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Articles

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

Notes from the Field

CLAMO Note
Center for Law and Military Operations (CLAMO), The Judge Advocate General's School, U.S. Army

USALSA Report
United States Army Legal Services Agency

The Uniform Code of Military Justice in Transition

The Honorable Jacob Hagopian
United States Magistrate Judge
United States District Court of Rhode Island

Editor's Note: The following article was written in 1968, when the author was a colonel in the Judge Advocate General's Corps. Colonel Hagopian was assigned by Major General Hodson, The Judge Advocate General, to serve as the executive agent to Congress during the legislative process of creating the Military Justice Act of 1968. The Army Lawyer *is pleased to present this article in its continuing series commemorating the Fiftieth Anniversary of the Uniform Code of Military Justice.*

The Uniform Code of Military Justice (Code)[1] became law on 31 May 1951. It has been authoritatively cited as comparing favorably with the most advanced criminal codes.[2] Like other criminal codes and procedures, the Code is now in a time of transition, contemporary standards replacing old concepts. In recent years Representative Charles E. Bennett has introduced a number of bills in Congress reflecting his forward looking ideas in the administration of military justice.[3] After many years of effort, his bill, House Resolution 15971, was recently signed into law by the President as the Military Justice Act of 1968.[4]

When the Military Justice Act of 1968 was originally introduced, it contained many of the military justice provisions of Bennett's omnibus bill, House Resolution 226. Congressman Bennett sought by this duplication to expedite enactment in the 90th Congress of those badly needed procedural reforms that were considered non-controversial. Indeed, he succeeded during the final days of the 90th Congress in securing for millions of service personnel serving on active duty the most modern system of criminal justice obtainable.

As enacted into law, House Resolution 15971 contains provisions virtually identical with the bill as originally introduced, and it contains a number of significant amendments added in the Senate by Senator Sam Ervin, Jr. Many of these Senate amendments were also contained in, or are similar to, various provisions of Representative Bennett's omnibus bill on military law.

The Military Justice Act of 1968 makes significant changes in the Code. The Act provides that an accused at a special court-martial must be afforded the opportunity to be defended by legally qualified counsel unless the commander certifies in

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1. 64 Stat. 108-49 (1950) (codified as amended at 10 U.S.C. §§ 801-940 (1964)).

2. Mr. Justice Clark said of the Code "[I]n addition to the essentials of due process, the Uniform Code of Military Justice includes protections which this court has not required a state to provide and some procedures which would compare favorably with the most advanced criminal code." Kinsella v. Krueger, 351 U.S. 470 (1956). In *Miranda v. Arizona*, 384 U.S. 436, 489 (1966), the majority opinion of the Supreme Court again cited the safeguards of the Code provisions and decisions of the Court of Military Appeals as an experience which should be applied to a civilian accused. There the Supreme Court said, "Similarly, in our country the UCMJ has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him . . . ." (citing 10 U.S.C. § 831b). "Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals . . . ." (citing United States v. Rose, 24 C.M.R. 251 (C.M.A. 1957); United States v. Gunnels, 23 C.M.R. 354 (C.M.A. 1957)).

3. On 10 January 1967 he introduced House Resolution 226. On 30 August 1967 he introduced House Resolution 12705 which contained some of the noncontroversial sections of House Resolution 226. Hearings were held on the latter bill before Subcommittee Number 1 of the House Armed Services Committee, chaired by Representative Philip J. Philbin. The subcommittee voted to report the bill with certain amendments to the full committee. The full committee approved the amended bill, House Resolution 15971 on 21 May 1968, and the House passed it on 3 June 1968. The bill was amended and passed by the Senate on 3 October 1968 and repassed by the House on 10 October 1968. President Johnson signed it on 24 October 1968 as Public Law 90-632.

4. 82 Stat. 1335 (1968). Representative Bennett's more comprehensive military law bill, House Resolution 226, would have made changes in administrative boards, discharges, and jurisdiction over certain civilians and former servicemen in order to fill a void created by decisions of the Supreme Court. Article 2(11) of the Code, which confers courts-martial jurisdiction over persons serving with, employed by, or accompanying the armed forces outside the United States, has been declared unconstitutional with respect to peacetime military jurisdiction over civilians abroad. Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guargiliardo, 361 U.S. 278 (1960); Kinsella v. Singleton; 361 U.S. 239 (1960); Reid v. Covert, 354 U.S. 1 (1957). *Cf.* Article 2(10) providing courts-martial jurisdiction over persons serving with or accompanying the forces in the field in time of war. Another provision of House Resolution 226 created a Judge Advocate General's Corps for the Department of the Navy. This provision was enacted into law separately as Public Law 90-179, 81 Stat. 545 (1967).

Sections 3, 7, 9(a), and 15 of House Resolution 226 would have made several changes in the operation of administrative discharge and separation boards. The acts for which a person has been tried judicially could not again be used for administrative separation. H.R. 226, § 7. See 5 U.S.C. § 555 (1964). Section 9(a) of the bill would have given subpoena powers to administrative boards and would have extended Article 37 of the Code, which deals with unlawful command influence concerning a court-martial case, to these administrative boards as well. Article 37 of the Code prohibits a court convening authority or any commanding officer from attempting to coerce or influence the action of a court-martial. The bill would have created a Department of Defense Board for the Correction of Military Records in lieu of the individual service boards now in existence. H.R. 226 § 18(a)(1). *See* 10 U.S.C. § 1552 (1956); Army Regulation 15-185 (1962). The board would also have authority to correct any military record, including authority to correct the findings and sentence of a court-martial not reviewed by a board of review. H.R. 226, § 18(b). A similar procedure would be authorized for the Department of Transportation to correct the records of members and former members of the Coast Guard.

writing that physical conditions or military exigencies prevent such counsel from being obtained.[5] The Act requires that an accused be defended by legally qualified counsel, with no exceptions, if a special court-martial awards a bad conduct discharge.[6] The new law changes the composition of special courts-martial by permitting a law officer, whose title is redenominated by the Act to that of military judge, to preside.[7] The Act requires a military judge at a special court-martial which awards a bad conduct discharge, unless the commander certifies that physical conditions or military exigencies prevent such judge from being obtained.[8] It makes mandatory a certified and trained judiciary at the general court-martial level for each of the services, responsible only to their respective judge advocates general.[9]

The Act abolishes the present boards of review and replaces them with one court of military review for each service. The court may sit in panels or *en banc*, and its judges, appointed by The Judge Advocate General, may be either civilians or military officers.[10] Rather than abolishing the summary courts-martial (the limited-jurisdiction courts composed of one officer),[11] the Military Justice Act gives an accused an absolute right to object to trial by summary court.

The new law brings much needed additional modernization to military trial procedure. The military judge will have many of the prerogatives of a federal district court judge; he will have authority to rule with finality on those matters that are currently determined by a civilian judge.[12] The rulings of the military judge on some matters—for example challenges of court members [13] and motions for findings of not guilty[14]—will no longer be subject to overruling by the members of the court-martial, untrained in the law, who are in reality the military jury.[15] The Act also provides for open recorded sessions by a military judge outside the presence of the military jurors.[16] The military judge will hear and determine motions, rule on interlocutory questions which can be determined without trial on the general issue,[17] hold arraignments, receive the pleas of the accused,[18]

5. 82 Stat. 1337 (1968). A special court-martial is an inferior tribunal composed of at least three members, which may include enlisted persons if the accused so requests. It is jurisdictionally limited to imposing a punishment no greater than confinement at hard labor for six months, two-thirds forfeiture of pay per month for six months and a bad conduct discharge.

6. *Id.* at 1335-36. A bad conduct discharge may be awarded as punishment only where a verbatim record of trial has been made. A conviction with such an approved sentence must be reviewed by a court of military review pursuant to Article 66 of the Code.

7. *Id.* at 1335.

8. *Id.* at 1335-36.

9. *Id.* at 1336. The Army has taken the lead in establishing an independent field judiciary to provide law officers for all general courts-martial. By *Army Regulation 22-8* (14 October 1964), the United States Army Judiciary was created to provide trained, experienced, judicial officers to serve as trial appellate military judges. In the Air Force and Navy, judge advocates of an installation are assigned to sit as trial judges along with their other functions which may include the prosecution and defense of cases.

10. 82 Stat. at 1341.

11. The summary court-martial has no jurisdiction to try officers or warrant officers; it cannot impose punishment in excess of 30 days' confinement, nor adjudge a dismissal or dishonorable or bad conduct discharge. An accused may waive trial by summary court-martial and request trial by a superior court-martial for the alleged misconduct. In many respects, the summary court-martial is similar to the trial of petty offenses by United States Commissioners. The jurisdiction of a United States Commissioner for the trial of petty offenses is dependent upon an election of the accused to such jurisdiction and upon a corresponding waiver of trial in federal district court. 18 U.S.C. § 3401 (1948). Generally, petty offenses triable by a United States Commissioner are punishable by imprisonment for not more than six months or a fine of not more than $500 or both. 18 U.S.C. § 1(3). A recent survey disclosed that one-third of the United States Commissioners are not lawyers. Would the abolition of the summary court-martial place a burden on the military justice system? What would be the burden placed on the federal judicial system if trial by United States Commissioner or comparable magistrate were to be abolished?

12. 82 Stat. at 1340.

13. *Id*. at 1339.

14. *Id*. at 1340.

15. *Cf.* FED. R. CRIM. P. 29.

16. 82 Stat. at 1338.

17. *See* FED R. CRIM. P. 12. A typical matter, which could be disposed of at a pretrial session is the resolution of a disputed question of admissibility of a purported confession. This frequently results in a lengthy hearing before the law officer alone that requires the finders of fact to withdraw from the courtroom. By permitting the military judge to rule on this question before the fact finding members of the court have assembled and have been enpanelled, the members would not be required to spend time waiting for the decision of the judge. The law officer is constitutionally required to make a preliminary determination of the voluntariness of a purported confession. Jackson v. Denno, 378 U.S. 368 (1964); United States v. King, 37 C.M.R. 475 (C.M.A. 1966). If he sustains the objection, the issue is resolved, and the facts and innuendoes surrounding the making of the confession will not reach the members by inference or otherwise. If the military judge determines to admit the confession, the issue of voluntariness will normally, under federal court and military practices, be re-litigated before the finders of fact who will determine the factual question of voluntariness under appropriate instructions(as they would any other fact).

and consider and dispose of other procedural matters. He may consider such items as the admissibility of a purported confession,[19] the legality of a search and seizure,[20] and the capacity of the accused to stand trial,[21] as well as matters such as jurisdiction of the trial court, venue and speedy trial. Mental responsibility as to the act charged is the only interlocutory matter that remains subject to objection by the military jurors.[22] These procedures will save the valuable time of military jurors, who will no longer be required to assemble just to legally constitute the proceedings and vest the military judge with jurisdiction to conduct a hearing out of their presence.[23] The procedure, when coupled with unlimited military discovery,[24] goes somewhat further than most criminal pretrial proceedings.

The military judge will also be able to hold post trial sessions without first assembling the military jurors.[25] This is a much-needed procedural reform. The absence of authority under present military law to convene a court-martial composed only of a law officer makes it difficult to carry out the mandates of the appellate courts in cases remanded for further proceedings at the trial level. The Act cures this weakness in the military system because under its provisions there will always be a court open just as there is in the federal civil system.[26] The Act also provides for additional post-conviction relief. The Judge Advocate General may vacate or modify any findings or sentence (unless reviewed by a court of military review) on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused.[27] The period within which an accused convicted of an offense may petition for a new trial is extended from one to two years, and the right is extended to all cases.[28]

The Act also provides authority, with necessary safeguards, whereby an accused person can waive a hearing before a military jury and be tried by the military judge alone[29] in non-capital cases.[30] This is the equivalent of the right of the accused to waive trial by jury in the federal courts.[31] The defendant is entitled first to know the identity of the military judge and to consult with counsel.[32] Only the military judge can approve the request for trial by a judge alone. In federal courts, Federal Rule of Civil Procedure 23(a) gives the prosecution the right to veto requests for trial by a judge alone, but Congress felt that this procedure would not be appropriate for the military services.[33]

Waiver of a military jury trial will streamline the administration of military justice. A large percentage of courts-martial cases are disposed of on guilty pleas.[34] Most of these cases, as

18. 82 Stat. at 1338.

19. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

20. *See* FED. R. CRIM. P. 41(e).

21. The capacity of the accused to stand trial under the *Manual for Courts-Martial* was determined by the court members. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 122 (1951) [hereinafter MCM].

22. *See id.* ¶ 122. In the military the law officer rules on interlocutory questions of mental responsibility subject to being overruled by vote of the court members.

23. *See* United States v. Robinson, 55 C.M.R. 200 (C.M.A. 1968).

24. Known in the military as the open file policy, the procedures are required by the MCM. MCM, *supra* note 21, ¶ 33(i)(2). This policy accounts for the paucity of cases in military law under the Jencks Act, 18 U.S.C.A. § 3500 (West 1958). *See generally* Major Luther C. West, *The Significance of the Jencks Act in Military Law,* 30 MIL. L. REV. 83 (1965).

25. 82 Stat. 1338 (1968).

26. 28 U.S.C.A. § 452 (West 1963).

27. 82 Stat. at 1342.

28. *Id*. at 1343.

29. *Id*. at 1335.

30. *Id.* The wording prevents the danger of the provision being declared unconstitutional. A similar provision in the Lindbergh Law was declared unconstitutional in *United States v. Jackson, 390 U.S. 570 (*1968). The court held a provision of the Lindbergh Law that permitted the accused to choose between trial with a jury or one without a jury and without possibility of the death penalty as unconstitutional. The effect of the choice was to compel the accused to choose a trial without a jury since it could not result in the death penalty.

31. FED. R. CRIM. P. 23a.

32. 82 Stat. at 1335.

33. S. REP. NO. 1601, at 4 (1968).

34. During fiscal year 1967, 67.4% of all Army court-martial cases were disposed of by guilty pleas.

well as many others, could appropriately be heard and determined with respect to finding and sentence by a military judge alone. The savings to the taxpayers in military manpower released from court duty would be significant. In addition, the military accused will also benefit by having another option available to safeguard his due process rights. The saving in military manpower is significant in another respect. The convening authority is required by Article 25(d) of the Code to appoint as court members, who sit as military jurors, such persons as in his opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These are the types of individuals who are the best commanders and combat leaders. In time of war the military can ill afford to utilize such persons in non-combat roles. Freeing them from court duties of prolonged court cases can have significant effect upon overall military efficiency.

The need for the legislation contained in the Military Justice Act has developed in part from a series of decisions of the Court of Military Appeals which has expanded the role of the law officer and placed upon him responsibilities virtually as great as those borne by federal district judges in conducting criminal trials.[35] In the discharge of these responsibilities, however, law officers are now hampered by provisions of law which unnecessarily limit their authority to perform essential and customary judicial functions. For example, under present law, the law officer cannot pass on the validity of challenges for cause.[36] The court members must pass on challenges for cause even though the basis for the challenge may affect all the members. The Court of Military Appeals has on several occasions reaffirmed its belief that it would be preferable for challenges for cause to be passed on by the law officer rather than the court members.[37]

The desirability of the other procedural and substantive changes contained in this legislation has become already evident in the conduct of criminal trials under the present rules. These rules have proved to be unwieldy and cumbersome when applied to the present day concepts of the military trial forum; those concepts distinguish between the role of the law officer as trial judge and that of court-martial members as arbiters of fact.

Several recent articles have been critical of the present system of military justice.[38] Some articles have been favorable to the system.[39] At one time it was clear that the military justice system, at the general court-martial level, was vastly superior to the civilian system of criminal justice, both state and federal. The general court-martial procedure requires free legal representation by a qualified lawyer at all trial and appellate stages, verbatim transcripts, automatic right to appeal at no cost, and full and complete disclosure of all relevant evidence at every stage of the case. In recent Supreme Court decisions, many of these safeguards preserved to a military accused are now secured to an accused in state and federal criminal proceedings.[40]

The Military Justice Act received many endorsements from interested organizations in the civilian community and in the military.[41] Comparative studies demonstrate that the military accused has had more due process protection than the civilian from early times to present day. Only since the so-called criminal law revolution which began in 1964 has civilian justice begun to catch up. The military repeatedly urged the Congress to amend the Code as early as 1953. The enlightened opinions of the Court of Military Appeals, its quest for a true judge and jury system, and its profound vision and work in the codes development, clearly demonstrated the need for the Military Justice Act of 1968. This legislation places the military again in the forefront of judicial modernization and insures that military justice will continue to be a model of judicial excellence.

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35. United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954); United States v. Biesak, 14 C.M.R. 132 (C.MA. 1954). For a discussion of the role and the training of law officers, see Delmar Karlen, *How the Army Trains Its Judges*, 34 U. MO. AT KAN. CITY L. REV. 271 (1966).

36. 10 U.S.C. § 841(a) (1956).

37. United States v. Talbott, 31 C.M.R. 32 (C.M.A. 1962); ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS 11 (1960).

38. *See* Sherman, *Military Justice*, 114 Cong. Rec. H2321 (daily ed. Mar. 27, 1968); Landau, *GI Justice: A Second-Class System*, THE EVENING NEWS (Harrisburg, Pa.), Sept. 14, 1967, at 7; Landau, *GI Justice: A Second-Class System*, THE EVENING NEWS (Harrisburg, Pa.), Sept. 16, 1967, at 15.

39. *See* Jacob Hagopian, *A Case of Free Speech in the Military and Due Process*, 113 Cong. Rec. A5434 (daily ed. Nov. 6, 1967); James Labar, *The Military Criminal Law System*, 50 A.B.A. J. 1069 (1964).

40. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

41. Such organizations as the American Bar Association, the Federal Bar Association, Brooklyn Bar Association, the Florida Bar, the State Bar of Georgia, the Jewish War Veterans of the United States of America, the Reserve Officers Association of the United States, New York County Lawyers Association, Veterans of Foreign Wars of the United States, Veterans of World War I of the United States of America, and the Committee on Military Justice of the Association of the Bar of the City of New York, indicated their support and desire for speedy passage of the bill. In addition, the Code Committee under Article 67(g) of the Code endorsed the bill. This committee consists of The Judge Advocates General of the Armed Forces and the judges of the Court of Military Appeals, all of whom have had many years of experience dealing with military law.

Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis

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Introduction

Women now represent approximately fourteen percent of the active duty military[1] and their presence in the military force structure is expected to increase as more positions are opened to them.[2] Because of military age restrictions, most women serving in the armed forces are at the prime child bearing age. Medical experts warn that, throughout their entire lives, women will be at greatest risk for psychiatric illness during the period following a birth.[3] Additionally, women are susceptible to the physical, mood and behavioral changes associated with the menstrual period. Negative premenstrual symptoms may occur after a woman's first menstruation, and these recurring symptoms, which generally appear in the last week of the menstrual cycle and disappear after the onset of menses (menstrual period),[4] are collectively known as Premenstrual Syndrome (PMS)[5] and most commonly strike women in this same age group.[6]

In their severest states, the psychological illnesses associated with birth and a woman's menstrual cycle may serve as the basis for a complete or partial defense to criminal charges and even milder versions of these maladies may be used in sentence mitigation. Although there are no reported military cases raising these defenses, both psychological illnesses have been used successfully in civilian courts and both are now recognized in their severest forms as mental disorders by the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM).[7]

Because of the rise in the number of women in the armed forces and the recognition of PMS and postpartum-related illnesses as bona fide mental maladies, judge advocates should be aware of these two mental illnesses and their potential as criminal defenses. Accordingly, this article reviews the development of PMS and postpartum illnesses as recognized mental disorders, discusses their use as criminal defenses and in sentence mitigation in various criminal jurisdictions, and examines their potential as defenses within the military justice system.

Premenstrual Syndrome

References to symptoms characteristic of PMS date back to the sixth century B.C. and began to appear in American medical literature as early as 1931.[8] Premenstrual Syndrome itself was first recognized by the medical profession as a psycho-physio-

1. Paul Richter, *Loss of Women Recruits a Warning Sign for Military*, L.A. TIMES, Nov. 29, 1999, at 1.

2. Rowan Scarborough, *Women Get More Army Jobs*, WASH. TIMES, Dec. 3, 1999, at 1 (reporting that the Army plans to open more jobs to women and is "[R]ecruiting a higher percentage of women. The goal today is 20 percent of 80,000 annual inductees, up from 12 percent in 1986."); *cf.* David Wood, *Today's Military Personnel Putting New Face On Image*, CLEV. PLAIN DEALER, Dec. 12, 1999, at 4K ("About 90 percent of all military career fields are open to women . . . .").

3. SHARON L. ROAN, POSTPARTUM DEPRESSION: EVERY WOMAN'S GUIDE TO DIAGNOSIS, TREATMENT & PREVENTION ix (1997) ("[N]ot enough women of childbearing age realize it is during the postpartum period that they are at highest risk for mental illness . . . ."); DAVID G. INWOOD, *Introduction* to RECENT ADVANCES IN POSTPARTUM PSYCHIATRIC DISORDERS ix (1985) ("[W]omen are at the highest risk of their entire life for psychiatric hospitalization during the immediate postpartum period."). The postpartum period is approximately the first year after birth. ROAN, *supra* at 2.

4. "Many people refer to the days of discharge as their 'period.' Technically the discharge is referred to as menses." Howard Seiden, *Why PMS Is So Difficult To Define*, TORONTO STAR (Canada), Mar. 25, 1993, at D2.

5. Sally K. Severino & Eva Rado, *Legal Implications of Premenstrual Syndrome*, 9 AM. J. FORENSIC PSYCH. 19 (1988). Premenstrual Syndrome "symptoms appear at midcycle, just after ovulation, peak the week before the monthly period begins and end just as bleeding starts." Sally Squires, *Prozac Joins Weapons Battling Premenstrual Syndrome*, ARIZ. REPUBLIC, June 13, 1995, at C2.

6. Squires, *supra* note 5, at C2 ("Women in their 20s and 30s are the most common sufferers . . . ."); *see* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 716 (4th ed. 1994) ("Premenstrual symptoms can begin at any age after menarche, with the onset most commonly occurring during the teens to late 20s. Those who seek treatment are usually in their 30s.") [hereinafter DSM-IV]; KAREN J. CARLSON ET AL., THE HARVARD GUIDE TO WOMEN'S HEALTH 508 (1996) (stating that the most serious cases of PMS affect women between 26 and 35); KATHARINA DALTON, ONCE A MONTH: UNDERSTANDING AND TREATING PMS 14 (6th ed. 1999) (stating that PMS "affects only women of childbearing age"); NIELS H. LAURENSEN & EILEEN STUKANE, PMS, PREMENSTRUAL SYNDROME AND YOU: NEXT MONTH CAN BE DIFFERENT 60 (1983) (stating that PMS is "rare among teenagers, more noticeable during the twenties, and not only common but severe in the thirties."). Most women have their first period between the ages of 11 and 16 and their last period between the ages of 45 and 55. Seiden, *supra* note 4, at D2.

7. The DSM is used regularly by courts in criminal cases when the defendant's mental state is at issue. *See infra* note 119; Lee Solomon, *Premenstrual Syndrome: The Debate Surrounding Criminal Defense*, 54 MD. L. REV. 571, 576 (1995) ("The DSM is considered 'the bible of mental illness' and is utilized not only by therapists but also by . . . judges to identify and define the mentally ill.").

logical disorder in 1953.[9] In 1983, diagnostic guidelines for PMS were established in the United States.[10]

In 1986 PMS was proposed for inclusion in the APA revised third edition of the DSM (DSM-III-R), but the APA instead used the term late luteal phase dysphoric disorder (LLPDD), which "differed from PMS by 'a clear emphasis on mood and behavioral as opposed to physical symptoms.'"[11] The DSM-III-R included LLPDD in its appendix as a "proposed clinical diagnosis" and treated the PMS-like illness as a psychological disease.[12] Late luteal phase dysphoric disorder was the first time the DSM contained a diagnostic term linked to a menstrual cycle-related mental disorder.[13] Significantly, the most current version of the manual recognizes severe PMS to some extent as a mental disorder. Despite opposition from women's groups,[14] DSM-IV now includes premenstrual dysphoric disorder (PMDD)–a form of severe PMS–as a type of depressive disorder.[15] The DSM-IV distinguishes PMDD "from the far more common 'premenstrual syndrome'" in terms of the "characteristic pattern of symptoms, their severity, and the resulting impairment."[16] Although recognizing PMDD as a mental disorder, DSM-IV notes that insufficient information exists to include PMDD as an "official" category in the manual and instead includes PMDD as a proposal for a new category in DSM-IV's appendix.[17]

The DSM-IV lists the essential features of PMDD as symptoms that occurred regularly during the week before the onset of menses "in most menstrual cycles during the past year," "remit within a few days of the onset of menses (the follicular phase) and are always absent in the week following menses."[18] Further, a PMDD diagnosis requires that the symptoms "must cause an obvious and marked impairment in the ability to function socially or occupationally in the week prior to menses."[19] Finally, a diagnosis of PMDD requires that at least five of the following symptoms appear under the above circumstances, to include at least one from the first four:

> (1) markedly depressed mood, feelings of hopelessness, or self-deprecating thoughts
> (2) marked anxiety, tension, feelings of being "keyed up," or "on edge"
> (3) marked affective liability (such as, feeling suddenly sad or tearful or increased sensitivity to rejection)
> (4) persistent and marked anger or irritability or increased interpersonal conflicts
> (5) decreased interest in usual activities (such as, work, school, friends, hobbies)
> (6) subjective sense of difficulty in concentrating
> (7) lethargy, easy fatigability, or marked lack of energy
> (8) marked change in appetite, overeating, or specific food cravings
> (9) hypersomnia or insomnia
> (10) a subjective sense of being overwhelmed or out of control

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8. Recent Decisions, *Criminal Law–Premenstrual Syndrome: A Criminal Defense*, 59 NOTRE DAME L. REV. 253, 254-55 (1983).

9. *In re* Irvin, 31 B.R. 251, 260 (Bankr. D. Colo. 1983). In 1953, Dr. Katharina Dalton and Dr. Raymond Green published the first paper on premenstrual syndrome in medical literature, in the *British Medical Journal*. DALTON, *supra* note 6, at 2-3.

10. DALTON, *supra* note 6, at 96 ("The first conference convened in 1983 by the National Institute of Mental Health established diagnostic guidelines for PMS . . . ").

11. Solomon, *supra* note 7, at 577 & n.48 (citation omitted); *cf.* DALTON, *supra* note 6, at 96 (defining PMS as LLPDD).

12. DALTON, *supra* note 6, at 96 (stating that PMS was defined as LLPDD and "considered a psychological rather than hormonal disease").

13. Severino & Rado, *supra* note 5, at 24 ("Only in 1987 has [the APA's DSM] included a specific diagnostic term in its research appendix to connote a disorder related to the menstrual cycle.").

14. Sally Squires, *New Guide To Mental Illness*, WASH. POST (HEALTH), Apr. 12, 1994, at 10 ("Women's groups have complained because of the stigma associated with classifying premenstrual symptoms as a mental disorder."); *Severe PMS Called 'Depressive Disorder,'* WASH. POST, May 29, 1993 (stating that the National Organization of Women opposed "efforts to link women's hormonal cycles with mental disorders" because such a connection has not been proven, PMS diagnoses may be based on "a 'cultural myth,'" and such a diagnosis "[c]ould be used against women in child custody battles, job discrimination sits and other court battles"); *see* Recent Decisions, *supra* note 8, at 268 (relating to the "concerns of many feminists that acceptance of PMS as a legal defense could lead to an erosion of the advances women have made toward social equality").

15. Solomon, *supra* note 7, at 571; *see* DSM-IV, *supra* note 6, at 716 (describing PMDD as a severe form of PMS); Squires, *supra* note 14, at 10 ("[D]ecision to classify a severe form of premenstrual syndrome called premenstrual dysphoric disorder (PMDD) as a mental illness in the appendix."). *But cf.* CARLSON ET AL., *supra* note 6, at 509 (stating that PMDD "may or may not be the same as PMS").

16. DSM-IV, *supra* note 6, at 716.

17. *Id*. at 703.

18. *Id*. at 715. Menses refers to the time of discharge. Seiden, *supra* note 4, at D2.

19. DSM-IV, *supra* note 6, at 715.

> (11) other physical symptoms, such as breast tenderness or swelling, headaches, joint or muscle pain, a sensation of "bloating" (weight gain).[20]

Similarly. Dr. Katharina Dalton, one of the world's leading authorities on PMS,[21] defines it as "recurrence of symptoms before menstruation with complete absence of symptoms after menstruation."[22] These symptoms are varied and far too numerous to list in their entirety.[23] However, the symptoms themselves do not dictate a PMS diagnosis, rather it is the timing of the symptoms in relation to the menstrual cycle.[24]

Significantly for purposes of criminal law, in its severest form the symptoms of PMS may include psychosis and hallucinations.[25] However, Dalton opines that such symptoms are short-lived, lasting only one to two days and occurring just before menstruation."[26] Further, severe PMS is considered relatively rare.[27] The DSM-IV notes that PMDD strikes only three to five percent of premenopausal women.[28] Dalton cautions that "genuine cases [of PMS that should excuse criminal misconduct] are few and far between, and it is important to ensure that PMS is not made a universal defense."[29]

Although there is no complete agreement on the cause of PMS,[30] many experts—including Dr. Dalton—believe that PMS is hormonally based.[31] Other nonhormonal causal theories include "the rapid decline in a metabolite of a neurotransmitter; yeast overgrowth in the intestines; allergies; psychological stress";[32] "a separate mood disorder that somehow becomes synchronized with the [menstrual] cycle,"[33] and "a deficiency of the brain chemical serotonin . . . ."[34] The DSM-IV fails to positively identify the cause of this mental illness. However, mental disorders may have a number of possible causes,[35] but for purposes of criminal law it is the impact of

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20. *Id*. at 717.

21. Solomon, *supra* note 7, at 573 n.20 (stating Dr. Dalton has studied PMS for over 30 years, "has studied approximately 30,000 cases and written many books and articles regarding this disorder"); Recent Decisions, *supra* note 8, at 255 (listing Dr. Dalton as "a pioneer in the study and treatment of PMS").

22. DALTON, *supra* note 6, at 7 (emphasis deleted).

23. *Id*. at 29 (stating that "150 different symptoms have already been recorded"); CARLSON ET AL., *supra* note 6, at 509 (stating that it is comprised of "variety of symptoms").

24. DALTON, *supra* note 6, at 14, 29; *see* Severino & Rado, *supra* note 5, at 19 ("[T]he symptoms themselves have been considered less important than the timing of their appearance.").

25. DALTON, *supra* note 6, at 10; *see* DSM-IV, *supra* note 6, at 716 ("Delusions and hallucinations have been described in the late luteal phase of the menstrual cycle but are very rare.").

26. *Id.* ("Symptoms of migrane, psychosis, hallucinations, and alcoholic bouts tend to last only a day or two and come immediately before menstruation.").

27. CARLSON ET. AL., *supra* note 6, at 508 ("The most serious cases of PMS [affect] 1 to 5 percent of all women . . . .").

28. DSM-IV, *supra* note 6, at 716; *see also* Sally Squires, *Study Supports Use of Antidepressant for PMS*, WASH. POST (HEALTH), Sept. 30, 1997, at 8 (stating that "[a]ffects 3 to 5 percent of women of reproductive age"). Premenstrual symptoms "usually remit with menopause." DSM-IV, *supra* note 6, at 716.

29. DALTON, *supra* note 6, at 177.

30. Solomon, *supra* note 7, at 574 ("Nor do medical experts agree on the cause . . . ."). One legal commentator noted that medical experts did not agree on the case, treatment, or diagnosis of PMS, but did seem to agree that it "causes marked psychological anomalies." Recent Decisions, *supra* note 8, at 257-8.

31. Stacey Schultz, *Sparking PMS Pains: Calcium Deficiency Triggers Symptoms*, U.S. NEWS & WORLD REP., Sept. 7, 1998 (reporting that researchers from St. Luke's-Roosevelt Hospital Center in New York report that "[f]luctuations in the hormones that regulate calcium levels over the course of a menstrual cycle may set off a host of PMS symptoms"); *see* DALTON, *supra* note 6, at 1-2, 67-80; LAUERSEN & STUKANE, *supra* note 6, at 48 ("PMS is triggered by hormonal irregularities . . . ."); Dr. Peter H. Gott, *Supplemental Hormones Ease PMS Symptoms*, ARIZ. REPUBLIC, Oct. 5, 1995, at E4 ("PMS is probably due to a hormone imbalance . . . ."); *cf.* CARLSON ET AL., *supra* note 6, at 508 (noting the "enormous hormonal changes associated with the menstrual cycle").

32. Solomon, *supra* note 7, at 574.

33. Susan Okie, *New Study Challenges PMS Case*, WASH. POST, Apr. 25, 1991, at A1 (noting that the "prevailing view" is that PMS is caused by "hormone changes that occur during a woman's menstrual cycle"). Although positing that their study "shows PMS is not triggered by hormonal changes late in the menstrual cycle," the researchers conceded that PMS "still could be tied to hormonal events in the first half of the cycle." *Id.* at A24.

34. Laura Bell, *PMS: Still a Mystery to Doctors, Sufferers: For All Its Infamy, Premenstrual Syndrome Remains Entangled in Misconceptions*, THE ORLANDO SENTINEL, Aug. 20, 1993, at E1.

35. Ralph Slovenko, *The Meaning of Mental Illness in Criminal Responsibility*, 5 J. LEGAL MED. 1, 5 (1984) ("Mental disorders now include those which not only have an organic or physical cause, but also the purely functional disorders."); *cf.* DSM-IV, *supra* note 6, at xxi-xxii ("[W]hatever its original cause, [to meet the DSM definition of a mental disorder, the illness] must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual.").

the mental illness on the accused's cognitive abilities that is of legal significance and not the root cause of the mental malady.[36]

The PMS defense has been no stranger to the European court system. European courts have seen menstruation-based defenses since at least 1845, when an English woman, Amy Shepherd, was found not guilty of shoplifting at Carlisle Quarter Sessions.[37] In 1851 and 1865 respectively, two women were acquitted of murder as a result of "temporary insanity from suppression of the menses."[38] Premenstrual Syndrome is reported to have been used as a temporary insanity defense in France.[39] Closer to home, in Canada the defense has been used successfully since the early 1980s. Early PMS defenses in Canadian courts resulted in dismissal of shoplifting charges and sentence leniency for a defendant convicted of assault.[40]

The modern resurgence of the PMS defense can be traced to three English cases tried in the early 1980s. The first case was *Regina v. Craddock.*[41] Charged with murdering a fellow barmaid, Sandie Craddock was a twenty-nine year-old woman with a record of thirty convictions and twenty-five prior suicide attempts.[42] Using Craddock's diaries and prison records, Craddock's attorney and Dr. Dalton were able to establish all of Craddock's criminal activity occurred at "cycles of 29.04 plus or minus 1.47 days" and her suicide attempts "occurred at intervals of 29.55 plus or minus 1.45 days."[43] Because of this evidence of diminished capacity, the Crown reduced Craddock's charge to manslaughter, of which she was convicted.[44] However, in light of Dr. Dalton's PMS diagnosis and successful treatment of Craddock with progesterone, the court only sentenced the defendant to probation, conditioned upon continued treatment.[45]

Craddock changed her name to Smith and generally stayed out of trouble until her progesterone dosage was reduced to its lowest level since treatment began. During her next paramenstrum, Smith threatened to kill a police officer on two separate occasions and was apprehended while lying in wait for the officer while armed with a knife.[46] Although Smith was convicted of all charges, the court again sentenced the defendant to probation, relying on Smith's PMS in mitigation.[47] On appeal, the court upheld the conviction and sentence, recognized PMS as a legitimate mitigating factor at sentencing, but found "it contrary to the purpose of criminal law to allow a defendant to commit a violent act and then be acquitted and discharged while still a threat to society."[48]

In a highly publicized murder case decided the day after *Smith*, Dr. Dalton again testified that the defendant, Christine English, who had killed her lover by pinning him to a utility pole with her car, committed the crime while under the influence of PMS.[49] In *Regina v. English*, the Crown reduced the charge to manslaughter due to the defendant's "diminished capacity," to which English pled guilty.[50] At sentencing, the

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36. *Cf.* Slovenko, *supra* note 35, at 1 (noting that the impact of the predicate mental disease or defect determines criminal responsibility).

37. Thomas L. Riley, *Premenstrual Syndrome as a Legal Defense*, 9 HAMLINE L. REV. 193, 194, n.5 (1986) (citing d'Orlan, *Medicolegal Aspects of the Premenstrual Syndrome*, 30 BRIT. J. HOSP. MED. 404, 406 (1983)).

38. *Id.*

39. Judith DiGennaro, *Sex-Specific Characteristics as Defenses to Criminal Behavior*, 6 CRIM. JUST. J. 187, 190 (1982); *see* Solomon, *supra* note 7, at 581; JO ANN C. FRIEDRICH, THE PRE-MENSTRUAL SOLUTION: HOW TO TAME THE SHREW IN YOU 85 (1987) ("In France, PMS is officially recognized as a cause of temporary insanity . . . ."). *But cf.* Recent Decisions, *supra* note 8, at 253 n.3 ("[S]everal commentators have noted that the French legal system recognizes PMS as a form of temporary insanity. None, however, has cited a French authority to support the proposition.").

40. DiGennaro, *supra* note 39, at 187. The assault conviction resulted in a sentence of probation "on the basis that the assault was in large part caused by PMS." *Id. See Solomon*, *supra* note 7, at 582 (noting that an Alberta, Canada, woman acquitted of shoplifting after presenting a PMS defense); *see* Severino & Rado, *supra* note 5, at 28 (noting that shoplifting charges were dropped in an Ottawa court in 1980 and a Toronto court in 1981 after evidence was presented that the defendants suffered from PMS).

41. 1 C.L. 49 (1981).

42. Recent Decisions, *supra* note 8, at 258. She had also been committed to mental hospitals on several occasions. *Id.*

43. DALTON, *supra* note 6, at 174; *see* Recent Decisions, *supra* note 8, at 259.

44. Recent Decisions, *supra* note 8, at 259.

45. *Id.*

46. *Id.* at 259-60. Smith threatened the police officer because of a three-year-old insult. *Id.* at 260.

47. *Id.*

48. *Id.* at 261.

49. *Id.* Dalton "testified that English suffered from PMS which caused her to become irritable and aggressive, and to lose self-control." *Id.* Further, the defense established that the defendant had probably suffered from PMS for the previous 15 years. *Id.* The case was highly publicized in the British press. *Id.* at 261 n.68.

court received evidence of PMS in mitigation, concluded "that English had acted under 'wholly exceptional circumstances,'" and "granted English a twelve-month conditional discharge and banned her from driving for one year."[51] Since this trilogy of cases, the British family and criminal courts have accepted PMS as a mitigating circumstance for most offenses.[52]

Although PMS was raised in earlier civil cases,[53] the first reported use of PMS in an American criminal case occurred in *People v. Santos*.[54] In Santos, a woman charged with child battering raised PMS as a defense, but the case was ultimately resolved through a plea bargain.[55] At a pre-trial hearing, Santos admitted beating her child, but claimed that she suffered a black out as a result of PMS. Significantly, in response to the defense argument that evidence of Santos' PMS was relevant on the issue of criminal intent, the judge ruled that such evidence would be admissible at trial.[56]

The PMS defense has been used successfully as a complete defense at least once in the United States, and the acquittal was met with heavy criticism.[57] After being pulled over by a Virginia state trooper, Geraldine Richter was verbally hostile and attempted to kick the officer in the groin.[58] She refused field sobriety tests, cursed at the troopers who attempted to handcuff her, and kicked the breathalyzer table once at the Fairfax County jail.[59] Although Richter's breathalyzer test indicated that she was legally intoxicated, the judge found her not guilty after receiving expert testimony from two witnesses concerning the affects of PMS and attacking the accuracy of the Breathalyzer, respectively.[60] The defense presented evidence that "women absorb alcohol more quickly during their premenstrual cycle" and that her perceived threat to the welfare of her children, who were also in the car, aggravated her situation.[61] A gynecologist who testified for the defense stated that Richter had PMS "but she could have controlled it if she [were] not being threatened with the welfare of her children . . . ."[62]

Postpartum Psychosis

Postpartum psychosis has been recognized by members of the medical profession since at least the fourth century B.C.[63] However, the first comprehensive study of postpartum medical maladies did not occur until 1858.[64] Recognition that women were psychologically affected by birth found its way into the Infanticide Acts of England in 1922 and 1938. This legislation

50. *Id.* at 261.

51. *Id.*

52. DALTON, *supra* note 6, at 172-73.

53. Recent Decisions, *supra* note 8, at 253 n.4 (noting various decisions beginning in 1966 concerning distribution of drugs designed to treat PMS, disability benefits for a PMS sufferer, a successful defense to revocation of a real estate broker's license, a wrongful death action using a PMS defense, and a child custody dispute in which evidence of PMS was introduced to attack the mother's competency) (citations omitted).

54. *Id.* ("*Santos* was the first attempt to use the PMS defense in a criminal case in the United States . . . .") (discussing People v. Santos, No. 1KO46229 (N.Y. Crim. Ct. Nov. 3, 1982)).

55. *Id.* at 253 (noting that charged with a felony, Santos pled guilty to a misdemeanor).

56. *Id.* at 262. Although convicted of the misdemeanor offense of harassment, Santos suffered no punishment. *Id.* (no incarceration, probation, or fine).

57. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 54-55 (1994) (criticizing the acquittal, calling the result wrong and "a setback for feminism"); DeNeen L. Brown, *PMS Defense Successful in Va. Drunken Driving Case*, WASH. POST, June 7, 1991, at A16 ("Assistant Commonwealth's Attorney . . . called the PMS argument 'ridiculous' . . . ."); *see* Solomon, *supra* note 7, at 587 (noting that the "case was controversial").

58. Brown, *supra* note 57, at A1.

59. *Id.*

60. *Id.* at A16 ("[O]ne of whom testified about how PMS affects some women's behavior and another who testified that the Breathalyzer reading was skewed because Richter held her breath . . . .").

61. *Id.*

62. *Id.*; *see* DALTON, *supra* note 6, at 27 ("Tolerance to alcohol also varies during the cycle in PMS sufferers. Although most days they can usually enjoy their favorite drink with no ill effects, during the premenstruum even a small amount cases intoxication.").

63. ROAN, *supra* note 3, at 24 ("Postpartum psychosis was described by Hippocrates in the fourth century B.C. as a severe case of insomnia and restlessness that began on the sixth day in a woman who bore twins."); *see* DAVID G. INWOOD, *The Spectrum of Postpartum Psychiatric Disorders*, *in* RECENT ADVANCES IN POSTPARTUM PSYCHIATRIC DISORDERS 2 (Dr. David G. Inwood ed., 1985) ("Physicians since antiquity have retrospectively recognized the association between childbirth and subsequent development of a spectrum of postpartum psychiatric disorders.").

64. ROAN, *supra* note 3, at 24. The study was conducted by French doctor Louis Victor Marce, whose list of symptoms included "melancholy, anemia, weight loss, constipation . . . menstrual abnormalities . . . confusion, faulty memory, and fogginess . . . ." *Id.*

reduced the maximum charge a mother could face for killing her baby from murder to manslaughter-like infanticide if the child was less than one year old and "if 'at the time of the act or omission casing death, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth.'"[65]

In 1952, the APA published its first edition of the DSM which failed to link childbearing with psychological illness.[66] The DSM's failure to adequately address postpartum psychiatric disorders continued until the APA's most recent edition of the manual. Indeed, DSM-III, published in 1980, noted that "there is no compelling evidence that postpartum psychosis is a distinct entity."[67] Although it failed to discuss the cause of postpartum illness and it "excludes postpartum depression, psychosis, anxiety, or any of the other observed variations as separate and distinct illnesses."[68] The DSM-IV did recognize postpartum illness as a separate mental disorder and recognized the risk of infanticide from severe postpartum depression (PPD) and psychosis.[69] However, onset of the condition must begin within four weeks of birth.[70]

The mental illness that follows the birth of a child can be broken down into three general categories. First, the majority of new mothers suffer from a period of sadness[71] within days of birth. Known as postpartum blues, maternity blues or baby blues, this form of postpartum illness usually begins three to five days after birth and lasts approximately ten to fourteen days.[72] Most medical experts believe that the blues are caused by the rapid drop in hormonal levels following birth.[73] During the third trimester, a woman's estrogen and progesterone (hormone) levels rise to their highest point and then plunge to nearly zero within twenty-four hours after the placenta is removed.[74] Common symptoms associated with the blues include uncontrolled and spontaneous crying, mood swings, insomnia, fatigue, confusion, difficulty concentrating, irritability, and feelings of loneliness.[75] Approximately seventy to eighty percent of all new mothers suffer to some extent from this condition.[76]

The second severest category of postpartum illness is PPD. This psychiatric disorder strikes approximately ten percent of all new mothers, which equates to over 300,000 women annually in the United States.[77] It may begin suddenly or start as maternity blues and gradually develop into a mild to severe form of depression.[78] Postpartum depression is characterized by abrupt mood swings in which the mother may rapidly shift from feeling miserable to feeling happy and then miserable again.[79] Postpartum depression usually develops between the second and fourth week after birth, and commonly lasts for

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65. C.L. Gaylord, *Sunday Morning*, CASE & COMMENT 29, 30 (Nov.-Dec.1988); *see* Clark Brooks, *'Baby Blues' Gone Berserk*, SAN DIEGO UNION-TRIB., Nov. 13, 1994, at A1, A22 ("At most, the mother may be convicted of infanticide, which carries the same penalty as manslaughter."). The Infanticide Act, and its presumption of a postpartum psychological illness when a mother kills her child of less than twelve months, remains the law of England. Brenda Barton, *Comment: When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 596 (1998).

66. ROAN, *supra* note 3, at 24 (stating that the DSM is "without any mention of childbearing and its relationship to psychiatric illness"). The DSM is "a kind of 'bible' for doctors that describes all known psychiatric disorders and how to treat them . . . ." *Id.*

67. *Id.* at 25. DSM-III-R, published in 1987, was a slight improvement, "[b]ut its only mention of postpartum illness [was] to practically dismiss it because of its complexity." *Id.*

68. *Id.* ("[M]any health professionals and women consider this omission disappointing . . . ."). *Id.*

69. DSM-IV, *supra* note 6, at 386-7 (Postpartum Onset Specifier); *see* Barton, *supra* note 65, at 603 ("[F]or the first time in history, the American Psychiatric Association recognized postpartum onset specified as a mental condition.").

70. DSM-IV, *supra* note 6, at 386.

71. ROAN, *supra* note 3, at 9 (stating that it was "a period of sadness"); *see* Susan H. Greenberg & Joan Westreich, *Beyond The Blues*, NEWSWEEK (SPECIAL ISSUE), SPRING/SUMMER 1999, at 75 (stating that it was a "short-lived period of tearfulness and mood swings").

72. ROAN, *supra* note 3, at 8-9; DSM-IV, *supra* note 6, at 386 (lasting from three to seven days).

73. ROAN, *supra* note 3, at 10 ("The likelihood that blues will peak on the third to fifth day suggests a biological case, such as the rapid decline of hormones that occurs as a woman's body adjusts from a pregnant to a nonpregnant state."); Michael W. O'Hara, *Psychological Factors in the Development of Postpartum Depression*, *supra* note 3, at 43 ("[T]here seems to be widespread agreement that the blues are rather specific to the early postpartum period and are probably related to decreases in levels of hormones that rise significantly during pregnancy.").

74. ROAN, *supra* note 3, at 110. The placenta is usually removed within thirty minutes of the baby's delivery. *Id.*

75. *Id.* at 9; *see* ANN DUNNEWOLD & DIANE G. SANFORD, POSTPARTUM SURVIVAL GUIDE 12 (1994) (describing "tearfulness, fatigue, insomnia, exhaustion, and irritability"); *accord* INWOOD, *supra* note 63, at 11.

76. ROAN, *supra* note 3, at 9; *see* DUNNEWOLD & SANFORD, *supra* note 75, at 12 (50-80%); *see* INWOOD, *supra* note 63, at 11 (stating that it occurs "in at least 50 percent of all women").

77. ROAN, *supra* note 3, at 11-12; *see* INWOOD, *supra* note 63, at 13 (stating that it "develop[s] in more than 10 percent of postpartum women").

months if not treated.[80] Some women become suicidal and think about hurting their babies, although the vast majority of women suffering from PPD do not harm their infants.[81]

The severest form of postpartum illness is the postpartum psychosis. Such a psychosis is considered "a true medical-psychiatric emergency" because the psychological disorder may be characterized by delirium, mania, hallucinations, delusions and a substantial risk that the mother may attempt to kill herself or her baby.[82] Women with a postpartum psychosis report having hallucinations or hearing voices and sounds that do not exist.[83] The DSM-IV specifically recognizes the threat to the baby that a psychosis presents, stating: "Infanticide is most often associated with postpartum psychotic episodes that are characterized by command hallucinations to kill the infant or delusions that the infant is possessed . . . ."[84] The psychosis usually begins to develop by the third to fourteenth day after birth.[85] The psychosis is difficult to predict; approximately seventy percent of postpartum women who develop a psychosis have no prior history of psychiatric problems.[86]

Fortunately postpartum psychosis is rare, occurring in only one to three of every thousand births.[87] However, women who suffer from PPD or a postpartum psychosis are likely to experience the illness again. The likelihood of recurrence of a psychosis following a subsequent birth is reported to be as high as seventy-five to ninety percent.[88] If treated properly, the mother may recover from the psychosis quickly.[89] Most women recover fully within a year of birth.[90] However, if not treated properly, the symptoms associated with a psychosis may last for two or three years.[91]

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78. ROAN, *supra* note 3, at 12. Sometimes medical professions fail to notice that a patient has progressed from maternity blues to PPD. CARL S. BURAK & MICHELE G. REMINGTON, THE CRADLE WILL FALL 120 (1994) ("The more serious depressions get lumped in with the baby blues and are not always appreciated.").

79. DUNNEWOLD & SANFORD, *supra* note 75, at 23 ("A women will feel great, then miserable, then good, then crummy, switching from high to low with surprising speed."); *see* ROAN, *supra* note 3, at 12 (specifying "rapid mood swings"). The rapid mood swings distinguishes PPD from maternity blues. DUNNEWOLD & SANFORD, *supra* note 75, at 23.

80. ROAN, *supra* note 3, at 12.

81. *Id.* at 12-13, 167-68; *see* DUNNEWOLD & SANFORD, *supra* note 75, at 24 ("Suicidal feelings, or thoughts about harming the baby, can haunt a woman . . . ."); Greenberg & Westreich, s*upra* note 71, at 75 ("Though most mothers with PPD would never act on those fantasies [of hurting their babies], they can't stop thinking them.").

82. INWOOD, *supra* note 63, at 6-7; ROAN, *supra* note 3, at 16-17; Greenberg & Westreich, *supra* note 71, at 75 ("Since it can lead to infanticide, it is considered a 'psychiatric emergency' . . ."); *see e.g.* BURAK & REMINGTON, *supra* note 78, at 97 (stating that mother while suffering from postpartum psychosis shot and killed her baby and then shot herself, but survived).

83. DUNNEWOLD & SANFORD, *supra* note 75, at 13 (stating that it was possible to "see or hear things that are not there"); Joel Stashenko, *Hospitals Join Fight Against "Baby Blues,"* TIMES UNION (Albany N.Y.), Sept. 29, 1997, at B2 (stating that sufferers are "beset by hallucinations and delusions"); *see e.g.* People v. Molina, 249 Cal. Rptr. 273 (Cal. App. 2d 1988) (stating that the defendant who stabbed her infant experienced delusions and "auditory hallucinations which gave her commands"); Brooks, *supra* note 65, at A-1, A-22 (reporting that voices told the mother to smother baby); Patricia Davis, *Immigrant Is Ruled Insane in Slaying of Son, Daughter*, WASH. POST., Sept. 5, 1991, at D1, D5 (stating that the mother experienced hallucinations and heard voices). Beverly Bartek, who was found not guilty by reason of insanity in Nebraska after killing her daughter in 1986, reported hearing voices that told her to kill the infant. Marianne Yen, *Women Who Kill Their Infants: A Bad Case of "Baby Blues"?*, WASH. POST, May 10, 1988, at A3.

84. DSM-IV, *supra* note 6, at 386. The manual also notes that infanticide "can also occur in severe postpartum mood episodes without such specific delusions or hallucinations." *Id.*

85. ROAN, *supra* note 3, at 16; INWOOD, *supra* note 63, at 7.

86. INWOOD, *supra* note 63, at 7.

87. ROAN, *supra* note 3, at 16 (stating that it is "occurring in just one or two among one thousand births"); *see* DSM-IV, *supra* note 6, at 386 ("Postpartum mood . . . episodes with psychotic features appear to occur in from 1 in 500 to 1 in 1000 deliveries . . . ."); INWOOD, *supra* note 63, at 7 (stating that it occurs in "one to three per 1,000 births").

88. ROAN, *supra* note 3, at 200; *see* DSM-IV, *supra* note 6, at 387 ("Once a woman has had a postpartum episode with psychotic features, the risk of recurrence with each subsequent delivery is between 30% and 50%."); Brooks, *supra* note 63, at A22 ("[I]t's 50-50 the psychosis will recur."); *see*, *e.g.*, BURAK & REMINGTON, *supra* note 78, at 196 (reporting that Angela Thompson, who killed her second baby suffered from severe postpartum depression following the birth of her first child); Ronald Sullivan, *Jury, Citing Mother's Condition, Clears Her in Death of 2 Babies*, N.Y. TIMES, Oct. 1, 1988, at 29-30 (reporting that a New York woman experienced three successive psychotic episodes, killing two of her babies and attempting to kill the third). In comparison, the likelihood of PPD recurring is approximately 50%. ROAN, *supra* note 3, at 200; *see* Yen, *supra* note 83, at A3 ("Medical literature also suggests that the incidence of severe postpartum depression increases with the second child.").

89. ROAN, *supra* note 3, at 124 ("[I]f the symptoms of psychosis are treated early, they may be resolved within a single week.").

90. INWOOD, *supra* note 63, at 10 ("[M]ore than 80 percent recover fully within one year postpartum.").

91. ROAN, *supra* note 3, at 124 ("Without aggressive management and early detection, the symptoms may extend into the second and third year postpartum.").

There exists no uniformity of opinion as to the cause of postpartum depression and psychosis.[92] Many experts believe they are caused, at least in part, by hormonal changes.[93]

Another theory is that "postpartum mental illness is actually a latent illness triggered by birth."[94] Additionally, many other factors appear to increase the likelihood that a woman will experience PPD or a psychosis. Such contributing factors may include a history of depression,[95] a family history of postpartum reactions,[96] stressful life events,[97] a problematic baby,[98] fatigue,[99] and a history of victimization.[100]

Although the evidence is inconclusive, a link appears to exist between PMS and postpartum disorders. Many women who experience postpartum depression also suffered from bouts of PMS,[101] and PMS sufferers are considered to be at a greater risk of developing postpartum related psychological disorders.[102] Additionally, the risk of PMS increases when a woman has suffered an adverse postpartum reaction to birth.[103] In England, Dr. Katharina Dalton has used progesterone to successfully treat both types of illnesses.[104] However, other studies have failed to substantiate any positive affects associated with the use of that hormone[105] and not all women who experience postpartum psychosis have a history of PMS.[106]

As a criminal defense, postpartum psychosis has enjoyed mixed results.[107] Juries are considered skeptical of the defense because the victims are infants.[108] Even if they prove the existence of postpartum psychosis, defense counsel must meet the difficult task of persuading a jury that their client had "it bad enough to kill their child."[109]

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92. GREENBERG & WESTREICH, *supra* note 71, at 75 ("No one knows what causes PPD.")

93. Stashenko, *supra* note 83, at B2 (stating that the cause is unclear but several "factors are probably at play, including the dramatic hormonal changes that occur in woman after they give birth"); Brooks, *supra* note 65, at A-22 (stating that some researchers believe it is "cased by the hormonal upheaval of giving birth"); DUNNEWOLD & SANFORD, *supra* note 75, at 24 ("hormone-related"), at 63 ("many symptoms can be attributed to hormones"); GREENBERG & WESTREICH, *supra* note 71, at 75 ("It may be partly hormonal; after delivery, all women experience fluctuations in their levels of progesterone, estrogen, cortisol and prolactin."); Debra Cassens Moss, *Postpartum Psychosis Defense*, A.B.A. J., Aug. 1, 1988, at 22 (stating that some scientists believe "hormonal changes caused the illness")

94. Moss, *supra* note 93, at 22; *see* O'Hara, *supra* note 73, at 43 (stating that postpartum depression is not unique; it merely is the byproduct of a stressor (childbearing) impacting on a psychologically or biologically vulnerable woman); Dr. James A. Hamilton, *Guidelines For Therapeutic Management of Postpartum Disorders*, in *supra* note 3, at 89 (reporting that the minority position is merely "a trigger . . . that mobilizes the previously latent illness and makes its symptoms overt").

95. GREENBERG & WESTREICH, *supra* note 71, at 75; *see* O'Hara, *supra* note 73, at 51 (linking it to personal or family history of depression).

96. DUNNEWOLD & SANFORD, *supra* note 75, at 46.

97. ROAN, *supra* note 3, at 89 ("Studies have repeatedly shown that stressful life events often contribute to postpartum disorders."). Examples include moving, losing a job, death of a loved one, and financial problems. *Id.* Marital discord is also a significant risk factor. *Id.* at 97 ("The strength of the marriage is another important factor in whether a woman at risk for postpartum depression becomes ill and/or how easily she recovers."). Poverty and being a single mother also increase the risk of postpartum illness. *Id.* at 99; *accord* DUNNEWOLD & SANFORD, *supra* note 75, at 47.

98. ROAN, *supra* note 3, at 92 ("Having an infant who is premature, sick, colicky, a poor sleeper, or frequently fussy constitutes an important risk factor for depression.").

99. *Id.* at 96 ("Fatigue is an important risk factor in postpartum illness.").

100. *Id.* at 100 (listing past emotional, physical or sexual abuse as a factor).

101. *Id.* at 117 ("It is common for women with postpartum mood disorders to report having suffered from PMS."); *see* CARLSON ET AL., *supra* note 6, at 508 ("About a third of women with PMS who also have children have a history of mild to severe postpartum depression, which is twice the rate in the normal population."); *see* Burak & Remington, *supra* note 78, at 137 (stating that the author suffered from postpartum psychosis previously had severe episodes of PMS).

102. ROAN, *supra* note 3, at 6 ("[W]omen who experience premenstrual syndrome (PMS) are at increased risk of developing postpartum depression."); *see* DUNNEWOLD & SANFORD, *supra* note 75, at 46 (listing PMS as a risk factor).

103. DUNNEWOLD & SANford, *supra* note 75, at 63 ("For reasons that are not fully understood, clinical accounts suggest that once a woman experiences a postpartum reaction, her chance of experiencing PMS also rises, even if she never had any prior premenstrual symptoms."); DSM-IV, *supra* note 6, at 716 ("Females who have had severe postpartum Major Depressive, Manic, or psychotic episodes may also be at greater risk for severe premenstrual dysphoric mood changes.").

104. ROAN, *supra* note 3, at 117 ("Her studies–both in the premenstrual period and in the postpartum period–claim to show mood improvement in women who receive progesterone.").

105. *Id.* Further, blood tests on women with severe cases of PMS have not shown any progesterone deficiencies. *Id*

106. *See, e.g.*, Burak & Remington, *supra* note 78, at 196-97 (stating that Angela Thompson who drowned her baby had no prior history of PMS).

107. *See id.* at 185 (stating that a Penn State University professor located 18 infanticide cases in a five year period that relied on an "altered postpartum mental state" as a defense; nine resulted in acquittals).

Nonetheless, several defendants relying on a postpartum psychosis defense have achieved acquittals in various state courts.[110] A California judge overturned a jury verdict finding Sheryl Massip guilty of second degree murder and acquitted the defendant on temporary insanity grounds.[111] Massip alleged that she suffered from a postpartum psychosis when she ran over her six-week-old son with the family Volvo.[112] In New York, a jury acquitted Ann Green of two murder charges and an attempted murder charge after hearing evidence that she suffered from postpartum psychosis at the time of the misconduct.[113] Green had admitted suffocating her first baby in 1980 and her second in 1982, and further admitted to attempting to smother her third baby in 1985.[114]

Other defendants have relied on evidence of severe postpartum illness to obtain lenient sentences.[115] In response to expert evidence that the defendant, Latrena Pixley, suffered from postpartum depression at the time she suffocated her six-week-old daughter, a District of Columbia judge only sentenced Pixley to serve weekends in jail for three years.[116] Pixley, who pled guilty to second-degree murder, could have received a sentence of imprisonment between fifteen years and life.[117]

To the extent a trend exists in unsuccessful postpartum psychosis defenses where compelling psychiatric evidence exists, it is when the mothers (defendants) initially concoct kidnapping stories to mask the death.[118] Under such circumstances prosecutors point to the kidnapping story as proof of premeditation and rational acts.[119]

Hormonal Defenses Under Military Law

Mental Responsibility

The military's insanity standard is contained at Article 50a of the Uniform Code of Military Justice. That provision of military law provides:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.[120]

To establish the defense of lack of mental responsibility, the accused has the burden of proof by clear and convincing evidence,[121] which has been defined as "lying somewhere between 'preponderance of the evidence' and 'beyond a reasonable

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108. Brooks, *supra* note 65, at A-22 ("Jurors are particularly skeptical of postpartum psychosis defenses . . . because the victims are babies."); *see* Moss, *supra* note 93, at 22 (stating that a defense counsel in Sheryl Massip case was "apprehensive about how the jurors will view the case, since they could be moved by 'passion and sympathy' for the child").

109. Brooks, *supra* note 65, at A-22 (citing San Diego defense counsel Jesse Gilbert).

110. Sabrina v. Collins, C.A. No. 17235, 1995 Ohio App. LEXIS 5149, *5 (Ohio Ct. App. Nov. 22, 1995) (stating that in 1981, an Ohio defendant who had killed her infant son was found not guilty by reason of insanity after being diagnosed as suffering from postpartum depression with psychotic features); Davis, *supra* note 83, at D1 (reporting that a Virginia judge found a Cambodian immigrant mother, who suffered from postpartum psychosis, not guilty by reason of insanity in the strangulation death of her 11-month-old daughter and four-year-old son); Yen, *supra* note 83, at A3 (reporting a Nebraska woman found not guilty by reason of insanity after killing her daughter).

111. Debra Cassens Moss, *Postpartum Psychosis Defense Succeeds,* A.B.A. J., Feb. 1989, at 40.

112. *Id.*

113. Sullivan, *supra* note 88, at 86.

114. *Id.* at 29-30.

115. *See, e.g.*, Brooks, *supra* note 65, at A22 (reporting that a San Diego woman who attempted to smother baby while suffering from postpartum psychosis sentenced to six years probation).

116. Paul Duggan, *Leniency in a Baby's Death,* WASH. POST, June 5, 1993, at A1.

117. *Id.*

118. Yen, *supra* note 83, at A3 ("In infanticide cases accompanied by a kidnapping story . . . the defense has been less effective . . . ."); *see* Moss, *supra* note 93, at 22 ("When women charged with such killings originally tell police the children were kidnapped, prosecutors and judges may cite it as evidence that the crime was premeditated.").

119. Yen *supra* note 83, at A3. However some mental health professionals argue that the kidnapping stories are a way of coping with the death. *Id.* (reporting that Dr. Eva Ebin, a psychiatry professor, opines that "the elaborate [kidnapping] stories may be 'a trick of the mind. It's a dissociative reaction. It's wishful thinking that they hadn't done it. They need to believe it in order to go on'").

120. UCMJ art. 50a(a) (1998).

doubt . . . .'"[122] However, the government "must still sustain its initial burden of establishing, beyond a reasonable doubt, every element of the offense—including *mens rea* [and] [t]he burden of disproving elements of the offense never shifts to the defense."[123] The military's insanity test is virtually identical to its federal counterpart[124] and is similar to the M'Naghten standard.[125]

Both the military and federal insanity tests require that the accused suffered from a mental disease or defect at the time of the crime and that such mental disease or defect be "severe." The initial inquiry in a mental responsibility defense then is whether a mental disease or defect exists. Unfortunately, there appears to be no definitive definition of these terms.[126] However, although not dispositive,[127] the reference source most widely relied upon within the criminal justice system to make this initial determination is the APA's DSM.[128] Further, for purposes of the military's mental responsibility standard, no substantive distinction exists between the terms mental disorder and mental illness and the statutory term mental disease or defect. "[I]t is the quality of the malady, not whether law and medicine attach the same label to it, that is significant."[129]

A "severe" mental disease or defect is a legal term of art,[130] but is not defined and is described almost exclusively in terms

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121. *Id.* art. 50a(b); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(b) (1998) [hereinafter MCM]; *see* United States v. Martin, 48 M.J. 820, 825 (Army Ct. Crim. App. 1998). The defense must establish *both* that the defendant suffered from a severe mental disease or defect *and* that such mental condition caused him "unable at the time of the crime to appreciate the nature and quality or the wrongfulness of his acts." United States v. Reed, 997 F.2d 332, 334 (7th Cir. 1993) (sustaining conviction, the court noted that the defendant admitted "that he knew [his] voices were telling him to do something wrong"). Merely establishing that the defendant was suffering from a severe mental disease or defect at the time of the crime is not enough. *Id.*

122. United States v. Dubose, 47 M.J. 386, 388 (1998) (citation omitted); *see* United States v. Jones, NMCM 94 00485, 1999 CCA LEXIS 137, at *12 (N.M. Ct. Crim. App. May 7, 1999) (citations omitted).

123. United States v. Berri, 33 M.J. 337, 342-43 (C.M.A. 1991).

124. *Martin*, 48 M.J. at 822 ("substantively identical"); United States v. Lewis, 34 M.J. 745, 750 (N-M.C.M.R. 1991) ("virtually identical"); *see generally* 10 U.S.C.A. § 17 (West 2000). Indeed, Article 50a and 10 U.S.C. § 17 are both products of the Insanity Defense Reform Act of 1984. *Berri*, 33 M.J. at 343 n.12; *Lewis*, 34 M.J. at 749.

125. Lieutenant Colonel Donna M. Wright, *"Though This Be Madness, Yet There Is Method In It": A Practitioner's Guide to Mental Responsibility and Competency to Stand Trial*, ARMY LAW., Sept. 1997, at 20; *cf.* United States v. Bennett, 29 F. Supp. 2d 236, 238 (E.D. Pa. 1997) ("Where the M'Naghten standard prevails, as in the Insanity Defense Reform Act . . . ."). The original M'Naghten standard required that the defendant be "'laboring under such a defect or reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.'" 10 CLARK & FINNEY 200, 8 ENG. REP. 718 (1843) *cited in* Ralph Slovenko, *The Meaning of Mental Illness in Criminal Responsibility*, 5 J. LEGAL MED. 1 n.1 (1984). The military and federal requirement for a "severe" mental disease or defect is the only substantive difference between it and the M'Naghten standard.

126. DSM-IV, *supra* note 6, at xxi ("[N]o definition adequately specifies precise boundaries for the concept of 'mental disorder.'"). Recently, the Surgeon General defined "mental disorders as diagnosable conditions that impair thinking, feeling and behavior and interfere with a person's capacity to be productive and enjoy fulfilling relationships." Jeff Nesmith, *Mental Illness Often Ignored*, ATLANTA J. CONST., Dec. 14, 1999, at A1, A21. However, this definition includes within its ambit mental illnesses of "varying severity." *Id.* at A21.

127. United States v. DiDomenico, 985 F.2d 1159, 1168 n.5 (2d Cir. 1993) (Ward, J., dissenting) ("[T]hat a defendant is suffering from a disorder included in DSM-III-R is not dispositive of the legal matter."). Indeed, DSM-IV warns that "[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency." DSM-IV, *supra* note 6, at xxvii.

128. Slovenko, *supra* note 35, at 5; *see, e.g.*, United States v. Young, 43 M.J. 196, 198 (1995) (stating that government appellate counsel and court referred to DSM-IV, finding that Post-traumatic Stress Disorder was a mental disorder); *Lewis*, 34 M.J. at 745 (reviewing DSM-III-R as part of court's analysis); United States v. Jones, NMCM 94 00485, 1999 CCA LEXIS 137 (N.M. Ct. Crim. App. May 7, 1999) at *4-*14 (stating that the accused was diagnosed with bipolar disorder under criteria in DSM-III-R), *14 (reporting that appellate court rejects diagnosis of trial expert, in part, because it was "not in accord with appropriate reference to the DSM-III-R"); United States v. Scholl, 166 F.3d 964, 970 (9th Cir.), *cert. denied*, 120 S. Ct. 176 (1999) (reporting that district court relied on DSM-IV to permit limited expert testimony on compulsive gambling); Commonwealth v. Comitz, 530 A.2d 473, 477-8 (Pa. Super. Ct. 1987) (stating that the DSM-III was reviewed in case relying on postpartum depression as a defense).

129. United States v. Van Tassel, 38 M.J. 91, 92 n.1 (C.M.A. 1993). The critical inquiry in this area "is whether the *medical diagnosis* of an accused constitutes a malady that the *law labels* 'a severe mental disease or defect.'" *Id.* (emphasis in original).

130. Wright, *supra* note 125, at 21 ("['I]t is a legal term and not a medical term."). Military courts have recognized a bipolar disorder as a severe mental disease or defect. *Jones*, 1999 CCA LEXIS at *13; *cf.* United States v. Martin, 48 M.J. 820, 825 (Army Ct. Crim. App. 1998) (accepting "[a]s a matter of judicial economy" the government's concession that the accused's bipolar disorder was a severe mental disease or defect). At least one federal court has found paranoid schizophrenia to be severe mental disease or defect. United States v. Jain, 174 F.3d 892 (7th Cir. 1999). Another federal court found a serious case of post traumatic stress disorder to satisfy the federal insanity standard. United States v. Rezaq, 918 F. Supp. 463, 467 (D.D.C. 1996). In contrast, an "intermittent explosive disorder" has been rejected by a military court as a severe mental disease or disorder. United States v. Lewis, 34 M.J. 745, 751 (N-M.C.M.R. 1991). Similarly, an Antisocial Personality Disorder has failed to satisfy this requirement. United States v. Ogren, 52 M.J. 528, 536 (N.M. Ct. Crim. App. 1999) ("Such a diagnosis falls short of establishing a lack of mental capacity . . . ."); *see* United States v. Hurn, 52 M.J. 629, 634 (N.M. Ct. Crim. App. 1999) ("[T]he term 'severe mental disease or defect' does not include nonpsychotic personality disorders.").

of what is excluded from its definitional ambit. Congressional intent in using the term was "'to emphasize that non-psychotic behavior disorders or neuroses . . . do not constitute the [insanity] defense.'"[131] Rule for Courts-Martial (RCM) 706 provides further elaboration stating that "[t]he term 'severe mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects."[132] Although the statement of congressional intent and RCM 706 indicate that a psychosis meets this threshold requirement, in United States v. Benedict,[133] the Court of Military Appeals (COMA)[134] held that a mental illness need not rise to the level of a psychosis in order to form the basis for a defense of lack of mental responsibility.[135]

The defense must then prove that the severe mental disease or defect so impaired the accused's cognitive abilities at the time of the misconduct that the accused was unable to appreciate the nature and quality of her misconduct or appreciate that what the accused was doing was wrong. This may be established through the testimony of both lay witnesses and mental health professionals.[136] Indeed, expert testimony should be admissible to the effect that PMS or postpartum psychosis is a "severe" mental disease or defect and that it rendered the accused unable to appreciate the nature and quality or wrongfulness of her acts.[137] All relevant evidence, both objective and subjective, should be considered in making this determination.[138]

Prior to admitting expert testimony, however, the military judge must satisfy his or her "gatekeeping responsibility" of ensuring that the expert testimony or evidence "is not only relevant, but reliable."[139] This responsibility extends to all expert testimony regardless of how characterized.[140] At courts-martial, "[t]he primary locus of this obligation" is found in Military Rule of Evidence (MRE) 702.[141] This evidentiary standard contains three related requirements that: (1) the witness be "qualified as an expert by knowledge, training, or education . . .."; (2) the testimony involves "scientific, technical, or other specialized knowledge . . ."; and (3) such testimony serves to "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[142]

The first prong is satisfied by establishing that the witness has, by virtue of education, experience or some combination thereof, "knowledge or skill [that the panel members] lack."[143] The rule is permissive allowing "'[a]nyone who has substantive knowledge in a field beyond the ken of the average court member' to be qualified as an expert witness."[144] The proffered witness "need not be an outstanding practitioner, but only someone who can help the jury."[145] In the PMS and post-partum mental

131. United States v. Whitehead, 896 F.2d 432, 436 (9th Cir. 1990) (citing S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3411)).

132. MCM, *supra* note 121, R.C.M. 706(c)(2)(A).

133. 27 M.J. 253 (C.M.A. 1988).

134. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the Court of Military Appeals. The new name is the United States Court of Appeals for the Armed Forces.

135. *Id.* at 259; Wright, *supra* note 125, at 21 & n.36.

136. United States v. Dubose, 47 M.J. 386, 388-89 (1998); Wright, *supra* note 125, at 27.

137. *See generally* MCM, *supra* note 121, Mil. R. Evid. 704 (ultimate issue opinion permissible). However, the defense expert cannot express an opinion as to the accused's guilt or innocence. *Id.* app. at 22-48. In *United States v. Dixon*, the United States Court of Appeals for the Fifth Circuit held that expert testimony under the more restrictive federal rule, which would preclude testimony on the ultimate issue of a defendant's legal insanity, did not preclude an expert witness from testifying that "the defendant was suffering from a severe mental illness at the time of the criminal conduct; he is prohibited, however, from testifying that this severe mental illness does or does not prevent the defendant from appreciating the wrongfulness of his actions." United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999).

138. *Dubose*, 47 M.J. at 389.

139. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 & n.7 (1993); *see* United States v. Griffin, 50 M.J. 278, 283-84 (1999); *see generally* Major Victor Hansen, *Rule of Evidence 702: The Supreme Court Provides a Framework for Reliability Determinations*, 162 MIL. L. REV. 1 (1999).

140. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999); *see Griffin*, 50 M.J. at 284.

141. *See Daubert*, 509 U.S. at 589 (addressing the identical federal counterpart to MRE 702).

142. MCM, *supra* note 121, MIL. R. EVID. 702; United States v. Shay, 57 F.3d 126, 132 (1st Cir. 1995) (discussing the identical Fed. R. Evid 702).

143. EDWARD J. IMWINKELREID, EVIDENTIARY FOUNDATIONS 284 (4th ed. 1998).

144. *See* United States v. Stinson, 34 M.J. 233, 238 (C.M.A. 1992); *see also* STEPHEN SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 726 (3d ed. 1991 and 1996 Supp.) ("In other words, anything that makes someone more knowledgeable, skillful or experienced than the average person might qualify one as an expert.").

145. *Stinson*, 34 M.J. at 238; *see* United States v. Stark, 30 M.J. 328, 330 (C.M.A. 1990); SALTZBURG ET AL., *supra* note 144, at 726.

illness context, most mental health practitioners should satisfy this initial threshold requirement.

For mental health professionals testifying based on specialized knowledge of PMS or postpartum-related disorders, the Supreme Court's opinion in *Daubert* requires the demonstration of a reliable theory, technique or symptomatology for these particular mental illnesses, usually through evidence that "there has been adequate empirical verification of the validity of the theory or technique."[146] The Court in *Daubert* suggested a non-exclusive list of factors that a trial judge may consider when determining whether the proffered testimony "has a reliable basis in the knowledge and experience of [the relevant] discipline."[147] These factors include whether the theory or technique (1) has or can be tested, (2) has been the object of peer review and publication, (3) has a measurable error rate, and (4) enjoys general acceptance within the relevant professional community.[148] However, the Supreme Court noted "that the gatekeeping inquiry must be 'tied to the facts' of the particular case" and all four factors "may not be pertinent in assessing reliability" in every case.[149] Significantly, error rates for "soft" sciences such as psychiatry may not always be available.[150]

Evidence of PMS and postpartum related mental illness should survive a trial judge's reliability determination. The methodology used to study these mental maladies includes case studies and clinical interviews which is commonly relied on by mental health professionals.[151] Additionally, numerous published studies of PMS and postpartum mental illness exist and have been subject to peer review.[152] Further, the fact that a severe form of PMS and postpartum depression are recognized in DSM-IV is evidence that these mental illnesses are recognized and generally accepted within the mental health community.[153] However, because general acceptance is no longer a prerequisite for admissibility,[154] testimony concerning less severe forms of these two mental illness that are not contained in DSM-IV may still serve as the basis for expert testimony.

The third evidentiary prong, that the testimony assist the trier of fact, sets a relatively low threshold for admissibility. It does not require that such testimony be "absolutely necessary or that the subject matter of expert testimony be totally beyond the ken of court members . . . ."; rather, MRE 702 merely requires that the testimony be "helpful."[155] However, there must still exist "a valid connection between the expert's testimony and a disputed issue."[156] Absent such a connection, the testimony would be irrelevant and concomitantly not helpful.[157] For example, expert testimony describing an accused's mental impairment at the time of the charged miscon-

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146. INWINKELREID, *supra* note 143, at 286-87. By doing so the court "rule[s] out 'subjective belief and speculation.'" United States v. Hall, 165 F.3d 1095, 1102 (7th Cir. 1999).

147. Kumho Tire v. Carmichael, 526 U.S. 137, 149 (1999); *see* United States v. Kline, 99 F.3d 870, 883 (8th Cir. 1996) ("Daubert sets forth four factors which the district court should consider in determining whether the proffered expert testimony qualifies as 'scientific knowledge.'").

148. *Kumho Tire*, 526 U.S. at 149; *see* INWINKELREID, *supra* note 143, at 116; Hansen, *supra* note 139, at 18. The Peer review and publication factor allows the relevant community to identify flaws. Note, *Throwing the Bath Water Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 B.U. L. REV. 1185, 1200 n.113 (1998).

149. *Kumho Tire*, 526 U.S. at 149.

150. Note, *supra* note 148, at 1202. A "soft" science is one that does not rely on a "machine or other nonhuman indicators." State v. Burton, 590 N.Y.S.2d 972, 973 n.2 (N.Y. App. Div. 1992); *cf.* DOROTHY O. LEWIS, GUILTY BY REASON OF INSANITY 123 (1998) (stating that psychiatry is a "'soft' discipline" that relies on subjective determinations developed during sensitive interviews).

151. Note, *supra* note 148, at 1200 ("Similar case studies form the foundation for other accepted syndromes such as Battered Women's Syndrome (BWS) and Rape Trauma Syndrome (RTS)."). This methodology is commonly accepted as valid. *Id.* at 1201; *cf. Burton*, 590 N.Y.S.2d at 974 (noting that clinical interviews are a recognized methodology in psychiatry).

152. *See* ROAN, *supra* note 3, at 221-230 (listing multiple professional journal articles discussing postpartum-related mental illnesses and abnormalities); DALTON, *supra* note 6, at 275-284 (listing professional publications by Dalton addressing PMS); FRIEDRICH, *supra* note 39, at 147-153 (listing numerous articles published in various professional journals discussing PMS); LAURENSEN & STUKANE, *supra* note 6, at 197 (stating that PMS "has been the subject of more than three hundred scientific articles"). In 1931, Dr. Robert T. Frank published the first professional paper on PMS (then called premenstrual tension). The article "*The Hormonal Causes of Premenstrual Tension*" appeared in the *Archives of Neurology and Psychiatry.* LAURENSEN & STUKANE, *supra* note 6, at 34.

153. United States v. DiDomenico, 985 F.2d 1159, 1167 (2d Cir. 1993) (Ward, J., dissenting) (stating that DSM "disorders have gained general acceptance in the academic and clinical psychiatric communities"); *see* IMWINKELREID, *supra* note 142, at 289.

154. Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 588 (1993).

155. SALTZBURG ET AL., *supra* note 144, at 725. One federal appellate court articulated the inquiry as follows: would "the untrained layman . . . be qualified to determine intelligently and to the best degree, the particular issue without the enlightment from those having a specialized understanding of the subject matter involved." United States v. Shay, 57 F.3d 126, 113 (1st Cir. 1995) (citation omitted); *see* United States v. Houser, 36 M.J. 392, 398 (C.M.A. 1993). Testimony that invades the exclusive providence of the jury, such as witness credibility determinations, is not considered helpful. United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996).

156. *Shay*, 57 F.3d at 113 n.5 (*citing Daubert*, 509 U.S. at 591).

duct and how the impairment impacted on the accused's ability to form the requisite mental state of mind, or on the voluntariness of the accused's conduct would be admissible because such testimony would connect the accused's mental malady and its manifestations with the disputed issue of mens rea or actus reus, respectively.[158]

In their most aggravated forms, both PMS and postpartum mental illness should satisfy the military's mental responsibility standard. As discussed earlier, DSM-IV recognizes the most severe forms of both PMS and postpartum mental illness as mental disorders, and these disorders are both characterized by psychosis and hallucinations.[159] In such aggravated states, both mental illnesses may preclude the accused from appreciating the nature and quality or wrongfulness of her acts.[160]

Even when PMS or a postpartum mental illness does not arise to the level of a severe mental disease or defect, evidence of the mental condition may still be used to rebut the *mens rea* element of a charge. In *Ellis v. Jacob*,[161] the COMA recognized a partial mental responsibility defense, holding that Article 50a(a) does not preclude defense evidence that the accused lacked the specific intent necessary to sustain a conviction.[162] Currently, military courts will permit evidence of mental illness to rebut *mens rea* elements such as "premeditation, specific intent, knowledge, or willfulness."[163] However, evidence of mental illness may not be offered when the charged offense is only a general intent crime.[164]

Finally, evidence that the accused was suffering from the effects of PMS or postpartum illness, even in mild form, is admissible at sentencing. Rule for Courts-Martial 1001 permits the defense to present evidence to both explain the circumstances of the crime (extenuation) and to lessen the punishment (mitigation), regardless of whether the accused had presented such matters during the case in chief.[165]

Automatism

In addition to a complete or partial mental responsibility defense, PMS and postpartum mental illness may provide the basis for an automatism defense.[166] Automatism refers to "[b]ehavior performed in a state of mental unconsciousness or dissociation without full awareness . . ." and is associated with "actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention . . . ."[167] Automatic behavior may be the result of numerous causes, including

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157. *Daubert*, 509 U.S. at 591; *see* United States v. Bennett, 29 F. Supp. 2d 236, 238-39 (E.D. Pa. 1997) (stating that the testimony of a mental health expert would be relevant and helpful if it "would 'support a legally acceptable theory of mens rea'") (citation omitted).

158. *Bennett*, 29 F. Supp. 2d at 239. Testimony that would address misconceptions about a woman's behavior following a birth or while under the influence of PMS would be helpful to the trier of fact. *See Houser*, 36 M.J. 398.

159. *See supra* notes 25-26 & 83.

160. *Cf.* DALTON, *supra* note 6, at 42 (stating that severe PMS may represent a form of temporary insanity). Of note, the postpartum psychosis defense has proven successful in at least one state court using the M'Naghten insanity standard. BURAK & REMINGTON, *supra* note 78, at 188-92 (stating that in a pretrial decision, the trial judge found author not guilty by reason of insanity–without objection from the prosecution–under Vermont's version of the M'Naghten insanity standard). *But cf.* Barton, *supra* note 65, at 598 (reporting that a woman who abandoned baby in desert convicted under Nevada's M'Naghten test despite expert testimony that she suffered from severe PPD).

161. 26 M.J. 90 (C.M.A. 1988).

162. *Id.* at 93 ("Article 50a(a), like its [federal] model, does not bar appellant from presenting evidence in support of his claim that he lacked specific intent . . . .").

163. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, para. 6-5, at 780 (C2, 15 Oct. 1999); *see* Wright, *supra* note 125, at 27 ("knowledge, premeditation, or intent"); Major Eugene R. Milhizer, *Murder Without Intent: Depraved-Heart Murder Under Military Law*, 133 MIL. L. REV. 205, 237 (1991) ("[T]he defense of partial mental responsibility . . . can negate special mens rea requirements including actual knowledge . . . ."); *see also* United States v. Schap, 49 M.J. 317, 322 (1998) ("relevant to attack *mens rea* elements"); United States v. Morgan, 37 M.J. 407, 409 n.2 (C.M.A. 1993) ("[M]ay be used to attack the *mens rea* element of the offense . . . . "); United States v. Tarver, 29 M.J. 605, 608-09 (A.C.M.R. 1989) (holding that evidence of mental illness relevant to attack required *mens rea* elements).

164. United States v. Ogren, 52 M.J. 528, 536 (N.M. Ct. Crim. App. 1999) (stating that because the accused was charged with a general intent crime a mental diagnosis of Antisocial Personality Disorder "in no way relieves him of culpability"); United States v. Willis, No. 97-4091, 1999 U.S. App. LEXIS 18,298 (6th Cir. Jul. 29, 1999) (affirming district court's ruling excluding psychological testimony where defendant was only charged with a general intent crime); United States v. Gonyea, 140 F.3d 649, 654 (6th Cir. 1998) ("[D]iminished capacity is not a defense to general intent crimes . . . ."); United States v. Frisbee, 623 F. Supp. 1217, 1224 (N.D. Cal. 1985) ("The Court will not allow the jury to consider the testimony in connection with the issue of whether the defendant may have possessed the necessary intent to commit lesser offenses requiring only general intent.").

165. MCM, *supra* note 121, R.C.M. 1001(c)(1)(A) & (B); *see* Wright, *supra* note 125, at 29. Evidence of PMS or postpartum illness may serve as the basis for a downward departure under the federal sentencing guidelines for nonviolent crimes. United States Sentencing Commission Federal Sentencing Guidelines Manual, § 5K2.13, Diminished Capacity and Application Note (1988) (stating that if the defendant suffered from "a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful").

166. *See* Recent Decisions, *supra* note 8, at 264-65 (holding that "the physiological anomalies of PMS cause behavior in women which American courts might classify as automatistic").

sleepwalking, concussion, gunshot wounds, epilepsy, convulsions, reflexive action, delirium, and diabetic shock.[168] The majority of jurisdictions view automatism as conceptually distinct from an insanity or mental responsibility defense.[169] Military court decisions have recognized the automatism defense, but have failed to define its parameters.[170]

Unlike the mental responsibility defenses described above, which focus on *mens rea*, the automatism defense asserts that there existed no *actus reas* at the time of the criminal misconduct.[171] In other words, no voluntary act exists.[172] The absence of *actus reus* serves as a complete defense to any criminal charge because absent a criminal act no criminal liability may attach.[173] Significantly for military practitioners, automatism has been used successfully in at least one reported military case[174] and its continued viability as a military defense was confirmed by COMA in *United States v. Berri.*[175]

Automatism may also serve as a defense when a complete or partial mental responsibility defense would fail because (1) the automatism defense does not require proof of any mental disease or defect[176] and (2) it may be used as a defense to both general and specific intent crimes.[177] Automatism also offers a procedural advantage to the accused, which a mental responsibility defense lacks. Significantly, because the automatism defense is distinct from a mental responsibility defense, the government continues to retain the ultimate burden of proof.[178] Further, defense counsel need not satisfy the disclosure requirements for an insanity defense, unless the defense intends to

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167. BLACK'S LAW DICTIONARY 134 (6th ed. 1990); *cf.* Reed v. State, 693 N.E.2d 988, 992 (Ind. Ct. App. 1998) ("[A]utomatism is a state a person enters, where, although he may be capable of action, he is not conscious of what he is doing.").

168. State v. Hinkle, 200 W. Va. 280, 285 (W.Va. 1996); Reed v. State, 693 N.E.2d 988, 992 (Ind. Ct. App. 1998); Recent Decisions, *supra* note 8, at 264 n.93.

169. Major Michael J. Davidson & Captain Steve Walters, *United States v. Berri: The Automatism Defense Rears Its Ugly Little Head*, ARMY LAW., Oct. 1993, at 17, 18-19:

> The majority of authorities distinguish automatism from insanity because the unconsciousness at the time of the alleged criminal action need not be the result of a mental disease or defect, and a criminal defendant found not guilty by reason of unconsciousness–as distinct from insanity– is not subject to commitment to a mental heath institution.

Id. (citations omitted); *see also Hinkle*, 200 W. Va. at 285 ("[T]he weight of authority in this country suggests that unconsciousness, or automatism as it is sometimes called, is not part of the insanity defense . . . ."); *cf.* McClain v. State, 678 N.E.2d 104, 107 (Ind. 1997) (noting split in jurisdictions but electing to distinguish automatism from insanity). The Canadian courts also draw a distinction between the insanity and automatism defenses. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 992 n.45 (3d ed. 1982).

170. United States v. Berri, 33 M.J. 337, 341 n.9 (C.M.A. 1991) ("What the status of unconsciousness might be under the Uniform Code of Military Justice, we do not decide here."). Without mentioning the COMA's opinion in *Berri*, the Army Court of Military Review tacitly recognized the automatism defense, but failed to fully develop it. However, the court did note–relying solely upon the cases cited by the appellant–that when presented with an automatism defense courts have examined the defendant's motivation for the misconduct and whether the defendant suffered from a condition that affected cognitive abilities at the time of the offense. United States v. Campos, 37 M.J. 894, 901 (A.C.M.R. 1993). Similar to a mental responsibility defense, an automatism defense contains "a mental component in the form of loss of cognitive functioning . . . . " *Hinkle*, 200 W. Va. at 285.

171. *See Berri*, 33 M.J. at 341 n.9 (stating that the common law and the Model Penal Code view the defense in terms of *actus reus*, but some jurisdictions treat unconsciousness as an affirmative defense).

172. State v. Connell, 493 S.E.2d 292, 296 (N.C. Ct. App. 1997); *Hinkle*, 200 W. Va. at 286; *Reed*, 693 N.E.2d at 992-93; Recent Decisions, *supra* note 8, at 264 n.91 (citing U.S. and English cases).

173. *Connell*, 493 S.E.2d at 296 ("Unconsciousness would be a complete defense because 'the absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.'") (citation omitted); *see* Davidson & Walters, *supra* note 169, at 25 ("If no *actus reus* is present, technically speaking, no 'act' giving rise to criminal liability exists.").

174. United States v. Braley, C.M.O. 3-1944, at 511-14. After receiving a blow to the head that had rendered him temporarily unconscious, Braley, while acting irrationally, pulled out a pistol and shot another sailor. *Id.* at 511-13. The subsequent murder conviction was set aside because Braley's injury caused him to act "on an automatic level." *Id.* at 513. Additionally, the accused was "unable to comprehend the nature and consequences of his acts or to distinguish right from wrong. *Id.* at 513-14. Here, the Navy Board appeared to combine the two defenses of insanity and automatism.

175. 33 M.J. 337 (C.M.A. 1991); *see generally* Davidson & Walters, *supra* note 169, at 17.

176. *Hinkle*, 200 W. Va. at 285 ("[U]nconsciousness does not necessarily arise from a mental disease or defect."); McClain v. State, 678 N.E.2d 104, 108 (Ind. 1997); *Reed*, 693 N.E.2d at 988 (stating that it "need not be the result of a disease or defect of the mind") (citation omitted); *see, e.g.*, *Connell*, 493 S.E.2d at 296 (stating that a defendant who indecently touched child while allegedly asleep entitled to present automatism defense).

177. *Connell*, 493 S.E.2d at 296 (Automatism "precludes the existence of any specific mental state . . . .")

178. *See Hinkle*, 200 W. Va. at 286 ("[T]he burden can be placed on the defendant to prove insanity" [but] "once the issue of unconsciousness or automatism is raised by the defense, the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime.").

offer expert testimony during the trial on the merits concerning the accused's mental state at the time of the crime.[179]

A significant achilles heel for a PMS or postpartum mental illness based automatism defense is that the defense may fail if the misconduct is foreseeable.[180] State courts have rejected automatism as a complete defense when the behavior was the result of voluntary intoxication, a "black-out" when the defendant had a history of them, and a blow to the head received in a fight started by the defendant.[181] Accordingly, evidence that the accused previously suffered from an acute postpartum reaction, or that she engaged in similar PMS-related misconduct would be relevant to rebut the two respective defenses. Nonetheless, even under such circumstances an accused may still offer evidence of unconscious or automatic behavior to rebut the mens rea element of a charge, such as knowledge, specific intent, willfulness and premeditation.[182]

Conclusion

Insanity defenses are infrequently used, difficult to prove, rarely successful, and often controversial. Indeed, insanity defenses are often considered the defense of last resort. Criminal defenses based on a postpartum mental illness or PMS in particular are no less controversial.[183] Indeed, even the leading authority on PMS, Dr. Katharina Dalton, has posited that it "is now the duty of both legal and the medical professions to ensure that the plea of PMS will not be abused . . . ."[184]

Military defense counsel must be particularly sensitive to the potentially hostile reaction of the finder of fact to these hormonal defenses. In the case of PMS, the defense may be trivialized or ridiculed as the raging hormone defense. In the case of postpartum illness, counsel will be attempting to excuse a woman from killing or injuring the most sympathetic victim imaginable—a baby. Nonetheless, with the proliferation of women into the armed forces, coupled with the growing recognition of PMS and postpartum mental illness as legitimate mental maladies, military practitioners should be familiar with their characteristics and potential as criminal defenses.

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179. MCM, *supra* note 121, R.C.M. 701(b)(2).

180. PERKINS & BOYCE, *supra* note 169, at 993; Davidson & Walters, *supra* note 169, at 24; *see Hinkle*, 200 W. Va. at 287.

181. PERKINS & BOYCE, *supra* note 169, at 993-94; Davidson & Walters, *supra* note 169, at 24-25; *cf. Hinkle*, 200 W. Va. at 287 n.24 ("The defense of unconsciousness must be distinguished from 'black-outs' caused by the voluntary ingestion of alcohol or nonprescription drugs . . . ."); State v. Morganherring, 517 S.E.2d 622, 641 (N.C. 1999) ("The defenses of voluntary intoxication and automatism are fundamentally inconsistent . . . .").

182. Davidson & Walters, *supra* note 169, at 25.

183. JANE M. USSHER, WOMEN'S MADNESS: MISOGYNY OR MENTAL ILLNESS? 248, 249 (1991) (describing PMS and PND as "counterfeit concoctions"). "The other favourite of the mental misogynists is women's wandering womb, which makes a transition from the Victorian disease, hysteria, to the late-twentieth-century syndromes, premenstrual syndrome (PMS), post-natal depression (PND) and menopausal syndrome." *Id.* at 248; Recent Decisions, *supra* note 8, at 267 (noting that "fears among the public that all women charged with crimes could escape liability merely by asserting the PMS defense"); DERSHOWITZ, *supra* note 57, at 334 (listing PMS as an "abuse excuse").

184. DALTON, *supra* note 6, at 173.

Application of the Copyright Doctrine of Fair Use to the Reproduction of Copyrighted Material for Intelligence Purposes

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Numerous Army intelligence activities reproduce copyrighted materials for distribution to Army personnel. For example, the National Ground Intelligence Center (NGIC) reproduces copyrighted text, photographs, and line drawings in classified intelligence documents for internal defense use. Tactical intelligence organizations provide copies of copyrighted photographs, line drawings, and imagery to war fighters for intelligence purposes. *Army Regulation 25-30, The Army Integrated Publishing & Printing Program* (*AR 25-30)*,[1] provides general information regarding copyright law and states the elements of fair use. There still remains, however, confusion as to the application of the fair use doctrine to Army users of copyrighted material for intelligence purposes.[2]

The purpose of this article is to describe the principles of the fair use doctrine and the legal authorities on which the doctrine is based and to explain why most Army intelligence uses of copyrighted material fall under the fair use doctrine.

The Copyright Act of 1976

Two authorities govern Army use of copyrighted material. The first is the federal Copyright Act of 1976,[3] which prohibits the use of copyrighted material without the prior permission of the copyright holder, unless the use fits within several exceptions. The second is *AR 25-30*, which essentially restates the Copyright Act with additional explanation.

Both the Copyright Act and *AR 25-30* adopt the fair use doctrine, a judicially created doctrine that allows reasonable use of copyrighted materials in limited circumstances.[4] The fair use doctrine clearly states:

> Notwithstanding the provisions of section 106 and 106A [which prohibit copyright infringement], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include–(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[5]

The statute itself does not state that fair use includes the reproduction of copyrighted material, or portions of copyrighted material, for internal government use. However, the Notes of the House of Representatives Committee on the Judiciary, which drafted the Act, specifically state that "reproduction of a work in legislative or judicial proceedings or reports" is fair use.[6] The committee even expressed the intention that publication of an entire copyrighted document in a legislative document constitutes fair use:

> The Committee has considered the question of publication, in Congressional hearings and

1. U.S. DEP'T ARMY, REG. 25-30, THE ARMY INTEGRATED PUBLISHING & PRINTING PROGRAM (28 Feb. 1989) [hereinafter AR 25-30].

2. One Army writer has described the application of the fair use doctrine generally, but he did not address the implications of the fair use doctrine in the intelligence context. *See* Captain James M. Hohensee, *The Fair Use Doctrine in Copyright: A Growing Concern for Judge Advocates*, 119 MIL. L. REV. 155 (1988).

3. 17 U.S.C.S. § 101 (LEXIS 2000).

4. The first judicial application of the fair use doctrine was in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), although the court did not define the term "fair use."

5. 17 U.S.C.S. § 107.

6. H.R. REP. NO. 1476, at 61-62 (1975).

> documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use.[7]

Army Regulation 25-30 specifically recognizes the fair use doctrine and applies it to Army use of copyrighted material.[8]

The Case Law

The federal courts are the ultimate guardian of the meaning of the fair use doctrine. Typically, the defendant in a suit brought by the owner of a copyright who alleges that the defendant infringed upon the copyright raises fair use as a defense.

There are few significant cases in which a government entity was sued for copyright infringement. In *Key Maps, Inc. v. Pruitt*,[9] the copyright holder of a county map, sued a county and its fire marshal, Pruitt, claiming that they had violated Key's copyright by reproducing and distributing a fire zone map, which was drawn on the Key county map, without Key's permission. The county claimed that their use of the map was a fair use of the map under 17 U.S.C. § 107. The U.S. district court ruled in favor of the county. The court stated its ruling as follows:

> The doctrine of "fair use" applies to the conduct of the Defendants because the use of the composite Fire Zone Map was for a legitimate, fair, and reasonable purpose, namely the coordination of fire prevention activities in the unincorporated area of Harris County. Also, Pruitt's use of the maps was not of a commercial nature because the distribution was not in competition with the Plaintiff but solely for internal purposes which related to a discernible public interest.
>
> After balancing the exclusive rights of the copyright holder, Key Maps, with the public's interest in disseminating the maps to the various fire departments for fire prevention purposes, the Court opines that a privilege is created in the Defendants to use the copyrighted maps in a reasonable manner without express consent of the Plaintiff.
>
> The fact that Pruitt had the composite Fire Zone Map reproduced by someone other than Key Maps, as a result of their unreasonable delay, does not diminish or prejudice the potential sale of Plaintiff's maps. Here again, the Court is of the opinion that Pruitt's use of the maps is insubstantial and entitled to the "fair use" defense because the maps were restricted to use by the approximately fifty Fire Departments, Law Enforcement Agencies and Civil Defense Units in Harris County for the purpose of showing the zones of each Fire Department.[10]

The *Key Maps* decision points out that "fair use presupposes good faith and fair dealing."[11] The court was favorably impressed by the fact that the fire marshal had first asked Key Maps to reproduce the fire maps pursuant to a purchase order, but Key Maps delayed copying the maps and the fire marshal canceled the purchase order and hired another vendor.

The *Key Maps* court cited *Williams & Wilkins Co. v. United States*,[12] the other significant case in which a government entity was sued for copyright infringement, as authority for the proposition that the four fair use factors must be evaluated "in concert."[13] Williams & Wilkins was the publisher of medical journals. It sued the libraries of the National Library of Medicine (NLM) and the National Institute of Health (NIH) for infringing the copyright of its medical journals by conducting large-scale photocopying of articles from the journals. The NLM, which serves government agencies, private organizations, and other libraries, photocopied articles, up to fifty pages in length, upon request. The NIH served only the agency's staff, but copied entire journal articles upon request by NIH researchers. Together, the libraries made millions of photo-

7. *Id.*

8. *See* AR 25-30, *supra* note 1, para. 2-44 (b).

9. 470 F. Supp. 33 (S.D. Tex. 1978).

10. *Id.* at 37-38 (citations omitted).

11. *Id.* at 38.

12. 487 F.2d 1345 (Ct. Cl. 1973). The best analysis of *Williams & Wilkins* is in Shannon F. Wagoner, *American Geophysical Union v. Texaco: Is the Second Circuit Playing Fair with the Fair Use Doctrine?*, 18 HASTINGS COMM. & ENT. L.J. 181 (1995).

13. *Key Maps*, 470 F. Supp. at 37.

copies of medical journal pages each year, including many copies of journal articles published by Williams & Wilkins.

A trial court found that the government libraries infringed Williams & Wilkins copyright.[14] A divided United States Court of Claims reversed the trial court in 1973, and it was affirmed by a divided Supreme Court in 1975.[15] The court identified "four main reasons for its decision"[16] that the libraries' reproduction of the copyrighted material constitutes fair use. First, and foremost, the libraries were non-profit organizations "devoted solely to the advancement and dissemination of medical knowledge."[17] Second, the libraries had policies that limited their photocopying.[18] Third, the court recognized that library photocopying had long been a common practice. Fourth, the court found that a finding of infringement would hamper medical science and research.[19]

The Court of Claims decision in *Williams & Wilkins* was severely criticized by the three dissenting judges, who characterized the case as "the *Dred Scott* decision of copyright law."[20] The dissent was based upon the fact that the libraries copied articles, in their entirety, on a vast scale. As Chief Judge Cowen, who wrote the dissenting opinion, pointed out:

> [T]his is not a case involving the copying of copyrighted material by a scholar or his secretary in aid of his research, nor is it a case where a teacher has reproduced such material for distribution to his class. Also, it is not a case where doctors or scientists have quoted portions of plaintiff's copyrighted articles in the course of writing other articles in the same field. We are not concerned here with a situation in which a library makes copes of ancient manuscripts or worn-out magazines in order to preserve information. What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material on a scale so vast that it dwarfs the output of many small publishing companies. In order to fill requests for copies of articles in medical and scientific journals, the NIH made 86,000 Xerox copies [of articles] in 1970, constituting 930,000 pages. In 1968, the NLM distributed 120,000 copies of such journal articles, totaling 1.2 million pages. As the trial judge correctly observed, this extensive operation is not only a copying of the copyrighted articles, it is also a reprinting by modern methods and publication by a very wide distribution to requesters and users.[21]

Despite the dissent, the Court of Claims, which has jurisdiction over copyright infringement claims against federal agencies,[22] held that the mass copying was fair use.

The meaning of *Williams & Wilkins* must be evaluated in light of the decision of the United States Court of Appeals for the Second Circuit in *American Geophysical Union v. Texaco, Inc*.[23] The facts of *Texaco* involve a common practice. Dr. Donald Chickering, a chemical engineering researcher at Texaco, copied eight articles from a scientific journal, *The Journal of Catalysis*, for future reference. The photocopies were solely for Chickering's own use and were not circulated or distributed to anyone else.[24] The trial court found that the photocopying was not fair use and infringed on the publisher's copyright.

The Second Circuit, in a two-to-one decision, affirmed the trial court decision that held that the photocopying was copyright infringement. The court found that the first element of fair use, the purpose and character of the use, was commercial because Texaco is a for-profit company and the copying of the material was a "factor in production."[25] The court found that

14. *Williams & Wilkins Co.*, 487 F.2d at 1347.

15. Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975).

16. Wagoner, *supra* note 12, at 191.

17. *Williams & Wilkins Co.*, 487 F.2d at 1354.

18. Wagoner, *supra* note 12, at 191.

19. *Id.*

20. *Williams & Wilkins Co.*, 487 F.2d at 1387 (Cowden, C.J., dissenting).

21. *Id.* at 1364 (Cowen, C.J., dissenting).

22. 28 U.S.C.S. § 1498(b) (LEXIS 2000).

23. 37 F.3d 881 (2d Cir. 1994). My analysis of *Texaco* is based upon Wagoner, *supra* note 12.

24. Wagoner, *supra* note 12, at 193.

25. *American Geophysical Union*, 37 F.3d at 890.

Texaco's use was not reasonable because Texaco could have contacted the Copyright Clearance Center (CCC) and obtained a copyright license.[26] The second factor, the nature of the copyrighted work, was decided in favor of Texaco because the "accepted rule is that reproduction of factual works is far more likely to constitute fair use than reproduction of creative works."[27] The Second Circuit accepted the trial court's conclusion that the third fair use factor, the amount and substantiality of the copying, did not support a finding of fair use because Chickering copied entire articles. However, at least one commentator has pointed out that copying one article should support a conclusion of fair use because publisher's revenues are derived mostly from the sale of subscriptions rather than the sale of individual articles.[28] Finally, the Second Circuit found that the fourth factor, the effect on the potential market for the original work, did not support a finding of fair use. The court pointed out that the Supreme Court has stated that the effect on the market is "undoubtedly the single most important element of fair use."[29] Texaco argued that Chickering's copying of the articles did not adversely affect the potential market for *The Journal of Catalysis* because the evidence at trial showed that there was no loss of sales of the journal as a result of the copying. However, the court concluded that the publisher lost the revenue that it could have made if Texaco had used the CCC to pay the publisher for a copyright license.[30]

Judge Jacobs of the Second Circuit dissented from the *Texaco* opinion. He wrote that the majority erred in holding that Chickering's actions did not constitute fair use. The main focus of the dissent was on the majority's premise that the CCC was a "market" for the original work. The dissent pointed out that the CCC was not a market unless court decisions made it a market:

> In this case the only harm to a market is to the supposed market in photocopy licenses. The CCC scheme is neither traditional nor reasonable; and its development into a real market is subject to substantial impediments. There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument that Texaco presents: but, under the statutory test, we cannot declare a use to be an infringement unless (assuming other factors also weigh in favor of the secondary user) there is a market to be harmed. At present, only a fraction of journal publishers have sought to exact these fees. I would hold that this factor decisively weighs in favor of Texaco, because there is no normal market in photocopy licenses, and no real consensus among publishers that there ought to be one.[31]

Several aspects of the *Texaco* decision caused a sensation. In response, the Second Circuit issued two amended opinions that stated that no single element of the fair use test is more important than the other elements, backing away from the statement in the original opinion that the fourth factor was most important.[32] The court also limited its holdings to "systematic copying."[33]

Application to Army Intelligence Users

Almost all Army uses of copyrighted material for intelligence purposes fall within the fair use doctrine. Five examples demonstrate Army applications of the doctrine. For many years, the Defense Intelligence Agency (DIA) circulated a daily classified intelligence bulletin called the *Early Bird,* which often contains photocopies of articles and photographs from periodicals. The *Early Bird* is now distributed electronically. The DIA has taken the position that the reproduction of the material, for limited distribution within the intelligence community, is fair use. Similarly, when the United States became increasingly involved in the Balkans, several intelligence agencies produced handbooks for commanders and soldiers, which contained copies of copyrighted material relating to Yugoslavian forces. Some of the handbooks were not classified, but were to be used "For Official Use Only." The proponents of the handbooks did not obtain permission to reproduce the copyrighted material from the copyright holders. In 1997, NGIC, the Army activity responsible for analyzing foreign ground-warfare equipment and organizations and disseminating their analyses to war fighters, sought permission from the Chinese to reproduce photographs that originally appeared in certain Chinese military magazines. In 1998, NGIC sought permission to photograph line drawings of Russian military equipment that

26. *Id.* at 898.

27. *Id*. at 893. The general rule is stated in *New Era Publications v. Carol Publishing*, 904 F.2d 152, 157 (2d Cir. 1990).

28. Wagoner, *supra* note 12, at 198.

29. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985).

30. *American Geophysical Union,* 37 F.3d at 899.

31. American Geophysical Union v. Texaco, 60 F.3d 913, 937 (2d Cir. 1995) (Jacobs, J., dissenting).

32. *Id.* at 913.

33. *Id.* at 916.

appeared in a Russian-owned military magazine. Lastly, in 1999, NGIC sought permission to reproduce in the classified NGIC journal a news photograph that originally appeared in *The Washington Post*. In each case, NGIC reached the conclusion that the reproduction of this material was fair use, although NGIC obtained prior permission from the copyright holders to reproduce the material.

The fair use doctrine applied to all of these situations. Three common elements of these situations are that: (1) an Army intelligence agency was seeking to use an image; (2) the image was to be used in a classified intelligence document with limited distribution; and (3) the analyst sought to use the image to illustrate his conclusion and not merely reproduce the image without comment.

The use of images such as these are well within the fair use doctrine for a number of reasons, each of which is an independent justification for the Army's reproduction of the material.[34]

First, the purpose and character of the use is beneficial to the public and is not prohibited by the Copyright Act. Most Army intelligence publications and products are classified and are intended for official use by government employees. Army intelligence publications are produced to provide intelligence for national security decision-makers. For this reason, Army intelligence agencies' use of copyrighted material is similar to the fire maps in the *Key Maps* case or the reproduction of material in legislative documents. The Army intelligence agencies' use of copyrighted material in an intelligence document, like the fire marshal's use of the map, is transformative. The fire marshal used the original map as a base but added additional information to the map, transforming its value. Similarly, Army analysts' use of copyrighted material as a source of intelligence merges the copyrighted material with other information, and produces an intelligence product that is different from the original copyrighted material. The material is for a "legitimate, fair, and reasonable purpose," namely national security intelligence. Moreover, intelligence must be fresh to be valuable. If Army intelligence activities were required to obtain copyright permission from the copyright owners of every piece of copyrighted material that an Army analyst wished to use, a copyright owner who did not wish to give permission to the Army could preclude intelligence production. Thus, it only makes sense that the Army may use most copyrighted material without permission.

Army purchase of copyrighted material may also have security implications. For example, intelligence analysts may seek a photograph of a particular individual or weapon, which the United States does not have the means to obtain without copying the photograph from a commercially-produced publication. If the Army has to obtain a license to reproduce the photograph, the Army will implicitly reveal that it does not have an independent source of the intelligence—from human intelligence assets, for example—and compromise the security of its intelligence system.

Second, the extent of copying by Army intelligence agencies is limited. Army intelligence activities do not normally copy entire books or articles. Usually, an analyst merely wishes to use a photograph or copy a portion of an article. The limited reproduction of copyrighted material constitutes fair use, under the express language of the statute.

Third, like the fire marshal's use of the Key's map, the Army's use of copyrighted material is not of a commercial nature because the distribution is not in competition with the copyright owner but is solely for internal purposes which are related to the discernible public interest in military intelligence. The Army does not distribute books, photographs, maps, diagrams, or any of the copyrighted material that it reproduces in its intelligence products to the general public. Army intelligence products are classified, at least "For Official Use Only," which by definition precludes their general distribution; they are distributed in limited quantities; and they are produced for specific military intelligence purposes. In the vast majority of instances, Army reproduction of copyrighted material will not have an adverse impact on the copyright owner's ability to sell his material in the market. For example, the use of a photograph from a foreign language military publication will have no effect on the market for the publication, which consists of foreign language readers. Similarly, the Army use of a news photograph will not adversely affect sales of the newspaper in which the photograph appeared–the newspaper is normally no longer sold after the day of publication. It follows that the reproduction of any other material that is no longer available in the marketplace would clearly be fair use because the reproduction would have no negative effect on the market for the copyrighted material.

There are only a limited number of situations where Army intelligence agencies' use of copyrighted material would be copyright infringement and the test of infringement will often be the second fair use factor—the "amount and substantiality" of the copying. An example would be the copying and distribution of an entire publication. This would not be fair use because it is merely "systematic" copying and the same result could be achieved by merely buying additional copies of the journal and distributing them. On the other hand, if the publication is no longer available for purchase and the only means of disseminating the information is copying, then the copying would constitute fair use. Copying of portions of a publication, even substantial sections of a publication, would constitute fair

34. Memorandum from Randolph D. Moss, Acting Assistant Attorney General, subject: Whether Government Reproduction of Copyrighted Materials Invariably is a "Fair Use" under Section 107 of the Copyright Act of 1976 (30 Apr. 1999) [hereinafter Moss Memorandum] (providing the most recent authoritative guidance from the Justice Department's Office of Legal Counsel (OLC), which is responsible for providing counsel to the executive branch of the government). The OLC concluded that government use of copyrighted material is not per se fair use, but concluded that most government uses of classified material will fall within the fair use exception. *Id. See generally* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (1989); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985).

use because the copying is "transformative"–it changes the packaging of the original in a way which makes it more useful for the user.[355]

Fourth, the Army's legal position is strong, in the unlikely event of litigation. No legal authority suggests that the Army would be held liable for copyright infringement for reproduction of material for intelligence purposes. The Court of Claims has jurisdiction over copyright infringement claims against the Army, and the court did not hold NIH or NLM liable in *Williams & Wilkins*. *Williams & Wilkins*, which involved the systematic reproduction of publications, supports the conclusion that the limited copying done by the Army is fair use because it is not nearly as extensive or egregious as the actions of the NIH and NLM, yet their actions were held to be fair use. The *Texaco* decision has stimulated increased attention to copyrights by copyright managers, but the holding in *Texaco* is only applicable to for-profit companies, which the Army is not; it is contradicted by *Williams & Wilkins* in the government context; and the Second Circuit seems to have backed away from its own decision.

The most problematic copyright issues faced by the Army would be the copying of photographs, drawings, and text from private publishing organizations such as Jane's or from photo houses which are in the business of selling photographs. The use of photographs from photo houses is the most difficult issue, because the photographs, like the map in *Key Maps*, are use-neutral. The only thing that the photo houses sell is an image, which could be used for any purpose. When an Army intelligence agency obtains a photograph, the intelligence activity does not transform the photograph into a different product. However, the photograph is treated as a *source of intelligence* and does not distribute the photograph to end-users without an explanation that the photograph is merely one source of intelligence that contributes to the analyst's conclusion. In this sense, the use of the image is national security intelligence, which is of sufficient public benefit that the image probably constitutes fair use.[36] In the case of Jane's, Jane's may sell its information in the same market that Army intelligence activities serve with their products. It may appear that the market for Jane's products would be diminished by substantial Army copying of images and information from Jane's publications. However, Army products almost always transform the general information from sources like Jane's into specific military intelligence for decision-makers. Thus, Army intelligence agencies' use of images an information from Jane's, even without the payment of royalties, probably constitutes fair use.

In fact, the Army's overzealousness in seeking copyright licenses may be counterproductive, as well as unnecessary. The Army's use of copyrighted material will almost never reduce the sales of the original copyrighted material in the market for which it was intended to be sold. However, if the Army continues to pay royalties for many uses of copyrighted material, it may create a market for license fees. If the Army customarily pays royalties in that market, and does not assert fair use for its use in most cases, and then asserts fair use in the future, a court, like the majority in *Texaco*, may hold that it denied the copyright holder the revenues it could have made in the royalty market that the Army produced in the first place.[37]

Moreover, the Army is acting in good faith in the application of its copyright policy, a factor which the *Key Maps* court recognized as an element of fair use. *Army Regulation 25-30* is a clear statement of intention to follow the Copyright Act. The Army does not allow individuals to make copyright decisions, but requires the copyright manager to review each copyright decision. Army intelligence agencies have repeatedly sought counsel regarding copyright issues. As long as the Army continues to follow the policy of *AR 25-30*, it will have demonstrated good faith in an effort to comply with the copyright laws.

Adherence to the law does not dictate the payment of royalties for every use of copyrighted material. Rather, the principles of the fair use doctrine, which will usually be applicable to Army use of copyrighted material for intelligence purposes, should be applied by copyright managers at intelligence activities in making their copyright decisions, prior to the decision to obtain a copyright license or pay royalties to the owner of the copyrighted material.

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35. *See id.* at 7.

36. On the other hand, the Army will often need to purchase the original image from the photo house so that it can be included in the publication. The Army would be required to pay for the image in that situation, but there is a difference between (1) purchasing an image, and (2) obtaining the right to reproduce and distribute the image.

37. *See* Moss Memorandum, *supra* note 34, at 5.

TJAGSA Practice Note

Faculty, The Judge Advocate General's School

Estate Planning Note

Preparation of Tangible Personal Property Memorandums Using Drafting Libraries (DL) Wills Software

When drafting wills, legal assistance attorneys commonly encounter clients that wish to give items of personal property upon death to friends or family. The best method for an attorney to accommodate a client's wishes is to create specific bequests in the client's will. Unfortunately, this method has its disadvantages. Multiple specific bequests can make wills lengthy and cumbersome. As a client disposes of the personal property during his lifetime, he should update his estate plan by executing a new will to reflect the changes relating to the specific bequest.

The laws of over half of the states allow the testator to make bequests of personal property by using writings separate and apart from a will. Twenty-seven states have enacted a provision (or a similar version) of the Uniform Probate Code (UPC) that allows for a separate writing "identifying devises of certain types of tangible personal property."[1] Military practitioners were introduced to personal property memorandums over a decade ago in an estate-planning note.[2] The current military will preparation software program, Drafting Libraries (DL) Wills, allows an attorney to provide a reference or a clause in a will to a tangible personal property memorandum (TPPM) and provides a basic form for drafting these separate documents. However, the attorney must be familiar with the substantive law in order to properly draft the will and the TPPM (or at least be able to advise the client regarding the drafting of a TPPM). A reliance on the DL Wills software, without understanding the substantive law may result in unintentional results that are contrary to testamentary desires of the client.

Uniform Probate Code § 2-513

A provision of the Uniform Probate Code, UPC § 2-513, allows for distribution of tangible personal property according to a separate writing independent from the testator's will:[3]

> Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

The language of UPC § 2-513 provides four basic requirements for TPPMs.[4] First, a TPPM cannot alter specific bequests made in a will. Second, a TPPM may distribute only items of tangible personal property. Third, the TPPM must adequately describe and identify items with reasonable certainty. Finally, the testator must sign a TPPM.

Prior to 1990, an unsigned TPPM was effective if it was in the handwriting of the testator.[5] Currently, UPC § 2-513 requires the signature of the testator.[6] Nevertheless, an unsigned TPPM could still be given effect under UPC § 2-503 if the proponent could prove by clear and convincing evidence that the testator intended the TPPM to be in force.[7]

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1. UNIF. PROBATE CODE § 2-513 (amended 1990), 8 U.L.A. 147-48 (Supp. 1995). See Appendix A for a listing of applicable state statutes. Before 1990, UPC § 2-513 was titled "Separate Writing Identifying Bequest of Tangible Property." The current title is "Separate Writing Identifying Devise of Certain Types of Tangible Personal Property." *Id.*

2. Major B. Ingold, *Estate Planning Note, Making Bequest of Personal Property*, ARMY LAW., Nov. 1989, at 29.

3. UNIF. PROBATE CODE § 2-513.

4. *See generally* UNIF. PROBATE CODE § 2-513, commentary.

5. *Id.*

6. *Id.*

7. *Id.*

If the client desires to create a TPPM, the will should contain a reference to the memorandum or writing. The reference can indicate the TPPM will exist at the time of the testator's death, and provides the testator with flexibility in estate planning. The testator may create the TPPM before or after execution of a will.[8] One of the tremendous benefits of the TPPM is that the client may change the memorandum from time to time without modifying or updating the will.

State TPPM Statutes and Trends

There is not a significant body of case law regarding creation or use of TPPMs. Some trends, however, have developed in the past decade. Not only is it important to understand some of the trends, but it is also important to understand that the states which do provide for TPPMs have enacted statutes in a variety of ways. Some states have enacted statutes that exactly mirror UPC § 2-153. Other states have slightly altered the language in UPC § 2-513, or have enacted legislation to carry out the intent of UPC § 2-513, but have done it in their own way using different language. Finally, several states still have statutes that mirror older versions of UPC § 2-513.

The TPPM may distribute only items of tangible personal property. The practitioner should ensure clauses in wills referencing TPPMs apply only to tangible personal property. The UPC provision does not specifically define tangible personal property. Likewise, state TPPM statutes generally do not define tangible personal property.[9] Courts have indicated the ordinary meanings of the words "tangible"[10] and "intangible"[11] as they apply to TPPMs.[12] The pre-1990 UPC provision expressly indicated "evidences of indebtedness, documents of title, and securities, and property used in a trade or business" were not items of tangible personal property to be disposed of in a TPPM.[13] These explicit limitations were later deleted from the UPC to improve clarity of the phrase tangible personal property.[14] The language of the various state TPPM provisions mirrors the evolution of the UPC provisions. Few state TPPM provisions define tangible personal property and many states retain the specific restrictions on tangible personal property. While these specific preclusions were eliminated from UPC § 2-513 in 1990, many states have not amended their own statutes relating to TPPMs.

State courts addressed the issue of what does or does not fit under the definition of tangible personal property. Courts hold the term "tangible personal property" designates personal and household items. Iowa provides a lengthy list of items qualifying as tangible personal property, such as household goods, furnishings, furniture, personal effects, clothing, jewelry, books, works of art, ornaments, and automobiles.[15] For example, courts have characterized "personal effects, clothing and household goods" as tangible personal property; while treasury bills, bonds, investment accounts, bank accounts, stocks, and certificates of deposit have been characterized as intangible personal property.[16] Iowa courts have specifically held the term "tangible personal property" under the state TPPM provision does not encompass a bank savings account.[17]

Minnesota courts agree with Iowa courts. In a Minnesota case,[18] a will contained the following clause:

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8. *Id.*

9. *See* Appendix A.

10. Tangible property has physical form and substance and is not intangible. Tangible property can be felt or touched, and is necessarily corporeal. BLACK'S LAW DICTIONARY 1456 (6th ed. 1990).

11. Intangible property is defined as property with no intrinsic and marketable value, but is merely representative or evidence of value (such as certificates of stock, bonds, promissory notes, copyrights, and franchises). *Id.* at 809.

12. *In re* Estate of Mettel, 566 N.W.2d 863 (Iowa 1997).

13. Before 1990, UPC § 2-513 prohibited the disposition of "evidences of indebtedness, documents of title, and securities, and property used in a trade or business" by way of a separate writing. The drafters of the UPC later eliminated these restrictions. *See generally* UNIF. PROBATE CODE § 2-513, commentary.

14. The comments regarding UPC § 2-513 indicate there was some confusion regarding the limitations ("evidences of indebtedness, documents of title, and securities, and property used in a trade or business") since evidences of indebtedness, documents of title, and securities are not items of tangible personal property, and partially to allow for the disposition of a broader scope of tangible personal property. *See generally* UNIF. PROBATE CODE § 2-513, commentary.

15. IOWA CODE § 633.276 (LEXIS 1999).

16. *In re* Estate of Thompson, 511 N.W.2d 374, 376-78 (Iowa 1994); *In re* Estate of Oxley, 262 N.W.2d 144, 150 (Iowa 1978). Iowa courts followed Colorado courts in determining bank accounts, credit union accounts, and insurance proceeds could not be disposed of by documents extrinsic to wills, because statutes expressly excluded such property. *In re* Estate of Schmidt, 638 P.2d 809, 810-811 (Colo. Ct. App. 1981).

17. A document titled "Instructions for Distribution of Specified Personal Property Authorized in my Last Will and Testament" listed, among other items, "what's left of my [savings]" to a named individual. At the time of death, there was $ 62,939.43 remaining in a savings account in a bank, and the court held this was not tangible personal property. *In re* Estate of Mettel, 566 N.W.2d 863 (Iowa 1997).

18. *In re* Estate of Gerald Edward Theis, C8-97-790, 1997 Minn. App. LEXIS 1135 (Minn. Ct. App. Oct. 7, 1997).

> In accordance with the provisions of Minnesota Statutes Section 524.2-513, I now reserve the right to prepare, and I hereby expressly refer to, a written list disposing of items of *tangible personal property* to the persons named in said list. . . . Any *personal property* not on such a list, or, if no such list shall be in existence at the time of my decease, then all of my personal property, I give to my wife . . . if she survives me; or if she does not survive me, then to my children who survive me, in equal shares.[19]

The surviving spouse contended the word "tangible" should not be added to the second provision in the clause designating any "personal property" to her. The district court ruled the phrase "personal property" referred only to "tangible personal property" rather than encompassing all of testator's personal property. The wife asserted this interpretation was erroneous because the district court supplied the additional term "tangible" to alter the meaning of the clause, and thus denied her intangible property such as stocks and other securities. In the instant case, the first provision of the will referred specifically to a list disposing of "tangible personal property." The second provision bequeaths "personal property not on such a list." Neither the will nor the state probate code defined the phrase "personal property." "Personal property" in the broadest and most general sense may include "everything that is the subject of ownership, not coming under denomination of real estate."[20] The appellate court concluded the bequest of "personal property" in the will must be read in the context of that article (or clause) and the will as a whole. The appellate court concluded that it was clear from the context that the testator, by the bequest of "personal property" in the second paragraph, intended to give only tangible personal property to his wife. The lesson for the military practitioner is to make sure that clauses included in wills referencing TPPMs do not have conflicting or vague verbiage. In addition, the attorney should make sure the client understands the meaning of the phrase "tangible personal property."

In most situations the military attorney may not actually draft the TPPM, but may draft a will referencing a TPPM and then give advice to a client who will draft their own TPPM. Attorneys must adequately advise a client about drafting a TPPM. In a Missouri case,[21] a woman executed a trust document and a warranty deed. She conveyed her home to the trust and bequeathed her estate to the trust. She expressly reserved the right to change, alter, or amend the trust during her lifetime. All assets held in the trust were identified in the trust document.

Several days after her death, a handwritten document entitled, "Schedule B," was discovered in the testator's home. "Schedule B" attempted to bequeath certain property to the testator's nieces and nephews, and provided in relevant part:

> In accordance with RSMo 474.333 (effective 1/1/81) and Article V of the . . . Trust, I hereby give and bequeath unto the following persons, the personal property listed after their names . . . .
>
> Since my home is "personal property", at the time of my demise, if I still have and own my property at 206 Donald Drive, I would like to have this sold and the money to be divided between Virginia Pritzel and Judith Ann Scrivner.
>
> Balance of fine jewelry & crystal to be sold at a private sale for nieces & nephews mentioned in Living Trust.[22]

A dispute arose after her death between the beneficiaries regarding these directives because of an apparent conflict with the distributive provisions of Article V of the trust, which provided in relevant part:

> This written statement or list, (hereinafter designated Schedule "B", attached hereto) which the Grantor will date and sign and in which list the Grantor will describe the items and the persons to whom the Grantor gives said items . . . shall not be used to give, bequeath, or dispose of money**,** evidences of indebtedness, documents of title, securities, real property used in a trade or business, and no contrary construction should be made of said written statement or list.

The Probate Court resolved the problem created by the conflict in the documents. It declared the bequeaths in Schedule B were void and of no effect due to their conflict with Article V of the trust. The court specifically found Schedule B was not an amendment to the trust document, and was merely an effort to dispose of the specified items of property. A thorough examination of the trust instrument revealed the testator intended Schedule B to be utilized to dispose of only those items of personal property which could be disposed of in a written statement or list referenced in a will. This intent was unequivocally expressed in the trust document. Article V of the trust provided

19. *Id.* at *4 (emphasis in original).

20. BLACK'S LAW DICTIONARY 1217 (6th ed. 1990).

21. Central Trust Bank v. Scrivner, 963 S.W.2d 383 (Mo. Ct. App. 1998).

22. *Id.*

Schedule B may be considered an amendment to the trust "only with respect to those items of personal property described therein." Schedule B operated to amend the provisions of the trust only to the extent that it disposed of personal property which would otherwise make up the corpus of the Trust and be distributed according to the provisions of the trust. The terms of the trust expressly and unequivocally limited the scope of Schedule B to those items of personal property authorized by state's TPPM statute.[23] The trust instrument expressly prohibited a construction of Schedule B that was contrary to the testator's intent that it not be used to give, bequeath, or dispose of money, evidences of indebtedness, documents of title, securities, or real property used in a trade or business. Therefore, the directive in Schedule B regarding the sale of the testator's home and the distribution of the proceeds therefrom was void and of no force or effect.

While most TPPM provisions do not define tangible personal property, all provisions require a TPPM describe items of personal property and the beneficiaries with reasonable certainty. It is advisable to list each item of tangible personal property to be disposed by the TPPM, but that is not an actual requirement of most TPPM provisions.[24] Therefore, it is perfectly acceptable for a TPPM to refer to "all my tangible personal property other than money" or "all my personal tangible personal property located in my home" or analogous catch-all verbiage.[25] For example, in a recent case a handwritten note was found in a testator's jewelry box that stated the testator wanted a beneficiary to have her dog and "these items" in the jewelry box. The court held the note was valid because it described the items with reasonable certainty.[26]

Practitioners should carefully avoid inconsistencies between provisions in a will and a TPPM. The practitioner must ensure vague descriptions in a TPPM do not appear to conflict or be inconsistent with descriptions of personal property in a will. A recent case exemplifies the problem of inconsistent provisions. The case involved a remarried testator that attempted to provide for his new wife and his children from a prior marriage as beneficiaries in his will.[27] One section of his will bequeathed to his wife a life estate in "all furnishings, appliances, and furniture" in their home. Another section of the will stated in part:

> *Subject to* the rights granted to my wife under *Section 2.1 above*, I give my tangible personal property to the extent provided therein, in accordance with a written list, signed by me and dated and otherwise prepared in accordance with the provisions of Minnesota Statutes, Section 524.2-513.

Attached to the will was a handwritten list of approximately seventy-five items of personal property to be divided between the testator's two children. The personal representative petitioned for construction of the will, requesting the court determine whether dishes, china, silver, and crystal included in the handwritten list were validly bequeathed under the section of the will referencing the TPPM or were instead "furnishings," subject to the section of the will devising to the wife a life estate in "all furnishings, appliances, and furniture" in their Minnesota home. The court observed the two sections of the will were inconsistent, and deemed the items were not furnishings. This case illustrates how inconsistencies in the language of a TPPM and of a bequest in a will may result in needless litigation between beneficiaries.

Potential Pitfalls and Problem Areas in Using TPPMs

The DL Wills software, along with an understanding of applicable substantive law, aids the attorney with drafting wills referencing TPPMs and the actual preparation of a TPPM. However, there are potential pitfalls for the practitioner integrating TPPMs into estate plans. There are several issues TPPM provisions do not address. For example, what is the legal and practical effect of tangible personal property designated in a TPPM that the testator does not own upon his death? What is the result of a TPPM "bequest" when the designated beneficiary predeceases the testator or refuses the property?[28] In addition, military attorneys must recall the transitory nature of military clients and inform the client to keep their TPPMs (and applicable sections in their wills) up to date with their current state of domicile.

A primary concern is the use of TPPMs when a client fails to understand the term tangible personal property and attempts to give stocks, bonds, notes, checks, money, bank deposits and other forms of intangible personal property or real property in a TPPM. Another potential dilemma may occur in cases where the testator executes a TPPM in a manner that satisfies the applicable state requirements for a holographic will or codicil.[29] Is this a can of worms that the testator or drafting attorney wants to open?

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23. MO. REV. STAT. § 474.333 (1999).

24. *See generally* UNIF. PROBATE CODE § 2-513 (amended 1990), 8 U.L.A. 147-148 (Supp. 1995), commentary.

25. *Id.*

26. Jones v. Ellison, 15 S.W.3d 710 (Ark. Ct. App. 2000).

27. *In re* Estate of Robert J. Lloyd, 1998 Minn. App. LEXIS 740 (Minn. Ct. App. Jan. 30, 1998).

28. A possible solution to the last question would be to designate alternate beneficiaries in the TPPM.

Tangible personal property items with significant monetary value should continue to be designated in a will as specific bequests. Distributions of expensive items have a greater potential to generate conflicts among potential beneficiaries. Because of the formality requirements of wills (and specific bequests) versus the relaxed standards for a TPPM, high value items and items likely to produce controversy or conflicts should continue to be listed in a will as specific bequests.

Attorneys preparing TPPMs or advising clients about them should be cautious concerning tangible personal property acquired during marriage. In the event a testator's TPPM bequeaths items to someone other than the surviving spouse, there may be an issue as to who is the "owner" of the property. In a second marriage, it might not be clear over a period of time as to which spouse brought property into the marriage. Even cohabitation can create similar potential conflicts. A comparable problem may arise in community property states. Generally, in community property states, household effects are part of the community property.[30] All property acquired during marriage is presumptively community property, provided the property was not acquired by gift, devise, or descent.[31] Potential problems exist where the testator attempts to bequeath community property by a TPPM.

The military practitioner should inform clients to update TPPMs periodically just as clients should update wills. The attorney should advise a client to destroy or adequately dispose of "old" TPPMs upon writing a new TPPM. Litigation could result in the event the testator died leaving two undated TPPMs with conflicting dispositions.

Alternatives to TPPMs

Although twenty-seven states have TPPM provisions, the DL Wills software will only assist with the preparation of TPPMs for twenty-three states.[32] There are some options available to the military practitioner for clients who do not have a state as a domicile that specifically recognizes TPPMs. The safest and most secure way to make these distributions of tangible personal property is by specific bequests in a will, or by a lifetime gift. Another method military practitioners have utilized for years is to bequest personal property to one trusted beneficiary (such as a spouse or parent), and then have a provision in the will that the client will prepare and leave a nonbinding memorandum of instruction to the executor requesting the distribution of the property to specific individuals. The practitioner must caution the client as this method could potentially lead to the frustration of the testator's intent since the memorandum is nonbinding.

Another solution available to clients that do not reside in a state that recognizes some form of TPPM is to use the doctrine of incorporation by reference to a specific writing regarding the distribution of personal property.[33] Generally, the rule of incorporation by reference generally has three elements.[34] First, the intention of the testator to incorporate an extrinsic document into the will must be unmistakably clear and appear in the will. A mere reference to an extrinsic document without evidence of intention to incorporate is inadequate.[35] Second, the reference must be to a written instrument in existence at the time the will is executed.[36] Third, the reference in the will must identify the extraneous document so definitely as to leave no doubt that the document referred to is the document proffered.[37] The doctrine of incorporation by reference is accepted in the great majority of state jurisdictions,[38] and a separate writing or document could be used to make binding gifts of tangible personal property. However, the practitioner must keep in mind the separate document or writing must exist at the time the will is executed and the will must refer to the separate document or writing. Military practitioners should avoid using the doctrine of incorporation by reference as a method for distributing tangible personal property. The problem with incorporation by reference is

29. Generally, a holographic will is one signed by and wholly in the handwriting of the testator. *See, e.g.*, *In re* Estate of Kleinman, 970 P.2d 1286 (Utah 1998).

30. *See generally* James G. Dickinson, *Avoiding Conflicts Among Beneficiaries Over Bequests of Property,* 17 EST. PLAN. 216 (July/Aug. 1990).

31. *Id.*

32. Currently, the DL Wills software will not assist with the preparation of personal property memorandums for Nevada, South Dakota, Virginia, and Wisconsin. Although these four state recognize TPPMs, the drafting attorney does not have the advantage of a software program to draft TPPMs.

33. The doctrine of incorporation by reference is an old one. Preceding the Statute of Frauds, the doctrine of incorporation by reference first appeared in England to allow a devisor of land to describe the terms of the conveyance in an extrinsic document. *See generally* 3 A.L.R.2d 682; THOMAS E. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 80, 385 (2d ed. 1953). Today, the UPC § 2-510 provides "[a] writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification." UNIF. PROBATE CODE § 2-510, 8 U.L.A. 146 (Supp. 1995).

34. Bottrell v. Spengler, 175 N.E. 781 (Ill. 1931); Newton v. Seaman's Friend Soc'y, 130 Mass. 91 (1881).

35. Wagner v. Clauson, 78 N.E.2d 203 (Ill. 1948); Whitham v. Whitham, 66 P.2d 281 (Or. 1937).

36. Daniel v. Tyler's Ex'r, 178 S.W.2d 411 (Ky. 1943); Simon v. Grayson, 102 P.2d 1081 (Cal. 1940).

37. *In re* Bauer's Estate, 124 P.2d 630 (Cal. Ct. App. 1942).

38. Generally, all states except Louisiana and New York recognize the doctrine of incorporation by reference. *See generally* ATKINSON, *supra* note 33, at 385.

that unlike the TPPM, the testator is not allowed to alter, change, or amend the separate document or writing after the will has been executed. Numerous reported cases serve as examples of litigation generated by using this doctrine.[39]

Practical Application of TPPMs & DL Wills

To use a TPPM, the drafter must accomplish two things. First, a clause should be inserted into the testator's will regarding the disposition of tangible personal property by a separate writing.[40] This clause should also inform the executor of the implications if a TPPM is not located within a designated period of time upon death.[41] Second, the attorney should assist in the preparation of the TPPM (or at least provide guidance to the client regarding how to draft the TPPM).

When preparing a will referencing a TPPM, the DL Wills software will take the drafter through three different "question screens."[42] By making the pertinent selections, the DL Wills software will insert the following provision into the will:

> Second: I give all tangible personal property owned by me at the time of my death, including without limitation personal effects, clothing, jewelry, furniture, furnishings, household goods, automobiles and other vehicles, together with all insurance policies relating thereto, in accordance with a written memorandum [some states use "statement" or "lists" instead of memorandum] which I intend to prepare and sign, disposing of such property or any part thereof, as permitted by [name of state inserted] law. If I sign more than one such memorandum, the memorandum which bears a date later than that of any other such memorandum shall govern. [Inserted for some states: I intend said memorandum to comply with [state code provision] and that the property listed thereon shall pass in accordance with said memorandum]. I intend to leave such a memorandum at my death, but if no such memorandum is found and identified as such by my personal representative within thirty days after the probate of this will, any such memorandum thereafter found shall be deemed null and void.–Or–I intend to leave such a memorandum at my death, but if no such memorandum is found and identified as such by my personal representative within ninety days after my death, any such memorandum thereafter found shall be deemed null and void.–Or–[nothing if "no such presumption is to be considered in the will" was selected]. In the absence of such a memorandum, or to the extent that such memorandum fails to effectively dispose of any such property for any reason, including the death of any beneficiary, I give such property or the portion not effectively disposed of as hereafter provided with respect to my residuary estate.

The DL Wills Program offers the drafting attorney the option to prepare a TPPM for the twenty-three states previously indicated. However, the form the DL Wills Program provides does not vary between the states. The DL Wills program does not provide specific information on applicable state law or case

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39. Gifford v. Estate of Gifford, 805 S.W.2d 71 (Ark. 1991). For a more detailed analysis of reported cases regarding incorporation by reference; *see generally*, Jodi M. Graves, *Incorporation by Reference, Integration, and Holographic Wills in Gifford v. Estate of Gifford*, 46 ARK. L. REV. 1013 (1994).

40. A general residuary bequest will not be considered a reference in the will to a written statement or list for purposes of a TPPM. Adkins v. Woodfin, 525 So. 2d 447 (Fla. Dist. Ct. App. 1988).

41. Although not required by UPC § 2-513, it maybe be advisable to include in the will instructions to the executor or personal representative to distribute the personal property among a named class of individuals as the executor deems fair and equitable considering the wishes of the individuals if a TPPM is not found within a certain period of time following the testator's death (such as 30, 60, or days). The DL Wills Program, however, does not include this type of language in the TPPM clause. Alternatively, a provision could be included in will regarding the absence of a TPPM, or to the extent the TPPM fails to effectively dispose of property for any reason, including the death of any beneficiary, giving the property or the portion not effectively disposed of as provided with respect to the residuary estate.

42. The DL Wills "question screens" for the TPPM currently are in the following format:

> How are the personal effects and other tangible personal property of the Testator to be bequeathed:
> a. All to one beneficiary.
> b. As per a schedule of specific bequests or a personal property memorandum (with items which are not listed passing as part of the residuary estate)(SELECT)
> c. As provided with regard to the residuary estate.
>
> Is the Testator going to use a personal property memorandum?
> SELECT YES
> Is the Will to contain a conclusive presumption that no personal property memorandum exists if none is found:
> a. Within 30 days after the probate of the Will.
> b. Within 90 days after the death of the Testator.
> c. No such presumption is to be contained in the Will.

law on TPPMs. The DL Wills Program does not provide any guidance or checklist for the attorney or the client regarding the TPPM. The DL Wills software simply provides a very basic TPPM form.

Military practitioners can easily create a TPPM for clients using the DL Wills software program and performing some basic document drafting.[43] Military practitioners should either assist the client with the preparation of the documents, or advise the client regarding the preparation of the TPPM.[44] The military practitioner should advise the client to retain the TPPM in the same location as the will, but not to attach the TPPM to the will. The testator should inform the executor or personal representative about the existence, meaning, and location of the TPPM.

Many clients want to ensure the orderly distribution of personal property that may have greater sentimental than monetary value. In the case where the client desires to make dispositions of tangible personal property, and for clients whose domicile recognizes some type of TPPM, military practitioners should advise clients regarding TPPMs in order to provide a great deal of flexibility in estate plans. Clients can effectively dispose of property by using the TPPM as an estate planning tool. Practitioners must carefully draft provisions in a client's will regarding a TPPM, and properly advise a client regarding the preparation of the TPPM. By understanding the basic requirements for TPPMs, the military practitioner can assist a client in keeping testamentary desires up to date and successfully carrying out an estate plan. Major Rick Rousseau.[45]

Appendix A

Summary of State Statutes Relating to Tangible Personal Property Memorandums

State	Statute Section	Title	Compared to UPC § 2-513 (1990 version)
Alaska	ALASK STAT. § 13.12.513 (LEXIS 2000)	Separate writing identifying devise of certain types of tangible personal property.	Uses the language of the pre-1990 version.
Arizona	ARIZ. REV. STAT. § 14-2513 (LEXIS 2000)	References to separate lists; requirements.	Uses language similar to the pre-1990 version. Different structure.
Arkansas	ARK. STAT. ANN. § 28-25-107 (LEXIS 1999)	Incorporation of writing by reference.	Uses language similar to the pre-1990 version. Different structure.
Colorado	COLO. REV. STAT. § 15-11-513 (LEXIS 1999)	Separate writing identifying devise of certain types of tangible personal property.	Same language, but kept pre-1990 clause allowing document to be handwritten.
Delaware	DEL. CODE ANN. § 212 (LEXIS 1999)	Separate writing identifying bequest of tangible property.	Uses language similar to the pre-1990 version.
Florida	FLA. STAT. § 732.515 (LEXIS 1999)	Separate writing identifying devises of tangible property.	Same language, but kept pre-1990 clause regarding property used in trade or business.
Hawaii	HAW. REV. STAT. § 560:2-513 (LEXIS 1999)	Separate writing identifying devise of certain types of tangible personal property.	Same language.
Idaho	IDAHO CODE § 15-2-513 (LEXIS 1999)	Separate writing identifying bequest of tangible property.	Uses the language of the pre-1990 version.
Iowa	IOWA CODE § 633.276 (LEXIS 1999)	Separate identification of bequest.	Uses language similar to the pre-1990 version. Includes definition of tangible personal property.
Kansas	KAN. STAT. ANN. § 59-623 (LEXIS 1999)	Reference in will to statement to dispose of certain tangible personal property; admissibility.	Uses language similar to the pre-1990 version.
Maine	ME. REV. STAT. § 2-513 (LEXIS 1999)	Separate writing identifying bequest of tangible property.	Uses the language of the pre-1990 version.
Michigan	MICH. STAT. ANN. § 27.12513 (LEXIS 1999)	Separate writing identifying devise of certain types of tangible personal property.	Same language. Effective 1 April 2000.

43. For a sample TPPM from the DL Wills Program with some suggested additional language see the July 2000, *The Army Lawyer* ("Miscellaneous Documents") at <www.jagcnet.army.mil>. The practitioner should consider the suggestions for modifications to the basic DL Wills TPPM.

44. For a sample instruction sheet for the attorney and client see the July 2000, *The Army Lawyer* ("Miscellaneous Documents") at <www.jagcnet.army.mil>. The instructions serve as a checklist for advising the client and then as a memorandum for the client to retain.

45. Major Vivian Shafer of the 48th Graduate Course, assisted with the preparation of this article.

Minnesota	MINN. STAT. § 524.2-513 (LEXIS 1999)	Separate writing identifying bequest of tangible property.	Uses the language of the pre-1990 version.
Missouri	MO. REV. STAT. § 474.333 (LEXIS 1999)	Will may provide for disposal of personal property by separate list.	Uses language similar to the pre-1990 version. Different structure.
Montana	MONT. CODE ANN. § 72-2-533 (LEXIS 1999)	Separate writing identifying disposition of tangible personal property.	Same language. Different structure.
Nebraska	NEB. REV. STAT. § 30-2338 (LEXIS 1999)	Separate writing identifying bequest of tangible property.	Uses language similar to the pre-1990 version. Includes language regarding date of writing.
Nevada	NEV. REV. STAT. § 133.045 (LEXIS 2000)	Disposition of certain tangible personal property by reference to list or statement; requirements.	Similar language, but more expansive with specific requirements. Kept pre-1990 language regarding tangible personal property.
New Jersey	N.J. REV. STAT. § 3B:3-11 (LEXIS 2000)	Identifying devise of tangible personal property by separate writing.	Uses language similar to the pre-1990 version.
New Mexico	N.M. STAT. ANN. § 45-2-513 (LEXIS 2000)	Separate writing identifying devise of certain types of tangible personal property.	Same language. Different structure.
North Dakota	N.D. CECT. CODE § 30.1-08-13 (LEXIS 2000)	Separate writing identifying devise of certain types of tangible personal property.	Same language.
South Carolina	S.C. CODE ANN. § 62-2-512 (LEXIS 1999)	Separate writing identifying devise of certain types of tangible personal property.	Uses language similar to the pre-1990 version.
South Dakota	S.D. CODIFIED LAWS § 29A-2-513 (LEXIS 2000)	Separate writing identifying devise of certain types of tangible personal property.	Same language.
Utah	UTAH CODE ANN. § 75-2-513 (LEXIS 1999)	Separate writing identifying devise of certain types of tangible personal property.	Same language.
Virginia	VA. CODE ANN. § 64.1-45.1 (LEXIS 1999)	Separate writing identifying recipients of tangible personal property; liability for distribution; action to recover property.	Similar language, but more expansive with specific requirements. Contains provision regarding personal representative.
Washington	WASH. REV. CODE § 11.12.260 (LEXIS 2000)	Separate writing may direct disposition of tangible personal property, requirements.	Similar language, but more expansive with specific requirements. Requires reference to document in will. Defines tangible personal property.
Wisconsin	WIS. STAT. § 853.32 (LEXIS 1999)	Effect of reference to another document.	Similar language, but more expansive with specific requirements. Requirements differ depending on date of execution. See language!
Wyoming	WYO. STAT. ANN. § 2-6-124 (LEXIS 2000)	Written statement referred to in will disposing of certain personal property.	Uses language similar to the pre-1990 version. Different structure.

The Military Battles for Electromagnetic Spectrum Superiority

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Introduction

Operation Desert Storm demonstrated the effective use of electronic systems as force multipliers on the modern battlefield. Today's military is becoming increasingly more reliant on frequency-dependent systems to provide positioning, navigation, imagery, communications, intelligence, weather, and to engage the enemy beyond visual range. For example, a soldier may receive positioning and navigation information from a Global Positioning System receiver worn like a wrist watch, or receive an early warning "page" that tells him he is within the fallout area of a ballistic missile.

However, the military's use of new and emerging frequency-dependent technologies is not unique. Commercial and state and local government uses of frequency-dependent systems have experienced similar growth. Capital investment in the wireless mobile industry alone has more than quadrupled since 1993 for a cumulative total of over $60 billion through 1998.[1]

This capital investment was made possible, in large part, when Congress permitted the Federal Communications Commission (FCC) to sell, through competitive bidding, portions of the spectrum that Congress required be reallocated away from federal government users.[2] As the federal government and other users compete for this valuable, but finite resource, the Department of Defense (DOD), as the federal government's principal user of the spectrum, marched to Capitol Hill to fight against the reallocation and sale of frequency spectrum.[3]

Initially proposed legislation prohibiting any interference with military systems failed to pass. Later, the National Defense Authorization Act for Fiscal Year 2000[4] (DOD Authorization Act) required an assessment of national spectrum planning (including the effect on military and intelligence capabilities and requirements), the reclamation of certain military frequencies, and an exchange of frequencies when the DOD is required to surrender such frequencies to other users.

The Spectrum Resource

Electromagnetic radiation is a form of oscillating electrical and magnetic energy capable of traversing space without benefit of physical interconnections. Electric and magnetic fields produce waves that move through space at different rates or "frequencies." Frequency is measured in cycles per second, or Hertz (Hz). For example, the faster a sound wave moves through space, the higher the frequency and, therefore, the higher the pitch of the sound. The set of all possible frequencies is called the electromagnetic spectrum. The subset of frequencies from three kilohertz (kHz) to 300 gigahertz (GHz) is known as the radio spectrum. The term "bandwidth" refers to the number of consecutive frequencies needed to transmit designated bits of information–the width of a communications channel.

The principal value of the spectrum resource lies in its use for conveying information of widely varying sorts at varying speeds over varying distances. Unlike other resources, use of the spectrum does not reduce its availability to other users. However, the spectrum is subject to congestion, in which signals that overlap in time, location, and frequency may interfere with each other. As technologies have improved, the amount of information the spectrum can carry has grown, and thus increased the demand for spectrum and resultant increased interference amongst its users.

Spectrum Regulation—No Cover for the Federal User

The first commercial use of the spectrum occurred on 2 November 1920, with the broadcast of Pittsburgh station KDKA. Because the spectrum was viewed as a public resource, rights for private use of the spectrum were distributed by the Secretary of Commerce on a first-come first-served basis, restricting only the frequency, location and time of broadcast. In 1926 U.S. District Judge Wilkerson held in *United States v. Zenith Radio Corp.*[5] that the Secretary of Commerce lacked the authority to regulate the radio spectrum. To remedy this situa-

1. *In Re* Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, FCC Docket No. 99-354 (Nov. 22, 1999) (on file with author).

2. Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66 (1993); Balanced Budget Act of 1997, Pub. L. No. 105-33 (1997).

3. Daniel Verton, *DOD asks Congress to save more radio frequencies for military,* FED. COMPUTER WK., Feb. 23, 1999.

4. Pub. L. No. 106-65, § 1062 (1999).

5. 12 F.2d 614 (N.D. Ill. 1926).

tion, Congress enacted the Radio Act of 1927, the substantive provisions of which were later incorporated into the Communications Act of 1934[6] (Communications Act), establishing the FCC.

National spectrum management is a shared responsibility between the FCC and the National Telecommunications and Information Administration (NTIA). The Communications Act gave the FCC authority to regulate the radio spectrum. However, Section 305 of the Communications Act expressly reserved to the President the authority to regulate the federal government's use of the radio spectrum. The President delegated this authority to the Secretary of Commerce, who delegated it, in turn, to the Assistant Secretary of Commerce for Communications and Information (also the Administrator of the NTIA).[7]

The Communications Act provides the FCC's regulation of non-federal spectrum must be in the "public interest."[8] The Communications Act fails to define "public interest," and the Supreme Court held that the FCC has broad discretion in formulating the public interest standard.[9] Despite the Supreme Court's deference, the FCC has been unable to establish any clarity for the public interest standard relative to spectrum regulation. Indeed, the inability of the public interest standard to separate claims of equal merit led the FCC, in part, to begin using lotteries and, subsequently, competitive bidding to assign licenses for use of the spectrum.[10]

Although Section 305 of the Communications Act grants authority to the President to regulate only the federal government's use of the radio spectrum, the NTIA, as the President's delegate for spectrum regulation, sees as its objective to ensure effective, efficient, and prudent use of the spectrum in the best interest of the nation.[11] However, the NTIA interprets "best interest of the nation" as encompassing the overall benefits the American public derives from radio-communication services, both federal and non-federal, as well as the needs of various federal and competing users.[12]

In its Strategic Plan for 1997-2002,[13] the Commerce Department intends to ensure all government needs for vital telecommunications services are satisfied. Nevertheless, the NTIA was one of many organizations opposed to legislation prohibiting interference with DOD communication systems. A market-based approach to spectrum regulation by the FCC is emerging.[14] The NTIA has apparently adopted non-federal users of the spectrum and are seemingly opposed to the interests of federal uses of the spectrum. This suggests the necessity of DOD's recent assault on Capitol Hill regarding the auctioning off of the spectrum compromising national security and military readiness. A proactive approach is required by federal agencies today seeking to preserve bandwidth for their current and future needs.

Reallocating and Auctioning the Spectrum—Federal Users Take a Hit

The Omnibus Budget Reconciliation Act of 1993 (OBRA-93) amended the Communications Act and the National Telecommunications and Information Administration Organization Act[15] to require the Commerce Department to identify federal government bandwidth for reallocation to commercial uses. The FCC, pursuant to the Communications Act, will manage this bandwidth in the future.

The OBRA-93 also required the NTIA and FCC to conduct joint spectrum planning sessions with a view toward increasing commercial access to the spectrum. Because the OBRA-93 also permitted the FCC to auction off licenses for use of the spectrum,[16] it was expected that the offering of formerly federal government spectrum through the competitive bidding process would, in turn, increase federal revenue.[17]

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6. 47 U.S.C.S. § 151 (LEXIS 2000).

7. Exec. Order No. 12,046, 43 Fed. Reg. 13,349 (1978); U.S. Department of Commerce, Department Organization Orders 10-10, 25-7 (on file with author).

8. 47 U.S.C.S. § 303.

9. Federal Communications Comm'n v. WNCN Listeners Guild, 450 U.S. 582 (1981).

10. Congressional Budget Office, Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management (1997) [hereinafter CBO Study].

11. NTIA Manual § 2-1 (1999). The *NTIA Manual* is the principal document for federal government spectrum management policies, rules, and technical standards. The *NTIA Manual* and all changes to it are incorporated by reference at 47 C.F.R. § 300.1 (1999).

12. National Telecommunications and Information Administration, U.S. Spectrum Management Policy: Agenda for the Future (1991).

13. Department of Commerce, Strategic Plan for 1997-2002 (1997).

14. William Kennard, Connecting the Globe: A Regulator's Approach to Building a Global Information Community (1999)

15. 47 U.S.C.S. § 901 (LEXIS 2000).

16. *Id*. § 309(j).

The OBRA-93 sought to commercialize the federal government's spectrum use. Specifically, when identifying the federal bandwidth for reallocation, Congress required the Commerce Department to consider whether the federal government could obtain commercial communications services over the identified spectrum. Moreover, Congress required the Commerce Department to promote commercially available substitutes for federal communications services to the maximum extent possible.

While the DOD has begun using commercial communication services, there is an operational and security risk associated with total reliance upon commercial systems. Commercial systems cannot be used for classified communications. Commercial systems are subject to disruption because of market-based economic decisions. This could result in priority access being provided to an adversary rather than the DOD.

In the three years following the OBRA-93, FCC auctions generated $27 billion in receipts to the U.S. Treasury.[18] The auctions generating the greatest revenues involved licenses for new paging services or narrowband personal communication services. Although the FCC auctions clearly achieved Congress' intent to increase federal revenues, an overall national spectrum management policy seemed to take a back seat to a balanced budget.

With the Balanced Budget Act of 1997 (BBA-97), Congress, presumably motivated by the success of the FCC's auctions, continued its practice of slicing federal spectrum and feeding it to commercial users. Accordingly, Congress also extended the authority of the FCC to issue licenses for spectrum based on competitive bidding.

The DOD went on the offensive in response to the continued reallocation of bandwidth from government to commercial use, the demand for wireless services, and deregulation of the telecommunications industry with the passing of the Telecommunications Act of 1996.

The DOD Authorization Act—Controlling the Hemorrhage

On 23 February 1999, several key DOD personnel testified before a joint hearing of the House Subcommittees for Military Procurement and Research and Development on Defense Information Superiority and Information Assurance. With respect to competition for frequency spectrum, Mr. Arthur Money, Assistant Secretary of Defense (Command, Control, Communications and Intelligence), stated the following:

> Much of our information superiority depends on access to the radio frequency spectrum. The priority we place on mobility, range, and speed dictates that much of our information technology be wireless and consequently we value access to the radio frequency spectrum which provides us the essential media for communicating information, unhampered by mechanical connections or hampered by weather and other natural phenomena. The U.S. military has an incredible investment in systems that exploit the spectrum and attempt to deny its use by our adversaries. We are frankly not surprised to find that the many attributes we value in sensing and communicating using the radio spectrum have private and commercial value as well. There is increasing pressure for the government to reduce its spectrum usage and to make this resource available for private sector development. We understand the resolution of who should use and how the spectrum is used is an important one. It is equally important we consider the impact to national security in these deliberations and understand the full costs in terms of security and dollars spectrum reallocation incurs. The DOD is committed to using the spectrum allocated to it more efficiently, but new military requirements for passing video and detecting low observable threats exacerbates an already difficult problem.
>
> Today there is no international mechanism for resolving spectrum allocation disputes, and we find ourselves not only competing with commercial interests but with international entities for spectrum. A number of foreign nations are considering charging the Department for spectrum usage.[19]

Mr. Money's comments were not abstract speculation. For example, the Republic of Korea's Ministry of Information and Communications (MIC) refused to allocate frequencies required to deploy the Patriot missile system into the Korean peninsula. The Patriot operates in a band of the spectrum occupied by cellular phone customers throughout Korea. Currently, the Patriot operates in Korea on a very strict not-to-interfere basis. The Korean MIC may be willing to relinquish a portion of the spectrum to facilitate Patriot operations, but not until the

17. *Id*. § 922(1).

18. CBO Study, *supra* note 10.

19. Arthur L. Money, statement to the House Subcommittees for Military Procurement and Research and Development on Defense Information Superiority and Information Assurance (Feb. 23, 1999) *available at* <http://www.house.gov/hasc/testimony/106thcongress//00-02-23money.htm>.

United States has provided documentation to the MIC from which it can complete a full system analysis.[20] But for an existing agreement between NATO countries, similar conflicts may have seriously impaired the recent bombing campaign in Kosovo.

In May 1999, Senator John Warner introduced an amendment to the DOD Authorization Act prohibiting any communication system from interfering with the DOD's use of the frequency spectrum, and requiring any offender to pay the remediation costs incurred by the DOD because of such interference.[21]

Senator Warner's proposed legislation met with great opposition. Satellite and telecommunications industry trade groups, the FCC, and the Office of Management and Budget all opposed the spectrum management provisions of the DOD Authorization Act.[22] The FCC Chairman, William Kennard, wrote directly to Senator Warner to express the FCC's opposition to the amendment. Even the NTIA opposed the amendment.

While the opposition managed to defeat Senator Warner's amendment, the DOD did obtain relief from the DOD Authorization Act in three distinct areas: (1) national spectrum planning; (2) reclamation of reallocated frequencies; and (3) a military frequency replacement procedure.[23]

First, Congress required the NTIA and the FCC, in concert with the effected federal agencies, to review and assess the progress towards implementing a national policy for spectrum management, the reallocation of federal bandwidth, and the impact on federal agencies of such reallocation. During the course of this review and assessment, Congress required the NTIA and FCC to give particular attention to the impact on current and future critical military and intelligence capabilities, operational requirements and national defense modernization programs. The results of this review and assessment must be submitted to the President and several Congressional committees by 1 October 2000.

Second, Congress established a procedure for the DOD to at least maintain its current allocations of bandwidth. Specifically, the DOD can withhold surrendering bandwidth for which it is a primary user until (1) the NTIA and FCC make replacement bandwidth available, and (2) the Secretary of Commerce, Secretary of Defense and the Chairman of the Joint Chiefs of Staff jointly certify that the replacement bandwidth offers comparable technical characteristics, relative to military capabilities, to the bandwidth being surrendered.

Pursuant to the OBRA-93 and BBA-97,[24] the Commerce Department, through the NTIA, identified and recommended the reallocation of federal government frequencies. Apparently disagreeing with the reallocation assessment of the NTIA, Congress expressly reclaimed a total of 16 MHz of bandwidth for use by the DOD. Specifically, the DOD reclaimed 3 MHz between 138 and 144 MHz, 5 MHz between 1385 and 1390 MHz, and the reduction by 8 MHz of spectrum below 3 GHz that was to be recommended for reallocation away from federal users.

Conclusion

Now that the dust has settled, it appears the DOD has won a small number of spectrum recovery campaigns. First and foremost, the DOD reclaimed portions of the radio spectrum previously reallocated away by the NTIA, and postponed further encroachment of the spectrum unless it receives a comparable replacement. As the primary federal spectrum user, the military will also have a greater voice in developing a national spectrum policy. In developing this national policy, current and future military systems must be fully considered.

One shortcoming of the DOD Authorization Act is the lack of any remedial provisions should, for example, the Commerce Secretary disagree with the Secretary of Defense regarding comparable replacement bandwidth. Also, will the review and assessment by the NTIA and the FCC attempt to re-open the DOD's old wounds? Another void in the DOD Authorization Act is a provision regarding who will pay the cost of relocating existing military systems to other portions of the spectrum when a comparable replacement is made available.

A national spectrum management policy may require greater efficiencies by federal users of the spectrum, reallocation of spectrum back to federal use, or possibly even management of the spectrum by associations of users rather than government regulators. If the DOD's attack on Capitol Hill results in an effective, comprehensive and equitable national spectrum policy then it not only has won the battle, it has won the war. That would be in the "best interest of the nation."

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20. Interview with Gunnery Sergeant Carroll "Alex" Alexander, United States Marine Corps, former Frequency Action Officer, Joint Frequency Management Office Korea, J6 Operations Division, United States Forces Korea (November 1999).

21. S. 1059, 106th Cong., 1st Sess. §§ 1049, 1050 (1999).

22. *Clinton Administration Opposes Handing DoD Spectrum Priority*, SATELLITE NEWS, July 5, 1999; *DoD May Gain Edge in Spectrum Disputes Via Authorization Bill*, SATELLITE NEWS, May 31, 1999; *Rep. Dingell Gains OMB Pledge to Fight Spectrum Provisions*, SATELLITE NEWS, July 5, 1999.

23. DOD Authorization Act, Pub. L. No. 106-65, § 1062 (1999).

24. 47 U.S.C. § 923 (LEXIS 2000).

Environmental Risk Management: Protecting Migratory Birds on Federal Installations

Captain Justin S. Tade
White Sands Missile Range, New Mexico

As Bubba pilots his Ford F-150, with the fully stocked gun-rack and Audubon Society stickers on the rear window, down the road bordering Fort Swampy, he is horrified to see a hawk gracefully alight on a power pole then burst into flames like a roman candle. Disgusted by this innocent bird's sad demise, Bubba, being the enviro-friendly guy he is, decides to report this incident to his local chapter of the Audubon Society and the U.S. Fish and Wildlife Service (USFWS). Should Bubba's report alarm Fort Swampy? Given some recent decisions in federal cases, it should.

Federal agencies' obligations under the Migratory Bird Treaty Act (MBTA)[25] were recently thrown into greater confusion at the hands of the federal district court for the District of Columbia.[26] In *Humane Society v. Glickman*,[27] the court held that the MBTA applies to federal agencies. Therefore, federal agencies must obtain appropriate permits before conducting activities that result in the intentional taking of migratory bird species.[28] This decision creates such turmoil because it runs directly counter to the 1997 decisions of two federal circuit courts, which held that the MBTA does not apply to the United States.[29] "A decision has not yet been made on whether to appeal the district court's ruling, leaving an open question as to whether federal agencies will now have to apply for permits from the USFWS before engaging in any activities that may be construed as taking migratory birds."[30] Given the dynamic nature of this issue, federal agencies such as the USFWS have been counseled to adopt a cautious position on this issue.[31] Therefore, installations should practice "forward-thinking" risk management and seek appropriate permits for intentional and unintentional destruction of migratory birds.

At this point it is important to consider the reasoning behind the holdings in *Newton County Wildlife Ass'n v. United States Forest Service*[32] and *Sierra Club v. Martin*.[33] Both cases involved the U.S. Forest Service selling logging rights to cut timber on federal land. This harvesting of timber would have indirectly resulted in the death of migratory birds. Neither of these cases discussed the Supreme Court's discussion in *Robertson v. Seattle Audubon Society*.[34] In *Robertson*, "the Supreme Court employed language that quite clearly suggested that it understood federal agencies to be bound by MBTA § 2, 16 U.S.C. § 703."[35] The court in *Humane Society* did not understand why the Eighth and Eleventh Circuit Courts[36] did not follow the Supreme Court's guidance in their respective cases. The court agreed that the Eighth and Eleventh circuits were likely correct to reason that Congress did not envision that the MBTA would be construed "as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds."[37] However, the *Humane Society* court did not follow the other courts' reasoning that Congress intended to exempt all actions committed by

25. 16 U.S.C.S. §§ 703–712 (LEXIS 2000).

26. *See* Major James Robinette, *Migratory Bird Treaty Act May Now Apply to Federal Agencies*, ARMY LAW., Nov. 1999, at 40.

27. No. 98-1510, 1999 U.S. Dist LEXIS 19759 (D.D.C. July 6, 1999). This case involved a plan by the United States Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services (APHIS-WS) to intentionally capture and kill Canadian geese in order to decrease conflicts between the geese and Virginia homeowners, businesses, and public institutions. The court rejected the argument that the MBTA does not apply to federal agencies, but, confusingly, the court order limited itself as to affected parties, affected species, and particular activities, such as, the APHIS-WS goose control program in Virginia.

28. *Id*. *See* 50 C.F.R. § 10.13 (1999) for a list of migratory bird species.

29. *See* Newton County Wildlife Ass'n. v. United States, 113 F.3d 110 (8th Cir. 1997) (concluding that the Forest Service is not a "person" for purposes of the MBTA); Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997).

30. *See* Robinette, *supra* note 26, at 41.

31. Memorandum from Office of the Solicitor, U.S. Department of the Interior, to Director, U.S. Fish and Wildlife Service, subject: Advice Regarding *Humane Society v. Glickman* (Aug. 1999) (unpublished memorandum on file with author). The Office of the Solicitor advised the USFWS to not take, hunt, capture, or kill any migratory bird in any location without a permit or regulatory authorization under the MBTA. Furthermore, the USFWS was directed to not assert in any communication or correspondence that federal agencies are not covered by the prohibitions of the MBTA.

32. *See Newton County Wildlife Ass'n*, 113 F.3d at 110; *Sierra Club*, 110 F.3d at 1551.

33. *Id.*

34. 503 U.S. 429 (1992).

35. *See* Humane Society v. Glickman, No. 98-1510, 1999 U.S. Dist. LEXIS 19759 (D.D.C. July 6, 1999).

36. States in the Eighth Circuit include Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. States in the Eleventh Circuit include Alabama, Florida, and Georgia.

all federal officials from the MBTA.[38] Given the position taken by the Eighth and Eleventh circuits, installations located within those jurisdictions may consider taking the liberal view that the MBTA does not apply to them.

Assuming the MBTA applies to federal agencies, it is important for Army installations to know about the recent decision in *United States v. Moon Lake Electric Ass'n*.[39] Moon Lake Electric Association (Moon Lake) is a rural electrical distribution cooperative based in Roosevelt, Utah. Moon Lake services electric customers in Utah and Colorado and has power lines, power poles, and other power distribution facilities running between the two states. On 9 June 1998, the Department of Justice filed an unprecedented information[40] charging Moon Lake with seven misdemeanor violations of the Bald and Golden Eagle Protections Act (BGEPA)[41] and six misdemeanor violations of the MBTA.[42] According to the United States, Moon Lake's violations resulted in the untimely electrocution of twelve golden eagles, four ferruginous hawks, and one great horned owl. The United States further proffered that these deaths were caused by Moon Lake's failure to install inexpensive equipment on power poles that would have otherwise protected the birds.

On 12 August 1999, the United States prevailed against Moon Lake. Moon Lake pled guilty to three violations of each act, agreed to pay $100,000 in penalties, and will serve three years probation. Moon Lake also agreed to retrofit its power poles.[43] The MBTA carries criminal penalties of up to six months confinement and a $15,000 fine for violation of a regulation made pursuant to the MBTA, or up to two years imprisonment and a maximum $250,000 fine if the violation is done with a pecuniary motive.[44] The maximum penalty for a first time conviction under the BGEPA is a fine of not more than $5000, or imprisonment of not more that one year or both.[45] However, in January 1999, Moon Lake filed a motion to dismiss in U.S. District Court for the District of Colorado.[46] Moon Lake basically argued that the electrocutions of birds, by their power distribution facilities, were not violations of the MBTA or the BGEPA because the electrocutions were unintentional and not caused by the sort of conduct normally exhibited by hunters and poachers.[47] First, the court addressed whether the MBTA and BGEPA proscribe only intentionally harmful conduct. The court then determined whether the acts proscribe only physical conduct normally associated with hunting or poaching.

On the first issue, citing *United States v. Corrow*,[48] the court found, "it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge."[49] In contrast, it is important to note that the BGEPA is not a strict liability crime and applies only to those who act "knowingly, or with wanton disregard for the consequences" of their acts.[50]

On the second issue, the court found against Moon Lake by holding that the plain language of the MBTA and BGEPA proscribes several types of physical conduct outside of hunting and

37. *See Humane Society*, 199 U.S. Dist. LEXIS 19759, at *34.

38. *Id.*

39. 45 F. Supp. 2d 1076 (D. Colo. 1999).

40. An information is a written accusation, made by a public prosecutor, that may be used in place of a grand jury indictment to bring a person to trial. FED. R. CRIM. P. 7.

41. 16 U.S.C.S. § 668 (LEXIS 2000).

42. *Id.* §§ 703, 707a.

43. *See* Ted Williams, *Zapped*, AUDUBON, Jan.-Feb. 2000, at 33. Though there is no estimate for the cost of the retrofit to Moon Lake, the U.S. Army retrofitted 320 poles at Rocky Mountain Arsenal at a cost of $94,000 in the mid-1990s.

44. *See* Robinette, *supra* note 26, n.10.

45. 16 U.S.C.S. § 668. In the case of a second or subsequent conviction for a violation the BGEPA, the fine is not more than $10,000 or imprisonment of not more than two years, or both. The commission of each taking or other act prohibited by the BGEPA with respect to a bald or golden eagle constitutes a separate violation.

46. *See* United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d. 1076 (D. Colo. 1999).

47. *Id.* at 1072. *Moon Lake* cited five cases supporting its argument that the MBTA prohibited only physical conduct associated with hunting and poaching. The seminal case relied upon was *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991).

48. 119 F.3d 796 (10th Cir. 1997). In *Corrow*, the Tenth Circuit joined the majority of circuit courts of appeal in holding that § 707(a) of the MBTA is a strict liability crime.

49. *Id.* at 805 (quoting United States v. Manning, 787 F.2d 431, 435 n.4 (8th Cir. 1986)).

50. 16 U.S.C.S. § 668(c).

poaching.[51] The MBTA prohibits pursuing, hunting, capturing, killing, shooting, wounding, trapping, collecting, possessing, offering for sale, selling, offering to barter, bartering, offering to purchase, purchasing, delivering for shipment, shipping, exporting, importing, delivering for transportation, transporting, carrying, and receiving migratory birds.[52] Obviously, most of these prohibited acts are not normally associated with hunting and poaching and show that Congress intended to prohibit conduct beyond that normally exhibited by hunters and poachers. The court exhaustively reviewed the congressional record pertaining to the passage of the MBTA to reach its conclusion. It is interesting to note that even in 1918, when the MBTA was being debated, at least one "astute" congressional representative saw the nexus between the Department of Defense (DOD) and the MBTA. While debating the MBTA, Representative Tillman noted, "God made woodpeckers, meadow larks, wild ducks, and bobolinks for boys to shoot . . . it makes better soldiers of them, if they learn to shoot."[53] Representative Tillman's argument failed to convince a majority of his colleagues.

Regardless of the location of your installation, from the deserts of the southwest to the hinterlands of Alaska, you probably have migratory birds or raptors using your land. If these birds prefer to use your installation's power poles for nesting or resting, your installation should be concerned. Retrofitting power lines and poles with bird friendly devices is strictly voluntary.[54] However, once a power pole on a federal installation outside of the Eighth and Eleventh Circuits kills a bird, the installation can be sued or otherwise subjected to criminal enforcement action pursuant the latest case law and the MBTA and BGEPA.

There are approximately 116,531,289 power distribution poles in the United States,[55] thousands of which are on DOD installations. Retrofitting every power line and pole on DOD property would cost millions of dollars. Though retrofitting every power pole on DOD property may be an impractical fix, the implementation of sound environmental risk management principles is not. Advice, guidance, and even design specifications for making power distribution systems safe for birds, especially raptors, can be found by contacting the USFWS or the utility industry's Avian Power Line Interaction Committee (APLIC).[56] Risk management steps to consider in order to protect migratory birds and raptors include the following eight steps.

First, identifying any power lines or poles on the installation that are known to kill migratory birds. Once these deadly power lines and poles have been identified, they should be retrofitted to ensure they are safe for use by migratory birds.

Second, meeting with installation environmental stewardship specialists and natural resource managers to ensure they are aware of these latest issues surrounding the MBTE and BGEPA. Installation environmental professionals should spearhead efforts to protect their installation from liability for the unlawful taking of migratory birds. These new cases should be incorporated into installation planning under the National Environmental Policy Act (NEPA),[57] the installation Integrated Natural Resources Management Plan (INRMP),[58] and the installation master plan.

Third, obtaining appropriate permits from the USFWS.[59] The USFWS special take permits are required if an installation proposes to control nuisance birds by "intentionally taking" them. Even the removal of a bird's nest from a building on the

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51. *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1080.

52. *See* 16 U.S.C.S. §§ 703–712.

53. *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1080 (citing 56 CONG. REC. 7447 (daily ed. June 6, 1918)).

54. *See Williams*, *supra* note 43, at 34.

55. *Id*.

56. AVIAN POWER LINE COMMITTEE, EDISON ELECTRIC INSTITUTE/RAPTOR RESEARCH FOUNDATION, SUGGESTED PRACTICES FOR RAPTOR PROTECTION ON POWER LINES: THE STATE OF THE ART IN 1996 (1996). The APLIC provides guidance standards for the utility industry pertaining to bird interaction with power lines and related facilities. The APLIC has produced two detailed reports on suggested practices utilities can use to protect raptors from electrocution on power lines and avoid bird collisions with power lines. To obtain these reports, send an electronic-mail request to enviro@sprnet.com.

57. 42 U.S.C.S. § 4321-4370D (LEXIS 2000).

58. *See* U.S. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES-LAND, FOREST AND WILDLIFE MANAGEMENT, para. 9.1 (28 Feb. 1995). Integrated natural resources management plans must be maintained for properties under DOD control. These plans guide planners and implementers of mission activities as well as natural resources managers. A natural resources management plan is integrated when the following criteria are met: (1) All renewable natural resources and areas of critical or special concern are adequately addressed from both technical and policy standpoints; (2) The natural resources management methodologies will sustain the capabilities of the renewable resources to support military requirements; (3) The plan includes current inventories and conditions of natural resources; goals; management methods; schedules of activities and projects; priorities; responsibilities of installation planners and decision makers; monitoring systems; protection and enforcement systems; land use restrictions, limitations, and potentials or capabilities; and resource requirements including professional and technical manpower; (4) Each plan segment or component (that is, land, forest, fish and wildlife, and outdoor recreation) exhibits compatible methodologies and goals including compliance with the Endangered Species Act and applicable endangered species management plans; (5) The plan is compatible with the installation's master plan, pest management plan, and master training schedule.

installation may require a USFWS permit.[60] Installations should consider contacting the USFWS even for activities that "foreseeably will result in unintentional destruction"[61] of migratory birds. The consultations with USFWS as to migratory bird take permits should be reflected in the administrative record.[62]

Fourth, where the purpose of an installation action is to intentionally and directly take migratory birds, the installation must by law and Army guidance apply for and obtain a depredation permit or other regulatory authorization from the USFWS prior to taking action and record any birds purposefully and intentionally taken under the permit and provide an annual report to the USFWS.[63]

Fifth, when an installation engages in an otherwise lawful activity that involves the unintentional taking of migratory bird species, it should coordinate with and seek the views of the USFWS and state fish and game officials. Furthermore, the installation should and seek to minimize impacts of management activities on migratory birds in INRMP and NEPA documents.[64]

Sixth, ensuring contracts with private companies for the installation of power distribution facilities include design specifications that reduce the risk of killing birds that may use the lines or poles. The added cost of installing "bird safe" measures should be reflected in all contract bids.

Seventh, coordinating with the U.S. Army Corps of Engineers, installation public works departments, or private utility companies that may install power distribution facilities on your installation. Inform these entities of cases and decisions like *Moon Lake* and *Humane Society v. Glickman*. Environmental law specialists and installation environmental specialists should ensure that anyone installing power lines and poles on the installation implement a policy that will result in "bird safe" power distribution facilities.

Eighth, publishing commander's guidance addressing the installation's position on environmental stewardship and the need to implement policies and procedures for the protection of migratory birds.

The DOD annually spends millions of dollars protecting the environment. It is wiser to invest dwindling federal dollars in protection programs than in fines and costly litigation. Taking these forward-thinking environmental risk management steps is another important way for the Army to promote environmental stewardship while focusing on its mission. [65]

59. Application procedures and general rules for acquiring depredation permits for migratory birds can be found at 50 C.F.R. § 21.41 (1999). Application procedures and general rules for acquiring permits for the taking, possession, and transportation of bald and golden eagles within the United States can be found at 50 C.F.R. § 22.

60. *See* 50 C.F.R. § 21.27. Special purpose permits may be issued for special purpose activities related to migratory birds, their nests, or eggs.

61. *See* Robinette, *supra* note 26, at 40.

62. An administrative record is the paper trail that documents an agency's decision-making process, the basis for the decision, and the final decision. *See* Major Michelle Shields, *Compiling an Administrative Record*, ARMY LAW., Mar. 2000, at 35.

63. Draft Information Paper from United States Army Environmental Center, subject: Migratory Bird Treaty Act (MBTA) (Mar. 1999) (on file with author).

64. *Id.*

65. The primary focus of this guidance is on power lines, power poles, and other power distribution facilities on DOD installations. Installation environmental law specialists should be consulted regarding issues involving the unintentional taking of migratory birds by other mission-related activities such as military training and timber harvesting.

CLAMO Note

Center for Law and Military Operations (CLAMO)
The Judge Advocate General's School

Introductory Note

The provision of legal support to operations, through the practice of operational law, is no less an art than the litigation of the largest criminal and civil cases. The operational law practitioner of the former carries a significant burden on his shoulders—the lives of soldiers and the success of an operation. Operational law is also a science that calls for education and internship in all of its component areas. Because its practice occurs in an operational setting, we usually characterize the study of operational law as *training*, vice *education*. But, do not let the "training" label mislead those who do not practice in this arena. Operational lawyers have had to ponder the following: the impact of the Ottawa Convention[1] on U.S. operations with allied signatories, the intricacies of U.S. fiscal law as it relates to requests for assistance by foreign nationals, the authority for non-governmental organization members and civilian dignitaries to ride aboard military aircraft, the impact of the Basel Convention[2] on managing hazardous waste during a contingency deployment, and the nuances of other nations' civil liability laws in order to adjudicate claims. This varied, multi-disciplinary, field requires that judge advocates be educated in all of the core legal disciplines.

The article below demonstrates how a staff judge advocate office can train to meet the challenges of today's legally complex operations. The article is noteworthy, not only for its content, but also for the initiative and forward thinking that it reflects. Operations law is interactive; lessons learned must be documented and shared. Unique approaches, solutions, and legal tools must be created and improved with each use. Toward this end, the Center has developed its newest database, *Combat Training Centers and Training*, available at <www.jagcnet.army.mil/clamo>. There, you will find the outline of the Fort Gordon Operational Law Training Program described below, materials on the Army's four Combat Training Centers, and many other operational law training documents. The Center continues to invite contributions of other materials and products that will better prepare judge advocates for future missions, domestically, and around the world.

OPLAW Attorney Training: A Program for Non-deployable Legal Offices

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Introduction

This note introduces a training program for military attorneys assigned to Training and Doctrine Command (TRADOC) installations or other non-deployable legal offices. Although rarely deploying its lawyers to provide support to military operations, the Office of the Staff Judge Advocate (OSJA), United States Army Signal Center and Fort Gordon, has conceived and developed this program to prepare its judge advocates for future assignments, deployments, and operational law (OPLAW) positions. Without a similar type of program, military attorneys in non-deployable legal offices can find themselves unprepared for the often quick transition to a deployable unit or position.

The OPLAW Attorney Training Program (ATP) is useful to introduce new judge advocates to the "soldier-lawyer" concept. It also develops and sustains the skills all military attorneys need for success in deployable assignments. With training focused in three areas—soldier skills, lawyer skills, and OPLAW skills—this ATP is readily adaptable to an existing leadership professional development (LPD) program; but it does require "out-of-office" exercises and qualification courses not normally attempted by non-deployable legal offices.[3]

Training Objectives

"To succeed in today's operational environment, judge advocates must be . . . knowledgeable as soldiers and lawyers . . . and proactively working to promote the mission . . . ."[4] The inspiration for the OPLAW ATP is derived in large part from the lessons learned at the Combat Training Centers (CTCs) as

1. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Mar. 1, 1999, 36 I.L.M. 1507.

2. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 649.

3. A description of this program and information on many of the training topics can be found on the Fort Gordon OSJA web page at <www.gordon.army.mil/osja/osja.htm> under the heading Administrative Law. It is also available in the "Leadership and Training" database on JAGCNET at <www.jagcnet.army.mil> and in CLAMO's new *CTC and Training* database available at <www.jagcnet.army.mil/clamo>.

4. U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations ix (1 Mar. 2000) [hereinafter FM 27-100].

reported by CLAMO in this publication.[5] The objectives of the program are soldier skill proficiency, familiarity with the core legal disciplines for military operations, and an understanding of the judge advocate's role in the OPLAW mission. The training cycle should be one year.

Soldier Skills

The most critical training area covered by this program is that of basic soldiering skills. If not adequately trained and proficient on common soldier skills, judge advocates and their fellow soldiers are at greater risk of injury or death in an operational environment.[6] Even if a lack of soldier skills does not get a military lawyer hurt or killed, credibility in the eyes of commanders and other soldiers is threatened, and this may hinder the legal support provided to the operation.

A judge advocate participating in the OPLAW ATP must successfully qualify on the M16A2 rifle and the 9mm pistol. Familiarity with the handling and operation of these two personal weapon systems is essential because a deployed judge advocate never knows what type of weapon he or she will be issued. The program also requires proficiency with nuclear, biological, and chemical equipment use and decontamination procedures, radio use and procedures, map reading and land navigation, use of night observation devices, and personal issue equipment. Judge advocates can also participate in a first aid qualification course as part of the program–a valuable skill often overlooked.

Each attorney is also expected to obtain a driver's license to operate a high-mobility multipurpose-wheeled vehicle (HMMWV). To accomplish this cost-effectively, the motor pool can train and license one judge advocate in the office; that individual then can train the other lawyers in the office and conduct the required "road tests." Once qualified to operate a HMMWV, a judge advocate will not always have to pull enlisted legal support from the mission to drive around the area of operations (unless the mission or convoy rules so require). Knowledge of how to operate a HMMWV could end up being a lifesaver in a combat crisis situation.

As a hybrid of the term "soldier skill," the ATP also incorporates training related to the judge advocate's role as a staff officer. It is critical that military attorneys providing legal support to deployable units learn the military decision making process (MDMP). Although MDMP is trained extensively at the Combined Arms and Services Staff School (CAS3), many judge advocates are thrust into a staff officer role before attending CAS3. Without an understanding of the MDMP, and of their role in it, judge advocates may be excluded from the planning stage of operations. Consequently, the judge advocate reacts to crises instead of helping the commander anticipate and proactively engage them.

Several of the soldier skills training areas require judge advocates to get out of the office and on the range, or behind the wheel, or in the gas chamber. Judge advocates in non-deployable legal offices will relish the opportunity to get away from clients or the computer screen and receive military training that can be fun and just might save their lives or the lives of others in the future.

Lawyer Skills

During the OPLAW ATP, judge advocates develop and sustain the skills necessary to provide accurate and timely legal support during military operations. They become familiar with the rucksack-deployable law office and library, and they gain proficiency in using JAGCNET. But most importantly, the program enhances their readiness to practice in the six core legal disciplines that comprise the Army's legal support of military operations.[7]

Because most judge advocates are exposed to legal assistance and military justice in their everyday garrison operations, the OPLAW ATP focuses mainly on three other disciplines: claims, administrative law, and civil law. The developers of this program feel these three legal areas are most critical in the modern operational environment.

The ability to pay claims to the inhabitants of foreign countries under the Foreign Claims Act[8] for property damage , personal injury, or death plays an important role during military operations. The purpose of the Act is to promote friendly relations by settling meritorious claims through commissions that can pay up to $100,000. The ability of the United States to pay claims quickly and efficiently during a military operation serves to promote good will with the local inhabitants of the host country and prevents grievances by potential claimants distracting the commander during operations.

Potentially, another source of distraction for commanders during military operations is investigations, especially *Army Regulation* (*AR*) *15-6* investigations.[9] The portion of the OPLAW ATP related to administrative law focuses on investi-

5. CLAMO Report, *Combat Training Centers: Lessons Learned for the Judge Advocate*, ARMY LAW., June 1999, at 52 (the first in a series of reports).

6. *Id.* at 60.

7. *See* FM 27-100, *supra* note 4, at 3-1 (listing military justice, international law, administrative law, civil law, claims, and legal assistance).

8. 10 U.S.C.S. § 2734 (LEXIS 2000).

9. U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988).

gations, situations that give rise to investigations (accidents and fratricide in particular), and techniques judge advocates can use to minimize the potential for distraction. Adequate pre-planning in this area, identifying investigating officers and preparing fill-in-the-blank investigation packets, will prove invaluable while deployed and minimize the distraction factor.

Another legal field critical to modern deployments is contingency contracting (which falls under the discipline of civil law in FM 27-100). Units rarely deploy these days with adequate food, fuel, and shelter. Much of this materiel must be acquired from a host nation. Securing such necessities requires legal support to the contracting process. At most Army installations, the attorneys working in the contract arena are Department of the Army civilians. Consequently, there is little opportunity for military attorneys to obtain practical hands-on experience in contract law. As an element of the OPLAW ATP, judge advocates are exposed to issues and processes related to contingency contracting. The civilian contract attorney can assist in this area (and may have practical active duty experience to share as well).

OPLAW Skills

Operational law is the body of domestic, foreign, and international law that directly affects the conduct of operations.[10] Operational law supports the command and control, sustainment, and conduct of operations. If not assigned to a deployable unit, a judge advocate will not be exposed to OPLAW or forced to develop proficiency in this area. The OPLAW ATP recognizes this and incorporates training related to the provision of OPLAW support into the program.

Staff judge advocates and other senior leaders in a legal office can provide instruction on the history of legal support to military operations. This is a perfect opportunity to hear the "war stories" and gain an appreciation of how the role of the judge advocate has evolved over time. Additionally, a soon-to-be-published account of judge advocates in combat[11] may serve as the basis of instruction or added to a professional development reading list.

Military attorneys participating in the ATP are expected to become familiar with command post structure and operations; to be capable of developing and training rules of engagement (ROE); to learn how to track a battle; and to understand the mission and role of the judge advocate in public affairs, civil affairs, psychological operations, information operations, and targeting. As part of the ROE objective, judge advocates develop lane training and situational training exercises applying ROE and mission-specific requirements of deployable units on the installation. Many TRADOC posts host deployable tenant units that can benefit greatly from this type of legal support in garrison. Additionally, this hands-on, real-life aspect of the program can pay big dividends to the deployable units to which the trained attorneys are eventually assigned. Due to the nature of modern day deployments, where an international incident can arise from the conduct of one junior enlisted "strategic soldier" with a weapon, it is essential that judge advocates know how to properly train the troops with respect to the use of force, especially when dealing with civilians.

Responding again to the lessons learned from the CTCs, the OPLAW ATP also requires participating judge advocates to develop the skills necessary to identify and resolve issues related to fratricides, civilians on the battlefield, the handling of the dead, and host nation relations. These are very important areas in which judge advocates must develop proficiency to ensure the most effective support for modern military operations. Judge advocates assigned to units deploying to the CTCs receive extensive training in these areas. Judge advocates assigned to a non-deployable legal office, on the other hand, will not normally delve into these issues unless they participate in the OPLAW ATP.

Conclusion

By using the materials already developed for Fort Gordon's OPLAW ATP, any installation can incorporate this training into its existing LPD program. To meet the objectives, however, additional training sessions, such as brown bag lunch lectures and "out-of-office" ranges and qualification courses, must be planned and executed to augment the LPD program. A legal office that does not have an OPLAW attorney should designate an experienced judge advocate to administer the OPLAW ATP. As a result of a properly run program, military attorneys stationed to non-deployable legal offices will leave that type of assignment knowing how to shoot, move, and communicate on the battlefield and will possess the OPLAW skills essential to success in supporting military operations.

10. *See* FM 27-100, *supra* note 4, at 3-2.

11. Fred L. Borch, Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (to be published by the U.S. Army Center of Military History later this year).

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 latest issue, volume 7, number 4, is reproduced in part below.

DOJ Decides No Supreme Court Review in EPA "Overfile" Case

On 16 September 1999, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit ruled that the Resource Conservation and Recovery Act (RCRA)[1] does not give the Environmental Protection Agency (EPA) the authority to bring an enforcement action against a company that has already resolved an action over the same violations brought by an authorized state agency.[2]

On 24 January 2000, the EPA requested a re-hearing by the three-judge panel, and by the entire Eighth Circuit court. The court denied both requests. An appeal of the Eighth Circuit's opinion was due to the Supreme Court on 24 April 2000. However, the Department of Justice (DOJ) declined to take the appeal to the Supreme Court on behalf of the EPA. Accordingly, the case is now formally closed. The EPA lacks legal authority to "overfile" environmental cases resolved with state agencies.

The plaintiff, Harmon Industries, was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon's employees threw used solvent residues out the back door of the plant. The discarded solvents were hazardous wastes under the RCRA.

In 1987, Harmon discovered what the employees were doing and ordered the practice to cease. 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 first being authorized to administer a program the EPA had never withdrawn the state's authority.

After meeting with Harmon, the MDNR oversaw the investigation and cleanup of the Harmon facility. Ultimately, the state approved a post-closure permit for the facility, with costs of over $500,000 over thirty years.[3] 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 of its view that fines should be assessed against Harmon. After the petition had been filed and approved by the state, the EPA filed an administrative complaint against Harmon seeking over two million dollars in penalties. An administrative law judge and the Environmental Appeals Board found for the EPA.[4] Harmon appealed to the 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.[5]

Harmon won the appeal to the federal district court.[6] According to the court, the RCRA does not give EPA authority to override the state once it determines an appropriate penalty. Section 3006(e) of RCRA gives the EPA only the option of withdrawing authorization of a state to administer a RCRA program. The EPA appealed the case to the Eighth Circuit. As noted above, the circuit court decided in favor of Harmon, and the DOJ has declined to take the case to the Supreme Court.

In light of this case, installation environmental law specialists should be aware of overfiling issues in all cases brought against an installation by the EPA. In almost all cases, installations will have some dealings with state regulators prior to receiving complaints from the EPA. In those cases which have resulted in the issuance of a state notice of violation, administrative order, or consent decree, the ability of the EPA to subsequently intervene and file an action on it's own behalf has been

1. 42 U.S.C.S. §§ 6901-6992K (LEXIS 2000).

2. Harmon Indus., Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999).

3. *Id.* at 897.

4. Harmon Indus., Inc. v. Browner, 19 F. Supp. 2d 988, 989 (W.D. Mo. 1998).

5. *Id.* at 988.

6. *Harmon Indus., Inc.*, 191 F.3d at 894.

severely limited by the court decision. In such cases, the EPA must demonstrate that it has denied the authority of the state to administer the RCRA program. Further, such denial is not simply for the case at hand. Instead, it must deny the authority of the state to administer the entire program on all regulated entities. Such requirements will be a heavy burden for the EPA and it is likely that overfilings will be reduced in the future.

One final caveat should be noted. The EPA is currently appealing a similar overfiling case in the Tenth Circuit.[7] Should the case be decided in favor of the EPA, it will create a split of opinion in the circuit courts. It is possible that this split may prompt the DOJ to seek a resolution of the issue with the Supreme Court. Major Cotell.

Conservation Requirements under the Endangered Species Act

Army Environmental Law Specialists (ELSs) should note that the Army not only has an obligation to avoid actions which are likely to jeopardize listed species as required under Section 7(a)(2) of the Endangered Species Act (ESA), but also has a responsibility to carry out programs for the conservation of listed species under Section 7(a)(1) of the ESA.[8] In recent environmental litigation, plaintiffs have challenged the adequacy of agencies' conservation programs in addition to challenging the sufficiency of biological opinions.

Section 7(a)(1) establishes both substantive and procedural duties for the conservation of endangered and threatened species for federal agencies. As defined under the ESA, "conservation" means "to use . . . all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary."[9] First, the substantive duties of Section 7(a)(1) require all federal agencies, including the Army, to carry out programs for the conservation of endangered and threatened species.[10] Second, the procedural duties of Section 7(a)(1) require the Army to consult with the U.S. Fish and Wildlife Service (FWS) on their conservation programs.[11]

Accordingly, Army ELSs should insure that their installations are implementing conservation programs for listed species pursuant to the ESA. *Army Regulation 200-3, Natural Resources–Land, Forest, and Wildlife Management* (*AR 200-3*) provides guidance on how to implement the conservation requirements of the ESA. According to *AR 200-3*, "The key to successfully balancing mission requirements and the conservation of listed species is long-term planning and effective management to prevent conflicts between these competing interests."[12] Towards that end, *AR 200-3* requires Army installations to prepare an Endangered Species Management Plan (ESMP) for listed and proposed species and critical habitat present on the installation.[13] Specific items that must be included and areas that must be covered in an ESMP are listed in *AR 200-3*. It is important to note that installation ESMPs will vary in length and detail depending on the complexity of management problems with the species and its habitat.[14] Therefore, at a minimum, each installation that has listed and proposed species and critical habitat on the installation must prepare an ESMP.

Army ELSs should also encourage innovation in developing installation conservation programs. For example, installations may carry out their conservation duties through research assistance, logistical assistance, and the like. *Army Regulation 200-3* also includes a number of methods for meeting conservation obligations such as participation in recovery planning, support of the reintroduction of species.[15] Additionally, installations should examine incorporating conservation recommendations from Fish and Wildlife Service's biological opinions into their ESMPs or conservation programs although they are generally discretionary. Finally, because each installation is different and the types of endangered and threatened species and critical habitat present on installations are different, conservation programs will vary widely from post to post throughout the United States.

Next, Army ELSs should insure that the consultation requirements of Section 7(a)(1) of the ESA have been met. The procedural task of "consulting" with FWS under Section 7(a)(1) is not the same as consultation under Section 7(a)(2). Section 7(a)(1) consultation can generally be accomplished by

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7. United States v. Power Eng'g Co., 10 F. Supp. 2d 1145 (1998).

8. 15 U.S.C.S. § 1536(a)(1), (2) (LEXIS 2000); U.S. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES–LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-2a (28 Feb. 1995) [hereinafter AR 200-3].

9. 15 U.S.C.S. § 1532(3); 50 C.F.R. § 424.02(c) (1999).

10. 15 U.S.C.S. § 1536(a)(1).

11. *Id.* "All other federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authority in . . . by carrying out programs for the conservation of endangered species and threatened species . . . . " *Id.*

12. AR 200-3, *supra* note 8, para. 11-1a.

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

14. *Id.* para. 11-5(b)(4).

an exchange of letters between the installation and FWS. First, the Army installation should send a letter to the FWS detailing their conservation actions and asking the FWS for comments regarding those actions. In return, FWS may respond with comments or suggestions on the installation's conservation program. Depending on the sufficiency of the ESMP and conservation actions, FWS may concur that the installation's conservation program meets Section 7(a)(1) responsibilities. Once the installation receives a letter from FWS endorsing the Army installation's commitment to Section 7(a)(1) of the ESA, the procedural loop of "consultation" can be considered closed.

In conclusion, the Army has committed to being a national leader in conserving listed species.[16] This article lays out the basic steps installations must take to meet their conservation requirements under the ESA. Army ELSs should be working in conjunction with installation environmental offices to insure that Army commanders and units are meeting their mission requirements in harmony with the ESA and its conservation requirements. Major Shields.

NEPA in a Nutshell

Questions about the National Environmental Policy Act? See the Council for Environmental Quality's (CEQ's) NEPAnet Website at <http://ceq.eh.doe.gov/nepa/nepanet.htm>.

This website's information includes the text of the statute, text of regulations, NEPA's Forty Most Asked Questions, CEQ annual reports, and more. The website also has CEQ publications on "hot topics" such as "Incorporating Biodiversity Considerations into NEPA Process" and "Considering Cumulative Effects under the National Environmental Policy Act." Major Shields.

15. *Id.* para. 11-8.

> The Army should actively participate in the development of recovery plans, whenever possible, to ensure that the FWS or New Mexico Forestry Service (NMFS) and the recovery teams appointed by the FWS or NMFS know and consider Army interests. For listed species present on Army installations, the Army should make a request to the FWS or NMFS to provide for Army representation on recovery teams.

Id. para. 11-14. "The Army will support the reintroduction of and introduction of federal and State listed, proposed, and candidate species on Army lands unless reintroduction/introduction will have a significant impact on the present or future ability of the Army to meet its mission requirements." *Id.*

16. *Id.* para. 11-1(a).

Guard and Reserve Affairs Items

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

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) began processing all applications for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by the Guard and Reserve Affairs, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837
(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

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

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

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

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, 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

July 2000

7-9 July	Professional Recruiting Training Seminar
10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
15 July-22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July-11 August	1st JA Warrant Officer Advanced Course (7A-550A2).
17 July-1 September	2d Court Reporter Course (512-71DC5).
31 July-11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August-24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August-1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	1st Court Reporting Symposium (512-71DC6).
6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
18-22 September	47th Legal Assistance Course (5F-F23).
19 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction Course (Phase II) (5F-F70).

October 2000

2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
2 October-21 November	3d Court Reporter Course (512-71DC5).
9-12 October	2d Advanced Ethics Counselors Workshop (5F-F203).
13 October-22 December	153d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
30 October-3 November	58th Fiscal Law Course (5F-F12).
30 October-3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
27 November-1 December	54th Federal Labor Relations Course (5F-F22).
27 November-1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November-1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-27 February	4th Court Reporter Course (512-71DC5).
9 January-2 February	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9 January-2 February	2001 PACOM Tax CLE (5F-F28P).
16-19 January	2001 Hawaii Tax CLE (5F-F28H).
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January-2 February	2001 JOAC (Phase II) (5F-F55).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

2 February-6 April	154th Basic Officer Course (Phase II, Fort Lee) (5-27-C20).
5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26 February-2 March	59th Fiscal Law Course (5F-F12).
26 February-9 March	35th Operational Law Seminar (5F-F47).
26 February-9 March	146th Contract Attorneys Course (5F-F10).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).

26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).
30 April-11 May	146th Contract Attorneys Course (5F-F10).

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Professional Recruiting Training Seminar
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2001

2-4 July	Professional Recruiting Training Seminar.
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course.
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).
13-17 August	167th Senior Officers Legal Orientation Course (5F-F1).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

5-7 September	2d Court Reporting Symposium (512-71DC6).

5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Basic Officer Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annaul CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
9-12 October	2d Advanced Ethics Counselors Workshop (5F-F203).
12 October-21 December	156th Basic Officer Course (Phase II, TJAGSA) (5-27-C20).
29 October-2 November	61st Fiscal Law Course (5F-F12).
29 October-2 November	168th Senior Officers Legal Orientation Course (5F-F1).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22).
26-30 November	169th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Basic Officer Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16 -18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	170th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Basic Officer Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).

18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Advanced Contract Law Course (5F-F103).
25-29 March	171st Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-24 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	172d Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Basic Officer Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Basic Officer Course (Phase II, TJAGSA) (5-27-C20).

July 2002

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

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 -16 August	173d Senior Officers Legal Orientation Course (5F-F1).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F-34).

11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption
For addresses and detailed information, see the March 2000 issue of *The Army Lawyer.*

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. LTC Goetzke.

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 DTIC, see the March 2000 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2000 issue of *The Army Lawyer.*

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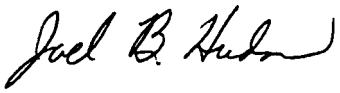

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Secretary of the Army
0016501

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US Army
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