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Tax Primer for Servicemembers with Residential Rental Property

Major Patricia K. Hinshaw[*]

I shall never use profanity, except in discussing house rent and taxes.[1]

I. Introduction

With the recent economic downturn and the housing crisis,[2] more American homeowners face falling home values and an inability to sell their property at a profit.[3] Servicemembers, in particular, are often unable to build adequate home equity because of frequent requirements to move or deploy. To avoid a significant financial loss from a short-term home sale, some military homeowners choose to convert their homes into rental properties rather than sell them. Other servicemembers deliberately purchase rental properties near their various duty stations as a long-term investment plan.[4] As the number of prospective military landlords grows in the future, attorneys in charge of installation tax centers must have a solid understanding of the tax issues related to residential rental property.[5]

This paper aims to give legal assistance attorneys and officers-in-charge (OICs) of tax centers an overview of the basic federal income tax implications of residential rental property. Part II of this primer concentrates on reporting rental income and expenses and how to properly account for each on Schedule E of the landlord's IRS Form 1040. Part III addresses the benefits of depreciating rental property and capital improvements made during the life of a rental. Part IV discusses the limits on what landlords can deduct in any given year. Finally, Part V concentrates on the sale of rental homes and describes the new limits imposed by Internal Revenue Code § 121 when a landlord sells his investment.

II. Rental Income and Expenses

A. What Is Rental Income?

Rental income is most conveniently defined as payment for the use or occupation of a piece of property,[6] but it also encompasses *any* benefits received from the rental property.[7] This includes both current[8] and advance[9] rent payments from tenants but generally excludes security deposits.[10] Rental income also includes any number of other payments that a landlord

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[1] MARK TWAIN, EUROPE AND ELSEWHERE 15 (1923).

[2] Phil Izzo, *Economists See No Growth Until 2nd Half of 2009*, WALL ST. J., Nov. 13, 2008, *available at* http://online.wsj.com/article/SB122651067485621191.html.

[3] The Office of Federal Housing Enterprise Oversight (OFHEO), http://www.ofheo.gov/hpi.aspx?Nav=275 (last visited Feb. 26, 2009).

[4] Barbara H. Pietrowski, *Make Rental Property Part of Your Retirement Plan*, ARMY TIMES, http://www.armytimes.com/money/financial_advice/ONLINE.INVEST.RENTALPROPERTY/ (last visited Mar. 6, 2009).

[5] Residential rental property is defined as real property with buildings or structures, where eighty percent or more of the property's annual gross rental income comes from dwelling units. INTERNAL REVENUE SERV., PUB. 946, HOW TO DEPRECIATE PROP. 32 (2007) [hereinafter IRS PUB. 946].

[6] I.R.C. § 61 (2006). Gross income includes all income from whatever source derived. This may include rent paid by a tenant, services provided in lieu of rent, or any other benefit the landlord receives for use of the property. *See* Comm'r v. Glenshaw Glass, 348 U.S. 426 (1955) (All income, whether traceable to labor, to capital, or to mere good fortune are gains that fall within broad sweep of gross income in I.R.C. § 61, unless expressly excluded by Congress).

[7] Treas. Reg. § 1.61-8a (2008); INTERNAL REVENUE SERV., PUB. 527, RESIDENTIAL RENTAL HOMES 3 (2008) [hereinafter IRS PUB. 527].

[8] Current rents are payments or services provided to the landlord for a contemporaneous rental period (usually the current month), and they must be reported when received. IRS PUB. 527, *supra* note 7, at 3.

[9] Advance rent payments are payments for future use of the property. A common example of advance rent payment occurs when the landlord demands payment of first and last month's rent upon signing the lease. The last month's rent is an advance payment and is not generally refundable to the tenant. Any advance rental payments are reported as income in the year received, not the future tax year covered by the payment. I.R.C. § 451 (2006).

[10] IRS PUB. 527, *supra* note 7, at 3; JEFFERY HELEWITZ, A GUIDE TO FEDERAL TAXATION 49 (2005).

may receive in the ordinary course of a tenancy, even though the landlord may not think of them as rent.[11] Once a landlord accounts for his total rental income, he must report it to the Internal Revenue Service (IRS) in the year he received, or constructively received, the payments.[12] For example, if the landlord accepts rent payments for December 2008 and January 2009 in December, the landlord must report both payments as part of his taxable income in 2008 because he received the payments within that tax year.

Security deposits, on the other hand, may not necessarily be taxable income.[13] The landlord's obligation to report a security deposit as income hinges on how the landlord ultimately treats the deposit.[14] If the landlord intends to return the security deposit to the tenant at the end of the lease, then the deposit is not income.[15] The landlord is merely safeguarding the money to ensure the tenant lives up to his obligations under the lease and does not receive any benefit from the deposit.[16] If the landlord keeps part of the security deposit because the tenant breached the lease, he must report only the retained amount as income.[17] Because many landlords have differing views of what constitutes a security deposit, tax preparers must always ask whether the landlord intends to return the deposit.[18]

At the end of the tax year, the landlord must report all actual and constructive rental income using an IRS Form 1040 Schedule E, Supplemental Income and Loss Form.[19] The landlord may list up to three rental properties on each Schedule E, with each property listed separately by location. He must identify each property consistently throughout the schedule, as either property A, B, or C. If the landlord owns more than three rental properties, he should use additional schedules to report and adjust his total rental income. However, as the landlord acquires increasing numbers of rental properties, the IRS may classify his rental earnings as business, rather than as supplemental, income.[20]

After listing actual and constructive rent on the Schedule E, the landlord may offset the income with deductions for rental expenses and depreciation, and then he must report the net rental income to the IRS.[21] As a consequence of this adjustment on the Schedule E, many landlords collecting thousands of dollars in rent may wind up with no rental income or even losses used to offset their other income.[22] This potential for negative rental income is a significant financial advantage for landlords, and it is imperative that tax center OICs thoroughly understand how to adjust income through expenses and depreciation to assist clients.

B. Rental Expenses—What Can the Landlord Deduct?

A landlord who intends to deduct his rental expenses on a Schedule E must keep track of all "ordinary and necessary expenses paid or incurred during the taxable year."[23] The three most significant expenses landlords incur as part of their

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[11] If the tenant pays to cancel the lease, that payment is considered rent in the tax year when the cancellation payment is received. IRS PUB. 527, *supra* note 7, at 3. If there are any insurance proceeds for the loss of rental income because of fire or other casualty, those proceeds are considered rental income. 26 C.F.R. 1.123-1 (2005). Additionally, any non-monetary benefits that the landlord receives will be included as rent. This includes a tenant paying the landlord's deductable expenses and any property or services received in lieu of rent payments. Treas. Reg. § 1.61-8(c) (2008).

[12] I.R.C. § 451 (2006); *see id.* § 441. Taxable income is computed based on the accounting method the taxpayer regularly uses to compute his income. *Id.* For most landlords, this is the cash basis method, under which income is reported when received or constructively received.

[13] IRS PUB. 527, *supra* note 7, at 3.

[14] For example, if the security deposit consists of first and last month's rent, then it is actually a current and advance payment, and it is considered rental income in the year that it is received. I.R.C. § 451.

[15] IRS PUB. 527, *supra* note 7, at 3.

[16] However, some states statutorily require landlords to put security deposits into an interest earning account, which may generate additional reportable rental income. *See* VA. CODE ANN. § 55-248.15:1 (2007).

[17] This amount is reported as income in the tax year the money is retained, as opposed to the year in which the deposit was originally received. IRS PUB. 527, *supra* note 7, at 3.

[18] This issue, and many others, can be resolved by using a separate rental income questionnaire for those tax payers who have residential rental property. *See infra* Appendix A.

[19] *See infra* Appendix B.

[20] If landlord is renting residential property as a business venture, a Schedule C should be filed rather than a Schedule E. *See* discussion *infra* Appendix G.

[21] *See infra* Appendix B.

[22] *See* discussion *infra* Part IV.B.

[23] I.R.C. § 62(a)(4) (2006); *id.* § 212. Ordinary and necessary expenses are those expenses that are common and accepted in the taxpayer's business or trade. They must be reasonable in amount and bear a reasonable relation to the management of the property. Bingham's Trust v. Comm'r, 325 U.S. 365 (1945).

rental activity are mortgage interest, real estate taxes, and insurance. The lender holding the mortgage must report each of these items to the landlord and IRS at the end of the tax year on an IRS Form 1098, Mortgage Interest Statement.[24] Tax center OICs and those working in installation tax centers should always request this document when assisting a landlord with residential rental property.[25] If the landlord used the home exclusively as a rental property for the entire year, the preparer may transfer these expenses directly from the Form 1098 to the landlord's Schedule E.[26] The landlord may deduct all his mortgage interest for the rental property as an expense.[27] Conversely, if the landlord paid any points on the loan, that expense must be prorated over the mortgage term.[28] The landlord may also deduct any insurance on the rental home as an expense for that tax year.[29] Finally, the landlord may deduct real estate taxes on the property as an expense. If the landlord paid his property taxes into an escrow account, as required by many lenders, his Form 1098 will usually list his annual real estate taxes.[30] After these large expenses are accounted for, the landlord should continue to list his expenses by category on the Schedule E.[31]

Military landlords often find themselves stationed far from their rental property. Consequently, many of these landlords use property managers to assist in finding suitable tenants, collecting monthly rent payments, and carrying out the day-to-day business of managing a property. Landlords may deduct management fees for these services as an expense.[32] Additionally, if the landlord checks on the rental property during the tax year, he may deduct his "ordinary and necessary auto and travel expenses,"[33] including 50% of his meal expenses when traveling away from home.[34] If the landlord's primary purpose for the trip is to "collect rental income or to manage, conserve or maintain the rental property,"[35] he may deduct either (1) his actual travel expenses, or (2) the standard mileage rate when calculating this expense.[36] However, if the landlord fails to maintain records substantiating his travel expenses, the IRS may deny the deduction.[37] This deduction is particularly confusing for many military landlords, and tax center OICs should be thoroughly familiar with the limits on auto and travel expenses.[38]

Another issue that frequently arises when reporting rental expenses is the proper accounting for repairs. Many landlords have difficulty distinguishing between repairs and improvements. A repair "keeps the rental property in good operating condition" and "does not materially add to the value of [the] property or substantially prolong its life."[39] Examples of repairs

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[24] IRS PUB. 527, *supra* note 7, at 4.

[25] If the landlord pays mortgage interest to a lender other than a financial institution or does not receive a Form 1098, he is required to maintain a record of the interest paid to the lender and should report the interest payments on line 13 (other interest), rather than line 12 (mortgage interest) on the Schedule E. IRS INSTRUCTIONS FOR SCHEDULE E (FORM 1040), SUPPLEMENTAL INCOME AND LOSS, at E-5 (2008) [hereinafter IRS INSTRUCTIONS FOR SCHEDULE E].

[26] If the home was not exclusively used as a rental property during that tax year, expenses must be apportioned between personal use and the rental use. Only the proportion related to rental use may be deducted as a rental expense. *See* discussion *infra* Part IV.A.

[27] I.R.C. §163 (2006). However, the landlord may not deduct any pre-paid interest as an expense. Ordinary interest paid on the mortgage should be entered in block 12 (mortgage interests paid to banks) of the Schedule E.

[28] Moore v. Comm'r, T.C. Memo 1994-503. Points will be placed in block 13 (other interest) of the Schedule E.

[29] I.R.C. § 62(a)(4); *id.* § 212. Insurance includes premiums for mortgage insurance, fire and casualty insurance, or any other ordinary or necessary insurance expenses required to maintain the rental home. The sum of these premiums should be entered in block 9 (insurance) of the Schedule E.

[30] Some landlords may also provide documents from their local tax assessor to substantiate the amount of real estate taxes paid on the rental property during the tax year. The total amount paid in real estate taxes should be listed on line 16 (taxes) of the Schedule E.

[31] *See infra* Appendix B.

[32] IRS PUB. 527, *supra* note 7, at 3. The landlord should report this expense on line 11 (management fees) of the Schedule E. If the landlord incurs any additional expenses by advertising the rental property, or as a commission to another party, he may also report these expenses on lines 5 (advertising) and 8 (commissions) of the Schedule E, respectively.

[33] INTERNAL REVENUE SERV., PUB. 463, TRAVEL, ENTM'T, GIFTS, AND CAR EXPENSES 4 (2008) [hereinafter IRS PUB. 463].

[34] However, all deductable travel expenses must relate solely to the rental activity. For example, Sergeant Smith spends $600 to fly to Austin, Texas, to see his mother and $70 to rent a car for his visit. He also chooses to check up on his rental property located near Fort Hood, Texas, during the visit. He will not be permitted to deduct the cost of his entire trip as a business expense. He is only permitted to deduct the round-trip mileage from Austin to the rental home at Fort Hood, plus fifty percent of his meal expenses during the trip to check on the property. The remainder of his expenses are personal or family-related.

[35] IRS PUB. 527, *supra* note 7, at 4.

[36] This amount is reported on line 6 (auto & travel) of the Schedule E. The standard mileage rate is listed each year in the instructions for the Schedule E.

[37] *See* Burton v. Comm'r, T.C. Memo 1991-12 (1991) (disallowing auto and travel expenses when petitioners could not present travel logs or other evidence to corroborate their testimony regarding such trips).

[38] *See* IRS PUB. 463, *supra* note 33.

[39] IRS PUB. 527, *supra* note 7, at 5.

include the fixing of a clogged sink or the replacement of a broken window pane. An improvement, on the other hand, "adds to the value of the property, prolongs its useful life, or adapts the property to new uses."[40] Finishing the basement on a rental home to expand its livable space is an example of an improvement.

Confusion over repairs and improvements often occurs when an item falls squarely into both categories. If the landlord replaces the roof on the rental home, it extends the useful life of the rental and adds value to the property. As such, a new roof would generally constitute an improvement. However, if the landlord only replaces part of the roof because it is leaking, the new roofing materials and labor are a necessary expense needed to keep the rental home in good operating condition. In each scenario, the landlord pays for exactly the same type of materials and labor, so he may be unable to distinguish whether the expense incurred represents an improvement cost or a deductable repair.[41] When the potential for confusion exists, it is "necessary to take into consideration the purpose for which an expenditure is made in order to determine whether such expenditure is capital in nature or constitutes a necessary expense."[42]

While most deductions on the Schedule E are self-explanatory, some are relatively vague and may be ripe for abuse by unscrupulous landlords.[43] Tax preparers can prevent much of this fraud by inspecting landlords' supporting documents.[44] Landlords must maintain records to substantiate their rental income and deductions each year.[45] If the landlord presents insufficient records, the preparer should ask him how he incurred his expenses and ask for supporting documents. Finally, it is always important to remember that landlords may never deduct the value of their own labor as an expense.[46]

III. Depreciation—How It Helps the Landlord

Depreciation is possibly the greatest tax benefit afforded to landlords. It permits landlords to recover the cost of wear and tear on their residential rental property through yearly tax deductions.[47] Using the dwelling as a rental home decreases the value of the asset for tax purposes, even though the fair market value of the home stays the same or even increases over time.[48] Using the Modified Accelerated Cost Recovery System (MACRS),[49] the useful life of a residential rental property is twenty-seven and a half years, and the value of this asset notionally drops each year during that period. If the landlord is the owner of the property[50] and meets all the criteria to depreciate the asset, he can deduct this depreciation on his Schedule E.[51]

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[40] *Id.*

[41] Repairs are deducted as an expense on line 15 (repairs) of the Schedule E. The cost of improvements to the rental home are not deductable expenses, but the cost may be recovered by taking depreciation on the improvements. *See* discussion *infra* Part III.B and Appendix C.

[42] Campbell v. Comm'r, T.C. Summ. Op. 2002-117 (2002) (allowing removal and replacement of roofing materials as a deductible expense when the only purpose was to prevent existing leakage and keep the rental home in operating condition and not to prolong the life of the property, increase its value, or make it adaptable for another use). Allowable repairs may be deducted as an expense on line 15 (repairs) of the Schedule E.

[43] For example, the supplies expense (line 5 of the Schedule E) is not defined in IRS Pub. 527 and is not specifically addressed in the IRS instructions for the Schedule E. Accordingly, landlords must fall back on the overarching principle that only "ordinary and necessary expenses" for operation of the rental property are deductable. *See* Bingham's Trust v. Comm'r, 325 U.S. 365 (1945).

[44] Installation tax centers operate under the IRS Volunteer Income Tax Assistance (VITA) program and help military taxpayers prepare individual tax returns in conjunction with Army Regulation 27-3, paragraph 3-6i. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6i (21 Feb. 1996). Tax returns prepared as part of the VITA program are considered self-prepared by the taxpayer. However, VITA preparers and supervising attorneys may not knowingly assist taxpayers in preparing or filing erroneous or fraudulent tax documents.

[45] I.R.C. § 6001 (2006); Shelton v. Comm'r, T.C. Summ. Op. 2002-9 (2002).

[46] Rental Property and the Tax Gap, http://www.irs.gov/newsroom/article/0,,id=172596,00.html (last visited Nov. 17, 2009); *see generally* Burton v. Comm'r, T.C. Memo 1991-12 (1991) (explaining petitioner could not deduct his "children's help" as an expense because any amounts paid to the children are expenses that are personal in nature and not deductible).

[47] IRS PUB. 946, *supra* note 5, at 3.

[48] I.R.C. § 167.

[49] *Id.* § 168. Taxpayers must use MACRS to depreciate residential rental property placed in service after 31 December 1986. Homes placed into service prior to 1 January 1987 use the Accelerated Cost Recovery System (ACRS) depreciation method instead of the MACRS method. Further information about using ACRS is contained in IRS Pub. 534. INTERNAL REVENUE SERV., PUB. 534, DEPRECIATING PROP. PLACED IN SERVICE PRIOR TO 1987 (Nov. 1995).

[50] The taxpayer is still considered the owner of the property even if it is subject to a lien or debt. IRS PUB. 946, *supra* note 5, at 4.

[51] Landlords often may not claim the full depreciation deduction for a tax year in which they used a rental home for personal use. *See* discussion *infra* Part IV.A.

When preparing tax returns for rental property, landlords frequently misunderstand the usefulness of the depreciation deduction. Although landlords must report all their rental income, they do not have to use their rental expenses or depreciation to adjust this income.[52] Few landlords willingly give up their expense deductions, but a surprising number contemplate forfeiting their depreciation deduction. The decision not to depreciate a property is often made by inexperienced landlords who believe depreciating the property for tax purposes will somehow decrease the value of the home. This notion is incorrect. When a landlord claims this benefit on his tax return, it does not affect the fair market value of the property. Depreciation is merely an opportunity for a landlord to recover his investment in tangible property through a tax deduction.[53]

A second misunderstanding about depreciation relates to the sale of a home. When a landlord sells a rental property, his capital gain includes both the profit realized from the sale and the depreciation on the home during the period it was used as rental property.[54] Some landlords mistakenly believe that by declining to depreciate the rental home on their annual tax returns, the IRS will not compel them to account for depreciation upon the home's sale. In truth, when the landlord calculates his capital gain, he must always adjust the value of the home for any *allowable* depreciation.[55] For example, if a landlord sells his rental home in 2008 for a $20,000 profit, and could have depreciated the rental home by $10,000 on his tax returns during the rental period, he must declare a total of $30,000 as capital gain upon the sale, even if he did not actually claim the depreciation during each of those tax years. Accordingly, landlords should always claim the maximum amount of depreciation when allowed, because they will have to adjust their basis by the amount they *could have* deducted on the rental home.[56]

A. Depreciating the Rental Home

To depreciate any asset, the landlord must know three things: (1) the recovery period, (2) the date the asset was placed in service, and (3) the basis of the asset.[57] The recovery period for residential rental property under the MACRS general depreciation system (GDS) is always twenty-seven and a half years.[58] Next, the date the rental property was "placed in service" is the month the asset was "ready and available for a specific use."[59] Finally, the basis amount is usually either the cost of the rental property or its fair market value.[60] Once the landlord determines the rental home's basis, calculating the depreciation deduction is relatively easy because the landlord only needs to determine his basis amount once—when the home is placed into service.[61] Tax centers using TaxWise software[62] to electronically prepare returns should note that TaxWise will automatically calculate the landlord's depreciation once the preparer has entered all the relevant information for the rental property. Preparers calculating depreciation manually must use the IRS Form 4562 and the relevant depreciation tables to determine the depreciation deduction.[63]

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[52] As with other adjustments, deductions, and tax credits, the taxpayer may willingly choose to give up his allowable deductions, but if he does so, he will pay more taxes than similarly-situated landlords.

[53] IRS PUB. 946, *supra* note 5, at 3.

[54] I.R.C. § 1016(a)(2); *see* Samson v. United States, 144 F. Supp. 620 (D.C.N.Y. 1956) (finding taxpayer was permitted by statute to claim depreciation, and, therefore, his adjusted cost basis at sale should have reflected this allowable depreciation).

[55] I.R.C. § 1016(a)(2). Allowable depreciation is the amount the landlord is permitted to claim under the tax code. Compare the difference between "allowable" depreciation, "claimed" depreciation (the amount the landlord actually claims on his tax return), and "allowed" depreciation (the amount the IRS allowed the landlord to claim on his tax return). If the landlord only claimed $500 in depreciation and that depreciation deduction was approved by the IRS when he was permitted to claim $1000 in depreciation, then his allowable depreciation was $1000, even though his claimed/allowed depreciation was only $500.

[56] *Id.*

[57] IRS PUB. 527, *supra* note 7, at 6.

[58] *Id.* at 9.

[59] IRS PUB. 946, *supra* note 5, at 34. This will be a fact-specific determination based on each individual property, as some rental homes are available for rent in one month but remain vacant for several months before the landlord actually secures tenants. *Id.*

[60] IRS PUB. 527, *supra* note 7, at 7–8. However, basis may be determined by other means if the rental home was acquired as a gift from a former spouse as a result of divorce, by inheritance, or through a like-kind exchange under I.R.C. § 1031. INTERNAL REVENUE SERV., PUB. 551, BASIS OF ASSETS 10 (2002) [hereinafter IRS PUB. 551].

[61] IRS PUB. 551, *supra* note 60, at 2–3. Each subsequent year that the home remains a rental property, the basis will remain the same for purposes of depreciation calculations. The preparer should be able to readily determine the basis of the rental property by looking at the landlord's Schedule E and IRS Form 4562 from the prior year.

[62] TaxWise is tax and accounting software licensed to the IRS for use in all VITA programs and tax centers.

[63] *See* discussion *infra* Appendix E.

1. Determining Basis by Cost

The basis of an asset is usually its cost.[64] However, determining the cost basis for residential rental property is more complex than most other assets because it consists of two separate items: (1) the rental home, and (2) the parcel of land the home sits on.[65] The landlord may only depreciate the value of the rental home and any other structures on the property; he cannot depreciate the value of the land itself.[66] Most landlords purchase the land and residence together, and they often need help determining the cost of each asset separately. To do this, a landlord must know the property's total purchase price and the assessed value of the parcel of land.[67] After establishing these amounts, the landlord simply subtracts the land value from purchase price, and the remainder is his cost basis in the rental home.

2. Determining Basis by Fair Market Value

Many military landlords use the home as a personal residence before converting it to a rental property. In such cases, it's often more advantageous for the landlord to calculate his basis using the property's fair market value (FMV) at the time of conversion, rather than its cost at the time of purchase. However, the landlord may only use this method to determine his basis when the home's FMV is *less than* the home's adjusted basis.[68] For example, assume a landlord purchased a parcel of land for $30,000 (land value) and built a $200,000 home on the property. While living in the home, he made an additional $26,000 in improvements before converting it to a rental home. In this case, the landlord's adjusted basis in the rental home is $226,000. Now assume the FMV of the property at the time it's converted to a rental is $250,000, of which $35,000 is for the current land value and the remaining $215,000 is for the home. The landlord may use the home's FMV ($215,000) as his basis for depreciation instead of the property's cost ($200,000), because the FMV of the property is less than the landlord's adjusted basis of $226,000. It is important to note that, regardless of whether the landlord uses the cost basis method or FMV method to determine his basis in the rental property, he never includes the land's value in this determination. He can only consider the value of the residence and other structures on the land.[69]

3. Depreciation Limits and Additions

The landlord may depreciate the rental property each year for twenty-seven and a half years, until he fully recovers the home's basis.[70] However, depreciation ends early if the landlord retires the rental property from service, either by selling it or converting the property to personal use.[71] Furthermore, if the landlord uses the rental home as his personal residence for a portion of the year, he may be unable to deduct the full amount of his depreciation that particular year.[72]

In addition to normal depreciation for the rental home, some landlords are also eligible for a special depreciation allowance, which *increases* their depreciation deduction.[73] For example, certain landlords receive a special depreciation allowance for rental properties homes built within a qualified Liberty Zone[74] or Gulf Opportunity Zone.[75] Once the landlord

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[64] I.R.C. § 1012 (2006); IRS PUB. 551, *supra* note 60, at 2.

[65] IRS PUB. 527, *supra* note 7, at 7–8.

[66] *Id.* at 6. The landlord cannot depreciate land because it does not wear out, become obsolete, or get used up. *Id.*

[67] The purchase price is readily available on the property's sale documents or the HUD-1. The value of the land by itself, however, is rarely itemized in the sale documents, unless the landlord purchased the parcel without any structures on it. Instead, the land's value is most easily established through tax appraisal records from the local tax assessor. *See* Sample Land Appraisal document *infra* Appendix D.

[68] IRS PUB. 946, *supra* note 5, at 12.

[69] IRS PUB. 527, *supra* note 7, at 7–8.

[70] IRS PUB. 946, *supra* note 5, at 7.

[71] *Id.*

[72] Personal use is defined as fourteen or more days in the year or more than ten percent of the total days it was rented to others at a fair market price. IRS PUB. 527, *supra* note 7, at 21.

[73] IRS PUB. 946, *supra* note 5, at 24.

[74] I.R.C. § 1400L (2006). The Liberty Zone includes qualified properties in areas of New York City damaged, destroyed, or condemned as a result of the 11 September 2001 terrorist attacks.

[75] *Id.* § 1400N. The Gulf Opportunity Zone covers qualified properties in Mississippi, Alabama, and Louisiana declared hurricane disaster areas after Hurricanes Katrina, Rita, or Wilma.

determines his total depreciation on the rental home, he may also begin depreciating any capital improvements made to the rental property.[76]

B. Depreciating Capital Improvements

Even though landlords cannot deduct improvement costs for rental properties as an "expense" on their Schedule E, they can recover these costs through depreciation.[77] Landlords must always remember to depreciate each improvement separately from the rental property using the improvement's appropriate recovery period.[78] For example, if a landlord installs a new dishwasher in a rental home two years after placing the home into service, he can continue depreciating the rental property for the remaining twenty-five and a half years of its recovery period and can also begin depreciating the dishwasher as a second asset.

Most improvements to rental property fall into the five-year, seven-year, or fifteen-year recovery periods.[79] Interior improvements, such as the installation of appliances, carpets, or air conditioning units, have a five-year recovery period.[80] Thus, a landlord can depreciate the value of a new dishwasher over five years to recover the cost of the improvement. Office furniture, fixtures, and equipment that are not structural components of the home have a seven-year recovery period.[81] The landlord may depreciate any improvements made directly to the land or added to it, including trees, shrubs, fences, roads, sidewalks, and bridges, over a fifteen-year period.[82] Finally, any other additions or improvements made to the structure itself have the same recovery period as the home.[83] For example, a new roof will be depreciated over twenty-seven and a half years.

Once the landlord has calculated the depreciation for improvements, he can add it to his depreciation on the home. He can then subtract the total depreciation amount from his rental income on Schedule E.[84] Adjusting rental income by subtracting rental expenses and depreciation often results in a negative amount or "loss." Losses often help landlords because they can be used to offset other income.[85] However, certain situations may limit whether the landlord can fully use this negative rental income in any given year.

IV. Limits on the Landlord's Rental Deductions

There are two circumstances when a landlord may not deduct the full extent of his expenses or depreciation. First, if a landlord uses the home as his private residence for more than fourteen days during the year, he must limit his deductions to the amount of his rental income for that year.[86] Second, if the landlord exceeds the passive activity loss limit, his losses for that year are phased out as his modified adjusted gross income (MAGI) increases.[87] These topics frequently appear when preparing rental returns, and tax center OICs must have a strong grasp of the underlying rules to explain these concepts.

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[76] IRS PUB. 527, *supra* note 7, at 5.

[77] *Id.*

[78] *Id.* at 10–11. As with rental homes, landlords must complete Form 4862 and use the MACRS method for depreciating the asset after determining the asset's basis, recovery period, and the date placed in service.

[79] *Id.* at 10.

[80] IRS PUB. 946, *supra* note 5, at 31.

[81] *Id.*

[82] *Id.* at 32.

[83] IRS PUB. 527, *supra* note 7, at 9.

[84] *See infra* Appendix E.

[85] I.R.C. § 469(i) (2006).

[86] *Id.* § 280A.

[87] *Id.* § 469.

A. Limitations Created by Personal Use of the Rental Home

If a landlord uses a home for personal use, his rental deductions (*i.e.*, expenses and depreciation) may not exceed his rental income.[88] In determining what the landlord can deduct, he must first apportion his expenses between his personal and the rental use of the home.[89] The landlord may only deduct the mortgage interest, real estate taxes, casualty losses, and any other rental expenses *unrelated* to his personal use of the home.[90] If there is any rental income remaining after these initial deductions, the landlord may also deduct his depreciation and other expenses, up to the amount of the remaining rental income.[91] The landlord cannot report negative rental income (losses) in any year in which he personally used the rental home. However, he can carry over any unused expenses to the next tax year if the sole reason he was unable to use them in the current tax year was due to the personal use rule.[92]

For example, assume CPT Jones lived in her home and used it as a personal residence for the first six months of 2008 before converting it into a rental home. Captain Jones must apportion her expenses between her personal use of the home and the rental activity. She may offset her 2008 rental income with the rental activity's portion (fifty percent) of the annual mortgage interest and property taxes, as well as all other rental expenses unrelated to her personal use of the home.[93] If there is any rental income left over after deducting these expenses, CPT Jones may then deduct her depreciation, up to the amount of remaining rental income. She cannot claim a loss in 2008; however, she can carry forward the losses she cannot deduct to 2009, because the sole reason her loss must be disallowed is related to her personal use of the home in 2008.[94]

These same limitations also apply to landlords who only rent out a portion of their home. In such cases, the landlord must apportion his expenses between the percentage of property retained for personal use and the percentage of the home rented to tenants.[95] A landlord must report all of his rental income and may only deduct a pro rata portion of the home's expenses.[96]

B. Passive Activity Loss Limits

Passive activity loss limits may also cap the amount of rental losses a landlord can use to offset his income in any given year. There are two types of passive activities: (1) a business or trade in which the taxpayer does not "materially participate"[97] and (2) ownership of residential rental property, so long as the landlord is not a real estate professional.[98] Most military landlords incur negative rental income or "passive losses" after deducting expenses and depreciation from their rental income. Under the general passive activity rules, taxpayers may not use passive losses to offset their earned income or

[88] *Id.* § 280A. This is most likely to occur in the first tax year in which the landlord converts the home into a rental property.

[89] IRS PUB. 527, *supra* note 7, at 22.

[90] *Id.*; IRS INSTRUCTION FOR SCHEDULE E, *supra* note 25, at E-3.

[91] IRS PUB. 527, *supra* note 7, at 22–23.

[92] *Id.*

[93] Such expenses might include advertising expenses and any amounts she paid to the property manager to handle the rental home.

[94] After accounting for her rental income and expenses, CPT Jones may then treat the expenses incurred solely from her personal use of the home (i.e., the remaining fifty percent of her mortgage interest, property taxes, and insurance) as an individual expense. She may list these expenses on her Schedule A, if she itemizes her personal deductions. *Id.* at 23.

[95] I.R.C. § 280A (2006); IRS PUB. 527, *supra* note 7, at 21.

[96] IRS PUB. 527, *supra* note 7, at 22. For example, if the landlord rents three of the nine rooms in his home, then one-third of his annual mortgage interest is a rental expense and two-thirds of the mortgage interest is a personal expense.

[97] I.R.C. § 469(c)(1). Passive activities became a very narrow category under the Tax Reform Act of 1986. Although a taxpayer does not materially participate in creating income or losses when purchasing stocks or mutual funds, winning the lottery, or earning interest on a bank account, these activities are still not considered passive activities. There are only two activities that create passive income. Also, note that any gains resulting from the sale of a passive activity is also considered passive income. Treas. Reg. § 1.469-2T(c)(2) (2008).

[98] I.R.C. § 469(c)(2). Real estate professionals materially participate in the business of renting homes. In general, a real estate professional spends half of his professional time and at least 750 hours per year engaged in the real property trade and business, and, therefore, materially participates in the trade or business and does not create passive income. IRS PUB. 527, *supra* note 7, at 12.

other non-passive investments.[99] However, a special rule permits landlords to use their rental losses to offset up to $25,000 of their other *non-passive* income.[100]

This rule creates a significant tax advantage for landlords who own at least a ten percent interest in the rental property, who "actively participate"[101] in the rental activity, and who have a MAGI of $100,000 or less.[102] If a landlord does not own the requisite percentage of the property or actively participate in the rental activity, he may not take advantage of this rule. However, if his MAGI exceeds $100,000, this tax benefit is only phased-out.[103] The landlord may still be able to use his rental losses to offset his income, although he may not be entitled to use the entire loss that tax year. For example, assume COL Fullhouse and his spouse have a MAGI of $130,000. They own a rental property and actively participated in managing that property. Due to their income level and the MAGI phase-out rules, their passive activity loss allowance is only $10,000 instead of the full $25,000 allowance.[104] If their rental loss on the property is $12,000, they may only use $10,000 of this loss to offset their gross income this tax year, and they will have to roll over the remaining $2,000 loss to a subsequent tax year.[105]

These rules for passive activity losses and personal use of the rental home are important because landlords often believe they are entitled to deduct all their expenses from the rental home and use any losses to offset their wages and income. Familiarity with these two limits can help OICs more thoroughly explain why a client cannot deduct all his rental expenses or losses in a given year. Explaining how these amounts roll over can also help appease landlords, who come to realize that their rental losses are not barred, only deferred to a future tax year.

V. Time to Sell the Investment—What Should the Landlord Know?

At some point, the military landlord may sell his rental property, leading to numerous new tax concerns. As with any home or capital asset, the profits from the sale of a rental home are subject to capital gains tax.[106] Accordingly, tax center OICs must understand how to properly account for capital gains from the sale of rental real estate.

A. Capital Gains from Sale of a Rental Home

When a landlord sells a rental property, he must report his capital gains on an IRS Form 4797, Sales of Business Property.[107] Because rental property is a depreciable asset, the landlord must also use the property's *allowable* depreciation to calculate his capital gain.[108] Whether or not the landlord actually chose to deduct depreciation in the tax years the home served as a rental, he must still account for depreciation at the time of sale.[109] This is called depreciation recapture. Accounting for depreciation when the home is sold prevents the landlord from receiving a tax benefit twice—first during the rental period and again upon sale. Depreciation recapture is why it is so important for the landlord to depreciate the home on

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[99] I.R.C. § 469(b). Whenever passive losses exceed passive income, the losses must be carried forward to the next tax year.

[100] *Id.* However, the special allowance is reduced to $12,500 for landlords who lived apart from their spouse for the entire year and have a filing status of "married filing separately." If the landlord's filing status is "married filing separately" but he lived with his spouse during the year, he may not use the allowance at all. *Id.*

[101] Active participation means that the landlord or his spouse made "management decisions about the rental property in a significant and bona fide sense." This active participation might include deciding on lease terms, approving new tenants, approving repair decisions, or other similar decisions. INTERNAL REVENUE SERV., PUB. 925, PASSIVE ACTIVITY AND AT-RISK RULES 3 (2008) [hereinafter IRS PUB. 925].

[102] IRS PUB. 527, *supra* note 7, at 13–14.

[103] I.R.C. § 469(i) (2006). If the taxpayer's MAGI is $100,000 or less, the loss allowance limit is $25,000. This allowance is phased out by fifty percent of the amount that the taxpayer's MAGI exceeds $100,000 up to a MAGI of $150,000. No loss is allowed in years when the taxpayer's MAGI exceeds $150,000. IRS PUB. 925, *supra* note 101, at 4.

[104] I.R.C. § § 469(i). If the landlord's MAGI is $130,000, his special allowance limit is $10,000 ($130,000 MAGI - $100,000 MAGI limit = $30,000; $30,000 x 50% = $15,000; $25,000 PAL allowance - $15,000 = $10,000 allowance). IRS PUB. 925, *supra* note 101, at 4.

[105] IRS PUB. 925, *supra* note 101, at 4.

[106] I.R.C. § 61.

[107] INTERNAL REVENUE SERV., PUB. 544, SALES AND OTHER DISPOSITIONS OF ASSETS (2007) [hereinafter IRS PUB. 544]. Although capital gains are reported on a Schedule D, sales of rental property must be calculated on an IRS Form 4797 first because the rental home is a depreciable asset. *See infra* Appendix F.

[108] INTERNAL REVENUE SERV., PUB. 523, SELLING YOUR HOME 16 (2008) [hereinafter IRS PUB. 523]; IRS PUB. 544, *supra* note 107, at 4.

[109] I.R.C. § 1016(a)(2).

his annual tax returns. If he fails to deduct the allowable depreciation each year, he will have to pay capital gains tax on a benefit he willingly chose to give up.[110]

B. Using the Section 121 Exclusion for Capital Gains

When a homeowner sells or exchanges a principal residence, the homeowner is only required to report the sale when his capital gain is more than $250,000.[111] This benefit, often referred to as the section 121 exclusion, can be used for a home sale every two years,[112] as long the owner used the home as his principal residence for at least two years in the five-year period preceding the sale.[113] Military homeowners receive an added benefit under section 121 because they can suspend this two-year "use test" for up to ten years while serving on active duty.[114] Thus, a servicemember using the home as his primary residence for two years during a five-year period can suspend disposition for *up to ten years* and still use the section 121 exception to exclude his capital gain from taxation.[115]

Prior to 2009, this rule also applied to landlords. As long as the landlord met both the ownership and use tests, he could use section 121 to exclude part of his capital gains from the sale of a rental home.[116] The landlord was still required to pay capital gains tax on an amount equal to depreciation on the rental home,[117] but he could exclude the remaining profit, as long as his total gain fell below $250,000.[118]

This exclusion helped many military landlords, because they could use property as an investment and build equity in the property over time. Toward the end of the investment, the landlord could convert the rental home back into his primary residence to meet the "use test" before selling it and excluding the majority of his capital gains from taxation. For example, assume SFC Turner lived in his home for twenty months and then leased it to tenants for thirty-six months while stationed out-of-state. To benefit from the section 121 exclusion, SFC Turner merely had to convert the home back to his primary residence at the end of the rental period for an additional four months before selling it.[119] If successful in meeting the section 121 use and ownership tests, SFC Turner only paid capital gains tax on the amount equal to the depreciation of the home over the thirty-six-month rental period.[120]

Unfortunately for landlords, section 3092 of the Housing and Recovery Act (HERA) of 2008 drastically amended this portion of the Code.[121] Section 121 now limits this exclusion to "qualified use" of a home.[122] To use the section 121 exclusion, homeowners must still meet both the ownership and use tests, but if they do not fulfill the requirements of both

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[110] *See* Jones v. Comm'r, 72 F.2d 114 (8th Cir. 1934) (Tax commissioner permitted to deduct $13,227.50 from taxpayer's sale price to account for allowable depreciation, even though taxpayer never claimed depreciation); *see also* Samson v. United States, 144 F. Supp. 620 (2nd Cir. 1956) (holding that taxpayer was permitted by statute to claim depreciation, his adjusted cost basis upon sale should reflect this allowable depreciation).

[111] I.R.C. § 121. The exclusion increases to $500,000 for taxpayers who are married and filing jointly. Any gain in excess of these limits must be reported as income.

[112] *Id.* § 121(b)(3).

[113] *Id.* § 121(a). This "use test" does not require the homeowner to reside in the home for two consecutive years, but it does require the homeowner to reside in the home for at least twenty-four months (or 720 days) in a sixty-month period immediately preceding the sale.

[114] *Id.* § 121(d)(9).

[115] For example, assume that Mr. Young, a civilian, buys a home in May 2004, and uses it as his principle residence until May 2006 (two years). He may use section 121 to exclude up to $250,000 of capital gains from the home's sale, as long as he sells the home by May 2009. If he sells the home after May 2009, he must pay capital gains tax on all the profit from the sale because he did not satisfy the "use test" under section 121. In other words, he did not use the home as his primary residence for two of the five years preceding the sale. However, if Staff Sergeant Young, an active duty Soldier, purchases the same home in May 2004 and lives in it for the next two years, he may wait until May 2019 to sell the home (May 2009 plus the ten-year suspension), as long as he remains on active duty for that entire suspended period and is stationed at least fifty miles away from the home.

[116] IRS PUB. 523, *supra* note 108, at 10.

[117] *Id*. at 16.

[118] *Id.*

[119] This example assumes the landlord only sold one home within a two-year period.

[120] I.R.C. § 1016(a)(2); IRS PUB. 523, *supra* note 108, at 16.

[121] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289 § 3092, 122 Stat. 289, 3092.

[122] I.R.C. § 121(b)(5) (2009). Qualified use is defined as use as a primary residence. All other uses, including rental properties, are deemed non-qualified use. *Id.*

tests *before* converting the property to a rental, they cannot take full advantage of the section 121 exclusion.[123] Instead, the landlord must allocate capital gains from the sale between the rental use and the personal use, and the portion of the home's capital gain equal to the non-qualified use (e.g., rental use) will no longer be excludable under section 121.[124]

In the example above, SFC Turner would still meet the ownership and use tests under section 121 because he owned and used the home as his primary residence for two of the five years preceding the sale. However, SFC Turner would not meet the use test *prior* to converting the home to a rental. Instead, to meet the use test, he had to use it as his primary residence for an additional four months. Because of the amendment to section 121, SFC Turner must now apportion his gains from the sale between the rental use and his personal use.[125]

Although Congress expressly added similar ten-year disposition language to the new version of section 121,[126] it will be increasingly difficult for many military landlords to take advantage of this exception as deployments supporting the Global War on Terrorism continue. This loophole only benefits those military landlords who can use the home as their primary residence for at least twenty-four months prior to converting the property into a rental.[127]

The recent change to section 121 is likely to have a considerable impact on military landlords who only convert their homes into rental properties when required to deploy or move pursuant to military orders. Often these servicemembers do not have the choice to remain in a home for twenty-four months before conversion. The prior version of section 121 recognized this problem and built in the ten-year disposition exception to accommodate military homeowners. That version permitted military landlords to exclude their entire capital gain (less depreciation), just like non-transient homeowners, as long as they resumed living in the home long enough to meet the use test. Now, military landlords who have been forced to convert their homes to rentals because of military orders are lumped into the same category as landlords who rent property as a business enterprise. This is unfortunate because many military landlords must convert their homes out of financial and military necessity rather than for commercial reasons.

With the frequency of deployments and permanent change of station (PCS) moves, the new requirement in section 121 may become an exceptionally difficult hurdle for the average military landlord to overcome, and it may force more servicemembers to remain tenants, rather than become homeowners and landlords themselves. Additionally, because of the change in the law, purchasing a home early in a servicemember's military career may no longer be a wise investment strategy if the home cannot be used as a primary residence for at least twenty-four months prior to conversion. The longer the home remains a rental, the greater the taxable capital gains will be when the home is sold.

VII. Conclusion

Because so many servicemembers own rental homes, legal assistance attorneys and tax center OICs must understand how to use the Schedule E to account for income, expenses, and depreciation on residential rental property. This primer addressed these basic concepts and discussed how a landlord's personal use of a rental home can significantly limit his rental deductions. The article also explained the passive activity loss rules and the advantage they afford many landlords seeking to offset their non-passive income. Finally, the primer described how depreciation affects capital gains upon the sale of a rental home, as well as how the amended section 121 will impact military landlords. Knowledge of these issues should make preparing tax returns for residential rental property much easier and help legal assistance attorneys anticipate the tax questions and needs of their landlord clients.

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[123] *See* Nat'l Ass'n of Realtors, New Rules for Taxing Gain When a Second Home Is Converted to a Principal Residence: Changes to the $500,000 Exclusion, http://www.realtor.org/government_affairs/gapublic/hr_3221_key_provisions (follow "View some examples that illustrate the application of this new rule" hyperlink provided under "Modification of $250,000/$500,000 Exclusion") (last visited Nov. 17, 2009); *see also* Exeter, Tax Fee Exclusion on the Sale of Primary Residence May be Significantly Reduced Under Certain Circumstances, http://www.exeter1031.com/article_changes_to_section_121.aspx (last visited Jan. 19, 2009).

[124] I.R.C. § 121(b)(5).

[125] I.R.C. § 121. In this example, the property was used as a rental property for three-fifths of the time the landlord owned the property. This is a non-qualified use, so three-fifths of the profit realized from the home's sale will now be *taxable* capital gains. Prior to 2009, the landlord would have had to pay capital gains tax only on the amount equal to his depreciation. Now he must pay capital gains tax on the depreciation *and* three-fifths of the profit from the sale.

[126] I.R.C. § 121(d)(9) (2006).

[127] I.R.C. § 121(b)(5)(C)(ii)(II).

Appendix A

Rental Questionnaire

1. How many rental properties do you own or partially own? _____

2. Where is your rental property located? (If you own multiple properties, make sure to identify each property consistently thoughout this questionnaire as property A, B, or C)

   Property A: _____

   Property B: _____

   Property C: _____

3. Did you live in any of these properties during 2009? ☐ Yes ☐ No

4. If so, which property? And when did you reside there? _____

5. Did you receive a **security deposit** on any of your property(s) in 2009? ☐ Yes ☐ No

6. What did your security deposit consist of?

   ☐ First and last month's rent

   ☐ A fixed dollar amount I intend to return to the tenant at the end of the rental period (after deducting damages)

   ☐ Other _____

7. How much **annual rent** did you receive on your rental property in 2009?

   Property A _____ Property B _____Property C_____

8. Did you receive any **"payments in kind"** in lieu of rent? (Example: Your tenant paid for a plumber to make repairs and deducted that amount from his monthly rent) ☐ Yes ☐ No

9. If you received payments in kind, how much were they? _____

10. Did you bring your IRS Form 1098 with you today? ☐ Yes ☐ No

11. How much **mortgage interest** did you pay on each rental property?

    Property A _____ Property B _____Property C_____

12. Did you pay any **other interest** (points) on any rental property? ☐ Yes ☐ No

13. How much did you **pay in property taxes** on each rental property?

    Property A _____ Property B _____Property C_____

14. How much did you pay in **insurance** on each property? (e.g. Homeowner's, fire, casualty)

    Property A _____ Property B _____Property C_____

15. Did you **actively manage** the property yourself (find or approve tenants, make or approve repairs, etc)? ☐ Yes ☐ No

16. Did you also use a **property manager** to assist you with your property? ☐ Yes ☐ No

17. If so, which property did you use your property manager(s) for? ☐ A ☐ B ☐ C

18. How much did you pay the property manager in 2008? _____

19. Did you pay a **commission** to anyone else? ☐ Yes ☐ No

20. Did you have any additional expenses for **advertising** the property? ☐ Yes ☐ No

21. Did you pay any necessary **utilities** for your rental property (gas, electric, etc)? ☐ Yes ☐ No

22. Did you pay for any **cleaning or maintenance** for the property? ☐ Yes ☐ No

23. Did you pay for any **legal or professional fees** related to the property? ☐ Yes ☐ No

24. Did you do any **travel** solely to check on your rental property? ☐ Yes ☐ No

25. Did you pay for any **repairs** to the rental property? (A repair fixes something that is inoperable and does not add any additional value to the home. For example, fixing a leaky toilet is a repair.) ☐ Yes ☐ No

26. If so, how much were your repairs? _____

27. Did you make any **improvements** on the rental property this year? (An improvement adds value to the home. For example, adding dishwasher, putting on a new roof) ☐ Yes ☐ No

28. If so, what improvements did you make and how much did they cost? _____

29. Did you sell your rental home this year? ☐ Yes ☐ No

30. Did you bring last year's tax return? ☐ Yes ☐ No

31. Do you have any special concerns or questions about your rental property? ☐ Yes ☐ No

PLEASE REMEMBER TO BRING THE FOLLOWING ITEMS TO YOUR TAX APPOINTMENT

- Form 1098
- Tax/land appraisal document (if this is the first year you rented the property out)
- Receipts or documents for your expenses
- Receipts or documents showing how much rent you collected
- Last year's tax return

Appendix B

Schedule E

SCHEDULE E (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Name(s) shown on return

Supplemental Income and Loss

(From rental real estate, royalties, partnerships, S corporations, estates, trusts, REMICs, etc.)

▶ Attach to Form 1040, 1040NR, or Form 1041. ▶ See Instructions for Schedule E (Form 1040).

OMB No. 1545-0074

2009

Attachment Sequence No. **13**

Your social security number

Part I **Income or Loss From Rental Real Estate and Royalties** **Note.** If you are in the business of renting personal property, use **Schedule C** or **C-EZ** (see page E-3). If you are an individual, report farm rental income or loss from **Form 4835** on page 2, line 40.

1	List the type and address of each **rental real estate property:**	2 For each rental real estate property listed on line 1, did you or your family use it during the tax year for personal purposes for more than the greater of: • 14 days **or** • 10% of the total days rented at fair rental value? (See page E-3)		Yes	No
A			A		
B			B		
C			C		

Income:		Properties A	Properties B	Properties C	Totals (Add columns A, B, and C.)
3 Rents received	3				3
4 Royalties received	4				4
Expenses:					
5 Advertising	5				
6 Auto and travel (see page E-4)	6				
7 Cleaning and maintenance	7				
8 Commissions	8				
9 Insurance	9				
10 Legal and other professional fees	10				
11 Management fees	11				
12 Mortgage interest paid to banks, etc. (see page E-5)	12				12
13 Other interest	13				
14 Repairs	14				
15 Supplies	15				
16 Taxes	16				
17 Utilities	17				
18 Other (list) ▶	18				
19 Add lines 5 through 18	19				19
20 Depreciation expense or depletion (see page E-5)	20				20
21 Total expenses. Add lines 19 and 20	21				
22 Income or (loss) from rental real estate or royalty properties. Subtract line 21 from line 3 (rents) or line 4 (royalties). If the result is a (loss), see page E-5 to find out if you must file **Form 6198**	22				
23 Deductible rental real estate loss. **Caution.** Your rental real estate loss on line 22 may be limited. See page E-5 to find out if you must file **Form 8582.** Real estate professionals **must** complete line 43 on page 2	23	( )	( )	( )	
24 **Income.** Add positive amounts shown on line 22. **Do not** include any losses					24
25 **Losses.** Add royalty losses from line 22 and rental real estate losses from line 23. Enter total losses here					25 ( )
26 **Total rental real estate and royalty income or (loss).** Combine lines 24 and 25. Enter the result here. If Parts II, III, IV, and line 40 on page 2 do not apply to you, also enter this amount on Form 1040, line 17, or Form 1040NR, line 18. Otherwise, include this amount in the total on line 41 on page 2					26

For Paperwork Reduction Act Notice, see page E-8 of the instructions. Cat. No. 11344L **Schedule E (Form 1040) 2009**

Appendix C

Repairs versus Improvements

Repairs
A repair keeps the rental property in good operating condition and does not materially add to the value of the property or substantially prolong its life. Repairs usually entail fixing a broken or faulty item that already exists in the home to bring it back to its prior working condition.

Improvements
An improvement adds to the value of the property, prolongs its useful life, or adapts the property to new uses. Improvements usually involve replacing an existing item with a more up-to-date item or installing something that did not previously exist in the home.

REPAIR	IMPROVEMENT
Fixing broken slats in hardwood floor	Replacing worn carpet with hardwood floors
Replacing a broken mirror	Installing a mirrored medicine cabinet
Re-hanging a towel bar in the bathroom	Installing a towel bar in the bathroom
Replacing missing tiles on kitchen counter	Replacing the entire countertop
Unclogging pipes under the sink	Installing a garbage disposal under the sink
Replacing faulty power cord on the dryer	Replacing dryer
Cleaning lint-clogged dryer duct	Adding outside air vent for dryer duct
Replacing batteries in fire detectors	Installing fire detectors
Replacing light bulbs in fixtures	Adding lights to outside of the home
Repair call from air-conditioner repairman	Replacing the air-conditioner
Fixing torn screens on windows	Screening in a back porch
Fixing hinge on cupboard door	Painting cupboards
Removing torn drapes	Installing mini-blinds
Removing a dead tree	Planting flowers
Fixing jets on hot tub	Adding a swimming pool

Appendix D

Sample Land Appraisal

6523

This is NOT a Tax Statement

2008 Notice Of Appraised Value

Do Not Pay From This Notice

TAX APPRAISAL DISTRICT
OF BELL COUNTY
PO BOX 390
BELTON, TX 76513-0390
Phone: (254) 939-5841

DATE OF NOTICE: May 1, 2008

[redacted]

Property ID: [redacted]
Ownership %:
Ref ID2: [redacted]
DBA:
Legal: [redacted]

Legal Acres:
Situs: [redacted]
Appraiser:
OWNER ID: [redacted]

Dear Property Owner,
We have appraised the property listed above for the tax year 2008. As of January 1, our appraisal is outlined below.

Appraisal Information	Last Year - 2007	Proposed - 2008
Structure & Improvement Market Value	194,228	196,141
Market Value of Non Ag/Timber Land	24,888	24,888
Market Value of Ag/Timber Land	0	0
Market Value of Personal Property/Minerals	0	0
Total Market Value	219,116	221,029
Productivity Value of Ag/Timber Land	0	0
Appraised Value * (Possible Homestead Limitations, see asterisk below)	219,116	221,029
Homestead Cap Value excluding Non-Homsite Value (i.e. Ag, Commercial)	219,116	221,029
Exemptions		

2007 Taxable Value	Taxing Unit	2008 Proposed Assessed Value	2008 Exemption Amount	2008 Taxable Value	2007 Tax Rate	2008 Estimated Taxes	2008 Freeze Year and Tax Ceiling**
219,116	BELL COUNTY	221,029	0	221,029	0.379500	838.81	
219,116	CENTRAL TEXAS COLLEGE	221,029	0	221,029	0.142000	313.86	
219,116	BELL COUNTY ROAD	221,029	0	221,029	0.029500	65.20	
219,116	KILLEEN ISD	221,029	0	221,029	1.141190	2,522.36	
219,116	CITY OF HARKER HTS	221,029	0	221,029	0.679600	1,502.11	
219,116	CLEARWATER U.W.C.D.	221,029	0	221,029	0.004000	8.84	

Total Estimated Tax: $5,251.18

The Texas Legislature does not set the amount of your local taxes. Your property tax burden is decided by your locally elected officials and all inquiries concerning your taxes should be directed to those officials.

The above tax estimates use last year's tax rates for the taxing units shown. The governing body of each unit (school board, county commissioners, and so forth) decides whether property taxes increase. The appraisal district only determines your property value. The taxing units will set tax rates later this year.

* Your residence homestead is protected from future appraisal value increases in excess of 10% per year from the date of the last appraisal PLUS the value of any new improvements.

** If you are 65 years of age or older and received the $10,000 school tax exemption on your home last year from the school listed above, your school taxes for this year will not be higher than when you first received the exemption on this home. If you are disabled and received the $10,000 school tax exemption on your home last year from the school listed above, your school taxes for this year will not be higher than the 2003 taxes or the first year you received the exemption, whichever is later. If your county, city, or junior college has approved a limitation on your taxes in the preceding year, your county, city, or junior college taxes will not be higher than the first year your county, city, or junior college approved the limitation or the first year you qualified for the limitation. If you improved your property (by adding rooms or buildings), your school, county, city, or junior college ceiling may increase for these improvements. If you are a surviving spouse, age 55 or older, you may be eligible to retain the school, county, city, or junior college tax ceiling.

Contact the appraisal office if you disagree with this year's proposed value for your property or if you have any problem with the property description or address information. If the problem cannot be resolved, you have the right to appeal to the appraisal review board (ARB).

To appeal, you must file a written protest with the ARB before the deadline date:

Deadline for filing a protest:
Location of Hearings:
ARB will begin hearings: [redacted]

Enclosed is a protest form to send the appraisal district office if you intend to appear and present evidence before the ARB. The ARB will notify you of the date, time, and place of your scheduled hearing. Also enclosed is information to help you in preparing your protest. You do not need to use the enclosed form to file your protest. You may protest by letter, if it includes your name, your property's description, and your reason for protesting.

If you have any questions or need more information, please contact the appraisal district office at (254) 939-5841 or at the address shown above.

Sincerely,

MARVIN HAHN
Chief Appraiser

Appendix E

Depreciation

It is essential that landlords not only take advantage of depreciation but also understand that they can depreciate both the rental home and any capital improvements to the home. If the landlord makes improvements to the home, he must depreciate each asset separately, because the recovery periods vary based on the property's classification. While TaxWise will automatically calculate these depreciation deductions, preparers and OICs should also know how to manually calculate these deductions. To do this, the preparer must use the IRS Form 4562, Depreciation and Amortization, and the depreciation tables in IRS Publication 946, both of which are available at the end of this appendix.

Depreciating the rental home

To manually calculate depreciation on the rental home, the landlord needs to know two things: (1) when he placed the home into service and (2) the property's basis.[128] All the information necessary to calculate the home's depreciation deduction is entered on IRS Form 4562, line 19h (residential rental property).[129] First, the landlord must enter the month and year the home was placed into service in column (b). This date is significant because depreciation begins the month the home is placed into service and uses a straight-line method over the useful life of the property.[130] Next, the landlord must enter the property's basis in column (c). The remaining information required for the depreciation calculation, including the recovery period (27.5 years), convention (mid-month), and depreciation method (straight-line), is already pre-printed in Form 4562 because that information remains constant when depreciating residential rental property.

In column (g), the landlord must use all the information in the prior columns to calculate that year's allowable depreciation deduction on the rental home. To do this, he must look in the 27.5-year depreciation table and find the appropriate percentage for the month and year when the home was placed in service. The table already accounts for the mid-month convention, so the landlord simply multiplies the appropriate percentage from the table by the basis of the home to find his depreciation deduction.

To illustrate how this process works, assume the landlord placed a home into service in July 2009 and the home's basis is $200,000. Using the 27.5 year depreciation table, the landlord determines the appropriate depreciation percentage for the home is 1.67% (July, year 1). He then multiplies this percentage by the home's basis ($200,000), and the landlord's depreciation amount for that tax year comes to $3,340. The landlord places this amount in column (g). Once this is complete, the landlord can calculate depreciation on any improvements to the home.

Depreciating improvements to the rental home

To manually calculate depreciation for an improvement using the IRS Form 4562, the landlord must know five things: (1) when he made the improvement, (2) its basis, (3) the proper recovery period, (3) the appropriate convention, and (5) the method of depreciation. The landlord must enter all this information on line 19 of Form 4562 and place it on the appropriate sub-line for each improvement's property classification/recovery period.[131] For, example replacing a dishwasher has a recovery period of five years, so that improvement is classified as a "5-year property" and its depreciation will be calculated on line 19(b).

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[128] *See* discussion *infra* Part III. The landlord determines the rental home's basis through either the cost method or the fair market value method.

[129] Line 19h is where most landlords will depreciate their residential rental home using the General Depreciation System (GDS). However, landlords are permitted to depreciate the rental home using using the Alternative Depreciation System (ADS), and will place this amount on line 20a. The resulting difference between the two calculations is negligible, however, whichever method the landlord chooses when he places the home in service must be used throughout the entire period the home is used as a rental property.

[130] I.R.C. § 168 (2006)

[131] The landlord determines the property classification by the recovery period for the improvement. The length of the recovery period and the property classification are identical.

Once the landlord determines the property's classification, he must enter the improvement's basis in column (c). In column (d), the landlord lists the applicable recovery period for the improvement.[132] In column (e), the landlord selects either the mid-quarter or half-year convention.[133] If the landlord uses the depreciation tables, he places "straight-line" method in column (f). Finally, in column (g), the landlord will use all the information in the prior columns to calculate the allowable depreciation deduction for that tax year.

To illustrate how to calculate the depreciation deduction for an improvement, assume the landlord added a $500 dishwasher to the rental home in May 2008, and that was his only improvement. A dishwasher has a five-year recovery period, so the landlord will place all his information on line 19b ("5-year property"). In column (c) he will list "$500" as his basis in the dishwasher; in column (d) he will place "5-year" as the recovery period; in column (e) the landlord will place "MQ" for mid-quarter; and in column (f) he will place "S/L" for straight-line method.

To calculate the total in column (g), the landlord must look up the appropriate depreciation percentage in the 5-year depreciation table. The dishwasher was put into service in May (second quarter) of 2008 (year 1), so the applicable depreciation percentage is 17.85%. Multiply this percentage by the asset's basis ($500), and the result is an $89.25 depreciation deduction for the dishwasher. The landlord places this amount in column (g).

Once the landlord has calculated the deprecation on both the rental home and all improvements, he must add these amounts together to determine his total allowable depreciation for that tax year. The landlord enters this sum on line 22 of Form 4562, before transferring that amount to his Schedule E.

[132] Most improvements to rental property fall into 5-year, 15-year, or 27.5-year property. Interior improvements to the rental property have a 5-year recovery period. Improvements made directly to the land have a 15-year recovery period. Additions or improvements to the actual structure have a 27.5-year recovery period. IRS PUB. 527, *supra* note 7, at 9.

[133] Normally, the landlord will use the mid-quarter convention. However, if the asset is placed in service between October and December of the tax year and constitutes more than 40% of the total basis of all assets placed in service that year, the landlord must use the half-year convention instead. For example, if the landlord puts a $500 dishwasher in the rental home in August and a $900 refrigerator in the home in October, he will use the mid-quarter conversion for the dishwasher and the half-year convention for the refrigerator. (The $900 basis of the refrigerator is more than 40% of the total basis of all the assets placed in service that year. His total basis between both assets was $1,400, and the refrigerator was 64% of that basis.) IRS PUB. 527, *supra* note 7, at 10.

	Use the row for the month the taxable year was placed in service					
	YEAR 1	YEARS 2-9	YEARS 10, 12, 14, 16, 18, 20, 22, 24, 26	YEARS 11, 13, 15, 17, 19, 21, 23, 25, 27	YEAR 28	YEAR 29
JAN	3.49%	3.36%	3.64%	3.64%	1.97%	
FEB	3.18%	3.36%	3.64%	3.64%	2.27%	
MAR	2.88%	3.36%	3.64%	3.64%	2.58%	
APR	2.58%	3.36%	3.64%	3.64%	2.88%	
MAY	2.27%	3.36%	3.64%	3.64%	3.18%	
JUN	1.97%	3.36%	3.64%	3.64%	3.49%	
JUL	1.67%	3.36%	3.64%	3.64%	3.64%	0.15%
AUG	1.36%	3.36%	3.64%	3.64%	3.64%	0.46%
SEP	1.06%	3.36%	3.64%	3.64%	3.64%	0.76%
OCT	0.76%	3.36%	3.64%	3.64%	3.64%	1.06%
NOV	0.46%	3.36%	3.64%	3.64%	3.64%	1.36%
DEC	0.15%	3.36%	3.64%	3.64%	3.64%	1.67%

Table 1. Residential Rental Property (Mid-month Convention) Straight-line–27.5 years

YEAR	Half-Year Convention	Mid-Quarter Convention			
		1st Qtr	2nd Qtr	3rd Qtr	4th Qtr
1	20.00%	35.00%	25.00%	15.00%	5.00%
2	32.00%	26.00%	30.00%	34.00%	38.00%
3	19.20%	15.60%	18.00%	20.40%	22.80%
4	11.52%	11.01%	11.37%	12.24%	13.68%
5	11.52%	11.01%	11.37%	11.30%	10.94%
6	5.76%	1.38%	4.26%	7.06%	9.58%

Table 2. 5-year property (Half-year and Mid-month Convention)

YEAR	Half-Year Convention	Mid-Quarter Convention			
		1st Qtr	2nd Qtr	3rd Qtr	4th Qtr
1	14.29%	25.00%	17.85%	10.71%	3.57%
2	24.49%	21.43%	23.47%	25.51%	27.55%
3	17.49%	15.31%	16.76%	18.22%	19.68%
4	12.49%	10.93%	11.97%	13.02%	14.06%
5	8.93%	8.75%	8.87%	9.30%	10.04%
6	8.92%	8.74%	8.87%	8.85%	8.73%
7	8.93%	8.75%	8.87%	8.85%	8.73%
8	4.46%	1.09%	3.34%	5.53%	7.64%

Table 3. 7-year property (Half-year and Mid-month Convention)

YEAR	Half-Year Convention	Mid-Quarter Convention			
		1st Qtr	2nd Qtr	3rd Qtr	4th Qtr
1	5.00%	8.75%	6.25%	3.75%	1.25%
2	9.50%	9.13%	9.38%	9.63%	9.88%
3	8.55%	8.21%	8.44%	8.66%	8.89%
4	7.70%	7.39%	7.59%	7.80%	8.00%
5	6.93%	6.65%	6.83%	7.02%	7.20%
6	6.23%	5.99%	6.15%	6.31%	6.48%
7	5.90%	5.90%	5.91%	5.90%	5.90%
8	5.90%	5.91%	5.90%	5.91%	5.90%
9	5.91%	5.90%	5.91%	5.90%	5.90%
10	5.90%	5.91%	5.90%	5.91%	5.91%
11	5.91%	5.90%	5.91%	5.90%	5.90%
12	5.90%	5.91%	5.90%	5.91%	5.91%
13	5.91%	5.90%	5.91%	5.90%	5.90%
14	5.90%	5.91%	5.90%	5.91%	5.91%
15	5.91%	5.90%	5.91%	5.90%	5.90%
16	2.95%	0.74%	2.21%	3.69%	5.17%

Table 4. 15-year property (Half-year and Mid-month Convention)

Appendix F

Sale of Home

Form **4797**

Department of the Treasury
Internal Revenue Service (99)

Sales of Business Property

(Also Involuntary Conversions and Recapture Amounts Under Sections 179 and 280F(b)(2))

► Attach to your tax return. ► See separate instructions.

OMB No. 1545-0184

2009

Attachment Sequence No. **27**

Name(s) shown on return | Identifying number

1 Enter the gross proceeds from sales or exchanges reported to you for 2009 on Form(s) 1099-B or 1099-S (or substitute statement) that you are including on line 2, 10, or 20 (see instructions) 1

Part I **Sales or Exchanges of Property Used in a Trade or Business and Involuntary Conversions From Other Than Casualty or Theft—Most Property Held More Than 1 Year** (see instructions)

2 (a) Description of property	(b) Date acquired (mo., day, yr.)	(c) Date sold (mo., day, yr.)	(d) Gross sales price	(e) Depreciation allowed or allowable since acquisition	(f) Cost or other basis, plus improvements and expense of sale	(g) Gain or (loss) Subtract (f) from the sum of (d) and (e)

3	Gain, if any, from Form 4684, line 43	3	
4	Section 1231 gain from installment sales from Form 6252, line 26 or 37	4	
5	Section 1231 gain or (loss) from like-kind exchanges from Form 8824	5	
6	Gain, if any, from line 32, from other than casualty or theft.	6	
7	Combine lines 2 through 6. Enter the gain or (loss) here and on the appropriate line as follows:	7	
	Partnerships (except electing large partnerships) and S corporations. Report the gain or (loss) following the instructions for Form 1065, Schedule K, line 10, or Form 1120S, Schedule K, line 9. Skip lines 8, 9, 11, and 12 below. **Individuals, partners, S corporation shareholders, and all others.** If line 7 is zero or a loss, enter the amount from line 7 on line 11 below and skip lines 8 and 9. If line 7 is a gain and you did not have any prior year section 1231 losses, or they were recaptured in an earlier year, enter the gain from line 7 as a long-term capital gain on the Schedule D filed with your return and skip lines 8, 9, 11, and 12 below.		
8	Nonrecaptured net section 1231 losses from prior years (see instructions)	8	
9	Subtract line 8 from line 7. If zero or less, enter -0-. If line 9 is zero, enter the gain from line 7 on line 12 below. If line 9 is more than zero, enter the amount from line 8 on line 12 below and enter the gain from line 9 as a long-term capital gain on the Schedule D filed with your return (see instructions)	9	

Part II **Ordinary Gains and Losses** (see instructions)

10 Ordinary gains and losses not included on lines 11 through 16 (include property held 1 year or less):

11	Loss, if any, from line 7	11	( )
12	Gain, if any, from line 7 or amount from line 8, if applicable	12	
13	Gain, if any, from line 31	13	
14	Net gain or (loss) from Form 4684, lines 35 and 42a	14	
15	Ordinary gain from installment sales from Form 6252, line 25 or 36	15	
16	Ordinary gain or (loss) from like-kind exchanges from Form 8824.	16	
17	Combine lines 10 through 16	17	
18	For all except individual returns, enter the amount from line 17 on the appropriate line of your return and skip lines a and b below. For individual returns, complete lines a and b below:		
a	If the loss on line 11 includes a loss from Form 4684, line 39, column (b)(ii), enter that part of the loss here. Enter the part of the loss from income-producing property on Schedule A (Form 1040), line 28, and the part of the loss from property used as an employee on Schedule A (Form 1040), line 23. Identify as from "Form 4797, line 18a." See instructions	18a	
b	Redetermine the gain or (loss) on line 17 excluding the loss, if any, on line 18a. Enter here and on Form 1040, line 14	18b	

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 13086I Form **4797** (2009)

Appendix G

Advice for Tax Center OICs

While many servicemembers have simple returns, the more complex and time-consuming returns OICs and tax preparers encounter involve residential rental properties. In my own experience as a tax center OIC, I developed four lessons on how to successfully assist landlords with their returns.

Recordkeeping: Training the Landlord

It is crucial to train landlords to take care of their records. I frequently referred to my most challenging landlords as "shoebox" clients because they would often stuff every receipt pertaining to their rental property into an envelope or shoebox and expect the preparer to sort everything out just days or weeks before their tax returns were due. Allowing landlords to continue this inadequate and often incomplete recordkeeping method is unacceptable and only sets the landlord up for future failures.

To take a deduction for expenses or depreciation on his Schedule E, the landlord must meet the "adequate records requirement."[134] Consequently, it is vital that military landlords maintain accurate and complete records of their rental income and expenses each year. Landlords can withstand their burden by maintaining an account book, log, expense statement, trip sheet, or similar record that, together with his receipts, is sufficient to establish his expenditures.[135]

If a landlord uses a property manager, he should request an itemized list of all income and expenditures from the property manager at the end of each tax year. This will assist in preparing his Schedule E and minimize the amount of paperwork required to substantiate the information on the form. If the landlord manages the property himself, he should keep a continuous log or record throughout the year as he incurs expenses. This record can be as simple as a spreadsheet attached to his receipts and cancelled checks. Additionally, maintaining expense records in the same order as they are listed on the Schedule E is helpful when preparing the landlord's taxes. Using a spreadsheet with the landlord's expenses grouped by category eases the burden of sorting a shoebox full of receipts at the end of the tax year.

As with any other legal assistance client, the attorney helping the landlord should always prepare the client to adequately handle his own legal affairs. By providing some simple recordkeeping tips, attorneys and tax preparers can help these military landlords become more organized for future tax years and leave them more prepared to defend their expenditures in the event of an audit.

Is it supplemental income or a rental business?

Some military landlords seem to "collect" homes every time they PCS. While owning a handful of rental homes is not unusual, there comes a point when the landlord is running a business. It is the OIC's responsibility to tell the landlord when this situation occurs, as his tax returns go beyond the scope of legal services provided under the Army's tax assistance program.

As discussed at the beginning of this primer, the more investment properties the landlord owns, the more likely the IRS is to classify his activities as a rental business, rather than individual investment income. The line where a particular landlord changes from a passive investor to a real estate professional may be blurry and difficult to ascertain. However, there are a number of questions a tax center OIC can ask that may reveal whether the landlord is "materially participating" in creating the rental income and thereby creating business income.[136] Some of these questions include the following: How many rental properties does the landlord own? What percentage of the landlord's income comes from his rental properties? How many hours a month does the landlord spend managing his rental activities? Is there anyone else who spends more time managing the properties than the landlord? Does the landlord provide services primarily for his tenant's convenience (changing linens, regular cleaning, or maid service)?

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[134] IRS PUB. 946, *supra* note 5, at 65.

[135] *Id.*

[136] Treas. Reg. § 1.469T (2008).

The landlord is "materially participating" in the creation of rental income if he participates in the rental activity for more than 500 hours per year, if his participation constitutes nearly all the management of the property, or when he participates for more than 100 hours a year, with no other individual managing the property more than him.[137] If the landlord is merely doing routine work customarily done by homeowners or investors, such as studying and reviewing financial statements or preparing documents that summarize his expenses and income, then his activities do not constitute material participation.[138] But, if the landlord actively manages rental properties and/or becomes involved on a regular, continuous, and substantial basis, he is no longer creating passive income.[139]

Proof of "the extent of the [landlord's] participation in [the rental] activity can be established by any reasonable means," including time reports, logs, appointment books, calendars, or narrative summaries.[140] If the landlord is materially participating in the rental activity, he is no longer eligible for the $25,000 special allowance under the passive activity rules, and he must account for his rental income using an IRS Form 1040 Schedule C, Profit and Loss from Business, rather than on a Schedule E.

Additionally, if the landlord is running a business, his tax returns go beyond the scope of the Army's tax assistance program. Although legal assistance attorneys can help with the rental of a client's principal residence and other real property, they are prohibited from assisting clients with private business activities.[141] If a landlord's rental activities amount to running a business, the OIC must inform him that the tax assistance program is unable to prepare his return.[142] Often the OIC can delicately relay this information to the landlord by informing him that it is best to have a tax professional assist in comprehensive tax planning and preparation when so many rental properties are involved. However, some military landlords will insist on having the installation tax center prepare their returns because they have historically done them there. If all else fails, the OIC can simply explain that Army regulations prohibit tax centers from preparing a Schedule C for any clients other than Family Child Care (FCC) providers.[143]

Using a rental income intake form

One of the easiest ways tax center OICs can screen prospective issues with military landlords is through a rental property questionnaire. In addition to the tax center's normal intake form,[144] this form helps the tax preparer assist landlords by posing key questions about the rental property. For example, the questionnaire should discuss the issue of security deposits and whether these are refundable deposits (non-income) or advance rental payments (rental income). Using a standardized questionnaire ensures that all tax preparers address these issues each time they begin helping a new landlord.

Using a rental intake form also assists the preparer in completing the landlord's Schedule E more efficiently because it forces the landlord to organize his income and expenses prior to his tax preparation appointment. When using a questionnaire, tax preparers often find that they can sort through the landlord's supporting documents much quicker and determine if the landlord is missing any items. It also serves as a checklist for the landlord and ensures that he brings all of his required documents to the tax preparation appointment.

Supervise and advise

Finally, it is always important to closely supervise preparers when they prepare rental returns. Some landlords attempt to pressure preparers into completing the Schedule E incorrectly or accounting for expenses that are inaccurate or fraudulent. As the OIC, it is your responsibility to step in and protect the preparers in your tax center from these pressures.

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[137] Treas. Reg. § 1.469T (2008).

[138] *Id.*

[139] IRS PUB. 527, *supra* note 7, at 12; *see* Schwalbach v. Comm., 111 T.C. 215 (1998) (determining that rental income received by dentist from leasing a building to a dental practice in which he materially participated is not a passive activity).

[140] Treas. Reg. § 1.469T (2008).

[141] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6c (21 Feb. 1996).

[142] *Id.* para. 3-8a(2).

[143] *Id.*

[144] IRS FORM 13614, INTAKE/INTERVIEW AND QUALITY CONTROL SHEET, or its equivalent.

Attorneys may not advise a landlord to take a deduction or exclude items from their rental income unless that attorney believes there is a reasonable expectation it will be substantiated and is not fraudulent.[145] These same requirements apply to tax preparers working under the attorney's supervision.[146]

While the preparers often know more about tax law than the average landlord merely by virtue of their VITA training, their role does not include giving tax advice. A properly trained team of tax preparers should willingly restate the law and show the landlord their underlying sources. However, if there is any significant debate over whether the tax code permits certain deductions, the tax center OIC must always get involved in that discussion. If the landlord disagrees with the attorney's interpretation of the law, the OIC can contact the faculty at The Judge Advocate General's Legal Center and School for clarification of the law. However, under no circumstances should the OIC assist in creating false documents or provide reckless or grossly incompetent legal advice on tax matters.

[145] Treas. Circ. 230 (Apr. 2008).

[146] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B (1 May 1992).

Appendix H

Resources for Tax Center OICs

IRS Publications

- IRS Pub. 3, Armed Forces' Tax Guide
- IRS Pub. 17, Your Federal Income Tax
- IRS Pub. 463, Travel, Entertainment, Gift, and Car Expenses
- IRS Pub. 523, Selling your home
- IRS Pub. 527, Residential Rental Property
- IRS Pub. 534, Depreciating Rental Property Placed in Service before 1987
- IRS Pub. 550, Investment Income and Expenses
- IRS Pub. 551, Basis of Assets
- IRS Pub. 544, Sales and Dispositions of Other Assets
- IRS Pub. 925, Passive Activity and At-risk Rules
- IRS Pub. 946, How to Depreciate Property

Articles

- Bill Bischoff, *So You Want to be a Landlord?* (http://www.smartmoney.com)
- Stephen Fishman, *Ten Reasons Landlords Pay Too Much* (http://www.forbes.com)
- Benny L. Kass, *Tax Rules Vary in Sale of Rental Property* (http://www.washingtonpost.com)
- William Perez, *Rental Income and Expenses: Tips for Schedule E* (http://www.about.com)

Books

- Stephen Fishman, *Every Landlord's Tax Deduction Guide* (2005)

Other resources

- IRS Tax Topic 414, Rental Income and Expense
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Personal Jurisdiction: What Does It Mean for Pay to be "Ready for Delivery" in Accordance with 10 U.S.C. § 1168(a)?

Major Wendy Cox[*]

Our review of the military judge's factual findings compels the conclusion that neither final pay nor a substantial part of that pay were ready for delivery within the meaning of the plain language of 10 U.S.C. § 1168(a).[1]

I. Introduction

It is Friday afternoon at 1745 and in walks one of your commanders. As a new trial counsel you are about to learn that all bad news comes to your office on Friday afternoons after the close of business. The commander tells you that one of your pre-preferral court-martial suspects has been discharged from the Army. He goes on to inform you that the Soldier received a Department of Defense (DD) Form 214[2] and that the Soldier has signed out of the unit. You immediately jump into action, knowing that it is possible the Army may no longer have court-martial personal jurisdiction over the Soldier. You turn to your trusty Uniform Code of Military Justice (UCMJ) and look up Rule for Courts-Martial (RCM) 202(a), and you discover the rule to be extremely vague and lacking specificity.[3] After some case law research, you realize the facts of your case will determine whether the Army has personal jurisdiction over the Soldier.

On Monday morning you visit the post transition center and discover the following: (1) the Soldier has received his DD Form 214; (2) he has completed all unit and post clearing and out-processing requirements; and (3) he has met with the finance office, but his pay has not been certified.[4] You inform the finance office supervisor that the Soldier is pending court-martial and that they should immediately cease processing of his final accounting of pay. Now it is up to you to figure out whether the Army still has personal jurisdiction over the Soldier.

This article is intended for practicing trial attorneys or chiefs of justice who need to determine whether the Army has personal jurisdiction over a Soldier for court-martial purposes. The article is specifically tailored to discuss what it means for a servicemember's "final pay" to be "ready for delivery"[5] in accordance with 10 U.S.C. § 1168(a). The article will demonstrate that the facts of an individual's situation are vital to the analysis of this issue.

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[1] United States v. Hart, 66 M.J. 273 (C.A.A.F. 2008).

[2] U.S. Dep't of Def., DD Form 214**,** Certificate of Release or Discharge from Active Duty (1 Aug. 2009)**.**

[3] Rule for Court Martial (RCM) 202 lays the foundation for which persons are subject to the jurisdiction of court-martial. The discussion section for RCM 202 states, "Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 (2008) [hereinafter MCM].

[4] DEF. FIN. & ACCOUNTING SERV., INDIANAPOLIS CTR. REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION glossary 14 (Mar. 2003) [hereinafter POLICY IMPLEMENTATION] ("Certifying Officer: An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment."); *see id.* para. 311304, at 31-7. The finance technician will then

> [p]ost pay affecting transactions received on the separating soldier and monitor the account until DOS plus 20 days. Perform a Post Separation audit of the account at DOS plus 20 days. Verify all transactions are posted properly and the payment computed for the soldier is the same as the information on the What-If and manual changes. Make corrective inputs for data not posted properly or require input. After ensuring that no other pay affecting documentation is due on the soldier then pay the soldier any residual pay due using the available system (use SRD1 until the programs are changed for "V" status accounts). The EFT payment is sent to the soldier's bank address on the MMPA, using the LH entry. The payment will be processed using the procedures for local payment via EFT.

Id.

[5] 10 U.S.C. § 1168(a) (2006) (Discharge or release from active duty: limitations).

This article is organized into three sections. The first section provides a background analysis of personal jurisdiction using authority from the *Manual for Courts-Martial* (*MCM*), 10 U.S.C. §§ 1168(a) and 1169, as well as case law precedent. The second section focuses on what it means for the final accounting of pay to be "ready for delivery." The third and final section consists of an analysis of the current understanding of the concept "ready for delivery," followed by the outcome of the introduction case.

II. Background

A. *MCM*

When determining whether personal jurisdiction exists over a Soldier, Article 2, UCMJ, and RCM 202 should be consulted. Article 2[6] and RCM 202(a) describe who is subject to court-martial jurisdiction.[7] The discussion of RCM 202(a) explains that "[c]ourt-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders."[8] However, as illustrated later, this interpretation of RCM 202(a) lacks the specificity needed to comply with 10 U.S.C. § 1168(a).

B. 10 U.S.C. §§ 1168(a) and 1169

According to *United States v. Howard*, "[i]t is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization."[9] Title 10 U.S.C. § 1168(a) specifies the requirements that must be met before a Soldier may be legally discharged from active duty service. Specifically,

> (a) A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.[10]

Title 10 U.S.C. § 1169 further establishes what law controls when a Soldier must be discharged from military service early, stating

> [n]o regular enlisted member of an armed force may be discharged before his term of service expires, except–(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law.[11]

Section 1169 relies on § 1168(a) to provide the specific requirements necessary to legally discharge a Soldier from his active duty service obligation. These two statutes, read together, provide the starting point for judicial analysis of the personal jurisdiction issue.

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[6] UCMJ art. 2 (2008). The following persons are subject to this chapter:

> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it . . . .

Id.

[7] MCM, *supra* note 3, R.C.M. 202(a) ("*In general*. Courts-martial may try any person when authorized to do so under the code.").

[8] *Id.* R.C.M. 202(a) discussion.

[9] United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985); *see* United States v. King, 42 M.J. 79, 80 (C.A.A.F. 1995) (quoting *Howard*, 20 M.J. at 354).

[10] 10 U.S.C. § 1168(a) (Discharge or release from active duty: limitations).

[11] *Id.* § 1169 (Regular enlisted members: limitations on discharge).

C. Case Law and Policy Interpreting the Application of 10 U.S.C. § 1168(a)

1. United States v. Howard: *Are the Delivery of Pay and the DD Form 214 Enough to Terminate Personal Jurisdiction?*

In *United States v. Howard*, the Court of Military Appeals (COMA) addressed the meaning of "delivery" under 10 U.S.C. § 1168(a).[12] Although the court focused on the delivery of the appellant's discharge certificate (DD Form 214), and not specifically on the delivery of the appellant's final accounting of pay, the court established that the term "delivery" has legal significance.[13] The appellant, Private (PV2) Claude Howard, Jr., had been pending separation for an administrative discharge under the provisions of Army Regulation (AR) 635-200[14] when he was ordered to the Separation Transfer Point at Fort Devens, Massachusetts.[15] The same morning he received his orders, the transfer point "issued him a General Discharge Certificate and a DD Form 214."[16] Howard "proceeded to the finance section to collect his travel pay and turn in his military identification card. . . . He then signed out of the command and was on his way home."[17] Later that day, the Criminal Investigation Division (CID) notified Private Howard's commander that the Soldier was under investigation for wrongful possession of a military identification card.[18] The commander directed that Howard's orders be revoked.[19] However, Howard "was not notified of this action until August 31, 1984, when he was located in Detroit, Michigan."[20] Private Howard was subsequently returned to his former duty station and was prosecuted for wrongful possession of a military identification card, false swearing, larceny, and forgery in violation of Articles 134, 121, and 123, UCMJ.[21]

At trial, the trial court judge held that "personal jurisdiction to try appellant had been lost when the Government gave him a discharge certificate, processed him for separation, permitted him to leave Fort Devens, and did not notify him of the revocation until 9 days later."[22] However, the U.S. Army Court of Military Review (CMR) reversed the trial court's decision and found that personal jurisdiction did exist over the appellant.[23] Appellant appealed to the COMA.

The issue before the COMA in *Howard* involved identifying the point at which a Soldier's "moment of discharge" from military court-martial jurisdiction becomes effective.[24] The court looked to 10 U.S.C. § 1168(a) to determine when the appellant was effectively discharged.[25]

> Our examination of the statutory language and the legislative history of 10 U.S.C. § 1168 shows no indication that Congress intended to change the longstanding historical precedent for delivery of the discharge certificate to the time when a service member is released from active duty and court-martial jurisdiction terminates. The discussion to RCM 202, Manual for Courts-Martial, United States, 1984, supports this finding. 'Delivery' in this context has significant legal meaning. It shows that the transaction is complete, that full rights have been transferred, and that the consideration for the transfer has been fulfilled.[26]

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[12] *Howard*, 20 M.J. 353.

[13] *Id.*

[14] Army Regulation (AR) 635-200 is the Army's active duty enlisted administrative separations regulation. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005). Private Howard was being separated from the Army under Chapter 13, which provides the authority to discharge a Soldier for unsatisfactory performance. *Howard*, 20 M.J. 353.

[15] *Howard*, 20 M.J. at 353.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 354.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 353.

[24] *Id.* at 354.

[25] *Id.*

[26] *Id.*

The court concluded that "[d]ischarge is effective upon delivery of the discharge certificate."[27] Although the court did not specifically say the issue of delivery of pay influenced the outcome of the case, it is reasonable to assume that the court found that the final pay had been delivered since it cited 10 U.S.C. § 1168(a) in its analysis. In the end, the COMA reversed the CMR and held that the court-martial "no longer had *in personam* jurisdiction to try appellant for the charged offenses"[28] because the commander had authorized the appellant "to pick up his discharge certificate, as well as his DD Form 214 and travel pay . . . ."[29] While the COMA focused on the legal significance of "delivery" as the foundation of its analysis in *Howard*, later courts would interpret exactly what the three elements of 10 U.S.C. § 1168(a) mean.

2. United States v. William King (King II)[30]: *Interpreting 10 U.S.C. § 1168(a)*

In *King II*, the COMA specifically addressed what a servicemember needs to effectuate a valid discharge in accordance with 10 U.S.C. § 1168(a).[31] Prior to the expiration of his current service obligation, the appellant in the case, Boatswain's Mate First Class William King, submitted a request for an early reenlistment. On the day of King's reenlistment ceremony, the appellant received a discharge certificate and refused to complete the reenlistment ceremony.[32] "Appellant then accompanied Ensign Vendrzyk, the reenlistment officer, to meet with a superior officer, Lieutenant Craig."[33] After explaining his family problems to his superior officer, "some discussions regarding leave ensued."[34] King then "returned to his 'boat,' retrieved his personal effects, and departed."[35] At trial, King was charged with Desertion under Article 85, UCMJ, and Fraudulent Separation under Article 83, UCMJ.[36] The trial judge "granted appellant's motion for dismissal of the desertion charge on the basis of lack of court-martial jurisdiction" but denied the motion as to the Article 83 offense.[37] The trial judge found that "[o]n 3 July, a discharge certificate was delivered to the accused with the intent, by the government, that it operate as a discharge in order that the accused be qualified to reenlist."[38] King "accepted the discharge certificate with the intent and understanding that it terminated his status in that he was discharged."[39] Even though the accused did not "check with his command or Disbursing [sic]," the trial judge found both matters to be "more administrative in nature and not conditions precedent to a discharge."[40]

During an earlier hearing of the case (*King I*),[41] the Navy-Marine Corps Court of Military Review (NMCMR) reversed the decision of the lower court[42] holding that "[t]he discharge, if any, was a nullity."[43] Because the discharge certificate was "delivered for the sole purpose of effecting a reenlistment," the actual delivery of the certificate lost its legal significance.[44]

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[27] *Id.*

[28] *Id.* at 355.

[29] *Id.*

[30] United States v. King (*King II*), 27 M.J. 327 (C.M.A. 1989).

[31] *Id.*

[32] *Id.* at 328.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 327.

[37] *Id.* at 328.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] United States v. King (*King I*), 1987 CMR LEXIS 514 (N-M.C.M.R. July 13, 1987).

[42] *King II*, 27 M.J. at 328.

[43] *King I*, 1987 CMR LEXIS 514.

[44] *Id.*; *see* United States v. Howard, 20 M.J. 353 (C.M.A. 1985).

"Therefore, delivery of the discharge certificate for the purpose of reenlistment did not terminate the military status of the accused and jurisdiction over his person."[45]

Eventually, King appealed, and the COMA upheld the NMCMR decision, finding that "court-martial jurisdiction existed over appellant."[46] The court held that the "physical transfer of a discharge certificate to appellant under the latter circumstances did not deprive military authorities of court-martial jurisdiction over him."[47] The court stated, "Congress has spoken as to what constitutes a valid discharge" in 10 U.S.C. § 1168(a) and 10 U.S.C. § 1169.[48] The court further explained,

> We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be a delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. § 1168(a). . . . Third, appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service.[49]

The three-element test developed by the court in *King II*[50] established the theoretical framework that is still used to determine whether a military court has personal jurisdiction over an accused. Finding that King had not satisfied any of the elements of the congressional mandate[51] and that the "mere physical transfer of the discharge certificate to appellant was not 'delivery' of the discharge as required by law," the court affirmed the decision of the NMCMR and held that court-martial jurisdiction had not been lost.[52] Although the three-element test is useful in defining when a discharge is effective, understanding the substance of each element is critical. For example, interpreting how the second element of *King II* may be met requires an understanding of how a local finance office processes a servicemember's final accounting of pay prior to the individual's discharge from active duty service.

3. Finance Policy and Payment Procedures

Understanding the payment procedures used by an installation finance office is important in determining whether a Soldier's final pay was "ready for delivery."[53] Defense Finance Accounting Services (DFAS) Manual 37-1 provides the framework for calculating a Soldier's final pay. According to paragraph 311304, the finance technician will "[p]ay the soldier a separation payment on the soldier's DOS [date of separation]."[54] The DOS is "[t]he date a Soldier is released from active duty; expiration term of service date."[55] However, the servicemember's "payment will be processed using the procedures for local payment by EFT (Electronic Funds Transfer)."[56]

The final pay processing procedure at the local level is one factor courts consider when determining whether final pay is "ready for delivery."[57] Although, the Defense Finance and Accounting Office (DFAO) provides the standard operating procedures (SOP) for installation finance offices, most offices have their own local SOP.[58] Recently, courts have considered

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[45] *King I*, 1987 CMR LEXIS at 514.

[46] *King II*, 27 M.J. at 328.

[47] *Id.* at 329.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] 10 U.S.C. § 1168(a) (2006) ("Discharge or release from active duty: limitations").

[54] POLICY IMPLEMENTATION, *supra* note 4, at 31-7.

[55] U.S. DEP'T OF DEF., STANDARD OPERATING PROCEDURE FOR ARMY MILITARY PAY OPERATIONS 4 (Nov. 2007).

[56] *Id.*

[57] United States v. Hart, 66 M.J. 273 (C.A.A.F. 2008).

[58] E-mail from Jenni Yacub, Lead Military Pay Technician, Defense Military Pay Office (Separations)–Fort Hood, Tex., to author (Jan. 13, 2009, 09:48 CST) (on file with author).

both the DFAO and local SOPs in their analysis, highlighting why trial counsel should understand these policies and procedures.[59] Without an understanding of these SOPs, trying to apply the case law interpreting 10 U.S.C. § 1168(a) to a particular case is pointless. As the next section will explain, these basic finance policies and procedures are used to interpret what delivery of the "final accounting of pay" means under 10 U.S.C. § 1168(a).

III. Interpreting What Delivery of the "final accounting of pay" Means IAW 10 U.S.C. § 1168(a)

A. *United States v. Joel S. King*

Prior to 2008, the courts failed to address specifically what "delivery" of the final accounting of pay meant under 10 U.S.C. § 1168(a). In *United States v. King*, decided in 1995, the Court of Appeals for the Armed Forces (CAAF) recognized this oversight but still failed to answer the question.[60]

The appellant in *King*, Sergeant Joel S. King, was scheduled to be discharged on 30 July 1992.[61] Because his orders stated he was not entitled to any separation pay, the appellant persuaded one of his fellow Soldiers to prepare a false amendment to his discharge orders stating he was entitled to separation pay.[62] King then submitted the fraudulent amendment to the finance office.[63] When King arrived at the transfer point for out-processing, someone noticed the false amendment and alerted CID.[64] King was apprehended, prosecuted, and subsequently convicted of "unauthorized absence (29 days), presenting a false claim, and conspiracy to make a false claim, in violation of Articles 86, 132, and 81, Uniform Code of Military Justice."[65] On 15 April 1993, "the Court of Military Review affirmed the findings and sentence"[66] of the lower court.

On appeal, the CAAF granted review of the case to determine whether "appellant's court-martial lacked personal jurisdiction."[67] Using the same analysis the court used in *King II*,[68] the CAAF found that King had not "picked up his paycheck nor undergone the required 'clearing process' prior to his apprehension."[69] Because of the appellant's fraudulent misconduct in "attempting to obtain separation pay to which he was not entitled, . . . the second and third prongs of the *King* requirements for a valid discharge from the armed forces were not met prior to appellant's apprehension."[70]

Focusing on the second prong of the *King II* analysis, appellant's counsel argued that the "picking up of appellant's final paycheck is not a required step to the completion of a final accounting of pay."[71] The court refused to address the issue stating that answering the contention "is not necessary. . . here" because "[a]ppellant's final accounting of pay was not

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[59] *Hart*, 66 M.J. 273; *see* United States v. Coker, 67 M.J. 571 (C.G. Ct. Crim. App. 2008).

[60] United States v. King, 42 M.J. 79 (C.A.A.F. 1995).

[61] *Id.* at 80.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 79.

[66] *Id.*

[67] *Id.*

[68] The *King II* court stated,

> We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be a delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. § 1168(a). . . . Third, appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service.

United States v. King (*King II*), 27 M.J. 327, 329 (C.M.A. 1989).

[69] *King*, 42 M.J. at 80.

[70] *Id.*

[71] *Id.*

resolved due to appellant's own misconduct in fraudulently attempting to obtain separation pay to which he was not entitled."[72] Thirteen years later, the CAAF would directly tackle this issue in *Hart*.[73]

B. *United States v. Hart*

In a three to two decision in *Hart*, the CAAF finally answered the question of what it means to have a final accounting of pay "ready for delivery" under 10 U.S.C. § 1168(a). However, the dissent by two of the five judges left open the potential for future litigation on the issue.

In *Hart*, the appellant, Airman First Class Dustin Hart, "confessed to various drug offenses during an interview with the Air Force Office of Special Investigations (AFOSI) on January 2, 2004."[74] "Following his confession he worked with AFOSI for several months as a confidential informant gathering information about illegal drug use by active duty members."[75] No charges were ever preferred during this time period; however, "on January 8, 2004, a Medical Evaluation Board found Hart physically unfit for military service."[76] The Office of the Secretary of the Air Force notified the separation section of Hart's unit that Hart was to be administratively separated with a disability discharge.[77] Hart then began out-processing from the Air Force, which included completing a "separate 'finance' checklist and a final interview with finance personnel."[78] After completing all the finance checklists, Hart "met with a finance technician on February 24, 2004, and provided the information necessary for the calculation of his final pay."[79] Hart's section commander, "unaware that [Hart] was personally implicated in criminal activity," cleared Hart for final out-processing that same day.[80] "Two days later, the initial calculation of Hart's separation pay was entered into the computer system of DFAS,"[81] and "[o]n 3 March 2004, the separations section issued Hart his DD Form 214 reflecting that date as the effective date of separation."[82]

On 5 March, "Hart's squadron commander, AFOSI, and the legal office learned that Hart had received his DD Form 214."[83] The legal office "directed the finance office not to take any further action in calculating Hart's final pay" and the squadron commander issued a memorandum asking that Hart's DD Form 214 be revoked.[84] On 9 March, Hart was reported absent without leave and was eventually "arrested by civilian authorities on March 18, 2004."[85] Charges were preferred on the appellant on 23 March.[86]

The trial judge denied appellant's motion to dismiss for lack of personal jurisdiction, and the appellant was "convicted of wrongful use, possession and distribution of various controlled substances."[87] The U.S. Air Force Court of Criminal Appeals affirmed the trial court's holding and "concluded that '[a]bsent a final accounting of pay, the appellant's early discharge was not legally effectuated and he remained subject to military court-martial jurisdiction.'"[88] The appellant then appealed to the

[72] *Id.*

[73] United States v. Hart, 66 M.J. 273, 274 (C.A.A.F. 2008).

[74] *Id.* at 274.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 275.

[88] *Id.*

CAAF, which heard the case in order to determine "whether a valid discharge occurred which would deprive the Air Force of *in personam* jurisdiction over Hart."[89]

The CAAF began its analysis by looking at 10 U.S.C. § 1168(a), § 1169, and *King II*[90] for guidance "as to what is required to effectuate discharge."[91] The court then narrowed its focus to determine whether the appellant's final pay was ready for delivery "within the meaning of the plain language of 10 U.S.C. § 1168(a)."[92] "Based on the DFAS manual and the procedures of the base finance office" the trial court judge found that "critical calculations, reconciliations, and authorizations of final pay pursuant to DFAS regulations had not yet started."[93] The facts of appellant's case did not support the proposition that possession by the finance office of all the documents required to compute his final pay was enough to satisfy 10 U.S.C. § 1168(a).[94] Based on the lower court's findings, the CAAF held that "Hart was not effectively discharged and remained subject to court-martial jurisdiction pursuant to Article 2(a)(1), UCMJ."[95] Hart's final pay was not ready for delivery within the meaning of 10 U.S.C. § 1168(a).[96]

In their dissent, Judge Effron and Judge Stucky concluded that "Hart's military status terminated on the date that the command delivered the discharge certificate to him."[97] They argued that the three-element test established in *King II* was only "the general practice applicable in most instances" when determining whether an early discharge by a servicemember had been accomplished.[98] They found that the majority's application of 10 U.S.C. § 1168 in Hart's case to be overly broad stating,

> Under the majority opinion's interpretation of § 1168, the effective date of separation set forth in a discharge document, such as a DD-214, must be disregarded if personnel in the finance office have overlooked or failed to make sufficient progress in calculating a departing servicemember's pay at the time of separation.[99]

The dissent further stated that the majority's holding allows the services to keep a servicemember on "active duty until an uncertain future time, the date on which his or her 'final pay or a substantial part of that pay' becomes 'ready for delivery.'"[100] This would in time "remove the certainty of an effective date on the DD-214 . . . and replace it with the necessity of determining on a case-by-case basis the date on which an individual's pay was 'ready for delivery.'"[101] Although disagreeing with the majority opinion, the dissent illustrates that determining whether an individual's pay is "ready for delivery" in accordance with 10 U.S.C. § 1168(a) must be done on a "case-by-case basis."[102] Following *Hart*, courts have continued to rely on this "case-by-case" analysis.

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[89] *Id.*

[90] United States v. King (*King II*), 27 M.J. 327 (C.M.A. 1989).

[91] United States v. Hart, 66 M.J. 273, 275 (C.A.A.F. 2008).

[92] *Id.* at 276.

[93] *Id.* at 277.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 280.

[98] *Id.* ("In noting that the discharge statutes 'generally' require three steps, the opinion sought to describe the general practice applicable in most instances, rather than set forth an absolute rule.").

[99] *Id.* at 279.

[100] *Id.*

[101] *Id.*

[102] *Id.*

C. *United States v. Coker*

In a unanimous decision in *United States v. Coker* the U.S. Coast Guard Court of Criminal Appeals (CGCCA) relied on the precedent established in *Hart*.[103] It is important to note, however, that the court saw the issue as a "question of subject matter jurisdiction over certain offenses" and that personal jurisdiction to try the appellant was not contested in the case. [104]

Lieutenant Junior Grade Jay Coker was a reserve officer in the Coast Guard who was serving on active duty under an "extended active duty agreement beginning 4 August 2003 and ending 3 August 2006."[105] Prior to the expiration of his agreement, Coker asked to extend his service agreement past 3 August.[106] However, "in May of 2006 he requested to be released from the new obligation and his request was approved."[107] On 29 June a separation authorization was issued stating that his last day of active duty service would be 3 August 2006.[108] Before Coker could receive his DD Form 214, he was required to complete a "check-out sheet."[109] "Under local procedures, Appellant should not have received his DD-214 until he had completed" this check-out sheet.[110] Nevertheless, on 3 August, appellant received his DD Form 214 showing a separation date of 3 August 2006.[111] Prior to 3 August, the Personal Services Center (PSC) received notice that appellant would be leaving active duty the next day and had requested "to sell back fifty-five days of leave."[112] On this date the "PSC had all the information they needed to calculate Appellant's final pay"[113] and "[a]ppellant's final pay calculation occurred on 8 August 2006."[114]

After being "convicted of misconduct on eight separate occasions involving six different four- and five-year-old boys,"[115] some of which occurred after 3 August 2006, Coker appealed the decision claiming that the

> court-martial did not have jurisdiction over Charge I, Specification 2, or over Charge V, Specification 7, because Appellant was not on active duty when those offenses were committed; he had received notice of final intent to release him from active duty, and his final pay was ready for delivery.[116]

Coker argued that "he had been separated on 3 August 2006 and therefore there was no court-martial jurisdiction to try him for alleged offenses occurring on 4 August 2006."[117] The trial court held that the U.S. Coast Guard did have subject matter jurisdiction over the above listed offenses because the delivery of the DD Form 214 was not "effective because the person who delivered it did not have authority to do so since Appellant had not completed the check out process."[118] Regarding the final accounting of pay issue, the trial court judge concluded that "[a]ppellant's final pay or a substantial portion of it was ready for delivery."[119]

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[103] United States v. Coker, 67 M.J. 571 (C.G. Ct. Crim. App. 2008).

[104] *Id.* at 574 n.2.

[105] *Id.* at 573.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 574.

[119] *Id.*

However, the CGCCA disagreed and found the trial court's finding on the issue of the DD Form 214 to be erroneous. The court resolved the subject matter jurisdiction issue by looking specifically at whether Coker's final pay had been ready for delivery. More specifically, the court looked at *Hart* to determine this issue. The court found that the final calculation of pay was not complete until 8 August 2006 and that the appellant's "final pay would have been deposited . . . on the mid-month payday."[120] Based on these findings, the court held that "[s]ince no part of Appellant's final pay was ready for delivery on 3 August 2006," Coker was not "truly released from active duty on that date, and his actions on 4 August could provide the basis for charges against him at a court-martial."[121] The court based its holding on the trial court's findings of fact, stating that the facts did "not meet the plain language of 10 U.S.C. § 1168(a)."[122] Although, the *Coker* case is not directly on point with the subject matter of this primer because it covers subject matter jurisdiction versus personal jurisdiction, the case demonstrates, once again, that facts matter when determining whether a servicemember's final accounting of pay was ready for delivery.

IV. Conclusion

In May 2008, *United States v. Hart*[123]finally answered what it means for a Soldier's pay to be "ready for delivery"[124] in accordance with 10 U.S.C. § 1168(a). *Hart* established that determining whether a Soldier's final pay was "ready for delivery" is a factual determination and not a determination as a matter of law. When faced with this issue, counsel must know the jurisdictional facts of their case and, more specifically, the policies and procedures of their local finance office. They must also ensure that these facts are included in the trial judge's findings on the record.

The introduction to this primer introduced an actual case resembling the facts of *United States v. Hart*. In line with *Hart*, the trial judge held that the Government had personal jurisdiction over the accused for court-martial purposes because the accused's pay was not "ready for delivery." Because the accused's pay had not been certified by the finance clerk and had not been sent to DFAS for final payment, the accused was prosecuted for his offenses. In the end, the facts of the case and the policies and procedures of the local finance office allowed the U.S. Army to prosecute this Soldier for his crimes.

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[120] *Id.* at 575.

[121] *Id.*

[122] *Id.*

[123] United States v. Hart, 66 M.J. 273 (C.A.A.F. 2008).

[124] 10 U.S.C. § 1168(a) (2006) (Discharge or release from active duty: limitations).

Know Your Ground: The Military Justice Terrain of Afghanistan

Captain Eric Hanson[*]

Introduction

This Note from the Field is intended to complement the Note from the Field published by Captain Jason Neff in the January 2009 issue of *The Army Lawyer*, which focused on getting cases to trial in a timely way during a combat deployment to Iraq.[1] This note is intended to further the discussion with a focus on the challenges of rapidly and effectively bringing courts-martial to trial and delivering other military justice support in Afghanistan.

At the time of this writing, the Army Judge Advocate General's Corps has accumulated over seven years of continuous experience conducting legal operations and delivering legal advice in real-world combat environments of Iraq, Afghanistan, and elsewhere. Articles published in *The Army Lawyer*[2] and *Military Law Review*,[3] as well as the evolving curriculum at The Judge Advocate General's Legal Center and School (TJAGLCS)[4] during that interval show that our Corps has been a learning organization,[5] acquiring and sharing knowledge borne of experience about the full spectrum of deployed Army legal practice. Much of this knowledge has been gained in Iraq as a result of the large contingent of Army forces deployed to that theater since 2003. As the commander-in-chief and the Army shift focus to Afghanistan,[6] there may be some Afghanistan-specific lessons learned that may be useful to Army judge advocates and others whose base of experience was developed elsewhere. This note will address strategies for effective military justice prosecution in Afghanistan based on experience there from 2007 to 2009.[7]

The Challenge of Afghanistan's Terrain

Military tacticians and strategists have long observed that success on the battlefield involves a recognition of the limitations and opportunities presented by the terrain.[8] Military justice practice in Afghanistan is the same, where time is of the essence both in collecting evidence and in getting the case to trial. Afghanistan features over two hundred camps, forward operating bases, combat outposts, firebases, and observation posts at which Soldiers live, work, and fight year-

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[1] Captain A. Jason Neff, Note from the Field, "*Getting to Court: Trial Practice in a Deployed Environment*," ARMY LAW., Jan. 2009, at 51.

[2] *See, e.g.*, Commander Gregory Raymond Bart, *Special Operations Commando Raids and Enemy* Hors de combat, ARMY LAW., July 2007, at 33; Captain Christopher Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, ARMY LAW., Dec. 2004, at 22; Major Timothy Austin Fuerin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations,* ARMY LAW., Oct. 2008, at 1; Major Joshua E. Kastenberg, *Tactical Level PSYOP and MILDEC Information Operations: How to Smartly and Lawfully Prime the Battlefield*, ARMY LAW., July 2007, at 61; Neff, *supra* note 1; Lieutenant Commander Vasilios Tasikas, U.S. Coast Guard, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45.

[3] *See, e.g.*, Captain Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92 (Fall 2006).

[4] *See, e.g.*, INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, USAREUR SPRING 2007 OPERATIONAL LAW CONFERENCE COURSE MATERIALS (2007) (on file with the author); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, USAREUR FALL 2008 OPERATIONAL LAW CONFERENCE COURSE MATERIALS (2008) (on file with the author); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, USAREUR SUMMER 2009 OPERATIONAL LAW CONFERENCE COURSE MATERIALS (2009) (on file with the author).

[5] *See generally* PETER M. SENGE, THE FIFTH DISCIPLINE (London: Century Business 1990) (elucidating the term "learning organization" in detail).

[6] President Barack H. Obama, Presidential Press Briefing, Wash., D.C. (Mar. 27, 2009); *see also* Helen Cooper & Eric Schmidt, *Obama Afghanistan Plan Narrows U.S. War Goals*, N.Y. TIMES, Mar. 28, 2009, at A1; Anna Mulrine, *Obama Turns Focus to War in Afghanistan,* U.S. NEWS & WORLD REP., http://www.usnews.com/articles/news/2009/07/02/obama-turns-focus-to-war-in-afghanistan.html (July 2, 2009).

[7] Generous assistance in preparing this article was provided by Captain Joshua Johnson, U.S. Army, 3d BCT, 1st Infantry Division, and Captain Ronald T. P. Alcala, The Judge Advocate General's Legal Center and School. Captain Alcala, the author, and Captain Johnson, respectively, served in succession as trial counsel for brigade combat teams headquartered at Forward Operating Base Fenty, Jalalabad, Afghanistan from January 2007 to July 2009.

[8] *See, e.g.*, SUN TZU, THE ART OF WAR chs. 10–11; Carl von Clausewitz, *Die wichtigsten Grundsätze des Kriegführens zur Ergänzung meines Unterrichts bei Sr. Königlichen Hoheit dem Kronprinzen* (*Principles of War*) ch. II (Hans W. Gatzke trans., 1942) (1812); CARL VON CLAUSEWITZ, ON WAR bk. VI, ch. 3 (J.J. Graham trans., 1873) (1832); U.S. ARMY, FIELD MANUAL 3-0, OPERATIONS para. 3-48 (27 Feb. 2008).

round.[9] Strings of small outposts in remote valleys are part of the strategy to confront the anti-Afghan insurgency.[10] As omnipresent as lawyers may seem to be in the modern Army, there are Army legal offices on only about fifteen installations in Afghanistan, and six of those are staffed by paralegals only.[11] As a result, most U.S. personnel deployed in Afghanistan are not co-located with any resident legal or law enforcement presence. For example, from 2007 to 2009, four provinces and over thirty installations were supported by only one organic legal office and a squad of National Guard military police, which performed customs and law-and-order duties.[12] A single Criminal Investigation Division (CID) office and a single Trial Defense Services (TDS) office serve the entire country from Bagram Airfield (BAF), the main U.S. military base in Afghanistan.[13] A military judge travels to BAF for a few days every month or two to hear motions and trials in a conference room converted to use as a courtroom.[14] In comparison, TDS operates five offices throughout Iraq,[15] and a military judge is regularly on assignment in Iraq, available to hear motions, conduct hearings, and try cases as necessary. The Victory Base Complex south of Baghdad alone boasts three dedicated courthouses. In short, most trial counsel (TC) in Afghanistan are physically remote from witnesses, evidence, and client commanders, and almost all TCs are located far from the country's only venue for Special and General Court-Martial proceedings.

The terrain not only dictates how many Soldiers and commanders have a legal or law enforcement presence on hand, it also dictates whether and how rapidly these assets can be moved around. Afghanistan's terrain[16] poses logistical challenges that can seriously hamper the movement of men and materiel across the battlefield. The aircraft and ground convoys that move personnel and equipment around the battlefield are limited, both in number and by the restrictive terrain.[17] Roads of any kind are few, and roads capable of carrying military vehicles are startlingly scarce. Consequently, some installations are difficult to access.[18]

Arranging travel can also be a challenge involving significant coordination up and down the chain of command. Travelling from one forward operating base (FOB) to another, even one five minutes down the road, requires organizing a convoy operation,[19] a process which can take a day or more even if the convoy is a high priority mission.

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[9] Combined Joint Task Force–101 (CJTF-101) Camp Tracker (May 2009) [hereinafter Camp Tracker] (on file with the author).

[10] Elizabeth Rubin, *Battle Company Is Out There*, N.Y. TIMES, Feb. 24, 2008, (Magazine), at 38, *available at* http://www.nytimes.com/2008/02/24/magazine/24afghanistan-t.html?scp=2&sq=%22battle+company+is+out+there%22&st=nyt.

[11] CJTF-101, Afghanistan Legal Personnel Contact Roster (6 May 2009) (on file with the author).

[12] CJTF-101, Task Organization Friendly Forces Laydown Briefing (11 Mar. 2009) (on file with the author).

[13] *Id.*

[14] This venue has been the only one available in Afghanistan for special and general court-martial hearings and trials since at least as far back as 2006. Preparing the spartan room for judicial proceedings involves piling tables and chairs to the ceiling at the back of the room, scrounging for pressboard desks to use as the military judge's bench and counsel tables, and setting up a small, round coffee shop table to serve as a witness stand. The court reporter must then run microphone wires across the floor and cover them with large Afghan rugs to prevent counsel from tripping on them. Conference rooms or offices in the adjacent building must be commandeered to serve as witness waiting rooms and a panel deliberation room.

[15] The TDS offices in Iraq are located at Camp Speicher (Tikrit), Joint Base Balad, Camp Liberty (Baghdad), Camp Victory (Baghdad), and Taji. REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, OCTOBER 1, 2007, TO SEPTEMBER 30, 2008, at 10, *reprinted in* ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, INCLUDING SEPARATE REPORTS OF THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, THE JUDGE ADVOCATES GENERAL OF THE U.S. ARMED FORCES, FOR THE PERIOD OCTOBER 1, 2007 TO SEPTEMBER 30, 2008, *available at* http://www.armfor.uscourts.gov/annual/FY08AnnualReport.pdf. The Trial Defense Service also operates an office at Camp Arifjan, Kuwait. *Id.* In total, one regional defense counsel, seventeen trial defense counsel, and six paralegals were deployed throughout the Central Command (CENTCOM) area of responsibility (AOR)—which includes Iraq, Afghanistan, Kuwait, Qatar, Saudi Arabia, Djibouti, and Egypt—between 1 October 2007 and 30 September 2008. *Id.*

[16] At approximately 251,772 square miles, Afghanistan is almost as large as Texas. U.S. CENSUS BUREAU, UNITED STATES SUMMARY: 2000, POPULATION AND HOUSING UNIT COUNTS tbl.17 (Apr. 2004); *see also* https://www.cia.gov/library/publications/the-world-factbook.htm (last visited Aug. 28, 2009). The country is so mountainous that more than half of the land area is higher in elevation than Denver, Colorado's Mile High Stadium. *See* http://countrystudies.us/afghanistan/32.htm (last visited Aug. 28, 2009). Winter weather in the mountains periodically and unpredictably precludes air and/or ground transportation. *See also* Moises Saman, Afghanistan From the Air, http://atwar.blogs.nytimes.com/2009/10/13/afghanistan-from-the-air/ (Oct. 13, 2009, 02:30 EST).

[17] *See, e.g.*, CJTF-10,1 Ring Route Schedule for Rotary-wing Aircraft (version 45D) (May 2009).

[18] *Id.*; CJTF-101 Camp Tracker, *supra* note 9.

[19] *See, e.g.*, STANDARD OPERATING PROCEDURE, INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF) 336, Annex A (Feb. 10, 2006) [hereinafter ISAF SOP]; U.S. ARMY, CENTER FOR ARMY LESSONS LEARNED, USSOCOM COMBAT CONVOY TACTICS, TECHNIQUES, AND PROCEDURES HANDBOOK 10–13 (Feb. 2005).

These geographic and operational factors limit resources in ways not seen in garrison or other combat theaters. To overcome these limitations, the fundamentals of military justice practice should be rigorously applied with an eye towards finding timely solutions when resources are unavailable. First, the ability to collect and preserve evidence upon discovery of suspected misconduct is often limited. Indeed, TCs often do not learn about an incident until it is too late to influence the preservation of case evidence. This information gap can hamstring the preparation of a case from the beginning. As a result, TCs must be ready to handle every report of misconduct, from the discovery of the misconduct to the end of the investigation, and, as noted earlier, time is of the essence in the deployed military justice arena.[20] Exactly what deployed case preparation entails will inevitably vary over time, from place to place, and unit to unit, but some techniques to help mitigate the "front end" challenges of deployed military justice practice are worth mentioning.

Prepare Yourself

Expect, plan, and prepare to actively coordinate evidence collection and preservation, not just analyze what investigators present for your review. Identifying and developing relationships with military police and CID personnel operating in the area will help you fully leverage their capabilities; however, understand that mission requirements, distance, weather, and other circumstances will often delay or preclude these organizations from providing adequate support. Trial counsel in Afghanistan should anticipate that support may be scarce and should proactively take a lead role in coordinating the preservation of evidence and the identification and interviewing of witnesses. Frequently, commander's inquiries[21] or informal investigations, either written or oral, under AR 15-6[22] are typically the best vehicles to gather and preserve evidence that would otherwise be lost. Indeed, when assigning responsibility for various types of legal actions, a BCT legal office may assign investigations to the TC, rather than assign responsibilities along the traditional "military justice" and "administrative law" lines.[23]

Prepare Your Office

The TC may benefit from assigning one or more paralegals (depending on how paralegals are deployed and employed by the unit)[24] various duties, including monitoring routine reports for investigation-triggering events (including suspected misconduct); generating initial appointment packets for investigating officers;[25] tracking the progress of investigations; supporting IOs by answering administrative questions and ensuring they meet important suspenses; reviewing investigations for administrative completeness prior to legal review;[26] and ensuring digital and hard copies of completed investigation are properly labeled, filed, or destroyed, as appropriate.[27] This task set is similar to, but more robust than, typical garrison military justice paralegal duties. A smoothly running BCT legal office can process three to four hundred investigations per

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[20] Neff, *supra* note 1.

[21] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2008) [hereinafter MCM].

[22] *See generally* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS ch. 4 (2 Nov. 2006) [hereinafter AR 15-6].

[23] *See, e.g.*, ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., JA 280, BASIC COURSE DESKBOOK (Jan. 2004); CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN'S.SCH., BASIC COURSE CRIMINAL LAW DESKBOOK (Jan. 2004); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY 4-13 through 4-17 (15 Apr. 2009) [hereinafter FM 1-04] (not specifically assigning 15-6 legal review and support duties to personnel organic to the BCT legal office, but allowing for situation-dependent flexibility in assigning duties).

[24] FM 1-04, *supra* note 23, para. 4-18.

[25] Such a packet typically consists of initial reporting of the investigation-generating event, results of any preliminary evidence gathering, and draft appointment memorandum for the appropriate commander's signature.

[26] AR 15-6, *supra* note 22, para. 2-3b.

[27] Federal Records Act of 1950, 44 U.S.C. §§ 3101–3107 (2006); 44 U.S.C. §§ 3301–3314 (2006); Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501–3520 (2007); U.S. DEP'T OF ARMY, REG. 25-400-2, THE ARMY RECORDS INFORMATION MANAGEMENT SYSTEM (ARIMS) (2 Oct. 2007).

year without faltering in the execution of other duties,[28] if paralegal talent and energy are fully leveraged. For BCTs lacking adequate investigative agency support, these are realistic numbers.[29]

Prepare Your Unit

United States Army doctrine identifies several pre-deployment tasks that facilitate the efficient administration of military justice during deployment.[30] In addition to these formal tasks, TCs should condition unit commanders to use commander's inquiries to investigate potential misconduct when other means of gathering evidence are unavailable. TCs should recognize when an AR 15-6 investigation is required and when merely an informal inquiry may be more appropriate. Training brigade, battalion, and company staff officers (the population from which AR 15-6 investigating officers[31] are invariably drawn) on investigative techniques, including the ability to recognize relevant evidence, interviewing techniques, and the correct preparation of paperwork, helps maximize investigation quality.[32] TCs should also ensure that every investigating officer (IO) receives a legal briefing prior to the investigation.[33] A legal briefing—which is usually conducted by telephone in Afghanistan—is often the best way to ensure the IO understands the tasks necessary to complete the investigation, recognizes the sequence of steps and techniques required to photograph and handle physical evidence, appreciates when and how to administer Article 31b rights to witnesses, and knows what the final investigation product should look like.[34] Following these simple preparatory steps pays huge dividends in the military justice landscape of Afghanistan.

Afghanistan produces most of the world's opium, and certain illicit drugs, including opium, heroin, marijuana, hashish, and prescription medications, are cheaply and easily available to Soldiers in theater.[35] Trial counsel should learn what these substances look like in Afghanistan and should consult unit surgeons, physician's assistants, or written resources for information on the symptoms of use and overdose associated with these drugs, when used both alone and in combination. Trial counsel should also become familiar with the effects of anti-opiate medications administered by the unit's aid stations and recognize how these medications affect patients under the influence of drugs. Understanding these issues can help guide investigating officers to ask crucial questions of witnesses in drug use or overdose cases. It can also help the TC ensure that suspected drug users are not questioned until the effects of the drug, the overdose experience, and medical treatment subside enough that answers will be admissible in UCMJ action.[36] Ensuring units thoroughly prepare Unit Prevention Leaders (UPLs)[37] and deploy with adequate urinalysis (UA)[38] supplies is also critical for preventive and investigative purposes.

Meanwhile, the distribution of forces across the battlespace can have significant consequences for UA inspection programs[39] that can affect the admissibility of evidence.[40] Geographical constraints may come into play in two ways. First,

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[28] *See* FM 1-04 *supra* note 23, ch. 5.

[29] This assessment is based on the experience of the legal offices of Task Force Bayonet (173d ABCT) from May 2007 to August 2008 and Task Force Duke (3-1 IBCT) in the Nangarhar, Nuristan, Kunar, and Laghman Provinces (N2KL) area from August 2008 to July 2009.

[30] *See, e.g.*, FM 1-04 *supra* note 23, para. 5-13.

[31] AR 15-6, *supra* note 22, para. 2-1.c.

[32] *See, e.g.*, U.S. Dep't of Army, DA Form 2823, Sworn Statement (Nov. 2006); U.S. Dep't of Army, DA Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1989); U.S. Dep't of Army, DA Form 1574, Report of Proceedings by Investigating Officer/Board of Officers (Mar. 1983); *see also* Memorandum from Undersecretary of Defense for Personnel and Readiness to Secretaries of the Military Departments, subject: Directive Type Memorandum (DTM) 07-015-USD(P&R)–"DoD Social Security Number (SSN) Reduction Plan" (28 Mar. 2008).

[33] AR 15-6, *supra* note 22, para. 3-1. *Cf. id.* fig.2-4 (not identifying a legal advisor or direct the IO to get a legal in-brief); *id.* fig.2-5 (identifying a legal advisor but not expressly directing the IO to get a briefing from the legal advisor).

[34] UCMJ art. 31b (2008); AR 15-6, *supra* note 22, para. 3-7.d; *see also* MCM, *supra* note 21, MIL. R. EVID. 305(c) (excluding evidence gathered in violation of Article 31, UCMJ, from consideration by the Court); United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

[35] *See* Sabrina Tavernise, *U.S. and Afghan Forces Seize Biggest Drug Cache to Date*, N.Y. TIMES, May 24, 2009, at A24.

[36] UCMJ art. 31d; MCM, *supra* note 21, MIL. R. EVID. 304, 305(g); United States v. Morris, 44 M.J. 841, 844 (A. Ct. Crim. App. 1996), *aff'd* 49 M.J. 227 (1998).

[37] U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM paras. 2-14, 4-9, 9-6 (2 Feb. 2009) [hereinafter AR 600-85]; *see generally* U.S. DEP'T OF ARMY, COMMANDER'S GUIDE AND UNIT PREVENTION LEADER'S HANDBOOK (June 2006) [hereinafter UPL HANDBOOK].

[38] AR 600-85, *supra* note 37, at 144.

[39] *Id.* ch. 4; *see generally* UPL HANDBOOK, *supra* note 37.

the dispersion of troops across multiple locations and the intermixing of disparate units may mislead a commander into mistaking the extent of his authority to order an inspection.[41] This can also arise when reserve component elements serve alongside or incorporated within active duty command structures, as frequently happens in Afghanistan.[42]

Understanding the disposition of troops on the ground can also affect the conduct of probable cause searches. For example, the first time a unit discovers that a Soldier may have overdosed on opium should not be the first time the TC considers where a UPL may be found; whether the unit has the appropriate bottles, labels, and sealing tape to conduct a proper UA; how a UA specimen may be transported to a lab for analysis; or where a military working dog[43] team may be located. Additionally, living and working conditions, which can vary significantly from base to base, can affect whether and where Soldiers have a reasonable expectation of privacy for Fourth Amendment purposes.[44] Accordingly, when advising commanders on probable cause search authorizations, the TC must avoid making assumptions about a location to be searched and should, instead, methodically gather details about the place, including what it looks like, how it is used, who has access to it, and what command policies apply at the location.

An effective TC will think creatively and proactively and utilize the brigade judge advocate (BJA), senior trial counsel, and chief of military justice in the preparation process. As an officer on the brigade staff,[45] the BJA can be the proponent of the Fragmentary Order (FRAGO)[46] necessary to bring a plan to life, both prior to and during the deployment. Brigade-level FRAGOs that could directly affect the administration of military justice include FRAGOs implementing the BCT's UA program, withholding or delegating certain classes of UCMJ authority and investigation approval authority, establishing requirements for investigations into certain types of incidents, requiring IOs to receive legal briefings, requiring battalions to provide standing pools of potential investigating officers, and directing the allocation of battalion paralegals during the deployment.

Taking charge of evidence development is both a natural role for the TC and a potentially risky one. Specifically, when building a case for trial, TCs should avoid becoming witnesses in their own cases, a circumstance which almost always

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[40] MCM, *supra* note 21, MIL. R. EVID. 313(b) (providing that evidence, including urine, gathered as part of an inspection to ensure security, military fitness, readiness, or good order and discipline is admissible.); United States v. Gardner, 41 M.J. 189, 190 (CMA 1994) (holding that a urinalysis is a constitutionally permissible inspection). Geographical constraints come into play in two different ways. First, dispersion of troops across multiple locations and intermixing with other units may lead a commander to mistake the extent of his authority to order an inspection. *See* United States v. Miller, 66 M.J. 306, 308 (C.A.A.F. 2008) (holding that evidence gathered at an inspection ordered by somebody lacking actual command authority over the person or place to be inspected is inadmissible). This can also arise when reserve component elements serve alongside or within active duty command structures, as frequently happens in Afghanistan.

[41] *See Miller*, 66 M.J. at 308 (holding that evidence gathered at an inspection ordered by somebody lacking actual command authority over the person or place to be inspected is inadmissible).

[42] *See* United States v. Dimuccio, 61 M.J. 588, 592–93 (A.F. Ct. Crim. App. 2005). Also, attempts by a commander of geographically dispersed elements to maximize the effectiveness or reach of an inspection—or failure to do so—could constitute impermissibly manipulating the set of troops inspected. *See* United States v. Clements, No. ACM 31957, 1996 CCA LEXIS 355 (A.F. Ct. Crim. App. Nov. 19, 1996) (citing United States v. Bickel, 30 M.J. 277, 286 (C.M.A. 1990) (stating non-discrimination, not mathematical randomness, in the selection of troops to be inspected makes an inspection valid); United States v. Parker, 27 M.J. 522, 527 (A.F.C.M.R. 1988) (explaining excusal of persons scheduled for an inspection could make the inspection invalid, depending on the facts of the case); *id.* at 526 (holding legitimacy of an inspection would be suspect if deliberately timed to include some personnel but not others). This could present a challenge, for example, when scheduling an inspection of company personnel constantly rotating among multiple remote firebases and the company headquarters for refit; the commander would have no choice but to choose certain personnel to be included and certain personnel to be exempted. *Cf.* United States v. Pappas, 30 M.J. 513, 515 (A.F. Ct. Cr. App. 1990) (holding that when geographical dispersion of randomly selected personnel affected the set of personnel who were actually inspected, the commander's *inadvertent* failure to subsequently inspect the absent personnel did not invalidate the inspection of the others). The *Pappas* decision leaves open the possibility that if the commander had acted knowingly and intentionally, the results of the inspection would have been inadmissible. *Id.*

[43] U.S. DEP'T OF ARMY, PAM. 190-12, MILITARY WORKING DOG PROGRAM paras. 2-34, 3-28 (30 Sept. 1993).

[44] U.S. CONST. amend. IV; MCM, *supra* note 21, MIL. R. EVID. 311(a); Katz v. United States, 389 U.S. 347 (1967) (the Fourth Amendment protects people— and not simply "areas"—against unreasonable searches and seizures); United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993) (citing RCM 302(e)(2) for the proposition that the legal concept of "private dwelling" for Fourth Amendment purposes does not extend to barracks or military encampments regardless of whether or not subdivided into individual units). *But cf.* United States v. Conklin, 63 M.J. 333, 337 (2006) (stating that barracks do not provide the same protections as a private room but not declaring there is no reasonable expectation of privacy); United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004) (noting that CAAF "has relied on Supreme Court civilian precedent, but has also specifically addressed contextual factors involving military life" when determining whether a reasonable expectation of privacy exists).

[45] FM 1-04, *supra* note 23, para. 4-1.

[46] U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION paras.1-19, 3-5, G-20 (20 Jan. 2005).

requires the TC to withdraw from the trial.[47] Trial counsel should not write a legal review for an investigation he was substantially involved in conducting.[48] Trial counsel should also be wary of becoming too heavily invested in building a case if it could result in diminished objectivity and impair the TC's ability to safeguard procedural rights and give impartial advice to the chain of command.[49] Although these dangers are not unique to Afghanistan, TCs, BJAs, and chiefs of military justice should be especially attuned to these circumstances in theater because of limited resources.[50] The BJA or another lawyer can always step in to assist with these tasks on a case-by-case basis, but requiring other attorneys to perform the TC's job can strain already limited resources.[51]

Bringing the Case to Court-Martial

Gathering and preserving evidence is just one consideration in getting a case to trial. The Afghan terrain and operating environment frequently affect the TC's ability to assemble the personnel required to conduct judicial proceedings. These "back end" challenges can be mitigated by vigorous coordination during the court-martial preparation process.

Securing the Witnesses

United States forces operating in Afghanistan work under several distinct "stovepipe" chains of command,[52] some of which include reserve component units. This means that FOBs often feature U.S. servicemembers from different chains of command working side-by-side. Some units, particularly those stationed at BAF or in the Kabul area, may also operate alongside multinational personnel, both military and civilian, under the auspices of the International Security Assistance Force (ISAF).[53] The intermingled character of these command relationships and the staggered time horizons of deployment cycles significantly increases the possibility that key witnesses may not fall under the command of the convening authority, an Army element, an active-duty unit, or even a U.S. commander at the time of the alleged crime or at the time of trial. Promptly and accurately identifying the unit and chain of command of witnesses, as well as their status, expected redeployment date, and follow-on contact information, is therefore important.

Coordinating witness availability can be an administrative challenge. Expert witnesses or other civilians from the United States require special approval to travel on military aircraft and to stay at BAF. For active duty witnesses, TCs should coordinate with the legal office supporting the witness's chain of command to secure the witness's presence at trial. National Guard personnel who have returned to civilian status should be recalled to active duty in order to testify in Afghanistan; this

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[47] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.7 (1 May 1992) [hereinafter AR 27-26].

[48] *Id.* R. 1.7b.

[49] *See id.* R. 1.10, R. 1.13, R. 2.1, R. 3.7, R. 3.8, R. 4.3.

[50] *Id*. R. 5.1.

[51] *Id.* R. 8.5. This is especially true in Afghanistan, where the Office of the Staff Judge Advocate of the sole General Court-Martial Convening Authority (GCMCA) in the country has a chief of military justice but no other trial counsel. All trial counsel are attached or assigned to units separate from the headquarters and are usually geographically dispersed from one another. In short, finding another TC to take over a case may be prohibitively difficult.

[52] "Stovepipe" is a colloquial term that implies that two or more chains of command do not share a higher headquarters, either on their base or in Afghanistan, and as a result do not have control over one another. With the recent establishment of the U.S. Forces–Afghanistan (USFOR-A) headquarters under the command of General Stanley A. McChrystal, this dynamic may start to be alleviated.

[53] *See* Command Relationships as of 01SEP08, CJTF-101 CAMPLAN Brief Abridged (on file with the author). In some parts of Afghanistan, platoon-, company-, and battalion-sized National Guard units fall under the operational control (OPCON) of active duty chain of command. An active-duty TC is well advised to be mindful of the specific legal needs of Reserve and National Guard elements that are attached to the BCT upon arrival in the combat zone. Developing relationships with them, and being mindful of circumstances involving Reserve- and National Guard–specific procedures or approval processes will enable the active-duty TC to best meet the legal needs of these units. *See generally e.g.*, U.S. DEP'T OF ARMY, REG. 135-175, ARMY NATIONAL GUARD AND ARMY RESERVE SEPARATION OF OFFICERS (28 Feb. 1987); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-7b (6 June 2005); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-7 (19 Nov. 2008). The same can be said about the multi-service provincial reconstruction teams (PRTs) that are designated as summary court-martial convening authorities (SCMCAs) and draw legal support from an Army BCT, which is also the special court-martial convening authority (SPCMCA) for the PRT. Provisional reconstruction team commanders are usually Air Force or Navy O-5s with limited experience with their own service's military justice apparatus, much less those of other services. The TC must be prepared to determine the best way to implement military justice in accordance with the correct service's procedures. *See* Memorandum from Headquarters, CJTF-101, to all CJTF-101 Personnel, subject: CJTF-101 Policy Memorandum—Military Justice (Apr. 21, 2008; U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (21 Dec. 2007); U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT (7 Nov. 2003); U.S. DEP'T OF NAVY, JAGINST 5800.7E, MANUAL OF THE JUDGE ADVOCATE GENERAL (21 Dec. 2007).

not only gives the witness service credit for the time spent testifying, it also ensures the witness's presence complies with existing agreements with Afghanistan, facilitates travel on military aircraft on military orders, and ensures the witness has all the benefits of active duty status in case of injury or death. This process requires coordination with the National Guard personnel office in Washington, D.C. (USARNG G-1) and the approval of the relevant state National Guard Adjutant General. Depending on how long the witness is required and the length of time since the witness was last activated for federal service, an uncooperative witness may be able to block or delay activation to testify in Afghanistan, so maintaining good relationships with witnesses can be especially important. The approved recall to active duty and orders to testify at trial are implemented by the witness's local National Guard chain of command.[54] Similarly, the availability of third-country military witnesses must be coordinated with the witness's chain of command and national military authorities. Witness procurement is one of the reasons that some cases will be tried "downrange" or not at all, reinforcing the need for TCs to speedily prepare cases for trial during deployments.

As in Iraq or Kuwait, calling a witness for one hour of testimony may require the witness to be absent from his unit and normal place of duty for a week or more.[55] This significant time commitment applies both to witnesses traveling from outside and from within Afghanistan, so it is important to prepare and manage witnesses efficiently. Given these time constraints, putting the Government's entire sentencing case into a stipulation of fact, rather than using live sentencing witnesses, for a guilty plea is often an effective use of resources. Informing commanders well in advance which witnesses will be called (and periodically reminding them) will also help ensure witness availability for trial. For the same reason, trial counsel should also encourage the defense to identify witnesses as early as possible, and experienced defense counsel will generally cooperate, understanding they face the same logistical constraints as the Government. The parties may also find the use of stipulations of expected testimony[56] mutually expedient in theater.

Prepare the Witnesses

Arranging for local national (LN) witnesses to testify at courts-martial and judicial proceedings presents a variety of special challenges. First, organizing transportation for LNs, especially for LNs traveling from outside the Bagram area, will often require the use of military vehicles, aircraft, and personnel. Coordinating a proper convoy operation can take time, as discussed above. In comparison, witnesses traveling on their own may require room and board, provided on the economy, which must be arranged well in advance. Finally, once LN witnesses have successfully arrived at BAF, they must be granted access to the installation in order to attend trial. The TC must ensure that each LN has a letter, usually from the convening authority, authorizing him to enter the installation; once granted access, the witness may be required to remain under armed guard in a segregated lodging facility if he does not already possess a BAF access badge. Additionally, LN witnesses may not be authorized to enter U.S. dining facilities, and arranging suitable meals must take into account Afghan dietary mores. Trial counsel must coordinate with the chief of military justice early and must manage witnesses' expectations to ensure these administrative issues are handled efficiently.

In addition to the logistical difficulty involved in securing Afghan witnesses for trial, TCs must also prepare for unique challenges in the courtroom. Afghanistan's rugged terrain has produced a population that is as linguistically fractured as the land itself.[57] It is therefore crucial to identify interpreters in advance who speak the same language and dialect as the witnesses. Interpreters should also be familiar with the subject matter of witness testimony. Finally, trial counsel should carefully explain to the interpreter his role at a court-martial prior to trial. Many new interpreters have a tendency to summarize witness statements—and counsel questions—rather than provide verbatim translations. Counsel accustomed to working with experienced German interpreters in USAREUR or certified Spanish interpreters in the United States may find working with their Afghan counterparts challenging. In the author's experience, multilingual Afghans experienced as *translators* did not immediately grasp the distinct task of interpreting testimony in court, and courtroom interpretation

[54] Documents on file with the author.

[55] Neff, *supra* note 1, at 51.

[56] MCM, *supra* note 21, R.C.M. 405(g) (use of stipulations for Article 32 investigations); *id.* R.C.M. 811 (use of stipulations at trial).

[57] *See* U. S. MIL. ACADEMY DEP'T OF GEO. & ENV. ENG., AFGHANISTAN: A REGIONAL GEOGRAPHY 46–50 (Oct. 5, 2001); U. S. DEP'T OF ARMY, OEF AFGHAN SOCIOLOGICAL DEMOGRAPHICS: DATA CUTOFF 5 JAN. 2005, at 5; ORGANIZATION FOR SURVEYING AND CARTOGRAPHY, NATIONAL ATLAS OF THE DEMOCRATIC REPUBLIC OF AFGHANISTAN, Languages map (GEOKART 1985), *available at* http://www.aims.org.af/maps/national/national_atlas/01/languages.jpg (last visited Oct. 29, 2009); Afghanistan Information Management Services, Afghanistan Physical Map, http://www.aims.org.af/maps/national/physical/physical_Map_32.pdf (last visited Oct. 29, 2009).

literally had to be practiced before trial. These interpreters had sufficient command of the languages to perform the task;[58] they simply had no idea what a court-martial proceeding was supposed to look and sound like. Interpreters were inclined to summarize the testimony of witnesses on the stand or engage in clarifying conversations with witnesses which, although a valued skill when accompanying a commander to a key leader engagement,[59] is insufficient in a court-martial setting.

Eliciting testimony from Afghan witnesses is also complicated by the Afghan unfamiliarity—a result of Afghanistan's historical geographical remoteness—with the flow of U.S. or Western-style court proceedings.[60] Unlike Americans raised on a steady television diet of Perry Mason,[61] Law and Order,[62] and "you can't handle the truth!"[63] Afghans are keepers of a vibrant oral storytelling tradition. Afghan witnesses—especially those with less-than-cosmopolitan life experiences—find it unnatural and disconcerting to constrain themselves to answering only the question asked and to break up the flow of a story to enable an interpreter to catch up or to allow counsel to ask more questions. Many Afghans are not accustomed to giving testimony multiple times and are unprepared to be challenged over minor variations between each telling. A TC may anticipate some measure of frustration from an Afghan witness who has told his story to a U.S. commander, then is questioned by an investigator, questioned again by the same investigator looking for a written statement, interviewed by the TC while preparing for the Article 32 hearing, questioned again at the Article 32 hearing, interviewed yet again by the TC at the courtroom prior to the beginning of the court martial, and finally examined by the TC during the court proceeding itself. Careful explanation to the Afghan witness of what it means to "swear" or "affirm" the truth of testimony may also be appropriate. Some Afghans consider it bad luck to swear to the accuracy of one's own statement, and perceive that the asking for such assurances is an affront to the declarant's honor and reputation for truthfulness.

Prepare the Convening Authority

Witnesses are not the only logistical hurdle that the successful TC must address. In recent years, the General Court-Martial Convening Authority (GCMCA) in Afghanistan has been a single two-star commander of a division headquarters element that is not the organic higher headquarters of all the BCTs in Afghanistan, and the GCMCA headquarters has not been on the same deployment schedule as those BCTs.[64] These jurisdictional alignments and overlapping deployment schedules make it a challenge to maintain a valid standing panel. The convening authority might not certify a panel until and unless a case requires it, as is his statutory prerogative.[65] In addition to the usual panel composition considerations,[66] Afghan geography and its attendant logistical constraints may tempt the convening authority to select members who already live and work at BAF. In some cases, choosing only members from BAF may actually be grounds for a defense objection to the entire panel.[67] (For example, the defense might successfully argue that a Soldier accused of committing a crime at the end of

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[58] *See* MCM, *supra* note 21, R.C.M. 502e(1).

[59] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24.2, TACTICS IN COUNTERINSURGENCY para. 7-63 (Apr. 2009) [hereinafter FM 3-24.2].

[60] *See generally* ROSANNE KLASS, LAND OF THE HIGH FLAGS: AFGHANISTAN WHEN THE GOING WAS GOOD (Odyssey 2007) (1964).

[61] *See generally* http://www.erlestanleygardner.com (Mar. 30, 2007) (documenting the fictional defense attorney and main character of eighty whodunnit courtroom novels by Erle Stanley Gardner published in the United States between 1933 and 1969, a U.S. syndicated radio crime serial from 1943 to 1955, and a television series from 1957 to 1966 and 1973 to 1974).

[62] *See generally* http://www.nbc.com/Law_and_Order (last visited July 1, 2009). The television series created by Dick Wolf and broadcast in the United States on the NBC television network since 1990 is an hour-long, weekday evening program which portrays the investigation and prosecution of crimes in New York City. *Id.*

[63] *See generally* A FEW GOOD MEN (Columbia Pictures 1992). This line by Colonel Nathan Jessup (Jack Nicholson) to Lieutenant Junior Grade Daniel Kaffee (Tom Cruise) was ranked the twenty-ninth best line in the history of American cinema by the American Film Institute in 2005. AMERICAN FILM INSTITUTE, AFI'S 100 YEARS. . . 100 MOVIE QUOTES, http://connect.afi.com/site/DocServer/quotes100.pdf?docID=242 (last visited Oct. 29, 2009).

[64] *See* Headquarters, CJTF-101, to all CJTF-101 Personnel, subject: CJTF-101 Policy Memorandum—Military Justice (May 12, 2008).

[65] UCMJ art. 25(d)(2) (2008).

[66] Article 25(d)(2) of the UCMJ states, "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.* Geographic convenience is not listed as a consideration.

[67] *See id.* Deviation from the stated criteria is permissible to form a more representative panel but is not permissible to create a less representative panel. United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988) (applying United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964)). Geography may also serve as a convenient proxy for other prohibited considerations intended to achieve a specific result in a case. *See Smith*, 27 M.J. at 250 (citing United States v. McClain, 22 M.J. 124, 132 (C.M.A. 1986)).

a fifteen-month combat tour in a remote, highly contested valley[68] cannot receive a fair trial if the convening authority selects a panel of newly arrived staff personnel, from unrelated units, who have never set foot outside BAF). Such a panel could also become a potential public relations liability to the command, the JAG Corps, or the Army in view of the well-documented academic and civilian unease with the court-martial panel selection process.[69] Identifying these issues well in advance and raising them to the attention of the chief of military justice should ensure the selection and certification of a proper panel and avoid delay in trying the case.

Conclusion

Military justice is a tool for maintaining good order and discipline in order maximize the effectiveness of the military and the security of the United States.[70] Perhaps ironically, the tools of good order and discipline seem heavier to wield in the midst of deployed combat operations, though that may be when they can have the greatest effect. Undoubtedly, there are many reasons for the apparent difficulty or reluctance to strictly enforce military justice during deployments; the phrase "T.I.A." (meaning "this is Afghanistan")[71] has been appropriated more than once to describe the seemingly endless barriers to getting things done in Afghanistan. Nevertheless, the common misconception that military justice is too difficult to implement or is too distracting to enforce during combat should be corrected. As a result, the most valuable service a deployed TC can provide may not be the advice he gives commanders on military justice matters. Rather, the deployed TC's true value may come from ensuring the dust of the deployed environment does not weigh so heavily on the tools of military justice that commanders become discouraged from using them when Justice demands. In other words, knowing what should be done is terrific, but knowing how to make it happen swiftly within the constraints Afghanistan presents is no less valuable. With luck, the information provided in this note will assist TCs, DCs, BJAs, chiefs of military justice, and all judge advocates involved in the administration of military justice to effectively confront the challenges Afghanistan presents.

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[68] As an illustration, consider the Korengal (Koranagal) Valley, Konar (Kunar) Province as described in open source reporting. *See, e.g.*, C. J. Chivers, *Korangal Valley Memo: In Bleak Afghan Outpost, Troops Slog On*, N.Y. TIMES, May 14, 2009, at A6; C. J. Chivers, *A Blast, an Ambush, and a Sprint to Escape a Taliban Kill Zone*, N.Y. TIMES, Apr. 20, 2009, at A1; C. J. Chivers, *Turning Tables, U.S. Troops Ambush Taliban with Swift and Lethal Results*, N.Y. TIMES, Apr. 17, 2009 at A6; C. J. Chivers, *Arms Sent by U.S. May be Falling into Taliban Hands*, N.Y. TIMES, May 20, 2009, at A1; C. J. Chivers, *A Young Marine's Dream Job*, N.Y. TIMES, May 1, 2009, at A1; Embedded at Firebase Vimoto, http://www.nytimes.com/slideshow/2009/04/30/world200904 30FIREBASE_index.html (last visited Oct. 29, 2009); Subduing the Korengal Valley, http://www.nytimes.com/slideshow/2008/02/21/magazine/0224-AFGHAN_index.html (last visited Oct. 29, 2009); Elizabeth Rubin, *A Bloody Stalemate in Afghanistan*, Feb. 25, 2008, http://www.nytimes.com/2008/02/25/ /world/asia/25iht-24afghanistant.10345845.html; Rubin, *supra* note 10.

[69] Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 193–95 (2003).

[70] *See* MCM, *supra* note 21, pt. I, ¶ 3 (2008).

[71] *See* BLOOD DIAMOND (Warner Bros. 2006) (employing the term "T.I.A." to mean "this is Africa" in much the same sense that it is now used in Afghanistan).

TJAGLCS Practice Note

Faculty, The Judge Advocate General's Legal Center and School

Pre-deployment Fiscal Law Training

Lieutenant Colonel Mike Mueller[1]

Recognizing the need to provide pre-deployment training and the difficulty involved in attending resident courses prior to deployments, the TJAGLCS Contract and Fiscal Law Department has made important training material available online at the Judge Advocate General's University (JAGU) website.

Since the onset of contingency operations in Iraq and Afghanistan, redeploying judge advocates have repeatedly highlighted the need for pre-deployment fiscal law training. Unfortunately, active duty judge advocate attendance at the TJAGLCS resident Fiscal Law Course substantially decreased between 2003 and 2008.[2] The decrease in active duty attendance at the Fiscal Law Course may be due to a misunderstanding of the term "contract law." Legal offices should ensure that judge advocates are enrolled in the appropriate course. Government Procurement Law, in general, incorporates both fiscal law (law governing what appropriations may be used for any given purpose) and government contract law (law regarding the formation and administration of government contracts). Too often, attorneys use the term "contract law" when speaking about "fiscal law," and this misuse of the term "contract law" may explain why active duty Army company grade judge advocate attendance at the Contract Law Course has doubled while Fiscal Law Course attendance has dropped.

While face-to-face instruction is the most effective means of training, this option is simply not available to the vast majority of deploying judge advocates. Acknowledging this fact, the Contract and Fiscal Law Department is developing alternate fiscal law training methods.

As part of the effort to increase the accessibility of fiscal law resources, all blocks of instruction presented during the Fiscal Law Course are now available online in stand-alone format at JAGU.[3] Anyone with an Army Knowledge Online (AKO) or Defense Knowledge Online (DKO) account can access these presentations, which are provided in "click and play" format; no course registration is required. To access these materials, log onto the latest version of JAGU at https://jag.ellc.learn.army.mil/, click on the "JAGU Library" tab, click on the "Video Library" bar, scroll down to "Contract and Fiscal Law," and then select "Fiscal Law." A new page will open listing various Fiscal Law Course classes (e.g., Funding U.S. Military Operations), which can be viewed with a single click. The presentations may be viewed in their entirety or in selected parts. The Satellite Fiscal Law Course has been superseded by Internet-based training and will no longer be offered.

Contract and Fiscal Law Department publications remain available online at the TJAGLCS website**.** The Contract and Fiscal Law Department has moved from course books to deskbooks to enable faculty members to update these publications more frequently. To ensure that you are accessing the most current version of a deskbook, start your search at https://www.jagcnet.army.mil/ and click on the link to the TJAGLCS website. If you enter the TJAGLCS website directly, you may be routed to an older version of the website that does not contain the most recent TJAGLCS publications.

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[1] Judge Advocate, U.S. Army. Currently assigned as Chair, Contract and Fiscal Law Department, The Judge Advocate Gen.'s Legal Ctr. & Sch. Charlottesville, Va.

[2] Attendance figures for 2009 are not yet available.

[3] Other presentations available at JAGU include Contract Attorneys' Course presentations, selected Advanced Contract Law presentations, and 2009 Contract and Fiscal Law Symposium Year in Review presentations.

Claims Report

U.S. Army Claims Service

Personnel Claims Note

New Personnel Claims Computer Program: PCLAIMS

Colonel R. Peter Masterton[*]

This fall, the U.S. Army Claims Service (USARCS) fielded a new computer program to process personnel claims:[1] the Personnel Claims Army Information Management System (PCLAIMS).[2] The new program permits Army claims offices and the USARCS to track personnel claims, much like the current personnel claims database. The program will also allow claimants to file personnel claims online, a feature that is not available through the current database.[3]

The new computer program is designed to replace the Personnel Claims Management System, which was taken offline in May 2008 because of security concerns.[4] For the past year, claims offices had been tracking claims using the personnel claims database, which was developed over twelve years ago and did not permit online filing.[5] The new program, PCLAIMS, has all of the features of the old Personnel Claims Management System and the older personnel claims database but is more robust.

Training on PCLAIMS was offered to all field claims offices worldwide in September 2009. Claims professionals who were unable to participate in the training can obtain information on the program from the USARCS Internet site.[6] A JAGCNet account is required to obtain access to the information on PCLAIMS.

Claimants who wish to file claims using the program should also consult the USARCS website.[7] The portion of the site used to file claims is open to the public and contains electronic versions of all of the forms needed to file a personnel claim,[8] along with detailed instructions describing the claims process. Individuals filing a claim must describe their loss, list their lost and damaged property, and provide repair or replacement costs, as appropriate. Claimants must also complete, scan, and upload the forms needed to adjudicate their claim, such as the DD Form 1840/1840R, Joint Statement of Loss or Damage at Delivery,[9] and estimates of repair.[10]

Claims filed using PCLAIMS are transferred to an appropriate Army claims office, which is responsible for assigning the claim to an examiner, obtaining necessary documentation, and adjudicating and paying the claim, as appropriate. Claimants must provide phone numbers and e-mail addresses so field claims offices may contact them if documents, such as the DD Form 1840/1840R, are missing or other information is required.

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[1] The Personnel Claims Act, 31 U.S.C. § 3721, provides the authority to pay military personnel for loss or damage to personal property incurred incident to service. *See generally* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS ch. 11 (8 Feb. 2008) [hereinafter AR 27-20].

[2] *See* Posting of Colonel Reynold P. Masterton to JAGCNet Claims Forum, subject: Name for New Personnel Claims Program: PCLAIMS, https://www.jagcnet2.army.mil/nntp/fclaims.nsf/b76c69a8a3b2d0fe85256a1900521a69/22e6f5e19c1a5b36852575e10070d036?OpenDocument (June 26, 2009, 16:32 EST).

[3] *See* Posting of Colonel Reynold P. Masterton to JAGCNet Claims Forum, subject: Training on New Personnel Claims Database—PCLAIMS, https://www.jagcnet2.army.mil/nntp/fclaims.nsf/b76c69a8a3b2d0fe85256a1900521a69/6048eaa8fc2dc427852575f4006f6351?OpenDocument (July 15, 2009, 16:16 EST).

[4] *See* Posting of Colonel Reynold P. Masterton to JAGCNet Claims Forum, subject: New Personnel Claims Database, https://www.jagcnet2.army.mil/nntp/fclaims.nsf/b76c69a8a3b2d0fe85256a1900521a69/11f8e6f70cf6923e852575d1005c0f0b?OpenDocument (June 10, 2009).

[5] *See* Posting of Joseph Goetzke to JAGCNet Claims Forum, subject: New PCMS—training schedule, https://www.jagcnet2.army.mil/nntp/fclaims.nsf/b76c69a8a3b2d0fe85256a1900521a69/e4630e19659358c385256fa900724ce2?OpenDocument (Feb. 15, 2005, 15:48 EST).

[6] U.S. Army Claims Service, *available at* https://www.jagcnet.army.mil/8525752700444FBA (last visited Oct. 5, 2009).

[7] *Id.*

[8] *See* AR 27-20, *supra* note 1, ¶ 11-8a.

[9] *Id.* ¶ 11-21c.

[10] *Id.* ¶ 11-15a.

The PCLAIMS program should not be confused with the Full Replacement Value (FRV) program, the system applicable to household goods and other transportation-related claims since 2007, or the Defense Personnel Property Program (DP3), a new computerized transportation program applicable to many household goods shipments since 2008.[11] Under FRV and DP3, Soldiers and Army civilian employees are encouraged to file transportation-related claims directly against the carrier responsible for the loss. Claimants only have nine months to file such claims but may recover the full replacement value for their lost or destroyed property.[12] In contrast, PCLAIMS cannot be used to file claims against carriers; it can only be used for personnel claims filed against the Government. However, claimants dissatisfied with carrier offers to settle claims under the FRV or DP3 programs may reject the carrier offers and file their claims against the Government using PCLAIMS.[13] Claimants interested in using PCLAIMS to file these new claims should contact the nearest military claims office for specific guidance on how to transfer these claims from a carrier to the military because there is no interface between DP3 (which also involves electronic claims filing) and PCLAIMS.

The new PCLAIMS program should improve the service we provide to Soldiers and family members. Any comments or recommended improvements to the program should be forwarded to the USARCS.[14]

[11] Information on these programs may be obtained at the Surface Deployment and Distribution Command (SDDC), *available at* http://www.sddc.army.mil/Public/Home (last visited Oct. 5, 2009).

[12] *Id.* Information on the FRV program may be found at http://www.sddc.army.mil/Public/Personal%20Property/Full%20Replacement%20Value%20(FRV). Information on DP3 may be found at http://www.sddc.army.mil/sddc/Content/Pub/45685/DP3%20Customer%20Pamphlet%202009%20Revision%202.pdf.

[13] *Id.*

[14] The USARCS may be contacted by telephone at (301) 677-7009 or e-mail at USARCSFRVclaims@conus.army.mil. A discussion board relating to personnel claims is available on the U.S. Army Claims Service internet site at https://www.jagcnet.army.mil/8525752700444FBA.

USALSA Report

U.S. Army Legal Services Agency

A View from the Bench

So, You Want to Be a Litigator?

Colonel Jeffery R. Nance[*]

Introduction

So, you want to be a litigator, a trial advocate, a courtroom legend? Who doesn't? However, lack of substance and style keeps many attorneys from realizing this dream.

Over the course of the last twenty years, I have observed or actively participated in literally hundreds of criminal and civil trials as a trial counsel, defense counsel, civil litigator, and military judge. Through these experiences, I have had the opportunity to observe and dissect the characteristics that make a successful litigator. Twelve characteristics seem to define successful litigators, and I have divided them into two general categories: substance and style.

Now, at first blush, one might conclude that "style" has no place in a discussion like this. I beg to differ. In art, style and substance are so intertwined as to be symbiotic. I believe trial advocacy is part art. There are substantive aspects that must be mastered: preparation, thoroughness, mastery of the facts, and organization. There are also some technical aspects that must be mastered: for example, rules of procedure and evidence. There are the stylistic aspects that give life to the legal work of art you produce: word choice, the ability to think on one's feet, calmness under pressure, presence, a deft touch, and the sense for properly picking one's battles. And there are some tasks that are part art, part science, like developing a theme and theory of the case, opening statements, voir dire, and witness examination. There is a lot of art in trial advocacy.

Certainly, as with all such ingredient lists for a topic with arguably nearly infinite ingredients, I do not contend that my list is exhaustive. Nor do I contend that someone else hasn't created a better list. Nevertheless, this is the list I have made. You decide what it is worth to you.

Substance

Preparation

Preparation is the key to the success. Preparation is the "backbone of trial advocacy."[1] Proper and thorough preparation casts out fear, instills confidence and enhances justice. What and how we prepare matters.

The key to effective preparation is planning. Backward planning has worked well in every major task I have undertaken. I even apply backward planning in my personal life—such as when it comes time to plan a PCS move. The concept is simple. One asks: What is the end state I hope to achieve? After identifying the desired end state, plan backward from the end state by working out the details and timing of each iterative step leading to that end. This backward planning concept is not new. The Army teaches it to its young leaders, and it was the subject of the seminal article on trial planning for advocates, "Trial Plan: From the Rear . . . March!"[2]

Whether you start from the rear, side, or front, planning is the key to proper preparation. A plan gives structure to your preparation. Without a plan, preparation can quickly become misguided, repetitive and counterproductive. For example, if you interview your key witness in a case five times but fail to interview the opposition's key witness even once, you are not fully prepared.

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[1] Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4.

[2] Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21.

Even when the objective is clear and the steps to achieve it have been set out, preparation is hard work. Needless to say, the litigator must read and understand every document in the case file and talk to every witness or potential witness in the case. Inevitably, some witnesses will be more important than others. Identifying your theme and theory early will help you identify the more important witnesses and help you allocate your time more efficiently. Defense counsel must hold frank and frequent conversations with their clients, and trial counsel must communicate often with commanders and victims (if there are any). Regular communication not only places events in context, helping counsel identify what other issues should be investigated, it also keeps parties focused and informed so there are fewer surprises on the day of trial.

As a young defense counsel, I represented a client who was accused of burglary, attempted kidnapping, and assault with a deadly weapon. The wife of a deployed Soldier returned home late one evening to find an intruder in her on-post quarters. When she screamed, he grabbed her seven-year-old son and held a knife to the boy's throat. The woman was white, the perpetrator black. As the assailant made his way out the back door of the quarters and fled, a white neighbor, alarmed by the scream, saw the perpetrator run in the opposite direction and pass under a street light approximately fifty feet away. The eyewitness later gave statements and descriptions to investigators. The victim helped a sketch artist draw a composite sketch of the perpetrator. Several days later, my client, who was drunk and roaming around post late at night, was picked up by the MPs. When they took him to the MP station, someone noticed he looked like the sketch of the burglar. During a line-up, both women picked my client five out of six times. He was arrested and charged.

At our first interview before his pre-trial confinement hearing he told me, "Sir, I did not do it. I was at Primary Leadership Development Course (PLDC) that night taking a land navigation test." As it turns out, he was roaming around post because he had flunked out of PLDC and was being sent home. I found the PLDC class, and I interviewed the instructors and all thirty students. They all corroborated his story. The place where he was taking the test was miles away from the site of the crime. I then interviewed the women. The first one gave a great description of the knife held against her son's throat. She could even describe the trademark embossed on the blade. The second one said she really never saw the assailant's face up close. They both said they were raised in small Midwestern towns where very few, if any, black people lived.

I went to the Government and laid it all out. They refused to consider dropping the charges. The Government had not talked to all these people; the Government was too busy. And, they had the line-up and the sketch. I tried to convince them to talk to the PLDC witnesses and tried to explain the cross-racial identification issue. They refused to listen, so we went to trial. My client was acquitted.

The lessons from this case should be apparent. Had I not talked to my client early and carefully listened to his side of the story, I might have missed the opportunity to talk to his PLDC classmates because they would have graduated and returned to their various duty stations. Had I not made the effort to travel to the site and to talk to each PLDC Soldier individually, I would not have learned that his alibi was ironclad. Had I simply been satisfied with the alibi, I would not have explored the reason the two eyewitnesses, with no reason to lie about my client, could have mistaken him for the perpetrator. Additionally, I would not have learned of their backgrounds. I would not have researched the issue of mistaken eyewitness identification and cross-racial identification. I would not have discovered the experts needed to explain identification problems to the trier-of-fact. I, too, was very busy. There were only two defense counsel at this installation. I could easily have justified spending less time preparing for this trial. However, that would have been a disaster for my client.

Preparation means thorough inquiry into every aspect of the case—turning over rocks, talking to people, research and learning. Then, put it all together in a logical persuasive way, and have a flexible plan for presentation.

Thoroughness

Closely related to preparation, indeed, a vital component of preparation, is thoroughness. Thoroughness extends to every aspect of litigation, both before and during trial. Thus, it warrants its own consideration.

An important aspect of thoroughness is attention to detail. When a party files a motion listing the name of a witness or an accused from another case, it evidences a lack of attention to detail. When the charge sheet is replete with errors and omissions, the thoroughness of the entire process becomes suspect. Lack of attention to detail concerning these items calls into question what other details the attorney may have ignored.

On the other hand, when counsel have everything "wired tight," they gain confidence and credibility. This confidence operates in two ways: The litigator has more confidence in himself, and the judge has more confidence in the litigator. The

credibility gained extends to other aspects of the case and to other cases as well. As a highly esteemed, former military judge put it, "The bottom line is that attention to detail should be the trial advocate's obsession. If counsel let down their guard, something will go wrong. Counsel who are not convinced of this point should peruse any of the [sixty-seven] volumes of the *Military Justice Reporters*."[3]

A second aspect of thoroughness is thoroughness of thought. It is more than simply knowing the law and facts of the case or having a consistent theme.[4] An advocate's thought process should include considering the broader consequences, rather than just the immediate effect, of a contemplated action. The advocate should try to anticipate the opponent's reactions and the second- and third-order effects of the action. For example, suppose that a trial counsel has a statement in which an accused admits to engaging in sexual intercourse with a victim but also claims the victim's behavior indicated she wanted to engage in sex. Predictably, consent will be an issue at trial, and the defense will rely on mistake of fact as to consent to defend the accused. The Government is left with a dilemma. The trial counsel could move to admit the accused's statement under Military Rule of Evidence 801(d)(2) and use the accused's own words admitting he had sex with the victim to convict the accused. Introducing the accused's statement, however, would also help establish the mistake of fact defense and allow the panel to hear the defense's side of the story without requiring the accused to testify. The panel would be instructed on mistake of fact because of the evidence provided by the Government, and the likelihood of the accused testifying would be dramatically reduced.

Alternatively, the accused would be more likely to testify if the statement were not admitted. It's unlikely the mistake of fact would be raised by other evidence. If the accused were to testify, he would likely recount his version of events differently at trial than he did in his statement. At this point, trial counsel could cross-examine the accused with the statement. Impeaching a witness (especially an accused) with his own words is very powerful. Trial counsel may also convince the judge to instruct on prior inconsistent statements—a potentially damaging instruction for the accused. This scenario assumes the Government could prove all the elements without using the statement, but the main point is clear: Thoroughness means thinking about actions, reactions, and second-order effects.

This raises the third and final aspect of thoroughness: anticipation. A quality litigator thinks through issues, anticipates the opposition's moves and is prepared with a counter-move. A good litigator anticipates objections to his evidence and prepares a response, including favorable case law. A good litigator puts himself in the opposition's shoes and tries to imagine what the opposition will do. A good litigator uses the imagined approach to plan a response, shore up weaknesses in the case and plan rebuttal evidence. Certainly, no one can anticipate everything that will happen in a trial; however, ninety-nine percent of issues can be anticipated if thoroughly thought through in advance. Anticipation not only affects preparation, but also reduces the need to "think on your feet."[5]

The following example illustrates this point. An accused intends to plead guilty to several offenses committed in a deployed environment. A punitive discharge seems certain based on the facts. The defense has requested several sentencing witnesses from the accused's noncommissioned officer chain of command, who fought with him in combat. Based upon your telephone interviews with these sentencing witnesses, you expect they will tell the court the accused was a good Soldier, fought hard, and often risked life and limb. However, you do not review Rule for Courts-Martial 1001 very closely during your preparation, and you do not immediately remember the case of *United States v. Griggs*.[6] Consequently, you fail to anticipate that these witnesses might recommend that the accused be retained in the service. Because you failed to read *Griggs* and failed to prepare to rebut this evidence, you do not discover or present the opinion of the company commander and first sergeant, who, despite the accused's good service in combat, believe he has no future in the Army. One might anticipate the results.

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[3] Cuculic, *supra* note 1, at 9.

[4] Subsequent sections will address these topics in more depth.

[5] The ability to think on one's feet is an important characteristic of a good litigator, which is covered later in this article. However, the less frequently the skill is required, the better, in this author's opinion.

[6] United States v. Griggs, 61 M.J. 402 (C.A.A.F. 2005).

Mastery of the Facts

Cases are decided on the facts. All trials are really about getting at the true facts, not someone's myopic or biased view of what happened. This sounds simple enough, but we all know that in practice it is not. To the master of the facts goes—if not always the victory—at least a sound night's sleep before trial.

A litigator simply must know the facts of his case better than anyone else. That imperative is so fundamental that panel members are told it is so in the preliminary instructions.[7] Mastery of the facts is one of the products of thorough preparation.

As part of thorough preparation, the good litigator will have read every document, interviewed every witness, examined all the evidence, and visited the scene of the crime. Most of the time, these tasks must be done more than once. "The goal of the [litigator] is to know everything about the case so that if a witness states something that is incomplete or incorrect, counsel knows exactly where contradictory information is located and can find it in an instant."[8] However, simply reading, looking, and talking are not enough. Knowing the facts is more than that.

To master the facts a litigator must know them thoroughly and be able to marshal them to the best advantage. For example, a chronological recitation of the facts may not always be the most effective way to present them. Only a master of the facts will recognize the subtle strategy that might make withholding some fact for later presentation more dramatic and devastating to the opposition.

My previous example of the case involving attempted kidnapping, aggravated assault, and burglary offers additional insights. In that case, the mother—the eyewitness—was able to describe the knife in great detail. When I interviewed her, she told me she could not only identify the trademark embossed on the blade, she also knew how many serrations there were on the top of the blade, what the grip was made of, and the length of the blade. I also knew that the knife had been held to her son's throat for only a few seconds. Once I read the literature on mistaken eyewitness identification, I realized the mother, in that situation, would not have taken her eyes off the knife. Certainly, I could have asked her about this during cross-examination. That would have been convenient and easy. However, I decided my client deserved more. Instead, I recalled the witness immediately after my mistaken identity expert had testified. I asked her about the knife and the amount of time the perpetrator had held the knife to her son's throat. When juxtaposed immediately after the expert's testimony, such evidence, even though taken on direct rather than cross, was far more effective. I would not have been able to make that tactical determination had I not mastered the facts.

Mastery of the Law

No one can know all the law; it is simply impossible. However, one can master the law of a particular case. Of course, this requires legal research and reading . . . and more.

At the beginning of each case, a good litigator will brush up on the law pertinent to the case. Even though this may be the thousandth drug use case she has tried, she will open the *Manual for Courts-Martial* and read Article 112a again. She will read about potential defenses. She will review the *Crimes and Defenses Deskbook*[9] and read the case law cited. Then she will Shepardize the case law cited. She will make copies of case precedents that address vital points she anticipates may become issues at trial. The good litigator will also do a proof analysis work sheet, even if she is a defense counsel. She will analyze what evidence can be used to prove each element. She will anticipate potential objections to that evidence, research the law, and prepare to make or answer objections based on the law. The good litigator will have read all the instructions that may be raised. She will prepare a list of instructions she wants or does not want given and will craft rational arguments to support her position. She will consider tailored instructions or instructions not included in Department of Army, Pamphlet 27-9,[10] and will have drafted them, with supporting legal precedents, for presentation to the judge and opposing counsel at the

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[7] The judge's preliminary instructions to members, as outlined in the *Military Judges' Benchbook*, include the following: "[C]ounsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what might to us appear to be an obvious question because they are aware that this particular witness has no knowledge on the subject." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5 (1 Apr. 2001) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[8] Cuculic, *supra* note 1, at 4.

[9] CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 337, CRIMES AND DEFENSES DESKBOOK (Apr. 2009).

[10] BENCHBOOK, *supra* note 7.

appropriate time. Finally, the good litigator will discuss the law of the case with peers and superiors. Defense counsel can do this without disclosing client confidentialities. Invariably, someone out there has tried a case like yours or has read or heard about particular legal issues relevant to your case. And, even if they have not, they may offer insights simply because they look at the matter from a slightly different angle.

Organization

Organization is critical at every stage of litigation. A litigator who is not organized prior to trial will miss important items, will waste time completing tasks twice and will find trial preparation wearisome and frustrating. A litigator who is not organized during the presentation of the case will forget to ask important questions, will fail to have documents needed to impeach at his fingertips, and will leave the panel and the judge with an impression that does not inspire confidence.

Organization is important to presentation. Organization in presentation comes through breaking down a trial to its various parts—voir dire, opening statements, presentation of evidence, and so forth. The organized litigator will keep a tab in his trial notebook or a separate file folder for each part of the trial and for each witness.[11] Those tabs or folders should contain all the documents relevant to that part of the trial or to that witness. For example, the voir dire folder should include the court-martial convening order(s), the counsel's approved voir dire questions, a copy of the standard questions the judge will ask, and an enlarged seating chart so that counsel can make notes under the name of the panel member he wants to recall for individual voir dire or challenge for cause or peremptorily.[12]

When a litigator is organized it shows and makes a positive impression at trial. Imagine the impression a litigator makes when, asked if she has any questions for the opposition's star witness, she pulls out an organized file folder and rises to conduct a scathing cross examination. Furthermore, organization can make a litigator feel more confident, less nervous, and more in control. One cannot anticipate every bump and curve during the course of a trial; however, one can anticipate that there will be bumps and curves. Being organized makes negotiating the bumps and curves easier and makes it less likely that any particular bump or curve will crash the entire case.

Have a Theme

The importance of having a theme cannot be overstated. The theme gives direction and meaning to the litigator's presentation and lets the fact finder know where the litigator is taking them. As he builds his case brick by brick, the fact finder can see how the evidence relates to the theme. In fact, the most effective litigators are able to involve the audience as actual participants in building the case's inevitable conclusion that the theme represents.

The theme, then, is properly defined as the conclusion the litigator wants to reach once the presentation of the case is complete. The theme must come first, and every other part of the trial should be designed to support it. The theme should be introduced in voir dire but should be completely developed in opening statement. It serves no purpose to have a theme but save it for closing argument.

The litigator provides a theme so that the panel can make sense of the evidence as it is presented.[13] The theme helps make sense of the facts, and as evidence is introduced that supports the theme, panel members begin to accept the theme. The closing argument then becomes an exercise in confirmation of the theme and serves as a reminder of how the evidence supports the counsel's conclusions. Panel members are smart and experienced, and if they are not provided a sound theme,

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[11] I prefer the file folder method. This allows me to keep my table clear of all but a couple parts of the trial at a time. It also allows me to access documents without having holes punched in the sides (remember, the record of trial will have two holes at the top, just like the file folder) and without constantly opening and closing the metal rings of the three-ring binder. The form, however, is adaptable to individual preference. Use what works best for you.

[12] Another format for trial notebooks can be found in *The Art of Trial Advocacy*, ARMY LAW., Oct., 1997, at 40. This format has conceptual tabs like "allied papers and foundational documents," "non-evidentiary court documents," and "planning documents" in which are found documents pertaining to that broad topic regardless of the part of the trial to which they pertain. This organization may work better for you. From this author's perspective, it is easier to find what you need in the heat of battle if you do not have to think about where a certain document might be located. This might result in more tabs or folders, but I think it serves better in the heat of battle.

[13] Cuculic, *supra* note 1, at 10.

they will choose one for themselves.[14] Having a framework helps them understand and process evidence, and if they are forced to provide their own theme because counsel has failed to provide one—or because the theme does not make sense—counsel will be more likely to lose the case.

To develop a theme, the litigator should ask, "What is it I want the panel to believe?" Not just that the accused is guilty or not guilty but why that is so. What is the reason, the hook? Often the theme reflects the accused's motive (he murdered her for the insurance money or because she was cheating on him with his best friend). Sometimes the theme is closely tied to an element of the offense or a defense (she did not consent and no reasonable person would have thought she consented under the circumstances). Take out the word "not," and substitute the word "any" for the word "no," and, in most cases, you have a defense theme.

Develop a sound theme at the beginning of your trial preparation, while writing your closing argument,[15] and refer to it early and often. The theme should dictate preparation, guide direct and cross-examination, steer the evidence one seeks to introduce, and even influence the timing of the introduction. The theme should inform voir dire and be the keystone of the opening statement. Cross-examination, if done, should be theme focused. In short, everything the litigator does at trial should support that theme. During trial preparation, if the litigator finds the theme is difficult to support, he should find a new theme.

Style

Pick Your Battles

The inclination of most new litigators, and unfortunately some old ones, is to fight every move, objection, motion, request or suggestion by the opposing party. For example, if, the defense asks that an accused's mother be allowed to sit in the gallery during a partial guilty plea, even though she will be a witness in the sentencing phase of the trial, the Government could say "yes" and lose nothing. However, many trial counsel will stubbornly say "no," or worse yet, will respond, "The Government has no problem with that your honor, as long as all our witnesses are also allowed to sit in during the trial." What is lost by allowing the mother to watch her son's trial? Usually, nothing. More importantly, what is lost when the Government refuses the request? The goodwill of the opposing lawyers. Consequently, when the Government raises an issue that requires some concession by the defense, the defense will probably refuse. The Government may also lose the goodwill of the judge because its actions may be viewed as petty, unreasonable, and unprofessional.

Picking the appropriate battles also makes the litigator more effective because he can spend less time on insignificant collateral issues. For example, in a drug case where an accused faces decades of punishment for selling drugs in the barracks, the defense advises trial counsel of possible restriction tantamount to confinement for a three-day period during which the accused was under restriction prior to pre-trial confinement. The facts are admittedly not clear and may or may not warrant credit under the law. However, arguing the motion will require days of preparation and hours on the record—time the trial counsel could better use concentrating on the elements of the offenses or figuring out how to convince the panel to believe his immunized witness. Three days is a small price to pay to avoid the distraction. Now, that is not to say that, in some cases, three days is not worth the fight. The point is, fight the battle after reasoned consideration, not because of machismo or obstructionism. The true litigator actually enhances his toughness by being reasonable and professional and not fighting every battle just because he can or because he thinks it is expected.

Picking one's battles applies throughout the litigation process, including on evidentiary matters. For example, why do some counsel object to defense-offered documentary evidence during sentencing just to force the defense to request that the rules be relaxed even though the trial counsel has no need for the rules to be relaxed to admit his own evidence? This is unwise. It wastes time and unnecessarily requires witnesses to testify, to the detriment of their own professional endeavors. Of course, some battles are worth fighting. If, for example, there is an Article 15 that the Government cannot authenticate and the defense refuses to stipulate to the authenticity of, then, by all means, the battle should be fought and no quarter given.

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[14] *Id.*

[15] *See generally* Pohl, *supra* note 2.

Picking one's battles extends to questioning witnesses and making arguments. Too often litigators think they must cross-examine every witness, even witnesses who have nothing useful to offer. These cross-examinations usually result in bickering between counsel and the witness and groping by counsel for the always elusive Perry Mason moment. Misguided counsel actually seem to think they can get the first sergeant to change his opinion about Specialist Snuffy, who he previously characterized as a "great duty performer," by asking, "Isn't a Soldier a Soldier twenty-four hours per day?" A smart litigator can do better than that. And, if he can't, he should just say, "No questions, your honor." The point is, as I say in nearly every "Bridging-the-Gap" session, if you can argue the point without asking the question, don't ask the question. Picking one's battles—focusing or foregoing cross-examination—can make the cross-examination more effective. Cross-examination for the sake of cross-examination, which usually results in an argument with the witness, dilutes the power of meaningful examination that might actually be legitimate and effective.

The ability to know when and what to ask comes with preparation, experience and common sense. The good litigator will develop this skill by talking to more experienced counsel, watching other litigators in action, and having a theme-based reason for everything he does.

Have a Deft Touch

The adjective "deft" means "characterized by facility and skill." Its etymology is from Middle English meaning gentle.[16] A litigator must not only know how to play his cards, but when. This understanding comes from preparation and experience. The litigator must make the best out of what he has, but resist the temptation to overplay his hand. A simple example illustrates this point.

Suppose the accused allegedly committed child rape. The panel has found him guilty, and significant jail time is possible. In mitigation, the defense plans to show the accused was himself abused as a child. Of course, Government counsel must address this issue, but how and to what extent will be key decisions for the litigator. A full frontal assault might not be the correct approach. The litigator could argue that the accused deserves no mercy because he showed none; his offenses are so heinous that whatever happened to him is irrelevant. This approach might or might not be effective depending on the circumstances.

On the other hand, the litigator could acknowledge that the accused was abused and try to turn that fact against him. As a victim of abuse himself, he had to know how horribly his conduct would affect the victim in the case, and yet he chose to do it anyway. Be prepared to cross-examine any defense expert called to testify about the abuse the accused suffered as a child. This cross-examination may include questions derived from the medical literature on the subject, especially articles discussing the unlikelihood that treatment in such situations would be effective. Argue that, as sad as the accused's abuse may have been, the case before the court is about what the accused did to the child victim in the case, and the jail term ought to be designed to prevent him from abusing other children because he is dangerous and nothing will change that. With this approach, the deft litigator still persuades the members who would have voted for a lengthy period of confinement, but now he also is more likely to get the members who might be receptive to the argument, made by the defense, that the accused deserves mercy because he was abused as a child. Remember, members vote on sentences from lowest to highest, and when they reach the required majority then that is their sentence. So, in this scenario, the advocate must focus on persuading the members at the low end who might be unreceptive to the Government's argument for lengthy confinement if the accused's own abuse were simply dismissed rather than acknowledged and explained.

Deftness of touch can be learned. In fact, quality trial experience increases deftness. But, deftness must be pursued; it will not develop on its own. Pursuit means observing others at trial and analyzing how things were done and how they might have been done more effectively. It comes from learning and considering human tendencies and how to affect them. And, it comes from humble introspection about one's own performance.

Presence

When I was a young Reserve Officer Training Corps cadet, I was taught by a wise and experienced instructor, "When in charge, take charge." This is a good axiom. As a litigator, you want to be in charge. Of course, the judge and the opposition

[16] Merriam-Webster Online, http://www.merriam-webster.com/dictionary/deft (last visited Oct. 20, 2009).

will have something to say about that, but you can certainly be in charge when you have the floor. Part of being in charge is attitude. Part is confidence. Attitude and confidence are fed by preparation.

The presence to which I refer, however, does not include arrogance or haughtiness. I know it is tempting to strut around the courtroom because you are an attorney. That is certainly *a* presence. It is just not *the* presence.

The greatest staff judge advocate I ever worked for never acted like he was the smartest person in the room, though he likely was. He never acted like he was the most courageous person in the command post, though I am sure he was. He never yelled at me when I made a mistake, though he could have. He never belittled anyone who was obviously of lesser mettle. He never had to tell anyone he was in charge or that he was the guy they ought to turn to when something needed to get done; but he was, and they did—and not just other JAGs. He had presence. When he spoke, people listened. When he asked something of you, you gave your best. He was a leader.

"Presence" in the courtroom isn't about putting on airs or making sure everyone knows where you went to law school. It is fundamentally about leadership. If not already a part of the litigator's character, leadership can be learned if approached humbly and with purity of purpose. The presence of a leader commands attention and consideration. This is what every litigator desires when she opens her mouth in court. If feigned, however, it is easily detected.

Word Choice

Words matter. One should say what one means and mean what one says. Equivocation is the bane of the litigator. Precision in word brings about precision in result. The English language is so ripe with perfect expression that no user of it, having properly schooled himself in it, should ever want for precision.

I once heard a defense counsel give an argument where he referred to the accused, who had just pled guilty to numerous sexual assaults of a minor, some committed with inanimate objects, as being "good with tools." Hmm. He probably could have left that out all together. Some words or expressions will never do.

Some words or expressions will do, though others might do better. In the closing argument or in direct or cross-examination, using the exact word to convey your precise meaning is critical. During closing argument in a sexual assault trial, I once heard a trial counsel say, "The accused cared only for his own desires." That certainly works, but, it was not the most powerful. After trial, I suggested he could have said, "The accused selfishly sought to satisfy his sexual desires no matter what." I think that would have been more effective.

Sometimes we make mistakes in the words we use. In a closing argument when the heart is beating and the mind is racing, it is easy to get ahead of one's self and use one word when we meant to use another. In another sexual assault trial in which the sole issue was consent and mistake of fact as to consent, the trial counsel argued that the alleged victim was "pressing against him." What he meant to convey was that the victim had pushed him away as a way of resisting him. The phase "pressing against him," however, seemed to connote consent. That was the last message the trial counsel wanted to send in that situation.

All of us have had a slip of the tongue and said "he" when we meant "she," or something of that nature. When this happens in a trial the danger is not that the members or the judge will not be able to figure it out. Instead, the danger is that as the fact-finder sorts through what you meant to say, they are not hearing what you say while they are thinking. A person can only process one thought at a time. When the panel or the judge is forced to figure out what the litigator meant, they may miss something important. These mistakes are often due to nerves and a tendency to rush. The cure is to force oneself to slow down and relax. Listen to what you say. Listen to the questions you ask and the answers given. If what is said is confusing to you, pause or go back and correct it.

Voir dire is where I commonly see counsel demonstrate good word choice or lack thereof. Think of it. Voir dire is the first time the members hear you speak. If you underwhelm them by using poor grammar, legal jargon, confusing, or just plain stupid questions, you may not recover. Do not neglect diction in voir dire. Even though the judge reviews your questions, he is not likely to try to make you look smart by editing your work.

The words we use affect all aspects of litigation. Words can project confidence and knowledge, or lack thereof. They can demonstrate mastery of the law or a scant understanding. Even if a litigator knows the law and is confident, her words

must show it, or no one else will know it. William Penn once said, "Speak properly, and in as few Words as you can, but always plainly; for the End of Speech is not Ostentation, but to be understood."[17] Word choice matters.

Calmness Under Pressure and Thinking Well on Your Feet

These last two topics are related and will be treated together. Litigation is a pressure cooker. The adage "no plan ever survives first contact with the enemy" certainly applies to litigation. When things don't go exactly as planned, the good litigator must be able to remain calm—to keep his head and adapt accordingly. The litigator who can accomplish that difficult task will stand a far better chance of success and will be less likely to suffer adverse health consequences associated with stress.

I don't have any secrets for staying calm under pressure.[18] I believe it is achieved by sheer self-control. I once had a new litigator appear before me in his first case. He was well prepared, eager and had done all his homework. He knew the facts and the law. He was ready, but he was nervous. His nervousness manifested itself in the all too common and bothersome habit of saying "O.K." after the answer to each of his questions to every witness in the trial. It was distracting. I could tell the panel members noticed it. After trial, in the bridging-the-gap session I told him he did well for his first time, but he needed to lose the "O.K." The next trial, the most amazing thing happened: He did not say "O.K." one time—not once. I complimented him on that brilliant display of self-control. In the dozens of cases he tried before me after that, I never heard him say "O.K." again.

Self-control is the answer. Only you know what will help you stay calm under pressure, and it is different for everyone. Nevertheless, you can do it. More than half the battle is telling yourself that you must stay calm and that you can. If you absolutely cannot, then you may need to find something less stressful to do.

Thinking well on one's feet is an old catch phrase for being able to think of a solution to a problem in the heat of trial. Calmness sets the conditions necessary to achieve the skill. However, nearly everything else discussed in this article also contributes to this ability. It is impossible to think well on one's feet without knowing the facts well or understanding the law. That bad litigator may think he has something to say, but quick responses with no substance are transparent and unhelpful. What comes out instead are trite catch phrases like "I'm not offering it for the truth of the matter asserted" or some crazy thing absorbed from too many Hollywood courtroom dramas. Better, under such circumstances, to stop and say nothing at all, then process the issue and make an intelligent reply. I had the refreshing experience recently when a litigator was caught off guard by a hearsay objection. He responded by saying, "I am not going to respond to that objection, your honor." Later he told me he had no response, so rather than make one up on the fly and risk sounding stupid, he simply demurred. I wanted to give him a medal.

The litigator must be so well prepared and so organized that if he does not have the answer on the tip of his tongue, he has it at the tip of his fingers. He must have a unifying, common sense theme coloring everything he does.[19] Style is then achieved when he is able to access that information in a seamless way that not only makes his in-trial decisions correct but also adds dash to his presentation. Then he shows who is in charge, who should be most regarded, who is the master of the case.

Conclusion

Trial advocacy is not easy. To be a good litigator is hard work. It requires substance and style. Thought and effort should be given to each of these aspects in order to be a successful litigator. However, the effort is worth it. The true trial advocate, the litigator, not only achieves great personal satisfaction, but also improves the quality of our military justice system. The better we are at what we do, the more likely justice will be achieved in every case. That should be what we are all about.

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[17] WILLIAM PENN, FRUITS OF SOLITUDE, *available at* http://www5.bartleby.com/1/3/209.html (last visited Oct. 20, 2009).

[18] There are some techniques that have been suggested by authors and experts in the field of trial advocacy training that might work for you. *See generally* Lieutenant Colonel David H. Robertson, *Preparing Mind, Body, and Voice*, ARMY LAW., Nov. 2003, at 51.

[19] Pohl, *supra* note 2, at 22.

THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION[1]

REVIEWED BY MAJOR JEREMY M. LARCHICK[2]

I. Introduction

Losano Ridge, named for an American Airman killed in action there, looked like a Louisville Slugger from Lieutenant Craig Mullaney's vantage point.[3] He was standing on a bluff in eastern Afghanistan, a mile and a half above sea level and a short distance away from the Pakistani border.[4] A trail slalomed between boulders and four-foot scrub pines up the ridge's spine.[5] Mullaney's platoon's mission that day was to clear the ridge to ensure there were no more fighters on it—fighters who had attacked another platoon earlier that day.[6] To protect his flank, Mullaney would send one of the platoon's squads on foot to patrol a wadi that paralleled the ridge, while the rest of the platoon patrolled the length of the ridge in Humvees.[7] Mullaney's decision to send his Soldiers into the wadi would prove fateful, as the squad thwarted a coordinated ambush of heavy machine guns, rifles, antiaircraft guns, and rocket-propelled grenades, but his decision would also result in the platoon's first K.I.A., or Soldier "killed in action."[8]

Compiled from author Craig Mullaney's memories, *The Unforgiving Minute* traces his path from first-year cadet, known as a plebe, at the U. S. Military Academy at West Point,[9] through training at the U.S. Army Ranger School,[10] two years at Oxford University as a prestigious Rhodes Scholar,[11] and platoon leader deployed to Afghanistan as a member of the 1st Battalion, 87th Infantry Regiment, of the 10th Mountain Division based out of Fort Drum, New York.[12] Mullaney attempts to determine whether his training as a Soldier, officer, and scholar, prepared him to lead his platoon in its first sustained firefight on Losano Ridge, to deal with his Soldier's death, and to face the consequences of his own actions that day.[13] Was he ready for that fight?[14]

II. Lessons On Leadership

The Unforgiving Minute is, at its heart, a lesson on leadership.[15] The author describes the title theme as the period in combat in which the leader must make real-time decisions that put Soldiers' lives on the line while the enemy continues to fight.[16] For an infantry officer like the author, all of his training prepared him for that minute.[17] He describes his response to

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[1] CRAIG MULLANEY, THE UNFORGIVING MINUTE: A SOLDIER'S EDUCATION (2009).

[2] Judge Advocate, U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] MULLANEY, *supra* note 1, at 281.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 280–82.

[7] *Id*. at 282.

[8] *See id*. at 284–85.

[9] *See id*. at 33–34.

[10] *See generally id.* at 88–121.

[11] *See generally id.* at 123–81.

[12] *See id*. at 191; *see also 1st Brigade* "Warriors," http://www.drum.army.mil/sites/tenants/division/1BCT/HQ/index.html (last visited Oct. 29, 2009..

[13] *See id*. at 292.

[14] *Id*. at 363 (summarizing a question by a student at the U.S. Naval Academy).

[15] *See id.* at 362.

[16] *See id.* at 285.

the "What do we do now?" moment while bullets, mortars, and other lethalities of war were impacting around his Soldiers and himself.[18]

The author begins many of the leadership lessons at West Point and continues to weave them throughout the rest of the book. A lesson on personal responsibility occurs on Reception Day, the author's first day at West Point and an extremely stress-inducing event for the several hundred new plebes like himself.[19] When the author is brusquely corrected by a senior cadet for not responding with an appropriate answer to the cadet's inquisition, the senior cadet describes the four permissible answers to respond to a question: "Yes, sir." "No, sir." "No excuse, sir." "Sir, I do not understand."[20] The author illustrates how the response, "No excuse, sir," hammered the acknowledgement of personal responsibility into his head so that it eventually became second nature—so much so that he uses the response throughout the book to acknowledge, even if in his own mind, his failings and shortcomings as a leader.[21]

The author's leadership lessons continue at Camp Buckner, West Point's summer military training camp.[22] The emphasis at Buckner is on leadership, and cadets must demonstrate they can build teams and lead Soldiers beyond West Point.[23] The author describes his apprehension at leading cadets just one year younger than himself, with his authority stemming solely from his rank and the fact that he had gone through Buckner the previous summer.[24] Mullaney aptly states that leading is at once both simple and difficult.[25] For example, he learns early to trust his Soldiers but to verify they are doing the right thing.[26] This maxim, "trust but verify," comes in handy when the author directs the platoon's fight on Losano Ridge.[27] Other concepts, such as leading from the front, are much harder to grasp because they are subtler than they sound.[28] The author looks at leadership as a contract between the leader and his Soldiers, where the most productive leader sets the example, leads by that example, and shows loyalty to his Soldiers.[29] He learned at Buckner that he served his Soldiers, not the other way around.[30] Later, as a platoon leader in Afghanistan, he states, "My part of the contract, the responsibility that came with the privilege of leadership, was never to spend [my Soldiers'] lives cheaply. I carried the weight of that responsibility on every patrol, yet unlike a rucksack or a Kevlar helmet, I could never slip it off when we came back inside the wire."[31]

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[17] *See id.* Prior to the action, the author had completed Infantry Officer Basic Course and U.S. Army Ranger School.

[18] *See id.* at 285.

[19] *See id.* at 4.

[20] *Id*. at 5.

[21] *See id.* at 6, 72, 292. When the author fails a mission during training at Fort Lewis, he responds, "No excuse, sir." In answering his own questions about the loss of his Soldier, he responds, "No excuse, sir."

[22] *See id.* at 48.

[23] *Id.* at 57.

[24] *Id*.

[25] *Id*.

[26] *Id.* at 58.

[27] *Id.* at 288. The author directs much of the fight over the radio, relying on his subordinate leaders to carry out his orders.

[28] *Id.* at 58.

[29] *Id*.

[30] *Id.*

[31] *Id.* at 268.

The author also highlights the interrelationship between leadership and competence throughout the book. For example, when leading in the military, details matter.[32] At West Point, and later at Fort Drum, he describes having an attention to detail beaten into his head with the regularity of a jackhammer.[33] "Military command, perhaps unlike any other profession, demands its practitioners see with absolute clarity the forest and the trees. Any number of missed details could compromise a mission."[34] On the flip side, a leader must know the difference between the things he could never perfect, and the things he had to.[35] Later, comparing competence to unit cohesion, the author states, "[A]ll the cohesion in the world is no substitute for tactical knowledge. Competence [is] the biggest morale booster."[36] The author often pushed his Soldiers to gain technical and tactical knowledge, sometimes at the expense of their comfort.[37] But in describing his Soldiers' many successes, the author makes it clear that such knowledge paid dividends.[38] "[M]aking them succeed had given me a satisfaction far greater than any individual achievement. The very act of leading was motivating: I wanted to deserve the men I would one day lead."[39] A Ranger School instructor reinforces the interrelationship between competence and leadership to the author. "You are here for one reason. . . . You are here for the troops you are going to lead. You are responsible for keeping them alive and accomplishing whatever mission you're given."[40]

Finally, the book's soul is a lesson on the importance of relationships. Mullaney highlights three key relationships: his relationship with his father, which ultimately drove him to attend West Point and become an officer;[41] his relationship with his wife, Meena, formed at Oxford and forged under the difficult circumstances of distance and deployment;[42] and finally his relationship with his Soldiers, formed at Fort Drum but hardened on Losano Ridge.[43]

The author's relationship with his father is central to the book. His father wore a hard hat and boots to work for his entire working life.[44] Mullaney learned from him that responsibility preceded privilege.[45] He describes his father as the consummate Soldier: competent and indestructible, whose only measure of success was hard work.[46] The author considered attendance at West Point as a way to connect with his father, but more importantly, as a way to extend those lessons of hard work that his father had instilled in him to his own life.[47] As he writes, "West Point does not owe you anything. You have to earn it. Every single day."[48]

The author also dedicates a significant portion of the book to his relationship with his wife. The theme throughout these passages is that their relationship took work. The two met at Oxford but had to suffer, first through the author's stationing at Fort Drum, his deployment to Afghanistan, and then her attendance at medical school.[49] It is clear that the author, like many

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[32] *Id.* at 58.

[33] *See id.* at 24.

[34] *Id.*

[35] *Id.* at 200.

[36] *Id.* at 59.

[37] *See id.*

[38] *See id.*

[39] *Id.* at 60.

[40] *Id.* at 102.

[41] *See id.* at 13–14.

[42] *See id.* at 151.

[43] *See id.* at 192.

[44] *Id.* at 13.

[45] *Id.*

[46] *See id.* at 14.

[47] *Id.*

[48] *Id.* at 13.

[49] *See id.* at 205–08.

young officers, felt the challenge of a long-distance relationship with another professional. However, he also makes it clear that both needed to persevere for their relationship to succeed.[50] The author recites words of encouragement he received from a fellow Oxford classmate who had just spent two years apart from her fiancé: "A long-distance relationship takes hope, good humor, and idealism. It takes a massive dose of courage to protect the relationship at all odds. It is hard, but worth it. You'll both be stronger as a result.'"[51] Such words should be taken to heart by young officers faced with the difficulties of such a relationship.

Finally, the author highlights his relationship with his Soldiers. It is clear that this relationship forms the strongest bond of all. The author endearingly depicts his relationship with his two platoon sergeants,[52] as well as his relationship with the other Soldiers of the platoon, from his radio operator[53] to his heavy weapons squad leader.[54] His Soldiers are initially wary of their new platoon leader.[55] Only later, through training and combat, thoughts of physical dominance are replaced by respect and cohesion.[56] How important the author's relationship with his Soldiers became is demonstrated on the author's last day with his platoon. As he is leaving, his platoon sergeant pays him what he describes as the highest compliment he ever received: "You done good."[57] He reciprocates the feeling by stating to his Soldiers, simply, "Thanks for the privilege of letting me fight with you."[58]

III. Criticisms of *The Unforgiving Minute*

Despite the fact that *The Unforgiving Minute* weaves an excellent path through the author's nine years in the Army, it has its share of drawbacks. First, the author's expansive vocabulary may serve as a distraction to some readers. For example, the author uses the term "ablutions."[59] The author's choice of words may distract some readers from the book's main message, and that would be unfortunate, since the themes are so relevant to all readers.

Second, this is not a scholarly analysis of the war in Afghanistan, but a first-hand account. The author cites no sources but states that he relied on personal narratives, notes, unit logs, and other sources of information in developing his concepts.[60] It would be helpful if the reader had a better idea of where the author retrieved his information. Despite this drawback, the author's observations are still extremely valuable for the insight they provide into the war. For example, he highlights the inadequate intelligence and resources available to Soldiers deploying to Afghanistan in 2003.[61] He also highlights what he termed the lessons of Afghanistan, loosely summed up as "the closer you look, the less you understand."[62]

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[50] *See id.* at 350.

[51] *Id.* at 181.

[52] *Id.* at 192–93.

[53] *Id.* at 261.

[54] *Id.* at 229.

[55] *Id.* at 194. "The platoon sergeant's acceptance was easier than the rest of the platoon's."

[56] *Id.* at 180–81.

[57] *Id.* at 326.

[58] *Id.*

[59] *Id.* at 56–57.

[60] *See id.* at 379–380; *see, e.g.*, Craig M. Mullaney Official Website, The Unforgiving Minute—Description, http://www.craigmmullaney.com/content/book.asp?id=desc (last visited Sept. 8, 2009).

[61] *Id.* at 218.

[62] *See id.* at 224.

IV. Application for Judge Advocates

Beyond the areas of leadership and relationships, there are a multitude of invaluable lessons that young judge advocates could gain by reading this insightful account. For example, Mullaney's description of the after-action review process, conducted after the ambush on Losano Ridge, showcases the different perspectives and perceptions various witnesses can have to the same traumatic event.[63] Another critical perspective emphasizes the author's struggle with the perception that he could not be both a scholar and a warrior while in the Army.[64] For example, the author describes how the battalion operations officer constantly belittled his advanced educational background, ribbings he felt bordered on personal attacks.[65] In one instance, while the author was attempting to learn Hindi in Afghanistan, the officer tells him that his focus would be better spent on becoming a better platoon leader rather than "screwing around" with languages.[66] Like the author, judge advocates will almost always have more formal education than the Soldiers they advise.[67] Some of these Soldiers may respect the formal training that goes into being a Soldier-lawyer, but others may not. Judge advocates should be cognizant of these perceptions and be aware of how they might impact their relationships within their areas of operations.

V. Conclusion

The Unforgiving Minute is an excellent choice from the recent wave of first-person narratives produced by junior officers participating in the Global War on Terrorism.[68] As this conflict enters its eighth year, a resource such as *The Unforgiving Minute* provides important lessons and insights, not only to today's young Soldiers, but also to the general public. The author's leadership, dedication to duty, and personal struggles will inspire empathy among his fellow Soldiers but will also provide civilian readers with a re-assuring look into the thoughts and feelings of a capable young leader. Civilians and Soldiers alike will be able to effectively gain from the author's insights.

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[63] *See id.* at 295–96.

[64] *See id.* at 303.

[65] *Id.*

[66] *Id.*

[67] *See* GoArmy.com, Army JAG Corps—Requirements, http://www.goarmy.com/jag/requirements.jsp (last visited Sept. 8, 2009).

[68] *See, e.g.*, DONOVAN CAMPBELL, JOKER ONE (2009).

WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS[1]

REVIEWED BY MAJOR JERI HANES[2]

> *"At first blush, the two wars appear similar. Both involved a president Bush and the United States in conflicts with Iraq and Saddam Hussein. There, however, the resemblance ends . . . ."*[3]

I. Introduction

Nearly six years after making the phrases "war of necessity" and "war of choice" a part of the American lexicon,[4] Dr. Richard N. Haass delivers a well-written, eagle-eyed account of the White House decision-making process during the first and second Gulf Wars. In *War of Necessity, War of Choice: A Memoir of Two Iraq Wars*, Haass expounds on the terms he brought to the forefront in his 2003 *Washington Post* Opinion Editorial.[5] He asserts that Operation Desert Storm (ODS) should "be viewed as essentially unavoidable, that is [an act] of necessity"[6] and that Operation Iraqi Freedom (OIF) should be viewed as "just the opposite, reflecting conscious choice when other reasonable policies [were] available . . . ."[7]

Although some may disagree with Haass's ultimate categorizations of the two Gulf Wars, Haass's book, nevertheless, lays out a useful framework for analyzing the basis of U.S. engagement in international armed conflict. Additionally, Haass's discussions of ODS and OIF and the decision-making processes that led to American involvement in both conflicts highlights important leadership principles. *War of Necessity, War of Choice* is a must-read for military professionals, policy-makers, and the American public at large.

II. Background

Dr. Richard N. Haass is a foreign policy expert[8] whose access to the decision-making process during both ODS and OIF undoubtedly distinguishes this book from others that discuss both Gulf Wars.[9] As Haass points out, he was one "of only a few individuals, along with . . . Colin Powell, Dick Cheney, and Paul Wolfowitz" to serve as a "relatively senior" member of the executive staff during both Bush administrations.[10]

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[1] RICHARD N. HAASS, WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS (2009).

[2] Judge Advocate, U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] HAASS, *supra* note 1, at 7.

[4] *See id*. at 11 (noting his use of the terms in a 2003 *Washington Post* Editorial and *Meet the Press* moderator Tim Russert's use of the terms in a 2004 interview with President George W. Bush). *But see* HAASS, *supra* note 1, at 9–11 (noting the concepts are not completely novel).

[5] Richard N. Haass, Editorial, *Wars of Choice*, WASH. POST, Nov. 23, 2003, at B7.

[6] HAASS, *supra* note 1, at 9.

[7] *Id*.

[8] Dr. Richard N. Haass is a Rhodes Scholar who received a Bachelor of Arts degree from Oberlin College and both a Master's and a Doctorate degree from Oxford University. Since 2003, Dr. Haass has served as President of the Council on Foreign Relations, a self-described, neutral foreign policy think tank. Dr. Haass has also served as the Director of Foreign Policy Studies at the Brookings Institute and as an instructor at Harvard University's John F. Kennedy School of Government. Dr. Haass served as a Senior Director on the National Security Council and Special Assistant to President George H.W. Bush from 1989 until 1993. He served as the State Department's Director of Policy Planning and as the United States Policy Coordinator for Afghanistan from 2001 until 2003. Council on Foreign Relations, http://www.cfr.org/bios/3350 (last visited Aug. 30, 2009).

[9] *See* HAASS, *supra* note 1, at 14–16 (detailing his role in both administrations and describing others who also had a role in both administrations during the Gulf Wars). *See generally e.g.*, DAVID RYAN ET AL., AMERICA AND IRAQ: POLICY-MAKING, INTERVENTION AND REGIONAL POLITICS (David Ryan & Patrick Kiely eds., 2009) (collection of essays by various historians that documents and examines ideology and foreign policy during U.S. involvement in Iraq from 1958 to 2009); STEVEN METZ, IRAQ & THE EVOLUTION OF AMERICAN STRATEGY (2008) (discussing the administration strategies during the two Gulf Wars from the perspective of a civilian national security expert).

[10] HAASS, *supra* note 1, at 16.

III. Analysis

Haass first defines the terms "war of necessity" and "war of choice" and uses ODS and OIF to illustrate the concepts. Haass asserts that ODS was a "war of necessity"—a war involving "the most important national interests . . . [and] the absence of promising alternatives to the use of force . . . ."[11] Haass argues that Saddam Hussein's aggression against a sovereign nation—especially in the immediate post–Cold War era—and the strategic consequences of allowing Hussein to dominate Middle Eastern oil supplies implicated the United States' national interests.[12] Haass also details the myriad unsuccessful sanctions, United Nations resolutions, and diplomatic attempts to evict Hussein from Kuwait to demonstrate the lack of promising alternatives prior to the use of force.[13]

Next, Haass argues that OIF was a "war of choice" because it was fought to bring about regime change[14] and because non-military options were still available, including the prosecution of Hussein for war crimes, to achieve this less-than-vital interest.[15] According to Haass, "wars of choice" occur when policy-makers decide that the "benefits" of waging war "outweigh the costs,"[16] whereas "wars of necessity" take place when policy-makers believe inaction will be "unacceptably negative and large."[17]

Prior to developing his thesis, Haass acknowledges that the phrases "war of necessity" and "war of choice" are "heavily subjective" and dependent on analysis and worldview.[18] However, Haass fails to overcome his own subjectivity when classifying ODS. Bob Woodward's book, *The Commanders*, provides evidence of Haass's shortfall.[19] On the eve of ODS, General Colin Powell articulated a containment policy that included the "U.N.-mandated blockade of Iraq and all the other allied measures that were putting the squeeze on Iraq." [20] President George H. W. Bush, however, felt this response was not politically expedient.[21] Furthermore, as the conflict began, politicians, historians, and foreign policy experts were just as likely to argue that no "vital" interests were at stake and that the United States had not exercised the full range of non-military options[22] as they were to support the war as a necessity.[23] Although Haass claims "[t]he stakes were enormous, and [the administration] had tried and exhausted the alternatives to employing military force,"[24] he admits that "[a] different president and set of advisors might have tolerated Iraqi control of Kuwait and limited the U.S. response to sanctions so long as Saddam did not go on to attack Saudi Arabia."[25] Haass's observation suggests the first Gulf War does not fit as neatly into the "war of necessity" category as he asserts elsewhere in the book.

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[11] *Id.* at 10.

[12] *Id.* at 62, 63, 69, 72, 76, 111–12.

[13] *Id.* at 60, 71, 73, 83, 88, 103, 105, 108–09.

[14] *E.g.*, *id.* at 7, 216, 276, 278.

[15] *E.g.*, *id.* at 10, 15,181, 211, 269.

[16] *Id.* at 10.

[17] *Id.*

[18] *Id.* at 11.

[19] BOB WOODWARD, THE COMMANDERS 41–42 (1991).

[20] *Id.* at 41.

[21] *Id*. at 42.

[22] *See*, *e.g.*, Arthur Schlesinger, Jr., Editorial, *White Slaves in the Persian Gulf*, WALL ST. J., Jan. 7, 1991, at A14 ("[T]he case that U.S. vital interests are at stake has simply not been made to the satisfaction of Congress and the American people . . . No one ever supposed that an economic embargo would bring Iraq to its knees in a short five months. Why not give sanctions time to work?").

[23] *See*, *e.g.*, Stephen J. Solarz, *The Stakes in the Gulf*, NEW REPUBLIC, Jan. 7 and 14, 1991, *reprinted in* THE GULF WAR READER 269 (Micah L. Sifry & Christopher Cerf ed., 1991) ("The United States clearly has a vital interest in preventing Saddam Hussein from getting away with his invasion and annexation of Kuwait.").

[24] HAASS, *supra* note 1, at 112.

[25] *Id.* at 63.

While many believe OIF was a "war of choice,"[26] some may argue that OIF does not belong in the category as Haass defines it. It is worth noting that the State Department and its officials "are by temperament and training inclined toward diplomacy"[27] and that Haass had less policy influence during the George W. Bush administration.[28] Clearly, Haass had a different perspective prior to OIF than he did prior to ODS.

To his credit, Haass acknowledges the legitimacy of alternative viewpoints, claiming "[s]till others would say that the . . . second Iraq war . . . was a necessary and even desirable undertaking but that it was carried out so poorly that its costs were increased and benefits decreased."[29] Nevertheless, Haass's conclusion that OIF was a "war of choice" is appropriate. While improved implementation policies may have led to a better post-war outcome, this fact only underscores Haass's initial contention that "wars of choice" require the "government of the day to demonstrate that the overall or net results of employing force will be positive . . . ."[30]

Although Haass's categorization of the Gulf Wars is susceptible to criticism, the terms "war of necessity" and "war of choice" are still extraordinarily useful in evaluating the exercise of military power. American participation in international armed conflict requires some level of approval, both domestically and internationally.[31] The U.N. Charter provides the legal context in which states may present the case for war to the international community.[32] However, Haass's terms provide a helpful framework to facilitate domestic discussion on the use of force. Haass's criteria are framed in layman's terms,[33] which increases the possibility for constructive dialogue among policy experts, government representatives, and ordinary citizens.[34]

Interestingly, Haass's "war of necessity" criteria compare favorably with Just War principles.[35] Indeed, as the book concludes, Haass analyzes the wars under Just War theory.[36] Haass also does an excellent job of using ODS and OIF to illustrate the three underlying themes of the book. First, Haass discusses the intersection of politics and the media and the influence the media can have on policy decisions.[37] Haass notes, "[t]he so-called CNN effect is real; it does create pressures

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[26] *See, e.g.*, Brent Scowcroft, Editorial, *Don't Attack Saddam: It Would Undermine Our Anti-Terror Efforts*, WALL ST. J., Aug. 15, 2002, at A3; *see also* SCOTT MCCLELLAN, WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON'S CULTURE OF DECEPTION (2008). *But see* LAWRENCE F. KAPLAN & WILLIAM KRISTOL, THE WAR OVER IRAQ: SADDAM'S TYRANNY AND AMERICA'S MISSION (2003).

[27] HAASS, *supra* note 1, at 182.

[28] *Id.* at 15, 171–72, 223.

[29] *Id.* at 271.

[30] *Id.* at 10.

[31] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, 58TH GRADUATE COURSE DESKBOOK D-1 (2009) [hereinafter DESKBOOK] ("Any decision to employ force must rest upon a viable legal basis in international law as well as domestic law.").

[32] *See id.* ("There are a variety of internationally-recognized legal bases for the use of force in relations between states . . . . Generally speaking, however, modern jus ad bellum . . . is reflected in the United Nations Charter.").

[33] *See* HAASS, *supra* note 1, at 10 (noting that "wars of necessity" are usually associated with self-defense, involve vital national interests, lack viable alternatives to military force, and require the Government to show the substantial consequence of inaction; and that "wars of choice" are fought despite the presence of reasonable non-military options, involve interests that are less-obviously critical, and require the Government to show that the benefits outweigh the costs of going to war).

[34] *See, e.g.*, Christi Parsons & Andrew Zajac, *Senate Committee Scraps Healthcare Provision That Gave Rise to 'Death Panel' Claims*, Aug. 14, 2009, http://www.latimes.com/news/nationworld/nation/la-na-health-end-of-life14-2009aug14,0,4670272.story. This article illustrates what happens to discourse when terms are not user-friendly. The article reports that the "Senate Finance Committee is taking the idea of advance care planning consultations with doctors off the table" in the proposed health care legislation because the language is confusing and has "given rise to fears of government 'death panels.'" *Id.*

[35] *See* DESKBOOK *supra* note 31, at A–6 (2009) (noting fundamental principles of Just War theory, including that (1) the decision to engage in war must be reached by legitimate authority; (2) resorting to non-peaceful means must be a last resort; (3) there must be a reasonable likelihood of success, except in cases of self-defense; and (4) the decision to engage in war must be based on self-defense, to regain wrongfully held land or assets, or to right a definite wrong).

[36] Haass states that Operation Desert Storm, a "war of necessity," satisfies the principles of Just War theory because "it was fought for a worthy cause, it was likely to succeed, it was undertaken with legitimate authority, and it was waged only as a last resort." HAASS, *supra* note 1, at 268. Conversely, he finds Operation Iraqi Freedom was not a just war because of the "worthiness of the cause, the likelihood of success, the legitimacy of the authority to undertake it . . ." and the fact that it was not a war of last resort. *Id.* at 269.

[37] *See, e.g.*, *id.* at 69–70, 102–03, 105–07, 211.

on policy makers,"[38] and his discussion of the plight of Iraqi refugees following ODS illustrates his point.[39] Following the media coverage of failed humanitarian airdrops, there was a public outcry for "the world to do more to help Iraqi refugees."[40] Days later, the United States conducted Operation Provide Comfort, which created safe camps for Kurds in northern Iraq, an option the administration had previously opposed.[41]

Second, Haass uses the Gulf Wars to highlight two competing approaches to American foreign policy: one which attempts to affect inter-state relations and one which strives to influence the domestic behavior of states. Haass states, "The difference between a foreign policy designed to manage relations between states and one that seeks to alter the nature of states is critical . . . ."[42] He explains that the two Gulf Wars represent "the two dominant and competing schools of American foreign policy."[43] According to Haass, the first Gulf War characterized a foreign policy paradigm that sought to use national power to influence the external actions of states.[44] In contrast, the second Gulf War embodied the second foreign policy approach, which involves the use of national power to influence the internal nature of states for idealistic or ethical reasons.[45] Ultimately, Haass presents a sound argument in support of the first school of thought.[46]

Finally, Haass uses the Gulf Wars to demonstrate the importance of a full-bodied policy-making process. Haass portrays a stark contrast between the formal National Security Council meetings that preceded ODS[47] and the informal and closed decision-making discussions that led to the start of OIF.[48] He argues that the lack of "systematic consideration" of the assumptions that predicated the second Gulf War resulted in costly post-"mission-accomplishment" consequences.[49]

This topic of decision-making, especially as a prelude to military action, is particularly useful to judge advocates. The military decision-making process (MDMP) is designed to present choices to commanders based on assumptions. However, as Haass notes, "[i]t is essential that . . . assumptions are challenged and tested and alternative explanations are put forward and subjected to scrutiny."[50] Haass's point can be easily applied to the military; a commander's decision is only as good as the process that led to it. Judge advocates play an important role in formal MDMP and in advising both commanders and staff members during informal decision-making processes.

The issue of decision-making informs Haass's discussion of September 11th and the effect the attacks had on President George W. Bush.[51] Haass notes that "September 11 changed the debate on Iraq,"[52] and, in his opinion, there would not have

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[38] *Id.*

[39] *Id.* at 142–44.

[40] *Id.* at 142–43.

[41] *Id.* at 143–44.

[42] *Id.* at 12.

[43] *Id.*

[44] *E.g.*, *id.* at 7, 11–12, 200–01, 275–76.

[45] *E.g.*, *id.* at 7, 11–12, 180–81, 216, 266, 275–76.

[46] *E.g.*, *id.* at 275–76 Haass asserts that the external behavior of states is less expensive, less difficult, and more important to U.S. interests. *Id.* Haass uses the examples of the critical U.S. interest in China and Russia helping to constrain North Korea and Iran's nuclear programs, respectively. *Id.* at 276. He contrasts that with the "markedly less than vital" U.S. belief that China and Russia should be "full democracies." *Id.* Haass concludes that "this should reinforce the notion that the principal business of American foreign policy ought to be the foreign policy and not the domestic nature of other countries . . . [and] using military force to oust regimes and build democracies is simply too costly and too uncertain in results to constitute a sustainable approach to U.S. foreign policy." *Id.*

[47] *Id.* at 61–71, 81–83, 92–93, 272–73.

[48] *Id.* at 182–86, 216, 272–73.

[49] *Id.* at 256–60, 272–73.

[50] *Id.* at 273.

[51] *Id* at 234–37.

[52] *Id.* at 234.

been a second Gulf War "[a]bsent 9/11."[53] Haass concludes that the aftermath of 9/11 highlighted two negative leadership qualities of President Bush: his tendency to reach conclusions too rapidly and his abhorrence of changing course.[54] Military leaders often have to make swift decisions in the face of challenging circumstances. However, it is important that leaders still give full consideration to alternate viewpoints, various courses of action, and the quality of the information they receive. They must be "pentathletes" who remain adaptive and flexible.[55]

IV. Additional Observations

One strength of *War of Necessity, War of Choice* is that it is simultaneously a memoir, a history book, and a foreign policy argument.[56] Haass's frequent use of personal anecdotes to explain the Gulf Wars[57] make this book a compelling read even for those who are not foreign policy or military experts. The introduction offers one example of how his personal insights add color to the book. In the first few pages, Haass grabs the reader's attention by recounting two separate meetings—one between himself and President George H. W. Bush, and one between himself and National Security Advisor Condoleeza Rice—at pivotal moments in American history when he knew the nation was about to go to war with Iraq.[58]

Haass's book is also well-organized, and his narrative is supported by helpful background information. He presents the Gulf Wars in chronological order and provides enough contextual information on U.S. foreign policy during the preceding or intervening periods to keep the narrative manageable but complete.[59] Haass is careful to explain relevant historical policies and the organization of various Government agencies for lay readers with no specialized military or foreign policy knowledge.[60] For example, when describing his appointment to the National Security Council (NSC) staff by President George H. W. Bush, he fully details the structure of the NSC and the functional responsibility of the organization and its staff members. [61]

Although this is a memoir, largely based on the author's personal observations, he amply supplements his first-hand knowledge with speeches, interviews, memoranda, and other primary sources.[62] Notably, Haass provides an appendix containing a previously classified information memorandum detailing the post-war challenges in Iraq.[63] Haass also includes a twenty-six page notes section citing his primary and secondary sources.[64]

V. Conclusion

In *War of Necessity, War of Choice*, Haass provides a close-up and compelling account of the decision-making processes that led to American participation in the two Gulf Wars. More importantly, he provides a useful framework for discussing U.S. engagement in armed conflict. Indeed, the phrases "war of necessity" and "war of choice" were recently invoked by our current commander-in-chief as he remarked on the war in Afghanistan.[65] Judge advocates should employ these frameworks

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[53] *Id.* at 237.

[54] *Id.* at 236.

[55] U.S. DEP'T OF ARMY, REG. 600-100, ARMY LEADERSHIP para. 1-4(c) (8 Mar. 2007).

[56] HAASS, *supra* note 1, at 16.

[57] *See, e.g., id.* at 71, 81, 101, 213, 220, 252–53.

[58] *Id.* at 1–6.

[59] *Id.* at 17–31, 154–67.

[60] *See, e.g., id.* at 19, 46, 115, 183.

[61] *Id.* at 33.

[62] *E.g., id.* at 9, 19, 26, 46, 61– 62, 89, 104, 116, 146–47, 172, 208.

[63] *Id.* at 279–93.

[64] *Id.* at 297–323.

[65] *See* Barrack Obama, President of the United States, Speech on Afghanistan and Pakistan at the Veterans Foreign Wars Convention (Aug. 17, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Veterans-of-Foreign-Wars-convention/) ("But we must

to supplement their responses to commanders' questions on the basis for their missions. Finally, military leaders should strive to remain open-minded and adaptive in the face of demanding circumstances and apply Haass's advice regarding the policy-making process. Military professionals will help their commanders to choose better courses of action by challenging assumptions during military decision-making processes. Leaders, policy-makers, and everyday citizens alike will benefit by reading this book.

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never forget: this is not a war of choice. This is a war of necessity . . . . So this is not only war worth fighting . . . . [T]his is fundamental to the defense of our people.").

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 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (2009—September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	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	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	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-F55	2010 JAOAC	4 – 15 Jan 10
5F-F5	Congressional Staff Legal Orientation (COLO)	18 – 19 Feb 10

5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 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	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	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-270A3	10th Senior Warrant Officer Symposium	1 – 5 Feb 10
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 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	10 – 14 May 10
5F-F57	2010 BCT Symposium (Non-CLE)	10 – 14 May 10
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-F28E	2009 USAREUR Tax CLE Course	30 Nov – 4 Dec 09
5F-F28	2009 Income Tax Law Course	7 – 11 Dec 09
5F-F28P	2010 PACOM Income Tax CLE Course	4 – 7 Jan 10
5F-F28H	2010 Hawaii Income Tax CLE Course	11 – 14 Jan 10
5F-F24	34th Administrative Law for Military Installations and Operations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
CONTRACT AND FISCAL LAW		
5F-F11	2009 Government Contract Law Symposium	17 – 20 Nov 09
5F-F14	28th Comptrollers Accreditation Fiscal Law Course	7 – 11 Dec 09
5F-F12	81st Fiscal Law Course	14 – 18 Dec 09
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	33d Criminal Law Advocacy Course	1 – 12 Feb 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10

INTERNATIONAL AND OPERATIONAL LAW		
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	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 (010) Lawyer Course (020) Lawyer Course (030)	13 Oct – 18 Dec 10 25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	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) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	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) (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)	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)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
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 (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	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 (020) Iraq Pre-Deployment Training (030)	5 – 8 Jan 10 6 – 9 Apr 10

	Iraq Pre-Deployment Training (040)	6 – 9 Jul 10
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	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 (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	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 (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 – 1 7 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	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 (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)	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 (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)	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**
Judge Advocate Staff Officer Course, Class 10-A	13 Oct – 17 Dec 09
Paralegal Craftsman Course, Class 10-01	13 Oct – 19 Nov 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 (JAOBC) 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 Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POCs
22 – 24 Jan 2010	Southeast On-Site	DOJ National Advocacy Center, Columbia, SC	12th LSO 174th LSO 213th LSO	001	Mrs. Kelly Anderson 803.751.1221 Kelly.y.anderson@usar.army.mil MSG Willie Watkins 803.751.1304 Willie.watkins@usar.army.mil
19 – 21 Feb 2010	National Capital Region On-Site	Fort Belvoir, VA or Fort Meade, MD	151st LSO 10th LSO 153rd LSO	002	MAJ Gary Bilski – Onsite OIC MAJ Matthew Caspari – S-3 SSG Michael Waskewich – NCOIC 703.960.7395 ext. 7420 Michael.Waskewich@usar.army.mil
19 – 21 Mar 2010	Northeast On-Site	Boston, MA	3rd LSO 4th LSO 7th LSO	003.	Mr. Aaron Stein 617.753.4565 Aaron.Stein1@usar.army.mil
23 – 30 Apr 2010	Western On-Site & FX	San Francisco, CA (followed by FX at Ft. Hunter Liggett 25 – 30 Apr)	87th LSO 6th LSO 75th LSO 78th LSO	004	LTC Tomson T. Ong Tomson.Ong@us.army.mil Tong@LASuperiorCourt.org 562.491.6294 Mr. Khahn Do Khahn.K.Do@usar.army.mil 650.603.8652
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Dawn Laubach Dawn.laubach@us.army.mil laubachlegal@hotmail.com 210.452.8822 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA	TBD	TBD	COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

2. 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.

3. 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.

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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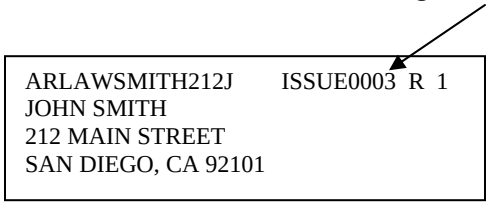

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The Judge Advocate General's Legal Center & School
U.S. Army
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