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Articles

USALSA Report

U.S. Army Legal Services Agency

Trial Judiciary Note

Book Review

A Reasonable Expectation of Privacy: Is a Government E-mail Account the Equivalent of a Wall Locker in a Barracks Room?

Major Lawrence A. Edell[*]

Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[1]

I. Introduction

The current Army computer-monitoring policy fails to overcome the reasonable expectation of privacy established by *United States v. Long* (*Long II*)[2] because it encourages personal use of electronic mail (e-mail), recognizes privilege in these communications, and is designed with the primary purpose of gathering information for law enforcement use.[3] E-mail has become an increasingly important part of modern society and has attained the status of the telephone and traditional mail.[4] The Army has recognized the importance of e-mail. Soldiers use government e-mail for official purposes and for personal communications.[5] Since the decision in *Long II*, the Army has reshaped its policy on computer monitoring to act as a tool for evidence collection against individuals using a government computer network.[6] This creates Fourth Amendment issues that did not exist under prior Army computer network monitoring policies.[7]

The use of e-mail has become commonplace in today's military and many units use it to accomplish their daily communications.[8] As the use of e-mail and computers expands in the Army, there is a need to ensure that government computer networks continue to operate properly and adequately safeguard operational information.[9] This will create an inherent tension between the desire to protect the network and the privacy concerns of Soldiers who use the network for personal use. The Court of Appeals for the Armed Forces (CAAF) has provided some guidance on this issue.

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[*] Judge Advocate, U.S. Army. Currently assigned as Group Judge Advocate, 3d Special Forces Group (Airborne), Fort Bragg, N.C. LL.M., 2008, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.; J.D., 2002, University of Georgia; B.S., 1996, U.S. Naval Academy. Previous assignments include Chief of Justice, U.S. Army Transportation Ctr. &Sch. (USATC&S), Fort Eustis, Va., 2006–2007; Administrative Law Attorney, USATC&S, Fort Eustis, Va., 2005–2006, Trial Counsel, 3d Brigade Combat Team (BCT), 1st Cavalry Division, Fort Hood, Tex., 2003–2005; Chief of Legal Assistance, 2003, 1st Cavalry Division, Fort Hood, Tex. Member of the bars of Georgia and the Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

[1] Boyd v. United States, 116 U.S. 616, 635 (1886).

[2] 64 M.J. 57 (C.A.A.F. 2006).

[3] This article is limited to discussion of e-mail recovered from a government server on behalf of law enforcement from an unclassified computer network. Information transmitted over a classified network is beyond the scope of this article. This article will focus on Army policy and regulations. *See* U.S. DEP'T OF ARMY, REG. 25-1, ARMY KNOWLEDGE MANAGEMENT AND INFORMATION TECHNOLOGY (15 July 2006) [hereinafter AR 25-1]; U.S. DEP'T OF ARMY, REG. 25-2, INFORMATION ASSURANCE (24 Oct. 2007) [hereinafter AR 25-2]; U.S. DEP'T OF ARMY, REG. 380-53, INFORMATION SYSTEMS SECURITY MONITORING (29 Apr. 1998) [hereinafter AR 380-53]; *infra* App. A for a brief overview of the delivery of e-mail messages.

[4] *See* Jayni Foley, *Are Google Searches Private? An Originalist Interpretation of the Fourth Amendment in Online Communication Cases*, 22 BERKELEY TECH. L.J. 447, 447–48 (2007).

[5] *See* AR 25-1, *supra* note 3, para. 1–10 (authorizing Soldiers to use their government e-mail accounts for personal use).

[6] *See also* Memorandum from Assistant Sec'y of Def. (Command, Control, Communication, and Intelligence), to Secretaries of the Military Dep'ts et al., subject: Policy on Department of Defense Electronic Notice and Consent Banner (16 Jan. 1998) [hereinafter ASoD (C4I) Memo] (on file with author); Memorandum from Forces Command (FORSCOM) Staff Judge Advocate, to FORSCOM G6, subject: FORSCOM Log-On Banner (18 Jan. 2007) [hereinafter FORSCOM Memo] (on file with author). *Compare* AR 25-2, *supra* note 3, *with* U.S. DEP'T OF ARMY, REG. 25-2, INFORMATION ASSURANCE (14 Nov. 2003) [hereinafter AR 25-2 (2003)].

[7] U.S. CONST. amend. IV. The previous Army computer monitoring policy specifically stated that computer users had a reasonable expectation of privacy. AR 25-2 (2003), *supra* note 6, para. 4-5r.

[8] *See* AR 25-1, *supra* note 3, para. 1–11.

[9] *See generally* AR 25-2, *supra* note 3; AR 380-53, *supra* note 3; U.S. DEP'T OF DEFENSE, MANUAL 8570.01-M, INFORMATION ASSURANCE WORKFORCE IMPROVEMENT PROGRAM (19 Dec. 2005) (explaining why there is a need to monitor government computer systems from both internal and external threats).

In 2000, the CAAF held in *United States v. Monroe* that a Soldier does not have a reasonable expectation of privacy in e-mails sent over a government network from monitoring by a system administrator.[10] In 2006, the CAAF answered a question left unanswered by *United States v. Monroe*: Is there a reasonable expectation of privacy in the content of e-mail sent from a government server vis-à-vis law enforcement?

Long II may be the most important case decided by the CAAF during the 2006 court term because of its effects outside the legal community.[11] In *Long II*, the CAAF determined that Lance Corporal (LCpl) Long had a reasonable expectation of privacy in her government e-mail account against a search conducted on behalf of law enforcement.[12] The decision in *Long II* has created concerns at the highest levels of Department of Defense (DOD) regarding the ability to monitor its computer networks and has resulted in new warning banners and changes in regulations concerning the monitoring of computer networks.[13] Arguably, *Long II* is limited to a very specific set of facts,[14] but revised Army and DOD policies have unsuccessfully attempted to undermine its holding. The new policies may inadvertently create an unconstitutional monitoring scheme despite legitimate reasons to monitor government computer networks. This article discusses how the Fourth Amendment adapts to technology, the legitimate reasons to monitor computer networks, the CAAF's previous rulings on computer privacy, and current Army policy on monitoring e-mail. This article concludes by recommending that law enforcement agents obtain a search authorization before searching government servers, despite the current Army policy that attempts to circumvent that requirement.

II. Why are Government Computer Networks Monitored?

Legitimate societal reasons argue for law enforcement monitoring of the Internet.[15] The Internet has provided a platform for the spread of several illicit activities.[16] Crimes such as identity theft, fraud, cyber stalking, and distribution of child pornography occur directly on the Internet.[17] The involvement of law enforcement in systems monitoring inherently implicates the Fourth Amendment. However, others have reasons to monitor the use of the Internet as well.

Employers who provide Internet and e-mail access to their employees have a multitude of reasons to monitor employees' usage.[18] First, it helps document and observe employee activities.[19] It can gauge productivity by viewing an employees' use of the Internet and e-mail for matters not related to work.[20] Second, it ensures those employees were working at their assigned tasks.[21] Third, it can ensure that trade secrets or proprietary information are not being improperly disseminated.[22] Finally, employers are liable for employees' actions related to the inappropriate use of e-mail.[23] As an employer, the government has an interest in monitoring its employees' use of the Internet and e-mail.

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[10] 52 M.J. 326 (C.A.A.F. 2000).

[11] Lieutenant Colonel M.K. Jamison, U.S. Marine Corps, *New Developments in Search and Seizure Law*, ARMY LAW., Apr. 2006, at 9, 13.

[12] *Long II*, 64 M.J. 57 (C.A.A.F. 2006).

[13] ASoD (C4I) Memo, *supra* note 6; FORSCOM Memo, *supra* note 6; *Long II*, 64 M.J. at 58 (certifying the Navy Judge Advocate General's issues); Interview with Major Kevin Harris, U.S. Marine Corps, Judge Advocate, in Charlottesville, Va. (Nov. 26, 2007) [hereinafter Harris Interview]. Major Harris was the Appellate Government Counsel for *Long II*, 64 M.J. 57, and *United States v. Long* (*Long I*), 61 M.J. 539, 540 (N-M. Ct. Crim. App. 2005). *Id.*

[14] Lieutenant Colonel Stephen R. Stewart, U.S. Marine Corps, *Katy Bar the Door—2006 New Developments in Fourth Amendment Search and Seizure Law*, ARMY LAW., June 2007, at 1, 12.

[15] *See id.*; Lieutenant Colonel Joginder S. Dhillon & Lieutenant Colonel Robert I. Smith, *Defensive Information Operations and Domestic Law: Limitations on Government Investigative Techniques*, 50 A.F. L. REV. 135, 159 (2001).

[16] U.S. DEP'T OF JUSTICE, SEARCH AND SEIZURE MANUAL, SEARCHING AND SEIZING COMPUTERS AND OBTAINING EVIDENCE IN CRIMINAL INVESTIGATIONS intro. (2002) [hereinafter SSCOECI MANUAL] (Computer Crime and Intellectual Property Section); U.S. DEP'T OF JUSTICE, PROSECUTING COMPUTER CRIMES ch. I (Feb. 2007) (Computer Crime and Intellectual Property Section).

[17] SSCOECI MANUAL, *supra* note 16, intro.

[18] *See* Smythe v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996) (holding that companies have a vital interest in monitoring their employees' e-mail messages); Myrna Wigod, *Privacy in Public and Private E-Mail and Online Systems*, 19 PACE L. REV. 95, 97 (Fall 1998).

[19] Wigod, *supra* note 18, at 97.

[20] *Id.* at 97–98.

[21] *Id.* at 98–99.

[22] *Id.* at 99.

[23] *Id.* at 98 (preventing the use of e-mail to commit sexual harassment, libel, copyright infringement, and hate crimes).

The government has additional reasons for monitoring the use of the Internet and e-mail by its employees. The first and most important reason is to protect national security.[24] Government computer systems are critical to the national defense.[25] Attacks against government networks could arise either from inside or outside of the network.[26] The government also has a proprietary interest.[27] "Employees shall protect and conserve federal property and shall not use it for other than authorized activities."[28] Finally, the Supreme Court recognized the special nature of the military society and its requirement for discipline.[29] Society holds the military to a higher standard of conduct and this provides for a substantial government interest in monitoring a Soldier's conduct in cyberspace "when accessing the Internet through a government computer system."[30] The Army has recognized the need to monitor its computer networks.[31]

The Army has three monitoring requirements to ensure proper use of government computer systems. First, monitoring ensures that operational security of systems networks is not vulnerable to disclosure of classified material or attacks by outside sources.[32] Second, monitoring serves a law enforcement purpose.[33] Through means such as an intercept or pen register,[34] law enforcement agents determine if the communication is evidence of a crime.[35] Finally, monitoring ensures that the network is operating properly, prevents the misuse of resources, and verifies that only authorized users have access to government computer networks.[36] Known as systems protection monitoring,[37] this task is performed by system administrators.[38] They are not law enforcement agents, but are often the ones who discover evidence of criminal conduct.[39] So, when does monitoring of a government computer system become a search under the Fourth Amendment?

III. What Triggers a Search Under the Fourth Amendment?

The Fourth Amendment protects against unreasonable searches and seizures conducted by government agents.[40] One must first determine if the government conducted the search or seizure before determining if the Fourth Amendment protects an individual.[41]

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[24] Lieutenant Colonel LeEllen Coacher, *Permitting Systems Protection Monitoring: When the Government Can Look and What It Can See*, 46 A.F. L. REV. 155, 156–57, 157 n.6 (1999) (quoting Lieutenant General William Donahue, *Special Month Focuses on Cyber Responsibilities*, A.F. MIL. NEWS (23 Jan. 1999)).

[25] *Id.*; WALTER G. SHARP, SR., CYBERSPACE AND THE USE OF FORCE 23 (1999) (citing Exec. Order No. 13,010, 61 Fed. Reg. 37,347 (July 17, 1996)).

[26] *See* SHARP, *supra* note 25, at 20–22; John C. Dolak & Anna E. Dolak, *Information Systems Security and Privacy Issues in the Armed Forces*, 8 COMP. L. REV. & TECH. J. 1, 2–4 (Fall 2003) (citing numerous attacks on DOD computer systems).

[27] U.S. DEP'T OF DEFENSE, DIR. 5500.7R, JOINT ETHICS REGULATION § 2–301 (C6, 29 Nov. 2007) [hereinafter JER].

[28] Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.101(b)(9) (2001). Public confidence in the military is important and ensuring that government resources are used properly is part of this confidence. Lieutenant Commander R. A. Conrad, *Searching for Privacy in All the Wrong Places: Using Government Computers to Surf Online*, 48 NAV. L. REV. 1, 23 (2001).

[29] *See generally* Parker v. Levy, 417 U.S. 733 (1974).

[30] Conrad, *supra* note 28, at 14–15.

[31] *See generally* AR 25-1, *supra* note 3; AR 25-2, *supra* note 3; AR 380-53, *supra* note 3.

[32] Coacher, *supra* note 24, at 155–56; *see* AR 380-53, *supra* note 3.

[33] Coacher, *supra* note 24, at 156; *see* U.S. DEP'T OF ARMY, REG. 190-53, INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS FOR LAW ENFORCEMENT PURPOSES (3 Nov. 1986) [hereinafter AR 190-53].

[34] A pen register is a device that can determine the destination (address or phone number) of a call or e-mail, but cannot determine the content of the transmission. *See* SSCOECI MANUAL, *supra* note 16, at IV.C.

[35] Coacher, *supra* note 24, at 156; AR 190-53, *supra* note 33, para. 1-1.

[36] Coacher, *supra* note 24, at 156–57.

[37] *Id.* at 168.

[38] AR 25-2, *supra* note 3, para. 3-3.

[39] *See* United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000); SSCOECI MANUAL, *supra* note 17, at I.D.

[40] *See* Rakas v. Illinois, 439 U.S. 128, 140–49 (1978) (holding that a person must have a legitimate property interest in the area or item searched by a government agent for the Fourth Amendment to apply); *see also* United States v. Portt, 21 M.J. 333 (C.M.A. 1986) (holding that the initial entry was not a governmental intrusion because the Airmen were not acting in their capacity as Security Forces); United States v. Hodges, 27 M.J. 754 (A.F.C.M.R 1988) (holding that the search by the employee of a public freight company was not a search protected under the Fourth Amendment).

[41] *See Portt*, 21 M.J. 333; *see also* Hoffa v. United States, 385 U.S. 293, 302 (1967) (holding that an informant's disclosure of a private conversation does not invoke Fourth Amendment protection).

The Supreme Court has considered the issue of whether a law enforcement agent or a private actor conducted a search. In *United States v. Jacobsen*,[42] employees of Federal Express (FedEx), a private company, opened the defendant's package to determine if they damaged its contents during shipment.[43] The employees believed the package contained cocaine after inspecting it and contacted the Drug Enforcement Agency (DEA).[44] The Court held that the search of the defendant's package by the FedEx employees did not violate his Fourth Amendment rights because the actions of the employees were clearly of a private character.[45] The Court also held that the DEA's subsequent action was not a search as long as it did not exceed the scope of the FedEx employees' search.[46]

The CAAF has applied *Jacobsen*[47] to the military.[48] In *United States v. Reister*,[49] the CAAF held that the warrantless search of the appellant's apartment by Naval Criminal Investigative Service subsequent to discovery of the evidence by the victim, a Sailor (a government employee), did not violate the Fourth Amendment.[50] The court determined that "the exclusionary rules were not triggered by any private invasion of appellant's privacy."[51] The victim, the appellant's girlfriend, had access to appellant's apartment.[52] Using the key the appellant provided her, the victim entered the appellant's apartment and discovered the evidence while looking around his apartment.[53] In the military, the focus should be on the capacity of the person who discovered the evidence at the time of the search, not the subsequent actions of the Soldier or his duty position.[54] Only a search by a government agent or employee while acting in a law enforcement capacity implicates the Fourth Amendment.

If a government search occurred, Justice Harlan's concurring opinion in *Katz v. United States*[55] provides the framework for analyzing whether a person has a reasonable expectation of privacy. First, the person must have exhibited an actual expectation of privacy.[56] This requires the court to determine if the person had a subjective belief that he had a reasonable expectation of privacy. The second part requires the expectation of privacy be one that society is prepared to recognize as reasonable.[57] The objective test looks at the competing values of society and the original intent of the framers of the Fourth Amendment.[58]

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[42] 466 U.S. 109 (1984).

[43] *Id.* at 111. A post-trial affidavit indicated that the employee opened the package because he thought it might contain contraband, not to determine if damage occurred to the contents of the tube. *Id.* at 115 n.10.

[44] *Id.* at 111.

[45] *Id.* at 115; *cf.* United States v. Sims, 2001 U.S. Dist. LEXIS 25819 (D.N.M. 2001) (holding that when law enforcement directs an employer to conduct a search of an employee's computer, it is a search under the Fourth Amendment).

[46] *Jacobsen*, 466 U.S. at 120–22.

[47] *Id.* at 109.

[48] *See generally* United States v. Reister, 44 M.J. 409 (C.A.A.F. 1996) (holding that a warrantless search by law enforcement did not violate the Fourth Amendment because the scope of the search did not exceed the scope of intrusion by a private actor); United States v. Hahn, 44 M.J. 360 (C.A.A.F. 1996) (holding that law enforcement's observation of stolen property is not a search or seizure if law enforcement were permitted to be at the location where the contraband was discovered); United States v. Visser, 40 M.J. 86 (C.M.A. 1994) (holding that a private moving company's decision to delay transporting appellant's property at the request of law enforcement is not a search); United States v. Bruci, 52 M.J. 750 (N-M. Ct. Crim. App. 2000).

[49] *Reister*, 44 M.J. 409.

[50] *Id.* at 416.

[51] *Id.*

[52] *Id.* at 411–12.

[53] *Id.*

[54] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 311(a) (2008) [hereinafter MCM]; *see also* United States v. Portt, 21 M.J. 333 (C.M.A. 1986) (holding that the actions of Air Force Security Police acting in their private capacity is not a search).

[55] 389 U.S. 347, 360–63 (1967) (Harlan, J., concurring).

[56] *Id.* at 361 (Harlan, J., concurring).

[57] *Id.*

[58] Rakas v. Illinois, 439 U.S. 128, 153 (1973).

IV. The Fourth Amendment Adopts to Technology

The number of Internet users has vastly increased in the past twenty years[59] and e-mail has replaced traditional means of communication for both personal and professional considerations.[60] In comparing the current use of electronic communications to the use of the telephone at the time of *Katz v. United States*,[61] a modern court should find them "as crucial as the public telephone of 1967."[62] Most users of e-mail simply assume that they have the same amounts of privacy in e-mail as they do in regular mail, which enjoys a longstanding societal expectation of privacy.[63] However, federal courts[64] have not recognized a reasonable expectation of privacy for e-mail recovered from an Internet service provider's (ISP's) server.[65] The Supreme Court has not ruled on this issue.[66] However, as a new form of technology develops and society accepts it, courts eventually recognize a reasonable expectation of privacy.[67] With this in mind, Americans are using e-mail for every facet of their lives.

E-mail and Internet use are increasing as more citizens, businesses, and government entities rely upon electronic communications for their needs. Only 8% of American households had a computer in 1984.[68] However, in less than thirty years, that number has skyrocketed to nearly 62%.[69] There are approximately thirty-five billion e-mail messages sent every day.[70] Numerous financial institutions offer their customers the ability to receive their banking documents via e-mail and to check their bank accounts on the World Wide Web.[71] Even state governments have begun to process administrative tasks for their residents on the Internet and by e-mail.[72] The Army is likewise more connected.

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[59] *See* JENNIFER CHEESEMAN DAY ET AL., COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003, at 1, fig.1 (2005), *available at* http://www.census.gov/prod/2005pubs/p23-208.pdf.; Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1575 (2004) ("Approximately 102 million U.S. individuals use e-mail, with about 60 million using it on any given day. Fifty-two million US individuals have used instant messaging, with over 10 million using it on a typical day.").

[60] Conrad, *supra* note 28, at 41–42.

[61] 389 U.S. 347, 351 (1967).

[62] Susan Freiwald, *First Principles in Communications Privacy*, 2007 STAN. TECH. L. REV. 3, para. 32 (2007).

[63] Randolph S. Sergent, *A Fourth Amendment Model for Computer Networks and Data Privacy*, 81 VA. L. REV. 1181, 1226 (1995).

[64] U.S. CONST. art. III, § 1.

[65] Susan Freiwald & Patricia L. Bellia, *The Fourth Amendment Status of Stored E-mail: The Law Professor's Brief in* Warshak v. United States, 41 U.S.F. L. REV. 559, 565 (Spring 2007). Courts have not favored finding a reasonable expectation of privacy in e-mail either intercepted during transmission or retrieved from an ISP's server. *Id.* Justice Harlan's test, derived from *Katz v. United States*, expands the Fourth Amendment to searches that do not involve a physical trespass. Scott A. Sundstrom, *You've Got Mail! (And the Government Knows It): Applying the Fourth Amendment to Workplace E-Mail Monitoring*, 73 N.Y.U. L. REV. 2064, 2070 (1998) (citing *Katz*, 389 U.S. at 361). The search of e-mail from an Internet service provider's (ISP) server is one such search.

[66] *Id.* Justice Stevens has argued that the Supreme Court should allow Congress to tackle the issue of balancing privacy concerns with technological advancements. *See* Kyllo v. United States, 533 U.S. 27, 51 (2001) (Stevens, J., dissenting). Arguably, the Supreme Court (or at least Justice Stevens) is not inclined to tackle this issue.

[67] *See* Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555, 563 (1998) (arguing that American law looks to history for answer and has trouble with technological advances, but that societal expectations of privacy help drive the change).

[68] DAY ET AL., *supra* note 59.

[69] *Id.* Households earning over $100,000 are more likely to have a computer and Internet access, but all economic classes have a significant percentage of users. *Id.* Households earning over $100,000 reported that 92.2% have Internet connection in their homes, while those earning less than $24,999 reported that 30.7% have an Internet connection. *Id*.

[70] *See* Craig Rhinehart, *Email Management and Sarbanes-Oxley Compliance*, SARBANES-OXLEY COMPLIANCE J., June 8, 2006, http://www.s-ox.com/feature/article.cfm?articleID=913. In comparision, the U.S. Post Office delivered 213,138 million pieces of traditional mail in 2006. *See* U.S. POSTAL SERV., UNITED STATES POSTAL SERVICE ANNUAL REPORT 2006, *available at* http://www.usps.com/financials/_pdf/anrpt2006_final.pdf.

[71] *See* U.S. Automobile Ass'n, www.usaa.com (last visited Oct. 9, 2008); Pentagon Federal Credit Union, www.penfed.org (last visited Oct. 9, 2008); Navy Federal Credit Union, www.nfcu.org (last visited Oct. 9, 2008). These three financial institutions are a small sampling of financial institutions that offer electronic banking services.

[72] In Texas, a resident may renew his vehicle registration or driver's license on the Internet. *See* Tex. Dep't of Motor Vehicles, http://rts.texasonline.state.tx.us (last visited Oct. 9, 2008). The Texan must provide basic information and a credit card number to renew his driver's license or vehicle registration. *Id.* The Texas Department of Motor Vehicles will then send an e-mail to the user confirming receipt of payment for proof of compliance until the vehicle registration or driver's license arrives in the mail. *Id.*

The Army provides its Soldiers, retirees, civilian employees, and even family members e-mail accounts.[73] Army Knowledge Online (AKO) provides information to Soldiers and other eligible families. It also allows Soldiers to keep in touch with other Soldiers and family members.[74] Army Knowledge Online has provided the Soldier with a tool to keep himself informed of his professional status and obligations, while it also provides a readily accessible e-mail account for personal use whenever the Internet is available.[75]

Although AKO is an official DOD website, it has services that allow a Soldier to send video messages to his family while deployed.[76] For a Soldier in a deployed environment, AKO may be the only method available to communicate with his family and friends.[77] The Soldier, unlike an employee in the United States, often does not have the option to use a private computer network.[78] The unique position of Soldiers further reinforces the need to respect the privacy of e-mail messages sent over a government network. The growing use of e-mail and the unique privacy concerns of Soldiers require the recognition of a reasonable expectation of privacy in e-mail. The Supreme Court has recognized this concept for other means of communication as they gained acceptance in society.[79]

As previously noted, when new technology becomes more prevalent in society, courts begin to recognize a reasonable expectation of privacy in the new technology.[80] In 1928, the Supreme Court did not extend the Fourth Amendment to warrantless wiretapping of telephones.[81] The Supreme Court's rejection of *Olmstead v. United States*[82] demonstrates how the

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[73] *See* Army Knowledge Online (AKO), How Do I Register for an AKO/DKO Account?, https://help.us.army.mil/cgi-bin/akohd.cfg/php/enduser/home.php (follow "Find Answers" hyperlink; then follow "How do I register for an AKO/DKO account?" hyperlink) (last visited Oct. 9, 2008) [hereinafter AKO]. The exhaustive list of those authorized access to a U.S. Army e-mail account is contained on this page. *Id*.

[74] *See* Army Knowledge Online (AKO), https://www.us.army.mil (follow "White Pages" hyperlink) (last visited Oct. 9, 2008). On the main AKO page, a user can simply click on White Pages hyperlink to find another registered user's e-mail address and contact information. *Id.* To begin the search the AKO user is required to know at least the first and last name of the person whom they are trying to contact. *Id.*

[75] *Id.* The AKO site has numerous links that inform Soldiers about everything from their dental readiness status to their enlisted record brief. *Id.*

[76] *Id.* The AKO site offers the following option for its users:

> This holiday season don't forget to use AKO/DKO Video Messaging to contact your loved ones that are deployed. The AKO Video Messaging System is designed to keep military families and troops stationed around the world connected using personal video messages. The program is easy-to-use, secure, and accessible through the Video icon at the top of the portal home page. All you need is a webcam and an Internet connection to send high-quality personal video messages to other AKO/DKO users.

Id. The AKO user agreement includes consent to monitoring and informs the user that evidence of unauthorized use of AKO discovered during monitoring could lead to criminal action. *Id.* The terms of service are:

> YOU ARE ACCESSING A U.S. GOVERNMENT (USG) INFORMATION SYSTEM (IS) THAT IS PROVIDED FOR USG-AUTHORIZED USE ONLY. By using this IS (which includes any device attached to this IS), you consent to the following conditions: -The USG routinely intercepts and monitors communications on this IS for purposes including, but not limited to, penetration testing, COMSEC monitoring, network operations and defense, personnel misconduct (PM), law enforcement (LE), and counterintelligence (CI) investigations. -At any time, the USG may inspect and seize data stored on this IS. -Communications using, or data stored on, this IS are not private, are subject to routine monitoring, interception, and search, and may be disclosed or used for any USG-authorized purpose. -This IS includes security measures (e.g., authentication and access controls) to protect USG interests--not for your personal benefit or privacy. -Notwithstanding the above, using this IS does not constitute consent to PM, LE or CI investigative searching or monitoring of the content of privileged communications, or work product, related to personal representation or services by attorneys, psychotherapists, or clergy, and their assistants. Such communications and work product are private and confidential. See User Agreement for details.

Id.

[77] This assertion is based on the author's professional experiences as the Trial Counsel, 3d BCT, 1st Cavalry Division, Fort Hood, Tex., from 1 November 2003 to 15 June 2005.

[78] *See* U.S. Army Information Assurance Training Ctr., Dep't of Defense Information Assurance Awareness Training, https://ia.gordon.army.mil/dodiaa/default.asp (last visited Oct. 9, 2008) (forbidding Soldiers from accessing commercial e-mail accounts via a government computer network).

[79] *See* Berger v. New York, 388 U.S. 41 (1967) (holding that there was a reasonable expectation of privacy in telephone conversations); *Ex parte* Jackson, 96 U.S. 727, 732–33 (1878) (holding that letters and packages sent through the U.S. Postal Service are protected from inspection by the Fourth Amendment); *see also* United States v. Maxwell, 45 M.J. 406, 416–17 (C.A.A.F. 1996) (comparing e-mail to letter and phone calls).

[80] Stephan K. Bayens, *The Search and Seizure of Computers: Are We Sacrificing Personal Privacy for the Advancement of Technology?*, 48 DRAKE L. REV. 239, 242 (2000).

[81] Olmstead v. United States, 277 U.S. 438 (1928) (holding that wire taps of phone conversation did not violate the Fourth Amendment and that Congress should develop of statutory suppression remedy). It was not until 1967 that the Supreme Court applied the Fourth Amendment to wiretaps. *See Berger*, 388 U.S. 41. Congress provided the first statutory suppression remedy for secret recordings of telephone conversations. Mulligan, *supra* note 59, at 1559–60.

[82] 277 U.S. 438.

prevalence of telephones in society created a reasonable expectation of privacy, but this took nearly forty years.[83] The CAAF has already recognized the importance and prevalence of e-mail in society and has had the foresight to recognize a reasonable expectation of privacy in e-mail stored on an ISP's server, but with limitations in the *Maxwell*, *Monroe*, and *Long* cases.[84]

V. The CAAF Ventures into Cyberspace

A. *United States v. Maxwell*—Establishing a Reasonable Expectation of Privacy in E-Mail

United States v. Maxwell is the CAAF's first look into cyberspace.[85] The CAAF concluded that a person has a reasonable expectation of privacy in e-mail sent, stored, or received through a commercial ISP.[86] The court easily applied traditional Fourth Amendment rules to e-mail to provide Soldiers with a reasonable expectation of privacy in their e-mail communications transmitted on a personal computer via a commercial ISP.[87]

Evidence gathered from a commercial ISP's server convicted Colonel (COL) Maxwell of communicating indecent language under Article 134, Uniform Code of Military Justice (UCMJ) and other charges resulting from his e-mail communications.[88] A private citizen provided the FBI and America Online (AOL), a commercial ISP, with a list of screen names of AOL subscribers who were transmitting pornography via e-mail.[89] Colonel Maxwell, an AOL subscriber, owned of one of the screen names that appeared on the list provided to the FBI.[90] Eventually, the FBI received a search warrant to seize the e-mails and subscriber information of the screen names mentioned in the letter. America Online retrieved the screen name that appeared on the list and all other screen names registered to an account.[91] The FBI searched all of the screen names belonging to COL Maxwell's account, despite the search warrant only authorizing the search of the screen name "Redde1."[92] Colonel Maxwell's defense objected to the search of the screen names not listed on the search warrant.[93]

The central issue facing the CAAF was whether there was a reasonable expectation of privacy in e-mail.[94] The CAAF analogized e-mail to both letters and phone calls.[95] The technology exists to monitor phone calls, but simply having the ability to monitor a phone call does not erase the expectation of privacy in that phone call.[96] The same is true for e-mail. The ability of the system administrators to retrieve the e-mail from the server does not erase the reasonable expectation of privacy in e-mail.[97]

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[83] Amy E. Wells, *Criminal Procedure: The Fourth Amendment Collides with the Problem of Child Pornography and the Internet*, 53 OKLA. L. REV. 99, 110 (Spring 2000).

[84] *See Maxwell*, 45 M.J. 406; United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000); *Long II*, 64 M.J. 57 (C.A.A.F. 2006).

[85] *Maxwell*, 45 M.J. 406; *see also* Major Charles N. Pede, *Driving 'Naked'; Privacy in Cyberspace; and Expansive 'Primary Purpose' Developments in Search, Seizure and Urinalysis*, ARMY LAW., May 1996, at 20, 20.

[86] *Maxwell*, 45 M.J. 406.

[87] Pede, *supra* note 85, at 20.

[88] *Maxwell*, 45 M.J. at 410.

[89] *Id.* at 413. AOL management received the list as well. *Id.* at 412.

[90] *Id.* at 411 ("These screen names are codes akin to CB handles, nicknames, and the like. . . . No two users may have the same screen name.").

[91] *Id.* at 413. This resulted in the release of all four of Colonel (COL) Maxwell's screen names. *Id.* One account may have several screen names. *Id.* at 411.

[92] *Id.* at 413–14.

[93] *Id.* at 414.

[94] Pede, *supra* note 85, at 21.

[95] *Maxwell*, 45 M.J. at 417–19; *see* Allegra Knopf, *Privacy and the Internet: Welcome to the Orwellian World*, 11 J. LAW. & PUB. POL'Y 79, 91 (Fall 1999) (concluding that an e-mail is akin to a first class letter by relying on the decision of *United States v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997)); Bayens, *supra* note 80, at 250–52 (concluding that e-mail is analogous to a letter or phone conversation); *cf.* Freiwald, *supra* note 62, paras. 15–19 (arguing that the analogy between e-mail and telephone calls is faulty because of the differences in the two mediums, but agreeing with the decision of the CAAF).

[96] Katz v. United States, 389 U.S. 347, 353–54 (1967). Each e-mail remains on the server of the Internet service provider of the sender and recipient. *See* Freiwald, *supra* note 62, para. 14. As for telephone calls, there will be a record made of the time and number dialed with the telephone company, just as with an e-mail. Mulligan, *supra* note 60, at 1562. The telephone company's switchboard does not record the content of the telephone call unlike the content of an e-mail that resides on a server. *Id.* at 1580.

[97] Mulligan, *supra* note 59, at 1580.

Electronic mail, as its name implies, consists of a message sent in an electronic envelope delivered to the recipient's electronic mailbox.[98] The e-mail sent by COL Maxwell required him to provide a password to enter AOL and the same was required for his intended recipient to retrieve the message.[99] This was not a message posted on a message board that anyone could view, but intended for one recipient.[100] In other words, an electronic envelope "sealed" the e-mail message COL Maxwell sent. The content of the e-mail was not viewable without opening the electronic envelope.[101] The CAAF determined that COL Maxwell had a subjective and objective expectation of privacy with respect to the e-mail sent to another user.[102]

Maxwell is important because it recognizes a reasonable expectation of privacy in e-mail, although it is limited to e-mail sent over a commercial ISP. This decision "comports comfortably with the historical development of the Fourth Amendment, expectations of privacy, and the guiding principles that it 'protects people not places.'"[103] The CAAF courageously provides Fourth Amendment protections to e-mail retrieved from an ISP's server, a step that no other court has done. However, *Maxwell* did not address whether there was a reasonable expectation of privacy in e-mail retrieved from a government server.

B. *United States v. Monroe*—No Reasonable Expectation of Privacy for Systems Monitoring

In *United States v. Monroe*, the CAAF provided useful guidance on the question left unanswered by *Maxwell*[104]: Is there a reasonable expectation of privacy in e-mail transmitted over a government computer network?[105] The system administrators of an Air Force computer network in Korea found fifty-nine undeliverable files addressed to Staff Sergeant (SSgt) Monroe.[106] The system administrators opened several of the files to determine why they failed to deliver in an attempt to clear the network.[107] Upon opening the files, the system administrators noticed that several contained pornographic images.[108] The system administrators notified the Air Force Office of Special Investigations (AFOSI).[109] The AFOSI obtained a search authorization and then searched SSgt Monroe's dormitory room, where he had his computer, and discovered both adult and child pornography stored on his computer.[110] On appeal, SSgt Monroe sought to suppress the evidence discovered by the system administrators, asserting his claim of a reasonable expectation of privacy in his government e-mail account.[111]

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[98] *See infra* App. A.

[99] *Maxwell*, 45 M.J. at 417–18. The searched e-mail messages were sent to another AOL user and not disclosed to the FBI by the private citizen. *Id.* "The user also has a password which is used to access the system before the screen name is used, and the quantity of usage of the screen names, as measured by time on-line, is tracked for billing purposes." *Id.* at 411.

[100] *Id.* at 417. Evidence obtained by FBI agents who were lawfully monitoring an AOL chatroom is admissible at trial. *Id.* A message left on a message board is the equivalent to an "electronic postcard." *Id.* at 411; *see also* United States v. Charbonneau, 979 F. Supp. 1177 (S.D. Ohio 1997) (holding the defendant ran the risk that when he sent the messages to the "public at large" that they would be read by law enforcement officials). If one allows exposure of his communications or privacy to outsiders, then he has demonstrated that he has no intention to keep it to himself. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[101] However, if the intended recipient provided the e-mail message to police, then COL Maxwell would have no expectation of privacy. *See* United States v. Hoffa, 385 U.S. 293 (1966).

[102] *See Maxwell*, 45 M.J. 406.

[103] Pede, *supra* note 85, at 21–22 (citing *Katz*, 389 U.S. at 351).

[104] *Maxwell*, 45 M.J. 406.

[105] United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000).

[106] *Id.* at 328.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 329–30.

[110] *Id.*

[111] *Id.* at 329.

The CAAF stopped short of finding that no reasonable expectation of privacy existed at all in government computer systems.[112] "Instead, the CAAF hedged by agreeing with the lower court that there was no reasonable expectation of privacy *vis-à-vis* the system administrators performing their official duties in monitoring the system and not viewing the files for law enforcement purposes."[113] The CAAF also relied on statutory privacy protections of the Electronic Communications Protection Act (ECPA)[114] in reaching this conclusion.[115]

1. Application of the Secured Communications Act to Government E-Mail

The ECPA provides the framework for statutory protection rights that govern voice, wire, and electronic communications.[116] The Stored Communications Act (SCA),[117] a subsection of the ECPA, deals with the retrospective surveillance of electronic communication.[118] The CAAF did not suppress the evidence because it determined the system administrator did not violate the ECPA's provisions.[119] In particular, the CAAF relied on the SCA in *Monroe*.[120]

> The version of [§] 2702(b) in effect at the time of trial in 1995 specifically states that "[a] person . . . may divulge the contents of a [stored electronic] communication . . . (6) to a law enforcement agency, if such contents (A) were inadvertently obtained by the service provider; and (B) appear to pertain to the commission of a crime."[121]

The SCA derived from an area in which the Supreme Court has provided Congress with little guidance and where the differences between electronic and traditional means of communication are the greatest.[122] Designed to regulate the conduct of governmental and private actors, the SCA provides the basic framework for privacy of stored electronic communications. The SCA is different from the Wire Tap Act[123] in that it covers both content and context (non-content) of the information that

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[112] *Id.* at 330. The Air Force Court of Criminal Appeals held that there was no reasonable expectation of privacy on a government computer. *See* United States v. Monroe, 50 M.J. 550, 560 (A.F. Ct. Crim. App. 1999).

[113] *See* United States v. Simons, 206 F.3d 392 (4th Cir. 2000) (holding that appellant, a government employee, had no reasonable expectation of privacy when evidence of child pornography was discovered on a government computer by the system administrator who reported it to the Federal Bureau of Investigation); Conrad, *supra* note 28, at 4 (citing *Monroe*, 52 M.J. at 329–30).

[114] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C. (2000)). The court determined that since the e-mails were on the server and not in transit that the provisions of the Stored Communications Act, a section of the Electronic Communications Protection Act, would apply. *Monroe*, 52 M.J. at 331.

[115] *Monroe*, 52 M.J. 326.

[116] ORIN S. KERR, COMPUTER CRIME LAW 449 (2006).

[117] *See* Stored Wired and Electronic Communications and Transactional Records Access, Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1860 (codified as amended at 18 U.S.C. §§ 2701–2712).

> The statute has been given various names by different commentators. Its names have included: (1) the "Electronic Communications Privacy Act" or "ECPA" because it was first enacted as part of that statute; (2) "Chapter 121" because it has been codified in Chapter 121 of Title 18 of the United States Code; (3) the "Stored Wired and Electronic Communications and Transactional Records Access" statute or "SWECTRA" because that is the formal title given to Chapter 121 in Title 18; and (4) "Title II" because it was enacted as the second title of ECPA.

Orin S. Kerr, *User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 n.1 (Aug. 2004). It is most commonly referred to as the SCA. *Id.*

[118] KERR, *supra* note 116, at 500.

[119] *See Monroe*, 52 M.J. 331. Even though the CAAF has subsequently held that the SCA does not provide a suppression remedy in other cases. United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000) (holding that there was no suppression remedy under the ECPA and allowing the evidence under a theory of inevitable discovery). However, the CAAF's analysis of the SCA provides insight that it is taking notice of privacy concerns raised by the governmental intrusion into e-mail stored on a government server.

[120] *Monroe*, 52 M.J. at 330–31.

[121] *Id.* (citing 18 U.S.C. § 2702(b) (1994)). However, this determination might not be valid since this section of the ECPA would not apply to the Air Force. *See infra* notes 126–44 and accompanying text.

[122] Mulligan, *supra* note 59, at 1567. Electronic communication is often stored on a server and is retrievable after the communication is complete, unlike a telephone conversation. *Id.*; *see also* Max Guirguis, *Electronic Mail Surveillance and the Reasonable Expectation of Privacy*, 8 J. TECH. L. & POL'Y 135, 142–44 (2003).

[123] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–2522 (2000)). The Wire Tap Act prohibits the interception of oral, wire, or electronic communications unless a statutory exception applies or a search warrant exists. *See* 18 U.S.C.S. § 2511(1) (LexisNexis 2008). The Department of Justice instructs law enforcement and prosecutors to ask the following questions to determine if the Wire Tap Act is applicable: (1) Is the communication to be monitored a protected communication?; (2) Will the proposed surveillance be

it governs.[124] The SCA breaks down the information into three categories.[125] The legislative history indicates that the purpose of this distinction was to distinguish information concerning the identity of the user from more revealing transactional information.[126] The actual substance of the message or data stored on a computer network falls into content.[127] It is important to determine what is being sought, the content or non-content of a stored electronic communication.

The SCA affords greater protection to the content information of stored communications than to the non-content information.[128] The reasons for this are intuitive: the actual body of a message provides greater privacy concerns than the information containing the address of the intended recipient.[129] The SCA provides several mechanisms, depending on the type of information sought, for the government to acquire evidence.[130] They are consent of user, subpoena, subpoena with prior notice to the customer, a court order in compliance with section 2703(d), and a search warrant.[131]

To acquire un-accessed content information stored on a server for less than one hundred and eighty days the government must attain a search warrant.[132] There are three options to acquire the contents of information maintained on a server for more than one hundred and eighty days.[133] The government may use a search warrant, a subpoena, or a court order under 18 U.S.C. § 2703(d).[134] This so-called "d" order is a combination of both a subpoena and a search warrant presented to a judge.[135] If the judge determines that government has provided specific and articulable facts showing that there are reasonable grounds to believe that the information to be compelled is "relevant and material" to a criminal investigation, he may sign the order.[136] The ISP responds to the "d" order like a normal subpoena.[137] The "d" order may contain language that forbids the ISP from notifying the subscriber that the government has compelled his information.[138] If information is

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an "intercept"?; and (3) If the answer is yes to these first two questions, does a statutory exception exist? SSCOECI MANUAL, *supra* note 16, at IV.D.1; *see also* Steve Jackson Games v. United States Secret Serv., 36 F.3d 457 (5th Cir. 1994) (holding the seizure of computer containing unretrieved e-mail is not an "intercept"); Wesley College v. Pitts, 974 F. Supp. 375 (D. Del. 1997) (viewing e-mail on another's computer screen not an intercept because it does not involve use of "electronic, mechanical, or other device"); United States v. Moriarty, 962 F. Supp. 217 (D. Mass. 1997) (ruling that "intercept" requires acquisition contemporaneous with transmission); Bohach v. Reno, 932 F. Supp. 1232 (D. Nev. 1996) (holding that in determining whether "intercept" occurred, must distinguish between very narrow "transmission phase" and much broader "storage phase"); United States v. Reyes, 922 F. Supp. 818, 836 (S.D.N.Y. 1996) (stating that "the acquisition of the data [must] be simultaneous with the original transmission of the data").

[124] KERR, *supra* note 116, at 450. The SCA covers both the content of the message and information concerning who established the e-mail account. *Id.* Non-content information is the "envelope" information, which is sending and receiving the information. Orin S. Kerr, *Internet Surveillance Law After the Patriot Act: The Big Brother That Isn't*, 72 NW. U. L. REV. 607, 611–14 (2003).

[125] SSCOECI MANUAL, *supra* note 16, at III.C. The first of these categories is basic subscriber information that includes basic information of the Internet user and his usage of the Internet. 18 U.S.C.S. § 2703(c)(2). It includes name; address; local and long distance telephone connection records, or records of session times and durations; length of service and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment for such service. *Id.* The second category is a catchall for all information that is not content. 18 U.S.C. § 2703(c)(1); *see* SSCOECI MANUAL, *supra* note 16, at III.C.2; *see also* United States v. Allen, 53 M.J. 402, 409 (C.A.A.F. 2000) (holding that a record identifying the date, time, user, and detailed Internet address of sites accessed by a user constitute information under 18 U.S.C.S. § 2703(c)(2) (2000)). The final category is content. 18 U.S.C.S. § 2711(1) (citing the definition for content in 18 U.S.C.S. § 2510).

[126] SSCOECI MANUAL, *supra* note 16, at III.C.2.

[127] 18 U.S.C.S. § 2711(1) (citing the definition for content in 18 U.S.C. § 2510); *see also* Kerr, *supra* note 124, at 646 (arguing that the subject line of an e-mail should be considered content as well).

[128] *See* SSCOECI MANUAL, *supra* note 16, at III.D.1–5 (providing what information may be compelled with the different procedural requirements).

[129] Kerr, *supra* note 117, at 1228 n.142 (discussing in detail the opinion of Professor Daniel Solove, who argues that the some non-content information raises even greater privacy concerns).

[130] 18 U.S.C.S. § 2703.

[131] *Id.* To access the non-content information normally only a subpoena is required, or in the case of non-content information covered under 18 U.S.C.S. § 2703(c)(1), a court order. *Id.* § 2703(c)(1)–(2).

[132] *Id.* § 2703(a).

[133] *Id.* § 2703(a), (b).

[134] *Id.* § 2705.

[135] Kerr, *supra* note 117, at 1219; *see also* 18 U.S.C.S. § 2703(d).

[136] Kerr, *supra* note 117, at 1219 n.73 (citing 18 U.S.C. § 2703(d)).

[137] *Id.*

[138] *See* 18 U.S.C.S. § 2705. Under the SCA, if a process with greater procedural hurdles is used, it entitles the government to information obtainable with lesser process. SSCOECI MANUAL, *supra* note 16, at III.D.

available with a subpoena, but the government compels disclosure with a search warrant or "d" order, the SCA has been satisfied.[139]

The SCA prohibits "public service providers"[140] from releasing information to other parties with some exceptions.[141] A public ISP, such as AOL or Yahoo, may not voluntarily disclose any non-content or content information to a government entity unless an exception to the prohibition exists.[142] The SCA is less stringent on voluntary disclosure for a nonpublic ISP.[143]

A provider is not public (i.e., nonpublic) if the service is only available to those with a special relationship to the provider.[144] If the service provider is nonpublic, then there is no prohibition against voluntary disclosure of information.[145] On its face, the SCA would not apply to e-mail services provided to Soldiers via a government computer network.[146]

Despite the Army's status as a nonpublic ISP, the CAAF has nonetheless applied the SCA to system administrators of government networks and thereby made this statute applicable to the military.[147] The DOD has also applied the SCA to the Army through its own policies.[148] Department of Defense Directive (DODD) 5505.9 clearly indicates that the SCA applies to military law enforcement agencies.[149] Arguably, the Army may have converted itself into a public ISP through its own policies by providing e-mail use for those not employed by the military.

The Army provides an AKO e-mail account to not only Soldiers, but to family members, contractors, and others associated with the military.[150] The Army is not a "public" ISP per se, because it still requires an affiliation with the Army to obtain an account.[151] Yet, it further demonstrates the increasing role of e-mail in modern society and the Army's willingness

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[139] SSCOECI MANUAL, *supra* note 16, at III.D (reasoning that law enforcement should exercise caution and adhere to the more onerous standards to ensure compliance); Kerr, *supra* note 117, at 1220 n.80 (arguing that obtaining a search warrant could avoid any Fourth Amendment challenges that may be raised); *see also* Warshak v. United States, 490 F.3d 455 (6th Cir. 2007), *vacated*, 2007 U.S. App. LEXIS 23741 (Oct. 9, 2007).

[140] *See* 18 U.S.C.S. § 2702(a). Public for purposes of this article is a private entity, such as AOL or Yahoo. Nonpublic is a government agency or a business that provides services only for its employees. *See* Anderson Consulting LLP v. UOP, 991 F. Supp. 1041 (N.D. Ill. 1998) (providing a comprehensive explanation of public and nonpublic ISPs).

[141] *See* 18 U.S.C.S. § 2702.

[142] *Id.* However, a public ISP may disclose non-content information to nongovernmental entities. *Id.* § 2702(c)(6). Eight exceptions allowing a public ISP to voluntarily disclose content information of a subscriber are: disclosure to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient; as otherwise authorized in 18 U.S.C. § 2511(2)(a), or § 2703; with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service; to a person employed or authorized or whose facilities are used to forward such communication to its destination; as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; to the National Center for Missing and Exploited Children; to a law enforcement agency if the contents were inadvertently obtained by the service provider and appear to pertain to the commission of a crime; or to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency. *Id.* § 2702(b). The exceptions to voluntary disclosure of non-content information of a subscriber are similar, but vary slightly. *See id.* § 2702(c).

[143] *See id.* § 2702(a)(1)–(3).

[144] Nonpublic is the term used in most academic research. It is counterintuitive. Public for purposes of this article is a private entity, such as AOL or Yahoo. Nonpublic is a government agency or a business that provides services only for its employees. *See Anderson Consulting LLP*, 991 F. Supp. 1041 (providing a comprehensive explanation of public and nonpublic ISPs).

[145] 18 U.S.C.S. § 2702. The rationale for this is not clear from the legislative history, but one reason may be that the service is for the benefit of the provider rather than the subscriber. SSCOECI MANUAL, *supra* note 16, at III.A. Additionally, a public provider offers a service in hopes of making a profit, while a nonpublic provider may offer it for a variety of reasons. Deborah M. McTigue, *Marginalizing Individual Individual Privacy on the Internet*, 5 B.U. J. SCI. & TECH. L. 5 paras. 15–17 (Spring 1999); *see infra* App. B (containing a simplified breakdown of the requirements for voluntary and compelled disclosure under the SCA).

[146] *See* Coacher, *supra* note 24, at 178 (concluding that the SCA is not applicable to e-mail service provided by the Air Force to its Airmen and civilian employees).

[147] United States v. Monroe, 52 M.J. 326, 330–31 (C.A.A.F. 2000) (applying the SCA to an Air Force computer network). *But see* Coacher, *supra* note 24, at 178 (concluding that the SCA is not applicable to e-mail service provided by the Air Force to its Airmen and civilian employees).

[148] U.S. DEP'T OF DEFENSE, DIR. 5505.9, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATION FOR LAW ENFORCEMENT (20 Apr. 1995) [hereinafter DODD 5505.9].

[149] *Id.* para. 4-2.

[150] *See* AKO, *supra* note 73. The exhaustive list of those authorized access to a U.S. Army e-mail account is contained on this page. *Id*.

[151] *See* Anderson Consulting LLP v. UOP, 991 F. Supp. 1041 (N.D. Ill. 1998).

to provide this technology for personal use. The SCA applies to the military through case law and policy, but this does not necessarily mean suppression for e-mail seized in violation of the SCA.

A statutory suppression remedy for a violation of the SCA does not exist, but § 2708 does leave open the possibility of suppression in the event of a constitutional violation.[152] Courts have consistently ruled against finding a violation of the SCA that rises to a constitutional violation.[153] The CAAF shares this view.[154]

While there has not been a suppression remedy for violation of the SCA, one court did enjoin the U.S. Navy from discharging a Sailor because the information attained in violation of the SCA formed the basis of the discharge.[155] The D.C. Circuit Court held there was a public interest in preserving privacy on the Internet and preventing the government from violating the SCA without recourse.[156] The holding in *McVeigh v. Cohen*[157] and DODD 5505.9 provide footing for suppressing information acquired in violation of the SCA, on the premise that the Army should not be rewarded for failing to adhere to DOD policy.

The SCA has come under attack for its constitutionality as well. *Warshak v. United States*, heralded as the first constitutional challenge to the SCA,[158] raised the possibility of Fourth Amendment protections for the content of stored electronic communications.[159] A Sixth Circuit panel relied on *Katz v. United States*[160] and *Smith v. Maryland*[161] to determine that Mr. Warshak had a reasonable expectation of privacy in the content of his e-mail stored on the commercial ISP server.[162] It held the government could only compel disclosure of a shared communication from a party who is a part of the conversation.[163] "It cannot, on the other hand, bootstrap an intermediary's limited access to one part of the communication (e.g. the phone number) to allow it access to another part (the content of the conversation)."[164] However, the Sixth Circuit sitting en banc vacated *Warshak*.[165] The holding of the Sixth Circuit panel further demonstrates that there is an objective expectation of privacy in e-mail residing on an ISP's server under the Fourth Amendment. The Military Rules of Evidence (MRE) seem to indicate this as well.

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[152] 18 U.S.C.S. § 2708 (LexisNexis 2008) ("The remedies and sanctions described in this chapter [the SCA] are the only judicial remedies and sanctions for non-constitutional violations of this chapter [the SCA]").

[153] *See* United States v. Hambrick, 225 F.3d 656 (4th Cir. 2000) (holding the issuance of a subpoena to a third party to secure information for criminal prosecution does not violate the Fourth Amendment); United States v. Kennedy, 81 F. Supp. 2d 1103 (D. Kan. 2000) (holding a violation of the ECPA does not violate the Fourth Amendment); United States v. D'Andrea, 497 F. Supp. 2d 117 (D. Mass. 2007) (holding a violation of the SCA does not require suppression of the evidence). *But see* Warshak v. United States, 490 F.3d 455 (6th Cir. 2007), *vacated*, 2007 U.S. App. LEXIS 23741; McVeigh v. Cohen, 983 F. Supp. 215 (D.C. Cir. 1998).

[154] United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000) (holding that there was no suppression remedy under the ECPA and allowing the evidence under a theory of inevitable discovery).

[155] *McVeigh*, 983 F. Supp. 215. Senior Chief McVeigh was the senior enlisted member of the U.S.S. *Chicago* at the time of discovery of his homosexual orientation. *Id.* at 217.

[156] *Id.* at 221–22. A Navy Petty Officer at the direction of Navy Judge Advocate obtained Senior Chief McVeigh's account information by false pretense. *Id.* at 217. Senior Chief McVeigh was allowed to retire from the Navy. *See* McTigue, *supra* note 145, para. 11 n.33 (citing Bradley Graham, *Gay Sailor Takes Navy Retirement Settlement; AOL Also Will Pay for Privacy Violation*, WASH. POST, June 13, 1998, at A3). The Department of Justice (DOJ) contends that this ruling may have been influenced by the "highly charged political atmosphere and press" coverage of this case. The DOJ contends the text of the statute makes it clear that there is not a suppression remedy for non-constitutional violations of the SCA and the holding is "somewhat perplexing." *See* SSCOECI MANUAL, *supra* note 16, at III.H.

[157] *See McVeigh*, 983 F. Supp. 215. The DOJ believes that the court must have been mistakenly referring to constitutional rights and not the SCA. *See* SSCOECI MANUAL, *supra* note 16, at III.H.

[158] Reynolds Holding, *E-mail Privacy Gets a Win in Court*, TIME, June 21, 2007, *available at* http://www.time.com/printout/0,8816,1636024.00.html.

[159] Warshak v. United States, 490 F.3d 455 (6th Cir. 2007), *vacated*, 2007 U.S. App. LEXIS 23741. The seizure of e-mail without a search warrant from an ISP's server raises issues of a reasonable expectation of privacy, and the ability of an ISP like a telephone company to intercept the content of a transmission does not waive an expectation of privacy. *Id.* at 471.

[160] 389 U.S. 347 (1967).

[161] 442 U.S. 735 (1979) (holding that the installation of a pen register was not a violation of the Fourth Amendment because it was not a search). When a person dials a telephone number and a pen register records it, he has no expectation of privacy in that information because he voluntarily turned that information to the telephone company, a third party. *Id.* at 743–44.

[162] *Warshak*, 490 F.3d at 471–75, *vacated*, 2007 U.S. App. LEXIS 23741.

[163] *Id.* at 471.

[164] *Id.*

[165] Warshak v. United States, 2007 U.S. App. LEXIS 23741 (6th Cir. Oct. 9, 2007).

2. Was This an Inspection or a Workplace Search?

a. MRE 313

Monroe does not completely erode the expectation of privacy in a government e-mail account, but erases it in terms of evidence inadvertently discovered by system administrators conducting system maintenance.[166] The court focused on the administrator's reason for opening the e-mails: "[T]o determine the reason they were stuck in the MQUEUE directory and not for any law enforcement purpose . . . ."[167] The system administrators discovered the evidence pursuant to an inspection of SSgt Monroe's e-mail to ensure that the network was operating properly.

"To qualify as an inspection under MRE [Military Rule of Evidence] 313(b),[168] the commander's primary purpose for ordering the inspection of his or her unit must be administrative, not a search for evidence of a crime."[169] Military Rule of Evidence 313 allows evidence obtained from inspections and inventories conducted according to this rule to be admissible at courts-martial.[170] It is when the character of the inspection changes from military fitness and unit readiness to a search to uncover evidence of wrongdoing that it is no longer an inspection, but a search.[171]

To order an inspection under MRE 313, a commander does not need to have probable cause.[172] The commander only needs to have a concern for the readiness of his unit. If the commander believes that evidence of crime exists before ordering an inspection, then the evidence, if found, is not admissible under MRE 313.[173]

While the CAAF did not cite MRE 313, the actions of the system administrators in *United States v. Monroe*[174] adhered to this rule. They were acting under authority of their commanding officer to ensure that the computer network they were monitoring was "functioning properly," thereby "maintaining proper standards of readiness."[175] Staff Sergeant Monroe was not suspected of committing any crimes when his e-mail was inspected.[176] Nor was he subjected to a more stringent inspection than others who were using the network. When the system administrators discovered what they correctly surmised to be illegal pornography, they contacted law enforcement who then attained a search authorization.[177] The facts in *Monroe* demonstrate that the systems monitoring conducted by the system administrators complied with MRE 313.[178] A legitimate inspection includes monitoring to ensure that a computer network is properly functioning and that users remain within the limits of appropriate use.[179] The inspections contemplated under MRE 313 are similar to workplace searches for employees of government agencies.

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[166] *See* United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000).

[167] *Id.* at 331.

[168] MCM, *supra* note 54, MIL. R. EVID. 313(b).

[169] Major James Herring, Jr., *What Is the "Subterfuge Rule" of MRE 313(b), After* United States v. Taylor*?*, ARMY LAW., Feb. 1996, at 24, 24.

[170] MCM, *supra* note 54, MIL. R. EVID. 313.

[171] United States v. Jackson, 48 M.J. 292, 294 (1998) ("At the same time, we noted that an inspection might not be sustained if its character changed during the process or if the circumstances were unreasonable.").

[172] MCM, *supra* note 54, MIL. R. EVID. 313.

[173] *Id.* MIL. R. EVID. 313(b). If the commander is searching for weapons or contraband, then he may order the inspection, but must prove by clear and convincing evidence that it was an inspection within the meaning of this rule. *Id.*

[174] 52 M.J. 326 (C.A.A.F. 2000).

[175] MCM, *supra* note 54, MIL. R. EVID. 313(b).

[176] *Monroe*, 52 M.J. at 328. The e-mail host administrator initially believed that SSgt Monroe received these large files as a prank, but came to realize that he was receiving these images on request. *Id.*

[177] *Id.* at 329–30.

[178] *See id.* at 326.

[179] *See generally id.*

b. A Workplace Search

O'Connor v. Ortega provides employees of government agencies limited Fourth Amendment protections in the workplace.[180] The Supreme Court held that Dr. Ortega, a physician employed by the State of California, maintained protections under the Fourth Amendment[181] for his personal belongings in the workplace, even when the search was conducted for a civil matter.[182] The realities of the workplace require a determination of what is reasonable in light of the efficient and effective requirements for the operation of the workplace.[183] "The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest."[184] For investigations of work-related misconduct and for work-related purposes, such as retrieving a file, a standard of reasonableness judged on a case-by-case basis is required.[185] "Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable."[186]

Like civilian employers, commanders have a requirement to ensure their "workplace" operates in an efficient and effective manner.[187] "The . . . complicating factor in the military is that sometimes business-supervisor and law-enforcement authority merge in the person of the commander."[188] The workplace search test is applicable to the military.[189] Military Rule of Evidence 313[190] provides additional guidance to the application of *O'Connor*[191] in a military workplace. This rule provides guidance on determining whether the search for an item was for law enforcement purposes or to ensure that a workplace is operating efficiently.[192] In *United States v. Muniz*,[193] decided before *O'Connor*, the Court of Military Appeals[194] used an "operational realities of the workplace"[195] concept to determine that appellant did not have a reasonable expectation of privacy in the drawers of his office credenza.

In *United States v. Muniz*, the command's motive for searching his locked credenza drawers was to ascertain his whereabouts for accountability purposes not for a law enforcement purpose.[196] While the court relied on MRE 313 to determine that a search did not occur,[197] the rationale of *O'Connor* would have denied Captain Muniz a reasonable expectation of privacy in his credenza as well. However, *Muniz* and MRE 313 do not address the situation when government workplace practices create a reasonable expectation of privacy. *Long II* addresses this issue.[198]

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[180] 480 U.S. 709 (1987).

[181] U.S. CONST. amend. IV.

[182] *O'Connor*, 480 U.S. at 715. Personal property recovered during the search of his office impeached Dr. Ortega at his termination hearing. *Id.* at 736. "Dr. Ortega commenced . . . action against petitioners in Federal District Court under 42 U.S.C. § 1983, alleging that the search violated the Fourth Amendment." *Id.* at 714.

[183] *Id.* at 721–22.

[184] *Id.* at 724.

[185] *Id.* at 725–26.

[186] *Id.* at 726. Justice Scalia, in a concurring opinion, believes that non-criminal government searches, which are normal in the private-employer context, do not violate the Fourth Amendment. *Id.* at 732 (Scalia, J., concurring).

[187] *See generally O'Connor*, 480 U.S. 709.

[188] United States v. Muniz, 23 M.J. 201, 205 (C.M.A. 1987).

[189] *See generally Long II*, 64 M.J. 57 (C.A.A.F. 2006); United States v. Tanksley, 54 M.J. 169 (C.A.A.F. 2000).

[190] MCM, *supra* note 54, MIL. R. EVID. 313.

[191] *O'Connor*, 480 U.S. 709.

[192] MCM, *supra* note 54, MIL. R. EVID. 313(b).

[193] *Muniz*, 23 M.J. at 205.

[194] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103–337, 108 Stat. 2663 (1994), changed the name of the U.S. Court of Military Appeals to the U.S. Court of Appeals for the Armed Forces. *See* Herring, *supra* note 169, at 24 n.5 (citing United States v. Sanders, 41 M.J. 485, 485 n.l (C.A.A.F. 1995)). The same act also changed the names of the various courts of military review to the courts of criminal appeals. *Id.*

[195] *O'Connor*, 480 U.S. at 717.

[196] *Muniz*, 23 M.J. at 203.

[197] *Id.* at 206.

[198] *Long II*, 64 M.J. 57 (C.A.A.F. 2006).

VI. The Impact of *United States v. Long*

A. Background

Lance Corporal Long was convicted of wrongful use of several illicit drugs in violation of Article 112a, UCMJ.[199] Evidence submitted included seventeen pages of e-mail messages in which LCpl Long discussed her fear of testing positive on a urinalysis and her efforts to mask her drug use with three other Marines.[200] Lance Corporal Long, at trial, moved to suppress these e-mails because the seizure occurred without a search authorization or her consent in violation of her Fourth Amendment rights.[201]

During the course of an investigation into other misconduct allegedly committed by LCpl Long, investigators uncovered e-mails detailing her drug use.[202] An officer from the U.S. Marine Corps' (USMC) Inspector General, with the assistance from the network administrator for Headquarters, Marine Corps, seized LCpl Long's e-mails.[203] The trial judge agreed with LCpl Long that the actions of the network administrator were a search for evidence without LCpl Long's consent and lacked a search authorization based on probable cause.[204] However, the trial judge admitted the evidence, ruling that LCpl Long had no reasonable expectation of privacy in her government e-mail account.[205]

The Navy-Marine Corps Court of Appeals (NMCCA) held the military judge committed error by admitting the e-mail messages.[206] The NMCCA relied on *United States v. Monroe*[207] to outline the requirement of establishing an expectation of privacy to the content of e-mail messages sent via a government computer network.[208] The NMCCA concluded that LCpl Long had a subjective expectation of privacy in her government e-mail account.[209] The NMCCA also held that LCpl Long had an objectively reasonable expectation of privacy regarding her government e-mail account when law enforcement was involved in the search.[210] However, the NMCCA affirmed LCpl Long's conviction, finding the admission of the e-mails was harmless.[211]

The Navy Judge Advocate General certified two issues for review by the CAAF:

> I. Whether the Navy-Marine Corps Court of Criminal Appeals erred when they determined that, based on the evidence adduced at trial, appellee held a subjective expectation of privacy in her e-mail account as to all others but the network administrator.
>
> II. Whether the Navy-Marine Corps Court of Criminal Appeals erred when they determined that it is reasonable, under the circumstances presented in this case, for an authorized user of the government computer network to have a limited expectation of privacy in their e-mail communications sent and

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[199] *Long I*, 61 M.J. 539, 540 (N-M. Ct. Crim. App. 2005).

[200] *Id.* at 541. In these e-mails, she admitted to using the illicit drugs as well. *Id.* at 542.

[201] *Id.* at 541.

[202] Harris Interview, *supra* note 13. Lance Corporal Long also allegedly fraternized with an officer assigned to Headquarters, U.S. Marine Corps. *Id.*

[203] *Long I*, 61 M.J. at 541. Army Inspector General's investigations are for the assessment of command and not for criminal investigation, but the information may be shared with law enforcement. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 8-11 (1 Feb. 2007). Arguably, Army Inspector General investigations may qualify as being at the behest of law enforcement.

[204] *Long I*, 61 M.J. at 541.

[205] *Id.* at 541–42.

[206] *Id.* at 542.

[207] 52 M.J. 326 (C.A.A.F. 2000).

[208] *Long I*, 61 M.J. at 543.

[209] *Id.* at 544. Even though LCpl Long did not testify in her motion to suppress, the court relied on the system administrator's testimony that her password was required to access the network. *Id.* The password, like a key, excluded others from using her account and was a precautionary step to protect her privacy. *Id.*

[210] *Id.* at 546. The court, relying on *Picha v. Weiglos*, 410 F. Supp. 1214 (N.D. Ill. 1976) and *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), held that "the reasonableness of an expectation of privacy turns on the degree of involvement by law enforcement." *Id*.

[211] *Long I*, 61 M.J. at 546–49. The NMCCA held the error harmless because the there was sufficient evidence based on government witnesses that LCpl Long would have been convicted without the admission of the e-mail transcript. *Id.*

received via the government network server.[212]

Lance Corporal Long filed a cross petition arguing that the Fourth Amendment violation was not harmless beyond a reasonable doubt.[213] The CAAF focused on whether LCpl Long had a reasonable expectation of privacy in her e-mail communications sent over a government network.[214] Based on the particular facts of this case, the CAAF held that LCpl Long did have a subjective expectation of privacy in her e-mails, that her expectation of privacy was objectively reasonable, and that the error in admitting these e-mails was not harmless.[215] The CAAF looked at several factors to reach this conclusion.

B. Analysis of *United States v. Long*

1. Personal Use

Both the NMCCA and the CAAF held that LCpl Long could use her government e-mail account for personal use; this was persuasive in determining that she had a reasonable expectation of privacy.[216] Mr. Assessor, the senior network administrator, testified that LCpl Long could use her government e-mail account as long as it did not interfere with official business.[217] This coincides with current version of the *Joint Ethics Regulation* (*JER*).[218]

The *JER* enforces the DOD policy on the use and subsequent monitoring of government computer networks. Section 2–301(a) informs service members and DOD civilian employees that government communications are for "official and authorized purposes only."[219] The *JER* expressly prohibits chain letters, pornography, and unofficial advertising, but permits limited personal use.[220] The *JER* specifically allows employees to use their e-mail to send "directions to visiting relatives," to check on house repairs, or to inform family members of changes in travel plans.[221] Each of the services has further refined the *JER* provisions and each varies slightly on what is permissible, but allows personal use of government e-mail.[222]

The Army has adopted the *JER* guidance on use of e-mail communications for personal matters.[223] Army regulations published after decision in *Long II* still maintain the *JER* standard. The permissible use of a government network, even encouraged in some instances,[224] indicates that the Army is promoting a reasonable expectation of privacy in those personal e-mails if the Soldier abides by the *JER*.

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[212] *Long II*, 64 M.J. 57, 58 (C.A.A.F. 2006).

[213] *Id.*

[214] *Id.* at 62.

[215] *Id.* at 59.

[216] *Id.* at 64; *Long I*, 61 M.J. at 541.

[217] *Long I*, 61 M.J. at 541. Judge Crawford, in her dissent, criticizes the majority's reliance on the system administrator's testimony. *See Long II*, 64 M.J. at 67 (Crawford, J., dissenting). She found that his perceptions of the Department of Defense (DOD) policy on computer use should not be "binding on the Department itself." *Id.* However, she could offer no evidence to demonstrate that the system administrator's perception was incorrect.

[218] *See* JER, *supra* note 27. The JER adopts the standards of ethical conduct for the Executive branch and ensures that all members of the military understand that "Public Service is a public trust." *Id.* § 2-301; Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.101(a) (2008).

[219] JER, *supra* note 27. "Federal Government communications systems and equipment (including Government owned telephones, facsimile machines, electronic mail, Internet systems, and commercial systems when use is paid for by the Federal Government) shall be for official use and authorized purposes only." *Id.* § 2-301(a).

[220] *Id.* § 2-301(a)(2)(d).

[221] *Id.* § 2-301(a).

[222] Conrad, *supra* note 28, at 25 n.207. The baselines of personal use include limits on frequency, no additional costs to DOD, and not reflecting adversely on DOD. *See* JER, *supra* note 27, § 2-301(a). Failures to adhere to the standards of use set forth by the *JER* are criminal offenses for Soldiers. *Id.* Promulgating letter, para. (B)(2)(a). "The prohibitions and requirements printed in bold italics in [this] reference are general orders and apply to all military members without further implementation." *Id.*

[223] *See* AR 25-1, *supra* note 3, para. 6-1e; AR 25-2, *supra* note 3, para. 4-5r(6).

[224] Army Knowledge Online, https://www.us.army.mil (follow "Inside AKO" hyperlink, then follow "AKO Video Messaging" hyperlink) (last visited Oct. 9, 2008).

As previously discussed in Section II of this article, the Army has legitimate reasons for monitoring a computer network. However, the Army wants to respect the rights of those who use government networks for personal use.[225] Army Regulation (AR) 380-53, *Information Systems Security Monitoring*, stresses that system administrators must conduct monitoring in the least obtrusive manner possible.[226] The system administrators will, to the maximum extent possible, respect "the privacy and civil liberties of individuals whose telecommunications are subject to monitoring."[227] Additionally, when evidence of criminal misconduct does occur, unless it requires additional monitoring to prevent death, serious bodily injury, or sabotage, administrators must stop systems monitoring and report the misconduct to law enforcement for investigation.[228] The Army's own longstanding policy to respect privacy and civil liberties demonstrates that the Army had provided an expectation of privacy vis-à-vis law enforcement prior to *Long II*.

Finally, AR 380-53 provides guidance to ensure that system administrators do not monitor privileged communications.[229] The Army published AR 380-53 before *Long II* and subsequent changes to the warning banner for all government computer networks. However, all of the senior uniformed Judge Advocates agree that communications between clients and attorneys remain privileged when sent over a government computer network despite valid reasons for systems monitoring.[230] Brigadier General James Walker[231] stated, "'The key aspect of the revision is to make certain that we maintain the protections of privileged communications . . .' within . . . the Department of Defense."[232] The American Bar Association has even opined that attorneys do not violate an ethical duty by communicating with clients via e-mail.[233] In its willingness to recognize privilege in addition to allowing personal use after *Long II*, the Army has implicitly strengthened the argument that Soldiers have a reasonable expectation of privacy in their government e-mail for Fourth Amendment purposes.

While the CAAF relied on the personal use policy to determine LCpl Long had a reasonable expectation of privacy, it examined other factors as well.[234] A policy permitting personal use does not, on its own, create a reasonable expectation of privacy. The CAAF looked at factors, such as the user's ability to exclude others from reading e-mail, to determine if government practices had created a reasonable expectation of privacy.[235]

2. The Use of a Password

The CAAF looked at MRE 314(d)[236] to determine if LCpl Long's e-mail was military property not requiring probable cause for a search.[237] The court relied on the holding in *O'Connor v. Ortega*,[238] which is consistent with MRE 314(d) allowing searches of government property without a search authorization unless facts demonstrate that the person had a

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[225] AR 25-2, *supra* note 3, para. 4-5s(4). System administrators will not engage in blanket monitoring of communications. *Id.*

[226] AR 380-53, *supra* note 3, para. 2-6c.

[227] *Id.* para. 2-1b.

[228] *Id.* para. 2-9c.

[229] *Id.* para. 2-10i. Army Regulation 380-53 does not provide any rules that forbid disclosure if inadvertently discovered nor does it provide any means for a system administrator to recognize what is a privileged communication under the Military Rules of Evidence. *Id.* See *infra* App. C for a more detailed discussion on ethical responsibilities of Judge Advocates in relation to communicating with clients on a monitored network.

[230] Teri Figueroa, *Pentagon Revising Computer-Snooping Policy*, N. COUNTY TIMES, Jan. 7, 2008, http://www.nctimes.com/articles/2008/01/07/news/top_stories/15_50_901_6_08.txt (relying on statements from the Staff Judge Advocate to the Commandant, U.S. Marine Corps); Telephonic Interview with Richard Aldrich, Contractor, Dep't of Defense Chief Info. Officer, in Charlottesville, Va. (Jan. 2, 2008) [hereinafter Aldrich Interview]; *see also* e-mail from Lieutenant Colonel Thomas J. Herthel, U.S. Air Force, Administrative Law Division Office of the Judge Advocate General, to Lieutenant Colonel Thomas Wand, U.S. Air Force, Chief, Joint Service Policy and Legislation (Jan. 11, 2008, 10:27 EST) [hereinafter Herthel e-Mail] (on file with author).

[231] Staff Judge Advocate to the Commandant, U.S. Marine Corps.

[232] Figueroa, *supra* note 230 (referring to Memorandum from Dep't of Def. Chief Info. Officer to Secretaries of the Military Dep'ts, et al., subject: Policy on Department of Defense Information Systems—Standard Consent Banner and User Agreement (2 Nov. 2007) [hereinafter CIO Memo I]). This policy is on temporary hold. Memorandum from Dep't of Def. Chief Info. Officer to Secretaries of the Military Dep'ts, et al., subject: Temporary Hold on Implementation of New Banner and User Agreement (7 Dec. 2007) [hereinafter CIO Memo II] (on file with author).

[233] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99–413 (1999).

[234] *Long II*, 64 M.J. 57, 64 (C.A.A.F. 2006).

[235] *Id*. at 63.

[236] MCM, *supra* note 54, MIL. R. EVID. 314(d).

[237] *Long II*, 64 M.J. at 64.

[238] 480 U.S. 709 (1987).

reasonable expectation of privacy in that property.[239] Relying on *Ortega*, the CAAF looked at the privacy expectations in terms of the office practices, procedures, and regulations in effect at Headquarters, USMC.[240] One of the office practices, the use of a password, was particularly persuasive.

The CAAF determined that the use of a password, known only to LCpl Long, was indicative in establishing an expectation of privacy.[241] "In fact, CAAF viewed the password requirements for e-mail as not only indicative of Long's privacy expectations, but as a business practice that reinforces this expectation."[242] Lance Corporal Long had a reasonable expectation of privacy because the ability to access her account relied on a password that only she knew.[243] In *City of Reno v. Bohach*, the Federal District Court of Nevada held that the appellant had no reasonable expectation of privacy in the content of his text pages stored on a police department computer.[244] In *Bohach*, anyone with access to the police department network could retrieve these messages.[245] In contrast, Lance Corporal Long (LCpl) had the ability to prevent everyone except the system administrator from accessing her e-mail account.[246] Lance Corporal Long's password to her e-mail account was the equivalent to the key for the lock on her wall locker.

Even though a master key existed for LCpl Long's e-mail account, the ability to secure an area demonstrates that a person has acquired a subjective expectation of privacy.[247] The CAAF has looked to the ability of a servicemember to secure government property to the exclusion of others to determine if an individual could establish a subjective expectation of privacy.[248] Chief Judge Everett, in a concurring opinion from *United Stated v. Muniz*, stated that there are circumstances, such as being able to secure the drawer to a credenza, that provide a service member a reasonable expectation of privacy in government-issued property.[249] Although the ability to exclude others from a desk or from accessing an e-mail account establishes an expectation of privacy, it does not prevent the command from inspecting or monitoring a Soldier's use of government equipment.[250] *Long II* reinforces that law enforcement cannot search government-owned property when a reasonable expectation of privacy has been established without a search authorization, yet a commander may still inspect that property.

The Army and DOD are attempting to circumvent *Long II* with new policies. The proposed DOD consent banner places users on notice that the password that a Soldier creates to access his e-mail is for the benefit of the government and not the Soldier.[251] No Army regulation states this. The approved consent banner issued by the Army does not state this.[252] Training that all Soldiers are required to complete before obtaining access to a government network stresses the importance of keeping individual passwords secured.[253] A Soldier may not share his password with other Soldiers, including supervisors, because

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[239] *Long II*, 64 M.J. at 64–65.

[240] *Id.* at 64.

[241] *Id.* at 63.

[242] Stewart, *supra* note 14, at 12.

[243] *Long II*, 64 M.J. at 63. Even though the password may have served some governmental interest, it did not diminish her subjective expectation of privacy. *Id.*

[244] 932 F. Supp. 1232 (D. Nev. 1996) (finding no expectation of privacy in text messages sent over the police department network). Bohach, a police officer, had sought an injunction to prevent the Internal Affairs Unit of the Reno Police Department from obtaining the text of pager messages based on Fourth Amendment and ECPA claim. *Id.* at 1233. The paging system allowed any user of the police department to send a text message from any police department computer using a program that would transmit the message to the department pager for a particular officer. *Id.* at 1233–34.

[245] *Id.* at 1235.

[246] *Long I*, 61 M.J. 539, 541 (N-M. Ct. Crim. App. 2005) (noting that system administrator did not even know LCpl Long's password and had to lock her out of the system to access her e-mail account).

[247] *But see* United States v. Geter, 2003 CCA LEXIS 134 (N-M. Ct. Crim. App. May 30, 2003). The court determined that the appellant did not demonstrate a subjective expectation of privacy because the password was for security of the system. *Id.* at *12. This argument is not persuasive. Soldiers store their government-issued TA-50 in a wall locker, so under this rationale Soldiers would have no reasonable expectation of privacy in their wall locker.

[248] United States v. Craig, 32 M.J. 614, 615 (C.M.A. 1992) (holding that there was no expectation of privacy when appellant was told by his commander to leave the desk unlocked so that others may access it).

[249] United States v. Muniz, 23 M.J. 201, 208 (C.M.A. 1987) (Everett, C.J., concurring).

[250] *Id.* at 203.

[251] CIO Memo I, *supra* note 232. This policy is on temporary hold. CIO Memo II, *supra* note 232.

[252] AR 25-2, *supra* note 3, para. 4-5m.

[253] U.S. Army Info. Assurance Training Ctr., Department of Defense Information Assurance Awareness Training, https://ia.gordon.army.mil/dodiaa/default.asp (last visited Oct. 9, 2008).

he is responsible for the use of that account.[254] All Soldiers still have the ability to exclude others, with the exception of the system administrators, from viewing the content e-mail messages even with implementation of the new DOD consent banner. The ability to exclude others from a government e-mail account demonstrates both a subjective and an objective expectation of privacy. While the stated intent of the password is for the benefit of the government,[255] in reality it provides the Soldier the ability to exclude others from accessing his assigned e-mail. Regardless, consent to monitoring may erase the reasonable expectation of privacy established by the presence of a password.

3. Consent

Because of *O'Connor*, a user's consent to monitor his government e-mail creates the largest hurdle to finding a reasonable expectation of privacy in government e-mail.[256] Nevertheless, *Long II* demonstrated that this is not an insurmountable task.[257] The NMCCA and the CAAF looked at the "Notice and Consent to Monitoring" banner to determine if LCpl Long had a reasonable expectation of privacy.[258] The banner put LCpl Long on notice that her e-mails were subject to monitoring by a system administrator, but did not mention that law enforcement could view the e-mails for reasons other than unauthorized use.[259] The NMCCA held that LCpl Long had a subjective expectation of privacy as to all others except for the network administrator based on the language of the banner.[260]

The CAAF, like the NMCCA, distinguished between systems monitoring and law enforcement.[261] "Simply put, in light of all the facts and circumstance in this case, the 'monitoring' function detailed in the log-on banner did not indicate to LCpl Long that she had no reasonable expectation of privacy in her e-mail."[262] The CAAF distinguished this case from *Monroe*;[263] the inspection of the e-mail was in accordance with the consent to monitoring to which SSgt Monroe had agreed.[264] Lance Corporal Long never consented to a search by law enforcement and therefore a search authorization was required.[265] The CAAF did not discuss the issue of voluntary consent.

"To be valid, consent must be given voluntarily."[266] The ability to use a government computer system relies on agreeing to consent to monitoring.[267] This provides for no real choice in some circumstances. Lance Corporal Long, stationed in

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[254] *Id.*; *see also* AR 25-2, *supra* note 3, para. 4–5a(8).

[255] *See* CIO Memo I, *supra* note 232.

[256] Conrad, *supra* note 28, at 2.

[257] *Long II*, 64 M.J. 57, 65 (C.A.A.F. 2006).

[258] *Long I*, 61 M.J. 539, 541 (N-M. Ct. Crim. App. 2005).

> This is a Department of Defense computer system. This computer system, including all related equipment, networks and network devices (specifically including Internet access), are provided only for authorized U.S. Government use. DoD computer systems may be monitored for all lawful purposes, including to ensure that their use is authorized, for management of the system, to facilitate protection against unauthorized access, and to verify security procedures, survivability and operational security. Monitoring includes active attacks by authorized DoD entities to test or verify the security of this system. During monitoring, information may be examined, recorded, copied and used for authorized purposes. All information, including personal information, placed on or sent over this system may be monitored. Use of this DoD computer system, authorized or unauthorized, constitutes consent to monitoring of this system. Unauthorized use may subject you to criminal prosecution. Evidence of unauthorized use collected during monitoring may be used for administrative, criminal or other adverse action. Use of this system constitutes consent to monitoring for these purposes.

Id.

[259] *Id.* at 541. This may have oversimplified the situation. Evidence discovered during systems monitoring generally fits into the exceptions of *O'Connor v. Ortega*, 480 U.S. 709 (1987). It is when the search is purely for law enforcement that the two prongs of *Ortega* are not satisfied. *See* O'Connor v. Ortega, 480 U.S. 709 (1987).

[260] *See Long I*, 61 M.J. at 544 (holding the military judge made no explicit finding on this); *Long II*, 64 M.J. at 65.

[261] *Long II*, 64 M.J. at 65.

[262] *Id.*

[263] 52 M.J. 326 (C.A.A.F. 2000).

[264] *Long II*, 64 M.J. at 64.

[265] *Long I*, 61 M.J. at 541.

[266] MCM, *supra* note 54, MIL. R. EVID. 314(e)(4).

[267] *See* AR 25-2, *supra* note 3, para. 4-5m.

Washington, D.C., had the ability to use a personal computer after duty hours to conduct personal business. For the Soldier deployed to an isolated location, he may have to choose between waiving his expectation of privacy in his government e-mail and communicating with family. This subtle difference is enough to make the consent involuntary.[268] Consenting to have your communications monitored by clicking on the log-in banner is a virtual "acquiescence to authority" that requires the suppression of the evidence.[269] The Army complicates this matter by offering e-mail accounts to spouses and encouraging personal use.[270] This practice erodes the consent to monitor personal e-mail.[271] Additionally, by consenting to monitoring when a Soldier has no other choice but to use a government e-mail account, a Soldier's ability to communicate freely and openly is restricted.

The Supreme Court has held that the government may not deny a benefit to a person on the basis that it infringes on a constitutionally protected area.[272] The Supreme Court was particularly concerned in cases involving free speech interests.[273] In terms of monitoring e-mail, Soldiers may unknowingly fail to consider that consenting to monitoring of e-mail may be eroding their privacy interests. This is especially troubling when the purpose of the monitoring is to gather evidence and bypass the Fourth Amendment.

VII. The Army's Reaction

Prior to the decision in *Long II*, Army policy regarding computer monitoring[274] was designed to ensure that government computers networks were functioning properly and not to serve as a law enforcement tool.[275] Since then, the focus has moved to a policy that enables unfettered law enforcement access to a Soldier's e-mail account under the premise of systems monitoring.[276] Discovering evidence of misuse or other illegal activity is a by-product of ensuring that the network is properly operating, not the primary focus.[277] The current focus in systems monitoring is to allow law enforcement unfettered access to any communication passed over government network. Allowing law enforcement to encroach upon systems monitoring invalidates the new policy. Comparing the Army policies in light of DOD policies before and after the decision in *Long II*[278] demonstrates this point.

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[268] United States v. White, 27 M.J. 264, 266 (C.M.A. 1988) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973)) ("For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.").

[269] *See* United States v. Radvansky, 45 M.J. 226, 230 (C.A.A.F. 1996) (citing United States v. McClain, 31 M.J. 130, 133 (C.M.A. 1990), United States v. White, 27 M.J. 264, 266 (C.M.A. 1988)). Professor Friewald argues that the government cannot deny constitutional protection merely because the government has taken that protection away. Freiwald, *supra* note 62, para. 31 (relying on *Smith v. Maryland*, 442 U.S. 735, 739 n.5 (1979)) ("To do otherwise would place constitutional rights at the mercy of the executive branch, an entity which the Fourth Amendment was specifically designed to constrain.").

[270] Army Knowledge Online, https://www.us.army.mil (follow "Inside AKO" hyperlink, then follow "AKO Video Messaging" hyperlink) (last visited Oct. 9, 2008); AKO, *supra* note 73.

[271] Memorandum from Dep't of the Air Force, Office of the Gen. Counsel (National Security & Military Affairs), to Air Force Office of Special Investigations Judge Advocate, subject: Computer Privacy (14 Dec. 2006) [hereinafter Air Force Gen. Counsel Memo] (on file with author). A log-in banner generally precludes as reasonable expectation of privacy "except where local practice has eroded consent." *Id.*

[272] Perry v. Sindermann, 408 U.S. 593 (1972).

[273] *Id.* at 597 (holding that the government may not deny benefits to its citizen based upon exercise their right of free speech). The CAAF has not addressed the constitutionality of consent to monitoring in any of the cases involving digital media from the aspect of the First Amendment. Lance Corporal Long's defense attorney did not raise any freedom of speech concerns in his appellate answer to CAAF. *See* Appellee's Answer, *Long II*, 64 M.J. 57 (C.A.A.F. 2006) (No. 05–5002/MC). If LCpl Long has been in Iraq and her only access was to a government network, the basis for her appeal may have taken on a different light.

[274] 64 M.J. 57 (C.A.A.F. 2006).

[275] Thomas King, Attorney, Office of the Staff Judge Advocate, U.S. Army Network Enterprise Technology Command, Legal Issues and Information Systems Operations (Sept. 16, 2002) (unpublished Power Point presentation citing guidance provided by the Deputy, Army Chief of Staff for Intelligence) (on file with author). Computer monitoring is not to be used to further internal unit investigations by targeting individual Soldiers. *Id.*

[276] *See* AR 25-2, *supra* note 3.

[277] The misuse of a government computer network discovered during monitoring is an offense punishable under the UCMJ as a *JER* violation. *See* JER, *supra* note 27, Promulgating letter, para. (B)(2)(a) ("The prohibitions and requirements printed in bold italics in [this] reference are general orders and apply to all military members without further implementation."). This does not mean that when a system administrator discovers misconduct that criminal prosecution was the primary purpose of the systems monitoring. *See infra* notes 298–301 and accompanying text.

[278] *See Long II*, 64 M.J. 57 (2006).

In the context of systems protection monitoring, DODD 8500.01E, *Information Assurance*, provides guidance on what monitoring entails.[279] The purpose of monitoring is to "detect, react, and isolate" threats to the government network, including threats of internal misuse.[280] It does not provide for systems monitoring to be a tool for law enforcement. This is consistent with policies in effect prior to the decision in *Long II*.

In 1998, the Assistant Secretary of Defense (Command, Controls, Communication, and Intelligence) provided guidance on computer monitoring.[281] Monitoring is for "purposes of systems management and protection, protection against improper or authorized use or access, and verification of applicable security features or procedures; . . . use of the system constitutes monitoring."[282] Neither this guidance nor DODD 8500.01E equates this to consenting to law enforcement monitoring.[283] However, in response to *Long II*[284] on 2 November 2007 the DOD Chief Information Officer supplemented this guidance to include consent to monitoring for law enforcement purposes.[285] This new log-in banner has been on hold since 7 December 2007.[286] However, the Army has adopted new log-in banner language and updated AR 25-2 to permit law enforcement encroachment upon systems monitoring.[287]

Army Regulation 25-2, paragraph 4-5m adopts the requirements for the consent for monitoring provided by the Assistant Secretary of Defense (Command, Controls, Communication, and Intelligence) in 1998, but has additional information as to the scope of the consent.[288] The prior log-in banner reflected the language required by the 1998 Assistant Secretary of Defense (Command, Controls, Communication, and Intelligence) policy.[289] The new language informs the user that he expressly consents to monitoring for law enforcement purposes and that there is no expectation of privacy in his government e-mail account.[290] This change is a direct response to *Long II*.[291] Prior to the publication of the 24 October 2007 version of AR 25-2, users maintained an expectation of privacy in systems monitoring with respect to law enforcement.[292]

The Army has reserved the right to view any communication whenever it desires in its new version of AR 25-2.[293] Paragraph 4-5s[294] provides that system administrators may retrieve, recover or intercept an e-mail only with the consent of a

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[279] U.S. DEP'T OF DEFENSE, DIR. 8500.01E, INFORMATION ASSURANCE (24 Oct. 2002) (C1, 23 Apr. 2007) [hereinafter DODD 8500.01E]. The *JER* also places Soldiers on notice that their use of a government computer system is subject to monitoring. JER, *supra* note 27, § 2-301(a)(3). The *JER* does not define monitoring, but refers the reader to two now-rescinded DOD directives. *Id.* (citing U.S. DEP'T OF DEFENSE, DIR. 4640.6, COMMUNICATIONS SECURITY TELEPHONE MONITORING AND RECORDING (26 June 1981) (rescinded 9 Oct. 2007); U.S. DEP'T OF DEFENSE, DIR. 4640.1, TELEPHONE MONITORING AND RECORDING (15 Jan. 1980) (rescinded 9 July 1990). Lieutenant Colonel Coacher compared this guidance to placing a size "2007" foot into a "1980" shoe, which is difficult to do and requires a lot of "wiggling" to accomplish. *See* Coacher, *supra* note 25, at 189.

[280] DODD 8500.01E, *supra* note 279, para. 4-20.

[281] ASOD (C4I) Memo, *supra* note 6.

[282] *Id.*

[283] U.S. DEP'T OF DEFENSE, INSTR. 8560.01, COMMUNICATION SECURITY (COMSEC) MONITORING AND INFORMATION ASSURANCE (IA) READINESS TESTING para. 4-5 (9 Oct. 2007). Criminal misconduct discovered during COMSEC monitoring may not be used for prosecution without approval of the general counsel of the department who conducted the monitoring. *Id.*

[284] 57 M.J. 64 (C.A.A.F. 2006).

[285] CIO Memo II, *supra* note 232. The change to the standard consent banner was in response to *Long II*, 64 M.J. 57 (C.A.A.F. 2006). Aldrich Interview, *supra* note 230; *see also* Figueroa, *supra* note 230 (citing Major Patrick Ryder, a spokesman for the DOD) ("In general terms, the main difference in the two user consent banners is that the updated version seeks to make it clearer to users what they are consenting to when they use a DoD computer.").

[286] CIO Memo I, *supra* note 232. Retracted because of concerns by the Air Force TJAG, Major General Rives, over the failure to explicitly recognize privileges under the new policy, in particular the attorney client privilege. Herthel e-mail, *supra* note 230. New DOD policy mentions that privileges were not negated by the new banner, but raises the issue if they even existed. CIO Memo I, *supra* note 232.

[287] *See* AR 25-2, *supra* note 3. On 3 August 2007, the Army released a major revision of AR 25-2 to replace the previous version dated 14 November 2003. AR 25-2 (2003), *supra* note 6. The 3 August 2007 version of AR 25-2 was replaced by the current version and corrected typographical errors and put in place the current log-in banner. *See* AR 25-2, *supra* note 3, Summary of Changes.

[288] *See* AR 25-2, *supra* note 3, para. 4-5m.

[289] *See* AR 25-2 (2003), *supra* note 6.

[290] AR 25-2, *supra* note 3, para. 4–5m. Prior to the change in AR 25-2, FORSCOM had adopted a banner that informed users that law enforcement officials for the purpose of "investigating and prosecuting criminal misconduct" might monitor computer systems. FORSCOM Memo, *supra* note 6.

[291] *Long II*, 64 M.J. 57 (C.A.A.F. 2006); Aldrich Interview, *supra* note 230.

[292] AR 25-2 (2003), *supra* note 6, para. 4-5r ("Users will be advised that there is no expectation of privacy while using Army ISs [information systems] or accessing Army resources except with respect to LE/CI [Law Enforcement/Counter-Intelligence] activities.").

[293] AR 25-2, *supra* note 3, para. 4-5s(4).

party to the communication, in response to the inspector general, in response to properly authorized law enforcement investigation, in response to an informal investigation under AR 15-6,[295] a preliminary inquiry under AR 380-5,[296] or a commander's inquiry under Rule for Courts-Martial 303.[297] There is an additional method for the release under paragraph 4-5t, a management search in the absence of an employee.[298] The Army allows liberal access to view a Soldier's e-mail on a government server. The ability to view a Soldier's e-mail on a government server ranges from systems monitoring, to administrative requests, or in response to investigations with an eye toward prosecution. The new Army policy, while trying to erase the reasonable expectation of privacy created by *Long II,* is at odds with Supreme Court precedent.[299]

The Army's policy for systems monitoring has transformed from an inspection to ensure readiness of its computer networks to a search to uncover wrongdoing for criminal prosecution. In *United States v. Burger*, the Supreme Court held that administrative inspections of a highly regulated industry are constitutional, in part to lower expectations of privacy due to the state's interest in regulation.[300] However, in *Ferguson v. City of Charleston*, the Supreme Court held that a Fourth Amendment violation occurs when a government policy exists for the primary purpose of collecting evidence for criminal prosecution, even if the policy has secondary non-criminal justification.[301] Army Regulation 25-2 has warped from something akin to an inspection envisioned by MRE 313 to a policy designed to allow law enforcement to seize e-mail without probable cause.[302] It is no longer monitoring to ensure that the network remains viable, but an attempt to bypass the Fourth Amendment by allowing law enforcement to access e-mail without acquiring a search authorization.[303]

VIII. Analysis

The CAAF, the SCA, and the MRE do not prohibit the monitoring of government computer networks to ensure that the system is operating properly and used for only authorized purposes.[304] However, the CAAF has held that a servicemember has a reasonable expectation of privacy vis-à-vis law enforcement in their government e-mail account.[305] The involvement of law enforcement shifts the purpose from systems protection to evidence collection, and thus requires probable cause and a search authorization.[306]

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[294] *Id.* para. 4-5s(10). The consent of the party to monitoring for this paragraph appears separate and distinct from the consent to monitor the user agrees to when he access a government information system.

[295] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).

[296] U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sept. 2000).

[297] MCM, *supra* note 54, R.C.M. 303. Arguably, investigations conducted under the provisions of AR 15-6, an Inspector General's Request, or AR 380-5 may not qualify as law enforcement investigations. However, if initiated with an eye towards prosecution they would qualify. This would require a careful examination of the facts in each situation.

[298] AR 25-2, *supra* note 3, para. 4-5t. For example, if a trial counsel, on emergency leave, has witness contact information on an e-mail stored on a government server, the Chief of Justice would be able to access it under this paragraph.

[299] *See generally* O'Connor v. Ortega, 480 U.S. 709 (1987) (holding that government employees have limited Fourt Amendment protections in the workplace).

[300] 482 U.S. 691 (1987) (upholding a New York statute that permitted warrantless inspections of junkyards for the primary purpose of deterring auto theft). The Court determined that New York had a substantial interest in deterring auto theft, that regulating the "vehicle dismantling" industry helps deter auto theft, the statute provides a constitutionally adequate substitute for a warrant, and finally the statute limits the "time, place, and scope" of the inspection. *See id.* at 708–13.

[301] 532 U.S. 67 (2001). A state-run hospital in South Carolina required all expectant mothers to receive a urinalysis. *Id.* Law enforcement received information on positive test results. *Id.* The hospital policy's ultimate goal was to ensure that the expectant mothers obtained drug counseling; its immediate goal was to provide information for prosecution. *See id.* The Supreme Court distinguished this case from *United States v. Burger*, 482 U.S. 691 (1987), where the discovery of criminal violations was incidental to an administrative search; in *Ferguson*, the policy "was specifically designed to gather evidence of violations of penal laws." *Ferguson*, 532 U.S. at 84 n.21.

[302] *See* United States v. Battles, 25 M.J. 58, 60 (C.M.A. 1987).

> Whether such government action might be considered constitutional as a legitimate administrative inspection in light of the holding of the Supreme Court in *New York v. Burger*, need not be decided today. Moreover, whether Mil. R. Evid. 313(b) is constitutional in light of the particular requirements of that decision is also a question for a later time.

Id. (citation omitted).

[303] "Monitoring is the observation of a resource for the purpose of ascertaining its status or operational state." *See* AR 25-2, *supra* note 3, glossary.

[304] *See generally* Dolak & Dolak, *supra* note 26; Conrad, *supra* note 28; Coacher, *supra* note 24.

[305] *Long II*, 64 M.J. 57 (C.A.A.F. 2006).

[306] Coacher, *supra* note 24, at 192–93.

The SCA[307] is applicable to the military by its own policies not by the terms of the statute. Under DODD 5505.9,[308] law enforcement are directed to adhere to the provisions of the ECPA.[309] The SCA is a sub-part of the ECPA.[310] Under the SCA, a system administrator may turn over evidence discovered while rendering services or in protecting the property of the provider.[311] If law enforcement wants to view the content of e-mail stored on a server, they are required to attain a subpoena or court order.[312] There is no per se suppression remedy for violating the terms of the SCA,[313] but DOD has solidified a Soldier's reasonable expectation of privacy in his government e-mail account by holding itself accountable to the provisions of the SCA.[314]

The Army and DOD further reinforce a Soldier's expectation of privacy in government e-mail by allowing personal use.[315] Soldiers use their government e-mail for personal use with permission from the government. The Army has even touted AKO as a means for Soldiers to communicate with their families by offering spouses e-mail addresses and informing Soldiers how to send video messages with their e-mail accounts.[316] The Army and the other services recognize the need to protect privileged communications contained in government e-mail as well.[317] A reasonable Soldier could believe he has an expectation of privacy in his government e-mail because the government allows him to use his government e-mail for personal communications, gives his spouse a government e-mail account, and then allows him to maintain privilege in protected communications. The innocuous log-in banner, even if one assume this is a valid consent to monitoring, loses its effectiveness in waiving any expectation of privacy by promoting policies that run counter to it.

Prior to the decision in *Long II*, the Army specifically ensured that Soldiers had a reasonable expectation of privacy from law enforcement during systems monitoring.[318] The monitoring policy was consistent with an inspection under MRE 313; an inspection directed at everyone using the network and subjecting everyone to the same level of scrutiny. Since the decision in *Long II*, the Army has focused the monitoring policy on gathering evidence against an individual instead of protecting the network. By changing its policy, the Army is now violating the holding in *O'Connor v. Ortega*[319] and *Ferguson v. City of Charleston*.[320] The Army's computer monitoring policy has now become a tool for law enforcement instead of a legitimate inspection to ensure the health of the computer network.

A system administrator should have considerable discretion to monitor a computer network to ensure it is operating properly. However, the involvement of law enforcement in computer monitoring raises Fourth Amendment issues.[321] The simplest solution is to prohibit any personal use of government computer systems and not recognize any privilege for material sent over government computer networks. This will likely not happen. Often e-mail is the only means of communications for deployed Soldiers. Additionally, it is not practical to forbid e-mail for personal use as it is the predominant means of communication, especially with younger Soldiers.[322] By permitting the personal use of a government

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[307] *See* Stored Wired and Electronic Communications and Transactional Records Access, Pub. L. No. 99–508, § 201, 100 Stat. 1848, 1860 (codified as amended at 18 U.S.C. §§ 2701–2712).

[308] DODD 5505.9, *supra* note 148.

[309] Electronic Communications Privacy Act of 1986, Pub. L. No. 99–508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

[310] *See supra* note 117 and accompanying text.

[311] *See* 18 U.S.C.S. § 2702(b) (LexisNexis 2008).

[312] *See supra* notes 125–39 and accompanying text for a more detailed discussion.

[313] 18 U.S.C.S. § 2708; *see also* United States v. Allen, 53 M.J. 402 (C.A.A.F. 2000) (holding that the SCA does not provide for a suppression remedy). *But see* McVeigh v. Cohen, 983 F. Supp. 215 (D.C. Cir. 1998).

[314] *McVeigh*, 983 F. Supp. 215 (enjoining the discharge of a homosexual Sailor because the information on which the discharge was based was obtained in violation of the SCA).

[315] *See* JER, *supra* note 27, § 2–301; AR 25-1, *supra* note 3, para. 6–1e.

[316] Army Knowledge Online, https://www.us.army.mil (follow "Inside AKO" hyperlink, then follow "AKO Video Messaging" hyperlink) (last visited Oct. 9, 2008).

[317] *See* Herthel e-mail, *supra* note 230; Figueroa, *supra* note 230.

[318] AR 25-2 (2003), *supra* note 6, para. 4-5r(2).

[319] 480 U.S. 709 (1987).

[320] 532 U.S. 67 (2001).

[321] *See* Coacher, *supra* note 24, at 156. *See generally Long II*, 64 M.J 57 (C.A.A.F. 2006) (holding that there is a reasonable expectation of privacy in a government e-mail account).

[322] *See* Freiwald & Bellia, *supra* note 65, at 568.

e-mail account, issues involving a reasonable expectation of privacy will always exist. The best course of action might be to revert to a systems monitoring policy that relies on the holding of *O'Connor v. Ortega*[323] and MRE 313 to ensure that evidence acquired during monitoring is admissible at trial.[324]

Until a new systems monitoring policy is developed, the best practice for criminal cases is to obtain a search authorization before viewing information residing on a government e-mail server.[325] A search authorization only requires probable cause.[326] In *United States v. Leedy*, the CAAF held that probable cause requires more that just a bare suspicion, but less than a preponderance of the evidence.[327] With such a low threshold, a good practice would be to attain a search authorization if law enforcement believes that evidence of criminal conduct exists in a Soldier's e-mail messages. In addition to preventing the suppression of evidence, this practice demonstrates that the military justice system is fair.[328] The prudent law enforcement agent will proceed only with a search authorization, despite the new e-mail monitoring policy, prior to viewing e-mail on a government server.

IX. Conclusion

It is uncertain whether the CAAF will continue to recognize a reasonable expectation of privacy in a government e-mail account or limit the impact of *Long II* to its facts. The CAAF has recently affirmed two cases from the Air Force Court of Appeals[329] that on their face seem to conflict with *Long II*.[330] Both cases are distinguishable from *Long II*. Neither case dealt with e-mail seized from a government server nor enforced workplace practices that created a reasonable expectation of privacy as they did in *Long II*.[331] As e-mail use continues to expand, the number of criminal cases involving evidence acquired from a government computer network will increase. The recognition of a reasonable expectation of privacy in electronic communications will continue to be a contested issue.

Even though decided on a very specific set of facts, the decision in *Long II* creates new privacy rights by recognizing a reasonable expectation of privacy in government e-mail. The Army has reacted by creating policies that try to erase the privacy rights created by the CAAF's decision in *Long II*. The Army's attempt to remove any expectation of privacy has transformed a legitimate computer network monitoring program into a law enforcement tool. Once the CAAF recognized a reasonable expectation of privacy in e-mail stored on a government server, policies and regulations denying the existence of this privacy expectation have missed the mark.

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[323] 480 U.S. 709 (1987).

[324] This could be accomplished by rescinding the current version of AR 25-2 and adopting the policies put in place under the 2003 version of AR 25-2.

[325] This is recommended by both the Navy and Air Force. *See* e-mail from Deputy Assistant Judge Advocate Gen. (Criminal Law) to All Navy and Marine Corps Judge Advocates, subject: Search Authorizations for Computer Files in Light of *United States v. Long*, 64 M.J. 57 (2006), Part II (1 June 2007) (on file with author); General Counsel of the Air Force, *Expectation of Privacy in Computer Systems: Follow-Up*, GEN. COUNSEL'S Q., Apr. 2007; *see also* Lieutenant Colonel John T. Soma et al., *Computer Crime: Substantive Statutes & Technical & Legal Search Considerations*, 39 A.F. L. REV. 225, 225–26 (1996).

[326] MCM, *supra* note 54, MIL. R. EVID. 315(a).

[327] 65 M.J. 208, 213 (C.A.A.F. 2007) (holding that there is no specific probability required to establish probable cause, but it is based on common sense that a crime has occurred). The current Air Force policy only requires "individualized suspicion" that a user engaged in criminal behavior. Air Force Gen. Counsel Memo, *supra* note 271. To search the user's e-mail account requires permission from someone authorized to issue a search authorization. *Id.* (citing U.S. DEP'T OF AIR FORCE, INSTR. 33–129, WEB MANAGEMENT AND INTERNET USE (3 Feb. 2005)). While not a search authorization, it is the practical equivalent.

[328] President Lyndon Johnson believed that the top priority of the military justice system was to ensure a perception of fairness. Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 19 (1987) (referencing comments made by President Johnson on the enactment of the Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335).

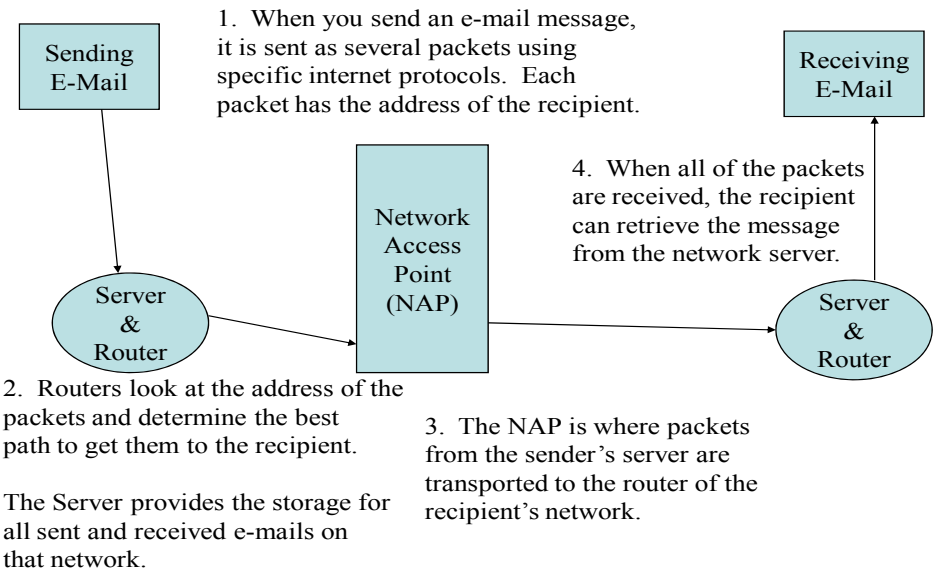
[329] *See* United States v. Larson, 64 M.J. 559 (A.F. Ct. Crim. App. 2007) (finding the appellant had no reasonable expectation in privacy in data stored computer when he knew that computer would be turned over to another officer upon his return from deployment); United States v. Rutherford, 2007 CCA LEXIS 262 (A.F. Ct. Crim. App. June 19, 2007) (affirming the military judge's ruling that the appellant lacked a subjective expectation of privacy in e-mails stored on his government computer and holding that the e-mails would have been admissible under the theory of inevitable discovery).

[330] United States v. Larson, 66 M.J. 212 (C.A.A.F. 2008); United States v. Rutherford, 2008 CAAF LEXIS 639 (May 27, 2008).

[331] *Larson*, 66 M.J. at 215–16 (holding that Appellant's activity was illegal, he was put on notice, he had consented to monitoring of activities that were illegal, and Appellant's commander could log onto the computer to access the seized material); United States v. Rutherford, 2007 CCA LEXIS 262 (finding that the e-mails were stored on the hard drive and were viewed by an Airman performing maintenance on the computer).

Appendix A

How E-mail is Delivered[332]



Electronic mail allows for an exchange of information between computers using telephone and cable lines.[333] Packet switching allows this to occur.[334] Data is broken into smaller pieces, i.e., packets, and sent out to its destination.[335] It is not necessary for each of these packets to travel the same route.[336] This allows computers to talk with one another without a direct connection.[337] This electronic communication occurs in various forms such as e-mails, web surfing, chat rooms, and bulletin boards. Electronic mail messages routed through and stored on an ISP's server until the recipient to collects them.[338] However, the e-mail, even after delivery, remains on the ISP's server as a back up.[339]

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[332] PRESTON GRALLA, THE INTERNET WORKS 11, 89–90 (1999).

[333] David T. Cox, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4 J. TECH. L. & POL'Y 1 para. 83 (Summer 1999).

[334] *Id.* para. 84.

[335] *Id.* para. 83.

[336] *Id.* para. 85.

[337] *Id.*

[338] *Id.*

[339] Mulligan, *supra* note 59, at 1562–63.

Appendix B

The Stored Communications Act[340]

Status	Voluntary Disclosure Public ISP	Voluntary Disclosure Nonpublic ISP	Compelled Disclosure Public ISP	Compelled Disclosure Nonpublic ISP
Unopened e-mail in storage for less than 180 days	No unless § 2702(b) Applies	Yes § 2702(a)(1) Applies	Search Warrant § 2703(a)	Search Warrant § 2703(a)
Unopened e-mail in storage for 180 days or more	No unless § 2702(b) Applies	Yes § 2702(a)(1) Applies	Subpoena with notice, § 2703(d) order, search warrant	Subpoena with notice, § 2703(d) order, search warrant
Opened e-mail or other content	No unless § 2702(b) Applies	Yes § 2702(a)(2) Applies	Subpoena with notice, § 2703(d) order, search warrant	SCA does not apply § 2711(2)
Most Non-content Records	No unless § 2702(c) Applies	Yes § 2702(a)(3) Applies	§ 2703(d) order, search warrant	§ 2703(d) order, search warrant
Basic session logs, subscriber information	No unless § 2702(c) Applies	Yes § 2702(a)(3) Applies	Subpoena, § 2703(d) order, search warrant	Subpoena, § 2703(d) order, search warrant

[340] KERR, *supra* note 116, at 507.

Appendix C

Attorney-Client Privilege

"System protection monitoring also raises policy issues when the system is used to transmit protected communications."[341] The *Manual for Courts-Martial* provides that communications between certain parties are privileged in nature and not admissible at courts-martial.[342] These communications are inadmissible as long as they remain confidential.[343] Army Regulation 27–26, *Rules of Professional Conduct for Lawyers*, also imposes an ethical duty on an attorney to maintain confidentiality in communications between him and his client.[344] The use of e-mail to communicate with a client and the monitoring of government networks may possibly violate an attorney's ethical duty to provide confidential communications with his client.

Electronic mail has become an increasingly preferred method for attorneys to communicate with clients; because of this, several state bar associations have issued ethics opinions that address this issue.[345] The Army Rules for Professional Conduct give limited guidance on communications over e-mail.[346] The discussion to Rule 1.6 cautions Judge Advocates to "strive to avoid" unauthorized persons from overhearing conversations and to scrutinize access by others to automation equipment.[347] The American Bar Association (ABA) has concluded that confidentiality will be maintained if the lawyer communicates with a client through e-mail.[348] The ABA has concluded that from a technological and legal standpoint, e-mail has progressed as a means of communication that has a reasonable expectation of privacy.[349] While e-mail is subject to intercept or retrieval by a third party, this does not diminish its confidentiality because every form of communication is subject to interception.[350]

Unsettled is the issue with electronic communications over a government network where the user has consented to monitoring of his e-mail.[351] The discussion to Army Rule 1.6 raises this issue, but provides no guidance.[352] This issue exists in the ongoing trial of LCpl Tatum in a motion to prevent the USMC from monitoring e-mails between the attorneys and the accused.[353] Lance Corporal Tatum's civilian defense attorney claims that communicating with the client by e-mail violates the attorneys' ethical duties under Navy Professional Rules of Conduct and their State Bar rules.[354] Lieutenant Colonel Colby Vokey[355] stated that "by using the computer, you are almost violating the state and military ethics rules on confidentiality."[356] The claims by LCpl Tatum's defense team center on the fact that the Marine Corps has unfettered access to e-mail communications between attorney and client, and the accused and his attorneys would be unaware if the government were to view their e-mails.[357] Army Regulation 380-53 instructs system administrators to avoid monitoring communications protected by privilege.[358] Lance Corporal Tatum's defense team also cites the USMCs' policy[359] that

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[341] Coacher, *supra* note 24, at 183.

[342] MCM, *supra* note 54, MIL. R. EVID. 501–04, 513.

[343] *Id.* There are exceptions to each of these privileges. *Id.*

[344] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.6 (1 May 1992) [hereinafter AR 27-26].

[345] Matthew J. Boettcher & Eric G. Tucciarone, *Concerns over Attorney-Client Communication Through E-Mail: Is the Sky Really Falling?*, 2002 L. REV. M.S.U.-D.C.L. 127, 138 (Spring 2002).

[346] AR 27-26, *supra* note 344, R. 1.6 discussion.

[347] *Id.*

[348] *See* Am. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 99–413 (1999).

[349] *Id.*

[350] *See id.*

[351] Boettcher & Tucciarone, *supra* note 345, at 140 n.70 (citing Conn. Bar Ass'n, Op. 99–52 (1999)).

[352] AR 27-26, *supra* note 344, R. 1.6 discussion.

[353] Teri Figueroa, *Lawyers Fret Over Military Computer Snooping*, N. COUNTY TIMES, Dec. 31, 2007, http://www.nctimes.com/articles/2008/01/01/news/top_stories/21_42_7312_31_07.prt.

[354] Motion for Appropriate Relief (For Injunctive Relief from Warrantless Intrusion into Attorney-Client Privileged Information on Computer of Defense Counsel), United States v. Tatum (Western Jud. Cir. N-M. Trial Judiciary Dec. 14, 2007) [hereinafter Tatum Motion].

[355] United States Marine Corps, Regional Defense Counsel, Western Region.

[356] Figueroa, *supra* note 353.

[357] Tatum Motion, *supra* note 354.

[358] AR 380-53, *supra* note 3, para. 2-10i.

implements the DOD Chief Information Operations new policy on scope of consent to systems monitoring.[360] However, they fail to mention that this policy states that it will have no effect on a privilege recognized by law.[361] Although this issue has not been settled by the Army Rules of Professional Conduct or by a formal opinion from the Office of the Standards of Conduct, an Army defense counsel is likely not violating his ethical duty by communicating with his client via a government e-mail account.

The MRE recognize several forms of protected communication that arise to a testimonial privilege.[362] These include communications to clergy,[363] husband-wife privilege,[364] psychotherapist-patient privilege,[365] and attorney-client privilege.[366] To invoke the attorney-client privilege recognized under MRE 502, the communication must be confidential and made for the purpose of seeking legal advice.[367] The intended recipient of the communication must be the attorney, client, or an agent of the attorney.[368] The CAAF has held if there is any doubt that the intent of the communication was to be confidential, it should be resolved in favor of the accused.[369] This is consistent with the decision in *United States v. Noriega*.[370] Manuel Noriega, the former President of Panama, made several calls to his attorney on the phone outside of his cell where he was detained pending trial.[371] The court held Noriega had a reasonable expectation of privacy in his conversations with his attorneys due the confusion surrounding the scope of the monitoring of telephone calls.[372] This could be applicable to the guidance provided by the Army and DOD.

The scarce references to the recognition of privilege by Army regulation and DOD guidance may save the day for maintaining any privilege for information passed over a government computer network. Brigadier General James Walker[373] stated, "'The key aspect of the revision is to make certain that we maintain the protections of privileged communications . . .' within . . . the Department of Defense."[374] Additionally, even if the system administrator does view privileged information during his monitoring function, this would not defeat the claim of confidentiality.[375]

A military attorney does not violate his ethical duties nor does a client waive his attorney-client privilege by communicating via a government e-mail account. There are steps a military attorney can do to protect himself from ever having to defend this issue. The attorney must familiarize himself with his licensing state. While governed by the Army Rules of Professional Conduct, he also has a duty not to violate the rules of the state in which he admitted to practice.[376] It would behoove the attorney to get consent to communicate via e-mail after explaining the possibility to his client that his e-

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[359] Tatum Motion, *supra* note 354 (citing Message, 060014Z Dec 07, Commandant Marine Corps, subject: Mandatory Requirement to Use Standard Department of Defense Information Systems (IS) Consent Banner and User Agreement).

[360] CIO Memo I, *supra* note 232. This policy is on temporary hold. CIO Memo II, *supra* note 232.

[361] Tatum Motion, *supra* note 354; *see also* CIO Memo I, *supra* note 232.

[362] MCM, *supra* note 54, MIL. R. EVID. 501–04, 513.

[363] *Id.* MIL. R. EVID. 503.

[364] *Id.* MIL. R. EVID. 504.

[365] *Id.* MIL. R. EVID. 513.

[366] *Id.* MIL. R. EVID. 502.

[367] *Id.* MIL. R. EVID. 502(a). "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client . . . " are protected as part of the attorney-client relationship. United States v. Spriggs, 48 M.J. 692, 695 (A. Ct .Crim. App. 1998) (quoting United States v. McCluskey, 20 C.M.R. 261, 267 (C.M.A. 1955) (citation omitted)).

[368] MCM, *supra* note 54, MIL. R. EVID. 502.

[369] United States v. Rust, 41 M.J. 472, 479 (C.A.A.F. 1995) (citing United States v. Gandy, 26 C.M.R. 135, 141 (A.B.R. 1958)).

[370] 764 F. Supp. 1480 (S.D. Fla. 1991).

[371] *Id.* at 1482–83. Contrary to prison policy, prison officials advised Noriega that calls to his attorneys were not monitored. *Id.* at 1482–87.

[372] *Noriega*, 764 F. Supp. at 1487. The court warned that there would have been no expectation of privacy had Noriega been aware that his calls to his attorneys were monitored. *Id.* at 1487–89.

[373] Staff Judge Advocate to the Commandant, U.S. Marine Corps.

[374] Figueroa, *supra* note 230 (referring to Memorandum from Dep't of Def. Chief Info. Officer to Secretaries of the Military Dep'ts et. al., subject: Policy on Department of Defense Information Systems—Standard Consent Banner and User Agreement (2 Nov. 2007)). This policy is on temporary hold. CIO Memo II, *supra* note 232.

[375] Coacher, *supra* note 24, at 185 n.182 (citing United States v. Noriega, 917 F.2d 1543, 1551 n.10 (11th Cir. 1990)).

[376] AR 27-26, *supra* note 344, para. 4a(3).

mail might be subject to monitoring and the alternative means of communications. "Such a process not only keeps the client reasonably informed to make the decision to use e-mail, but protects the attorney" from violating his ethical duties.[377] The attorney could also place the words "Attorney-Client Privilege" in the subject line of any e-mail containing privileged material.[378] This should put the system administrator on notice of the privilege and even if turned over to law enforcement it would put them on notice as well.[379] The defense attorney could also work with the system administrator to ensure that the he understands the reasons not to disclose the defense attorney's e-mail. These proactive steps will help prevent the cat from ever getting out of the bag.

[377] Boettcher & Tucciarone, *supra* note 345, at 146–47.

[378] Alternatively, you could place this warning in the body of the e-mail:

> ATTENTION: This transmission may contain attorney work-product or information protected under the attorney-client privilege, which is protected from disclosure under 5 USC § 552. Do not release outside of DoD channels without prior authorization from the sender. If you have received this message in error, please notify the sender immediately by telephone and delete this message. Thank you.

[379] Coacher, *supra* note 24, at 188 n.195.

> It might be advisable for attorneys and their clients who use e-mail to communicate to clearly label any messages containing confidences. For example, most e-mail programs allow for a subject line. Similar to labels placed on most legal office FAX cover sheets, a smart attorney will use this subject line to label a confidential message as "Attorney-Client Information." This would put a system administrator on notice that the information contained in the message is protected and should not be further monitored or released.

Id.

Extraordinary Relief: A Primer for Trial Practitioners

Captain Patrick B. Grant[*]

Introduction

Most counsel have litigated a pretrial motion with the absolute confidence they would win, only to feel the sting of reading "Denied" in the military judge's ruling. If counsel represents the Government, Article 62, Uniform Code of Military Justice (UCMJ), may give direct access to the appellate courts to challenge an adverse ruling.[1] If the matter does not fall within the scope of Article 62, UCMJ, in the vast majority of cases, counsel cannot successfully seek interlocutory appeal of the adverse ruling and can only hope for relief months or years later on direct appeal. In rare cases however, where the motion concerns an extraordinary matter presenting a clear and indisputable entitlement to relief, counsel should consider seeking redress through an extraordinary writ.[2]

Appellate courts disfavor granting writs and counsel filing a writ bear an "extremely heavy burden" in seeking extraordinary relief.[3] For example, in three years the Court of Appeals for the Armed Forces (CAAF) has granted four of the ninety requests for extraordinary relief filed.[4] In determining if they can meet their heavy burden, counsel must consider (1) whether the court has jurisdiction to hear the writ; (2) which writ is appropriate; and (3) do the circumstances of the case justify extraordinary relief.[5] This article will first discuss this three-step analysis and then provide a road map for seeking extraordinary relief. Although Article 62 appeals are not petitions for extraordinary relief, this article will also provide counsel with a road map for filing an Article 62 appeal.

Jurisdiction

Military courts derive their power to hear a writ from the All Writs Act.[6]

> The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions and agreeable to the usages and principles of law.*[7]

Although military courts are among those empowered to issue extraordinary writs under the All Writs Act, the Act confines a court to issuance of process in aid of its existing statutory jurisdiction and does not enlarge that jurisdiction.[8]

Counsel must therefore look to Articles 66 and 67, UCMJ to determine if their case will aid in the court's jurisdiction.[9] The Army Court of Criminal Appeals (ACCA) has statutory jurisdiction of cases with an approved sentence that extends to death, dismissal of a commissioned officer or cadet, dishonorable or bad conduct discharge, or confinement for one year or

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[*] Previous writs coordinator for Defense Appellate Division, and currently assigned to Litigation Division. Several people assisted in the completion of this article. Of particular note is Major Fansu Ku for encouraging me to write, and helping me to edit the article. Lieutenant Colonel Steven Henricks also generously assisted in editing.

[1] UCMJ art. 62 (2008) (granting the government the right to seek an interlocutory appeal a military judge's order or ruling which terminates the proceeding, excludes evidence that is substantial proof of a material fact, or concerns classified information).

[2] McKinney v. Jarvis, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

[3] *Id*. at 873.

[4] U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2005 sec. 2, at 6 (2006); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2006 sec. 2, at 4–5 (2007); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2007 sec. 2, at 7 (2008).

[5] Loving v. United States, 62 M.J. 235, 237 (C.A.A.F. 2005). Before considering merits of petitioner's claim, the court first answered threshold issues of jurisdiction and whether writ was necessary and proper. *Id.*

[6] Dettinger v. United States, 7 M.J. 216, 219–20 (C.M.A. 1979) (citing UCMJ art. 67). The Court of Military Review is a court created by Congress for the purposes of All Writs Act, and therefore may entertain petition for extraordinary relief as provided in 28 U.S.C. § 1651(2000). *Id.* at 218.

[7] 28 U.S.C. § 1651(a) (emphasis added).

[8] Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999).

[9] UCMJ arts. 66, 67 (2008).

more.[10] The CAAF has statutory jurisdiction of cases in which the ACCA has affirmed a sentence of death, the Judge Advocate General orders a case sent to the CAAF for review, or cases reviewed by ACCA.[11]

If counsel has a case that has potential to fall within the scope of Articles 66 or 67 in the future, military courts will likely find that a petition for extraordinary relief is in aid of their jurisdiction. For example, courts have found jurisdiction to hear writs concerning, among other things, Article 32 hearings,[12] illegal pretrial confinement,[13] and double jeopardy claims.[14] Although none of these cases had an adjudged sentence that definitively placed them within the scope of a court's statutory jurisdiction, they all had preferred charges with the potential to fall within the court's statutory jurisdiction upon completion of the trial.

Conversely, a writ will not be in aid of a court's jurisdiction if the matter falls outside the scope of Articles 66 and 67 because the All Writs Act does not give military courts the power to oversee all matters arguably related to military justice.[15] Courts will therefore not consider writs challenging administrative separations, summary court-martials, non-judicial punishment, letters of reprimand, or other administrative matters because they are not part of the court-martial process that can result in a "findings" or "sentence" reviewable under Articles 66 or 67.[16]

The most recent question concerning the scope of the CAAF's jurisdiction arose from a writ filed by four Guantanamo Bay prisoners.[17] The petition argued that CAAF has jurisdiction to hear the writ because the petitioners are "presumptive prisoners of war" subject to the UCMJ and therefore fall within the CAAF's future jurisdiction.[18]

The petitioners did not address how the Military Commissions Act affects the CAAF's jurisdiction.[19] The Military Commissions Act provides jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after 11 September 2001.[20] It also grants the Court of Military Commission Review, the U.S. Court of Appeals for the District of Columbia, and the Supreme Court exclusive jurisdiction to review military commission decisions.[21] As such, it is difficult to see how the writ is in aid of the CAAF's jurisdiction when the CAAF does not have jurisdiction to conduct direct appellate review of their cases. Despite this jurisdictional hurdle, the CAAF ordered the Navy Judge Advocate General to appoint government counsel and show cause why the court should not grant the writ.[22] Without deciding the question of jurisdiction, the CAAF dismissed the petition without prejudice because the petitioners raised the same challenge in other federal courts.[23]

Types of Writs

Once counsel has determined that a writ is in aid of the court's jurisdiction, they must next consider what type of writ is appropriate for the relief sought. Trial practitioners will generally seek writs of mandamus, prohibition, or habeas corpus.

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[10] *Id.* art. 66.

[11] *Id.* art. 67.

[12] McKinney v. Jarvis, 46 M.J. 870 (A. Ct. Crim. App. 1997).

[13] Berta v. United States, 9 M.J. 390 (C.M.A. 1980).

[14] Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986).

[15] Clinton v. Goldsmith, 526 U.S. 529, 536 (1999).

[16] *Id.* (holding that the CAAF cannot use the All Writs Act to enjoin military officials from dropping an officer from the rolls as such matter is an executive action).

[17] *In re* Ali v. United States, 66 M.J. 474 (C.A.A.F. 2008).

[18] *Id.* at 3, 10–12.

[19] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C.S. §§ 948a-950j (2008)).

[20] *Id.* § 948d.(a).

[21] *Id.* § 950a.

[22] *In re* Ali, 66 M.J. 474.

[23] *Id.*

Military courts will also hear writs of error *coram nobis*, but because of the post-trial nature of *coram nobis* (explained below), trial practitioners will almost never need to use it.[24]

Mandamus means "we command" and requires the performance of a specified act by a court or official.[25] Mandamus is a preemptory writ traditionally used to confine an inferior court to a lawful exercise of its prescribed jurisdiction.[26] A court will only grant a writ of mandamus if an inferior court or official has exceeded its authority in a ruling or decision that is contrary to statute, settled case law, or valid regulation.[27]

A writ of prohibition is the "process by which a superior court prevents an inferior court . . . from exceeding its jurisdiction."[28] It is essentially the inverse of mandamus because it prevents the commission of a specific act rather than ordering an act to be done.

In Latin, habeas corpus means, "you have the body."[29] A habeas corpus writ challenges either the legal basis or manner of confinement. Petitioners have successfully used the writ of habeas corpus to challenge being held in pretrial confinement for their own protection,[30] being held in pretrial confinement while pending charges that violate double jeopardy,[31] and to receive the correct amount of confinement credit.[32]

Error *coram nobis* means "let the record remain before us."[33] It requests the court that imposed the judgment to consider exceptional circumstances, such as new facts or legal developments that may change the result of trial.[34] In the military justice system, appellate courts, rather than the trial court, review writs for error coram nobis because the trial court does not have independent jurisdiction over a case after authentication of the record of trial.[35]

Agreeable to the Usage and Principles of Law

After deciding which writ is appropriate, counsel must determine if a writ in their case is agreeable to the usages and principals of law.[36] In other words, do the circumstances of their case justify extraordinary relief? Again, the extraordinary nature of relief under the All Writs Act places an extremely heavy burden upon the party seeking relief and issuance of a writ is not generally favored.[37] Because counsel bear such an extremely heavy burden, it is critical that the moving party establish the extraordinary nature of their case by addressing the appropriate factors in their writ petition.

No matter what type of writ counsel seeks, appellate courts commonly consider the five *Bauman* factors[38] to determine whether to grant extraordinary relief.[39] The *Bauman* factors typically apply to a writ of mandamus, but military appellate

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[24] Loving v. United States, 62 M.J. 235, 251–53 (C.A.A.F. 2005). Trial practitioners will not generally use the writ of error *coram nobis* because the writ invites the court's attention to new facts or evidence that were not known at the time of trial.

[25] BLACK'S LAW DICTIONARY 961 (6th ed. 1990) [hereinafter BLACK'S].

[26] Dew v. United States, 48 M.J. 639, 648 (A. Ct. Crim. App. 1998).

[27] *Id.* at 648.

[28] McKinney v. Jarvis, 46 M.J. 870, 873 (A. Ct. Crim. App. 1997) (quoting BLACK'S, *supra* note 25, at 1212).

[29] BLACK'S, *supra* note 25, at 709.

[30] Berta v. United States, 9 M.J. 390 (C.M.A. 1980).

[31] Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986).

[32] United States v. Orzechowski, 65 M.J. 538 (N-M. Ct. Crim. App. 2006) .

[33] Loving v. United States, 62 M.J. 235, 251 (C.A.A.F. 2005).

[34] Denedo v. United States, 66 M.J. 114, 125 (C.A.A.F. 2008) (citing *Loving*, 62 M.J. at 252).

[35] *Id*.

[36] 28 U.S.C. § 1651(a) (2000).

[37] McKinney v. Jarvis, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

[38] Bauman v. United States Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977). In *Bauman*, the Ninth Circuit Court of Appeals identified five factors as guidelines designed to frame the boundaries of a court's mandamus power. *Id.*

[39] Dew v. United States, 48 M.J. 639, 648–49 (A. Ct. Crim. App. 1998).

courts have applied the Bauman factors when considering other types of writs. Indeed, ACCA requires counsel to address the first Bauman factor in all petitions for extraordinary relief.[40]

Although the CAAF has never expressly adopted the *Bauman* factors, it has granted or denied writs based upon equivalent considerations. It therefore remains persuasive for counsel to address the *Bauman* factors when articulating why their case is extraordinary and agreeable to the usages and principles of law.

The *Bauman* factors are (1) no other adequate means, such as direct appeal, exist to obtain relief; (2) will the petitioner be damaged or prejudiced in a way not correctable on appeal; (3) is the lower court's order clearly erroneous as a matter of law; (4) is the lower court's order an oft repeated error, or manifests a persistent disregard of federal rules; and (5) does the lower court's order raise a new and important problem, or issues of law of first impression.[41] Courts will balance these factors to determine whether to grant relief, and no one factor is dispositive or always relevant.[42]

Courts will not consider a matter extraordinary if the petitioner has an alternative adequate means of relief. A failure to exhaust administrative remedies falls within the first *Bauman* factor. For instance, petitioners challenging pretrial confinement or restriction through a writ of habeas corpus must first seek relief through Article 138, UCMJ, or file a motion with the military judge.[43] A court, however, will not require a petitioner to first exhaust administrative remedies if it deems further attempts futile.[44]

Courts will also consider whether alternative means of relief are adequate. Indeed, the CAAF has considered whether presidential action under Article 71(a), possible review by an Article III court, or other options constituted an adequate, not just an alternative, means to obtain relief through writs of error *coram nobis*.[45]

In *Loving v. United States*, the petitioner filed two separate writs of error *coram nobis* asking the CAAF to apply two recent Supreme Court decisions to his capital conviction.[46] The petitioner's case had completed direct appellate review, and the Government forwarded the case to the President for action under Article 71(a).[47]

The CAAF held that presidential action fails as an adequate remedy because it falls outside the judicial process.[48] The CAAF further held that an Article III court could grant petitioner relief under a habeas petition, but this again fails as an adequate remedy at law because an Article III court was unlikely to grant review before petitioner's case becomes final under Article 76.[49] Finally, the CAAF dismissed the writs without prejudice because it found that a writ of habeas corpus, rather than error *coram nobis*, the appropriate [or alternative adequate] means of relief when petitioner is in confinement.[50]

A ruling or order damaging or prejudicing a petitioner in a way not correctable on appeal presents another factor courts will consider in deciding whether a writ is extraordinary. In *Chapel v. United States*, the Court of Military Review used this second Bauman factor to deny a writ of error *coram nobis*.[51] After his direct appellate process was over, the petitioner discovered evidence of unlawful command influence (UCI), but could not offer any evidence of the UCI causing prejudice.[52] Denying the writ, the court reasoned that had the petitioner raised the issue on direct appeal he would have lost because he

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[40] ARMY COURT OF CRIMINAL APPEALS, INTERNAL RULES OF PRACTICE AND PROCEDURE R. 20(a)(7) (2002) [hereinafter ACCA RULES] (requiring petition to contain statement why the relief sought cannot be obtained during the ordinary course of appellate review).

[41] *Dew*, 48 M.J. at 649 (citing *Bauman*, 557 F.2d 650).

[42] *Id.*

[43] Font v. Seaman, 43 C.M.R. 227, 391 (C.M.A. 1971).

[44] Keys v. Cole, 31 M.J. 228, 230 (C.M.A. 1990).

[45] Loving v. United States, 62 M.J. 235, 247–48 (C.A.A.F. 2005)

[46] *Id.*

[47] *Id.* at 252.

[48] *Id.*

[49] *Id.* at 249.

[50] *Id.* at 254.

[51] 21 M.J. 687 (C.M.R. 1985).

[52] *Id.* at 689–90.

could not meet the prejudice prong of UCI.[53] In other words, the court denied the writ because the damage the petitioner claimed was not correctable on direct appeal.

In *Font v. Seaman*, the Court of Military Appeals (CMA) likewise denied a writ of habeas corpus on the second Bauman factor.[54] Here the petitioner made statements to the media concerning the poor living conditions of enlisted Soldiers living on Fort Meade, Maryland.[55] His commander subsequently ordered the petitioner not to enter any barracks unless first given permission.[56] The petitioner violated the order and the commander preferred charges.[57] Before the trial, the petitioner filed a writ of habeas corpus claiming, in part, that the order violated his constitutional right of free speech.[58] The CAAF dismissed the writ reasoning, in part, that the legality of the order could be reviewed in the normal course of appellate review.[59]

A court will also grant a writ if it finds a ruling or order clearly erroneous. In *Kreutzer v. United States*, the CAAF applied this third Bauman factor in granting a writ of mandamus.[60] In this instance, the ACCA previously set aside the petitioner's capital sentence, but the Army continued to confine the petitioner on death row.[61] The CAAF granted mandamus and ordered the Government to remove the petitioner from death row because Army regulations clearly prohibit commingling of prisoners under sentence of death with other non-capital sentence prisoners.[62]

The CMA likewise granted a writ of habeas corpus where the trial judge made a clearly erroneous decision.[63] In *Berta*, while awaiting his trial for a separate incident, the petitioner attempted to break up a fight between two other Marines.[64] The next night, approximately seventeen Marines assaulted the petitioner with a knife and a shotgun in the barracks.[65] The Government could only identify and confine two of the seventeen Marines who assaulted the petitioner.[66] Upon his release from the hospital, the Government placed the petitioner in confinement for his own protection, and the military judge denied the petitioner's request for release.[67] In granting the petition for habeas corpus, the court found that the clearly erroneous standard of confining a service member for his personal safety warranted extraordinary relief.[68]

Conversely, the ACCA has denied a writ of mandamus where a military judge did not abuse his discretion in accepting a guilty plea.[69] In *Dew*, the petitioner made statements during the providence inquiry that alluded to, but did not per se raise, a defense.[70] After her conviction, the petitioner sought a writ of mandamus ordering the Judge Advocate General to set aside the findings and sentence.[71] The court found that the petitioner's statements were consistent with her plea.[72] In denying the writ, the ACCA reasoned that perhaps the military judge should have conducted a more thorough plea inquiry, but he did not

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[53] *Id.* at 690.

[54] 43 C.M.R. 387 (C.M.A. 1971).

[55] *Id.* at 389–90.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 390.

[59] *Id.* 391.

[60] 60 M.J. 453 (C.A.A.F. 2005).

[61] *Id.*

[62] *Id.*

[63] Berta v. United States, 9 M.J. 390, 392 (C.M.A. 1980).

[64] *Id.* at 391.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 392.

[69] Dew v. United States, 48 M.J. 639, 652 (A. Ct. Crim. App. 1998).

[70] *Id.* at 649.

[71] *Id.* at 642.

[72] *Id.* at 651.

commit gross error or usurp his judicial authority.[73] In other words, the military judge's acceptance of the plea was not clearly erroneous.

There are no examples of military courts applying the fourth Bauman factor, an often-repeated error. In *United States v. McVeigh*, however, the Court of Appeals for the Tenth Circuit denied a writ of mandamus, in part, because of this fourth Bauman factor.[74] In *McVeigh*, the district court ordered several documents relating to the Oklahoma City bombing sealed.[75] Several media companies sought a writ of mandamus to order the district court judge to unseal documents.[76] The fourth Bauman factor was relevant here because the district court also issued an order detailing what factors it would consider in the future to determine whether to seal additional documents.[77] The court denied the writ, in part, because the district court's order sealing the documents was not clearly erroneous and therefore not a risk of becoming an oft-repeated error.[78]

The author likewise found no examples of military courts applying the fifth Bauman factor. Nevertheless, *United States v. Lopez de Victoria* is an example of a case where the fifth Bauman factor would have been relevant if it was before the court as a petition for extraordinary relief rather than a Government Article 62, UCMJ, appeal.[79]

In *Lopez de Victoria*, the military judge held that the statute of limitations barred appellee's conviction for indecent acts and liberties.[80] The military judge found that the 2003 amendment to Article 43(b), UCMJ, extending the statue of limitations for child abuse from five years until the child attained the age of twenty-five, did not apply retroactively.[81]

The Government appealed the military judge's ruling under Article 62, UCMJ.[82] *Lopez de Victoria* was the first appellate case to present the issue of whether the 2003 amendment to Article 43, UCMJ, applies retroactively to offenses committed before its effective date, that were not time barred under previous Article 43. If the military judge had ruled that the amendment applied retroactively, the defense counsel could have argued that this presented an extraordinary matter because it was an issue of first impression.

Courts will consider additional factors in determining if a writ of error coram nobis is agreeable to usages and principles of law. The six stringent threshold requirements for a court to issue a writ of error coram nobis are (1) the alleged error is of the most fundamental character; (2) no remedy other than coram nobis is available; (3) valid reasons exist for not seeking relief earlier; (4) the new information in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist.[83]

Again, military trial practitioners will almost never have to file a writ of error coram nobis because the writ requires discovery of new evidence that could not have been discovered before the original judgment, or that a change in the law would affect the outcome of the court-martial. Since this primer solely focuses on trial practitioners, it does not discuss how courts have analyzed theses six factors.

Procedure for Filing a Writ

Counsel should first litigate a motion at trial or seek relief from an official's decision at the lowest possible level. Appellate courts remain unlikely to grant extraordinary relief where there remains questions of fact or law that were not

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[73] *Id.* at 652.

[74] 119 F.3d 806, 808 (10th Cir. 1997).

[75] *Id.*

[76] *Id.*

[77] *Id.* at 808–09.

[78] *Id.* at 810–11.

[79] 66 M.J. 67 (C.A.A.F. 2008).

[80] *Id.* at 68.

[81] *Id.*

[82] *Id.*

[83] Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008).

addressed below.[84] Counsel should also consider filing a motion for reconsideration if the military judge's findings of fact or conclusions of law are clearly erroneous. To develop a record for extraordinary relief, counsel should file a written request to the trial court notifying the court of counsel's intent to seek extraordinary relief, requesting that the military judge make written findings of fact and conclusions of law, and authenticate the record of trial. Counsel may also consider asking the trial court to stay the proceedings until an appellate court has decided whether to grant extraordinary relief. If the military judge refuses to grant any of these requests, counsel can readdress them in the petition for extraordinary relief.

Although not required, before filing a petition for extraordinary relief, trial defense counsel should consult with the writs coordinator of Defense Appellate Division (DAD). However, Government counsel must consult with the Chief of the Government Appellate Division (GAD) before filing a petition for extraordinary relief.[85] The appellate divisions will assist counsel in determining whether their case will be in aid of the court's jurisdiction, if the circumstances justify extraordinary relief, formatting pleadings, and guiding the writ through the appellate system. The appellate divisions may also assist counsel in drafting the petition and brief. Counsel from the appellate divisions will not represent petitioner or the Government, however, until appointed under Article 70.[86]

Counsel seeking relief at ACCA start the writ process by filing two separate pleadings: a petition for extraordinary relief and a brief in support of the petition.[87] If counsel are not members of the court, they must also file a motion *pro hac vice*, with the petition and brief. Such motion allows counsel to represent the petitioner for one particular occasion.[88] The petition must contain a history of the case, an objective statement of relevant facts, a statement of the issue and relief sought, reasons for granting relief, the jurisdictional basis for relief, and the reasons why ordinary relief cannot be obtained in the ordinary course of appellate review.[89]

If desired, counsel must also request appointment of appellate defense counsel in the petition.[90] Once an appellate defense counsel is appointed, the defense counsel's role in the writ process is limited to assisting the appellate defense counsel.[91]

Counsel should also file any relevant documents from the record of trial with the petition and brief.[92] Counsel should consider filing the relevant documents from the record in a joint appendix format that meets CAAF's rules.[93] A joint appendix simply reproduces what the parties agree are the relevant portions of the record of trial.[94] Although ACCA does not require a joint appendix, taking this additional step at ACCA will make it easier for counsel to later file a writ-appeal at CAAF within the twenty-day deadline because they will not have to spend additional time assembling the joint appendix and adding citations to the appropriate pages of the joint appendix in their writ-appeal.

After receiving the petition and brief, ACCA may dismiss or deny the petition, order the respondent to show cause and file an answer, or take other appropriate action.[95] A show cause brief is the respondent's opportunity to argue why the court should not grant the writ and the appropriate appellate division usually drafts the show cause brief. The respondent will have ten days to answer a show cause order, and the petitioner will have seven days to reply to respondent's answer.[96] The ACCA can then set the matter for oral argument or decide to deny or grant the writ based on the pleadings.

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[84] *See* Summary Disposition, Lis v. United States, 66 M.J. 292 (C.A.A.F. 2008) (dismissing writ-appeal filed before Article 32 hearing because ordinary processes of justice should be allowed to take its course).

[85] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 13-2 (16 Nov. 2005) [hereinafter AR 27-10].

[86] *Id*.

[87] ACCA RULES, *supra* note 40, R. 20.

[88] *Id*. Rules 8, 13.

[89] *Id*.

[90] *Id*. at R. 20; *see* UCMJ art. 70(c)(1) (2008) (requiring appellate counsel to represent the accused when requested); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1202(b)(2)(A) (2008) [hereinafter MCM].

[91] AR 27-10, *supra* note 85, para. C-2(d).

[92] *Id*.

[93] *See* U.S. COURT OF APPEALS FOR THE ARMED FORCES, RULES OF PRACTICE AND PROCEDURE R. 24(f) (1996) (C3, 1 Sept. 2008) [hereinafter CAAF RULES] (detailing what must be included in a joint appendix).

[94] *Id*.

[95] *Id*.

[96] *Id*.

Counsel can omit filing a writ at ACCA and file an original petition for extraordinary relief at CAAF.[97] However, counsel must show good cause why they did not first seek relief at the ACCA, and the CAAF rarely grants original petitions for extraordinary relief.[98] Counsel filing an original petition at the CAAF must do so within twenty days of learning of the action complained of.[99] Counsel may however file petitions for writs of habeas corpus and error coram nobis at any time.[100]

If counsel filed a writ at the ACCA first, they have twenty days to file a writ-appeal at the CAAF after the ACCA's decision is served upon counsel or the appellant.[101] An appellee then has ten days to answer the writ-appeal, and appellant has five days to file a reply to appellee's answer.[102]

If the CAAF denies a writ-appeal or an original writ, military counsel cannot seek relief in a federal civil court without prior written approval of The Judge Advocate General.[103] Trial defense counsel can, however, explain to their clients a pro se petition and the option to retain civilian counsel. Trial defense counsel cannot draft any pleading for their client or civilian co-counsel.[104]

Before seeking written approval to appear in a federal civil court, counsel should bear in mind that federal courts have a very limited authority to review decisions made by courts-martial.[105] When a military court has dealt "fully and fairly" with an issue raised in a petition for extraordinary relief, "it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."[106] "Only when the military has not given a petitioner's claim full and fair consideration does the scope of review by the federal civil court expand."[107] An allegation receives "full and fair" consideration when an issue is briefed and argued before a military court, even if the claim is disposed of summarily.[108]

Despite this stringent standard, the U.S. District Court for the Western District of Washington (district court) recently stayed a court-martial and ordered a preliminary injunction pending review of the petitioner's habeas petition.[109] In *Watada*, the Government charged the petitioner with, among other things, missing movement for refusing to deploy to Iraq, in violation of Article 87.[110] The military judge ruled that the order to deploy was lawful, and that the petitioner could not present evidence on the legality of the war or his motive for missing movement.[111] Pursuant to a pretrial agreement, the parties subsequently entered into a stipulation of fact that admitted all of the elements of the offense, but contained language concerning the petitioner's belief that the war is illegal.[112]

The Government rested its case after introducing the stipulation of fact and other evidence for the panel to consider.[113] Counsel for the petitioner then asked the military judge for a mistake of fact instruction concerning the petitioner's believe that he had a legal and moral obligation not to participate in the war.[114] The Government, however, believed that that the

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[97] CAAF RULES, *supra* note 93, R. 4(b)(1).

[98] *Id*.

[99] *Id*. R. 4(d).

[100] *Id*.

[101] *Id*. R. 4(e).

[102] *Id.*

[103] AR 27-10, *supra* note 85, para. 1-6(a).

[104] *Id*.

[105] Burns v. Wilson, 346 U.S. 137, 139 (1953); Roberts v. Callahan, 321 F.3d 994 (10th Cir. 2003); Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008).

[106] *Burns*, 346 U.S. at 142 (quoting Whelchel v. McDonald, 340 U.S. 122 (1950)).

[107] Lips v. Commandant, United States Disciplinary Barracks, 997 F.2d 808, 811 (10th Cir. 1986).

[108] Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986).

[109] Watada v. Head, 530 F. Supp. 2d 1136 (W.D. Wa. 2007).

[110] *Id*. at 1138.

[111] *Id*. at 1139.

[112] *Id*.

[113] *Id.* at 1140.

[114] *Id*.

petitioner had entered into a confessional stipulation and did not have a defense to missing movement.[115] The military judge therefore rejected the stipulation of fact because no meeting of the minds had occurred, and, over the petitioner's objection, granted the Government's motion for a mistrial.[116]

Upon re-referral of the charges, the petitioner sought extraordinary relief through a writ of prohibition at the ACCA and the CAAF, arguing jeopardy had attached at the first trial.[117] Both the ACCA and the CAAF summarily denied the writ of prohibition.[118]

The district court adopted a four-prong test for determining whether the military had given "fair consideration" under *Burns* to petitioner's allegation.[119] The four inquires are: (1) the alleged error in the court-martial [is] one of constitutional significance or so fundamental as to have resulted in a miscarriage of justice; (2) the alleged error must be a question of law, and not intertwined with disputed facts previously determined by the military; (3) whether factors peculiar to the military or important to military considerations require a different constitutional standard; and (4) whether the military courts adequately considered the issues raised in the habeas corpus proceeding and applied the proper legal standard.[120]

Applying this test, the district court found that the petitioner's double jeopardy claim is subject to collateral attack under 28 U.S.C. § 2241.[121] The court reasoned that double jeopardy is a substantial constitutional claim, the petitioner alleged an error of law independent from facts, and the petitioner did not raise matters peculiar to the military. The court further reasoned that because the ACCA and the CAAF did not write opinions when denying the writ, it could not conclude that the petitioner's claims received full and fair consideration.[122] The district court granted a preliminary injunction staying the court-martial proceedings.[123] In a subsequent opinion, the district court decided that the Fifth Amendment bars the petitioner's retrial on the charges that were the subject of the original court-martial.[124]

Article 62 Appeal

Unlike defense counsel who can only interlocutory challenge an adverse ruling with the appellate courts through an extraordinary writ, Government counsel have direct access to the appellate courts for certain adverse rulings through Article 62, UCMJ.[125] If a military judge presides over a court-martial in which a punitive discharge may be adjudged, Government counsel can appeal an order or ruling that: (1) terminates the proceeding with respect to a charge or specification; (2) excludes evidence that is substantial proof of a fact material in the proceedings; (3) directs disclosure of classified information; (4) imposes sanctions for nondisclosure of classified information; (5) a military judge's refusal to issue a protective order to prevent disclosure of classified information; and (6) a military judge's refusal to enforce an order to issue a protective order by appropriate authority.[126]

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[115] *Id*. at 1142.

[116] *Id*. at 1144–45.

[117] *Id*. at 1145–46.

[118] *Id*.

[119] *Id*. at 1150 (quoting Calley v. Callaway, 519 F.2d 184, 203 (5th Cir. 1975)).

[120] *Id.*

[121] *Id*. at 1151.

[122] *Id*. at 1150.

[123] *Id*. at 1533. In deciding whether to grant injunctive relief pending determination of the action on the merits, courts must find that: (1) the moving party will suffer irreparable harm if relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and (4) the public interest favors granting relief. Finding that a party will likely prevail on the merits for purposes of a preliminary injunction does not resolve the merits of an accompanying habeas petition. *Id.*

[124] Order Granting in Part and Denying in Part Petitioner's Second Amended Petition For Writ of Habeas Corpus, Watada v. Head, C07-5549, at 21 (W.D. Wa. Oct. 21, 2008).

[125] *See generally* Captain Howard G. Cooley & Bettye P. Scott, *The Role of the Prosecutor in Government Appeals*, ARMY LAW., Aug. 1986, at 38. (providing a more in depth analysis of the history of Article 62 and tactical considerations for trial counsel filing an Article 62 appeal).

[126] UCMJ art. 62 (2008); MCM, *supra* note 90, R.C.M. 908(a).

Trial counsel must provide the military judge with a written notice of appeal within seventy-two hours of the adverse ruling or order.[127] Before filing the notice, Government counsel must first obtain authorization from the general court-martial convening authority or the staff judge advocate.[128] Counsel should also consider consulting GAD before filing notice as GAD makes the decision whether to file an Article 62 appeal with an appellate court. The notice of appeal shall identify the ruling or order to be appealed, the charges and specifications effected, the date and time of the military judge's ruling or order, and the time and date of service of notice upon the military judge.[129] The trial counsel must also certify that the appeal is not taken for delay or, if relevant, that the evidence excluded is substantial proof of a fact material in the proceedings.[130]

Once the trial counsel files the notice, the court-martial proceeding concerning the ruling or order appealed is automatically stayed.[131] The court-martial can proceed, however, on the charges and specifications not affected by the ruling or order.[132]

The trial counsel then has twenty days to forward the notice of appeal and original and three copies of the verbatim record of trial, or a portion of the record concerning the issue to be appealed, to the Chief of GAD.[133] The Chief of GAD will file the original record of trial with the ACCA, and serve a copy of the record of trial on DAD. The GAD then has twenty days after filing the record with the court to either file an appeal with the ACCA or withdraw the appeal.[134] Defense Appellate Division will have twenty days to file an answer to the Government's appeal.[135] The Government can appeal an adverse decision from ACCA to CAAF by asking the Judge Advocate General to certify the issue to CAAF, and the defense can directly appeal an adverse decision to CAAF.[136]

Government Writs

Because of the wide scope of Article 62, Government writs are uncommon. The Government may nonetheless seek extraordinary relief through a writ if a matter does not fall within the scope of Article 62. For instance, the ACCA recently decided a Government writ of prohibition in *United States v. Reinert.*[137]

In *Reinert*, five noncommissioned officers (four of them drill sergeants) publically ridiculed and stigmatized the accused by making such comments as "you're going to jail soon to look for a boyfriend," and telling other Soldiers not to be like this "scumbag."[138] The military judge granted the accused twenty days of Article 13 credit, but further stated that the, "credit alone I don't think will solve Article 13 issues."[139] The military judge therefore ordered the Government to have a brigade-level commander or sergeant major counsel each of the noncommissioned officers, and to conduct post-wide training for every drill sergeant, through an article in the post newspaper, letter, or other means, concerning Article 13.[140] If the Government failed to comply with the judge's order, he would award the accused an additional five days of confinement credit.[141]

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[127] UCMJ art. 62(a)(2); MCM, *supra* note 90, R.C.M. 908(b)(3).

[128] AR 27-10, *supra* note 85, para. 13-3(a); MCM, *supra* note 90, R.C.M. 908(b)(2).

[129] MCM, *supra* note 90, R.C.M. 908(b)(3); AR 27-10, *supra* note 85, para. 13-3(b).

[130] MCM, *supra* note 90, R.C.M. 908(b)(3).

[131] *Id.* R.C.M. 908(b)(4).

[132] *Id*.

[133] *Id.* R.C.M. 908(b)(6); AR 27-10, *supra* note 85, para. 13-3(c).

[134] ACCA RULES, *supra* note 40, R. 21(d)(1).

[135] *Id*.

[136] MCM, *supra* note 90, R.C.M. 908(c)(3); *see* United States v. Lopez de Victoria, 66 M.J. 67, 71 (C.A.A.F. 2008) (affirming the Defense right to appeal an adverse Service Court of Criminal Appeals Article 62, UCMJ, decision to the CAAF).

[137] Army Misc. 20071195 (A. Ct. Crim. App. Aug. 7, 2008) (unpublished).

[138] *Id*.

[139] *Id*.

[140] *Id*.

[141] *Id*.

The Government counseled the five noncommissioned officers, but failed to conduct the post-wide training, arguing on the grounds that the military judge's order exceeded his authority.[142] The military judge's order did not fall within the scope of Article 62 because it did not dispose of a charge or specification, excluded evidence, or concern confidential evidence. The Government therefore sought a writ of prohibition as it had no other recourse to challenge the military judge's order.

In an unpublished opinion, the ACCA first affirmed that the Government could not meet the statutory requirements of Article 62 or the procedural prerequisites of Rule for Court-Martial (RCM) 908[143] because the military judge's order did not terminate any charges or specifications, excluded evidence, or address disclosure of classified information.[144] The court proceeded to express concern that the Government could use the All Writs Act to circumvent the carefully crafted jurisdictional and procedural requirements of Article 62 and RCM 908.[145] It nevertheless concluded that it had jurisdiction to consider the Government writ because *Suzuki*, *Caprio*, and *ABC Inc*, a line of superior cases, bound the ACCA to allow the Government to seek extraordinary relief under the All Writs Act.[146]

Given the ACCA's hesitation to find jurisdiction to hear a Government writ concerning a matter that is beyond the scope of Article 62, it is somewhat surprising that the respondent did not appeal the opinion. Although the ACCA felt bound by *Suzuki*, *Caprio*, and *ABC Inc.*, *Suzuki*, and *Caprio* predate Article 62 and *ABC Inc*. involved the media seeking a writ of mandamus to open an Article 32 hearing, rather than the Government seeking relief under the All Writs Act. It therefore remains prudent for counsel in future Government writ cases to address whether the Government can seek relief under the All Writs Act for a matter that exceeds the scope of Article 62.

Conclusion

Because counsel bear a very heavy burden in establishing the extraordinary nature of a writ, a petition must address how the writ is in aid of the court's jurisdiction and is agreeable to the usages and principles of law. Counsel can do this by articulating how their case falls within the scope of either Articles 66 or 67, and by applying the relevant Bauman factors to the circumstances of their case. Counsel representing the government must first consult with the GAD before seeking extraordinary relief. It is also prudent for defense counsel to first consult with the DAD before deciding to seek extraordinary relief so they can receive assistance in analyzing the merits of their writ and avoiding procedural pitfalls in the filing process. Counsel must also realize that rarely will a case be an extraordinary matter in which a clear and indisputable entitlement to relief exists. Counsel should therefore only consider a writ for matters that are truly extraordinary.

[142] *Id*.

[143] MCM, *supra* note 90, R.C.M. 908.

[144] *Reinert*, Army Misc. 20071195.

[145] *Id.*

[146] *Id.* (citing United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); ABC Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997); United States v. Caprio, 12 M.J. 30 (C.M.A. 1981)).

The Sexual Assault Prevention and Response (SAPR) Program—in Need of More Prevention

Major Katherine A. Krul[*]

"Military's response to rapes, domestic abuse falls short. Reforms lag despite numerous scandals, recommended solutions."[1]

I. Introduction

As a deployed Brigade Judge Advocate (BJA) whose higher headquarters is hours away, you serve on the brigade's Sexual Assault Review Board (SARB).[2] During one of your monthly meetings, the Deployable Sexual Assault Response Coordinator (DSARC), a Sergeant First Class (SFC) who volunteered for the position, briefs the commanders in attendance that a female Private First Class (PFC) was sexually assaulted after a night of drinking. Although the PFC wants to restrict the report, the Unit Victim Advocate (UVA), who is also her company commander, explained she did not have this option because she confided in a chaplain's assistant when seeking counseling and a medic when she sought testing for sexually transmitted diseases (STDs). Instead, the company commander took her to Criminal Investigation Division (CID) and told her to make a statement because he intends to court-martial the offender, who is also in his unit. She reminds him that she does not want anyone else to find out; she just wants help dealing with the situation. The brigade commander, like the company commander, is furious about the incident. During the SARB he announces he will "castrate the next Soldier he finds messing with his females." For their own safety, he orders all female Soldiers to always travel in buddy teams, especially at night. Your paralegal has already drafted the victim's Article 15 for drinking in violation of General Order Number 1.

Although this scenario is notional, it is not hard to imagine. Perhaps more surprising is that most of these issues are not directly addressed by the Army's current policy.[3] While the Department of Defense (DOD) response to increasing reports[4] of sexual assault was commendable, it is fraught with potential pitfalls, allowing scenarios like the one above to occur. Likewise, there is little guidance on how to accomplish the Judge Advocate's (JA's) mission as a part of the SAPR team.[5] Parts I and II of this article will provide JAs a general overview of the program, address problem areas, and provide practical solutions to common problems. Part III will specifically address SARB implementation, and Part IV will provide guidance on SAPR implementation in a deployed environment.

II. Background and Overview

In 2004, perhaps in response to public outrage,[6] the DOD became serious about rethinking the current sexual assault policies,[7] and the Secretary of Defense ordered a review of sexual assaults throughout the military.[8] Just two months later,

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[*] Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 3d Brigade Combat Team, 25th Inf. Div., Iraq. LL.M., The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va.; J.D., 2000, University of South Carolina; B.A., 1997, Saint Bonaventure University, N.Y. Previous assignments include Chief, Administrative Law, Fort Jackson, S.C. 2006–2007, Chief, Criminal Law, Fort Jackson S.C. 2005–2006, Defense Counsel, Fort Jackson, S.C. 2004–2005, Brigade Judge Advocate/Trial Counsel, Fort Drum, N.Y. 2002–2004, Chief, Client Services, Kosovo 2001–2002, Legal Assistance Attorney, Fort Drum, N.Y. 2001. Member of the bars of South Carolina and the District of Columbia. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

[1] Amy Herdy & Miles Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short: Reforms Lag Despite Numerous Scandals, Recommended Solutions*, DENV. POST, Nov. 18, 2003, at A-1 (describing military sexual assault scandals including those at the Air Force Academy, and reports of sexual assaults of Soldiers deployed to Operation Enduring Freedom (OEF) and Operation Iraqi freedom (OIF)).

[2] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY app. F-1 (18 Mar. 2008) [hereinafter AR 600-20] ("In a deployed environment, the SARB will be convened at brigade or higher level as appropriate and follow the same format as the installation SARB.").

[3] *Id.* ch. 8.

[4] U.S. DEP'T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT v (2004) [hereinafter TASK FORCE REPORT].

[5] AR 600-20, *supra* note 2, para. 8-5(g).

[6] *See generally* U.S. DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, REPORT NO. IP02004C003, EVALUATION OF SEXUAL ASSAULT, REPRISAL, AND RELATED LEADERSHIP CHALLENGES AT THE UNITED STATES AIR FORCE ACADEMY background (2004) (describing how the investigation into this issue began).

[7] *Sexual Assault and Violence Against Women in the Military and at the Academies: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations, of the H. Comm. on Government Reform*, 109th Cong. 94 (2006) [hereinafter *Hearing*] (statement of Dr. Kaye Whitley) (explaining the task force was launched out of Defense Secretary Rumsfeld's "concern about reports of sexual assault in Iraq and Kuwait").

the DOD Care for Victims of Sexual Assaults Task Force (Task Force) released *The Task Force Report on Care for Victims of Sexual Assault*.[9] It found that "[e]xisting policies and programs aimed at preventing sexual assault were inconsistent and incomplete,"[10] and the military lacked a "standard approach in preventing sexual assault."[11] Perhaps most importantly, the Task Force found the lack of confidentiality available to victims in the military prevented a significant number of victims from even reporting sexual assaults.[12]

A. Response

Congress mandated the development of a comprehensive sexual assault policy by 2005.[13] The Under Secretary of Defense soon directed the services to adopt new policies and procedures regarding sexual assault.[14] The information in these memoranda was incorporated into guidelines published by DOD.[15] These included requirements for training on sexual assault prevention and the implementation of Sexual Assault Response Coordinators (SARC), as well as Victim Advocates (VAs).[16] The position of Sexual Assault Prevention and Response Office (SAPRO) was created to provide oversight, guidance and accountability of sexual assaults within the DOD.[17] Perhaps the most significant and controversial change was the new confidential reporting policy.[18] This policy gave sexually assaulted Soldiers an option of "restricted reporting" [19] so they could receive medical and psychological care without initiating an investigation.[20]

Many military leaders are still uncomfortable with DOD's decision to allow restricted reporting, as it represents a "major cultural shift"[21] in our value system. Judge Advocates themselves may not believe servicemembers should have the option of restricted reporting, as some view it as turning a blind eye to crime. While the Task Force took these concerns into account,[22]

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[8] *See* TASK FORCE REPORT, *supra* note 4, at v (expressing concern "about recent reports regarding allegations of sexual assaults on service members deployed to Iraq and Kuwait" (quoting Memorandum from Sec'y of Defense to Under Sec'y of Defense, subject: Department of Defense Care for Victims of Sexual Assault (Feb. 5, 2004))).

[9] *See id.* at vii.

[10] *Id.* at ix, 23.

[11] *Id.* at 9.

[12] *Id.* at 30.

[13] *Hearing*, *supra* note 7, at 95 (statement of Dr. Kaye Whitley).

[14] *See* Memoranda from The Under Sec'y of Defense to Secretaries of the Military Dep'ts et al., subject: Collateral Misconduct in Sexual Assault Cases (Nov. 12 2004); Increased Victim Support and A Better Accounting of Sexual Assault Cases (Nov. 22, 2004); Review of Administrative Separation Actions Involving Victims of Sexual Assault, DTM-04-018 (Nov. 22, 2004); Training Standards for Pre-Deployment Information on Sexual Assault and Response Training, DTM-04-016 (Dec. 13, 2004); Department of Defense (DoD) Definition of Sexual Assault, DTM-04-014 (Dec. 13, 2004); Collaboration with Civilian Authorities for Sexual Assault Victim Support (Dec. 17, 2004); Commander Checklist for Responding to Allegations of Sexual Assault, DTM-04-013 (Dec. 15, 2004); Training Standards for DoD Personnel on Sexual Assault Prevention & Response, DTM-04-015 (Dec. 13, 2004); Response Capability for Sexual Assault, DTM-04-012 (Dec. 17, 2004); Confidentiality Policy for Victims of Sexual Assault (Mar. 16, 2005); DoD Policy on Collecting DNA Samples from Military Prisoners (Apr. 18, 2005); Essential Training Tasks for a Sexual Assault Response Capability, DTM-05-010 (Apr. 26, 2005); Sexual Assault Evidence Collection and Preservation Under Restricted Reporting, DTM-05-009 (June 30, 2005); Memorandum from The Under Sec'y of Defense to Assistant Sec'y of the Army et al., subject: Data Call for CY04 Sexual Assaults, DTM-04-019 (Nov. 22, 2004).

[15] U.S. DEP'T OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (6 Oct. 2005) [hereinafter DODD 6495.01]; U.S. DEP'T OF DEFENSE, INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES (23 June 2006) [hereinafter DODI 6495.02].

[16] DODI 6495.02, *supra* note 15, para. E.3.2.

[17] *Id.* para. 5.3.

[18] *Hearing*, *supra* note 7, at 105 (statement of Dr. Kaye Whitley).

[19] *See* AR 600-20, *supra* note 2, para. 8-4(c).

> Restricted reporting allows a Soldier who is a sexual assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling, without triggering the official investigative process. Soldiers who are sexually assaulted and desire restricted reporting under this policy should report the assault to the sexual assault response coordinator (SARC), victim advocate, chaplain, or a healthcare provider.

Id.

[20] *Hearing*, *supra* note 7, at 106 (statement of Dr. Kaye Whitley).

[21] *Id.* at 105 (statement of Dr. Kaye Whitley).

[22] *See* TASK FORCE REPORT, *supra* note 4, at 32, 41 (recognizing the concern that restricted reporting could impede commanders' responsibilities and increase the potential for false allegations).

the policy was developed with serious consideration of the needs of our servicemember victims.[23] Army Regulation (AR) 600-20 explains

> The Army is committed to ensuring victims of sexual assault are protected, treated with dignity and respect, and provided support, advocacy and care. Army policy strongly supports effective command awareness and prevention programs, and law enforcement and criminal justice activities that will maximize accountability and prosecution of sexual assault perpetrators. To achieve these dual objectives, the Army prefers complete reporting of sexual assaults to activate both victims' services and accountability actions. However, recognizing that a mandate of complete reporting may represent a barrier for victims to access services when the victim desires no command or law enforcement involvement, there is a need to provide an option for confidential reporting.[24]

B. Educating our Leaders

Appreciation of the problem and acceptance of the policy is the first step to this program's success. Understanding the reasons behind the policy may make it more palatable for those who are not immediately convinced of the need for the option of confidentiality. A JA can help commanders who struggle with the notion of restricted reporting by explaining the rationale.[25]

For example, a prevalent reason why both civilian and Soldier victims choose not to report is the concern for privacy.[26] Many circumstances can necessitate this need for privacy. The sheer emotional response[27] from the event may cause a person to reconsider reporting. Other victims may believe they could have prevented the assault, and therefore blame themselves.[28] These reasons affect not only military victims, but civilians' decisions as well.[29]

Leaders should also understand that military victims have other, significant reasons not to report an assault.[30] Some do so out of a lack of faith in the military justice system.[31] Some simply do not want to "tarnish the reputation of their unit or of the armed forces when service members are losing their lives for their country."[32] It is also possible that the victim cannot escape the assailant's presence. He[33] may live in the same barracks or be her supervisor.[34] She may also fear prosecution for a military crime such as adultery[35] or fraternization,[36] or the stigma associated with seeking psychological care, regardless of the reason.[37] The lack of control that comes with "secondary victimization" is "one of the most frequently cited concerns

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[23] *See id.* at 28 (finding that Soldiers did not report out of "concerns that they will not be believed, feelings of embarrassment and stigma, ambiguity about what constitutes sexual assault, concerns that the criminal justice system is largely ineffective at responding to or preventing such incidents[, and] fear of reprisal from the offender").

[24] AR 600-20, *supra* note 2, app. H-2.

[25] *Id.*

[26] TASK FORCE REPORT, *supra* note 4, at 10.

[27] *See* DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 77 (1995) ("[T]he trauma of rape, like that of combat, involves minimal fear of death or injury; far more damaging is the impotence, shock, and horror in being so hated and despised as to be debased and abused by a fellow human being.").

[28] Rachel Yehunda, *Post-Traumatic Stress Disorder*, 346 NEW ENG. J. MED. 11 (2002).

[29] NAT'L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 6–7 (2005) ("Victims may be embarrassed or fear reprisal; and victims who may have been drinking before the assault might fear sanctions for violating campus policy on alcohol use."); *see also* TASK FORCE REPORT, *supra* note 4, at ix.

[30] MIC HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA'S MILITARY 168 (2007).

[31] TASK FORCE REPORT, *supra* note 4, at 28.

[32] T.S. NELSON, FOR LOVE OF COUNTRY 33 (2002).

[33] The use of "he" to indicate the assailant and "she" to refer to the victim is not meant to imply that men are not sexually assaulted. The pronouns are used in this manner for ease of reading.

[34] NELSON, *supra* note 32, at 33.

[35] UCMJ art. 134 (2008).

[36] *Hearing*, *supra* note 7, at 212 (letter from Colonel (Retired) Patrick M. Rosenow, U.S. Air Force).

[37] NELSON, *supra* note 32, at 130.

about reporting an abusive situation in the military."[38] This can include real or perceived "harassment from the command, the investigators, or co-workers."[39] A confidentiality policy, however, gives victims the opportunity to get the help they need,[40] while ensuring that their fears do not become reality.

Another tool JAs can use to educate their commanders is to compare the victim's experience to that of a Soldier in combat. Sexual assault victims often have Post Traumatic Stress Disorder (PTSD)[41] and describing victims' responses in relation to PTSD can alert commanders to the notion that not only do they need help on their own terms, but if they do not receive it, there may be second and third order effects.[42] These effects may include impacts on retention, readiness, morale, and loyalty.[43] An explanation and perhaps literature indicating that "rape is much more likely to cause PTSD than combat"[44] may help enhance a commander's appreciation of the situation.[45] This is because "sexual assault, particularly when committed by one's comrades is a 'close-up, inescapable, interpersonal' act of hatred and aggression"[46] which is more dangerous than "impersonal death and destruction."[47]

Judge Advocates may also encounter commanders fearful of false reports. Some leaders question whether the restricted reporting option will encourage confidential, but false reports.[48] Although somewhat counter-intuitive, there is a belief that because some people make false "allegations for secondary gain,"[49] more individuals will file false reports to garner attention or other favor if they know it will not be investigated.

Despite some leaders' concern for "false reports," it is extremely difficult to estimate how many actually occur. While some reports are ultimately unsubstantiated,[50] the victim may still believe the assault is very real.[51] For example, imagine a Specialist who consents to a sexual encounter with a command sergeant major. She may feel as if she had no choice and that she was taken advantage of. The restricted reporting option allows this Soldier to receive the emotional help she needs, without anyone judging her uninformed decision or labeling it a "false report." Such false reports may occasionally be made by a Soldier in need of psychological help, as opposed to being made with the intent to hurt another.[52] While DOD was sensitive to the concern of false reports when designing the SARP, the need for a policy to care for victims simply outweighed the danger of false reports.[53] A leader's trust in the military justice system should be great enough to put aside fears of false reports for the good of the Soldier victims.

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[38] *Id.* at 122.

[39] *Id.*

[40] *See* AR 600-20, *supra* note 2, para. 8-4(c).

[41] HUNTER, *supra* note 30, at 182.

[42] *See* NELSON, *supra* note 32, at 193 (explaining retention is one of these effects).

[43] HUNTER, *supra* note 30, at 209–16.

[44] ERIN SOLARO, WOMEN IN THE LINE OF FIRE: WHAT YOU SHOULD KNOW ABOUT WOMEN IN THE MILITARY 287 (2006).

[45] *See* Andrea Stone, *Mental Toll of War Hitting Female Servicemembers*, USA TODAY, Jan. 2, 2008, at 1A (explaining the relationship between military sexual trauma and PTSD).

[46] HUNTER, *supra* note 30, at 162.

[47] *Id*. at 182 (quoting GROSSMAN, *supra* note 27, at 81).

[48] TASK FORCE REPORT, *supra* note 4, at 42. Potential reasons for a false report may include a need for attention, a desire for a transfer to a new unit, or separation. *See also* AR 600-20, *supra* note 2, para. 8-5(o) (outlining commander's duties, which include determining "if an administrative separation of the victim is in the best interests of either the Army or the victim, or both").

[49] TASK FORCE REPORT, *supra* note 4, at 42.

[50] *See* U.S. GEN. ACCOUNTABILITY OFFICE, REP. NO. GAO-08-296, MILITARY PERSONNEL: THE DOD AND COAST GUARD ACADEMIES HAVE TAKEN STEPS TO ADDRESS INCIDENTS OF SEXUAL HARASSMENT AND ASSAULT, BUT GREATER FEDERAL OVERSIGHT IS NEEDED 31, 32 (2008) [hereinafter GAO-08-296] (explaining that because DOD did not provide a definition of "substantiated," the data can vary between services, especially at academies). An unsubstantiated finding does not mean the assault did not occur, however.

[51] Stephanie Sacks, *Sexual Assault and the Military: A Community Sexual Assault Program's Perspective*, CONNECTIONS 17–18 (Fall/Winter 2005).

[52] TASK FORCE REPORT, *supra* note 4, at 42.

[53] *Id.* at 41.

The rate of sexual assault in the military,[54] as well its effects on individual Soldiers[55] and the Army as a whole, demands an aggressive approach to addressing this issue.[56] This begins with a confidential reporting option. It not only helps the victim, but the command as well. "A victim who receives appropriate care and treatment, and is provided an opportunity to make an informed decision about a criminal investigation is more likely to develop increased trust that his/her needs are of primary concern to the command and may eventually decide to pursue an investigation."[57]

Perhaps the most persuasive argument for the new policy is that "it is hoped that the prevention and response measures taken over the past three years have caused a decrease in sexual assaults."[58] In other words, the Army's current SAPR program appears to be working.[59] Without a confidential option, significant numbers of servicemembers would likely fail to report the incident and attempt to deal with assault on their own.[60] Therefore, JAs should convince commanders that restricted reporting is necessary if we truly want our Soldiers to get the help they need.[61]

III. General Problem Areas and Guidance

"The Sexual Assault Prevention and Response Program reinforces the Army's commitment to eliminate incidents of sexual assault through a comprehensive policy that centers on awareness and prevention, training and education, victim advocacy, response, reporting and accountability."[62] While G-1 is responsible for oversight of the program,[63] success at the installation level requires a team effort. In addition to the SARC, key players include representatives from the Provost Marshal's Office, CID, Medical Command (MEDDAC), Office of the Chaplain, Office of the Staff Judge Advocate (OSJA), and Inspector General (IG).[64] These individuals not only support the SAPR mission, but also serve on the SARB, to "provide executive oversight, procedural guidance and feedback concerning the installations Sexual Assault Prevention and Response program."[65] Although AR 600-20, *Army Command Policy*, was amended to include a chapter on the SAPR and the SARB,[66] much is still subject to interpretation. The following will address, and provide solutions to, some of the issues frequently tackled by JAs.

A. Restricted Reporting Nuances

Like many Soldiers,[67] the PFC in our example does not want her assault investigated, yet she wants help to deal with the situation. Under the current policy, a Soldier who is sexually assaulted may report a sexual assault without initiating an investigation, and with some confidentiality,[68] using the restricted reporting policy. This "allows a Soldier who is a sexual

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[54] U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY 4 (Mar. 2008) [hereinafter DOD REPORT] (finding 2688 reports of sexual assault in 2007); *see also* HUNTER, *supra* note 30, at 175 ("[T]he Department of Veteran Affairs found that from 1994 to 2004, 21 percent of servicewomen had been raped and 30 percent had experienced attempted rape.").

[55] HUNTER, *supra* note 30, at 251.

[56] Matthew J. Friedman, *Veterans' Mental Health in the Wake of War*, 352 NEW ENG. J. MED. 1289 (2005).

[57] AR 600-20, *supra* note 2, app. H-4(a).

[58] DOD REPORT, *supra* note 54, at 24.

[59] *See generally id.* at 3 (FY07 Policy and Program Highlights and Accomplishments); *see also* U.S. DEP'T OF DEFENSE, INSTR. 6400.06, DOMESTIC ABUSE INVOLVING DOD MILITARY AND CERTAIN CIVILIAN AFFILIATED PERSONNEL (21 Aug. 2007) (implementing a similar restricted reporting option for victims of domestic abuse, indicating restricted reporting may be the wave of the future in DOD).

[60] *See* DOD REPORT, *supra* note 54, at 19 (finding 705 reports of sexual assault in 2007, and "[o]f these . . . reports, 489 (69%) were reports of rape" but "102 (or 14% of the total 705) Restricted Reports were changed to Unrestricted Reports at the request of the victims").

[61] Friedman, *supra* note 56.

[62] AR 600-20, *supra* note 2, para. 8-1(a).

[63] *Id.* para. 8-5(a).

[64] *Id.* para. 8-5(a–h).

[65] *Id.* app. F-2.

[66] *Id.* ch. 8.

[67] *See* DOD REPORT, *supra* note 54, at 20 (reporting 705 restricted reports in FY 07).

[68] *See* AR 600-20, *supra* note 2, app. H-6 (describing the exceptions to confidentiality). The list of exceptions includes the amorphous "when disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of victim or another." *Id.*

assault victim, on a confidential basis, to disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling without triggering the investigative process."[69] She can make a restricted report only to the "sexual assault response coordinator (SARC), victim advocate, chaplain, or a healthcare provider."[70] While the first two disclosure options are clearly defined,[71] the term "chaplain" and "healthcare provider" have room for interpretation and can create questions for the JA advising the SAPR team. When addressing such issues, the JA should keep in mind the policy to "promote sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes,"[72] as well as the definition of restricted reporting.[73] The policy explains that "Soldiers who are sexually assaulted and desire restricted reporting under this policy *should* report the assault to the sexual assault response coordinator (SARC), victim advocate, chaplain, or a healthcare provider."[74] Remembering this permissive language allows JAs to look at the Soldier's intent and balance it with the purpose of the policy to prevent an honest mistake from stripping a victim of her rights.[75]

Like the PFC in our example, it is easy to imagine a sexual assault victim who, intending to make a restricted report to a physician, tells a medic some of the details of her assault. Should this report now be unrestricted?[76] Department of Defense Directive 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, defines Healthcare Provider (HCP) as

> those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide health care services, at a military medical or military dental treatment facility, or who provide such care at a deployed location or in an official capacity. This term also includes military personnel, DoD civilian

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[69] *Id.* para. 8-4(c).

[70] *Id.*

[71] *See id.* para. 8-5(p)–(s). "The installation SARC is a DA or contract civilian employee who works for the Family advocacy program manager (FAPM) and reports directly to the installation commander for matters concerning incidents of sexual assault." *Id.* para. 8-5(p). "[I]nstallation victim advocates (IVAs) are DA civilian or contract employees trained to provide advocacy services to victims of sexual assault. The IVA reports directly to the Sexual Assault Response Coordinator (SARC) for sexual assault cases." *Id.* para. 8-5(r). "The unit victim advocate (UVA) is one of two Soldiers/civilians who is appointed on orders by each battalion-level commander and trained to perform collateral duties in support of victims of sexual assault, particularly in deployed environments." *Id.* para. 8-5(s).

[72] *Id.* para. 8-1(a).

[73] *Id.* para. 8-4(c).

[74] *Id.* (emphasis added).

[75] *See* e-mail from Nathan F. Evans, U.S. Army Deputy Program Manager, Sexual Assault Prevention and Response Program, to Captain (CPT) Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Oct. 22, 2007) [hereinafter Evans e-mail] (on file with author) (explaining restricted reporting will likely be more thoroughly explained in future guidance.) Draft language includes:

> (1) The fact that the SARC/VA knows a third-party individual (victim's friend/roommate/family member, or other, etc) who is outside the restricted reporting protective sphere (SARC/VA, HCP, Chaplain) is aware of a sexual assault incident (either as a witness or told of the incident by the victim) does not preclude the SARC/VA from offering the victim a restricted report. When offering a restricted report under these circumstances, the SARC/VA must ensure the victim is aware that an investigation may occur if law enforcement or the chain of command learns of the incident either from the third party or any other source; and that the SARC/VA will change the report to unrestricted at that time.
>
> (2) The SARC/VA *shall not* offer a restricted report to a victim if the SARC/VA is aware (either first-hand or told by the victim or another source) that law enforcement/CID or the victim's chain of command (to include NCO supervisory chain) knows of the incident. Under these circumstances, the SARC/VA should advise the victim that a restricted report is not an option because the chain of command is required to report the incident and law enforcement/CID is required to investigate. The SARC/VA should immediately contact the first lieutenant colonel in the chain of command and law enforcement/CID to ensure an investigation is initiated.
>
> (3) If the SARC/VA offers restricted reporting in good faith (i.e., the SARC/VA does not know that law enforcement/CID, or the chain of command is aware of the incident), and later learns that the chain of command and/or law enforcement/CID is aware of the incident, the SARC/VA will change the report to unrestricted and make every attempt to notify the victim. The SARC/VA should immediately contact the first lieutenant colonel in the chain of command and law enforcement/CID to ensure an investigation is initiated.
>
> (4) The type of report (restricted or unrestricted) does not change the confidential nature of information provided by the victim to the SARC/VA. Neither the chain of command nor law enforcement/CID should pressure the SARC/VA for information about the incident that the victim does not want revealed. The victim retains the right not to cooperate with the investigation.

Id.

[76] *See id.* ("[I]f the medic learns of the assault from the victim (or anyone else) in a capacity other than the performance of their duties as a medic— then the Soldier/medic 'should' report the assault. However, Army policy does not mandate a Soldier (unless in the chain of command) to report an incident."); *see also* AR 600-20, *supra* note 2, para. 8-2(a).

employees, and DoD contractors who provide health care at an occupational health clinic for DoD civilian employees or DoD contractor personnel.[77]

While this definition does not specifically address medics, the expansive definition arguably intends to cover them as a restricted reporting source. The term "healthcare professionals"[78] can be interpreted to mean all those involved in the care and treatment of Soldiers. Likewise, the reference to those who "provide such care at a deployed location"[79] certainly describes medics at a remote Forward Operating Base (FOB). The last phrase, describing those who are "employed or assigned . . . in an official capacity" [80] arguably covers all those in the military healthcare profession. [81]

While some may find this too broad a reading of the regulation, it is a necessary and appropriate interpretation.[82] To maintain the integrity of the program, the Army must allow a Soldier who honestly and reasonably believes she is making a restricted report to maintain her privacy, even if there is some question over a technicality.[83] Of course, the Soldier must intend for her report only to be used to obtain treatment.[84] Therefore, in a case such as the one in our example, the JA should advise the UVA, SARC, CID, and the commander to allow the Soldier to restrict her report.

The young Soldier in our example, familiar with the SAPR program from training she attended, also attempts to seek help from the chaplain, with the intent it will remain confidential. Due to ignorance of either the duty position or the nuances of the regulation, she instead reports the incident to the chaplain's assistant, who in turn informs the chaplain. It is unclear whether this Soldier who intended to make a restricted report can now keep her disclosure confidential.[85] Soldiers "aware of a sexual assault should immediately (within 24 hours) report incidents."[86] Chaplain's assistants are not excluded from this policy. However, they are directed by their own regulation that "sensitive information normally should not be disclosed unless the declarant expressly permits disclosure."[87] Therefore, chaplain's assistants should report such incidents only to a Chaplain.

A strict interpretation of the regulation[88] would determine that the PFC's report falls outside the restricted realm.[89] However, requiring an unrestricted report would not be in the victim's, command's, or the program's best interest. Military Rule of Evidence (MRE) 503 provides JAs with an argument to keep the report restricted.[90] Prior to the SAPR program's implementation, many military personnel believed a Soldier could confidentially report a sexual assault to a chaplain or a chaplain's assistant.[91] This belief was based on MRE 503's general rule of privilege between a Soldier and a "clergyman or a clergyman's assistant." [92] Although the theory that any Soldier could restrict a report if it was given to a chaplain or

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[77] DODD 6495.01, *supra* note 15, para. E2.1.5.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See* AR 600-20, *supra* note 2, para. 8-7(b)(3)(j)(1) (indicating medical services are "agencies with whom victims can initiate a restricted report").

[82] Telephone Interview with Charles E. Orck, U.S. Army Medical Command Attorney, in Fort Sam Houston, Tex. (Oct. 1, 2007) [hereinafter Orck Interview].

[83] *Id.*

[84] *See id.* (explaining that if the victim was a medic and the hospital commander was treating her, the report could still be restricted. We should look at the intent of the regulation, as opposed to the hyper-technical definitions in the regulation. Likewise, a receptionist could also be a covered source, if the patient was seeking medical treatment.).

[85] *See* Evans e-mail, *supra* note 75 (explaining that while a medic can sometimes qualify as a HCP, a chaplain's assistant can never qualify as a "chaplain" for purposes of this regulation. *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 503 (2008) [hereinafter MCM] (explaining a privilege exists when a "confidential communication" is disclosed to a "clergyman's assistant").

[86] AR 600-20, *supra* note 2, para. 8-2(a).

[87] U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4(n)(2) (25 Mar. 2004) [hereinafter AR 165-1].

[88] *See* Evans e-mail, *supra* note 75.

[89] AR 600-20, *supra* note 2, para. 8-4(c).

[90] MCM, *supra* note 85, MIL. R. EVID. 503.

[91] TASK FORCE REPORT, *supra* note 4, at 12.

[92] MCM, *supra* note 85, R.C.M. 503.

chaplain's assistant is somewhat imperfect,[93] an analogy between our current regulation and MRE 503 can be made to allow restricted reporting to chaplain's assistants. Given the purpose of the SAPR program,[94] the historical privilege, and the directive regarding sensitive information,[95] the JA should argue the Soldier is entitled to the restricted reporting option.[96]

A comparison of the chaplain's assistants to the broad definition of "healthcare provider"[97] can also be made as an argument for a restricted report. As discussed, this definition arguably allows for a Soldier to make a restricted report to a medic and maintain confidentiality. Analogizing a chaplain's assistant to a medic for SAPR purposes allows a victim to maintain the privacy she wants while obtaining the help she needs. However, because of the competing guidance, the JA should ensure chaplain's assistants, like medics, receive specialized training with emphasis on situations like the one in the example.

Judge Advocates cannot rely only on the AR 600-20 when addressing restricted report issues. For instance, although not specifically addressed by the regulation, a Legal Assistance or Trial Defense Service (TDS) attorney may also provide a restricted reporting option for a victim; these JAs must keep a client's confidences.[98] Therefore, those learning of a sexual assault under the cloak of attorney-client confidentiality as opposed to a victim-prosecutor relationship must respect the client's wishes.[99] Client services attorneys should be well versed in Soldiers' options and explain them in detail. If the Soldier wants to make a restricted report, the attorney should be able to put them in touch with a victim advocate as soon as possible.

Restricted reporting issues in the Initial Entry Training (IET) environment are even more abundant, and again, JAs must look beyond AR 600-20 for guidance. Training and Doctrine Command (TRADOC) Regulation 350-6, *Enlisted Initial Entry Training (IET) Policies and Administration* (TR 350-6), reminds cadre to be mindful of the restricted reporting option available to Soldiers when "collecting pre-sick call information."[100] In other words, it recognizes the inherent rank disparity between trainees and cadre can cause new Soldiers, who must address nearly every concern with their drill sergeant before taking action, to forget the nuances of the restricted reporting option.

Even with this provision, it is easy to imagine a situation where an IET Soldier asks a drill sergeant for permission to go to sick call, and the drill sergeant responds with "What for, Soldier?" This places the victim in a precarious situation. Given the environment, she is likely to respond truthfully to her drill sergeant's inquiry, potentially forfeiting her right to a restricted report. Although TR 350-6 explains the drill sergeant could be subject to disciplinary action for a violation of the policy, it does not address whether the Soldier has lost the ability to keep her assault confidential.[101] After the "cat is out of the bag" to a member of the chain of command,[102] restricted reporting is technically no longer an option.

In all situations, the commander should still ensure the victim has the opportunity to meet with a VA immediately. The VA may explain to the Soldier that if she still does not want to pursue an investigation, she can elect not to make a statement to CID. This would effectively allow her to maintain her confidentiality while remaining within DOD and Army guidance.[103] While some CID agents may intuitively see this as a reasonable solution, JAs should discuss this option with their servicing CID office to ensure that the agents do not unduly pressure the victim. Judge Advocates must also proactively discuss the health and safety exception with law enforcement personnel, as explained below.

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[93] *See id.* (limiting the privilege to those "made either as a formal act of religion or as a matter of conscience"). In the case described, and many others, the privilege could therefore not be invoked.); *see also* Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 163 (2005).

[94] AR 600-20, *supra* note 2, para. 8-1(a) ("promote[ing] sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes").

[95] AR 165-1, *supra* note 87, para. 4-4(n)(2).

[96] *But see* DOD REPORT, *supra* note 54, at 6 (directly contradicting AR 600-20 para. 8-4(c), stating that chaplains "cannot accept Restricted Reports").

[97] DODD 6495.01, *supra* note 15, para. E2.1.5.

[98] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.6(a) (1 May 1992) [hereinafter AR 27-26].

[99] *But see id.* R. 1.6 (providing exceptions to the general rule of confidentiality).

[100] TRADOC REG. 350-6, ENLISTED INITIAL ENTRY TRAINING (IET) POLICIES AND ADMINISTRATION app. H-4(c) (8 May 2007) [hereinafter TR 350-6].

[101] *Id.*; *see also Hearing*, *supra* note 7, at 95 (statement of Delilah Rumburg) (identifying "loopholes" such as this).

[102] AR 600-20, *supra* note 2, app. H-4(b).

[103] *See* e-mail from Lieutenant Colonel (LTC) Martha L. Foss, U.S. Army JAG Corps Legal Assistance Policy Div., to CPT Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Mar. 10, 2008) [hereinafter Foss e-mail] (on file with author) (from 2004–2007, LTC Foss was the Deputy SJA at Fort Jackson, S.C).

B. Health and Safety Exception to Confidential Reporting

A "health and safety" exception has been carved out of the restricted reporting rules "to prevent or lessen a serious and imminent threat to the health or safety of victim or another."[104] Judge Advocates must help determine when this exception should allow disclosure of a restricted report to the command or law enforcement to protect the intent of the SAPR policy.[105] It should be used carefully, looking at the totality of the circumstances.[106] For example, informing law enforcement that a victim claims her assailant threatened to kill her if she reports the assault could be an appropriate use of this exception.[107]

This exception could be used when there are repeated restricted reports of sexual assault committed by the same individual. If multiple victims come forward regarding the same person, the report could lose its confidentiality in order to protect the next potential victim.[108] This exception should be saved for the most serious cases to maintain the integrity of the policy, and "[t]he disclosure will be limited to information necessary to satisfy the purpose of the disclosure"[109] However, a disclosure could be for anything from implementing additional safety procedures to a potential court-martial, the JA should be a part of the decision making process whenever the health and safety exception is considered.

C. Jurisdictional Issues to Confidential Reporting

Although HCPs are one of the four listed confidential reporting options,[110] they may have to report sexual assaults based on the law of the state where they are stationed.[111] When the HCP is located in a state that requires reports of sexual assaults, the medical treatment facility must report such incidents.[112] Although this seems counter-intuitive, especially on an exclusive federal jurisdiction installation, AR 600-20, appendix H-6(a)(5) is interpreted to mean that state law applies to sexual assault reporting.[113] It waives the restricted reporting protections when "disclosure is ordered by or is required by Federal or state statute."[114] The state law where the medical facility is located, not the state law licensing the HCP, determines release of the information.[115] It is crucial for JAs to understand this policy, as AR 600-20 requires the "SARC, victim advocates, and healthcare providers . . . [to] consult with the servicing legal office" on these matters.[116] Judge Advocates must ensure that any reporting to civilian authorities is the absolute minimum to meet state law requirements.[117]

Judge Advocates should also verify that VAs and HCPs properly brief Soldiers on this nuance, especially in states that require such reporting, so victims can make a truly informed decision.[118] Unfortunately, some victims may then choose not to report the assault at all, and fail to get the help they need.[119]

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[104] AR 600-20, *supra* note 2, app. H-6(a)(2).

[105] Examples of what qualifies under the health and safety exception are not provided. *But see* Evans e-mail, *supra* note 75 (concurring that examples include circumstances where a victim's life is threatened, or numerous victims file a restricted report on the same alleged offender).

[106] *See* DODD 6495.01, *supra* note 15, para. E3.1.8.6.

[107] Evans e-mail, *supra* note 75.

[108] *Id.*

[109] DODD 6495.01, *supra* note 15, para. E3.1.8.8

[110] AR 600-20, *supra* note 2, para 8-4(c).

[111] Evans e-mail, *supra* note 75.

[112] *Id.*

[113] Orck Interview, *supra* note 82.

[114] AR 600-20, *supra* note 2, app. H-6(a)(5).

[115] *See* Evans e-mail, *supra* note 75 ("HCPs assigned to an MTF in a state that requires sexual assault reporting will comply with that rule. In states that do not require reporting, all HCPs will follow that rule, even if they are licensed in a state that requires reporting of sexual assaults.").

[116] AR 600-20, *supra* note 2, app. H-6(a)(5).

[117] *See* Evans e-mail, *supra* note 75 ("The HCP will NOT report the matter to CID or installation law enforcement, only to the state authorities as required by statute.").

[118] Because DD Form 2910, block 1(c)(4) prompts the VA or SARC to explain this requirement, the issue should be highlighted during training and comprehension thoroughly checked when obtaining the victim's preference. *See* U.S. Dep't of Defense, DD Form 2910, Victim Reporting Preference Statement (June 2006).

D. Collateral Misconduct

The paralegal in our scenario already prepared the Article 15 for the victim's drinking. However, the regulation directs commanders to, "[a]bsent overriding considerations, . . . consider exercising their authority in appropriate cases to defer disciplinary actions for the victim's misconduct until after the final disposition of the sexual assault case."[120] This directive is not always well received, as commanders are rarely comfortable allowing Uniform Code of Military (UCMJ) actions of any type to linger, and many sexual assaults involve misconduct of some sort by the victim.[121] Judge Advocates must serve as a gate keeper when a commander wants to quickly address a victim's alleged misconduct. Judge Advocates can remind commanders to take the victim's alleged misconduct seriously, but in proper context of the entire situation.[122] Leaders should be sensitive to the fact that the fear of punishment for collateral misconduct is one of the reasons victims fail to report.[123] Taking action against the victim will only compound the problem, not only for the individual at hand, but also for those who may be victimized in the future. Their fears will be realized.[124]

Judge Advocates must also train paralegals to recognize these situations, and to inform their JA when a commander intends to take quick action. For instance, the paralegal in the introduction's example should have notified the BJA instead of preparing the Article 15 immediately. Although it is a commander's responsibility[125] to "determine how to best dispose of the victim's collateral misconduct,"[126] Judge Advocates must ensure that it is the exception, and not the general rule, that victims' collateral misconduct is handled prior to the "final disposition of the sexual assault case."[127]

Judge Advocates should also recognize that some victims do not report because they are fearful of "being traumatized by the criminal justice system process."[128] In fact, some find the process "more traumatic than the sexual assault because it was perpetrated by those who were supposed to help."[129] These feelings will be even more intense if they are actually punished for misconduct surrounding the assault. Commanders and JAs alike should keep in mind that successful prosecutions and victim recovery should override the general philosophy of swift justice when it comes to victims of sexual assault. Victim recovery can be aided, or potentially hindered by UVAs, and their careful selection is crucial. The following will address who is best suited to assume UVA duties.

E. Selection of UVAs

The UVA should be able to be the one constant in the victim's life, as he or she "provide[s] crisis intervention, referral, and ongoing non-clinical support to the sexual assault victim."[130] Some of their most important duties are to "[i]nform victims of their options for restricted and unrestricted reporting,"[131] "provide information to the SARC,"[132] and "[p]rovide

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[119] *See* Theresa Scalzo, *Restricted Reporting and Civilian Rape Reporting Laws*, SAPR SOURCE., Apr. 30, 2007, at 2, *available at* http://www.sapr.mil/contents/news/Aprill%202007%20Newsletter.pdf; *see also* DOD REPORT, *supra* note 54, at 10 ("An action plan has been devised which includes outreach to civilian communities on the issue.).

[120] AR 600-20, *supra* note 2, app. G-2(o).

[121] TASK FORCE REPORT, *supra* note 4, at 40.

[122] AR 600-20, *supra* note 2, app. G-2(n) (o); *see also* DOD REPORT, *supra* note 54, at 25–26 ("The use of alcohol as a non-traditional weapon by perpetrators cannot be ignored. We must begin to examine the intersection between alcohol and sexual assault to determine whether we are responding in the best way possible to victims of alcohol-facilitated sexual assault.").

[123] HUNTER, *supra* note 30, at 168.

[124] *See* Assoc. Press, *Airman Who Alleged Rape Faces Court-Martial: She Ties Her Prosecution to Refusal to Testify Against Airmen She Says Attacked Her*, WASH. POST, Aug. 8, 2007, at A16 (discussing a case in which three alleged rapists received nonjudicial punishment and were granted immunity to testify against the Airman who refused to testify against them. Her charges of "committing indecent acts and . . . of consuming alcohol as a minor . . . involve the same men she accused of raping her."); *see also* Kelcey Carlson, *Alleged Air Force Rape Victim Won't Face Court Martial*, 14 Sept. 2007, at http://www.wral.com/news/local/story/1813624/ (explaining she was ultimately "administered nonjudicial punishment for the underage drinking charge").

[125] AR 600-20, *supra* note 2, para. 8-5(m)(5) (withholding the authority to dispose of sexual assault cases to the battalion commander level).

[126] *Id.* app. G-2(o).

[127] *See id.* (explaining there should be "overriding circumstances" for a commander to deal with the victim's collateral misconduct first).

[128] HUNTER, *supra* note 30, at 168.

[129] NELSON, *supra* note 32, at 123.

[130] AR 600-20, *supra* note 2, para. 8-5(s)(1).

[131] *Id.* para. 8-5(s)(4).

support to the victim throughout the medical, investigative and judicial process."[133] Therefore, JAs should advise commanders not to select UVAs and DSARCs haphazardly. This type of preventive advocacy will ensure the program's success, while appointing those less qualified can cause the mission to fail.

A commander may be tempted to select Soldiers who volunteer for this additional duty, as the obligation can be onerous. These individuals are not necessarily the best choice for this sensitive position, however. While AR 600-20 attempts to guide commanders by placing minimum rank requirements on UVAs and DSARCs,[134] merely meeting these minimum requirements will not promote the program's success.

A commander should adhere to the UVA selection criteria,[135] although this can be difficult.[136] Perhaps most easily overlooked, but also the most important, are the requirements to "have outstanding duty performance, as evidenced by a review of the individual's evaluation reports"[137] and "[d]emonstrate stability in personal affairs. Soldier will not have a history of domestic violence or severe personal problems, including significant indebtedness, excessive use of alcohol, or any use of illegal drugs."[138] Potential UVAs who themselves are dealing with personal issues may not be the best choice. It is important to have model, yet unbiased individuals in this position, as they are responsible to "support, assist and guide the victim through the process."[139] Someone whose obligations will not allow them to be the one constant in the victim's life should not serve in this role.

The individual must be mature enough to assist the victim, without counseling her.[140] They must remain within the scope of their duties, which may be difficult for some to do. [141] Therefore, commanders should look beyond the requirements of the regulation, and truly determine the best candidate for the job, as opposed to merely having the S-1 inquire into who currently does not hold an additional duty.

At first blush, a battalion commander may see Department of Army (DA) civilians, company commanders, and mental health professionals as ideal choices. In most cases, however, commanders should avoid appointing these individuals in UVA positions. Instead, commanders should consider appointing Equal Opportunity Advisors (EOA) and battalion and brigade staff as they are best situated for this duty.

While a DA civilian may be an attractive answer for a commander whose military leaders are stretched thin, this is often a poor choice. The servicing JA should remind the commander that although a GS-9 or above can serve as a UVA,[142] they must be able to deploy with their unit.[143] The commander should also realistically address whether the DA civilian, like a military UVA candidate, is someone who is physically and emotionally accessible to potential victims. A UVA is one of the confidential reporting options and the UVA should be someone Soldiers feel comfortable addressing. Commanders must also remember that civilian employees who are members of a union cannot be appointed without first discussing the additional duty with the collective bargaining unit representative.[144] A UVA is on always on call[145] and overtime pay is another issue commander's should keep in mind when considering a DA civilian for this position.

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[132] *Id.* para. 8-5(s)(4)(c).

[133] *Id.* para. 8-5(s)(6).

[134] *See id.* para. 8-5(o)(10) (requiring "two UVAs per battalion level and equivalent units. Commanders will select qualified officers (CW2/ILT) or higher), NCOs (SSG or higher), or DA civilian (GS-9 or higher) for duty as UVAs."); *see also* para. 8-5(q) (requiring the deployable SARC to be an NCO (SFC or higher), officer (MAJ/CW3 or higher), or civilian (GS-11 or above)).

[135] *Id.* para. 8-6.

[136] The current Optempo means the best and brightest Soldiers are often already over-employed.

[137] AR 600-20, *supra* note 2, para. 8-6(d).

[138] *Id.* para. 8-6(e).

[139] *Id.* para. 8-5(s)(6).

[140] *Id.*

[141] *See id.* (demanding the UVA not "make decisions for the victim, speak for the victim, or interfere with the legitimate operations of medical, investigative, and judicial processes").

[142] *Id.* para. 8-5(s).

[143] *Id.* para. 8-5(k)(9).

[144] *Id.* para. 8-6.

[144] *Id.* para. 8-5(o)(10).

Battalion or brigade commanders may require each company have a UVA.[146] Using the listed criteria,[147] they may be tempted to appoint company commanders as UVAs or SARCs, as in the scenario. However, company commanders should not be assigned these additional duties, as holding both a command and SAPR duty position creates unnecessary confusion for the victim and a conflict of duty for the commander. Holding both positions makes it difficult to determine whether a report was intended to be restricted if reported to the chain of command. Even if it is clear that the victim confided to the company commander while he was acting in the UVA role, the commander may now feel torn, especially if the alleged offender is also in the company. It is easy to imagine a junior commander who tries to convince the victim to unrestrict her report, or worse, divulges the information to law enforcement for the good of the company.

Placing a company commander in the UVA or SARC role may also discourage victims from reporting at all. One of the purposes of the program is to "[c]reate a climate that encourages victims to report incidents of sexual assault without fear."[148] It is unlikely a Soldier who merely wants treatment without action from the chain of command would feel comfortable reporting to her commander. If commanders must serve in these roles due to personnel issues, a local policy should be put in place so that they do not serve as the UVA for their own Soldiers.[149] In this case, the JA can assist in drafting a policy memo for the unit to create such a rule, and every training session should remind Soldiers who serves as their UVA.

Just as commanders are attractive, but poor choices for UVAs, in the Initial Entry Training Environment, commanders may want to place drill sergeants in these positions. Drill sergeants are rarely the best choice, for several reasons. Drill sergeants' schedules are incredibly rigorous, as they train alongside their Soldiers.[150] They simply do not have the additional time needed to dedicate to a victim.[151] It is easy to imagine a Drill Sergeant becoming resentful towards a victim, as their duty as a UVA would take them away from training Soldiers.[152]

The potential for unwanted media attention in light of the Aberdeen Proving Ground, Maryland and Fort Leonard Wood, Missouri scandals[153] is another reason to avoid having drill sergeants serve as UVAs. Although perhaps unwarranted, the opportunity for public criticism is great if commanders place drill sergeants in positions that could allow them to keep sexual abuse allegations quiet. Sexual harassment and inappropriate relationships[154] between drill sergeants and initial entry Soldiers are far from unusual[155] and the public could certainly perceive the implementation of the SAPR program in this fashion as a step backwards. As Privates interact with few leaders, if a victim accuses a drill sergeant of misconduct, a drill sergeant UVA could very well be the alleged drill sergeant's battle buddy.[156] This could result in bias against the Soldier, a breach of confidentiality out of a sense of loyalty, or a rift in the leadership of the unit.

Commanders may also want to appoint psychiatrists and psychologists as UVAs, as a leader would presume they have the appropriate training to care for victims. While this assumption is almost certainly true, a JA should discourage their selection.[157] Unit victim advocates are directed to "provide support to the victim throughout the medical, investigative, and judicial process."[158] Unit victim advocates may help schedule appointments, and on occasion, sit through appointments with

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[145] *See id.* para. 8-5(o)(15) (requiring unit commanders to "[p]ublish contact information of SARCs, installation victim advocates, and UVAs, and provide take-away information such as telephone numbers for unit and installation points of contact"). Department of the Army (DA) civilians may not want personal contact information published throughout the unit.

[146] *But see id.* para. 8-5(1) (requiring two per battalion). Appointing more UVAs is not prohibited.

[147] *Id.* para. 8-6.

[148] *Id.* para. 8-1(b)(2).

[149] For instance, a battalion policy could state that A Company Soldiers use the B Company Commander as their UVA, and vice-versa.

[150] *See* e-mail from CPT John Koch, Trial Defense Service, to CPT Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Mar. 8, 2008) [hereinafter Koch e-mail] (on file with author) (from 2006–2007, CPT Koch was the Chief of Justice at Fort Jackson, S.C).

[151] Foss e-mail, *supra* note 103.

[152] *Id.*

[153] NELSON, *supra* note 32, at 86.

[154] TR 350-6, *supra* note 100, para. 2-3(b).

[155] NELSON, *supra* note 32, at 86.

[156] This use of "battle buddy" refers to a fellow drill sergeant who works closely with, and looks out for another drill sergeant.

[157] *See* Evans e-mail, *supra* note 75 (explaining that although the Chief of Chaplains "put out guidance that Chaplains will not serve as VA/SARC," the SAPRO does not recognize the conflict with psychologists or psychiatrists serving in these roles).

[158] AR 600-20, *supra* note 2, para. 8-5(s)(6).

victims.[159] By appointing a health care provider as a UVA, in some respects the victim is losing an advocate, because UVAs can provide "ongoing non-clinical support."[160]

Appointing a psychotherapist (mental health care provider) as a UVA or SARC also creates the potential for confusion at trial. Military Rule of Evidence (MRE) 513 creates a psychotherapist-patient privilege which gives the patient the

> privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between a patient and a psychotherapist, or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.[161]

This privilege does not extend to UVAs, SARCs or DSARCs.[162] Therefore, the psychotherapist who was also a Soldier's UVA would have to constantly explain and delineate what was, and was not, a protected communication for purposes of MRE 513.[163] In addition, the psychotherapist would likely be forced to keep separate files on the Soldier; one recording the UVA relationship, and one documenting the psychotherapist-patient relationship.[164] The comingling of such files, although understandable if the psychotherapist was dual-hatted, would create even more confusion at trial.[165] The entire record would likely have to be reviewed.[166] The benefit of having a professionally trained psychotherapist is not only contrary to the intent of the program, but also not worth the risk or confusion created by such an appointment.[167]

Equal opportunity advisors, however, may be a good option[168] for UVAs or DSARCs provided the individual can still accomplish his EO mission.[169] These Soldiers are mature, have already been through a stringent screening process,[170] and have training that will assist them with this duty.[171] They also already hold a position Soldiers know they can turn to for help in lieu of addressing the situation with the command.[172] Although there is a prohibition against EOAs serving in positions that "may subsequently disqualify them from being impartial or being perceived as impartial,"[173] this additional duty should not interfere with their support of the EO program.

Battalion and brigade staff members may be the officers best situated to hold the additional duty of a UVA. Not only will they likely have the maturity to handle sensitive situations, but they are also separated from the company command. Unlike a company commander or first sergeant, they will not feel as great a demand on them to maintain the good order and discipline of the unit. Therefore, they can focus their attention on the victim's needs. Although a commander may see these officers as indispensible and unable to take on an additional duty, the JA must remind the commander that not only are all officers busy, but the program demands the best and the brightest serve as UVAs.[174]

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[159] *Id.*

[160] *Id.* para. 8-5(s)(1).

[161] MCM, *supra* note 85, MIL. R. EVID. 513.

[162] *Id*; *see also* Schimpf, *supra* note 93, at 174.

[163] MCM, *supra* note 85, MIL. R. EVID. 513.

[164] *See generally id.* MIL. R. EVID. 513(e) (Procedure to determine admissibility of patient records or communications.).

[165] *But see* Evans e-mail, *supra* note 75 (explaining there is "no guidance on the use of psychologists" and their office does not "see a conflict").

[166] MCM, *supra* note 85, MIL. R. EVID. 513(e).

[167] For similar reasons, chaplains and Judge Advocates should also not be appointed as UVAs or DSARCs.

[168] *But see* U.S. MARINE CORPS, ORDER 1752.5A, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM para. 5.2.d (5 Feb. 2008) [hereinafter USMC ORDER 1752.5A] (discouraging Marine commanders from appointing EOAs or EORs "because of the potential for a conflict of interest between the billets as a result from the SAPR Response Structure").

[169] *See* Evans e-mail, *supra* note 75 (explaining no guidance on the use of EOAs as VAs or SARCs has been issued).

[170] AR 600-20, *supra* note 2, para. 6-6(a).

[171] *Id.* para. 6-7.

[172] *See id.* para. 6-3(k)(14).

[173] *Id.* para. 6-3(i)(22)(a).

[174] *Id*. para. 8-6(d).

The selection of UVAs is an incredibly important process and each should be carefully selected. The JA can, and should, help ensure a successful program by discussing this issue with battalion and brigade commanders at least yearly. A good opportunity to hold such a conversation is in the spring or early summer when most Soldiers PCS and new UVAs will be selected.

F. Selection of DSARCs

The proper selection of a DSARC is arguably even more important than the careful selection of a UVA. Deployable sexual assault response coordinators "[e]nsure the overall management of sexual assault awareness, prevention, training, and victim advocacy."[175] They share UVA responsibilities, but also have additional, administrative duties. For instance, they "[o]versee Unit Victim Advocates in the performance of their UVA duties."[176] They must also "[m]aintain liaison with the Provost Marshal/CID, medical and legal services, and commanders."[177] Perhaps most importantly, they "[s]erve as the designated program manager of victim support services who coordinates and oversees implementation and execution of the Sexual Assault Prevention and Response Program."[178] They essentially assume SARC duties while deployed,[179] but must also still fulfill their primary duties, therefore, the DSARC must be an exceptional individual.

The DSARC selection criteria are the same as those for UVAs, with the exception of rank.[180] A DSARC must be an "NCO (SFC or higher), officer (MAJ/CW3 or higher), or civilian (GS-11 or above)."[181] The same concerns regarding the selection of UVAs apply to DSARCS, but because the DSARC has supervisory duties over the UVAs, rank must be more carefully considered.

It is likely some of the UVAs will be lieutenants (LTs) or captains (CPTs) and so commanders should first look to appoint a major (MAJ) or above to hold the DSARC position. The selection of a field grade officer will not only aid in the supervision of the program and its participants, but it will also facilitate the necessary relationships with the CID, OSJA, the Provost Marshal and medical authorities.[182] As long as they meet the appropriate criteria, the brigade S-1 or division G-1 is a logical choice to serve as the DSARC. The individual is often co-located with the BJA, or staff judge advocate (SJA), facilitating frequent discussion about the program.[183] The SAPRO is part of Army G-1[184] and will also have the background, connection, and sense of ownership over the program that another officer may not.[185]

The servicing JA should remind their commander that they should not wait until they receive orders to deploy to select a DSARC. Every brigade, brigade combat team (BCT), and higher should have a DSARC, trained and ready to assume the duties of the SARC if, and when, the unit deploys.[186] The DSARC should have a strong relationship with the installation SARC so that they can easily "maintain a liaison"[187] while deployed and understand the installation's process and procedure for providing services."[188]

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[175] *See id.* para. 8-5(q)(1).

[176] *Id.* para. 8-5(q)(6).

[177] *Id.* para. 8-5(q)(8).

[178] *Id.* para. 8-5(q)(2).

[179] *Id.*

[180] *Id.* para. 8-6.

[181] *Id.* para. 8-6(q).

[182] *Id.* para. 8-5(q)(8).

[183] *See id.*

[184] *Id.* para. 8-5(a).

[185] *But see* e-mail from Major Edward W. Bayouth, Deputy Dir. Training Dep't, Adjutant General (AG) Sch., Fort Jackson, S.C., to CPT Katherine A. Krul, Student, 56th Graduate Course, TJAGLCS (Nov. 8, 2007) (on file with author) (explaining someone with more experience and time would be a better choice. The AG Captain's Career Course receives four hours of SAPR training, however.).

[186] AR 600-20, *supra* note 2, para. 8-5(q). If the BCT is a subordinate unit co-located with another headquarters that operates the SAPR program for the entire FOB, the BCT may not have to have a DSARC or run their own SARB.

[187] *Id.* para. 8-5(q)(3).

[188] *Id.*

The DSARC will likely not have extensive exposure to the SAPR program while in garrison and the BJA or SJA can be a distinct asset to them. The JA should recognize that their role may expand in a deployed environment, as they may be the only one on the staff with previous experience in this arena. This is yet another opportunity for the JA to be a force multiplier for the unit, and the SAPR team.

Judge Advocates also have the opportunity to shape the SARB, not only in the deployed environment, but in garrison as well. Although the SARB is proscribed by the regulation,[189] its workings are largely left up to interpretation. The following will address issues surrounding the SARB Chair and the JA's role on the SARB.

III. The SARB Implementation

Sexual assault review board standard operating procedures (SOPs) can vary by installation, as the format is not dictated by the regulation.[190] However, the SARC will likely be the primary point of contact for the meeting, and generally run the SARB.[191] The SARC and the other members of the board, will "meet at least monthly to review the handling and disposition of all alleged sexual assault cases."[192] Although the SARB is at the heart of the prevention prong of the SAPR program,[193] without proper JA involvement, it has the potential to create further problems.[194] While it is sometimes difficult, members of the SARB must remain faithful to its mission:

> The SARB provides executive oversight, procedural guidance and feedback concerning the installation's Sexual Assault Prevention and Response program. This board reviews the installations prevention program and the response to any sexual assault incidents occurring at the installation. This includes reviewing cases and procedures to improve processes, system accountability and victim access to quality services.[195]

A. The Sexual Assault Review Board Chair

Installation commanders must "establish an active SARB," and he, "or his designated representative," serves as the chair.[196] The term "installation commander" is defined to include "senior mission commanders, regional readiness commanders, or state joint forces headquarters level commanders."[197] While this seems to imply the garrison commander, commanding generals (CG) may want to convene and chair the SARB. Although not specifically prohibited by the regulation, JAs should discourage this practice. [198]

The potential pitfalls are simply too great to have a CG chair, or even sit on the SARB. Specific dangers include unlawful command influence over commanders as well as the potential panel. Comments innocently made by a CG at the SARB regarding the proper handling of alleged sexual assaults could quickly become grounds for an unlawful command influence (UCI) claim.[199] For instance, statements meant to be supportive of the SAPR program, but that take too firm a stance on how offenders should be treated, could result in either actual or apparent UCI.[200]

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[189] *See generally id.* app. F-1 (discussing in general terms the purpose, mission, composition and responsibilities of the SARB).

[190] *Id.*

[191] Foss e-mail, *supra* note 103.

[192] AR 600-20, *supra* note 2, app. F-4(b)(3).

[193] *See id.* app. F-4(a)(2).

[194] Further problems that may arise include unlawful command influence and tainting of the panel.

[195] *Id.* app. F-2.

[196] *Id.* para. 8-5(m)(4).

[197] *Id.*

[198] *See* Evans e-mail, *supra* note 75 (explaining the SJA representative has the responsibility to "keep commanders straight" when selecting the SARB chair).

[199] MCM, *supra* note 85, MIL. R. EVID. 104(a).

[200] *See generally* United States v. Stoneman, 57 M.J. 35, 43 (C.A.A.F. 2002).

The potential for a UCI claim increases if the CG not only chairs the SARB, but also demands subordinate commanders' presence. Although brigade, battalion, and company commanders are not specifically prohibited from being members of the SARB, JAs should discourage this practice as well. The list of required members includes "[o]ther members . . . appointed by nature of their responsibilities as they pertain to sexual assault (for example, victim witness liaisons, Alcohol and Substance Abuse Program (ASAP) representative)."[201] While it seems clear that the regulation did not intend for commanders to be regular members of the SARB, the SJA may have to persuade the CG and senior leadership to avoid these meetings. The UCI issue becomes even more problematic if the CG and the SJA, or his representative were also present, and perhaps provided comment.[202] A compromise of requiring executive officers (XOs) to attend is one, although imperfect, solution.[203]

Panel preservation is another reason to avoid senior leaders on the SARB. At many installations, a significant number of commanders will also be panel members and will hear about countless cases with some detail at the SARB, an effective voir dire could exclude many senior members simply because of their attendance at the board. A good defense counsel is wise to craft questions eliciting responses from the members that they have been briefed on the case, or a similar case, while at the SARB.[204] However, as discussed below, an effective JA SARB representative may be able to prevent some of these issues.

B. The JA's Role on the Sexual Assault Review Board

The installation Office of the OSJA must "[p]rovide a representative with appropriate experience and level of expertise to serve on the SARB."[205] While not explicitly stated, and depending on the SARB membership, either the chief of administrative law or the chief of military justice should serve in this position.[206] He will usually have the maturity and military justice experience to serve as an effective subject matter expert.[207] At installations where the CG and commanders attend the SARB, the chief of administrative law should serve as the board representative. If the SARB is chaired by the installation commander or his representative,[208] the chief of military justice can serve in this position.

The SJA may want to represent the OSJA on the board as the installation commander, or perhaps even the CG, will chair the board. However, given the potential for UCI, this is not recommended.[209] Where the CG and his commanders are members of the SARB, placing the chief of military justice on the board raises some of the same concerns. A real or perceived conflict of interest with the chief of justice's prosecutorial duties can develop, as he may find it difficult to "recommend or carry out an appropriate course of action . . . because of the lawyer's other responsibilities or interests"[210] at the SARB. As the chief of justice will be intimately familiar with the cases, he may unknowingly and unintentionally disclose too much about the case in front of panel members.[211] Therefore, it is especially important to have members of the criminal law division avoid representing the OSJA at the SARB if the installation requires commanders to sit as board members.[212] If a board member was briefed on a case by a SJA, chief of justice, or trial counsel, and he also sits on the panel, challenges for cause could easily be granted.[213] The chief of administrative law, however, will be less familiar with case

[201] AR 600-20, *supra* note 2, app. F-3(9).

[202] *See* United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986) (finding an SJA has the potential for "unlawfully influencing the outcome of trials" because they "generally act[] with the mantle of command authority" (citing United States v. McClain, 22 M.J. 124 (C.M.A. 1986)).

[203] This is not a perfect solution since XOs certainly might report to their commander about what was said at the SARB.

[204] *See* Raymond McCaffrey, *Superintendent's Comments on Assault Could Play Role in Misconduct Trial*, WASH. POST, Mar. 8, 2007, at B6 (discussing a case in which defense attorneys argued that "the U.S. Naval Academy superintendent's campaign against sexual harassment and assault has tainted the jury pool").

[205] AR 600-20, *supra* note 2, para. 8-5(g)(9).

[206] At a BCT, the BJA, as opposed to the trial counsel, is best suited to serve in this position.

[207] The elements of crimes are not always readily apparent, and the JA must be able explain the behavior individual charges reflect.

[208] AR 600-20, *supra* note 2, para. 8-5(m).

[209] *See* United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986).

[210] AR 27-26, *supra* note 98, R. 1.7 cmt.

[211] *See* AR 600-20, *supra* note 2, app. F-4(a)(6) (requiring the members "[m]aintain the integrity of confidential cases (that is, do not discuss any identifying information rather use case numbers or other non-identifying data)").

[212] *See Kitts*, 23 M.J. at 108.

[213] *See* United States v. Olson, 29 C.M.R 102, 105 (C.M.A 1960) ("[T]he scales always become loaded against justice when lectures attended by court members involve extended discussion of offenses identical or closely related to those for which an accused is shortly to be tried.").

details and more concerned with the effectiveness of the program and opportunities for improvement. In these cases, the chief of administrative law would be a good choice to serve as the board representative, and coordinate with the victim witness liaison to be able to meaningfully participate in case updates.[214]

Regardless of duty position, the JA representative must help ensure the SARB remains mission focused, and "provides executive oversight, procedural guidance and feedback concerning the installation's Sexual Assault Prevention and Response Program."[215] It is very easy for commanders and SARB staff to question each other about particular punishments.[216] For instance, when the SARC briefs that a Soldier only received an Article 15 for a sexual assault, the SARB chair may demand that the brigade commander in attendance explain why he was not court-martialed. Even a rational explanation for the commander's decision does not rectify the situation. Such second-guessing creates a hostile environment, and subordinate leaders can feel their discretion is limited. While dispositions should be discussed,[217] JAs can help the program grow by encouraging SARB members to focus on and address opportunities for prevention.[218] The JA representative can improve the process by suggesting a portion of the meeting be dedicated to prevention opportunities.[219]

The JA should also help maintain the victims' privacy and confidentiality.[220] Although the SARC is required only to "maintain the integrity of confidential cases"[221] discussed at the SARB, there is no reason unrestricted cases cannot be discussed with some level of privacy as well. This could be done by assigning the case a number, or referring to the victim as "PFC X." This is especially important if the installation allows, or requires, senior leaders who are also members of the panel to attend the SARB. This is yet another way the JA can help protect the integrity of both the victim and the military justice system.

Maintaining confidentiality is even more important when dealing with restricted cases.[222] The SARC must not "discuss any identifying information rather use case numbers or other non-identifying data."[223] Although this seems to be a simple task, on some installations it may prove difficult. For instance, if there is only one female MAJ on a particular BCT staff, it will be easy to identify the victim. In such a case, the incident should only be reported as involving a female service member from a BCT, without mentioning her rank or unit.

The SARC, as well as members of the SARB should have a single point of contact at the OSJA.[224] The chief of administrative law is the best person to serve in this role when VAs, chaplains, HCPs, and other members have questions about the program. This will likely occur naturally, if they attend the SARB together.[225] However, this should also be part of the standard operating procedure to avoid forum shopping and accidental reporting of a restricted issue to a trial counsel. Establishing a good rapport with the SARC will not only prevent issues, but can make the program more efficient.

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[214] *See* AR 600-20, *supra* note 2, app. F-4(a)(5).

[215] *See id.* app. F-2. The SARB should "review the handling and disposition of all alleged sexual assault cases" as opposed to criticize dispositions. *Id.* app. F-4(b)(3).

[216] *Id.* app. F-2.

[217] *Id.* app. F-4(b)(3).

[218] *Id.* app. F-4(a)(2).

[219] *See id* app. F-4(b)(1) ("The SARB members will perform required functional tasks as designated by the appropriate regulations and as directed by the installation commander."). The JA should encourage the board to ask the "so what" questions regarding the statistics, in search of trends that can illuminate specific areas of concern.

[220] *Id.* app. F-4(a)(6).

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *But see id.* para. 8-5(a) (explaining G-1 has overall responsibility for the program. Some new SARCs may read the regulation and turn to AG personnel for help, initially. It is important for the JA to develop a relationship with the SARC early on to prevent this problem.).

[225] Foss e-mail, *supra* note 103.

V. Deployment Issues

Deployments raise additional, unanswered questions about how to effectively implement the SAPR program. Although the program was developed[226] during Operations Iraqi and Enduring Freedom, guidance on its implementation in a deployed environment is especially lacking. Judge Advocates must take preventative, and innovative measures to address this challenge. This section of the paper will discuss how JAs can help ensure a successful SAPR program in an operational setting.

A. Predeployment

The SAPR program requires at least, if not more attention in a deployed environment than in garrison.[227] Prevention begins with predeployment training.[228] However, this should consist of more than just a power point brief.[229] Although AR 600-20, requires predeployment training,[230] it does not specifically place this responsibility on any one individual or office. As a significant player in this process, every SJA and BJA should help ensure the training occurs. While they can serve as a combat multiplier and conduct this training themselves, the DSARC is the most appropriate individual to serve as the instructor.[231] Conducting predeployment training will force them to become competent in their additional area of expertise. Importantly, it will also allow Soldiers to meet the DSARC. He may have to enlist the help of other subject matter experts as well, as he is expected to brief Soldiers on the "customs, mores, and religious practices, and a brief history of the foreign countries or areas. The cultural customs and mores of coalition partners will also be addressed."[232] Enlisting the help of the S-3 or G-3 will ensure the appropriate subject matter experts, such as civil affairs officers, assist in this process.

B. The Deployed Environment

The joint and coalition nature of our operations requires an understanding of not only the U.S. Army policy on sexual assault, but also an appreciation of our coalition partners' attitudes on the matter, as well as our sister services' rules and regulations. In some cases, the lack of uniformity[233] creates frustration.

Sexual assault by foreign nationals or coalition forces is one of the additional, yet unanswered concerns of the SAPR program.[234] Clear direction on how to deal with this type of issue is not provided.[235] Instead, commanders are told to "confer with SJA"[236] Therefore, JAs should be prepared to address these issues.[237] Again, knowledge and prevention are essential.[238] A strong relationship with our coalition partner JAs may be our strongest asset in combating this problem. Even in the absence of a memorandum of agreement (MOA) or status of forces agreement (SOFA), discussing our concern and policy

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[226] DODD 6495.01, *supra* note 15; DODI 6495.02 *supra* note 15.

[227] *See* TASK FORCE REPORT, *supra* note 4, at x (explaining the combat theater "has a detrimental effect on the ability to timely and effectively investigate and prosecute cases, due primarily to heavy investigative workloads and insufficient on-the-ground resources to respond").

[228] AR 600-20, *supra* note 2, para. 8-7(c).

[229] Injects during field training exercises (FTX) would help the unit determine if the VAs and DSARC are ready to tackle the difficult issue of sexual assault in a deployed environment.

[230] AR 600-20, *supra* note 2, para. 8-7(c).

[231] *See id.* para. 8-5(q)(1) (requiring the DSARC to "[e]nsure overall management of sexual assault awareness, prevention, training, and victim advocacy").

[232] *Id.* para. 8-7(c)(2).

[233] *See* GAO-08-296, *supra* note 50, at 7 ("Inconsistencies exist in the way sexual harassment and assault data have been collected and reported because the department has not clearly articulated data-reporting requirements.").

[234] AR 600-20, *supra* note 2, para. 8-7(c)(1,2).

[235] *See* TASK FORCE REPORT, *supra* note 4, at xi (recommending the establishment of "flexible templates for diplomatic and/or military-to-military agreements with coalition partners that address the jurisdiction and responsibility for crimes committed by a citizen of one nation against the citizen of another").

[236] AR 600-20, *supra* note 2, app. G-2(l)(5).

[237] The JA should first look to their higher headquarters to determine if any agreements have been developed.

[238] *See* TASK FORCE REPORT, *supra* note 4, at 26 ("[A]ggressive efforts must be taken to ensure U.S. service members understand the cultural and religious differences of coalition and host country foreign nationals that could affect their interactions with U.S. service members (male and female), and more specifically, how to deal with any inappropriate behavior of a foreign national.").

against sexual assault can prompt our counterparts to address the issue with their troops. If practicable, we could also provide our coalition partners training material on what the U.S. military considers sexual assault. Out of a desire for prevention as well as respect for their soldiers, we should be willing to do the same. If an incident occurs, hopefully the established relationship will help both parties to come to a swift and appropriate resolution. At the same time, the JA should be ready to brief a commander that sometimes our only remedy is to provide the victim the best treatment possible, as we do not have jurisdiction over our coalition partners.

The current joint operating environment creates even more questions. Although all branches of Service must comply with DODD 6495.01, *Sexual Assault Prevention and Response Program*, and DODI 6495, *Sexual Assault Prevention and Response Program Procedures*, each branch of Service has implemented its own program.[239] Unfortunately, no guidance has been issued on what policy to apply in a joint environment.[240] While Joint Publication 1-0, *Personnel Support to Joint Operations*, prompts commanders to ensure all safeguards are in place to have a successful SAPR program in a joint environment, it does so by asking questions instead of providing answers.[241] Nevertheless, preventative lawyering can help alleviate some stress the lack of guidance creates.[242]

Judge Advocates should recommend that the Army policy applies to Soldiers, regardless of their operating environment.[243] Such transparency will prevent confusion[244] and ensure victims receive the help they need in the manner desired.[245] All Services must comply with DODI 6495.02, *Sexual Assault Prevention and Response Program Procedures*[246] and the senior mission commander's system of review and oversight could apply to the entire SAPR program.[247]

Regardless of service, it is easy to envision the commander in the scenario who has a strong reaction to reports of sexual assault on his FOB. He may develop rules to prevent any further assault of female Soldiers. Judge Advocates must guard against the imposition of "artificial restrictions on a selected subgroup of personnel."[248] An example of a well intentioned, but inappropriate order is the requirement that female Soldiers have a battle buddy accompany them to the latrine at night.[249] Instead, the JA can recommend more appropriate changes, such as better lighting, or training on how to prevent victimization.

VI. Conclusion

Sadly, the PFC's unfortunate situation in the example is too easy to imagine. Although necessary, our new policy is currently fraught with potential pitfalls, allowing mistakes with serious ramifications to occur. Well intentioned commanders, like the ones in the example, can follow the regulation[250] and still have poor results.

Fortunately, most of these issues can be avoided when JAs are proactive. As subject matter experts, JAs are not limited to a reactive role. Instead, JAs are in a unique position to properly influence this young program and ensure its success. A

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[239] *See* SAPR Home Page, http://www.sapr.mil (last visited Sept. 4, 2008) (providing links to all Service's programs).

[240] *See* Evans e-mail, *supra* note 75; *see also* DOD REPORT, *supra* note 54, at 9 (recognizing this issue must be addressed).

[241] JOINT CHIEFS OF STAFF, JOINT PUB.1-0, PERSONNEL SUPPORT TO JOINT OPERATIONS app. C (16 Oct. 2006).

[242] *See* USMC ORDER 1752.5A, *supra* note 168, paras. 3-1, 3-6 **(**detailing the U.S.M.C. SAPR program. Differences include; the SARC is normally an O-5 or O-6 and the SARB equivalent, known as the Case Management Group (CMG) is attended by both the trial and defense counsel.); *see also* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1752.1B, SEXUAL ASSAULT VICTIM INTERVENTION (SAVI) PROGRAM encl. 4 (29 Dec. 06) (providing commanders a detailed checklist to follow to ensure a successful program before and after a sexual assault, including how to treat an accused).

[243] *See* DOD REPORT, *supra* note 54, at 22 ("The Army continues to be the chief service provider to victims of sexual assault in the deployed environment.").

[244] *See* AR 600-20, *supra* note 2, para. 8-2(a) (explaining Soldiers *should* report incidents (emphasis added)). *But see* USMC ORDER 1752.5A, *supra* note 168, para. 7.3 (requiring Marines to "[r]eport all incidents of sexual assault to PMO and the chain of command").

[245] *See* DOD REPORT, *supra* note 54, at 20 (reporting that in the USCENTCOM FY07 saw 153 Unrestricted Reports and 22 Restricted Reports).

[246] DODI 6495.02 *supra* note 15, para. 2.

[247] *See generally* AR 600-20, *supra* note 2, app. F-3(a) (listing the senior mission commander, regional readiness commander, or state joint forces headquarters level commander as individuals who may be responsible for the SARB).

[248] *See id.* para. 8-5(m)(12) (explaining "curfews for women only" are inappropriate).

[249] *See id.*

[250] *Id.* ch. 8.

dedicated, well-integrated JA can issue spot with the regulation's intent[251] in mind and prevent[252] such scenarios. Like many challenges, a JA can help ensure continued success[253] by approaching the SAPR program with a positive attitude[254] and a focus on the mission's intent.

[251] *Id.* para. 8-1(a).

[252] *See generally* DOD REPORT, *supra* note 54, at 13 (indicating the "[w]ay [a]head for FY08" is a "comprehensive prevention strategy . . . as more research on effective bystander interventions becomes available. The Department will also enlist experts in this field to help with the development of a social marketing campaign.").

[253] *See Hearing*, *supra* note 7, at 108–9 (statement of Dr. Kaye Whitley) ("[I]ncreased reporting means more victims receiving help and more investigations that will enable commanders to punish offenders.").

[254] HUNTER, *supra* note 30 at 238.

A View from the Bench

The Guilty Plea—Traps for New Counsel

Lieutenant Colonel Edye U. Moran[*]
Military Judge, 2d Judicial Circuit
U.S. Army Trial Judiciary
Fort Bragg, North Carolina

Many of our civilian colleagues are often shocked to learn the exhaustive detail that accompanies a guilty plea inquiry in courts-martial practice. They are unaware that unique limitations restrict an accused's ability to plead guilty, and require the military judge and counsel to assume a much more active role. While Article 45 of the Uniform Code of Military Justice affords an accused a right to plead guilty, it also requires the court to enter a plea of not guilty for an improvident accused.[1] Rule for Courts-Martial (RCM) 910(e) also dictates that the military judge shall refuse to accept an untruthful or improvident plea.[2] In order to determine the accuracy of the guilty plea, the military judge must personally discuss each element of the offense, and the accused must also admit facts which objectively support his plea.[3] "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."[4]

Military judges are generally afforded wide discretion in deciding whether to accept an accused's guilty plea.[5] However, if the accused reasonably raises a potential defense or other matter inconsistent with his guilty plea, "it [is] incumbent upon the military judge to make a more searching inquiry to determine the accused's position on the apparent inconsistency."[6] Military judges appreciate counsel who have thoroughly prepared their clients for providency and recognize potential problems before the court-martial begins.

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[*] Presently assigned as a Military Judge, 150th Legal Support Organization (Trial Judiciary), Alexandria, Va.

[1] UCMJ art. 45 (2008).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2008) [hereinafter MCM].

[3] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969): MCM, *supra* note 2, R.C.M. 910. This rule provides as follows:

> (c) *Advice to accused*. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:
>
> (1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;
>
> (2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;
>
> (3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;
>
> (4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and
>
> (5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.
>
> (d) *Ensuring that the plea is voluntary*. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.
>
> (e) *Determining accuracy of plea*. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

Id.; *see also Care*, 40 C.M.R. 247.

[4] United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996).

[5] *See* United States v. Gallegos, 41 M.J. 446 (C.A.A.F. 1995); United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Phillippe, 63 M.J. 307 (C.A.A.F. 2006).

[6] *See* United States v. Timmins, 45 C.M.R. 249, 253 (C.M.A. 1972).

Guilty pleas can contain more traps for the unwary than contested courts-martial. This is important for the practitioner because guilty pleas comprise the vast majority of current courts-martial practice and improvident pleas could result in reversal.[7] It is not uncommon for new trial and defense counsel to sit as lead chair the first week on the job. To help counsel avoid trying the case twice, this note contains observations from one military judge of some of the more common issues that arise during guilty plea proceedings.

Inexperienced Counsel and Unique Procedures in Guilty Pleas

Ostensibly straightforward guilty pleas present a plethora of issues at the trial and appellate levels. This occurs for two reasons: first, counsel's experience level, and second, the unique procedures and requirements attendant in military guilty pleas.

In the civilian legal community, new law school graduates sometimes wait years to gain courtroom experience. Military counsel, however, are expected to immediately walk into court and represent clients in serious felony cases, while simultaneously trying to master the Military Rules of Evidence (MRE) and the unique procedures and requirements set forth in the RCM.

There is nothing inherently wrong with being inexperienced—as the old saying goes: there is a reason they call it the "practice" of law. Learning to apply the MRE and the RCM takes practice and time in an authentic environment—an actual trial, with an actual judge, an actual accused, and an actual opposing counsel. Counsel new to military trial practice must realize that, while they "know what they know," more often they "don't know what they don't know."[8] Those who are willing to admit to their inexperience level are often more receptive to advice, and work more diligently than their counterparts.

Another reason we often encounter problems with guilty pleas is because counsel frequently underestimate the difficulty of a "straightforward" guilty plea. Defense counsel new to criminal law may be more inclined to overlook pertinent defenses and spend too little time preparing the client for providency. New defense counsel may even encourage an accused to plead guilty when it is not in his best interest to do so.[9] Similarly, new trial counsel can clutter the charge sheet with minor offenses that would be better addressed through administrative separation[10] or Article 15 proceedings.[11] Trial counsel also often squander the opportunity to present a meaningful stipulation of fact that will actually assist the fact finder, and instead end up offering a document that is nothing more than an a recitation of legal conclusions. From the beginning of the investigation, both trial and defense counsel must take the time to fully prepare for the possible guilty plea.

Pretrial Tips for Inexperienced Trial Counsel

First— have a plan**.** Before preferring the charges, it is important that trial counsel strategically determine what to exclude**.** In order to do this, the government must have a fully developed theory of its case. Then charge only what is required to do justice, elicit the government's theory of the case, and address the gravamen of the alleged misconduct—not any and everything that can possibly be called an offense.

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[7] In Current Year 2006, the ratio of the 1358 courts-martial was approximately 75% guilty pleas and 25% contested. Telephone Interview with Mr. Squires, Clerk of Court/Judicial Advisor, to the U.S. Army Court of Crim. Appeals, in Washington, D.C. (Oct. 31, 2008).

[8] *See* Newsbrief, Donald H. Rumsfeld, Sec'y of Defense (Feb. 12, 2002) (transcript available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636).

> Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.

Id.

[9] In such cases, the military judge will hopefully find the accused's pleas improvident. As has been noted by numerous military trial judges in post-trial sessions with counsel, it is not the military judge's duty to get the accused across the guilty plea "finish line."

[10] *See* U.S. DEPT. OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005); U.S. DEPT. OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

[11] *See* UCMJ art. 15 (2008); U.S. DEPT. OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005).

Second—be careful what you charge. In most cases, the more charges on a charge sheet, the better chance to obfuscate the issues and create greater opportunities for appellate error. For example, on a basic training post there are multiple ways for new recruits to fall into disfavor with their drill sergeant. Often, an accused facing trial at such an installation will have committed many offenses. In such a scenario, should the trial counsel charge every possible "crime" the accused has committed, such as all past failures to repair, every regulatory violation, and each disrespect and disobedience offense? Or should the trial counsel charge only the more serious offenses that are "driving the train?" If counsel chooses the former, not only will the providence inquiry continue *ad infinitum,* but issues of import will sink into obscurity.

Third—make the pretrial agreement do your work for you. Pretrial agreements should be tailored to the case and omit unnecessary language. For example, if defense counsel knows there are no motions in the case, they should omit the provision that requires the accused to "waive all waivable motions." Likewise, if there is only one charge and specification, counsel should not add a "savings clause" that the pretrial agreement is not affected if the military judge dismisses an offense. The quantum portion, likewise, should be concise, and include only the limitation on sentence. Eliminate superfluous language, such as reiteration of the terms of the pretrial agreement.

Stipulations of Fact[12]

Well-written stipulations of fact advance the judicial process in guilty pleas. Military judges use well-written and informative stipulations of fact in preparation for and during the providence inquiry. Unfortunately, in many cases, trial counsel introduce stipulations which contain few facts and circumstances about the offense(s), no personal information about the accused, and merely regurgitate legal conclusions.

By definition, a stipulation of fact should contain factual information about the particular offense, not conclusions of law.[13] Though trial counsel should include each element of each offense in the stipulation of fact, it should transcend the mere recitation of legal conclusions and should detail facts that support the accused's guilty plea. For example, instead of saying "the accused acted with negligence when he discharged the firearm" the stipulation should contain what facts support the conclusion that the accused's conduct was negligent. In other words, it should explain why this particular act is a crime.

Throughout the process of preparing the stipulation, trial counsel should deliberately view the case from a defense perspective and anticipate potential impediments to the accused's guilty plea. The trial counsel should review the evidence again, and reread the accused's confession, along with all the witness statements. What might the accused have difficulty admitting? What are some of the potential defenses in the case? An effective trial counsel will include the facts about these issues in the stipulation of fact. Well-written, useful stipulations detail the accused's confession, include facts from the police reports, and extract credible, informative facts from witness statements. Another advantage of a well-written stipulation of fact is that it alerts the military judge to potential issues that may arise. A military judge may well identify a legal grenade that neither counsel has anticipated—and be able to rectify the problem prior to trial.[14]

As a condition to accepting the pretrial agreement, the convening authority may also require the defense to agree to include in the stipulation aggravating circumstances relating to the offense to which the accused has pled guilty.[15] In appropriate cases, the government may then choose to present only the stipulation of fact and forego the presence of sentencing witnesses, saving time and money.

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[12] *See* MCM, *supra* note 2, R.C.M. 811.

[13] *See* United States v. Sweet, 42 M.J. 183, 185 C.A.A.F. 1995).

> We acknowledge that a more detailed inquiry in many instances may be advisable *or even necessary* in order to resolve questions surrounding the providence of pleas. Here, however, we take into consideration that appellant is an officer who was represented by qualified counsel, *that appellant agreed to a stipulation of fact which describes his criminal acts in detail, and that his "yes" and "no" answers to the military judge's inquiry responded to questions of fact and not conclusions of law.* Thus, we are persuaded to agree with the Court of Military Review that the "facts contained in the stipulation along with the inquiry of appellant on the record fully support the military judge's determination that a factual basis existed for those pleas." . . . We therefore hold that the military judge's inquiry satisfied the requirements of *Care* and RCM 910.

Id. at 185–86 (second emphasis added).

[14] *See* MCM, *supra* note 2, R.C.M. 802. Many issues can be resolved outside the courtroom, with the wise counsel of the military judge.

[15] *See id.* R.C.M. 1001(b)(4) (allowing the prosecution to introduce evidence in aggravation "directly relating to or resulting from the offenses of which the accused has been found guilty").

Not All Cases Should be Plead Out

Defense attorneys must plan on spending a lot of time with clients interviewing, closely listening to, and rehearsing guilty pleas. Defense counsel new to military criminal practice will quickly find out there is no such thing as a "simple" guilty plea. Though this may be stating the obvious, defense counsel must learn their craft. This requires researching case law, reading the *Manual for Courts-Martial* and the *Crimes and Defenses Deskbook*,[16] and watching other counsel in the courtroom.

After carefully examining the specifications, defense counsel should first determine whether it is in the accused's best interest to even plead guilty. Though the accused may come to his defense counsel eager to confess wrongdoing, and might well have engaged in *some* misconduct, it may be extremely difficult for the government to prove its case. Additionally, while the accused may have committed the charged offense, he may have an affirmative defense.[17] In such cases, though it is ultimately the accused's decision whether to plead guilty,[18] counsel might advise him to plead not guilty. In such cases, though it is ultimately the accused's decision whether to plead guilty,[19] counsel might advise him to plead not guilty. For example, in a reckless driving case, the defense counsel should research statutes and case law and determine if the facts of the case support such a charge. Was the accused's driving actually reckless, or simply negligent?

Also, when determining whether to advise the accused to plead guilty, defense counsel must ferret out all potential defenses—having spent the required time *in advance of trial* explaining these defenses to the accused. Advising the accused of possible defenses also means that counsel, and the military judge during the providence inquiry, must give the accused accurate and thorough information concerning the defense, because "where an accused is misinformed as to possible defenses, a guilty plea must be set aside."[20] If the judge first learns about the defense during the *Care*[21] inquiry or during the sentencing phase after entering findings, then the judge is obligated to conduct further inquiry if the accused's statements raise matters "inconsistent with the plea."[22]

Specific Intent Crimes

In determining potential defenses, the most important thing for defense counsel to do is read the charge sheet. Specific intent crimes should be analyzed separately from general intent crimes and defense counsel should anticipate problems with specific intent offenses, such as a voluntary intoxication defense. For example, in *United States v. Metivier*[23] the accused had no trouble pleading guilty to being drunk on duty and driving a five ton truck while drunk, but he raised the defense of voluntary intoxication when he pled guilty to willfully discharging a firearm as to endanger human life when he told the military judge during his unsworn statement: "[T]he whole thing would have—been happened differently if we hadn't been drinking, Your Honor."[24] The Army Court of Criminal Appeals found the military judge erred by not reconciling this apparent inconsistency.[25] The court stated that voluntary intoxication is raised as a defense when there is "'some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary

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[16] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (Feb. 2008), *available at* https://www.jagcnet.army.mil/8525744700446A95 (follow "2008 Crimes & Defenses Desk Book.pdf" hyperlink).

[17] *See* MCM, *supra* note 2, R.C.M. 916. Also known as "special defenses," the accused does not deny he committed one or more of the acts constituting the offense charged, but he "denies, wholly or partially, criminal responsibility for those acts." *See id.* R.C.M. 916 discussion. These defenses include the defenses of justification, obedience to orders, self-defense, accident, entrapment, coercion or duress, inability, ignorance or mistake of fact and lack of mental responsibility. *Id.*

[18] *See id.* R.C.M. 910.

[19] *See id.*

[20] United States v. Zachary, 63 M.J. 438, 444 (C.A.A.F. 2006).

[21] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (establishing the principles for the modern guilty plea inquiry).

[22] United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

[23] United States v. Metivier, No. 20050615 (A. Ct. Crim. App. July 24, 2007) (memorandum opinion).

[24] *Id.* at 4.

[25] *Id.* at 2.

intent, not just evidence of mere intoxication."[26] The accused's unsworn statement was "some" evidence. The court dismissed the specification.[27] If defense counsel should encounter a similar situation, he should tell the judge that he has discussed the defense of voluntary intoxication with his client and that it does not apply in the case. The judge should then ensure that the accused understands the defense, and elicit specific facts as to why it does not apply.

Many a guilty accused has come into the courtroom ill-prepared for the questioning that he will get from the military judge on the specific intent element of the charged offense. Most are quick to respond "yes" when queried on the specific intent requirement, however, upon further questioning, the accused backtracks, rationalizes, and often posits an explanation or excuse, incorrectly believing that the judge has become his advocate. These situations, and "day of trial defenses," hitherto unknown to defense counsel, often evince a lack of time spent with a client and a failure to adequately prepare for trial.

Sanity and Sentencing

In some cases, problems may arise after the accused has successfully entered pleas of guilty, and then raises a mental responsibility or diminished capacity issue during the sentencing portion of the trial. Mental health issues bear special status in the military, especially today where many soldiers facing courts-martial have served multiple tours in Iraq and Afghanistan.[28] Combat situations can create or aggravate mental health issues. If the accused's comments about his condition are "passing observations" and raise only a "mere possibility" of a defense,[29] then perhaps the military judge need not re-open the providency and conduct further examination on the sanity issue. However, whether further inquiry "is required as a matter of law is a contextual determination."[30]

For example, one common way this scenario occurs is when the accused, in an unsworn statement, tells the judge "I was diagnosed with bi-polar [disorder] and that is when I started to get in trouble."[31] In such cases, the defense counsel should know that there is going to be a potential issue to resolve, and alert the military judge before this occurs. Judges do not like being surprised with a sanity issue after the accused has survived providency. If defense counsel has researched the issue and advised the accused that mental responsibility or diminished capacity is not a defense in this case, then the defense counsel should so inform the military judge. If defense counsel has not discussed or advised the accused at all, the military judge may have to re-open the inquiry, and must also "determine whether to order psychological testing by a sanity board."[32]

Stipulations of Fact and the Defense

What can the defense do with stipulations of fact? Though in most jurisdictions trial counsel draft the stipulation of fact, nothing prohibits defense counsel from offering a draft stipulation. Defense counsel can express facts from the defense perspective, inserting extenuating and mitigating evidence where appropriate. The defense counsel may even offer to forego live witness testimony if the trial counsel agrees to include extenuating and mitigating information in the stipulation. This option is especially attractive to trial counsel who labor under a limited budget and are trying to save money. Bottom line, trial counsel and defense counsel are allowed and encouraged to be reasonable with each other at all stages of the trial process and the stipulation of fact is no exception.

Counsel's Joint Responsibility

Trial and defense counsel both have a responsibility to assist the court by listening to the military judge's questions, taking notes, and asking the judge to follow-up on particular questions that bear further inquiry. Judges sometimes prepare

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[26] *Id.* at 3 (quoting United States v. Peterson, 47 M.J. 231, 233–34 (C.A.A.F. 1997) (citation omitted)).

[27] *Id.* at 5.

[28] *See* United States v. Shaw, 64 M.J. 460 (C.A.A.F. 2007). Combat, itself, may cause or aggravate certain mental illnesses. *See also* MCM, *supra* note 2, R.C.M. 706, MIL. R. EVID. 302.

[29] United States. V. Phillippe, 63 M.J. 307 (C.A.A.F. 1991).

[30] *Shaw*, 64 M.J. at 464.

[31] *Id.*

[32] *Id.* at 465 (citing MCM, *supra* note 2, R.C.M. 706(a), R.C.M. 916(k)(3)(B)).

questions in advance of trial, and, in rare "off moments," miss something the accused said—or failed to say. Listening and asking the proper follow-up questions can make the difference during appellate review of the case. Counsel should note when the judge asks the accused to agree to a legal conclusion and then subsequently fails to obtain further factual details to support that conclusion. When this occurs, counsel should wait until the close of the inquiry and, when the judge asks whether either side desires further questioning on any offense, speak up at that time. The judge appreciates this attention to detail. Even when trial judges ask the accused a plethora of questions, the appellate courts can still find the accused's guilty plea to be improvident. It is therefore imperative that both sides listen to the accused's answers.

Conclusion

In sum, guilty pleas are often deceptively difficult. New counsel who find themselves representing or prosecuting an accused in a guilty plea case can be most effective if they know what to anticipate. Trial counsel must be reasonable, prepare a useful stipulation of fact and listen attentively during the providence inquiry for matters inconsistent with the accused's plea. Defense counsel should thoroughly research the legal issues, prepare for the providence inquiry and rehearse, rehearse, and rehearse—recognizing before trial when the accused is simply unable or unwilling to admit guilt. To do so should speed the transition from inexperienced counsel to polished litigators.

PALESTINE: PEACE NOT APARTHEID[1]

REVIEWED BY MAJOR MARC B. WASHBURN[2]

Peace will come to Israel and the Middle East only when the Israeli government is willing to comply with international law, with the Roadmap for Peace, with official American policy, with the wishes of a majority of its own citizens—and honor its own previous commitments—by accepting its legal borders.[3]

Former U.S. President Jimmy Carter describes his newest book as "provocative" and "designed to restimulate the prospect for peace."[4] This bold work by the former President and Nobel Peace Prize recipient[5] recounts his efforts over the past thirty years to end Arab–Israeli violence and establish a permanent Palestinian state.

Carter's approach is unique. He often weaves his personal experiences and conversations with others into the saga—from his personal friendship with former Egyptian President Anwar Sadat[6] to his playing with the baby daughter of Yassar Arafat.[7] This allows him to educate readers and keep them interested in a complex historical topic, while portraying the personal sacrifice that he has devoted to the process. In doing so he lends an air of credibility that might otherwise be absent in such a one-sided and contentious work.[8]

Carter's premise to achieve a permanent and substantive two-state agreement in the Middle East is threefold. First, Israel must withdraw all armed forces from occupied territories and its borders must coincide with the armistice line of 1967.[9] Second, Arab nations must openly acknowledge Israel's right to exist in peace and pledge to terminate any further acts of violence against the legally constituted nation of Israel.[10] Third, Israel must cease colonizing occupied territories in Gaza and the West Bank with settlements, remove the Segregation Wall, and rescind martial law in these territories in order to end violence initiated by Palestinian extremists.[11]

Personal experiences aside, Carter's analysis is extremely one-sided. He often makes bold assertions without revealing his source or placing his assertions in an understandable context. For example, consider his description of living conditions following Israel's unilateral withdrawal from Gaza settlements in August 2005:

> [Palestinians] are being strangled since the Israeli "withdrawal," surrounded by a separation barrier that is penetrated only by Israeli-controlled checkpoints . . . . There have been no moves by Israel to permit transportation by sea or by air. Fishermen are not permitted to leave the harbor, workers are prevented from going to outside jobs, . . . and the police, teachers, nurses, and social workers are deprived of salaries.[12]

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[1] JIMMY CARTER, PALESTINE: PEACE NOT APARTHEID (2006).

[2] U.S. Army. Written while assigned as a Student, 56th Judge Advocate Graduate Course, The Judge Advocate General's Legal Ctr. & Sch. U.S. Army, Charlottesville, Va.

[3] CARTER, *supra* note 1, at 216.

[4] *See Democracy Now*: *Palestine: Peace Not Apartheid . . . Jimmy Carter in His Own Words* (television broadcast Nov. 30, 2006) (quoting President Carter at a book event in Virginia, Nov. 28, 2006) (transcript available at http://www.democracynow.org/2006/11/30/palestine_peace_not_apartheid_jimmy_carter) [hereinafter *Democracy Now Review*].

[5] CARTER, *supra* note 1, at 164.

[6] *Id.* at 89.

[7] *Id.* at 143.

[8] Shortly following publication, Democrats and Republicans alike voiced public outrage at his analogy to apartheid. *See Democracy Now Review*, *supra* note 4 (quoting House Speaker Nancy Pelosi as stating that "Democrats reject that allegation vigorously").

[9] CARTER, *supra* note 1, at 207.

[10] *Id.*

[11] *Id.* at 208.

[12] *Id.* at 175–76.

Instead, Carter characterizes the fence as an imprisonment wall,[13] and he carefully avoids any substantive discussion of the attacks committed by Hamas militants from Gaza against other Israelis. Carter leads his reader to believe the wall's sole intended purpose is to imprison and oppress the innocent populace for the deplorable acts of a few.

Other times, he identifies the source, but fails to test its credibility against other evidence. This is the case as he recounts a conversation with a prominent trade family in Gaza. According to the patriarch, the Israelis stopped five truckloads of oranges at the Allenby Bridge crossing into Jordan for several days and caused the fruit to rot in retaliation for statements made by one of his sons against Israeli occupation.[14]

In both instances, Carter deprives himself of the opportunity to validate the information in support of his point. The result is a one-sided story full of misleading and controversial assertions. Moreover, because Carter is highly critical of only Israel in this multi-party Middle East conflict, readers unfamiliar with the historical background are tempted to accept Carter's thesis at face value. This is troublesome as many of Carter's points are fundamentally flawed.

A. Withdrawal to Pre-1967 Borders

Former President Carter asserts that U.N. Security Council Resolution 242,[15] the Camp David Accords,[16] the Oslo Agreement,[17]and U.S. policy all require Israel's "withdrawal to the 1967 borders."[18] Resolution 242 requires the "[w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict."[19] Though on its face, the Resolution seems to support this proposition, the legislative history surrounding the document contradicts it. Interestingly, the primary drafter of the Resolution, Lord Caradon, the British delegate to the United Nations, denies that the language "occupied territories" was ever meant to require a retreat from "all occupied territories."[20] Further, Arthur Goldberg, the former U.S. Ambassador to the United Nations, explained in a 12 March 1980 letter to the *New York Times*, "[i]n a number of speeches at the U.N. in 1967, I repeatedly stated that the armistice lines fixed after 1948 were intended to be temporary."[21] "We all knew—that the boundaries of '67 were not drawn as permanent frontiers, they were a cease-fire line of a couple of decades earlier . . . . We did not say that the '67 boundaries must be forever."[22] Carter never addresses these inconsistencies and leaves the reader to believe that his interpretation, as construed by many Arab leaders, including Anwar Sadat[23] and Yassar Arafat,[24] is a settled matter—Israel must return to its pre-1967 borders.

Further, the Camp David Accords themselves do not cleanly resolve the issue. Though the Accords state that "[t]he agreed basis for a peaceful settlement . . . is . . . Resolution 242, in all its parts,"[25] they further state that "negotiations will resolve, among other matters, the location of the boundaries and the nature of the security arrangements."[26] Again, Carter never reconciles this apparent inconsistency.

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[13] *Id.* at 174.

[14] *Id.* at 116.

[15] S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

[16] Camp David Accords, Isr.–Egypt, Sept. 17, 1978, *available at* http://www.jimmycarterlibrary.org/documents/campdavid/accords.phtml.

[17] Declaration of Principles on Interim Self-Government Arrangements, Isr.–Palestine Liberation Organization, Sept. 13, 1993, *available at* http://www.usip.org/library/pa/israel_plo/oslo_09131993.html [hereinafter Oslo Agreement].

[18] CARTER, *supra* note 1, at 215 (emphasis added).

[19] *Id.* at 218.

[20] *The Shape of Peace in the Middle East: Interview with Lord Caradon*, 5 J. PALESTINE STUD. 19-20, 144 (Spring/Summer 1976) (partial transcript available at http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1267).

[21] *A Comprehensive Collection of Jimmy Carter's Errors*, CAMERA, Jan. 22, 2007, http://camera.org/index.asp?x_context=2&x_outlet=118&x_article =1273.

[22] *Security Council Resolution 242 According to its Drafters*, CAMERA, Jan. 15, 2007, http://www.camera.org/index.asp?x_context=&x_outlet=118&x_ article=1267 (quoting Interview with Lord Caradon from *MacNeil/Lehrer Report* (PBS television broadcast Mar. 30, 1978)).

[23] CARTER, *supra* note 1, at 48.

[24] *Id.* at 134.

[25] *Id.* at 222.

[26] *Id.* at 226.

Carter's reliance upon the Oslo Agreement is also problematic. The Oslo Agreement does not definitively resolve the issue of borders. Specifically, Article XVII(1a) reserves the issue as one "that will be negotiated in the permanent status negotiations."[27]

It is unclear why Carter opted not to address these contradictions. Regardless, among the text of Resolution 242, its legislative history, and all subsequent agreements, sufficient ambiguity exists to cast serious doubt on the validity of his assertion that international law mandates that Israel recognize its pre-1967 borders. By not addressing these inconsistencies, Carter undermines his argument.

B. Arab Nations Must Openly Acknowledge Israel's Right to Peacefully Exist

From its inception, Israel has faced persistent challenges to its sovereignty. Since declaring independence in May 1948, Israel has victoriously fought three wars against combined Arab forces from Egypt, Syria, Jordan, Lebanon, Palestine, and Iraq.[28] The united Arab front against Israel continued until Egypt shocked the Arab nations and signed a bilateral peace agreement with Israel.[29] Arab reaction to Egypt's "betrayal" was swift, resulting in Egypt's economic isolation and the subsequent assassination of Anwar Sadat.[30] Consequently, it was not until after the Oslo Agreements that a second nation, Jordan, signed a separate bilateral peace agreement with Israel.[31]

Carter states that despite recent public statements by some individuals[32] to the contrary, the results of bilateral negotiations[33] and private discussions with Arab leaders[34] have been promising. As a result, he spends little time substantively analyzing this issue. Almost simplistically, he reasons that full Arab recognition will occur only after Israel honors its international commitments, thus ending the "cycle of distrust and violence."[35] He does not discuss Israel's insistence on Arab recognition and cessation of violence as a precursor to any Israeli negotiations.[36]

Though recognizing the interrelationship of the two issues, Carter downplays the impact of other key influences—the refusal by some Arabs to accept Israel as a neighbor, the absence of a clear and authoritative Palestinian voice acceptable to Israel, and the rise of Islamic fundamentalism.[37] Of particular concern to Israel is the future role of Hamas following its majority victory in the 2006 Palestinian elections[38] and its refusal to recognize Israel.[39] Carter reasons that because Palestinian President Mahmoud Abbas retains "substantial authority under Palestinian law [and] is the undisputed leader of the PLO, the only Palestinian entity recognized by Israel or the international community,"[40] negotiation should only occur through him. Though perhaps technically accurate, even Carter admits that President Abbas has been largely marginalized by Hamas.[41]

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[27] Interestingly, former President Carter does not include the Olso Agreement as an appendix even though he relies upon it as a primary legal authority. *See* Oslo Agreement, *supra* note 17.

[28] These were the Arab-Israeli War from May 1948 to March 1949, the 1967 Six Day War, and the 1973 Yom Kippur War. HOWARD M. SACHAR, A HISTORY OF ISRAEL FROM THE RISE OF ZIONISM TO OUR TIME *passim* (1976).

[29] CARTER, *supra* note 1, at 52.

[30] *Id.* at 79.

[31] *Id.* at 205.

[32] Carter is referring to 2005 and 2006 statements by Iranian President Mahmoud Ahmadinejad calling for the annihilation of Israel and describing the Holocaust as a "myth." *Id.* at 18.

[33] *Id.* at 207.

[34] *Id.* at 13.

[35] *Id.* at 206.

[36] *Id.* at 160.

[37] *Id.* at 13.

[38] *Id.* at 186.

[39] *Id.* at 184.

[40] *Id.* at 187.

[41] *Id.* at 210.

C. Cessation of West Bank Colonization through Settlements, Removal of the Segregation Wall and Termination of Martial Law

Carter's most vehement objections to Israeli policy are also the most controversial, or using his term, provocative.[42] Citing violations of both Israeli[43] and international law,[44] Carter outlines how the systematic settlement of the West Bank, the building of the Segregation Wall, and the state of martial law have contributed to the denial of basic human rights in Gaza and the West Bank.[45]

Carter attributes the nefarious purpose behind all three incidents to be means of achieving a common goal—the acquisition of land in violation of U.N. Security Council Resolution 242 and the "voluntary" relocation of the Palestinian people outside of Israel.[46] In short, Carter accuses the Israeli government of "imposing a system of partial withdrawal, encapsulation, and apartheid on the Muslim and Christian citizens of the occupied territories."[47]

In a novel argument, Carter even attributes Israel's participation in the Oslo Agreements as evidence of Israel's land-grabbing motives.[48] According to Carter, Israel was now able to "shed[] formal responsibility for the living conditions and welfare of [Gaza and the West Bank's] rapidly increasing population, [while] still completely dominated by Israeli forces."[49] Ironically, Palestinian Liberation Organization (PLO) Chairman Yassar Arafat, Israeli Prime Minister Yitzahk Rabin, and Foreign Minister Shimon Peres, all received the Nobel Peace Prize for their work on the Oslo Agreements.[50]

Though Carter's premise is novel, his logic is seriously flawed and disregards the historical significance that resulted from the Oslo Agreement. First, in a letter from Yassar Arafat to the Israeli Prime Minister following the Oslo Agreement, the PLO "unequivocally . . . recognized the right of Israel to exist in peace and security, accepted U.N. Security Resolution[] 242 . . . [and] renounced . . . terrorism."[51] This was the first time the PLO publicly recognized Israel. Second, he failed to acknowledge that both Gaza and the West Bank were now one step closer to the "full autonomy" promised them by Israel in the Camp David Accords.[52] Third, a politically oppressed and economically isolated and impoverished populace in Gaza under semi-autonomous rule represented an even greater threat to Israeli peace and security. Finally, Israel's own Supreme Court advocated restraint and held that "'the law of belligerent occupation . . . imposes conditions' on the authority of the military."[53]

In addition to the biased interpretation of events, Carter's second serious flaw in this section of the book is that he makes overreaching generalizations that detract from his more powerful arguments. Rather than focusing on the International Court of Justice opinion and Israel's subsequent refusal to follow it, Carter incorrectly alleges that the wall is "mainly within Palestinian territory."[54] Ironically, his own maps do not even support such a generalization and show that large sections of the wall appear to be parallel to the original 1949 Armistice line.[55] Those sections not following the Armistice will only be in Palestinian territory when the official boundaries are determined.

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[42] *See Democracy Now Review*, *supra* note 4.

[43] CARTER, *supra* note 1, at 194 (citing the Israeli Supreme Court's opinion that the West Bank is "in belligerent occupation").

[44] *Id.* at 193 (referring to the July 2004 International Court of Justice opinion holding that the Israeli government's construction of the segregation wall in occupied areas of the West Bank violated the Fourth Geneva Convention).

[45] *Id.* at 208.

[46] *Id.* at 190.

[47] *Id.* at 189.

[48] *Id.* at 134.

[49] *Id.* at 137.

[50] *Id.* at 134.

[51] *Id.* at 134–35.

[52] *Id.* at 46.

[53] *Id.* at 194 (quoting the Israeli Supreme Court).

[54] *Id.* at 190.

[55] *Id.* at 191.

Finally, his most egregious error is to equate the situation in the West Bank and Gaza in Israel with the South African apartheid regime. In its most fundamental state, at its height, apartheid represented the institutionalized oppression of the members of a particular race by the Republic of South Africa. The conflict between Israel and Palestine—or even Jew and Arab, generally—is not predicated on racial superiority, a fact even noted by Carter.[56] To invoke such an analogy can only have one intended purpose—to arouse the reader's passions so that emotion will cloud reason, perhaps disguising flaws in logic. While such a pop culture approach to literature may result in attractive book sales, it also degrades any scholarly value of the work.

In *Palestine Peace Not Apartheid*, former President Jimmy Carter states that "there is a formula for peace with justice . . . . It is compatible with international law and sustained American government policy, has the approval of most Israelis and Palestinians, and conforms to agreements previously consummated—but later renounced."[57] Contrary to Carter's assertions, the return of Israel to its pre-1967 Six-Day's War armistice borders is neither a settled matter of international law nor a consensus position of the international community. While Israel certainly bears its share of responsibility for the failure to achieve sustained peace in the past sixty years, it is a responsibility shared by all Middle East nations. One can appreciate Carter's efforts to reinvigorate the stalled peace process. However, one can only hope that former President Carter's overly biased, logically flawed critique, with its "offensive and wrong"[58] accusation that Israel is deliberately creating an apartheid system in Gaza and the West Bank, has not irreparably harmed the already fragile peace process.

[56] *Id.* at 189.

[57] *Id.* at 19.

[58] *See Democracy Now Review*, *supra* note 4 (quoting John Conyers, Chairman of the House Judiciary Committee, who had urged President Carter to change the title).

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, 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. TJAGLCS CLE Course Schedule (2008 - September 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09

5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
	NCO ACADEMY COURSES	
5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
	WARRANT OFFICER COURSES	
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
	ENLISTED COURSES	
512-27D/20/30	20th Law for Paralegal NCO Course	23 – 27 Mar 09
512-27D-BCT	11th BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09
	ADMINISTRATIVE AND CIVIL LAW	
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09

5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F23E	2008 USAREUR Legal Assistance CLE	3 – 7 Nov 08
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F24E	2009 USAREUR Administrative Law CLE	14 – 18 Sep 09
5F-F26E	2008 USAREUR Claims Course	20 – 24 Oct 08
5F-F28	2008 Income Tax Law Course	8 – 12 Dec 08
5F-F28E	2008 USAREUR Tax CLE Course	1 – 5 Dec 08
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
CONTRACT AND FISCAL LAW		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F11	2008 Government Contract Law Symposium	2 – 5 Dec 08
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09
5F-DL12	3rd Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35	32d Criminal Law New Developments Course	3 – 6 Nov 08

5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F45	8th Domestic Operational Law Course	27 – 31 Oct 08
5F-F47	51st Operational Law of War Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	14 Oct – 12 Dec 08 26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (020) (Newport) Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	26 – 30 Jan 09 (Newport) 9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)

2622	Senior Office (Fleet) (020) Senior Office (Fleet) (030) Senior Office (Fleet) (040) Senior Office (Fleet) (050) Senior Office (Fleet) (060) Senior Office (Fleet) (070) Senior Office (Fleet) (080) Senior Office (Fleet) (090) Senior Office (Fleet) (100) Senior Office (Fleet) (110)	12 – 16 Jan 09 (Pensacola) 2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (020) BOLT (020)	15 – 19 Dec 08 (USN) 15 – 19 Dec 08 (USMC)

	BOLT (030) BOLT (030) BOLT (040) BOLT (040)	30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	14 – 15 Feb 09 (Yokosuka) 27 – 28 Apr 09 (Naples, Italy)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090 Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	12 – 14 Nov 08 (Norfolk) 12 – 14 Nov 08 (San Diego) 12 – 14 Jan 09 (Mayport) 2 – 4 Feb 09 (Okinawa) 9 – 11 Feb 09 (Yokosuka) 17 – 19 Feb 09 (Norfolk) 17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	11 – 15 May 09 (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09

961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (020)	6 – 10 Apr 09 (San Diego)

525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	29 Sep – 12 Dec 08 12 Jan – 27 Mar 09 11 May – 24 Jul 09
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (020)	4 – 15 May 09
7485	Classified Info Litigtion Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	12 Sep – 14 Nov 08 5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (010) Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	27 Aug – 6 Nov 08 5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	1 – 19 Dec 08 26 Jan –13 Feb 09 2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050 Legal Clerk Course (060) Legal Clerk Course (070))	1 – 12 Dec 08 26 Jan – 6 Feb 09 2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09

3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	17 – 21 Nov 08 12 – 16 Jan 09 23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	1 – 19 Dec 08 5 – 23 Jan 09 23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	1 – 12 Dec 08 5 – 16 Jan 09 30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	2 – 6 Feb 09 (Okinawa) 9 – 13 Feb 09 (Yokosuka) 30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 09-01	7 Oct – 20 Nov 08
Paralegal Craftsman Course, Class 09-01	14 Oct – 20 Nov 08
Federal Employee Labor Law Course, Class 09-A	8 – 12 Dec 08
Deployed Fiscal Law & Contingency Contracting Course, Class 09-A	15 – 18 Dec 08
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09

Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09

Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional 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

APRI:
American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

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 (850) 561-5600
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 South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
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

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

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 Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. 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 additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website

at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2009 On-Site Continuing Legal Education Training – SAVE THE DATES. POCs and details will be in next month's *The Army Lawyer*.

Date	Region	Unit/Location	Units
24–25 Jan 09	Northwest	Seattle University Seattle, WA	6th LSO 87th LSO
6–8 Feb 09	Southeast	Atlanta (Airport Hotel) Atlanta, GA	213th LSO 12th LSO 174th LSO
16–19 Feb 09	Northeast	JJ College Manhattan, NY	4th LSO 7th LSO 3d LSO
6–8 Mar 09	NCR	Ft. Belvoir, VA	151st LSO 10th LSO 153d LSO
13–15 Mar 09	California	San Diego or LA, CA	78th LSO 75th LSO 87th LSO
3–5 Apr 09	Midwest	Cincinnati, OH	9th LSO 91LSO 139th LSO
17–19 Apr 09	Heartland	New Orleans, LA	8th LSO 1st LSO 2d LSO 214th LSO
19–25 Apr 09	TDS	Ft. Sam Houston, TX	22d LSO (Lead)
19–25 Apr 09	Southeast Functional Exercise	Ft. Jackson, SC	7th LSO (Lead) 12th LSO 174th LSO (Support)
15–19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO
26–30 Jan 09	Military Judges Conference	Maxwell AFB, AL	150th LSO (Lead)
Various	TDS	Various	154th LSO (Lead)

The consolidated list of the on-sites for Fiscal Year 2009 will be published in the next issue of *The Army Lawyer*.

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

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* Indicates new publication or revised edition.
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3. The Legal Automation Army-Wide Systems XXI—JAGCNet

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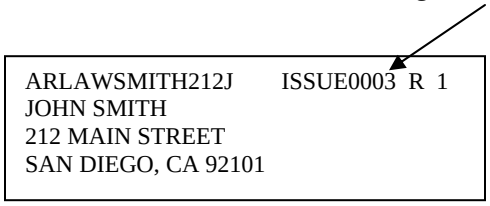

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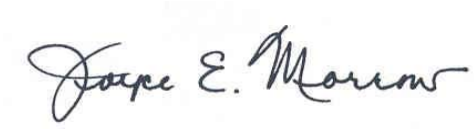

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