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Articles

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Articles

TJAGSA Practice Notes

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

Note from the Field

USALSA Report

United States Legal Services Agency

Annual Review of Developments in Instructions—2001[1]

Lieutenant Colonel Michael J. Hargis
Circuit Judge, 1st Judicial Circuit
United States Army Trial Judiciary
Fort Drum, New York

Lieutenant Colonel Martin H. Sitler
Circuit Judge
United States Navy and Marine Corps Trial Judiciary
Camp Lejuene, North Carolina

This article is the annual installment of developments on instructions, and covers cases decided during the Court of Appeals for the Armed Forces' (CAAF) 2001 term.[2] Those involved in military justice may find this article helpful, but the primary resource for instructions issues remains the *Military Judges' Benchbook*.[3] As with earlier reviews on instructions, this article addresses new cases from the perspective of substantive criminal law, evidence, and sentencing.

Substantive Criminal Law

Child Pornography: United States v. James[4]

Seaman James was assigned to a U.S. Navy ship based in Guam. With access to the Internet provided by his roommate's computer, James downloaded and uploaded child pornography on multiple occasions, believing his electronic communications were with someone called "Fast Girl."[5] At trial, James pled guilty to violations of 18 U.S.C. § 2252A, part of the Child Pornography Prevention Act (CPPA) of 1996,[6] through Article 134, Uniform Code of Military Justice (UCMJ).[7] On appeal, he challenged the constitutionality of § 2252A, arguing that to the extent it prohibited "virtual" child pornography, it was overbroad because the government had no compelling interest in restricting the transfer and possession of such virtual images.[8]

Agreeing with the majority of federal cases addressing this issue, the CAAF found the statute constitutional.[9] The CAAF held that the government had a compelling interest in preventing trafficking in even virtual pornography, given that child abusers can use such images to "whet their . . . appetites," "facilitate [their] sexual abuse of children," and that computers can alter images of actual children in "innocuous images" into child pornography.[10]

On 16 April 2002, in *Ashcroft v. Free Speech Coalition*,[11] the Supreme Court found the CPPA's provisions dealing with "virtual" child pornography[12] unconstitutionally overbroad.[13] Writing for the majority, Justice Kennedy disagreed with the Court of Appeals for the First Circuit's reasoning in *United States v. Hilton*,[14] upon which the CAAF relied in *James*.[15] The petitioners did not challenge, and the Court thus did not specifically

1. For fiscal year 2001 (1 October 2000 through 30 September 2001).

2. This article does not purport to review all of the cases from the CAAF or the service courts; it only includes those that the authors consider the most important. Although this article mainly focuses on discussing cases from an instructional perspective, it also includes other cases that may benefit practitioners—on or off the bench.

3. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001) [hereinafter BENCHBOOK].

4. 55 M.J. 297 (2001).

5. *Id.* at 298. In reality, "Fast Girl" was a male U.S. Customs Service agent in the continental United States. *Id.*

6. Pub. L. No. 104-208, div. A, tit. I, § 101(a), 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251-2252A, 2256 (2000)).

7. UCMJ art. 134 (2000).

8. *James*, 55 M.J. at 297-98. Although the accused admitted to trafficking in child pornography involving actual children, he challenged the constitutionality of the statute as it related to "virtual" or computer-generated depictions of children. *Id.* at 298.

9. *Id.* at 300-01 (citing United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Fox, 248 F.3d 394 (5th Cir. 2001)).

10. *Id.* at 300 n.4 (quoting *Hilton*, 167 F.3d at 66-67 (quoting S. REP. NO. 104-358, pt. IV(B) (1996))).

11. 122 S. Ct. 1389 (2002).

address, the constitutionality of the CPPA provisions concerning child pornography involving real children.[16]

Instructing on child pornography cases under the noted federal statutes has never been easy. Although sample instructions exist, practitioners must now carefully excise those portions relating to virtual child pornography.[17]

Threats Against the President: United States v. Ogren[18]

Seaman Recruit Robert Ogren was unhappy with the conditions of his pretrial confinement. While in pretrial, he was loud, uncooperative, and made several threats against the life of President Clinton.[19] These threats resulted in his ultimate conviction for a violation of 18 U.S.C. § 871[20] under Article 134, UCMJ.[21]

Upon reviewing the legislative history of § 871(a), which indicates Congress balanced the prohibited speech against the First Amendment, the CAAF determined that the offense has two elements:

(1) The accused made a "true" threat; and
(2) The threat was knowing and willful.[22]

The First Amendment does not protect all speech. Requiring the threat to be a "true" threat is intended to separate the protected First Amendment "wheat" from the unprotected "chaff." "True threats" do not include "political hyperbole, . . . jests or innocuous remarks, . . . [or] 'very crude offensive methods[s] of stating a political opposition to the President.'"[23] Adopting *Watts v. United States*,[24] the CAAF listed three factors to be considered when determining whether the accused's threat was a "true threat":

12. 18 U.S.C. §§ 2256(8)(B), (D) (2000) (prohibiting visual depictions that "appear[] to be" or "convey[] the impression of" minors engaging in sexually explicit conduct, respectively).

13. *Free Speech Coalition*, 122 S. Ct. at 1405-06.

14. 167 F.3d 61 (1st Cir. 1999).

15. *See James*, 55 M.J. at 300 (adopting explicitly the rationale of *Hilton*).

16. 18 U.S.C. §§ 2256(8)(A), (C).

17. Before retiring, Colonel Gary Holland, with assistance from Captain John Rolph, U.S. Navy, produced some excellent sample instructions on child pornography. Although these instructions do address virtual child pornography, the authors anticipated the current debate, and these instructions can be tailored to remove any references to now-unconstitutional provisions.

18. 54 M.J. 481 (2001), *cert. denied*, 122 S. Ct. 644 (2001).

19. *Id*. at 483. The opinion reflects Ogren's salty language as follows:

> On two separate occasions on July 21, appellant made statements involving the President. Appellant first told Petty Officer Lyell: "**** off. And **** the rest of the staff. **** Admiral Green. Hell, **** the President, too. . . . [As] a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard." Petty Officer Lyell understood that this latter reference was to the President of the United States. Appellant did not indicate that he had a plan or scheme to get a gun and kill the President. However, Petty officer Lyell took the statement seriously.
>
> Appellant's second statement was to Operations Specialist Second Class Marnati, recounted by Marnati at trial as follows:
>
> OSI Marnati: [I asked appellant] why he was beating on his cell and what's he yelling for. . . . He told me, "I can't wait to get out of here, Man." I said, "Why?" He said, "Because I'm going to find the President, and I'm going to shove a gun up his ***, and I'm going to blow his ******* brains out.". . . I asked him which President he was talking about. . . . He said, "Clinton, Man. I'm going to find Clinton and blow his ******* brains out" or similar to that.

Id. at 482-83 (citations omitted).

20. Section 871(a) provides that

> [w]hoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office of by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowing and willfully otherwise makes any such threat against the President, President-elect, Vice President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 871(a) (2000).

21. *Ogren*, 54 M.J. at 482.

22. *Id*. at 483-84.

(1) The context of the threat;
(2) Whether the statement was expressly conditional; and
(3) The reaction of the listeners.[25]

In Ogren's case, his threats were not conditioned on any certain event.[26] Ogren made them frequently and, although Ogren was confined when he made these threats, Ogren's jailers took him seriously enough to report his threats to the Secret Service. The day after making the threats, Ogren admitted to a Secret Service agent that he had made them and made two additional comments implying an interest in obtaining guns. Although Ogren told the agent that he was just "blowing off steam," Ogren did not express any religious, political, or moral motives for his remarks.[27] Based on the *Watts* factors, the CAAF found that Ogren's statements were "true threats."[28]

Addressing the second "knowing and willful" element of the offense, the CAAF wrestled with whether to adopt a subjective or an objective standard, ultimately adopting the latter: If, considering the language used and all the surrounding circumstances, "a reasonable person would foresee that the statement [made by the accused] would be interpreted by those [who heard it] as a serious expression of an intention to . . . take the life of the President[, this element is satisfied]."[29] Under this objective test, the accused need not have actually intended to carry out the threat, but he must have intended to make the threat.[30]

In addition to providing specific guidance on instructions for the offense of communicating a threat, *Ogren* gives practitioners a general outline for the elements and proposed instructions when faced with an offense charged under clause three of Article 134, UCMJ. Military judges and counsel are often faced with deciphering the U.S. Code to determine the elements for such cases.[31]

The Parental Discipline Offense: United States v. Rivera[32]

When charged with an assault upon one of their children, parents have an affirmative "parental discipline" defense.[33] In *United States v. Rivera*, the CAAF narrowed the breadth of this defense available to a military accused.

Sergeant (SGT) Jose M. Rivera had a thirteen year-old stepson, Edward. In response to a report card with multiple Ds and Fs, SGT Rivera punched Edward a single time in the stomach with a closed fist. At trial, Edward testified that he fell down and stayed down until Rivera stopped talking and left. Edward showed no evidence of any mental harm or any manifested physical harm, such as welts or bruises. Apparently, Edward did not need or seek medical treatment after SGT Rivera struck him.[34]

Previously, the CAAF had adopted a two-part test for the affirmative defense of parental discipline.[35] This test states that to overcome this defense, the government must prove beyond a reasonable doubt that the following do not apply:

[1] the force used by the accused was for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

23. *Ogren*, 54 M.J. at 484 (quoting Watts v. United States, 394 U.S. 705, 707-08 (1969)).

24. 394 U.S. 705 (1969).

25. *Ogren*, 54 M.J. at 484 (citing *Watts*, 394 U.S. at 707-08).

26. *Id.* at 487. Ogren made some of his threats in response to a question of why he wanted to get out of pretrial confinement, significantly weakening any argument that his threats were merely the idle banter of one who was in no position to carry them out. Regardless, courts interpreting this section have not found that release from confinement makes the threats conditional. *Id*. at 487 n.16 (citing United States v. Howell, 719 F.2d 1258 (5th Cir. 1983); United States v. Miller 115 F.3d 361 (6th Cir. 1997)).

27. *Id*. at 482-83. Apparently, the CAAF believed these motives might have provided Ogren some protection under the First Amendment. *See id*. at 488 n.17.

28. *Id*. at 487.

29. *Id*. at 485 (quoting Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969)).

30. *See id*. As the CAAF indicated, the Supreme Court has questioned the objective standard. *Id.* at 486 (citing *Watts*, 394 U.S. at 707-08). Until that Court states differently, based on *United States v. Ogren*, the military will apply the objective standard.

31. *See* BENCHBOOK, *supra* note 3, para. 3-60-2B n.3 (advising the bench and bar to consult each other on the elements and instructions for the charged offense).

32. 54 M.J. 489 (2001).

33. *See id*. at 491 (citing MODEL PENAL CODE § 3.08(1) (ALI 1985)).

34. *Id*. at 490-91.

35. *Id*. at 491 (citing United States v. Brown, 26 M.J. 148, 150-51 (1988); United States v. Robertson, 36 M.J. 190, 191-92 (1992)).

> [2] the force used was not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.[36]

The question in *Rivera* was whether a single blow which did not cause any mental distress or manifest any physical harm could satisfy the second element.[37] The CAAF found it could. "[T]he burden of establishing substantial risk [of serious bodily harm] can be met without physical manifestation of actual harm."[38] Thus, under the appropriate facts, trial counsel might request the following addition to the parental discipline instruction:[39] force does not have to leave a mark or cause mental distress to be excessive or unreasonable.

While the CAAF quickly indicated it was *not* creating a rule of strict liability for closed fist punches, it said that the use of a closed fist does carry with it certain implications, such as the motive of the assailant or the likelihood of injury, when compared to a slap with an open hand.[40] In other words, the use of a closed fist is a factor the members can consider when deciding the two parts of the parental discipline test.

Finally, the CAAF appears to have shut the door on the use of expert witnesses in these types of cases. According to the CAAF, whether the facts are such to create a substantial risk of the harms contemplated "does not rest on specialized medical knowledge, but rather on the everyday 'common sense and knowledge of human nature and the ways of the world' expected of triers of fact."[41] Given this language, trial counsel may have a difficult time convincing a military judge that expert testimony on risk of harm from certain conduct "will assist the trier of fact to understand the evidence or to determine a fact in issue."[42]

Larceny and Electronic Fund Transfers (EFTs): United States v. Sanchez[43]

Specialist (SPC) Alfredo Sanchez used improperly obtained American Express cards to obtain cash from several automatic teller machines (ATMs). With each money transfer, SPC Sanchez obtained the amount he keyed into the ATM, and American Express received an additional administrative fee directly from the cardholder's account via EFT. The government charged SPC Sanchez with larceny under Article 121 for all funds transferred from the cardholders' accounts; that is, both the "keyed in" amounts and the administrative fees. At trial, SPC Sanchez entered pleas of guilty.[44]

The Army Court of Criminal Appeals (ACCA) found SPC Sanchez's guilty plea to larceny of the administrative fees improvident. With regard to these fees, the ACCA determined that Sanchez did not satisfy any of the the three theories of liability for larceny—taking, withholding, and obtaining.[45] Finding that SPC Sanchez moved and had possession of the money taken from the ATM machine, the ACCA affirmed the conviction for that amount. Specialist Sanchez was not guilty of larceny of the administrative fees, however, because those fees went directly from the victims' accounts to American Express.[46]

Sanchez is important for counsel to consider when charging an accused or when reviewing charges against a client in cases involving the transfer of funds electronically. The ACCA has given practitioners on both sides (as well as judges) some guid-

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36. *Id.* (quoting MODEL PENAL CODE § 3.08(1)).

37. *Id.* at 490. The CAAF clearly stated that SGT Rivera's motive fit the first element of the parental discipline defense. *Id.* at 492.

38. *Id.* at 492. The CAAF's position was that "[a] rule that requires physical evidence of injury invites one blow too many." *Id.* The Army Court of Criminal Appeals has already referred to *Rivera*'s holding that no actual harm need be demonstrated to overcome the parental discipline defense. *See* United States v. Arab, 55 M.J. 508, 517 (Army Ct. Crim. App. 2001) (citing *Rivera*, 54 M.J. at 492).

39. BENCHBOOK, *supra* note 3, para. 5-16.

40. *Rivera*, 54 M.J. at 492.

41. *Id.* at 491 (quoting United States v. Oakley, 29 C.M.R. 3, 7 (C.M.A. 1960)).

42. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 702 (2000) [hereinafter MCM].

43. 54 M.J. 874 (Army Ct. Crim. App. 2001).

44. *Id.* at 876-77.

45. *Id.* at 877-78. "The [*MCM*] requires that the thief possess the property for larceny: 'There must be a taking, obtaining, or withholding . . . of specific property.'" *Id.* at 877 (quoting MCM, *supra* note 42, pt. IV, ¶ 46c(1)(b) (1998) [hereinafter 1998 MCM]). Sanchez did not "take" the administrative fees because "there was no movement of the property, or any exercise of dominion over [them]." *Id.* at 878 (citing 1998 MCM, *supra*, pt. IV, ¶ 46c(1)(b)). Likewise, no obtaining or withholding occurred because the accused "never received or possessed these fees." *Id.*

46. *Id.* at 878-79. The ACCA stated that the accused would have been provident to obtaining services under false pretenses, however, under Article 134. *Id.* at 878.

ance on determining the limits of larceny in today's world of EFTs.[47]

Mistake of Fact: United States v. Binegar[48]

Senior Airman Binegar was charged with larceny of contact lenses. At trial, Airman Binegar claimed that he thought he was allowed to order contact lenses for certain personnel. Accordingly, his defense counsel asked the military judge to give the mistake of fact instruction for the specific intent crime of larceny; that is, the mistake must only be honestly held.[49] Disagreeing, the military judge said that Binegar's mistake, if any, related "generally to the offense [of larceny,] and is not related to that element which requires specific intent[; that is, the intent to permanently deprive the Air Force of the contact lenses]."[50] The military judge therefore instructed the panel that Binegar's mistake had to be both honest and reasonable. The Air Force Court of Criminal Appeals agreed with the military judge that Binegar's mistake related to the wrongfulness of the taking—a general intent element.[51]

On appeal to the CAAF, the government argued that the military judge was correct. After all, the *Military Judges' Benchbook* specifically cautions military judges to evaluate carefully the element of the offense to which mistake applies. The *Benchbook* notes that even in specific intent crimes, if the mistake is to a general intent element, the mistake need be honest and reasonable, not just honest.[52] The defense persisted that Binegar's mistake was to the specific intent element of larceny.[53]

In a split opinion, Judge Sullivan, joined by Judges Effron and Baker, agreed with the defense. In Judge Sullivan's view, Binegar's mistake related to his specific intent to permanently defraud the Air Force of the contact lenses; therefore, his mistake need only have been honest.[54]

Judge Gierke, concurring in the result, said that Binegar's mistake went to both the wrongfulness of the taking (if the accused thought he had permission to give out the contacts then his taking would not have been wrongful) and to the intent to permanently defraud (if the accused thought he had permission, he could not have had the specific intent to permanently defraud). Because Binegar's mistake related to both general and specific intent elements, the specific intent instruction was appropriate; with the specific intent instruction "subsuming" the general intent instruction, giving both instructions was unnecessary.[55]

In a lengthy dissent, Judge Crawford said that Binegar was only mistaken about the wrongfulness of the taking, not about the intent to permanently deprive. Binegar's mistake, therefore, needed to be both honest and reasonable.[56]

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47. The ACCA is not the only court to recognize the difficulties engendered by EFTs and "plastic" (credit cards, debit cards and ATM cards). In *United States v. Hegel*, 52 M.J. 778 (C.G. Ct. Crim. App.), the Coast Guard Court of Criminal Appeals found identifying the "victim" in a larceny case difficult: "[We have not found] any cases that stand for the proposition that larceny of money from the issuer of a credit card is a proper offense under Article 121, UCMJ, when a credit card is used improperly to make purchases [of goods from merchants]." *Id.* at 780. *See also* United States v. Franchino, 48 M.J. 875 (C.G. Ct. Crim. App. 1998) (affirming convictions of larceny of goods from merchants, rather than accepting the pleas of guilty to larceny of money from the cardholder (the U.S. Government)).

The 2002 amendments to the *MCM* also addressed this issue, as follows:

> h. Paragraph 46c(1)(h) is amended by adding at the end the following new clause:
>
> (vi) *Credit, Debit, and Electronic Transactions*. Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny of money from the entity presenting the money or a negotiable instrument. For the purpose of this section, the term "credit, debit, or electronic transaction" includes the use of an instrument or device, whether known as a credit card, debit card, automated teller machine (ATM) card or by any other name, including access devices such as code, account number, electronic serial number or personal identification number, issued for the use in obtaining money, goods, or anything else of value.

Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,777 (Apr. 17, 2002).

48. 55 M.J. 1 (2001).

49. *Id.* at 1-3.

50. *Id.* at 4.

51. *Id.*

52. BENCHBOOK, *supra* note 3, para. 5-11.

53. *Binegar*, 55 M.J. at 4-6.

54. *Id.* at 4-6.

55. *Id.* at 6-8 (Gierke, J., concurring in the result).

In applying the mistake of fact defense, Judge Gierke succinctly set out the questions counsel and the bench must answer to determine which instruction to give:

> (1) What is the specific fact about which the [accused] claims to have been mistaken?
> (2) To what element or elements does that specific fact relate?[57]

Although reaching different results, all three opinions agree that even a specific intent crime can have a general intent element to which the mistake may apply, and that such a mistake must only be honest. Accordingly, the guidance from paragraph 5-11 of the *Benchbook* remains sound. The opinions also agree that judges and counsel must carefully evaluate the alleged mistake and the elements of the offense, as the *Benchbook* states, before deciding which instruction is appropriate.

Lawfulness of the Order: United States v. New[58]

In 1995, SPC Michael New was assigned to an infantry unit ordered to the Former Yugoslav Republic of Macedonia in support of United Nations (UN) peacekeeping operations. As part of that deployment, SPC New and his unit were ordered to make certain modifications to their uniforms, to include wearing UN shoulder patches and UN berets. Specialist New refused, challenging the legality of the order. After several opportunities to comply, New was charged with failure to obey a lawful order under Article 92(2), UCMJ.[59]

At trial, the military judge considered the lawfulness of the order as a question of law for his decision. Subsequently, he advised the members that he found the order lawful. Specialist New complained that lawfulness of the order is an element of the offense, and as such, the judge had to submit this decision to the members.[60]

In a lengthy decision in which four of the five judges wrote opinions, the CAAF determined that the military judge was correct; lawfulness of the order is not a separate element of the offense of violation of a lawful order under Article 92(2). Instead, lawfulness of the order is a question of law for the military judge.[61]

The CAAF's decision does not, however, mean that the panel no longer has a role in determining the lawfulness of an order. The opinion does not give the military judge fact-finding powers, even on the issue of lawfulness, in a members case.[62] The CAAF referred to the role of the members as follows:

> Questions of the applicability of a rule of law to an *undisputed* set of facts are normally questions of law.[63]
>
> . . . .
>
> [Prior case law does not require the issue of lawfulness to go to the members, as those opinions only address] circumstances in which *predicate* factual issues were submitted to the members.[64]

New's impact on violation of lawful orders' cases under other UCMJ Articles is still undetermined.[65] This opinion certainly provides ammunition to those arguing that lawfulness of the order is a matter for the military judge, however, even if the

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56. *Id.* at 8 (Crawford, C.J., dissenting). Judge Crawford also stated that even if the judge erred by giving the honest and reasonable instruction, the error was harmless. *Id.* In Judge Crawford's view, the evidence (ordering contact lenses for friends under "coded" names, rather than their real names) refuted an honestly held mistake on Binegar's part. *Id.* at 14.

57. *Id.* at 7. Judges Sullivan and Crawford make what are essentially similar observations. *Compare id.* at 5 (Sullivan, J.) ("The pertinent inquiry is whether the purported mistake concerns a fact which would preclude the existence of the required specific intent."), *with id.* at 10 (Crawford, C.J., dissenting) ("(1) Does the mistake show that the specific intent was not in fact entertained by the defendant? If it does, then the normal specific intent rule applies, and an honest mistake is a defense. (2) If the mistake does not show that the specific intent is lacking, then the normal *general intent* rule applies, and only an honest and reasonable mistake is a defense.").

58. 55 M.J. 95 (2001), *cert. denied*, 122 S. Ct. 356 (2001).

59. *Id.* at 97-98.

60. *Id.* at 100.

61. *Id.*

62. *New* does not convert Article 92 into a "strict liability" offense. If the lawfulness of the order turns on factual issues, those issues are for the members to decide. The military judge is tasked with drafting appropriate instructions to the members, such as "if you find the order was given to maintain good order and discipline within the unit, the order is lawful as a matter of law. If you find the order was given for the personal gain of the officer giving it, the order is not lawful as a matter of law."

63. *New*, 55 M.J. at 101 (citing MCM, *supra* note 42, R.C.M. 801(e)(5) discussion).

64. *Id.* at 102.

factual determination underlying the issue remains with the members.

Involuntary Manslaughter: United States v. Oxendine[66]

On the night of 20 December 1997, Private First Class (PFC) Philip Oxendine, his best friend Lance Corporal (LCpl) Epley, and other Marines were involved in a test of trust: with their buddies holding their ankles as the only means of support, participants were suspended head first from a third story barracks window. When it was LCpl Epley's turn, LCpl Epley fell to his death when Oxendine and another Marine lost their grip on him. At his subsequent trial for LCpl Epley's death, Oxendine was found guilty of involuntary manslaughter.[67]

To be guilty of involuntary manslaughter, an accused's actions that result in death must constitute culpable negligence. Culpable negligence is a negligent act "accompanied by a gross, reckless, wanton or deliberate disregard for the foreseeable results to others."[68] Foreseeability, an objective test, is viewed from the position of the "reasonable person, in view of all the circumstances."[69]

On appeal, PFC Oxendine argued that LCpl Epley's death was not "foreseeable from the standpoint of 'a reasonable eighteen to twenty year-old' Marine."[70] The CAAF disagreed, holding that to graft the "status or attributes of a particular person" onto the reasonable person standard would convert that test from an objective to a subjective one.[71] Accordingly, it was appropriate for the members to consider PFC Oxendine's actions and all the surrounding circumstances when evaluating the foreseeability of LCpl Epley's death, but only from the perspective of a reasonable person, not a reasonable eighteen to twenty year-old Marine.[72]

For trial practitioners, *Oxendine* is a clear statement that the accused's subjective belief about the foreseeability of the harm is not the appropriate standard. Counsel need to present evidence of the circumstances as they were at the time of the offense, and then argue whether those circumstances would have made the harm foreseeable to a reasonable person, not to someone in the accused's shoes.

Multiplicity and Unreasonable Multiplication:
United States v. Frelix-Vann[73] *and* United States v. Quiroz[74]

Captain (CPT) Francis Frelix-Vann was convicted of larceny of certain items from the Post Exchange (PX). Based on the same larceny from the PX, she was also convicted of conduct unbecoming an officer.[75] While she argued that these offenses were multiplicious for sentencing at trial, she did not raise the issue of multiplicity for findings. At trial, the judge only considered the offenses as multiplicious for sentencing.[76]

On appeal, CPT Frelix-Vann argued that the two charges were multiplicious for findings, and that the larceny charge should be dismissed. Filling in a hole left by last year's case of *United States v. Cherukuri*,[77] the CAAF held that the same conduct cannot be the basis for two convictions, one for an enumerated offense and one under Article 133.[78]

The CAAF recited that it will, in this area, look to the elements and the pleadings in applying the *United States v. Teters*[79] analysis.[80] To resolve *Felix-Vrann*, however, the CAAF needed

65. *New* has significant implications for other violations of orders' cases, such as Articles 89, 90, and 91, from cases involving anthrax refusals to those involving tattoos.

66. 55 M.J. 323 (2001).

67. *Id*. at 324-25.

68. BENCHBOOK, *supra* note 3, para. 3-44-2.

69. *Oxendine*, 55 M.J. at 325 (quoting United States v. Henderson, 23 M.J. 77, 80 (C.M.A. 1986)).

70. *Id.* (quoting appellant's brief at 3).

71. *Id*. at 326.

72. *Id.*

73. 55 M.J. 329 (2001).

74. 55 M.J. 334 (2001).

75. *Felix-Vrann*, 55 M.J. at 330.

76. *Id.* at 330 n.1, 333.

77. 53 M.J. 68 (2000) (improper to have two convictions under Articles 134 and 133 for the same conduct).

78. *Felix-Vrann*, 55 M.J. at 331.

to look no further than the *Manual for Courts-Martial* (MCM), part IV, paragraph 59c(2). That provision states that when a specific offense is charged under the *MCM*, and an Article 133 offense is also charged based on the same conduct, the elements of the Article 133 offense are the same as the elements of the specific offense, "with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman."[81] Finding the elements of the specific offense (here, larceny) subsumed under the Article 133 offense, the CAAF found the Article 133 offense to be the greater offense, but allowed the government to choose which offense to dismiss.[82]

Merely applying the *Teters* analysis does not ensure the charge sheet is "bulletproof." Charges surviving the *Teters* analysis may nevertheless be found unreasonably multiplied.[83] In *United States v. Quiroz*,[84] the CAAF approved the Navy-Marine Court of Criminal Appeal's (NMCCA) framework for analysis of a separate concept, unreasonable multiplication of charges.[85]

In the NMCCA's *Quiroz* opinion in 1999,[86] the court discussed multiplicity and unreasonable multiplication of charges as separate concepts; the former growing from Double Jeopardy, the latter from fairness and reasonableness considerations. The NMCCA set forth a five-part framework for analyzing whether charges are unreasonably multiplied.[87] The CAAF adopted this framework with only a minor modification, putting to rest arguments that multiplicity subsumed any considerations of unreasonable multiplication of charges.[88] The *Quiroz* factors give the military judge significant discretion in the area of unreasonable multiplication of charges, from whether to find it to how to respond to it. As a result, counsel on both sides bear a heavy burden to inform and persuade the military judge that their position is correct.

Vagaries of proof aside, trial practitioners should only charge the offense that best encompasses an accused's misconduct. Charging additional offenses under Articles 133 or 134 for the same conduct needlessly creates appellate issues and consumes trial time with motions that counsel can avoid through judicious charging. Likewise, counsel should take a close look at the *Quiroz* factors before preferring charges in anticipation of a defense motion.

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79. 37 M.J. 370 (C.M.A. 1993).

80. *Felix-Vrann*, 55 M.J. at 331 (citing United States v. Weymouth, 43 M.J. 329, 340 (1995) (holding that the CAAF will look not only at the elements of the offenses charged, but also the elements of the offenses as pled on the charge sheet in applying the *Teters* elements test). In *United States v. Teters*, the Court of Military Appeals formulated a test for determining whether separate offenses arising from a single criminal act could be separately charged and punished. The essence of the test is congressional intent. If Congress's intent is clear, it is to be followed. If congressional intent is unclear, practitioners should look to the elements of the proposed offenses. If each offense contains an element that the other does not, the presumption is that Congress intended that the offenses could be charged and punished separately, even if arising from the same criminal act. *Id.* at 376. Later cases, such as *United States v. Weymouth*, 43 M.J. 329 (1995), and *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), have "softened" that approach by adding consideration of the pleadings when determining the elements to compare.

81. MCM, *supra* note 42, pt. IV, ¶ 59c(2).

82. *Felix-Vrann*, 55 M.J. at 333.

83. United States v. Quiroz, 55 M.J. 334, 338 (2001).

84. 55 M.J. at 334.

85. *Id.* at 337.

86. United States v. Quiroz, 53 M.J. 600 (N-M. Ct. Crim. App. 1999) (reconsideration en banc).

87. *Id.* at 607. The NMCCA laid out the five-part framework as follows:

> [1] Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
> [2] Is each charge and specification aimed at distinctly separate criminal acts?"
> [3] Does the number of charges and specifications misrepresent or exaggerate the [accused's] criminality?
> [4] Does the number of charges and specifications [unreasonably] increase the [accused's] punitive exposure? and
> [5] Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?"

Id. The NMCCA used the term "unfairly" in factor four. *Id.* On appeal, the CAAF changed "unfairly" to "unreasonably." *Quiroz*, 55 M.J. at 339.

88. *Quiroz*, 55 M.J. at 339. Some have argued that *Teters* and its progeny overruled the discussion to Rule for Courts-Martial 307(c)(4) mentioning unreasonable multiplication. By citing this discussion in support for what the CAAF believes is a separate concept of unreasonable multiplication, *see id.* at 337, the CAAF effectively put an end to this argument.

Theories of Liability: United States v. Brown[89]

Captain (Capt) Michael Brown was a married Air Force nurse with ten years of military service. Over the course of a year, Capt Brown engaged in a course of conduct with three female nurses—Capt TT, Capt LK, and First Lieutenant (1Lt) VC—that included questions ranging from whether they worked out, whether they had boyfriends, and what kind of men they liked, to comments about clothing size, extra-marital affairs, and sexual practices. Captain Brown also repeatedly touched these women, to include placing his hand on an officer's thigh, brushing an officer's cheek with the back of his hand, and brushing his hand and forearm against an officer's breast.[90]

The Air Force charged Capt Brown with violations of Article 133, alleging that his actions were conduct unbecoming an officer and a gentleman.[91] Each specification contained specific conduct relating to a single alleged victim. For example, Capt Brown was charged with making comments to Capt TT including: "Have you ever had an affair?," "You look like a size 4," "You have a very good shape and look very good for your age," "Do you wear a one piece or two piece swim suit?," "Do you get along with your husband?," and "Do women masturbate?"[92]

At the conclusion of trial, the defense requested an instruction that included the following language:

> At least two-thirds of the members . . . must agree with each other . . . that the same means or method alleged . . . was . . . engaged in or employed by the Accused in allegedly committing the offense alleged. . . . Unless the Government has proven the same means or method to at least two-thirds of the members, beyond a reasonable doubt, you must acquit the Accused. . . .[93]

The military judge refused to give the requested instruction, giving the variance instruction in the *Benchbook*, paragraph 7-15, instead.[94]

On appeal, the majority found the alleged error regarding the instruction moot; however, Judge Crawford addressed it in a partial concurrence and dissent. As a starting point, she restated the test for determining whether denying a requested instruction is an abuse of discretion. She then stated the correct test for evaluating non-standard *Benchbook* instructions:

> (1) Is the proposed instruction a correct statement of the law?;
> (2) Is the proposed instruction "not substantially covered" by the other instructions given?; and
> (3) Is the proposed instruction "on such a vital point that in the case that failure to give it deprived the accused of a defense or seriously impaired its effective presentation."[95]

Judge Crawford found the proposed instruction lacking on the first point of the test—it was not a correct statement of the law. Citing a litany of cases, Judge Crawford reiterated that when the facts show that an accused may have committed an offense by several different methods, the members are not required to agree on the *same* method to convict an accused. The members only need to agree that the accused committed the offense by *some* method.[96] Counsel submitting proposed instructions to the military judge should be prepared to justify them using the standard quoted by Judge Crawford.[97]

Robbery: United States v. Szentmiklosi[98]

Specialist Andrew Szentmiklosi was a military policeman (MP) at Fort Riley, Kansas. After conspiring with three others to pull off a robbery, SPC Szentmiklosi and one accomplice

89. 55 M.J. 375 (2001).

90. *Id.* at 378-82.

91. *Id.*

92. *Id.* at 381 n.13.

93. *Id.* at 389 (Crawford, C.J., concurring in part and dissenting in part).

94. *See id.* The judge gave the following instruction:

> If you have doubt about the time or specific manner alleged but you are satisfied beyond a reasonable doubt that the offense was committed at a time or in a particular manner that differs slightly from the exact time or manner in the Specification, you may make minor modifications in reaching your findings by changing the time or manner described in the Specification, provided you do not change the nature or identity of the offense. If you discuss doing that, you can come and ask me for more suggestions on how to go about doing that.

Id.

95. *Id.* (citing United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993)).

96. *Id.* at 390.

robbed the PX money courier of his daily money drop. During the robbery, Szentmiklosi maced the courier and took the moneybag containing $36,724, while his accomplice struck the courier's MP escort with a shotgun and took items from the MP.[99] Szentmiklosi was charged with two robberies of the same money (and the money only); one specification charging "from the person of [the courier]," the other "from the presence of [the MP escort]."[100]

On appeal, Szentmiklosi argued that because the property belonged to a single entity, only one robbery occurred. The ACCA, however, agreed with the government's position that the assault element was the paramount aspect of robbery, therefore, Szentmiklosi committed two separate robberies, even though multiple victims were in possession of the same property belonging to a single entity.[101]

Noting the divergence among state and federal courts addressing this issue, the CAAF looked for clues as to which theory Congress intended to adopt. Finding an indication that Congress intended the single-robbery theory in the text of Article 122,[102] the CAAF decided against multiple convictions. The CAAF held that the "forcible taking of property belonging to one entity from the person . . . of multiple individuals . . . possessing the property on behalf of [that] entity" constitutes only one robbery.[103] If different items belonging to different individuals are taken from more than one person, however, there are multiple robberies.[104]

In *Szentmiklosi*, the accused was charged with taking the same property belonging to the same entity (the money) in both robbery specifications. Had the government charged Szentmiklosi in the specification relating to the MP escort with taking the items his accomplice took from the MP escort, two robbery convictions would likely have been upheld. This case provides the bench and bar authority when dealing with motions to dismiss or consolidate robbery specifications under similar circumstances.

Defense of Property and Accident: United States v. Marbury[105]

Staff Sergeant (SSG) Chrissandra Marbury was assigned to Korea. One evening, SSG Marbury and a group of other noncommissioned officers (NCOs) were partying in the common area of SSG Marbury's "hooch,"[106] apparently "drinking significant amounts of alcohol."[107] At some point during the party, SSG Marbury went to her bedroom to prepare to go out for the evening. An intoxicated party member, Sergeant First Class (SFC) Pitts, followed SSG Marbury into her bedroom, telling her that she could not go out because she had had too much to drink. When SSG Marbury disagreed with SFC Pitts, SFC Pitts, a martial arts expert, hit her in the mouth.[108]

After being struck, SSG Marbury left her bedroom to get other party members to help her get SFC Pitts out of her room. Rather than assisting SSG Marbury, the other participants laughed at her. Staff Sergeant Marbury then said she would handle the situation herself, grabbed a kitchen knife with a six-inch blade, and returned to her bedroom.[109]

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97. *See also* United States v. Briggs, 42 M.J. 367 (1995) (citing like standard). Counsel should be prepared to support any request they make of the military judge. For example, counsel submitting voir dire questions should be prepared to explain to the military judge how each question assists them in the intelligent exercise of challenges. *See* United States v. Smith, 24 M.J. 859 (A.C.M.R. 1987); United States v. Parker, 19 C.M.R. 400 (C.M.A. 1955).

98. 55 M.J. 487 (2001).

99. *Id*. at 488-89.

100. *Id.* at 488 n.2.

101. *Id.* at 488.

102. The CAAF stated that the language "of anyone in [the victim's] company at the time of the robbery" in Article 122 indicates Congress's intent that multiple persons having items belonging to one person taken from them constitutes a single robbery. *Id.* at 490.

103. *Id.* at 491.

104. *Id*.; *see* United States v. Parker, 38 C.M.R. 343 (C.M.A. 1968) (finding two robberies when the accused held up two individuals, took $20 from one victim, and took $20 and a watch from the other). Referring to *Parker*, the CAAF in *Szentmiklosi* stated that when an accused holds up several persons and "property [belonging to different people] is removed from each person," there are separate robberies. *Szentmiklosi*, 55 M.J. at 490.

105. 56 M.J. 12 (2001).

106. The "hooch" included four separate bedrooms adjoining and sharing a common area. *Id.* at 13.

107. *Id.*

108. *Id.*

109. *Id.* at 13.

According to SSG Marbury, she placed herself in the back of the room so that SFC Pitts was between her and the door. She held the knife outward at mid-torso pointed at SFC Pitts, and ordered him to leave. Rather than leave, SFC Pitts advanced on SSG Marbury, pinning her to the bed. Marbury then yelled for other NCOs to get SFC Pitts off her, which they did. After SFC Pitts had been pulled off SSG Marbury, he kicked SSG Marbury hard enough in the chest to knock her off her feet, and then left. Once outside the hooch, SFC Pitts collapsed from a "sucking chest wound."[110]

At trial, the members found the accused guilty of intentional infliction of grievous bodily harm upon SFC Pitts. On appeal, the ACCA found the evidence sufficient to support only a conviction for aggravated assault with a dangerous weapon.[111]

In a four to one opinion, the CAAF discussed the application of several infrequently used instructions. First, the majority discussed protection of property. Referencing *Benchbook* paragraph 5-7, Defense of Property, Judge Sullivan recited that the force used by one in defense of property (and in removing a trespasser)[112] must be reasonable. The CAAF found that SSG Marbury's actions of returning to her room with a knife in the face of an intoxicated and demonstrably violent trespasser once she had already extricated herself from that situation were negligent, and therefore the force she used was unreasonable.[113]

Second, the CAAF discussed the defense of accident. Staff Sergeant Marbury contended that she was entitled to brandish the knife to eject SFC Pitts, and therefore the injury to SFC Pitts was an accident.[114] Rule for Courts-Martial (RCM) 916(f) defines "accident" as the "unintentional and unexpected result of doing a lawful action in a lawful manner."[115] To be accidental, the result in question must not be the result of a negligent act.[116] Having found SSG Marbury's actions of returning to her room and brandishing the knife were negligent, the CAAF found that by definition there could not be any accident.[117]

Obtaining Services by False Pretenses: United States v. Perkins[118]

Sergeant Melvin Perkins moved into family quarters at Fort Stewart, Georgia, around May or June of 1994. At the time, SGT Perkins was married and thus entitled to live in family quarters. Sergeant Perkins remained in family quarters until 14 January 1998, well after his divorce became final (and his entitlement to family quarters ended) on 3 November 1994. Although SGT Perkins apparently made no affirmative misrepresentations of his marital status regarding his entitlement to family quarters, he never reported his lack of entitlement, either. As a result, he was charged with and pled guilty to obtaining services under false pretenses from November 1994 to 14 January 1998.[119]

On appeal, SGT Perkins argued that he was not guilty of obtaining services under false pretenses because he did not make a misrepresentation to obtain family quarters; he was married when he originally was assigned to quarters. Furthermore, he argued he was not guilty because he did not make any affirmative misrepresentations of his marital status to the housing office after his divorce.[120] Given the definition of "false pretense" in Article 121, UCMJ, as a "false representation of a past or existing fact . . . by means of any act, word, symbol or token,"[121] SGT Perkins's position seemed logical.

The ACCA found differently, agreeing with the Navy-Marine and Air Force service courts on this issue. Citing decisions from both courts, the ACCA said that a false pretense "may exist by one's silence or by a failure to correct a known misrepresentation."[122] The ACCA found that SGT Perkins had

110. *Id.* at 13-14.

111. *Id.* at 14-15.

112. *See* BENCHBOOK, *supra* note 3, para. 5-7 n.3.

113. *Marbury*, 56 M.J. at 16.

114. *Id.* at 17.

115. MCM, *supra* note 42, R.C.M. 916(f).

116. *Id.* R.C.M. 916(f) discussion.

117. *Marbury*, 56 M.J. at 17.

118. 56 M.J. 825 (Army Ct. Crim. App. 2001).

119. *Id.* at 828.

120. *Id.*

121. MCM, *supra* note 42, pt. IV, ¶ 46c(1)(e).

122. *Perkins*, 56 M.J. at 828 (citing United States v. Johnson, 39 M.J. 707, 710 (N-M.C.M.R. 1993); United States v. Dean, 33 M.J. 505, 510 (A.F.C.M.R. 1991)).

an obligation to report his change in marital status and to correct a known misrepresentation about his entitlement to family quarters. The court found this inaction by SGT Perkins as false pretenses sufficient to support a conviction, even absent an affirmative misrepresentation by Perkins.[123]

Army counsel should be aware that although the CAAF has yet to address this issue, the Army is now in line with two of the three other service courts. An accused's silence can be a sufficient theory of liability to support a conviction for obtaining services by false pretenses.

False Official Statement: United States v. Newson[124]

Specialist Leslie Newson was convicted of making a false official statement. The evidence at trial showed that, without speaking, she had handed a forged pregnancy profile to one of her supervisors; that action formed the basis of the charge.[125] The military judge gave the standard instructions for a false official statement,[126] but did not define the term "statement" for the members. The defense did not request any such instruction or object to the standard instructions on a false official statement.[127]

On appeal, SPC Newson asserted that the physical action of handing her supervisor the forged profile, unaccompanied by any verbal statement, could not be a "statement." Finding no definition in the *Benchbook* or any other location for a false official statement, the ACCA looked to analogous sources. Drawing from the areas of confessions and hearsay, the ACCA held that "a physical act or nonverbal conduct intended by [an accused] as an assertion is a 'statement' [for the purposes of] Article 107, UCMJ."[128] Therefore, in response to requests from counsel[129] or the inevitable question from a panel, *Newson* provides military judges with a definition of the term "statement" when nonverbal or physical acts are involved.[130]

Indecent Exposure: United States v. Graham[131]

Corporal (CPL) Quinton Graham was convicted of, among other charges, indecent exposure for dropping his towel, in his own bedroom, in the presence of his fifteen year-old babysitter. Graham challenged the sufficiency of his conviction, arguing that the exposure was not in "public view" because it was in his private residence in a manner unlikely viewed by the general public.[132]

Benchbook paragraph 3-88-1 does not define the term "public view."[133] Undeterred after finding no military case directly on point, the NMCCA looked to state law decisions to hold that "'public view' occurs when the exposure is done in a place and in a manner that is reasonably expected to be viewed by another."[134] According to the NMCCA, because CPL Graham invited a member of the public into what would otherwise be a private area—his bedroom—Graham should reasonably have expected that such member of the public would see that "certain part of [Graham's] body"[135] when his towel dropped.[136] By so defining the term "public view," the NMCCA expanded the circumstances under which an otherwise non-public exposure

123. *Id.* at 828-29.

124. 54 M.J. 823 (Army Ct. Crim. App. 2001).

125. *Id.* at 824.

126. BENCHBOOK, *supra* note 3, para. 3-31-1.

127. *Newson*, 54 M.J. at 824.

128. *Id.* at 825.

129. Counsel must remember that if they submit an instruction, they must convince the military judge that it states the law correctly. *See* United States v. Brown, 55 M.J. 375 (2001).

130. The ACCA suggested that military judges follow Military Rule of Evidence 801(a)(2) when crafting a definition of "statement" under Article 107. *Newsom*, 54 M.J. 825 at n.2.

131. 54 M.J. 605 (N-M. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 266 (2002).

132. *Id.* at 610.

133. *See* BENCHBOOK, *supra* note 3, para. 3-88-1.

134. *Graham*, 54 M.J. at 610 (citing State v. Whitaker, 793 P.2d 116 (Ariz. Ct. App. 1990)). "Such an analysis is based on a case-by-case approach, and must look to both the location of the event and all the surrounding circumstances." *Id.*

135. MCM, *supra* note 42, pt. IV, ¶ 88.

136. *Graham*, 54 M.J. at 610.

may be termed "public" and prosecuted under Article 134 as indecent exposure.

On 30 January 2002, the CAAF upheld the NMCCA's decision in *Graham* on similar rationale:

> In our opinion, consistent with a focus on the victims and not the location of public indecency crimes, "public view" means "in the view of the public," and in that context, "public" is a noun referring to any member of the public who views the indecent exposure. It is this definition of "public view" that governs the offense of indecent exposure in the military.[137]

Graham therefore provides the bench and bar guidance in defining "public view," whether required in responding to members' questions, or in drafting or evaluating non-standard instruction requests.

Maltreatment and Sexual Harassment: United States v. Carson[138]

Sergeant Claude Carson was the supervising desk sergeant in an MP station. While supervising female subordinates, SGT Carson exposed himself to them repeatedly, without their consent. As a result, he was charged with and convicted of maltreatment under Article 93, UCMJ. On appeal, SGT Carson contended that "as a matter of law, [the offense of] maltreatment . . . requires proof of 'physical or mental pain or suffering' by the alleged victim."[139] At trial, the victims testified that they did not ask the accused to expose himself, were bothered and shocked by the exposure, and considered themselves victims.[140]

After reviewing CAAF precedent which recognized, but did not resolve, disagreement among the service courts over whether the offense of maltreatment requires proof of physical or mental pain or suffering,[141] the ACCA reversed its precedent that required such a showing.[142] The ACCA stated that "[a]fter reevaluating this issue, we now conclude that because the UCMJ and [*MCM*] do not require physical pain or suffering, a nonconsensual sexual act or gesture may constitute sexual harassment and maltreatment without this negative victim impact."[143] Accordingly, the ACCA recommended modification of *Benchbook* paragraph 3-17-1, which currently contains a requirement for such pain or suffering,[144]

The CAAF granted review of this issue last year.[145] Therefore, an opinion resolving the split in the service courts over the requirements of maltreatment may be forthcoming.

Housebreaking: United States v. Davis[146]

Senior Airman Davis worked in a position that required him to have access to a warehouse where equipment was stored. To have access to the equipment twenty-four hours a day, Airman Davis was given a key to the entire warehouse.[147] Davis was not given any instructions on the limitations of his use of the key. One evening, Airman Davis used the key to enter the warehouse and remove household furnishings, also stored in the warehouse, for later sale at a swap meet. As a result, Davis was charged with and pled guilty to housebreaking.[148]

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137. United States v. Graham, 56 M.J. 266, 269-70 (2002).

138. 55 M.J. 656 (Army Ct. Crim. App. 2001), *rev. granted*, 56 M.J. 205 (2001).

139. *Id.* at 657 (quoting BENCHBOOK, *supra* note 3, para. 3-17-1).

140. *Id.*

141. United States v. Knight, 52 M.J. 47, 49 (1999) (construing United States v. Hanson, 30 M.J. 1198, 1208 (A.F.C.M.R. 1990), *aff'd*, 32 M.J. 309 (C.M.A. 1991) (physical or mental pain or suffering required); United States v. Goddard, 47 M.J. 581, 584-85 (N-M. Ct. Crim. App. 1997) (physical or mental pain or suffering not required)).

142. *Carson*, 55 M.J. at 659. The ACCA's precedent, *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993), required physical or mental pain or suffering. *Id.* at 801-02.

143. *Carson*, 55 M.J. at 659.

144. *Id.* at 659 n.4.

145. 56 M.J. 205 (2001).

146. 54 M.J. 622 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 299 (2002).

147. *Id.* at 623-24. The equipment for which Davis needed to enter the warehouse, however, was stored in only a portion of that warehouse. *See id.* at 625.

148. *Id.* at 624.

On appeal, Davis challenged the sufficiency of his plea, arguing that under the above facts, his entry of the warehouse was not "unlawful."[149] Following the principles set out by the Court of Military Appeals in *United States v. Williams*,[150] the AFCCA found Davis's entry unlawful.[151]

Based on Air Force precedent, the AFCCA also stated in *Davis* that an intent to commit a criminal offense in the building is not proof that the entry itself was unlawful.[152] The CAAF affirmed the AFCCA's decision earlier this year;[153] however, it clarified that criminal intent at the time of entry *is* a consideration in determining the lawfulness of the entry.[154]

Conspiracy, Attempt, and Impossibility: United States v. Roeseler[155]

In late December 1997 or early January 1998, PFC Toni Bell told SPC David Roeseler and other members of her platoon that she had a problem. She said that her husband had died, and that her in-laws, Joyce and Jerry Bell, were now trying to gain custody of her children. Bell told Roeseler that she wished her in-laws were dead and that she wanted someone to "take care of them."[156] Specialist Roeseler and a friend, PVT Armann, agreed to kill PFC Bell's in-laws for her. Unknown to Roeseler, Bell's "in-laws" were fictitious. Among other charges, Roeseler subsequently pled guilty to attempted conspiracy to commit murder.[157]

On appeal, SPC Roeseler argued that his conviction for this charge was improper because the military judge failed to advise him that PFC Bell did not share his criminal intent as a conspiracy conviction would require.[158] Likewise, the accused argued the military judge should have explained impossibility as a defense.[159] The CAAF disagreed on both counts.

First, the CAAF restated its position that attempted conspiracy is a recognized offense under the UCMJ.[160] Second, the CAAF did not require the military judge to explain why the accused was guilty of only attempted conspiracy and not guilty of conspiracy; the military judge did not need to explain the unilateral versus bilateral theories of conspiracy.[161] Finally, the CAAF reiterated what it said in *United States v. Valigura*:[162] impossibility is not a defense to either conspiracy or attempt;[163] therefore, impossibility is not a defense to attempted conspiracy.[164]

149. *Id.*

150. 15 C.M.R. 241 (C.M.A. 1954). The factors laid out in *Williams* are:

> (1) [T]he nature and the function of the building involved;
> (2) [T]he character, status, and duties of the entrant, and even at times his identity;
> (3) [T]he conditions of the entry, including time, method, ostensible purpose, and numerous other factors of frequent relevance but generally insusceptible of advance articulation;
> (4) [T]he presence or absence of a directive of whatever nature seeking to limit or regulate free ingress;
> (5) [T]he presence or absence of an explicit invitation to the visitor;
> (6) [T]he invitational authority of any purported host;
> (7) [T]he presence or absence of a prior course of dealing, if any, by the entrant with the structure or its inmates, and its nature—and so on.

Davis, 54 M.J. at 624-25 (quoting *Williams*, 15 C.M.R. at 247).

151. *Id.* at 625.

152. *Id.* at 624 (citing United States v. Doskocil, 2 C.M.R. 802, 804 (A.F.B.R. 1952)).

153. 56 M.J. 299 (2002).

154. *Id.* at 303.

155. 55 M.J. 286 (2001).

156. *Id.* at 287.

157. *Id.* at 286-87.

158. *Id.* at 288.

159. *Id*. at 290.

160. *Id.* at 288 (citing United States v. Riddle, 44 M.J. 282 (1996)).

161. *Id*. at 289. For a thorough and at times impassioned review of these theories, see *United States v. Valigura*, 54 M.J. 187 (2000). Under the bilateral theory, a conspiracy requires the meeting of the minds of two parties to commit an offense. Thus, if one party feigns agreement, such as an undercover police officer, there is no conspiracy; only an attempted conspiracy exists. *Id*. at 188. Under the unilateral theory, as under the Model Penal Code, *id*. at 189, and as supported by Judge Crawford, *id*. at 192 (Crawford, C.J., dissenting), such agreements with undercover police officers would be conspiracies, even though only one person actually agreed to commit the offense. *See id*. at 189.

Innocent Possession: United States v. Angone[165]

While being escorted from pretrial confinement to his arraignment on unrelated charges, SSG James Angone was taken to his quarters to recover some personal items. While getting something from his medicine cabinet, Angone noticed a marijuana cigarette. Believing it belonged to his roommate, but convinced that if his escorts saw the marijuana they would think it was his, Angone took it. Unfortunately for Angone, the escorts saw Angone with the marijuana and immediately seized it from him. As a result, SSG Angone was charged with and pled guilty to possession of a controlled substance.[166]

On appeal, SSG Angone challenged the sufficiency of his plea, arguing that his intent to immediately destroy the marijuana made his possession innocent and not "wrongful."[167] "Military courts have long recognized that possession of drugs is not wrongful if the appellant's intent is to properly dispose of the drugs."[168] Angone argued that finding his possession wrongful would prevent him from protecting himself from false accusations that the drugs belonged to him. He also argued that his own destruction of the drugs would serve the public policy of keeping the drugs off the streets equally as well as surrendering the marijuana to the police.[169]

Rejecting Angone's arguments, the ACCA held that "[t]he defense of innocent possession does not apply in those cases where an appellant exercises control over an item for the purpose of preventing its imminent seizure by law enforcement or other authorities, even if he intends to thereafter expeditiously destroy the item."[170] The CAAF affirmed the ACCA's decision on 17 July 2002.[171]

Evidentiary Instructions

The Urinalysis Case: United States v. Green[172]

In *Green*, the CAAF clarified the law regarding the application of the permissive inference in drug use cases.[173] In many urinalysis cases, the prosecution does not have direct evidence of the accused's use of the controlled substance. In these cases, the only evidence that may show drug use is a drug test that identifies the presence of a controlled substance in the accused's urine. Proof of drug use requires some proof of knowledge.[174] Recognizing established military case law, the President, in the *Manual for Courts-Martial*, stated that "knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence" and that "[t]his permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge."[175]

Following the CAAF's decision in *United States v. Campbell*,[176] there was much confusion and uncertainty in the military justice community about urinalysis cases—specifically,

162. 54 M.J. 187 (2000).

163. *Roeseler*, 55 M.J. at 291 (citing *Valigura*, 54 M.J. at 189).

164. *Id.*

165. 54 M.J. 945 (Army Ct. Crim. App. 2001), *aff'd*, No. 01-0530, 2002 CAAF LEXIS 712 (July 17, 2002).

166. *Id.* at 945-46.

167. *Id.* at 946.

168. *Id.* at 947 (citations omitted).

169. *Id.* at 947-48.

170. *Id.* at 948. The Army court also cited with approval a California jury instruction which said possession of drug was not lawful when "'[c]ontrol is . . . exercised over the [drugs] for the purpose of preventing its imminent seizure by law enforcement." *Id.* at 948 n.6.

171. United States v. Angone, No. 01-0530, 2002 CAAF LEXIS 712, at *2 (July 17, 2002).

172. 55 M.J. 76 (2001).

173. Drug use cases, also commonly referred to as urinalysis cases, are those cases in which the offense referred to a court-martial is a violation of Article 112a, UCMJ—wrongful use of a controlled substance. *See* UCMJ art. 112a (2000).

174. MCM, *supra* note 42, pt. IV, ¶ 37c(10).

175. *Id.*

176. 50 M.J. 154 (1999) (*Campbell I*), *supplemented on reconsideration*, 52 M.J. 386 (2000) (*Campbell II*). *See also* Lieutenant Colonel Michael R. Stahlman, *New Developments on the Urinalysis Front: A* Green *Light in Naked Urinalysis Prosecutions?*, ARMY LAW., Apr. 2002, at 14 (providing a scholarly discussion about the significance of *Green*); Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell: *A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38 (presenting an in-depth analysis of *Campbell I* and *II* and the impact of those decisions on urinalysis case prosecution).

regarding the application of the permissive inference for knowing use of a controlled substance.[177] Many interpreted *Campbell* to require the prosecution to establish a three-part test before relying on the permissive inference.[178] If the prosecution failed to establish any of the factors, then some believed that the prosecution failed to present sufficient evidence and the case would not survive a motion for a finding of not guilty.[179] In *Green*, the CAAF emphasized that the *Campbell* three-part analysis was not established as a threshold test.[180]

Sergeant Green was convicted at a special court-martial of wrongfully using cocaine.[181] The only evidence introduced by the prosecution to prove the wrongful use was scientific evidence. The drug laboratory expert was the typical forensic chemist from a military drug laboratory who testifies about the standard tests conducted on urine samples that screen positive for a controlled substance.[182]

The CAAF started its discussion in *Green* by emphasizing that in cases "where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance, '[e]xpert testimony interpreting the tests or some other lawful substitute in the record is required to provide a rational basis upon which the fact-finder may draw an inference that [the controlled substance] was [wrongfully] used.'"[183] The court then recognized the military judge's role as the "gatekeeper" of scientific evidence, which in the urinalysis case context also equates to a role as the gatekeeper of the permissive inference. *Green* identifies several factors the trial judge *may* consider when performing this gatekeeping role.[184]

What the CAAF made abundantly clear in *Green* is that the military judge must exercise his gatekeeping role effectively. If the prosecution intends to offer a novel scientific testing procedure to show that the accused's urine contained a controlled substance, and it is challenged by the defense, then the scientific method must satisfy the reliability and relevance standards established by applicable rules and case law.[185] In doing so, the CAAF encourages the trial judge to apply the guidance provided in *Green*, as well as in *Campbell I* and *II*.

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177. United States v. Green, 55 M.J. 76, 81-85 (2001) (Sullivan, J., concurring); *see also* Stahlman, *supra* note 176, at 15 n.14.

178. *Campbell I*, 50 M.J. at 160. Specifically, the court stated:

> The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question . . . ; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug[;]" . . . and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. The most contentious of the three factors was the second one. *See* Stahlman, *supra* note 176, at 15.

179. MCM, *supra* note 42, R.C.M. 917. The argument to support a defense motion raised under RCM 917 was that all three *Campbell* factors must be established before the prosecution can rely on the permissive inference for knowing and wrongful use, and if the prosecution failed to present evidence indicating that an accused, at some time, would have experienced the effects of the drug, then the prosecution could not rely on the permissive inference. Without the permissive inference, there would be insufficient evidence to establish every essential element of the offense charged.

180. *Green*, 55 M.J. at 79.

181. *Id.* at 77.

182. *Id.* at 78. The Navy Drug Screening Laboratory in Jacksonville, Florida, tested the accused's urine. The first two tests the laboratory conducted on the accused's urine were immunoassay-screening tests. The third test was a confirmation test using gas chromatography/mass spectrometry technology. The defense did not challenge the scientific testing procedures or the expert testimony. *Id.*

183. *Id*. at 80 (quoting United States v. Murphy, 23 M.J. 310, 312 (C.M.A. 1987)).

184. *Id.* The three factors identified by the CAAF that the military judge may consider are whether:

> (1) the metabolite is naturally produced by the body or any substance other than the drug in question; (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors; and (3) the testing methodology is reliable in terms of detecting the presence and quantifying the concentration of the drug or metabolite in the sample.

Id. The court emphasized that this "three-part approach is not exclusive, and the military judge as gatekeeper may consider other factors, so long as they meet applicable standards for determining the admissibility of scientific evidence." *Id.*

185. *Id.*; *see also* MCM, *supra* note 42, MIL. R. EVID. 702, 703; Kumho Tire v. Carmichael, 526 U.S. 137 (1999) (concluding that the trial judge's gatekeeping responsibilities apply to all types of expert testimony and that the *Daubert* analysis can be used to evaluate nonscientific expert testimony); Joiner v. General Elec. Co., 522 U.S. 136 (1997) (determining that the trial court may evaluate the reliability of both an expert's methodology and the expert's conclusions and opinions); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (ruling that the *Frye* test is no longer the single controlling factor courts should use to evaluate the reliability of scientific expert evidence; rather, the Court established factors a trial judge should consider when determining if the scientific evidence in question is both reliable and relevant).

Silence:
United States v. Whitney[186] *and* United States v. Oliver[187]

In *Whitney* and *Oliver*, military appellate courts addressed a frequently occurring issue that involves both evidence and instructions. It is an issue that usually arises with the following scenario: a prosecution witness testifies that the accused, when questioned about alleged misconduct, invoked his right to silence. This scenario may transpire in a number of different ways at trial—from questioning by the prosecutor, in which she solicits the testimony from the witness, to a situation where the witness volunteers the information. Regardless of the scenario, the CAAF has consistently held that testimony revealing the accused's invocation of silence results in error, which may be cured with a proper limiting instruction.[188]

In *Whitney*, the accused, an Air Force Tech Sergeant, was convicted of raping and forcibly sodomizing an Airman First Class. As part of the investigation, the accused, with the advice of counsel, agreed to a polygraph with the understanding that the accused would not participate in a post-polygraph interview. As arranged, the accused participated in the polygraph. When the polygraph was completed, the polygrapher told the accused that he believed that the accused was untruthful. The accused did not respond to the polygrapher's comment.[189] At trial, the prosecution's direct examination of the polygrapher went as follows:

> TC: And at the conclusion of the interview, did you confront Sergeant Whitney?
> WIT: Yes, I did.
> TC: What did you tell him?
> WIT: I told him I didn't—did not feel he'd been truthful in his answers.
> TC: What did Sergeant Whitney tell you?
> WIT: He did not say anything.
> TC: Did he make—after this, did the interview continue?
> WIT: I escorted him to the door to exit; on the way out, he extended his hand and thanked me for doing a good job.[190]

The defense counsel did not object to this testimony. When given the opportunity to ask questions of the witness, two of the members posed a similar question—"Why [did] you feel [the accused] was not truthful during the interview?"[191]

The military judge did not ask the members' questions. He instructed the members to disregard the testimony of the witness about the accused's silence, and to disregard the witness's opinion about his belief that the accused was not telling the truth.[192]

In addition to holding that the human lie detector testimony was inadmissible, the CAAF addressed the comment about the accused's silence in response to the polygrapher's question. The court held that Military Rule of Evidence (MRE) 301(f)(3) had been violated and that the error was of constitutional proportion; however, the court determined that the military judge's instruction was adequate to correct the error.[193] In reaching this decision, the court emphasized that "in the absence of contrary evidence, court members are presumed to understand and follow the military judge's instructions."[194]

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186. 55 M.J. 413 (2001).

187. 56 M.J. 695 (N-M. Ct. Crim. App. 2001).

188. *See* United States v. Gray, 51 M.J. 38 (1999) (concluding that the military judge's curative instruction corrected any harm that may have existed from the prosecutor's comment on the accused's election not to testify); United States v. Sidwell, 51 M.J. 262 (1999) (finding error when a prosecution witness testified about the accused's invocation of silence during an interrogation, but ruled that any error was cured by the military judge's instruction to disregard the testimony); United States v. Riley, 47 M.J. 276 (1997) (holding that the admission of testimony regarding the accused's invocation of the privilege against self-incrimination during a pretrial interrogation constituted plain error when the military judge failed to give the members a curative instruction).

189. *Whitney*, 55 M.J. at 414.

190. *Id.* at 415.

191. *Id.*

192. *Id.*

193. *Id.* at 416; *see also* MCM, *supra* note 42, MIL. R. EVID. 301(f)(3) (making an accused's exercise of his right to remain silent inadmissible against him). In an attempt to cure the inadmissible testimony, the military judge gave the members the following instruction:

> You're to disregard his testimony about the fact that Sergeant Whitney didn't respond to that. That is not admissible evidence and I probably should have struck it earlier. So, please do disregard that. In regards to the questions by Captain Hansen and Colonel Walgamott, which is the same question, "Why did you feel that Tech Sergeant Whitney was not truthful during the interview," that's not a permissible question. The reason being is determination of truth is your realm, and nobody can come in here and tell you whether or not someone is being truthful. That's purely up to you to decide.

Whitney, 55 M.J. at 415.

United States v. Oliver is an NMCCA case in which the court upheld a conviction despite the failure of the military judge to give a curative instruction to the members to disregard any comment about the accused's election to remain silent. Regardless, the court identified that the testimony about the accused's election of silence was improper and that the military judge should have addressed the error with a curative instruction.[195]

An important principle from the *Whitney* and *Oliver* cases is that when evidence is presented that indicates an accused exercised his privilege against self-incrimination, the military judge should instruct the members to disregard the evidence.[196]

Uncharged Misconduct: United States v. Tyndale[197]

In *Tyndale*, the CAAF affirmed the military judge's decision to permit the prosecution, in rebuttal, to offer a prior positive urinalysis test of the accused, which was the basis of an earlier court-martial that resulted in an acquittal. The accused, a Marine Corps Staff Sergeant, was a guitar player who often played his guitar at private parties for pay. In 1994, he tested positive for methamphetamine. Charges were referred to a court-martial, and he was acquitted. His defense was innocent ingestion—someone drugged his coffee while he played a "gig."[198]

Two years later, the accused tested positive again for methamphetamine. At his second trial, the accused asserted the same defense; that is, he was at a private party playing his guitar, and someone spiked his drink with a drug. The prosecution moved to admit the prior positive urinalysis. The military judge initially denied the prosecution's motion; however, after the defense case in chief, the judge permitted the prosecution to introduce the prior positive urinalysis, along with the defense asserted by the accused at his first trial.[199]

In affirming the military judge's decision, the court identified the three-step analysis that applies when determining the admissibility of uncharged misconduct (MRE 404(b) evidence).[200] The three-steps are: (1) "the evidence must reasonably support a finding that [the accused] committed the prior crimes, wrongs, or acts;" (2) "the evidence must make a fact of consequence more or less probable;" and (3) "the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice."[201]

In its decision, the CAAF recognized that evidence of prior drug use is not inadmissible *per se*. Under the facts in *Tyndale*, the prosecution offered the evidence to show that it was unlikely that the accused would have found himself twice in this type of situation. Applying the doctrine of chances, a theory of logical relevance that supports the argument that it is "unlikely an accused would be repeatedly, innocently involved in similar, suspicious, circumstances," the CAAF agreed with the prosecution.[202]

Tyndale provides an excellent discussion and application of the test for the admissibility of 404(b) evidence. The case also recognizes the efforts of the military judge in instructing the members on the limited scope in which they could consider the evidence of a prior drug use.[203]

194. *Id*. at 416.

195. 56 M.J. 695, 700 (N-M. Ct. Crim. App. 2001).

196. In April 2001, the Army adopted the instruction given by the military judge in *United States v. Sidwell*, 51 M.J. 262 (1999). *See* BENCHBOOK, *supra* note 3, para. 2-7.

197. 56 M.J. 209 (2001).

198. *Id.* at 212. A "gig" is defined as "an entertainer's engagement for a specified time." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 517 (1985).

199. *Tyndale*, 56 M.J. at 212.

200. *Id.*; *see also* MCM, *supra* note 42, MIL. R. EVID. 304(b).

201. *Tyndale*, 56 M.J. at 212-13 (citing United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)).

202. *Id.* at 213.

203. *Id.* at 215. Specifically, the court recognized that "the military judge gave a clear and narrowly crafted instruction cautioning the members that they could only consider the evidence of the [prior] urinalysis on the issues of knowledge and intent, and to rebut the issue of innocent ingestion." *Id.*

Attacking the Veracity of a Non-Testifying Accused:
United States v. Goldwire[204] *and* United States v. Hart[205]

Goldwire and *Hart* address when it is permissible for the prosecution to attack the veracity of a non-testifying accused. In these cases, the CAAF not only identified when it is permissible to do so, but the court also gives guidance on what limiting instruction may be appropriate.

The accused in *Goldwire* was convicted of rape. The evidence indicated that the accused had intercourse with the victim when she was passed-out drunk.[206] As part of the investigation, the accused made a statement to investigators in which he provided information that was both inculpatory and exculpatory. At trial, the prosecution only introduced those portions of the accused's statements that were admissions.[207] During the defense's cross-examination of the agent who questioned the accused, the defense solicited the accused's exculpatory statements—statements indicating that the victim may have consented to the sexual intercourse. Later in the trial, despite an objection from the defense, the military judge permitted the prosecution to call a witness (MSG Green) to testify that, in the witness's opinion, the accused was not a truthful person.[208]

After admitting the opinion testimony, the military judge gave the following limiting instruction to the members:

> Members of the court, with regard to the testimony you heard yesterday from Sergeant Green, Master Sergeant Green was permitted to express his opinion of the accused's character for truthfulness for your evaluation in considering the weight you'll accord the accused's out of court statements as related in the testimony of other witnesses . . . . [Y]ou may not infer from his opinion or its basis that the accused is a bad person and must therefore have committed the offenses here charged.[209]

The facts in *Goldwire* implicate several rules: MRE 106,[210] the common law rule of completeness,[211] MRE 304(h)(2),[212] and MRE 806.[213] In applying the first three rules, the CAAF found that the accused's entire statement was admissible—specifically, the exculpatory portion of the accused's statement offered by the defense.[214] The court went on to hold that when the defense exercises these rules, under MRE 806, the prosecution may attack the accused's veracity.[215] The court did not comment on the appropriateness of the military judge's limiting instruction. One can infer that since the court took the time to include the instruction in its opinion, and did not criticize it, the court endorsed the instruction.

Hart presents a similar set of circumstances. The accused in *Hart* was convicted of larceny. At his court-martial, the accused claimed that he did not steal the property; rather, he was given the property. During cross-examination of several of the prosecution's witnesses, the defense solicited testimony in which the accused told the witnesses that he believed that the property was his. The effect of this testimony was that it raised

204. 55 M.J. 139 (2001).

205. 55 M.J. 395 (2001).

206. *Goldwire*, 55 M.J. at 140.

207. *Id.* at 141. For purposes of this article, the word "confession" includes both a confession and an admission. A confession is defined as "an acknowledgment of guilt." MCM, *supra* note 42, MIL. R. EVID. 304(c)(1). An admission is defined as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." *Id.* MIL. R. EVID. 304(c)(2).

208. *Goldwire*, 55 M.J. at 141.

209. *Id.*

210. MCM, *supra* note 42, MIL. R. EVID. 106. This rule "permits the defense to interrupt the prosecution's presentation of the case as to written and recorded statements." *Goldwire*, 55 M.J. at 143.

211. Professor Wigmore defined the common law rule of completeness as follows: "[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113, at 653 (J. Chadbourn rev. 1978).

212. MCM, *supra* note 42, MIL. R. EVID. 304(h)(2). This is a rule specific to confessions and admissions that "allows the defense to complete an incomplete statement regardless of whether the statement is oral or in writing." *Id.* MIL. R. EVID. 304(h)(2) analysis, app. 22, at A22-13.

213. *Id.* MIL. R. EVID. 806. This rule states "that a hearsay declarant or statement may always be contradicted or impeached." *Id.* MIL. R. EVID. 806 analysis, app. 22, at A22-57.

214. *Goldwire*, 55 M.J. at 143.

215. *Id.* at 144. The attack on credibility should be limited to the declarant's out of court statement, and should only be offered for the purpose of attacking the weight of the out of court statement.

the mistake of fact defense even though the accused did not testify. In response to this defense tactic, the prosecution introduced opinion and reputation testimony that the accused was untruthful.[216] The military judge permitted the prosecution to impeach the accused in this manner. Unlike the trial judge in *Goldwire*, however, the trial judge in *Hart* did not give a limiting instruction to the members.[217]

The CAAF affirmed the trial judge's actions. The court found that the accused's statements offered by the defense were "state-of-mind" statements—that is, hearsay statements. As such, the prosecution could impeach the accused under MRE 806.[218] Again, the CAAF remained silent about the requirement for a limiting instruction.

The clear rule litigants can derive from *Goldwire* and *Hart* is that "[w]hen the defense affirmatively introduces the accused's statement in response to the prosecution's direct examination, the prosecution is not prohibited from impeaching the declarant under Mil. R. Evid. 806."[219] A subtler tenet of these cases is that if this scenario presents itself at trial, the military judge should consider giving a limiting instruction similar to the one used in *Goldwire*.[220]

Sentencing Instructions

In the recent case of *United States v. Hopkins*,[221] the CAAF upheld the military judge's decision to not instruct the members about the accused's expression of remorse made during his unsworn statement.[222] Instead, the trial judge provided the standard sentencing instruction that tells the members they "must consider all matters in extenuation and mitigation, as well as those in aggravation."[223]

In writing for the majority, Judge Effron identified two key concepts regarding sentencing instructions. First, the military judge has a duty to tailor his sentencing instructions to comport to the law and the state of the evidence; and second, on appeal, sentencing instructions are reviewed using the abuse of discretion standard.[224] These two concepts give a military judge considerable discretion in tailoring sentencing instructions. Last year's cases identify several sentencing scenarios, however, in which this discretion is limited.

Loss of Retirement Benefits: United States v. Luster[225] *and* United States v. Boyd[226]

The issue of when evidence or instructions relating to the impact of a punitive discharge on future retirement benefits should be admitted or presented to the trier of fact is not a new topic for the CAAF.[227] In the past, the resolution of this matter has depended on the situation. Although the conclusions the CAAF reached in *Luster* and *Boyd* are fact dependent, with its analysis, the court provided definitive guidance on when this type of sentencing evidence is relevant.

In *Luster*, the accused, a Staff Sergeant in the Air Force, was convicted of a single specification of marijuana use.[228] She pled

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216. United States v. Hart, 55 M.J. 395, 396 (2001).

217. *See id*. at 396-97.

218. *Id.* at 396.

219. *Goldwire*, 55 M.J. at 144. Similar to character evidence, in circumstances such as those presented in *Goldwire*, the defense holds the key to the door of MRE 806. *See* MCM, *supra* note 42, MIL. R. EVID. 404(a). Significantly, as of 1 June 2002, the recent amendment to MRE 404(a)(1) took effect in the military. With the change, MRE 404(a)(1) reads as follows:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, *or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.*

Id. MIL. R. EVID. 404(a)(1) (emphasis added).

220. *See Goldwire*, 55 M.J. at 141.

221. 56 M.J. 393 (2002).

222. *Id*. at 394. The case discusses the application of *Wheeler* factors—aggravating, extenuating, and mitigating factors that the military judge should inform the members about to assist them in deciding an appropriate sentence. *See* United States v. Wheeler, 38 C.M.R. 72, 75 (C.M.A. 1967).

223. *Hopkins*, 56 M.J. at 394; *see also* BENCHBOOK, *supra* note 3, para. 2-5-23.

224. *Hopkins*, 56 M.J. at 395.

225. 55 M.J. 67 (2001).

226. 55 M.J. 217 (2001).

guilty to the offense and elected enlisted members for sentencing. At the time of trial, she had eighteen years, three months in service. If she successfully completed her current enlistment, she would be eligible for retirement.[229]

During the sentencing case, the defense offered evidence about retirement pay. The purpose of this evidence was to show the members what retirement pay the accused would lose if they sentenced her to a punitive discharge. The prosecutor objected, arguing that the evidence would create confusion.[230] The military judge sustained the trial counsel's objection, but permitted voir dire and argument about the issue.[231] The AFCCA affirmed the case, but the CAAF reversed and set aside the sentence. The CAAF found that the military judge abused her discretion by not admitting the evidence, and that such error materially prejudiced the accused.[232]

In its opinion, the CAAF emphasized that there is no per se rule that precludes sentencing evidence that addresses the effect of a punitive discharge on retirement benefits when the accused is not retirement eligible. The decision to admit or exclude this type of evidence should not be based solely on the number of months remaining until retirement.[233]

Not long after the CAAF published *Luster*, the court again was faced with deciding an issue relating to sentencing evidence that dealt with the effect that a punitive discharge would have on retirement benefits in *United States v. Boyd*.[234] In *Boyd*, the CAAF gave some firm guidance on when the issue of the financial impact a discharge would have on retirement benefits becomes relevant.

Captain Boyd was a nurse with fifteen and one-half years of active service in the Air Force when he was convicted by general court-martial of drug use and the larceny of drugs.[235] At the time of trial, a physical evaluation board recommended the accused for temporary disability retirement; however, this information was not presented to the members.[236] During a presentencing hearing, the defense requested that the military judge instruct the members on the effect a punitive discharge would have on possible retirement benefits for length of service. The judge declined to give the instruction requested by the defense; however, he did give the members an instruction explaining the effect and stigma associated with a dismissal.[237] Once the military judge finished instructing the members, the president of the court-martial asked the judge a question about the impact of a punitive discharge. The question asked was whether the accused could continue to serve in the military if he was not sentenced to a punitive discharge. The military judge did not answer the specific question; rather, he repeated the instruction describing the effect and stigma of a dismissal. The members sentenced the accused to a dismissal.[238]

On appeal before the CAAF, the accused asserted that it was error for the military judge to not instruct the members on the impact a punitive discharge would have on the accused's potential retirement benefits. The government's position was that the accused was not "perilously close" to retirement; therefore, the military judge did not err in refusing to give the defense-requested instruction.[239] The CAAF did not decide whether fifteen and one-half years of service as an officer entitles the accused to the instruction. Rather, the court assumed the military judge erred in not instructing the members about the effect a discharge would have on retirement benefits, and held that

227. *See* United States v. Greaves, 46 M.J. 133 (1997) (holding that it was error for the military judge to not instruct the members on the adverse impact a punitive discharge would have on retirement benefits when the accused had nineteen years, ten months on active duty); United States v. Becker, 46 M.J. 141 (1997) (concluding that it was error for the military judge to exclude evidence of potential loss of retirement benefits when the accused had nineteen years, eight and one-half months on active duty); United States v. Henderson, 29 M.J. 221 (C.M.A. 1989) (upholding a military judge's decision to exclude evidence estimating the impact a punitive discharge would have on retirement benefits when the accused had seventeen years on active duty, but was not retirement eligible under his current enlistment contract).

228. *Luster*, 55 M.J. at 67.

229. *Id.* at 68.

230. *Id.* at 69. The prosecutor argued that the accused's time until retirement (two years) was "too long to be confusing the members about the effects of [her] retirement." *Id.*

231. *Id.* at 70.

232. *Id.* at 72.

233. *Id.* at 71.

234. 55 M.J. 217 (2001).

235. *Id.* at 219.

236. *Id.* at 218.

237. *Id.* at 219.

238. *Id.* at 220.

under the circumstances in the case, any error committed by the military judge in not giving the instruction was harmless.[240]

In reaching its decision, the court made the following pronouncement:

> [W]e will require military judges in all cases tried after the date of this opinion to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it. We expect that military judges will be liberal in granting requests for such an instruction. They may deny a request for such an instruction only in cases where there is no evidentiary predicate for it or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence.[241]

The court ruled that this analysis applied to both a retirement for length of service and a temporary disability retirement.[242]

But what constitutes an "evidentiary predicate?" The above language seems to indicate that an evidentiary predicate does not take much to establish. In the opinion, the CAAF identified several ways an evidentiary predicate may be satisfied. For example, direct evidence by the defense that shows the impact a punitive discharge would have on the accused. The court also recognized other non-evidentiary means an evidentiary predicate may be established, such as comments made by the accused during his unsworn statement, or comments made by counsel during argument.[243] What is apparent from *Boyd* is that the military judge should liberally grant requests to introduce retirement impact evidence and instructions addressing the same. Furthermore, if information is presented that satisfies the requisite evidentiary predicate, yet neither side requests an instruction, then the CAAF will test the failure of the military judge to instruct under the plain error doctrine, unless the trial judge obtains a waiver from both sides.[244]

The Ineradicable Stigma of a Punitive Discharge: United States v. Rush[245]

A special court-martial, composed of members, convicted Private Rush, U.S. Army, of aggravated assault and wrongfully communicating a threat. While instructing the members on sentencing, the military judge read the standard bad-conduct discharge instruction, but "did not read any portion of the standard ineradicable stigma instruction."[246] When finished reading the sentencing instructions, the military judge asked counsel if they had any objections to the instructions given or wanted additional instructions. The defense asked the judge to instruct the members about the ineradicable stigma of a punitive discharge. Without explanation, the military judge denied the defense counsel's request.[247]

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239. *Id.*

240. *Id.* at 222.

241. *Id*. at 221. A footnote to the pronouncement indicates that the prosecution may be entitled to an instruction on the "legal and factual obstacles to retirement faced by a particular accused." *Id*. at 221 n.*. This seems to suggest that the only time the prosecution may be entitled to an instruction explaining the impact of a punitive discharge on retirement benefits is when the defense requests it first. It is hard to imagine that *Boyd* stands for the proposition that the military judge must give an instruction on retirement benefits whenever an evidentiary predicate exists. A fair interpretation of *Boyd* is that the defense holds the key to the instruction if an evidentiary predicate exists, and if given, the prosecution is then entitled to an instruction explaining the obstacles to retirement by the accused. *See* United States v. Burt, 56 M.J. 261 (2002) (holding that it was a logical tactical decision for the defense counsel to reject a proposed instruction concerning the loss of retirement benefits).

The CAAF encouraged judges to tailor instructions on retirement benefits appropriately to the facts of the case. At a minimum, the court suggested the following instruction: "In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits." *Boyd*, 55 M.J. at 221 (citing BENCHBOOK, *supra* note 3, para. 2-6-10).

242. *Boyd*, 55 M.J. at 221.

243. *Id.* Ironically, the accused's unsworn statement is not evidence, yet may still be used to satisfy the evidentiary predicate threshold.

244. *Id.* at 222 (citing United States v. Grier, 53 M.J. 30, 34 (2000)).

245. 54 M.J. 313 (2001).

246. *Id*. at 314. The military judge used the standard bad-conduct discharge instruction contained in the 1996 version of the *Benchbook*. The ineradicable stigma instruction reads as follows:

> You are advised that the ineradicable stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he)(she) has served honorably. A punitive discharge will affect an accused's future with regard to (his)(her) legal rights, economic opportunities, and social acceptability.

BENCHBOOK, *supra* note 3, at 69-70 (30 Sept. 1996).

Both the ACCA and the CAAF agreed that it was error for the military judge to refuse to give the standard ineradicable stigma instruction when requested by the defense. In reaching this conclusion, the CAAF viewed the ineradicable stigma instruction as a "standard instruction," and that "the military judge [had] a duty to explain why he [was] refusing to give a standard instruction requested by the defense."[248] The court concluded, however, that the error was harmless under the facts in the case.[249]

Rush does not require that the military judge give the ineradicable stigma instruction in all sentencing cases in which a punitive discharge is authorized. Rather, the decision highlights that a military judge has a duty to explain why he is denying the counsel's request to give the ineradicable stigma instruction, or any other requested standard instruction.[250]

The Ambiguous Request for a Punitive Discharge:
United States v. Pineda,[251] United States v. Bolkan,[252]
and United States v. Burt[253]

Pineda, *Bolkan*, and *Burt* are three cases recently decided by the CAAF that address the situation of an apparent conflict between what the accused desires and what the defense counsel requests regarding a punitive discharge. With these three cases, the CAAF makes clear that the military judge *shall* make appropriate inquiries to resolve any conflict.

In *Pineda*, the accused, a corporal in the U.S. Marine Corps, pled guilty before a military judge at a special court-martial to numerous offenses.[254] In his unsworn statement, the accused "implicitly acknowledged the reasonable certainty of a punitive discharge."[255] During the sentencing argument, the accused's defense counsel conceded that a bad-conduct discharge was an appropriate sentence in hopes to persuade the military judge not to adjudge a lengthy period of confinement. At no time did the military judge question the accused about his understanding of the ramifications of a punitive discharge.[256] The military judge's sentence included a bad-conduct discharge.[257]

On appeal, the accused asserted that his defense counsel erred when he argued for a punitive discharge, and that such error resulted in prejudice that warranted a sentence rehearing. The NMCCA agreed that the accused's defense counsel erred by conceding the appropriateness of a bad-conduct discharge; however, it held that such error was not prejudicial. The CAAF affirmed the service court's decision.[258]

In reaching its decision, the CAAF recognized that the defense counsel erred when he argued for a punitive discharge on behalf of his client when it was unclear that his client was requesting one. The court also recognized that when this scenario occurs, the military judge should clarify any ambiguity that may exist between what the accused has indicated and what the defense counsel is arguing for.[259] Despite the error, under the facts in *Pineda*, the court did not find prejudice.[260]

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247. *Rush*, 54 M.J. at 314.

248. *Id.* at 315.

249. *Id.*

250. *See also* United States v. Greszler, 56 M.J. 745 (A.F. Ct. Crim. App. 2002). In *Greszler*, the AFCCA held that the military judge did not err when he instructed on the stigma of a punitive discharge, but did not use the term "ineradicable stigma." "The military judge refused to use the word 'ineradicable' because he believed the term 'stigma' was the appropriate descriptive term for a bad-conduct discharge and that 'ineradicable' was redundant." *Id*. at 746. In supporting its decision, the AFCCA cited to the dictionary in defining "ineradicable" as "incapable of being eradicated." *Id.* The court asserted that the stigma of a punitive discharge may be eradicated, therefore the more appropriate term is "stigma." *Id.*

Greszler does not conflict with *Rush*. In *Greszler*, the military judge explained why he was deviating from the standard ineradicable stigma instruction—a duty the CAAF mandated in *Rush*. Furthermore, the court determined that the instruction the military judge gave satisfied the purpose of the standard ineradicable stigma instruction.

251. 54 M.J. 298 (2001).

252. 55 M.J. 425 (2001).

253. 56 M.J. 261 (2002).

254. *Pineda*, 54 M.J. at 299. The accused pled guilty to, and was found guilty of, "unauthorized absence, nine specifications of making false official statements, forgery, and six specification of fraud against the United States." *Id.*

255. *Id*. at 301.

256. *Id.* at 300.

257. *Id.* at 299. The accused was sentenced to a bad-conduct discharge, confinement for four months, forfeiture of $600 pay per month for four months, and reduction to pay grade E-1. *Id.*

258. *Id.* at 300.

In *Bolkan*, the CAAF focused on the response by the military judge to defense counsel's concession that a punitive discharge was an appropriate sentence.[261] During the sentencing argument, the defense counsel told the members that if they "must choose between confinement and a bad-conduct discharge [they should] give [the accused] the punitive discharge."[262] In his unsworn statement, the accused informed the members that he wished to remain in the service.[263] The military judge did not question the accused concerning whether the defense counsel's argument that a discharge is better than confinement reflected the accused's desires. The court determined that the military judge's failure to question the accused about this matter was error; however, under the facts of the case, the error was harmless.[264]

In a concurring opinion, Judge Baker emphasized that the military judge erred by not inquiring into the apparent contradiction between the accused's unsworn statement and the defense counsel's argument. He asserted that "case law dictates that judges test an apparent ambiguity between counsel's argument and the accused's desires."[265] If not clear before, after *Bolkan* there should be no doubt that a military judge has an affirmative duty to clarify with the accused any conflict that occurs between the accused's desires regarding a punitive discharge and the defense counsel's argument.

In *Burt*, the CAAF found that the civilian defense counsel did not concede that a punitive discharge was appropriate or that the accused did not have any rehabilitative potential.[266] In finding no error, the court again emphasized that "[c]ounsel errs by conceding the appropriateness of a punitive discharge when an accused wishes to remain in the service or otherwise avoid such a separation."[267]

Thus, the trilogy of *Pineda*, *Bolkan*, and *Burt* highlight two vital rules. They are: (1) defense counsel errs by conceding the appropriateness of a punitive discharge when the accused indicates a desire to remain in the service; and (2) the military judge must clarify with the accused any apparent conflict between counsel's argument and the accused's desires regarding a punitive discharge.

Conclusion

This article captures the developments in instructions over the past CAAF term in the areas of substantive law, evidence, and sentencing. Hopefully, military judges and counsel alike will find this review a useful supplement to the primary source on instructions, the *Military Judges' Benchbook*. Practitioners should heed the advice from the CAAF and the service courts presented in this article, and remain alert for decisions from the CAAF on the issues for which it has granted review.

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259. *Id.*

260. *Id.* at 301. The CAAF relied on the following facts when determining there was no prejudice: the accused was convicted of numerous offenses of a serious nature, the accused had committed some of the charged offenses while he was a noncommissioned officer, the accused had a below average military record, and the trial was before a military judge alone. *Id.*

261. United States v. Bolkan, 55 M.J. 425, 428 (2001). The CAAF assumed that the defense counsel conceded the appropriateness of a punitive discharge. On appeal, the accused did not attack the effectiveness of his representation. *Id.*

262. *Id.*

263. *Id.* at 427.

264. *Id*. at 428 (citing *Pineda*, 54 M.J. at 298). In dissenting opinions, Judges Sullivan and Effron opine that the errors committed by the defense counsel and the military judge were not harmless. *Id.* at 431 (Sullivan, J., dissenting), (Effron, J., dissenting).

265. *Id.* at 429 (Baker, J., concurring in the result).

266. United States v. Burt, 56 M.J. 261, 264 (2002).

267. *Id.* at 264; *see also* United States v. Robinson, 25 M.J. 43 (C.M.A. 1987); United States v. Webb, 5 M.J. 406 (C.M.A. 1978); United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971).

Contractor Challenges to the Government's Evaluation of Past Performance During the Source-Selection Process: "Thou Protesteth Too Much?"

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Introduction

The evaluation of contractor past-performance is a critical part of the source-selection process. Just as most Americans would consider a vendor's reputation for excellence before buying goods or services,[1] the government now recognizes the common sense notion that choosing contractors with good track records reduces the risk of nonperformance.[2] Gone are the days, at least in theory, when poor performers were repeatedly rewarded with new government contracts.

Since 1995, the Federal Acquisition Regulation (FAR)[3] has required the evaluation of contractor past-performance during source-selection on all competitively negotiated contracts expected to exceed $100,000.[4] This regulatory revision came on the heels of acquisition reform legislation in which Congress recognized the importance of past-performance in the source-selection process.[5] Together, these statutory and regulatory changes intensified a thirty-year effort to evaluate contractor past-performance during source-selection.[6] Now, all agencies governed by the FAR are examining the past-performance of offerors and letting the offerors' past records drive the source-selection, rather than awarding contracts to the parties that "bluff" the best in their technical proposals.[7] Indeed, Office of Federal Procurement Policy (OFPP) guidance suggests that past-performance should normally be weighted *at least twenty-five percent* of the total evaluation criteria, or equal to other non-cost evaluation factors.[8] Agencies are even free to consider only price and past-performance as evaluation factors in best-value acquisitions.[9] Without question, past-performance has been, and will continue to be, the deciding factor in many source-selections.

To support the evaluation of past-performance during source-selection, agencies are required to assess contractor performance at the conclusion of every government contract exceeding $100,000.[10] Agencies, however, are not limited to these reports when evaluating past-performance. Agencies are free to use any "relevant information"[11] regarding a contractor's performance under previously awarded contracts, including information derived from the personal knowledge of the evaluators.[12]

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1. *See generally* Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance 39 (1990) (stating that the use of past-performance to predict future performance is "so common that people would hardly go about their daily lives without it").

2. *See* Office of Federal Procurement Policy (OFPP) Policy Letter 92-5, 58 Fed. Reg. 3573 (1993) (stating that a contractor's past-performance is a "key indicator for predicting future performance"); Steven Kelman, *Past Performance: Becoming Part of the Solution*, 30 Procurement Law. 12 (Winter 1995) (OFPP Director describes the philosophy behind governmental efforts to use past-performance in awarding contracts as "nothing but common sense"); Ralph C. Nash & John Cibinic, *Postscript: Past Performance*, 8 Nash & Cibinic Rep. ¶ 33, at 83 (June 1994) ("All other things being equal, award to an offeror with good [past-performance] is less risky than award to one with an inferior record.").

3. General Servs. Admin. et al., Federal Acquisition Reg. (June 1997) [hereinafter FAR].

4. *See* Federal Acquisition Cir. No. 90-26, 60 Fed. Reg. 16,718 (1995) [hereinafter FAC 90-26] (amending, *inter alia*, FAR pt. 15, effective 31 May 1995). The FAC 90-26 established phase-in milestones for agencies to implement this requirement. Full implementation occurred on 1 January 1999. *See* FAR, *supra* note 3, § 15.304(c)(3)(ii). Note, however, that the contracting officer is not required to evaluate past-performance if he "documents the reason past-performance is not an appropriate evaluation factor for the acquisition." *Id.* § 15.304(c)(3)(iv). This may be appropriate when using the "lowest price technically acceptable" source-selection process. *See id.* § 15.101-2(b)(1).

5. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 (recognizing that past-performance "is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract," and mandating the implementation of guidance to achieve this result).

6. Comptroller General decisions reflect an agency practice of evaluating past-performance as early as the 1960's. *See, e.g.*, To Educ. Srvs., B-156860, 1965 U.S. Comp. Gen. LEXIS 2365 (July 26, 1965); To Aerojet-Gen. Corp., B-165488, 1969 U.S. Comp. Gen. LEXIS 3105 (Jan. 17, 1969).

7. *See* Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Best Practices for Using Current & Past Performance Information 4 (Mar. 2000) [hereinafter OFPP Guide] (describing how the government's practice of relying upon detailed technical proposals to select offerors for contract award allows offerors that can write outstanding proposals, but have "less than stellar performance," to win contracts).

8. *Id.* at 17.

9. *Id.*; *see also* Aqua-Chem., Inc., Comp. Gen. B-249516.2, May 18, 1993, 93-1 CPD ¶ 389.

As logical as the use of past-performance in the source-selection process may appear, the adoption of this new rule in 1995 was not without controversy. Contractors and legal practitioners have repeatedly expressed concern that the mandatory evaluation of past-performance will result in erroneous, unfair, or biased source-selections, thus undermining the very gains that the government hopes to achieve by this process.[13] To back up these concerns, contractors have used the protest process[14] vigorously.[15]

The evaluation of past-performance during the source-selection process has provided protesters with a "target-rich" environment. Contractors have challenged not only the procedures used by agencies when evaluating past-performance, but also the substance of those evaluations. A surprising number of these challenges have resulted in successful protests.[16]

When deciding a case involving a past-performance evaluation, the General Accounting Office (GAO) considers three "bedrock principles"—reasonableness, fairness, and consistency.[17] While these principles apply to any case involving the government's evaluation of an offeror's proposal, they are especially crucial to past-performance evaluations. By their very nature, past-performance evaluations are highly subjective. Agencies have enormous discretion when rating an offeror's performance.[18] Not surprisingly, offerors frequently disagree with these ratings, instinctively believing that their performance is better than evaluated. This creates a recipe for conflict, which is only likely to increase as the government increases its efforts to use past-performance in source-selections. It is, therefore, doubly important for procurement officials to be reasonable, fair, and consistent when evaluating contractor past-performance.

This article examines protest cases involving past-performance evaluations arising since the 1995 revisions to the FAR. A review of these protests reveals common mistakes that agencies make during the source-selection process. This article analyzes protest cases in the context of eight "problem areas," and suggests questions that procurement officials should ask when evaluating past-performance. When properly answered, these questions should assist the contracting officer in making a fair, reasonable, and legally supportable source-selection.

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10. FAR, *supra* note 3, § 42.1502(a). Agencies are encouraged to assign contractors one of five ratings on these assessments: exceptional, very good, satisfactory, marginal, or unsatisfactory. *See* OFPP GUIDE, *supra* note 7, at 11. Note, however, that agencies need not evaluate contractor performance for contracts awarded in accordance with FAR subparts 8.6 (Acquisitions from Federal Prison Industries, Inc.) and 8.7 (Acquisitions from Nonprofit Agencies Employing People Who are Blind or Severely Disabled). For construction and architect/engineer contracts, agencies evaluate contractor performance in accordance with FAR part 36. The U.S. Army Corps of Engineers operates two automated centralized databases to collect performance information on construction and architect-engineer contracts. *See id.* at 9.

11. Past-performance information is defined as:

> [r]elevant information, for future source-selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

FAR, *supra* note 3, § 42.1501. The OFPP encourages agencies to rely on existing documentation from federal systems "to the maximum possible extent." OFPP GUIDE, *supra* note 7, at 19. However, where such information is not readily available, agencies may conduct a survey or phone interviews to verify past-performance, or ask the offeror to submit references. *Id.*

12. *See* Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 568 (1999).

13. *See, e.g.*, William W. Goodrich, *Past Performance as an Evaluation Factor in Public Contract Source Selection*, 47 AM. U. L. REV. 1539, 1542 (1998) (stating that past-performance evaluations create the risk of "de facto debarments" and "unjust retaliation against contractors"); *ABA Group Calls for Rules Changes to Let Contractors Participate in the Evaluation Process*, 71 FED. CONT. REP. (BNA) No. 20, at 686 (May 17, 1999); *More Guidance Needed on Implementing Past Performance Evaluation*, 66 FED. CONT. REP. (BNA) No. 19, at 490 (Nov. 18, 1996); John S. Pachter & Jonathan D. Shaffer, *Past Performance as an Evaluation Factor—Opening Pandora's Box*, 38 GOV'T CONTRACTOR ¶ 280 (June 12, 1996).

14. Contractors may file a protest with the procuring agency, the General Accounting Office (GAO), or the Court of Federal Claims. *See* 28 U.S.C. § 1491 (2000) (court); 31 U.S.C. §§ 3551-3556 (2000) (GAO); FAR, *supra note* 3, pt. 33 (agency).

15. *See* Goodrich, *supra* note 13, at 1561 (stating that from 1993 to 1998, past-performance issues "played an important role in the outcome of approximately 500 GAO decisions"); Ralph C. Nash & John Cibinic, *Past Performance Evaluations: Are They Fair?*, 11 NASH & CIBINIC REP. ¶ 21 (May 1997) (finding "a lot of protests on the evaluation of contractor past-performance").

16. Based on the author's informal survey, the GAO has sustained over thirty protests involving past-performance evaluations between 1996-2001. The Court of Federal Claims, whose volume of protest cases is significantly smaller than the GAO, has sustained only a few. This article focuses primarily on decisions of the GAO.

17. *See* Wind Gap Knitwear, Comp. Gen. B-261045, June 20, 1995, 95-2 CPD ¶ 124.

18. *See* Goodrich, *supra* note 13, at 1572 (stating that the GAO has "repeatedly applied" the principle that it will approve an agency's past-performance evaluation so long as it is reasonable and consistent with the evaluation criteria).

Problem Area #1: Have I Told the Contractor That He Is "Damaged Goods?"

Agencies are required to conduct discussions with all offerors in the competitive range.[19] The GAO has long required these discussions to be "meaningful."[20] To be meaningful, discussions must identify the weaknesses in a proposal that preclude the offeror from having a reasonable chance for award,[21] and must point to sections of the proposal requiring "amplification or revision."[22]

While one might naturally think that such "weaknesses" in a proposal would include adverse past-performance information, this was generally not the case before 1995. In fact, the GAO typically excused agency failure to discuss adverse past-performance information by holding that such information was "historical information" not likely to be changed during discussions.[23]

This changed dramatically with the advent of Federal Acquisition Circular (FAC) 90-26.[24] Among other things, this FAC amended the FAR to require contracting officers to address past-performance information during discussions with offerors in the competitive range, to the extent that offerors had not had a previous opportunity to comment on the information.[25]

With this new rule in place, the GAO did an "about face" and started routinely sustaining protests whenever the protester could show that the agency failed to provide the protester an opportunity to discuss and comment upon adverse past-performance information. For example, in *McHugh/Calumet, a Joint Venture*,[26] an offeror protested the General Services Administration's (GSA) failure to discuss adverse past-performance information arising from a previous GSA contract.[27] Rather creatively, the GSA responded that the FAR requires discussions only with respect to information obtained from third-party sources, rather than internal agency information, since such internal information is "unlikely to be misinterpreted."[28] The GAO was not persuaded by this argument. The GAO found nothing in the language of the FAR or the statutory provisions governing past-performance information that would exempt internal agency information from the requirement to hold discussions.[29]

The GAO also has been largely unsympathetic to agency attempts to show that the protester "should have known" about the adverse past-performance information and, therefore, already had an opportunity to respond. In *Aerospace Design & Fabrication, Inc.*,[30] the agency acknowledged that it did not discuss the adverse information directly with the protester, but argued that the protester had an opportunity to rebut the same information during award fee discussions on a previous contract. The protester, however, was only a subcontractor on the previous contract. Not surprisingly, the GAO found that the award fee discussions with the prime contractor did not provide a meaningful opportunity for the protester to respond to the adverse information.[31] Similarly, in *McHugh/Calumet*,[32] the agency asserted that the protester had a previous opportunity to

19. FAR, *supra* note 3, § 15.306(d).

20. *See* Dep't of the Navy—Reconsideration, Comp. Gen. B-250158.4, May 28, 1993, 93-1 CPD ¶ 422.

21. *Id.*

22. Davies Rail & Mech. Works, Inc., Comp. Gen. B-283911.2, Mar. 6, 2000, 2000 CPD ¶ 48.

23. *See, e.g.*, JCI Envtl. Servs., Comp. Gen. B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299; Bendix Field Eng'g Corp., Comp. Gen. B-241156, Jan. 16, 1991, 91-1 CPD ¶ 44. *But see* Alliant Techsystems, Inc.; Olin Corp., Comp. Gen. B-260215.4, Aug. 4, 1995, 95-2 CPD ¶ 79 (rejecting agency characterization of proposed subcontractor's adverse past-performance information as "merely historical information that could not be changed and which was not required to be mentioned during discussions").

24. FAC 90-26, *supra* note 4 (amending FAR, *supra* note 3, pts. 9, 15, 42) (31 Mar. 1995)).

25. *See id*. at 16,719 (codified as amended at FAR, *supra* note 3, § 15.306(d)(3)).

26. Comp. Gen. B-276472, June 23, 1997, 97-1 CPD ¶ 226.

27. *Id.* at 1. The GSA had assessed the protester's performance on a federal building renovation contract as below average or poor due to a "negative working relationship" and an "adversarial and opportunistic" attitude. *Id.* at 5-6.

28. *Id*. at 7.

29. The GAO noted that 41 U.S.C. § 405(j)(1)(c)(i) explicitly requires discussion even of adverse past-performance information generated internally within the agency. *Id*.

30. Comp. Gen. B-278896.2, May 4, 1998, 98-1 CPD ¶ 139.

31. *Id*. at 15-16.

32. Comp. Gen. B-276472, June 23, 1997, 97-1 CPD ¶ 226.

comment on its performance during the course of the GSA project because the problems were "common knowledge," and because the GSA had expressed dissatisfaction with its performance throughout the contract.[33] The GAO rejected this assertion because the agency could produce no documentary evidence that the protester was ever notified of its adverse performance or should have even been aware of it.[34]

The lesson from these cases is clear: agencies should err on the side of discussing any arguably adverse performance information with the offerors. The contracting officer must be especially sensitive to information received through surveys, telephone calls to other agencies, or from members of the evaluation team. The contracting officer must review this information and identify any adverse past-performance information on which the offeror has not previously commented, and notify the offeror of this information during discussions. The contracting officer should also ensure that contractor performance reports prepared by agencies at the conclusion of contract performance include contractor rebuttal to any adverse information, as required by FAR part 42.

A question naturally arises—when is past-performance information considered "adverse" such that it triggers the requirement to conduct discussions? The answer is simple: anything that results in a less than excellent score during proposal evaluation is adverse and should be discussed. In *GTS Duratek, Inc.*,[35] the Navy received a past-performance survey for one of the protestor's recent contracts—after the protest had already been filed. The survey contained several negative comments. The Navy re-evaluated the protestor's past-performance and determined that the protester should retain the same rating of good. The Navy, however, failed to discuss the past-performance survey with the protester. The GAO found that the protester was "unquestionably entitled to comment" on the survey because of the negative comments it contained.[36] The GAO sustained the protest, reasoning that the protester might have been able to improve its past-performance rating if the Navy had engaged it in meaningful discussions.[37]

As with other evaluation errors, the GAO will test agency failure to discuss adverse past-performance information for prejudice. If the agency can convince the GAO that any rebuttal comments would not have affected the source-selection decision, the GAO will not grant relief.[38] More often than not, however, the GAO is unable to conclude that the protester would not have had a reasonable possibility of receiving the award but for the failure to discuss the adverse information.[39]

In addition to conducting discussions with all offerors in the competitive range, agencies must not overlook offerors considered, but rejected, for the competitive range. Agencies are required to conduct "communications" with offerors whose past-performance is the "determining factor" keeping them out of the competitive range.[40] These communications must include "adverse past-performance information to which the offeror has not previously had an opportunity to comment."[41]

Should agencies alert offerors to adverse past-performance information when the agency intends to award the contract *without* discussions?[42] Generally, this is not required.[43] The contracting officer enjoys broad discretion whether to "clarify" adverse past-performance information.[44] This discretion is not

33. *Id.* at 7.

34. *Id.* at 8. The FAR requires contracting activities to evaluate contractor performance on SF-1420 for each construction contract in excess of $500,000. FAR, *supra* note 3, § 36.201. For non-construction or architect-engineer contracts, the FAR requires agencies to prepare evaluations of contractor performance for each contract in excess of $100,000 at the time the work is completed. *Id.* § 42.1502. The contractor is entitled to thirty days to submit rebuttal comments. *Id.* § 42.1503. The GAO's decision did not explain whether GSA followed these procedures for the federal building procurement.

35. Comp. Gen. B-280511.2, Oct. 19, 1998, 98-2 CPD ¶ 130.

36. *Id.* at 14.

37. *Id.*; *see also* Aerospace Design & Fabrication, Inc., Comp. Gen. B-278896.2, May 4, 1998, 98-1 CPD ¶ 139 (finding that the agency was required to discuss adverse past-performance information with the protester despite giving protester an overall score of good, and despite the source-selection official raising the score to very good).

38. *See, e.g.*, Black & Veatch Special Projects Corp., Comp. Gen. B-279492.2, June 26, 1998, 98-1 CPD ¶ 173. To prevail in federal court, protesters must also show prejudice. *See* Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

39. *See, e.g.*, Biospherics, Inc., Comp. Gen. B-278278, Jan. 14, 1998, 98-1 CPD ¶ 161.

40. FAR, *supra* note 3, § 15.306(b)(1)(i).

41. *Id.* § 15.306(b)(4).

42. The FAR provides that when an agency intends to award without discussions, the offerors *may* be given the opportunity to clarify the relevance of adverse past-performance information to which the offeror has not previously had an opportunity to respond. FAR, *supra* note 3, § 15.306(a).

43. *See* Rohmann Servs., Inc., Comp. Gen. B-280154.2, Nov. 16, 1998, 98-2 CPD ¶ 134 (upholding contracting officer's decision to award contract without offering the protester the opportunity to respond to adverse past-performance information).

absolute, however. In *A.G. Cullen Construction, Inc.*,[45] the GAO held that when there is a "clear basis" to question the validity of the adverse past-performance information, the contracting officer must provide the offeror an opportunity to clarify the information before awarding a contract without discussions. For example, if there are "obvious inconsistencies" between a reference's narrative comments and the numerical ratings assigned to the offeror, the contracting officer must clarify those inconsistencies.[46] Aside from these rare cases, however, the contracting officer is not required to clarify adverse past-performance information before awarding without discussions.[47]

Although not required, prudence dictates that the contracting officer should go beyond the GAO's minimal requirements and seek clarification whenever the offeror has not had a prior opportunity to comment and the adverse past-performance information will materially affect the award decision. For example, if an otherwise competitive offeror with adverse past-performance information offers a lower price than an offeror with excellent past-performance, the contracting officer should clarify the adverse past-performance information before awarding to the higher-priced offeror. This would result in a more informed and fair procurement process, and would ultimately help the government to achieve its goal of obtaining the best value.[48]

Problem Area #2: Am I Ignoring Past-Performance Information That Is "Too Close At Hand"?

Another common procedural mistake agencies make in evaluating past-performance is failing to consider "super-relevant" information. Generally, agencies are not required to consider *all* possible past-performance information when conducting an evaluation. Moreover, agencies are not required to contact all of an offeror's references listed in its proposal,[49] and need not contact the same number of references for each offeror.[50] Nevertheless, the GAO often deems some information to be "too close at hand" to be ignored during an evaluation of past-performance.[51]

In *GTS Duratek, Inc.*,[52] the Navy solicited offers for the transportation and processing of Pearl Harbor Naval Shipyard's (PHNS) radioactive waste. GTS Duratek's proposal explained its performance on various similar Navy contracts, including a PHNS contract for "radioactive metal melting and recycling services."[53] Nevertheless, the Navy neglected to consider the offeror's performance on this contract in its past-performance evaluation because the offeror did not submit a Contractor Past Performance Data Sheet.[54] The GAO found the Navy's actions unreasonable, noting that the contract was so relevant that it served as the basis of the government estimate. Concluding that this information was "too close at hand to ignore," the GAO sustained the protest.[55]

Similarly, in *Scientech, Inc.*,[56] the Department of Energy (DOE) neglected to solicit and evaluate a customer satisfaction

44. *See id*. at 8.

45. Comp. Gen. B-284049, Feb. 22, 2000, 2000 CPD ¶ 45.

46. *Id.* at 5.

47. *Id.* The GAO concluded in this case that the contracting officer exercised his discretion reasonably when deciding not to clarify the adverse past-performance information. *Id.*

48. The *OFPP Guide* suggests that agencies should consider allowing offerors to rebut all negative past-performance information, even when discussions are not anticipated, "in the interest of fairness." OFPP GUIDE, *supra* note 7, at 25. *See also* Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box*, 29 PUB. CONT. L.J. 637, 666-68 (Summer 2000) (providing a more complete discussion of this issue).

49. *See* Black & Veatch Special Projects Corp., Comp. Gen. B-279492.2, June 26, 1998, 98-1 CPD ¶ 173 (finding agency's decision to contact only two of protester's fifteen references reasonable); Advanced Data Concepts, Inc., Comp. Gen. B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 (finding that agency acted reasonably by assigning a neutral rating to protester after none of the three agency contact points returned past-performance questionnaires).

50. *See* IGIT, Inc., Comp. Gen. B-275299.2, June 23, 1997, 97-2 CPD ¶ 7.

51. GTS Duratek, Inc., Comp. Gen. B-280511.2, Oct. 19, 1998, 98-2 CPD ¶ 130, at 14.

52. *Id.*

53. *Id.* at 12.

54. The Request for Proposals advised offerors that the government would collect performance information using Past Performance Data Sheets, and that it might contact other references as well. *Id.*

55. *Id.* at 14.

56. Comp. Gen. B-277805, Jan. 20, 1998, 98-1 CPD ¶ 33.

questionnaire regarding the protester's incumbent contract.[57] The protester had clearly identified in its proposal the incumbent contract as the focal point of its past-performance and experience. The GAO found the incumbent contract remarkably similar to the solicited contract in scope of work, size, and type, and concluded that the DOE's failure to evaluate the protester's work on this contract was "patently unfair."[58]

To avoid this pitfall, agencies must be sensitive to the existence of relevant past-performance information, and should err on the side of evaluating past-performance information rather than ignoring it. This applies not only to favorable information, but also to adverse information.[59] If the information is relevant, it will likely assist the agency in acquiring a more accurate picture of the offeror's past-performance history, thus resulting in better past-performance evaluations.

Problem Area #3: Am I Sticking to the Plan?

Agencies are required by statute to evaluate proposals according to the criteria specified in the Request for Proposals (RFP).[60] The GAO generally sustains protests of source-selection evaluations when the agency deviates from the criteria specified in the RFP.[61] Past-performance evaluations are no exception. Thus, for example, if an agency states in the RFP that offerors with no prior contract experience in military contracts will be given a neutral rating, then giving such an offeror anything other than a neutral rating contravenes the RFP and is improper.[62]

In this area, perhaps more than any other, it is critical for agency personnel charged with drafting the RFP evaluation criteria to *say what they mean and mean what they say.* Agencies must choose past-performance subfactors wisely. The GAO is leery of creative reinterpretations of the RFP during the evaluation process, even when done for such noble purposes as to "promote efficiency."

In *Kathpal Technologies, Inc.; Computer & Hi-Tech Management, Inc.*,[63] the Department of Commerce (Commerce) issued an RFP for a government-wide acquisition contract in which the past-performance factor consisted of two subfactors—Quality Recognition/Certifications (QRC)[64] and Past Performance Management (PPM).[65] Due to an unexpectedly large number of proposals submitted, Commerce decided to screen all proposals to determine which were most competitive. Based only on the offerors' QRC subfactor ratings, the agency established a cut-off point, allowing only those offerors with sufficiently high QRC ratings to make oral presentations. Kathpal protested its elimination from the competition. The GAO had little difficulty finding that Commerce failed to consider Kathpal's proposal ratings under *all* stated past-performance evaluation criteria, and sustained the protest.[66]

57. *Id.* at 3. The past-performance/experience criterion had two subcriteria—relevant past-performance and customer satisfaction. The protester submitted ten references, including references for the incumbent contract. The DOE sent customer satisfaction questionnaires to only four of the references, none of which pertained to the incumbent contract. *Id.* at 4-5.

58. *Id.* at 5. The GAO sustained the protest and recommended that the DOE include Scientech in the competitive range. *Id.* at 8. *Accord* Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560 (1999) (sustaining protest in which agency failed to consider protester's performance on incumbent contract even though protester provided references for the incumbent contract in its proposal); Int'l Bus. Sys., Inc., Comp. Gen. B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 (sustaining protest in which agency failed to consider contract with same agency, for the same services, and with the same contracting officer, and protester had asked that its performance of this contract be considered). *Cf.* Am. Dev. Corp., Comp. Gen. B-251876.4, July 12, 1993, 93-2 CPD ¶ 49 (finding agency's evaluation methodology unreasonable where it considered the relevance of prior contracts but failed to consider the quality of performance on those contracts).

59. *See* Airwork Ltd.-Vinnell Corp. (A Joint Venture), Comp. Gen. B-285247, Aug. 8, 2000, 2000 CPD ¶ 150 (stating that an agency generally may not ignore negative past-performance information of which it is aware).

60. *See* 41 U.S.C. § 253b(a) (2000).

61. *See, e.g.*, Found. Health Fed. Servs., Inc., Comp. Gen. B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3.

62. *See* Found. Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., Comp. Gen. B-278189.3, Feb. 4, 1998, 98-2 CPD ¶ 51. In this case, the GAO found that the agency's decision to deny a "bonus" to healthcare providers who lacked military experience "was not the equivalent of a required neutral rating," and recommended that the agency amend the solicitation to reflect its actual needs. *Id.* at 7-8, 16.

63. Comp. Gen. B-283137.3, Dec. 30, 1999, 2000 CPD ¶ 6.

64. The RFP indicated that the agency would evaluate the quality, relevance, and currency of the offerors' recognition or certification, with greater weight given to international or national quality performance awards. *Id.* at 3.

65. For this subfactor, the RFP explained that the agency would evaluate the offerors' past-performance in the management of complex information technology service efforts. *Id.*

66. *Id.* at 11, 15. The GAO noted that 41 U.S.C. § 253b(d)(2) and FAR section 15.306(c) now permit agencies to limit the competitive range to the "most highly rated proposals" for purposes of efficiency. Before establishing a competitive range, however, agencies must first evaluate all proposals received in accordance with the RFP evaluation criteria, including price. *Id.* at 11. *But cf.* IGIT, Inc., Comp. Gen. B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 (denying protest and excusing agency's "slight deviation" from solicitation criteria when the protester cannot show that the deviation caused prejudice).

Agencies should also be alert to RFP language stating that the agency will evaluate past-performance using prior contracts that are "the same or similar" to the present requirement. When such language is used, consideration of dissimilar or mildly similar prior contracts may be improper. For example, in *GTS Duratek, Inc.*,[67] the RFP stated that the Navy would evaluate past-performance under prior contracts for services that were the "same or similar in scope, magnitude, or complexity to this requirement" and would consider the quality of performance "relative to the size and complexity of the requirement under consideration."[68] The evaluation board concluded that the awardee's prior contracts were for "similar" work, and gave it an "excellent" rating, even though the awardee's prior contracts included only a few of the services required by the RFP.[69] The GAO found that the Navy's determination was based on a "cursory" examination of these prior contracts, resulting in a failure of the Navy to comply with the RFP evaluation criteria.[70]

Problem Area #4: Am I Evaluating Offerors on the Same Basis?

Agencies evaluating past-performance information must apply the same standards to all offerors. When an agency down-grades one offeror's past-performance, it should down-grade similarly-situated offerors in the same way. Agencies may forget this common sense notion, with disastrous results. For example, in *Trifax Corp.*,[71] the Army solicited offers for occupational health care services at various sites. The Army eliminated the protester's proposal from the competitive range primarily for its past-performance and insufficient quality control plan. After a close review of the record, the GAO found little support for any of the Army's stated reasons for downgrading the proposal. Moreover, the GAO determined that offerors with similar past-performance histories received higher scores than the protester.[72] Because of these inconsistencies, the GAO found the evaluation unreasonable and sustained the protest.[73]

In a similar case,[74] the GAO found that the Department of Housing and Urban Development improperly downgraded the protester's proposal for a lack of corporate experience while neglecting to do so with the awardee's proposal. Both the protester and the awardee were newly-formed corporations whose principal officers had previous experience working for the same company. The agency credited the experience of the awardee's key employees for the "corporate experience" factor, but failed to do so for any other offeror. The GAO found disparate treatment between the protester and the awardee, and sustained the protest.[75]

Agencies should help ensure that they rate all offerors' past-performance consistently by using the same evaluation form for all offerors. Failure to do so may lead to disparate treatment of the offerors. In *Seattle Security Services, Inc. v. United States*,[76] the court determined that the agency's use of an evaluation form to assess the protester's, but not the awardee's, past-performance resulted in the awardee potentially receiving a higher past-performance score than it otherwise would have had.[77]

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67. Comp. Gen. B-280511.2, Oct. 19, 1998, 98-2 CPD ¶ 130.

68. *Id.* at 12.

69. *Id.* at 13.

70. *Id.* at 16. *See also* NavCom Defense Elecs., Inc., Comp. Gen. B-276163, May 19, 1997, 97-1 CPD ¶ 189 (sustaining protest in which record failed to support agency's conclusion that awardee's past-performance involved contracts that were the "same as" or "similar to" the RFP requirements). *But see* Amer. Dev. Corp., Comp. Gen. B-251876.4, July 12, 1993, 93-2 CPD ¶ 49 (holding that agency did not deviate from the evaluation factors by considering relevance because relevance is "logically encompassed by and related to the past-performance factor").

71. Comp. Gen. B-279561, June 29, 1998, 98-2 CPD ¶ 24.

72. *Id.* at 7. The GAO cited an example. A competitor had three contracts of similar size and scope as the protester, including a health care contract of a smaller scale and an Army contract with "similar staffing problems" as the protester. *Id.* Despite these similarities, the competitor received a higher score than the protester. *Id.*

73. *Id.* at 8.

74. U.S. Prop. Mgmt. Serv. Corp., Comp. Gen. B-278727, Mar. 6, 1998, 98-1 CPD ¶ 88.

75. *Id.* at 6-7. In *Ogden Support Servs., Inc.*, Comp. Gen. B-270012.4, Oct. 3, 1996, 96-2 CPD ¶ 137, the GAO sustained a protest because the agency had given the awardee *too high* of a score for past-performance. The GAO concluded that the agency could not properly award an offeror with minimum relevant experience a nearly perfect score for past-performance because this would negate the evaluation weight assigned to past-performance criteria. *Id.* at 3-4.

76. 45 Fed. Cl. 560 (1999).

77. *Id.* at 569. The contracting officer evaluated the protester's past-performance using the evaluation form, assigning the protester a score of ten. In contrast, the contracting officer evaluated the awardee's past-performance based on three letters of reference contained in the awardee's proposal, and assigned the awardee a score of eleven. The court determined that the use of the form would likely have resulted in a lower past-performance score for the awardee because one of its references rated the awardee's performance "merely satisfactory." *Id.*

The Court of Federal Claims found that the agency's actions prejudiced the protester and sustained the protest.[78]

Problem Area #5: Am I Using the Right Prior Contracts?

Agencies must also consider the *right* contracts when evaluating an offeror's past-performance. In appropriate cases, agencies may consider the past-performance of predecessor companies, subcontractors, or even key employees.[79] Likewise, the agency may properly consider the past-performance of parent or subsidiary firms to the extent that a relationship exists between the two firms that may affect contract performance.[80] For offerors with no past-performance, agencies must assign a rating that is neither favorable nor unfavorable.[81]

Agencies must approach this area with caution. The key here is "relevance." The GAO will sustain a protest when an agency uses the past-performance of affiliated firms without showing the relevance of such firms to the present effort.[82] Specifically, the agency must have information that the affiliated company intends to use its workforce, management, facilities, or other resources in performing the contract.[83] Agencies must do more than simply accept the offeror's statement taking credit for the performance of the affiliate. There must be some "actual or potential relationship to contract performance."[84]

Problem Area #6: Am I Penalizing Any Offerors Unfairly?

The FAR defines past-performance broadly, to include the contractor's history of reasonable and cooperative behavior andcommitment to customer satisfaction.[85] This definition appears to give agencies the leeway to assign a negative evaluation to uncooperative or belligerent contractors. Nevertheless, agencies must tread carefully, avoiding any evaluation that appears to penalize an offeror for exercising its right to pursue legal remedies in good faith.

In *Nova Group, Inc.*,[86] the Navy solicited for pier-side construction projects at Pearl Harbor, Hawaii. The RFP advised that past-performance would be evaluated for customer satisfaction on similar projects.[87] The Navy gave the protester a "satisfactory" rating for past-performance, rather than "outstanding," because the protester had filed nine claims on prior contracts over a fifteen-year period.[88] The GAO found that this basis was unreasonable. Noting that the filing of claims is consistent with the statutory contract disputes process,[89] the GAO found no evidence in the record to suggest that the protester's claims lacked merit or had an adverse impact on contract performance. The GAO concluded that the Navy's action unfairly penalized the protester for utilizing the contract dispute process, and sustained the protest.[90]

Problem Area #7: Am I Otherwise Being Reasonable in My Evaluation?

Generally, the GAO is deferential to the agency's evaluation of proposals, and does not question the evaluation unless shown by the protester to be unfair or unreasonable. Mere disagreement with the evaluation by the protester is insufficient grounds to sustain a protest.[91] To prove unreasonableness, the protester must show some type of serious error meriting relief.[92]

78. *Id.* at 571.

79. *See* FAR, *supra* note 3, § 15.305(a)(2)(iii); *see also* Myers Investigative & Sec. Servs., Inc., Comp. Gen. B-286971.2, April 2, 2001, 2001 CPD ¶ 59 (holding that agencies may consider a proposed subcontractor's experience when evaluating an offeror's past-performance, unless language in the RFP prohibits such consideration).

80. *See* NAHB Research Ctr., Inc., Comp. Gen. B-278876.2, May 4, 1998, 98-1 CPD ¶ 150, at 4.

81. FAR, *supra* note 3, § 15.305(a)(2)(iv).

82. Universal Bldg. Maint., Inc., Comp. Gen. B-282456, July 15, 1999, 99-2 CPD ¶ 32.

83. *Id.* at 6.

84. ST Aerospace Engines Pte. Ltd., Comp. Gen. B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161, at 5.

85. FAR, *supra* note 3, § 42.1501.

86. Comp. Gen. B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56.

87. *Id.* at 2. The RFP advised that the Navy would measure customer satisfaction by "quality of workmanship; timely completion of work; reasonableness of price; cooperation/responsiveness and safety." *Id.*

88. *Id.* at 3-4. The Navy reasoned that the protester's failure to reach bilateral agreements on those prior contracts raised questions about customer satisfaction and the protester's cooperation/responsiveness. *Id.* at 9.

89. *See* Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000).

90. 99-2 CPD ¶ 56, at 9.

While the above rules make it appear that protesters have a difficult burden to overcome, protesters have been increasingly successful in persuading the GAO to find flaws in agency evaluations. To survive a protest, agencies must be able to demonstrate a reasonable basis for evaluating an awardee's past-performance. Legal advisors have a crucial role to play here, ensuring that procurement officials are acting not only legally, but using good judgment. Attorneys should review the evaluation narrative to ensure it is supported by sufficient evidence.

While the GAO may be reluctant to second-guess an agency's past-performance evaluation, it will sustain a protest when it considers the agency's supporting rationale for the source-selection decision to be inadequate. For example, the GAO found HUD's award decision to be unreasonable in *ACS Government Solutions Group, Inc*.[93] In this procurement of comprehensive loan servicing for single family homes, the evaluation board concluded that the awardee had extensive experience in this line of business and awarded it a "near perfect score."[94] The GAO examined the record and found insufficient evidence to support this conclusion, as nearly all of the awardee's experience pertained to work other than loan servicing, or to loan servicing of small consumer loans.[95]

In *Pacific Ship Repair and Fabrication, Inc.*,[96] the Navy issued questionnaires to agency contracting personnel for eleven contracts listed in the protester's proposal. The personnel receiving these questionnaires declined to rate the protester's performance on four of these contracts.[97] Despite this lack of rating or other information, the Navy assigned a satisfactory rating to these contracts. The GAO held this was improper, finding that the Navy had a duty to acquire information adequate to support an evaluation once it decided to include these contracts within the scope of its past-performance rating.[98]

When reviewing past-performance evaluations, attorneys should also ensure that agencies make valid comparisons among offerors' performance records when assigning ratings. Invalid comparisons may result in unreasonable evaluations. In *Green Valley Transportation, Inc.*,[99] the GAO sustained a protest against the Army's award of numerous freight transportation contracts. The Army evaluated the past-performance of the offerors primarily by examining "negative performance actions" by the shippers and the corrective measures they took in response.[100] The Army neglected, however, to compare the *number* of negative actions against the number of shipments the offerors made over the relevant time period. The protester had made many more shipments than other offerors, and therefore had many more negative actions in its record, resulting in a lower score than other offerors. But if one counted the protestor's total negative actions as a percentage of the total number of shipments it had made, the protester's history appeared much more favorable.[101] The GAO found the Army's method of comparison to be irrational and sustained the protest.[102]

In *Beneco Enterprises, Inc.*, a recent case involving an RFP for job-order construction services at Fort Rucker, Alabama, the GAO rebuked the Army for unreasonably selecting an offeror with a minimal record of relevant past-performance.[103] The Army evaluated the awardee as having "good to excellent" past-performance with low risk, the same evaluation as the pro-

91. *Id.* at 6; *see also* Parmatic Filter Corp., Comp. Gen. B-285288.3, Mar. 30, 2001, 2001 CPD ¶ 71.

92. Nova Group, Inc., Comp. Gen. B-282947, Sept. 15, 1999, 99-2 CPD ¶ 56.

93. Comp. Gen. B-282098, June 2, 1999, 99-1 CPD ¶ 106.

94. *Id.* at 3-4. The evaluation board based its decision almost entirely on the experience of the awardee's proposed key personnel, rather than on the firm's corporate experience. The GAO found, on the contrary, that the RFP "contemplated a separate evaluation of corporate and key personnel experience." *Id.* at 10.

95. *Id.* at 10-13; *see also* Mech. Contractors, S.A., Comp. Gen. B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121 (finding an evaluation of protester's experience unreasonable because agency failed to give any weight to subcontractor's certification to perform the work); PMT Servs., Inc., Comp. Gen. B-270538.2, Apr. 1, 1996, 96-2 CPD ¶ 98. In *PMT*, the agency evaluated the protester's past-performance as "marginal," with a probability of success as "poor," solely because the protester had not previously performed a contract of similar size and complexity. *PMT Servs.*, 96-2 CPD ¶ 98, at 3. The GAO found this determination unreasonable because the agency failed to take into account any factors relating to complexity other than size, noting that size was not necessarily related to greater complexity. *Id.* at 6-9.

96. Comp. Gen. B-279793, July 23, 1998, 98-2 CPD ¶ 29.

97. *Id.* at 5. The respondents were unable to locate knowledgeable contracting personnel or past-performance records documenting the protester's performance. *Id.*

98. *Id.* Despite the Navy's "unreasonable" evaluation, the GAO refused to sustain the protest, finding that the protester failed to show it was prejudiced by the Navy's action. The GAO had offered the protester the opportunity to submit evidence that its performance was better than satisfactory, but the protester declined this invitation. *Id.* at 5-6.

99. B-285283, 2000 U.S. Comp. Gen. LEXIS 122 (Aug. 9, 2000).

100. *Id.* at *9.

101. The GAO noted that over a three-year period, the protester made 39,441 shipments of about 155 million pounds. The Army gave another offeror the same past-performance rating as the protester, though it had made only 760 shipments of 12 million pounds during the same period. The Army's evaluation focused only on the absolute number of performance problems, failing to "take into account the size of the universe of performance in which those problems occurred." *Id.* at *12.

tester, even though the awardee had significantly less experience in job-order contracts than the protester.[104] The Army reached this conclusion by evaluating the past-performance and experience of the awardee's senior project manager, something the RFP allowed only for "new entities," those without previous experience in contracts of that kind.[105] The record showed that the awardee was anything but new.[106] The record also failed to demonstrate that the Army had adequate information to evaluate the awardee's personnel.[107] In a harshly worded opinion,[108] the GAO concluded that the Army's evaluation was "fundamentally flawed."[109]

Problem Area #8: Have I Explained the Award Decision Adequately?

After the contracting officer reasonably evaluates and documents the offerors' past-performance, the agency may still need to complete one more level of analysis before selecting the winning bid. The FAR permits agencies to make a cost/technical tradeoff.[110] Agencies have broad discretion in making such determinations, and the GAO normally will defer to the agency decision unless it is clearly unreasonable. Thus, an agency is free to award to a higher-priced offeror with better past-performance, but it *must* be able to provide a reasonable explanation for doing so.[111] The GAO will sustain a protest when the agency makes only conclusory statements of the tradeoff decision.[112]

The tradeoff decision must demonstrate the relative difference among proposals, their weaknesses and risks, and the basis for the selection decision.[113] Failure to do so might be reversible error, even for simplified acquisitions. In *National Aerospace Group, Inc.*,[114] the Defense Logistics Agency (DLA) solicited quotes for sheet metal using simplified acquisition automated purchase procedures that contemplated a best-value assessment. The contracting officer awarded the contract to an experienced vendor with a high quote, using an Automated

102. *Id.* The GAO also based its decision on the Army's failure to document its "reasoned analysis of the past-performance information at its disposal," as required by the RFP, and its failure to consider the volume of deliveries made by the offerors when evaluating the percent of "on-time deliveries" made. *Id.* at *22-23. *See also* OSI Collection Srvs., Inc., Comp. Gen. B-286597, Jan. 17, 2001, 2001 CPD ¶ 18. In *OSI Collection Services*, the GAO sustained a protest involving a federal supply schedule task-order contract for private collection services, in which the agency based its past-performance evaluation primarily on Competitive Performance and Continuous Surveillance (CPSC) scores on previous collection contracts. The CPSC scores measured the relative performance of each contractor on four performance indicators, including "net back recovery" and "number of litigation packages prepared." *Id.* at 7. The GAO found the agency's "overly mechanical application" of the CPSC scores unreasonable because the agency failed to consider how the differing workloads assigned to the private collection contractors might impact their CPSC scores. *Id.* at 8-9.

103. Beneco Enters., Inc., Comp. Gen. B-283512.3, July 10, 2000, 2000 CPD ¶ 176. This was the GAO's second decision on this procurement; the GAO had previously sustained Beneco's protest of the Army's evaluation of the awardee's past-performance. In the earlier protest, the GAO found that the Army unreasonably gave the awardee an excellent rating even though it had no job-order prime contractor experience, while giving Beneco only a good rating despite its extensive record of successful performance under job-order contracts. *See* Beneco Enters., Inc., Comp. Gen. B-283512, Dec. 3, 1999, 2000 CPD ¶ 175, at 9-10.

104. 2000 CPD ¶ 176, at 6. The protester, Beneco, was the incumbent job-order contractor at Fort Rucker. It submitted information in its proposal regarding its performance on eighteen contracts, fifteen of which were considered "highly relevant job-order-type contracts." *Id.* at 4.

105. *Id.* at 5. The awardee's senior project manager had served as "the top on-site manager" for Beneco's incumbent job-order contract at Fort Rucker. *Id.* The awardee stated in its proposal that this senior project manager had ten years of "direct JOC experience," and had impacted twenty job-order contracts with "superior performance." *Id.*

106. *Id.* at 7. The awardee's proposal listed many contracts it had been awarded for projects similar to the work required by the RFP. Some of these contracts dated back over six years. *Id.* at 7 n.3.

107. *Id.* at 8. The GAO found that the Army "accepted without support" the awardee's statement that its project manager had "impacted with superior performance" over twenty unidentified job-order contracts. *Id.*

108. The GAO found that the Army's actions "repeatedly favored [the awardee] without a reasonable basis" and "cast a shadow over the integrity of this procurement process." *Id.* at 8 n.9.

109. *Id.* at 9. In sustaining the protest, the GAO recommended that the Army appoint a new source-selection evaluation board and source-selection authority to conduct a new evaluation of proposals. *Id. Cf.* Airwork Limited-Vinnell Corp. (A Joint Venture), Comp. Gen. B-285247, Aug. 8, 2000, 2000 CPD ¶ 150. In *Airwork Limited*, the GAO found that the agency reasonably evaluated the protester and the awardee as both having exceptional past-performance, even though the protester was the incumbent contractor. The GAO determined that the agency was not required to reduce the exceptional rating assigned to the awardee—even if the protester's past-performance was better. *Id.* at 9.

110. FAR, *supra* note 3, § 15.308.

111. *See* Numura Enter., Inc., Comp. Gen. B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148.

112. *See* Si-Nor, Inc., Comp. Gen. B-282064, May 25, 1999, 2000 CPD ¶ 159.

113. *See* ACS Gov't Solutions Group, Inc., Comp. Gen. B-282098, June 2, 1999, 99-1 CPD ¶ 106.

114. Comp. Gen. B-281958, May 10, 1999, 99-1 CPD ¶ 82.

Best Value Model (ABVM).[115] The contracting officer based his award decision on a determination that the awardee represented a lesser risk of nonperformance than the protester, a relatively new supplier who had received a neutral rating. The DLA presented no evidence, however, to show that the contracting officer ever performed a comparative assessment of vendors or a price/performance tradeoff. The GAO found this violated 41 U.S.C. § 405(j)(2) and FAR section 15.305(a)(2), and sustained the protest.[116]

Conclusion

Past-performance evaluations during contract source-selection are now an important part of the selection process, and they will remain so for the foreseeable future. Agencies will continue to use this tool to measure the risk of non-performance more effectively, and non-selected contractors will continue to mount challenges to these necessarily subjective evaluations in the courts and at the GAO. Legal advisors must be alert to the problem areas that have plagued source-selections in the past, and advise agencies accordingly. By remembering the bedrock principles of source-selection evaluations—reasonableness, fairness, and consistency—agencies can minimize both the basis and incentive for contractor protests. This would go a long way toward building a more efficient procurement system.

115. *Id.* at 2. The ABVM is an "automated system that collects a vendor's past-performance data for a specific period and translates it into a numeric score." *Id.*

116. *Id.* at 4.

Ethics Note

The General Officer Aide and the Potential for Misuse

Introduction

"Rank has its privileges." That adage has some truth, at least when it comes to the benefits conferred upon general officers in the U.S. military. Along with respect and responsibility, promotion provides perks that are not available to lower ranking officers. When an Army officer pins on the first star, that officer also takes on additional privileges. As privileges increase, so does the potential for abuse of those privileges, and more importantly, so does the level of public scrutiny. To assist general officers, judge advocates must understand the issues. The purpose of this note is to educate attorneys on the selection and roles of general officer aides, identify potential areas for abuse, and assist attorneys in protecting their general officers from allegations of unethical conduct.

The Selection of Personal Aides

The Army authorizes general officers to have the assistance of a personal staff, to include an officer aide de camp[1] and enlisted soldiers.[2] Although 10 U.S.C. § 3543 permits more than one officer aide contingent upon the general officer's grade,[3] the Army has traditionally limited general officers to one officer aide de camp.[4] The actual number of enlisted aides authorized is determined by the U.S. Total Army Personnel Command (PERSCOM) using a complex statutory formula.[5] Regulations explicitly establish the entitlement to aides for a few general officers,[6] but "budget constraints" and the general officer's specific requirements determine the entitlement for

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1. U.S. Dep't of Army, Field Manual 101-5, Staff Organization and Operations 4-29 (31 May 1997) [hereinafter FM 101-5] (establishing the aide de camp as a member of the general officer's personal staff).

2. U.S. Dep't of Army, Army Reg. 614-200, Enlisted Assignments and Utilization Management para. 8-10 (31 Oct. 1997) [hereinafter AR 614-200].

3. *See* 10 U.S.C. § 3543 (2000).

> § 3543. Aides: detail; number authorized.
>
> (a) Each major general of the Army is entitled to three aides selected by him from commissioned officers of the Army in any grade below major.
> (b) Each brigadier general of the Army is entitled to two aides selected by him from commissioned officers of the Army in any grade below captain.

Id.

4. *See* U.S. Dep't of Army, Army Reg. 614-16, Personal Staff for General Officers para. 1-2 (7 June 1974) [hereinafter AR 614-16, 1974 version]. *Army Regulation* (*AR*) *614-16* was superceded on 15 December 1981 by the then current version of *AR 614-200*. General officers "occupying a modification table of organization and equipment (MTOE) position" and general officers "in command of troops may be assigned an aide de camp." U.S. Dep't of Army, Army Reg. 614-16, Personal Staff for General Officers para. 1-1 (C1, 7 Nov. 1975).

5. The congressionally established formula is found in 10 U.S.C. § 981, as follows:

> § 981. Limitation on number of enlisted aides.
>
> (a) Subject to subsection (b), the total number of enlisted members that may be assigned or otherwise detailed to duty as enlisted aides on the personal staffs of officers of the Army, Navy, Marine Corps, Air Force, and Coast Guard (when operating as a service of the Navy) during a fiscal year is the number equal to the sum of (1) four times the number of officers serving on active duty at the end of the preceding fiscal year in the grade of general or admiral, and (2) two times the number of officers serving on active duty at the end of the preceding fiscal year in the grade of lieutenant general or vice admiral.
>
> (b) Not more than 300 enlisted members may be assigned to duty at any time as enlisted aides for officers of the Army, Navy, Air Force, and Marine Corps.

10 U.S.C. § 981.

6. *See, e.g.*, AR 614-200, *supra* note 2, para. 8-10a (establishing the Army Chief of Staff's entitlement to four enlisted aides); *see also* AR 614-16, 1974 version, *supra* note 4, para. 2-3. "General of the Army is authorized three enlisted aides, and generals and lieutenant generals in public quarters are authorized three and two aides respectively. General officers in selected O8 and O7 positions (when incumbent is in public quarters) will be authorized aides by separate HQDA (ODCSPER) letter." *Id.* Table 2-1 of the 1974 version of *AR 614-16* indicates that major generals and brigadier generals who are specifically authorized an enlisted aide by HQDA (ODCSPER) may each have one enlisted aide in the grade of E-7 and E-6, respectively. *Id.* tbl. 2-1.

most general officers.[7] These soldiers normally work directly for the general officer.[8]

In most cases, the general officer personally selects the soldiers who will serve as aides. General officers may select an aide "from within their command or request aide nominations from the Officer Personnel Management Directorate (OPMD), PERSCOM."[9] Whoever chooses the junior officer, selection as an aide de camp commonly distinguishes young officers from their peers.

The coveted aide de camp and enlisted aide positions bring laurels to those selected to serve a general officer. "There are few more subjective honors in the Army than being chosen as aide de camp, the personal assistants who cater to scores of the service's top generals."[10] The reason is clear. "The post is a strong indicator of success: one-third of the Army's top generals were aides early in their careers."[11]

The selection of enlisted aides is equally subjective. Enlisted soldiers may volunteer for enlisted aide duty, provided they meet certain eligibility requirements.[12] The "Sergeant Majors Branch, Enlisted Personnel Management Branch (EPMB), PERSCOM, nominates qualified soldiers for such positions," and the General Officer Management Office "manages the authorizations,"[13] but the individual general officer often chooses his own aides.

The Role of Personal Aides

There is little official published guidance on the role of general officer aides. Aides may look to *Army Regulation* (*AR*) *614-200* for guidance; however, *AR 614-200* pertains only to enlisted soldiers and does not contain any provisions that regulate aides de camp. *Army Regulation 614-16* regulated both officer and enlisted aides until 1975, when it was superceded by *AR 614-200*, which omits the provisions governing aides de camp.[14] Consequently, no current Army regulation covers aides de camp.[15] Nonetheless, a section in the General Officer Policies pamphlet provides guidance.[16] This guidance instructs aides de camp to "remain flexible" and that their "actual duties depend upon the personality of the general" for whom they work.[17]

While aides de camp fulfill a more public role, enlisted aides are normally less visible. The sole mission of enlisted aides is to assist the general in the performance of military and official

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7. AR 614-200, *supra* note 2, para. 8-10a.

8. *Field Manual 101-5* establishes the aide de camp as a member of the general officer's personal staff. FM 101-5, *supra* note 1, at 4-29. It is not uncommon, however, for enlisted aides to work directly under the supervision of the aide de camp. General Officer Polices, General Officer Management Office (GOMO), October 1995, at 10 (unpublished, on file with GOMO and with author) [hereinafter GOMO Handbook].

9. GOMO Handbook, *supra* note 8, at 10.

10. Dana Priest, *A Male Prototype for Generals' Protégés; In Choosing Aides de Camp, Army's Leaders Nearly Always Exclude Female Officers*, WASH. POST, Dec. 29, 1997, at A1.

11. *Id.*

12. The prerequisites include the possession of a current food-handler's certificate, at least twelve months of remaining active service, a minimum general technical score of ninety, a valid driving permit, and a Single-Scope Background Information (SSBI) or no information on record that may preclude a favorable SSBI. AR 614-200, *supra* note 2, para. 8-10d.

13. GOMO Handbook, *supra* note 8, at 10.

14. *See supra* note 4.

15. *Army Regulation 611-101*, COMMISSIONED OFFICER CLASSIFICATION SYSTEM (26 June 1995), contains a brief description of the aide de camp role, but does not outline required or permissible duties. Similarly, *AR 614-200*, *supra* note 2, contains brief coverage of enlisted aides' duties. In the mid-70s, the Quartermaster's School at Fort Lee, Virginia, produced an informational booklet entitled *The Enlisted Aide*. Efforts to obtain a copy have proven fruitless.

16. A section entitled "Aide de Camp Handbook" is included in the GOMO Handbook, *supra* note 8. This section is the only "official" written guidance available for aides de camp.

17. *Id.* at 33. The pamphlet states the aide de camp's duties succinctly: "Your primary mission is simply to assist the general in the performance of his or her duties, a simple definition, but a monumental task." *Id.* More practical guidance is outlined under the heading "What is an Aide?"

> An aide has to be a secretary, companion, diplomat, bartender, caterer, author, and map reader as well as mind reader. He or she must be able to produce at a minutes notice timetables, itineraries, the speeds and seating capacity of various aircraft, trains, and sundry surface transportation . . . , must know the right type of wine for a meal, how many miles it is to Timbuktu, where to get the right information and occasionally, how the bosses steak or roast beef ought to be cooked . . . always look fresh, always know what uniform to wear, what is happening a week from today, have the latest weather report and in their spare time study to maintain military proficiency.

Id.

duties. They are "authorized for the purpose of relieving general and flag officers of those minor tasks and details which, if performed by the officers, would be at the expense of the officers' primary military and official duties."[18]

There are several limitations on enlisted aides' duties, however. First, officers are prohibited by statute from using "an enlisted member of the Army as a servant."[19] This generally precludes requiring an enlisted aide to perform duties that personally benefit the officer, as opposed to duties that professionally benefit the officer. Second, the duties of enlisted aides must "relate to the military and official duties of the [general officer] and thereby serve a necessary military purpose."[20] The language of Department of Defense Directive (DODD) 1315.9 more specifically prohibits the use of enlisted soldiers for "duties which contribute only to the officer's personal benefit and which have no reasonable connection with the officer's official responsibilities."[21] Finally, the Standards of Ethical Conduct for the Executive Branch,[22] or the *Joint Ethics Regulation* (*JER*),[23] further limit interaction between officers and their subordinates. Under the *JER*, subordinates' official time may only be used for official duties.[24]

The types of authorized duties that a superior may assign to an enlisted aide are diverse. *Army Regulation 614-200* outlines a "not all inclusive" list of "official functions" or duties, including cleaning the officer's quarters, uniforms, and personal equipment; shopping and cooking; and running errands.[25] Many of the enumerated duties seem personal in nature. But, "[t]he propriety of the duties is determined by the official purpose they serve, rather than the nature of the duties."[26] In *United States v. Robinson*,[27] the Court of Military Appeals asserted that a different interpretation "which would apply the proscription to the kind of work done, and not to its ultimate

18. Dep't of Defense, Dir. 1315.9, Utilization of Enlisted Personnel on Personal Staffs of General and Flag Officers para. III.A (26 Feb. 1975) [hereinafter DOD Dir. 1315.9].

19. 10 U.S.C. § 3639 (2000). This provision was originally part of the Army Appropriations Act of 15 July 1870, and was codified at § 14, 16 U.S. Stat. 319: "Sec. 14. And be it further enacted, That it shall be unlawful for any officer to use any enlisted man as a servant in any case whatever." *Id.* The language was changed somewhat in 10 U.S.C. § 608 (1956): "§ 608. Officers using enlisted men as servants. No officer shall use an enlisted man as a servant in any case whatsoever." *Id.* In *United States v. Robinson*, 20 C.M.R. 63 (C.M.A. 1955), the Court of Military Appeals determined that the

> real purpose of the enactment was to prevent the use of enlisted men in assignments that contributed only to the convenience and personal benefit of individual officers which had no reasonable connection with the efficient employment of the armed services as a fighting force.
>
> The word "servant" has a myriad of meanings, but as used in the context of the original act, we conclude that Congress intended to give it the meaning of one who labors or exerts himself for the personal benefit of an officer. Certainly, it could not have intended to prevent an enlisted man from laboring for officers in furtherance of their official duties. As enacted originally, the Act suggests that Congress was interested in having the enlisted men of the Army earn their pay in the performance of military duties, and not as personal servants attending to the physical comforts of their individual superior officers.

Id. at 68.

20. AR 614-200, *supra* note 2, para. 8-10b.

21. DOD Dir. 1315.9, *supra* note 18, para. III.B. *But see* AR 614-200, *supra* note 2 (stating that the "no reasonable connection" language of DODD 1315.9 was not included in the proscriptions of *AR 614-200*).

22. Standards for Ethical Conduct for the Executive Branch, 5 C.F.R. § 2635 (1993) [hereinafter Standards for Ethical Conduct].

23. Dep't of Defense, Dir. 5500.7-R, Joint Ethics Regulation (30 Aug. 1993).

24. Standards for Ethical Conduct, *supra* note 22, § 2635.705b. This provision states that "[a]n employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." *Id.*

25. The list is included in both *AR 614-200*, *supra* note 2, and DODD 1315.9, *supra* note 18. The following provisions are found at *AR 614-200*, paragraph 8-10b:

> In connection with military and official functions and duties, enlisted aides may perform the following (list not all inclusive, provided only as a guide):
>
> (1) Assist with care, cleanliness, and order of assigned quarters, uniforms, and military personal equipment.
> (2) Perform as point of contact (POC) in the GO's quarters. Receive and maintain records of telephone calls, make appointments, and receive guests and visitors.
> (3) Help plan, prepare, arrange, and conduct official social functions and activities, such as receptions, parties and dinners.
> (4) Help to purchase, prepare and serve food and beverages in the GO's quarters.
> (5) Perform tasks that aid the officer in accomplishing military and official responsibilities, to include performing errands for the officer, providing security for the quarters, and providing administrative assistance.

AR 614-200, *supra* note 2, para. 8-10b.

26. 10 U.S.C. § 3639 (2000). Paragraph 8-10b of *AR 614-200* repeats this language verbatim. *Cf.* AR 614-200, *supra* note 2, para. 8-10b.

purpose, would so circumscribe the military community that the preparation for, or the waging of, war would be impossible."[28] The duties assigned to an enlisted aide only need to have a "reasonable connection" to the military duties of the general officer.[29]

The general officer himself often determines what duties his aides are to perform and whether the duties are reasonably connected to the general's official duties. Aides perform many of these assigned duties inside the officer's quarters. Consequently, little or no monitoring of the enlisted aides' activities occurs. Whether the duties actually are official is seldom questioned or known. Enlisted aides would unlikely protest if the rules were bent. After all, working for the general is a privilege and the position is highly sought. Consequently, a Specialist, or even a Master Sergeant, is unlikely to tell a general officer, "No, sir. I think that assignment crosses the ethical line." Even if the aide knows that the task is personal, rather than official, the aide may perform the assignment loyally without ever considering a complaint.

The Potential for Misuse

Aides often develop very close relationships with their general officers.[30] The benefits of these long-term relationships did not go unnoticed by the military, which authorizes enlisted aides to transfer with the general's "household."[31] Consequently, enlisted aides often develop close relationships with the officer's family, as well. In such a relationship, it is not difficult to envision situations in which a general officer assigns "unofficial" duties to or asks "favors" from an aide. The general officer must remain mindful that he only assigns duties reasonably connected to the officer's military duties.[32] Moreover, the general officer must take care to avoid requesting favors. Favors conjure the concept of personal, rather than official, requests. While requested favors may include chores reasonably related to the officer's military duties, it may be more appropriate for the general to direct or order the performance of such official duties.

Favors may also require legal and ethical analysis. While an aide may voluntarily perform a favor, the nature of the aide's willingness may be an issue. Whether a Specialist could freely decline to perform a requested favor is questionable.[33] Additionally, if in performance of the favor the aide "labors or exerts himself for the personal benefit of an officer,"[34] then the officer may be in violation of the prohibition against using a subordinate as a servant.[35]

Moreover, favors may be improper for other reasons. Aides may only perform official duties during official time. To the degree that it is improper to use official time for personal purposes,[36] it may be unethical for an aide to perform favors during

27. United States v. Robinson, 20 C.M.R. 63 (C.M.A. 1955).

28. *Id.* at 68.

29. DOD DIR. 1315.9, *supra* note 18, para. III.B (requiring a nexus between the duties and the officer's official responsibilities).

30. "This relationship is one of slaps on the back, of genuine warmth." Priest, *supra* note 10, at A1 (quoting a general officer explaining his relationship with his enlisted driver).

31. Paragraph 8-10e of *AR 614-200* outlines the following guidance:

> Enlisted aides serving on the GO's staff may be reassigned with the GO provided—
>
> (1) The GO so desires.
> (2) The enlisted aide is authorized in the new assignment.
> (3) PERSCOM's clearance is obtained.

AR 614-200, *supra* note 2, para. 8-10e.

32. *Id.* para. 8-10b.

33. Only enlisted soldiers who volunteer for duty as a general officer aide are assigned as such. *See id.* para. 8-10d. Volunteering to serve as an aide, however, does not necessarily imply that the aide volunteers to perform any particular duty.

34. United States v. Robinson, 20 C.M.R. 63, 68 (C.M.A. 1955).

35. 10 U.S.C. § 3639 (2000).

36. The prohibition against using official time for personal purposes is not absolute.

> (a) Use of an employee's own time. Unless authorized in accordance with law or regulations to use such time for other purposes, an employee will use official time in an honest effort to perform official duties. An employee . . . has an obligation to expend an honest effort and *reasonable proportion* of his time in the performance of official duties.

STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.705a (emphasis added).

duty hours.[37] Furthermore, it follows that a supervisor may also violate ethical rules by allowing a subordinate to use official time for unofficial duties.[38] Cognizant of the proscription against using official time for unofficial duties, an aide may volunteer to perform personal duties after duty hours.[39]

An aide's "off-duty" performance of a "favor," however, could also be subjected to the Standards for Ethical Conduct's gift analysis. As a general rule, subordinate employees may not give gifts to superiors, and superiors may not directly or indirectly accept gifts from subordinates.[40] Although the Standards for Ethical Conduct provide several exceptions to the general rule,[41] these exceptions do not apply to the "gift" of services. As most people realize, time is money; people do not normally undertake responsibilities without some sort of compensation. Therefore, the time an aide spends conducting the general officer's unofficial or personal chores could be viewed as compensable. To the extent that the aide receives no remuneration, the favor may be a gift. That an aide conducts the service secretly should not affect the analysis.[42] Consequently, both aides and general officers must be vigilant to ensure that aides' duties are official, rather than personal, in nature.

Another potential "gift" situation bears mention. General officers should also periodically ensure that their subordinates have not improperly subsidized either the general's personal or official expenses. Aides de camp often handle the general officer's petty cash fund.[43] The general officer routinely provides advance money[44] for the purchase of small items, like stamps or uniform accessories, or other small expenses, like lunches. Aides de camp are instructed to keep accurate records of such expenses, both for the general officer's income taxes and to avoid commingling funds. It is not unthinkable that an aide may "absorb" expenses for which a receipt was lost. Such a practice is comparable to the giving of a "gift" by the subordinate officer, however, and is prohibited by the Standards for Ethical Conduct.[45]

The aide's close relationship with and proximity to the officer's family may create other ethical problems. While

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37. The regulation does not define "reasonable proportion." Therefore, while it may be permissible for aides to perform unofficial favors during duty hours, it does not follow that such activities are expedient.

38. *See* STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.705b.

> (b) Use of a subordinate's time. An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

Id. This proscription is more definite than the guidance found in section 2635.705a, which includes a "reasonable proportion" proviso.

39. Based upon the disparity between the ranks of the parties, an unbiased observer may question the "voluntary" nature of any service provided by an enlisted soldier for a general officer.

40. *See* STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.302. The Standards for Ethical Conduct generally prohibit subordinates from giving gifts to superiors. Moreover, the regulation makes it unlawful for a superior to solicit a gift from a subordinate.

41. The rule has both general and special exceptions:

> (a) General exceptions. On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:
>
> (1) Items, other than cash, with an aggregate market value of $10 or less per occasion;
> (2) Items such as food and refreshments to be shared in the office among several employees;
> (3) Personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends;
> (4) Items given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions; and
> (5) Leave transferred . . . .
>
> (b) Special, infrequent occasions. A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:
>
> (1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or birth or adoption of a child; or
> (2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

Id. § 2635.304(a)-(b).

42. An aide may undertake inappropriate duties on his or her own volition without the general officer's direction, knowledge or approval. This, however, does not diminish the inappropriate nature of the conduct.

43. GOMO HANDBOOK, *supra* note 8, at 44.

44. In addition to other authorized pay and allowances, 37 U.S.C. § 414 grants a "personal money allowance to general officers." 37 U.S.C. § 414 (2000).

45. *See generally* STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.302.

transporting the general's unaccompanied spouse or children on personal errands is clearly inappropriate for the general's aide or driver, other problem areas are less obvious. For instance, it is not uncommon for an aide, who routinely performs official household chores for the general, to perform "unofficial" duties or "favors" for the general officer's spouse. One particularly troublesome situation arises when an enlisted aide performs services for the Officers' Spouses Club when that private organization meets in the general officer's quarters. Less obvious, but equally improper, is the use of enlisted aides to assist an officer's spouse with Family Readiness Groups. Despite the fact that Army regulations authorize logistical support to Family Readiness Groups,[46] use of the general officer's aides to assist the general's spouse with organizational chores is inappropriate. The aides' statutory duties are to assist with the general officer's military and official duties, rather than that officer's spouse's "official" obligations.

Questions about the use of the general's aides are seldom raised. When concerns are voiced, they usually regard an aide's activities outside the general officer's residence. For example, the Inspector General's office may receive a telephone complaint that soldiers routinely mow the general's lawn or work in the general's vegetable garden, that someone saw the general's driver driving the general's son home from football practice, or that a visitor to the general's office saw the general's daughter's college application in the aide's typewriter. These clearly are tasks that, if performed by the officer, would be at the expense of the officer's military or official duties. But, these tasks are also highly personal in nature, and do not inherently serve a necessary military purpose. These examples illustrate the problems caused when officers assign aides tasks without a military nexus.

Discerning whether an aide's assigned duties are reasonably connected to a general officer's military duties often meets with great difficulty. Having an aide "run" an official errand is obviously related to the officer's duties. Having that aide hand-carry a general officer's household goods shipment claim is also reasonably related to military duty. The determination becomes much more questionable when the aide's duties relate to what would otherwise be considered personal matters. Cooking, cleaning, and personal errands may fall into this category. Ostensibly, if there is a nexus between grocery shopping for a general officer and that officer's military duty, one could argue that a similar nexus exists between the same chore and a brigade commander's duties, or a battalion commander's, or a company commander's. If an enlisted soldier's completion of an officer's personal time-consuming tasks permits the officer more time to concentrate on his official duties, isn't the required nexus established? Is it permissible then for general officers to lawfully and ethically order soldiers to complete tasks that would be unlawful or unethical if performed for a more junior officer? The answer may simply be that rank has its privileges. Both *AR 614-200*[47] and DODD 1315.9[48] authorize enlisted aides to perform duties for general officers that would otherwise be prohibited if performed for lower ranking officers. There is, however, an overarching principle that cannot be violated: generals' aides are to perform official, rather than personal, duties.[49]

The line that separates "official" duties from duties that inure solely to the personal benefit of the officer, however, is often very fine. For instance, an enlisted aide's preparation of a meal for visiting dignitaries to consume in the general's quarters is an official duty. On the other hand, it would be innappropriate for the general officer to order that same soldier to prepare a candlelight dinner for the general officer and the officer's spouse. Between the two extremes lie more questionable duties, such as the preparation of a meal at which the general officer and a subordinate will discuss "business."

What does "official" really mean? Can a duty be both official and personal?[50] Is it proper to permit "official" duties that result in significant personal benefits? How does one determine whether a benefit that may be both personal and official is more of one than the other? After all, isn't the aides' purpose to perform time-consuming, lesser duties that enable the officer to attend to the more significant chores of managing the Army's affairs? No definitive interpretation of the term "official" assists in this analysis. Nonetheless, some nexus must exist between the aides' duties and the officer's military duties. Simply freeing-up the general officer's time to concentrate on official business is not enough. Maybe a more fitting question is when is it ever appropriate for a subordinate to perform tasks

46. *See generally* U.S. DEP'T OF ARMY, PAM. 608-47, A GUIDE TO ESTABLISHING FAMILY SUPPORT GROUPS (16 Aug. 1993). On 1 June 2000, the Department of the Army's Community and Family Support Center (CFSC) redesignated Family Support Groups (FSG) as Family Readiness Groups (FRG). Although this change purports to alter the status of FSGs/FRGs, the CFSC did not withdraw *Department of the Army 608-47*. Telephone Interview with Ms. Holly Gifford, Mobilization and Deployment Program Manager, Army Community Services (July 29, 2002); *see* also Memorandum, Department of the Army Community and Family Support Center (CFSC-SFA), to Family Readiness Groups, subject: Implementing Guidance for Transitioning from Family Support Groups (15 June 2000) (on file with author); U.S. DEP'T OF ARMY, REG. 210-22, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS (22 Oct. 2001).

47. AR 614-200, *supra* note 2, para. 8-10b.

48. DOD DIR. 1315.9, *supra* note 18, para. III.A.

49. *Id.* para. III.B.

50. The Court of Military Appeals posited that the test was "whether these services were to be performed in the capacity of a private servant to accomplish a private purpose, or in the capacity of a soldier, i.e., to accomplish a necessary military purpose." United States v. Robinson, 20 C.M.R. 63, 69 (C.M.A. 1955) (quoting United States v. Semioli, 53 BR 65).

for a general officer that could otherwise be considered inappropriate if performed for a lower ranking officer?

The Standards for Ethical Conduct also explicitly prohibit the use of public office for private gain.[51] Undoubtedly, in drafting this provision, the authors primarily contemplated financial gain. However, it is conceivable that an officer might "lawfully" use subordinates (to assist with or decrease the officer's "official" work) for the sole purpose of increasing the officer's personal free time. While this use of subordinates may not constitute a violation of the Standards for Ethical Conduct's prohibition against using one's office for private gain, it may be inappropriate for no other reason than it creates the appearance of a violation.[52] Put simply, if a reasonable person would believe that an action violates the law or the standards of conduct, then most likely the action violates the Standards for Ethical Conduct. Applied to the facts in this scenario, this principle should serve to deter general officers from using subordinates in any questionable manner.

Avoiding the appearance of impropriety is crucial. In short, this may be the most important issue for general officers to remember. No reasonable officer would jeopardize their current position of respect or trade their future career for the embarrassment and minimal personal gain achieved through the misuse of subordinates. Intentional violations of the ethical rules are obvious to spot and are quick to draw unwanted public attention, but, unintentional or incidental misuse of subordinates is more likely to cause problems. In either case, the misuse of aides' time or services is unethical. Consequently, general officers and their advisors must guard against both actual and perceived violations of the law.

Conclusion

Many questions may remain regarding the proper duties of general officer aides. There truly is little guidance in this area, and the guidance that does exist is very "loose." Skeptics may argue that general officers would like to keep it that way so as to maximize the privileges of rank, but the truth is that the overwhelming majority of general officers are only interested in the full utilization of the assets or privileges lawfully afforded to them. While few detailed rules exist, detailed rules may not be necessary. Although thin, the present regulations provide sufficient guidance, while retaining sufficient flexibility for officers to mold their aides' duties to the fluid needs of the military. General officers are entrusted to do the right thing,[53] and previous promotions are generally proof that the officer has acted ethically and responsibly. Rank may indeed have its privileges, but it also has significant responsibilities. Major Tuckey.

Legal Assistance Note

State-by-State Analysis of Divisibility of Military Retired Pay[54]

Former Spouses' Protection Act Update

The Uniformed Services Former Spouses' Protection Act (USFSPA),[55] which legislatively overruled the Supreme Court's decision in *McCarty v. McCarty*,[56] allows state courts to divide military pensions as marital property in accordance with the laws of the jurisdiction.[57] Therefore, to provide competent advice, legal assistance attorneys must not only understand the USFSPA, but also the law of their client's state or territory.

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51. STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.702; *see also id.* § 2635.502; Exec. Order No. 12,674, 3 C.F.R. § 215 (1990).

52. STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.101(b)(14). This section of the Standards of Conduct was drafted to provide guiding principles to apply in situations not otherwise covered by the regulation.

> Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Id.

53. The regulations that do exist appear to have been written with deference to the common sense that generals and aides have shown in the past. More guidance may not be needed simply because general officers and their aides have heretofore acted responsibly, or that the parties have had the wisdom to make proper choices, or maybe that few complaints of abuse have been made. Regardless of the reason, more regulation may not be needed. In fact, this may be one reason why the aide de camp provisions, included in the former *AR 614-16*, were never reissued as part of a new regulation.

54. This note updates previous editions of the state-by-state analysis. *See, e.g.*, TJAGSA Practice Notes, Legal Assistance Items, *State-by-State Analysis of the Divisibility of Military Retired Pay*, ARMY LAW., July 1996, at 21. Many military attorneys and civilian practitioners located throughout the country have contributed to this guide throughout the last ten years. In order to maintain the accuracy and timeliness of this guide, please submit updates and suggested revisions to the Administrative & Civil Law Department, The Judge Advocate General's School, U.S. Army, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

55. 10 U.S.C. § 1408 (2000).

56. 453 U.S. 210 (1981) (holding that states are preempted from dividing non-disability military retired pay). *See generally* H. R. CONF. REP. NO. 97-749, at 165 (1982); S. REP. NO. 97-502, at 1-3, 16 (1982).

57. 10 U.S.C. § 1408(c)(1).

By compiling state statutes and case law that address many issues concerning the division of a military pension upon divorce, this guide serves as an aid to legal assistance attorneys in learning the law of particular states and territories. Some of these issues include whether the state will divide a military pension as marital property, methods of valuation, vesting requirements, and other nuances of state law.

When using this guide, note that although *McCarty* overruled some then-existing state case law, many of these cases were reinstated after the USFSPA became effective. Also, note that in *Mansell v. Mansell*,[58] the Supreme Court held that states are preempted from dividing the value of waived military retired pay (to receive disability pay) because it is not "disposable retired pay" as defined by the USFSPA.[59] Thus *Mansell* overrules state case law to the extent such law suggests state courts have the authority to divide more than disposable retired pay. Major Stone.

Alabama

Divisible. *Vaughn v. Vaughn*, 634 So. 2d 533 (Ala. 1993) (holding that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property). With *Vaughn*, the Supreme Court of Alabama overruled *Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Civ. App. 1979), and cases relying on it that are inconsistent with *Vaughn*. Alabama had previously awarded alimony from military retired pay. *See, e.g.*, Underwood v. Underwood, 491 So. 2d 242 (Ala. Civ. App. 1986) (awarding wife alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded fifty percent of husband's gross military pay as alimony). Alabama Civil Code permits division of the present value of future or current "vested" pensions, and requires a ten-year marital overlap with the earning of such a pension. *See* ALA. CODE § 30-2-51 (2001).

Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983) (affirming the superior court's discretionary power to consider military retirement in the distribution of the marital assets); *see* ALASKA STAT. § 25.24.160(a)(4) (2001). Non-vested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987); *see also* Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (reversing the trial court's order that a civilian employee must retire to ensure the spouse receives her share of a pension, and holding that the employee should have had the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay).

Arizona
(community property state)

Divisible. DeGryse v. DeGryse, 135 661 P.2d 185 (Ariz. 1983) (holding that the USFSPA resurrects *Van Loan v. Van Loan*, 569 P.2d 214 (Ariz. 1977), and *Neal v. Neal*, 570 P.2d 758 (Ariz. 1977) as controlling the issue of military pension division). These cases hold that a miltary pension earned during the marriage is divisible as community property. *See* ARIZ. REV. STAT §§ 25-211, 25-318(A) (2001); Kelly v. Kelly, 9 P.3d 1046 (Ariz. 2000); Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986) (holding that if a civilian employee is not eligible to retire at the time of the dissolution of the marriage, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not the employee does retire at that point); Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977) (holding that a non-vested military pension is divisible as community property).

Arkansas

Divisible. Young v. Young, 701 S.W.2d 369 (Ark. 1986); *see* ARK. CODE ANN. § 9-12-315 (2001). Arkansas has a vesting requirement. Durham v. Durham, 708 S.W.2d 618 (Ark. 1986) (holding military retired pay not divisible as marital property when the member had not served twenty years at the time of the divorce because the military pension had not vested. *But see* Burns v. Burns, 847 S.W.2d 23 (Ark. 1993) (dissenting) (rejecting twenty years of service as a prerequisite to "vesting" of a military pension).

California
(community property state)

Divisible. *In re* Fithian, 517 P.2d 449 (Cal. 1974) (holding that a miltary penison is divisible so long as it vests during the marriage, even though it does not mature until later); *see* CAL. FAM. CODE § 2610 (2001). *But see In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976) (holding that a husband's contingent pension interest, vested or not vested, is a property interest of the community, overruling *In re Fithian* on this point).

Jurisdiction. Tucker v. Tucker, 226 Cal. App. 3d 1249 (Cal. Ct. App. 1991) (holding that a non-resident service member did not consent to California's jurisdiction to divide his military pension, even though he consented to the court deciding dissolution, child support, and other property issues); *see also* Hattis v. Hattis, 242 Cal. Rptr. 410 (Cal. Ct. App. 1987) (requiring more than minimum contacts to establish jurisdiction to divide a military pension).

58. 490 U.S. 581 (1989).

59. *Id.* at 589.

Colorado

Divisible. *In re* Marriage of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (vested and non-vested military retirement benefits pensions are divisible as marital property); *see* COLO. REV. STAT. § 14-10-113 (2001); *In re* Hunt, 909 P.2d 525, (Colo. 1996) (holding that post-divorce increases in pay resulting from promotions are marital property subject to division) (approving the use of the following formula to define the marital share: final pay of the member at retirement is multiplied by a percentage defined by fifty percent of a fraction, wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member).

Connecticut

Probably Divisible. *See* CONN. GEN. STAT. § 46b-81 (2001) (providing courts with broad discreation to divide property). In *Krafick v. Krafick*, 663 A.2d 365 (Conn. 1995), the Connecticut Supreme Court affirmed the division of a vested civilian pension as property under Connecticut General Statute section 46b-81. "Although we do not reach non-vested pension benfits here, we note that the same reasoning has been applied to find that such benefits also, as an initial matter, constitute property." *Id*. at 373. In *Rosato v. Rosato*, 766 A.2d 429 (Conn. 2000), the supreme court stated, "We recognize that it is an open question whether non-vested pension benefits are subject to distribution in a dissolution order." *Id*. at 436 n.19. *But see* Bender v. Bender, 758 A.2d 890 (Conn. App. Ct. 2000) (affirming division of a non-vested civillian pension). "It is important to note . . . [that] neither party challenges the authority of the court to award non-vested pension rights." *Id*. at 893.

Delaware

Divisible. Memmolo v. Memmolo, 576 A.2d 181 (Del. 1990) (stating pensions which accrue during a marriage, whether vested or not at the time of divorce, are normally considered marital property); *see* DEL. CODE ANN. tit. 13, § 1513 (2001); Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983); Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Super. Ct. 1982).

District of Columbia

Divisible. Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (holding that a vested but non-matured civil service pension is divisible as marital property; suggesting in dicta that non-vested pensions are also divisible); *see also* D.C. CODE § 16-910 (2002).

Florida

Divisible. Pastore v. Pastore, 497 So. 2d 635 (Fla. 1986) (holding vested military retired pay can be divided). *But see* FLA. STAT. § 61.075(3)(a)4 (2001) (allowing courts to divide vested or non-vested pension rights).

Georgia

Probably Divisible. *Compare* Courtney v. Courtney, 344 S.E.2d 421 (Ga. 1986) (non-vested civilian pensions are divisible), *with* Stumpf v. Stumpf, 294 S.E.2d 488 (Ga. 1982) (military retired pay may be considered in establishing alimony obligations). *See also* Hall v. Hall, 51 B.R. 1002 (S.D. Ga. 1985) (Georgia divorce judgment awarding debtor's wife thirty-eight percent of debtor's military retirement, payable directly from the United States to the wife, granted the wife a non-dischargeable property interest in thirty-eight percent of the husband's military retirement); *Holler v. Holler*, 54 S.E.2d 140 (Ga. 1987) (citing *Stumpf* and *Courtney*, the court "[a]ssum[ed] that vested and non-vested military retirement benefits acquired during the marriage are now marital property subject to equitable division," but then decided that military retired pay could not be divided retroactively if not subject to division at the time of the divorce).

Hawaii

Divisible. HAW. REV. STAT. ANN. §§ 580-47, 510-9 (2001); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986); Linson v. Linson, 618 P.2d 748 (Haw. 1981); *see also* Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989) (ruling that *Mansell*'s limitation on dividing Veteran's Administration (VA) benefits cannot be circumvented by awarding an offsetting interest in other property; holding that *Mansell* applies to military disability retired pay and VA benefits); Wallace v. Wallace, 677 P.2d 966 (Haw. Ct. App. 1984) (ordering a Public Health Service employee to pay a share of retired pay upon reaching retirement age, whether he retires at that point or not).

Idaho
(community property state)

Divisible. Griggs v. Griggs, 686 P.2d 68 (Idaho 1984) (overruling Rice v. Rice, 645 P.2d 319 (Idaho 1982); reinstating Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975) (holding that military retirement pay is divisible as community or separate property, depending on whether the service upon which it was earned occurred before or during the marriage)); *see* IDAHO CODE § 32-906 (2002); Hunt v. Hunt, 43 P.3d 777 (Idaho 2002) (explaining state formula for dividing retirement benefits); Balderson v. Balderson, 896 P.2d 956 (Idaho 1995) (affirming lower court's decision ordering a service member to pay his spouse her community share of the military pension, even though he had decided to delay retirement); Leatherman v.

Leatherman, 833 P.2d 105 (Idaho 1992) (holding that a portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit, and thus subject to statute relating to modification of divorce decrees, to include division of military retirement benefits); Mosier v. Mosier, 830 P.2d 1175 (Idaho 1992); Walborn v. Walborn, 817 P.2d 160 (Idaho 1991); Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989) (holding that courts cannot circumvent *Mansell*'s limitation on dividing VA benefits by using an offset against other property).

Illinois

Divisible. *In re* Brown, 587 N.E.2d 648 (Ill. App. Ct. 1992) (holding that a military pension may be treated as marital property under Illinois law); *In re* Korper, 475 N.E.2d 1333 (Ill. App. Ct. 1985) (holding that a pension is marital property, even if it is not vested and a spouse is entitled to receive a share upon member eligibility); *see* 750 ILL. COMP. STAT. ANN. 5/503 (2001).

Indiana

Divisible. IND. CODE § 31-1-11.5-2(d)(3) (2001) (providing that property for marital dissolution purposes includes "the right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a) acquired during the marriage, that is or may be payable after the dissolution of the marriage"); *see also* Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990) (holding that non-vested national guard pension was properly excluded as marital property); Arthur v. Arthur, 519 N.E.2d 230 (Ind. Ct. App. 1988) (ruling that Indiana Code section 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date—1 September 1985).

Iowa

Divisible. *In re* Howell, 434 N.W.2d 629 (Iowa 1989) (holding that a military pension in Iowa is marital property and divided as such in a dissolution proceeding); *see* IOWA CODE ANN. § 598.21 (2001). *See generally In re* Marriage of Anderson, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying the Supreme Court's reasoning in *Rose v. Rose*, 481 U.S. 619 (1987), Iowa court held that a disabled veteran whose only source of income is his disability payments must still pay alimony, child support, or both in a divorce).

Kansas

Divisible. KAN. STAT. ANN. § 23-201(b) (2001) (defining vested and non-vested military pensions as marital property); *In re* Harrison, 769 P.2d 678 (Kan. Ct. App. 1989) (overruling prior case law prohibiting division of military retired pay).

Kentucky

Divisible. Jones v. Jones, 680 S.W.2d 921 (Ky. 1984) (holding that a vested military pension is a divisible marital property interest under Kentucky Revised Statute Annotated section 430.190); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (non-vested military retirement benefits are marital property); *see* KY. REV. STAT. ANN. § 403.190 (2001).

Louisiana
(community property state)

Divisible. Swope v. Mitchell, 324 So. 2d 461 (La. 1975) (affirming lower court's division of military retired pay as community property); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (non-vested and non-matured military retired pay is marital property); *see* LA. CIV. CODE ANN. art. 2336 (2002); Warner v. Warner, 651 So. 2d 1339 (La. 1995) (confirming that the ten-year test of 10 U.S.C. § 1408(d)(2) is a prerequisite for direct payment, but not for award of a share of retired pay to a former spouse); Gowins v. Gowins, 466 So. 2d 32 (La. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); Campbell v. Campbell, 474 So. 2d 1339 (La. Ct. App. 1985) (awarding former spouse a share of disposable retired pay, not gross retired pay, and not VA disability benefits paid in lieu of military retired pay); Jett v. Jett, 449 So. 2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So. 2d 485 (La. Ct. App. 1983).

Maine

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987) (affirming a lower court's division of a military pension as property); *see also* ME. REV. STAT. ANN. tit. 19 § 953 (2001).

Maryland

Divisible. MD. CODE ANN., FAM. LAW. § 8-203(b) (2002) (defining military retirement as marital property); Nisos v. Nisos, 483 A.2d 97 (Md. Ct. Spec. App. 1984) (dividing military pension); *see* Andresen v. Andresen, 564 A.2d 399 (Md. 1989) (holding that decrees silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA); Deering v. Deering, 437 A.2d 883 (Md. 1981); Ohm v. Ohm, 431 A.2d 1371 (Md. 1981) (non-vested pensions are divisible).

Massachusetts

Divisible. MASS. GEN. LAWS ANN. ch. 208, § 34 (2002) (defining vested and non-vested pensions as marital property subject to division upon marital dissolution); Andrews v. Andrews, 543 N.E.2d 31 (Mass. Ap. Ct. 1989) (affirming lower court's ali-

mony award from military retired pay, noting that the lower court could have awarded it as property, but did not).

Michigan

Divisible. MICH. COMP. LAWS ANN. § 552.18 (2002) (vested or non-vested retirement benefits are part of the marital estate subject to award); *see* Vander Veen v. Vander Veen, 580 N.W.2d 924 (Mich. Ct. App. 1998); Keen v. Keen, 407 N.W.2d 643 (Mich. Ct. App. 1987); Giesen v. Giesen, 364 N.W.2d 327 (Mich. Ct. App. 1985); McGinn v. McGinn, 337 N.W.2d 632 (Mich. Ct. App. 1983).

Minnesota

Divisible. MINN. STAT. § 518.54 subdiv. 5 (2001) (defining vested or non-vested pensions as marital property); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984) (holding that a court may award a spouse a share of gross retired pay); *see also* Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (non-vested pensions divisible). *But see* Mansell v. Mansell, 490 U.S. 581 (1989) (holding that a court may only award a spouse a share of disposable retired pay).

Mississippi

Divisible. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994) (adopting equitable distribution as the method of marital asset division); Powers v. Powers, 465 So. 2d 1036 (Miss. 1985) (affirming lower court's award to former spouse of permanent alimony equal to half of the husband's military pension, noting that the USFSPA authorized the lower court to divide it as property); Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994) (defining marital property for the purpose of a divorce as "any and all property acquired or accumulated during the marriage"); *see also* Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995) (noting that military pensions can be divided regardless of fault since, unlike alimony, the pension is property).

Missouri

Divisible. Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983) (noting that the USFSPA nullifies *McCarty*, thus the lower court correctly divided a military pension as property); *In re* Marriage of Weaver, 606 S.W.2d 243 (Mo. Ct. App. 1980) (holding that military pensions are marital property subject to division upon dissolution); *see* MO. REV. STAT. § 452.330 (2001); Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990) (holding that only disposable retired pay is divisible); Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (holding non-vested and non-matured military retired pay are marital property).

Montana

Divisible. *In re* Marriage of Kecskes, 683 P.2d 478 (Mont. 1984) (holding that military retirement pay shall be included for purposes of establishing the marital estate); *In re* Marriage of Miller, 609 P.2d 1185 (Mont. 1980) (holding that military retirement pay is divisible as marital property), *vacated and remanded sub. nom*. Miller v. Miller, 453 U.S. 918 (1981); *see* MONT. CODE ANN. § 40-2-202 (2001).

Nebraska

Divisible. NEB. REV. STAT. ANN. § 42-366(8) (2001) (military pensions are part of the marital estate, vested or not, and may be divided as property or alimony); Ray v. Ray, 383 N.W.2d 752 (Neb. 1986); Taylor v. Taylor, 348 N.W.2d 887 (Neb. 1984) (holding non-disability military retirements divisible).

Nevada
(community property state)

Divisible. NEV. REV. STATE. ANN. § 125.150 (2001); Gemma v. Gemma, 778 P.2d 429 (Nev. 1989) (holding spouses can elect to receive their share when employee spouses become retirement eligible, whether or not retirement occurs at that point); Forrest v. Forrest, 668 P.2d 275 (Nev. 1983) (holding all retirement benefits are divisible community property, whether vested or not, and whether matured or not). *But see* Tomlinson v. Tomlinson, 729 P.2d 1303 (Nev. 1986) (holding a silent decree res judicata of *non*-division of retirement benefits). The Nevada Supreme Court has since held, however, that the parties to a divorce remain tenants in common of all assets omitted from the decree, whether by fraud or simple mistake. Williams v. Waldman, 836 P.2d 614 (Nev. 1992); Amie v. Amie, 796 P.2d 233 (Nev. 1990).

New Hampshire

Divisible. N.H. REV. STAT. ANN. § 458:16-a (2002) (including vested and non-vested pensions as marital property subject to equitable division); Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990) (affirming the statutory language).

New Jersey

Divisible. N.J. STAT. ANN. § 2A:34-23 (2002) (including pensions in equitable distribution of marital property); Castiglioni v. Castiglioni, 471 A.2d 809 (N.J. 1984) (retroactively dividing a pension under 10 U.S.C. § 1408); Whitfield v. Whitfield, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (holding that non-vested military retired pay is marital property); *see also* Moore v. Moore, 553 A.2d 20 (N.J. 1989) (holding that post-divorce cost-of-living raises in a police pension are divisible).

New Mexico
(community property state)

Divisible. N.M. STAT. ANN. § 40-3-12 (2001); Mattox v. Mattox, 734 P.2d 259 (N.M. 1987) (suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire even if the member elects to remain on active duty); Walentowski v. Walentowski, 672 P.2d 657 (N.M. 1983) (reinstating the law under *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969), which held military pensions are divisible as community property); Stroshine v. Stroshine, 652 P.2d 1193 (N.M. 1982) (holding that the disability portion of retired pay is divisible community property because it was earned during coverture); *see also* White v. White, 734 P.2d 1283 (N.M. Ct. App. 1987) (awarding a share of gross retired pay). *But see* Mansell v. Mansell, 490 U.S. 581 (1989) (holding that states are limited to dividing disposable retired pay).

New York

Divisible. N.Y. DOM. REL. § 236 (2002); Majauskas v. Majauskas, 463 N.E.2d 15 (N.Y. 1984) (dividing a vested but non-mature police pension as marital property); Lydick v. Lydick, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987) (stating that a military pension is marital property); Gannon v. Gannon, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986) (affirming the lower court's division of a military pension as marital property); West v. West, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984) (holding that disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation); Damiano v. Damiano, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983) (dividing non-vested pension).

North Carolina

Divisible. N.C. GEN. STAT. § 50-20(b)(1) (2001) (providing that "marital property includes all vested and non-vested pension, retirement, and other deferred compensation rights, and vested and non-vested military pensions eligible under the [USFSPA]"); *see also id.* § 50-20.1 (explaining pension valuation and methods of distribution).

North Dakota

Divisible. N.D. CENT. CODE § 14-05-24 (2002); Bullock v. Bullock, 354 N.W. 2d 904 (N.D. 1984) (holding a non-vested military pension is divisible as a marital asset); Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984); *see also* Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirming that "disposable retired pay" as defined in 10 U.S.C. § 1408 limits what states are authorized to divide as marital property, but holding that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay"); Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (affirming a 17.5% award to a seventeen-year spouse by considering equitable factors).

Ohio

Divisible. OHIO REV. CODE. ANN. § 3105.171 (2002); King v. King, 605 N.E.2d 970 (Ohio App. 1992) (holding that the trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years when no evidence of value demonstrated); Lemon v. Lemon, 537 N.E.2d 246 (Ohio App. 1988) (holding non-vested pensions are divisible as marital property *when some evidence of value demonstrated*). *But see* Ingalls v. Ingalls, 624 N.E.2d 368 (Ohio 1993) (affirming division of non-vested military retirement benefits consistent with agreement of the parties expressed at trial); Cherry v. Figart, 620 N.E.2d 174 (Ohio App. 1993) (distinguishing *King* by affirming division of non-vested pension when parties had agreed to divide the retirement benefits and suit was brought for enforcement only).

Oklahoma

Divisible. Messinger v. Messinger, 827 P.2d 865 (Okla. 1992) (holding that only a vested pension at the time of the divorce is divisible); Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (holding that a military pension may be divided as jointly acquired property).

Oregon

Divisible. ORG. REV. STAT. § 107.105 (2001); *In re* Richardson, 769 P.2d 179 (Or. 1989) (holding that non-vested pension plans are marital property); *In re* Manners, 683 P.2d 134 (Or. App. 1984) (holding military pensions divisible).

Pennsylvania

Divisible. 23 PA. CONS. STAT. ANN. § 3501 (2002); Major v. Major, 518 A.2d 1267 (Pa. Super. Ct. 1986) (holding non-vested military retired pay is marital property).

Puerto Rico

Not Divisible as Marital Property. Delucca v. Colon, 119 P.R. Dec. 720 (P.R. 1987) (reestablishing retirement pensions as separate property of the spouses, consistent with its earlier decision in *Maldonado v. Superior Court*, 100 P.R.R. 369 (P.R. 1972), and overruling *Torres v. Robles*, 115 P.R. Dec. 765 (P.R. 1984), which held that military retired pay is divisible); *see also* Carrero v. Santiago, 133 P.R. Dec. 727 (P.R. 1993) (citing *Delucca* with approval); Benitez Guzman v. Garcia Merced, 126 P.R. Dec. 302 (P.R. 1990).

Rhode Island

Divisible. R.I. GEN. LAWS § 15-5-16.1 (2001) (listing broad, statutory factors to effect an equitable distribution of the parties' property); *see* Flora v. Flora, 603 A.2d 723 (R.I. 1992) (rejecting implied consent to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4)).

South Carolina

Divisible. S.C. CODE ANN. § 20-7-472 (2001); Tiffault v. Tiffault, 401 S.E.2d 157 (S.C. 1991) (holding that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution); Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (holding non-vested military retirement benefits subject to equitable division). *But see* Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (denying wife any portion to military retired pay because she lived with her parents during entire period of husband's naval service and made no homemaker contributions).

South Dakota

Divisible. S.D. CODIFIED LAWS § 25-4-44 (2001); Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (holding that military retired pay is divisible); *see also* Radigan v. Radigan, 465 N.W.2d 483 (S.D. 1991) (holding that a husband must share with ex-wife any increase in his retired benefits that results from his own post-divorce efforts); Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (holding that the present cash value of a non-vested retirement benefit is marital property); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (holding a civilian pension divisible, observing that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement"); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (holding that a vested civilian pension is divisible).

Tennessee

Divisible. TENN. CODE ANN. § 36-4-121(b)(1)(B) (2001) (defining vested and non-vested pensions as marital property); *see also* Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) (affirming trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property). Note that a disabled veteran may be required to pay alimony, child support, or both in divorce actions, even when his only income is veterans' disability and supplemental security income. *See, e.g.*, Rose v. Rose, 481 U.S. 619 (1987) (upholding the exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran).

Texas
(community property state)

Divisible. TEX. FAM. CODE § 700.3 (2002); Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982); *see also* Grier v. Grier, 731 S.W.2d 931 (Tex. 1987) (awarding spouse a share of gross retired pay, but ruling that post-divorce pay increases constitute separate property). *But see* Mansell v. Mansell, 490 U.S 581 (1989) (rejecting divisibility of "gross retired pay"); *Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981) (holding that a court cannot divide VA disability benefits paid in lieu of military retired pay).

Utah

Divisible. Utah Code Ann. § 30-3-5 (2001); Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988) (holding marital property encompasses military retirement benefits accrued in whole or in part during the marriage); *see also* Woodward v. Woodward, 656 P.2d 431 (Utah 1982); Maxwell v. Maxwell, 796 P.2d 403 (Utah Ct. App. 1990) (ordering a military retiree to pay his ex-wife one-half the amount he had withheld in excess from his retired pay for taxes).

Vermont

Probably Divisible. *See* VT. STAT. ANN. tit. 15, § 751 (2001) (listing broad factors in settling property division); Milligan v. Milligan, 613 A. 2d 1281 (Vt. 1992) (no general barrier to distributing pensions as marital assets); McDermott v. McDermott, 552 A.2d 786 (Vt. 1988) (holding pension rights acquired by a party to a divorce during the marriage consitute marital property and are subject to equitable distribution along with other assets).

Virginia

Divisible. VA. CODE ANN. § 20-107.3 (2002) (defining marital property to include all pensions, whether or not vested); *see* Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992) (holding a settlement agreement's guarantee/indemnification clause requiring the retiree to pay the same amount of support to the spouse, despite the retiree beginning to collect VA disability pay, does not violate *Mansell*); Mitchell v. Mitchell, 355 S.E.2d 18 (Va. Ct. App. 1987); Sawyer v. Sawyer, 335 S.E.2d 277 (Va. Ct. App. 1985) (holding that military retired pay is subject to equitable division).

Virgin Islands

Divisible. Fuentes v. Fuentes, 41 V.I. 86 (Terr. Ct. 1999) (holding that a defined benefit retirement plan is marital property to the extent is was earned during the marriage); *see also* 16 V.I. CODE ANN. § 109 (2001).

Washington
(community property state)

Divisible. WASH. REV. CODE § 26.09.080 (2002); Konzen v. Konzen, 693 P.2d 97 (Wash. 1985) (affirming lower court's division of military pension as property); Wilder v. Wilder, 534 P.2d 1355 (1975) (holding non-vested pension divisible); *see In re* Smith 657 P.2d 1383 (Wash. 1983); Payne v. Payne, 512 P.2d 736 (Wash. 1973).

West Virginia

Divisible. W. VA. CODE ANN. § 48-5-610 (2001); Butcher v. Butcher, 357 S.E.2d 226 (W. Va. 1987) (vested and non-vested military retired pay is marital property subject to equitable distribution).

Wisconsin
(community property state)

Divisible. Leighton v. Leighton, 261 N.W.2d 457 (Wis. 1978) (holding disability benefits not divisible); Rodak v. Rodak, 442 N.W.2d 489 (Wis. Ct. App. 1989) (holding that portion of civilian pension earned *before* marriage is included in marital property and subject to division); Thorpe v. Thorpe, 367 N.W.2d 233 (Wis. Ct. App. 1985) (affirming lower court's retroactive division of military retirement); Pfeil v. Pfeil, 341 N.W.2d 699 (Wis. Ct. App. 1983).

Wyoming

Divisible. WYO. STAT. ANN. § 20-2-114 (2001); Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (holding that non-vested military retired pay is marital property, and that the ten-year test is a prerequisite for direct payment of military retired pay as property, but not for division of military retired pay as property); *see also* Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (affirming award of one-hundred percent of "disposable retired pay" to former spouse as property, but acknowledging only fifty percent of this award can be paid directly). This holding is inconsistent with the 1990 amendment to USFSPA, 10 U.S.C. § 1408(e)(1), which deems all orders dividing military retired pay as property satisfied once a threshold of fifty percent of the "disposable retired pay" is reached.

Note from the Field

"Identity Theft" and DD Form 214: Georgia's Legislative Solution a Model for Others?

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As legal assistance practitioners are well aware, the issue of "identity theft"[1] has become a major concern for legal assistance clients.[2] Individuals must be especially protective of their social security numbers (SSN), as these unique numbers are prime targets for identity thieves.[3]

Department of Defense (DD) Form 214[4] contains a wealth of information documenting a soldier's military service, to include his characterization of discharge—which is of particular interest to prospective employers. The DD Form 214 also contains sensitive information, such as the soldier's SSN.[5] At one time, retirement service offices and legal assistance practitioners advised retirees to register a copy of their DD Form 214 at the local county courthouse because it is the linchpin document for substantiating one's military service and eligibility for benefits. Registering the document with the court made the document a public record, which facilitated replacement of the document if the original was lost.[6]

Times and trends have changed, however, and privacy concerns, including identity theft, have prompted retirement services offices and legal assistance attorneys to cease issuing such guidance.[7] While the military should undertake a public information campaign to discourage future public recordings,[8] this will not rectify the problem of untold number of DD Form 214s already publicly recorded throughout the country.

Unfortunately, a publicly recorded document may not simply be "unrecorded." Redaction or retraction of a public document requires action by a court. In consideration of court action on behalf of legal assistance clients, attorneys from the Fort Benning legal assistance office brainstormed issues related to the retraction or redaction of certain information from a publicly recorded DD Form 214. In counterbalance to individual privacy concerns, two issues sprang to mind. First, if the DD Form 214 were redacted, what information would be removed, and if that information was removed, would the publicly recorded document still serve a purpose?[9] Second, if the DD Form 214 was retracted, what future court actions might result?[10]

One proposed solution was for legal assistance personnel to draft a motion to address these concerns. Such a motion would then be tested in the Muscogee County courts, located adjacent to Fort Benning. Another proposed solution was for legal assistance personnel to coordinate with Georgia state representatives to draft proposed legislation addressing their constituents' privacy concerns.

1. The National Consumer Law Center states that "[i]dentity theft, also called name theft, identity fraud, or true name fraud, refers to an imposter's use of key items of another person's identity—such as name, social security number, credit card number, or PIN, to obtain funds, credit, goods, services, or other benefits. NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING ACT § 7.6.11 (4th ed. 1998).

2. *Id.* (reporting that an estimated 2000 cases of identity theft occur each week); Staff Sergeant Marcia Triggs, *Scams Target Veterans for Identity Theft*, ARMY NEWS SERVICE (January 22, 2002), *available at* http://www.dtic.mil/armylink/news/Jan2002/a20020122dd214.html (stating that the Federal Trade Commission reported "between 600,000 and 700,000 cases of identity theft . . . in 2000"). Veterans are at particular risk. *See Triggs, supra*.

3. *See* Triggs, *supra* note 2.

4. U.S. Dep't of Defense, Form 214, Certificate of Discharge (1 Nov. 1988).

5. *See id.*

6. Triggs, *supra* note 2. Additionally, a fire at the National Personnel Records Center (Military Personnel Records) on 12 July 1973 destroyed between sixteen to eighteen million official military personnel files. As a result of that fire, eighty percent of the records of Army personnel discharged between 1 November 1912 and 1 January 1960 were lost. Since there were no duplicates, microfilm copies, or indexes, the information was irrevocably lost—unless it could be reconstructed using other sources. National Archives and Records Administration, *The 1973 Fire*, *at* http://www.nara.gov/regional/mprfire.html (last visited Apr. 22, 2002).

7. Triggs, *supra* note 2. There are still some holdouts. *See, e.g.*, The American War Library, *Public Posting and Preserving Your DD-214*, *at* http://members.aol.com/forvets/dd214sav.htm (last visited Apr. 22, 2002).

8. The installation or command's legal assistance office, retirement services, or both, can do this.

9. For example, if the SSN was redacted, would the document still contain enough information to verify the retiree's identity?

10. *Id.* For example, if the prior trend was to publicly record such documents, and the current trend is to remove them, might the pendulum swing back? If independent measures can alleviate the privacy concerns (for example, credit card applications no longer requiring a SSN), would the individuals who first recorded their DD Form 214s, then redacted them, return to the courts to once again publicly record them?

Before the Fort Benning legal assistance office could implement either plan, the Georgia government acted on this issue. Legislation signed by the Governor of Georgia on 13 May 2002 provides that certain military records recorded in the superior courts are not subject to public inspection, and establishes confidential treatment of such records, procedures for review and copying them, and penalties for violations of these provisions.[11]

Georgia's legislation serves to strictly limit access to the publicly recorded DD Form 214. Legal assistance offices in jurisdictions without similar protections may consider Georgia's model as a template, taking into consideration the issues contemplated above and those issues unique to their jurisdiction. Proposing such legislation may not only benefit Army legal assistance clients, but can also serve as a valuable exercise in attorney professional development.[12]

11. GA. CODE ANN. § 15-6-72(c) (2002) (codifying House Bill 1203).

12. One should also seek to engage National Guard and reserve component resources in any such effort. Many such personnel have legislative positions or connections in their civilian capacities, and can be instrumental in the process.

Litigation Division Notes

Court Dismisses Suit Seeking to Stop "War Against Terror"

Since 11 September 2001, U.S. military personnel from active and reserve component units have deployed around the world in the fight against terrorism. Recently, Mr. James Johnson, a pro se plaintiff, filed suit in the U.S. District Court for the Western District of Texas to enjoin President Bush and members of Congress from using military force in the "War Against Terror."[1] Specifically, Mr. Johnson complained that the President's mobilization and deployment of U.S. forces to Afghanistan, and Congress's decision to fund these efforts, without a formal declaration of war were unconstitutional and violated Executive Order 11,905, which forbids political assassination.[2] On 25 March 2002, the district court granted the government's motion to dismiss Mr. Johnson's complaint, holding (1) that Mr. Johnson lacked standing, and (2) that Johnson's complaint raised nonjusticiable political questions.[3]

Standing

To have standing, Mr. Johnson had to demonstrate to the district court that "he suffers an injury-in-fact that is fairly traceable to the [government's] challenged conduct that is likely to be redressed by the relief he seeks from the court."[4] To meet the injury-in-fact requirement, "[Mr. Johnson] must allege an injury that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'"[5]

Mr. Johnson alleged, without further elaboration, that the president and Congress's acts injured him and others by "depriving them of the wealth of their heritages."[6] The United States argued that because Mr. Johnson's vague allegation "purports to represent such a large class of all American taxpayers, or perhaps even all American citizens, he admittedly suffered the same harm as large numbers of Americans."[7] The district court agreed, determining that Mr. Johnson "merely asserted a generalized grievance, not a particularized injury, and did not meet the injury-in-fact requirement."[8]

The court also analyzed Johnson's standing to sue as a taxpayer.

> [To] have standing to challenge Congress's exercise of tax-and-spend power under Article I, a plaintiff must establish: (1) a logical link between their taxpayer status and the type of legislation attacked; and (2) a nexus between taxpayer status and the precise nature of the constitutional infringement alleged.[9]

The court found that Johnson's complaint, by challenging Congress's enactment of the Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States (Terrorist Appropriations),[10] met the first part of this test. But, the court determined that Johnson failed "to show that the [Terrorist Appropriations] exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power, and not simply that the [Terrorist Appropriations] were generally beyond the powers delegated to Congress by Article I, section 8."[11] Instead, the court found that Johnson "simply disagree[d] with Congress's decision to use its tax-and-spend power to appropriate money to the President to respond to the terrorist attacks."[12]

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1. Johnson v. United States, No. A-01-CA-632-88, slip op. (W.D. Tex. Mar. 25, 2002).

2. *Id*. at 2. Executive Order 11,905, signed by President Ford in 1976, states in part: "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Exec. Order No. 11,905, Fed. Reg. 7703 (Feb. 18, 1976).

3. *Johnson*, No. A-01-CA-632-88, slip op. at 10.

4. *Id.* at 3 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

5. *Id.* (quoting *Lujan*, 504 U.S. at 560 (citations omitted)).

6. *Id.* (quoting Plaintiff's Response at 3).

7. *Id.* at 4.

8. *Id*. Furthermore, the district court determined that Johnson's injuries were too "abstract and indefinite" to establish standing. *Id.* Comparing Johnson's complaints to those raised in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), the *Johnson* court stated it "will respect the Supreme Court's caution against creating 'government by injunction' based on an abstract injury." *Johnson*, No. A-01-CA-632-88, slip op. at 6 (quoting *Schlesinger*, 418 U.S. at 222). The plaintiffs in *Schlesinger* brought a class action lawsuit to enjoin members of Congress from simultaneously serving in the Reserve Armed Forces. *Schlesinger*, 418 U.S. at 212.

9. *Johnson*, No. A-01-CA-632-88, slip op. at 6 (citing Flast v. Cohen, 392 U.S. 83, 102-03 (1968)).

10. Pub. L. No. 107-38 (Sept. 18, 2001).

Therefore, Mr. Johnson's taxpayer status did not give him standing to sue in federal court.[13]

Political Questions

Government counsel argued that Johnson's petition to enjoin the President and Congress from engaging and funding a war in Afghanistan without a formal declaration of war presented the district court with nonjusticiable political questions. The determine if Johnson's allegations presented nonjusticiable political questions, the district court applied the test of *Baker v. Carr.*[14]

> To determine if a case presents a nonjusticiable political question, the court needs to consider whether there is (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially manageable methods for resolving the issue;" or (3) other prudential reasons for not intervening, such as "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made."[15]

Agreeing with the government, the district court noted that "Article I, Section 8 gives Congress the power to declare war; [and] Article II, Section 2 names the President commander-in-chief of the U.S. military."[16] Therefore, "the Constitution commits the power to declare war and to pursue military action to other branches of government, and [not to the courts]."[17]

The district court also recognized that "prudential concerns cautioned against deciding the political questions before it."[18] The court noted that "[Johnson's case] involves Congress and the President's highly sensitive foreign policy choices that necessarily impact national security."[19] The court cited "potential consequences to national security, foreign relations, and the balance of power among the branches of government that could flow from the court's adjudication of this case" as sufficient reason to refrain from hearing Johnson's complaints.[20]

Conclusion

Mr. Johnson's complaints against the "War Against Terror" amounted to vague allegations raising issues clearly committed in the Constitution to the executive and legislative branches. By granting the government's motion to dismiss, the district court's decision is in keeping with a long line of cases which hold that courts do not become involved in cases in which "the plaintiff has no concrete and particularized injury but merely an ideological disagreement with Congress and the President."[21] CPT Witherspoon.

World War II Takings Case Dismissed

Introduction

In a recent decision involving a takings claim under the Fifth Amendment,[22] the Court of Federal Claims (COFC) determined that the six-year statute of limitations governing claims against the United States[23] barred the plaintiffs' case. The COFC's dismissal of *Hair v. United States*[24] illustrates the rule that when a plaintiff bases a taking claim upon the govern-

11. *Johnson*, No. A-01-CA-632-88, slip op. at 7 (citing *Flast*, 392 U.S. at 102-03).

12. *Id*.

13. *Id*.

14. 369 U.S. 186 (1962).

15. *Johnson*, No. A-01-CA-632-88, slip op. at 8 (quoting *Baker v. Carr*, 369 U.S. at 217).

16. *Id*.

17. *Id*.

18. *Id*. at 9.

19. *Id*. (citing Atlee v. Laird, 347 F. Supp. 689, 696 (E.D. Penn. 1972)).

20. *Id*. at 9-10.

21. *Id*. at 10.

22. U.S. CONST. amend. V. The Takings Clause states: "nor shall private property be taken for public use, without just compensation." *Id*.

23. 28 U.S.C. § 2501 (2000). This section states that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." *Id*.

ment's ratification of a treaty, the six-year statute of limitations begins upon ratification, not when the government provides notice of a refusal to pay just compensation.[25]

Background

Plaintiffs Gilbert M. Hair and Ethel Blaine Millet are U.S. citizens who suffered at the hands of the Japanese during World War II. On 2 February 1942, the Imperial Japanese Army arrested Mr. Hair, then a child, along with his mother, and interned him at the Santo Tomas Internment Camp in the Philippines. There he suffered from malnutrition and disease until Allied forces liberated the camp in 1945. The Japanese captured Ms. Millet, then an Army nurse, on 11 May 1942, imprisoned her at Santo Tomas, where she suffered from malnutrition and physical injury until Allied forces freed her in 1945, as well.[26]

The plaintiffs, on behalf of themselves and others similarly situated,[27] filed suit in the COFC for one trillion dollars from the United States for injuries caused by Japan during World War II.[28] The plaintiffs asserted that the United States is

> liable to them for a taking without just compensation under the Fifth Amendment in connection with the April 28, 1952 ratification of the 1951 Treaty of Peace with Japan, known as the "San Francisco Peace Treaty."[29] Plaintiffs contend that as a result of the San Francisco Peace Treaty, the United States committed a "taking" of their claims for damages against Japan.[30]

In response, the United States filed a motion to dismiss, arguing that the statute of limitations barred this claim.[31]

Decision

For purposes of the decision, all parties agreed that the six-year statute of limitations applied to the plaintiffs' claim. Therefore, the only disputed issue was when the claim actually accrued.[32] The government argued that the statute of limitations began upon the ratification of the San Francisco Treaty in 1952. The plaintiffs argued that the six-year period did not begin until November 2001, when the government filed its motion to dismiss the plaintiffs' case.[33] The plaintiffs asserted that until this time, "they had a 'reasonable belief' that the government would make good on its 'implied promise to pay.'"[34]

Agreeing with the government, the COFC, assuming a taking had occurred, held that the plaintiffs had only until 1958 to

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24. No. 01-521C, 2002 U.S. Claims LEXIS 86 (Fed. Cl. Apr. 15, 2002).

25. *See id*. at *13; Alliance of Descendants of Texas v. United States, 37 F.3d 1478, 1481-82 (Fed. Cir. 1994).

26. *Hair*, 2002 U.S. Claims LEXIS 86, at *3-4.

27. Mr. Hair and Ms. Millet "purport[ed] to represent a class of between 437,025 and 600,000 members." *Id*. at *2 n.1.

28. *Id*. at *6. In addition to filing in the COFC,

> [the plaintiffs] have also filed suit in the District Court for the Eastern District of Illinois against the Japanese government, seeking one trillion dollars in damages for their injuries. *See* Rosen v. People of Japan, No. 01C-6864 (E.D. Ill. filed Sept. 4, 2001). The plaintiffs state in their complaint [at the COFC] that "any monies actually collected as a result of Rosen, will be set off against the present claim against the United States."
>
> . . . .
>
> The plaintiffs also acknowledge[d] that the under War Claims Act, [50 U.S.C. app. §§ 2001-2007 (2000)], Congress established a commission to compensate U.S. citizens who were prisoners of war or internees during World War II. . . . Plaintiffs, however, [have contended] that [payments made under the Act] "did not . . . constitute just compensation."

Hair, 2002 U.S. Claims LEXIS 86, at *5-6.

29. Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

30. *Hair*, 2002 U.S. Claims LEXIS 86, at *1-2.

31. *Id*. at *2.

32. *Id*. at *7 & n.2. "Plaintiffs conced[ed] that 'there was a taking of private property for public use on April 28, 1952,' upon ratification of the San Francisco Peace Treaty." *Id*. at *7.

33. *Id*. at *8-9.

34. *Id*. at *9.

file their claim—six years from the ratification of the San Francisco Treaty.[35] The court stated that

> there is no support for plaintiffs' contention that a taking claim does not accrue until the government announces its refusal to pay just compensation, or that the government's action in effectuating the taking can be bifurcated from the government's obligation to pay for that taking in terms of the accrual of the taking claim.[36]

Furthermore, the court noted that "the only time the government's refusal to pay starts the statute of limitations clock is when a statute establishes a requirement for government payment." The court determined that the San Francisco Peace treaty did not set forth such a requirement.[37] Therefore, the government's refusal to pay was not relevant to the accrual of the plaintiffs' takings claim.[38]

Conclusion

The *Hair* decision serves as a reminder that the COFC will strictly construe the six-year statute of limitations, "as it pertains to the government's waiver of sovereign immunity."[39] *Hair* also states the rule that when the ratification of a treaty by the United States constitutes "the taking," absent tolling or an express provision requiring government payment, the statute of limitation begins when the government ratifies the treaty. Major Salussolia.

35. *Id.* at *17.

36. *Id.* at *13.

37. *Id.* at *13-14.

38. *Id.* at *14.

39. *Id.* at *13-14 (citing Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

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-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

2002

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12-23 August	38th Operational Law Course (5F-F47).
12 August-22 May 03	51st Graduate Course (5-27-C22).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	173d Senior Officers Legal Orientation Course (5F-F1) (**CANCELLED**).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).
17 September - 10 October	159th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
23-27 September	2002 USAREUR Legal Assistance CLE (5F-F23E).

October 2002

7-11 October	2002 JAG Worldwide CLE (5F-JAG).
11 October - 19 December	159th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
21-25 October	56th Federal Labor Relations Course (5F-F22).
21 October - 1 November	5th Speech Recognition Training (512-27DC4).
21-25 October	2002 USAREUR Administrative Law CLE (5F-F24E).
23-25 October	1st Advanced Federal Labor Relations Course (5F-F21).
28 October - 1 November	2d Domestic Operational Law Course (5F-F45).
28 October - 1 November	64th Fiscal Law Course (5F-F12).

November 2002

18-21 November	26th Criminal Law New Developments Course (5F-F35).
18-22 November	174th Senior Officers Legal Orientation Course (5F-F1).

December 2002

2-6 December	2002 USAREUR Criminal Law CLE (5F-F35E).
3-6 December	2002 Government Contract & Fiscal Law Symposium (5F-F11).
9-13 December	6th Income Tax Law Course (5F-F28).
9-13 December	9th Fiscal Law Comptroller Accreditation Course Hawaii (**TENTATIVE**) (5F-F14-H).

January 2003

5-17 January	2003 JAOAC (Phase II) (5F-F55).
6-10 January	2003 USAREUR Contract & Fiscal Law CLE (5F-F15E).
6-10 January	2003 USAREUR Income Tax Law CLE (5F-F28E).
7 January - 31 January	160th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
13-17 January	2003 PACOM Income Tax Law CLE (5F-F28P).
21-24 January	2003 Hawaii Income Tax Law CLE (5F-F28H).
22-24 January	9th RC General Officers Legal Orientation Course (5F-F3).
27-31 January	175th Senior Officers Legal Orientation Course (5F-F1).
27-31 January	2003 Hawaii Estate Planning Course (**TENTATIVE**).
27 January - 28 March	9th Court Reporter Course (512-27DC5).
31 January - 11 April	160th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2003

3-7 February	79th Law of War Course (5F-F42).
10-14 February	2003 Maxwell AFB Fiscal Law Course (5F-F13A).
10-14 February	2002 USAREUR Operational Law CLE (5F-F47E).
24-28 February	65th Fiscal Law Course (5F-F12).
24 February - 7 March	39th Operational Law Course (5F-F47).

March 2003

3-7 March	66th Fiscal Law Course (5F-F12).
10-14 March	27th Administrative Law for Military Installations Course (5F-F24).
17-21 March	4th Advanced Contract Law Course (5F-F103).
17-28 March	19th Criminal Law Advocacy Course (5F-F34).
24-28 March	176th Senior Officers Legal Orientation Course (5F-F1).
31 March - 4 April	14th Law for Paralegal NCOs Course (512-27D/20/30).

April 2003

7-11 April	**__th Fiscal law Comptroller** Accreditation Course Korea (5F-F14-K).
14-17 April	2003 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April	1st Ethics Counselors Course (5F-F202).
21-25 April	14th Law for Paralegal NCOs Course (512-27D/20/30).
28 April - 9 May	150th Contract Attorneys Course (5F-F10).

28 April - 16 May	46th Military Judge Course (5F-F33).
28 April - 27 June	10th Court Reporter Course (512-27DC5).

May 2003

5-16 May	2003 PACOM Ethics Counselors Workshop (5F-F202-P).

June 2003

2-6 June	6th Intelligence Law Course (5F-F41).
2-6 June	177th Senior Officers Legal Orientation Course (5F-F1).
2-27 June	10th JA Warrant Officer Basic Course (7A-550A0).
3-27 June	161st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9-11 June	6th Team Leadership Seminar (5F-F52S).
9-13 June	10th Fiscal Law Comptroller Accreditation Course Alaska (5F-F14-A).
9-13 June	33d Staff Judge Advocate Course (5F-F52).
16-20 June	7th Chief Paralegal NCO Course (512-27D-CLNCO).
16-20 June	14th Senior Paralegal NCO Management Course (512-27D/40/50).
23-27 June	14th Legal Administrators Course (7A-550A1).
27 June - 5 September	161st Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2003

7 July - 1 August	4th JA Warrant Officer Advanced Course (7A0550A2).
14-18 July	80th Law of War Course (5F-F42).
21-25 July	34th Methods of Instruction Course (5F-F70).
28 July - 8 August	151st Contract Attorneys Course (5F-F10).

August 2003

4-8 August	21st Federal Litigation Course (5F-F29).
4 August - 3 October	11th Court Reporter Course (512-27DC5).
11-22 August	40th Operational Law Course (5F-F47).
11 August 03 - 22 May 04	52d Graduate Course (5-27-C22).
25-29 August	9th Military Justice Managers Course (5F-F31).

September 2003

8-12 September	178th Senior Officers Legal Orientation Course (5F-F1).
8-12 September	2003 USAREUR Administrative Law CLE (5F-F24E).
15-26 September	20th Criminal Law Advocacy Course (5F-F34).
15-26 September	52d Legal Assistance Course (5F-F23).
16 September - 9 October	162d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2003

6-10 October	2003 JAG Worldwide CLE (5F-JAG).
10 October - 18 December	162d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
20-24 October	57th Federal Labor Relations Course (5F-F22).
20-24 October	2003 USAREUR Legal Assistance CLE (5F-F23E).
22-24 October	2d Advanced Labor Relations Course (5F-F21).
27-31 October	3d Domestic Operational Law Course (5F-F45).

27-31 October	67th Fiscal Law Course (5F-F12).
27 October - 7 November	6th Speech Recognition Course (512-27DC4).

November 2003

12-15 November	27th Criminal Law New Developments Course (5F-F35).
17-21 November	3d Court Reporting Symposium (512-27DC6).
17-21 November	179th Senior Officers Legal Orientation Course (5F-F1).
17-21 November	2003 USAREUR Operational Law CLE (5F-F47E).

December 2003

1-5 December	2003 USAREUR Criminal Law CLE (5F-F35E).
2-5 December	2003 Government Contract & Fiscal Law Symposium (5F-F11).
8-12 December	7th Income Tax Law Course (5F-F28).

January 2004

4-16 January	2004 JAOAC (Phase II) (5F-F55).
5-9 January	2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).
5-9 January	2004 USAREUR Income Tax Law CLE (5F-F28E).
6-29 January	163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
12-16 January	2004 PACOM Income Tax Law CLE (5F-F28P).
20-23 January	2004 Hawaii Income Tax Law CLE (5F-F28H).
21-23 January	10th Reserve Component General Officers Legal Orientation Course (5F-F3).
26-30 January	9th Fiscal Law Comptroleer Accreditation Course Hawaii (5F-F14-H).
26-30 January	180th Senior Officers Legal Orientation Course (5F-F1).
26 January - 26 March	12th Court Reporter Course (512-27DC5).
30 January - 9 April 04	163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2004

2-6 February	81st Law of War Course (5F-F42).
9-13 February	2004 Maxwell AFB Fiscal Law Course (5F-F13A) (**TENTATIVE**).
23-27 February	68th Fiscal Law Course (5F-F12).
23 February - 5 March	41st Operational Law Course (5F-F47).

March 2004

1-5 March	69th Fiscal Law Course (5F-F12).
8-12 March	28th Administrative Law for Military Installations Course (5F-F24).
15-19 March	5th Contract Litigation Course (5F-F102).
15-26 March	21st Criminal Law Advocacy Course (5F-F34).
22-26 March	181st Senior Officers Legal Orientation Course (5F-F1).

April 2004

12-15 April	2004 Reserve Component Judge Advocate Workshop (5F-F56).
19-23 April	6th Ethics Counselors Course (5F-F202).
19-23 April	15th Law for Paralegal NCOs Course (512-27D/20/30).
26 April - 7 May	152d Contract Attorneys Course (5F-F10).
26 April - 14 May	47th Military Judge Course (5F-F33).

26 April - 25 June	13th Court Reporter Course (512-27DC5).

May 2004

10-14 May	53d Legal Assistance Course (5F-F23).
24-28 May	182d Senior Officers Legal Orientation Course (5F-F1).

June 2004

1-3 June	6th Procurement Fraud Course (5F-F101).
1-25 June	11th JA Warrant Office Basic Course (7A-550A0).
2-24 June	164th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
7-9 June	7th Team Leadership Seminar (5F-F52S).
7-11 June	34th Staff Judge Advocate Course (5F-F52).
12-16 June	82d Law of War Workshop (5F-F42).
14-18 June	8th Chief Paralegal NCO Course (512-27D-CLNCO).
14-18 June	15th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 June	15th Legal Administrators Course (7A-550A1).
25 June - 2 September	164th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2004

12 July - 6 August	5th JA Warrant Officer Advanced Course (7A-550A2).
19-23 July	35th Methods of Instruction Course (5F-F70).
27 July - 6 August	153d Contract Attorneys Course (5F-F10).

August 2004

2-6 August	22d Federal Litigation Course (5F-F29).
2 August - 1 October	14th Court Report Course (512-27DC5).
9-20 August	42d Operational Law Course (5F-F47).
9 August - 22 May 05	53d Graduate Course (5-27-C22).
23-27 August	10th Military Justice Managers Course (5F-F31).

September 2004

7-10 September	2004 USAREUR Administrative Law CLE (5F-F24E).
13-17 September	54th Legal Assistance Course (5F-F23).
13-24 September	22d Criminal Law Advocacy Course (5F-F34).

October 2004

4-8 October	2004 JAG Worldwide CLE (5F-JAG).

3. Civilian-Sponsored CLE Courses

23 August ICLE	Nuts & Bolts of Family Law Hyatt Regency Hotel Savannah, Georgia
6 September ICLE	U.S. Supreme Court Update Swissotel Atlanta, Georgia
27 September ICLE	Eight Steps to Effective Trial National Speakers Series Marriott Gwinnett Place Hotel Atlanta, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611

(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

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

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

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

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

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

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

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

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. 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	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually

South Carolina**	15 January annually
Tennessee*	1 March annually Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2002 issue of *The Army Lawyer.*

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

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 October 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel J T. Parker, telephone (800) 552-3978, ext. 357, or e-mail JT.Parker@hqda.army.mil.

Current Materials of Interest

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

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2002 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2002 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(a) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(b) Follow the link that reads "Enter JAGCNet."

(c) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(d) If you have a JAGCNet account, *but do not know your user name and/or Internet password,* contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(e) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(f) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(g) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer.*

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is Web browser accessible before departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have Web accessi-

ble e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

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

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (434) 972-6394, facsimile: (434) 972-6386, or e-mail: lullnc@hqda.army.mil.

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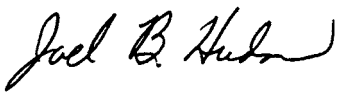

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Administrative Assistant to the
Secretary of the Army
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The Judge Advocate General's School
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