlying Legal Problem

Despite its broad coverage, the Convention contains an important limitation. Its focus fills the void where UN and associated personnel had no prior treaty-based protections. The convention, is consistent in that it "shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the UN Charter in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."[93]

The negotiated language of Article 2 serves as a legal device to switch the jurisprudential tracks from the law of peace to the law of war. As the operation becomes an international armed conflict, and the participants become lawful targets, the preexisting criminal prohibitions against attacking them expire. When the United States delegation proposed the language quoted above, most delegations immediately recognized that it would help protect the established law of war from being undermined.[94]

84. *Id.* art. 14 Article 14 of the Safety Convention states:

> The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offense of a grave nature under the law of that State.

See also FM 27-10, *supra* note 74, para. 506.

85. Safety Convention, *supra* note 56, art. 15(1).

86. *Id.* art. 2(1).

87. *Id.* art. 1(c).

88. *Id*.

89. *Id.* art. 1(a). The term "United Nations Personnel also includes 'Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted.'" *Id.* art. 1(a)(ii).

90. *Id.* note 56, art. 1(a)(iii).

91. U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 20 (30 Dec. 1994).

92. Lepper, *supra* note 78, at 389.

93. Safety Convention, *supra* note 56, art. 2(2).

The drafters intended to create a "clear separation" between the UN Safety Convention and the laws of war to allow one or the other bodies of law to cover UN and associated personnel at all times. The drafters, did not intend for both bodies of law to apply at the same time.[95] The problem is that the Geneva Conventions set the threshold for applying the laws of war at a deliberately low, subjective threshold to maximize their application.[96] One observer called this provision the "fatal flaw" in the UN Safety Convention.[97]

From one perspective, the Convention fails to maximize the protections afforded to UN and associated personnel because enemy forces can subjectively assess whether the operation has triggered the laws of war. For example, such a determination would have allowed the Somalis to invoke the Geneva Convention Relative to the Treatment of Prisoners of War as legal authority to detain Michael Durant. On the other hand, the American Bar Association (ABA) concluded "it is asking too much for a Somali clan warrior or Bosnian militiaman to know whether or not he is becoming an international criminal by firing at UN troops or aircraft."[98] The ABA supported ratification of the Convention subject to the understanding that either a Chapter VI[99] (of the UN Charter) or Chapter VII (of the UN Charter) operation could rise to the level of an international armed conflict.[100]

Regardless of your personal opinion about where your deployment is classified along the spectrum of conflict, this issue requires coordination through technical channels. Whether the Convention protects the soldiers of your task force is a policy matter as well as a legal matter, and should be coordinated appropriately. Operational law attorneys should understand the Convention and explain its application to the soldiers who are affected by its provisions.

Foreseeable Impacts

As it becomes a binding treaty, the United Nations Convention on the Safety of United Nations and Associated Personnel will not immediately reshape United States operations. The Senate will probably debate the Convention during the 106th Congress prior to giving its advice and consent. Other than spawning debate over the wisdom of deploying in support of UN mandates, the Convention will likely gain broad bipartisan support in the Senate. Senate approval of the Convention will require implementing legislation that could, in turn, require some changes to the *Manual for Courts-Martial*. Judge advocates should monitor the debate and implement any necessary changes.

On a more immediate note, the Convention contains some language that affects current operations. Article 3 requires military and civilian components of a UN operation to "bear distinctive insignia."[101] It further requires associated personnel to "carry appropriate identification documents."[102] Judge Advocates may become involved in the obligation of states to "afford

94. Lepper, *supra* note 78, at 394. This line between protections of the Convention and those afforded by the law of war helps explain why the International Committee of the Red Cross (ICRC) is not included in the text. As a neutral humanitarian agency, the ICRC operates across the full spectrum of conflict, and thus is logically not linked to the United Nations operations by being included within the class of protected persons.

95. Bloom, *supra* note 79, at 625.

96. *See* FM 27-10, *supra* note 74, para. 8. *See also* U.S. v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992)(stating that the law of war applies to "an incredibly broad spectrum of events" and citing the State Department policy that the international armed conflict threshold should be "construed liberally").

97. Sharp, *supra* note 78, at 149. The Savings provisions of Article 20 do little to clarify the issue by stating:

> Nothing in this Convention shall affect: The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.

Id. art. 20(a)

98. Michael D. Sandler, Chair, American Bar Association Section of International Law and Practice Standing Committee on World Order under Law Report to the House of Delegates, Safety of U.N. and Associated Personnel, 31 INT'L LAW. 195, 200 (1997).

99. General practice describes operations by reference to the sections of the United Nations Charter, which provides legal authority for the operation. Judge Advocates should be especially familiar with the provisions of Chapter VI, Pacific Settlement of Disputes (Articles 33-38) and Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51). Chapter VI envisions a Security Council role in assisting parties to "any dispute likely to endanger the maintenance of international peace and security" as they strive to resolve conflicts through "peaceful means of their own choice." U.N. CHARTER, chap. VI. Chapter VI does not specifically envision or authorize the deployment of military forces under UN authority to interpose themselves between hostile parties. The frequent use of military forces as peacekeepers, however, evolved as an extension of the UN's desire to facilitate the "adjustment or settlement of international disputes or situations which might lead to a breach of the peace." *Id.* Peacekeeping is an internationally accepted mode of managing conflicts and giving states a buffer to seek long term, peaceful resolutions. Because Peacekeeping was a compromise generated from the Security Council's inability to use its Chapter VII enforcement powers, peacekeeping operations have become an inherent part of the UN's strategy for resolving international disputes in the absence of more comprehensive and lethal collective security operations.

100. Sandler, *supra* note 98, at 203. The language of Article 2 rejected the ICRC contention that international armed conflicts by definition are waged between two states, and the United Nations can therefore never be involved in an international armed conflict because it is not a "state." Lepper, *supra* note 78, at 402.

one another the greatest measure of assistance in connection with criminal proceedings set out in Article 9."[103]

Finally, Article 8 provides an additional legal basis for demanding the immediate release of any non-combatant personnel who are captured or detained by hostile parties. The Convention provides that "they shall not be subjected to interrogation and they shall be promptly released and returned to the UN or other appropriate authorities."[104] During the hopefully brief period that United States personnel are unlawfully detained, they must be "treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949."[105] Importantly, unless they are deployed as combatants in an international armed conflict, United States personnel cannot lawfully be detained by any hostile forces.

Conclusion

The United Nations Convention on the Safety of United Nations and Associated Personnel is the latest multilateral effort to enforce international law through the punitive judicial systems of the nations of the world. Assuming that states fulfill their legal obligation to implement the Convention, the efforts of the UN on behalf of international peace and security should be enhanced. This is a win-win multilateral treaty that benefits individual soldiers as well as the entire international community. Major Newton.

Principle 5: Protecting the Force from Unlawful Belligerents

The following note is the sixth in a series of practice notes[106] that discuss concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense (DOD) Law of War Program.[107]

The principle proposed in this note involves a law of war foundation for force protection measures used during Operations Other Than War. This principle is derived from various sources that grant a military force the right to defend itself against threats when in hostile areas. While the law of war is normally not associated with the "rights" of armed forces to defend themselves, this right is implied from virtually every explicit "limitation" in the law. This note deciphers the source of this implied right within the context of a force confronted with a hostile threat, not from an enemy armed force, but from some other hostile organization or individual.

This principle is derived from three primary sources. The first source is the law of war's explicit recognition that a force may target civilians when they take part in hostilities against the force.[108] The second is the occupation prong of the law of war.[109] This source was intended to balance of the objective of protecting civilians under enemy occupation with the legitimate need of the occupying force to ensure its security against hostility from that population.[110] The third source is the tradition of treating hostile acts by non-belligerents as a violation of the law of war.[111]

All of these sources share the common theme of empowering an armed force to take measures necessary for its protection

101. Safety Convention, *supra* note 56, art. 3.

102. *Id.*

103. *Id.* art. 16.

104. *Id.* art. 8.

105. *Id.* Article 13 Convention Relative to the Treatment of Prisoners of War provides:

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135.

106. *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54 [hereinafter *Principle 3*]; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 22.

107. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). *See also* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

108. *See infra* notes 117-21, and accompanying text.

in a hostile land. Today, these measures fall under the doctrinal umbrella of "force protection."[112] This term, however, provides no source of the legal foundation for this conduct. One view suggests that the right of self-defense is inherent and implied in every military operation, regardless of the source of the threat.[113] Assuming that this conclusion is accurate, or if there are other potential sources of authority for such measures,[114] deriving a law of war foundation for such measures carries two potential benefits. First, it provides the commander, through his legal advisor, a familiar source of authority to rely upon when he is determining the appropriate means of force protection.[115] Second, it provides some potentially valuable guidance for the commander on the level of necessity that is required to implement such measures.

Loss of Civilian Immunity

Perhaps the most fundamental issue related to force protection is when traditional non-combatants become the legitimate object of our lethality. Military practitioners should be familiar with current U.S. policy, in the form of the Standing Rules of Engagement,[116] that obligates commanders to take defensive measures. These measures are based upon military necessity and tempered by proportionality. Practitioners may be unaware that the law of war validates this approach. This validation comes in the form of Article 51 of Geneva Protocol I.[117] Although entitled "Protection of the Civilian Population,"[118] and considered by the Official Commentary to be "one of the most important articles in the Protocol,"[119] Article 51 acknowledges the right of an armed force to treat "civilians" as legitimate targets *if, and for so long as*, "they take a direct part in hostilities."[120] The Official Commentary further explains the legitimate nature of directing lethality against these individuals. While civilians are normally immune from attack, they forfeit this immunity whenever they take any action intended to cause actual harm to the personnel and equipment of an armed force.[121] Thus, even during international armed conflict, the law of war acknowledges the absolute right of an armed force to use deadly force to protect itself from any threat. This right extends to a threat posed by persons who, but for their hostile act or intent, would be considered civilians.

Occupation Law

The Fourth Geneva Convention, which focuses on relations between armed forces and civilians, also acknowledges the right of a force to protect itself.[122] This treaty, which is devoted exclusively to the protection of civilians during armed conflict

109. *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907, sec. III, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP'T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) (discussing Military Authority Over the Territory of the Hostile State); Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 2-3, 6 U.S.T. 3316, 75 U.N.T.S. 287, *reprinted in* U.S. DEP'T OF ARMY PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) [hereinafter GC]; 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, art. 51(3), 16 I.L.M. 1391, [hereinafter GP I].

110. *See* A.P.V. Rogers, LAW AND WAR SINCE 1945 (1996) (discussing the drafting history of the Fourth Geneva Convention).

111. *See infra* notes 130-38, and accompanying text.

112. *See* U.S. DEP'T OF DEFENSE JOINT PUBLICATION 1-02, DOD DICTIONARY (23 Mar. 1994) (Updated April 1997) ("Security program[s] designed to protect soldiers, civilian employees, family members, facilities, and equipment, in all locations and situations, accomplished through planned and integrated application of combating terrorism, physical security, operations security, personal protective services, and supported by intelligence, counterintelligence, and other security programs.").

113. *See* INTERNATIONAL AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, ch. 9 (1998) [hereinafter OPERATIONAL LAW HANDBOOK] (discussing rules of engagement for United States forces); *see also*, CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT, app. A (1 Oct. 1994) [hereinafter STANDING RULES] (establishing the obligation of commanders of United States forces to use force to protect these forces from threats of hostilities when conducting military operations outside the territory of the United States).

114. For example, treating the right of force protection as derived from the national right of self-defense under Article 51 of the Charter of the United Nations.

115. *See* OPERATIONAL LAW HANDBOOK, *supra* note 113, at 11-16 (discussing the "law by analogy" method that is recommended for use during Military Operations Other Than War).

116. *See* STANDING RULES, *supra* note 113.

117. GP I, *supra* note 109.

118. *Id.* art. 51.

119. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 615 (YVES SANDOZ et al. eds., 1987) [hereinafter OFFICIAL COMMENTARY].

120. GP I, *supra* note 109, art 51(3). (providing a more extensive discussion of Article 51, including an analysis of the whether the United States is bound by it). *See Principle 3*, *supra* note 106.

121. *See* OFFICIAL COMMENTARY, *supra* note 119, at 618-19.

and occupation, contains 159 articles intended to implement such protections. As with Geneva Protocol I, in spite of this clear "civilian protection" focus, Article 5 of the Convention explicitly recognizes the right of an armed force to protect itself against hostile elements in the civilian community.[123] This Article ensures that enemy civilians cannot rely on the Convention's extensive protection to shield themselves from the legitimate consequences of acts considered harmful to the friendly armed forces or state.[124] Thus, Article 5 permits derogation from the provisions of the Convention when state or occupying authorities definitely suspect that an individual, otherwise protected by the Convention, is engaged in activities hostile to the security of the state or occupying force.[125]

According to Geoffrey Best, a distinguished law of war scholar, this was a major point of contention during the drafting of the Fourth Geneva Convention.[126] This contention arose between supporters of a "no derogation" position and the major Allied powers, who were administering occupied territories at the time the Convention was drafted. These powers, including the United States, rejected the "no derogation" position of the International Committee of the Red Cross.[127] The Allied powers were sympathetic to the concern that forces might use a derogation provision as a subterfuge to mistreat enemy civilians. They were, however, more focused on what they considered to be a critical need for an occupying force to retain the flexibility needed to deal with a hostile civilian population.[128] According to Geoffrey Best:

> The other side of the coin from protection of civilians was protection of combatants. What powers did the Civilians Convention leave with or give to States to maintain their security and that of their armed forces against challenges from civilian, or seeming-civilian, sources? At first sight this may appear a contradiction in terms or a self-evident absurdity . . . By the time the Diplomatic Conference had finished dealing with it, however, the majority of the States represented there had come to recognize that it really was a problem . . . .
>
> The security-and order-maintaining parts of the Civilians Convention show how the Diplomatic Conference trod this tightrope. They were the necessary counterpart to the civilian-protection parts, which otherwise and on their own must be considered pure fantasy . . . .
>
> For the maintenance of security and of general order in occupied territory, the Civilians Convention prescribed, first, the continuance of the normal operations of the ordinary penal law of the land; and, second, to the extent that the functioning of that law should be undermined by its officials' noncooperation or should be in any case inadequate to meet the occupier's security and military requirements, the enforcement of his own penal laws by his own military courts.[129]

Concerns for the security of the force ultimately prevailed, with Article 5 as the most obvious manifestation of that result. Thus, the law of war explicitly acknowledged the right of an armed force to take measures necessary to protect itself from hostile civilian actors even when such civilians qualified as "protected persons" under enemy occupation.

Prohibition Against Unlawful Belligerents

The final source of support for the proposition that the law of war includes a "force protection" principle is derived from the traditional prohibition against "unlawful belligerents." During past conflicts, states have used this prohibition as the basis to prosecute and punish enemy nationals, not qualifying as members of the enemy armed forces, who attempted to take or took hostile acts against the state or its armed forces.[130] The classic example of an "unlawful belligerent" is the enemy saboteur who, without qualifying for status as a combatant, infiltrates friendly areas with intent to cause harm to the force.

122. *See* GC, *supra* note 109.

123. *See* GC, *supra* note 109, art. 5. This acknowledgment is entitled "Derogations."

124. COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 52-53 (JEAN S. PICTET *et al.* eds., 1958).

125. *See* GC, *supra* note 109 art. 5.

126. GEOFFREY BEST, WAR AND LAW SINCE 1945, 123 (1994).

127. *Id.* at 123-24.

128. *Id.*

129. *Id.* at 123-25.

130. *See* 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312 (2d ed. 1912).

International law has long recognized the right of a state to punish these individuals as unlawful belligerents. According to Oppenheim:

> Since international law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of the armed forces, and the enemy has according to a customary rule of International Law the right to consider and punish such individuals as war criminals.[131]

Oppenheim's statement is significant for several reasons. First, although the nature of warfare has changed significantly since Oppenheim made this statement in 1912, the basic premise seems to remain sound(that individuals who commit hostile acts without meeting the criteria necessary for gaining combatant status are not entitled to any combatant immunity upon capture.[132] Second, the term "war crime" as used by Oppenheim, has a broader meaning than is normally associated with the term today. It encompasses any conduct that subjects the perpetrator to legitimate punishment by the enemy upon capture.[133] Third, and most significant for this analysis, is the fundamental premise contained in Oppenheim's quote(that the need for force security allows a state to punish civilians who commit acts hostile to the force.

One of the most dramatic historic examples of the legitimacy of this premise comes from our own Supreme Court. In 1942, the legality of trying and punishing individuals as "unlawful combatants" was "put to the test" when President Roosevelt convened a military commission to try seven Nazi operatives who had been captured in the U.S. with plans to commit acts of sabotage against our war industry.[134] These individuals, including one U.S. citizen, had been trained in Germany as saboteurs. They landed on Long Island and in Florida for their missions. Upon landing, they discarded any uniform items and attempted to blend into society as civilians. Federal Bureau of Investigation agents captured these individuals and, at the direction of the President, turned them over to the Provost Marshall for the Military District of Washington for a trial before a military commission. Among the offenses military authorities charged them with was the crime of "unlawful belligerency."[135]

In denying writs of *habeas corpus* for the prisoners, the Supreme Court concluded that unlawful belligerency was a valid charge under the law of war. According to the Court:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[136]

For the individuals involved in this case, the result of this decision was execution.[137]

The purpose of this discussion of the offense of "unlawful belligerency" under the law of war is not to suggest that during future Operations Other Than War U.S. commanders should plan to convene military commissions to punish individuals hostile to the force. In fact, whether these commissions are viable options for use during such operations is unknown.[138] Assuming these commissions are viable options, the absence of armed conflict during Operations Other Than War likely deprives them of their jurisdiction to try specific offenses. Rather, the discussion of "unlawful belligerency" reinforces the notion that armed forces can take measures necessary to protect themselves from hostile civilians.

These three sources of authority all point to one undeniable conclusion: when justified by military necessary, the law of

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131. *Id.*

132. In fact, this point seems validated by the existence in Geneva Protocol I of a rule intended to provide minimum humane treatment protections for individuals falling into this category and pending punishment by a belligerent. *See* GP I, *supra* note 109, art. 45(3).

133. *See* OPPENHEIM, *supra* note 130, at 309.

134. *Ex Parte* Quirin, 317 U.S. 1 (1942).

135. *Id.*

136. *Id.* at 30-31.

137. *See The Milligan Decision*, 11 THE Q. J. OF MIL. HIST., Winter 1999, at 44.

138. *See* Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1 (1996) (containing an in-depth analysis of the viability of using military commissions during Operations Other Than War).

war empowers military forces to do what is required to protect themselves from hostile civilians. Justifiable measures range from temporary detention to targeting these individuals, depending on the exact nature of the threat posed to the force. Treating this authority as a "principle" of the law of war provides a solid legal foundation for force protection measures imposed by U.S. commanders during non-conflict operations. Additionally, it reinforces the Standing Rules of Engagement: that U.S. forces never have to wait until they take casualties before they do what is needed to defend themselves. Major Corn.

Note from the Field

Carrier Review Boards and Department of Defense (DOD) Transportation

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Introduction

This note introduces the Military Traffic Management Command's (MTMC) Carrier Review Board (CRB) process and discusses some of MTMC's transportation procurement programs and unique program provisions. This broad introduction to the CRB process, the programs, and procurement provisions should benefit military practitioners, especially legal assistance officers and claims attorneys.

Understanding the CRB process, and the practical effect of the MTMC's CRB authority, may provide claims attorneys with some leverage in pursuing collection actions against carriers. Legal assistance attorneys will find this information useful when dealing with carriers on behalf of disgruntled service members seeking remedies for inconvenience costs resulting from poor carrier performance. Staff Judge Advocates may want to share this note with their installation's Directorate of Logistics (DOL), emphasizing the need for installation transportation offices and personal property shipping offices to maintain solid performance data on carriers. In the past, ineffective oversight of carrier performance has resulted in inadequate protection of DOD property.[1] Timely and accurate performance data from installations and activities will greatly aid the MTMC in protecting the DOD's property and shipping interests.

Military Traffic Management Command (MTMC) Regulation 15-1

Purpose and Authority

Military Traffic Management Command Regulation describes a unique tool used by the MTMC to ensure that the DOD does business only with responsible carriers. Under *MTMCR 15-1*, a CRB, comprised of five traffic management experts, may disqualify a carrier from participating in certain military transportation procurement programs.[2] The CRB generally disqualifies a carrier after it reviews the carrier's performance data and determines that there is a pattern of performance failures. The goal of every hearing convened under *MTMCR 15-1* is to protect the DOD's shipping interest.[3]

The MTMC's statutory authority for CRBs can be traced to the Federal Property and Administrative Services Act of 1949.[4] This statute gives the General Services Administration (GSA) authority to obtain transportation and traffic management on behalf of all federal agencies.[5] Under 49 U.S.C.A. § 481(a), however, the Secretary of Defense may exempt the DOD from GSA action.[6] Using this statute, the Secretary of Defense exempted the DOD from the GSA's authority and assigned responsibility for transportation and traffic management to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).[7] The DOD directed the Army, through the MTMC, to provide traffic management services for passenger, freight, and worldwide personal property movements. Specifically, the directive required the MTMC to manage "transportation resources to assure optimum responsiveness, efficiency, and economy to support the DOD mission."[8]

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1. *See* General Accounting Office Report, GAO/NSIAD-92-96, subject: DEFENSE TRANSPORTATION, INEFFECTIVE OVERSIGHT CONTRIBUTES TO FREIGHT LOSSES, (June 1992).

2. MILITARY TRAFFIC MANAGEMENT REG. 15-1, DESCRIPTION OF PROCEDURES GOVERNING DISQUALIFICATION AND NONUSE OF CARRIERS OF DOD TRAFFIC para.7 (13 July 1993) [hereinafter MTMCR 15-1].

3. *Id*. para. 2.

4. 49 U.S.C.A. § 481 (West 1998)

5. *Id.* § 481 (a)(1).

6. *Id.* § 481(a)(4).

7. U.S. DEP'T OF DEFENSE DIR. 5126.9, EXEMPTION UNDER TITLE II OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT TRANSPROTATION AND TRAFFIC MANAGEMENT (2 Oct. 1954) [hereinafter DOD DIR. 5126.9]

In January 1993, the DOD assigned the United States Transportation Command (USTRANSCOM) the mission of providing air, land, and sea transportation for the DOD, both in time of peace and time of war. The USTRANSCOM became the DOD's "single manager" for transportation, with authority to obtain commercial transportation services.[9] As the Army component of the USTRANSCOM, the MTMC has continued to provide traffic management services for passenger freight and worldwide personal property moves.[10]

Part 47 of the Federal Acquisition Regulation (FAR) is important to the underlying authority of *MTMCR 15-1*.[11] This part prescribes the government's policies and procedures for acquiring transportation or transportation-related services. There are two methods for obtaining transportation services. The first is by express contracts as regulated by the FAR. The other procurement method is through a Government Bill of Lading (GBL) issued to common carriers and freight forwarders. The GBL typically incorporates either a carrier's public tariff, or a reduced rate (as compared to the public tariff) offered under specific transportation laws.[12] The FAR does not regulate the acquisition of transportation or transportation-related services when the GBL is the contract.[13] Further, the FAR states that procedures for the acquisition of transportation-related services by sealed bid or negotiated contracts do not apply when the DOD relocates a person at government expense by the DOD under the Personal Property Traffic Management Regulation (PPTMR).[14]

Recognizing the unique nature of GBL procurements, the GSA implemented regulations for the temporary nonuse of commercial carriers transporting freight or household goods for civilian executive agencies.[15] The MTMC's procedures for disqualification and nonuse are the counterpart to GSA's temporary nonuse procedures. These procedures are similar to the debarment and suspension process promulgated by the Office of Federal Procurement Policy Letter 82-1, and implemented at FAR 9.4.

Due Process

When the MTMC disqualifies a carrier, the carrier is excluded for a period from participating in the programs established to transport DOD freight, personal property, or passengers.[16] The period of disqualification depends on numerous facts and circumstances. These factors include: (1) the seriousness of the service failure, (2) the trend or pattern of failures, (3) the impact of a disqualification on the DOD as well as the carrier, and (4) whether the carrier has taken or planned any corrective action.[17] In essence, the CRB may consider any relevant information necessary to protect the DOD's shipping interests. A CRB may take a variety of actions ranging from a two-year disqualification from participating in DOD's transportation business to a request that the carrier submit a technical or management plan detailing steps planned to prevent future service deficiencies.[18]

The principles of administrative due process apply to CRBs. In particular, the MTMC provides notice of service failures.[19] The notice states the specific factual allegations concerning the service failures on a particular shipment. It provides the carrier with enough information to respond adequately to the allegations. The notice also specifies the hearing date and invites the

8. U.S. DEP'T OF DEFENSE DIR. 4500.9, TRANSPORTATION AND TRAFFIC MANAGEMENT (26 Jan. 1989). *See* U.S. DEP'T OF DEFENSE, DIR. 4500.34, DOD PERSONAL PROPERTY SHIPMENT PROGRAM (10 Apr. 1986).

9. U.S. DEP'T OF DEFENSE DIR. 5158.4, UNITED STATES TRANSPORTATION COMMAND (8 Jan. 1993).

10. Id.

11. GENERAL SERVS. ADMIN, ET AL., FEDERAL ACQUISITION REG., pt. 47 (June 1997) [hereinafter FAR].

12. In the past, common carriers could transport property without charge or at a rate that was lower than its tariff rate. In other words, they could discriminate to afford the government rate preferences. Shippers, other than government shippers, had to be treated equallyin terms of rate application. Now, certain types of carriers may offer shippers any rate they want to offer. *See generally*, Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (substantially codified at 49 U.S.C. § 10101 et seq) wherein Congress abolished the Interstate Commerce Commission and repealed laws (1) requiring that a carrier file tariffs for all types of goods it transports; (2) prohibiting discrimination and preferential treatment; (3) prohibiting government requisition of reduced rate treatment; and (4) permitting a carrier voluntarily to offer the government reduced rates.

13. FAR, *supra* note 11, at 47.000

14. FAR, *supra* note 11, at 47.200(d)(3).

15. 41 C.F.R. § 101-40.401 (1998).

16. MTMCR 15-1, *supra* note 2, para. 3.

17. *Id.* para. 7d(3).

18. *Id.* para. 3.

19. *Id.* para. 6.

carrier to explain its side of the story and how it intends to fix the problem. The notice letter advises the carrier that the specified failures may result in a disqualification from participation in DOD transportation programs.

The hearing affords the carrier an opportunity to contest or explain the service failures to the CRB.[20] Ideally, no factual dispute should exist in a CRB. If the performance data received from the field is accurate and the service failure is established by a preponderance of the evidence, the only issue would be appropriate corrective measures. Unfortunately, factual disputes often occur. It is important, therefore, that the installation transportation office provide the MTMC with timely and accurate performance data.

While the MTMC intends the hearing to be nonadversarial, in reality, many carriers view it as adversarial. Carriers often claim that the MTMC convenes CRBs to punish them. Therefore, many carriers seek representation by counsel. From the carrier's perspective, disqualification causes a loss of business and revenue. The MTMC's position, however, is that a CRB simply assesses whether or not the carrier is a "responsible carrier." In essence, the CRB prospectively determines whether the carrier, based on its past performance, has the necessary capacity, ability, resources, integrity, and skills to perform transportation movements safely and in accordance with program requirements.

Military Traffic Management Command Regulation 15-1 also permits immediate action to place a carrier in "temporary nonuse" (without notice and hearing) if this action is necessary to protect the DOD's shipping interest.[21] The regulation, however, does not describe what instances might necessitate taking this action. Typically, the MTMC takes this action in emergencies, or in those situations when waiting for notice and a CRB hearing might result in some harm to the DOD's shipping interests. Normally, the MTMC does not impose temporary nonuse for more than thirty days.[22] Further, the MTMC may convene a CRB to review the facts and circumstances that gave rise to the temporary nonuse. A CRB may determine that the situation, which resulted in temporary nonuse, warrants a disqualification period to protect the DOD.

A carrier may appeal a disqualification determination by writing to the MTMC's Deputy Chief of Staff for Operations (DCSOPS); the appellate authority.[23] The appellate authority may terminate, suspend, or reduce the disqualification period if the carrier presents new evidence concerning the facts, or changed circumstances.[24] The appellate authority's decision is considered administratively final.[25]

Unique Transportation Procurement Provisions and Practices

As noted, the provisions of the FAR do not govern many of the MTMC's transportation arrangements.[26] Consequently, the MTMC created additional transportation-unique contractual provisions to protect the DOD's shipping interests and meet the needs of those who rely on its traffic management expertise. When a carrier violates these, or any other provision of its tender or agreement, the installation transportation office should advise the MTMC. This allows the MTMC to take appropriate action under the provisions of *MTMCR 15-1* to protect the DOD's shipping interests. Attorneys counseling service members, or pursuing recoveries from carriers, should also provide performance data and other relevant information regarding the carrier to the installation transportation officers to help them track and monitor carrier performance.

Carrier Qualification

Generally, before a carrier is eligible to participate in procurement it must be "qualified."[27] To become qualified, a carrier must file various documents and forms that show it has the ability and capacity to operate lawfully. The program also serves as a prescreening tool to ensure that carriers can provide the needed service. Carriers are generally required to establish that they have the required operating authorities, public liability and cargo insurance, safety ratings, appropriate financial standing, and sufficient and adequate equipment or the ability to obtain such equipment.

The MTMC manages numerous procurement programs. These programs generally fall under three broad categories: freight, passenger, and personal property transportation. Once

20. *Id.* para 7d(3)(b).

21. *Id.* para. 6c.

22. *Id.*

23. *Id.* para. 10.

24. *Id.* For example, a bona fide change of management, or evidence establishing a correction of the cause or condition giving rise to the disqualification.

25. *Id.*

26. *See generally* FAR, *supra* note 11, pt. 47.

27. Qualification requirements are explained in various pamphlets published by the MTMC's program managers. The pamphlets provide a guide though the various program "wickets." These pamphlets are on the MTMC Home Page at *www.mtmc.army.mil*.

qualified, carriers may voluntarily file "tenders" quoting rates for future movements, or respond to formal solicitations that request rates for regular movements of various commodities over different routes.

Inconvenience Claims

Many hardships are associated with a permanent change of station move. These hardships are illustrated by an incident involving the movement of privately owned vehicles (POVs) by a ship in the Gulf of Alaska. Rough seas destroyed or damaged many of the vehicles on the ship. The service members had little choice but to rent cars until the government resolved their claims for the actual damage. Although the service members were eventually reimbursed for the actual damage to their vehicles, they were not compensated for rental car expenses. Service members encounter similar incidents during household goods shipments.

The PPTMR states that the "carrier industry has generally shown a willingness to honor reasonable inconvenience claims."[28] Under program rules, carriers must consider reasonable inconvenience claims.[29] While this provision is admittedly weak, it imposes some duty on the carrier. If an inconvenience claim is not reasonably considered, the MTMC may review the carrier's actions.[30]

To aid service members, Congress recently passed legislation authorizing reimbursement for rental car expenses following a POV shipment.[31] Section 653 of Public Law 105-261[32] permits the government to reimburse service members for rental care expenses up to $30 per day for up to seven days when the POV does not arrive on its scheduled delivery date. Before Congress enacts this reimbursement provision, however, the Secretary of Defense must certify that the DOD has a system to recover the cost from the contractor that is responsible for the delay.

Because of this legislation, service members may soon experience some relief from inconveniences they suffer from delayed POV shipments. No corresponding legislation exists, however, that authorizes payment for household good shipment delays. Accordingly, a legal assistance attorney assisting a service member who was inconvenienced by a move should be familiar with the MTMC's inconvenience claim provisions and the CRB process. If the attorney does not believe the household goods carrier reasonably considered the service member's claim, he should report this information to the MTMC. Under program rules, a service failure results if a carrier does not reasonably consider an inconvenience claim. Legal assistance attorneys who are familiar with the provisions of *MTMCR 15-1* may wish to explain to a carrier the consequences of a failure to reasonably consider inconvenience claims.

Performance Bond

As part of the qualification process, a carrier must submit a performance bond.[33] The MTMC uses the bond as a tool to recover excess reprocurement costs incurred in acquiring substitute carriage. The MTMC's performance bond creates a triangular relationship between the principal or carrier, the surety, and the beneficiary—the government. The bond provides that the surety will assume the principal's liability to the government for excess reprocurement costs. The surety will assume this liability when, due to the principal's failure to complete delivery of a shipment, the MTMC deems it necessary to reprocure transportation services.

When a shipment is, or may be, delayed at origin or in transit (for example, failure by a prime carrier to pay its agents or other subcontractors), transportation offices should notify the MTMC of the problem through command channels. The MTMC may use timely and accurate shipment data from the field such as the location, destination, GBL information, and other pertinent data to assert a demand on the surety to arrange for the shipment's onward movement.[34]

Installation transportation offices need to notify the MTMC of shipment delays and frustrations. Shipment delays and problems at a particular installation or base may be just the "tip of the iceberg." As the DOD's traffic manager for the surface movements of freight, personal property, and many passenger groups, it may be necessary to take broad and comprehensive action against a carrier to protect the DOD's shipping interests. This protective action includes disqualification or nonuse under *MTMCR 15-1*. The MTMC may follow the disqualification or nonuse by federal-wide suspension or debarment.

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28. U.S. DEP'T OF DEFENSE, DIR. 4500.34R, PERSONAL PROPERTY TRAFFIC MANAGEMENT, para. 10,002 (1 June 1995) [hereinafter DOD DIR. 4500.34R].

29. *Id*.

30. MTMCR 15-1, *supra* note 2, para. 5.

31. The POV, of course, must have been shipped at government expense.

32. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920-98 (1998).

33. MTMCR 15-1, *supra* note 2.

34. DOD DIR. 4500.34R, *supra* note 28, app. A, para. 10,007(j).

Hostage Shipments

Shipment delays often are a precursor to future problems. Carriers that stop performing their transportation obligations, for whatever reason, often leave their agents, port handling contractors, warehousemen, and ocean carriers unpaid. Many of these unpaid parties attempt to assert some type of lien as justification for holding the commodity. A few years ago, the MTMC's legal office helped pass legislation prohibiting the assertion of any lien on a DOD sponsored household goods or POV shipment. The law is broad in that, in addition to the prohibition against asserting a lien, no person may "interfere" with the movement of the property.[35]

Typically, the MTMC's position when billing disputes occur is that it is a private matter between the individual or the company holding the shipment, and the carrier; not the government. As reflected on the GBL, the government's privity relationship is with the carrier. Therefore, the MTMC expects carriers to resolve disputes in a timely manner, to avoid any disruption in service.

When a carrier to whom the MTMC has tendered freight or household goods allows a hostage scenario to develop, as often occurs when there are billing disputes, it is not complying with the terms and conditions of its agreement. In most cases, a hostage situation develops because a carrier has declared bankruptcy. Simple billing disputes, however, unrelated to a bankruptcy, are common. Carriers agree to "perform prudent traffic management." They also accept "through responsibility" for household goods shipments from their origins to their destinations.[36] Thus, carriers that require the government to intervene in managing a shipment because of a billing dispute may be violating the terms of their agreement with the MTMC. The MTMC may use this information in a CRB.[37]

A Few CRB Success Stories

Something has gone wrong if a CRB must convene. Ideally, the MTMC would approve or "qualify" only responsible and reliable carriers. Unfortunately, items often tend to break during a move, even though a carrier has exercised appropriate care. In addition, some shipment delays are unavoidable. The CRB evaluates the facts and circumstances surrounding service failures and determines whether the MTMC should take any measures to protect the DOD's shipping interests. The following scenario illustrates some cases evaluated by the MTMC CRB.

Household Goods Transportation Program

An installation transportation officer issued a GBL directing delivery of a shipment from Florida to Ohio. The carrier, in violation of program rules, arrived late at the service member's residence. After packing the service member's personal property, the carrier's driver determined that there was not enough room on the truck. To complete the "pack-out," the driver had the service member's spouse drive him to town to rent a U-Haul truck. The driver also allegedly tossed $20 at the service member and requested "some KFC and Coke for dinner." The shipment missed the required delivery date and sustained substantial damage.

The personal property shipping office at the installation relayed the facts and circumstances of the move to the MTMC. The MTMC notified the carrier that it intended to convene a CRB and advised the carrier that it faced worldwide disqualification.

Because of the CRB process, the carrier sent the service member a check for $10,000, although the amount initially claimed was $3700. The carrier fired the driver and other employees, and sent an emphatic apology to the service member regarding the move. The carrier also provided the MTMC with detailed corrective plans to ensure that such a dramatic service failure would not recur. No service failures have been reported against this carrier since MTMC's review of the situation.

Passenger Transportation Program

A state highway patrol stopped a bus, owned and operated by a DOD qualified carrier, for speeding. At the time, the bus was carrying a group of DOD passengers. After a blood-alcohol test determined that the driver was under the influence, the state trooper arrested the driver. Consequently, the passengers were stranded, and the mission was delayed until the company provided a substitute driver.

The MTMC immediately placed the company in nonuse and advised the company that a CRB would review not only the circumstances surrounding the movement, but also the company's overall performance and safety record. Before the hearing, during the nonuse period, the carrier took a number of remedial actions. Specifically, it fired the driver, placed saliva testing kits on board all of its buses for use by the base traffic management offices, hired a safety consulting firm, and hired a management firm to administer a drug and alcohol testing program. After a six-month disqualification period, the company emerged as a safe and reliable passenger transportation firm.

35. 37 U.S.C.A.§ 406 (West 1998); 10 U.S.C.A. § 2634 (West 1998).

36. DOD DIR. 4500.34R, *supra* note 28, app. A (discussing tender of service).

37. *See generally* MTMCR 15-1, *supra* note 2, para. 5.

Freight Transportation Program

A CRB convened to review the facts and circumstances of a rail carrier's failure to provide surveillance for military equipment it was transporting. The program requirements obligated the carrier to inspect its rail cars on an hourly basis. The inspection records, however, indicated that the carrier had not inspected the cars before discovering missing military items.

Based on information and reports from the transportation office, the CRB concluded that the rail carrier did not meet its contractual obligations. The CRB further discovered that, due to the nature of rail movements, rail carriers should improve security procedures. The carrier expedited reimbursement for the lost equipment, and military industry meetings were convened to discuss rail movement security issues.

Conclusion

Ideally, anyone affected by or involved in the DOD's transportation process might use some of the information in this note to assist clients, pursue recoveries against carriers, and aid MTMC's efforts to protect the DOD's shipping interests.

When carriers violate program rules, *MTMCR 15-1* can be a useful tool in protecting the DOD's shipping interests. Program violations and service failures, however, must be reported through command channels in a timely and accurate manner. Legal offices, working as a team with traffic managers and service members, can improve the transportation process and assist the MTMC in "weeding out" the poor performing carriers.

Address questions regarding the DOD's transportation procurements, or the CRB process to Mr. Jakubowski, (703) 681-6580, DSN 761-6580, jakubowj@baileys-emh5.army.mil.

The Art of Trial Advocacy

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

The Art of Military Criminal Discovery Practice—Rules and Realities for Trial and Defense Counsel

You have had all you can take from this sanctimonious trial counsel, a former friend, now a burr in your saddle. Amazingly, he has changed since he became a trial counsel. First, he delays in providing you discovery until the very last minute (when the convening authority refers the case), and now he refuses to let you inspect the rape victim's medical and mental health records. He also inquires how you can sleep at night, calling your client bad names during your brief hallway encounters. What will this self-righteous, white-hat-wearing-lowbrow do tomorrow? Contrary to the better angels of your nature, you feel driven to seek retribution.

At the next Article 39(a) session, the military judge asks if counsel have anything further. Suddenly, every affront chafes you anew, and you announce a motion to compel discovery. You ask for *all* the victim's medical and mental health records (because there is evidence from another interview that the victim has a history of inpatient treatment for behavioral problems), the CID agent notes, and, in a parting flourish, state that your opponent has been generally uncooperative and will probably provide nothing without a judicial order.

Before the military judge can speak, trial counsel squawks that he has technically complied with discovery under Rule for Courts-Martial (R.C.M.) 701(a), which requires disclosure of charges and allied papers as soon as practicable after service of *referred* charges under R.C.M. 602. Secondly, he has an open file discovery policy. He further asserts that this defense motion is framed like the entire defense case—a veritable "chicken with its head cut-off" theory. This is the first he has heard about the defense's request, and he has no obligation to search for, much less provide, this irrelevant information. The military judge looks down from the bench and sees, not two young lawyers presenting reasoned arguments, but two equally dyspeptic and ineffectual stumblebums.

The Problem

Both of these new trial and defense counsel have much to learn about discovery practice and advocacy in general. The defense counsel has hoped that sudden inspiration will prevail, and, therefore, cannot alert the judge to any prior requests for documents that she may have made. She has habitually relied on the government to provide her with discovery without a written request, and has made all of her specific discovery requests orally. Now, for the first time, she is facing an opponent with discovery amnesia. She is so angry about this latest episode that she cannot formulate a coherent argument, much less cite case law.

The trial counsel's response, likewise, is a visceral ad hominem retort that lacks thought or substance. His personal insults do not mask his dearth of knowledge concerning his discovery obligations. In his view, providing information to the defense counsel, without a fight, is counterintuitive. Why should he do his job *and* her job? She should be able to get this information on her own.

Sadly, this incivility has potential to infect the entire trial. These counsel will cavil and bicker over objections and insignificant details. They will almost certainly make unfavorable impressions on the judge and panel members. The accused will have a zealous representative, but unfortunately for him, much of his counsel's energies will be misguided. There may have been material evidence that defense counsel never discovered that may have acquitted the accused, reduced the degree of guilt, or otherwise mitigated the sentence.[1]

Fortunately, a successful criminal discovery practice is within the grasp of each of these counsel. Successful discovery, however, requires a fundamental understanding of the purpose and the rules of discovery, a mindfulness of the need for civility, and a common-sense application of those rules to courtroom realities.

1. *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding that suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment). Essentially, *Brady* is based on due process, and requires the prosecution to disclose only evidence that is both favorable to the accused and material to either guilt or punishment.

Making a Proper Discovery Motion

A proper discovery motion does not rise like a phoenix from the ashes. Counsel must document, plan, and research beforehand. Counsel must not only know the rules, which are contained in case law, the *Manual for Courts Martial*[2] and the ethical rules,[3] but also must conceptualize "the big picture." Without these ingredients, discovery motions remain formless and ineffectual. Discovery issues occur throughout a trial and may become some of the most significant issues in the case. Therefore, counsel must logically frame discovery motions to make a well-reasoned, persuasive case before the judge.

Gamesmanship and ignorance of the rules and case law impede counsel's ability to see the big picture.[4] Counsel in the above scenario started a game that could result in disastrous consequences for either or both of their clients. Discovery turns into a game when counsel let things become personal, or when counsel merely go through the motions without preparing or knowing why they are doing something.

Begin with the Rules

Due Process—The Minimum Constitutional Requirement

The fundamental purpose of criminal discovery practice is simple—to ensure a fair trial. For the government this means recognizing and automatically providing the defense with favorable material evidence that negates guilt or punishment.[5] This practice keeps the government within *Brady v. Maryland*, its progeny, and R.C.M. 701(a)(6)—the military's version of the *Brady* rule.[6] *Brady* evidence can be exculpatory evidence; for example, a victim's failure to identify the accused in a photographic lineup; a statement from a co-accused professing greater responsibility for the crime; or a statement from the victim or another witness that may reduce the sentence. *Brady* material also includes impeachment evidence. Impeachment evidence can be a government witness's prior inconsistent statement; a prior Article 15 for false swearing; or a grant of immunity or some other form of leniency for a key government witness. When questioning whether evidence is material, exculpatory or impeachment evidence, government counsel should consult with peers and supervisors, rather than risk reversal.[7] When in doubt, government counsel can release the information.

Article 46, UCMJ and R.C.M. 701

In addition to Constitutional Due Process, Article 46, UCMJ, provides the military criminal bar with even broader discovery rights than its federal counterpart. Article 46 provides that the "trial counsel, defense counsel and court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the president may prescribe."[8] Both the trial and defense counsel will find Article 46 useful in discovery motions. Defense counsel can use it as an alternative basis for relief—and cite it as authority for an even broader discovery right than Constitutional due process. Rule for Courts-Martial 701 implements Article 46 and is intended to promote full discovery to the maximum extent possible.[9]

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2. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

3. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. Though this article does not discuss the ethical considerations of violating discovery obligations, counsel should read Rule 3.8 (Special Responsibilities of a Trial Counsel) and Rule 3.4 (Fairness to Opposing Party).

4. *See* MCM, *supra* note 2, R.C.M. 701 analysis, app. 21, at A21-30.

5. *See generally Brady*, 373 U.S. 83; *see also* MCM, *supra* note 2, R.C.M. 701(a)(6).

6. *See* MCM, *supra* note 2, R.C.M. 701(a)(6) (codifying the *Brady* rule for military practitioners).

7. Trial counsel should also be aware of the ethical pitfalls of failing to release *Brady* evidence. Rule of Professional Conduct 3.8 requires trial counsel to:

> [M]ake timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation. . . .

AR 27-26, *supra* note 3, rule 3.8.

8. *See* MCM, *supra* note 2, R.C.M. 701 (discussing discovery); *see also id.* R.C.M. 703 (discussing production of witnesses and evidence).

9. *See id.* R.C.M. 701 analysis, app. 21, at A21-30. This note is not an encyclopedic discourse on every aspect of R.C.M. 701; however, *defense* counsel's discovery obligations under this rule are worth briefly reiterating. Before beginning the trial on the merits, defense must provide notice of certain defenses. *See id.* R.C.M. 701(b)(2). Defense counsel must also disclose the names of witnesses and statements in its case-in-chief. *See id.* R.C.M. 701(b)(1). Reciprocal discovery is discussed later in this note. *See id.* R.C.M. 701(b)(3), (4). Lastly, upon request of the trial counsel, the defense must provide names of sentencing witnesses and allow inspection of sentencing evidence. *See id.* R.C.M. 701(b)(1). Though the defense need not notify the government of its defenses of innocent ingestion, alibi, or mental responsibility until immediately before the trial begins, it may be advantageous to notify the trial counsel earlier so that the defense can receive the requisite notice of the government's rebuttal witnesses on these defenses. *See id.* R.C.M. 701(a)(3).

Both counsel can cite R.C.M. 701(e) when it appears that the other side is impeding access to witnesses or evidence. For example, if a civilian defense witness refuses a government interview and the trial counsel suspects the defense counsel has told the witness she need not cooperate, trial counsel should cite R.C.M. 701(e) to the military judge. This rule states that "[n]o party may unreasonably impede the access of another party to a witness or evidence."[10] Though the judge cannot compel an interview, absent ordering a deposition,[11] the rule and an irritated judge can have considerable influence over counsel's advice to the witness. Alternatively, the defense counsel can invoke the rule with equal force when she suspects that the trial counsel has acted similarly.

Other Dislosure Obligations

In addition to his discovery obligations under R.C.M. 701, the trial counsel has Section III disclosure obligations.[12] He must give notice automatically of: (1) the grant of immunity or leniency to a prosecution witness,[13] (2) the accused's written or oral statements relevant to the case (known to the trial counsel and within the control of the armed forces),[14] (3) all evidence seized from the accused that the prosecution intends to offer into evidence at trial,[15] and (4) all evidence of a prior identification of the accused at a lineup or other identification process that it intends to offer at trial.[16] Additionally, if the prosecution intends to offer evidence of similar crimes in sexual assault cases or child molestation cases, Military Rules of Evidence (MRE) 413 and 414 require the prosecution to give the defense notice at least five days before trial.[17] The defense has a similar five-day notice (and written motion) requirement when it intends to offer rape shield evidence under MRE 412.[18] Lastly, *upon request of the defense*, MRE 404(b) requires the trial counsel to provide pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which he intends to introduce at trial.[19]

Apply the Rules—Trial Tips for Counsel

Put Discovery Requests in Writing

Counsel's first mistake was not putting her discovery requests in writing. Though the local Staff Judge Advocate's office in the hypothetical does not routinely use written discovery, such practice almost always works to the defense's disadvantage. A defense counsel with documentation can easily overcome a trial counsel with discovery amnesia.[20]

Likewise, trial counsel should consider waiting for a written defense discovery request for R.C.M. 701(a)(2)(A) and (B) material (books, tangible objects, reports and tests) before allowing the defense to inspect these materials. This invokes the government's right to reciprocal discovery under R.C.M. 701(b)(3) and (4).[21] Under reciprocal discovery (provided the trial counsel complies), defense counsel must permit the trial counsel to inspect any documents, tangible objects, reports and tests that it intends to introduce in its case-in-chief. Trial counsel who routinely receive written defense requests to inspect such material and who suddenly do not receive a request, or who receive a request that *omits* a request for R.C.M. 701(a)(2)(A) and (B) material, should be wary that the defense has a motive behind the omission.

Trial Counsel's Affirmative Duty to Search for Information

The *Brady* rule not only imposes an affirmative duty to disclose, it also imposes an affirmative duty to *search* for evi-

10. *See id.* R.C.M. 701(e).

11. *See id.* R.C.M. 702.

12. Known as "Section III" because it refers to Section III of the Military Rules of Evidence dealing with self-incrimination, search and seizure and eyewitness identification. *See id.* Mil. R. Evid. 301-321.

13. *See id.* Mil. R. Evid. 301(c)(2) (requiring notice before arraignment or within a reasonable time before the witness testifies).

14. *See id.* Mil. R. Evid. 304(d)(1) (requiring notice before arraignment).

15. *See id.* Mil. R. Evid. 311(d)(1) (requiring notice before arraignment).

16. *See id.* Mil. R. Evid. 321(c)(1) (requiring notice before arraignment).

17. *See id.* Mil. R. Evid. 413(b), 414(b) (discussing evidence of similar crimes in sexual assault cases and child molestation cases).

18. *See id.* Mil. R. Evid. 412(c).

19. *See id.* Mil. R. Evid. 404(b) ("[counsel] shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.").

20. In some cases, the defense may find it desirable to have the trial counsel sign and date the discovery request upon receipt.

21. *See* MCM, *supra* note 2, R.C.M. 701(b)(3), (4).

dence. In recent years, courts have held that a prosecutor's office cannot get around the *Brady* rule by keeping itself ignorant and chanting "open file discovery."[22] Simply because the prosecutor literally does not have the information in his own file does not absolve him of his obligation to search other files within his own office,[23] or even files outside of his office. In some cases, for example, trial counsel may be required to seek out evidence contained within the files of the police or a drug testing laboratory.[24]

In addition to *Brady*, R.C.M. 701(a)(2)(B) places a similar affirmative duty on trial counsel to make available to the defense any government documents or reports that are *material to the preparation of the defense* which "may become known" to trial counsel "by the exercise of due diligence."[25]

A defense counsel can trigger this affirmative duty by making individualized, specific discovery requests. The more specific the request, the greater the duty of the trial counsel to obtain the "outside" information, provided it is relevant and necessary. If a trial counsel is on notice of specifically requested material and fails to obtain that information, he may have violated 701(a)(2)(B), as well as the *Brady* rule (R.C.M. 701(a)(6)). Lastly, a trial counsel who responds negatively or incompletely to a specific discovery request, without having all of the facts, runs the risk of reversal. In *United States v. Bagley* the court stated:

> An incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it would otherwise have pursued.[26]

Military courts have applied an even stricter standard in determining whether the evidence is material when a trial counsel ignores or fails to respond to a specific discovery request. When the government does not disclose information pursuant to a specific defense request or where prosecutorial misconduct is present, the court will consider the evidence material unless the government can demonstrate, beyond a reasonable doubt, that its failure to disclose was harmless.[27]

Organize in Advance

Defense counsel made her second mistake by failing to prepare. She does not know the rules, she has given no notice of her motion (per requirements of the local rules of court), and she has failed to articulate the relevance of the requested records. Advance preparation allows time for research and organization and greatly increases counsel's chances of obtaining relief and avoiding judicial wrath.

Counsel should: (1) specify the requested documents, (2) explain why the request is reasonable, and (3) explain why the undisclosed documents are relevant and necessary.[28] This means articulating what evidence is "expected to be exculpatory, or how any unreleased portion of the medical records could possibly lead to potentially relevant evidence."[29] For example, the defense believes there may be exculpatory or impeachment evidence within the records because it learned in the victim's pretrial interview that she has made a previous allegation of rape and has spent time in a psychiatric ward. Even if the defense loses the motion at trial, a well-presented motion

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22. *See* Carey v. Duckworth, 738 F.2d 875 (7th Cir. 1994). Although R.C.M. 701(a)(6) provides that trial counsel has a duty to disclose only "known" evidence, the Court of Appeals for the Armed Forces has interpreted this to impose the same affirmative duty to discover evidence through due diligence as that imposed explicitly in R.C.M. 701(a)(2)(B). *See* MCM, *supra* note 2, R.C.M. 701(a)(6), 701(a)(2)(B); *see also* United States v. Simmons, 38 M.J. 376 (C.M.A. 1993).

23. *See generally* United States v. Giglio, 405 U.S. 150 (1972); United States v. Romano, 46 M.J. 269 (1997); *but see* United States v. Williams, 47 M.J. 621 (Army Ct. Crim. App. 1997).

24. *See generally Simmons*, 38 M.J. 386; United States v. Sebring, 44 M.J. 805 (N.M. Ct. Crim. App. 1996); Smith v. New Mexico Department of Corrections, 50 F.3d 801 (D.C. Cir. 1995).

25. Interestingly, this language was missing from the 1995 MCM, and has since been replaced in the 1998 MCM. *See* MCM, *supra* note 2, R.C.M. 701(a)(2)(B). *See also* United States v. Simmons, 38 M.J. 376 (C.M.A. 1993). This rule does not require trial counsel to search for the proverbial needle in a haystack. "He need only exercise due diligence in searching his own files *and those police files readily available to him." Id.* at 382 (emphasis added). In the *Brady* arena, in *Kyles v. Whitley* the Supreme Court held that the "individual prosecutor has a duty to learn of any favorable evidence known to the others actin g on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419 (1995).

26. *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

27. *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990); United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986). In the military, where there is no request or a general request by defense, the evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. *Hart*, 29 M.J. at 410.

28. *See* MCM, *supra* note 2, R.C.M. 703(f)(1), (f)(4)(c).

29. United States v. Briggs, 48 M.J. 143, 144 (1998).

has a much greater chance of clarifying the issue—and perhaps prevailing—at the appellate level.

In a motion to compel discovery, the key argument that trial counsel will make is that the requested information is not relevant and necessary (the defense "fishing expedition" argument). To retain credibility with the judge and the opposition, however, trial counsel should comply as soon as possible with reasonable defense discovery requests. The military rules of evidence establish a low threshold of relevance and "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant.[30]

In Camera Inspections

If there is a dispute over relevance of highly sensitive material (such as a victim's *entire* medical record), either the trial counsel or the defense counsel can request that the military judge conduct an *in camera* inspection. *In camera* inspections avoid needless appellate litigation and often pose a middle-ground solution for both trial and defense counsel.[31] As the Court of Appeals for the Armed Forces recently explained in *United States v. Briggs*, "[t]he preferred practice is for the military judge to inspect the medical records *in camera* to determine whether any exculpatory evidence was contained in the file prior to any government or defense access."[32]

Rule for Courts-Martial 701(g)[33] specifically authorizes *in camera* inspections. Trial counsel should call the records custodian to bring a sealed copy of the record for the *in camera* inspection. The judge should then review the record and make a ruling allowing access "or denying access and resealing the records as an exhibit for appellate review."[34]

Rule for Courts-Martial 701(g) also gives the military judge wide discretion in the conduct of the *in camera* inspection. Defense counsel who are reluctant to disclose the defense theory should request an *ex parte* hearing to explain the information sought. An *ex parte* hearing avoids unnecessary disclosure of the defense theory, and is also allowed under R.C.M. 701(g). The defense is in the best position to recognize relevant, necessary material—and sometimes even the defense does not know it until it literally sees the information.

Remedies

For discovery violations that arise *during* trial, counsel should be aware of the considerable remedies available to the judge under R.C.M. 701(g).[35] If there is evidence the trial counsel *willfully* violated discovery obligations, the judge has many options, to include: dismissal, mistrial, and preclusion of evidence. For discovery infractions that do not involve culpable negligence or willfulness, less drastic remedies, such as a continuance or an instruction, will probably suffice. The judge can also preclude defense evidence if it violates a discovery obligation; however, this should be done only if the judge finds that the defense counsel's:

> [Failure] to comply with [the] rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the government.[36]

Conclusion

Discovery is a rule-based area of the law; however, counsel must apply the rules with an overarching concern for the *purpose* of those rules. Trial counsel's big picture should include providing due process to the accused, which in many instances means fighting the urge to hold the cards to his chest. Both trial and defense counsel must realize that the case and client are ultimately more important than one counsel's personal distaste for the accused or the opposing counsel. Incivility will get your client nowhere. Knowledge of the rules, their purpose, and thorough preparation are the keys to successful discovery practice. Major Moran.

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30. *See* MCM, *supra* note 2, Mil. R. Evid. 401. *See also* United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985).

31. *See generally* United States v. Briggs, 48 M.J. 143 (C.M.A. 1998); United States v. Reece, 25 M.J. 93 (C.M.A. 1987).

32. *Briggs*, 48 M.J. at 145.

33. *See* MCM, *supra* note 2, R.C.M. 701(g).

34. *Briggs*, 48 M.J. at 145.

35. *See* MCM, *supra* note 2, R.C.M. 701(g).

36. *See id.* R.C.M. 701(g)(3) discussion. If defense counsel's behavior is so egregious as to cause the judge to preclude defense evidence, it is highly likely that the appellate court will be concerned about whether the accused received effective assistance of counsel. *See* U.S. CONST. amend. VI.

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 files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issues, volume 5, numbers 13 and 14, are reproduced in part below.

Management of Unexploded Ordnance, Munitions Fragments, and Other Constituents on Military Ranges

The Environmental Protection Agency's (EPA) Military Munitions Rule (implemented in August 1997) identifies when conventional and chemical munitions become wastes that are regulated under the Resource Conservation and Recovery Act (RCRA).[1] Wastes that are regulated under the RCRA must be handled under strict management standards for transportation, storage, treatment, and disposal. The EPA has delegated implementation of the RCRA to most states.[2] These states can impose more stringent regulations than the federal program. The Munitions Rule generally excludes unexploded ordnance (UXO) and munitions fragments on active and inactive ranges from coverage under the RCRA. Additionally, it postpones an EPA decision on whether to regulate these items on closed, transferring, and transferred (CTT) ranges until after the Department of Defense (DOD) completes its Range Rule.[3]

The DOD proposed the Range Rule in September 1997 and is currently reviewing comments received during the public comment period. The Range Rule sets forth the DOD's process for addressing UXO, munitions fragments, and other contaminants on ranges that are no longer needed to support the DOD's mission.[4] Fundamental to the DOD's efforts, as well as to regulatory and public acceptance, is development of a risk model that integrates explosives safety and environmental concerns. The DOD expects to publish a final Range Rule this year.

While the DOD successfully persuaded the EPA that it is appropriate to exclude UXO and munitions fragments on active and inactive ranges from regulation under the RCRA, recent EPA comments suggest that the EPA may no longer support this approach. The EPA has indicated that UXO could become RCRA wastes after some unspecified period of time. This interpretation could subject active and inactive ranges to environmental regulations that make their continued use uncertain, at best, and impossible, at worst. Also, if UXO and munitions fragments on ranges are determined to be RCRA wastes, states may establish management standards that are more stringent than the current federal standards. Additionally, some elements within regulatory agencies and environmental groups have advocated that UXO on CTT ranges are "hazardous substances" under the comprehensive Environmental Response and Liability Act (CERCLA) and are, thereby, subject to release reporting and cleanup requirements outside of the DOD's control. As a result of such a designation, activists could seek to use the CERCLA to shut down range activities or, as proposed in current Superfund Reauthorization bills pending in Congress, seek fines and penalties for non-compliance. Although partnering initiatives with the EPA and other stakeholders continue, the Army must emphasize the critical role that ranges play in maintaining readiness. The Munitions Rule and the partnering efforts to draft a realistic, yet protective, Range Rule are designed to avoid overly restrictive regulations that will degrade readiness, while maintaining proper safeguards for human health and the environment.[5] This is primarily a military readiness and training issue with environmental concerns, rather than an environmental issue with readiness and training concerns.

Recent DOD policy initiatives will likely draw additional attention to the issue. The Office of Secretary of Defense (OSD) has drafted guidance on Emergency Planning and Community Right to Know Act[6] (EPCRA) Toxic Release Inventory (TRI) reporting for munitions used on active ranges. As a result, installations that previously had no reportable releases related to range activities may suddenly report significant releases into the environment from range activities. If the OSD finalizes the guidance, the first report will be due on 1 July 2000. The OSD's TRI guidance could attract attention to range

1. 42 U.S.C.A. §§ 6901-6992 (West 1998).

2. *See*, 42 U.S.C.A. §§ 6927, 6928.

3. 40 C.F.R. pt. 260, subpt. M (1997).

4. For example, formerly used defense sites or defense Base Closure and Realignment sites.

5. The munitions rule has successfully survived its initial legal challenge.

6. 42 U.S.C.A. §§ 11001 - 11050.

activities by characterizing range activities as releases of hazardous substances into the environment. The Army is developing data concerning actual emissions and residue from the firing of munitions so that installations will not overstate any such reporting. Due to the number of munitions in the inventory, and the nature of the testing, it will require several years to complete this effort. While the purposes and standards for reporting under the CERCLA and the EPCRA are different, the designation of munitions (or their constituents) as hazardous substances under one law will have a spillover effect into the other law's requirements.

The OSD has also drafted Department of Defense Instructions (DODI) that could require periodic clearance of UXO on active and inactive ranges, health risk characterizations, public outreach, and other actions. The services have non-concurred in the draft DODIs, but it is apparent that some level of information collection or response actions on active ranges may be a future requirement.

The cumulative result of these actions will be ever-increasing visibility of range operations to the public and pressure to monitor, if not reduce or curtail, operations that are perceived to impact the environment adversely. Efforts to coordinate responses to these potential challenges require the close cooperation of the environmental and operational communities. [7] Major Egan.

Storage and Disposal of Non-DOD Owned Toxic and Hazardous Materials Update[8]

This note focuses on recent amendments to the Military Construction Authorization Act of 1985,[9] (hereinafter the Act) which may affect installations that store non-DOD toxic or hazardous materials. The Act now provides three new statutory exemptions that allow non-DOD (private and other agency) entities to store, treat, and dispose of non-DOD hazardous toxic and hazardous substances on DOD property.[10] To promote timeliness, the Act delegates the approval process for instituting these exemptions down the chain of command.

The Act's pre-amendment requirements were particularly onerous for specific installations. These include facilities that are closing due to Defense Base Closure and Realignment Act (BRAC) actions, installations contracting for tenant services, and those engaged in privatizing installation maintenance, housing, or utility services.[11] The recent amendments, however, bring the Act in line with current management trends for DOD installations. First, Congress amended the statute to allow storage, treatment, or disposal of non-DOD toxic or hazardous materials that are used in connection with a DOD activity or with a service performed at a DOD installation for the benefit of the DOD.[12] Second, the Act now exempts the storage of non-DOD toxic or hazardous material generated in connection with the authorized and compatible use of a facility.[13] Finally, the amended act allows, under contract agreement, the treatment and disposal of non-DOD toxic or hazardous material if it is required or generated in connection with a facility's authorized and compatible use.[14]

The Secretary of the Army has delegated approval authority for these exemptions to the Assistant Secretary of the Army (Installations, Logistics, and Environment).[15] In limited circumstances, involving only the storage of non-DOD owned toxic and hazardous materials,[16] the Secretary of the Army has further delegated the approval authority to Major Command Commanders, with authority to further delegate to a Flag-level Chief of Staff.[17] To request sample exemption forms and memoranda for delegating authority, call the author at the Army ELD Office, (703) 696-696-1597, DSN 426-1597. Mr. Wendelbo.

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7. This article was originally presented to the Chief of Staff of the Army for inclusion in his weekly summary. The weekly summary highlights issues of national importance to be distributed to all general officers.

8. *See* Environmental Law Division Note, *Storage and Disposal on Non-Department of Defense (DOD) Toxic and Hazardous Materials*, ARMY LAW., Mar. 1998, at 43.

9. Pub. L. No. 98-407, tit. VIII, pt. A § 805(a), 98 Stat. 1520 (codified at 10 U.S.C.A. § 2692 (West 1998)).

10. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-88 § 343 (1997).

11. 10 U.S.C.A. § 2692.

12. *Id.* § 2692(b)(1); National Defense Authorization Act § 343(b).

13. 10 U.S.C.A. § 2692(b)(9); National Defense Authorization Act § 343(d).

14. 10 U.S.C.A. § 2692(b)(10); National Defense Authorization Act § 343(e).

15. Memorandum, Secretary of the Army, subject: Delegation of Authority under Title 10 U.S.C.A. § 2692 (4 Aug. 1998).

16. 10 U.S.C.A. § 2692(b)(9).

17. Memorandum, Assistant Secretary of the Army (Installations, Logistics, and Environment), subject: Delegation of Authority under Title 10 U.S.C. § 2692 (3 Sept. 1998).

No RCRA Double Jeopardy

A recent district court case in Missouri provides some encouraging news for those installations struggling to satisfy two masters—the state and the federal EPA. The court rejected an argument by the EPA that it may take an administrative action when a state has already been delegated authority under the RCRA.[18] The court held that the EPA cannot seek to take action against a state-regulated entity unless it also withdraws the state's authority to administer the RCRA. This is good news in the case where an installation is negotiating with a delegated state and suddenly the EPA files a complaint.

In *Harmon Industries, Inc. v. Browner*,[19] the plaintiff (Harmon) was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon's employees used organic solvents to clean equipment at one of its plants. Unknown to Harmon, every one to three weeks maintenance employees would throw used solvent residues out the back door of the plant. Over the years, about thirty gallons were dumped on the grounds. The discarded solvents were RCRA hazardous wastes.

In 1987, Harmon discovered what the employees were doing and ordered the practice to stop. Harmon then hired consultants to investigate the effects of the disposal. The report of the investigation concluded that contaminants were in the soil; however, there was no danger to human health. Harmon then reported the disposal to the Missouri Department of Natural Resources (MDNR). The EPA had authorized the MDNR to administer its own hazardous waste program under the RCRA. Since being authorized to administer a program, the EPA never withdrew the state's authority.

After meeting with Harmon, the MDNR oversaw the investigation and cleanup of the Harmon facility. The state approved a variety of investigations by Harmon concerning the heath risks of the contamination. The costs of the studies were over $1.4 million. Ultimately, the state approved a post-closure permit for the facility, which anticipated additional costs of over $500,000 during a period of over thirty years.

In 1991, the state filed a petition against Harmon in the state court, along with a consent decree signed by both Harmon and the MDNR. The court approved the consent decree that specifically provided that Harmon's compliance with the decree constituted full satisfaction and release from all claims arising from allegations in the petition. The consent decree did not impose a monetary penalty.

Earlier, the EPA had notified the state that it should assess fines against Harmon. After the petition had been filed and approved by the state, the EPA filed an administrative complaint against Harmon seeking over $2 million in penalties. In its complaint, the EPA did not allege that the state had exceeded its authority. In addition, the complaint did not assert that the site posed a health risk, but merely demanded a fine. Harmon demanded a hearing. The administrative law judge (ALJ) found for the EPA on the substantive counts of the complaint but reduced the fine to $586,716. Harmon appealed to the Environmental Appeals Board (EAB). The EAB affirmed the ALJ's findings. Harmon then brought the case to federal district court on the issue of the authority of the EPA to take an enforcement action where the state had already entered into a consent decree.

The court found for Harmon. The court concluded that the plain language of section 3006(b) of the RCRA provides that state enforcement programs operate instead of federal programs. As such, the concept of co-existing powers is inconsistent with the EPA's delegation of authority. Such a division of power was also anticipated in the memorandum of understanding (MOU) between the EPA and the state that defined each party's responsibilities. The MOU required the EPA to provide notice to the state prior to taking an enforcement action, even if the state elects not to act. Likewise, under the MOU, if the EPA recommends an assessment of fines, it must refer the matter to the state attorney general. According to the court, neither the agreement, nor the RCRA, gives the EPA authority to override the state once it determines an appropriate penalty. Section 3006(e) of the RCRA gives the EPA only the option of withdrawing authorization of a state's RCRA program. The EPA does not possess the option to reject part of a state's program or to censor a state's course of action on an incident-by-incident basis.

Although *Harmon* reflects the view of only one federal district court and is presently subject to appeal, it may prove quite useful for an installation environmental law specialist responding to an EPA complaint. The case should be cited as the basis for an affirmative defense in all enforcement actions where the state has taken any administrative action and the EPA subsequently files a complaint. Furthermore, although the case involved only the imposition of additional fines, it is not limited to these facts. Any action taken by the state to coerce compliance on the part of an installation should preclude similar enforcement by EPA. Unless the EPA specifically withdraws a state's authorization to administer the program, the EPA should not take independent action. Otherwise an installation does not know with whom it should negotiate during a state enforcement action. As the court noted in *Harmon*, such independent action by the EPA would be "schizophrenic" and result in uncertainty in the public mind. Major Cotell.

18. 42 U.S.C.A. §§ 6901- 6992 (West 1998).

19. 47 Env't Rep. Cas. (BNA) 1229, 1998 U.S. Dist. LEXIS 13751 (W.D. Mo., August 25, 1998).

The CERCLA Permit Exclusion—a Reminder

Installations should not pursue *permits for on-site CERCLA remediation activities.* Permits are specifically excluded from the CERCLA, which states that no "federal, state or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite . . . ."[20] This exclusion is based on Congress' recognition that cleanups under the CERCLA should be spared the delay, duplication, and additional costs involved in acquiring permits for remediation. Individuals who are uncertain about whether an activity is considered "onsite" or who have questions regarding the CERCLA's permit exclusion should contact their environmental law specialist. Ms. Barfield.

Clean Air Act Enforcement Alerts

This note provides the latest on the doctrine of sovereign immunity as it relates to the Clean Air Act (CAA).[21] It also updates readers on the EPA's efforts to implement its authority to impose punitive fines on other federal agencies.

No Waiver of Sovereign Immunity—the Latest

The Air Force recently scored a significant CAA victory in a case decided by the U.S. District Court for the Eastern District of California. In *Sacramento Metropolitan Air Quality Management District v. United States*,[22] the Sacramento District sought to enforce a punitive fine of $13,050 against McClellan Air Force Base for violations of the base's permitted natural gas usage limits. In granting the Air Force's motion for summary judgment, the court closely followed Supreme Court precedent. The court held that the CAA does not waive sovereign immunity for punitive fines.[23] Hopefully, the *Sacramento* case signals a positive federal court trend toward resolving what has been a contentious issue for years.

No Waiver of Sovereign Immunity Background

The CAA's federal facilities provision[24] contains a limited waiver of sovereign immunity regarding state, interstate, and local air pollution control laws. It requires federal agencies to comply with air pollution control programs "to the same extent as any nongovernmental entity."[25] It also requires federal agencies to pay administrative fees and subjects them to the "process and sanctions" of air program regulatory entities.[26] For several years, federal court litigation has attempted to define the precise meaning of "process and sanctions." The United States Supreme Court interpreted these terms when it examined the federal facilities provision of the Clean Water Act (CWA)[27] in *U.S. Department of Energy (DOE) v. Ohio*.[28] The Court found that this aspect of the CWA's sovereign immunity waiver, which is virtually identical to the CAA's waiver, did not subject federal facilities to "punitive fines" imposed as a penalty for past violations. In so holding, the court reasoned that the CWA did not contain a clear and unequivocal waiver of sovereign immunity. In contrast, the Court found that the CWA waived sovereign immunity for court-ordered "coercive fines" imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively.

In *U.S. v. Georgia Department of Natural Resources*,[29] a federal district court in Georgia formally extended the Supreme Court's decision in *DOE v. Ohio* to the CAA. After applying the Supreme Court's analysis, the *Georgia* court held that the CAA does not require federal agencies to pay punitive fines. A district court in Tennessee, however, reached a contrary result in *U.S. v. Tennessee Air Pollution Control Board*.[30] In *Tennessee* the court deviated from the U.S. Supreme Court's analytical approach. The *Tennessee* case is currently pending appeal in the Sixth Circuit. In its written briefs and oral arguments to the Sixth Circuit, the United States argued that the CAA does not require federal agencies to pay punitive fines. In support of its argument, the United States emphasized the similarities between the CAA's partial waiver of sovereign immunity and the partial waiver found in the CWA. The McClellan Air Force

20. 42 U.S.C.A. § 9621(e). *See* 40 C.F.R. § 300.4000(e) (1997) (discussing the NCP provisions for permits).

21. 42 U.S.C.A. §§ 7401-7671q.

22. CIV S-98-437 (E.D. Cal. Nov. 13, 1998).

23. *Id.*

24. 42 U.S. C. A. § 7418(a).

25. *Id.*

26. *Id.*

27. 33 U.S.C.A. §§ 1251-1387 (West 1998).

28. 503 U.S. 607 (1992).

29. 897 F. Supp. 1464 (N.D. Ga. 1995).

30. 967 F. Supp. 975 (M.D. Tenn. 1997).

Base case has joined the CAA sovereign immunity landscape as the third federal district court to consider this issue, and the second case to find that the CAA does not contain a waiver of immunity.

No Waiver of Sovereign Immunity—A Caution

The availability of sovereign immunity as a defense against punitive fines should only serve as a shield to fine payment(never as a sword against CAA compliance. Federal agencies must comply with all laws and regulations for air pollution control. As such, they are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a federal facility's air pollution control activities, the facility has the same obligation as nongovernmental entities to correct all infractions expeditiously. Federal facilities are not exempted from these responsibilities because they are not required to pay punitive fines.

Despite the foregoing, some state regulatory agencies insist that they cannot effectively regulate the various military services unless they are able to impose punitive fines. This, coupled with their view that Congress waived sovereign immunity for CAA fines, can create contentious negotiations. Consequently, installations that have established a poor "track record" with regulatory agencies can find it very difficult to resolve even minor infractions. Consistently demonstrating CAA compliance is the only effective way to dispel a state's perception that it is unable to regulate federal facilities. Sovereign immunity makes vigilance in CAA compliance essential to maintaining peace with the regulatory community.

EPA's New Authority to Assess Fines

In contrast to the U.S. position on sovereign immunity vis-a-vis state regulators, last year, the Department of Justice opined that the EPA has authority under the CAA to impose punitive fines against federal agencies.[31] Since then, the EPA has pursued regulatory changes that will formally extend existing administrative hearing procedures to the EPA's CAA enforcement actions.[32] The EPA recently published guidance that instructs its regional counsels and air program directors to provide the same administrative procedures to federal agencies as apply to private entities.[33] The EPA's policy discusses the hearing and settlement procedures that are available. It also discusses the EPA's policies on compliance orders, criteria for penalty assessments, and its press release practice. The policy also indicates that federal agencies will have the opportunity to consult with the EPA Administrator prior to a CAA penalty becoming final, and explains how that right may be exercised. To date, the EPA has not exercised its new found penalty authority against an Army facility, nor has it initiated an enforcement action acting as the surrogate of a state air program regulatory agency. Lieutenant Colonel Jaynes.

Litigation Division Note

"Don't Ask, Don't Tell" Held Constitutional: Now What?

Introduction

Able v. United States[34] cleared the last major litigation challenge to the "don't ask, don't tell" policy.[35] The United States Court of Appeals for the Second Circuit, reversing a district court decision, held that the services did not violate the Equal Protection Clause of the Constitution by discharging a service member who engaged in homosexual conduct.[36]

Six gay and lesbian service members brought suit in 1994 challenging the "don't ask, don't tell" policy. In 1995, the United States District Court for the Eastern District of New York held that the "statements provision"[37] of the policy violated the First and Fifth Amendments. The court, however, further held that the plaintiffs lacked standing to challenge the "acts prohibition"[38] of the policy as they only alleged that they had made statements expressing their sexual orientation.[39] On appeal, the Second Circuit reversed the portion of the district court's decision that held the "statements provision" of the policy was unconstitutional because it violated the First Amendment.[40] The Second Circuit, however, held that the district court erred in ruling that plaintiffs did not have standing to chal-

31. Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, subject: Administrative Assessment of Civil Penalties under The Clean Air Act (July 16, 1997).

32. *See* 63 Fed. Reg. 9464 (1998) (to be codified at 40 C.F.R. pts. 22, 59) (revisions to existing rules proposed Feb. 25, 1998). The EPA has also resumed its CAA field citation program rulemaking. This was previously interrupted when the EPA asked the Department of Justice to resolve the DOD-EPA dispute over the EPA's authority to assess penalties. *See also* 59 Fed. Reg. 22776 (1994) (to be codified at 40 C.F.R. pt. 59) (proposed May 3, 1994).

33. Memorandum from Steven Herman, Assistant Administrator, to Regional Counsels and Air Program Directors, Environmental Protection Agency, subject: Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (Oct. 9, 1998) *available at* <http://es.epa.gov/oeca/fedfac/policy/caaui8.pdf>.

34. 155 F.3d 628 (2d Cir. 1998).

35. *See* 10 U.S.C.A. § 654(b) (1998).

36. *Able*, 155 F.3d at 636.

lenge the acts prohibition and remanded the case to the district court.[41] In July 1997, the district court ruled that the "acts prohibition" portion of the policy was unconstitutional because it imposed unequal conditions on homosexuals in violation of the Equal Protection component of the Fifth Amendment.[42]

The Second Circuit, in reversing the district court, found that the policy should be afforded a strong presumption of validity. The court, applying the rational basis test,[43] presumed the statute was constitutional and emphasized that the burden rests with the party attacking the legislation. The court found that the United States justified the prohibition on homosexual conduct on the basis that it promotes unit cohesion, enhances privacy, and reduces sexual tension.[44] The plaintiffs attacked each of these rationales as simply masking irrational prejudice against homosexuals.[45] In addition, the plaintiff's argued the reasons were not rationally related to the Act's prohibition on homosexual conduct.[46]

The Second Circuit rejected both arguments. It found that the rationales proffered by Congress and by military authorities, which were supported by extensive findings set out in 10 U.S.C.A. § 654[47] itself, were sufficient to withstand the equal protection challenge.[48] The court dismissed the argument that irrational fear and prejudice toward homosexuals motivated the policy The court found that the services legitimately imposed the prohibition to maintain unit cohesion and reduce sexual tension. Personal privacy concerns are valid considerations that distinguish the military from civilian life and go directly to the military's need to foster "instinctive obedience, unity, commitment, and esprit de corps."[49]

The court also rejected plaintiffs' argument that the stated rationale was not rationally related to the prohibition on homosexual conduct. The court cited extensive congressional hearings and deliberations that supported the policy.[50] Congress relied on testimony from military officers, defense experts, gay rights advocates, and other military personnel as well as reports

37. 10 U.S.C.A. § 654(b)(2). This section provides:

> That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Id.

38. 10 U.S.C.A. § 654(b)(1). This section provides:

> That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
> (A) such conduct is a departure from the member's usual and customary behavior;
> (B) such conduct, under all the circumstances, is unlikely to recur;
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
> (D) under the circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
> (E) the member does not have a propensity or intent to engage in homosexual acts.

Id.

39. *See* Able v. United States, 880 F. Supp. 968, 980 (E.D.N.Y. 1995).

40. *Able*, 155 F.3d at 636.

41. Able v. United States, 88 F.3d 1280, 1296 (2d Cir. 1996).

42. Able v. United States, 968 F. Supp. 850, 865 (E.D.N.Y. 1997).

43. In striking down the Act as failing to bear even a rational relationship to a legitimate governmental interest, the district court suggested that in reviewing statutes that discriminate on the basis of homosexuality heightened scrutiny would be appropriate. *Able*, 968 F. Supp. at 861-64. The Second Circuit, however, did not decide this issue because the plaintiffs asserted they were not seeking any more onerous standard than the rational basis test. Accordingly, the sole question before the court was whether the Act survives rational basis review.

44. *Able*, 155 F.3d at 634.

45. *Id.*

46. *Id.*

47. 10 U.S.C.A. § 654(a) (West 1998).

48. *Able*, 155 F.3d at 635.

49. *Id.* (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).

by both houses of Congress explaining their conclusions.[51] According to the court, several factors allowed the Act to withstand an Equal Protection challenge. The factors included: (1) the strong presumption of validity given to classifications under the rational basis test, (2) the special respect afforded to congressional decisions regarding military matters, (3) the testimony of numerous military leaders, (4) the extensive review and deliberation by Congress, and (5) the detailed findings set forth in the Act itself.[52]

Now that the "don't ask, don't tell" policy has been upheld in every circuit where it has been challenged,[53] future court challenges will likely shift to other areas, such as whether sufficient evidence exists to separate a soldier.[54] Army regulations provide that homosexual conduct[55] is grounds for separation from the Army.[56] A statement by a soldier that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in, or will engage in, homosexual acts.[57] A soldier's sexual orientation is not a bar to continued service unless he engages in homosexual conduct.

A soldier's statement that he is homosexual or bisexual creates a rebuttable presumption that the soldier engages in, or intends to engage in homosexual acts. The soldier's command must advise him of this presumption and give him the opportunity to rebut it.[58] The soldier bears the burden of rebutting the presumption.[59]

In *Kindred v. United States*,[60] the Court of Federal Claims recently ordered the Navy to reinstate an officer because his board failed to address his rebuttal evidence. In an investigation into whether Mr. Kindred had sexually molested his stepdaughter, he revealed that he had engaged in a number of homosexual encounters four years before.[61] The information was forwarded to his commander who convened a Board of Inquiry (BOI). At the BOI, Mr. Kindred admitted prior homosexual conduct, but denied molesting his stepdaughter.[62] The BOI cleared Mr. Kindred of molesting his daughter, but recommended that the Navy discharge him for homosexual conduct.[63]

After his discharge, Mr. Kindred brought suit alleging, in part, that the BOI had failed to consider the retention factors when recommending his discharge.[64] The court agreed, holding that the BOI had an obligation to evaluate and make findings concerning the retention factors. The court specifically looked

50. *Id.*

51. *Id. See* S. Rep. No. 103-112 (1993); H.R. Rep. No. 103-200 (1993).

52. The court further noted that in its previous opinion, it had held that the statements provision (section 654(b)(2)) "substantially furthers the government's interest . . . in preventing the occurrence of homosexual acts in the military." The court concluded that "if the acts prohibition of subsection (b)(1) is constitutional . . . the statements presumption of subsection (b)(2) does not violate the First Amendment." *Able*, 88 F.3d at 1296. Because the court held the acts prohibition (section 654(b)(2)) is constitutional, then the prohibition on statements (section 654(b)(2)) is also constitutional. *Able*, 155 F.3d at 636.

53. *See* Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir.), *cert. denied*, 136 L. Ed 2d 250, 117 S. Ct. 358 (1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir.), *cert. denied*, 139 L. Ed. 2d 12, 118 S. Ct. 45 (1996).

54. Future challenges to homosexual conduct separation could also be expected to attack matters such as the manner in which the investigation is conducted. *See* McVeigh v. Cohen, 983 F. Supp. 215 (D.D.C. 1998).

55. Homosexual conduct includes homosexual acts, a statement by the soldier that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 15-2, (17 Oct. 1990) (IO3, 30 Nov. 1994)[hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, PERSONNEL-GENERAL: OFFICER TRANSFERS AND DISCHARGES (21 July 1995) [hereinafter AR 600-8-24]; *see* U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, para. E3.A1.1.8.1.1. (21 Dec. 1993) (C1, 4 Mar. 1994).

56. AR 600-8-24, *supra* note 55, para. 4-22; AR 635-200, *supra* note 55 para. 15-2.

57. AR 600-8-24, *supra* note 55, para. 4-22; AR 635-200, *supra* note 55 para. 15-2.

58. AR 600-8-24, *supra* note 55, para. 4-22(b)(2); AR 635-200, *supra* note 55, para. 15-3.

59. In rebutting the presumption, the following should be considered: (1) whether the soldier engaged in homosexual acts, (2) the soldier's credibility, (3) testimony from others about the soldier's past conduct, character and credibility, (4) the nature and circumstances of the soldier's statement, and (5) any other evidence relevant to whether the member is likely to engage in homosexual acts. AR 600-8-24, *supra* note 55, para. 4-22(b)(2); AR 635-200, *supra* note 55, para. 15-3b.

60. 41 Fed. Cl. 106 (1998).

61. *Id.* at 110.

62. *Id.*

63. *Id.*

64. *Id.* at 111.

at the BOI's findings worksheet and found that there were no findings regarding retention. The court held that the "only conclusion one can draw from the report is that the BOI, after finding [Mr. Kindred] had committed 'misconduct,' did not consider the retention factors. Plainly, it did not make specific findings concerning any of them."[65] Since the record did not demonstrate that the BOI considered the retention factors, the court set aside Mr. Kindred's 1994 discharge and directed the Navy to reinstate him.[66]

Though the *Kindred* case was decided under the old policy, the retention factors are virtually identical to those contained in the new policy. Counsel must ensure that BOIs specifically consider the retention factors when faced with such a case. The BOI findings should include whether the respondent raised the retention factors. If a service member raises a retention factor, the BOI's findings should specifically state whether the factor was accepted or rejected, and the reasoning behind its findings. If a BOI fails to do so, a court may set aside the separation. Major Meier.

65. *Id.* at 117-18.

66. The court did note that its decision, including reinstatement, did not preclude a reconvened BOI from addressing: (1) the charge of misconduct that constituted the basis for plaintiff's discharge, and (2) the retention factors. Significantly, the Navy later changed its officer separation guidance to clarify how and when a BOI should address retention. *Id.* at 121.

Claims Report

United States Army Claims Service

Vehicle Theft and Vandalism Off-Post

Paragraph 11-5h(5) of *Army Regulation (AR) 27-20* permits claims offices to pay for off-post theft and vandalism of privately owned vehicles in certain very limited situations.[1] Such theft and vandalism is compensable under the Personnel Claims Act[2] only if the claimant submits clear and convincing evidence that the damage was incident to service.[3] The claimant does notneed to be on temporary duty or using his vehicle to perform a military mission at the time the theft or vandalism occurred. In addition, the damage is not compensable if the theft or vandalism occurred at non-government quarters in a state or the District of Columbia.[4]

For example, if a claimant is dining at an off-post restaurant, and his vehicle, bearing a military sticker, is spray painted with the phrase "soldiers kill babies," there is sufficient evidence of a direct connection between the claimant's service and the damage. Therefore, the claims office should pay the soldier's claim. On the other hand, if the same claimant is dining at an off-post restaurant and his vehicle is intentionally scratched, the mere presence of a military sticker on the vehicle is not sufficient evidence of a service connection. The claims office should not pay such a claim. Alternatively, if a group of vehicles bearing military stickers are parked in a lot with other vehicles, and the vehicles with stickers are the only ones scratched, this may be sufficient evidence of a service connection, allowing the claims office to pay the claims. Mr. Lickliter, Lieutenant Colonel Masterton.

Use of Privately Owned Vehicles (POVs) for the "Convenience of the Government"

Claims offices may pay for damage to POVs only in limited circumstances. One circumstance is when a claimant uses his privately owned vehicle to perform a military duty "for the convenience of the government."[5] These claims are generally payable if the claimant is reimbursed for mileage for the trip. Unfortunately, it is often difficult to determine whether a vehicle is being used "for the convenience of the government" or whether the claimant can be reimbursed for mileage.

To determine if these claims can be paid, claims offices should divide them into three categories. The first category includes claimants who have written orders authorizing them to use their vehicles for military duties. The second category includes claimants who do not have written orders, but obtained oral permission to use their vehicles for military duties. The third category includes claimants who do not have written orders or oral permission, but were actually using the vehicle for military duties.

Claims offices can usually pay claims in the first category (where the claimant has written orders). Written orders will normally state that the claimant is entitled to reimbursement for mileage. Additionally, they often specifically state that he is entitled to use his POV "for the convenience of the government."[6] The written orders, however, must have been issued *before* the damage being claimed occurred. Written orders that are issued after the fact raise the presumption that the travel was not for the convenience of the government.[7] In addition, a claimant who is on written orders is not using his vehicle for the convenience of the government if he deviates from the orders. For example, losses that occur while a soldier is on leave in conjunction with authorized temporary duty orders, are generally not compensable. Similarly, a soldier who has orders authorizing him to drive his vehicle from Fort Drum to Fort Meade is not using his vehicle for the convenience of the government if he deviates from the route by traveling to Maine to visit relatives.[8]

The second category (involving oral permission) may result in a compensable claim if the claimant clearly obtained the oral permission to use his vehicle *prior* to the travel. Travel without written orders may result in entitlement to mileage reimburse-

1. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (31 Dec. 97) [hereinafter AR 27-20].

2. 31 U.S.C.A. § 3721 (West 1998).

3. U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES, para. 11-5h(4) (1 Apr. 1998)) [hereinafter DA PAM 27-162].

4. AR 27-20, *supra* note 1, para. 11-5h(5). The limitation is required by the Personnel Claims Act, 31 U.S.C.A. § 3721.

5. DA PAM 27-162, *supra* note 3, para. 11-5h(1). Losses that occur when the claimant is commuting to or from his permanent place of duty, and losses that arise as a result of a mechanical or structural failure of the vehicle are not compensable. *Id.*

6. DA PAM 27-162, *supra* note 3, para. 11-5h(1)(a).

7. *Id.*

8. *Id.* para. 11-5(1)(b).

ment and be deemed "for the convenience of the government" if the claimant's superior directed him to use a privately owned vehicle to accomplish a mission.[9] Claims personnel should ensure that the authorization was clear and was issued before the damage occurred.

The third category generally will not result in a compensable claim. This category involves soldiers and civilian employees who use their vehicles for military duties, but fail to obtain proper authorization. In these situations, reimbursement for mileage is generally not authorized. Similarly, the use is not "authorized or directed" for the "convenience of the government." Consequently, any damage that results generally is not compensable. Lieutenant Colonel Masterton.

Evidence of Driving Under the Influence (DUI) in an Article 139 Claim

Will a soldier driving while under the influence of alcohol be subject to liability under Article 139 of the Uniform Code of Military Justice[10] for damage he causes in an automobile accident? The answer to this question is not a simple yes or no. The degree of intoxication is one factor that claims offices should examine to determine whether the soldier's actions were in "reckless and wanton disregard for the property rights of others."[11]

A soldier can be held liable under Article 139 for damage to property only if his actions were "willful." Willful damage to property falls into one of two categories: (1) damage caused intentionally (i.e. vandalism), and (2) damage resulting from "riotous, violent or disorderly acts, acts of depredation or acts showing a reckless and wanton disregard for the property rights of others." Situations in which a soldier intentionally causes a motor vehicle collision will be rare. A field office, however, may receive Article 139 claims involving actions by military drivers that could be considered reckless and wanton, including allegations that the soldier was intoxicated at the time of the collision.

Neither *AR 27-20*[12] nor *Department of the Army Pamphlet 27-162*[13] deals specifically with DUI as it relates to Article 139 claims. Given the standard of "reckless and wanton disregard" needed to subject a soldier to liability for damage to property, there is no "bright line" to establish liability merely by proving that a soldier was under the influence of alcohol at the time of an accident. The degree of intoxication[14] may be sufficient, either alone or in combination with other evidence of recklessness, to establish that the soldier's actions leading up to the collision were "willful." Legal intoxication, sufficient to subject the soldier to criminal liability, is not determinative. This situation is analogous to a soldier who may have exceeded the speed limit at the time of the accident—Article 139 liability is not automatic.[15] Mr. Kelly.

Staff Judge Advocate (SJA) Denial of Requests for Reconsideration

Paragraph 11-20d of *AR 27-20*[16] states that an SJA may deny a request for reconsideration if the following requirements are met: (1) there is no new evidence submitted, (2) the request is submitted after the sixty-day time limit, and (3) the amount under dispute is not more than $1000. Paragraph 11-20e[17] states that requests for reconsideration must be forwarded to the United States Army Claims Service (USARCS) if "any" of the criteria above are not met. The intent of these apparently conflicting provisions is to permit SJAs to take final action denying requests for reconsideration *if and only if* the amount in dispute is not more than $1000. Any previous guidance to the contrary should not be followed.

For example, if claimant Alfred submits a request for reconsideration asking for $1200 more than he was paid originally, but has not submitted the request within the sixty-day time limit, this request should be forwarded to the USARCS. Similarly, if claimant Brenda submits a request for reconsideration asking for $1200 more than she was paid and does not submit any new evidence, this request should also be forwarded to the USARCS. On the other hand, if claimant Charlie submits a

9. *Id.* para. 11-5(1)(a).

10. UCMJ art. 139 (1996).

11. DA PAM 27-162, *supra* note 3.

12. *Id.*

13. DA PAM 27-162, *supra* note 3.

14. The degree of intoxication may be established through a blood alcohol test or eyewitness testimony.

15. *See* DA PAM 27-162, *supra* note 3, para. 9-4a(2). According to *DA Pam 27-162*, an Article 139 claim against a soldier who drove a car at 80 miles per hour in a 55-mile zone, crossed the centerline, and collided with an oncoming vehicle is not cognizable. This example is intended only to illustrate this principle. If excessive speed or other facts tend to show willful conduct, a claim will be cognizable.

16. AR 27-20, *supra* note 1.

17. *Id.*

request for reconsideration within sixty days which contains new evidence, but only requests $100 more than he was paid, the SJA may take final action denying this request (unless one of the other conditions in paragraph 11-20e is met).[18] Similarly, if claimant Deborah submits a request for reconsideration asking for $1200 more than she was paid, and she is paid $600 of what she is asking for, the SJA can take final action denying the rest of her reconsideration. The key is the amount in dispute. You must ask yourself whether the amount is under $1000.

Staff Judge Advocates may always take final action on a request for reconsideration if the claimant is fully satisfied with the action taken. On the other hand, SJAs should always send requests for reconsideration involving questions of policy or practice to the USARCS. In addition, SJAs should always send the USARCS requests for reconsideration involving claims on which they personally acted initially. Since SJAs are required to act on all denials, this means they should always send these requests for reconsideration to the USARCS. Mr. Lickliter, Lieutenant Colonel Masterton.

18. *Id.* The other conditions are: (1) the request involves a claim on which the head of an area claims office or higher settlement authority has personally acted, where that individual believes the request should be denied, and (2) the request involves a question of policy or practice that the head of an area claims office or higher settlement authority believes is appropriate for resolution by the Army Claims Service. *Id.*

Standards of Conduct Note

Standards of Conduct Office, Office of The Judge Advocate General

Changes to the Processing of Public Financial Disclosure Reports

Introduction

The Standards of Conduct Office recently instituted several procedural changes to the processing of the Public Financial Disclosure Report (SF 278).[1] These changes became effective on 30 December 1998,[2] and should make the ethics counselor's review less burdensome.

This note reviews the SF 278 filing requirement and explains the recent changes to the review process. Additionally, it provides the ethics counselor with a checklist for conducting a proper review of SF 278s.

The primary purpose of the SF 278 is to assist the Army in identifying potential conflicts of interest between the official duties of employees and their outside financial interests.[3] All general officers and civilians who are detailed to Senior Executive Service positions must file a SF 278 report annually.[4] National Guard and United States Army Reserve general officers must file a report only if they served sixty-one days or more of active duty during the calendar year. Filers need not include drill weekends and administrative nights in calculating this number.[5] Filers must file their reports for calendar year 1998 no later than 15 May 1999.[6] We encourage filers to submit their reports early, to allow their ethics counselors more time for review and information gathering. Reports are considered filed with the agency when the ethics counselor receives them.[7] Absent extraordinary circumstances, however, the reports should be filed with the Standards of Conduct Office by 15 May 1999.

Changes to the Review Process[8]

In an effort to streamline the review process, Department of the Army (DA) Form 4971-R[9] has been eliminated. The most significant impact of this change is that the ethics counselor of the filer's supervisor no longer needs to review and sign the form. Only the filer, the ethics counselor, and the filer's supervisor must sign the forms.

With the elimination of the DA Form 4971-R, the required signatures must be on the SF 278 itself. The filer's ethics counselor will sign the block on the front of the SF 278 entitled "Other Review." The ethics counselor must include a duty phone number and an e-mail address in this block. Additional information about the form or filer may be attached to the form or annotated on the back of the front page.[10]

The next block, entitled "Agency Ethics Official's Opinion," is reserved for final agency review at DA. The filer's supervisor will sign in the last block, entitled "Comments of Reviewing Officials." The filer's ethics counselor will insert the following statement on the left-hand side of the block:

> Supervisor Certification. I have reviewed the interests reported on this form in light of the filer's duty position. I am satisfied there is no actual or apparent conflict of interest.
> Supervisor's Signature _____

This statement should be in nine-point typeface, and should be left justified to preserve the remaining space in the comment block. This statement may be reproduced by rubber stamp,

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1. U.S. Office of Government Ethics, Standard Form 278, Executive Branch Public Financial Disclosure Report (Rev. 6/94). The SF 278 is available on Forms Engine and at <http://www.explorer.doe.gov:1776/pdfs/forms/f278.pdf>.

2. Message, 051032Z Jan 99, Headquarters, Dep't of Army, DAJA-SC, subject: Cancellation of DA Form 4971-R (5 Jan. 1999) [hereinafter DA Message].

3. *See* PUBLIC FINANCIAL DISCLOSURE: A REVIEWER'S REFERENCE, U.S. OFFICE OF GOVERNMENT ETHICS 1-1 (1994), *available at* <http://www.usoge.gov/usoge006.html#publications>.

4. *See* 5 C.F.R. §§ 2634.201, 202(c) (1997).

5. *See* U.S. DEP'T OF DEFENSE REG. 5500.7-R, JOINT ETHICS REGULATION, para. 7-203(c) (C4 Aug. 30, 1993).

6. *Id.*

7. *See* 5 C.F.R. § 2634.602(a).

8. DA Message, *supra* note 2.

9. U.S. Dep't of Army, DA Form 4971-R, Certificate of Preliminary Review of Standard Form (SF) 278 (Nov. 1994).

10. More information is better than no information. We encourage ethics counselors to explain any unusual circumstances presented by the filer's report.

printed on an address label, or typed onto a form downloaded from the computer.

The Standards of Conduct Office has developed the following checklist of commonly overlooked items to assist ethics counselors in their review of SF 278s. Ethics counselors are encouraged to share this checklist, or their own version of it, with their filers. Captain Waldron.

Checklist for Review of SF 278

This is a non-exclusive list of commonly overlooked items.

1. Administrative data is complete.

2. Each section has an entry or a "None" block checked.

3. All required schedules (A, B, C, and D) are completed and attached.

4. Each asset on Schedule A has value, and type and amount of income.

5. Purchases and sales listed in Schedule B are also reported in Schedule A, if the asset produced more than $200 of income or if the sale resulted in more than $200 of capital gain.

6. Mutual funds are identified by specific fund name, not just fund family (*i.e.*, "Fidelity Magellan" rather than "Fidelity.")

7. Underlying assets of investment and brokers' funds are identified.

8. Accrued income from IRA accounts is reported in amount block (even if the income is not withdrawn).

9. Locations of real estate assets are reported.

10. Name, location, and nature of business are reported for all nonpublic partnerships, closely held corporations, and similar private business ventures.

11. Account numbers and social security numbers have been redacted from broker statements (broker statements may be used in lieu of listing assets on Schedule A).[11]

12. Filer's position description is attached.

13. Reported financial interests have been reviewed for actual and apparent conflicts of interest,[12] in light of the filer's duty description.[13]

14. Conflicts of interest have been resolved through:[14]

-formal disqualification (statement attached)
-change of duties without reassignment
-divestiture of the interest
-transfer, reassignment, or resignation
-exemption under 18 U.S.C. § 208(b) (supervisor's determination is attached)
-establishment of a blind trust

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11. 5 C.F.R. § 2634.311(c).

12. *See* 5 C.F.R. § 2635.402 (defining a financial conflict of interest).

13. Ethics counselors bring local expertise to the review process. The greatest concern is that the filer will have a financial interest in a contractor that operates on post. Accordingly, ethics counselors should also contact the Principal Assistant Responsible for Contracting or the Director of Contracting for their command or organization to identify the relevant contractors that may create a basis for a conflict. A list of Department of Defense contractors is available at <http://www.defenselink.mil/dodgc/defense_ethics/index.html>.

14. We encourage ethics counselors to contact the Standards of Conduct Office to coordinate resolutions other than disqualification and reassignment.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....trometn@hqda.army.mil
Director

COL Keith Hamack,.....hamackh@hqda.army.mil
USAR Advisor

Dr. Mark Foley,.....foleyms@hqda.army.mil
Personnel Actions

MAJ Juan Rivera,.....riverjj@hqda.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkeda@hqda.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostesl@hqda.army.mil
IMA Assistant

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1998-1999 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riverjj@hqda.army.mil. Major Rivera.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1998-1999 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
6-7 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	BG Thomas J. Romig BG Richard M. O'Meara MAJ Victor Hansen LTC Karl Goetzke COL Keith Hamack	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: Tdonne2947@aol.com
20-21 Feb	Denver, CO 87th MSO Embassy Suites Denver Tech Center Costila Avenue 10250 Englewood, CO 80112 1-800-654-4810	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Thomas W. Eres MAJ Jody Hehr MAJ Michael Smidt COL Thomas N. Tromey	MAJ Paul Crane DCMC Denver Office of Counsel Orchard Place 2, Suite 200 5975 Greenwood Plaza Blvd. Englewood, CO 80111 (303) 843-4300 (108) e-mail:pcrane@ogc.dla.mil
27-28 Feb	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG John F. DePue LTC Jackie R. Little MAJ Michael Newton MAJ Juan J. Rivera	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449 thompsongc@in-arng.ngb.army.mil
6-7 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Herb Ford MAJ Walter Hudson COL Thomas N. Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (301) 394-0558 e-mail: lampat@mail.va.gov
13-14 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Joseph R. Barnes BG John F. DePue MAJ Mike Berrigan MAJ Dave Freeman COL Keith Hamack	COL Robert P. Johnston Office of the SJA, 12th LSO Building 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
13-14 Mar	San Francisco, CA 75th LSO	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres LTC Manuel Supervielle MAJ Edye Moran Dr. Mark Foley	MAJ Douglas T. Gneiser Hancock, Rothert & Bunshoft Four Embarcadero Center Suite 1000 San Francisco, CA 94111 (415) 981-5550 dgneiser@hrblaw.com

20-21 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John F. DePue LTC Paul Conrad MAJ Norm Allen Dr. Mark Foley	CPT Ted Gauza 2636 Chapel Hill Dr. Arlington Heights, IL 60004 (312) 886-0480 (312) 886-3514 gauzatom@aol.com
10-11 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Marty Sitler LTC Richard Barfield Dr. Mark Foley	LTC Barbara Koll Office of the Commander 213th LSO 1650 Corey Boulevard Decatur, GA 30032-4864 (404) 286-6330/6364 work (404) 730-4658 bjkoll@aol.com
23-25 Apr	Dallas, Texas 90th RSC/1st LSO/2nd LSO Crown Plaza Suites 7800 Alpha Road Dallas, TX 75240 (972) 233-7600	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigant@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Training Center 360 Elliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromey	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	BG Michael J. Marchand BG Richard M. O'Meara LCDR Brian Bill MAJ Beth Berrigan COL Keith Hamack	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: browncr@usarc-emh2.army.mil
14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John f. DePue MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556 e-mail: jtobin996@aol.com Web site: http://home.att.net/~sckndck/jag

*Topics and attendees listed are subject to change without notice.
Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

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 which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, 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

1999

February 1999

8-12 February	70th Law of War Workshop (5F-F42).
8-12 February	1999 Maxwell AFB Fiscal Law Course (5F-F13A).
8-12 February	23rd Administrative Law for Military Installations Course (5F-F24).

March 1999

1-12 March	31st Operational Law Seminar (5F-F47).
1-12 March	142nd Contract Attorneys Course (5F-F10).
15-19 March	44th Legal Assistance Course (5F-F23).
22-26 March	2d Advanced Contract Law Course (5F-F103).
22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).

April 1999

12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May	54th Fiscal Law Course (5F-F12).
3-21 May	42nd Military Judge Course (5F-F33).

June 1999

7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).

7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 June	154th Senior Officers Legal Orientation Course (5F-F1).
14-18 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
14-18 June	29th Staff Judge Advocate Course (5F-F52).
21 June-2 July	4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).
28-30 June	Professional Recruiting Training Seminar

July 1999

5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).
6-9 July	30th Methods of Instruction Course (5F-F70).
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July-24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).
21-23 July	Career Services Directors Conference

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).
9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999-26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August-3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October-22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-15 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-21 January	2000 JAOAC (Phase II) (5F-F55).
17-28 January	151st Basic Course (Phase I-Fort Lee) (5-27-C20).
18-21 January	2000 PACOM Tax CLE (5F-F28P).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January-7 April	151st Basic Course (Phase II-TJAGSA) (5-27-C20).
31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).

June 2000

5-9 June	3rd National Security Crime and Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).

12-16 June	4th Senior Legal NCO Course (512-71D-CLNCO).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1999

February

19 February	Motion Practice
ICLE	Atlanta, Georgia

March

18-19 February ICLE	Trial Evidence Atlanta, Georgia
25 March ICLE	Courtroom Techniques Marriott North Central Hotel Atlanta, Georgia
25 March ICLE	Mediation Advocacy Atlanta, Georgia
26 March ICLE	Jury Selection and Persuasion Sheraton Hotel Buckhead, Atlanta

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

For detailed information on mandatory continuing legal education jurisdiction and reporting dates for other states, see the September 1998 issue of *The Army Lawyer*.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1998 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer.*

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3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer.*

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer.*

5. Article

The following information may be useful to judge advocates:

Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583 (September 1998).

Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to a Traditional Legal Writing Course*, 50 FLA. L. REV. 709 (September 1998).

6. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 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 or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or 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 Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.