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Articles

Notes from the Field

Navigating the Rape Shield Maze: An Advocate's Guide to MRE 412

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[The witness] could not have ruthlessly destroyed that quality [chastity] upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched.[1]

Introduction

The opinion expressed in the quotation above—that an unchaste woman is less credible than a more virtuous woman—seems antiquated by today's standards.[2] One may disregard this belief as the outdated thinking of its era, but every criminal jurisdiction in the United States accepted it for most of the twentieth century.[3] Until the mid-1970s, evidence of an alleged victim's prior sexual behavior was usually admissible in a sexual offense trial.[4] Evidence of a rape complainant's promiscuity was not only permitted to prove consent, but also to attack the complainant's credibility.[5] Impeachment of a witness's "unchaste character" was specifically permitted by the Military Rules of Evidence, which stated:

> For the purpose of impeachment it may be shown that a witness has a bad character as to truth and veracity. After impeaching evidence of this kind is received, or after it has been shown that . . . the witness has an unchaste character . . . , proof that the witness has a good character as to truth and veracity may be introduced in rebuttal.[6]

This language invited both the prosecution and the defense to investigate every fact or rumor about the complainant's sexual history thoroughly. The belief that prior sexual behavior was relevant to truthfulness frequently resulted in the victim being placed on trial and subjected to extensive cross-examination (and re-direct examination) about embarrassing details of her private life.[7]

By the end of the 1970s, as attitudes within society[8] and judicial philosophies[9] shifted, legislatures and courts in every state had enacted statutes, composed rules of court, or written opinions designed to limit the introduction of evidence of an alleged victim's sexual history.[10] Such evidence, after all, sometimes strained even the traditional definition of relevance; it often had only a tenuous connection to the circumstances of the offense

1. State v. Coella, 28 P. 28, 29 (Wash. 1891). The word "smirch" means "to dishonor or defame." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1220 (New College ed. 1976).

2. A 1997 study by the Department of Justice found that 91% of rape and sexual assault victims were female, and that nearly 99% of the reported offenders were male. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 8 (1997). Accordingly, this article uses the female pronoun when discussing victims and the male pronoun when discussing accused. However, Military Rule of Evidence (MRE) 412 applies equally to accused and victims of either gender. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (2002) [hereinafter MCM].

3. Andrew Z. Soshnick, *The Rape Shield Paradox*: *Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 NW. U. J. CRIM. L. & CRIM. 651, 696 n.35 (1987).

4. *Id.* at 696 n.5 (citing Sally Gold & Martha Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U. L. REV. 695, 698-705 (1978)).

5. Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 486 (1997); *see also* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 597 (1997) [hereinafter SALTZBURG].

6. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XXVII, ¶ 153b (1951).

7. United States v. Lauture, 46 M.J. 794, 797 n.4 (Army Ct. Crim. App. 1997) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. III, ¶ 153b (1969)).

8. The Women's Movement challenged and ultimately influenced society's beliefs about women and sexuality. By the 1970s, society was less likely to agree that sex outside of marriage was relevant to a woman's character. Contrary to the concern that false rape charges were easy to fabricate, society also recognized that many rape incidents actually went unreported because the victims feared that they would be harassed or embarrassed. *See* Soshnick, *supra* note 3, at 650-51; Richard A. Wayman, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865 (1992).

9. Even before the enactment of rape shield laws, courts began to reveal increasing skepticism that evidence of victims' sexual histories carried sufficient probative value to justify extensive inquiry. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE 574 (3d ed. 1984). *See, e.g.*, United States v. Kasto, 584 F.2d 268 (8th Cir. 1978).

being tried.[11] Practitioners and courts observed that the evidence often served no real purpose and needlessly embarrassed victims. At best, it was often of minimal probative value. At worst, it was likely to confuse and distract the fact-finders, discourage the reporting of sexual assaults, and unnecessarily waste the court's time. [12]

In 1978, Congress passed The Privacy Protection for Rape Victims Act of 1978,[13] which created Federal Rule of Evidence (FRE) 412.[14] Adoption of this "rape shield" rule into military practice as Military Rule of Evidence (MRE) 412 significantly restricted the introduction of evidence of a victim's prior sexual behavior and greatly changed the way practitioners try sexual offense cases.[15] The rape shield rule of MRE 412 is a victim-protection rule; its primary purpose is to safeguard sexual assault victims from the degrading and embarrassing disclosure of intimate details of their private lives.[16]

Practitioners have litigated MRE 412 heavily since its enactment. Courts have struggled to define key terms in MRE 412 that Congress did not define, and balance MRE 412's policies against the constitutional rights of accused. After many years of judicial interpretation, MRE 412 can seem more like a collection of case-by-case rules than a unified body of legal reasoning following a clear standard.

The purpose of this article is to help practitioners understand and apply MRE 412, and to provide a road map through its provisions and extensive case law. The article first discusses the scope and application of MRE 412. It then analyzes the three exceptions to the rule's general prohibition, emphasizing the exception for constitutionally required evidence. Then, the article discusses the courts' application of the "constitutionally required" exception, to help the practitioner coherently visualize this term's legal definition. Finally, the article provides some practical advice on the effective litigation of MRE 412 motions. While this article is intended for trial and defense counsel alike, MRE 412 is a rule of exclusion; therefore, the article is presented primarily from the perspective of the most likely proponent—the defense counsel.

The Rape Shield Rule: MRE 412

The Scope and Application of the Rule

Military Rule of Evidence 412 has two main components: (1) evidentiary rules; and (2) procedural requirements.[17] The basic evidentiary rule of MRE 412(a) is that in any "proceeding involving sexual misconduct," evidence offered to prove that an alleged victim engaged in other sexual behavior" or to prove "any victim's sexual predisposition," is not admissible.[18] Military Rule of Evidence 412(d) defines "sexual behavior" as "any sexual behavior not encompassed by the alleged offense."[19] "Sexual predisposition" has a broader definition and includes any evidence that may have a sexual connotation for the fact-finder; it refers to such evidence as a victim's mode of dress, speech, or lifestyle, and other evidence that does not directly relate to sexual activities or thoughts, but that may be presented as an insinuation or innuendo of sexual conduct.[20]

The protections of MRE 412 apply to any case in which "sexual misconduct" is alleged.[21] The rule does not define "sexual misconduct," but defines "nonconsensual sexual offense" to include rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.[22] Courts also apply MRE 412 to sexual offenses where consent is not a defense. Accordingly, if the

10. Soshnick, *supra* note 3, at 1.

11. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35. *See, e.g.*, *Kasto*, 584 F.2d at 271.

12. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35.

13. Pub. L. No. 95-540, 92 Stat. 2046.

14. *See generally* FED. R. EVID. 412. *See also* Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981) ("The text, purpose and legislative history of Rule 412 clearly indicate that Congress enacted the rule for the special benefit of the victims of rape.").

15. SALTZBURG, *supra* note 5, at 520.

16. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35.

17. *See generally id.* MIL. R. EVID. 412.

18. *Id*. MIL. R. EVID. 412(a). Before the 1998 amendments to the *Manual for Courts-Martial*, MRE 412 only applied to "past sexual behavior," defined as "sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(d) (1994) [hereinafter 1994 MCM].

19. MCM, *supra* note 2, MIL. R. EVID. 412(d).

20. *Id.*

21. *Id*. MIL. R. EVID. 412(a).

accused is charged with carnal knowledge, MRE 412 excludes introduction of evidence of the victim's sexual history, even though consent is not a defense to carnal knowledge.[23]

Not all evidence tending to have a sexual connotation is automatically subject to MRE 412. Military Rule of Evidence 412 only applies to evidence of other sexual behavior or sexual predisposition of the victim. Evidence that the alleged victim has made past false complaints of sexual offenses, for example, is not barred under MRE 412.[24] Courts have not yet specifically decided whether MRE 412 applies to evidence of prior sexual assaults upon the victim.[25] Although such incidents may be considered to be sexual acts, at least one member of the Court of Appeals for the Armed Forces has opined that the sexual assault of a victim is not sexual behavior *engaged in* by the victim as provided by MRE 412.[26]

The parties must be mindful of the purpose for which the evidence of other sexual behavior is offered, and whether that purpose brings the evidence within the policy considerations of MRE 412. Courts may exclude evidence of a victim's past behavior based on sexual innuendo, even when the evidence does not fall within the literal language of MRE 412. In *United States v. Greaves*,[27] the accused sought to introduce evidence that the victim "worked in a Japanese bar, dressed provocatively, and made good money."[28] Though the court admitted to being uncertain whether MRE 412 applied to the evidence, it applied MRE 412 and affirmed the exclusion of the evidence because it believed "that [the accused] wanted the court members to project . . . that [the victim] was in fact a prostitute."[29] An advocate who offers evidence that appears to violate MRE 412's policy purposes will face a difficult task in persuading a trial judge to admit it.

Military Rule of Evidence 412 is intended to be the primary means of limiting evidence of a sexual offense victim's sexual character and conduct.[30] Consequently, courts may use MRE 412 to exclude evidence that may be admissible under another rule of evidence.[31] The exclusionary provisions of MRE 412 apply in "any proceeding involving alleged sexual misconduct."[32] The Rule defines "any proceeding" to include courts-martial, as well as pretrial investigations pursuant to Article 32.[33] In *United States v. Fox*,[34] the Court of Military Appeals held that Rule 412 also trumps Rule for Courts-Martial (RCM) 1001,[35] which permits relaxing the rules of evidence at the sentencing phase.[36] The court reasoned that limiting MRE 412's application to the findings portion would defeat Rule 412's pur-

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22. *Id*. MIL. R. EVID. 412(e) (defining "nonconsensual sexual offenses" to include rape, forcible sodomy, or indecent assault where consent is a defense, and attempts to commit such offenses).

23. *See, e.g.*, United States v. Vega, 27 M.J. 744, 746 (A.C.M.R. 1988) (reasoning that MRE 412 was intended to be broader in scope than the federal rule and protect all sex offense victims, particularly since carnal knowledge is an offense of constructive force against children, clearly included within the intent of Rule 412). The analysis to Rule 412 also emphasizes the drafters' intent to apply Rule 412 as broadly as needed to serve the social policies that inspired it. MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-36.

24. MCM, *supra* note 2, MIL. R. EVID. 412(b)(2) analysis, app. 22, at A22-36. The analysis states that, "evidence of prior false complaints . . . is not within the scope of MRE 412 and is not objectionable if otherwise admissible." *Id*. The proponent of such evidence however, must be able to establish that the prior complaints were actually false. *See* United States v. Velez, 48 M.J. 220, 227 (1998).

25. *See* United States v. Pagel, 45 M.J. 64 (1996).

26. *Id*. at 70 (Sullivan, J., concurring) (stating that "sexual assault . . . in my view is not 'sexual behavior' engaged in by the victim as provided in MRE 412").

27. 40 M.J. 432 (C.M.A. 1994).

28. *Id*. at 437. *Greaves* was decided before the 1998 amendments to MRE 412 specifically barred evidence of a victim's sexual predisposition. MCM, *supra* note 2, MIL. R. EVID. 412 analysis, app. 22, at A22-36. Under the current version of MRE 412, evidence that the victim "dressed provocatively" would likely be excludable as evidence of sexual predisposition. *See id*. MIL. R. EVID. 412(a).

29. *Greaves*, 40 M.J. at 437.

30. United States v. Vega, 27 M.J. 744, 746 (C.M.R. 1988); SALTZBURG, *supra* note 5, at 598.

31. SALTZBURG, *supra* note 5, at 598.

32. MCM, *supra* note 2, MIL. R. EVID. 412(a).

33. *Id*. R.C.M. 405(i). Military Rule of Evidence 1101(d) also makes MRE 412 applicable in proceedings for search authorizations and pretrial restraint. *Id*. MIL. R. EVID. 1101(d).

34. 24 M.J. 110 (C.M.A. 1987).

35. *Id*. at 112.

36. MCM, *supra* note 2, R.C.M. 1001(c)(3).

pose of protecting victims from needless embarrassment and unwarranted invasions of privacy.[37]

Exceptions to the General Rule of Exclusion

Notwithstanding the general rule of exclusion, MRE 412 provides three categories of exceptions.[38] The first exception allows the defense to introduce evidence of other sexual behavior to prove that another person is the source of physical evidence, such as semen or an injury. The second exception permits the accused to introduce evidence of the victim's past sexual behavior with him to prove consent.[39] Both exceptions are narrowly tailored, and their application is relatively clear. The third exception, for constitutionally required evidence,[40] is much broader, and far more difficult to define and apply.

Military Rule of Evidence 412(b)(1) states that evidence that meets the requirements of an exception to Rule 412 is admissible only if it is "otherwise admissible under these rules."[41] Thus, the first step in analyzing whether the evidence fits within an MRE 412 exception is to determine the character and form of the proposed evidence and its admissibility under the other rules of evidence. For example, the proponent may wish to present testimony from Person *X* that he overheard Person *Y* say the victim engaged in an extramarital affair. This evidence would be objectionable as hearsay.[42] The proponent would not be able to reach the question of admissibility under MRE 412 unless he could first qualify the testimony under a hearsay exception or exemption.[43]

Finally, even evidence that is admissible under all of the other rules of evidence and meets at least one MRE 412 exception must still survive the heightened scrutiny of MRE 412's own balancing test.[44] Under MRE 412(c)(3), evidence of the victim's other sexual behavior is only admissible if it is relevant, *and* if its probative value *outweighs the danger that it will cause unfair prejudice*.[45] This is a significantly higher standard than the more familiar MRE 403 balancing test, which provides that evidence may be excluded if its probative value is "substantially outweighed" by dangers such as unfair prejudice, confusion of the issues, misleading the members, undue delay, and waste of time.[46]

Exception A—Source of Semen, Injury, or Other Physical Evidence

The first exception, MRE 412(b)(1)(A) (Exception A), states that "evidence of specific instances of sexual behavior by the alleged victim" is admissible if "offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence."[47] Evidence that someone other than the accused is the source of injury or semen is usually admissible, subject to the need for the evidence's probative value to outweigh the danger that it will cause unfair prejudice.[48] The temporal and circumstantial distance between the other sexual behavior and the charged incident will likely determine how the court will rule. For example, evidence that someone other than the accused injured the victim during sexual intercourse four months before an alleged rape is generally not relevant to establish an alternate source of injury.[49]

Exception B—Prior Sexual Behavior With the Accused

The second exception, MRE 412(b)(1)(B) (Exception B), permits the introduction of evidence to prove the alleged vic-

37. *Fox*, 24 M.J. at 112; *accord* United States v. Whitaker, 34 M.J. 822 (A.F.C.M.R. 1992).

38. MCM, *supra* note 2, MIL. R. EVID. 412(b).

39. *Id*. MIL. R. EVID. 412(b)(1)(A)-(B).

40. *Id*. MIL. R. EVID. 412(b)(1)(C).

41. *Id*. MIL. R. EVID. 412(b)(1).

42. *See id*. MIL. R. EVID. 801 (defining "hearsay" as an out-of-court statement, "other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

43. *Id*. MIL. R. EVID. 801(d)-804. *See, e.g*., United States v. Velez, 48 M.J. 220, 227 (1998).

44. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3).

45. *Id*.

46. *Id*. MIL. R. EVID. 403.

47. *Id*. MIL. R. EVID. 412(b)(1)(A).

48. *See id*.; SALTZBURG, *supra* note 5, at 599.

49. *See, e.g.*, United States v. Pickens, 17 M.J. 391 (C.M.A. 1984).

tim's consent. This provision states that evidence of "specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct . . . offered by the accused" is admissible "to prove consent."[50] This exception permits the introduction of evidence of previous sexual activity between the accused and the victim. Again, the evidence must survive the MRE 412(c) balancing test.[51] A court is likely to consider the time span between the prior and charged events—and their factual similarity—to be the key factors. Therefore, the accused will likely be permitted to present evidence that he had a ten-year sexual relationship with the victim immediately before the alleged misconduct to prove that the victim consented to the alleged sexual assault. However, evidence that the accused and the victim had sexual intercourse ten years before the charged incident will likely be excluded as too remote to be relevant or helpful.[52]

Exception C—Constitutionally Required Evidence

Military Rule of Evidence 412 is not a rule of absolute privilege; its drafters did not intend for it to deprive an accused of his constitutional right to present a relevant defense.[53] Military Rule of Evidence 412(b)(1)(C) (Exception C) states that "evidence the exclusion of which would violate the constitutional rights of the accused" is admissible if otherwise admissible under the other rules of evidence.[54] The remainder of this article attempts to untangle and clarify the application of these thirteen words—some of the most litigated language in the *Manual for Courts-Martial*.[55]

Exception C mandates the admissibility of constitutionally required evidence, but does not explain what evidence the constitution requires.[56] The constitutional foundations of Exception C are the Sixth Amendment right to confrontation and the Fifth Amendment right to due process.[57] An accused has a right to present evidence in his defense, so long as that evidence is relevant, material, and favorable to the defense.[58] Excluding defense impeachment evidence against a key witness may be constitutional error if it is reasonably likely that the evidence could have "tipped the credibility balance" in the case to the defense's favor.[59] But an accused's right to present relevant evidence is not uninitiated, and in appropriate cases, may "bow to accommodate other legitimate interests of the criminal trial process" or societal interests.[60] The Supreme Court has held that "[r]ape victims deserve heightened protection against surprise, harassment and unnecessary invasions of privacy."[61] Restrictions on the accused's constitutional rights, however, must not be arbitrary or disproportionate to the purposes they are designed to serve.[62] "In determining admissibility, there must be a weighing of the probative value of the evidence against the interest of shielding the victim's privacy,"[63] which means that the trial judge must conduct a balancing test.[64] The defense has the burden of demonstrating why the protections of MRE 412 should be lifted to allow admission of the otherwise proscribed evidence.[65]

50. MCM, *supra* note 2, MIL. R. EVID. 412(b)(1)(B). Note that the remainder of MRE 412 also applies to evidence offered by the prosecution. *Id*.

51. *Id*. MIL. R. EVID. 412(c).

52. SALTZBURG, *supra* note 5, at 599.

53. United States v. Dorsey, 16 M.J. 1, 4 (C.M.A. 1983) (citing Davis v. Alaska, 415 U.S. 308 (1974)); MCM, *supra* note 2, MIL. R. EVID. 412(a) analysis, app. 22, at A22-35.

54. *Id*. MIL. R. EVID. 412(b)(1)(C).

55. Many of the factual and legal questions practitioners regularly face in the context of Exception C also apply to Exceptions A and B. This is important to remember because if the prospective evidence is not admitted under one of the first two exceptions, the argument that the evidence is "constitutionally required" will often be the proponent's fallback position.

56. MCM, *supra* note 2, MIL. R. EVID. 412(b)(1)(C); SALTZBURG, *supra* note 5, at 600.

57. Michigan v. Lucas, 500 U.S. 145 (1991); *Davis*, 415 U.S. at 308.

58. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); United States v. Avery, 52 M.J. 496, 498 (2000); *Dorsey*, 16 M.J. at 5. *See* SALTZBURG, *supra* note 5, at 600 (citing California v. Trombetta, 467 U.S. 479 (1984); Faretta v. California, 422 U.S. 806 (1975)).

59. United States v. Hall, 56 M.J. 432, 437 (2002).

60. *Lucas*, 500 U.S. at 149 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); Rock v. Arkansas, 483 U.S. 44, 55 (1987). *See also* United States v. Velez, 48 M.J. 220, 226 (1998) (explaining that "while relevance is required, it is not a sufficient basis alone to establish a constitutional violation").

61. United States v. Sanchez, 44 M.J. 174, 178 (1996) (quoting *Lucas*, 500 U.S. at 150).

62. *Lucas*, 500 U.S. at 151.

63. *Sanchez*, 44 M.J. at 178 (citing *Lucas*, 500 U.S. at 149-50).

64. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3).

Applying Exception C in a trial court, therefore, requires practitioners and judges to balance victim-protection against the constitutional rights of the accused. It is far easier to balance those interests in a particular case than to articulate a simple or clear standard of admissibility under Exception C. In theory, the evidence must be relevant, material, and favorable to the defense, [66] and its probative value must outweigh the danger of unfair prejudice.[67] In practice, whether evidence is constitutionally required is determined on a case-by-case basis.[68] This means that understanding the limits of Exception C requires the practitioner to (1) know its extensive case law; and (2) know how to distinguish, analyze, and apply the closely related concepts of relevance, materiality, and favorableness to the defense. In many cases, distinguishing these concepts will be difficult, but the advocate who is prepared to argue each of them individually may gain a decisive advantage over the opponent who does not.

Relevance and Materiality

Relevance is the key to admissibility under Exception C.[69] Relevance under MRE 412 is no more than a specific application of the general principles of relevance in Rules 401 and 403; the proffered evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[70] Traditionally, relevance referred to the tendency of evidence to make a fact more or less probable, while materiality referred to the fact's degree of consequence to the determination of the action.[71] Today, "relevance" has swallowed "materiality" within the single definition of relevance found at MRE 401.[72] This means that the advocate must be able to articulate (1) what evidence he intends to offer; (2) how the evidence makes the fact more or less probable; and (3) how that fact, if proven, is of consequence to the determination of the accused's guilt. The best way for practitioners to craft successful arguments for relevance is to examine cases that presented courts with similar facts and arguments. The extensive Exception C precedent cannot cover every factual variation, but it does alert counsel to the location of the logical fault lines.

Courts usually reject theories of relevance that appear to be veiled attacks on the victim's sexual morality or general predisposition to sex. Ordinarily, sexual behavior by the victim with others, even under related circumstances, is not admissible to prove consent to sexual behavior with the accused.[73] Evidence that the victim had worked as a prostitute or is sexually promiscuous is of minimal relevance to her credibility or consent. [74] In *United States v. Fox*, [75] the defense sought to introduce evidence of the victim's past sexual behavior at the sentencing phase of the trial. The defense theorized that the victim's prior (consensual) sexual experiences mitigated the traumatic impact of the accused's assault on her. The court held that this evidence was not relevant or material to the determination of an appropriate sentence for the accused,[76] but *did* permit the accused to testify as to his own state of mind about the victim's receptiveness to sex in general and sex with him in particular. The court held that the accused's beliefs about the victim's predisposition had some relevance to the question of his state of mind, and that his state of mind at the time of the offense was material to the question of an appropriate sentence.[77] This illustrates the importance of articulating one's theory of relevance carefully; a court

65. United States v. Moulton, 47 M.J. 227, 228 (1997).

66. *Id*.; *see also* United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994); United States v. Williams, 37 M.J. 352, 359 (C.M.A. 1993); United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983). Courts have articulated several definitions of "constitutionally required." United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

67. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3); *Greaves*, 40 M.J. at 438.

68. United States v. Buenaventura, 45 M.J. 72, 79 (1996), *quoted in* United States v. Carter, 47 M.J. 395 (1998).

69. *Carter*, 47 M.J. at 398.

70. MCM, *supra* note 2, MIL. R. EVID. 401, 403. *See Dorsey*, 16 M.J. at 5.

71. MCM, *supra* note 2, MIL. R. EVID. 401 analysis, app. 22, at A22-33.

72. *Id*.; *see generally id.* MIL. R. EVID. 401.

73. *See* United States v. Sanchez, 44 M.J. 174, 179 (1996); United States v. Hicks, 24 M.J. 3, 10 (C.M.A. 1987); United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

74. United States v. Greaves, 40 M.J. 432, 437 (C.M.A. 1994); United States v. Hollimon, 12 M.J. 791, 793 (C.M.A. 1982) (citing United States v. Kasto, 584 F.2d 268 (8th Cir. 1978)). *But see* MCM, *supra* note 2, MIL. R. EVID. 412(b)(1) analysis, app. 22, at A22-36 (suggesting that where a hypothetical complainant, a prostitute, had threatened to fabricate a rape allegation against the accused unless he paid her an additional sum, the admissibility of evidence that the victim was a prostitute may be constitutionally required).

75. 24 M.J. 110, 111-12 (C.M.A. 1987).

76. *Id*. at 112.

may hold that the same facts are relevant under one theory but irrelevant under another.

Courts have accepted the validity of other specific theories of relevance, and counsel who offer evidence of other sexual behavior under one of these theories are the most likely to prevail. Evidence of other sexual behavior by the victim may be admissible when it demonstrates a motive for the victim to fabricate the allegation against the accused.[78] The victim's motive to lie may be "to explain a pregnancy, injury, or in the case of a minor, an all-night absence from home."[79] A victim's desire to protect her relationship with her boyfriend or husband and to explain why she was with another individual may also create a motive to fabricate.[80] Prior sexual behavior may be relevant when it is so similar, distinctive, and unusual that it corroborates the accused's version of the alleged events or suggests contrivance on the part of the victim.[81] In cases involving young victims, evidence of specific acts may be admissible to show a source of unusually advanced sexual knowledge.[82]

"Simply stating a valid theory of relevance is not sufficient to make evidence admissible, however."[83] To be relevant, the evidence must rationally support the theory, and the theory must be significant to the outcome of the case.[84] In other words, the proponent must demonstrate that the proffered evidence tends to prove the existence of the fact asserted.[85] If, for example, the proponent intends to prove that the victim has a motive to fabricate a rape allegation against the accused, the fact that she had had an extramarital affair with a third person two years previously would probably not be helpful to prove the existence of that motive.[86]

Favorableness to the Defense

The proponent who establishes that the proffered evidence is relevant and material must also prove that it is "favorable to the defense." In a sense, this term is misleading; it suggests a tactical decision that logically should be the province of the defense counsel. It would be more accurate to say that the evidence must be "important" or "vital" enough to the defense to have constitutional significance and overcome the policy interests of MRE 412.

Courts have used many different words to define "favorable" evidence.[87] Simply stated, evidence is favorable to the defense when it is important to the defense's theory, in the context of all of the evidence that both sides will present at trial.[88] Some courts have stated that the evidence must be "critical" or "necessary, critical, or vital" to the defense case.[89] As this suggests, the strength of the government's case against the accused is an important factor in the favorableness of the evidence, and the strength of the defense's other evidence is another. In *United States v. Williams*,[90] the Court of Military Appeals held

77. *Id*. The court explained its reasoning as follows:

> If a person begins a sexual misadventure believing that the object of his attentions will be a willing and cooperative partner, then pursues this behavior even after he becomes aware that his partner is unwilling, his conduct *may* be viewed as less culpable than that of one who, at the outset, knows that his advances are unwelcome.

Id. This part of the holding in *Fox* is questionable in light of subsequent amendments to MRE 412 that specifically exclude evidence of the victim's sexual predisposition. MCM, *supra* note 2, MIL. R. EVID. 412 analysis, app. 22, at A22-36.

78. Olden v. Kentucky, 488 U.S. 227 (1988); *Sanchez*, 44 M.J. at 178; United States v. Williams, 37 M.J. 352 (C.M.A. 1993); United States v. Dorsey, 16 M.J. 1, 4 (C.M.A. 1983).

79. *Sanchez*, 44 M.J. at 179 (quoting FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 20-32.32(b), at 837 (1991)).

80. *See Sanchez*, 44 M.J. at 178; *Williams*, 37 M.J. at 352.

81. *See* United States v. Velez, 48 M.J. 220, 226-27 (1998); *Sanchez*, 44 M.J. at 179.

82. United States v. Buenaventura, 45 M.J. 72, 79 (1996) (citing United States v. Gray, 40 M.J. 77, 79-80 (C.M.A. 1994); United States v. Hurst, 29 M.J. 477, 481 (C.M.A. 1990)).

83. United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

84. *Id*.

85. United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983).

86. *See Lauture*, 46 M.J. at 794.

87. *Id*. at 799 (listing some of the words courts have used to define "constitutionally required" evidence, and applying some of the same words—such as "vital" and "critical"—to define favorableness of the evidence to the defense).

88. *Dorsey*, 16 M.J. at 6.

89. *Lauture*, 46 M.J. at 799 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973); United States v. Sanchez, 44 M.J. 174 (1996)).

that evidence of the victim's extramarital affair with a third person was necessary to the defense that the victim consented to sex with him, then fabricated her allegation to explain to her paramour why she was with the accused. The court reasoned that the government's case was less than overwhelming, and concluded that the testimony might have shifted the outcome in the defendant's favor.[91]

Other factors that influence favorableness include whether the evidence undermines the credibility of a crucial government witness, such as the only eyewitness to an allegation;[92] whether the evidence is exculpatory or corroborates the accused's testimony;[93] and whether alternative evidence is available to achieve the same benefit.[94] Accordingly, if the proponent can present other key exculpatory evidence without the sexual behavior evidence, the evidence of other sexual behavior will probably not be held to be favorable. For example, if the defense has several options available with which to attack the victim's credibility, any MRE 412 evidence would be less favorable in light of the entire defense case.[95] If, on the other hand, the sexual behavior evidence is the only available means to impeach the credibility of the victim, the evidence becomes more important, and thus more favorable.[96]

One more substantive barrier still stands between the proponent and admission of the evidence—the special balancing test of MRE 412(c)(3), which states that the probative value of the evidence must outweigh the danger that it will cause unfair prejudice.[97] Although there is some authority for weakening, if not omitting, this balancing test for Exception C evidence,[98] courts continue to apply MRE 412(c)(3) to all three of the exceptions to MRE 412, including Exception C.[99] Practitioners should therefore be prepared to argue that the probative value of the evidence outweighs the danger that it will create unfair prejudice.

Procedural Rules

The second part of MRE 412 is a detailed set of procedural rules.[100] The proponent must know and follow these requirements; failure to comply with them may result in exclusion of the evidence.[101]

A party intending to introduce evidence under MRE 412 must first provide notice by filing a written motion at least five days before the entry of pleas.[102] The proponent must serve the motion on the opposing party and the military judge, and must also notify the alleged victim.[103] The motion must include an offer of proof specifically describing the evidence the proponent intends to introduce and stating the purpose for offering the evidence.[104] Although the proponent need not make a proffer when the substance and materiality of the evidence are obvious,[105] this course of action carries the obvious risk that the

90. 37 M.J. 352, 361 (C.M.A. 1993)

91. *Id.* at 361.

92. *Dorsey*, 16 M.J. at 6.

93. *See* United States v. Velez, 48 M.J. 220, 223 (1998) (rejecting defense evidence of the victim's prior sexual behavior when the defense was that the alleged sexual contact never happened).

94. *Dorsey*, 16 M.J. at 7.

95. *Velez*, 48 M.J. at 227.

96. *See* United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

97. MCM, *supra* note 2, MIL. R. EVID. 412(c)(3).

98. United States v. Williams, 37 M.J. 352, 360 n.7 (C.M.A. 1993). The court in *Williams* stated that:

> In *United States v. Dorsey*, 16 M.J. 1, 8 (CMA 1983), this Court did not consider itself bound to apply the balancing test required under [MRE] 412(c)(3), yet applied the test nonetheless. Once again, under a literal interpretation of [MRE] 412(b)(1), this Court is not required to apply a balancing test for undue prejudice independent of any requirements under [MRE] 403.

Id.

99. *See* United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994); United States v. Harris, 41 M.J. 890 (Army Ct. Crim. App. 1995). Recent case law suggests that this issue remains unsettled. United States v. Carter, 47 M.J. 395, 397 (1998) (Sullivan, J., concurring).

100. *See* MCM, *supra* note 2, MIL. R. EVID. 412(c).

101. Michigan v. Lucas, 500 U.S. 145, 152-53 (1991). Although counsel's failure to provide notice may be so flagrant as to warrant exclusion of the evidence, the better practice is to view MRE 412's notice requirement with flexibility. Accordingly, a continuance or delay is the preferred remedy given the potential importance of the evidence. SALTZBURG, *supra* note 5, at 603.

102. MCM, *supra* note 2, MIL. R. EVID. 412(c)(1)(A).

military judge will *not* agree that the evidence is obviously material, and deny the motion. Not every permissible course is a wise one; the counsel who fails to proffer what evidence he intends to introduce throws away his first opportunity to sway the military judge. The proponent should therefore clearly and specifically identify the evidence he seeks to admit to make the clearest possible case for its relevance, materiality, and favorableness to the defense.

If the proffer suggests the existence of evidence that meets one of the three MRE 412 exceptions, the military judge *must* conduct a closed hearing before admitting the evidence under MRE 412.[106] If the proffer does not meet this minimal standard, no hearing is required.[107] The parties may call witnesses, including the victim, and may offer relevant oral or written evidence. The alleged victim must be afforded a reasonable opportunity to attend the hearing and to be heard.[108]

Practice Tips

Military Rule of Evidence 412 is balanced in favor of the exclusion of evidence; advocates who seek to admit evidence under this rule must be prepared to overcome significant obstacles. Although the strength of the evidence is beyond practitioners' control, counsel can strengthen their arguments by understanding and skillfully applying the law to their facts.

Consider the following hypothetical.[109] The accused, *A*, is charged with rape. The alleged victim, *V*, says she met *A* at his apartment on the evening of the alleged assault. When *V* attempted to leave, *A* forcibly prevented *V* from leaving and raped her. Several hours before the alleged rape, *V* was with another man, a friend of *A*, at the friend's apartment. *A* knew that *V* had had sex with his friend at that time. Knowing this, *A* accused *V* of being a "whore" because she had just had sex with his friend and then wanted to have sex with *A*. That evening, *V* reported that *A* had raped her.

A intends to testify at trial that he accused *V* of having an affair with his friend, and about *V*'s reaction to *A*'s accusation. The defense also intends to call *A*'s friend to testify that he had a sexual liaison with *V* earlier on the same evening as the alleged assault.

Tip #1—Use a Valid Theory for Admission of the Sexual Behavior Evidence

The proponent must have a valid purpose for presenting evidence of an alleged victim's other sexual behavior.[110] As previously discussed, courts have accepted several specific theories of relevance; these include evidence of a victim's motive to fabricate,[111] evidence of a source other than the accused of sexual knowledge beyond the victim's tender years,[112] evidence of mistaken identification of the accused by the victim,[113] and evidence of the victim's unusual and distinctive behavior that verifies the accused's version of the charged incident.[114] This is not an exclusive list, and proponents should analyze the case law and available evidence and seek to apply other legitimate alternatives. Practitioners should also be familiar with—and avoid—theories of relevance that courts have specifically rejected.[115]

The proponent must articulate the purpose for offering the evidence and be prepared to explain and argue each step of the

103. *Id.* MIL. R. EVID. 412(c)(1)(B). One commentator expresses concern about the use of the term "opposing party" and to whom this term is intended to refer—the staff judge advocate, chief of military justice, or trial counsel. SALTZBURG, *supra* note 5, at 602. Service on any of these government counsel will usually be sufficient, however.

104. MCM, *supra* note 2, MIL. R. EVID. 412(c)(1)(A).

105. United States v. Means, 24 M.J. 160, 162 (C.M.A. 1987) (citing United States v. Peters, 732 F.2d 1004 (1st Cir. 1984)).

106. MCM, *supra* note 2, MIL. R. EVID. 412(c)(2); SALTZBURG, *supra* note 5, at 602-03.

107. United States v. Sanchez, 44 M.J. 174, 177 (1996) ("To require a hearing when the offer has not met the threshold requirements would undermine the rationale for MRE 412(a) and (b)—to protect the victims against humiliating, embarrassing and harassing questions.").

108. MCM, *supra* note 2, MIL. R. EVID. 412(c)(2).

109. The hypothetical and the arguments that follow are taken from *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983). The arguments in the dissent favor exclusion of the evidence. *Id*. at 8-13 (Cook, J., dissenting).

110. *See, e.g.*, United States v. Greaves, 40 M.J. 432, 439 ("The defense counsel failed to demonstrate the specific evidence that he would introduce or to articulate a theory of admissibility.").

111. *See, e.g.*, United States v. Williams, 37 M.J. 352 (C.M.A. 1993); *Dorsey*, 16 M.J. at 1.

112. *See, e.g.*, United States v. Pagel, 45 M.J. 64 (1996); United States v. Gray, 40 M.J. 77 (C.M.A. 1994).

113. *See, e.g.*, United States v. Buenaventura, 45 M.J. 72, 79 (1996).

114. *See, e.g.*, United States v. Sanchez, 44 M.J. 174 (1996).

analysis for the judge. Never assume that the purpose for offering evidence is obvious to the judge. If the proponent gives the judge a vague and indefinite proffer, the judge may conclude that the real purpose for offering the evidence is a "smear attempt to paint the victim in a bad light."[116]

In the hypothetical case of *A*, the proponent's theory is that the evidence shows that *V* has a motive to fabricate the claim of rape. He will argue that it is reasonable to infer that *V*, confronted with *A*'s accusations, felt guilty about her own conduct, became angry with *A*, and wanted revenge against him. He will also argue that it is reasonable to infer that *V* fabricated a claim that *A* had raped her out of vindictiveness against *A*. The evidence of *V*'s vengeful reaction is supported by the truth underlying *A*'s accusation about the affair. The truth of the allegations will be established through testimony of *A*'s friend, and perhaps through cross-examination of *V* herself.

Contrast the argument above with one that simply states that evidence of *V*'s affair with *A*'s friend is admissible because "it goes to her credibility." Given such a meager proffer, the military judge is unlikely to admit the evidence.

Tip #2—The Purpose Must Be Consistent With the Case Theory

The proponent must understand—and be prepared to articulate—how the evidence supports the defense theory of the case. If the purpose for offering evidence does not advance that theory, the evidence will likely be found to be irrelevant.

In the hypothetical case of *A*, the defense theory is that *V* fabricated the rape claim to get revenge against *A*. *A*'s counsel could argue that the evidence of *V*'s affair with *A*'s friend—and the resulting argument between *V* and *A*—provides the motive for the false claim. That is, *A* knew about the affair and angrily confronted *V* with this knowledge, which gave *V* a motive to fabricate the rape accusation against *A*. If the proponent makes this argument for admission of the evidence of the affair, it will support the defense theory and is relevant to the case.

Contrast this argument to the argument made by the defense counsel in *United States v. Velez*.[117] In *Velez*, the defense counsel argued that the other sexual behavior created a motive for the victim to fabricate the accusation. However, instead of using the evidence to directly support this argument, the defense counsel actually offered the evidence to prove that the victim had a pattern of repeatedly placing herself in sexual situations and then making questionable complaints to the authorities.[118] Finally, his theory of the case was that the alleged incident never occurred—a theory that was not supported by the evidence of the other sexual behavior. Not surprisingly, the court held that the victim's prior sexual behavior was irrelevant and inadmissible.[119]

Tip #3—Argue That the Evidence Is "Relevant, Material, and Favorable"

To be constitutionally required, evidence must be "relevant, material and favorable to the defense."[120] The proponent, therefore, should argue how the proffered evidence satisfies each of these components of the standard independently. These components can be logically difficult to separate from each other; arguments for relevance and materiality are almost certain to overlap with each other, and may also overlap with the argument for favorableness. Practitioners should still analyze and argue the standard for Exception C methodically, one component at a time. This requires counsel to have a strong command of the facts and evidence in their cases, as well as the law.

Having already discussed the relevance and materiality of the hypothetical evidence of *V*'s affair with *A*'s friend, *A*'s counsel would next argue that its admission is favorable to the defense. Assume that the government's case consists entirely of *V*'s testimony that *A* raped her. The government's case would be far from overwhelming, and *V*'s credibility would be a critical issue in the case. The proffered evidence is directly related to *V*'s motive to lie, and therefore, to her credibility. Furthermore, *A*'s friend will testify about the affair he had with *V* on the night of the alleged incident. By doing so, this witness will also partially corroborate *A*'s version of the facts. Accordingly, a court is likely to find that the evidence is favorable to the defense.

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115. *See, e.g.*, United States v. Hicks, 24 M.J. 3 (C.M.A. 1987). The defense counsel's stated purpose for presenting evidence of the victim's prior sexual behavior was to show that she was "not pure as the driven snow." *Id*. at 9. The trial judge stated that this was not a permissible basis to introduce evidence under MRE 412, and asked the civilian defense counsel, "Can you make it relevant, please, sir?" *Id*. at 10. The defense counsel responded, "No, Your Honor, I cannot." *Id*. The trial judge then said, "Then it's not admissible." *Id*. The court held that this offer failed to even minimally demonstrate that the evidence was relevant. *Id*.

116. United States v. Velez, 48 M.J. 220, 228 (1998).

117. *Id*.

118. *Id*. at 226.

119. *Id*. at 228.

120. United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994). *See also* United States v. Williams, 37 M.J. 352 (C.M.A. 1993); United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983); United States v. Lauture, 46 M.J. 794, 799 (Army Ct. Crim. App. 1997).

Tip #4—Have a Plan for Presenting the Evidence

The proponent should plan what facts he must prove to establish his theory and how he will prove each of those facts. Alternatives include cross-examining the victim, calling additional witnesses, or presenting documentary evidence. If the proponent will need any other evidence, he must be certain that it is available and accessible. At a minimum, the proponent must be able to explain clearly to the military judge exactly what evidence he will present at trial. Whenever possible, however, he should be ready to actually present the witnesses and evidence at the motion hearing.[121]

In *United States v. Carter*,[122] the defense counsel vigorously argued for the admission of evidence that the victim had a sexual relationship with her female roommate at the time of the alleged rape.[123] The defense counsel intended to use this evidence to show that the victim had a motive to fabricate her claim that the accused raped her. According to the defense theory of the case, the victim had consensual sex with the accused, but claimed that the sex was without her consent when her roommate learned of it. The defense counsel argued that the victim's desire to protect the relationship with her roommate motivated her to fabricate her allegation. When the military judge stated that he was willing to hear the testimony, the defense could not identify a witness who could testify that the purported relationship existed.[124] Practitioners who move to admit evidence under MRE 412 must plan for success by preparing their evidence for trial.

Tip #5—Use Experts

There is no exclusive list of permissible theories of admissibility under MRE 412. Not all evidence will fit squarely into one of the limited categories supported by existing case law. A proponent may need to offer a new theory to fit the available evidence. The theory must not be speculative, however. For example, the proponent may seek to argue that the victim transferred another memory to the accused. Transference, cross-modal memory, and integration are all examples of theories that will require expert testimony to establish their validity with a sufficient degree of certainty and reliability.[125] Experts will be essential to establish the validity of less accepted or more obscure theories and to apply them to the facts of the case.[126] Even widely accepted scientific theories can be difficult for military judges and finders of fact to understand; an articulate expert can give clarity and credibility to the defense argument.

Tip #6—Prepare Alternatives

The proponent should be prepared to give up some ground, if necessary. Most cases need not be all-or-nothing propositions. Accordingly, the proponent should prepare to suggest other alternatives in the event the court does not admit all of the proffered evidence. Getting some of the evidence admitted is preferable to getting none at all. The proponent may be able to formulate a "fallback position" that accomplishes the proponent's main objective without using the evidence of sexual behavior. In the hypothetical case of *V* and *A*, for example, *A*'s counsel wishes to show that *V* had a motive to fabricate her allegation that *A* raped her. If the military judge does not allow *A*'s counsel to present evidence of *V*'s affair with *A*'s friend, he should then ask the military judge to admit evidence of *A*'s accusation about the affair, and *V*'s reaction to *A*'s accusation. If the judge denied this request, *A*'s counsel should clarify the extent to which he could offer evidence of the argument between *A* and *V* and attempt to paint a picture of the emotional intensity of *A*'s anger, without mentioning the reason for the argument. Finally, *A*'s counsel should be alert for the prosecution or a witness to open a door that would allow him to use the evidence for impeachment or rebuttal.[127]

The military judge is responsible for specifying what evidence may be presented and how it may be presented.[128] The judicial process involves risk, and the proponent should be prepared to suggest alternatives for presenting the evidence that is most important to his theory of the case. Practitioners on both sides should prepare to suggest limiting instructions to prevent the trier of fact from misusing the evidence. The practitioner who is prepared to give up some ground is in a better position to hold the ground that is most important to his objective.

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121. Although MRE 412 also applies to Article 32 proceedings, RCM 405 states that the defense "shall be given wide latitude when cross-examining witnesses." MCM, *supra* note 2, R.C.M. 405(h)(1)(A). A prudent practitioner will remember that the Article 32 hearing may be the best opportunity to explore any potential MRE 412 evidence and build a foundation for success at an MRE 412 hearing, or on cross-examination at trial.

122. 47 M.J. 395 (1998)

123. *Id.* at 397.

124. *Id.*

125. *See* United States v. Buenaventura, 45 M.J. 72, 81 (1996) (Crawford, J., dissenting); United States v. Sanchez, 44 M.J. 174 (1996).

126. *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993).

127. *See* MCM, *supra* note 2, MIL. R. EVID. 613.

128. *Id.* MIL. R. EVID. 412(c)(3).

Conclusion

Military Rule of Evidence 412 creates substantial obstacles to the admission of evidence of prior sexual behavior. Courts are reluctant to lift its protections unless the proponent can clearly explain why one of the three listed exceptions applies. Proponents should not expect that crossing the barriers of MRE 412 will be easy, and their opponents should not believe that MRE 412 is impermeable. Both parties may feel lost in a maze of balancing tests, standards, and procedural roadblocks, but successfully arguing an issue under the MRE 412 requires particularly careful attention to the rules, the case law, and the policies behind them. The advocate who understands the law clearly—and who can use this understanding to analyze his argument for the military judge methodically—will have the advantage.

Leader Development: Tactics, Techniques, and Procedures for Working with Union Employees[1]

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Introduction

You have just become the Corps Commander at Fort Snuffy, a large Army installation with 41,000 soldiers and 8000 civilians. As an officer with more than thirty years of military experience and schooling, you are confident in your ability to lead and develop your officers and enlisted personnel; but, are you equally confident that you are ready to lead your civilian employees, 4000 of whom have elected to have a union representative speak on their behalf?

How prepared are the senior leaders of today's Army to lead and work with the fifty-six percent of federal civilian workers who belong to unions?[2] In most cases, the answer depends on whether they understand labor-management relationships and their important role in successful leadership. Army leaders "must be appropriately developed before assuming leadership positions"[3] and "must have a certain level of knowledge to be competent."[4] Part of that knowledge includes developing technical, conceptual, and interpersonal skills that enable them to know their people and how to work with them.[5] To develop these leadership and occupational skills, Army officers and noncommissioned officers progress through a formal leader development system.[6] They receive extensive institutional training at military schools throughout their careers.[7] They advance to operational assignments[8] where they plan and execute complex missions worldwide using the most technologically advanced equipment and technically skilled personnel available. Leaders carefully manage their careers and learn to develop their military subordinates as they advance in rank and responsibility. But do they learn to develop their federal civilian employees, especially those represented by a union?[9]

In 2001, the Army had 114,798 union employees—fifty-six percent of its civilian workforce. Unions also represent fifty-four percent of the civilian employees at the Department of Defense (DOD), seventy-one percent of those in the Department of the Air Force, and fifty-nine percent of those in the Department of the Navy.[10] Most of these employees work in the United States, but union employees are also assigned to Bermuda, Puerto Rico, Panama, Guam, Europe, Japan, South Korea, and Hawaii.[11]

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1. A more detailed version of this article was originally published in the July-August 2002 edition of the *Military Review.*

2. U.S. Office of Personnel Management, Union Recognition in the Federal Government, Statistical Summary, Summary Reports Within Agencies, and Listings Within Agencies of Exclusive Recognitions and Agreements 52 (2002) [hereinafter Statistical Summary].

3. U.S. Dep't of Army, Pam. 350-58, Leader Development for America's Army 1 (13 Oct. 1994) [hereinafter DA Pam. 350-58].

4. U.S. Dep't of Army, Field Manual 22-100, Army Leadership 1-7 (31 Aug. 1999) [hereinafter FM 22-100].

5. *Id.*

6. DA Pam. 350-58, *supra* note 3, at 1.

7. Institutional training is the first step in the Army Leader Development Model and focuses on basic job skills. *Id*. at 3. Officers usually complete a basic course, advanced course, and the Command and General Staff Officer Course. Some officers also attend pre-command courses and senior service schools. Noncommissioned officers (NCOs) attend basic training, advanced individual training, primary leadership development training, basic and advanced NCO courses, and, if selected, the Sergeant's Major Academy. Officers and NCOs also attend a variety of short courses designed to develop further the specific skills needed for their positions. This formal education process does not include detailed instruction in labor-management relations.

8. Operational assignments are the second step in the Army Leader Development Model and provide leaders the opportunity to translate institutional theory into practice in progressively more complex assignments. *Id.*

9. In this article, the term "union employees" connotes a "bargaining unit"—a group of federal civilian employees who have elected a particular union to serve as their exclusive representative under a collective bargaining agreement (CBA). The fact that the union represents these federal employees does not necessarily mean that the employees pay dues to the union or that every employee in the group voted for the union. This article addresses federal civilian employees represented by unions under public sector labor laws. It does not address contractor employees covered by private sector labor laws or foreign nationals covered by unions under their host nation laws.

10. Statistical Summary, *supra* note 2, at 51-53.

As leaders move to assignments at higher levels of command, they inevitably supervise more union employees. The Army's traditional military schools, however, do not train leaders about labor-management relations. Leaders who have not previously dealt with labor issues may gravely underestimate their importance. Although it is possible to learn these rules at operational assignments, this method may become a process of trial-and-error. Mistakes in labor relations often have legal consequences; they can also adversely impact mission accomplishment and the command's relationship with its employees and their elected union representatives. Leader self-development in the area of labor-management relations is clearly superior to trial-and-error.[12] As a minimum, Army leaders must learn the basic rules of working with union employees; they must also insure that the key subordinate leaders learn these rules. Knowing these rules is an important part of becoming "the very best leader you can be; your [civilian employees] deserve nothing less."[13]

This article distills the fundamental rules of labor-management relations into eleven Tactics, Techniques, and Procedures (TTPs). These TTPs are intended to help leaders develop their management skills without suffering the consequences of avoidable mistakes. They discuss such issues as preparing for a successful command, training key subordinates, communicating with union members and representatives, and understanding the consequences of violating the rules.

TTP #1—Know What Decisions Require Prior Notice to the Union

> *When Physical Training (PT) at Fort Snuffy started at 0600 and ended at 0700, soldiers complained that because the Child Care Center did not open until 0600, they could not get to PT on time. The Child Care Center does not have sufficient staff to open earlier. In response, you changed the PT start time to 0630. The next day, the union filed an Unfair Labor Practice (ULP) charge against you for violating the rights of your civilian employees.*

How could labor relations laws limit a commander's exercise of a fundamental command prerogative, such as changing a PT schedule? The answer to this hypothetical question is that the commander may change the schedule, but must first consult with union representatives if the change could affect the working conditions of employees they represent.

Federal labor-management relations law[14] requires agencies to negotiate, or collectively bargain,[15] with civilian employees through their elected union representatives before making changes or policies that affect union employees' working conditions.[16] Some possible examples include rearranging office furniture, canceling an office water cooler or newspaper subscription, or implementing new parking rules.[17] Not every work-related issue is negotiable, however.[18] Congress has spe-

11. *Id.* at 105-231.

12. DA PAM. 350-58, *supra* note 3, at 1. Self-development is the third step in the Army Leader Development Model and is designed to fix weaknesses, reinforce strengths, and stretch and broaden an individual beyond the job or training. *Id.*

13. FM 22-100, *supra* note 4, at 1-1.

14. The rules of the federal labor-management relations process are codified within the Federal Service Labor Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101-7135 (2000).

15. The FSLMRS defines "collective bargaining" as follows:

> [T]he performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Id. § 7103(a)(12).

16. *Id*. § 7117(d)(2). There is no duty to bargain with union employees about issues that affect them only during off-duty hours. Nat'l Ass'n of Gov't Employees, Local R5-168 and Dep't of the Army, Headquarters, 5th Infantry Div. & Fort Polk, La., 19 F.L.R.A. 552 (1985).

17. 5 U.S.C. § 7102(2) (stating that each employee shall have the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees"). The statute defines "conditions of employment" that must be negotiated as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." *Id*. § 7103(a)(14). Conditions of employment do not include prohibited political activities, the classification of any position, or anything prohibited by federal law. *Id*.

18. For example, federal facilities do not have a duty to bargain over proposed changes to conditions of employment that will have a very minor or *de minimis* effect on union employees. Gen. Serv. Admin. and Nat'l Fed'n of Fed. Employees Local 81, 52 F.L.R.A. 1107 (1997) (deciding that an agency did not have to bargain over temporarily relocating a union employee from one building to another); Dep't of Health and Human Serv. and Am. Fed'n of Gov't Employees, Local 1760, 24 F.L.R.A. 403 (1986) (holding that agency did not have to bargain with union employee when it changed the title of her position but did not change her duties).

cifically exempted certain fundamental management responsibilities, such as creating budgets, internal security, hiring, firing, and the assignment of duties to employees, from the negotiation requirements.[19] While the substance of these rights is not negotiable, the parties are obligated to negotiate over the impact of these rights, if requested by the union. Leaders who want to change day-to-day working conditions that will impact on union employees must give union representatives notice of the proposed changes and the opportunity to bargain about them.[20] Once an agency gives notice, the union must make a timely request for bargaining. If not, then the agency may implement the change. If the union asks to bargain over the proposed change, then the agency must delay making the change pending completion of the bargaining process.[21]

The hypothetical commander of Fort Snuffy may have violated the rights of his union employees by unilaterally changing the PT start time without notifying the union representative and giving him the opportunity to bargain over the *impact* this change may have on union employees. Delaying the PT schedule by thirty minutes could affect traffic conditions at the time employees travel to work. They may have to slow down for soldiers running in formation, or face increased traffic congestion immediately after PT. If these employees are late for work, the agency could discipline them. Their union could therefore argue that the PT schedule change impacts their working conditions. This, in turn, would give the union the legal right to prior notice of the change and the opportunity to bargain over its impact. Because the commander did not give the union representative advance notice of this change, the union may now file a ULP charge at the Federal Labor Relations Authority (FLRA).[22]

TTP #2—Understand the ULP Process

Once a union files a ULP charge against a command or agency, there are two ways to resolve it. The first—and best—way to resolve a ULP is for the parties to resolve the charge through informal bargaining or through the grievance procedure in the collective bargaining agreement (CBA).[23] A representative of Fort Snuffy, for example, could meet with the union representative to discuss possible compromises. Among other possible solutions, the parties could agree to temporarily give affected civilians an additional fifteen minutes of administrative time to get to work on PT days, or find a way to alleviate traffic congestion. Regardless of its terms, an amicable compromise and the withdrawal of the ULP charge would save both sides time and money, and would promote positive labor-management relations.

If the parties do not reach an informal agreement, the FLRA will resolve the ULP charge at formal proceedings. Initially, the FLRA's General Counsel will receive the charge at one of its regional offices. The General Counsel (or a regional representative) will investigate the charge, evaluate its merit, and may then prosecute the charge at a hearing before an Administrative Law Judge (ALJ).[24] An attorney from the Office of the FLRA General Counsel will prosecute the case on behalf of the party filing a ULP charge. Counsel for the other party—whether that party is an agency or a union—will also have an opportunity to present witnesses and evidence supporting its side of the case. The ALJ will then decide the matter.[25] Either party may file exceptions to the ALJ's decision with the FLRA, which will consider all the arguments before making a final decision.[26] A final decision by the FLRA binds the parties. In

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19. 5 U.S.C. § 7106(a) states that management officials have the following rights that are not subject to negotiation:

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> (2) in accordance with applicable laws—
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
> (C) with respect to filling positions, to make selections for appointments from—
> (i) among properly ranked and certified candidates for promotion; or
> (ii) any other appropriate source; and
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

Id.

20. *Id*. § 7113(b).

21. *Id*. § 7117(d)(3)(A).

22. The FLRA is the federal agency responsible for interpreting and administering the FSLMRS. It also renders the final decision in all ULP cases. *Id*. § 7104.

23. *See id*. §§ 7116(d), 7121(b), 7122(a)(1).

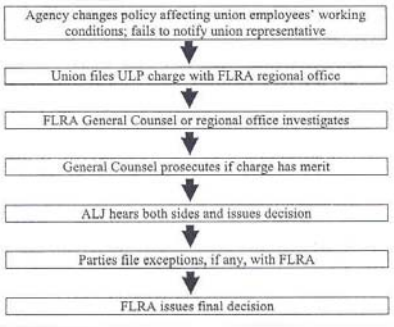
24. *Id*. §§ 7104(f), 7118(a)(1).

25. *Id*. § 7118(a)(6); 5 C.F.R. § 2423.40 (1999).

26. 5 C.F.R. § 2423.40.

very limited circumstances, a party may appeal to a federal district court.[27]

Fig. 1—Simplified Diagram of the ULP Process



TTP #3—Understand the Impasse Resolution Process

What if the Fort Snuffy commander and the union have fully discussed the PT start time, but cannot agree how to reduce its impact on the union employees? If the parties cannot agree, they have reached an impasse.[28] Here, unlike the ULP scenario discussed previously, no one has broken the law by denying the other party the chance to bargain over an issue. Both sides have complied with their duty to bargain; they simply cannot reach an agreement. In a civilian business, the employees could go on strike, but federal employees do not have this option.[29] Instead, the Federal Service Impasses Panel (FSIP) will hear their dispute.[30]

Before going to the FSIP, the parties must first try to settle their impasse through mediation.[31] If the parties reach an agreement, they will sign an agreement or memorandum of understanding concluding their mediation. If they do not reach an agreement, the mediation ends.[32] At this point, the parties may agree to binding arbitration, or either of them may take the dispute directly to the FSIP.[33]

The FSIP, a board within the FLRA designed to help agency and union counterparts resolve their negotiation impasses, hears disputes not resolved through negotiation, mediation, or arbitration.[34] When the parties cannot reach an agreement, the FSIP will take "whatever action is necessary" to resolve the impasse.[35] This can include reviewing written submissions, holding a hearing, or using any other method the FSIP deems appropriate for resolving the dispute. The FSIP then renders a final, binding decision,[36] one that is very rarely subject to review by a federal court.[37] If either the agency or the union fails to comply with the terms of the FSIP's decision, the other party may file a ULP charge with the FLRA,[38] which could lead to an expensive and time-consuming ULP hearing.

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27. 5 U.S.C. § 7123.

28. 24 C.F.R. § 2470.2(3) (1999); U.S. Dep't of Army, Pam. 690-33, Resolving Labor Negotiation Impasses para. 1-2 (1 Apr. 1983) [hereinafter DA Pam. 690-33].

29. 5 U.S.C. § 7116(b)(7)(A).

30. *Id.* § 7119(c); DA Pam. 690-33, *supra* note 28, para. 3-2.

31. 5 U.S.C. § 7119(a), (b); 5 C.F.R. subpt. 2471.6; *see* Office of the Executive Director, Federal Service Impasses Panel, A Guide to Dispute Resolution Procedures Used By the Federal Service Impasses Panel 4-5 (June 2002), *available at* http://www.flra.gov/fsip/fsip_drp.html. The parties typically choose a mediator from the Federal Mediation Conciliation Service (FMCS) as a neutral third party to listen to their positions and help them resolve their dispute. The mediator does not decide the case; the parties do. The mediator merely meets with the parties, together and separately, and allows them to vent their complaints and concerns. Using the information provided, the mediator seeks concessions from each side and relays that information to the opposite side. The mediator has no authority to force either side to concede or agree to any particular language. However, parties participating in the mediation process should remember that mediation is their last chance to have direct input into the outcome of their dispute. If mediation fails, a third party will review each side's position, then direct specific binding contract language to resolve the impasse. Astute mediators focus primarily on the parties' underlying concerns rather than on their specific demands. For example, a mediator chosen to hear the Fort Snuffy PT case would focus on the reason why the PT time change concerns the union, rather than on the time change itself. This tactic gives the parties flexibility in brainstorming possible alternatives that address the union's concerns about employees being on time for work, while still alowing the command to make the change it wants to support soldiers needing childcare during PT.

32. 5 C.F.R. § 2471.10.

33. 5 U.S.C. § 7119(b).

34. *Id.* § 7119(c)(1).

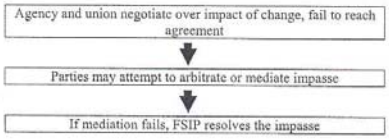
35. *Id.* § 7119(c)(5)(B)(iii).

36. 5 C.F.R. § 2471.10.

37. 5 U.S.C. § 7119(c)(5)(C).

38. *Id.* § 7116(a)(6), (b)(6).

Fig. 2—The Impasse Resolution Process



TTP #4—Read the CBA

Army leaders must read the CBAs affecting their union employees as soon as they arrive at a new unit. The CBA is the document negotiated by command and union representatives that establishes the rules applicable to a bargaining unit.[39] Installations usually designate certain leaders as agency representatives for labor-management relations, but all leaders are bound by the terms of the CBA and must understand their responsibilities towards union employees. At a minimum, leaders and managers should know which employees the CBA covers, which union represents them, and the rules governing the day-to-day working relationship between the command and those employees. For example, the first page of a typical CBA might look like this:

Fig. 3—Cover Page of a Typical CBA

Collective Bargaining Agreement
between
Fort Snuffy and the American Federation of Government Employees (AFGE)
January 1, 2001 to January 1, 2004

Table of Contents:
Applicability . . . 1
Management Rights . . . 2
Official Time . . . 3
Grievance Arbitration Procedures . . . 4
Leave Procedures . . . 5

This example immediately tells the reader that (1) there is a CBA in effect at Fort Snuffy; (2) it covers all clerical employees working on post; and (3) the AFGE represents them.[40] Fort Snuffy must comply with the CBA and work with AFGE on all labor relations issues that affect the workers it represents. The index highlights some of the specific subject areas the CBA covers; some of these reflect statutory requirements, and some are unique to the installation. Leaders can only comply with these terms if they know what the rules are.

These first pages also reveal that the CBA will expire on 1 January 2004. The command should prepare to negotiate a new contract with the union at least six months before then, unless both sides want the existing CBA to roll over unchanged. The installation should identify a team to represent it at the bargaining table, and then schedule and fund training for its members. The team should survey all of the levels of management about specific terms in the CBA that it should target for renegotiation. It should then draft proposed revisions to those terms and staff them through the senior leadership.[41]

On many installations, Army leaders work with several CBAs and unions representing their civilian employees. For example, five different CBAs apply to five different groups of employees working at Fort Bliss, Texas.[42] Each CBA governs the day-to-day working conditions for the specific employees covered by the agreement. All military and civilian leaders working with union employees must understand their installation's CBAs as part of their obligation to treat their employees fairly.

How can leaders get access to their installation's CBAs? First, they can contact their servicing management-employee relations (MER) or labor relations specialist and ask for copies of all applicable agreements.[43] After reading the CBAs, leaders should ask about the history of the relationship with each union. If there is no installation MER specialist, Army leaders can contact the labor counselor[44] at their servicing staff judge advocate office for assistance. Labor counselors for reserve compo-

39. *See id.* § 7102(2).

40. While the CBA states which employees it covers, the parties do not bargain over whom to include in the bargaining unit. When a union first seeks to represent a group of employees, it petitions the FLRA with the relevant information and the FLRA decides which employees constitute an appropriate bargaining unit. 5 C.F.R. pt. 2422.

41. Every CBA must contain negotiated grievance procedures to resolve complaints that stem from violations of the CBA itself. 5 U.S.C. § 7121(a)(1). If the parties do not settle the grievance within command channels, then either the command or the union may invoke binding arbitration to resolve the complaint. *Id.* § 7121(b)(1)(C)(iii). Binding arbitration is the last step in every negotiated grievance procedure. *Id.* Usually, the parties cannot appeal an arbitrator's decision, except when they can show that the decision is contrary to any law, rule, or regulation. *Id.* § 7122(a)(1). The parties may also agree to use the grievance procedures to enforce compliance with federal labor laws instead of ULP procedures. *Id.* § 7116(d). Once a party elects to use the grievance procedures instead of the ULP process, it may not change its mind. *Id.*

42. STATISTICAL SUMMARY, *supra* note 2, at 154-56.

43. An MER or labor relations specialist is a civilian employee assigned to advise Army leaders on labor-management relations issues, prepare civilian personnel documents relating to performance or discipline, and represent the agency in its contacts with union representatives. The MER specialist also maintains copies of the installation CBAs, and is often the best source for historical information regarding labor-management relationships at a facility. Labor relations specialists usually work at the servicing Civilian Personnel Advisory Center (CPAC).

nent units can be found at the servicing Regional Support Command or at Fort McCoy, Wisconsin.[45]

TTP #5—Know the Players

While laws and agreements are the structure of labor-management relationships, the people who participate in the process often determine its success or failure. Army leaders who manage union employees must recognize the potential impact of their actions on current and future labor-management relations. New leaders can gain valuable insight about the labor-management relationships on their installations by inquiring about the history of those relationships. When a command and a union have established a history of trust and mutual respect, a new leader can focus on maintaining that positive relationship. When personality differences and distrust have harmed the relationship, a new leader must gradually rebuild it.

Garrison commanders and other leaders must know which persons are designated representatives for the command and the unions, how effectively they have interacted in the past, and what labor relations issues have affected their interactions. Predecessors, MER specialists, and labor counselors usually know the answers to these questions. When potential labor issues arise, leaders should work through agency representatives rather than contacting union representatives directly. Agency representatives should track any information sent to the unions and any union responses, including requests to bargain over certain issues.

After gathering information about the union and reading the relevant CBAs, new agency representatives should meet their union counterparts and try to make positive impressions early in those relationships. Army leaders must recognize that they will have to work harder at developing successful labor-management relationships than more experienced union representatives who may have been on their installations for years. Agency representatives, however, change frequently, complicating the process of building trust and respect with union representatives. Designating non-union civilians as agency representatives may help stabilize these relationships, but Army leaders should also designate military representatives to demonstrate that the military leadership cares about the union employees' concerns. Open, sincere, and regular communication with union representatives is the best way to build strong working relationships with them.

TTP #6—Insure That Agency Representatives Receive the Training They Need

Leaders have a duty to assess and develop themselves and their organizations.[46] If leaders' knowledge of the labor-management relations process is weak, they must add "self study, reading programs, and civilian education courses"[47] to their personal leadership development programs. Unfortunately, most books about federal labor relations are written for labor lawyers; they are not helpful resources for those who seek to familiarize themselves with the basic elements of the labor relations process. Some better resources include the Web sites of the FLRA, Office of Personnel Management (OPM), and Army civilian personnel offices.[48] Commanders and their subordinate supervisors should also attend labor relations or negotiation courses offered at local installations or at the Army's Civilian Personnel Operations Center Management Agency (CPOCMA).[49] New battalion and brigade level commanders can take federal labor relations classes during the Senior Officer Legal Orientation (SOLO) Course at The U.S. Army Judge Advocate General's School,[50] or during pre-command courses at Fort Leavenworth, Fort Belvoir, and Fort McCoy.

Army leaders must also devote time and resources to training their civilian leaders. Some civilian employees do not understand the federal labor relations system because either a union has never represented them or because they have never worked with union employees. Leaders sometimes forget that "[s]oldiers and civilians of the Active Army and Reserve com-

44. A labor counselor is a judge advocate or civilian attorney responsible for advising senior leaders on the legal aspects of labor-management relations and representing the command or federal facility at third-party labor proceedings (for example, ULP hearings, federal mediations, and grievance procedures). The labor counselor also advises the management team negotiating the CBA for the command or federal facility.

45. Personnel assigned to reserve component units that do not have a labor counselor at the Regional Support Command can contact a labor counselor at Fort McCoy by calling (608) 388-2165. Telephone Interview with Tim Johnson, Labor Counselor, Fort McCoy, Wisconsin (Feb. 6, 2002). The Deputy Chief of Staff for Personnel at the servicing Regional Support Command will have the name and phone number for a specific point of contact at the Fort McCoy Civilian Personnel Advisory Center. Telephone Interview with Kim Meyer, Fort McCoy Civilian Personnel Advisory Center (Feb. 6, 2002).

46. FM 22-100, *supra* note 4, at ix.

47. DA PAM. 350-58, *supra* note 3, at 3.

48. The FLRA Web site, www.flra.gov, contains extensive information about rules and procedures for ULPs, impasses, negotiation, dispute resolution, and other labor relations issues. It also has copies of FLRA decisions. The Office of Personnel Management helps federal government agencies work effectively with federal labor organizations. Its Web site, www.opm.gov/lmr, contains numerous resources for managers and agency representatives. The Army also maintains a labor law Web site at http://cpol.army.mil/index.html.

49. The CPOCMA offers numerous labor relations at Aberdeen Proving Ground, Maryland, each year, including a labor relations course for executives. Course information is available at CPOCMA's Web site, www.cpocma.army.mil/catalog/list-alpha.htm.

ponent are equally essential to the success of our national security."[51] Army leaders should give civilians the same training in labor relations as their military counterparts.

TTP #7—Management Must Stay Neutral About Employee Participation in Unions

> *A union employee at Camp Snuffy, Korea submitted a request to stay in Korea for another overseas tour. The command has granted similar requests in limited circumstances, but denied this one without explanation. Is this a problem?*

Federal law gives civilian employees the absolute right to decide whether they will join unions or participate in union activities, free of coercion or interference with their choices.[52] Leaders may not express their disapproval of a particular union or encourage employees to join a different union.[53] They may not penalize or discriminate against any employee for filing a complaint against an installation or supporting union activity.[54] Assume that the hypothetical civilian employee in Korea was an active member of the union and that the command disapproved of his union activities. If the union could show that the command denied the employee's tour extension for this reason, the FLRA would find that the command interfered with the employee's statutory rights and engaged in a ULP.

Just as management must respect workers' choices to join unions, the unions must also respect workers' choices *not* to join them. Unions may not coerce or discriminate against workers who are covered by a CBA but choose not to pay dues or participate in union activities.[55] Once a group of employees elects a union to represent it, the union has a duty to represent each of them fairly and equally, including employees who do not join the union.[56] If, for example, a union routinely hires lawyers to represent its dues-paying members at ULP hearings, but merely provides union representatives for non-members, such a practice would create the initial appearance of discrimination, and thus, a ULP.[57]

TTP #8—Agencies and Unions Must Bargain in Good Faith

Army representatives must bargain with their union counterparts in good faith, beginning when they negotiate their first CBA, and continuing through any bargaining over changes to the CBA or working conditions.[58] Army leaders must always work through union representatives when discussing changes in working conditions or other issues subject to bargaining; they must not go directly to the employees.[59] For example, an installation that wants to modify the leave policies for union employees may not directly solicit employee preferences about this work-related issue unless it first obtains the union's permission to do so. If the installation sends a survey to union employees without the union's permission and then implements any suggestions it receives, it has bypassed the union, which may file a ULP charge alleging a breach of the duty to bargain in good faith.[60]

Union officials will often need information from the installation where the employees work to represent them properly. They will submit requests to relevant Army offices to obtain this information. A union request of this nature must show a "particularized need" for the information—a link between the information sought and the union's duty to represent the employees.[61] Once the union demonstrates its need, the Army

50. The U.S. Army Judge Advocate General's School offers the SOLO Course five times a year. The SOLO is a one-week course for Army and Marine Corps battalion and brigade commanders, covering the full spectrum of legal issues these commanders may encounter. The course includes electives on labor law subjects such as sexual harassment, labor-management relations, and civilian personnel law. Commanders interested in attending the SOLO course should contact their Army Training Requirements and Resources System (ATRRS) representative.

51. DA PAM. 350-58, *supra* note 3, at 3.

52. 5 U.S.C. § 7116 (2000).

53. *Id*. § 7116(a).

54. U.S. Penitentiary Leavenworth, Kansas and Am. Fed'n of Gov't Employees, 55 F.L.R.A. 1276 (1999).

55. 5 U.S.C. § 7114(a)(1).

56. *Id*. § 7116(b)(1).

57. Nat'l Treasury Employees Union v. Fed. Labor Relations Auth., 800 F.2d 1165 (D.C. Cir. 1986) (holding that the duty of fair representation applies only to matters related to the CBA).

58. 5 U.S.C. § 7114(b).

59. *Id*. §§ 7111(a), 7114(a)(1).

60. *See, e.g.*, Air Force Accounting & Fin. Ctr. and Am. Fed'n of Gov't Employees Local 2040, 42 F.L.R.A. 1226, 1239 (1991).

61. Internal Revenue Serv. and Nat'l Treasury Employees Union, Chapter 66, 50 F.L.R.A. 661 (1995).

office receiving the request has a statutory duty to furnish the information in a timely manner.[62] Army officials cannot tell the union to copy the information itself, charge the union for providing the information, fail to reveal that the information no longer exists, destroy information, or delay its release.[63] If they do, the union may file a ULP charge for failure to furnish information as part of the agency's duty to bargain in good faith.

TTP #9—Respect Employees' Rights to Union Representation

Once civilian employees elect to have a union represent them, federal law creates a right to union representation at two types of work-related meetings. First, the union has the right to have a representative present at any "formal discussion" of a grievance or work-related issue when one or more employees from the bargaining unit are present.[64] The statute does not define the term "formal discussion," but prior ULP cases have helped to define it. The FLRA looks at the totality of the circumstances when deciding whether a meeting was formal; it considers circumstances such as the location of the meeting, its duration, who was present, whether there was an agenda, and whether anyone kept notes of the meeting.[65]

If the FLRA decides that a discussion is formal, its next inquiry will be whether the agency gave the union advance notice and the opportunity to be present.[66] It does not matter whether the employees want union representation at the discussion; the union itself has a right to attend.[67] If the agency did not give the union notice and the opportunity to be present, the FLRA may find that the agency violated the union's representation right and committed a ULP. The FLRA has held that union representatives also have a right to speak at formal discussions.[68] A union representative, however, may not disrupt the discussion, or use it as a forum for irrelevant union business.[69]

Union members also have the right to union representation when agency representatives question them at "investigatory examinations."[70] A meeting qualifies as an investigatory examination when: (1) an Army or DOD official talks to a union employee as part of an investigation; and (2) the employee reasonably believes that the discussion could result in disciplinary action against him.[71] If the employee asks to have a union representative present, the questioning official has three options. First, the official can allow the union representative an opportunity to attend. Second, the official can end the interview and continue the investigation without input from the employee. Third, the agency official can give the employee the option of either answering the questions without a union representative present or having no interview at all.[72] Note that the right to union representation at an investigatory examination belongs to the employee, not the union; the employee must affirmatively invoke it for it to apply.[73] Investigators and agency officials do not have a statutory obligation to tell union employees of their right to have a union representative present before an investigatory examination.[74] Agencies must remind employees of these rights annually, however.[75] Possible methods for notifying employees include mail, e-mail, or mandatory annual meetings.[76]

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62. 5 U.S.C. § 7114(b)(4).

63. Dep't of the Army 90th Reg'l Support Command Little Rock, Ark. and Am. Fed'n of Gov't Employees Local 1017, No. DA-CA-80370, 1999 F.L.R.A. LEXIS 200 (Sept. 17, 1999); Soc. Sec. Admin., Dallas Region and Am. Fed'n of Gov't Employees Local 1336, 51 F.L.R.A. 1219 (1996) (concluding that the agency violated duty to furnish information by destroying requested information and failing to tell the union that it no longer existed); Internal Revenue Serv. and Nat'l Treasury Employees Union, Chapter 66, 50 F.L.R.A. 661 (1995) (finding that a three-month delay in responding to a union's request for information was unreasonable).

64. 5 U.S.C. § 7114(a)(2)(A).

65. Marine Corps Logistics Base, Barstow, Cal. and Am. Fed'n of Gov't Employees Local 1482, 45 F.L.R.A. 1332 (1992).

66. *See* 5 U.S.C. § 7114(a)(2)(A).

67. *Id*. § 7114(a)(2)(A).

68. Dep't of the Army, New Cumberland Army Depot and Am. Fed'n of Gov't Employees Local 2004, 38 F.L.R.A. 671 (1990).

69. Nuclear Regulatory Comm'n and Nat'l Treasury Employees Union, 21 F.L.R.A. 765, 768 (1986).

70. 5 U.S.C. § 7114(a)(2)(B).

71. *Id.*

72. U.S. Dep't of Justice U.S. Penitentiary Leavenworth, Kan. and Am. Fed'n of Gov't Employees Local 919, 46 F.L.R.A. 820 (1992).

73. 5 U.S.C. § 7114(a)(2)(B).

74. Agency officials should carefully review the relevant CBA to determine if it imposes a more liberal notification requirement.

75. 5 U.S.C. § 7114(a)(3).

TTP #10—Understand the Consequences of Violating the Rules

> *A union files a ULP charge against Camp Snuffy, Korea, for denying a union employee's overseas tour extension. The FLRA finds that the command illegally denied the request because of the employee's union activities. What could the FLRA do to remedy this violation?*

If the FLRA finds that an agency or a union has committed a ULP, it can take any remedial action it deems necessary to resolve the case.[77] In most cases, the FLRA will choose from a combination of five remedies. First, when the FLRA finds that a party has committed a ULP, it may order a *public posting* of its decision for a specified period of time.[78] Second, if the agency violated the law, the FLRA decision will identify the violation and what the agency must do to remedy it.[79] Third, the FLRA decision may include a *cease and desist order* requiring the agency to stop a continuing violation immediately.[80] Fourth, the FLRA could issue a *retroactive bargaining order* requiring the agency to go to the bargaining table to discuss a policy change or working condition with union representatives.[81] Finally, if the agency had disciplined an employee unfairly, the FLRA could issue a *status quo ante order* removing any disciplinary action taken and returning the employee to the position he was in before the ULP. Such an order may include a provision entitling the employee to collect back pay or reinstatement.[82]

If, for example, Camp Snuffy, Korea, denied its hypothetical employee's tour extension because of his legally protected union activities, it would have committed a ULP. The FLRA would probably order the unit to post a copy of its findings and decision. If the employee had already returned to the United States, the FLRA could issue a status quo ante order, requiring the Army to fly him back to Korea at government expense and place him in his former job. It could also issue a back pay award for the amount of any wages the employee lost as a result of the command's denial of the tour extension.[83]

Although much of this article has discussed potential violations of the rules by agencies, union representatives have the same duties to bargain and act in good faith. If a union improperly refuses to discuss an issue, refuses to cooperate in the impasse resolution process, or violates a settlement agreement, the agency can file a ULP charge against it.[84] The FLRA will investigate and resolve such a charge using the same procedures that apply to a complaint by a union.

TTP #11—Build and Preserve Good Labor-Management Relations

Violating the rules of good labor-management relations can have legal consequences; it may also have less obvious but equally destructive practical consequences. Army leaders must work hard to build mutual trust and amicable relations with their union counterparts. The conduct of every Army leader who works with a union will contribute to the success or failure of that relationship. Above all, Army leaders must comply with the rules, or risk causing lasting harm to the labor-management relationship. Union employees will carefully observe the command's attitude toward their welfare, their rights, and the rules. Civilian employees—whether union or non-union—may develop negative attitudes toward the command and their work if they perceive that the command is unfair, uninformed, or unconcerned about them.

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76. Agencies should exercise caution when communicating directly with employees; the more prudent course would be to notify union representatives and obtain their consent. *See id*. §§ 7111(a), 7114(a)(1). This is especially true of mandatory meetings, which could qualify as "formal discussions." *See* Marine Corps Logistics Base, Barstow, Cal. and Am. Fed'n of Gov't Employees Local 1482, 45 F.L.R.A. 1332 (1992).

77. 5 U.S.C. § 7105(g)(3).

78. *See, e.g.*, Dep't of the Army, Dir. of Fin. and Accounting, Assistant Sec'y of the Army (Fin. Mgmt.), Indianapolis, Ind. and Am. Fed'n of Gov't Employees Local 1411, 51 F.L.R.A. 1006, 1012 (1996); Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and Am. Fed'n of Gov't Employees, 46 F.L.R.A. 1184, 1190 (1993).

79. 5 U.S.C. § 7118(a)(7).

80. *Id*. § 7118(a)(7)(A).

81. *Id*. § 7118(a)(7)(B).

82. *Id*. § 7118(a)(7)(C).

83. Memorandum from Joe Swerdzewski, General Counsel, U.S. Federal Labor Relations Authority, to Regional Directors, U.S. Federal Labor Relations Authority (May 8, 2000), *at* http://www.flra.gov/gc/ulp_remedy/gc_ulpr2.html.

84. 5 U.S.C. § 7116(b)(5)-(6).

Conclusion

In the field of labor-management relations, leadership begins at the top. Because the Army's traditional military schools do not teach labor-management relations, leaders must learn the process themselves or pay a price in unit efficiency and morale. Reading the TTPs discussed in this article is only a beginning; leaders and their key subordinates must read their installation CBAs, meet their agency and union representatives, and build good relationships with them. They should coordinate with their civilian personnel offices to train their key subordinates in the labor relations process.

Despite leaders' best efforts, representatives of either side may still violate the rules. Leaders must understand and accept the likely consequences of violations. Army leaders must be the command's standard bearers for efficient and amicable labor-management relations. They must understand the labor relations process and strive to abide by its rules. By doing so, they demonstrate that they can lead their union employees with the same degree of competence and caring they show their military personnel.[85]

85. The author would like to thank Mr. David Helmer, Labor Relations Officer, Office of the Assistant Secretary of the Army—Manpower and Reserve Affairs, and LTC Chuck Hernicz, Department of the Army Labor Counselor, Labor and Employment Law Division, for their helpful comments in finalizing this article for publication.

International Law and Terrorism: Some "Qs and As" for Operators

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The events of 11 September 2001 present military lawyers—like the rest of the U.S. armed forces—with a variety of new challenges. The war on terrorism raises complex legal issues, not the least of which is whether it is a "war" at all. As difficult as it may be to determine what law applies to a particular question, it may be even more challenging to translate one's legal analysis into something that commanders and their troops can understand.

This note presents a series of common questions raised by recent events and a suggested answer for each question. These answers are not intended to be comprehensive dissertations on every aspect of each question; they are designed to guide practitioners through the key points of law and help them give clear, understandable responses to non-lawyers. For questions that require further research, this note's format and citations are intended to provide the reader with a useful starting point. It is important to remember, however, that the international and domestic laws that apply to terrorism are changing rapidly. Practitioners, therefore, must stay current with these laws to ensure that their answers follow the most recent authorities and national policy.[1]

1. What Is Terrorism?

The United States Code defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents."[2] The Department of Defense (DOD) defines terrorism more broadly, calling it "the calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."[3]

2. Does the United States Consider Terrorism a Crime or An "Act of War"?

Historically, the United States has treated terrorist acts committed by non-state actors—persons not acting for a nation-state—as crimes to be addressed by domestic law enforcement authorities.[4] The United States is a party to several international treaties that apply to particular forms of terrorism; most of these conventions require the parties to establish criminal jurisdiction over offenders.[5] State-sponsored terrorism is ordinarily considered to be a national security issue to be addressed by the armed forces.[6]

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1. *FindLaw* maintains a comprehensive listing of U.S. laws related to terrorism. *See generally* FindLaw, *Special Coverage: War on Terrorism*, *at* http://news.findlaw.com/legalnews/us/terrorism/laws.html (last visited Nov. 13, 2001).

2. 22 U.S.C. § 2656(d)(1) (2000).

3. Joint Chiefs of Staff, Joint Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms 443 (12 Aug. 2002), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

4. Int'l & Operational Law Dep't, The Judge Advocate General's School, U.S. Army, JA 422, Operational Law Handbook 315 (2003) [hereinafter Operational Law Handbook].

5. *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167. The United States has enacted criminal statutes prohibiting specific terrorist acts as required by the respective treaties. *See, e.g.*, 18 U.S.C. § 1203 (2000) (prohibiting the taking of hostages); 49 U.S.C. § 46502 (2000) (prohibiting air piracy).

6. The White House, National Security Strategy of the United States of America 10-12 (2002) [hereinafter National Security Strategy], *available at* http://www.whitehouse.gov/nsc/nssall.html. Neutral nations have an obligation to prevent belligerents from using their territory for warlike purposes. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 5, 36 Stat. 2310, 2323, 1 Bevans 654, 662. If the "neutral" nation permits belligerents to organize, recruit, or communicate on its territory in violation of these obligations, the aggrieved state has a right to defend itself. U.N. Charter art. 51; *see also* Operational Law Handbook, *supra* note 4, at 4-5.

3. In Terms of International Law, What Does "Act of War" Really Mean?

In the modern era, the phrase "act of war" is more a political term than a legal one.[7] Article 2 of the U.N. Charter has since supplanted the concept of "act of war" by requiring members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[8]

4. Does the U.N. Charter Outlaw All Uses of Force?

No. The U.N. Charter provides two principal exceptions to its prohibition against the use of force: (1) The U.N. Security Council can authorize member nations to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security";[9] and (2) member states may use force in self-defense under Article 51 of the U.N. Charter. Specifically, Article 51 states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . . ."[10]

5. The Security Council Passed a Resolution Condemning the 11 September 2001 Attacks; Does This Resolution Provide Legal Authority to Use Force?

On 12 September 2001, the Security Council adopted a resolution that condemned the attacks, expressed its determination to combat terrorist acts by "all means,"[11] reaffirmed member states' inherent rights of individual and collective self-defense, and expressed its readiness "to take all necessary steps" to respond to the terrorist attacks. It does not, however, explicitly authorize the use of force except in self-defense.[12]

6. On What Legal Theory Is the United States Relying to Justify the Use of Force Against Terrorists?

The United States is relying on its inherent right of self-defense. In its joint resolution authorizing the use of force, Congress noted that the attacks of 11 September 2001 "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens, both at home and abroad, . . . to deter and prevent acts of international terrorism against the United States."[13]

7. Does the Law of Armed Conflict (LOAC) Apply to Counter-Terrorism Operations?

Generally, the LOAC only applies to international armed conflicts between nation-states, and under certain circumstances, organized resistance movements.[14] The LOAC usually does not govern the conduct of military or police personnel in law enforcement operations against non-state actors. If a state sponsors the terrorist group, the LOAC may govern counter-terrorism operations.[15] As a matter of U.S. government policy, however, the U.S. armed forces must "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."[16]

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7. The phrase "act of war" appears in the U.S. Code, but not in the context of a rationale to engage in armed conflict. Specifically, Title 18 defines "act of war" as:

> [A]ny act occurring in the course of—
> (a) declared war;
> (b) armed conflict, whether or not war has been declared, between two or more nations; or
> (c) armed conflict between military forces of any origin.

18 U.S.C. § 2231.

8. U.N. CHARTER art. 2, para. 4.

9. *Id.* art. 42.

10. *Id.* art. 51.

11. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), *available at* http://daccess-ods.un.org/doc/undoc/gen/n01/533/82/pdf/n0153382.pdf.

12. *Id*.

13. Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also* U.N. CHARTER art. 51; NATIONAL SECURITY STRATEGY, *supra* note 6, at 10-12.

14. *See* Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 3118, 75 U.N.T.S. 31, 33; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 3220, 75 U.N.T.S. 85, 88; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 137 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 289 [hereinafter Geneva Convention IV].

8. You Said LOAC Only Applies to International Armed Conflicts Between States. Will Our Response Be Considered Part of an "International Armed Conflict"?

It depends. By definition, the Geneva Conventions apply in cases of "armed conflict which may arise between two or more of the High Contracting Parties."[17] This means that the Conventions, which form a large part of the LOAC, apply mainly when *nations* fight. Whether a specific response to a specific terrorist attack rises to the level of nations fighting depends on the factual circumstances surrounding the attackers, the attack, and the response. It may also depend upon the level of involvement of any harboring or protecting state.[18] If the conflict does not rise to the level of an "international armed conflict," then only a small portion of the Geneva Conventions would legally apply.[19] In such a case, the United States could not, for example, *legally* demand that any of its soldiers captured during counter-terrorist operations have prisoner of war (POW) status.[20]

9. Is It Legal for the United States to Use Military Force Against Non-State Terrorists in Another State in Self-Defense?

Yes. As a general rule, states should only employ military force as a last resort, when law enforcement efforts are ineffective.[21] Ordinarily, U.S. law enforcement and judicial authorities will respond to terrorist acts in the United States first.[22] Most experts agree, however, that all states "must be able to exercise their inherent rights to defend themselves against all actors—non-state and state alike."[23]

10. Is It Legal to Use Military Force Against a State That Harbors Non-State Terrorists?

Yes, under certain circumstances. When non-state actor terrorists merely use a state's territory as a "safe haven," and the host state is unable to prevent the terrorists from operating there, a victim state is entitled to use force against the *non-state actors* in self-defense, although this will violate the sovereignty of the host nation.[24] When the host nation does more than merely acquiesce to the terrorists' presence and conspires with them, or aids or abets them, the actions of the terrorists become imputed to the state itself.[25] In such "state sponsorship" situations, the victim state may use such force as is necessary against the host nation itself to ensure that the host nation no longer presents a threat of continued facilitation or support of terrorist operations.[26]

11. Is It Legal to Use Force Against Countries That Help, But Do Not Harbor, Terrorists?

Possibly. A state's right to act in anticipatory self-defense may warrant the use of force when necessary to stop future attacks.[27] The lawfulness of the state's action depends largely upon the nature and magnitude of the state support given to the terrorists.[28]

12. What Exactly Is Permitted Under the Concept of Self-Defense?

The U.S. military's Standing Rules of Engagement (SROE)[29] say that the use of force in self-defense "must be reasonable in intensity, duration, and magnitude to the perceived

15. Although the U.S. military position is to apply the principles of the law of war in international armed conflicts and military operations other than war, CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4(a) (12 Aug. 1996) [hereinafter CJCSI 5810.01], the United States objects to certain provisions of the 1977 Geneva Protocols that appear to give additional protections to non-state actors who do not carry arms openly or wear a fixed and distinctive insignia. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 11; *see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, arts. 43, 44, 16 I.L.M. 1391, 1413, 1125 U.N.T.S. 3, 23 [hereinafter Protocol I].

16. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.3.1. (9 Dec. 1998).

17. *See* Geneva Convention III, *supra* note 14, art. 2.

18. *See id*.; OPERATIONAL LAW HANDBOOK, *supra* note 4, at 315.

19. *See* Geneva Convention III, *supra* note 14, art. 3.

20. In such an event, the U.S. government would likely call for the immediate repatriation of the service members and demand that their captors afford them all of the protections to which lawful combatants are entitled. E-mail from Colonel Thomas Tudor, Chief, International and Operations Law Division, U.S. Air Force, to Colonel Charles J. Dunlap, Jr., Staff Judge Advocate, Air Education and Training Command (Oct. 9, 2001) (on file with author).

21. *See* RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED TERRORISM 212 (1989).

22. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 315, 317-18.

23. Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37, 39 (2000).

24. *See generally* U.N. CHARTER art. 51. One expert concludes that "[m]erely providing safe haven for international terrorists after they have committed their acts" is not an "armed attack" as that term is used in the U.N. Charter. John F. Murphy, *The Control of International Terrorism*, *in* NATIONAL SECURITY LAW 465 (John Norton Moore, Fredrick S. Tipton, & Robert F. Turner, eds., 1990).

or demonstrated threat based on all the facts known to the commander at the time."[30] Self-defense also includes the "authority to pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent."[31] International law does not limit actions in self-defense to only those necessary to counter immediate, tactical dangers; rather, it is permissible to continue the use of force on a wider basis until the aggressor no longer constitutes a threat.[32]

13. Do We Have to Wait Until We Are Under Attack Again Before We Act in Self-Defense?

No. The United States and other (but not all) countries believe that *anticipatory* self-defense is inherent in the basic right of self-defense.[33] When a potential adversary exhibits hostile intent, the SROE permits U.S. forces to act in anticipatory self-defense.[34] The White House has made it clear that anticipatory self-defense is part of the U.S. national security strategy:

> We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction

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25. Richard J. Erickson explained the limits of a state's imputed responsibility when he wrote:

> As an abstract entity, the state becomes liable under international law through the acts or omissions of its officials and agents. These acts or omissions are imputed to the state. The acts of the head of government are always imputable to the state, as are the acts of ministers within the scope of their ministries. The same is true of all other officials and agents, irrespective of governmental level. This includes military and police authorities. Additionally, acts or omissions are imputed to the state even if beyond the scope of the legal power of the official and even if opposite to that directed so long as they are not repudiated by governmental authority and the wrongdoer is not appropriately disciplined or punished.

ERICKSON, *supra* note 21, at 99. There is precedent in international law—for example, the Nuremberg trials—for applying the criminal law concepts of principals and conspiracy to war crimes. The Charter of the International Military Tribunal provided that:

> Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 280, 286-88 [hereinafter Charter of the International Tribunal].

26. *See* U.N. CHARTER art. 51; L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 9 (Manchester Univ. Press 1993).

27. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 4-5; NATIONAL SECURITY STRATEGY, *supra* note 6, at 10-12.

28. *See* Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog Of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 541-49 (2002) (arguing that the term "armed attack," as used in Article 51, should include the provision of arms, supplies, or safe haven to terrorists).

29. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter CJCSI 3121.01A].

30. *Id.* para. 5f.

31. *Id.* para. 8b.

32. GREEN, *supra* note 26, at 9. As the author explained:

> While the charter restricts the right to resort to measures of a warlike character to those required by self-defense, its provisions only relate to the *jus ad bellum.* Once a conflict has begun, the limitations of Article 51 become irrelevant. This means there is no obligation upon a party resorting to war in self-defense to limit his activities to those essential to his self-defense. Thus, if an aggressor has invaded his territory and been expelled, it does not mean that the victim of the aggression has to cease his operations once his own territory has been liberated. He may continue to take advantage of the *jus in bello*, including the principle of proportionality, until he is satisfied that the aggressor is defeated and no longer constitutes a threat.

Id.

33. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 4-5. The accepted customary law rule of anticipatory self-defense has its origin in an 1842 incident in which the British Navy caught the American steamship *The Caroline* ferrying rebel forces and supplies into Canada. The British Navy attacked the ship, burned it, and sent it over Niagara Falls. After the indicent, Secretary of State Daniel Webster exchanged notes with the British diplomat Lord Ashburton. They ultimately agreed that customary international law allows for the use of force against an imminent threat if such use constitutes "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." This restrictive definition of anticipatory self-defense is still widely accepted as customary international law, despite its obvious limitations in a modern era of intercontinental missiles, long-range supersonic aircraft, nuclear submarines, cruise missiles, and biological weapons. TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW 139-44 (1996).

against the United States and our allies and friends. . . . It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.[35]

14. Is "Retaliation" Considered Self-Defense?

No. Retaliation, as that word is used in the law, is not permitted under international or domestic law.[36] Retaliation is *lex taliones*, that is, the "infliction upon a wrongdoer of the same injury which he has caused another."[37] An aggrieved state cannot legitimately use force to inflict punishment or retribution for its own sake; force is only lawful to the extent needed to restore peace, and where possible, bring criminals to justice.[38] It is the responsibility of the appropriate courts and tribunals to determine the appropriate punishment for criminals, including war criminals. Military forces may not inflict summary punishment.[39]

The Secretary of Defense recognized the important distinction between retaliation and self-defense in a 13 September 2001 television interview. When asked about the possible use of force to retaliate against terrorists, he corrected the interviewer and stated, "I don't think of it as retaliation. I don't think of it as punishment. I think of it as self-defense."[40] Likewise, in an interview on 20 October 2001, the Chairman of the Joint Chiefs of Staff stated that "[t]he United States isn't into retribution."[41]

15. What Is a "Reprisal"?

In legal terms, a "reprisal" is the legal use of an otherwise unlawful act in response to an illegal act by the enemy.[42] For example, if an enemy uses an illegal weapon, the doctrine of reprisal would permit the use of weapons that would "otherwise be unlawful in order to compel the enemy to cease its prior violation."[43] Nations may only carry out reprisals during international armed conflicts; there is no such thing as a legitimate

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34. CJCSI 3121.01A, *supra* note 29, para. 5(h). The SROE defines "hostile intent" as follows:

> The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [U.S. government] property.

Id.

35. NATIONAL SECURITY STRATEGY, *supra* note 6, at 12.

36. *See* U.N. CHARTER arts. 2, 51. *See generally* CJCSI 3121.01A, *supra* note 29; Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155 (2001).

37. BLACK'S LAW DICTIONARY 1058 (4th ed. 1968).

38. *See* OPERATIONAL LAW HANDBOOK, *supra* note 4, at 8-10; ERICKSON, *supra* note 21, at 211 ("If [force is used] in self-defense, then the action must be protective, not punitive.").

39. Protocol I, *supra* note 15, art. 85.4(e). The United States is not a party to Protocol I; however, it considers this rule to be a binding part of customary international law. OPERATIONAL LAW HANDBOOK, *supra* note 4, at 11.

40. *Larry King Live* (CNN television broadcast, Sept. 13, 2001). The full transcript of that portion of the interview is as follows:

> KING: And how—just a couple more moments—how do we define retaliation? Do we retaliate through legal means? Do we retaliate through an armed force? What is the definition in your head of retaliation?
>
> RUMSFELD: Larry, I don't think of it as retaliation. I don't think of it as punishment. I think of it as self-defense. The United States of America has every right to defend itself, and that is what it is about. It is consciously saying that countries and entities and people who actively oppose the United States and damage our interests by acts of violence, acts of war, are our enemies, and they are people and organizations and entities and states that we have every right to defend ourselves against.

Id.

41. General Richard B. Meyers, Pentagon Briefing on the Use of U.S. Army Special Forces in Afghanistan (Oct. 20, 2001), *at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/myers_102001.html.

42. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF ARMED CONFLICT para. 497 (18 July 1956).

43. U.S. DEP'T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 10-7 (19 Nov. 1976).

reprisal against a non-state actor criminal.[44] Protocol I to the Geneva Conventions forbids reprisals against civilians and civilian property.[45]

The United States is *not* a party to Protocol I and does not consider its proscriptions against reprisals directed at civilians to be part of customary international law. The United States *is* a party to the Geneva Convention on Civilians,[46] and follows its provisions prohibiting reprisals against *protected* persons and their property.[47] In general, "protected persons" are those "in the hands" of the opposing nation's forces.[48] According to this view, if a nation attacks civilian targets *in another nation* while acting according to the law of reprisals, the reprisal would be lawful; it would violate Protocol I (which the United States does not recognize) but not the Geneva Convention itself. Civilians in the targeted areas would not be considered "protection persons" because they are not "in the hands" of the nation carrying out the reprisal.

16. May a State Use a Disproportionate Response in a Counter-Terrorism Operation?

No. To understand the legality of a disproportionate response, one must first define the precise context in which this term is used. There is no prohibition against the use of overwhelming force to achieve a legitimate military objective or a bona fide law enforcement purpose. The concept of proportionality, however, which is part of the LOAC, prohibits attacks where the incidental loss of civilian life or property "would be excessive in relation to the concrete and direct military advantage anticipated."[49] The concept of proportionality is applied differently in cases of self-defense.[50] The responding government's forces must carry out their attacks in a manner that discriminates between legitimate targets and civilians or protected property.[51]

17. Can a Government Assassinate Terrorists As Part of a Military Operation?

No, but not every killing of an individual is an "assassination" under international or domestic law. Under Executive Order 12,333, no U.S. government employee or service member may "engage in, or conspire to engage in, assassination."[52] "Assassination," however, ordinarily contemplates some measure of treachery or perfidy. For example, killing someone protected by a flag of truce is unlawful assassination. Absent treachery or perfidy, the prohibition against assassination does not prohibit the killing of individuals when necessary in self-defense; it also permits the killing of individual leaders who are directing or controlling armed forces in armed combat.[53]

18. If U.S. Military Forces Capture a Terrorist, Is He a POW?

Probably not. The Geneva Convention protections for prisoners of war only apply to "armed conflict which may arise between two or more of the High Contracting Parties."[54] Even if one assumes that such circumstances exist, the captive must usually be a member of the armed forces of a party to the Convention.[55] Even a member of the armed forces of a party to the Convention—who is entitled to POW status if captured—may be tried for crimes, including war crimes, if he commits an unlawful act.[56] A non-state actor will almost never qualify for POW status, however, except in very rare circumstances. A member of an "organized resistance movement," for example, may be entitled to POW status if the resistance movement's

44. *See generally* GEOFFREY BEST, WAR AND LAW SINCE 1945, at 311-18 (1994).

45. Protocol I, *supra* note 15, arts. 51.1 - 52.1.

46. Geneva Convention IV, *supra* note 14.

47. *Id*. art. 33.

48. *Id*. art. 4.

49. Protocol I, *supra* note 15, art. 51.5(b).

50. During an armed conflict, the rule of proportionality only applies in the context of collateral damage analysis, the balancing of an attack's expected military advantage against the foreseeable non-combatant injury or death it could cause. Protocol I, *supra* note 15, art. 51(5)(b). When a nation acts strictly in self-defense, however, outside of any ongoing conflict, proportionality restricts the use of force to the amount, type, and duration "necessary to decisively counter a hostile act or demonstrated hostile intent and ensure the continued safety of US forces." CJCSI 3121.01A, *supra* note 29, enclosure A, para. 7(c). In the War on Terror, therefore, the proportionality of a particular strike may depend on whether U.S. forces take the action in self-defense, or as part of the ongoing campaign against al Qaeda.

51. Protocol I, *supra* note 15, art. 51.5(b).

52. Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

53. *Id*.; *see generally* Hon. Caspar W. Weinberger, *When Can We Target the Leaders?*, 29 STRATEGIC REV. 21 (2001).

54. Geneva Convention III, *supra* note 14, art 2.

55. *Id*. art. 4(A)(1).

members: (1) are commanded by a person responsible for his subordinates; (2) wear a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war.[57] In an international armed conflict, persons whose status is unknown are entitled to be treated as POWs until the question of their status is resolved.[58]

19. If a Terrorist Captures a U.S. Military Member, Is He a POW?

It depends. If captured by a *state* actor—such as a member of the armed forces of a hostile country—during an international armed conflict, the military member is entitled to POW status.[59] There are exceptions to this rule; for example, if the individual was acting as a spy or a saboteur in hostile territory, he could not claim POW status.[60] If a U.S. service member is captured by a *non*-state actor, such as a terrorist or other criminal, the U.S. military member is technically not a POW but simply a crime victim—a hostage.[61] International law permits an enemy power to hold POWs until the end of hostilities, but the criminal captors of a U.S. soldier are required to immediately release him.[62]

20. Does the Code of Conduct Apply in Situations Involving Terrorist Captors?

Yes, but special considerations apply. *Department of Defense Directive 1300.7, Training and Education Measures Necessary to Support the Code of Conduct*, contains explicit guidance on how the Code of Conduct applies during captivity by terrorists.[63]

21. What Is the Scope of the President's Authority to Counter Terrorism?

As Commander-in-Chief, the President has extensive power to act in the interest of national defense in emergency situations.[64] This power is not unlimited, however. For example, during the Korean War, President Truman ordered the government to take control of the steel industry in anticipation of a strike that he feared would impede national security. The Supreme Court set aside the order, holding that the President's emergency powers are limited to those set forth in the Constitution or provided by statute.[65] After the terrorist attacks of 11 September 2001, Congress granted the President broad war powers to act against terrorists, stating

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. [66]

22. Must Congress Declare War Before the United States May Take Action Against Terrorists?

No. The President, as Commander-in-Chief, has the constitutional authority[67] and specific congressional authorization to act in the nation's defense,[68] even without a formal declaration of war. In 1973, Congress passed the War Powers Resolution,[69] which requires the President to report to Congress immediately

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56. *Id*. art. 82.

57. *Id*. art. 4(A)(2).

58. *Id*. art. 5.

59. *Id*. arts. 2, 4.

60. Protocol I, *supra* note 15, art. 46.

61. *See* H. Wayne Elliott, *Hostages or Prisoners of War: War Crimes at Dinner*, 149 MIL. L. REV. 241 (1995).

62. Geneva Convention III, *supra* note 14, art. 4.

63. U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT encl. 3, para. K (23 Dec. 1988).

64. *See* Donald L. Robinson, *Presidential Emergency Powers*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 665 (Kermit L. Hall ed., 1992).

65. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

66. Pub. L. No. 107-40, 115 Stat. 224 (2001).

67. U.S. CONST. art. II, § 2, cl. 1.

68. 115 Stat. at 224.

when U.S. forces become involved in hostilities or are deployed overseas equipped for combat. Within sixty days of reporting to Congress, the President must either (1) remove the forces; (2) extend the deadline by a single period of thirty days; or (3) obtain congressional approval for continuing the operation, such as through a declaration of war or congressional resolution.[70] Although presidents have generally complied with the War Powers Resolution, some academics question its constitutionality.[71]

23. What Are a Commander's Obligations Under the LOAC?

Commanders must know the LOAC, ensure that their forces are properly trained in it, observe it in practice, and promptly report LOAC violations. Commanders who order war crimes, or who fail to prevent war crimes they know or *should have* known would occur, may be criminally liable for them.[72]

The case of General Tomoyuki Yamashita illustrates the responsibilities of commanders for the actions of their subordinates. Yamashita commanded Japanese forces in the Philippines during the Second World War. Shortly before the end of the war, soldiers and sailors under his command killed thousands of Filipino civilians. Despite the absence of any evidence that General Yamashita had ordered or committed any atrocities, a military tribunal tried and convicted him for these killings after the war.[73] The Supreme Court affirmed the findings and death sentence, concluding that

> [t]he law of war imposes on any . . . commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war . . . . [H]e may be charged with personal responsibility for his failure to take such measures when violations result.[74]

24. How Can Military Members Be Certain That Their Orders in Counter-Terrorism Operations Are Lawful?

Military members are only obligated to obey *lawful* orders. Blind obedience of a superior's orders is not a defense.[75] Members of the U.S. armed forces, however, may *infer* that all orders are lawful, however, unless they are patently illegal.[76] The U.S. military rarely, if ever, executes an operation plan without first obtaining a legal review of that plan by a trained legal advisor. DOD policy requires that "all operation plans . . . concept plans, rules of engagement, execute orders, deployment orders, policies, and directives [be] reviewed by the command legal advisor to ensure compliance with domestic and international law."[77] Furthermore, Protocol I of the Geneva Conventions requires legal advisors to be available at all levels of command.[78] Department of Defense policy also incorporates this requirement.[79]

Conclusion

The War on Terrorism is unlike any other war in American history. Terrorists do not wear uniforms, carry weapons openly, fight as organized units, or obey the most fundamental principles of the LOAC. This new war combines the elements of an international armed conflict, a global guerrilla war, and an international criminal investigation. Fortunately, the U.S. government and the international community have created legal frameworks for each of these levels of hostilities. Practitioners who can understand the fundamental principles of the LOAC that apply to a particular conflict—and who can interpret them for commanders—will become vital assets in the War on Terrorism.

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69. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555.

70. *Id*. at 555.

71. *See, e.g.*, Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1 (1999).

72. CJCSI 5810.01, *supra* note 15, para. 5(c).

73. *In re* Yamashita, 327 U.S. 1 (1946).

74. *Id*. at 14. *See also* W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

75. "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires." Charter of the International Tribunal, *supra* note 25, art. 8; *see also* OPERATIONAL LAW HANDBOOK, *supra* note 4, at 30.

76. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14c(2)(a)(i) (2002). *But see* MARK J. OSIEL, OBEYING ORDERS (1999) (arguing for a new norm that would require deliberative judgment in lieu of a presumption of lawfulness).

77. CJCSI 5810.01, *supra* note 15, para. 6(c)(5).

78. Protocol I, *supra* note 15, art. 82.

79. CJCSI 5810.01, *supra* note 15, para. 5(b).

The Case for Court-Martial Jurisdiction Over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice

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Introduction

Article 2(a)(10) of the Uniform Code of Military Justice (UCMJ) provides for court-martial jurisdiction "[i]n time of war, [over] persons serving with or accompanying [a U.S.] armed force in the field."[80] For centuries, armies have exercised court-martial jurisdiction over civilians accompanying them in the field.[81] During the nineteenth century, Article 63 of The Articles of War claimed military jurisdiction over "[all] retainers to the camp,[82] and all persons serving with the armies of the United States in the field."[83] This provision, "with some slight modifications, [came] down from our original code of 1775, which derived it from a corresponding British article."[84] In 1916, Congress revised The Articles of War, extending jurisdiction to include persons "accompanying" the armies of the United States, "both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."[85] The revised statute allowed court-martial jurisdiction over "retainers" and "persons accompanying or serving with the armed forces in the field."[86]

In November 2000, President Clinton signed the Military Extraterritorial Jurisdiction Act (MEJA),[87] which asserts the jurisdiction of federal civilian courts over civilians accompanying the armed forces overseas. The new statutes, which borrow the relevant language of Article 2(a)(10), UCMJ,[88] specifically disclaim any intent to deprive courts-martial of concurrent jurisdiction.[89] Congress and the President's care to avoid eviscerating Article 2(a)(10) suggests that they intended to preserve its validity. The question remains, however, whether the judicial branch would view an exercise of Article 2(a)(10) jurisdiction today with equal favor.

Article 2(a)(10) clearly has deep roots. The more pertinent question is whether it would survive scrutiny by the Supreme Court if courts-martial attempted to exercise jurisdiction over civilians today, particularly U.S. citizens on U.S. soil. Is Article 2(a)(10) merely a defunct relic of a bygone era, or one that applies only during a declared war? This note will argue that Supreme Court precedent limits—but does not prohibit—the exercise of court-martial jurisdiction over civilians under Arti-

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80. UCMJ art. 2(a)(10) (2000) (codified at 10 U.S.C. § 802(a)(10) (2000)). Article 2(a)(11) provides for court-martial jurisdiction over "persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands," even during peacetime, except as limited by international law or treaties. *Id.* rt. 2(a)(11). Because of the mutual applicability of court decisions addressing Article 2(a)(10) and Article 2(a)(11), this article cites several decisions addressing Article 2(a)(11) jurisdiction.

81. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 98 (2d ed., 1920 reprint).

82. The term "retainers to the camp" encompassed "[o]fficers' servants" and "[c]amp-followers attending the army but not in the public service." *Id.*

83. *Id.* at 99-100.

84. *Id.* at 98.

85. Act of August 29, 1916, ch. 418, § 3, 39 Stat. 650, 651.

86. *Id.*; Hines v. Mikell, 259 F. 28, 34 (4th Cir. 1919).

87. 18 U.S.C. §§ 3261-3267 (2000).

88. *Id.* § 3261(a). This provision states as follows:

> (a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
> (1) while employed by or accompanying the Armed Forces outside the United States; or
> (2) while a member of the Armed Forces subject to . . . the Uniform Code of Military Justice,
> shall be punished as provided for that offense.

Id.

89. *Id.* § 3261(c). This subsection states:

> (c) Nothing in this chapter . . . may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

Id. The act also prohibits federal civilian courts from trying service members unless and until they are no longer subject to the UCMJ, or when they are charged with committing offenses with civilians. *Id.* § 3261(d).

cle 2(a)(10). It also argues that courts-martial should have Article 2(a)(10) jurisdiction over civilians, even on U.S. soil and in the absence of a declared war.

The Constitutionality of Article 2(a)(10)

Supreme Court precedent strictly limits the exercise of military jurisdiction over civilians when civilian courts are available as an alternative forum.[90] In *Ex parte Milligan*,[91] the Court held that a military commission lacked jurisdiction to try a U.S. citizen on U.S. soil when a civilian court could have tried the defendant, even though the defendant had conspired to assist the Confederate Army. In *Duncan v. Kahanamoku*,[92] the Court refused to permit the wartime military trial of civilians under martial law in Hawaii. In the face of the government's assertion that martial law justified trial by military tribunal, the Court responded that the civilian courts could have functioned and that they were unjustifiably closed.[93] In *United States ex rel. Toth v. Quarles*,[94] the Court held that courts-martial could not exercise jurisdiction over civilians after their discharge for crimes committed during their military service. The major exception to the Court's strong preference for trying civilians in civilian courts applies to civilians who act as enemy belligerents.[95]

Following the limitations of this precedent, the first versions of the UCMJ incorporated a more limited application of military jurisdiction to civilians in Article 2(10), now known as Article 2(a)(10). Article 2(10) applied only to "persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States."[96] The Supreme Court, however, continued to limit the jurisdiction of courts-martial over civilians, even under these limited circumstances. In *Reid v. Covert*,[97] the Court held that the court-martial of the wife of a service member stationed overseas in peacetime was unconstitutional, because a court-martial could not guarantee fundamental rights, including "indictment by grand jury, jury trial, and the other protections contained in . . . the Fifth, Sixth, and Eighth Amendments."[98] The Court reasoned that American civilians do not give up these fundamental rights simply because they accompany their military family members overseas.[99] Other Supreme Court holdings apply these same constitutional protections to non-U.S. citizens on U.S. soil.[100]

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90. Courts have cited the absence of operating civilian courts to justify the exercise of military jurisdiction over U.S. citizens. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341 (1952) (upholding the jurisdiction of a military commission, convened in the American Zone of Occupied Germany, to prosecute a U.S citizen who murdered her husband, a member of the U.S. military, in their government quarters in Germany).

91. 71 U.S. (4 Wall.) 2 (1866).

92. 327 U.S. 304 (1946).

93. *Id.* at 313-14.

94. 350 U.S. 11 (1955).

95. *See Ex parte* Quirin, 317 U.S. 1 (1942). In *Quirin*, the defendant was a Nazi saboteur and U.S. citizen who was caught and convicted by a military tribunal. The Court held that the tribunal had jurisdiction to try the defendant, stating:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention.

Id. at 37.

96. UCMJ art. 2(11) (1951). Article 2(11) was later redesignated Article 2(a)(11). *See* UCMJ art. 2(a)(11) (2000).

97. 354 U.S. 1 (1957).

98. *Id.* at 32. *See also* McElroy v. Guagliardo, 361 U.S. 281 (1960) (holding that Article 2(11) jurisdiction over civilian employees of the armed forces stationed overseas during peacetime was unconstitutional); Grisham v. Hagan, 361 U.S. 278 (1960) (holding that court-martial of government employee stationed overseas during peacetime was unconstitutional); Kinsella v. Singleton, 361 U.S. 234 (1960) (holding that court-martial of civilian family member overseas during peacetime was unconstitutional).

99. *Reid*, 354 U.S. at 5.

100. *See* Zadvydas v. Davis, 533 U.S. 678, 694 (2001) ("'All persons [U.S. citizens or aliens] within the territory of the United States are entitled to the protection' of the Constitution." (quoting Wong Wing v. United States, 163 U.S. 228, 238 (1896))); *accord* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within its borders." (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).

Nevertheless, the Court left room for court-martial jurisdiction over civilians accompanying the armed forces, within certain strict limits. In *Reid*, the Supreme Court was careful to distinguish between its preclusion of court-martial jurisdiction over citizens during peacetime and court-martial jurisdiction under Article 2(10), the predecessor of Article 2(a)(10), during wartime. The Court opined, "We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.'"[101] In *McElroy v. Guagliardo*,[102] which concerned two overseas peacetime courts-martial of civilians under Article 2(11), the Supreme Court was also careful not to tread on Article 2(10). The Court commented that cases "based on the legal concept of the troops being 'in the field,' [were] inapposite" to evaluating the propriety of court-martial jurisdiction under Article 2(11).[103]

Military courts have further limited court-martial jurisdiction over civilians in the field, though they have not held that Article 2(a)(10) would be invalid during a declared war. In *United States v. Averette*,[104] the appellant, a civilian contractor stationed at Long Binh, Vietnam, was convicted of larceny before a court-martial. He appealed the conviction, challenging the constitutionality of the Army's exercise of Article 2(a)(10) jurisdiction over him.[105] The Court of Military Appeals (COMA) strictly construed the definition of "in time of war" and held that the court-martial lacked jurisdiction because Congress never formally declared war in Vietnam. The court, however, was careful to state that the Constitution did not necessarily preclude the trial of civilians under Article 2(a)(10).[106] Nearly twenty years later, in *Willenbring v. Neurauter*,[107] the Court of Appeals of the Armed Forces (CAAF) discussed the impact of cases holding that the Constitution forbade the exercise of Article 2(a)(11) jurisdiction over civilians. The CAAF reasoned that, in those cases, "the Supreme Court indicated that the same considerations would not necessarily preclude exercise of court-martial jurisdiction over civilians accompanying the armed forces in time of war."[108]

Even as courts have strictly limited the reach of courts-martial over civilians, they have refused to contest Congress's decision to authorize court-martial jurisdiction over civilians serving with the armed forces in the field during wartime. This suggests that, despite the courts' strict interpretations, jurisdiction under Article 2(a)(10) remains viable during a declared war.

Prerequisites to the Exercise of Article 2(a)(10) Jurisdiction

There are three prerequisites to the exercise of court-martial jurisdiction under Article 2(a)(10): (1) the trial must occur in time of war; (2) the accused must be serving with or accompanying an armed force; and (3) the accused must be in the field.[109]

1. "In Time of War" Requirement

Courts-martial may only try civilians under Article 2(a)(10) in time of war.[110] The 1970 *Averette* case held that "in time of war" means a war formally declared by Congress,[111] although the court recognized "that the fighting in Vietnam qualifies as a war as that word is generally used and understood."[112] Indeed, the court recognized that it had previously interpreted the term "in time of war" to include the fighting in Vietnam when applied to the question of tolling the statute of limitations under Article 43(a) of the UCMJ.[113] The court concluded, however, that its recognition that a war was taking place in Vietnam

101. *Reid*, 354 U.S. at 34 n.61.

102. 361 U.S. 281 (1960).

103. *Id.* at 284-85.

104. 41 C.M.R. 363 (C.M.A. 1970).

105. *Id.* at 363.

106. *Id*. at 364-66.

107. 48 M.J. 152 (1998).

108. *Id.* at 157 n.4.

109. UCMJ art. 2(a)(10) (2000).

110. *Id*.

111. *Averette*, 41 C.M.R. at 365-66.

112. *Id.* at 365.

113. *Id.* (citing United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968)).

"should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction."[114]

One month after *Averette*, the COMA decided *Zamora v. Woodson*,[115] which overturned the conviction of a civilian tried pursuant to Article 2(10). *Zamora* is the most recent case of a civilian appealing the exercise of court-martial jurisdiction based on the civilian's status as a person serving with or accompanying the armed forces during war.[116] Thus, *Averette*'s definition of "in time of war"—that is, during a congressionally declared war—stands as the threshold requirement for the assertion of Article 2(a)(10) jurisdiction. There are good arguments for challenging this definition today, however.

First, *Averette* is the view of a narrow majority, written when memories of declared wars were still fresh, and with a strong dissent by Chief Justice Quinn.[117] Today, congressionally declared wars are a distant memory from another era. The impracticality of this strict definition of "in time of war" alone could support a decision by the CAAF to hold that Article 2(a)(10) also applies to undeclared wars that fit the term's plain meaning.

Second, *Averette* was poorly reasoned. Contrast *Averette*, interpreting "in time of war" under Article 2(a)(10) of the UCMJ, with *United States v. Anderson*,[118] interpreting Article 43 of the UCMJ. In *Anderson*, decided by the same court just two years before *Averette*, the COMA held that "in time of war" *did* include the Vietnam War for purposes of tolling of the statute of limitations.[119] *Averette* rested its holding on the concern that it should strictly limit the exercise of court-martial jurisdiction over non-combatant U.S. citizens.[120] Although the court could simply have reasoned that constitutional concerns limited Article 2(a)(10) jurisdiction in cases such as the one presented, the court instead based its decision on a definition of "in time of war" inconsistent with its own precedent. As a result, the reasoning in *Averette* seems disingenuous.

Third, the court's decision ignored long-standing legal precedent for a broad definition of "in time of war" to reach its desired result. During the nineteenth century, hostilities against Indian tribes were considered a "time of war" justifying court-martial jurisdiction over civilians serving with the army in the field.[121] In *United States v. Grossman*,[122] the Army Court of Military Review, citing *Averette*, overturned the murder conviction of a civilian who shot three American soldiers in Vietnam. The court expressed its clear regret in doing so, noting that "[a]s far back as the Indian Wars, court-martial jurisdiction has been exercised over civilians serving with the armies in the field during hostilities which were not formally declared wars."[123] Government counsel in *Averette* had also cited numerous cases where courts had held that "in time of war" included undeclared hostilities. The court, however, distinguished those cases because they interpreted "in time of war" as written in other articles of the UCMJ, and because the accused in those cases were military personnel. The court's analysis suggests that it would have ruled differently if it had been aware of authority for the exercise of court-martial jurisdiction over civilians during undeclared hostilities.[124]

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114. *Id*. at 365-66; *accord* Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972) (agreeing with the *Averette* definition of "in time of war" in an action by the estate of a former civilian employee in Vietnam to recover a fine he paid pursuant to a court-martial sentence). *But see* Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969) (holding that a civilian court-martialed under Article 2(10) for murder in Vietnam was not "serving with or accompanying" the armed forces, after assuming arguendo that Vietnam qualified as a "war").

115. 42 C.M.R. 5 (C.M.A. 1970).

116. The CAAF last discussed *Averette* in *Willenbring v. Neurauter*, 48 M.J. 152, 157 n.4 (1998). *Willenbring* upheld the exercise of court-martial jurisdiction over a reservist ordered to active duty for trial by court-martial on rape charges. In a footnote, the CAAF cited *Averette* for the proposition that the phrase "in time of war" is limited to "a war formally declared by Congress." *Id*.

117. *Averette*, 41 C.M.R. at 366.

118. 38 C.M.R. 386 (C.M.A. 1968).

119. *Id*. at 388.

120. *See Averette*, 41 C.M.R. at 365.

121. WINTHROP, *supra* note 81, at 101.

122. 42 C.M.R. 529 (A.C.M.R. 1970).

123. *Id.* at 530.

124. *Averette*, 41 C.M.R. at 366.

Fourth, *Averette* was based on a Supreme Court case, *O'Callahan v. Parker*,[125] that has since been overruled by *Solorio v. United States*.[126] Referring to *O'Callahan*, *Averette* stated that "[a]s a result of the most recent guidance in this area from the Supreme Court we believe that a strict and literal construction of the phrase 'in time of war' should be applied."[127] If *Solorio* is "the most recent guidance in this area," and the CAAF reconsidered the same question today, it would likely overrule *Averette*.

2. "Serving with or Accompanying an Armed Force" Requirement

The second prerequisite to Article 2(a)(10) jurisdiction is that the accused must be serving with or accompanying an armed force.[128] Specifically, the civilian's "presence [must be] not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel."[129]

In *United States v. Rubenstein*,[130] the accused was the civilian manager of a club located on an American air base near Tokyo, Japan. As a non-appropriated fund activity, the club was a government instrumentality "operated for the benefit of civilian employees of the Air Force on duty at the base."[131] The accused had signed a contract acknowledging that the club "operated under Army regulations."[132] He was "furnished living quarters and subsistence at the air base in accordance with army regulations; and he was guaranteed transportation to his home in the United States upon termination of employment."[133] Given these circumstances, the COMA held that the accused qualified as a person "accompanying the armed forces" in Japan and was subject to court-martial jurisdiction.[134]

In *United States v. Burney*,[135] the accused was a civilian employee of Philco Television and Radio Corporation. He was stationed at an Air Force base in Japan, where he maintained Air Force technical equipment. He was supervised by and worked alongside Air Force personnel, slept in an Air Force billet, ate in Air Force dining facilities, and shopped in an Air Force exchange. Moreover, the "manner in which he performed his work and conducted his personal activities had a direct bearing on the efficiency, discipline, and reputation of the Air Force in that area."[136] Under these circumstances, the COMA held that the accused was a person "serving with or accompanying" an armed force, despite the fact that he worked for a private contractor rather than the U.S. Government.[137]

In *Ex parte Gerlach*,[138] the accused was a civilian sailor employed by the U.S. Shipping Board to serve aboard a military transport during the First World War. He had volunteered to stand watch for German submarines for several days, but later refused an order to continue to do so. The commanding officer of the ship convened a court-martial, which convicted the accused of disobeying the order. The *Gerlach* Court held that the accused was a person "accompanying" or "serving with the armies of the United States" under these circumstances.[139]

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125. 395 U.S. 258 (1969). In *O'Callahan*, the Court held that a court-martial had no jurisdiction to try a soldier for an off-post assault and attempted rape because the offenses were not "service connected." *Id.* at 273-74.

126. 483 U.S. 435 (1987).

127. *Averette*, 41 C.M.R. 363, 365. In *Solorio*, the Supreme Court abandoned the *O'Callahan* "service connection" test for court-martial jurisdiction. The Court concluded that the accused's status as a member of the armed forces justified his trial by court-martial for the sexual abuse of a minor in a private home in Alaska. *Solorio*, 483 U.S. at 451.

128. UCMJ art. 2(a)(10) (2000).

129. United States v. Rubenstein, 22 C.M.R. 313, 317 (1957).

130. *Id.* Although *Rubenstein* was a question of Article 2(11) jurisdiction, *id.*, its reasoning applies to language virtually identical to that found in Article 2(10). *Compare* UCMJ art. 2(a)(10) (2000) ("persons serving with or accompanying an armed force in the field") *with id.* art. 2(a)(11) ("persons serving with, employed by, or accompanying the armed forces outside the United States").

131. *Rubenstein*, 22 C.M.R. at 316.

132. *Id.*

133. *Id.* at 318.

134. *Id.* at 317.

135. 21 C.M.R. 98 (1956).

136. *Id.* at 110.

137. *Id.*

138. 247 F. 616 (S.D.N.Y. 1917).

3. *"In the Field" Requirement*

Article 2(a)(10) applies only to civilians serving "in the field." Historically, this term has meant that the accused must serve in "an area of actual fighting."[140] As the Supreme Court stated in *United States v. Reid*,[141] "From a time prior to the adoption of the Constitution, the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules."[142] The Court of Military Appeals has stated that "the question of whether an armed force is 'in the field' is determined by the activity in which it may be engaged at any particular time, not by the locality where it is found."[143]

In *McCune v. Kilpatrick*,[144] the U.S. District Court for the Eastern District of Virginia held that "in the field" included a ship transporting troops during wartime.[145] In doing so, the court relied on the reasoning in *Ex parte Gerlach*,[146] that "the words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications where military operations are being conducted."[147] Likewise, in *Ex parte Falls*,[148] the U.S. District Court for the District of New Jersey held that a civilian cook on a ship carrying military supplies during the First World War was also "in the field."[149]

Courts have also held that "in the field" may include locations in the United States. In *Ex parte Jochen*,[150] the United States District Court for the Southern District of Texas held "in the field" encompassed "service in mobilization, concentration, instruction or maneuver camps as well as service in [a] campaign, simulated campaign or on the march."[151] Applying this definition, the court held that a civilian quartermaster stationed with an Army unit just inside the U.S.-Mexican border during the First World War was "in the field."[152] Finally, in *Hines v. Mikell*,[153] the Fourth Circuit Court of Appeals upheld the exercise of court-martial jurisdiction over a civilian auditor and stenographer at Camp Jackson, South Carolina, during the First World War.[154] Soldiers then converged on what is now Fort Jackson for basic training before deploying to the theater of operations.[155] The court held that "any portion of the army confined to field training in the United States should be treated as 'in the field'" and that "troops in cantonments in [the United States] are 'in the field.'"[156] The court concluded that "all persons serving there [Camp Jackson] are strictly 'in the field' and subject to military regulations."[157]

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139. *Id*. at 617.

140. United States v. Reid, 354 U.S. 1, 34 n.61 (1957).

141. 354 U.S. at 1.

142. *Id*. at 33.

143. 21 C.M.R. 98 (1956) (citing Hines v. Mikell, 259 F. 28, 34 (4th Cir. 1919)).

144. 53 F. Supp. 80 (E.D. Va. 1943).

145. *Id.* at 84.

146. 247 F. 616 (S.D.N.Y. 1917).

147. *Id*. at 617.

148. 251 F. 415 (D.N.J. 1918).

149. *Id.* at 416.

150. 257 F. 200 (S.D. Tex. 1919).

151. *Id.* at 208-09.

152. *Id.* at 205, 209.

153. 259 F. 28 (4th Cir. 1919), *cert. denied*, 250 U.S. 645 (1919).

154. *Id*. at 28.

155. *Id*.

156. *Id*. at 34.

157. *Id.* at 35.

Conclusion

Congress granted court-martial jurisdiction over civilians accompanying the armed forces during wartime when it enacted Article 2(a)(10) of the UCMJ. Although the Supreme Court has stated that Article 2(a)(10) jurisdiction is constitutional when limited to the circumstances where it was intended to be used, military courts have eviscerated its applicability by limiting its reach to declared wars. Courts and practitioners should reconsider this excessively strict construction of Article 2(a)(10) in light of today's circumstances and more recent changes in case law. During wars, whether declared or undeclared, judge advocates should be able to use Article 2(a)(10) as a means to exercise court-martial jurisdiction over civilians—whether aliens or U.S. citizens—who serve with or accompany the armed forces in the field.

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, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2003

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).
27-29 January	2003 Hawaii Estate Planning Course.
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.
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	9th Fiscal Law Comptroller Accreditation Course (Korea).
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).
12-16 May	52d Legal Assistance Course (5F-F23).

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).
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).
26-27 October	8th Speech Recognition Training (512-27DC4).
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

3-7 November	53d Legal Assistance Course (5F-F23).
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 Comptroller 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.
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 Officer 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 Reporter 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

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
Texas	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 September 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. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2002-2003 Academic Year)

DATE	TRNG SITE/HOST UNIT	GENERAL OFFICER AC/RC	SUBJECT	ACTION OFFICER
11-12 Jan 03	Long Beach, CA 78th LSO	BG Black/ BG Pietsch	Contract Law; Administrative Law	MSG Rosie Rocha (714) 229-3700 rosie.rocha@usarc-emh2.army.mil
1-2 Feb 03	Columbus, OH 9th LSO	BG Black/ COL(P) Schneider	Administrative Law (Legal Assistance); Contract Law	1LT Keith Blosser (614) 554-4355 kblosser@columbus.rr.com
1-2 Feb 03	Seattle, WA 70th RSC/WAARNG	MG Marchand/ BG Arnold	International Law; Criminal Law	LTC John Felleisen (253) 798-7894 john.felleisen@usarmy.mil
15-16 Feb 03	Indianapolis, IN INARNG	BG Wright/ COL(P) Schneider	Contract Law; International Law	LTC George Thompson (317) 247-3491 george.Thompson@in.ngb.army.mil
21-23 Feb 03	Salt Lake City, UT 96th RSC/87th LSO	BG Black/ BG Pietsch	Contract Law; Administrative Law	LTC Lawrence A. Schmidt (801) 523-4322/4408 Lawrence.Schmidt@ut.ngb.army.mil
21-23 Feb 03	W. Palm Beach, FL 174th LSO/FLARNG	MG Marchand BG Arnold	Administrative Law; International Law	COL John Mantooth (305) 779-4022 john.mantooth@se.usar.army.mil LTC Elizabeth Masters (904) 823-0132 Elizabeth.masters@fl.ngb.army.mil
8-9 Mar 03	Washington, DC 10th LSO	BG Black BG Pietsch	Criminal Law; Administrative Law	CPT Mike Zito (301) 599-4440 mzito@juno.com
22-23 Mar 03	West Point, NY	TBA	Eastern States Senior JAG Workshop	COL Randall Eng (718) 520-3482 reng@courts.state.ny.us
26-27 Apr 03	Boston, MA 94th RSC	MG Marchand/ BG Arnold	Administrative Law; Contract Law	SSG Neoma Rothrock (978) 796-2143 neoma.rothrock@us.army.mil
16-18 May 03	Kansas City, MO 89th RSC	BG Carey/ BG Pietsch	Criminal Law; International Law	MAJ Anna Swallow (316) 781-1759, est. 1228 anna.swallow@usarc-emh2.army.mil SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
17-18 May 03	Birmingham, AL 81st RSC	BG Wright/ BG Arnold	Criminal Law; International Law	CPT Joseph Copeland (205) 795-1980 joseph.copeland@se.usar.army.mil
	Charlottesville, VA OTJAG	All General Officers scheduled to attend	Spring Worldwide CLE	

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

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

For a complete listing of TJAGSA Materials Available Through the DTIC, see the September 2002 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September 2002 issue of *The Army Lawyer.*

4. 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 cases. 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) U.S. Army JAG Corps civilian 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 U.S. Army 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.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer.*

6. 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, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to

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Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

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Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 488-6306, commercial: (434) 972-6306, or e-mail at Daniel Lavering@hqda.army.mil.

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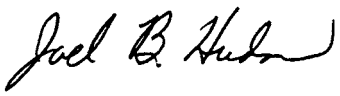

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