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Articles

Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer

Major Andrew D. Flor

Government Contracting Disputes: It's Not All About the Money

Major Scott E. Hutmacher

**“Defending Those Who Defend America”: Avoiding Conflicts of Interest in Order to
Provide an Ethical and Effective Defense**

Captain Aimee M. Bateman

Claims Report

U.S. Army Claims Service

Tort Claims Note

Wounded Soldier Property

Tom Kennedy

Book Reviews

CLE News

Current Materials of Interest

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Articles

Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer <i>Major Andrew D. Flor</i>	1
Government Contracting Disputes: It's Not All About the Money <i>Major Scott E. Hutmacher</i>	31
“Defending Those Who Defend America”: Avoiding Conflicts of Interest in Order to Provide an Ethical and Effective Defense <i>Captain Aimee M. Bateman</i>	42

Claims Report

U.S. Army Claims Service

Tort Claims Note

Wounded Soldier Property <i>Tom Kennedy</i>	49
---	----

Book Reviews

<i>Lincoln and the Court</i> Reviewed by <i>Major Robert C. Stelle</i>	54
<i>The Day Freedom Died: The Colfax Massacre, The Supreme Court, and The Betrayal of Reconstruction</i> Reviewed by <i>Major Phillip Griffith</i>	59

CLE News	63
-----------------------	----

Current Materials of Interest	76
--	----

Individual Paid Subscriptions to <i>The Army Lawyer</i>	Inside Back Cover
--	-------------------

Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer

Major Andrew D. Flor*

*Everything should be made as simple as possible, but not simpler.*¹

I. Introduction

Before 2006, most trial defense counsel had little reason to consider sex offender registration laws in their day-to-day business. In late-2006, this changed completely when the Court of Appeals for the Armed Forces (CAAF) created a new rule that gave sudden attention to sex offender registration laws in courts-martial practice.² The CAAF held that a trial defense counsel's failure to advise an accused charged with a sex offense of potential sex offender registration requirements on the record³ would not constitute "per se ineffective assistance of counsel, . . . [but would] be one circumstance [that the CAAF would] carefully consider in evaluating allegations of ineffective assistance of counsel."⁴

The dilemma for trial defense counsel stems from the fact that the federal criminal justice system, including the military justice system, does not dictate the registration of sex offenders.⁵ The individual states dictate sex offender registration requirements. As a result, a defense counsel advising an accused charged with a sex offense would need to study all fifty state sex offender registration laws in order to completely advise a client. Thankfully the CAAF did not require this; they only required "trial defense counsel to be aware of the federal statute addressing mandatory reporting and registration for those who are convicted of offenses within the scope of this statute."⁶

This article addresses the minimum standard articulated by the court and also provides a state-by-state analysis of sex offender registration laws and their requirements. First, this article analyzes the background of sex offender registration laws and defines what constitutes a sex offender. Second, this article addresses the different state methodologies regarding sex offender registration and what constitutes an offense requiring registration. Finally, the appendices address each state

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¹ Attributed to Albert Einstein. THE EXPANDED QUOTABLE EINSTEIN 314 (Alice Calaprice ed., 2000). Einstein was describing his version of Occam's Razor. William of Ockham [sic] was a 14th Century Franciscan Friar who propagated the theory that "plurality should not be posited without necessity." Sugihara Hiroshi, *What is Occam's Razor?*, 1997, <http://math.ucr.edu/home/baez/physics/General/occam.html> (originally written by Phil Gibbs). Over time this became known as a razor because it "shaves" away any unnecessary theories to get to the root of the issue. *Id.* Today we would often say "all things being equal, the simple solution is the best." *Id.* In the author's opinion, the military version of Occam's Razor is "K.I.S.S." or "Keep It Simple Stupid." On its face, sex offender registration would appear to be a simple matter, but this primer will show that it is anything but simple.

² See *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006).

³ The specific requirement was "inform an accused prior to trial as to any charged offense listed on the DoD Instr. 1325.7 Enclosure 27: Listing of Offenses Requiring Sex Offender Processing." *Id.* at 459. There are eighteen listed offenses in the DoD Instruction. See U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 27 (17 July 2001) (C1, 10 June 2003) [hereinafter DoDI 1325.7].

⁴ *Miller*, 63 M.J. at 459.

⁵ There is no federal sex offender registry, but the federal government does maintain a comprehensive sex offender registration website that incorporates all of the state registries. See Dru Sjödin National Sex Offender Public Website, <http://www.nsopw.gov> (last visited July 6, 2009). There is a federal criminal statute that punishes failing to register as a sex offender, and it specifically mentions convictions under the Uniform Code of Military Justice. 18 U.S.C. § 2250 (2006).

⁶ *Miller*, 63 M.J. at 459 (referring to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071).

specifically. This article provides trial defense counsel with sufficient information to advise a client on the specific collateral consequences⁷ of a possible sex offense conviction, depending on the state where the client will live after confinement.

II. Background

California was the first state to pass a sex offender registration law back in 1944;⁸ however, this law did not compare to modern sex offender registration requirements. For example, the law was primarily used by California law enforcement agencies.⁹ The public had no access to the list until 1995, and even then only by telephone via the Child Molester Identification Line.¹⁰ California waited until 2004 to make sex offender registration information available through the Internet.¹¹ Despite California's early action with sex offender registration laws, many states did not pass their own version until much later.¹² Unfortunately, the tragic death of Megan Kanka in New Jersey in 1994 was the primary force driving the modern sex offender registration and notification laws, including the applicable federal laws.¹³

A. Federal Law

Federal sex offender registration does not exist.¹⁴ However, since 1994, the federal government has mandated that all states establish sex offender registration laws under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Jacob Wetterling Registration Program).¹⁵ The statute requires registration by the states for three categories of offenses: criminal offenses against a victim who is a minor,¹⁶ sexually violent offenses,¹⁷ and, sexually violent offenses where the offender suffers from a mental abnormality that makes the person likely to engage in further predatory sexually violent offenses.¹⁸ Congress applies this statute to military offenders and offenses through the inclusion of a provision that requires "each State [to] include in its registration program resident[s] who were convicted in another State and [to] ensure that procedures are in place to accept registration from—residents who were . . . sentenced by a court martial [sic]."¹⁹ As this article illustrates, some states have not completely met this requirement.²⁰

⁷ A collateral consequence is "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence." BLACK'S LAW DICTIONARY 278 (8th ed. 2004).

⁸ See SCOTT MATSON & ROXANNE LIEB, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 5 (1996), available at <http://www.wsipp.wa.gov/pub.asp?docid=96-07-1101>.

⁹ See California Megan's Law—California Department of Justice—Office of the Attorney General, <http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH> (last visited July 6, 2009).

¹⁰ *Id.*

¹¹ *Id.*

¹² See *infra* Part II.B.

¹³ There are dozens of articles on the internet that give an in-depth look into Megan Kanka's story. Previous New Jersey sex offender registration laws did not require community notification when a predator moved into the area. See, e.g., Seamus McGraw, *Megan Kanka*, TRUTV, http://www.trutv.com/library/crime/serial_killers/predators/kanka/1.html (last visited July 6, 2009). The federal statute is actually named for another eleven-year-old child, Jacob Wetterling, who went missing in 1989 in Minnesota and remains missing today. See *Snatched by a Stranger* photo gallery, <http://www.trutv.com/library/crime/photogallery/missing-kids.html?curPhoto=9> (last visited July 6, 2009). However, the statute is also called the federal "Megan's Law." See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14,071 (2006).

¹⁴ See *supra* note 5 (discussing the lack of a federal registration system).

¹⁵ 42 U.S.C. § 14071. Through this act, any state that fails to implement a sex offender registration program will lose ten percent of the funds they would have received under the Bureau of Justice Assistance Grant Program, 42 U.S.C. § 3756 (2000) (note that this statute has been revised numerous times, with the current version enacted in 1996). See 42 U.S.C. § 14,071(g)(2).

¹⁶ Criminal offenses against a victim who is a minor include: kidnapping, except by a parent; false imprisonment, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct; use of a minor to engage in sexual conduct; use of a minor in a sexual performance; solicitation of a minor to practice prostitution; any conduct that by its nature is a sexual offense against a minor; production or distribution of child pornography; and attempts to commit these offenses if the state criminalizes such attempts. See *id.* § 14,071(a)(3)(A).

¹⁷ A sexually violent offense "means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of offenses encompassed by aggravated sexual abuse or sexual abuse." *Id.* § 14,071(a)(3)(B).

¹⁸ See *id.* § 14,071(a)(3)(A)–(D).

¹⁹ *Id.* § 14,071(b)(7).

²⁰ See *infra* Part III.A.

Current federal law includes the Adam Walsh Child Protection and Safety Act of 2006.²¹ The primary purpose of this statute was to expand the definition of a sex offense,²² and to mandate that the Department of Justice (DOJ) establish a national sex offender registry website to collect all relevant sex offender information from the states so that it could be found in one location.²³ One measure in this statute required the Secretary of Defense to define what the term “sex offense” meant with regards to military offenses.²⁴ This statute also created the DOJ Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART).²⁵ On 2 July 2008, the SMART office published The National Guidelines for Sex Offender Registration and Notification.²⁶ These guidelines included language about military offenders consistent with the previous statutes. The guidelines require “military correctional and supervision personnel to notify the receiving jurisdiction’s authorities concerning the release to their areas of such sex offenders.”²⁷

B. State Law

Despite California’s sex offender registration requirements from 1944, only twenty-two states had enacted sex offender registration laws by the time the Jacob Wetterling Registration Program was passed in 1994.²⁸ All fifty states and the District of Columbia have now enacted sex offender registration laws with Massachusetts being the last in August 1996.²⁹

Despite the sex offender registration requirements, several states still have issues. For example, the Missouri Constitution prohibits laws of retrospective operation,³⁰ which is uncommon in other states. The U.S. Supreme Court has ruled that the Ex Post Facto Clause of the U.S. Constitution³¹ does not apply to retroactive sex offender registration requirements because the requirement to register is administrative, not punitive.³² However, the Missouri Supreme Court has read its state constitution to forbid any retroactive registration of sex offenders in Missouri.³³

²¹ 42 U.S.C.A. §§ 16901–16962 (West 2009). This act is also known as the Sex Offender Registration and Notification Act (SORNA). Adam Walsh was a six-year-old boy abducted from a Sears in Florida in 1981. Only his severed head was later recovered in a canal 120 miles away. His father later hosted the famous TV show, *America’s Most Wanted*. See Mark Gado, *My Baby is Missing!*, TRUTV, http://www.trutv.com/library/crime/criminal_mind/psychology/child_abduction/9.html (last visited July 6, 2009). No one was ever convicted of this crime, but the case was recently closed. Law enforcement concluded that Otis Edward Toole, who died while incarcerated for another offense in 1996, killed Adam. See Donna Leinwand & Emily Bazar, *Walsh’s Murder Had Impact Across USA*, USA TODAY, Dec. 17, 2008, available at http://www.usatoday.com/news/nation/2008-12-17-walshinside_N.htm.

²² For example, video voyeurism and using the internet to facilitate criminal sexual conduct involving a minor were added to the definition. See 42 U.S.C.A. § 16,911(7)(F), (H).

²³ See Dru Sjodin National Sex Offender Public Website, <http://www.nspow.gov> (last visited July 6, 2009). Dru Sjodin was a twenty-two year-old woman who was sexually assaulted and murdered in 2003 in North Dakota. See Rachael Bell, *The Murder of Dru Sjodin*, TRUTV, http://www.trutv.com/library/crime/notorious_murders/classics/dru_sjodin/1_index.html (last visited July 6, 2009).

²⁴ The statute states, “the term ‘sex offense’ means—a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. § 951 note).” 42 U.S.C.A. § 16911(5)(A)(iv). The referenced section, enacted in 1997, requires the Secretary of Defense to specify categories of conduct that are sex offenses; proscribe procedures to provide notice concerning the release from confinement of such persons convicted; inform them of registration obligations; and, track compliance with registration requirements during any period of parole, probation, or other conditional release. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 115(a)(8)(C)(i), 111 Stat. 2440, 2464 (1997). The Secretary of Defense complied by publishing DoDI 1325.7, *supra* note 3.

²⁵ 42 U.S.C.A. § 16,945.

²⁶ OFFICE OF THE ATTORNEY GENERAL, U.S. DEP’T OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (2008) [hereinafter GUIDELINES]. These guidelines were required by the Adam Walsh Child Protection and Safety Act of 2006. See 42 U.S.C.A. § 16,912(b).

²⁷ GUIDELINES, *supra* note 26, at 47. The way the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas handles this requirement is to follow the precise counseling and notification procedures in Army Regulation (AR) 190-47. See U.S. DEP’T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM ch. 14 (15 June 2006).

²⁸ These states were: Alabama, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Kansas, Louisiana, Maine, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, Washington, and Wisconsin. *Id.* Only six enacted sex offender registration laws prior to 1980: Alabama, Arizona, California, Florida, Nevada, and Ohio. See MATSON & LIEB, *supra* note 8, at 13–20.

²⁹ See H.B. 5949, 1996 Leg., 2d Sess. (Mass. 1999).

³⁰ “That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” MO. CONST. art. I, § 13.

³¹ “No Bill of Attainder or ex post facto Law shall be passed.” U.S. CONST. art. I, § 9, cl. 3.

³² *Smith v. Doe*, 538 U.S. 84 (2003).

³³ See generally *Doe v. Blunt*, 225 S.W.3d 421 (Mo. 2007) (holding that retroactive sex offender registration was retrospective law prohibited by state constitution).

Another issue is due process. The Supreme Court of Hawaii has ruled that the due process clause of the Hawaii Constitution forbids public notification of sex offender registration.³⁴ The court concluded that the public notification aspect of the Hawaii sex offender registration law violated due process because the law harmed the defendant's reputation and other "tangible interests" without a process in place to ensure erroneous sex offender registration did not occur.³⁵

State sex offender registration laws change frequently and they also vary widely in size and scope.³⁶ Alabama's law is only two pages printed³⁷ while Ohio's law is sixty-five pages.³⁸ Alabama's laws are silent on many issues: there is no specific mention of the military; the list of covered offenses includes only seven crimes; and there is no public access to the registry.³⁹ By comparison, Ohio's law includes an eight-page list of definitions.⁴⁰

III. Analysis

A. Which States Require Military Registration?

Not all states have fully complied with the federal statute requirement to ensure that military offenders are included in state sex offender registration systems.⁴¹ Before analyzing which states have not fully complied with the federal requirements, the first step is to look at the language of the statutes. The first major piece of analysis involves which states require military offenders to register. The states have implemented four main registration categories: the "federal court" or "federal law" category; the "another jurisdiction" category; the "requires registration in the federal or military system" category; and the "military offense" or "military court" category.⁴² All fifty states and the District of Columbia fall into at least one of these categories, and most fall into several of the categories. The language describing these categories comes from the specific language in each state statute that describes who must register under that state system. The language varies from state to state, but the general theme of each of these four categories stays consistent across the country. Appendix A lists each state and which category or categories that they use.⁴³

1. "Federal Court" or "Federal Law"

Eleven states use the "federal court" or "federal law" category to determine who must register in their state.⁴⁴ Five of these states also apply language from one of the other three categories.⁴⁵ The language used varies slightly and includes "the

³⁴ "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5.

³⁵ See *Hawaii v. Bani*, 36 P.3d 1255, 1264 (Haw. 2001).

³⁶ For example, VA. CODE ANN. § 9.1-902 (West 2009) has been amended eighteen times since 2003. See 2003 Va. Legis. Serv. 732 (West); 2004 Va. Legis. Serv. 414 (West); 2004 Va. Legis. Serv. 444 (West); 2005 Va. Legis. Serv. 586 (West); 2005 Va. Legis. Serv. 603 (West); 2005 Va. Legis. Serv. 631 (West); 2006 Va. Legis. Serv. 857 (West); 2006 Va. Legis. Serv. 875 (West); 2006 Va. Legis. Serv. 914 (West); 2006 Va. Legis. Serv. 931 (West); 2007 Va. Legis. Serv. 463 (West); 2007 Va. Legis. Serv. 718 (West); 2007 Va. Legis. Serv. 759 (West); 2007 Va. Legis. Serv. 823 (West); 2008 Va. Legis. Serv. 592 (West); 2008 Va. Legis. Serv. 747 (West); 2008 Va. Legis. Serv. 772 (West); 2008 Va. Legis. Serv. 877 (West).

³⁷ See ALA. CODE §§ 13A-11-200 to -204 (2009).

³⁸ See OHIO REV. CODE ANN. §§ 2950.01-99 (West 2009).

³⁹ See ALA. CODE § 13A-11-201.

⁴⁰ See OHIO REV. CODE ANN. § 2950.01.

⁴¹ See *supra* note 19 and accompanying text (discussing the federal statute requirement). Although generally speaking, most of the states do require military sex offenders to register. Most of the confusion results from the wording of the state statutes.

⁴² These registration schemes are the author's own for purposes of analysis for this primer. There are no formal categories of registration schemes amongst the states.

⁴³ See *infra* app. A.

⁴⁴ See ALA. CODE §§ 13A-11-200 to -204 (2009); D.C. CODE §§ 22-4001 to -4017 (2009); DEL. CODE ANN. tit. 11, §§ 4120-4122 (2009); GA. CODE ANN. §§ 42-1-12 to -15 (2009); N.D. CENT. CODE § 12.1-32-15 (2009); N.H. REV. STAT. ANN. §§ 651-B:1-12 (2009); N.J. STAT. ANN. §§ 2C:7-1 to -21 (West 2009); 42 PA. CONS. STAT. ANN. §§ 9791-99.9 (West 2009); S.C. CODE ANN. §§ 23-3-400 to -550 (2009); VA. CODE ANN. § 9.1-900 to -922 (West 2009); WASH. REV. CODE ANN. §§ 9A.44.130-145 (West 2009).

⁴⁵ See D.C. CODE §§ 22-4001 to -4017; GA. CODE ANN. §§ 42-1-12 to -15; 42 PA. CONS. STAT. ANN. §§ 9791-99.9; VA. CODE ANN. § 9.1-900 to -922; WASH. REV. CODE ANN. §§ 9A.44.130-145.

United States,”⁴⁶ or “the federal government.”⁴⁷ Alabama’s statute is an example of the common usage of this language, “[i]f any person . . . has heretofore been convicted, or shall be convicted in any state or municipal court in Alabama, or federal court . . . for any of the offenses hereinafter enumerated, such person shall, upon his or her release from legal custody, register with the sheriff”⁴⁸ An example of different language can be found in Delaware’s statute: “Any person convicted of any offense specified in the laws of another state, the United States or any territory of the United States”⁴⁹

The application of this federal court or federal law category to the military is uncertain without further insight to establish what each state means by their own statute language. While undoubtedly a military court-martial is a federal court applying federal law, there are distinct differences between a court-martial and a federal district court. For example, a court-martial is an Article I court under the U.S. Constitution,⁵⁰ while a federal district court is an Article III court.⁵¹ Another key difference is that federal district courts normally apply Title 18, U.S. Code, in criminal matters,⁵² while courts-martial generally apply the Uniform Code of Military Justice (UCMJ) under Title 10, U.S. Code.⁵³ Either way, without legislative history reports or case law interpreting the specific portion of the state statute, the application of this language to a military offender is not very clear. However, the five states that apply another scheme on top of this language plainly include military offenders. For instance, Georgia specifically includes those who were “convicted under the laws of another state or the United States, under the Uniform Code of Military Justice, or in a tribal court of a sexually violent offense,” among other requirements.⁵⁴

2. “Another Jurisdiction”

Thirteen states use the “another jurisdiction” language to determine who must register in their state.⁵⁵ Of these thirteen, eight also apply language from one of the other three categories.⁵⁶ The language used varies slightly from state to state, and includes the words “any court.”⁵⁷ The common usage of this language may be found in Alaska’s statute, which reads: “sex offender or child kidnapper” means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction”⁵⁸ Another example using similar language comes from Iowa: “‘convicted’ or ‘conviction’ means a person who is found guilty of . . . an act which is an indictable offense in this state or in another jurisdiction”⁵⁹

The application of another jurisdiction category to the military is not clear without case law or other applicable references to determine what each state means by that language. The five states that use this category alone are the most difficult to apply to the military. Alaska’s law presents a prime example.⁶⁰ Alaska’s statute does not mention the military,

⁴⁶ See DEL. CODE ANN. tit. 11, § 4120(e)(1).

⁴⁷ See N.H. REV. STAT. ANN. § 651-B:1(b).

⁴⁸ ALA. CODE § 13A-11-200 (2009).

⁴⁹ DEL. CODE ANN. tit. 11, § 4120(e)(1).

⁵⁰ “These provisions [article I] show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations.” *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

⁵¹ “The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

⁵² 18 U.S.C. §§ 2–6005 (2006).

⁵³ UCMJ arts. 77–134 (2008).

⁵⁴ GA. CODE ANN. § 42-1-12(e)(5) (2009).

⁵⁵ ALASKA STAT. §§ 12.63.010–100 (2009); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3829 (2009); D.C. CODE §§ 22-4001 to -4017 (2009); FLA. STAT. ANN. § 944.607 (West 2009); IOWA CODE ANN. §§ 692A.1–16 (West 2009); ME. REV. STAT. ANN. tit. 34-A, §§ 11,201–11,256 (2009); MISS. CODE ANN. §§ 45-33-21 to -59 (West 2009); N.M. STAT. ANN. §§ 22-11A-1 to -10 (West 2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); OR. REV. STAT. ANN. §§ 181.592–606 (West 2009); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009); UTAH CODE ANN. § 77-27-21.5 (West 2009); WYO. STAT. ANN. §§ 7-19-301 to -308 (2009).

⁵⁶ D.C. CODE §§ 22-4001 to -4017; FLA. STAT. ANN. § 944.607; IOWA CODE ANN. §§ 692A.1–16; ME. REV. STAT. ANN. tit. 34-A, §§ 11,201–11,256; MISS. CODE ANN. §§ 45-33-21 to -59; N.M. STAT. ANN. §§ 22-11A-1 to -10; N.Y. CORRECT. LAW § 168; WYO. STAT. ANN. §§ 7-19-301 to -308.

⁵⁷ N.M. STAT. ANN. § 22-11A-3(A).

⁵⁸ ALASKA STAT. § 12.63.100(5).

⁵⁹ IOWA CODE ANN. § 692A.1(3).

⁶⁰ ALASKA STAT. §§ 12.63.010–100.

nor does it define the meaning of another jurisdiction.⁶¹ One possible reading of another jurisdiction is very broad: another jurisdiction includes any court of competent jurisdiction in the United States.⁶² However, it may also be read narrowly: another jurisdiction includes only other state courts. Unfortunately, no Alaska appellate court has interpreted the application of their sex offender registration laws to the military.⁶³

For the eight states that include language from one of the other categories, application to the military is clearer. For example, Iowa specifically requires registration for “[a] person who has been convicted of a criminal offense against a minor, an aggravated offense, sexual exploitation, an [sic] other relevant offense, or a sexually violent offense in this state or in another state, or in a federal, military, tribal, or foreign court.”⁶⁴ This language, combined with the conviction in another jurisdiction language above, shows the Iowa legislature’s intent to require military sex offenders to register in their jurisdiction.

3. “Requires Registration in Federal or Military System”

This category, the least common, requires registration for convicted individuals when the federal or military system requires registration. Only seven states use this method and all seven include language from another registration category.⁶⁵ The most common language follows the example of Virginia’s statute: “‘Offense for which registration is required’ includes . . . [a]ny offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.”⁶⁶ Another example can be seen in Maine’s statute: “[a]t any time of an offense that requires registration in the jurisdiction of conviction pursuant to that jurisdiction’s sex offender registration laws or that would have required registration had the person remained there.”⁶⁷

Standing alone, this category would almost conclusively not apply to the military because the military (and the federal government) do not register sex offenders.⁶⁸ Therefore, if any state based their system solely upon the requirement to register in the military system, then no military sex offenders would have to register in that state.⁶⁹

Four of the seven states also use the “military offense” or “military court” category: Connecticut, Maryland, Missouri, and Nebraska.⁷⁰ Their statutes specifically mention how their sex offender registration laws apply to the military.⁷¹ Maine and New York both use the “another jurisdiction” category and their requirements are as unclear as Alaska’s.⁷² The last state, Virginia, applies the “federal court” scheme.⁷³ Based solely upon a reading of the statute, application of Virginia law to a military conviction is vague at best. Virginia uses the following language: “any similar offense under the laws of any

⁶¹ *Id.*

⁶² This is the plain meaning of the statute and the one likely to control. Out of an abundance of caution, a defense counsel should probably use this definition when advising their client.

⁶³ At least as of 14 July 2009. Research on file with the author.

⁶⁴ IOWA CODE ANN. § 692A.2(1).

⁶⁵ CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009); ME. REV. STAT. ANN. tit. 34-A, §§ 11,201–11,256 (2009); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009); MO. ANN. STAT. §§ 589.400–426 (West 2009); NEB. REV. STAT. §§ 29-4001 to -4014 (2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); VA. CODE ANN. §§ 9.1-900 to -922 (West 2009). The reader may ask why the author even included this section. The primary reason for including this section is that this language appears frequently in the statutes. Seven states is a sizeable minority. Even though this section is not technically required since all seven states use one of the other schemes, the author wanted to ensure that the reader did not get misled by this language.

⁶⁶ VA. CODE ANN. § 9.1-902(A)(6).

⁶⁷ ME. REV. STAT. ANN. tit. 34-A, § 11202(2)(A).

⁶⁸ See *supra* note 5.

⁶⁹ Although some states interpret this portion of their statute to require registration for those offenses included in DoDI 1325.7. DoDI 1325.7, *supra* note 3. The primary reason for this interpretation is that the military does require registration processing for those offenses. See *infra* note 77 for further information.

⁷⁰ CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009); MO. ANN. STAT. §§ 589.400–426 (West 2009); and, NEB. REV. STAT. §§ 29-4001 to -4014 (2009).

⁷¹ For further discussion see *infra* Part III.A.4.

⁷² ME. REV. STAT. ANN. tit. 34-A, §§ 11,201–11,256 (2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); see *supra* Part III.A.2. As of 14 July 2009, no Maine court has applied their sex offender registration law to the military (research on file with the author). New York courts have applied their sex offender registration laws to the military. Those cases will be discussed further in Part III.C.

⁷³ VA. CODE ANN. §§ 9.1-900 to -922 (West 2009).

foreign country or any political subdivision thereof, the United States or any political subdivision thereof”⁷⁴ While the military is part of the U.S. government, the question of whether the military is a political subdivision of the United States is uncertain.⁷⁵ Most likely, Virginia meant to include the military in this definition.⁷⁶ Unfortunately, no appellate court has interpreted the Virginia sex offender registration law as applied to the military.⁷⁷

4. “Military Offense” or “Military Court”

Thirty-six states use the “military offense” or “military court” language to ensure that military sex offenders register in their state.⁷⁸ Twelve of these states also apply one of the other three categories discussed above.⁷⁹ The language used can vary widely and includes “Uniform Code of Military Justice,”⁸⁰ “felony [sex] offense subject to a court-martial,”⁸¹ and “military . . . jurisdiction.”⁸² As an example, Florida’s statute states: “Conviction of a similar offense includes, but is not limited to, a conviction by a federal or military tribunal, including courts-martial conducted by the Armed Forces of the United States”⁸³ Another example using different language comes from Idaho: “‘Offender’ means an individual convicted of an offense listed . . . or a substantially similar offense under the laws of another state or in a federal, tribal or military court or the court of another country.”⁸⁴

This category provides the clearest application to convictions at a court-martial. The language covers all military sex offenders and court-martial convictions for sex offenses.⁸⁵ Unlike the other three categories, the statutory intent to reach

⁷⁴ *Id.* § 9.1-902(F).

⁷⁵ However, even as part of the U.S. government, the law does not gain clarity. As discussed previously, courts-martial are different than a U.S. federal district court. *See supra* Part III.A.1.

⁷⁶

Any entity which has been created directly by the State, so as to constitute a department or administrative arm of the government, or administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate, shall be deemed to be a “State or political subdivision thereof”

Coverage of Employees under the Williams-Steiger OSHA 1970, 29 C.F.R. § 1975.5(b) (2009). While this is not directly on point, this definition is probably what Virginia meant. Using these definitions, the military is a department of the federal government administered by public officials. Therefore it is a political subdivision of the United States.

⁷⁷ As of 14 July 2009. Research on file with the author. However, Virginia does register military sex offenders. They apply a “substantially similar” analysis to the offenses a military accused was charged with, and they consider a military court-martial to be a part of the U.S. court system. Interview with Thomas Lambert, Legal Specialist, Office of the Va. State Police in Richmond, Va. (Mar. 10, 2009). All but one of the Virginia circuit courts to analyze military sex offenders has upheld the registration requirement. *Id.* The one that did not was because the record of trial showed the offense as consensual sodomy. *Id.* Virginia also interprets their statute to require registration when the offense is listed in DoDI 1325.7. *Id.*; DoDI 1325.7, *supra* note 3.

⁷⁸ ARK. CODE ANN. §§ 12-12-901 to -923 (West 2009); CAL. PENAL CODE §§ 290–294 (West 2009); COLO. REV. STAT. ANN. §§ 16-22-101 to -115 (West 2009); CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009); FLA. STAT. ANN. § 944.607 (West 2009); GA. CODE ANN. §§ 41-1-12 to -15 (West 2009); HAW. REV. STAT. §§ 846E-1 to -13 (2009); IDAHO CODE ANN. §§ 18-8301 to -8331 (2009); 730 ILL. COMP. STAT. ANN. 150/1-12 (West 2009); IND. CODE ANN. §§ 11-8-8-1 to -22 (West 2009); IOWA CODE ANN. §§ 692A.1–16 (West 2009); KAN. STAT. ANN. §§ 22-4901 to -4913 (2009); KY. REV. STAT. ANN. §§ 17.500–580 (West 2009); LA. REV. STAT. ANN. §§ 15:540–552 (2009); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009); MASS. GEN. LAWS ANN. ch. 6, §§ 178C–178Q (West 2009); MICH. COMP. LAWS ANN. §§ 28.721–736 (West 2009); MINN. STAT. ANN. § 243.166 (West 2009); MISS. CODE ANN. §§ 45-33-21 to -59 (West 2009); MO. ANN. STAT. §§ 589.400–426 (West 2009); MONT. CODE ANN. §§ 46-23-502 to -507 (2009); NEB. REV. STAT. §§ 29-4001 to -4014 (2009); N.M. STAT. ANN. §§ 22-11A-1 to -10 (West 2009); NEV. REV. STAT. ANN. §§ 179D.010–850 (West 2009); N.C. GEN. STAT. ANN. §§ 14-208.5–45 (West 2009); OHIO REV. CODE ANN. §§ 2950.01–99 (West 2009); OKLA. STAT. ANN. tit. 57, §§ 581–90 (West 2009); 42 PA. CONS. STAT. ANN. §§ 9791–99.9 (West 2009); S.D. CODIFIED LAWS §§ 22-24B-1 to -30 (2009); TENN. CODE ANN. §§ 40-39-201 to -306 (West 2009); TEX. CODE CRIM. PROC. ANN. art. 62.001-408 (Vernon 2009); VT. STAT. ANN. tit. 13, §§ 5401–14 (2009); WASH. REV. CODE ANN. §§ 9A.44.130–145 (West 2009); WIS. STAT. ANN. §§ 301.45 to -46 (West 2009); W. VA. CODE ANN. §§ 15-12-1 to -10 (West 2009); WYO. STAT. ANN. §§ 7-19-301 to -308 (2009).

⁷⁹ CONN. GEN. STAT. ANN. §§ 54-250 to -261; FLA. STAT. ANN. § 944.607; GA. CODE ANN. §§ 41-1-12 to -15; IOWA CODE ANN. §§ 692A.1–16; MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727; MISS. CODE ANN. §§ 45-33-21 to -59; MO. ANN. STAT. §§ 589.400–426; NEB. REV. STAT. §§ 29-4001 to -4014; N.M. STAT. ANN. §§ 22-11A-1 to -10; 42 PA. CONS. STAT. ANN. §§ 9791–99.9; WASH. REV. CODE ANN. §§ 9A.44.130–145; WYO. STAT. ANN. §§ 7-19-301 to -308.

⁸⁰ TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(H).

⁸¹ KY. REV. STAT. ANN. § 17.500(8).

⁸² COLO. REV. STAT. ANN. § 16-22-103(1)(b).

⁸³ FLA. STAT. ANN. § 944.607(1)(b).

⁸⁴ IDAHO CODE ANN. § 18-8303(8).

⁸⁵ For example, Massachusetts uses the language “or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.” MASS. GEN. LAWS ANN. ch. 6, § 178C (West 2009). The practitioner still must analyze whether or not the military offense matches the state registration offenses, but this language makes application to the military clearer.

military sex offenders could not be more apparent. The fifteen states that do not use this category, create the greatest source of confusion for the military practitioner.⁸⁶

B. Which Offenses under the UCMJ Require Registration in Each State?

After analyzing which states require registration for military offenders, the practitioner must next determine which offenses under the UCMJ require registration in each state. The states generally apply five different methodologies in deciding which offenses require registration: the comprehensive list of offenses; the statutory cross-reference list; the partial or limited list; federal statute references; or, the “required to register elsewhere” method.⁸⁷ As with the analysis of the states that require military registration, all fifty states and the District of Columbia use at least one of these methodologies. Some states apply more than one methodology in determining offenses that require registration.⁸⁸ The names of these methodologies comes from the way that the state lists (or do not list) the offenses requiring registration in that state. Appendix B lists the states and the methodologies that each state uses.⁸⁹

1. Comprehensive List

Twenty-six states apply the comprehensive list methodology when determining which offenses require sex offender registration.⁹⁰ These states list every offense that requires registration in their sex offender registration statutes. For example, Colorado lists twenty-seven different offenses that qualify for registration, ranging from common offenses, such as sexual assault, to offenses that few states include, such as “engaging in sexual conduct in a penal institution.”⁹¹

Application of the comprehensive list methodology to the military is clear in most cases.⁹² Generally speaking, the practitioner should compare offenses in Department of Defense Instruction (DoDI) 1325.7 against the list of offenses in the state comprehensive list.⁹³ If the offense is listed in DoDI 1325.7 and the state statute, then a conviction for that offense requires registration in that state.⁹⁴ The most common pitfalls include Article 134 offenses that are not listed in DoDI 1325.7 and the revised Article 120 offenses.⁹⁵

⁸⁶ Those fifteen states are: Alabama, Alaska, Arizona, Delaware, District of Columbia, Maine, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Carolina, Utah, and Virginia. See ALA. CODE §§ 13A-11-200 to -204 (2009); ALASKA STAT. §§ 12.63.010–100 (2009); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3829 (2009); DEL. CODE ANN. tit. 11, §§ 4120–4122 (2009); D.C. CODE §§ 22-4001 to -4017 (2009); ME. REV. STAT. ANN. tit. 34-A, §§ 11,201–11,256 (2009); N.H. REV. STAT. ANN. §§ 651-B:1–12 (2009); N.J. STAT. ANN. §§ 2C:7-1 to -21 (West 2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); N.D. CENT. CODE § 12.1-32-15 (2009); OR. REV. STAT. ANN. §§ 181.592–606 (West 2009); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009); S.C. CODE ANN. §§ 23-3-400 to -550 (2009); UTAH CODE ANN. § 77-27-21.5 (West 2009); VA. CODE ANN. §§ 9.1-900 to -922 (West 2009).

⁸⁷ As before, these methodologies are the author’s own creation. There are no formal categories of offense lists amongst the states.

⁸⁸ Arkansas, Missouri, Nevada, New York, Rhode Island, and Virginia each use three methods. See ARK. CODE ANN. §§ 12-12-901 to -923 (West 2009); MO. ANN. STAT. §§ 589.400–426 (West 2009); NEV. REV. STAT. ANN. §§ 179D.010–850 (West 2009); N.Y. CORRECT. LAW § 168; R.I. GEN. LAWS §§ 11-37.1-1 to -20; VA. CODE ANN. §§ 9.1-900 to -922.

⁸⁹ See *infra* app. B.

⁹⁰ ARIZ. REV. STAT. ANN. §§ 13-3821 to -3829; ARK. CODE ANN. §§ 12-12-901 to -923; COLO. REV. STAT. ANN. §§ 16-22-101 to -115 (West 2009); D.C. CODE §§ 22-4001 to -4017; GA. CODE ANN. §§ 41-1-12 to -15 (West 2009); IDAHO CODE ANN. §§ 18-8301 to -8331 (2009); 730 ILL. COMP. STAT. ANN. § 150/1-12 (West 2009); IND. CODE ANN. §§ 11-8-8-1 to -22 (West 2009); IOWA CODE ANN. §§ 692A.1–16 (West 2009); KAN. STAT. ANN. §§ 22-4901 to -4913 (2009); LA. REV. STAT. ANN. §§ 15:540–552 (2009); MASS. GEN. LAWS ANN. ch.6, §§ 178C–178Q (West 2009); MISS. CODE ANN. §§ 45-33-21 to -59 (West 2009); NEB. REV. STAT. §§ 29-4001 to -4014 (2009); NEV. REV. STAT. ANN. §§ 179D.010–850; N.J. STAT. ANN. §§ 2C:7-1 to -21; N.M. STAT. ANN. §§ 22-11A-1 to -10 (West 2009); N.C. GEN. STAT. ANN. §§ 14-208.5–45 (West 2009); OR. REV. STAT. ANN. §§ 181.592–606; 42 PA. CONS. STAT. ANN. §§ 9791–99.9 (West 2009); S.C. CODE ANN. §§ 23-3-400 to -550; S.D. CODIFIED LAWS §§ 22-24B-1 to -30 (2009); TENN. CODE ANN. §§ 40-39-201 to -306 (West 2009); TEX. CODE CRIM. PROC. ANN. art. 62.001-408 (Vernon 2009); UTAH CODE ANN. § 77-27-21.5; VT. STAT. ANN. tit. 13, §§ 5401–14 (2009).

⁹¹ COLO. REV. STAT. ANN. § 16-22-102(9)(u).

⁹² See *infra* Part III.D for further analysis.

⁹³ See DoDI 1325.7, *supra* note 3, enclosure 27.

⁹⁴ Of course the careful practitioner should still apply the analysis from Part III.A, *infra*, to determine if the state properly recognizes military convictions.

⁹⁵ See *infra* app. C for a list of the offenses included in the instruction. See *infra* note 134 for the proposed revisions to the instruction that include the new Article 120 offenses.

2. Statutory List

Twenty-four states apply the statutory list methodology when determining which offenses require sex offender registration.⁹⁶ In their sex offender registration statutes these states include a cross reference list of offenses that require registration. For example, Florida lists sixteen different criminal statutes that qualify for registration.⁹⁷ However, reading the Florida statute quickly becomes complex because there are no details of what these statutes actually proscribe. In order to determine which offenses Florida requires sex offender registration for, a practitioner must look up all sixteen of the statutes spread across the Florida criminal code.⁹⁸

Application of the statutory list methodology to the military is clear in most cases. As with the comprehensive list, the practitioner should compare the list of offenses in DoDI 1325.7 against the state's statutory list to apply that state law to the military.⁹⁹ This extra step of looking up the statutory cross-references to determine what the listed offenses contain is the only substantive difference between these first two methodologies. The remainder of the analysis does not change.¹⁰⁰

3. Partial or Limited List

Only one state applies the partial or limited list methodology when determining which offenses require sex offender registration: Alabama.¹⁰¹ Alabama does not list every offense that requires registration either through a comprehensive list or a statutory list. Instead, Alabama lists a few offenses and then includes a broad general statement designed to capture other sexual offenses. Alabama's statute reads,

any act of sexual perversion involving a member of the same or the opposite sex, or any sexual abuse of any member of the same or the opposite sex or any attempt to commit any of these acts, and without limiting the generality of the above statement shall include specifically¹⁰²

Application of the limited list methodology to the military is unclear.¹⁰³ On the one hand, the general statement of application implies that almost all sexual offenses are included in Alabama. This would mean that even offenses not included in other states could apply in Alabama, such as sexual misconduct.¹⁰⁴ States that follow the comprehensive list methodology rarely include such misdemeanor crimes in their sex offender statutes.¹⁰⁵

⁹⁶ ALASKA STAT. §§ 12.63.010–100 (2009); CAL. PENAL CODE §§ 290–294 (West 2009); CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009); DEL. CODE ANN. tit. 11, §§ 4120–4122 (2009); FLA. STAT. ANN. § 944.607 (West 2009); HAW. REV. STAT. §§ 846E-1 to -13 (2009); KY. REV. STAT. ANN. §§ 17.500–580 (West 2009); ME. REV. STAT. ANN. tit. 34-A, §§ 11,201–11,256 (2009); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009); MICH. COMP. LAWS ANN. §§ 28.721–736 (West 2009); MINN. STAT. ANN. § 243.166 (West 2009); MO. ANN. STAT. §§ 589.400–426 (West 2009); MONT. CODE ANN. §§ 46-23-502 to -507 (2009); N.H. REV. STAT. ANN. §§ 651-B:1–12 (2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); N.D. CENT. CODE § 12.1-32-15 (2009); OHIO REV. CODE ANN. §§ 2950.01–99 (West 2009); OKLA. STAT. ANN. tit. 57, §§ 581–90 (West 2009); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009); VA. CODE ANN. §§ 9.1-900 to -922 (West 2009); WASH. REV. CODE ANN. §§ 9A.44.130–145 (West 2009); W. VA. CODE ANN. §§ 15-12-1 to -10 (West 2009); WIS. STAT. ANN. §§ 301.45 to -46 (West 2009); WYO. STAT. ANN. §§ 7-19-301 to -308 (2009).

⁹⁷ FLA. STAT. ANN. § 944.607(1)(a)(1).

⁹⁸ Generally speaking, the sixteen offenses are (1) kidnapping of a child under 13; (2) false imprisonment of a child under 13; (3) luring or enticing a child; (4) sexual battery; (5) sexual activity with minors; (6) prostitution of a minor; (7) sex trafficking of minors; (8) lewd acts with a minor; (9) lewd acts with the elderly; (10) sexual performance by a child; (11) giving obscene materials to minors; (12) child pornography possession; (13) distribution of child pornography; (14) distribution of child pornography to minors; (15) selling a minor; and, (16) teacher/student sexual acts. See FLA. STAT. ANN. §§ 787.01, 787.02, 787.025(2)(c), 794.011, 794.05, 796.03, 796.035, 800.04, 825.1025, 827.071, 847.0133, 847.0135, 847.0137, 847.0138, 847.0145, 985.701.

⁹⁹ See *supra* Part III.B.1.

¹⁰⁰ See *infra* Part III.D for further analysis.

¹⁰¹ ALA. CODE §§ 13A-11-200 to -204 (2009).

¹⁰² *Id.* § 13A-11-200(b).

¹⁰³ Alabama almost certainly requires military sex offenders to register for at least some offenses. A former member of the Air Force was recently convicted and sentenced to six years confinement for failing to register after having been released from military confinement for indecent assault. See News Release, Alabama Attorney General, AG King Announces Conviction of Sex Offender (Feb. 19, 2009), available at http://www.ago.state.al.us/news_template.cfm?Item=1251.

¹⁰⁴ Alabama defines this misdemeanor crime as “[b]eing a male, he engages in sexual intercourse with a female without her consent, under circumstances other than those covered by [rape statutes]; or with her consent where consent was obtained by the use of any fraud or artifice.” ALA. CODE § 13A-6-65(a)(1). The military now has a similar crime in the revised Article 120 called wrongful sexual contact. See UCMJ art. 120(m) (2008).

¹⁰⁵ See, e.g., GA. CODE ANN. §§ 41-1-12 to -15 (West 2009) (showing that Georgia does not list misdemeanor sex crimes in its statutes).

On the other hand, the general statement of application could mean that other crimes would not apply unless they are similar to the listed offenses. For example, Article 134 sex offenses that are not specifically listed, such as child pornography, may not fall under the Alabama statute. Child pornography is not one of the listed offenses.¹⁰⁶ Under the general statement above, child pornography arguably only falls under the sexual abuse category, but even that link is tenuous.¹⁰⁷

4. Federal Statute References

Six states include references to federal statutes when determining which offenses require sex offender registration.¹⁰⁸ All six states also apply at least one other methodology.¹⁰⁹ Normally, the state cites the federal statutes in order to define a specific set of crimes or to capture a specific category of crimes. For example, Arkansas uses a federal statute to define aggravated sexual offense¹¹⁰ and New York specifically incorporates convictions for eight federal statutes in their sex offender registration methodology.¹¹¹

Because these states also use other methodologies in determining who must register, application of the federal statute reference to the military is plain in most cases. Generally speaking, the federal statute reference will only add clarity to the set of crimes for which the state requires registration. The Arkansas's statute references the federal aggravated sexual abuse statute which adds clarity to military application because the revised Article 120 borrows heavily from the federal statute.¹¹² The clarity is also seen in the New York statute which incorporates one of the most frequently assimilated federal crimes in the military under Article 134—child pornography.¹¹³

5. "Required to Register Elsewhere"¹¹⁴

The "required to register elsewhere" methodology allows the states to incorporate by reference the sex offender registration requirements of the rest of the states. Twenty-seven states include this clause in their registration statutes.¹¹⁵ The usual way this clause works involves requiring registration in the state if any other state would require registration, even if

¹⁰⁶ Obscenity is a listed offense, but the offense of obscenity is a class C misdemeanor for displaying an obscene sign or bumper sticker. See ALA. CODE § 13A-12-131. Strangely enough, Alabama might require sex offender registration for displaying an obscene bumper sticker, but not for child pornography!

¹⁰⁷ Under the revised Article 120, abusive sexual contact is a very specific set of crimes, none of which include child pornography. See UCMJ art. 120(h), (i). The meaning of sexual abuse in the Alabama statute is probably similar to that of Article 120.

¹⁰⁸ ARK. CODE ANN. §§ 12-12-901 to -923 (West 2009); MO. ANN. STAT. §§ 589.400-426 (West 2009); NEV. REV. STAT. ANN. §§ 179D.010-850 (West 2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009); VA. CODE ANN. §§ 9.1-900 to -922 (West 2009).

¹⁰⁹ In fact, all six use three methodologies: Arkansas applies the comprehensive list and the required to register elsewhere; Missouri applies the statutory list and the required to register elsewhere; Nevada applies the comprehensive list and the required to register elsewhere; New York applies the statutory list and the required to register elsewhere; Rhode Island applies the comprehensive list and the required to register elsewhere; and, Virginia applies the statutory list and the required to register elsewhere. See generally ARK. CODE ANN. §§ 12-12-901 to -923; MO. ANN. STAT. §§ 589.400-426 (West 2009); NEV. REV. STAT. ANN. §§ 179D.010-850 (West 2009); N.Y. CORRECT. LAW § 168 (McKinney 2009); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009); VA. CODE ANN. §§ 9.1-900 to -922 (West 2009) (showing that these states apply multiple methodologies in their statutes).

¹¹⁰ "Aggravated sex offense" means an offense in the Arkansas Code substantially equivalent to 'aggravated sexual abuse' as defined in 18 U.S.C. § 2241 as it existed on March 1, 2003" ARK. CODE ANN. §§ 12-12-903(3).

¹¹¹ "Sex offense" means . . . a conviction of . . . any of the provisions of 18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423, or 18 U.S.C. 2425 . . ." N.Y. CORRECT. LAW § 168-a(2)(d).

¹¹² Compare UCMJ art. 120, with 18 U.S.C. § 2241 (2006).

¹¹³ See 18 U.S.C. § 2252A.

¹¹⁴ This term is the author's own for this registration methodology borrowed from any number of states using this system. For example, Colorado uses the language, "would be required to register if he or she resided in the state or jurisdiction of conviction." COLO. REV. STAT. ANN. § 16-22-103(3) (West 2009).

¹¹⁵ ARIZ. REV. STAT. ANN. §§ 13-3821 to -3829 (2009); ARK. CODE ANN. §§ 12-12-901 to -923; CAL. PENAL CODE §§ 290-294 (West 2009); COLO. REV. STAT. ANN. §§ 16-22-101 to -115 (West 2009); CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009); GA. CODE ANN. §§ 41-1-12 to -15 (West 2009); HAW. REV. STAT. §§ 846E-1 to -13 (2009); IND. CODE ANN. §§ 11-8-8-1 to -22 (West 2009); IOWA CODE ANN. §§ 692A.1-16 (West 2009); KAN. STAT. ANN. §§ 22-4901 to -4913 (2009); ME. REV. STAT. ANN. tit. 34-A, §§ 11,201-11,256 (2009); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009); MICH. COMP. LAWS ANN. §§ 28.721-736 (West 2009); MINN. STAT. ANN. § 243.166 (West 2009); MISS. CODE ANN. §§ 45-33-21 to -59 (West 2009); MO. ANN. STAT. §§ 589.400-426 (West 2009); NEB. REV. STAT. §§ 29-4001 to -4014 (2009); NEV. REV. STAT. ANN. §§ 179D.010-850 (West 2009); N.H. REV. STAT. ANN. §§ 651-B:1-12 (2009); N.Y. CORRECT. LAW § 168; N.C. GEN. STAT. ANN. §§ 14-208.5-45 (West 2009); OR. REV. STAT. ANN. §§ 181.592-606 (West 2009); 42 PA. CONS. STAT. ANN. §§ 9791-99.9 (West 2009); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009); S.C. CODE ANN. §§ 23-3-400 to -550 (2009); VA. CODE ANN. §§ 9.1-900 to -922 (West 2009); W. VA. CODE ANN. §§ 15-12-1 to -10 (West 2009).

the registering state would not normally require registration for that offense. For example, South Carolina requires registration for “[a]ny person . . . who has been convicted of . . . an offense for which the person was required to register in the state where the conviction or plea occurred.”¹¹⁶ A more complex wording is found in Hawaii’s statute which requires registration for

[a] person who establishes or maintains a residence in this state and who has been designated as a covered offender . . . or any other sexual offender designation in another state or jurisdiction and was, as a result of such designation, subjected to registration . . . without regard to whether the person otherwise meets the criteria for registration as a covered offender, shall register in the manner provided¹¹⁷

Application of this methodology to the military can be confusing at best. By incorporating every other state’s registration requirements into their own, these twenty-seven states have basically created a “super registration” statute that consists of the offenses requiring registration from all of the states.¹¹⁸ Again, the problem of lack of clarity is heightened when dealing with the non-listed Article 134 offenses.¹¹⁹

C. State-Specific Cases

A few state courts have had the opportunity to apply their sex offender registration statutes to military convictions, with mixed results. In 2006, the New York Court of Appeals¹²⁰ held that a former Sailor convicted of indecent assault under Article 134¹²¹ did not have to register as a sex offender under New York law.¹²² However, this holding has since been narrowed.¹²³

Another state with a specific case on point is Illinois. In this case, the plaintiff filed a civil suit to seek declaratory judgment that he did not have to register as a sex offender.¹²⁴ He had been convicted at a court-martial for indecent assault in violation of UCMJ, Article 134.¹²⁵ Because Illinois was a military offense or military court jurisdiction¹²⁶ with a comprehensive list statute,¹²⁷ application of their law to the plaintiff hinged on whether or not indecent assault was “substantially equivalent” to an offense in the state statute.¹²⁸ The court held that it was and affirmed the registration requirement.¹²⁹

¹¹⁶ S.C. CODE ANN. § 23-3-430(A).

¹¹⁷ HAW. REV. STAT. § 846E-2(b) (2009). To make matters even more complicated, Hawaii allows the offender to “petition[] the attorney general for termination of registration requirements by . . . [d]emonstrating that the out-of-state convictions upon which the sexual offender designation was established are not covered offenses.” *Id.* § 846E-2(b)(2). An out-of-state convicted offender moving to Hawaii for an offense not requiring registration in Hawaii would have to register until they can petition the attorney general to terminate the requirement on the grounds that Hawaii does not require registration for that offense.

¹¹⁸ Unfortunately, even trying to write them all down would be an exercise in futility due to constantly changing state laws and the differences in how each state handles the same offense.

¹¹⁹ See *infra* Part III.D for further analysis.

¹²⁰ The Court of Appeals is the highest court in New York. New York State Court of Appeals Home Page, <http://www.nycourts.gov/ctapps/> (last visited Mar. 10, 2009).

¹²¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 63 (2005) (indecent assault).

¹²² See *People v. Kennedy*, 850 N.E.2d 661 (N.Y. 2006).

¹²³ See *North v. Bd. of Exam’rs of Sex Offenders*, 871 N.E.2d 1133 (N.Y. 2007). This case applied several other provisions of the New York law to ensure the defendant (who had not been convicted at a court-martial, but rather in federal court) had to register for possession of child pornography. *Id.*

¹²⁴ See *Rodimel v. Cook County Sheriff’s Office*, 822 N.E.2d 7 (Ill. App. Ct. 2004).

¹²⁵ *Id.* at 8.

¹²⁶ See *supra* Part III.A.4.

¹²⁷ See *supra* Part III.B.1.

¹²⁸ *Rodimel*, 822 N.E.2d at 10.

¹²⁹ *Id.* at 12.

D. Determining Which Offenses Require Registration

One of the largest steps for the practitioner involves determining which offenses require registration in each state. The most logical place to start is DoDI 1325.7.¹³⁰ All of the military confinement facilities require sex offender processing for individuals convicted of the listed offenses.¹³¹ Appendix C¹³² lists the offenses that DoDI 1325.7 requires sex offender processing for in the military corrections system.¹³³ Appendix C also includes a list of the offenses not included in the outdated DoDI 1325.7.¹³⁴

Next, the practitioner must apply those offenses to the state registration methodology. Using the state of Georgia as an example, most of the offenses from DoDI 1325.7 match up with the state comprehensive list.¹³⁵ Kidnapping of a minor in the military is equivalent to kidnapping of a minor in Georgia.¹³⁶ Confusion arises when comparing Article 134 offenses with the Georgia comprehensive list. Most of the offenses are still covered, such as pornography involving a minor in the military which is equivalent to computer pornography in Georgia.¹³⁷ However, Georgia does not use a “conduct prejudicial to good order and discipline”¹³⁸ standard as a catch-all that the military uses. But it does use a catch-all of sorts by including “[a]ny conduct which, by its nature, is a sexual offense against a minor or an attempt to commit a sexual offense against a minor.”¹³⁹

Another factor for the practitioner to consider is that DoDI 1325.7 does not include “service discrediting” crimes.¹⁴⁰ While this might have been an oversight, it appears to be intentional because of the specific listing of “conduct prejudicial to good order and discipline” crimes.¹⁴¹

The solution for analyzing unlisted crimes or those that do not quite compare to the state comprehensive list is to look at the overall theme of the crimes listed. Returning to the Georgia statute, all of the offenses have either a sex crime against children component,¹⁴² or a dangerous sex crime component.¹⁴³ Applying this theme to the military would show that adultery, while clearly a sex crime, would not require registration as a sex offender under the Georgia statute. Not only is adultery not listed in DoDI 1325.7, but adultery is also not a sex crime against children or considered a dangerous sex crime.¹⁴⁴

¹³⁰ See *supra* note 3.

¹³¹ See DoDI 1325.7, *supra* note 3, enclosure 27.

¹³² See *infra* app. C.

¹³³ See DoDI 1325.7, *supra* note 3, enclosure 27.

¹³⁴ See *infra* app. C. The primary changes since then consists of the revised Article 120 and the deletion of several Article 134 offenses such as indecent assault. See Exec. Order No. 13,447, 72 Fed. Reg. 56,179 (Sept. 28, 2007). The proposed revision to this instruction is forthcoming. A copy of the new list of offenses will also be included in the new Army Regulation (AR) 27-10. Additional offenses in the revision include rape of a child; aggravated sexual assault; aggravated sexual assault of a child; aggravated sexual contact; aggravated sexual abuse of a child; aggravated sexual contact with a child; abusive sexual contact; abusive sexual contact with a child; indecent liberty with a child; indecent acts with a minor; forcible pandering; wrongful sexual contact; indecent exposure to a minor; and attempts, conspiracies, and solicitations to commit the foregoing. See U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 25-2 (n.d. draft) (on file with author).

¹³⁵ GA. CODE ANN. § 41-1-12(a)(9), (10) (West 2009).

¹³⁶ Compare *id.* § 16-5-40, with MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 92 (2008) [hereinafter MCM] (kidnapping) (showing that the two kidnapping offenses are similar).

¹³⁷ Compare GA. CODE ANN. § 16-12-100.2, with 18 U.S.C. § 2252A (2006) (showing that the most commonly charged child pornography federal statute in the military is similar to the Georgia computer pornography law).

¹³⁸ MCM, *supra* note 136, pt. IV, ¶ 92c(1) (commonly referred to as a clause 1, Article 134 offense).

¹³⁹ GA. CODE ANN. § 42-1-12(a)(10)(A)(xix).

¹⁴⁰ MCM, *supra* note 136, pt. IV, ¶ 92c(2) (commonly referred to as a clause 2, Article 134 offense).

¹⁴¹ See DoDI 1325.7, *supra* note 3, enclosure 27. This oversight has not been corrected in the proposed revision to DoDI 1325.7. See *supra* note 134.

¹⁴² Georgia calls offenses like this a “[c]riminal offense against a victim who is a minor.” See GA. CODE ANN. § 42-1-12(a)(9)(B).

¹⁴³ In fact, Georgia lists some of these offenses under the category “[d]angerous sexual offense.” See *id.* § 42-1-12(a)(10)(A).

¹⁴⁴ In the author’s opinion, adultery does have real harms associated with it, but it is not normally dangerous in the sense of violence during the sexual act itself.

E. Step-by-Step Method for Advising a Potential Sex Offender Client¹⁴⁵

The first step in advising a potential sex offender client is to learn which state the client will live in after they serve any potential confinement time. With that information, you can apply the methodologies in this primer to learn about the registration requirements of that state.

The second step is to determine what military registration language that state uses.¹⁴⁶ This step is particularly critical if the state your client will live in is one of the fifteen that does not use the “military court” or “military offense” language.¹⁴⁷ Most likely by itself, this step will not keep your client from the requirement to register. This is particularly true if the language of each state statute is read broadly.¹⁴⁸

The third step is to compare the charge sheet against DoDI 1325.7.¹⁴⁹ If the offense your client faces is one of the listed offenses, such as rape, then move to step four. If the offense your client faces is not one of the listed offenses, then you must compare that offense to each offense in the state statute.

This leads you to the fourth step, which is to analyze which offenses under the UCMJ require registration in that state.¹⁵⁰ This step can be completed very quickly and easily if the state uses a comprehensive list. On the other hand, it can be a slow process if the state uses a statutory list. Either way, the best method to figure out if the offense your client faces requires registration is to do an elements test against the state statute. If the military offense is “substantially equivalent” to the state offense, then your client will likely have to register.¹⁵¹

Step five is only applicable in rare cases where the courts of that state the client wishes to live in have rendered opinions about their registration laws as applied to the military. Currently only two states have this distinction.¹⁵² If your client is moving to New York or Illinois, then you should apply those cases to your client’s charges.

The sixth step is to advise your client of your analysis at this point. If registration is clearly applicable,¹⁵³ then advise your client he will probably have to register. If registration is not clearly applicable, or your client faces charges that might not be included,¹⁵⁴ then you should contact the state registration authorities for further clarification.¹⁵⁵ Either way you interpret the law, as a precaution, have your client sign a memorandum for record advising them of the probable requirement to register.¹⁵⁶

Along the way, a savvy trial defense counsel should attempt to negotiate for a favorable pre-trial agreement that does not include a conviction for any offense which requires registration.¹⁵⁷ If that is not possible, then you should attempt to negotiate for a sex offense that might not require registration in the state your client wants to live in after any potential confinement.¹⁵⁸

¹⁴⁵ This Part is entirely the author’s opinion.

¹⁴⁶ See *supra* Part III.A.

¹⁴⁷ See *supra* Part III.A.4.

¹⁴⁸ See *supra* note 77 for an example of a state that reads their statute broadly (Virginia).

¹⁴⁹ DoDI 1325.7, *supra* note 3, enclosure 27.

¹⁵⁰ See *supra* Part III.B.

¹⁵¹ This test was applied in both *People v. Kennedy*, 850 N.E.2d 661 (N.Y. 2006), and *Rodimel v. Cook County Sheriff’s Office*, 822 N.E.2d 7 (Ill. App. Ct. 2004). Virginia also applies this standard. See *supra* note 77.

¹⁵² See *supra* Part III.C.

¹⁵³ The clearest case in the author’s opinion would be a client facing a serious charge, such as rape, who will move to a state that applies the “military court” methodology and uses a comprehensive list of offenses.

¹⁵⁴ Such as a UCMJ, art. 134, cl. 2, offense or a novel sex crime under UCMJ, art. 134.

¹⁵⁵ See *infra* app. D for a complete state listing of points of contact.

¹⁵⁶ See *infra* app. E for a sample memorandum for record. Even if you interpret the statute as not requiring registration, the fact that state laws change rapidly should encourage you to use such a memorandum in almost all sex crime cases. See *supra* note 36 for an example of how frequently state laws can change.

¹⁵⁷ For example, a client charged with sexual assault who pleads guilty to simple assault instead. No state includes simple assault in their registration system.

¹⁵⁸ An example of this: a client charged with sexual assault who pleads guilty to indecent exposure. Many states do not include indecent exposure as a listed offense.

If none of these strategies work in your client's favor, argue to the panel or to the judge for an acquittal. All states require a conviction before registration requirements take effect. If a full acquittal is not likely, at least argue for a lesser included offense or ask for instructions on a lesser included offense that will not require registration in the state your client will eventually live in.

IV. Conclusion

The mandate from the CAAF seems simple on its face.¹⁵⁹ At a bare minimum, a trial defense counsel must advise their client charged with a sex offense on the record of the potential sex offender registration requirements.¹⁶⁰ The challenge arises when a trial defense counsel wants to do more than the bare minimum for their client. With four categories for determining whether or not the state includes military convictions,¹⁶¹ five methodologies for determining which offenses the state includes in their registration programs,¹⁶² and an almost six-year-old DoDI 1325.7 that does not include the 2007 revisions to Article 120, UCMJ,¹⁶³ a trial defense counsel can quickly be overwhelmed by the magnitude of sex offender registration requirements. With careful application of the principles in this article, a trial defense counsel can adequately advise any potential sex offender client of the registration requirements in all fifty states. Due to the harsh realities and the lasting impacts of sex offender registration, military clients deserve the best advice from their trial defense counsel, not just the bare minimum standard required by the CAAF.¹⁶⁴

¹⁵⁹ See *United States v. Miller*, 63 M.J. 453, 459 (C.A.A.F. 2006).

¹⁶⁰ See *id.*

¹⁶¹ See *supra* Part III.A.

¹⁶² See *supra* Part III.B.

¹⁶³ See DoDI 1325.7, *supra* note 3, at enclosure 27.

¹⁶⁴ See *Miller*, 63 M.J. at 459.

Appendix A

Which states require military registration?¹⁶⁵

State registration categories

State	Federal Court or Federal Law	Another Jurisdiction	Requires Registration In Federal / Military System	Military Offense or Military Court
	<i>Includes "United States" or "Federal Government"</i>	<i>Includes "Any Court"</i>		<i>Includes "Military Jurisdiction" or "UCMJ"</i>
Alabama ALA. CODE §§ 13A-11-200 to -204 (2009).	X			
Alaska ALASKA STAT. §§ 12.63.010–100 (2009).		X		
Arizona ARIZ. REV. STAT. ANN. §§ 13-3821 to -3829 (2009).		X		
Arkansas ARK. CODE ANN. §§ 12-12-901 to -923 (West 2009).				X
California CAL. PENAL CODE §§ 290–294 (West 2009).				X
Colorado COLO. REV. STAT. ANN. §§ 16-22-101 to -115 (West 2009).				X
Connecticut CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009).			X	X
Delaware DEL. CODE ANN. tit. 11, §§ 4120–4122 (2009).	X			
District of Columbia D.C. CODE §§ 22-4001 to -4017 (2009).	X	X		
Florida FLA. STAT. ANN. § 944.607 (West 2009).		X		X
Georgia GA. CODE ANN. §§ 41-1-12 to -15 (West 2009).	X			X

¹⁶⁵ Research on file with author.

State	Federal Court or Federal Law	Another Jurisdiction	Requires Registration In Federal / Military System	Military Offense or Military Court
Hawaii HAW. REV. STAT. §§ 846E-1 to -13 (2009).				X
Idaho IDAHO CODE ANN. §§ 18-8301 to -8331 (2009).				X
Illinois 730 ILL. COMP. STAT. ANN. 150/1-12 (West 2009).				X
Indiana IND. CODE ANN. §§ 11-8-8-1 to -22 (West 2009).				X
Iowa IOWA CODE ANN. §§ 692A.1-16 (West 2009).		X		X
Kansas KAN. STAT. ANN. §§ 22-4901 to -4913 (2009).				X
Kentucky KY. REV. STAT. ANN. §§ 17.500-580 (West 2009).				X
Louisiana LA. REV. STAT. ANN. §§ 15:540-552 (2009).				X
Maine ME. REV. STAT. ANN. tit. 34-A, §§ 11,201-11,256 (2009).		X	X	
Maryland MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009).			X	X
Massachusetts MASS. GEN. LAWS ANN. ch.6, §§ 178C-178Q (West 2009).				X
Michigan MICH. COMP. LAWS ANN. §§ 28.721-736 (West 2009).				X
Minnesota MINN. STAT. ANN. § 243.166 (West 2009).				X

State	Federal Court or Federal Law	Another Jurisdiction	Requires Registration In Federal / Military System	Military Offense or Military Court
Mississippi MISS. CODE ANN. §§ 45-33-21 to -59 (West 2009).		X		X
Missouri MO. ANN. STAT. §§ 589.400–426 (West 2009).			X	X
Montana MONT. CODE ANN. §§ 46-23-502 to -507 (2009).				X
Nebraska NEB. REV. STAT. §§ 29-4001 to -4014 (2009).			X	X
Nevada NEV. REV. STAT. ANN. §§ 179D.010–850 (West 2009).				X
New Hampshire N.H. REV. STAT. ANN. §§ 651-B:1–12 (2009).	X			
New Jersey N.J. STAT. ANN. §§ 2C:7-1 to -21 (West 2009).	X			
New Mexico N.M. STAT. ANN. §§ 22-11A-1 to -10 (West 2009).		X		X
New York N.Y. CORRECT. LAW § 168 (McKinney 2009).		X	X	
North Carolina N.C. GEN. STAT. ANN. §§ 14-208.5–45 (West 2009).				X
North Dakota N.D. CENT. CODE § 12.1-32-15 (2009).	X			
Ohio OHIO REV. CODE ANN. §§ 2950.01–99 (West 2009).				X
Oklahoma OKLA. STAT. ANN. tit. 57, §§ 581–90 (West 2009).				X

State	Federal Court or Federal Law	Another Jurisdiction	Requires Registration In Federal / Military System	Military Offense or Military Court
Oregon OR. REV. STAT. ANN. §§ 181.592–606 (West 2009).		X		
Pennsylvania 42 PA. CONS. STAT. ANN. §§ 9791–99.9 (West 2009).	X			X
Rhode Island R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2009).		X		
South Carolina S.C. CODE ANN. §§ 23-3-400 to -550 (2009).	X			
South Dakota S.D. CODIFIED LAWS §§ 22-24B-1 to -30 (2009).				X
Tennessee TENN. CODE ANN. §§ 40-39-201 to -306 (West 2009).				X
Texas TEX. CODE CRIM. PROC. ANN. art. 62.001-408 (Vernon 2009).				X
Utah UTAH CODE ANN. § 77-27-21.5 (West 2009).		X		
Vermont VT. STAT. ANN. tit. 13, §§ 5401–14 (2009).				X
Virginia VA. CODE ANN. §§ 9.1-900 to -922 (West 2009).	X		X	
Washington WASH. REV. CODE ANN. §§ 9A.44.130– 145 (West 2009).	X			X
West Virginia W. VA. CODE ANN. §§ 15-12-1 to -10 (West 2009).				X
Wisconsin WIS. STAT. ANN. §§ 301.45 to -46 (West 2009).				X

State	Federal Court or Federal Law	Another Jurisdiction	Requires Registration In Federal / Military System	Military Offense or Military Court
Wyoming WYO. STAT. ANN. §§ 7-19-301 to -308 (2009).		X		X

Appendix B

Which UCMJ offenses require registration?¹⁶⁶

State registration methodologies

State	Comprehensive List	Statutory List	Partial or Limited List	Federal Statute References	“Required to Register Elsewhere”
Alabama ALA. CODE §§ 13A-11-200 to -204 (2009).			X		
Alaska ALASKA STAT. §§ 12.63.010–100 (2009).		X			
Arizona ARIZ. REV. STAT. ANN. §§ 13-3821 to -3829 (2009).	X				X
Arkansas ARK. CODE ANN. §§ 12-12-901 to -923 (West 2009).	X			X	X
California CAL. PENAL CODE §§ 290–294 (West 2009).		X			X
Colorado COLO. REV. STAT. ANN. §§ 16-22-101 to -115 (West 2009).	X				X
Connecticut CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West 2009).		X			X
Delaware DEL. CODE ANN. tit. 11, §§ 4120–4122 (2009).		X			
District of Columbia D.C. CODE §§ 22-4001 to -4017 (2009).	X				
Florida FLA. STAT. ANN. § 944.607 (West 2009).		X			
Georgia GA. CODE ANN. §§ 41-1-12 to -15 (West 2009).	X				X
Hawaii HAW. REV. STAT. §§ 846E-1 to -13 (2009).		X			X
Idaho IDAHO CODE ANN. §§ 18-8301 to -8331 (2009).	X				

¹⁶⁶ Research on file with author.

State	Comprehensive List	Statutory List	Partial or Limited List	Federal Statute References	“Required to Register Elsewhere”
Illinois 730 ILL. COMP. STAT. ANN. 150/1-12 (West 2009).	X				
Indiana IND. CODE ANN. §§ 11-8-8-1 to -22 (West 2009).	X				X
Iowa IOWA CODE ANN. §§ 692A.1-16 (West 2009).	X				X
Kansas KAN. STAT. ANN. §§ 22-4901 to -4913 (2009).	X				X
Kentucky KY. REV. STAT. ANN. §§ 17.500-580 (West 2009).		X			
Louisiana LA. REV. STAT. ANN. §§ 15:540-552 (2009).	X				
Maine ME. REV. STAT. ANN. tit. 34-A, §§ 11,201-11,256 (2009).		X			X
Maryland MD. CODE ANN., CRIM. PROC. §§ 11-701 to -727 (West 2009).		X			X ¹⁶⁷
Massachusetts MASS. GEN. LAWS ANN. ch.6, §§ 178C-178Q (West 2009).	X				
Michigan MICH. COMP. LAWS ANN. §§ 28.721-736 (West 2009).		X			X
Minnesota MINN. STAT. ANN. § 243.166 (West 2009).		X			X
Mississippi MISS. CODE ANN. §§ 45-33-21 to -59 (West 2009).	X				X
Missouri MO. ANN. STAT. §§ 589.400-426 (West 2009).		X		X	X

¹⁶⁷ Requirement to register elsewhere is limited to offenses committed elsewhere before enactment of state statute. “A person shall register . . . if the person is . . . an offender . . . who, before moving into this [s]tate, was required to register in another state or by a federal, military, or Native American tribal court for a crime that occurred before July 1, 1997” MD. CODE ANN., CRIM. PROC. § 11-704(a)(6) (West 2009).

State	Comprehensive List	Statutory List	Partial or Limited List	Federal Statute References	“Required to Register Elsewhere”
Montana MONT. CODE ANN. §§ 46-23-502 to -507 (2009).		X			
Nebraska NEB. REV. STAT. §§ 29-4001 to -4014 (2009).	X				X
Nevada NEV. REV. STAT. ANN. §§ 179D.010–850 (West 2009).	X			X	X
New Hampshire N.H. REV. STAT. ANN. §§ 651-B:1–12 (2009).		X			X
New Jersey N.J. STAT. ANN. §§ 2C:7-1 to -21 (West 2009).	X				
New Mexico N.M. STAT. ANN. §§ 22-11A-1 to -10 (West 2009).	X				
New York N.Y. CORRECT. LAW § 168 (McKinney 2009).		X		X	X
North Carolina N.C. GEN. STAT. ANN. §§ 14-208.5–45 (West 2009).	X				X
North Dakota N.D. CENT. CODE § 12.1-32-15 (2009).		X			
Ohio OHIO REV. CODE ANN. §§ 2950.01–99 (West 2009).		X			
Oklahoma OKLA. STAT. ANN. tit. 57, §§ 581–90 (West 2009).		X			
Oregon OR. REV. STAT. ANN. §§ 181.592–606 (West 2009).	X				X
Pennsylvania 42 PA. CONS. STAT. ANN. §§ 9791–99.9 (West 2009).	X				X
Rhode Island R.I. GEN. LAWS §§ 11- 37.1-1 to -20 (2009).		X		X	X

State	Comprehensive List	Statutory List	Partial or Limited List	Federal Statute References	“Required to Register Elsewhere”
South Carolina S.C. CODE ANN. §§ 23-3-400 to -550 (2009).	X				X
South Dakota S.D. CODIFIED LAWS §§ 22-24B-1 to -30 (2009).	X				
Tennessee TENN. CODE ANN. §§ 40-39-201 to -306 (West 2009).	X				
Texas TEX. CODE CRIM. PROC. ANN. art. 62.001-408 (Vernon 2009).	X				
Utah UTAH CODE ANN. § 77-27-21.5 (West 2009).	X				
Vermont VT. STAT. ANN. tit. 13, §§ 5401–14 (2009).	X				
Virginia VA. CODE ANN. §§ 9.1-900 to -922 (West 2009).		X		X	X
Washington WASH. REV. CODE ANN. §§ 9A.44.130–145 (West 2009).		X			
West Virginia W. VA. CODE ANN. §§ 15-12-1 to -10 (West 2009).		X			X
Wisconsin WIS. STAT. ANN. §§ 301.45 to -46 (West 2009).		X			
Wyoming WYO. STAT. ANN. §§ 7-19-301 to -308 (2009).		X			

Appendix C

Department of Defense Instruction 1325.7 List of Offenses¹⁶⁸

Offenses Listed in DoDI 1325.7

UCMJ Article	Offense
120	Rape ¹⁶⁹
120	Carnal Knowledge ¹⁷⁰
125	Forcible Sodomy
125	Sodomy of a Minor
133	Conduct Unbecoming (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
134 ¹⁷¹	Prostitution Involving a Minor
134	Assault with Intent to Commit Rape
134	Assault with Intent to Commit Sodomy
134	Indecent Act with a Minor ¹⁷²
134	Indecent Language to a Minor
134	Kidnapping of a Minor (by a person not parent)
134	Pornography Involving a Minor
134	Conduct Prejudicial to Good Order and Discipline (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
134	Assimilative Crime Conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
80	Attempt (to commit any of the foregoing)
81	Conspiracy (to commit any of the foregoing)
82	Solicitation (to commit any of the foregoing)

¹⁶⁸ DoDI 1325.7, *supra* note 3, at enclosure 27.

¹⁶⁹ Because DoDI 1325.7 was last updated in June 2003, it does not specifically cover the revised Article 120 effective 1 Oct. 2007. See *supra* note 134 for the proposed additional covered offenses.

¹⁷⁰ *Id.*

¹⁷¹ In the original text, this Article designation is missing, but the “DIBRS Code” is 134-B6, indicating that they meant this to be an Article 134 offense. See DoDI 1325.7, *supra* note 3, at enclosure 27. The article designation is probably missing because prostitution involving a minor was not a listed offense in the 2002 edition of the *Manual for Courts-Martial*, nor is it listed today as a specific offense. Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 97 (2002) (pandering and prostitution), with MCM, *supra* note 136, pt. IV, ¶ 97 (pandering and prostitution) (showing that the only change from 2002 to the present was the addition of the crime of patronizing a prostitute). Forcible pandering was added to the new Article 120, but that offense does not require the victim to be a minor. See UCMJ art. 120(l) (2008).

¹⁷² This offense has been deleted pursuant to Executive Order No. 13,447. Exec. Order No. 13,447, 72 Fed. Reg. 56,179 (Sept. 28, 2007).

Offenses Not Listed in DoDI 1325.7¹⁷³

UCMJ Article	Offense
120	(All revised Article 120 offenses) ¹⁷⁴
134	Conduct Service Discrediting (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
80	Attempt (to commit any of the foregoing)
81	Conspiracy (to commit any of the foregoing)
82	Solicitation (to commit any of the foregoing)

¹⁷³ Research on file with author.

¹⁷⁴ UCMJ art. 120. In all likelihood, most of these offenses would be included in any state registration scheme. The offenses to pay particular attention to include wrongful sexual contact and indecent exposure. Many states do not include these offenses. See *supra* note 134 for the proposed additional offenses in the revised DoDI 1325.7.

Appendix D

Points of Contact

State	Point of Contact
Alabama	Alabama Department of Public Safety http://dps.alabama.gov/Information/Contact.aspx E-mail available by following "Contact DPS" hyperlink (334) 242-4371 (General Contact Number)
Alaska	Alaska Department of Public Safety http://www.dps.state.ak.us/sorweb/Sorweb.aspx E-mail unavailable (907) 269-0396
Arizona	State of Arizona Department of Public Safety http://az.gov/webapp/offender/main.do E-mail available by following "Contacts" hyperlink; then following "Main Contacts" hyperlink; then following "Contact us via e-mail" hyperlink. (602) 255-0611
Arkansas	Arkansas Crime Information Center http://www.acic.org/Registration/index.htm Paula Stitz, Sex Offender Registry Manager (501) 682-2222
California	Office of the Attorney General, Department of Justice http://www.meganslaw.ca.gov/ meganslaw@doj.ca.gov (916) 227-4974
Colorado	Colorado Bureau of Investigation http://sor.state.co.us/ sor@cdps.state.co.us (303) 239-4222
Connecticut	Connecticut Department of Public Safety http://www.ct.gov/dps/cwp/view.asp?a=2157&q=294474 sex.offender.registry@po.state.ct.us (860) 685-8060
Delaware	Delaware State Police, State Bureau of Identification http://sexoffender.dsp.delaware.gov/ soffender@state.de.us (302) 739-5882
District of Columbia	Metropolitan Police Department http://mpdc.dc.gov/mpdc/site/default.asp (follow "Sex Offender Registry" hyperlink under "Services") sexoffender.registry@dc.gov (202) 727-4407
Florida	Florida Department of Law Enforcement http://offender.fdle.state.fl.us/offender/homepage.do sexpred@fdle.state.fl.us (888) 357-7332 or (850) 410-8572
Georgia	Georgia Bureau of Investigation http://gbi.georgia.gov/ (follow "Services" hyperlink; then follow "Georgia Sex Offender Registry" hyperlink) Email unavailable (404) 270-8465
Hawaii	Department of the Attorney General http://sexoffenders.ehawaii.gov/sexoffender/welcome.html hcjdc@hcjdc.hawaii.gov (808) 587-3100

Idaho	Idaho State Police Criminal Identification http://www.isp.state.id.us/sor_id/ idsor@isp.idaho.gov (208) 884-7305
Illinois	Illinois State Police http://www.isp.state.il.us/sor/ E-mail unavailable (888) 414-7678 or (217) 785-0653
Indiana	Indiana Sheriffs; Indiana Department of Corrections http://www.insor.org/insasoweb/ svor@cji.in.gov Sheriffs: (800) 622-4779; Corrections: (317) 232-1232
Iowa	Iowa Department of Public Safety http://www.iowasexoffender.com/ E-mail available by following "Contact" hyperlink Phone not available. Must contact local Sheriff.
Kansas	Kansas Bureau of Investigation http://www.accesskansas.org/kbi/ro.shtml E-mail available by following "Contact Us" hyperlink (785) 296-2841
Kentucky	Kentucky State Police http://kspsor.state.ky.us/ E-mail unavailable (866) 564-5652
Louisiana	Louisiana State Police http://www.lsp.org/socpr/default.html SOCPR@dps.state.la.us (800) 858-0551
Maine	Maine State Police Department of Public Safety http://sor.informe.org/sor/ maine_SOR.help@maine.gov (207) 624-7270
Maryland	Maryland Department of Public Safety & Correctional Services http://www.dpscs.state.md.us/onlineservs/socem/default.shtml E-mail unavailable (410) 585-3600
Massachusetts	Executive Office of Public Safety and Security http://mass.gov/sorb/ eopsinfo@state.ma.us (978) 740-6400
Michigan	Michigan State Police http://www.mipsor.state.mi.us/ E-mail available by following "Contact MSP" hyperlink (517) 332-2521
Minnesota	Minnesota Department of Corrections http://www.doc.state.mn.us/level3/search.asp level3@co.doc.state.mn.us (866) 396-9953
Mississippi	Mississippi Department of Public Safety http://www.sor.mdps.state.ms.us/sorpublic/hpsor_search.aspx msor@mdps.state.ms.us (601) 987-1540
Missouri	Missouri State Highway Patrol http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/SOR/SORPage.html mosor@mshp.dps.mo.gov (888) 767-6747

Montana	Montana Department of Justice http://www.doj.mt.gov/svor/ dojsvor@mt.gov (406) 444-2497 or (406) 444-9479
Nebraska	Nebraska State Patrol http://www.nsp.state.ne.us/SOR/ sor@nsp.state.ne.us (402) 471-8647
Nevada	Nevada Department of Public Safety http://www.nvsexoffenders.gov/ sorhelp@dps.state.nv.us (775) 684-6262
New Hampshire	New Hampshire Division of State Police http://www.egov.nh.gov/nsor/ E-mail unavailable (603) 271-6344
New Jersey	New Jersey State Police http://www.nj.gov/njsp/info/reg_sexoffend.html E-mail available at: http://www.nj.gov/lps/formmail.htm (609) 882-2000 (General Contact Number)
New Mexico	New Mexico Department of Public Safety http://www.nmsexoffender.dps.state.nm.us/ dps.sorna@state.nm.us (505) 827-9297
New York	New York Division of Criminal Justice Services http://criminaljustice.state.ny.us/nsor/ infodcjs@dcjs.state.ny.us (518) 457-3167
North Carolina	North Carolina State Bureau of Investigation http://ncfindoffender.com/ E-mail available at: http://ncfindoffender.com/contact.aspx Phone not available. Must contact local Sheriff.
North Dakota	North Dakota Office of Attorney General http://www.sexoffender.nd.gov/ ndag@nd.gov (701) 328-2210
Ohio	Ohio Attorney General http://www.esorn.ag.state.oh.us/Secured/p1.aspx E-mail available at: http://www.ag4ohio.gov/Public/details.aspx?s=215 (877) 244-6446 (General Contact Number)
Oklahoma	Oklahoma Department of Corrections http://docapp8.doc.state.ok.us/pls/sors osor@doc.state.ok.us Phone not available. Must contact local Sheriff.
Oregon	Oregon State Police http://www.oregon.gov/OSP/SOR/faqs.shtml sexoffender.questions@state.or.us (503) 378-3725 ext. 44429
Pennsylvania	Pennsylvania State Police http://www.pameganslaw.state.pa.us/ E-mail unavailable (866) 771-3170
Rhode Island	Rhode Island Sex Offender Community Notification Unit http://www.paroleboard.ri.gov/sexoffender/agree.php E-mail unavailable (401) 462-0905

South Carolina	South Carolina Law Enforcement Division http://services.sled.sc.gov/sor/ E-mail unavailable (803) 896-1440
South Dakota	South Dakota Division of Criminal Investigation http://sor.sd.gov/ sdsor@state.sd.us (605) 773-3331 (Ask for SOR Compliance Coordinator)
Tennessee	Tennessee Bureau of Investigation http://www.ticic.state.tn.us/sorinternet/sosearch.aspx E-mail unavailable (888) 837-4170
Texas	Texas Department of Public Safety https://records.txdps.state.tx.us/DPS_WEB/SorNew/index.aspx AFIS_CJIS@txdps.state.tx.us (512) 424-2477
Utah	Utah Department of Corrections http://www.communitynotification.com/cap_main.php?office=54438 Registry@utah.gov (801) 495-7700
Vermont	Vermont Criminal Information Center http://www.dps.state.vt.us/cjs/s_registry.htm E-mail unavailable (802) 241-5400
Virginia	Virginia State Police http://sex-offender.vsp.virginia.gov/sor/ E-mail available by following "Comments" hyperlink (804) 674-2000 (General Contact Number)
Washington	Washington Association of Sheriffs and Police Chiefs http://ml.waspc.org/ E-mail unavailable (360) 534-2000
West Virginia	West Virginia State Police http://www.wvstatepolice.com/sexoff/ registry@wvsp.state.wv.us (304) 746-2133
Wisconsin	Wisconsin Department of Corrections http://offender.doc.state.wi.us/public/ bopadmin@doc.state.wi.us (800) 398-2403 or (608) 240-5830
Wyoming	Wyoming Division of Criminal Investigation http://wysors.dci.wyo.gov/ WySORS@dci.wyo.gov Phone not available. Must contact local Sheriff.

Appendix E

Sample Memorandum for Record¹⁷⁵

UNITED STATES)	
)	
v.)	
)	MEMORANDUM FOR RECORD
DOE, JOHN A.)	
PVT, U.S. Army)	
2d Brigade Combat Team)	
10th Mountain Division (Light Infantry))	
Fort Drum, New York 13602)	(DATE)

I, PVT John A. Doe, have discussed with my attorney, CPT Michael Smith, the requirement that I must register as a sex offender IAW DODI 1325.7 and AR 27-10 if my guilty plea is accepted or if I am found guilty in court. Additionally, I will most likely be required to register as a sex offender with the state and/or local government where I reside regardless of whether I remain in the Army or if I am separated. Registration as a sex offender is accessible by the public and I understand that I may encounter substantial prejudice from being classified as a sex offender. [OPTIONAL: After discussing these requirements and the potential adverse consequences of registering as a sex offender, I still believe that pleading guilty is in my best interest, and I do so voluntarily and without any coercion.]

(DATE)	JOHN A. DOE
	PVT, USA
	Accused

¹⁷⁵ This sample is just a guideline. You should modify the memorandum as necessary to suit your client's case and the offenses involved.

Government Contracting Disputes: It's Not All About the Money

Major Scott E. Hutmacher*

*Under certain circumstances, urgent circumstances, desperate circumstances, profanity provides a relief denied even to prayer.*¹

I. Introduction

Money isn't everything. This cliché is not only true in life; it is also true in the world of government contract appeals. Nonmonetary remedies are available and viable alternatives to monetary relief. Parties in the government contracting process, at some time or another, find themselves in a dispute and one party wants a specific type of relief . . . this is disputes 101. The relief sought in most contract disputes is monetary.² However, monetary relief does not always make the allegedly wronged party "whole." Sometimes, what the party seeks is nonmonetary relief.

This article serves as a practical guide to contract litigators. The article first identifies the forums available for disputes in government contracting and the particular authorities creating the forum. The article then outlines the nonmonetary remedies available in those forums. The article goes on to identify and address the limitations of nonmonetary relief available to the forums. Finally, the article provides litigators the ability to understand what contractors may ask for and some instances of what they received.

*"What We Have Here Is a Failure to Communicate"*³

Litigation is expensive for all parties to a dispute; this is clear from the language in the Federal Acquisition Regulation (FAR) requiring, as a policy, that contracting officers attempt to settle claims through mutual negotiation.⁴ Yet, not all disputes find resolution with the contracting officer or other available dispute resolution proceedings. Congress created the Contract Disputes Act of 1978 (CDA) to deal with contract disputes in a streamlined and efficient manner.⁵ The next section provides a brief background of the two forums available for disputes.

II. Forums

The CDA includes a choice of forum clause allowing parties to raise appeals in two forums: the Boards of Contract Appeals (BCAs) and the Court of Federal Claims (COFC).⁶ The CDA mandates that the BCAs provide a less expensive and less formal forum for parties of government contracts to litigate their disputes.⁷ The boards possess the authority to grant any relief that would be available to a party asserting a claim in the COFC.⁸ Each government agency has its own board, e.g., the BCA for the Armed Services (ASBCA), for the U.S. Postal Service, for the Postal Rate Commission, for the Tennessee

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¹ ALBERT BIGELOW PAINE, MARK TWAIN, A BIOGRAPHY, <http://paine.classicauthors.net/twainbio/twainbio39.html> (last visited July 5, 2009).

² Michael J. Schaengold & Robert S. Brams, *Choice of Forum Contract Claims: Court vs. Board/Edition II*, WL Briefing Papers No. 06-6, May 2006, at 10, WL 06-6 BRPAPERS 1.

³ COOL HAND LUKE (Warner Bros. 1967) (stated by the captain of Road Prison 36).

⁴ GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 33.204 (Jan. 2009) [hereinafter FAR].

⁵ Thomas C. Wheeler, *Let's Make the Choice of Forum Meaningful*, 28 PUB. CONT. L.J. 655, 655 (1999).

⁶ *Id.*

⁷ Contract Disputes Act of 1978, 41 U.S.C. § 607(e) (2006).

⁸ *Id.* § 607(d).

Valley Authority, and the Civilian BCAs.⁹ These boards have jurisdiction to hear any claim that arises from a decision of an agency's contracting officer.¹⁰ The Civilian BCA has jurisdiction to hear claims arising from a decision of a contracting officer from the executive agencies who do not have their own named boards.¹¹ Although BCAs may grant any relief available to a party asserting a claim in the COFC,¹² the intent of Congress was for the BCAs to hear the routine matters and leave the more difficult issues for the COFC.¹³

The COFC has jurisdiction to hear claims against the United States based on the Constitution, acts of Congress, regulation of an executive department, claims arising from alleged express or implied contracts with the federal government, or claims dealing with liquidated and unliquidated damages in non-tort cases.¹⁴ Initially, the COFC did not possess jurisdiction to rule on nonmonetary claims.¹⁵ This changed when Congress passed the Federal Courts Administration Act of 1992.¹⁶ This Act authorized the COFC to "render judgment" on disputes with contractors "arising under section 10(a)(1) of the [CDA]."¹⁷ These disputes included termination of a contract, rights in tangible or intangible property, adherence to cost accounting standards, "and other nonmonetary disputes on which a decision of the contracting officer has been issued" under the CDA.¹⁸ The next section addresses the particular nonmonetary remedies available to both the BCAs and the COFC which include reformation,¹⁹ rescission,²⁰ declaring a contract void ab initio,²¹ and declaratory relief.²²

III. Nonmonetary Remedies

A. Reformation

"The general rule is that, to be binding, a contract must be 'sufficiently definite to permit determination of breach and remedies.'"²³ Additionally, the provisions of Federal Acquisition Regulation part 33.205 provide that "a proven request for contract 'rescission or reformation' based on legal entitlement" constitutes a claim for purposes of the CDA.²⁴ A board or court can reform a contract when there has been a unilateral mistake, mutual mistake, or when a contract violates a statute or agency regulation. Keep in mind that "[r]eformation is an extraordinary remedy. Its purpose is not to make a new agreement between the parties, but to establish the true existing one."²⁵ The following sections account for three scenarios in which reformation is available: (1) unilateral mistake with reliance upon misrepresentation, (2) mutual mistake, and (3) contracts written in violation of a statute or regulation.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Wheeler, *supra* note 5, at 655.

¹⁴ Total Med. Mgmt., Inc. v. United States, 104 F.3d 1314, 1319 (Fed. Cir. 1997).

¹⁵ Ralph Nash & John Cibinic, *Nonmonetary Claims: Jurisdiction to Exercise Discretion*, 11 NASH & CIBINIC REP. ¶ 57, at 2 (Nov. 1999).

¹⁶ *Id.*; Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4516.

¹⁷ Nash & Cibinic, *supra* note 15, at 2.

¹⁸ *Id.*

¹⁹ BLACK'S LAW DICTIONARY 1285 (7th ed. 1999) ("3. an equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties, usually to correct fraud or mutual mistake"). The actual intended agreement usually must be established by clear and convincing evidence. *Id.*

²⁰ Rescission is a party's unilateral unmaking of a contract for legally sufficient reason, such as the other party's material breach. *Id.* at 1308. Rescission is generally available as a remedy or defense for a nondefaulting party and restores the parties to their pre-contractual positions. *Id.* Equitable rescission is a rescission decreed by a court of equity. *Id.*

²¹ A contract is void ab initio. *Id.* at 1568. Null from the beginning, as from the first moment when a contract is entered into. *Id.* A contract is void ab initio if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract. *Id.*

²² Schaengold & Brams, *supra* note 2, at 10.

²³ Total Med. Mgmt., Inc. v. United States, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (quoting Modern Sys. Tech. Corp. v. United States, 979 F.2d 200, 202 (Fed. Cir. 1992)).

²⁴ Thompson Numerical, Inc., ASBCA No. 41327, 91-3 BCA ¶ 24,169, at 3.

²⁵ Pac. Coast Molybdenum Co., AGBCA No. 84-162-1, 89-2 BCA ¶ 21,755, at 7.

1. Unilateral Mistake and Reliance upon Misrepresentation

A recent case out of the General Services Administration (GSA) BCA dealt with an alleged unilateral mistake on the part of the government benefiting the contractor. In *Appeal of Parcel 49 C Ltd. Partnership*,²⁶ a dispute existed concerning the base year the parties would use to calculate tax assessment for the property leased by GSA from the partnership.²⁷ Parcel asserted that the parties agreed that the base year would be 2000, whereas GSA asserted that the agreed upon year was 2003.²⁸ The contracting officer submitted a memorandum to Parcel in which he erroneously calculated the government's tax liability on year 2000's assessment.²⁹ Parcel responded agreeing that the calculations were correct.³⁰ The contracting officer later realized his mistake and declined to pay Parcel's claim for the increased tax costs derived from the incorrect base year.³¹ Parcel argued that the written dialogue between Parcel and the contracting officer amounted to a modification of the contract and was therefore entitled to the increased amount.³²

The board addressed the issue by applying the *Restatement (Second) of Contracts*, section 155.³³ The board determined that even if the supplemental lease agreements were "clear and unambiguous," the board should look to the parties' actions that led to the drafting of the supplemental lease agreements citing that the comments in the restatement maintain that "the parole evidence rule does not preclude . . . a showing of mistake."³⁴ In applying the *Restatement*, the board found that reformation regarding a contract officer's mistake as to interpreting the contract, should be applied only in cases of evidenced bad faith³⁵ and a failure to act in accordance with reasonable standards of fair dealing.³⁶ The board cited to the *Restatement* affirming that, "[r]eformation is not precluded by the mere fact that the party who seeks it failed to exercise reasonable care in reading the writing."³⁷ When one party has been mistaken and the other has misrepresented circumstances surrounding the mistake, reformation is appropriate where the misled party relied on the misrepresentation.³⁸ Therefore, when one party misrepresents,³⁹ without regard to intent, the party who misrepresented must correct the mistake and cannot hold the mistaken party to the product of their mistake.⁴⁰ The board found that the contracting officer had acted in good faith and in accordance with reasonable standards of fair dealing by waiting until completion of the investigation into the base year issue.⁴¹ The board also ruled that the contracting officer relied upon appellant's misrepresentation concerning the tax base year and the reliance would cause excessive damage to GSA if the contract were not reformed.⁴² Therefore, misrepresentation of the original intent of the parties by one party combined with a unilateral mistake by the other party is not the basis for reformation of a contract.

²⁶ GSBCA No. 16447, 05-2 BCA ¶ 33,013.

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ *Id.* at 5.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 6.

³³ *Id.* at 7.

³⁴ *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 157 and cmt. a (1981)).

³⁵ BLACK'S LAW DICTIONARY 134 (7th ed. 1999) ("1. Dishonesty of belief or purpose."). An evasion of the spirit of the bargain. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d.

³⁶ *Parcel 49 C Ltd. P'ship*, 05-2 BCA ¶ 33,013, at 7.

³⁷ *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 157 and cmt. a).

³⁸ *Id.* at 8 (citing *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665-66 (Fed. Cir. 1992)).

³⁹ *But see* *Edwards v. United States*, 19 Cl. Ct. 663, 670 (1990) (regarding claims of misrepresentation against the Government). The court in *Edwards* determined that in order for a misrepresentation claim to succeed the Government must have made a representation that was erroneous, the representation must have been material, that the representation operated as an inducement to entering the contract, that the plaintiff had a legal right to rely on its accuracy, and that the plaintiff relied on the representation to their detriment. *Id.*

⁴⁰ *Parcel 49 C Ltd. P'ship*, 2005-2 BCA ¶ 33,013, at 8 (citing RESTATEMENT (SECOND) OF CONTRACTS § 172)).

⁴¹ *Id.*

⁴² *Id.*

2. Mutual Mistake

In *Pacific Coast Molybdenum Co.*,⁴³ Pacific Coast sought reformation of the contract alleging mutual mistake as to the value of lumber.⁴⁴ Pacific Coast signed the contract attaching a cover letter referencing prior conversations conducted with the Forest Service in which the parties discussed that the Forest Service may want to appeal the rates concerning the value of the lumber within thirty days.⁴⁵ Pacific Coast claimed that the attached cover sheet created the misunderstanding of the parties that led to the mutual mistake within the contract.⁴⁶ The board held that reformation due to mutual mistake requires a mistake occurring in the writing representing the intent of the parties and not any conversations that occurred in its making.⁴⁷ The fact that the parties would have agreed differently, if they would have known the facts at the time the contract was drafted, does not create an appropriate opportunity or need for reformation.⁴⁸

Pacific Coast further claimed that boards have reformed in past cases when the contract “does not reflect antecedent expressions of the parties at variance with the writing.”⁴⁹ The board agreed that reformation has been used in cases where neither party assumed risk of error within the contract but distinguished those cases from Pacific Coast’s by stating the standard in those cases: specifically, appellants are required to prove that the respondent would have been willing to agree to the reformed terms at the time of the signing, and that the appellant would have been willing to be bound by those same terms at the time of the signing.⁵⁰ Yet another opportunity for reformation for a party arises when a contract violates statutes or regulations.

3. Contract Written in Violation of Statute or Regulation

Contract reformation is also available for contractors who entered a contract with the Government that was in violation of a statute or regulation.⁵¹ Furthermore, if the legislature or agency enacted the statute or regulation to protect contractors, the victimized contractor is not subject to the doctrine of estoppel from filing a claim simply because he performed the contract or failed to protest.⁵² It makes no difference that a contractor files a claim post-award or even post-performance; the remedy is still available.⁵³

Although reformation is explicitly available for contracts violating statutes or regulations, such violations are not an automatic right to the remedy. In *Labarge Products v. West*, the Government violated FAR part 15.610(d) (1984)⁵⁴ by

⁴³ AGBCA No. 84-162-1, 89-2 BCA ¶ 21,755.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 7 (quoting *Lea Co.*, GSBCA No. 5697, 81-2 BCA ¶ 15,207).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Labarge Prods., Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995).

⁵³ *Id.*

⁵⁴ 48 C.F.R. § 15.610(d), (e) (1984).

(d) The contracting officer and other Government personnel involved [in negotiations] shall not engage in technical leveling.

(e) The following conduct may constitute prohibited conduct . . .

(2) Auction techniques, such as—

(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(ii) Advising an offeror of its price standing relative to another offeror . . .

(iii) Otherwise furnishing information about other offerors’ prices.

Id.

entering into auction-like negotiations with Labarge Products' competitors, creating the appearance of trying to leverage the bid process away from them.⁵⁵ Labarge Products was the lowest bidder for a contract to supply pipe couplings to the U.S. Army.⁵⁶ The Army did not immediately award the contract because it wanted to access drawings and production tooling.⁵⁷ The Army subsequently disclosed Labarge Products' bid information to a competing bidder without their knowledge or approval.⁵⁸ The Army then made a request for "best and final offers from the bidders."⁵⁹ Labarge Products realized that the Army disclosed its bid and therefore committed to a lower bid in attempt to secure its "lowest" bid status.⁶⁰ Labarge Products had the lowest bid and the contracting officer awarded them the contract.⁶¹ Labarge Products performed the contract and subsequently submitted a claim to the contracting officer requesting reformation of the contract to the original bid price in order to compensate the company for the unfair advantage given to its competitors during the bid process.⁶² The Army declined the claim forcing Labarge Products to appeal to the ASBCA.⁶³ The ASBCA denied the appeal and Labarge Products appealed to the COFC.

The COFC ruled that the Government has the opportunity to show that the purpose was rational, reasonable, and unrelated to the violation.⁶⁴ In *Labarge Products*, the court found that the Government adequately made a showing that the request for "best and final offers" was made with the intent of ensuring the quality of the product and not for awarding to another competitor and therefore their practice was rational, reasonable, and unrelated to the violation.⁶⁵ Similarly, in *American Telephone and Telegraph Co. v. United States* the COFC looked to the ruling in *United States v. Mississippi Valley Generating Co.*, wherein "the Court explained that when a statute 'does not specifically provide for the invalidation of contracts which are made in violation of [its provisions]' the court shall inquire 'whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in [the statute].'"⁶⁶ Thus, the courts must consider the underlying policy of the statute when the statute is silent as to the remedy for noncompliance.⁶⁷

B. Rescission—Holding the Government to a High Standard

A request for rescission "implies some reason existing before the agreement was made, or implies that, because of some mistake, the agreement is different from that which was intended."⁶⁸ Therefore, rescission is available in matters of mistake and fraud.⁶⁹ Rescission places the parties in the position they were in prior to the formulation of any agreement.⁷⁰ Rescission is a remedy acknowledged by the CDA that allows contractors the opportunity to exit the contract when they have made an

⁵⁵ *Labarge Prods., Inc.*, 46 F.3d at 1551.

⁵⁶ *Id.* at 1549.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1550.

⁶³ *Id.* at 1549.

⁶⁴ *Id.* at 1555.

⁶⁵ *Id.* at 1556; *see also* *Logicon, Inc. v. United States*, 22 Cl. Ct. 776 (1991).

⁶⁶ 177 F.3d 1368, 1374 (Fed. Cir. 1999) (quoting *Miss. Valley Generating Co.*, 364 U.S. 520 (1961)).

⁶⁷ *Id.*

⁶⁸ R. PRESTON SHEALEY, *THE LAW OF GOVERNMENT CONTRACTS* [FEDERAL CONTRACTS] 214 (3d ed. 1938).

⁶⁹ *Id.* at 213.

⁷⁰ *Id.*

error at the time of drafting.⁷¹ Different from reformation, in matters of unilateral mistakes where neither inducement nor misrepresentation existed, rescission prevents parties from unfairly benefiting from their own mistake.⁷²

Boards have utilized rescission when contractors have submitted bids containing material mistakes ultimately leading to those contractors winning the award. In *Appeal of Don Simpson*,⁷³ Simpson submitted a bid on a tree thinning contract that was forty percent lower than the next closest bidder.⁷⁴ Simpson was the lowest responsive, responsible bidder, and therefore the contracting officer awarded him the contract.⁷⁵ Simpson commenced performance by employing another cutter and then, realizing he had miscalculated his bid, informed the contracting officer that “he had misjudged the area and wanted out of the contract.”⁷⁶ The contracting officer ultimately terminated Simpson for default and Simpson appealed.⁷⁷ The board found that the contracting officer did not properly attempt to verify the bid in accordance with the procedures of FAR 14.406-1⁷⁸ and therefore shared “mutual fault” in the failure of the contract and granted the rescission.⁷⁹ The board ruled that although “an erroneous bid based upon a mistake of judgment does not entitle the contractor to reformation of its contract, it is clear that rescission may be granted, at least for some errors in judgment where the Government has . . . failed in its bid verification responsibilities.”⁸⁰ Therefore, tribunals require the Government to act reasonably in its interpretation of the FAR requirements and will hold the Government partially at fault when it fails in its duties.

Yet another example of a board finding fault on the part of the Government and ruling that rescission was proper was in *Appeal of Raco Services, Inc.*⁸¹ Raco was the lowest bidder for a paving contract for the National Park Service.⁸² Prior to the contract being awarded, Raco informed the contracting officer that it was facing foreclosure and would not be able to perform the awarded contract and subsequently requested that its name be removed from the bid process.⁸³ The contracting officer disregarded Raco’s request and relied instead on a Dun & Bradstreet⁸⁴ report which represented Raco as a responsible bidder.⁸⁵ Without further inquiry, the contracting officer awarded the contract to Raco.⁸⁶ Raco failed to perform and the contracting officer terminated the contract for default.⁸⁷ The board held that the contracting officer improperly awarded the contract to Raco on the theory that contracting officers have an affirmative duty⁸⁸ to verify the responsibility of bidders.⁸⁹

⁷¹ In *Appeal of Thompson Numerical Inc.*, the board explained that a party’s belief of entitlement to rescission to “correct or mitigate” the consequences of a mistake “shall be treated as a claim under the [Contract Disputes] Act. ASBCA No. 41327, 91-3 BCA ¶ 24,169, at 3. Therefore, a clear showing of a legally proper request for relief in the form of rescission “must be considered a claim under the CDA.” *Id.*

⁷² SHEALEY, *supra* note 68, at 213.

⁷³ IBCA No. 2058, 86-2 BCA ¶ 18,768.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ FAR, *supra* note 4, pt. 14.406-1. After the opening of bids, contracting officers shall examine all bids for mistakes. *Id.* In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. *Id.* If the bidder alleges a mistake, the matter shall be processed in accordance with section 14.406. Such actions shall be taken before award. *Id.*

⁷⁹ Don Simpson, 86-2 BCA ¶ 18,768, at 4.

⁸⁰ *Id.* (citations omitted).

⁸¹ IBCA No. 2260, 87-1 BCA ¶ 19,653.

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ Dun & Bradstreet is a database service that compiles reports on businesses to allow potential customers to evaluate their business relationships. Dunn & Bradstreet Reports, <http://support.dialog.com/searchaids/dialog/dnb.shtml> (last visited July 5, 2009). Dun & Bradstreet business reports provide a complete view of current and future financial performances for hundreds of thousands of U.S. businesses. *Id.* These reports contain vital information that aid customers in reducing credit risk. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Raco Servs., Inc.*, 87-1 BCA ¶ 19,653, at 2.

⁸⁸ FAR, *supra* note 4, pt 9.103(b). No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. *Id.* In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. *Id.*

Here the board ruled that they view construction or repair contracts similar to supply contracts “where a contractor erroneously or through bad judgment submitted what was clearly too low a bid.”⁹⁰ Therefore, not only is rescission available to the boards, they will apply the theory to prevent a seemingly harsh result to the contractor. When a board or court finds that a contract cannot or should not be reformed or rescinded, they have the authority to exercise the third form of nonmonetary relief discussed in this article: declaring the contract void ab initio.

C. Void Ab Initio, Nullity, Invalid

1. Automatic When Violating a Statute?

In *American Telephone and Telegraph Co. v. United States*,⁹¹ the Court of Appeals reviewed the certified question resulting from a decision by the COFC of whether a violation of a federal statute made a contract void ab initio.⁹² The court pointed to precedent and legislative intent in determining that an agency’s noncompliance with a federal statute does not logically flow to the conclusion that a contract should be void ab initio.⁹³ When a contract has been fully performed and the issue of noncompliance of a federal statute is raised, courts have “variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void ab initio.”⁹⁴ The courts also must look to performance when weighing whether to invalidate a contract.⁹⁵ In this case, the court recognized the severity of the remedy and stated “the invalidation of a contract after it has been fully performed is not favored but leaves open the use of void ab initio for those contracts that do not reach substantial performance.”⁹⁶ Yet, in cases where there existed criminal conduct there is much less hesitation as indicated by the next case, *Appeal of Erwin Pfister*.⁹⁷

2. Intolerance for Criminal Conduct

In *Erwin Pfister Gen.-Bauunternehmen*, the Government moved to dismiss the case claiming that the two contracts at issue were void ab initio due to their creation by bribery in the inducement.⁹⁸ The contracts dealt with the repair of bathrooms and barracks in Germany.⁹⁹ An investigation into the dealing of the contracting officer and the contractor found that the contracting officer accepted bribes from the contractor to ensure that the contracts were awarded to the contractor.¹⁰⁰ The contractor’s company claimed that the bribes paid and received ultimately had no bearing on the award process since the contractor’s bid was the lowest, and would result in the awarding of the contracts to the contractor’s company regardless of the criminal conduct.¹⁰¹

The board found that the conduct of the contracting officer prevented fair and open competition by failing to inform or post solicitations in the manner prescribed by the rules of the FAR and therefore corrupted the entire award process for those two contracts.¹⁰² The board found that due to the corruption of the process there was no way to ratify and remove the taint of

⁸⁹ *Raco Servs., Inc.*, 87-1 BCA ¶ 19,653, at 3.

⁹⁰ *Id.*

⁹¹ 177 F.3d 1368, 1374 (Fed. Cir. 1999).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1376.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1375.

⁹⁷ ASBCA No. 45570, 2001-2 BCA ¶ 31,431.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

the criminal conduct and therefore ruled that the contracts were, in their purest form, void ab initio.¹⁰³ The board stated that “due to the primacy of the public interest in preserving the integrity of the Federal procurement process as well as the overriding concern for insulating the public from corruption” the harsh but just remedy was required.¹⁰⁴ A remedy many times less harsh in enforcement upon the parties, but equally powerful in its effect, is declaratory relief.

D. Declaratory Relief

The BCAs and the COFC have authority to grant declaratory relief to determine the rights of the parties in accordance with the terms of the contract.¹⁰⁵ In *Newport News Shipbuilding and Dry Dock Co. v. United States*, the court held that an appeal requesting an interpretation of the obligations created by the contract and its modifications is in the jurisdictional purview of the boards and they have authority to grant declaratory relief.¹⁰⁶ Because the authority to grant declaratory relief was not given as a means for the tribunals to “micromanage” or involve themselves in the daily activities of contract management, a request for an interpretation by the tribunals does not automatically give a party access.¹⁰⁷ In order for a tribunal to decide to hear a case it must determine the following: (1) is declaratory relief appropriate?; (2) is there a “live dispute?;”¹⁰⁸ (3) will the requested relief resolve the dispute?; and (4) are remedies available to adequately protect the interests of the parties?¹⁰⁹ It is crucial that a request for declaratory judgment be a request for the determination of the rights and obligations of the parties and not a monetary claim “clothed” as a request for a contract interpretation.¹¹⁰ Although the CDA grants authority to the BCAs to grant any relief that would be available to a litigant asserting a contract claim in the COFC¹¹¹ this authority is not absolute, as explained in the next section.

IV. Limitations of the BCAs and COFC

The CDA does not empower BCAs or COFC with the authority to grant equitable relief to parties challenging agency acquisition decisions.¹¹² The boards have very limited authority to order contracting officers to act or refrain from acting. Specifically, the CDA allows contractors “to request the tribunal concerned to direct a contracting officer to issue a [final] decision in a specified period of time . . . in the event of undue delay on the part of the contracting officer.”¹¹³ The authority to order a contracting officer to submit a final decision is as far as their power reaches. Compliance in a purely temporal matter does not extend to the substance of the contractor’s decision. These tribunals have consistently maintained that they lack the authority to grant specific performance, issue injunctive relief, or issue orders in the form of mandamus.¹¹⁴

Often contractors request boards to order contracting officers to effect specific results, or in the alternative, to refrain from acting in a particular manner. Appellants have routinely attempted to get boards to expand their reach into ordering specific performance, injunctive relief, and various forms of mandamus only to have the boards recite the same language: boards lack the authority to grant equitable relief in such forms. A representation of these cases follows.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993).

¹⁰⁶ 44 Fed. Cl. 613, 616 (Fed. Cir. 1999).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

¹¹⁰ *Rohr Inc.*, ASBCA No.44193, 93-2 BCA ¶ 25,871, at 4 (citing *Shirley Constr. Corp.*, ASBCA No. 35868, 89-2 BCA ¶ 21,590).

¹¹¹ *Wheeler*, *supra* note 5, at 655.

¹¹² *Statistica, Inc.*, ASBCA No. 4416, 92-3 BCA ¶ 25,095, at 3.

¹¹³ 41 U.S.C. § 605(c)(4) (2006).

¹¹⁴ *Sabbia Corp.*, VABCA No. 5557, 99-2 BCA ¶ 30,394, at 9.

A. Injunctive Relief

1. *Government Exercise My Option!*

In *Appeal of Dixon Pest Control, Inc.*,¹¹⁵ the Government contracted Dixon to provide pest control services.¹¹⁶ The Government chose not to exercise its options and to conduct the services in-house.¹¹⁷ Dixon argued that the Government failed to abide by the procedures found in Office of Management and Budget Circular A-76 and therefore failed to abide by the spirit of the policy guidance.¹¹⁸ Dixon claimed that the Government's failure to exercise the option harmed it and requested reinstatement of the contract.¹¹⁹ The board ruled that it had neither the authority to grant injunctive relief nor specific performance, but as always, the board had the authority to determine the rights of the parties defined in the contract.¹²⁰

2. *They Must Negotiate!*

In *Appeal of Rohr, Inc.*,¹²¹ Rohr brought a complaint before the board stemming from the Government's contractual agreement to enter into negotiations in determining a price concerning a modification in dispute.¹²² Rohr requested the board make a declaration that in accordance with the contract that the contracting officer's decision to invalidate the contract was void and that the contracting officer must enter into negotiations to attempt to resolve the dispute.¹²³ In keeping with previous rulings, the board ruled that it was in no position to order the contracting officer to abide by such a provision of the contract since it did not possess the authority to order injunctive relief or specific performance.¹²⁴ The board dismissed the case.¹²⁵

3. *Just Modify the Contract*

In *Appeal of Statistica, Inc.*,¹²⁶ Statistica requested that the board order the contracting officer to execute a modification to a contract which would bind the Government to two new categories within the contract.¹²⁷ The appeal concerned an information technology contract where the Government had a requirement for two additional positions and the contracting officer requested the incumbent contractor, Statistica, to submit a price proposal.¹²⁸ The contracting officer prepared a modification to the contract to incorporate the two positions but did not issue the modification as the addition of the two positions was determined to be beyond the scope of the current contract; Statistica appealed the decision.¹²⁹ Once again, the

¹¹⁵ ASBCA No. 41042, 91-1 BCA ¶ 23,640.

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 3 (citing FED. OFFICE OF MGMT. AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (May 29, 2003)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ ASBCA No. 44193, 93-2 BCA ¶ 25,871.

¹²² *Id.* at 2.

¹²³ *Id.* at 4.

¹²⁴ *Id.* at 5–6.

¹²⁵ *Id.*

¹²⁶ ASBCA No. 4416, 92-3 BCA ¶ 25,095.

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 2–3.

board declared that the prayer for injunctive relief was beyond its authority.¹³⁰ The board stated it lacked the authority to order a contracting officer to abide or accept a modification of a contractor.¹³¹

B. Specific Performance

The contractor in *Appeal of Sabbia Corp.* requested both specific performance and injunctive relief. Sabbia won a service contract to paint the Edward Hines Jr. Veterans Affairs (VA) Medical Center for one base year with three one-year option periods.¹³² Sabbia performed the first contract and the contracting officer exercised the first option year.¹³³ After a request by Sabbia to expand the contract to other VA facilities in the Wisconsin and Chicago area, the contracting officer reviewed the contract finding, amongst other issues, that the contract was improperly designated a service contract and the wrong-year funds were used for the ongoing projects.¹³⁴ The contracting officer decided not to expand the contract and ordered the Chief Engineer to cease issuing task orders for the contract.¹³⁵ Sabbia requested the following: (1) declaratory relief by declaring the conduct of Veteran's Affairs "violative" of the contract; (2) an order to force the VA to modify the contract extending the terms for an additional three years; (3) an order extending the contract to include all facilities in the control of the Great Lakes Health Care System Acquisition Center; and (4) an order requiring VA to appoint a new contracting officer.¹³⁶ The board, in following the long list of previous rulings, ruled that they had no authority to issue an order to require a contracting officer to "award task orders" or grant relief in the nature of mandamus.¹³⁷

C. Mandamus¹³⁸ Relief

1. *You Can't Let Me Go!*

In *Appeal of Maria Manges*,¹³⁹ the Government did not renew Manges's teaching contract at West Point Elementary School.¹⁴⁰ The contract was for one-year and renewable "at the option of the government."¹⁴¹ Manges claimed that the failure to renew the contract was a wrongful discharge in violation of a collective bargaining agreement between the school's teachers association and the U.S. Military Academy.¹⁴² Among other requests, Manges requested relief in the form of reinstatement and removal of all references to any unsatisfactory performance of her contract from the school's records.¹⁴³ The board stated that Manges's request for relief equated to a prayer for injunctive relief not available to the board under the CDA and therefore no remedy was available for the relief requested.¹⁴⁴

¹³⁰ *Id.* at 3.

¹³¹ *Id.*

¹³² *Id.* at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1.

¹³⁷ *Id.* at 9.

¹³⁸ "A writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly." BLACK'S LAW DICTIONARY 973 (7th ed. 1999).

¹³⁹ ASBCA No. 25350, 81-2 BCA ¶ 15,398.

¹⁴⁰ *Id.* at 6.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 7.

2. *Defend Yourself!*

Similarly, in *Appeal of Raymond Kaiser Engineers, Inc./Kaiser Steel Corp., A Joint Venture*,¹⁴⁵ the board received a request from the Appellant, asking that the board direct the contracting officer to issue an order requiring the Government to: defend against a state court action involving Appellant and indemnify Appellant for costs incurred in connection with the state court's action.¹⁴⁶ The board responded by stating that such a request for mandamus exceeded the scope of the board's authority and explained that contract law procedures existed for those seeking reimbursement of costs incurred relating to state court actions.¹⁴⁷ The board further explained that such a direction to a contracting officer exceeded the authority of the board since the board possesses no power to "grant injunctive relief, specific performance or relief in the nature of a mandamus."¹⁴⁸

VI. Conclusion

Although the majority of cases heard by the BCAs and the COFC are requests for monetary relief, nonmonetary remedies such as reformation, rescission, voiding, and declaratory judgments provide parties a clear and concrete resolution to disputes. The authority of these tribunals to hear requests for nonmonetary relief is limited in scope and applied with specificity. The remedies discussed above provide parties and tribunals alternatives to monetary relief allowing the contracting process to continue with as little interruption as possible. Moreover, the authority to grant such remedies aids the tribunals in maintaining judicial efficiency and economy and provides relief to complaining parties at the lowest level. Nonmonetary relief is not only available, but it is also a unique tool for tribunals and parties to forgo pursuing monetary remedies while keeping the government contracting process fluid and moving.

¹⁴⁵ ASBCA No. 34133, 87-3 BCA ¶ 20,140.

¹⁴⁶ *Id.* at 1.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*

“Defending Those Who Defend America”:¹ Avoiding Conflicts of Interest in Order to Provide an Ethical and Effective Defense

Captain Aimee M. Bateman²

Introduction

The U.S. Army’s Judge Advocate General’s Corps (JAG Corps) is this country’s oldest, and one of the largest, law firms.³ Despite its rich history, the military justice system was very slow in evolving the defense function of the JAG Corps into an independent entity. Although criticism about the lack of a separate defense service dates back to the end of World War II,⁴ the U.S. Army Trial Defense Services (TDS) was not established until 1980.⁵ The Department of the Army (DA) created TDS in order to avoid the inherent conflict of interest, or at least the appearance of conflict, involved with having defense lawyers evaluated and influenced by lawyers and commanders who were prosecuting the Soldiers they were defending.⁶ This new organization, made up solely of military defense counsel, was intended “to improve the efficiency and professionalism of counsel through direct supervision and evaluation within the defense chain.”⁷

However, the establishment of TDS did not eliminate the problem of conflicts of interest in the defense of military defendants. Because of the small military community most defense lawyers work in,⁸ the limited number of lawyers assigned to defense,⁹ and the TDS mission to “provide a full-range of defense legal services to Soldiers serving in numerous commands worldwide,”¹⁰ avoiding conflicts of interest is one of the most difficult ethical issues TDS lawyers face on a daily basis.

This article discusses the ethical rules Army lawyers must follow to avoid conflicts of interest. It presents practical guidance and advice for implementing these guidelines and providing military defendants with an ethical, effective, and conflict-free defense.

The Army Rules

The Army Rules of Professional Conduct (Army Rules) are also a new addition to the military justice system. Although it has had legal professionals in its ranks for over 230 years, the Army has had a professional code of conduct, specific to military lawyering, for less than twenty-two years.¹¹

¹ TDS, Fort Carson Field Office, <http://www.carson.army.mil/LEGAL/TDS/Jag/TDS.htm> (last visited July 6, 2009) (motto of the U.S. Army Trial Defense Services).

² Trial Counsel, 1st Brigade Combat Team, 10th Mountain Division (Light Infantry), Fort Drum, N.Y.

³ GoArmy.com, Army JAG Corps, History, <https://www.goarmy.com/jag/history.jsp> (last visited July 6, 2009) (“General George Washington founded the U.S. Army JAG Corps on July 29th, 1775. . . . [It is] one of our country’s largest law firms, with more than 3,400 full- and part-time Attorneys.”).

⁴ Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 6–7 (1983).

⁵ *Id.* at 45.

⁶ *Fact Sheet: US Army Trial Defense Services*, ARMY LAW., Jan. 1981, at 27, available at http://www.loc.gov/rr/frd/Military_Law/pdf/01-1981.pdf.

⁷ *Id.*

⁸ Captain Nancy Higgins, *Avoiding Conflicts of Interest in the Trial Defense Practice*, ARMY LAW., June 1990, at 24, 28.

⁹ See U.S. Army Trial Defense Services (USATDS)–HQ, History, [https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/\(JAGCNetDocID\)/T+D+S+HISTORY?OpenDocument](https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/(JAGCNetDocID)/T+D+S+HISTORY?OpenDocument) (last visited Aug. 7, 2009) [hereinafter TDS Mission] (stating that TDS has approximately 130 Active Component officers and about 212 Reserve Component officers.).

¹⁰ U.S. Army Trial Defense Services (USATDS)–HQ–TDS Mission, <https://www.jagcnet.army.mil/TDS> (follow “TDS Mission” hyperlink) (last visited July 6, 2009).

¹¹ C. Peter Dungan, *Avoiding “Catch 22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31, 38 (2005/2006) (citing Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 2 (1989)).

Comparison to the Model Rules

In general, the Army Rules follow relatively closely with the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).¹² For instance, Army Rules 1.7 through 1.10 govern conflict of interest issues,¹³ as do Model Rules 1.7 through 1.10.¹⁴ However, there are significant changes to the text and comments of some of the Army Rules. Among the reasons for such changes are (1) an ABA Rule's inapplicability to Army practice; (2) the need for guidance tailored to Army practice; and (3) differences in approach to the resolution of specific ethical issues for Army lawyers.¹⁵

No Imputed Disqualifications

Army Rule 1.10 deals with conflicts and deviates sharply from the corresponding Model Rule 1.10.¹⁶ As mentioned above, military lawyers operate in a very small community. Most of the lawyers in TDS stay in the organization for approximately two years or less and their previous job may have been as a trial counsel in the local military justice section.¹⁷ Therefore, Army Rule 1.10 explicitly contradicts Model Rule 1.10, stating "Army lawyers working in the same Army law office are *not* automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2."¹⁸

As the comment to Army Rule 1.10 explains, unlike most law firms in America, defense attorneys who share an office or clerical assistance, even with someone who is representing a client with competing interests, are not prohibited from representing their respective clients (such as co-accused at a court-martial).¹⁹ Rather than holding the imputed disqualification rule as controlling, the Army requires a "functional analysis of the facts" in any given situation to determine if attorney-client confidentiality or independence of judgment will be compromised before disqualifying an attorney.²⁰

Clarification Through the Comments to the Army Rules

Despite the sharp deviation from Model Rule 1.10, Army Rules 1.7 through 1.9 generally mirror the requirements of their Model Rule counterparts. The comments to the Army Rules, however, highlight the unique challenges military criminal defense lawyers may face.

The turnover rate in a TDS office is comparatively high.²¹ The comment to Army Rule 1.7 specifically addresses this by stating that "a military lawyer's desire to take leave or transfer duty stations should not motivate the lawyer to recommend a pretrial agreement in a case."²²

¹² U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 7.b (1 May 1992) [hereinafter AR 27-26].

¹³ *Id.* at 9-12.

¹⁴ MODEL RULES OF PROF'L CONDUCT, tbl. of contents, available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited July 6, 2009) [hereinafter MODEL RULES].

¹⁵ AR 27-26, *supra* note 12, para. 7.b.

¹⁶ *Id.* at 12 (Army R. 1.10: Imputed Disqualifications: General Rule).

¹⁷ E-mail from Major Jeffrey Hagler, Student, Command & General Staff College, Fort Leavenworth, Kan., to author (Nov. 7, 2006, 19:12 CST) [hereinafter Hagler e-mail] (on file with author).

¹⁸ AR 27-26, *supra* note 12, R 1.10, at 12 (Army R. 2.2 concerns mediation) (emphasis added).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Hagler e-mail, *supra* note 17.

²² AR 27-26, *supra* note 12, cmt. to R. 1.7, at 10.

Another major difference with the military justice system is that military defendants do not pay their TDS attorney nor do they pay for any of the expenses involved in litigation. Therefore, a comment allowing lawyers to pay the court costs of indigent clients is unnecessary. But, Army Rule 1.8 does assure trial defense counsels that it is permissible to “purchase . . . an authorized ribbon for wear on the accused’s uniform during court-martial proceedings.”²³ This comment is important because “[t]he Army is a uniformed service where discipline is judged, in part, by the manner in which a soldier wears a prescribed uniform”²⁴ and uniform regulations require that “all medals and ribbons are clean and not frayed.”²⁵ It is imperative that a defense attorney ensures his client is presented in the best possible light to the court, and this small detail can go a long way in portraying a military defendant as a disciplined and dedicated Soldier.

In addition to these comments, there are two notable differences between the text of Model Rules 1.8 and Army Rule 1.8. Model Rule 1.8(j) and (k)²⁶ have no correlating sections in the Army Rules.²⁷ The deletion of subparagraph (k) follows along with the discussion above concerning Army Rules 1.10.²⁸ Model Rule 1.8(k) imputes the disqualifications of 1.8(a) though (i) to the other members of the firm, a proposition that the Army Rule explicitly does not hold as controlling.²⁹

No Prohibitions Concerning Sexual Relations

It is less clear why the Army chose to eliminate Model Rule 1.8(j) from the Army Rules. This provision states, “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”³⁰ Adding to the confusion is the conflicting case law on the subject.³¹ Most reasonable attorneys know that they should avoid having a sexual relationship with a client. It is not as obvious why the Army, through its Rules of Professional Conduct and case law, has not offered clearer guidance on this issue.

The Disqualification Due to Familial Relationships

The Army replaced the subparagraph prohibiting sexual relations with a provision that prohibits a lawyer from representing a client if the lawyer is related to another lawyer who is representing a directly adverse position to that of the client.³² This prohibition appears nowhere in the text of Model Rules, but is rather listed as “personal interest conflict” in the comments of Model Rule 1.7.³³

The greater emphasis on this conflict in the Army Rules is also likely related to the small military community and the chance that there will be married Judge Advocate (JA) couples at some Army installations. Of all the married female officers who were in the Army in 2008, nearly thirty-eight percent were married to other servicemembers.³⁴ The JAG Corps acknowledges that “[t]here are a number of JA husband-wife teams . . . on active duty.”³⁵ While the Army Rules allow for married lawyers to represent clients with conflicting interests “upon consent by the client after consultation regarding the relationship,”³⁶ it is unlikely that two lawyers would want to strain their marital relationship or compromise their undivided

²³ *Id.* cmt. to R. 1.8, at 11.

²⁴ U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 1-7a (3 Feb. 2005).

²⁵ *Id.* para. 1-9a(3).

²⁶ MODEL RULES, *supra* note 14, R. 1.8, available at http://www.abanet.org/cpr/mrpc/rule_1_8.html (last visited July 6, 2009).

²⁷ AR 27-26, *supra* note 12, at 12.

²⁸ See discussion *supra* *No Imputed Disqualifications*.

²⁹ AR 27-26, *supra* note 12, cmt. to R. 1.10, at 12.

³⁰ MODEL RULES, *supra* note 14, R. 1.8(j), available at http://www.abanet.org/cpr/mrpc/rule_1_8.html (last visited July 6, 2009).

³¹ Compare *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988) (declining to create a per se rule that a civilian attorney’s sexual relations with his client created an actual conflict, where the client was a female Army Captain), with *United States v. Cain*, 59 M.J. 285, 296 (2004) (finding by a divided court that a per se conflict when a military lawyer has sex with his male, enlisted client).

³² AR 27-26, *supra* note 12, R. 1.8(i), at 11.

³³ MODEL RULES, *supra* note 14, R. 1.7, available at http://www.abanet.org/cpr/mrpc/rule_1_7_comm.html (last visited July 5, 2009).

³⁴ Army Profile—FY08, <http://www.armyg1.army.mil/hr/docs/demographics/FY08%20Arm%20Profile.pdf> (last visited July 24, 2009).

³⁵ PERSONNEL PLANS AND TRAINING OFFICE, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB. 1-1, app. Personnel Policies, JAGC-Personnel Policies, para. 5-10a, p. 31 (1 Nov. 2008) [hereinafter *THE DIRECTORY*].

loyalty to their client. In order to ensure that this potential conflict will not arise, the JAG Corps has established the policy that “[w]hen a husband and wife are assigned to the same location, they will not have contemporaneous assignments as trial counsel and defense counsel.”³⁷

Resolving Discrepancies Between the Army Rules and the Model Rules

Although Army Lawyers are also bound by the rules of the state in which they are licensed,³⁸ Army Rule 8.5 states the Army Rules take precedence in the case of “a conflict between these Rules and the rules of the lawyer’s licensing authority.”³⁹ While the comment to this rule says that a conflict with a rule promulgated by a military lawyer’s licensing authority is likely to be more “theoretical than practical,”⁴⁰ this may not always be the case.

As discussed above, Army Rules 1.10 is in direct contrast to Model Rule 1.10.⁴¹ This should not be an issue because Model Rule 8.5 states that “[a] lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”⁴² Michigan, though, seemingly ignored the imperative stated in Model Rule 8.5 when it issued an opinion that stated there was “no special exception under the Rules for legal services organizations” and that Michigan’s Rule concerning imputed disqualifications applied to military lawyers.⁴³

While no other state has issued a similar opinion ignoring the requirements of Model Rule 8.5, the possibility of it happening in the future should not be completely dismissed. This issue should be of special concern to the lawyers of TDS. While military defendants generally have greater rights than their civilian counterparts, this is not the case when it comes to those prosecuted at a military tribunal.⁴⁴ Trial Defense Service lawyers who are assigned to defend the accused at such proceedings may find themselves in situations where the representation of their client is so restricted that it is in violation of the Model Rules.⁴⁵

While no state, as of yet, has attempted to condemn or disbar TDS attorneys who have defended clients under conditions that violate the Model Rules,⁴⁶ the National Association of Criminal Defense Lawyers Ethics Advisory Committee issued an opinion that stated “the conditions imposed on defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.”⁴⁷ In light of the Supreme Court’s decision in *Hamdan v. Rumsfeld*⁴⁸ and the enactment of the Military Commissions Act of 2006,⁴⁹ the controversy surrounding deviations from the Model Rules in the practice of military law is likely to continue. Trial Defense Service attorneys should contact their supervisor for guidance on apparent conflicts between the Army Rules and state rules of professional conduct. Ultimately, some conflicts may require

³⁶ AR 27-26, *supra* note 12, R. 1.8(i), at 11.

³⁷ THE DIRECTORY, *supra* note 35, para. 5-10a.

³⁸ AR 27-26, *supra* note 12, R. 8.5(f), at 30.

³⁹ *Id.*

⁴⁰ *Id.* cmt. to R. 8.5, at 30.

⁴¹ See discussion *supra* at *No Imputed Disqualifications*.

⁴² MODEL RULES, *supra* note 14, R. 8.5(b)(2), available at, http://www.abanet.org/cpr/mrpc/rule_8_5.html (last visited July 6, 2009).

⁴³ Mich. Op. RI-172 (1993), available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-172.htm.

⁴⁴ See George P. Fletcher, *Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635 (2002).

⁴⁵ See Dungan, *supra* note 11, at 32.

⁴⁶ See *id.* at 32–34. Captain Dungan offers a hypothetical in which a lawyer licensed in a state with a “Michigan-like” opinion on the Army Rules has his license to practice law suspended by his state bar after defending an enemy combatant at a military commission. *Id.* The prospect of this happening could have a detrimental effect on the ability of lawyer to continue to serve in the JAG Corps, since a lawyer must be a member of the bar of a federal court or the highest court of a state, and must be in good standing in order to practice law in the JAG Corps. See U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 13-2h(1) (30 Sept. 1996). Therefore, the officer in Captain Dungan’s example would also be relieved of his legal duties in the JAG Corps. Dungan, *supra* note 11, at 34.

⁴⁷ Op. 03-04 (Aug. 2003), available at <http://www.nacdl.org/public.nsf/freeform/ethicsopinions?opendocument> (follow “No. 03-04 - Representation Before Military Commissions” hyperlink).

⁴⁸ 548 U.S. 2749 (2006).

⁴⁹ Pub. L. No. 109-366, 120 Stat. 2600 (2006).

the involvement of TDS Headquarters or even the Standards of Conduct Office at the Office of The Judge Advocate General (OTJAG).

Practitioner Tools, Guidance, and Advice

TDS Standard Operating Procedures

In addition to the Army Rules and the rules promulgated by the state a lawyer is licensed in, an Army Lawyer must also be aware of, and adhere to, all the other Army rules or regulations that govern his conduct.⁵⁰ It can be a daunting task to even know which of the Army's published directives, regulations, instructions, memoranda, circulars, or pamphlets apply to daily operations.⁵¹ One of the most important sources of information for a Soldier is his unit's Standard Operating Procedures (SOP). An SOP is written and frequently updated by commanding officers and their staffs to serve as a quick reference to the voluminous rules and regulations published by the Army.⁵² The TDS SOP is especially important because many of the "Legal Services" regulatory guidelines are written for the JAG Corps as a whole. Many of the issues that TDS attorneys face on a daily basis are different from the issues that ninety percent of the JAG Corps deals with.⁵³

The TDS SOP provides important guidance for avoiding conflicts of interest, going beyond the text and comments of Army Rules 1.7 through 1.10.⁵⁴ First, and probably most importantly, the SOP lays out the duties of the Senior Defense Counsel (SDC).⁵⁵ While the Army regulation merely states that the SDC "[p]rovides technical advice to trial defense counsel,"⁵⁶ he plays the primary role in ensuring conflicts of interest do not exist in the attorney-client relationships of the lawyers supervised. The SDC assigns lawyers to the Soldiers that they will represent, and it is his responsibility to make a preliminary inquiry into the facts surrounding the representation of the accused in order to determine whether his office can adequately represent the suspect or suspects.⁵⁷

The main conflict of interest pitfall that the TDS SOP addresses is multiple accused situations.⁵⁸ While the Army Rules say that multiple representation is permissible provided "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation,"⁵⁹ the TDS SOP states that "USATDS counsel should not represent more than one client in conflict situations."⁶⁰ It is again up to the SDC to try and make this happen. For every potential case, the SDC must make a preliminary assessment of the total number of clients potentially involved and the likelihood that individual cases will go to court-martial.⁶¹ Because it is the goal that all accused are promptly provided counsel,⁶² it is important that this preliminary assessment is done in a timely manner, especially if the SDC's office will not be able to accommodate a conflict-free representation for every accused. In such cases, TDS attorneys from another field office will be brought in to provide defense services.⁶³

⁵⁰ AR 27-26, *supra* note 12, para. 7.2(a).

⁵¹ For a complete directory of the thousands of Army publications, go to the Army Publishing Directorate web page. Army Publishing, <http://www.army.mil/usapa/> (last visited July 6, 2009).

⁵² The USATDS SOP cites to twenty-eight separate statutory and regulatory sources and is published by the TDS training branch in Arlington, Va. U.S. ARMY TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES (n.d.) hereinafter TDS SOP]. Updates please

⁵³ About 340 of the 3400 JAG Corps attorneys work in TDS. TDS Mission, *supra* note 9.

⁵⁴ TDS SOP, *supra* note 52, ch. 3.

⁵⁵ The SDC "is responsible for the performance of the USATDS mission within the area serviced by a field office. The senior defense counsel is the direct supervisor of all trial defense counsel within a field office." U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-3f(1) (16 Nov. 2005).

⁵⁶ *Id.* para. 6-3f(2)(b).

⁵⁷ TDS SOP, *supra* note 52, para. 3-2.

⁵⁸ *Id.* para. 3-3.

⁵⁹ AR 26-27, *supra* note 12, R. 1.7(a)(1)-(2), at 9.

⁶⁰ TDS SOP, *supra* note 52, para. 3-3.

⁶¹ *Id.* para. 3-3a(1). Soldiers are guaranteed the right to counsel in courts-martial proceedings, but not at summary courts-martial, administrative proceedings, or non-judicial punishment. *Middendorf v. Henry*, 425 U.S. 25 (1976).

⁶² TDS SOP, *supra* note 52, para. 3-3a.

⁶³ *Id.* para. 3-3b.

Another complication is that the SDC job also includes “[r]epresenting Soldiers in courts-martial . . . and other proceedings.”⁶⁴ However, if the SDC were to represent one co-accused, and one of his trial defense counsels were to represent another co-accused in the same case, a potential conflict of interest is created. Since the SDC evaluate the trial defense counsels, each trial defense counsel has an interest in avoiding a potential violation of Army Rule 1.7.⁶⁵ The SOP advises that in such a situation the trial defense counsel should “review the specifics of the case and determine if they reasonably believe that their own interests will not adversely affect representation of the client.”⁶⁶ Based on the attorney’s assessment and the accused’s willingness to consent, the trial defense attorney may be allowed to continue his representation, or as discussed above, another attorney may be brought in to assume the client representation that would have been undertaken by the SDC.⁶⁷

As the guidance in the TDS SOP indicates, the Army’s lack of an imputed disqualification rule, while allowing for most accused to be represented by an attorney from their local field office, does not completely eliminate the potential for conflicts of interest due to the competing lawyers’ interests and duty requirements of the lawyers involved.

Advice from Past and Current Practitioners

None of the documents produced by the Army, whether a DA regulation or an SOP from a local TDS office, comes close to providing the straightforward, on-point, and realistic guidance that practitioners in the field could use to avoid conflicts of interest. As a means of tying together all the published guidance on conflicts of interest in the military defense practice, the observations and advice of former TDS attorneys is given below.

Multiple Representation

Going further than the TDS SOP requirements that TDS counsel *should not* represent more than one client in conflict situations, those who have served in TDS say counsel *do not* undertake such representation.⁶⁸ Additionally, the situations explained above concerning the SDC and trial defense counsel representing co-accused is not likely to happen. Generally, SDCs will not represent any of the accused when there is more than one accused.⁶⁹ This does not resolve all the conflict of interest issues. However, the SDC is supposed to provide technical advice to his trial defense counsels.⁷⁰ If several trial defense counsels are representing several co-accused, it is possible that the guidance that the SDC gives to one subordinate lawyer might hurt the case of another.⁷¹ Therefore, when such a situation arises, each lawyer representing a co-accused should have a different supervising officer available to offer advice.⁷²

Joint Defense Relationships

At least one commentator has suggested that in military cases, especially in cases involving multiple accused, conducting a joint defense can “contribute[] to the quality of legal representation” despite the ethical and tactical problems that may

⁶⁴ AR 27-10, *supra* note 55, para 6-3f(2)(d).

⁶⁵ TDS SOP, *supra* note 52, para. 3-3e.

⁶⁶ *Id.* para. 3-3e(1).

⁶⁷ *Id.* para. 3-3e(2).

⁶⁸ Interview with Captain John W. Brooker, Senior Defense Counsel, Region III (Fort Sill Field Office), U.S. Army Trial Defense Services, in Lubbock, Tex. (Sept. 22, 2006) [hereinafter Brooker Interview]; E-mail from Lieutenant Colonel Patricia Ham, Regional Defense Counsel, Region IV (U.S. Southwest), U.S. Army Trial Defense Services, Fort Hood, Tex., to author (Nov. 12, 2006, 16:22 CST) [hereinafter Ham e-mail] (on file with author); Telephone Interview with Michael R. Holley, Associate, Lanier Law Firm, in Houston, Tex. (Nov. 17, 2006) [hereinafter Holley Interview] (Mr. Holley is a former TDS Trial Defense Attorney.).

⁶⁹ Ham e-mail, *supra* note 68.

⁷⁰ AR 27-10, *supra* note 55, para. 6-3f(2)(b).

⁷¹ Ham e-mail, *supra* note 68.

⁷² *Id.*

arise.⁷³ There is no mention in the TDS SOP of the possibility of employing this tactic, nor is there any published commentary on the subject beyond the cited article. This is likely due to the fact that most TDS attorneys do not fully appreciate the advantages of a joint defense, or those who do may be too timid to advise it as a tactic to the scores of TDS attorneys who are relatively inexperienced in criminal practice.⁷⁴ When properly employed, however, a joint defense can be a highly effective tool for building a client's defense.⁷⁵ Although conducting a joint defense may raise concerns over client confidentiality, certain communications among co-accused and their counsel are protected by an evidentiary privilege known as the joint defense privilege.⁷⁶ The joint defense privilege is "an extension of the attorney client privilege and 'protects communications between an individual and an attorney for another when the communications are "part of an on-going and joint effort to set up a common defense strategy.'""⁷⁷ As Major Davidson suggested in his article more than ten years ago,⁷⁸ the joint defense privilege should be given greater attention by the military legal community, and it would probably serve TDS and its clients well to establish procedures for utilizing this privilege.⁷⁹

Portraying Yourself as a Loyal and Zealous Advocate

Compounding the problems of institutional bias are the big-picture organizational issues that cause clients to question whether an attorney in TDS can really be a zealous advocate for their defense. Some Soldiers may be completely unaware that TDS exists as a separate organization. However, they are acutely aware that the officer who has been assigned to represent him wears the same uniform of the officer who is accusing him of a crime.⁸⁰ The best tactic to gain the trust of your military client as a TDS attorney is to start by explaining, as simply as possible, the structure of TDS. The easiest way to do so is to show the Soldiers the patch that you wear⁸¹ and explain to your client that you do not belong to any unit on his post and do not answer to any commanders.⁸² This will help instill the idea of "separateness" and freedom from command influence that was the basis for the creation of TDS.

Conclusion

The role and the impact of lawyers in TDS go beyond the clients that they directly serve. By ethically and effectively representing Soldiers, these attorneys give all Soldiers confidence in the military justice system, which in turn improves the morale and discipline of the force.

The military defendant has a tremendous amount of rights, starting with the guaranteed right to counsel.⁸³ The system, however, is only as good as the lawyers entrusted to protect and advocate for those rights. By being cognizant of the potential conflicts of interest that may arise during the course of representation, military attorneys can avoid ethical and malpractice pitfalls and be zealous and unbiased advocates, thereby living up to the standard of representation sought by the creation of TDS.

⁷³ Major Michael J. Davidson, *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields*, ARMY LAW., June 1997, at 17.

⁷⁴ Holley Interview, *supra* note 68.

⁷⁵ *Id.*

⁷⁶ *See generally* Davidson, *supra* note 73.

⁷⁷ *Id.* at 18.

⁷⁸ *Id.*

⁷⁹ Holley Interview, *supra* note 68.

⁸⁰ The perception of TDS attorneys is not helped by the civilian defense attorneys (most of whom are former military lawyers and judges) who may talk down the capabilities of TDS attorneys in order to gain the business of military defendants.

⁸¹ A "patch," or shoulder sleeve insignia, identifies Soldiers of a common command. Having a different patch than the accused is an immediate indication that defense lawyers are separate from the command that is accusing the Soldier of a crime. The TDS patch can be viewed at the TDS web page. TDS Mission, *supra* note 9.

⁸² Brooker Interview, *supra* note 68.

⁸³ 10 U.S.C. § 827(a)(1) (2006).

Claims Report
U.S Army Claims Service

Wounded Soldier Property

*Tom Kennedy**

Since Fiscal Year 2003, the Army has paid over \$3.5M in claims to wounded, ill, or injured Soldiers who have been medically evacuated from Iraq and Afghanistan, for personal property left in theater that was not returned to them by their units.¹ This note explains the process which units in theater should follow with regards to the personal property of medically evacuated Soldiers from the time of injury until the property is returned to the Soldier. It explains how to minimize the loss of property carried by Soldiers en route to medical treatment, as well as how field claims offices should process wounded Soldier claims.

The program to return personal property to a medically evacuated Soldier is administered through the Joint Personal Effects Depot (JPED) at Aberdeen Proving Grounds.² As advisors to commanders, Judge Advocates are uniquely situated to apprise the chain of command about this program and explain its value as a morale multiplier.³ This note will provide a brief outline of the JPED Program. Judge Advocates must involve themselves early in the process to ensure commands are promptly securing, inventorying, and shipping property to the Soldier via JPED. Being proactive will, in many cases, obviate the need to process claims for lost property and, more importantly, improve morale.

Personal Property

In the military medical community, personal property is commonly referred to as personal effects (PE) and includes all privately-owned, moveable personal property.⁴ This includes items that are normally found on a person such as watches, rings, jewelry, money, wallets, as well as other possessions, such as personal clothing, personally-owned military clothing, televisions, and DVD players.

Medically evacuated Soldiers' property must be treated with care and attention to detail.⁵ The standard is 100% accountability for all personal property from the unit in theater, through Mortuary Affairs Collection Points (MACP), to the JPED, which is usually the final station before PE are returned to the Soldier. Every PE item is important, and everyone in the chain of custody must ensure this mission is executed to standard.⁶

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¹ Data provided by Recovery Branch, U.S. Army Claims Service, July 2009

² JPED is a contingency activity established to process the return of personal effects of deployed servicemembers of all branches of the Armed Forces. U.S. Army Human Resources Ctr., Army Casualty and Mortuary Affairs Contact Information, <https://www.hrc.army.mil/site/Active/TAGD/CMAOC/CMAOCPages/CMAOCContactUs.htm#jped> (last visited July 16, 2009).

³ All claims attorneys are encouraged to review policy guidance and All Army Activities (ALARACT) messages on this subject. Personnel Policy Guidance for Contingency Operations in Support of GWOT, Mortuary Affairs (Personal Effects), Headquarters, U.S. Dep't of Army G-1, DAPE-MPZ-MM, para. 9–5e (13 Feb. 2008) [hereafter Personnel Policy Guidance] (“When a Soldier or DA civilian dies, is medically evacuated from theater, or becomes missing in the area of operations, the personal property in theater and at the rear detachment must be handled in accordance with ALARACT Messages 139/2006, 161/2007, 224/2007, 235/2007, AR 638-2, Chapters 17-22 and DA Pam 638-2 Chapters 11-16.”). Claims attorneys should also register for and check the ALARACT website periodically for updates. U.S. Army, Army ALARACT Knowledge Center, <https://www.us.army.mil/suite/page/550282> (last visited July 3, 2009).

⁴ See Message, 210236z Jul 06, Headquarters, Dep't of Army, DAMO-AOC, subject: Policies and Procedures for the Handling Of Personal Effects (PE) and Government Property (ALARACT 139/2006), para. 2.b [hereinafter ALARACT 139/2006].

⁵ Message, 112300z Oct 07, Headquarters, Dep't of Army, TAG, subject: Revised Policies for Certifying and Reporting Theater Summary Court Martial Officers (SCMO) in the CENTCOM AOR (ALARACT 224/2007), para. 5.b [hereinafter ALARACT 224/2007].

⁶ The MACP is responsible for property of evacuated Soldiers as well as remains. *Id.* para. 7.

Personal Property on the Soldier at the Time of Injury

All items found on or near the medically evacuated Soldier will accompany the individual to the local medical treatment facility (MTF). The only items that will be separated are weapons, radios, munitions, classified documents, and hazardous materials.⁷

At the MTF, hospital personnel will inventory any property, protective gear, and organizational clothing and individual equipment (OCIE) that it retains, using Department of the Army (DA) Form 4160.⁸ A copy of this form will be provided to the Soldier's unit.⁹ The PE of an evacuated Soldier will be secured by the MTF. These items will be transferred out of theater with the injured Soldier by the MTF and will accompany the Soldier to his final destination.

Appointment of a SCMO

Commanders are required to appoint a commissioned officer, warrant officer, or non-commissioned officer in the grade of E-6 or above as the Summary Court-Martial Officer (SCMO) upon notice that a Soldier has been hospitalized.¹⁰ The SCMO is responsible for collecting and safeguarding any medically evacuated Soldier's property found in places under Army jurisdiction or control.¹¹ The SCMO will immediately contact the Soldier's chain of command, roommate, friends and acquaintances, and those at the Soldier's work site, to identify and safeguard all PE and equipment, and conduct an inventory within twelve hours of the appointment.¹²

The SCMO also will segregate mission-essential government items such as weapons, ammunition, government satellite cell phones, arms room keys, and night vision devices, along with other mission-critical or hazardous items.¹³ Throughout this process, the SCMO will adhere to a standardized checklist provided at ALARACT message 235/2007, to facilitate the return of the PE to the Soldier and ensure that the shipment meets customs pre-clearance requirements.¹⁴

The SCMO will note the item number, manufacturer, brand name, serial number, and model number, as well as the condition of the property, such as "damaged," "dented," "scratched," or "not operational".¹⁵ The SCMO is expected to make use of receipts to identify property purchased at the post exchange, such as MP3 players, CDs, DVDs and game cartridges, and ensure the condition of these items is noted before packing.¹⁶ The SCMO will carefully describe items likely to have intrinsic or sentimental value. Descriptions of jewelry will specify the color of the metal (rather than speculate as to its metallic content), presence and color of stones, if any, as well as any inscriptions (for example: "Ring, gold in color, with a blue stone, inscribed JHS").¹⁷

⁷ Personnel Policy Guidance, *supra* note 3, para. 9-5b(3).

⁸ See U.S. DEP'T OF ARMY PAM. 638-2, CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS para. 12-11b (Forms used to inventory PE) (22 Dec. 2000).

⁹ ALARACT 139/2006, *supra* note 4, para. 3.b.

¹⁰ Message, 090012Z Jan 09, Headquarters, Dep't of Army, HRC, subject: Policies and Procedures for the Handling of Personal Effects for Medically Evacuated Soldiers from a Combatant Theater [hereinafter ALARACT 006/2009] (no longer limiting the appointment of SCMOs to warrant and commissioned officers). SCMOs are also appointed upon notification of a Soldier's death or status as missing-in-action. *Id.*

¹¹ *Id.* para. 3e; see U.S. DEP'T OF ARMY, REG. 638-2, CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS (22 Dec. 2000) (providing further information about the SCMO's duties).

¹² ALARACT 139/2006, *supra* note 4, para. 3.e.2 ("The SCMO will perform an inventory within 12 hours using Two-person control of all safeguarded equipment.").

¹³ Message, 191734z Oct 07, Headquarters, Dep't of Army, HRC-HQDA, TAG, subject: Summary Court Martial Officer (SCMO) Checklist for Current CENTCOM Theater Use Only (ALARACT 235/2007), para. 7 [hereinafter ALCARACT 235/2007].

¹⁴ *Id.* para. 1 ("ALARACT 153/2006 091926z Aug 2006, SCMO checklist, is rescinded."); see also *id.* para. 2 ("All previous editions of that checklist are obsolete.").

¹⁵ *Id.* SCMO Checklist.

¹⁶ *Id.*

¹⁷ *Id.*

Once the inventory is complete, the SCMO will safeguard the property until it is transferred with receipt to the closest MACP in Iraq or Afghanistan, most of which are operated at logistics bases.¹⁸

This process is not optional. Alternative methods, such as the mailing of PE out of theater or keeping it in a large shipping container (such as a CONEX or MILVAN) until the unit's redeployment, are prohibited.¹⁹

From SCMO to the MACP/TPED/JPED

While earlier guidance indicated that the SCMO must "ensure that the secured PE and OCIE is . . . sent to the nearest mortuary affairs collection point (MACP),"²⁰ the SCMO is now required to "hand deliver" personal property to the MACP²¹ within seventy-two hours of the incident²² unless operational or safety concerns preclude meeting that standard.²³ The MACP processes the personal property and OCIE of all deceased, missing in action, and medically evacuated Soldiers²⁴ and electronically reports its property shipments to armypeops@conus.army.mil.²⁵ This report is the first official notice that a Soldier's property is en route to the JPED, and may be of value to claims personnel attempting to track the whereabouts of property believed to have been entered into the JPED system.

The MACPs in Iraq forward the PE to the Theater Personal Effects Depot (TPED) at Kuwait City International Airport by the most expeditious means possible.²⁶ The TPED processes and ships the personal property to the JPED.²⁷ In Afghanistan, MACPs bypass the TPED and forward property directly to the JPED via premier air freight service.²⁸ Once received, the JPED determines which OCIE will be treated as PE and which will be processed as government-owned OCIE to be cleared from the individual's OCIE hand receipt.²⁹

The dedicated Soldiers, Sailors, Marines, and Airmen who manage the JPED tend to the property in their temporary custody with great care. Personal effects and personally-owned OCIE are cleaned and sorted; on-station SCMOs inventory all arriving shipments. At the end of the process, PE are usually mailed via FedEx to the Soldier's home of record, to a person eligible to receive the effects, or to the individual's home station.³⁰ Soldiers still recuperating in a hospital may request that the JPED ship specific comfort items directly to the MTF, bearing in mind the limited space available in such facilities for securely storing high-value or sentimental items.

Actions on Receipt of a Claim

Soldiers may file a claim for lost PE. While most medically evacuated Soldiers wait until they return to their home station to file for most of their missing PE, many file a claim at the MTF for missing personal "comfort items," such as laptops,

¹⁸ *Id.*

¹⁹ Message, 182006z Jul 07, Headquarters, Dep't of Army, TAG, subject: ALARACT 161/2007, para. 6 [hereinafter ALARACT 161/2007].

²⁰ ALARACT 139/2006, *supra* note 4, para. 3.f.1.

²¹ ALARACT 161/2007, *supra* note 19, para. 6.

²² ALARACT 235/2007, *supra* note 13, SCMO Checklist ("Personally escort the PE to the MACP within 72 hours from the date of the incident. . . . Remain with the PE until the footlockers have been signed for by the MACP. Get a receipt memorandum from the MACP. . . .").

²³ ALARACT 139/2006, *supra* note 4, para. 3.f.4.

²⁴ *Id.* para. 2.

²⁵ ALARACT 224/2007, *supra* note 5, para. 9(4).

²⁶ ALARACT 139/2006, *supra* note 4, para. 4.

²⁷ *Id.* para. 4a.

²⁸ *Id.* para. 4b.

²⁹ *Id.* para. 2c.

³⁰ *Id.* para. 4c.

cameras, CDs, DVDs, iPods, MP3 players, portable DVD players.³¹ There are three recommended actions that a local claims office should consider with respect to an evacuated Soldier's PE.

1. The JPED Database

When accepting a claim from a Soldier who has been evacuated from theater, first check the JPED database. The PE may not be lost and may be en route from the theater of operations to the TPED or JPED. Personnel of the U.S. Army Claims Service have access to the JPED database and can help locate PE for a Soldier. Checking the database should be the first step taken by the local claims office whenever a medically evacuated Soldier wishes to file a claim. Claims offices without access to the JPED database may call the U.S. Army Claims Service directly and speak to the Recovery Branch Chief.

2. Mortuary Affairs Office, Human Resources Command

Another means to locate property is through the Mortuary Affairs Office, Human Resources Command (HRC), which can submit an inquiry to its Theater Mortuary Officer and unit property officers to determine whether they received a specific Soldier's PE. If the JPED database does not contain a record of the claimant's PE, contact the U.S. Army Claims Service Recovery Branch. They can liaison with HRC to make this inquiry on behalf of your claims office.

3. Contact the Unit

When a Soldier's name does not appear in the JPED database, you must identify the unit the Soldier was assigned to at the time of injury and the names of the members of his chain of command up to company/detachment level. Contact the Soldier's chain of command and ask if the unit did anything with the Soldier's PE. If they still have it and the unit is still deployed, explain the MACP/JPED process to them and advise the unit commander to inventory and transport the property to the nearest MACP immediately. If the unit has returned to its home base and they still have the Soldier's PE, the installation Transportation Office (TO) can assist in shipping the PE directly to the Soldier. If, after delivery, you determine that some of the Soldier's PE was lost or destroyed, you should pay the Soldier for those items.

When efforts to locate a Soldier's PE through JPED and other channels have failed, you should promptly process the claim. The normal rules apply to such claims, although you should consider the circumstances of the Soldier's departure from theater when deciding what substantiation is required.

Soldiers also may submit claims for PE that were on their person at the time of injury. This property was never inventoried by the SCMO because it traveled with the Soldier to the MTF. Some items may have been destroyed in the event that caused the injury. Items that are with the Soldier on arrival at the MTF are inventoried and secured by the MTF, but items that are contaminated by bodily fluids may be destroyed as medical waste. Claims offices should check with the Patients' Trust Fund, Patient Administration Division at the last MTF where the Soldier was an inpatient to see if the MTF has any record of the disposition of the property that was evacuated with the Soldier.

Claims submitted by wounded Soldiers for items carried on the uniform during medical evacuation continue to be among the most difficult to substantiate. Process these claims much like any theft or loss claim with due recognition of the special circumstances in which property is lost. Over the course of the war, units in theater have relaxed their standards with respect to the kinds of property Soldiers may place on their uniform or weapon. For example, Soldiers have submitted claims for specialty sights, ammo clips, blast proof sunglasses, canteens, and rucksacks. While payment for this property may be approved, claims offices should seek verification from the unit whenever a claim has been submitted for an unreasonable quantity of such items.

³¹ While no one disputes the recuperative and morale-building value of comfort items, this note does not endorse the practice on the part of commands of allowing wounded Soldiers to carry expensive items either on their person or in accompanying baggage while they are being evacuated to medical treatment facilities out of theater.

Guidance and Lessons Learned

The JPED system is efficient and expedient. However, commands in combat zones have dozens of critical issues to consider daily and attention to the JPED process may be overlooked. The Claims community can help by ensuring that the JPED process is covered during pre-deployment briefings to commanders and senior non-commissioned officers. Judge Advocates can also spread the word to commanders and sergeants major in theater.

Commanders should be advised to restrict carry-on baggage and personal comfort items accompanying medically evacuated Soldiers. When a Soldier is not immediately evacuated from the MTF, volunteers in the command usually pack some of the Soldier's PE such as laptops, DVD players, I-Pods or MP3 players in a rucksack or duffel bag, fully expecting that the property will accompany the Soldier to the final treatment and rehabilitation MTF. Similarly, the Soldier may express a desire to carry along an IPOD, camera, watch, etc., believing it safer and more practical to place these items in pockets, around the neck, or on a wrist than leave them behind with the unit.

Unfortunately, experience has shown that PE accompanying the Soldier during medical evacuation often do not make their way safely back with the individual. Many medically evacuated Soldiers are immobilized on gurneys during their journey to the MTF and they may lose sight of accompanying baggage. Items on the Soldier's uniform may be cast off in the course of treatment or discarded because they have been soiled. Many Soldiers are evacuated from theater to an intermediate MTF, often the Army Medical Center at Landstuhl, Federal Republic of Germany. Sometimes Soldiers are then evacuated from that facility to a final MTF in CONUS and notice is not given to the property accountability section that has control of the Soldier's PE. The patient and property get separated and the Soldier may not have his PE on arrival back at the final CONUS MTF. Judge Advocates are urged to counsel their Soldiers and commanders to use the JPED system to the maximum degree possible, even when doing so would deprive the evacuated Soldier of these items during the journey to the treatment facility. The PE of evacuated Soldiers are safer in the hands of the SCMO and others who are dedicated to ensuring their return to the Soldier. Moreover, a commander may not authorize a wounded Soldier to carry PE to an MTF unless the commander has good reason to believe the PE will be secured while in transit.³²

Judge Advocates should also advise commanders that they may not always receive notice about a medically evacuated Soldier's status through medical or personnel channels. If the commander reasonably believes the injuries are of such severity that the Soldier will not return to the unit, the commander should immediately place the PE into the JPED system by appointing and a SCMO. The faster the property is placed into the JPED system, the faster it will be returned to the Soldier.

Conclusion

We owe our medically evacuated Soldiers our best effort to safeguard their property and ensure it is promptly returned. The Judge Advocate community should do all that it can to educate the entire chain of command of the requirements for the proper handling of the PE of medically evacuated Soldiers. The goal is to ensure proper accountability at all stages of the process in order to ensure that evacuated Soldiers and their PE are re-united. By working toward this goal, we also can avoid the need to process claims for missing property and the costs of paying those claims.

³² ALARACT 139/2006, *supra* note 4, para. 2.a.

The decision to ship PE and OCIE with medically evacuated individuals, instead of through the MACP, must be made prudently considering the individual's state of mind, the limit on allowable Baggage that can be carried on military airlift, *and ability to control the items in their possession throughout the evacuation Process.*

Id. (emphasis added).

LINCOLN AND THE COURT¹

REVIEWED BY MAJOR ROBERT C. STELLE²

*My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it What I do about slavery, . . . I do because I believe it helps to save the Union.*³

I. Introduction

The challenge of protecting civil liberties during war is not a new issue. Tensions between the competing interests of protecting these fundamental rights and effectively prosecuting a war have been part of our political landscape for many generations. Today, as our national leaders grapple with this issue once again in the context of the ongoing overseas contingency operations, the Civil War era provides an excellent example from which we can draw many lessons.

In *Lincoln and the Court*, a meticulously researched, well-organized, and engaging narrative, author Brian McGinty provides much more than just another history book.⁴ His detailed account of executive and judicial decision-making in a time of national crisis reminds us of just how difficult some of these issues can be. Likewise, his insight into President Lincoln's relationship with the Supreme Court and the politics of his judicial appointments serves to remind us that personal agendas and partisanship must always be taken into account. Indeed, the Civil War marks one of the most tumultuous times in the history of our constitutional democracy. The President was determined to save the Union; many others, including some on the Court, were equally as determined to uphold the institution of slavery.

McGinty's work is extremely useful for today's practicing Judge Advocates, providing an excellent historical reference for us to better understand the constitutional nuances implicated by our conduct in the Global War on Terrorism. This book review not only summarizes the key points of *Lincoln and the Court*, but also discusses and builds upon the author's analysis of one of today's most difficult legal issues: our continuing efforts to strike a balance between the protection of civil liberties and the exercise of executive authority in a time of war.

II. Summary of the Book

One central theme in McGinty's book is that judges are human, a fact that "inevitably enters into even the most careful judicial decision."⁵ By synthesizing an amazing collection of primary and secondary sources, he presents the "Supreme Court [J]ustices of Lincoln's time as living and breathing human beings, . . . attempting to live up to their judicial oaths, sometimes failing but mostly succeeding, shaped by . . . the pressures of the war."⁶ As the book progresses, McGinty provides a detailed background for each of them as they are introduced into the story.⁷

As for the Civil War itself, McGinty argues that it "was, *at its heart*, a legal struggle between two competing theories of constitutional law."⁸ One camp believed that the United States was a loosely configured "league of sovereign states whose legal ties were severable at any time and for any reason,"⁹ while the other felt that the nation was a "permanent union of

¹ BRIAN MCGINTY, *LINCOLN AND THE COURT* (2008).

² U.S. Army. Currently assigned as Special Prosecutor, U.S. Army Legal Servs. Agency, with duty at Fort Bragg, N.C. LL.M., 2009, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. The author wishes to thank Mr. Frederic L. Borch, historian of the U.S. Army Judge Advocate General's Corps, for his insights and advice during the preparation and editing of this book review.

³ Letter from President Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in 5 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 388 (Roy P. Basler ed., 1955), available at <http://home.att.net/~rjnorton/Lincoln78.html>.

⁴ MCGINTY, *supra* note 1.

⁵ *Id.* at 10 (quoting WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (1998)).

⁶ *Id.*

⁷ See *infra* notes 24, 43 and accompanying text..

⁸ MCGINTY, *supra* note 1, at 1 (emphasis added).

⁹ *Id.*

states, . . . tied together by . . . firm bonds of nationhood.”¹⁰ Indeed, Lincoln believed that the Union was perpetual and existed *before* the Constitution.¹¹ As he stated in his First Inaugural Address:

[W]e find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was, *to form a more perfect Union*.¹²

Throughout his book, McGinty details how this fundamental difference of interpretation, starkly reflected in the personalities on the Court, played a critical role in the deliberative process for many of the era’s key decisions.¹³

The first of these critical opinions was the infamous *Dred Scott* case.¹⁴ Using persuasive evidence to support his position, McGinty depicts this case as one of the precipitating events that ultimately led to war. Ostensibly, the legal question before the Court was the constitutionality of legislation that restricted slavery in the western territories.¹⁵ The case took on much greater significance, however, serving to clarify the legal and moral positions of both sides on the issue of slavery in general.¹⁶ It held the nation’s attention for more than three years, and the release of the Court’s opinion in 1857 was one of the key factors that led to the Civil War.¹⁷

Speaking for a divided Court in *Scott*, Chief Justice Roger Taney asserted that the Constitution provided no rights whatsoever to persons of African descent.¹⁸ Indeed, Taney wrote, the Founders did not intend to include persons of color when asserting in the Declaration of Independence that “all men are created equal.”¹⁹ Thus, under the law, “Africans . . . ‘had no rights which the white man was bound to respect.’”²⁰

Predictably, the case became a major point of public debate and ultimately helped propel Lincoln, an outspoken critic of the Court’s ruling and of Chief Justice Taney, to the Presidency.²¹ When he was inaugurated in 1861, the Court only had eight members,²² seven of whom were Democrats who supported slavery.²³ McGinty provides a thorough background for each of the Justices in support of his compelling argument that personal history was a critical factor in explaining why members of the Court voted the way they did.²⁴

Soon after Lincoln took office, the Civil War broke out with the rebel bombardment of Fort Sumter, South Carolina.²⁵ To put down the insurrection in the south, Lincoln ordered the mobilization of 75,000 militiamen in the north, including

¹⁰ *Id.* at 2 (citations omitted).

¹¹ Abraham Lincoln, First Inaugural Address, in AMERICAN HISTORICAL DOCUMENTS, 1000–1904, at 313, 316 (Charles W. Eliot ed., 1980).

¹² *Id.*

¹³ MCGINTY, *supra* note 1.

¹⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁵ MCGINTY, *supra* note 1, at 48, 52.

¹⁶ *Id.* at 46–51.

¹⁷ *Id.* at 39 (“It would be an exaggeration to say that the *Dred Scott* decision *caused* the Civil War. But it certainly pushed the nation far closer to that war.”) (quoting PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 2* (1997)).

¹⁸ *Id.* at 52 (citing *Scott*, 60 U.S. at 404). Justice Curtis issued a strong dissent and ultimately resigned over his disagreement with Chief Justice Taney. *Id.* at 56.

¹⁹ *Id.* (citing *Scott*, 60 U.S. at 410–11).

²⁰ *Id.* (citing *Scott*, 60 U.S. at 407).

²¹ *Id.* at 58–62.

²² *Id.* at 21–22. Associate Justice Peter Daniel had died in 1860; his replacement had yet to be nominated by the time Lincoln took office. *Id.* at 22.

²³ *Id.* at 21.

²⁴ *Id.* at 14–17 (Taney, C.J.), 22–24 (McLean, J.), 24 (Wayne, J.), 24–25 (Catron, J.), 25–26 (Nelson, J.), 26 (Grier, J.), 26–28 (Campbell, J.), 28 (Clifford, J.).

²⁵ *Id.* at 66–67.

troops from Pennsylvania and Massachusetts.²⁶ To get from their locations in the North to where they were needed in the South, these Soldiers had to pass through Maryland, a state with strong southern sympathies.²⁷ As they passed through Baltimore, Union troop formations quickly became popular targets for both protests and violent attacks.²⁸ In response, based on his constitutional authority as Commander-in-Chief, Lincoln ordered the suspension of habeas corpus and gave military leaders authority to arrest and detain persons who supported the insurrection.²⁹ Lincoln was concerned that without the suspension of habeas, judges with southern sympathies could release “dangerous persons as quickly as the army could arrest and detain them.”³⁰

Very quickly, the President’s order came under judicial scrutiny. After a resident of Maryland was arrested by the Army for treason and held at Fort McHenry, Chief Justice Taney, sitting as a federal circuit judge for Maryland, ordered the commander of the confinement facility to appear in Baltimore and to produce the detainee.³¹ When the commander refused to comply, Taney issued an opinion declaring Lincoln’s order illegal because, in his view, the power to suspend habeas rested with Congress, not the President.³² Taney believed that “there was no place for . . . military detentions or military trials in places like Maryland. . . . [V]iolations of the criminal law had to be dealt with in the usual way before the usual courts.”³³

Taney’s opinion, however, was issued as a federal court judge, not as an official Supreme Court decision, and Lincoln ultimately refused to comply.³⁴ Instead, relying on his constitutional authority to do so, the President authorized the Army to continue making arrests, suspend habeas when and where necessary, hold trials before military commissions, and hand out punishments.³⁵ These orders never came before the Court again until after the end of the war and, by then, Taney’s primary legal objection was moot because Congress had specifically acted to ratify all orders of the President made after the start of the war.³⁶

In addition to the suspension of habeas corpus several of Lincoln’s other war measures eventually ended up before the Court. Among these were a challenge to the blockade of southern ports,³⁷ a challenge to the Legal Tender Act which authorized the creation of paper money as payment for all debts,³⁸ and a free speech case involving the Army’s detention of an Ohio man for declaring his “sympathy for the enemy.”³⁹ McGinty does an excellent job explaining the legal nuances and political dynamics of each of these important cases.

In each decision, the author argues, the Court “*could* have defied Lincoln’s intention to preserve the Union and thwarted his efforts to ‘defend’ the Constitution.”⁴⁰ The Court “*could* have struck down the president’s major war measures [and made] it all but impossible for Lincoln to prosecute the war to a successful conclusion. But the Court chose *not* to do so.”⁴¹ While many other factors were involved, McGinty suggests that the primary reason for this was the President’s appointment

²⁶ *Id.* at 66.

²⁷ *Id.*

²⁸ *Id.* at 66–67.

²⁹ *Id.* at 70–71.

³⁰ *Id.* at 69.

³¹ *Id.* at 72–73.

³² *Id.* at 73–74 (citing *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)).

³³ *Id.* at 78–79 (citing *Merryman*, 17 F. Cas. at 152).

³⁴ *Id.* at 87.

³⁵ *Id.*

³⁶ *Id.* at 83–84.

³⁷ *Id.* at 133–42 (referencing *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)).

³⁸ *Id.* at 276–86 (referencing *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870)).

³⁹ *Id.* at 185 (referencing *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864)).

⁴⁰ *Id.* at 9 (emphasis added).

⁴¹ *Id.* (emphasis added).

of five new Justices during his term in office.⁴² Throughout his book, the author admirably details the political and personal issues involved with each of these five appointments.⁴³

III. Analysis and Applicability to Current Events

In addition to being a superb history book, *Lincoln and the Court* is also a great supplement to the growing body of work exploring the interplay between the President's war powers and civil liberties. McGinty takes up this issue with his analysis of *Ex parte Milligan*⁴⁴ in which the *full* Court finally considered the detention and trial of a U.S. citizen by a military commission.⁴⁵ Mr. Milligan had been arrested in Indiana for "disloyal practices" and for membership in "a secret 'army' dedicated to ending the war on terms favorable to the South."⁴⁶ In finding his detention illegal, the Court pointed out that Milligan had not been a belligerent; to the contrary, "[t]here was no war in Indiana when Milligan was arrested, and the courts were open and functioning. [Thus], trial by military commission was neither necessary nor constitutionally permissible."⁴⁷

Jumping forward almost eighty years, this precedent was put to the test when a group of German spies, including an American citizen, was captured on U.S. soil and tried before a military commission ordered by President Roosevelt.⁴⁸ Unlike *Milligan*, however, the detainees in *Ex parte Quirin*⁴⁹ were *active* belligerents who were eventually tried, convicted and sentenced to death for offenses against the law of war.⁵⁰ Under these facts, the Court had no difficulty distinguishing *Milligan* and upholding the jurisdiction of the military commission.⁵¹

Today, once again, the United States finds itself at war and the use of military commissions has returned as a hot topic of political and legal debate. How do *Milligan* and *Quirin* affect the current war and our efforts to try captured terrorists before military tribunals? McGinty attempts to answer this question by looking at some of the Court's key decisions since 9/11. While the Justices have repeatedly cited these two precedents, neither case has provided the sole basis for any of the Court's recent rulings. Indeed, the Justices dodged the issue altogether in one case by declaring that a captured terrorist had filed his petition in the wrong district.⁵² Likewise, they avoided the tough constitutional issues in another case by finding statutory authority for the federal courts to exercise habeas jurisdiction over detainees held in Cuba.⁵³

The Court, however, has been forced to tackle some of these issues. In a 2004 case, Justice O'Connor addressed *Milligan* and *Quirin* by explaining that both are valid law.⁵⁴ Justice O'Connor then elaborated that *Quirin* served to update *Milligan*, and the difference between the two cases turned "in large part on the fact that Milligan was not a prisoner of war."⁵⁵ As in *Quirin*, where a detainee is a prisoner of war, his detention as an enemy combatant is legal.⁵⁶ Justice O'Connor made it clear, however, "that a state of war is not a blank check for the President when it comes to the rights of [our] citizens."⁵⁷ But

⁴² *Id.* at 291.

⁴³ *Id.* at 106–07 (Swaine, J.), 108–10 (Miller, J.), 113–17 (Davis, J.), 176–80 (Field, J.), and 212–21 (Chase, C.J.).

⁴⁴ 71 U.S. (4 Wall.) 2 (1866).

⁴⁵ MCGINTY, *supra* note 1, at 248–50, 257–60.

⁴⁶ *Id.* at 248.

⁴⁷ *Id.* at 258 (summarizing the facts of *Milligan*, 71 U.S. (4 Wall.) at 122–25).

⁴⁸ *Id.* at 308.

⁴⁹ 317 U.S. 1 (1942).

⁵⁰ MCGINTY, *supra* note 1, at 308–09.

⁵¹ *Id.* at 309; *see also* JEFFREY F. ADDICOTT, *TERRORISM LAW* 88–89 (4th ed. 2007) (analyzing *Quirin* and its import in understanding the struggle between effectively prosecuting a war and protecting civil rights); REHNQUIST, *supra* note 5, at 221, 224–25 (detailed discussion reconciling *Milligan* and *Quirin*).

⁵² *Id.* at 309–10 (citing *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)).

⁵³ *Id.* at 310 (citing *Rasul v. Bush*, 542 U.S. 466 (2004)).

⁵⁴ *Id.* at 310–11 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 521–23 (2004)).

⁵⁵ *Id.* at 311 (citing *Hamdi*, 542 U.S. at 522).

⁵⁶ *Id.* at 310.

⁵⁷ *Id.* at 311 (citing *Hamdi*, 542 U.S. at 536).

instead of addressing the specific limits of the President's authority, the Court again dodged the critical issue by rationalizing that the right of habeas corpus had not actually been suspended and once again finding statutory authority for a detainee to have access to the federal courts.⁵⁸

Finally, in a highly fractured 2006 decision featuring six differing opinions, the Court granted relief to another military detainee being held for trial by a military commission.⁵⁹ As before, the Court found that the President could hold a detainee, but that he had no authority to try or punish him because the proposed military commission "did not satisfy the requirements of the Uniform Code of Military Justice and the Geneva Convention."⁶⁰

The only real shortcoming of McGinty's book is his failure to include Congress's response to this series of cases in his analysis. When Congress passed the Military Commissions Act of 2006,⁶¹ it established a procedure for the current military commissions which is "consistent with the requirements of Common Article 3 of the Geneva Conventions,"⁶² and likely to survive appellate scrutiny in light of Justice O'Connor's assertion in *Hamdi v. Rumsfeld* that "the standards [of due process articulated by the Court] *could* be met by an appropriately authorized and properly constituted military tribunal."⁶³ Only time will tell. On 6 August 2008, the first military trial of a detainee in the Global War on Terrorism resulted in a conviction of the accused for providing aid to terrorism,⁶⁴ a case which is sure to become the subject of appellate litigation very soon.

The Global War on Terrorism may make civil liberties "more *vulnerable* to erosion, but the so-called 'slippery slope' argument which resists all changes in the law must be viewed against the clear and present threat [of terrorism]."⁶⁵ As 9/11 taught us, "[t]he all too real specter of mass casualties . . . and civil disorder absolutely demands that the federal government fulfill its primary mission of ensuring the safety of its citizens."⁶⁶

IV. Conclusion

Lincoln and the Court is a valuable resource for today's Judge Advocates. Military commissions are in full swing, not only as a tool of national policy to aid in the prosecution of the Global War on Terrorism, but also as a means of distributing justice to those who wish to do us harm. This book provides insight into many of the legal issues associated with our current war, and gives readers an excellent historical context for understanding how previous generations have dealt with similar concerns.

⁵⁸ *Id.* at 305, 310–12.

⁵⁹ *Id.* at 311–12 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

⁶⁰ *Id.* at 311.

⁶¹ ADDICOTT, *supra* note 51, at 107 (referencing Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950p (2006))).

⁶² *Id.*

⁶³ 548 U.S. 507, 538 (2004) (emphasis added).

⁶⁴ Alan Gomez, *Split Hamdan Decision Illustrates Cases' Difficulty*, USA TODAY, Aug. 7, 2008, available at http://www.usatoday.com/news/world/2008-08-06-gitmo_N.htm.

⁶⁵ ADDICOTT, *supra* note 51, at 160.

⁶⁶ *Id.*

The Day Freedom Died: The Colfax Massacre, The Supreme Court, and The Betrayal of Reconstruction¹

REVIEWED BY MAJOR PHILLIP GRIFFITH²

I. Introduction

In *The Day Freedom Died*, author Charles Lane masterfully details the dynamics of the post-Civil War Reconstruction era in Louisiana.³ He tells the story of the horrific murders of dozens of black men in Colfax, Louisiana on 13 April 1873, and describes how our legal system failed to provide justice, effectively opening the door to sanctioned terrorism in the South.⁴

Lane's thoroughly researched historical account effectively reminds the reader of an embarrassing period in our history.⁵ While the book is initially difficult to read, its methodical description of one man's quest for justice in the face of numerous obstacles merits belated honor to his memory.⁶ In spite of its shortcoming in failing to convincingly argue that the U.S. Supreme Court should have resolved the injustice in the case of *United States v. Cruikshank*,⁷ this book is a valuable resource for laymen and historians.

II. A Reminder of a Shameful Past

The Day Freedom Died humbly reminds us that citizens of the United States were all too familiar with the horrors of terrorism over 125 years ago.⁸ During the Post-Civil War Reconstruction era in Grant Parish, Louisiana (a newly created parish where blacks outnumbered whites) black and white Republicans merged into a politically powerful group.⁹ Just when blacks finally anticipated becoming integrated into a productive society that recognized the dignity of all races, white Democrats, scrambling to maintain power, began their reign of terror.¹⁰

White supremacists began to regain control of political power and social order in Grant Parish on 25 September 1871.¹¹ On that day, a white mob, led by the parish sheriff, murdered the former sheriff and attempted to murder the parish's acting judge.¹² Both victims were whites who sympathized with the black cause.¹³ The state governor attempted to restore order in the parish by appointing a black man as the commander of a state militia, leading to the arrests of a handful of the group responsible for the murder.¹⁴ After the murderers posted bail and returned to Grant Parish, both sides prepared for war.¹⁵

¹ CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

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³ Charles Lane is an editorial writer for the *Washington Post* who has previously served as the newspaper's U.S. Supreme Court writer, as senior editor of *The New Republic*, and as a foreign correspondent at *Newsweek*. The Washington Post, <http://projects.washingtonpost.com/staff/articles/charles+lane> (last visited Sept. 9, 2008).

⁴ See LANE, *supra* note 1, at 9–266.

⁵ See *id.*

⁶ *Id.* at 262–63.

⁷ *Id.* at 205–49.

⁸ See *id.* at 90–109.

⁹ *Id.* at 42–43.

¹⁰ See *id.* at 44–109.

¹¹ *Id.* at 50–52.

¹² *Id.* at 50.

¹³ *Id.*

¹⁴ *Id.* at 56–59.

¹⁵ *Id.* at 62–89.

On Easter morning, 13 April 1873, a white Democrat mob attacked the Grant Parish Courthouse, where many blacks had assembled in the face of a looming assault.¹⁶ The whites set the building on fire and ultimately killed approximately sixty to seventy black men, many of whom had already surrendered.¹⁷

Through painstaking detail, Lane's book effectively paints a picture of an agonizing and embarrassing period in our nation's history: the Colfax Massacre.¹⁸ This is an event that many readers may not be aware of, and Lane's portrayal of it enhances the book's shocking effect. The book reminds the reader that citizens of even the most principled nation are prone to horrific treatment of others when they begin to view their victims as something less than human. *The Day Freedom Died* prods the reader to consider how members of the United States, a country founded on principles of freedom and justice, could have tolerated these events and encourages them to never allow something like this to happen again.

III. Overall Readability

As *The Day Freedom Died* vividly describes a shameful event in our history, it does so in a manner that is not particularly easy to read, especially for the first 100 pages or so. This difficulty stems from the amount of information Lane packs into his relatively short book (266 pages of main text).¹⁹ When Lane introduces each character into the story, he diligently provides background information that enables the reader to understand each character's behavioral tendencies. This additional detail may strain some readers to keep track of pertinent information. In return for this extra effort, however, Lane vividly realizes the characters and gives the reader the ability to anticipate and understand each character's subsequent actions. Once the reader fully grasps the main characters, the book's readability increases dramatically.

The extra detail Lane provides is especially insightful for lawyers.²⁰ Approximately half of *The Day Freedom Died* describes the judicial process following the Colfax Massacre.²¹ Lane methodically details how the prosecutor, James Beckwith, a U.S. Attorney from New Orleans, develops a prosecution strategy, drafts his charges under provisions of the Enforcement Act,²² selects his witnesses, anticipates challenges from the defense, and deals with a tainted jury pool.²³ *The Day Freedom Died* requires an attentive reading approach, but this is a small price to pay for the depth of information obtained in return.²⁴

IV. A Case Study in an Attorney's Duty

The Day Freedom Died effectively paints the picture of an attorney whose dedication and principled approach to the practice of law are some of the few redeeming qualities demonstrated by any of the characters in the story. Using over a century of hindsight, perhaps the only true hero involved in the events following the Colfax Massacre was the federal prosecutor in New Orleans, U.S. Attorney James Beckwith.²⁵

During a period when the State of Louisiana turned a blind and approving eye to the murders of innocent black men, Beckwith sought out on an extremely difficult prosecution of the few murderers who could be located and brought to trial.²⁶

¹⁶ *Id.* at 89–100.

¹⁷ *Id.* at 100–09, 265–66.

¹⁸ See generally LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION*, at xi–xviii (2008).

¹⁹ See generally LANE, *supra* note 1, at 1–266.

²⁰ See Kevin Boyle, *White Terrorists*, N.Y. TIMES, May 18, 2008 (late edition), at 24 (reviewing KEITH, *supra* note 18; LANE, *supra* note 1).

²¹ *Id.*

²² 16 Stat. 140 ch. 114 (1870).

²³ See LANE, *supra* note 1, at 111–85.

²⁴ The way in which Lane provides this detailed information about the judicial process is in contrast to LeeAnna Keith's, *The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction*, a similar book also published in 2008. Boyle, *supra* note 20, at 24. In her book, Keith chooses not to delve into the intricacies of the case development, prosecution, and appellate process of *United States v. Cruikshank*, the case that came out of the Colfax Massacre. *Id.*

²⁵ See LANE, *supra* note 1, at 263.

²⁶ See *id.* at 110–26.

Facing numerous prosecutorial challenges, such as the murder of several prosecution witnesses, a shrinking budget in the Department of Justice, intimidated jurors, questionable rules of evidence, and a hung jury in his first jury trial, Beckwith faithfully performed his duties until two of the defendants finally received guilty verdicts at the end of the second jury trial.²⁷ Unfortunately, the U.S. Supreme Court set aside the convictions in *United States v. Cruikshank*,²⁸ a devastating outcome for Beckwith.²⁹

Although *The Day Freedom Died* leaves the reader with an overwhelming sense of dissatisfaction and sorrow for the injustice committed by the broader legal system during the Reconstruction era, it does so in a way that honors Beckwith. Beckwith fought for a noble cause with very little support, was hated by the locals, and seemingly wasted his time seeking justice.³⁰ Meanwhile, the murderers in the Colfax Massacre were treated as heroes throughout the state.³¹ Lane compels the reader to hope that Beckwith, a man of conviction, at least went to his grave with a sense of pride that he fearlessly dedicated himself to seeking justice.³² In spite of a prosecution that ultimately failed, Lane inspires the reader to honor a man whose ultimate professional accomplishment was his undaunted pursuit of justice for the Colfax Massacre victims.³³

V. Criticism

Although ably portraying James Beckwith's heroic sense of duty as a prosecutor, Charles Lane misses the mark when he fails to convincingly establish one of the main premises of the book—that the Supreme Court's decision in *United States v. Cruikshank* was wrong. Despite the shortcomings in his argument, Lane drafts his book in such a way that prompts the reader to ultimately blame the U.S. Supreme Court for the injustice of the Colfax Massacre, based on the unfairness of the decision.³⁴

The Day Freedom Died describes how James Beckwith charged those individuals responsible for the Colfax Massacre under provisions of the Enforcement Act, a federal law designed to prohibit actions that interfered with individual rights and privileges under the U.S. Constitution.³⁵ The Supreme Court later determined that Beckwith's indictments, along with much of the Enforcement Act, were unconstitutional.³⁶ In *Cruikshank*, the Supreme Court determined, in part, that the Fourteenth Amendment prohibits States, but not individuals, from violating certain individual rights.³⁷ This decision opened the door for widespread terrorism throughout the South, where white supremacists were free to enforce their reign of terror while state officials acquiesced to their unlawful behavior.³⁸

Lane does an outstanding job of explaining why the actions of the Supreme Court Justices, especially Justice Joseph Bradley (who sat on the second *Cruikshank* jury trial while riding circuit and granted the defendants' appeal),³⁹ were motivated by their sympathetic attitudes toward Southern whites.⁴⁰ Lane also persuasively points out a great deal of

²⁷ *Id.* at 127–204.

²⁸ 92 U.S. 542, 559 (1876).

²⁹ LANE, *supra* note 1, at 210.

³⁰ *See id.* at 127–247.

³¹ *Id.* at 156–57.

³² *See generally id.* at 262–63.

³³ While many whites celebrated the unjust result at the conclusion of *United States v. Cruikshank*, Beckwith seemingly drifted off into obscurity. *Id.* at 255–63. According to Lane, “[Beckwith] insisted that no social order could be founded on the violent subjection of an entire race of people. It was Beckwith who believed that the United States could not truly call itself a nation of laws as long as the men who spilled a sea of blood in Colfax, Louisiana, on April 13, 1873, went ‘unwhipped of justice.’” *Id.* at 263.

³⁴ *See id.* at 244–47.

³⁵ *Id.* at 113.

³⁶ *United States v. Cruikshank*, 92 U.S. 542, 559 (1876); *see also* LANE, *supra* note 1, at 244.

³⁷ *Id.* at 554–55. The first section of the Fourteenth Amendment states, in part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

³⁸ LANE, *supra* note 1, at 247–49.

³⁹ *Id.* at 189.

⁴⁰ *Id.* at 191–92.

hypocritical behavior by Justice Bradley who, prior to writing his circuit court decision in *Cruikshank*, had advised a judge within his circuit that the Fourteenth Amendment would in fact apply in cases such as this, where individual actors denied citizens' rights and the states failed to intervene.⁴¹

In spite of his explanations for the Justices' tainted motivations, Lane does not commit enough of the book to argue convincingly that the Fourteenth Amendment properly applies to actions of individuals or to State inaction. Taking a plain reading of the constitutional text, one would reason that the Court's decision in *Cruikshank* was correct in that the Fourteenth Amendment does not cover actions by individuals but only by States.⁴² In fact, Lane acknowledges that *Cruikshank* remains good law even today,⁴³ and the Supreme Court has recently cited *Cruikshank* in *United States v. Morrison* for the notion that the Fourteenth Amendment protects fundamental rights against actions by States, not individuals.⁴⁴

This one criticism does not taint the book's quality overall, but it does leave the reader somewhat unconvinced that the Supreme Court should have upheld the convictions in *Cruikshank* while following the blackletter law. This weakness may influence the reader to search outside the book to consider the interesting Constitutional issues presented in *Cruikshank*.⁴⁵

VI. Conclusion

Charles Lane has created a well-written book that draws attention to a regretful period in our history. Certainly the Supreme Court's decision in *Cruikshank*, right or wrong, does not detract from the reprehensible actions of many white Southerners who participated in, approved, or tolerated the acts of intimidation and terrorism that took place after the Civil War. The reader might easily point blame at the State of Louisiana, which failed to prosecute the case under basic state laws against murder,⁴⁶ and at the white supremacist culture that appeared more than happy to revel in the murder of blacks and the injustice that followed.⁴⁷

The absence of justice prevailing at the end of the book frustrates the reader; however, this may be the book's greatest quality. This unique point forces the reader to consider how arguably benign symbols of the South's glory days, such as the Confederate flag, create feelings of deep anger for those who have a fuller understanding of the injustice that permeated that culture. Injustice that Lane writes of with a deep understanding.

⁴¹ *Id.* at 210–11.

⁴² See generally U.S. CONST. amend. XIV, § 1; see also *Cruikshank*, 92 U.S. at 554–55.

⁴³ LANE, *supra* note 1, at 261–62.

⁴⁴ See *United States v. Morrison*, 529 U.S. 598 (2000); see also LANE, *supra* note 1, at 261–62.

⁴⁵ Although not sufficiently explained in the book, Lane does in fact argue that the Fourteenth Amendment should have applied to the case of *United States v. Cruikshank* for legitimate reasons. See generally Posting by Charles Lane to The Volokh Conspiracy, *More Evidence on Cruikshank*, <http://volokh.com/posts/1207188718.shtml> (Apr. 2, 2008); Posting of Charles Lane to The Volokh Conspiracy, *Why Cruikshank was Wrongly Decided*, http://volokh.com/archives/archive_2008_03_30-2008_04_05.shtml#1207159565 (Apr. 2, 2008); Posting of Charles Lane to The Volokh Conspiracy, *Why Cruikshank was Wrongly Decided (Part II)*, <http://volokh.com/posts/1207275718.shtml> (Apr. 3, 2008).

⁴⁶ LANE, *supra* note 1, at 143.

⁴⁷ *Id.* at 156–57.

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 ATRRS 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 ATRRS 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 ATRRS 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 (2009—September 2010) (<http://www.jagenet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5-27-C20	180th JAOBC/BOLC III (Ph 2)	6 Nov 09 – 3 Feb 10
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	209th Senior Officer Legal Orientation Course	19 – 23 Oct 09
5F-F1	210th Senior Officer Legal Orientation Course	25 – 29 Jan 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10

5F-F5	Congressional Staff Legal Orientation (COLO)	18 – 19 Feb 10
5F-JAG	2009 JAG Annual CLE Workshop	5 – 9 Oct 09
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F55	2010 JAOAC	4 – 15 Jan 10
5F-F70	Methods of Instruction	22 – 23 Jul 10
NCO ACADEMY COURSES		
5F-F301	27D Command Paralegal Course	1 – 5 Feb 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	8 Mar 10 Apr 10
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	17 May – 22 Jun 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	12 Jul – 17 Aug 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	17 May – 22 Jun 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 Jul – 17 Aug 10
WARRANT OFFICER COURSES		
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	5 – 30 Jul 10
7A-270A3	10th Senior Warrant Officer Symposium	1 – 5 Feb 10
ENLISTED COURSES		
512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th 27D BCT NCOIC/Chief Paralegal NCO Course	19 – 23 Apr 10
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10

512-27DC7	12th Redictation Course	4 – 15 Jan 10
512-27DC7	13th Redictation Course	29 Mar – 9 Apr 10
ADMINISTRATIVE AND CIVIL LAW		
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-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F23	65th Legal Assistance Course	26 – 30 Oct 09
5F-F23E	2009 USAREUR Client Services CLE Course	2 – 6 Nov 09
5F-F24	34th Administrative Law for Military Organizations	15 – 19 Mar 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
5F-F28	2009 Income Tax Law Course	7 – 11 Dec 09
5F-F28E	2009 USAREUR Tax CLE Course	30 Nov – 4 Dec 09
5F-F28H	2010 Hawaii Income Tax CLE Course	11 – 15 Jan 10
5F-F28P	2010 PACOM Income Tax CLE Course	5 – 8 Jan 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
CONTRACT AND FISCAL LAW		
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
5F-F11	2009 Government Contract Law Symposium	17 – 20 Nov 09
5F-F12	81st Fiscal Law Course	14 – 18 Dec 09
5F-F14	28th Comptrollers Accreditation Fiscal Law Course	7 – 11 Dec 09
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F34	33d Criminal Law Advocacy Course	1 – 12 Feb 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35	33d Criminal Law New Developments Course	2 – 5 Nov 09

5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10
INTERNATIONAL AND OPERATIONAL LAW		
5F-F45	9th Domestic Operational Law Course	19 – 23 Oct 09
5F-F47	53d Operational Law of War Course	22 Feb – 5 Mar 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47E	2009 USAREUR Operational Law CLE	10 – 14 Aug 09
5F-F47E	2010 USAREUR Operational Law CLE	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2009-2010 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 (040) Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	3 Aug – 2 Oct 09 13 Oct – 18 Dec 10 25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (070) Senior Officer (080) Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport) 13 – 16 Oct 09 (Newport) 8 – 12 Mar 10 (Newport) 12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	21 – 25 Sep 09 (Pensacola) 16 – 20 Nov 09 (Pensacola) 14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	9 Oct – 18 Dec 09 15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10

056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (010) Trial Refresher Enhancement Training (020)	1 – 5 Feb 10 2 – 6 Aug 10
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	1 – 12 Feb 10 (San Diego) 19 – 30 Apr 10 (Norfolk)
4046	Mid Level Legalman Course (010) Mid Level Legalman Course (020)	22 Feb – 5 Mar 10 (San Diego) 14 – 25 Jun 10 (Norfolk)
4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) 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) Senior Enlisted Leadership Course (Fleet) (170)	10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton) 14 – 16 Oct 09 (Norfolk) 9 – 10 Nov 10 (San Diego) 16 – 20 Nov 10 (Norfolk) 11 – 15 Jan 10 (Jacksonville) 25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 16 – 20 Feb 10 (Norfolk) 16 – 18 Mar 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego) 2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010) Law of Naval Operations (010)	14 – 18 Sep 09 13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
748K	USMC Trial Advocacy Training (040)	14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10

850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	21 – 25 Sep 09 14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010) Coast Guard Legal Technician Course (010)	3 – 14 Aug 09 2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	14 – 15 Dec 09 (Hawaii) 25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)
961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	19 – 23 Oct 09 (Norfolk) 12 – 16 Apr 10 (San Diego)
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 10 6 – 9 Apr 10 6 – 9 Jul 10
NA	Legal Specialist Course (040)	26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (090) Legal Officer Course (010) 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)	17 Aug – 4 Sep 09 19 Oct – 6 Nov 09 30 Nov – 18 Dec 09 25 Jan – 12 Feb 10 22 Feb – 12 Mar 10 29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (070) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	17 – 28 Aug 09 26 Oct – 6 Nov 09 7 – 18 Dec 09 1 – 12 Feb 10 1 – 12 Mar 10 5 – 16 Apr 10 19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (010) Senior Officer Course (020)	10 – 14 Aug 09 14 – 18 Sep 09 5 – 9 Oct 09 16 – 20 Nov 09

	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	11 – 15 Jan 10 22 – 26 Mar 10 24 – 28 May 10 9 – 13 Aug 10 13 – 17 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (010) 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)	20 Jul – 7 Aug 09 17 Aug – 4 Sep 09 19 Oct – 6 Nov 09 30 Nov – 18 Dec 09 4 – 22 Jan 10 22 Feb – 12 Mar 10 3 – 21 May 10 7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (010) 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)	27 Jul – 7 Aug 09 17 Aug – 4 Sep 08 13 – 23 Oct 09 30 Nov – 11 Dec 09 4 – 15 Jan 10 29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (080) 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) Senior Officer Course (080) Senior Officer Course (090)	14 – 18 Sep 09 (Pendleton) 5 – 9 Oct 09 (San Diego) 25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 8 – 12 Feb 10 (San Diego) 29 Mar – 2 Apr 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 26 – 30 Apr 10 (San Diego) 24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 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 09-05	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
Civilian Attorney Orientation, Class 10-A	1 – 2 Oct 09
Area Defense Counsel Orientation Course, Class 10-A	5 – 9 Oct 09
Defense Paralegal Orientation Course, Class 10-A	5 – 9 Oct 09
Federal Employee Labor Law Course, Class 10-A	5 – 9 Oct 09
Paralegal Apprentice Course, Class 10-01	6 Oct – 20 Nov 09
Judge Advocate Staff Officer Course, Class 10-A	13 Oct – 17 Dec 09
Paralegal Craftsman Course, Class 10-01	13 Oct – 19 Nov 09
Reserve Forces Judge Advocate Course, Class 10-A	17 – 18 Oct 09
Advanced Environmental Law Course, Class 10-A (off-site Wash., DC)	20 – 21 Oct 09
Pacific Trial Advocacy Course, Class 10-A (off-site Japan)	7 – 11 Dec 09
Deployed Fiscal Law & Contingency Contracting Course, Class 10-A	14 – 17 Dec 09
Trial & Defense Advocacy Course, Class 10-A	4 – 15 Jan 10
Paralegal Apprentice Course, Class 10-02	5 Jan – 19 Feb 10
Judge Advocate Mid-Level Officer Course, Class 10-A	11 – 29 Jan 10
Air National Guard Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Air Force Reserve Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Homeland Defense/Homeland Security Course, Class 10-A	1 – 5 Feb 10
CONUS Trial Advocacy Course, Class 10-A (off-site, Charleston, SC)	1 – 5 Feb 10
Legal & Administrative Investigations Course, Class 10-A	8 – 12 Feb 10
European Trial Advocacy Course, Class 10-A (off-site, Kapaun AS Germany)	16 – 19 Feb 10
Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10
Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10

Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10
Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

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. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to

enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.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 Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. TJAGSA Legal Technology Management Office (LTMO)

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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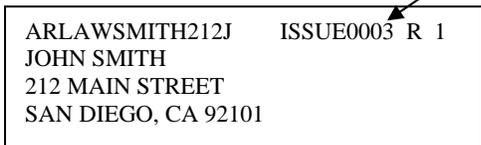
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