

# THE ARMY LAWYER

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## Military Commissions

Major General (Ret.) Michael J. Nardotti, Jr.

*Editor's Note: Major General (Retired) Michael J. Nardotti, Jr., The Judge Advocate General of the Army (1993-1997), made these remarks before the Senate Judiciary Committee Subcommittee on Administrative Oversight and the Courts on 4 December 2001. General Nardotti's incisive observations on the President's proposed use of military commissions, the need for the military justice system, and the purposes of courts-martial and military commissions begin our series of articles on military commissions and their use.*

Mr. Chairman and Members of the Committee, thank you for the opportunity to contribute to this important dialogue.

The possible use of military commissions, as ordered by the President in his role as Commander-in-Chief of our Armed Forces, to conduct trials of non-United States citizens for violations of the law of war, as described in the Military Order of November 13, 2001, concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,"<sup>1</sup> is [an] extraordinary measure in response to extraordinary events. Careful explanation of the justification and basis for this proposed action and related actions which will follow, certainly will inform the vigorous public debate.

To assist in this effort, I have been asked to highlight and discuss some of the similarities and differences between the prosecution of criminal matters in our Armed Forces in courts-martial under the Uniform Code of Military Justice and those matters prosecuted in Article III federal courts. Further, I have been asked to relate these similarities and differences to military commissions as some of those tribunals have been conducted in the past and may be conducted in the future under the President's Order.

### *Background*

As a matter of background, I am a veteran of over twenty-eight years of active duty in the United States Army. Early in my career, I served as an infantry platoon leader in combat in Vietnam and, later, in a variety of positions in the United States and overseas as a soldier and lawyer. I served as The Judge Advocate General of the Army from 1993 until my retirement in 1997. Since that time, I have been in the private practice of law in Washington, DC.

### *The President's Proposed Use of Military Commissions*

Before describing the issues which will be the primary focus of my statement, I should make clear my view of the President's proposed use of military commissions to [try] non-citizens who planned, perpetrated, or aided and abetted the attacks of September 11, without restating the arguments previously made to this Committee in support of the President.

I agree with those who believe the President, as Commander-in-Chief, has the authority under the Constitution to take these actions. The terrorist acts of the organization known as al Qaida, up to and including the horrendous attacks of September 11, 2001, leave no doubt that the United States is in a state of armed conflict with an outside enemy and that the President is most certainly correct in his conclusion that "an extraordinary emergency exists for national defense purposes."

The Joint Resolution of the Senate and House of Representatives underscores this conclusion and supports the need for extraordinary action in authorizing the President, "to use all necessary means and appropriate force" against those who planned and perpetrated these acts to prevent them from committing future terrorist acts.

The use of military commissions under these circumstances is a lawful means available to the President, as Commander-in-Chief, to achieve this end. The justification for the use of military commissions is well-established in international law, and the use of tribunals of this type has a lengthy history in times of extraordinary emergency in our country. Congress has recognized and affirmed their use previously in the Articles of War and currently in Articles 21 and 36 of the Uniform Code of Military Justice.

The United States Supreme Court upheld the constitutionality of trial by military commissions of enemy saboteurs caught within the United States during World War II in *Ex parte Quirin*, 317 U.S. 1 (1942). The Court's reasoning in that case with respect to the lawfulness of trying unlawful combatants—those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war—would appear to be particularly applicable to those who planned, perpetrated, or aided and abetted the attacks of September 11—acts of monumental and extreme violence against thousands of our civilian citizens.

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1. President Bush's Military Order is attached as an appendix to this article.

The more debatable and critical issue may well be how the President chooses to exercise this option. The *Quirin* model is relevant to an extent, but it does not necessarily provide all the answers for a similar undertaking today. The Military Order of November 13, 2001, raises important issues which will need further clarification, and Administration officials have already begun to clarify some of those points. They have stressed repeatedly that the specifics of the rules to be applicable to military commissions in this instance are still under development and review by the Department of Defense.

The President, nevertheless, has made certain basic requirements clear, including that there be a full and fair trial. The determination of what constitutes a full and fair trial under these circumstances should include particularly careful consideration to the extraordinary circumstances which justify the use of and compel the need for military commissions in this instance. Further, the significant evolution in the administration of military justice since the *Quirin* decision, and the extent to which that evolution should impact on the conduct of military commissions today, also should be carefully considered.

#### *The Unique Need for the Military Justice System*

Before focusing on military commissions, I will explain, as a starting point, why there are differences between criminal prosecutions in Article III federal courts and criminal prosecutions in the Armed Forces. Congress and the courts have long-recognized that the need for a disciplined and combat-ready armed force mandates a separate system of justice for the military.

Our Armed Forces operate world-wide in a variety of difficult and demanding circumstances which have no parallel in the civilian community. Military commanders of all services are responsible for mission accomplishment and the welfare of their troops. In the most difficult operational and training situations, they make decisions that can and do put the lives of their troops at risk.

These commanders also are responsible for administering a full range of discipline to ensure a safe and efficient environment in which their troops must serve. They are able to accomplish this goal through the use of military law, the purpose of which, as stated in the Preamble to the *Manual for Courts-Martial, United States* (2000 Edition), is “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” The range of disciplinary options and circumstances under which commanders are able to employ them simply make resort to alternatives in the civilian community, whether through the federal courts or other means, an unworkable and unrealistic option.

In recognition of this fact, Congress, acting under its constitutional authority “to make Rules for the Government and reg-

ulation of the land and naval Forces,” enacted the Uniform Code of Military Justice (UCMJ) in 1950 to set forth the substantive and procedural laws governing the Military Justice System. Congress enacted the UCMJ to make “uniform” what previously was not—the criminal law applicable to all the Military Services.

Substantive law is contained in the various punitive articles which define crimes under the UCMJ. While Congress defines crimes, the President establishes the procedural rules and punishment for violation of crimes. The President’s rules are set forth in the *Manual for Courts-Martial*. The *Manual* is reviewed annually to ensure it fulfills its fundamental purpose as a comprehensive body of law.

#### *Article III Federal Courts Prosecutions and Courts-Martial: A Comparison of Certain Rights, Practices, and Procedures*

The administration of military justice under these authorities, by congressional and presidential design, is, by necessity, different in some respects from the civilian counterpart, but in other respects is similar. Several examples of differences and similarities in the pretrial, trial, and post-trial phases are the following:

- (1) Rights warnings against self-incrimination in the military are broader than those required in the civilian community and actually predated the requirement of the *Miranda* decision by many years; rights advisement in the military is and has been mandated whether or not the interrogation occurs in a custodial session.
- (2) Right to counsel in the pretrial and trial phases in the military is broader than in the civilian community where counsel is appointed if the accused is indigent. Military counsel is provided regardless of ability to pay. Individually requested military counsel also may be provided if available. Civilian counsel may be appointed as well at the service member’s own expense.
- (3) In the pretrial investigation phase for felony prosecutions in the military, there is not the equivalent of a secret grand jury in which the defendant has no right to be present. An investigative hearing, which is routinely open, is conducted under Article 32 of the UCMJ to determine whether there are reasonable grounds to believe the accused service member committed the offense alleged. The accused service member has the right to be advised in writing of the charges, to attend the hearing with counsel, to examine the government’s evidence, to cross examine wit-

nesses, to produce witnesses, and to present evidence.

(4) Pretrial discovery in the military is similar to that followed in federal criminal proceedings, but more broad. The government is required to disclose any evidence it will use in the sentencing phase of the proceeding if there is a conviction, or evidence that tends to negate the degree of guilt or reduce the punishment.

(5) Unlawful command influence—an attempt by superior military authority to influence the outcome of a proceeding—is prohibited and is subject to criminal sanctions. There is no equivalent issue in federal proceedings.

(6) In federal prosecutions, a jury of peers is selected at random. General courts-martial must have at least five members selected, as required by Article 25 of the UCMJ, based on “age, education, training, experience, length of service, and judicial temperament.” Civilian jury and military court-martial panel members may be challenged for cause or peremptorily.

(7) With respect to trial evidence, the rules in both forums—the Federal Rules of Evidence in federal courts and the Military Rules of Evidence in courts-martial—are almost identical. New Federal Rules of Evidence automatically become new Military Rules of Evidence unless the President takes contrary action within eighteen months.

(8) The burden of proof for conviction in both forums is beyond a reasonable doubt.

(9) For conviction or acquittal in federal prosecutions, jurors must be unanimous. Otherwise, a hung jury results and the defendant may be retried. In courts-martial, except in capital cases, two-thirds of the panel must agree to convict. The first vote is binding. If more than one-third of the panel vote to acquit, then there is an acquittal. A hung jury and retrial on that basis is not possible in the military. In capital cases in courts-martial, a unanimous verdict is required for conviction.

(10) Sentencing in federal courts is done by the judge alone, and sentencing guidelines for minimum and maximum sentences apply. In courts-martial, sentencing is decided by

the court-martial panel members or by the military judge (if the accused service member chose to be tried by a military judge alone). There are maximum sentence limitations but no minimums.

The accused service member is entitled to present evidence in extenuation and mitigation, including the testimony of witnesses on his or her behalf, and may make a sworn or unsworn statement for the court-martial’s consideration. Two-thirds of the panel must agree for sentences of less than ten years. Three-quarters of the panel must agree for sentences of ten years or more. To impose capital punishment, the panel must unanimously agree to the findings of guilt, must unanimously agree to the existence of an “aggravating factor” required for a capital sentence, and must unanimously agree on the sentence of death. Capital punishment may not be imposed by a military judge alone.

(11) In federal prosecutions, appeal is permissible, but mandatory in cases of capital punishment. There are two levels of appeal—the Circuit Courts of Appeal and the United States Supreme Court.

In the military, appeal is automatic for sentences which include confinement of one year or more or a punitive (Bad Conduct or Dishonorable) discharge. There are three levels of appeal—the Courts of Criminal Appeals of the military services, the Court of Appeals for the Armed Forces, and the United States Supreme Court. Sentences which do not require automatic appeal may be appealed to the Judge Advocate General of the convicted member’s service.

(12) Appellate representation in federal prosecutions is provided if the convicted person is indigent. In the military, appellate representation is provided in all cases regardless of financial status.

This comparison of the relative handling of pretrial, trial, and post-trial matters, respectively, in Article III federal courts and courts-martial is not exhaustive. It demonstrates, however, that even in accommodating the needs unique to the administration of military justice, courts-martial, in many important respects, compare very favorably, even though not identically, to process and procedures accorded in the Article III federal courts.

### *Courts-Martial and Military Commissions*

Just as there are sound reasons for differences in rights, practices, and procedures between Article III federal courts and courts-martial, there also are sound reasons for differences between courts-martial and military commissions.

Courts-martial and military commissions, of course, are not one in the same. Courts-martial are the criminal judicial forums in which members of our Armed Forces are prosecuted for criminal offenses, the vast majority of which are defined in the Uniform Code of Military Justice. Congress and the President have given continuing attention to the development and growth of the Military Justice System to ensure that in seeking to achieve “good order and discipline in the armed forces [and] to promote efficiency and effectiveness in the military establishment,” justice is also served in the fair treatment of soldiers, sailors, airmen, and marines.

Military Commissions serve a distinctly different purpose and have been used selectively in extraordinary circumstances to try enemy soldiers and unlawful combatants, among others, for violations of the laws of war. In the case of unlawful combatants—those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war—their actions and conduct determine their status and the type of action which may be taken against them as a result.

Those who entered our country surreptitiously and who planned, perpetrated, or aided and abetted the attacks of September 11, causing death and destruction on an unprecedented scale, engaged in an armed attack on the United States in violation of customary international law. Their actions and offenses under the law of war allow them to be treated differently from lawful combatants and others who violate the criminal law.

Military commissions are the appropriate forum for dealing with these unlawful combatants. To reiterate the earlier-stated justifications, the use of military commissions is supported by

international law, there is lengthy historical precedent for their use, the United States Supreme Court has upheld their use in similar circumstances, Congress has recognized and affirmed their use in the Uniform Code of Military Justice and in the predecessor Articles of War, and the extraordinary emergency which the President has declared and Congress’s support to the President in its Joint Resolution authorizing him “to use all necessary means and appropriate force” where there have been egregious violations of the law of war, all compellingly support this conclusion.

The question of the rules and procedures to apply remains, nevertheless. While the President has determined that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” the appropriate principles and rules of procedures prescribed for courts-martial may still serve as a useful guide.

The propriety of these principles and rules should be measured against the legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in the course of a military operation rather than through traditional law enforcement means. Further, the principles and rules adopted also should take into account the evolution, growth, and improvement in the administration of criminal justice in general, and of military justice in particular, in determining the standards to apply with respect to the most compelling issues, such as those relating to the imposition of capital punishment.

I am confident that the President and the Department of Defense are mindful of the exceptional significance of these issues, and that they will take them into careful account as further decisions are made.

Mr. Chairman and Members of the Subcommittee, I am prepared to answer your questions.

**Military Order of November 13, 2001**

**Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism**

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

**Section 1. Findings.**

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant

part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

**Sec. 2. Definition and Policy.**

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of interna-

tional terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

### **Sec. 3. Detention Authority of the Secretary of Defense.**

Any individual subject to this order shall be—

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

### **Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.**

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

**Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.**

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

**Sec. 6. Additional Authorities of the Secretary of Defense.**

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

**Sec. 7. Relationship to Other Law and Forums.**

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

**Sec. 8. Publication.**

This order shall be published in the Federal Register.

GEORGE W. BUSH  
THE WHITE HOUSE,  
November 13, 2001.

**AMERICAN BAR ASSOCIATION TASK FORCE ON TERRORISM AND THE LAW  
REPORT AND RECOMMENDATIONS  
ON  
MILITARY COMMISSIONS<sup>2</sup>**

January 4, 2002

In response to the unprecedented attacks of September 11, on November 13, 2001, the President announced that certain non-citizens would be subject to detention and trial by military authorities. The order provides that non-citizens whom the President deems to be, or to have been, members of the al Qaida organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission.

The September 11 attacks caused over 3000 deaths and billions of dollars of economic losses. Beyond their immediate, horrible impact, they demonstrated that a threat once thought hypothetical is all too real: there are groups of persons with the organization, resources, and will to cause mass death and destruction in the United States and elsewhere. It is the duty of the Government to bring those responsible to justice and to take all legal measures to prevent future attacks; it is also the duty of the Government to preserve and protect fundamental rights and liberties under the Constitution.

The President's order raises important issues of constitutional and international law and policy. The language in the order makes its potential reach quite broad and raises questions for which there is no clear, controlling precedent. Many of the issues will come into clearer focus only if and when more specific rules are drafted and a military commission is convened for the trial of a particular individual.

This paper addresses some of the major issues that can now be identified. It discusses the authority for and history of military commissions. It discusses the jurisdiction of military commissions, and judicial review of military commissions. It describes some of the issues relating to the procedures in a military commission. It discusses policy reasons for and against military commissions in the current circumstances. It concludes with a summary and recommendations.

The members of the task force are Harold S. Barron, chair-elect of the Business Law Section of the ABA, the former Gen-

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Unless otherwise noted, the report and recommendations have not been adopted as the policy of the American Bar Association and should be considered solely as the views of the Task Force.

### **I. Authority for Military Commissions**

Military commissions derive their authority from Articles I and II of the Constitution. Article I, Section 8, grants to Congress the powers: "To . . . provide for the common Defence"<sup>3</sup> and "To define and punish piracies on the high seas, and offenses against the Law of Nations; To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . .; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces."<sup>4</sup> Article II confers on the President the "executive Power"<sup>5</sup> and makes him the "Commander in Chief of the Army and Navy."<sup>6</sup>

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3. U.S. CONST. art. I, § 8, cl. 1.

4. *Id.* art. I, § 8, cls. 10-14.

Congress has provided for military commissions in Article 21 of the Uniform Code of Military Justice,<sup>7</sup> which provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.<sup>8</sup>

Military commissions have existed, albeit under different names, since before the beginning of the Republic. George Washington ordered the trial of John Andre for spying by a “Board of Officers,” which was, in all but title, a military commission.<sup>9</sup> The term “military commission” came into use during the Mexican War, and by the time of the Civil War was well embedded in usage.<sup>10</sup> Military commissions have had the authority to try persons not otherwise subject to military law for violations of the law of war and for offenses committed in territory under military occupation.<sup>11</sup>

Military commissions were used for both purposes in World War II, and were upheld by the U.S. Supreme Court.

In *Ex parte Quirin*,<sup>12</sup> the Court upheld the jurisdiction of a military commission ordered by President Roosevelt to try eight German saboteurs who had entered the United States surreptitiously. The Court stated:

By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.<sup>13</sup>

(Article 21 of the UCMJ is identical in material respects to its predecessor, Article of War 15.)

The Court expressly left open the question whether the President’s commander-in-chief power alone is authority to establish a military commission, since Article of War 15 recognized such authority. “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”<sup>14</sup>

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5. *Id.* art. II, § 1.

6. *Id.* art. II, § 2.

7. 10 U.S.C. § 821 (2000).

8. *Id.* This language is designed to retain the common law jurisdiction of military commissions. In *Application of Yamashita*, 327 U.S. 1 (1946), the Court discussed Article of War 15, which contained substantially the same language as UCMJ Article 21. It explained that Article 15 was adopted in 1916 in response to other amendments of the Articles of War, which granted jurisdiction to courts-martial to try offenses and offenders under the law of war. Thus, the Court stated:

[I]t was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles [of War] 12, 13, and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. . . . By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.

*Id.* at 19-20 (citation omitted). See also *Ex parte Quirin*, 317 U.S. 1 (1942); *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952) (“Since our nation’s earliest days, such [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war. They have been called our common-law war courts.” (citation omitted)).

Article 18, UCMJ, provides that, in addition to jurisdiction over persons subject to military law, primarily members of the armed forces, “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” Presumably, the President has chosen to use military commissions because the procedures can more easily be tailored to meet the exigencies of the circumstances.

9. See generally WINTHROP, MILITARY LAW AND PRECEDENTS 832 (2d ed. 1920 reprint). Winthrop points to other trials in the Revolutionary War, as well as to the trials of individuals in the War against the Creek Indians in 1818, as early uses of military tribunals to try persons not otherwise subject to military jurisdiction. See also *Madsen v. Kinsella*, 343 U.S. at 346-47.

10. WINTHROP, *supra* note 9, at 832.

11. See *Madsen v. Kinsella*, 343 U.S. at 346-47; WINTHROP, *supra* note 9, at 831-46.

12. 317 U.S. 1 (1942).

13. *Id.* at 28.

14. *Id.* at 29.

In *Quirin* the defendants were captured, held, and tried in the United States. The Court rejected their claims that, because the civilian courts were open and functioning, they were entitled to be tried in such courts.<sup>15</sup>

Following the surrender and occupation of Germany and Japan in 1945, military commissions were used extensively. In Germany, over 1600 persons were tried for war crimes by U.S. Army military commissions.<sup>16</sup> In the Far East nearly 1000 persons were tried by such commissions.<sup>17</sup> Military commissions were also used to try individuals, including U.S. citizens, for ordinary criminal activity in the occupied territories. The Supreme Court upheld jurisdiction under both doctrines.

In *Application of Yamashita*,<sup>18</sup> the Court upheld the jurisdiction of a military commission to try Japanese General Yamashita for war crimes.<sup>19</sup> In discussing Article of War 15, the Court stated, “By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.” The Court also stated:

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin*, 217 U.S. 28, 63 S. Ct. 11. The trial and punishment of enemy combatants who

have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. *Id.* at 11.

In *Madsen v. Kinsella*,<sup>20</sup> the Supreme Court upheld the jurisdiction of a military commission to try a civilian U.S. citizen for the murder of her husband, a U.S. serviceman, in occupied Germany in 1950. The Court’s opinion discussed the history of military commissions.

The World War II military commissions were similar in composition and procedure to the international war crimes tribunals that tried the leaders of Germany and Japan for war crimes and other offenses against international law. The titles of the international tribunals—the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East—reflect that similarity.

It has been argued that it may be legally significant that there has not been a declaration of war with regard to the authority to create such tribunals as well as their jurisdiction.

*Quirin*, *Yamashita*, *Madsen*, and the other World War II cases occurred following a declaration of war by Congress.<sup>21</sup> A state of declared war offers the clearest authority for the broadest use of war powers. A declaration of war draws clear lines. It defines (or at least has traditionally done so) who the enemy is: another state, and all the nationals of that state. It

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15. The Court distinguished *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, the Court held that a military commission in Indiana lacked authority to try Milligan, “not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service.” *Id.* at 118. The *Milligan* Court stated that jurisdiction could not be applied under “the laws and usages of war” “to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.” *Id.* at 121. In *Quirin*, one of the defendants claimed U.S. citizenship. Assuming, without deciding, this to be the case, the *Quirin* Court stated, “Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.” *Quirin*, 317 U.S. at 37. The *Quirin* Court opined that Milligan, as a non-belligerent, was not subject to the law of war, and therefore not amenable to trial by a military commission.

At least with respect to *citizens*, the *Quirin* Court seems to have drawn a distinction based on the status of the offender. The *Quirin* defendants were combatants, that is, members of the German armed forces, who sneaked behind enemy lines and shed their uniforms with the intent to commit sabotage against U.S. defense facilities. Lambden Milligan, on the other hand, was never a member of the enemy forces (although he was, allegedly, a member of a secret society in the north that intended to overthrow the government). His offenses were otherwise similar to those of the *Quirin* defendants: communicating with the enemy and conspiring to seize government munitions and to free confederate prisoners of war.

16. As compared to some 200 tried by international military tribunals. See TELFORD TAYLOR, NUREMBERG AND VIET NAM: AN AMERICAN TRAGEDY (1970); H.W. Elliott, The Trial and Punishment of War Criminals: Neglected Tools in the “New World Order” (1996) (unpublished thesis) (on file with the University of Virginia Law School).

17. TAYLOR, *supra* note 16. Conviction rates were about eighty-five percent in both theaters. *Id.*

18. 327 U.S. 1 (1946).

19. See also *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding habeas relief not available to enemy aliens to challenge military commissions where the crimes, apprehension, and trial all occurred outside the United States).

20. 342 U.S. 341 (1952).

21. Although in the latter two cases the hostilities had ended when the trials occurred.

marks a clear beginning, and (again traditionally) an end, with some legal act or instrument marking its conclusion.

The Supreme Court and Congress have recognized that a state of war may exist without a formal declaration.<sup>22</sup> While such a declaration would provide the clearest authority in support of military commissions, military commissions, or similar military tribunals, have been used in hostilities in which there was no declaration of war, including the Civil War and the Indian Wars.<sup>23</sup> Nothing in Article 21 or elsewhere in the UCMJ or other statutes explicitly limits or permits the use of military commissions when war has not been declared.

On September 18, 2001, Congress enacted a joint resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>24</sup> The Preamble to the resolution states that the acts of September 11 were attacks against the United States that “render it both necessary and appropriate that the United States exercise its rights to self-defense.”

It can reasonably be argued that Congress’s authorization to use “all necessary and appropriate force” includes authority for the President’s order, at least with respect to offenses relating to the September 11 attacks. Presidents have asserted a constitutional authority to use military commissions arising from their executive duties as Commander in Chief of the Armed Forces. The scope of the President’s power to act alone with respect to military commissions has not been developed in case law, but it

is clear that the President’s authority is least open to question when it is supported by an explicit act of Congress.

## II. Jurisdiction of Military Commissions

### A. Offenses Against the Law of War<sup>25</sup>

By its terms, Article 21 limits the jurisdiction of military commissions to “offenders or offenses that by statute or by the law of war may be tried by military commissions.” No other statute that would give jurisdiction to a military commission appears to apply in the current circumstances,<sup>26</sup> so the exercise of jurisdiction by a military commission must be under the law of war. That jurisdiction generally rests on either of two bases: military occupation or prosecution for law of war violations. Only the latter basis is in issue here. The Supreme Court, in *Ex parte Quirin* and *Application of Yamashita*, has recognized that military commissions are proper fora for the trial of violations of the law of war.

What violations of the law of war may have been committed? A variety of theories may be applied to various activities of those responsible for the September 11 attacks and those associated with them. Basically, two questions arise: were these acts of war, and, if so, did they violate the law of war? The [answer to the] second question is simple: assuming these were acts of war, these attacks on noncombatant civilians violated the law of war.<sup>27</sup>

The first question, were these acts of war, is a bit more complicated. Although there is room for argument on both sides, it can reasonably be concluded that these were acts of war.

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22. See *The Prize Cases*, 67 U.S. 635 (1863); *Bas v. Tingy*, 4 U.S. 37 (1800). In *Talbot v. Seeman*, 5 U.S. 1 (1801), Chief Justice Marshall, for the Court, wrote, “It is not denied, nor in the course of the argument has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they apply to our situation, must be noticed.” *Id.* at 28.

Of course, this leaves open the question, how “far” do they apply? Marshall provided no clear answer, but the opinion did recognize that their application need not be explicit in Congress’s authorizing act. See also Congress’s declaration in the Mexican War, where Congress did not “declare war.” Rather, it recognized that “by the act of the Republic of Mexico, a state of war exists between that government and the United States.” WINTHROP, *supra* note 9, at 668.

23. See *Madsen v. Kinsella*, 343 U.S. at 346; WINTHROP, *supra* note 9, at 831-35. However, in the Civil War, Congress specifically authorized the use of military commissions in several acts. See WINTHROP, *supra* note 9, at 833.

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

25. In modern usage, the term “law of armed conflict” is ordinarily used. Because the term “law of war” is used in the UCMJ, that term is used in this paper.

26. Arguably, Article 104, UCMJ (10 U.S.C. § 904) might apply. Article 104 provides:

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

UCMJ art. 104 (2000). By its terms, article 104 applies to any person and is not limited to persons who are otherwise subject to the UCMJ. It seems likely that anyone who might have violated Article 104 with respect to the September 11 attacks would also be liable for a war crime.

Certainly, had they been carried out under the sponsorship of a state, no one would question that the September 11 attacks were acts of war. Al Qaida and others who may be responsible for the attacks do not constitute a state. This does not mean that they cannot commit or are not liable for war crimes. The law of war applies to non-state actors, such as insurgents.<sup>28</sup> Given the degree of violence in these attacks and the nature and scope of the organization necessary to carry them out, it is much more difficult to argue that they are not acts of war than to argue that they are.<sup>29</sup> The joint resolution of Congress, the action of the North Atlantic Treaty Organization recognizing the September 11 attack as an event triggering Article V of the Treaty, and the recognition by the United Nations Security Council that the attacks justify the right to self-defense strongly support the con-

clusion that the attacks were an act of war.<sup>30</sup> Finally, it is clear that individuals may be responsible for violations of the law of war.<sup>31</sup>

In sum, it would be anomalous to argue that, by operating so far outside the norms and principles of international law, the perpetrators of the attacks are beyond the application of the law of war.

As noted above, the jurisdiction of military commissions is limited to violations of the law of war.<sup>32</sup> Therefore, violations of U.S. criminal statutes are not, as such, subject to the jurisdiction of military commissions. This may restrict the number, and utility, of military commissions. It could complicate choice

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27. That a deliberate attack on noncombatant civilians violates the law of war is firmly embedded in customary law of war and also reflected in several conventions, such as Common Article 3 of the Geneva Conventions of 1949. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Depending on the theory used, it may be that the attack on the Pentagon did not constitute a war crime, because the Pentagon may be a legitimate military target. Nevertheless, the kidnapping and murder of civilians aboard the four hijacked aircraft and the attacks on the World Trade Center seem, by any definition, to constitute war crimes.

Additional war crimes might include unlawful belligerency, that is, the commission of acts of war without complying with the laws of war for recognition as a belligerent. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 80-82 (1956). *See also* Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

28. *See* Common Article 3 of the 1949 Geneva Conventions, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. *See also* The 1977 Protocols Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 (The United States has not ratified the 1977 Protocols, but recognizes that parts of them reflect customary law of war); DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 230-31 (2001).

Since World War II, there has been considerable debate about the application of the law of war to conflicts involving non-state actors. Many, if not most, of the conflicts since World War II have been "internal," that is, between a rebel or insurgent group and the state itself. Typically, and understandably, states have resisted the application of the law of war to such conflicts, for to do so might imply legitimacy to acts of violence carried out by the non-state actors. After all, the law of war recognizes that lawful combatants may kill and engage in other acts of violence against legitimate targets. States have not wished to risk conceding such a privilege to rebels, preferring to treat them, and their acts, as criminal.

To address conflicts between a state and non-state internal forces, Protocol II of the Geneva Conventions provides for applying law of war protections to conflicts between a state's "armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Clearly, the persons responsible for the September 11 attacks were not a state or even a "dissident force" under Additional Protocol II; nor were they entitled to the privileges pertaining to lawful combatants. The United States would be fully justified in treating them as common criminals. The question, however, is: must it do so? And, must it do so when the non-state actors are not an internal dissident group, but an apparently well organized and resourced entity operating on a global scale.

The conventions and customary law of war are designed to protect innocent victims. They do so by establishing standards of treatment for various noncombatants, including civilians, as well as lawful combatants who have been captured. That does not mean that these protections should be turned into a shield against the jurisdiction of a court for the trial of war crimes of an unprecedented nature.

29. It should also be noted that the September 11 attacks apparently marked the continued escalation of attacks attributed to al Qaida. Arguably, the United States was in a state of armed conflict with al Qaida long before September 11, 2001, as evidenced by attacks attributed to al Qaida on the World Trade Center in 1993, U.S. military barracks at Khobar, Saudi Arabia, in 1996, U.S. embassies in Kenya and Tanzania in 1998, and the USS Cole in 2000, and by U.S. retaliatory strikes against al Qaida targets in Sudan and Afghanistan in 1998. Whether or not that is the case, the earlier attacks on U.S. citizens and facilities add more weight to the case that the September 11 attacks were acts of war by an organized enemy. Moreover, it now appears that elements of al Qaida are engaged in the fighting in Afghanistan, lending further weight to their status as belligerents—albeit unlawful belligerents.

30. On 12 September 2001, NATO's North Atlantic Council stated that it regarded the attack as an action covered by Article V of the Washington Treaty, which states that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all." Also, on 12 September, the United Nations Security Council recognized the United States' right to self-defense. U.N.S.C. Res. 1368 (2001).

31. *See* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). *See generally* JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 209-10 (1996). Also, Congress's September 18 Resolution authorized the use of armed force against "organizations and individuals," as well as states.

32. Absent a grant of jurisdiction under some other statute. *See supra* note 26 and accompanying text.

of forum questions in cases in which a person may be liable for violations of U.S. laws as well as for war crimes.<sup>33</sup> More importantly, it raises serious questions about the breadth of the President's order. Indeed, it is in this context that the reach of the President's order creates some concerns.

The President's order includes a much broader group of people than those who may have committed war crimes. The order applies to "members" of al Qaida, to people complicit in "acts of international terrorism," and to those who have "harbored" such persons. The offenses, and hence offenders, described in the order are not limited to the September 11 attacks, or to acts related to them. This raises several questions.

First, it is not clear that membership, alone, in al Qaida or harboring terrorists violates the law of war—the necessary predicate to the jurisdiction of a military commission under both common law and Article 21, UCMJ. Indeed, not all acts of international terrorism are necessarily violations of the law of war. Therefore, if the order is to be applied to these categories of acts and persons, specific authority from Congress appears necessary.

Second, the order's application of military commissions to acts not associated with the September 11 attacks would uncouple the authority of such military commissions from Congress's September 18 joint resolution, which authorized force against those who "planned, authorized, committed, or aided the terrorist attacks on September 11." Using a military commission to address offenses unrelated to the September 11 attacks, particularly against persons in the United States, would raise additional serious questions of constitutional and statutory authority, at least in the absence of further authority from Congress.

Finally, the order applies a "reason to believe" standard to determining whether to subject someone in these categories to the jurisdiction of a military commission; thus, a resident alien could be compelled to forfeit substantial rights (see subsection II.B. below) without a clear demonstration that he or she is properly subject to the jurisdiction of a military commission.

### B. Persons Addressed in the President's Order

The President's order applies to non-U.S. citizens who are or were members of al Qaida or who were principals or accomplices in the September 11 attacks or who knowingly harbored such persons. Potential prosecutions before military commissions could arise against non-citizens (aliens) under a variety of circumstances, but they would fall into two broad categories: aliens not within the United States (or its territories), and aliens within the U.S.<sup>34</sup>

Aliens not within the United States have few, if any, constitutional protections.<sup>35</sup> Aliens present within the United States are entitled to due process protections. "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."<sup>36</sup>

For more than a century, it has been recognized that aliens, whether or not lawfully in the United States, are entitled to the rights of the Fifth and Sixth Amendments before criminal penalties may be imposed.<sup>37</sup> Of course, *Ex parte Quirin* suggests that an exception may exist for one who enters the country illegally in order to commit a war crime.<sup>38</sup>

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33. U.S. district courts have jurisdiction to try persons for war crimes, if the perpetrator or the victim is a

U.S. national or a member of the armed forces of the United States. 18 U.S.C. § 2441 (2000). This Act does not deprive military commissions of jurisdiction. H.R. REP. NO. 104-698, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166 ("The enactment of H.R. 3680 is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under the law of war or the law of nations."). *See also* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261(c). "Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." *Id.* Thus, Congress has recently recognized, and taken steps to preserve, the authority of military commissions to try offenses and offenders under the law of war.

34. Aliens in the United States can be divided into two broad groups—those present lawfully and those present unlawfully. The first group includes: lawful permanent residents; nonimmigrants (such as diplomats, and temporary visitors for work, study, or pleasure); and certain persons in humanitarian categories. Unlawful aliens includes: undocumented aliens, that is, persons who entered the United States without authorization or inspection and who have not acquired lawful status; and, status violators, that is, persons who entered the United States with authorization but who overstayed a visa or otherwise violated the terms of admission. *See* AMERICAN BAR ASSOCIATION CENTER FOR IMMIGRATION LAW AND REPRESENTATION, A JUDGE'S BENCHBOOK ON IMMIGRATION LAW AND RELATED MATTERS ch. 3 (2001).

35. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *see also* *Zadvydas v. Davis*, 533 U.S. 678 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

36. *Zadvydas*, 533 U.S. at 693.

37. *Wong Wing v. United States*, 163 U.S. 228 (1896). The Court has upheld, in some limited contexts, treating aliens differently from citizens, and treating some types of aliens different from other types, but these distinctions have been narrowly drawn. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding ban on alien probation officers); *Mathews v. Diaz*, 426 U.S. 67 (1976) (permitting distinction on rational basis grounds between permanent resident aliens based on length of time in the United States for purposes of Medicare eligibility).

Subjecting non-U.S. citizens outside the United States to the jurisdiction of military commissions raises the least likelihood of constitutional impediments, and also appears less objectionable on policy grounds. With respect to aliens already in the United States, such jurisdiction raises much more serious questions. It should be recalled, however, that in *Ex parte Quirin*, the Supreme Court upheld the trial during World War II—a declared war—by military commission for war crimes of a person presumed to be a U.S. citizen. The absence of a formal declaration of war in the current circumstances *could* have legal significance with respect to aliens within the United States, particularly those lawfully present.

### III. Judicial Review of Military Commissions

The President's order provides:

With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

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38. As discussed in note 15 and accompanying text, *supra*, in *Ex parte Quirin*, the Supreme Court upheld jurisdiction of a military commission to try a U.S. citizen for offenses committed in the United States because the citizen was a "belligerent" in a declared war. It distinguished *Ex parte Milligan*, which held a military commission lacked jurisdiction to try a citizen who was not a belligerent for offenses committed in the United States.

The President's order excludes citizens from the jurisdiction of military commissions, but arguably the belligerent—non-belligerent distinction *Quirin* drew with *Milligan* may have some relevance to the application of the President's order to aliens in the United States. Of course, the issue is further blurred by the fact that defining who is a "belligerent" is problematic in the current situation.

39. *Ex parte Vallandigham*, 68 U.S. 243 (1863).

40. But see *Johnson v. Eisentrager*, 339 U.S. 763 (1950), wherein the Court denied habeas review of the jurisdiction of a military commission outside the United States to try an enemy alien who was never in the United States for war crimes alleged to have been committed outside the United States. The Court distinguished its review of jurisdiction in *Yamashita*, pointing out that *Yamashita's* offenses and trial occurred in the Philippines, which were, at that time, possessions of the United States.

41. "The Proclamation also stated in terms that all such persons were denied access to the courts." *Ex parte Quirin*, 317 U.S. 1, 23 (1942).

42. Article 36(a), UCMJ (10 U.S.C. § 836(a)), provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ art. 36(a) 2000. The President's order refers to this provision; it also states that "I find consistent with section 836 of title 10 United States Code, that it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

Notwithstanding the broad nature of this language, it does not expressly suspend the writ of habeas corpus, and it is most unlikely that it could. Although the Supreme Court has held that military commissions are outside the normal process of judicial review,<sup>39</sup> it has reviewed applications for writ of habeas corpus by persons being tried by military commission. See, e.g., *Madsen v. Kinsella*, *Application of Yamashita*, *Ex parte Quirin*, all discussed above.<sup>40</sup>

The Court has carried out these reviews even in the face of language in the implementing Presidential order that purported to foreclose judicial review, much as in the current order.<sup>41</sup> In conducting such reviews, the Court has examined whether the legal predicates for a military commission were established. Consequently, if the President's order leads to trial of one or more individuals, it can be assumed that the validity of the order and the jurisdiction of such commissions will be reviewed in federal courts—at least with respect to any persons or trials within the United States, if the defendant has legal counsel who seeks review notwithstanding the prohibitory language of the President's order.

### IV. Procedures for Military Commissions

The President's order of November 13 provides only the sketchiest outline of procedures, leaving the details to the Secretary of Defense.<sup>42</sup> The order directs "a full and fair trial," "admission of such evidence as would . . . have probative value to a reasonable person," safeguarding classified information, conviction and, if necessary, sentencing "only upon the concurrence of two-thirds of the members of the commission," and review by the President or the Secretary of Defense. It also recognizes a right to counsel for the defendant.<sup>43</sup>

It remains to be seen what procedures will be developed and promulgated, but there is no reason these should not provide due process, even considering the exigencies that motivated the President's order.

In World War II and previously, the procedures in military commissions generally mirrored those used in courts-martial. Procedures in courts-martial have changed significantly over the last fifty years and, in many respects, parallel those used in civilian criminal trials. In paragraph 2(b)(2) of the Preamble of the Manual for Courts-Martial, the President has prescribed that, "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules and procedures and evidence prescribed for courts-martial." Therefore, except to the extent that his November 13 order provides otherwise, it appears that procedures for courts-martial should be the basis for those in military commissions.<sup>44</sup>

The United States is a party to the International Convention on Civil and Political Rights.<sup>45</sup> Article 14 of the ICCPR describes certain standards and procedures that should be used in all courts and tribunals.<sup>46</sup> It is fair to note that there is nothing in the Convention that suggests that either the United States or other nations contemplated at the time they adopted the Convention that it would apply to war crimes and military commissions, but it is also true that the basic rights set forth in the Convention have been respected in "war crimes" prosecutions conducted by the United Nations' special tribunals.<sup>47</sup>

## V. Other Considerations

Trying individuals by military commission would be a controversial step. Military commissions probably will not afford the same procedural protections as civilian courts.<sup>48</sup> The United States has protested the use of military tribunals to try its citizens in other countries. If conducted under reasonable procedures, however, military commissions can deliver justice

with due process. Nevertheless, regardless of their actual fairness, many will view the verdict of a military commission with skepticism.

The alternatives are not without difficulties. Killing surrendering individuals with no process whatever is hardly an option. This leaves several possible fora besides military commissions: U.S. domestic courts; an international tribunal; or the domestic courts of another country.

U.S. civilian courts, federal or state, would have jurisdiction to try war crimes and other offenses under various criminal statutes. Major concerns with the exercise of such jurisdiction center on security. This includes the physical security of the courthouse and the participants (including jurors) in the trial. It also includes the ability to safeguard classified information, including intelligence sources and methods whose compromise could facilitate future terrorist acts. While mechanisms exist to protect evidence of a classified nature from public exposure, these may not suffice to protect the information from the defendants and, through them, others who may use such information to the harm of the United States and its citizens.<sup>49</sup>

Trial before an international tribunal would have many of the same problems as trial in a U.S. court. The risk to intelligence sources would probably be substantially greater. Also, it is unlikely that the death penalty would be available in such a forum. Finally, given experience with international tribunals in Yugoslavia and Rwanda, it could take an unacceptably long time to authorize and set up an international tribunal to address these cases.<sup>50</sup>

Concerns with trial in the court of another country would depend on the circumstances. To the extent that evidence from U.S. intelligence sources was necessary, the concerns about compromise would be serious. Of course, with respect to trial in some foreign countries, due process concerns about military commissions could pale by comparison. Finally, even in the unlikely event that another country were willing to assert jurisdiction, it may be questioned whether the U.S. government or

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43. Under section 4(c)(5) of the order, the Secretary of Defense is authorized to prescribe regulations for "the conduct of the defense by attorneys for the individual subject to this order." Presumably, these would concern the qualifications of counsel and perhaps access to classified information. Extensive or unusual regulation could be cause for concern.

44. Some confusion may exist concerning whether Article 36, UCMJ, requires military commissions to follow the procedures the UCMJ prescribes for courts-martial, because Article 36 says the procedures in courts-martial and military commissions "may not be contrary to or inconsistent with this chapter." This language must be read in light of the other articles in the UCMJ, however. Most of those articles apply expressly to courts-martial, e.g., Article 51 says, "Voting by members of a general or special court-martial . . . shall be by secret written ballot." (emphasis added).

By their express terms, these articles and the procedures they prescribe do not include military commissions. Any suggestion that they apply by inference to military commissions is negated by the fact that in a few articles, e.g., Article 37, Congress expressly mentions military commissions along with courts-martial. Thus, when Congress wanted to make a specific provision applicable to military commissions as well as courts-martial, it did so. The fact that it did not apply most of the court-martial procedures to courts-martial, but left it to the President to decide (subject to the guidance, "so far as he considers it practicable" to apply rules and principles used in U.S. district courts), reflects the common law nature of military commissions, and the flexibility of their procedures.

45. GA. Res. 2200A (XXI), U.N. GAOR, Supp. No. 21, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. The United States, when it entered the Covenant, declared that in its view, Articles 1 through 27 of the treaty are not self-executing. The United States position is that these protections are, generally, in the United States Constitution and require no further implementation, and that the Covenant does not provide a basis for individuals to claim relief in United States Courts. Since the United States joined the Covenant, it has not departed from its provisions.

public would view such as an appropriate and adequate forum in which to bring to justice those responsible for the attacks.

## VI. Summary

1. The unprecedented and horrible attacks of September 11 demonstrated that the United States faces an organized enemy with the

resources and the will to cause mass death and destruction in the United States and elsewhere.

2. It is the duty of our Government to bring those responsible to justice and to take all legal measures to minimize the possibility of future terrorist attacks, consistent with its duty to preserve fundamental rights and liberties.

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46. Article 14 provides:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to have his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

*Id.*

47. The Human Rights Committee, established under Part IV, Articles 28-45, of the ICCPR has stated, in General Comment Number 13, that it “notes the existence, in many countries, of military or special courts which try civilians,” and that “[w]hile the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees of Article 14.” The ICCPR also includes, in Article 4, a provision permitting parties to derogate from their obligations, “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”

48. This view could complicate requests for extradition, or some other form of delivery, of suspected terrorists to control of the United States. For example, it has been reported that Spanish officials will refuse to extradite persons suspected of complicity in the September 11 attacks unless they receive assurances that such persons would be tried in civilian courts. Matthew Purdy, *A Nation Challenged: The Law; Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1.

49. The Classified Information Protection Act, 18 U.S.C. app. §§ 1-16 (2000), provides procedures for notice to the government and judicial screening when the defendant wishes to reveal classified information. It is designed to limit the defense's ability to leverage its possession of classified information in plea negotiations. The CIPA provides no protection for information that the prosecution might need to introduce or for information that the defense is permitted to introduce.

50. It should also be noted that the procedures in such tribunals do not necessarily comport with those in U.S. civilian trials. See Note, *Due Process in International Criminal Courts: Why Due Process Matters*, 87 VA. L. REV. 1381 (Nov. 2001).

3. There is historical authority supporting the President's establishment of military commissions in wartime, under the Constitution and laws of the United States.

4. Military commissions have been used in periods other than declared war.

5. Congress has authorized the President to use armed force against those persons, organizations, and states responsible for the September 11 attacks.

6. The scope of the President's power to act alone with respect to military commissions has not been developed in case law. The President's constitutional authority to use military commissions is least open to question when the President consults with and has the support of Congress.

7. Military commissions have authority to try persons for violations of the law of war. It can reasonably be argued that the September 11 attacks were violations of the law of war.

8. Absent additional congressional authority, military commissions do not have authority to try persons for crimes other than law of war violations.

9. The President's order of November 13, on its face, appears to apply to offenses that may not have been war crimes, and that may not be connected to the September 11 attacks.

10. The President's order applies to all non-citizens, including aliens lawfully present in the United States. The breadth of the President's order raises serious constitutional questions under existing precedent.

11. Military commissions are subject to habeas corpus proceedings in federal court, at least as to persons present in the United States and to U.S. citizens.

12. The President's order states that any military commission must provide a "full and fair" trial. It leaves to the Secretary of Defense to prescribe most of the procedures. Paragraph 2(b)(2) of the Preamble of the Manual for Courts-Martial suggests those procedures should generally follow those used in courts-martial.

13. The United States is a party to the International Convention on Civil and Political Rights. Article 14 of the ICCPR describes certain standards and procedures that should be used in all courts and tribunals. Although war crimes trials may not have been contemplated by the parties, the basic rights and procedures in Article 14 have been respected in United Nations special tribunals for war crimes.

14. Alternatives to military commissions include trial in U.S. district courts, international tribunals, and the courts of other countries. Each forum has advantages and disadvantages. The advantages of military commissions include providing greater security to participants and protecting sensitive intelligence that might be used to facilitate future terrorist acts. The major disadvantage is the perception (at least), at home and abroad, that military commissions lack adequate safeguards to ensure a fair trial. This perception will depend significantly on the application of the order and the procedures used in any military commission.

## VII. Recommendations

The Task Force makes the following recommendation which is consistent with existing American Bar Association policy:

All branches of the federal government should adhere to applicable U.S. Constitutional and international Rule of Law principles in all activities relating to the apprehension, detention, prosecution, sentencing, and appeals of persons suspected of or charged with committing terrorist acts or terrorism-related activities against the United States.

In addition, although the American Bar Association has no specific existing applicable policies, the Task Force makes the following recommendations:

1. Any use of military commissions should be limited to narrow circumstances in which compelling security interests justify their use.

2. Unless there is additional specific authority from Congress, the following persons should not be tried by military commission: persons lawfully present in the United States; persons in the United States suspected or accused of offenses unconnected with the September 11 attacks; and persons not suspected or accused of violations of the law of war.

3. The procedures for any military commission should fulfill the President's direction that they afford a "full and fair trial." They should "be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial," Manual for Courts-Martial, Preamble, paragraph 2(b)(2), and should conform to Article 14 of the International Covenant on Civil and Political Rights. The procedures in Article 14 include: an independent and impartial tribunal, with the proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the defendant: presumption of innocence; prompt notice of charges, and adequate time and facilities to prepare a defense; trial without undue delay; to be present, and to be represented by counsel of choice; to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses in his behalf under the same conditions as the witnesses against him; to the free assistance

of an interpreter; not to be compelled to testify against himself or to confess guilt; and to review of any conviction and sentence by a higher tribunal. In addition, any person tried by a military commission in the United States should be permitted to seek habeas corpus relief in United States courts; trial observers, if available, who have appropriate security clearance, should be permitted to observe the proceedings of military commissions; and no sentence of death should be permitted on less than a unanimous vote of all the members of a military commission.

4. In establishing and implementing procedures and selecting trial venues for handling persons charged with terrorist acts or terrorism-related activity against the United States, the federal government should consider the impact of its choices as precedents in (a) the prosecution of U. S. citizens in other nations and (b) the use of international rule of law norms in shaping other nations' responses to future acts of terrorism.

# Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts

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On 13 November 2001, President George W. Bush signed Military Order 222, authorizing the trial of non-U.S. citizens for war crimes by military commission.<sup>1</sup> Since the signing of that order, a contentious debate has raged over the possible use of military commissions to try suspected terrorists. As part of that debate, the media has used various terms to describe the proposed military commissions. They have called them "Secret Military Trials,"<sup>2</sup> "Military Tribunals,"<sup>3</sup> and "U.S. Military Court[s]."<sup>4</sup> A Cable News Network internet story described military commissions as "essentially a courts-martial, or a military trial, during a time of war."<sup>5</sup> This quotation illustrates the underlying misperception that military commissions and courts-martial are the same.<sup>6</sup> They are not.

In fact, substantial differences exist between military commissions and courts-martial. Although both courts have existed since the beginning of the United States, they have existed for different purposes, based on different sources of constitutional authority, and with different jurisdictional boundaries. These differences can affect who may order a trial, who may be tried, what types of cases the court can hear, and the pretrial, trial, and appellate procedures applied in a particular case.

This article examines two of the major distinctions between military commissions and courts-martial: the constitutional authority to create each court and their respective jurisdictional limitations. Due to the complicated constitutional and jurisdictional issues presented by military commissions, as compared to the relatively straightforward courts-martial, this article is

devoted primarily to discussing this generally misunderstood court.

## Section I: Constitutional Authority for Courts-Martial and Military Commissions

Most illustrative of the distinction between military commissions and courts-martial is the constitutional authority for the creation of these two courts. The Supreme Court has held, "Congress and the President, like the courts, possess no power not derived from the Constitution."<sup>7</sup> Thus, no branch of the government may convene a court without some source of authority from the Constitution. This section identifies and contrasts the constitutional authority for the creation of military commissions and courts-martial, and discusses the significance of these differences.

### *Courts-Martial*

The Constitution vests Congress with the authority to create courts-martial and establish rules for their operation. This power is derived from Article I, section 8, clause 14 of the Constitution, which states: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."<sup>8</sup> Congress first exercised its authority under Article I, section 8, in 1789, when it expressly recognized the then existing Articles of War and made them applicable to the Army.<sup>9</sup> In 1950, Congress dramatically revised the Articles of

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1. Military Order 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).
  2. Neil King, Jr., *Bush's Plan to Use Tribunal Will Hurt U.S. in Human-Rights Arena, Some Say*, WALL ST. J., Nov. 27, 2001, at A-2.
  3. Mona Charen, *Presidential Power and Military Tribunals*, WASH. TIMES, Nov. 26, 2001, at A-17.
  4. Dennis Byrne, *Can They Get a Fair Trial?; Sweet Justice in a U.S. Military Court*, CHI. TRIB., Nov. 19, 2001, at 23.
  5. Kevin Drew, *Tribunals Break Sharply from Civilian Courts*, CNN.com/LAWCENTER (Dec. 7, 2001), at <http://www.cnn.com/2001/LAW/12/06/inv.tribunals.explainer/index.html>.
  6. See generally William Glaberson, *A Nation Challenged: The Law; Tribunal v. Courts-Martial: Matter of Perception*, N.Y. TIMES, Dec. 2, 2001, at B-6 (describing the misperception and the reaction of former military attorneys to the misperception).
  7. *Ex parte Quirin*, 317 U.S. 1, 25 (1942).
  8. U.S. CONST., art. I, § 8.
  9. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 23 (2d ed., 1920 reprint).

War, creating the Uniform Code of Military Justice (UCMJ).<sup>10</sup> Through the UCMJ, Congress established courts;<sup>11</sup> defined their jurisdiction;<sup>12</sup> identified crimes;<sup>13</sup> delegated authority to create pre-trial, trial, and post-trial procedures;<sup>14</sup> and created an appellate system.<sup>15</sup>

### *Military Commissions*

Although the constitutional authority for courts-martial is easy to identify, the power to establish military commissions is not. Military commissions are a recognized method of trying those who violate the law of war,<sup>16</sup> but the power to create them lies at a constitutional crossroad. Both Congress and the President have authority in this area.<sup>17</sup> Congress's authority lies in Article I, section 8, clauses 1, 10, 11, 14, and 18.<sup>18</sup> Particularly given Congress's authority "to define and punish Piracies and Felonies committed on the high seas, and Offense against the Law of Nations,"<sup>19</sup> there is little question that Congress could, under appropriate circumstances, establish a military commission.

### *Presidential Authority*

The more controversial question concerns the President's authority to establish military commissions based upon his Article II powers. The President's authority regarding commissions is derived from Article II, section 2, clause 1, of the Constitution, which states, "The President shall be Commander in Chief of the Army and Navy of the United States."<sup>20</sup> The President's power to appoint a military commission without an

express grant of that authority from Congress is inherent to his role as the Commander in Chief of the armed forces. This argument has support from the UCMJ, international law, and Supreme Court precedent.

### *Statutory Authority*

While the UCMJ discusses military commissions,<sup>21</sup> it does not specifically grant the President the authority to create military commissions.<sup>22</sup> Instead, Articles 18 and 21, when taken together, recognize the jurisdiction of military commissions to try violations of the law of war, and articulate Congress's intent that the UCMJ not preempt that jurisdiction. Article 18 grants courts-martial the authority to try anyone suspected of committing war crimes, including civilians. It states: "[g]eneral courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."<sup>23</sup> Article 21 expresses Congress's intent not to interfere with the existing jurisdiction of military commissions over war crimes:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.<sup>24</sup>

If the UCMJ and other statutes do not vest the President with the authority to create military commissions, that authority, if it

10. 10 U.S.C. §§ 801-946 (2000). The UCMJ is a comprehensive collection of statutes that are the skeleton and much of the flesh of today's military justice system.

11. UCMJ art. 16 (2000).

12. *Id.* arts. 2-3, 17-21.

13. *Id.* arts. 77-134.

14. *Id.* art. 36.

15. *Id.* arts. 59-76.

16. WINTHROP, *supra* note 9, at 831; *see In re Yamashita*, 327 U.S. 1, 10 (1946); *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

17. *Quirin*, 317 U.S. at 26.

18. U.S. CONST. art. I, § 8, cls. 1, 10-11, 14, 18.

19. *Id.* art. I, § 8, cl. 10.

20. *Id.* art. II, § 2, cl. 1.

21. *See* UCMJ arts. 18, 21, 28, 36-37, 47-50, 58 (arguably), 104, 106 (2000).

22. *See id.*

23. *Id.* art. 18.

24. *Id.* art. 21.

exists, must be inherent to the President as Commander in Chief of the military.

Critical to this position is the concurrent jurisdiction language of Article 21. Given the significance of this Article, it bears further discussion. Article 21 was enacted in 1950 as part of the original UCMJ, and was derived verbatim from Article of War 15.<sup>25</sup> Perhaps because Article 21 was a wholesale adoption of Article of War 15, there was little discussion of it in the legislative history of the UCMJ.<sup>26</sup> Thus, to understand the intent of Article 21, it is necessary to examine the legislative history of Article of War 15.

Article of War 15 came into existence as part of the 1916 revisions to the Articles of War.<sup>27</sup> The chief proponent of Article 15 was Major General Enoch H. Crowder, the Judge Advocate General of the U.S. Army between 1911-1923.<sup>28</sup> General Crowder testified before the House of Representatives and the Senate on the necessity of Article 15. General Crowder described the military commission as a “common law of war” court.<sup>29</sup> He pointed out that the “constitution, composition, and jurisdiction of these courts have never been regulated by statute,”<sup>30</sup> but “its jurisdiction as a war court has been upheld by the Supreme Court of the United States.”<sup>31</sup> General Crowder argued that Article 15 was necessary to make clear that expansion of courts-martial jurisdiction did not preempt the jurisdiction of military commissions.<sup>32</sup> General Crowder concluded his testimony before the Senate by stating that Article 15 would

insure that military commissions would “continue to be governed as heretofore by the laws of war rather than statute.”<sup>33</sup>

General Crowder’s testimony before Congress supports the argument that Article of War 15, and thus Article 21 of the UCMJ, is a recognition of the jurisdiction of military commissions to try alleged violations of the laws of war. By recognizing the jurisdiction of military commissions without an express statutory grant of authority, Congress has effectively acknowledged the constitutional authority of the President to convene commissions.

#### *Customary International Law*

Although customary international law cannot bestow upon the President any authority he does not already possess through the Constitution, it can help to explain what powers are generally considered inherent to military command. International law recognizes the authority of a nation, and in particular, military commanders, to try war criminals by military commission.<sup>34</sup> Military courts have been used to try violators of the laws of war from medieval times,<sup>35</sup> including the American Revolutionary War,<sup>36</sup> the Mexican American War,<sup>37</sup> the Civil War,<sup>38</sup> and World War II.<sup>39</sup> Besides the United States, Great Britain,<sup>40</sup> Germany,<sup>41</sup> France,<sup>42</sup> Italy,<sup>43</sup> the Soviet Union,<sup>44</sup> Australia, the Philippines,<sup>45</sup> and China have all used military commissions to try individuals accused of war crimes.<sup>46</sup>

25. H.R. Doc. No. 81-491, at 17 (1949); S. REP. NO. 81-486, at 13 (1949).

26. The House and Senate hearings discussed military commissions, however, the discussion focused on little more than defining the meaning of the term “military commission.” The House and Senate reports mention commissions, but only indicate that military commissions have been recognized by the Supreme Court and that Article 21 is derived from Article of War 15.

27. *Revision of the Articles of War, Hearing on H.R. 23,628 Before the House Comm. on Military Affairs*, 62d Cong. 35 (May 21, 1912) (statement of Brigadier General Enoch H. Crowder, Judge Advocate General, U.S. Army) [hereinafter Crowder Testimony]; REVISION OF THE ARTICLES OF WAR, S. REP. NO. 63-229, at 53 (1914).

28. JONATHAN LURIE, *ARMING MILITARY JUSTICE* 47 (1992).

29. *Id.* at 35.

30. *Id.*

31. REVISION OF THE ARTICLES OF WAR, *supra* note 27, at 53.

32. *Id.* General Crowder argued that Article 15 was necessary because proposed changes to the Articles of War would give jurisdiction to courts-martial to try “persons subject to military law.” *Id.* If courts-martial jurisdiction was expanded to include “persons subject to military law,” then courts-martial, in addition to military commissions, would have jurisdiction over those who violate the laws of war. General Crowder urged that without Article 15, the question would arise whether Congress had ousted the jurisdiction of military commissions. *Id.*

33. *Id.* at 35.

34. Wigfall Green, *The Military Commission*, 42 AM. J. INT’L L. 832, 832 (1948).

35. Harold Wayne Elliott, *Trial and Punishment of War Criminals* 46 (1998) (unpublished S.J.D. dissertation, University of Virginia) (on file with author).

36. Green, *supra* note 34, at 832.

37. WINTHROP, *supra* note 9, at 832.

38. *Id.* at 833.

During the twentieth century, when the international community joined together to try war criminals, it relied upon the jurisdictional authority of military courts as the platform for its trials. After World War I, the allies demanded that Germans suspected of committing war crimes be turned over for trial before a military court.<sup>47</sup> After World War II, over ten nations took part in the International Military Tribunals in the Far East.<sup>48</sup> The Tribunals in the Far East were provided for in the Potsdam Declaration and convened by order of General Douglas MacArthur, the Supreme Commander of Allied Powers.<sup>49</sup> The international war crimes trials at Nuremberg were military tribunals. Although France, Great Britain, the United States, and the Soviet Union agreed upon the trials in the London Agreement of 8 August 1945, military officers signed the orders that actually established the International Military Tribunal,<sup>50</sup> and the trials were before military courts.<sup>51</sup>

Under customary international law, the right of a military commander to establish and use military commissions to try suspected war criminals is inherent to his authority as a commander. By making the President the commander of the U.S. military forces, the Constitution vests the President with that

authority generally associated with command, including the authority to create military commissions.

### *Supreme Court Precedent*

The Supreme Court confirmed the President's inherent authority to establish military commissions. The Court discussed this authority in three landmark cases. In *Ex parte Quirin*<sup>52</sup> and *In re Yamashita*,<sup>53</sup> the Court acknowledged that both the President and Congress have authority regarding military commissions, but neither case defines the President's authority to establish military commissions in the absence of an express grant from Congress.<sup>54</sup> The Court took this further step in *Madsen v. Kinsella*,<sup>55</sup> concluding that absent congressional action to the contrary, the President has the authority as Commander in Chief to create military commissions.<sup>56</sup>

Perhaps the most well-known case regarding military commissions, *Ex parte Quirin* involved the trial of eight German soldiers who had infiltrated the United States in 1942 with the intent to sabotage war facilities.<sup>57</sup> After being captured, the soldiers were tried before a military commission in accordance

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39. *Ex parte Quirin*, 317 U.S. 1 (1942).

40. WINTHROP, *supra* note 9, at 831 n.64; HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 105 (1993).

41. LEVIE, *supra* note 40, at 20.

42. *Id.* at 19.

43. *Id.* at 119.

44. *Id.* at 127.

45. *Id.* at 176.

46. *Id.* at 177.

47. *Id.* at 26-27. Although the Germans were never turned over, the fact that the Allies intended to try the Germans before a military court supports the position that international law recognizes the jurisdiction of military courts to try war criminals. *Id.*

48. *United States and Ten Other Nations v. Araki and Twenty-Seven Other Defendants*, *Transcripts of the International Japanese War Crimes Trials*, vol. I, 1 (1946) (on file with the U.S. Army Judge Advocate General's School, Charlottesville, Virginia).

49. *Id.* at 105-06, 123.

50. *I Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946-1949; Trials of War Criminals Before the Nuremberg Military Tribunal*, vol. 1, *The Medical Case*, XVI (1949); *Military Government—Germany, United States Zone, Ordinance No. 7*, Feb. 17, 1947.

51. JOHN A. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL LAW* 12 (1954).

52. 317 U.S. 1 (1942).

53. 327 U.S. 1 (1946).

54. *Quirin*, 317 U.S. at 29; *Yamashita*, 327 U.S. at 10.

55. 343 U.S. 72 (1952).

56. *Id.* at 348.

57. *Quirin*, 317 U.S. at 21.

with an order from President Franklin D. Roosevelt. The government charged the saboteurs with violating the law of war; Article of War 81, relieving intelligence to the enemy; and Article of War 82, spying. The saboteurs were also charged with conspiracy to violate Articles 81 and 82.<sup>58</sup> The petitioners filed a writ of habeas corpus in federal court, and the Supreme Court heard the writ on an expedited review. The proceedings before the military commission were suspended pending the Supreme Court's ruling.<sup>59</sup>

The petitioners in *Quirin* claimed that the President's order appointing a military commission was without constitutional or statutory authority. The Court disagreed, principally on statutory grounds. Although the Court discussed the President's constitutional authority regarding military commissions, it stated that "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."<sup>60</sup> Pointing to several Articles of War, the Court ruled that Congress had authorized military commissions by recognizing their jurisdiction and authorizing the President to establish rules for their conduct.<sup>61</sup>

Although the *Quirin* Court did not resolve to what extent the President had the authority to appoint military commissions, it set the stage for the case that eventually would. In *Quirin*, the Court discussed the President's constitutional role in the creation of military commissions. The Court pointed out that "the

Constitution . . . invests the President, as Commander in Chief, with the power to wage war which Congress has declared."<sup>62</sup> It also observed, "An important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."<sup>63</sup> Thus, when the President is executing a military action specifically authorized by Congress, he is permitted to create military commissions incident to the execution of that military operation.<sup>64</sup>

The Court's conclusions and reasoning in *Quirin* regarding the President's authority to appoint military commissions were echoed in *In re Yamashita*.<sup>65</sup> *Yamashita* involved the prosecution of General Tomoyuki Yamashita, the Commanding General of the Imperial Japanese Army in the Philippines. General Yamashita was tried and convicted by military commission for violations of the law of war in connection with his command of the Fourteenth Japanese Army Group.<sup>66</sup>

One of General Yamashita's allegations of error was that the commission that tried him was not lawful.<sup>67</sup> In answering this question, the Court reiterated its position in *Quirin* that Congress, through Article 15, had recognized the authority of military commanders to try violations of the law of war at a military commission.<sup>68</sup>

Based on this premise, the only question left to the Court regarding the lawfulness of the commission was whether it had been properly convened. The Court found that the President

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58. *Id.* at 23.

59. *Id.* at 20.

60. *Id.* at 29.

61. *Id.* at 26.

62. *Id.*

63. *Id.* at 28.

64. *Id.* The *Quirin* Court stated:

By his [the President's] Order creating the present commission he has undertaken to exercise the authority conferred upon him by Congress and also such authority as the Constitution itself give the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

*Id.* Some may argue that the President's authority in *Quirin* to create a military commission was critically linked to Congress's declaration of war. The Court gave no indications, however, that Congress's declaration of war carried with it any greater significance than an authorization to conduct a military action that was something less than war. This issue is discussed at length by Professor Curtis A. Bradley and Jack L. Goldsmith in an upcoming article entitled *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d (forthcoming Spring 2002). Bradley and Goldsmith point out in that article: "A congressional declaration of war is not necessary in order for the President to exercise his independent or statutorily-delegated war powers." *Id.*

65. 327 U.S. 1 (1946).

66. *Id.* at 5.

67. *Id.* at 6.

68. *Id.* at 7.

had directed General Yamashita be tried by military commission and the commission itself was convened by order of General Wilhelm D. Styer.<sup>69</sup> General Styer was Commanding General of the U.S. Army Forces in the Western Pacific, which included the Philippines. The Philippines was the location where the petitioner had committed his offenses, surrendered, was detained pending trial, and where the military commission was conducted.<sup>70</sup> Based on these facts, the Court concluded, “[I]t . . . appears that the order creating the commission for the trial of [the] petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals.”<sup>71</sup> Thus, the Court found it unnecessary to discuss the President’s authority regarding military commissions in any greater detail than it had in *Quirin*.

Seven years after *Yamashita*, the Supreme Court decided *Madsen v. Kinsella*,<sup>72</sup> and resolved the question of the President’s inherent authority to create military commission. The *Madsen* case came to the Supreme Court through a petition for a writ of habeas corpus submitted by Mrs. Yvette J. Madsen. In 1950, a military commission convicted Mrs. Madsen, a native-born U.S. citizen, of murdering her husband, a lieutenant in the U.S. Air Force, in their military quarters in Frankfurt, Germany. Mrs. Madsen was tried before a military commission in the American Zone of Occupied Germany.<sup>73</sup>

Madsen made a number of jurisdictional attacks on the military commission that convicted her. Among the errors alleged were that: (1) Madsen should have been tried by a courts-martial rather than a military commission, (2) the commission lacked jurisdiction over the offenses for which Madsen was tried, and (3) the commission itself was unconstitutional.<sup>74</sup> The Court rejected each of these claims, stating, “[i]n the absence of attempts by Congress to limit the President’s power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.”<sup>75</sup> The

Court emphasized that Congress had made no attempt to limit the President’s power regarding commissions. Rather than attempting to limit the President’s authority to appoint military commissions, Congress recognized and sanctioned this authority in Article of War 15.<sup>76</sup>

In *Madsen* the Supreme Court clarified an issue that hung conspicuously unanswered in *Quirin* and *Yamashita*. Both *Quirin* and *Yamashita* emphasized that Congress and the President had authority in the area of military commissions, but the Court did not articulate the extent of the President’s authority.<sup>77</sup> In *Madsen*, the Court resolved the issue, concluding that, absent congressional action to the contrary, the power to create military commissions is inherent in the President as Commander in Chief.

The shared power to create military commissions is unusual in a government predicated on the necessity of a separation of powers; it lies in what Justice Jackson called “a zone of twilight in which [the President] and Congress may have concurrent authority.”<sup>78</sup> Although this authority appears to be concurrent, it is not equal. The President’s authority to establish military commissions is subject to Congress’s power to limit that authority.<sup>79</sup> This hierarchy of power is logical given that the Constitution expressly grants Congress the authority to create military commissions,<sup>80</sup> while the President’s authority must be implied from his role as Commander in Chief of the armed forces.<sup>81</sup>

This brief examination of constitutional authority for the creation of courts-martial and military commissions demonstrates that these two types of courts are fundamentally different. The authority to create courts-martial jurisdiction rests with Congress alone. The Constitution vests in Congress alone the authority to create rules and regulations for the governance of the armed forces. In contrast, the authority to create military commissions is vested in both Congress and the President.

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69. *Id.* at 11.

70. *Id.* at 10.

71. *Id.* at 11.

72. 343 U.S. 341 (1952).

73. *Id.* at 343.

74. *Id.* at 342.

75. *Id.* at 348.

76. *Id.* at 354.

77. *Ex parte Quirin*, 317 U.S. 1, 26 (1942); *In re Yamashita*, 327 U.S. 1, 7 (1946).

78. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

79. *Madsen*, 343 U.S. at 348.

80. U.S. CONST. art. I, § 8.

Based on the UCMJ's legislative history, international law, and Supreme Court precedent, this shared authority arises from military commissions' function as a tool for the execution of war.

## Section II: Jurisdiction of Courts-Martial and Military Commissions

In addition to a distinctly different source of constitutional authority, the respective jurisdictions of military commissions and courts-martial are also different. Jurisdiction is a fundamental issue in every case. No criminal trial may proceed unless the court conducting the trial has jurisdiction over the person being tried and the subject matter in issue.<sup>82</sup> The fact that the jurisdiction of courts-martial overlaps with military commissions in some areas may contribute to the misconception that courts-martial and military commissions are one in the same. To remove any confusion and to highlight the differences between the two courts, this section will discuss and describe the jurisdiction of courts-martial and military commissions.

The UCMJ establishes personal jurisdiction for courts-martial at Articles 5 and 17. Article 17 states that “[e]ach armed force has courts-martial jurisdiction over all persons subject to this chapter,”<sup>83</sup> and Article 5 states that this jurisdiction “applies to all places.”<sup>84</sup> This general grant of jurisdiction can be exercised at three levels of courts-martial: general, special, or summary. Articles 18, 19, and 20 define the jurisdictional limitations of these courts. The main distinction between these courts is the maximum punishment each is authorized to impose.<sup>85</sup> The UCMJ authorizes general courts-martial to impose “any punishment not forbidden by [the Code], including the penalty of death,”<sup>86</sup> while special and summary courts martial punishments are considerably more limited.<sup>87</sup>

The phrase “persons subject to this chapter” appears in Articles 17 through 20, and describes the individuals over whom courts-martial jurisdiction may be exercised. Article 2 of the UCMJ defines this phrase as including individuals in the military on active duty,<sup>88</sup> members of the National Guard and Reserves in certain circumstances,<sup>89</sup> enemy prisoners while in custody,<sup>90</sup> retired service members,<sup>91</sup> and individuals accompanying a military force in times of war.<sup>92</sup> In addition to individ-

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81. Congress has exercised its authority regarding defining and punishing violations of the law of nations by, among other actions, authorizing the trial of violations of the law of war at courts-martial or military commission. By expressly recognizing the jurisdiction of military commissions in Article 21, UCMJ, and authorizing the President to prescribe rules for their conduct in Article 36, UCMJ, Congress has provided express authorization for the commissions. As noted by Justice Jackson in *Youngstown Sheet*: “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” 343 U.S. at 635.

82. *See, e.g.*, *United States v. Baucum*, 80 F.3d 539, 540 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 879 (1996); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1344 (9th Cir. 1999), *vacated on other grounds*, 508 U.S. 1201 (1992).

83. UCMJ art. 17 (2000).

84. *Id.* art. 5.

85. *Id.* arts. 18-20. In addition to distinctions in the maximum punishment each court is authorized to impose, there are due process and composition differences as well. As the maximum punishment a soldier is exposed to decreases so does the process due. For example, all contested general courts-martial must go through an Article 32 investigation before being brought to trial, while special and summary courts-martial do not. *Id.* art. 32. The minimum number of panel members necessary to create a quorum at a general court-martial is five, at a special it is three, while summary courts-martial are presided over by one officer. *Id.* art. 16.

86. *Id.* art. 18.

87. *Id.* arts. 18-20. According to UCMJ article 19, special courts-martial may impose no punishment greater than a bad conduct discharge, one year in confinement, hard labor without confinement for three months, and two-thirds forfeiture of pay for one year. *Id.* art. 19. This jurisdiction has been further limited by the President, as authorized by Congress, in Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(i). *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(B)(i) (2000)* [hereinafter MCM]. Summary court-martial jurisdiction is discussed in UCMJ article 20. The maximum punishment at a summary court-martial is confinement for one month, hard labor without confinement for forty-five days, restriction for two months, and forfeiture of two-thirds pay for one month. UCMJ art. 20. Neither a special nor a summary courts-martial may impose the death penalty, dismissal, or a dishonorable discharge. *Id.* arts. 19-20.

88. *Id.* arts. 2(a)(1)-(2).

89. *Id.* arts. 2(a)(3), (5)-(6).

90. *Id.* art. 2(a)(9).

91. *Id.* art. 2(a)(4).

92. *Id.* arts. 2(a)(10)-(11). Article 2 also defines “persons subject to this chapter” as including “persons in custody of the armed forces serving a sentence imposed by a courts-martial” and people occupying an area which the United States has leased, reserved, or otherwise acquired which is outside the United States, the Canal Zone, Puerto Rico, Guam, and the Virgin Islands. *Id.* art. 2.

uals described in Article 2, general courts-martial have personal jurisdiction over those accused of violating the laws of war. Article 18 provides that “[g]eneral courts-martial . . . have jurisdiction to try any persons who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”<sup>93</sup>

Besides describing the three levels of courts-martial, Articles 18, 19, and 20, also describe the subject-matter jurisdiction of those courts. Each court has jurisdiction to try “any offense made punishable by this chapter.”<sup>94</sup> Articles 77 through 134 describe the offenses that are made punishable by the UCMJ. General courts-martial also have the added subject-matter jurisdiction over any violation of the laws of war that could be tried at a military commission.<sup>95</sup>

### *Military Commissions*

Because court-martial jurisdiction is established by statute, it is a relatively simple task to read the statute and understand who can be tried for what crimes by courts-martial. This task is more complex with military commissions. To determine the jurisdiction of military commissions, three zones of jurisdiction must be considered: customary international law, international treaties, and the Constitution. These three zones of jurisdiction must be considered and laid over one another to determine the jurisdiction of military commissions.

### *Jurisdictional Limitations Imposed by Custom and History*

Military commissions have been used throughout American and international history. These courts have not always been called military commissions; before the term military commission came into use they were called courts-martial, courts of inquiry, or special courts-martial.<sup>96</sup> From the historical use of these commissions, customary international law regarding their jurisdiction can be discerned. The jurisdictional boundaries of these tribunals have evolved and been refined, arguably to

accommodate the changing nature of warfare. This evolution and refinement is illustrated particularly well in U.S. history.

As explained by General Crowder in his testimony before Congress, and by the Supreme Court in *Ex parte Quirin*, *In re Yamashita*, and *Madsen*, U.S. military commissions have drawn their jurisdiction to try cases from customary international law.<sup>97</sup> (General Crowder and the Supreme Court often used the term “international common law” when referring to what is more commonly referred to as “customary international law.”) Therefore, a historical examination of the evolution and refinement of American military commissions reflects the evolving nature of customary international law.

The United States has used military commissions since before the ratification of the Constitution<sup>98</sup> and as late as 1950 in occupied Germany.<sup>99</sup> Customary international law, Supreme Court precedent, and U.S. history indicate that three distinct types of military commissions have been used: martial law courts, military government courts, and war courts.<sup>100</sup> Each type of military commission has unique jurisdictional characteristics. Martial law courts refer to courts established by a military commander whose forces have occupied a particular area within the United States and displaced the civil government. Military government courts are the same as martial law courts, except they are established either outside of the United States or in areas within the United States in a state of rebellion. Finally, war courts are established by military commanders strictly for the purpose of trying violations of the laws of war.<sup>101</sup>

### *American Commissions in Their Infancy*

One of the first and most famous military commissions in the United States, the trial of Major John André, was a war court. André, the Adjutant General to the British Army in North America, was captured after meeting with Major General Benedict Arnold in September 1780.<sup>102</sup> At the meeting, General Arnold gave André copies of the defense plans for the military post at West Point.<sup>103</sup> André still possessed the plans at the

93. *Id.* art. 18.

94. *Id.* arts. 18-20.

95. *Id.* art. 18.

96. WINTHROP, *supra* note 9, at 831-32; WINTHROP SERGENT, *THE LIFE OF MAJOR ANDRE* 347 (1871).

97. *Madsen v. Kinsella*, 343 U.S. 341, 346 (1952); *In re Yamashita*, 327 U.S. 1, 20 (1946); *Ex parte Quirin*, 317 U.S. 1, 30 (1942); Crowder Testimony, *supra* note 27.

98. WINTHROP, *supra* note 9, at 831-32.

99. *See, e.g., Madsen*, 343 U.S. at 341.

100. *See MCM*, *supra* note 87, pt. I, ¶ 2. Part I, paragraph 2 of the *MCM* describes military jurisdiction. The *MCM* lists four distinct areas within military jurisdiction: military law, martial law, military government, and the law of war. *Id.*

101. *Id.*

102. SERGENT, *supra* note 96, at 347.

time of his capture. General George Washington ordered Major André tried for the offense of spying. A military commission found André guilty and sentenced him to death.<sup>104</sup>

Although the trial of Major André was controversial, this was not due to jurisdictional issues. The jurisdiction to try enemy soldiers for war crimes at a military commission was well established by 1780. Indeed it would be difficult for the British to claim that the trial ordered by General Washington lacked jurisdiction, given Britain's use of a less formal proceeding to find Nathan Hale guilty and execute him four years earlier for the same offense.<sup>105</sup>

A more controversial use of a military commission occurred when General Andrew Jackson ordered the trial of a non-military U.S. citizen at one of the first martial law courts in the United States. In December of 1814, prior to the Battle of New Orleans, General Jackson declared a state of martial law in the city of New Orleans.<sup>106</sup> Jackson prepared the city for a siege, and to that end, he established curfews and pass policies.<sup>107</sup> Individuals found in violation of Jackson's curfew or pass policy faced arrest. Jackson also ordered military personnel to enter private homes to commandeer entrenching tools or other supplies he deemed necessary to the war effort.<sup>108</sup> After winning the Battle of New Orleans, General Jackson maintained the city in a state of martial law, despite the retreat of the British forces.<sup>109</sup>

Jackson's actions drew widespread criticism throughout New Orleans. One of Jackson's critics was Louis Louaillier, a member of the Louisiana Legislature. Louaillier wrote an editorial in a local newspaper declaring that the continued state of martial law was inappropriate and unnecessary.<sup>110</sup> Jackson ordered that Louaillier be arrested and tried by military commission for a number of offenses, including espionage and inciting mutiny.

An attorney who witnessed Louaillier's arrest filed a petition for a writ of habeas corpus on behalf of Louaillier in federal court. Louaillier's attorney claimed the military court had no jurisdiction over his client since Louaillier was a civilian. Federal judge Dominick A. Hall granted the writ, and ordered Louaillier be presented to his court the next day. Jackson, who was an attorney by trade, refused to honor the court order, and had Hall arrested on a charge of aiding and abetting and exciting mutiny.<sup>111</sup> A military commission tried Louaillier, but he was not found guilty of any charge. The commission determined it did not have jurisdiction to try Louaillier for six of the seven charges in the case. As to the seventh charge—espionage—the commission found Louaillier not guilty. Jackson refused, however, to accept the findings of the commission, and placed Louaillier back into confinement.<sup>112</sup>

Shortly after the military commission acquitted Louaillier, news that Britain and the United States had signed a peace treaty finally reached New Orleans. Upon receiving notice of the peace agreement, General Jackson lifted the state of martial law. Jackson also ordered the release of Louaillier and all the other individuals whom he had ordered arrested based on violations of martial law.<sup>113</sup>

Judge Hall wasted little time in issuing an order for Jackson to show cause why he should not be held in contempt of Judge Hall's earlier order to release Louaillier. General Jackson made a number of responses to the court's show cause order, but they were all rejected. The court found Jackson in contempt and ordered him to pay a \$1000 fine as punishment. Judge Hall effectively summarized the case of *United States v. Jackson* by stating: "The only question was whether the Law should bend to the General, or the General to the Law."<sup>114</sup>

The declaration of martial law in New Orleans and the trial of Louis Louaillier, along with the subsequent contempt proceedings against Jackson in federal court, are historically valu-

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103. ROBERT HATCH, MAJOR JOHN ANDRE 243-48 (1986).

104. SERGEANT, *supra* note 96, at 347. The convening order from Washington tasked the court to examine whether "[h]e came within our lines in the night on an interview with Major General Arnold, and in assumed character; and was taken within our lines, in a disguised habit, with a feigned name, and with the enclosed papers concealed upon him." *Id.*

105. HATCH, *supra* note 103, at 68-69.

106. LURIE, *supra* note 28, at 12.

107. MARQUIS JAMES, ANDREW JACKSON: THE BORDER CAPTAIN 226 (1933).

108. *Id.* at 244.

109. *Id.* at 275.

110. *Id.* at 282.

111. LURIE, *supra* note 28, at 12.

112. JAMES, *supra* note 107, at 283.

113. *Id.*

able for two reasons. First, Jackson's use of martial law and a military court to try Louaillier provides one of the first examples of a martial law court being used in the United States to try a non-military U.S. citizen. Second, the trial of Louis Louaillier illustrates one of the most fundamental jurisdictional issues in the area of military commissions in the United States: when may a military commission be used against a U.S. civilian? This question, raised by the events of 1815, arose again in 1866, 1946, and in 1952 with varying results.<sup>115</sup>

The trials of Major André and Louis Louaillier are examples of American military commissions in their infancy. They demonstrate that as early as 1780 and 1815, the United States had employed military commissions as both war courts and martial law courts. Although these early cases establish the United States had used military commissions in the Revolutionary War and the War of 1812,<sup>116</sup> it was not until the Mexican-American War and the Civil War that the United States employed military commissions on a large scale.<sup>117</sup> It was also during these larger conflicts that the distinction between military government courts, martial law courts, and war courts achieved greater clarity.

#### *Mexican-American War*

During the Mexican-American War in 1847, the U.S. Army occupied large sections of Mexico. General Winfield Scott, the commander of those occupied areas, declared a state of martial law and suspended the authority of the civil government. Individuals who committed crimes in those occupied areas could be brought to one of two kinds of military courts: a military commission or a council of war. In 1847, these two military courts were generally alike, except for their names and the type of cases they heard. Military commissions were essentially military government courts. They were used to try individuals for crimes that would normally be brought before a civilian crimi-

nal court during peacetime. Councils of war were war courts. They were used to try violations of the law of war.<sup>118</sup>

During the Mexican American War the jurisdictional limitations of military commissions began to crystallize.<sup>119</sup> Both military government courts and war courts faced territorial and temporal limitations to their subject-matter jurisdiction. Offenses tried before a commission must have been committed: (1) in a theater of war, (2) within the territory controlled by the commander ordering the trial, and (3) during a time of war.<sup>120</sup> Additionally, the trial itself had to be conducted within a theater of war.<sup>121</sup> These jurisdictional limitations are arguably still in place today, but the meaning of the term "theater of war" has evolved.

#### *Civil War*

The Civil War and the subsequent four years entail the most extensive use of military commissions in U.S. history. The government conducted over 4000 military commissions during the war<sup>122</sup> and 1435 more between 1865 and 1869.<sup>123</sup> These commissions, used in the North and the South, tried both military personnel and civilians. The charges they heard ranged from crimes against the laws of war, to acts in violation of President Lincoln's 24 September 1862 proclamation, to crimes usually cognizable by civil criminal courts.<sup>124</sup> Functioning as war courts, martial law courts, and military government courts, respectively, each type of military court was called a military commission.<sup>125</sup>

One of the most controversial uses of military commissions during the Civil War stemmed from President Lincoln's 24 September 1862 declaration of a state of limited martial law throughout the country.<sup>126</sup> Lincoln's proclamation authorized the use of military commissions to try U.S. civilians in areas that were not in a zone of occupation or under insurrection, and

114. *Id.* at 286.

115. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Madsen v. Kinsella*, 343 U.S. 341 (1952).

116. WINTHROP, *supra* note 9, at 832.

117. *Id.* at 832-34.

118. WINTHROP, *supra* note 9, at 832.

119. *Id.* at 837.

120. *Id.* at 836-37.

121. *Id.* at 836.

122. MARK NEELY, *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 168 (1991).

123. *Id.* at 176.

124. *Id.* at 168.

125. WINTHROP, *supra* note 9, at 832.

suspended the writ of habeas corpus for anyone confined by military authorities.<sup>127</sup> The use of military commissions in this context was so questionable that at least one military commission declared that it did not have jurisdiction to try U.S. civilians outside of a zone of occupation or insurrection.<sup>128</sup> Others, like noted law of war scholar Francis Lieber, believed the commissions proper, arguing that because the whole country was at war, the whole country was within the theater of war.<sup>129</sup>

Some might argue that the Supreme Court resolved this debate in 1866 when it decided *Ex parte Milligan*.<sup>130</sup> In *Milligan*, the Court ruled that military commissions lacked the jurisdiction to try U.S. civilians when the civil courts were still in operation. The Court also held that the authority to use military commissions could not arise “from a threatened invasion.”<sup>131</sup> Rather, “the necessity must be actual and present” and the jurisdiction was limited to “the locality of actual war.”<sup>132</sup> The majority in *Milligan* based this ruling not just on an interpretation of the Constitution, but also on the traditions of England.<sup>133</sup>

Despite the Supreme Court’s strongly worded denunciation of military commissions, the scope of the Court’s ruling in *Ex parte Milligan* was surprisingly limited. The only jurisdictional limitation placed on military commissions by the Court regarded their use against civilians in areas not under valid martial law or occupation.<sup>134</sup> Thus, the ruling had no effect on the use of commissions in the occupied South or in the case of mil-

itary personnel.<sup>135</sup> In fact, the United States conducted well over two hundred military commissions after the *Milligan* decision.<sup>136</sup>

### *Post-Civil War*

After the Civil War, it was not until World War II that it was necessary for the United States to resort to the large-scale use of military commissions.<sup>137</sup> Once again, the United States used these commissions as war courts, military government courts, and martial law courts.<sup>138</sup> Customary international law standards for jurisdiction remained in place, but, given the global nature of World War II, the limitation of “the theater of war” lost much of its relevance. This evolution in the jurisdiction of military commissions is best illustrated by *Ex parte Quirin*.

In *Quirin*, the United States tried the petitioners for sabotage, spying, attempting to give intelligence to the enemy, and conspiracy to commit those crimes. The government alleged the saboteurs committed these offenses in Florida, New York, and arguably other states on the east coast of the United States. After being captured, the petitioners were tried by military commission in Washington D.C.<sup>139</sup>

The location of the petitioners’ offenses and their trial are both significant because neither appears to be within the theater

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126. The widespread use of military commissions, military arrests, and the suspension of the writ of habeas corpus are some of President Lincoln’s most controversial acts during the Civil War.

127. NEELY, *supra* note 122, at 65. President Lincoln’s proclamation ordered that

during the existing insurrection and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.

*Id.*

128. *Id.* at 144.

129. *Id.* at 160.

130. 71 U.S. (4 Wall.) 2 (1866).

131. *Id.* at 127.

132. *Id.* at 128; NEELY, *supra* note 122, at 176.

133. *Milligan*, 71 U.S. at 128.

134. *Id.*

135. LURIE, *supra* note 28, at 42.

136. NEELY, *supra* note 122, at 177.

137. *Id.* at 182-83.

138. REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES: EUROPEAN COMMAND, JUNE 1945 TO JULY 1948 52 (1948) [hereinafter JAG WAR CRIMES REPORT].

139. *Ex parte Quirin*, 317 U.S. 1, 22-23 (1942).

of war as that term was defined in the Civil War.<sup>140</sup> The Court discussed the petitioners' claim that the military commission had no jurisdiction over them because they had committed no "act of depredation or entered the theatre or zone of active military operations."<sup>141</sup> The Court resolved the petitioners' claim by concluding the petitioners completed their crimes when they passed through U.S. military lines and remained in this country.<sup>142</sup> This answer tacitly agreed with the Attorney General's brief in *Quirin* which argued, "The time may now have come . . . when the exigencies of total and global war must force a recognition that every foot of this country is within the theatre of operations."<sup>143</sup>

From the earliest moments of U.S. history to World War II, the United States has applied customary international law to define the jurisdiction of military commissions. Therefore, the expansion of "the theater of operations" illustrates that American military commission jurisdiction, and thus the jurisdictional limitations imposed by customary international law, have evolved over time with the changing nature of warfare.

### *Jurisdictional Limitations Imposed by International Treaties*

International treaties further restrict the jurisdiction of military commissions. Even if the United States has the authority under customary international law to conduct a military commission, it would be unable to exercise that authority if it had entered into a treaty which precluded the use of commissions. Although the United States is not a signatory to any treaty expressly forbidding the use of military commissions, it has entered into several treaties that affect how or when it can use commissions and the minimum due process necessary at a commission. The most significant of these treaties regarding military commissions are the four 1949 Geneva Conventions, particularly, Geneva Convention III Relative to the Treatment of Prisoners of War,<sup>144</sup> and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.<sup>145</sup>

All four of the 1949 Geneva Conventions were enacted in response to the events of World War II. The international community created the Conventions in an effort to establish universal rules for the protection of the victims of war.<sup>146</sup> The Conventions specifically addressed the treatment of the wounded and sick in the field and at sea,<sup>147</sup> prisoners of war,<sup>148</sup> and civilians.<sup>149</sup> Among the safeguards provided by these Conventions were due process obligations imposed on any nation seeking to prosecute individuals during a time of armed conflict.<sup>150</sup>

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140. WINTHROP, *supra* note 9, at 832.

141. *Quirin*, 317 U.S. at 38. Although the Court did address the theater of war issue relating to where the petitioners crimes were committed, it did not address the theater of war issue relating to the location of the commission. *See id.*

142. *Id.*

143. *Id.* at 46; Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 75 (1980).

144. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

145. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

146. JEAN DE PREUX ET AL., COMMENTARY, IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, forward (Jean S. Pictet ed., 1958) [hereinafter DE PREUX]. The forward sections of all of 1949 Geneva Convention commentaries are the same.

147. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

148. Geneva Convention III, *supra* note 144.

149. Geneva Convention IV, *supra* note 145.

150. Geneva Convention I, *supra* note 147, art. 3 [hereinafter Common Article 3] (this provision is in all four Conventions, thus referred to as Common Article 3); Geneva Convention III, *supra* note 144 ch. 3; Geneva Convention IV, *supra* note 145, arts. 64-78. These provisions address the trial or punishment of individuals during armed conflict.

With the exception of Common Article 3, all the articles of the four 1949 Geneva Conventions, apply only to “international armed conflicts.”<sup>151</sup> Thus, the provisions of Geneva Conventions III and IV regarding the jurisdiction of military commissions are only applicable to the situation where a “difference between two States . . . [leads] to the intervention of members of the armed forces.”<sup>152</sup>

### *Geneva Convention III*

Before the 1949 Conventions, several international agreements had laid substantial groundwork regarding the treatment of prisoners of war.<sup>153</sup> Geneva Convention III built upon this foundation. The trial of prisoners of war was one area of particular concern after World War II. The Convention devotes twenty-eight of its 143 articles to the trial and punishment of prisoners. Articles 4, 84, 85, and 102 are particularly relevant to the jurisdiction of military commissions.

Under Geneva Convention III, the term “prisoner of war” does not apply to all those captured by our military during a time of war. Prisoner of war is defined at Article 4 of Geneva Convention III, and includes, among others “members of the armed forces of a party to the conflict;”<sup>154</sup> “members of militias, . . . volunteer corps, . . . and organized resistance movements” who meet certain conditions;<sup>155</sup> and “persons accompanying the force without actually being members thereto.”<sup>156</sup> If persons do not meet the definition contained in Article 4 of the Convention, then they are not considered to be a prisoner of war and are not entitled to the protections provided by Geneva Convention III beyond Common Article 3.<sup>157</sup>

For those entitled to prisoner of war status, the Convention recognizes the competency of military courts to try them, with limitations. Article 84 states that “[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense alleged.”<sup>158</sup> Although Article 84 recognizes and even favors the use of military courts to try prisoners of war, Article 102 limits the kind of military court that may be employed. Under Article 102 “a prisoner can be validly sentenced only if the sentence has been pronounced by the same courts according the same procedure as in the case of members of the armed forces of the Detaining Power.”<sup>159</sup> Article 85 makes it clear that the limitations established in Article 102 were intended to apply regardless of when a prisoner of war’s crimes were committed. Article 85 states: “[P]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”<sup>160</sup>

Thus, based on Articles 84, 85, and 102, the United States could only use military commissions to try prisoners of war when they are used to try U.S. military personnel. Because the United States does not currently use commissions to try its military personnel, it could not use them to try prisoners of war.

Some may argue the above conclusion is flawed, claiming the United States can use military commissions to try enemy prisoners of war so long as we *could* use them to try our own military. Thus, even if the United States does not customarily try its own service members by military commissions, the simple fact that it has the authority to do so is sufficient to meet the requirements of Articles 84, 85, and 102. This argument fails for two reasons.

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151. Common Article 3, *supra* note 150.

152. DE PREUX, *supra* note 146, at 23.

153. *Id.* at 3-4.

154. Geneva Convention III, *supra* note 144, art. 4(A)(1).

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

156. *Id.* art. 4(A)(4).

157. When the status of an individual is in question, the Convention provides a mechanism for resolving the issue. Article 5 provides:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

*Id.* art. 5. Thus, when it is unclear whether an individual meets Article 4’s definition of prisoner of war, the detaining power can conduct a tribunal to determine that individual’s status.

158. *Id.* art. 84. Thus, Article 84 “establishes the competence of military courts.” DE PREUX, *supra* note 146, at 412.

159. Geneva Convention III, *supra* note 144, art. 102.

160. *Id.* art. 85.

First, the language of Article 102 is inconsistent with such an interpretation. Article 102 states: “A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of the members of the armed forces of the Detaining Power.”<sup>161</sup> Those supporting the argument that we *can* use military commissions to try prisoners of war even when we are not using them to try our own service men and women seek to rewrite Article 102. This new Article 102 would read: “A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same court *that could be used to try the armed forces of the Detaining Power*, according to the same procedure *that could be used* in the case of members of the armed forces of the Detaining Power.” Nothing in Article 102 or the Commentary to the Article supports such an interpretation.

The second reason such an argument fails is that it would undercut the objectives of Article 85. Article 85 was created, at least in part, to address the situation when members of the armed forces of a nation were not afforded the protections of the 1929 Geneva Convention because their crimes were alleged to have been committed before capture.<sup>162</sup> The Commentary to Article 85 specifically cites to *In re Yamashita* as an example of what the drafters of Article 85 sought to avoid. Those that would argue that Article 85 only requires a nation to try prisoners of war by those courts that it could have used to try its own service members ignore the objectives of Article 85, to include the objective of preventing a repeat of *Yamashita*. In 1946, the United States could have used military commissions to try its own personnel, it simply did not. Accordingly, if General Yamashita were tried today, a military commission could still try him. It seems extremely unlikely that the drafters and signatories of Geneva Convention III intended Article 85 to be so impotent.

The interplay between Articles 84, 85, and 102 are particularly significant for the United States. During World War II, the United States used military commissions to try prisoners of war for violations of the laws of war committed prior to capture.<sup>163</sup> The United States, however, did not use military commissions to try its own soldiers, regardless of when the infractions were alleged to have been committed.<sup>164</sup> This distinction was signif-

icant. The Manual for Courts-Martial in effect in 1945 placed restrictions on the use of hearsay evidence and deposed testimony; military commissions were not bound by these restrictions.<sup>165</sup> This fact was highlighted by De Preux in his Commentary on Article 85 and cited to as one of the reasons for Article 85.<sup>166</sup> Thus, based on Articles 84, 85, and 102, it seems that the United States could not exercise military commission jurisdiction today as it did during the Second World War. If the United States wished to take an enemy prisoner of war to a military commission, it could do so only if it used military commissions to try its own soldiers.

#### *Geneva Convention IV*

In addition to the new restrictions on military commissions established in Geneva Convention III, Geneva Convention IV also places greater limitations on the use of military commissions in an international armed conflict. While the restrictions placed on the use of military commissions by Geneva Convention III seem to be directed to war courts, the restrictions in Geneva Convention IV go principally to military government courts. This focus is logical given the Convention’s objective of protecting civilians in the time of war.

Civilians are perhaps at their most vulnerable when in the hands of an occupying military force. Thus, Geneva Convention IV provides detailed provisions regarding the trial of civilians in occupied territories.<sup>167</sup> The provisions of Geneva Convention IV relevant to the jurisdiction of military commissions are Articles 64, 66, and 70.

Article 64 demonstrates the strong preference to try civilians in an occupied territory before their own courts: “[S]ubject to the latter consideration of justice and to the necessity of ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws.”<sup>168</sup> By encouraging the continued use of court systems in operation before occupation, the Convention allows civilians in occupied areas to avoid facing “a lack of understanding or prejudice on the part of a people of foreign mentality, traditions or doctrines.”<sup>169</sup>

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161. *Id.* art. 102.

162. DE PREUX, *supra* note 146, at 413-16.

163. JAG WAR CRIMES REPORT, *supra* note 138, at 46-51.

164. *In re Yamashita*, 327 U.S. 1, 20-21 (1946); *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950).

165. *Yamashita*, 327 U.S. at 20-21.

166. DE PREUX, *supra* note 146, at 413.

167. *See* Geneva Convention IV, *supra* note 145, arts. 64-78.

168. *Id.* art. 64.

169. DE PREUX, *supra* note 146, at 336.

Although Article 64 demonstrates a preference for maintaining the preexisting courts of an occupied area, this preference is not without restriction. The preexisting courts will not be used: (1) if the court system itself is contrary to Geneva Convention IV or has “been instructed to apply inhumane or discriminatory laws,”<sup>170</sup> or (2) if the preexisting court system cannot administer justice effectively.<sup>171</sup> Thus, except when the preexisting courts of an occupied territory are unwilling or unable to provide justice, those courts should be used to try offenses that were criminal before occupation.

Besides establishing the presumption that the criminal courts in operation before an occupation will continue to administer the civilian criminal justice system, Article 64 also contains provisions that enable an occupying force to create laws necessary for the efficient conduct of the military government and for the protection of the occupying force. The second paragraph of Article 64 states:

[T]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.<sup>172</sup>

De Preux characterized the above section as the “legislative powers of the occupant.”<sup>173</sup> This legislative power is particularly important with regard to the jurisdiction of military commissions under the Convention.

Although Geneva Convention IV favors trials of civilians in their country’s own courts, this is not true of offenses made criminal under the occupying power’s legislative authority. Under Article 66 of Geneva Convention IV, “[i]n cases of a breach of the penal provisions promulgated by it in virtue of the second paragraph of Article 64, the occupying power may hand

over the accused to its properly constituted, non-political military courts, on condition that said courts sit in the occupied country.”<sup>174</sup> Article 66 allows the occupying power the jurisdiction to punish those who violate the legislation created by that power.

The last section of Geneva Convention IV regarding the jurisdiction of military commissions is Article 70, which states: “[P]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.”<sup>175</sup> This Article limits the occupying power’s jurisdiction to offenses committed during the time of actual occupation. The one exception to this general rule is for “breaches of the laws and customs of war.”<sup>176</sup> This exception is based on the principle of universal jurisdiction, under which an individual who violates the law of war, violates international law.<sup>177</sup> “The punishment of such crimes is therefore as much the duty of a State which becomes the Occupying Power as of the offender’s own home country.”<sup>178</sup>

The limitations imposed by Articles 64, 66, and 70 of Geneva Convention IV restrict the customary international law jurisdiction of a military commission operating in an occupied territory. In an occupied territory, the United States can only try civilians at a military commission for violations of the rules the United States established after becoming an occupying force, or for violations of the law of war.

The four 1949 Geneva Conventions represent a turning point in the international law of armed conflict. Their provisions touch a wide variety of issues regarding the conduct of war to include the subject of military commissions. The significance of Geneva Conventions III and IV to the jurisdictional boundaries of military commissions is considerable. Both Conventions create limitations on the exercise of military commission jurisdiction, whether that commission is in the form of a military government court or a war court. Depending on the status of the individual the United States is seeking to try, U.S. practices that were arguably permissible during World War II are likely no longer acceptable.

170. *Id.*

171. *Id.*

172. Geneva Convention IV, *supra* note 145, art. 64.

173. DE PREUX, *supra* note 146, at 337.

174. Geneva Convention IV, *supra* note 145, art. 66.

175. *Id.* art. 70.

176. *Id.*

177. DE PREUX, *supra* note 146, at 350.

178. *Id.*

## *Constitutional Restrictions on the Exercise of Military Commission Jurisdiction*

This article has already discussed several landmark Supreme Court decisions regarding military commissions. These cases have been discussed as they related to the constitutional authority to create commissions and the historical evolution of the use of military commissions in the United States. This section revisits these Supreme Court opinions and others that define the jurisdiction of military commissions under the Constitution. This section will examine these opinions as they relate to two critical jurisdictional issues. First, under what circumstances may a military commission exercise jurisdiction over a U.S. civilian? Second, when may a commission try foreign nationals?

### *Jurisdiction of Commissions Over U.S. Civilians*

The trial of U.S. civilians by military commission is perhaps the most controversial issue in any discussion of the jurisdiction of military commissions. When American civilians are subjected to the jurisdiction of U.S. military courts, it strikes a disharmonious chord in the American psyche. The United States was born out of the struggle to throw off the oppression imposed by the British government through its military.<sup>179</sup> The Framers of the Constitution feared the military, some believing that standing armies posed a threat to a free society. Thus, in drafting the Constitution, the Framers strictly subordinated the military to civilian control.<sup>180</sup> Based on this historical and constitutional construction, the Supreme Court has stated that military commissions can be used to try U.S. civilians only under specific extreme circumstance during war.<sup>181</sup>

The Supreme Court has addressed the jurisdiction of military commissions to try U.S. civilians in numerous cases, four

of which are particularly relevant. In *Ex Parte Milligan*,<sup>182</sup> *Duncan v. Kahanamoku*,<sup>183</sup> *Madsen v. Kinsella*,<sup>184</sup> and *Ex parte Quirin*,<sup>185</sup> the Supreme Court provides some clear boundaries for the application of military commission jurisdiction over U.S. civilians. These boundaries vary depending on where the commission is held and what type of commission is being conducted. The Court subjects martial law courts to the greater restrictions than military government courts conducted in occupied territories<sup>186</sup> and war courts.

### *Martial Law Courts*

As mentioned above, martial law courts conducted against U.S. civilians face greater restriction on their exercise of jurisdiction than other types of military commissions. These restrictions are discussed and illustrated in *Ex parte Milligan* and *Duncan v. Kahanamoku*.<sup>187</sup> Although some have argued that “the *Milligan* decision had little practical effect,”<sup>188</sup> this criticism is directed principally at the Court’s failure to address the use of military commissions in the occupied South, the military detentions authorized by the President, or the President’s act of suspending the writ of habeas corpus.<sup>189</sup> For the purposes of establishing jurisdictional boundaries for military commissions, *Milligan* still has relevance.

Members of the U.S. military arrested Lambdin P. Milligan on 5 October 1864 and tried him by military commission on the 21st of that month.<sup>190</sup> Military authorities alleged that Milligan conspired against the government of the United States, afforded aid and comfort to the enemy, incited insurrection, violated the laws of war, and engaged in disloyal practices. The commission found him guilty and sentenced him to death. All of the criminal acts alleged against Milligan were committed in the state of Indiana, and stemmed from his membership in an organization called the Order of American Knights or Sons of Lib-

179. BERNARD BAILYN, *THE ORIGINS OF THE AMERICAN REVOLUTION* 95, 112-19 (1967).

180. *Id.* at 61-63.

181. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). The Supreme Court has never said that a declared state of war was necessary for the use of military commissions. Rather, the extreme circumstances created by warfare may necessitate and justify the use of military commissions.

182. *Milligan*, 71 U.S. at 2.

183. *Duncan*, 327 U.S. at 304.

184. 343 U.S. 341 (1952).

185. 317 U.S. 1 (1942).

186. The phrase “occupied territories” is intended to refer to locations outside of the United States and its territories.

187. 71 U.S. at 126-27; 327 U.S. at 319-23.

188. NEELY, *supra* note 122, at 176.

189. *Id.*

190. *Milligan*, 71 U.S. at 107.

erty.<sup>191</sup> At the time the U.S. military tried Milligan by commission, the civilian courts in Indiana were open and in operation.

The issue that occupied the majority of the Court's opinion was "upon the facts stated [did] . . . the military commission [have] jurisdiction legally to try and sentence . . . Milligan."<sup>192</sup> The Court answered this question with a resounding "no."<sup>193</sup> In arriving at that answer, the Court used what one author called "thunderously quotable language."<sup>194</sup> The majority concluded, "[M]artial rule can never exist where the courts are open."<sup>195</sup> Although "there are occasions when martial rule can be properly applied,"<sup>196</sup> those occasions are limited to when due to "foreign invasion or civil war, the courts are actually closed."<sup>197</sup> The thrust of the majority opinion is that military courts created in a state of martial rule to try civilians are courts of necessity and "as necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power."<sup>198</sup>

Despite claims that the *Milligan* opinion is irrelevant, it is still significant where martial law courts are established within the borders of the United States. The decision creates strict guidelines intended to limit the jurisdiction of martial law courts to the smallest physical area for the briefest period of time. The Court created these limitations based on the recognition that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in the conflict, one or the other must perish."<sup>199</sup> Eighty years after the *Milligan* decision, the Supreme Court once again visited the

question of whether a martial law court had the jurisdiction to try U.S. civilians.

In *Duncan v. Kahanamoku*,<sup>200</sup> the Court reached the same conclusions as in *Milligan*, although for slightly different reasons. Two days after the Japanese attack on Pearl Harbor, Hawaii, President Roosevelt approved the Governor of Hawaii's declaration of martial law in accordance with the Hawaiian Organic Act.<sup>201</sup> After this declaration, the commanding general in that area declared himself the Military Governor and ordered the civil and criminal courts to close. The Military Governor then established military tribunals in the place of the civilian criminal courts.<sup>202</sup> *Duncan* arose out of two prosecutions conducted by these military commissions. The two petitioners were convicted in unrelated cases of embezzlement and assault, respectively. One of the petitioner's trial was conducted over eight months after the Pearl Harbor attack, while the other was tried over two years after that attack.<sup>203</sup>

Although the *Duncan* Court faced very similar issues as those in *Milligan*, there was a significant distinction. In *Milligan*, the President, without any express approval from Congress, declared martial law.<sup>204</sup> In *Duncan*, Congress had passed the Hawaiian Organic Act. This Act granted the Governor of Hawaii the authority, in certain specified emergencies,<sup>205</sup> to declare martial law. This Act also granted the President the authority to approve the governor's decision and thus continue the state of martial law. Therefore, the *Duncan* Court had to address an issue not present in *Milligan*: whether the Organic Act had empowered the military "to supplant all civilian laws and to substitute military for judicial trials."<sup>206</sup> If the Act had

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191. *Id.* at 107.

192. *Id.* at 109.

193. *Id.* at 127.

194. NEELY, *supra* note 122, at 176.

195. *Milligan*, 71 U.S. at 127.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 124-25.

200. 327 U.S. 304 (1946).

201. *Id.* at 307.

202. *Id.* at 308.

203. *Id.* at 310.

204. NEELY, *supra* note 122, 65, 68.

205. *Id.* at 308. The governor was authorized to declare martial law in Hawaii when it was necessary "to prevent or suppress lawless violence, invasion, insurrection, or rebellion in the said Territory." *Id.*

not so empowered the military, then the Court could rely on *Milligan* to resolve the granted issue.

In addressing this issue, the Court pointed out that the term martial law was open to a variety of definitions. Because the Organic Act was unclear on its face, and the Act's legislative history was inadequate, the Court stated, "[I]t must look to other sources in order to interpret that term."<sup>207</sup> The other sources the Court considered were those embodied "in the birth, development and growth of our governmental institutions."<sup>208</sup> Based on these other sources the Court concluded Congress "did not wish to exceed the boundaries between military and civilian power."<sup>209</sup> Congress intended instead "to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion [and] was not intended to authorize the supplanting of courts by military tribunals."<sup>210</sup>

After determining that Congress did not intend to authorize military trials to supplant civilian criminal trials, the Court stated simply: "[W]e hold that both petitioners are now entitled to be released from custody."<sup>211</sup> The majority did not do an additional "*Milligan*" analysis to determine whether martial law was permissible under an argument of necessity. This lack of an examination, however, does not suggest that the standards created in *Milligan* no longer exist. In the Court's statement of the facts at the beginning of the *Duncan* opinion, the Court noted that at the time of both petitioners' convictions the civilian courts were open in some capacity. Additionally, the Court indicated that "at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilian evacuation or even to evacuate the buildings necessary to carry on the business of the courts."<sup>212</sup> Thus, it was unnecessary for the Court to discuss the *Milligan* "open court" test. The Court had already concluded in the accepted facts of the case that the Hawaiian courts

were capable of being in operation at the time the petitioners were tried by military commission.

*Milligan* and *Duncan* stand for the proposition that martial law courts will not be permitted to supplant the jurisdiction of U. S. civilian courts where those civilian courts are capable of operation. Both *Milligan* and *Duncan* point out that the roots of this rule run as deeply as those of the Constitution. These decisions also stand for the proposition that even in the extreme circumstances of war, the subordination of the military to civilian control must, to the greatest extent possible, continue.

#### *Military Government Court*

As discussed above, the constitutional restrictions on military commissions are at their zenith when the military seeks to subject U.S. civilians to the jurisdiction of martial law courts within the United States. These constitutional restrictions are at their lowest ebb, however, when U.S. civilians or others are subjected to these same courts outside of the United States. As early as 1853, in *Cross v. Harrison*,<sup>213</sup> the Supreme Court announced its acceptance of the principle that military governments in occupied territories had the right to govern the population of that territory in accordance with "the lawful exercise of a belligerent right over a conquered territory."<sup>214</sup> The Court reiterated this proposition in 1879 in the case of *Dow v. Johnson*,<sup>215</sup> when the Court once again upheld the lawfulness of a military government court in an area outside of the United States.<sup>216</sup>

In *Duncan v. Kahanamoku*,<sup>217</sup> the Court made it clear that one of the authorities given to the military government in an occupied territory is the power to try civilians. The Court distinguished military government courts operating in occupied territories from that of martial law courts operating in the United States, stating: "[W]e are not concerned with the recog-

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206. *Id.* at 313.

207. *Id.* at 319.

208. *Id.*

209. *Id.* at 324.

210. *Id.*

211. *Id.* at 324.

212. *Id.* at 313.

213. 57 (16 How.) 164 (1853).

214. *Id.* at 192.

215. 100 U.S. 158 (1879).

216. *Id.* at 166.

217. 327 U.S. 304 (1946).

nized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot or does not function.”<sup>218</sup>

The most recent case on this point is *Madsen v. Kinsella*.<sup>219</sup> In *Madsen*, the petitioner was a U.S. civilian convicted of murder by a military government court in occupied Germany.<sup>220</sup> The petitioner claimed she had the right to trial by courts-martial rather than military commission. The Court disagreed. In reaching its conclusion that military commissions in Germany had jurisdiction to try U.S. civilians, the Court stated: “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.”<sup>221</sup> One of these responsibilities is “the President[’s] . . . urgent and infinite responsibility . . . of governing any territory occupied by the United States by force of arms.”<sup>222</sup>

### *Law of War Court*

The final circumstance to be discussed regarding the jurisdiction of military commissions is the use of a law of war court to try a U.S. civilian. This particular jurisdictional circumstance is thorny and not fully developed. The boundaries of military commission jurisdiction in this context appears to straddle the line between jurisdiction over military personnel, when jurisdiction is not in doubt, and jurisdiction over U.S. civilians violating laws heard by civilian courts, when jurisdiction is reluctant.

The Supreme Court addressed this issue, at least in part, in *Ex parte Quirin*.<sup>223</sup> In *Quirin*, the Court qualified the broad language of *Milligan*, concluding that although military commissions in the United States cannot try U.S. civilians, they can try U.S. citizens who engage in belligerent acts.<sup>224</sup>

One of the petitioners in *Quirin*, Haupt, claimed U.S. citizenship.<sup>225</sup> Based on this claim, Haupt asserted that *Milligan* prohibited his trial before a military commission so long as the civilian courts were open.<sup>226</sup> The government opposed Haupt’s claim, arguing that through his conduct he had effectively renounced his U.S. citizenship. The Court concluded it did not have to resolve the issue of Haupt’s citizenship “because citizenship of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”<sup>227</sup> The Court went on to state: “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.”<sup>228</sup> Thus, according to *Quirin*, a U.S. citizen who is an unlawful belligerent exposed himself to the potential penalties associated with that violation of the law of war,<sup>229</sup> including trial by military commission.

These statements represent at least a partial departure from the holding in *Milligan* that military commissions “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”<sup>230</sup> Recognizing this departure, the *Quirin* court distinguished *Milligan* by emphasizing that, unlike the petitioners in *Quirin*,<sup>231</sup> the petitioner in *Milligan* was not “a

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218. *Id.* at 314.

219. 343 U.S. 341 (1952).

220. *Id.* at 343.

221. *Id.* at 346.

222. *Id.* at 348.

223. 317 U.S. 1 (1942).

224. *Id.* at 37-38.

225. *Id.* at 20.

226. *Id.* at 45.

227. *Id.* at 37.

228. *Id.*

229. *Id.* at 37-38.

230. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

231. *Id.* The petitioners in *Quirin* were charged with “being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform—an offense against the law of war.” *Id.* The distinction between the petitioner’s status in *Milligan* versus *Quirin* was emphasized by Mr. Patrick Philbin during a panel discussion hosted by the American Bar Association in Washington, D.C., on 16 January 2002.

part of or associated with the armed forces of the enemy”<sup>232</sup> and thus “was a non-belligerent, not subject to the laws of war.”<sup>233</sup> The *Quirin* Court ruled that *Milligan* was not intended to address the situation present in *Quirin*.<sup>234</sup>

Although the Court supported the use of military commissions to try the petitioners in *Quirin*, it refused to provide a comprehensive definition of when U.S. military commissions sitting in the United States may try its citizens for violations of the laws of war. Instead, the Court concluded it “had no occasion to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war . . . [because] it is enough that petitioners here, upon the conceded facts, were plainly within those boundaries.”<sup>235</sup>

The issues at stake when the military takes over the traditional functions of a civilian government within the United States are substantial. According to the Court in *Milligan*, their significance “cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.”<sup>236</sup> In *Milligan* and *Duncan* the Court established standards to protect those principles and to ensure that martial law courts are used only in the most extreme circumstances. The fundamental principles at issue in *Milligan* and *Duncan* are not as present in cases where military commissions are operating in occupied territories or as war courts. Military government courts do not raise the same specter of military domination of civilian government as those same courts operating within the United States. Additionally, military commissions in the form of war courts do not present the same concerns as martial law courts operating in the United States. War courts do not seek to subject the entire civilian populace of a given area to trials by military court.

#### *Jurisdiction Over Foreign Nationals*

The jurisdictional basis to try foreign nationals by military commission is, in general, the same as that for trying U.S. citi-

zens. The United States can exercise military commission jurisdiction over foreign nationals through martial law courts, military government courts, or war courts. Foreign nationals can be tried for violations of the laws of war or for violations of crimes normally heard by civilian courts when in an area under U.S. military government. Despite the same general jurisdictional authority to try foreign nationals by military commission as that to try U.S. citizens, there are jurisdictional wrinkles. These wrinkles include the application of international treaties that would not be in issue for the trial of U.S. citizens, and issues related to habeas corpus jurisdiction. *In re Yamashita*<sup>237</sup> and *Johnson v. Eisentrager*<sup>238</sup> address these issues.

*In re Yamashita* involved the prosecution of General Tomoyuki Yamashita for violations of the laws of war. The charges against General Yamashita alleged, in part, that

while commander of armed forces of Japan at war with the United States of America and its allies, [he] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the member of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.<sup>239</sup>

The prosecution submitted a bill of particulars listing 123 war crimes committed by General Yamashita’s troops while under his command.<sup>240</sup>

Among General Yamashita’s allegations of error was the claim that the military commission that tried him violated Articles 60 and 63 of the 1929 Geneva Convention.<sup>241</sup> Article 60 of the 1929 Geneva Convention required a detaining power that is about to direct “judicial proceedings . . . against a prisoner of war [to] . . . advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial.”<sup>242</sup> Article 63 requires that a “sentence may be pronounced against a prisoner of war only by the same

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232. *Ex parte Quirin*, 317 U.S. 1, 45 (1945).

233. *Id.* at 46.

234. *Id.* at 45.

235. *Id.* at 45-46.

236. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866).

237. 327 U.S. 1 (1946).

238. 339 U.S. 763 (1950).

239. *Id.* at 13-14.

240. *Id.* at 14.

241. *Id.* at 20-21.

courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power.”<sup>243</sup> The military commission that tried General Yamashita did not notify his country, nor did the commission apply the same rules of evidence and procedure as applied at courts-martial.

The Court examined both allegations of error, and found no violation of the Convention. The Court held that Articles 60 and 63 were not intended to apply to violations of the laws of war that occurred before an individual became a prisoner of war.<sup>244</sup> According to the Supreme Court, Articles 60 and 63 were intended to “apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war.”<sup>245</sup>

Although the ultimate conclusion of the Supreme Court in *Yamashita* regarding Article 63 is likely moot based on Article 85 of the 1949 Geneva Convention, the Court’s application of international law is significant. In the case of foreign nationals, international treaties, such as the 1949 Geneva Conventions, may restrict the jurisdiction of U.S. military commissions or dictate certain minimum due process rights for those proceedings. This could lead to the counter-intuitive situation where a U.S. citizen being tried for a war crime would be entitled to less due process than a foreign national tried for the same offenses.

In addition to the jurisdictional wrinkles created by international treaties when trying foreign nationals by military commission, there are habeas corpus issues as well. The habeas corpus issues present are not relevant to the military commission’s jurisdiction; instead they go to the jurisdiction of U.S. federal courts. *Johnson v. Eisentrager*<sup>246</sup> discussed these issues at length.

The petitioners in *Eisentrager* were German nationals convicted of war crimes by an U.S. military commission conducted in China.<sup>247</sup> After being convicted, the petitioners were sent to serve their respective sentences in a U.S. Army confinement facility in occupied Germany. The petitioners sought a writ of habeas corpus in the federal district court in Washington D.C. The D.C. court ruled it did not have jurisdiction to hear the case because the petitioners were confined outside of the United States. The Court of Appeals for the D.C. Circuit reversed, concluding that jurisdiction existed to hear a writ of habeas corpus where anyone was deprived of liberty based on the authority of the United States.<sup>248</sup> The Supreme Court disagreed, ruling that under the circumstances, “no right to the writ of habeas corpus appear[ed].”<sup>249</sup>

The Court was cautious to limit its ruling that the petitioners in *Eisentrager* did not have the right to the writ of habeas corpus. The Court began by noting that the ruling in the case did not apply to citizens, stating: “[W]ith the citizen we are now little concerned, except to set his case as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens.”<sup>250</sup> Next, the Court indicated that resident enemy aliens would still have access to the writ, as the petitioners in *Quirin* and *Yamashita* did.<sup>251</sup> This access was based on territorial jurisdiction.<sup>252</sup> The U. S. military confined the petitioners in *Quirin* and *Yamashita* in the United States or its territories, for crimes committed in the United States or its territories.<sup>253</sup> The Court’s ruling, therefore, is directed at one very specific class of people, “the nonresident enemy alien . . . who has remained in the service of the enemy.”<sup>254</sup>

The Court denied the petitioners access to the writ of habeas corpus in *Eisentrager* because none of the traditional heads of jurisdiction were present. The petitioners were nonresident enemy aliens, whose crimes, trial, and confinement all occurred

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242. Geneva Convention Relative to the Prisoners of War, art. 60, July 27, 1929, 47 Stat. 2051, 118 L.N.T.S. 343.

243. *Id.* art. 63.

244. *In re Yamashita*, 327 U.S. 1, 22-23 (1946).

245. *Id.*

246. 339 U.S. 763 (1950).

247. *Id.* at 765-66. The petitioners were convicted of passing information to the Japanese after Germany had surrendered. *Id.*

248. *Id.* at 767.

249. *Id.* at 781.

250. *Id.* at 769.

251. *Id.* at 779-80.

252. *Id.*

253. *Id.* at 780.

254. *Id.* at 767.

outside of the United States or its territories.<sup>255</sup> The Court expressed concern that granting nonresident enemy aliens in active hostility with the United States access to the writ might adversely affect future U.S. war efforts. The majority argued, “[I]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”<sup>256</sup>

*Eisentrager* and *Yamashita* highlight some of the potential jurisdictional wrinkles when the United States seeks to try foreign nationals at U.S. military commissions. These wrinkles seem to counter-balance one another. On the one hand, based on international treaties, foreign nationals may have rights regarding military commissions that U.S. citizens do not. On the other hand, U.S. citizens will always have access to our federal courts through the writ of habeas corpus, while foreign nationals may not. Despite these wrinkles, the Supreme Court has repeatedly supported the jurisdiction of military commissions to try foreign nationals, both under customary international law and the Constitution.

The jurisdiction for courts-martial and military commissions are as varied and distinct as the constitutional authority for these two courts. Each court’s jurisdiction is restricted differently. These jurisdictional boundaries are affected by the location and nature of the crime, the location of the court that tries

the offenders, the status of the offenders at the time they committed their offense and at the time of trial, and whether peace has been declared. Yet, despite these variations, courts-martial and military commissions share jurisdiction over violations of the laws of war. This shared jurisdiction can be misleading and give some the impression that courts-martial and military commissions are more alike than they are. A close examination of the jurisdiction of the two courts highlights their different natures.

## Conclusion

Military commissions and courts-martial are both valid trial venues, but they serve different purposes. Courts-martial are a part of military law and are intended “to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment.”<sup>257</sup> Military commissions are “an important incident to the conduct of war” whereby a military commander can “subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”<sup>258</sup> Military commissions also serve as a valuable part of military government where, as a result of war, no other government exists. These different purposes are reflected in their different constitutional bases and jurisdictional boundaries.

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255. *Id.* at 767-68, 781.

256. *Id.* at 769.

257. MCM, *supra* note 86, pt. I, § 3.

258. *Ex parte Quirin*, 317 U.S. 1, 28 (1942); *In re Yamashita*, 327 U.S. 1, 11(1946).

# Military Commissions: A Historical Survey

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On 13 November 2001, in response to the tragic events of 11 September, President Bush issued Military Order 222 concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.<sup>1</sup> The order provides for the detainment of international terrorists for violating the law of war and other applicable laws, subject to the order, and subsequent trial by military commission.<sup>2</sup> Since the release of the order, military commissions, or tribunals, have received widespread media and public attention, much of it unfavorable.<sup>3</sup>

Much of the unfavorable publicity stems from a serious misunderstanding of the history, nature, and purpose of these commissions. Far from being the new kid on the judicial block, military commissions have provided commanders with an effective method for investigating and punishing violations of the law of war since before the existence of the United States.<sup>4</sup> A short survey of the history of such commissions provides valuable insight on why and how warriors have imposed their unique justice upon their fellow warriors, and upon those individuals who seek to engage in combat, but are unwilling to present themselves as warriors. To understand the commis-

sion's possible role today, one must first understand its history. Or, as Justice Holmes said of the law: "[T]o know what it is, we must know what it has been."<sup>5</sup>

## Origin of Military Commissions

There is much speculation on the origin of military commissions. Most scholars agree that commanders initially created military commissions as an alternative to the exercise of their unlimited power on the battlefield.<sup>6</sup> From warfare's earliest origins, commanders have held the authority of life and death over any individual captured on the battlefield who qualified as an unlawful combatant, spy, or pirate.<sup>7</sup> Some commanders have exercised this unique war power unflinchingly, without regard to traditional western notions of due process of law.<sup>8</sup> Others have sought to use the same power to punish their fellow warriors or the unlawful combatant for violations of the law of war when the conflict is over. Accordingly, the Supreme Court has recognized this "war power":

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1. Military Order of November 13, 2001, 66 Fed. Reg. 57,831 (Nov. 16, 2001), *reprinted supra* p. 5.

2. *Id.* sec. 1(e).

3. See, e.g., Anne Gearan, *Military Court Would Mean Faster Trials, More Secrecy, Fewer Rights in Terrorism Cases*, AP, Nov. 15, 2001 (stating that such commissions would violate basic civil liberties), available at <http://www.law.com>; Tony Mauro, *Historic High Court Ruling Is Troublesome Model for Modern Terror Trials*, AM. LAW. MED., Nov. 19, 2001, at 1 (stating that prior Supreme Court decisions validating the military commission concept are flawed and examples of wartime paranoia), available at <http://www.law.com>; J.D. Tuccille, *Trying Terrorists Before Military Tribunals Plays into Our Enemies Hands* (Nov. 19, 2001) (stating that any use of military commissions for captured Al Qaeda terrorists could threaten basic civil liberties), at <http://civilliberty.about.com/library/weekly/aa111501a.htm>; David Graves & Ben Fenton, *Al-Qa'eda Fighters 'Flown to Island'*, LONDON DAILY TELEGRAPH, Nov. 29, 2001 (stating that the use of military tribunals is inconsistent with international law); Laurence H. Tribe, *Why Congress Must Curb Bush's Military Courts, Trial by Fury*, THE NEW REPUBLIC ON LINE (Nov. 29, 2001) (stating that President Bush's order and the entire military commission concept are riddled with flaws), at <http://www.thenewrepublic.com/tribe121001.html>.

4. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, 17 (1975) [hereinafter JAG CORPS HISTORY].

5. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1948).

6. See, e.g., Wigall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948); see also Lieutenant Colonel Thomas Marmon, Major Joseph Cooper & Captain William Goodman, *Military Commissions* 8 (1953) (unpublished LL.M. thesis) (on file with the U.S. Army Judge Advocate General's School, Charlottesville, Virginia).

7. See INGRID DETTER DE LUPIS, THE LAW OF WAR (1987).

8. MICHAEL HOWARD, GEORGE J. ANDREOPOULOS & MARK SHUMAN, THE LAWS OF WAR (1994). During the Dutch revolt from Spain in the mid-sixteenth century, the Spanish commander, the Duke of Alba, implemented a policy to hang any member of the rebellion captured by Spanish forces. *Id.* at 55. During the American Revolution in 1780, British Lieutenant Colonel Banastre Tarleton was renowned for vicious atrocities, committed not only against combatants, but also against anyone else found on the battlefield. The Americans considered him so bloodthirsty that eventually the term "Tarleton's Quarter" became synonymous for no quarter. *Id.* at 80. During Napoleon's invasion of Russia in 1812, the French took several hundred prisoners after the Battle of Bordino. When Russian soldiers were unable to keep up with the marching columns, the French ruthlessly ordered many of the Russian soldiers killed. Similarly, the French ordered other Russian prisoners of war to be shot when the prisoners became too great a burden after the retreat from Moscow began. *Id.* at 91.

The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.<sup>9</sup>

While it is impossible to point to the first modern commission, during the Reformation in Europe in the early seventeenth century, at least one commander sought an alternate method for resolving the status of the unlawful belligerent.<sup>10</sup> Gustavus Adolphus is often hailed as the father of modern warfare.<sup>11</sup> As the King of Sweden and the Field Commander of Swedish forces during the Thirty Years War (1618-1648), he introduced myriad new technological and training techniques. Adolphus was also among the first to institute the use of a panel of officers to hear law of war violations and make recommendations on their resolution. The use of the military commission was one of the many revolutionary reforms Gustavus Adolphus instituted for the successful enforcement of discipline and administration in his army.<sup>12</sup>

The British adopted a similar system, and used a military commission in 1776 to try Captain Nathan Hale for spying during the American Revolution.<sup>13</sup> The British did not call the proceeding a military commission, but rather a court-martial.<sup>14</sup> In fact, the military commission, or tribunal, has been known by a variety of names. Court-martial, war court, military court under martial law, military court, court of inquiry, special court-martial, and common law war court are just a few of the terms for military commissions throughout their history.<sup>15</sup> As the

Supreme Court stated in *Madsen v Kinsella*, military commissions have taken many forms and borne many names.<sup>16</sup>

### *American Use of Military Commissions*

The United States early military traditions were, in many respects, carbon copies of their former colonial masters, the British. These traditions continued when the Continental Congress drafted the Articles of War for the Continental Army in 1775.<sup>17</sup> In addition to an almost exact duplication of the British Articles of War, which only applied to courts-martial of their own servicemen, the young republic implemented the established tradition of the military commission with a court of inquiry to try British officer and suspected spy—Major John André.<sup>18</sup>

American forces captured Major André in 1780. When captured, Major André was wearing civilian clothing and carrying the defensive schematics for West Point. General George Washington ordered that a court of inquiry try Major André for spying.<sup>19</sup> The court found Major André guilty and sentenced him to death by hanging—the same fate that befell Nathan Hale under similar circumstances.<sup>20</sup>

In the early nineteenth century, a future American President made extensive use of the military commission. Andrew Jackson convened a commission against Louis Louaillier after the Battle of New Orleans in 1815, which resulted in Louaillier's acquittal.<sup>21</sup> During the first Seminole War (1817-1818), Jackson again used the commission to try Alexander Arbuthnot and Robert Ambrister, two British Indian traders who Jackson accused of inciting and assisting the Creek Indians.<sup>22</sup> The com-

9. *In re Yamashita*, 327 U.S. 1, 12 (1946).

10. Marmon, *supra* note 6.

11. THE DAWN OF MODERN WARFARE, WEST POINT MILITARY HISTORY SERIES 57 (Thomas Griess ed., 1984).

12. H.W. KOCK, THE RISE OF MODERN WARFARE 30 (1981).

13. Green, *supra* note 6, at 832.

14. *Id.* Before the Boer War in 1899, the British Army had the confusing habit of referring to both commissions and traditional courts-martial as courts-martial. In fact, one scholar noted, "In England both descriptions of courts are called courts-martial, and the general public are consequently not able to discriminate between the two." CAPTAIN DOUGLAS JONES, NOTES ON MILITARY LAW 3 (1880), *cited in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920 reprint).

15. *See generally* Marmon, *supra* note 6.

16. 343 U.S. 348 (1951).

17. WINTHROP, *supra* note 14, at 17. The Articles of War were the precursors to the modern Uniform Code of Military Justice passed by Congress in 1950. *See* H.R. DOC. NO. 81-491 (1949); S. REP. NO. 81-846 (1940). The early American articles (and their British counterparts) only dealt with the punishment of offenses committed by American soldiers. There was no thought of incorporating unlawful combatants, enemy civilians, or spies under the umbrella of the articles. WINTHROP, *supra* note 14, at 17-24. The traditional venue for trying these individuals was the military commission. *See* DE LUPIS, *supra* note 7.

18. Green, *supra* note 6, at 832.

19. Marmon, *supra* note 6, at 4.

20. Green, *supra* note 6, at 832.

mission (which Jackson called a special court-martial) convicted both Arbuthnot and Armbister, and gave them death sentences. The executions caused a flurry of protests in both Great Britain and the President's cabinet, but no action was taken against the ever-popular Jackson.<sup>23</sup>

The first recorded use of the term "military commission" occurred during the Mexican-American War in 1847. After the conflict, General Winfield Scott, Commander of the U.S. Army, recognized that the Articles of War did not cover crimes committed by the indigenous population against the occupying American forces.<sup>24</sup> To fill the void, General Scott issued General Order Number 20: "Assassination, murder, poisoning, rape or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft . . . whether committed by Mexicans or other civilians in Mexico against U.S. military forces . . . should be brought to trial before military commissions."<sup>25</sup>

After establishing military commissions, General Scott and his subordinate commanders, Generals Wool and Taylor, used them repeatedly. The commissions were not only used to try and convict common criminals for the above offenses, but also to try unlawful combatants for violations of the law of war, such as "threatening the lives of soldiers" and "riotous conduct."<sup>26</sup> If a lawful combatant committed a law of war violation, however, General Scott used a separate proceeding called a "council of war" to determine guilt.<sup>27</sup>

### *Civil War*

It was not until the American Civil War (1861-1865) that the terms "council of war" and "military commission" merged to form the modern day meaning of military commission. General Henry Halleck, Commander of Union forces in the West (as well as an attorney and an author of a textbook on international

law), was among the first to recognize that the Articles of War were inadequate for administering justice during the rebellion.

General Halleck's command faced two difficult issues early in the war. First, Union forces occupied large areas of hostile territory—containing an unfriendly populous—whose transgressions against Union forces were not covered by the Articles of War. Second, General Halleck's operational base in southern Illinois, Indiana, and Ohio, contained large numbers of Southern sympathizers. Called "Copperheads" or "Butternuts," some of these Northerners with Southern sympathies had formed covert paramilitary organizations, such as the infamous "Knights of the Golden Circle," and sought to derail the Union war effort.<sup>28</sup>

To address these challenges, on 1 January 1862 General Halleck issued General Order Number 1. Well written and narrowly tailored, General Order Number 1 established the nature and jurisdictional basis for the commissions used by Halleck—other commanders soon followed.<sup>29</sup> The military commission soon became the accepted venue for dealing with the troublesome issue of how to punish unlawful combatants; the North convened over two thousand commissions during the Civil War.<sup>30</sup>

Among the Civil War military commissions, the Supreme Court heard two convictions on appeal, thus making American legal history. The first case concerned Clement Laird Vallandigham, who had been an ardent critic of the Lincoln administration when he lost his congressional reelection campaign in Ohio in 1862. Due to his hatred of the Republicans and Lincoln's war aims, Vallandigham attempted to become the leader of the extreme Democrats and Copperheads in the old Northwest by running for the governorship of Ohio in 1863.<sup>31</sup> Vallandigham's rhetoric and campaign speeches became so vehemently anti-Union and pro-Confederate that General Ambrose Burnside ordered Vallandigham's arrest and trial by a military commission. The commission found Vallandigham guilty of

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21. *Id.*

22. GEORGE C. KOHN, *DICTIONARY OF WARS* 413 (1986).

23. *Id.* at 414.

24. WINTHROP, *supra* note 14, at 832.

25. *Id.*

26. *Id.*

27. Harold Wayne Elliot, *The Trial and Punishment of War Criminals* 173 (1998) (unpublished S.J.D. dissertation, University of Virginia) (on file with University of Virginia Law Library).

28. JAMES MCPHERSON, *THE BATTLE CRY OF FREEDOM* 493 (1988).

29. WINTHROP, *supra* note 14, at 833.

30. Marmon, *supra* note 6, at 6.

31. JULIUS J. MARKE, *VIGNETTES OF LEGAL HISTORY* 116 (1965).

violating General Order Number 38 and “declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government.”<sup>32</sup> He was sentenced to confinement for the duration of the conflict.<sup>33</sup>

Although Vallandigham’s conviction and confinement led to widespread dissent and disapproval in the North, the Supreme Court denied the writ of certiorari, stating:

The appellate powers of the Supreme Court as granted by the Constitution, are limited and regulated by the acts of Congress, and must be subject to the exceptions and regulations made by Congress. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789.<sup>34</sup>

In short, the *Valladigham* Court stated that it was not given the power to review the results of a military commission by the Constitution. The Court would come to a radically different view in 1866, however, when the Court decided *Ex parte Milligan*.

Lambdin P. Milligan was another charismatic leader of the Copperhead movement in Indiana from 1862-1864. A military commission convicted Milligan of planning and organizing an attack upon the Democratic convention, which was to be held in Chicago in 1864.<sup>35</sup> General Alvin Hovey approved the death sentence for Milligan, and in April 1865, forwarded the sentence to President Andrew Johnson for final approval. Simultaneously, Milligan filed a petition for a writ of habeas corpus

with the Federal Circuit Court in Indiana and subsequently to the Supreme Court.<sup>36</sup>

The Supreme Court granted the writ, releasing Milligan. The Court’s landmark decision set the first clear boundaries for the future jurisdiction of military commissions:

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances . . . it cannot be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.<sup>37</sup>

Two other Civil War military commissions are notable, even though they did not receive review by the Supreme Court. These are the Lincoln assassination and Henry Wirz commissions.

Less than one month after the assassination of President Lincoln on 14 April 1865, military commissions tried eight individuals for the crime.<sup>38</sup> Pursuing federal troops had killed the actual assassin, John Wilkes Booth. The defense attorneys argued that the commission did not have jurisdiction because the war was over and the defendants were U.S. citizens. Both arguments failed, however, because the *Milligan* decision was still a year away. The commission sentenced four of the eight defendants to death by hanging and gave the other four prison sentences.<sup>39</sup>

The military commission against confederate officer Henry Wirz convened on 23 August 1865.<sup>40</sup> Wirz was the commandant of the notorious Andersonville prison camp in southern

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32. *Id.* at 119.

33. *Id.*

34. *Ex parte Vallandigham*, 68 U.S. 243, 251 (1863).

35. MARKE, *supra* note 31, at 130-31.

36. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

37. *Id.* Although the writ of habeas corpus was granted to Milligan on 10 April 1866, the Court did not issue its formal opinion until 17 December 1866. MARKE, *supra* note 36, at 137.

38. JAG CORPS HISTORY, *supra* note 4, at 63.

39. *Id.* The sentences of some of the accused continue to evoke debate even today. Mrs. Mary Surratt was one of those sentenced to death—the only woman ever tried by a commission and given a death sentence. Although she admitted to housing some of the conspirators in her boarding house before the assassination attempt, there was little evidence that she was aware of their plans or participated in any way. Five of the members of the commission signed a letter asking President Johnson to reduce or suspend her sentence. Much controversy remains over whether President Johnson ever saw the request. The Judge Advocate General, General Holt, said he delivered the petition to the President, who rejected it. President Johnson denied ever seeing the petition. Mrs. Surratt was executed on 7 July 1865. Dr. Samuel Mudd, the physician that set the break in John Wilkes Booth’s leg, received a sentence of imprisonment at hard labor for life. The scant evidence of Dr. Mudd’s knowledge of his patient’s prior acts, as well as his obligations as a medical professional, have led many to question the wisdom of Dr. Mudd’s sentence. *Id.*

Georgia where one out of every four Union prisoners died. Although Wirz made the traditional defenses of superior orders and necessity, he was convicted for violations of the law of war and hanged on 10 November 1865.<sup>41</sup>

### *Post-Civil War Commissions*

Almost every American conflict between the Civil War and the Second World War used military commissions in some way. Commanders used military commissions to punish law of war violations the Articles of War did not cover in the Indian Wars (a Moco Indian in 1873), the Spanish American War (Rafael Ortiz in 1899), and the First World War (Pablo Waberski in 1918).<sup>42</sup> Not until the Second World War, however, did the Supreme Court again review the legitimacy of using military commissions.<sup>43</sup>

In early 1942, two Nazi U-boats landed eight German saboteurs on Long Island, New York and Ponte Vedra, Florida. Although the eight individuals wore German naval marine infantry uniforms when they landed, they quickly changed into civilian clothes and buried their military uniforms along with explosives and supplies. The saboteurs had received extensive military training in Germany, and were intent upon the destruction and sabotage of critical U.S. wartime industries. Within days, all eight were in custody. President Roosevelt ordered that a military commission try the saboteurs for spying and violations of the law of war, as described in his order convening the commission on 2 July 1942<sup>44</sup>—an order similar in many respects to the 13 November 2001 order promulgated by President Bush.<sup>45</sup>

United States Attorney General Francis Biddle and the defense attorneys for the Germans convinced the Supreme Court to review the legitimacy of the tribunal even before filing a writ of habeas corpus.<sup>46</sup> The defense team launched a variety

of attacks on the commission, including its jurisdiction, the lack of constitutional safeguards, and the issue of the alleged citizenship of one of the defendants (Haupt), similar to *Milligan*. They failed on all fronts. The Court reaffirmed the jurisdiction and legitimacy of the military commission: “By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”<sup>47</sup>

In *Quirin*, the Court also discussed the important difference between the lawful and unlawful combatant—in language as relevant today as it was sixty years ago:

By universal agreement and practice, the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by the opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>48</sup>

In response to the defense’s contention that such a tribunal lacked constitutional safeguards, the *Quirin* Court stated:

[W]e must conclude the sec[ti]on 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.<sup>49</sup>

40. *Id.* at 64.

41. McPHERSON, *supra* note 28, at 797. Interestingly, Andersonville did not have the highest mortality rate of all Southern prisoner of war camps. Andersonville’s mortality rate of twenty-nine percent pales in comparison to the thirty-four percent death rate of Salisbury, North Carolina. Thirteen thousand of the 45,000 Union soldiers imprisoned in Andersonville died of disease or starvation. *Id.*

42. Marmon, *supra* note 6, at 6.

43. *Ex parte Quirin*, 317 U.S. 1 (1942).

44. *Id.* at 22.

45. Roosevelt’s order, like President Bush’s, authorized the appointment of military commissions for those citizens or residents of nations at war with the United States. The order also gave the commission the power to make rules for the conduct of the proceedings and closed the civilian courts. See Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the NAZI Saboteur Case*, 89 MIL. L. REV. 59 (1980).

46. Mauro, *supra* note 3, at 1.

47. *Quirin*, 317 U.S. at 28.

48. *Id.* at 31.

49. *Id.* at 40.

The Court did not rule on the citizenship status of defendant Haupt. The Court suggested, however, that even if Haupt were a U.S. citizen, *Ex parte Milligan* would not apply because of Haupt's status as an unlawful combatant:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because it is in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.<sup>50</sup>

Subsequently, six of the eight defendants were executed in the electric chair and the remaining two were given long prison sentences.<sup>51</sup>

Another World War II military commission reviewed by the Supreme Court is *In re Yamashita*.<sup>52</sup> Tomoyuki Yamashita was one of Japan's most successful generals during the Second World War. Known as the "Tiger of Malaya," Yamashita was known for his daring and flexibility on the battlefield, which resulted in the quick capture of the Malaysian peninsula as well as the British Fortress of Singapore in 1941-1942.<sup>53</sup> In 1944 he was the Commander of the Japanese Fourteenth Army Group in charge of the defense of the Philippine Islands against attack from the United States. On 20 October 1944, shortly after Yamashita had taken command, U.S. forces landed on the island of Leyte and began the liberation of the Philippines. After a long and bitter campaign, Yamashita surrendered on 3 September 1945.<sup>54</sup>

Soon after his capture, General Douglas MacArthur decided to try Yamashita by military tribunal. The order for the tribunal was issued by General Styer, Commander of the U.S. Army, Western Pacific.<sup>55</sup> General Yamashita's indictment alleged

sixty-four crimes committed by troops under his command.<sup>56</sup> During the U.S. campaign to liberate the Philippines, Japanese soldiers committed numerous violations of the law of war against the local civilian population. The bill of particulars filed against Yamashita stated that he was responsible for the execution of

a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of the Batangas Province, and to devastate and destroy public, private, and religious property therein, as a result of which more than 25,000 men, women, and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial and entire settlements were devastated and destroyed wantonly and without military necessity.<sup>57</sup>

On 7 December 1945, the military commission, consisting of five general officers, found General Yamashita guilty and sentenced him to death by hanging. The commission found that the atrocities were so widespread and egregious, that Yamashita either secretly ordered the acts or that he should have known what was occurring. The Supreme Court agreed to hear the appeal under a writ of habeas corpus filed by Yamashita's defense attorneys.<sup>58</sup>

The defense team made many of the same constitutional and jurisdictional arguments against the commission as the petitioners made in *Quirin*. In addition, they argued that the commission was not legitimate because the conflict was over, the commission's appointment authority did not have that power, and the prosecution had failed to present any evidence showing that General Yamashita had *actual knowledge* of the actions of his soldiers.<sup>59</sup>

The Court did not agree with the defense arguments and upheld Yamashita's death sentence. The Court quoted *Quirin*

50. *Id.* at 37-38.

51. Belknap, *supra* note 45, at 59.

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

53. R.E. DUPUY & T.N. DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY 1130 (1986).

54. *Id.* at 1177-79.

55. *Yamashita*, 327 U.S. at 10.

56. *Id.* at 34. United States prosecutors filed a supplemental bill alleging fifty-nine more crimes committed by Yamashita's troops. The supplemental bill alleged Yamashita had "unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." *Id.*

57. *Id.* at 14.

58. Major Bruce Landrum, *The Yamashita War Crimes Trial*, 149 MIL. L. REV. 293, 296 (1995).

59. *In re Yamashita*, 327 U.S. at 1.

as support for the legitimacy of the military tribunal to determine violations of the law of war.<sup>60</sup> Although Yamashita's attorneys had argued that Yamashita had no knowledge of the atrocities, the Court refused to accept the defense. The Supreme Court affirmed the legality of Yamashita's trial by military commission, and in doing so established a new standard for command responsibility.<sup>61</sup>

### *Conclusion*

The use of a military commission to try violators of the law of war is not new. Since before the birth of the United States, warriors have used such tribunals to determine the guilt or inno-

cence of their fellow warriors for law of war violations, as courts of occupation or under martial law. On several petitions for review, the Supreme Court has upheld the legitimacy of such tribunals. Only in *Milligan* did the Court limit the jurisdiction of such tribunals—ruling that U.S. citizens could not be subject to such commissions as long as the local courts were open.

Throughout history, the military commission has filled the void between the commander's absolute authority on the battlefield and the formal legal code that governs what action he can take against his own soldiers. The military commission has proven to be an effective and powerful tool to bridge that gap.

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60. *Id.* at 7.

61. *Id.* at 16. After the Court quoted the relevant law of war articles on the responsibility of a commander, it stated:

These provisions plainly imposed on petitioner, who at the time specified was the military governor of the Philippines as well as commander of Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian populations.

*Id.*

Military law widely quotes *Yamashita* as the signature "command responsibility" case. Command responsibility stands for the important supposition that a commander can be held criminally liable if he had actual knowledge or *should have had knowledge* that troops subject to his command have committed a war crime, or if he fails to take the necessary and reasonable steps to insure compliance with the law of war. See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 178 (1956).

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## Legal Assistance Note

### What Do You Mean, I Need a Permission Slip Before I Can Ship My Car Overseas?

#### Restrictions on Shipping a POV Overseas

Many people assume that once they buy or lease a car, even if the bank “owns” it, the car is theirs to do with as they wish. When people move from state to state, their car, along with their other possessions, moves with them. When moving overseas, however, different rules apply—especially to leased cars.

Section 192.2 of the Code of Federal Regulations (C.F.R.)<sup>1</sup> requires the permission of either the leasing company or the finance company before a leased vehicle or a vehicle encumbered by a lien can be shipped overseas, even if not required by the lease or loan agreement.<sup>2</sup> The general requirements for exportation of a vehicle are found at 19 C.F.R. section 192.2. An individual attempting to export a vehicle (shipper) must provide both the vehicle and the required documentation to the customs officials at the port of exportation.<sup>3</sup> This note addresses the documentation required for shipping a vehicle overseas when that vehicle is titled in the United States, and provides courses of action a client can pursue if the required documentation is unavailable.

To ship a vehicle overseas, the shipper must provide an original certificate of title or a certified copy of the certificate of title along with two complete copies. If the title shows that a third party (in most cases either a lessor or lienholder) owns or has a claim to the vehicle, the shipper must also provide written

permission from the third party expressly stating that the vehicle may be exported. Under the C.F.R., this statement must be on the third party's letterhead; signed and dated by the third party; and must contain a complete description of the vehicle, including the vehicle identification number and the name and telephone number of the leased vehicle's owner or lienholder.<sup>4</sup>

Under the C.F.R., government employees that ship a vehicle in conjunction with official travel orders are exempt from providing the original certificate of title; however, these individuals must comply with certain Department of Defense shipping procedures.<sup>5</sup>

*Department of Defense Directive 4500.9-R* requires service personnel to have written authority from their leasing company to ship a leased vehicle to their permanent duty station or other authorized destination.<sup>6</sup>

The Military Traffic Management Command (MTMC), which sets the Army procedures governing the shipment of privately owned vehicles (POVs) overseas pursuant to military orders,<sup>7</sup> requires service personnel to comply with 19 C.F.R. section 192.2.<sup>8</sup> Therefore, when a vehicle is leased or a recorded lien exists, a service member must provide written approval on the third party's letterhead paper per 19 C.F.R. 192.2(b)(ii). The MTMC regulations also require that the written approval include the leasing company or lienholder's acknowledgement that return shipment before the next permanent change of station is a private matter between the leasing company or lienholder and the service member.<sup>9</sup>

Even if the lease agreement expressly states that the leased vehicle may be relocated, service personnel must still comply

1. The Code of Federal Regulations is a compilation of all original acts enacted by Congress and the original documents containing executive orders and proclamations of the President, other presidential documents, regulations, and notices of proposed rulemaking.

2. See 19 C.F.R. § 192.2 (LEXIS 2002) (setting out the requirements for exportation of a vehicle).

3. *Id.*

4. *Id.* § 192.2(b)(ii).

5. *Id.* § 192.2(b)(iii).

6. U.S. DEP'T OF DEFENSE, DIR. 4500.9-R, DEFENSE TRANSPORTATION REG. (Aug. 1999).

7. The Joint Federal Travel Regulation defines “overseas” as outside the continental United States. I JOINT FED. TRAVEL REGS. app. A., pt. I (1 Apr. 2001), available at <http://www.dtic.mil/perdiem/jftr.pdf>. Under the MTMC regulations, the third party statement providing permission to ship the vehicle also applies to shipping vehicles to Hawaii and Alaska. MILITARY TRAFFIC MANAGEMENT COMMAND, SHIPPING YOUR POV 5 (Dec. 28, 2001) [hereinafter MTMC POV SHIPPING GUIDE], available at <http://www.mtmc.army.mil/CONTENT/599/Povpam.pdf>.

8. See MTMC POV SHIPPING GUIDE, *supra* note 7.

9. *Id.* For example, if the service member defaults on the obligation, the lessor or lienholder would want to recover the vehicle, either through voluntary surrender or repossession. If the vehicle is overseas, the costs for return of the vehicle to the United States would fall on the lessor, lienholder, or service member, and not the U.S. government.

with the requirements of 19 C.F.R. section 192.2. Therefore, legal assistance attorneys must ensure that service personnel are aware of these restrictions on shipping a POV. Failure to arrive at the port of exportation with the appropriate paperwork will prevent shipment of the POV and may leave service personnel with little time to correct the problem.

#### *Lease Termination or Voluntary Surrender*

Service personnel may believe that if the lessor or lienholder will not allow shipment of the vehicle, they must return the car to the lessor or lienholder. Although this option is a consideration, it can result in exorbitant fees.

#### *Leases*

When a lease is terminated early, the lessee owes the lessor not only all back unpaid lease payments, but also the additional amount specified in the lease. The early termination or default liability is an approximation of the lessor's damages incurred from the premature lease termination.

*Federal Reserve Board Regulation M* requires the lease to contain a formula that specifies the consumer's liability upon early termination or default.<sup>10</sup> Legal assistance attorneys must review the lease agreement and dissect the early termination formula to determine how to assist their client best.

If early termination is the best course of action, legal assistance attorneys must advise their clients of ways to minimize early termination liability. The best way to minimize early termination is to request, in writing, that an independent appraiser, agreed to by both parties, appraise the car before the client surrenders the vehicle.<sup>11</sup> If the lessor unreasonably fails to agree on an appraiser, the service member should obtain an appraisal unilaterally and provide that value to the lessor. Although the client must pay for the appraisal, the lessor will have difficulty justifying a lower realized value for the car. Because a major component of the early termination formula is the realized value (usually the sale price), a higher realized value means a lower early termination penalty.<sup>12</sup>

Alternatively, the client can obtain an actual bid for the vehicle and send the bid and name of the bidder to the lessor. Again,

the lessor will be in a difficult position if the lessor uses a realized value lower than the bid amount.

#### *Liens*

If the service member "owns" the car, the member can voluntarily return the car to the lienholder. Voluntary repossession, sometimes referred to as voluntary surrender, occurs when the debtor surrenders the collateral to the secured party before the creditor repossesses the vehicle. In either a voluntary surrender or repossession, the creditor is generally entitled to repayment of the loan plus any amount expended to recover and sell the collateral.<sup>13</sup> This amount is normally referred to as a deficiency. By voluntarily surrendering the vehicle, a service member may reduce the amount of the deficiency by avoiding repossession costs.

There are certain instances, however, where the financial advantages of voluntary surrender are sharply limited. Some state laws prohibit creditors from seeking deficiency judgments after disposing of the collateral.<sup>14</sup> Additionally, many creditors use the same code for voluntary surrender as they do for repossessions. Therefore, the advantages of voluntary surrender may be limited for clients concerned about negative credit reports.<sup>15</sup> A client faced with either of these situations should offer to voluntarily surrender the vehicle in exchange for concessions from the creditor, such as a waiver of the right to seek a deficiency or a promise not to include the default in any credit report.

#### *Conclusion*

Legal assistance attorneys must educate service personnel and family members on the requirements for shipping a POV out of the continental United States and the potential problems their clients may encounter. While there may be situations where early termination or voluntary surrender of the vehicle is advantageous, legal assistance attorneys must understand the intricacies of calculating early termination fees and deficiency judgments.

Preventive law is the key to protecting and preserving the client's options when faced with a third party who will not permit shipment of the vehicle overseas. While legal assistance attorneys can assist service personnel by negotiating terms

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10. See NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 9.5.3.1 (4th ed. 1999).

11. *Id.* § 9.5.5.

12. See generally *id.* § 9.5.4.

13. NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS AND FORECLOSURES § 6.2.2 (4th ed. 1999). About half of the states have enacted legislation that prohibit or limit the creditor from seeking a deficiency after disposing of the collateral. See *id.* § 11.4 (for a state-by-state analysis of this topic).

14. *Id.*

15. NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS AND FORECLOSURES § 6.2.1 (4th ed. 1999 and Supp.).

acceptable to both parties, retaining the vehicle until an agreement can be reached is critical to negotiating power. Major Kellogg.

## ***Environmental Law Note***

### **Army Corps of Engineers Finalizes Regulations on Nationwide Permits**

The Army Corps of Engineers recently published a Final Notice regarding the issuance of revised Nationwide Permits for the discharge of small amounts of dredge and fill material into waters of the United States.<sup>16</sup> Section 404 of the Federal Water Pollution Control Act (Clean Water Act) requires a permit to discharge dredge and fill material into the navigable waters of the United States. Section 404(e) of the Clean Water Act sets out authority for the establishment of General Permits by the Secretary of the Army, acting through the Chief of Engineers, on a state, regional, or nationwide basis.<sup>17</sup> General per-

mits are typically viewed as less burdensome than individual permits for discharging dredge and fill material. Installation attorneys facing issues involving activities in areas that are considered wetlands<sup>18</sup> should be aware of the new regulations pertaining to Nationwide Permits.

The new regulations on Nationwide Permits take effect on 18 March 2002.<sup>19</sup> Army attorneys should carefully review these highly technical regulations before advising clients on the use of any of the Nationwide Permits.

Army attorneys should take particular note of revised Nationwide Permit 39.<sup>20</sup> This permit could potentially apply to Army construction projects that disturb less than one-half acre of wetlands or less than 300 linear feet of a streambed.<sup>21</sup> Specific Nationwide Permit General Conditions for use of Nationwide Permit 39 and all Nationwide Permits must be complied with,<sup>22</sup> and projects resulting in the loss of greater than one-tenth-acre of non-tidal wetlands are subject to specific notification requirements.<sup>23</sup> In addition, acreage waiver provisions for

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16. Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002). The summary of the Final Notice states:

[T]he Corps of Engineers is reissuing all the existing Nationwide Permits (NWP), General Conditions, and definitions with some modifications, and one new General Condition. These final NWPs will be effective on March 18, 2002. All NWPs except NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 7, 12, 14, 27, 31, 40, 41, 42, 43, and 44 expire on March 18, 2002. In order to reduce the confusion regarding the expiration of the NWPs and the administrative burden of reissuing NWPs at different times, we are issuing all NWPs on the same date so that they expire on the same date. Thus, all issued, reissued, and modified NWPs, and General Conditions contained within this notice will become effective on March 18, 2002 and expire on March 19, 2007.

*Id.*

17. 33 U.S.C.A. § 1344 (West 2002).

18. Wetlands have been defined by both the Army Corps of Engineers and the U.S. Environmental Protection Agency as follows:

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 328.3(B) (LEXIS 2002) (Corps of Engineers definition); 40 C.F.R. § 230.3(t) (LEXIS 2002) (EPA Definition).

19. Issuance of Nationwide Permits, 67 Fed. Reg. at 2020.

20. *Id.* at 2085. Nationwide Permit 39 reads in part as follows:

39. *Residential, Commercial, and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP.

Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship.

*Id.*

21. *Id.*

22. *Id.* at 2089.

23. *Id.* at 2085-86.

intermittent streambeds carry added procedural requirements.<sup>24</sup> Finally, practitioners should be aware that the Army Corps of Engineers has reaffirmed its commitment to the “no net loss” of wetlands standard.<sup>25</sup> The “no net loss” standard will be applied programmatically “on an acreage basis for the District as a whole.”<sup>26</sup>

Army attorneys providing legal advice in the area of wetlands permits should review the new regulations and procedural requirements for Nationwide Permits. Lieutenant Colonel Tozzi.

### *Tax Law Note*

#### **IRS Says No Tax Implications for Personal Use of Frequent Flyer Miles**

Employees of the Department of Defense, both military and civilian, may now keep and make personal use of frequent flyer miles arising from official travel.<sup>27</sup> This reverses the long-standing position, codified in the Federal Travel Regulation<sup>28</sup>

and the Federal Property Management Regulations,<sup>29</sup> which required that promotional benefits, including frequent flyer miles, earned on official travel were the property of the government and only to be used for official travel.<sup>30</sup>

On 28 December 2001, the President signed into law Senate Bill 1438, National Defense Authorization Act for Fiscal Year 2002.<sup>31</sup> Section 1116 authorizes federal employees to retain promotional items, including frequent flyer miles, earned on official travel.<sup>32</sup> This new law repeals section 6008 of the Federal Acquisition Streamlining Act of 1994,<sup>33</sup> which had prohibited personal retention of such promotional items.<sup>34</sup>

The positive receipt of this benefit, however, was tempered with the uncertainty of whether personal retention of frequent flyer miles created taxable income for the employee. The Internal Revenue Service (IRS) says “no.”

On 21 February 2002, the IRS stated in Announcement 2002-18 that it would not assert that an individual owes taxes because of his receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to business or

24. *Id.* at 2086.

25. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

26. Issuance of Nationwide Permits, 67 Fed. Reg. at 2064. See the U.S. Army Corps of Engineers News Release, *U.S. Army Corps of Engineers Clarifies Inaccuracies in Wetlands Permit Reporting*, January 16, 2002, at <http://www.hq.usace.army.mil/cepa/releases/clarify.html>, which states:

*“No Net Loss”/acre-for-acre wetlands replacement.* Developers (and others who use the permits) are still required to offset damage or impacts, and the standard this year is more restrictive than ever. In the past, Corps districts—which issue the permits—had to ensure that wetland functions were replaced which often resulted in less than one-for-one acreage mitigation. Now they must not only ensure that functions are replaced, but also that the “no net loss” goal is met on an acreage basis within the geographic boundary of the district. This allows area regulators to consider cumulative impacts holistically rather than piecemeal, making decisions in the best interest of the entire watershed.

*Id.*

27. Pub. L. No. 107-107, § 1116(b), 115 Stat. 1012 (2001).

(b) Retention of Travel Promotional Items—To the extent provided under subsection (c), a Federal employee, member of the Foreign Service, member of a uniformed service, any family member or dependent of such an employee or member, or other individual who receives a promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under section 1353 of title 31, United States Code, may retain the promotional item for personal use if the promotional item is obtained under the same terms as those offered to the general public and at no additional cost to the Federal Government.

*Id.*

28. 41 C.F.R. §§ 301-353 (LEXIS 2002).

29. *Id.* §§ 101-125.

30. U.S. Gen'l Servs. Admin., *Travel Advisory Number 5*, Dec. 31, 2001.

31. National Defense Authorization Act of 2002, § 1116 (repealing section 6008 of the Federal Acquisition Streamlining Act of 1994 (codified at 5 U.S.C. § 5702 note)).

32. *Id.*

33. 5 U.S.C. § 5702 note (2000).

34. National Defense Authorization Act of 2002, § 1116.

official (that is, government-related) travel.<sup>35</sup> There is no tax relief, however, for travel or other promotional benefits that are converted to cash, to compensation that is paid in the form of travel or other promotional benefits, or in other circumstances where these benefits are used for tax avoidance-purposes.<sup>36</sup>

Through Announcement 2002-18, the IRS formalized what had been its *unofficial* approach to frequent flyer miles.<sup>37</sup> This current IRS decision, however, may be more a matter of administrative convenience than a strict application of law. Previously, the IRS position was not so benign. In fact, the IRS found potential tax issues when a reimbursed employee is allowed to keep frequent flyer miles (or other promotional items) received in connection with employee travel, or when a self-employed taxpayer earns frequent flyer mileage for business travel.<sup>38</sup>

In a 1995 technical advice memorandum (TAM), the IRS ruled that an employer's air travel expense reimbursement plan did not qualify as an "accountable plan" when employees were allowed to retain for themselves any "frequent flyer" or "frequent traveler" miles earned as a result of business air travel.<sup>39</sup> Where employee business expenses are reimbursed under an "accountable plan," the amount of the reimbursements are excluded from the employee's gross income, the reimbursements are exempt from withholding and employment taxes, and the corresponding expenses are not deducted.<sup>40</sup> Consequently, unless a plan is structured to make it "accountable," employees will have to include the amount of the reimbursements in gross income, the reimbursements will be subject to withholding and employment taxes, and the employees will be left with claiming the offsetting expenses as miscellaneous itemized deductions subject to the 2%-of-AGI floor.<sup>41</sup>

This position of the IRS raised concerns within the business community. There are numerous technical and administrative issues relating to these benefits on which the IRS had provided no official guidance, including issues relating to the timing and valuation of income inclusions and the basis for identifying personal use benefits attributable to business (or official) expenditures versus those attributable to personal expenditures.<sup>42</sup>

Due to these unresolved issues and the protest that arose after release of the TAM, the IRS stated that it would reconsider portions of the TAM. The IRS acknowledged that the TAM did not address the full range of issues potentially applicable to employee reimbursement plans that involve frequent flyer miles. The IRS chose not to pursue a tax compliance program for promotional benefits such as frequent flyer miles.<sup>43</sup>

Before 21 February 2002, the IRS had not issued any formal position or guidance on their policy of not taxing the personal retention or use of frequent flyer miles. The extension of the retention of frequent flyer miles to a class of employees as large as "[f]ederal employee[s], member[s] of the Foreign Service, member[s] of a uniformed service, [and] any family member or dependent of such employee[s]"<sup>44</sup> arguably forced the IRS to issue formal guidance.

The IRS is now on record; it will not assert that an individual owes taxes due to the receipt or personal use of frequent flyer miles.<sup>45</sup> The individual taxpayer should exercise caution not to convert any such benefit to cash, however, because the IRS has indicated that it would tax the benefit if converted to cash.<sup>46</sup>

We may not have heard the final word on this issue. The IRS stated in Announcement 2002-18 that "[a]ny further guidance on the taxability of these benefits [frequent flyer miles] will be

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35. IRS Announcement 2002-18, 2002-10 I.R.B. 1 (2002).

36. *Id.* The conversion-to-cash issue arose in *Charley v. Comm'r*, 91 F.3d 72, (9th Cir. 1996), *aff'g in part and rev'g in part* 66 T.C.M. (CCH) 1429. In *Charley*, the Court of Appeals for the Ninth Circuit affirmed a Tax Court decision that a shareholder-employee's conversion to cash of frequent flyer miles provided by the employer was taxable. *Id.*

37. IRS Announcement 2002-18, *supra* note 35.

38. Tech. Adv. Mem. 95-47-004 (July 11, 1995) [hereinafter TAM 95-47-004].

39. *Id.* The IRS found that the "frequent flyer" miles were purchase price adjustments that reduced the employer's cost of air travel (with the adjustments effectively granted to agents of the employer—that is, the employees). It ruled that these purchase price adjustments were amounts in excess of the substantiated costs of air travel that the employees were not required to return to the employer. The plan consequently did not satisfy the "return of excess reimbursements" requirement, and was not an accountable plan. *Id.*

40. Treas. Reg. § 1.62-2(c)(4) (LEXIS 2002).

41. *Id.* § 1.162(c)(1) To be an accountable plan, an employer's reimbursement plan must meet business connection and substantiation requirements, and must require the return of reimbursement amounts in excess of substantiated expenses. *See id.*

42. TAM 95-47-004, *supra* note 38.

43. I.R.S. Priv. Ltr. Rul. 95-47-001 (Nov. 24, 1995) (comments by the Research Institute of America on TAM 95-47-004).

44. National Defense Authorization Act of 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

45. IRS Announcement 2002-18, *supra* note 35

applied prospectively.”<sup>47</sup> So enjoy your flight, but keep your seatbelt fastened and your headsets tuned to the IRS. Lieutenant Colonel Parker.

## *Family Law Note*

### **A QuickLook at Parental Alienation Syndrome**

The QuickScribe separation agreement program, recently introduced for use throughout military family law practice, allows the drafter to include the following clause on parental responsibility: “Neither party will disparage or criticize the other party in the presence of the [child/children], and each party will ensure that other adults refrain from disparaging or criticizing the other parent in the presence of the [child/children].” This clause scratches the surface of the pernicious problem of parental alienation.

In its simplest terms, parental alienation occurs when one parent engages in a campaign to drive a wedge between a child and the targeted parent. Attempts at parental alienation may be as subtle as persistent snide remarks, or as blatant as false allegations of sexual abuse.

When one parent manipulates a young child into hating the targeted parent, the targeted parent (often the non-custodial parent) may allege the child suffers from Parental Alienation Syndrome (PAS). The targeted parent, arguing PAS, may seek and receive a judicial remedy of custody reversal.<sup>48</sup>

While some argue PAS is quackery, others argue it is a legitimate psychological condition. Regardless of one’s position, state courts and family law codes are beginning to address PAS. Therefore, legal assistance attorneys who counsel family members and soldiers on separation, divorce, and child custody

should understand Parental Alienation Syndrome. This note raises the issue of PAS to the military practitioner, considers its criticisms, and reviews its emergence in the family courts.

### *PAS: Origin and Criticism*

Dr. Richard Gardner coined the phrase “Parental Alienation Syndrome” in 1985 in the context of false child abuse allegations against the non-custodial parent.<sup>49</sup> Proponents of PAS currently recognize the syndrome as potentially encompassing four different criteria areas: access and contact blocking, unfounded abuse allegations, deterioration in relationship since separation, and intense fear reaction by children.<sup>50</sup>

Critics, however, attack PAS as overly broad and without scientific basis. Law professor Carol S. Bruch, for example, recently published an article severely criticizing PAS and specifically attacking the credibility of Dr. Gardner.<sup>51</sup> She argues that Dr. Gardner overstates his theory, and calls his remedy of reversing custody and deprogramming “coercive, [and] highly intrusive judicial intervention.”<sup>52</sup>

Ms. Bruch points out several flaws in the PAS theory and in the how the legal system is addressing PAS. She contends that children who are separated from a parent may form rejection feelings naturally and unrelated to the conduct of the custodial parent.<sup>53</sup> She argues that courts are not doing their job as gatekeeper by requiring the proponent of PAS to satisfy the evidentiary foundation for admissibility under accepted precedents.<sup>54</sup> Finally, she asserts that PAS causes a chilling effect on custodial parents by causing them to refrain from making legitimate child abuse allegations out of fear of losing custody or further endangering children.<sup>55</sup>

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46. TAM 95-47-004, *supra* note 38; *see* Charley v. Comm’r, 91 F.3d 72 (9th Cir. 1996) (discussed *supra* note 36).

47. IRS Announcement 2002-18, *supra* note 35.

48. *See, e.g.*, Hendrickson v. Hendrickson, 603 N.W.2d 896 (N.D. 2000) (affirming the trial court’s changing custody from the mother to the father based upon PAS).

49. Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation*, ACAD. F., Summer 1985, at 3 (arguing that a child’s campaign of denigration against one parent resulting from “programming” by the other parent is a condition called PAS).

50. Michael Bone & Michael Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, FLA. BAR J., Mar. 1999, at 44 (noting that PAS may exist in any one area or in combination).

51. Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, FAM L.Q., Fall 2001, at 527 (calling Dr. Gardner’s theory dramatic and hyperbolic and challenging his medical credentials); *see also* Rorie Sherman, *Gardner’s Law: A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse ‘Hysteria’*, NAT’L L.J., Aug. 16, 1993, at 1.

52. Bruch, *supra* note 51, at 543.

53. *Id.* at 530.

54. *Id.* at 537; *see also* Daubert v. Merrell Dow Pharm., Inc, 509 U.S. 579 (1993) (setting forth the analysis for accepting scientific evidence as reliable).

55. Bruch, *supra* note 51, at 533 (noting the dangerous irony of removing the child from the parent alleging abuse and placing the child with the abusing parent).

## *Emergence of PAS in Family Courts and State Codes*

Despite these criticisms, PAS has appeared in legal proceedings and in reported cases. Currently, seven state supreme courts have addressed PAS.<sup>56</sup> *Pearson v. Pearson*,<sup>57</sup> heard by the Supreme Court of Alaska, demonstrates how courts have treated PAS evidence.

In *Pearson*, the father attempted to gain physical custody of his two children from their mother. He alleged PAS and offered expert testimony, but the trial court did not grant his request. On appeal, the father argued that the trial court erred by not considering evidence of PAS. The Supreme Court of Alaska ruled against the father, finding that the trial court had admitted the testimony on PAS, it simply had not found in favor of the father.<sup>58</sup> Significantly, in *Pearson*, the Alaska Supreme Court acknowledged the uncertainty of the scientific validity of PAS, but did not object to its admissibility.<sup>59</sup>

None of the state supreme court cases mentioned in this note address the issue of the admissibility standard for PAS. The critics of PAS blast courts for not using judicial rigor in applying the *Daubert* admissibility analysis.<sup>60</sup> Perhaps the courts downplay the admissibility standard of PAS because they simply do not give PAS much weight. Most of the reported cases indicate that while PAS had been admitted, it has not influenced the court's decision. In fact, in only once instance has a state supreme court affirmed a custody reversal based upon PAS.<sup>61</sup>

State codes have also begun to address the issue of PAS. For example, the Delaware Domestic Relations Code states: "[If] the Court finds, after a hearing, that contact of the child with 1 (sic) parent would endanger the child's physical health or significantly impair his or her emotional development . . . the Court shall also impose 1 or more of the following remedies or sanctions: . . . (2) A temporary transfer of custody."<sup>62</sup> In other words, if the targeted parent can establish that the custodial parent is impairing the emotional development of the child by engaging in parental alienation, the targeted parent has a recognized statutory cause of action to attempt a custody reversal.

## *Conclusion*

In light of this discussion of PAS, what then is the meaning of inserting the "no disparaging remarks" clause in the QuikScribe separation agreement program? Is it necessary? Is it enforceable? What is the remedy? Understanding the variations and degrees of PAS and how individual states treat the theory are the first steps a legal assistance attorney should take before blindly checking the parental responsibility box in the QuikScribe separation agreement program. Major Stone.

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56. See *Kaiser v. Kaiser*, 23 P.3d 278 (Okla. 2001) (noting that a father introduced testimony concerning PAS in general in an attempt to block the mother's relocation); *Hendrickson v. Hendrickson*, 603 N.W.2d 896 (N.D. 2000); *State ex rel. George, B.W. v. Kaufman*, 483 S.E. 852 (W. Va. 1997) (affirming the father's request to prohibit the mother from visitation based on her boyfriend's alleged sexual abuse of the child and mentioning Dr. Gardner's PAS theory in connection with the father's request for evaluation by Dr. Gardner); *Cabot v. Cabot*, 697 A.2d 644 (Vt. 1997) (rejecting the father's claim that awarding custody to the mother rewards her alienating behavior of blocking the father's visitation access); *Truax v. Truax*, 874 P.2d 10 (Nev. 1994) (holding that the trial court did not improperly discount the father's expert who testified about coaching and PAS); *McCoy v. Wyoming*, 886 P.2d 252 (Wyo. 1994). In *McCoy*, the court held that a father's cross-examination of the prosecutor's expert in a child sexual abuse criminal case was not ineffective assistance of counsel. The prosecutor's expert testified to PAS and how it did not exist in that case as a reason for false sexual abuse allegations. *Id.*

57. 5 P.3d 239 (Alaska 2000)

58. *Id.* at 243.

59. *Id.* "Although the syndrome is not universally accepted, the trial court heard evidence from two experts . . . who both believe that it may occur . . . but disagreed as to whether the syndrome was present in this case." *Id.*

60. Bruch, *supra* note 51, at 57; see also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

61. See *supra* note 56. This illustrates that while PAS may be admitted into evidence, it may not always be dispositive.

62. DELAWARE DOMESTIC RELATIONS CODE tit. 13, ch. 7, § 728 (2001).

# The Art of Trial Advocacy

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

## “Advocacy” Outside of the Courtroom: Dispelling Common Misperceptions Held by Commanders

### The Problem: Commanders' Common Misperceptions

*After falling victim to the legal system by trying to make it work for the command . . .<sup>1</sup>*

*First and foremost, commanders must realize the military justice system is a system to protect the rights of the individual and, in my opinion, does not necessarily address the rights of the unit.<sup>2</sup>*

Unfortunately, the comments above are not uncommon of commanders who have been “touched” by the military justice system. Commanders often perceive the military justice system as a roadblock instead of an effective leadership tool. In many cases, this misperception is understandable. When military justice problems arise, commanders often either do not know who to go to for legal advice or do not feel they will receive competent advice. Regardless of why commanders fail to seek legal advice when they should, judge advocates must understand they (judge advocates) play an important role for commanders in the military justice system, not just in the courtroom. This note provides judge advocates with a few ideas on how to serve their commanders better by dispelling some common misperceptions of the military justice system held by commanders.

The initial challenge for any judge advocate is to figure out their role. From there, judge advocates must step out of their offices and get to know their commanders and the units they support. The third and most critical step for judge advocates is getting into their commanders' decision loop on military justice matters. Although becoming “relevant” to their commanders is not always easy, it is a prerequisite for any judge advocate to be successful. Finally, judge advocates must learn and use their commanders' language, and explain any unique legal terms used. Commanders may not be familiar with many legal terms, and they may use acronyms and terms that are foreign to judge advocates.

## The Solution

*Understand Your Role: Find a Mentor*

Courtroom advocacy is just a small part of a judge advocate's role in the military justice system. Trial counsel advise commanders on a wide variety of military justice and administrative law issues outside of the courtroom. Unfortunately, most trial counsel feel they should either spend their tours entirely in the courtroom or in their offices preparing for trial. This is because judge advocates are expected to be ready to serve as trial counsel after completing their service's judge advocate basic course. Regardless of the extent of their prior military service, every new judge advocate needs time to be indoctrinated properly into the judge advocate culture. Whether taking the initiative to learn their job or the legal office providing training, each judge advocate needs mentoring, guidance, and advice to do their jobs effectively.

So how does this happen? How does a new judge advocate turn into an effective military attorney? The best way is by following the path of others. In other words, new judge advocates should find a mentor (or mentors). In his remarks to the 1999 Judge Advocate General's Worldwide Continuing Legal Education program, Brigadier General Cooke told the audience of staff judge advocates that “[f]irst, you must be a mentor and trainer. Ensure that counsel not only know the mechanics and techniques of trying cases, but that they understand the history and purpose of the system.”<sup>3</sup> This responsibility to mentor and train, however, should not fall entirely on supervising attorneys or staff judge advocates.<sup>4</sup> Individual judge advocates must also actively seek out suitable mentors. Ultimately it is each counsel's responsibility to understand their role in the military justice system and seek out the right person to get them headed in the right direction.

*Know Your Commanders*

Commanders focus on mission accomplishment. Judge advocates provide support for commanders to accomplish the mission. Unfortunately, many young (and older) judge advocates provide advice without considering their commanders'

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1. Captain Patrick T. Lavigne, *Does the Legal System Support Leadership? A Commander's View*, MARINE CORPS GAZETTE, Oct. 2001, at 50 (written in response to Captain Paul H. Atterbury, *A Marine in Trouble Is Never Abandoned*, MARINE CORPS GAZETTE, Aug. 2000, at 34).

2. *Id.* Interestingly, Captain Lavigne's article was published in the “Legal” section of the *Gazette* and Captain Atterbury's article was published in the “Leadership” section. Captain Lavigne is an infantry officer (and a former commander) and Captain Atterbury is a judge advocate.

3. Brigadier General (Retired) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, Address at the 1999 Judge Advocate General's World Wide Continuing Legal Education Program (Oct. 8, 1999) [hereinafter *Cooke Address*], in *ARMY LAW*, Mar. 2000, at 5.

4. See Captain Michael P. Dillinger, *Mentoring the Young JAG*, THE REPORTER, June 2001, at 30 (commenting on the need for mentoring and that it is a “win-win” situation for both parties).

concerns. The only way to advise commanders properly is to become familiar with their world. The most effective way for judge advocates to do this is by getting out and meeting their commanders and spending time considering their commanders' perspective. In other words, judge advocates need to look through the eyes of their commanders when providing support.

How do judge advocates get to know their commanders? Before giving advice, new trial counsel should have an initial, face-to-face meeting with their commanders. Judge advocates should not rely solely on e-mail or telephone contact. There is no substitute for face-to-face contact with commanders. Incumbent trial counsel should have introduced their replacements to all the commanders the new trial counsel will support. Otherwise, new trial counsel should get their mentor, or the Chief, Criminal Law, the DSJA, or the SJA to help, or make their command visits alone.

Judge advocates must not stop there. They should periodically "check in" with their commanders. Although trial counsel should have a reason before dropping in on their brigade or battalion commanders, they should stop by their company commanders regularly. Judge advocates should offer their services to their commanders, and let their commanders know they are there to assist. New trial counsel should get their commanders to tell them about what their commanders do. Learning how commanders think and finding out what's important to them helps judge advocates give legal advice tailored to their commanders' specific needs.

Aside from gaining their trust and confidence, an additional benefit is that today's company commanders are tomorrow's battalion and brigade commanders. Providing good, competent legal advice not only helps judge advocates, because their commanders will recognize their value and make them an integral part of the command staff, but also helps the judge advocates who will work with these commanders in later assignments.

Captain Lavigne's article highlights some common points to learn from. For example, he states that commanders should be able to use "confessions" of Marines who break the law to teach other Marines that "wrongdoing will be punished."<sup>5</sup> Commanders can and should use the wrongdoing of others to teach and lead members of the command. The difficulty lies with doing it correctly. One wrong way to teach subordinates is by reading a copy of an accused's confession to the rest of the unit,

as Captain Lavigne appears to suggest. One recent example of this mistake is *United States v. Biagase*,<sup>6</sup> a Marine Corps case. In *Biagase*, the accused confessed to several robberies and, before trial, his company commander received a copy of his confession. Ultimately, a redacted copy of the confession was read at several formations. At trial, although the military judge found no unlawful command influence, he ordered a variety of remedial measures to ensure that the accused received a fair trial.<sup>7</sup>

Why is *Biagase* relevant to judge advocates knowing their commanders? Because the trial counsel in the case, on his first assignment as a judge advocate, did not know what the command had done with the confession. Even worse, neither the trial counsel nor the commander ever attempted to contact each other before trial. Why did the commander fail to contact the trial counsel? Because he did not know he should talk to someone about reading the confession to his unit, largely because he had never seen or heard from his trial counsel before.<sup>8</sup> Had the commander known to contact the trial counsel, this problem could have been resolved, and the problems that became evident at trial could have been averted. Furthermore, had the accused's commander contacted his trial counsel, or had the trial counsel been in contact with the commander, he would have learned how to properly use the accused's wrongdoing as an opportunity to "teach" his subordinates.<sup>9</sup>

#### *Be "Relevant" to Commanders*

Judge advocates should be force-multipliers, not excess baggage. Unfortunately, because of their prior experiences with judge advocates, many commanders see them as necessary nuisances. Although knowing their commanders is critical for judge advocates, it is not enough. All judge advocates must become integral parts of their supported commands. This means judge advocates must learn about weapon systems, equipment, operational commitments, upcoming training exercises, and myriad other important aspects of their supported commands.

More importantly, judge advocates must know what their commands are doing, operationally and in the training environment, and participate as much as possible. Commanders want regular legal training. Being involved ultimately leads judge advocates to a better understanding of their commanders' con-

5. LAVIGNE, *supra* note 1, at 51.

6. 50 M.J. 143 (1999).

7. *Id.* at 148. The military judge also brought the company commander and other members of the command element into the courtroom to admonish them concerning their actions, which came close to compromising the integrity of the proceedings against LCpl Biagase. *Id.*

8. The author of this note was the trial counsel.

9. The specifics of how the commander could have used LCpl Biagase's wrongdoing are beyond the scope and purpose of this article. The commander could have generally expressed to his command the requirement to follow the law, emphasizing the importance of the military justice system to be fair and impartial to the accused. In other words, to follow the advice of Captain Atterbury in *A Marine in Trouble Is Never Abandoned*, MARINE CORPS GAZETTE, Aug. 2000, at 34-35.

cerns, allowing judge advocates to provide legal advice tempered to each commander's unique needs. Moreover, getting involved will enable commanders to understand why judge advocates are needed and relevant as a force-multiplier. Finally, judge advocates should socialize with their peers in other occupational specialties or branches. The connections made by counsel outside the judge advocate community help them better understand the big picture.

*Talk Straight to Commanders and Don't Sound  
Like a "Lawyer"*

Commanders, like most people, do not like "legalese." Counsel must remember their audience—they are not advising other lawyers—judge advocates are advising individuals who use legal advice as a factor in their decision-making process. It is the job of judge advocates to make sure they are understood. The acronyms and legal terms judge advocates use daily are often alien to commanders. Likewise, commanders have their own unique acronyms and terms usually common within a particular type of command. Trial counsel must understand their commanders and, conversely, commanders must understand their legal advisors. Although avoiding legalese may be relatively easy, learning a particular commander's language takes considerable time and effort; however, the dividends, such as becoming a trusted member of the staff and being informed of critical issues, are well worth it. Getting involved with their commands and learning their commanders' language will help judge advocates reap those dividends.

Another problem is that commanders view judge advocates as people who just tell them they are wrong or they cannot do something "legally." Although sometimes "No" is the only answer, before going that route, judge advocates must explore all options and couch their advice in terms of how it can be done, but differently.<sup>100</sup> The alternate approach might be the complete opposite of what the commander thought; however, if counsel proposes it as another way to satisfy the commander's "intent," the commander will view the judge advocate as a problem-solver, instead of a barricade to mission completion.

Judge advocates must provide solutions whenever possible, not reasons why a particular course of action cannot be taken.

### Conclusion

True discipline is doing the right thing even when the right thing is very hard to do and no one else is looking. That discipline is the product of a military system of training and education, standards and customs, ethics and values. Military justice is central to that system. Military justice inculcates and reinforces morale and discipline.<sup>111</sup>

For military justice to work, commanders must have confidence in the military justice system and their legal advisors. Confidence in the system comes with time and experience. Confidence in their legal advisors occurs when a judge advocate becomes an integral part of the commanders' decision-making process. Unfortunately, many commanders have negative perceptions of the system because of bad experiences. The best way for judge advocates to correct these perceptions is to become the answer. They must get out of their offices and talk to their commanders face-to-face. Judge advocates should see their commanders regularly; counsel should not rely on their e-mail and phone to talk to their commanders. Judge advocates must learn their commanders' language and not sound like a lawyer.

Finally, counsel must be accountable. Judge advocates must never use the military justice system as a scapegoat. When the defense wins a motion or case, trial counsel must not blame the defense counsel or military judge. Commanders will not have confidence in the military justice system if their trial counsel say or imply that the system does not work. Judge advocates must dispel the common misperceptions that commanders have—not initiate or perpetuate them. Lieutenant Colonel Michael R. Stahlman (USMC).

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10. See, e.g., Lieutenant Colonel (Lt.Col.) Gary E. Lambert, *The Customer Is Always Right: The Commander, the SJA, and the Law of Military Operations*, MARINE CORPS GAZETTE, Oct. 2001, at 51. Although a quick glance at Lt.Col. Lambert's article seems to suggest that judge advocates should always say "yes," a more thorough look at his article shows otherwise. Obviously, commanders must be told when they are wrong and they expect it. The advice in this note and Lt.Col. Lambert's article is for judge advocates to try to find a way to satisfy their commander's intent. In other words, counsel must look for other ways to accomplish the mission. If none exist, judge advocates must tell their commanders that it cannot be done.

11. See Cooke Address, *supra* note 3, at 6.

# CLAMO Report

Center for Law and Military Operations (CLAMO)  
The Judge Advocate General's School, U.S. Army

## Paving the Road to the Warfighter: Preparing to Provide Legal Support on the Battlefield

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*Field Manual (FM) 27-100* defines “operational law” as “that body of domestic, foreign, and international law that directly affects the conduct of operations.”<sup>2</sup> More precisely, *FM 27-100* states that operational law is a practice that consists of legal services to support the command and control and sustainment functions of an operation.<sup>3</sup> Given this doctrinal character, judge advocates (JAs), legal administrators, and paralegal specialists must be prepared to provide operational law support on the battlefield, not only understanding and applying the relevant law, but also effectively advising commanders as fully integrated members of the battle staff.

Charged with training commanders and battle staffs from the brigade to corps levels, the Army’s Battle Command Training Program (BCTP) provides a unique opportunity for JAs, legal administrators, and paralegal specialists to develop and test their abilities to provide operational legal support.<sup>4</sup> During Fiscal Year (FY) 2001, the Office of the Staff Judge Advocate, XVIII Airborne Corps (Corps OSJA), Fort Bragg, North Carolina, served as higher headquarters to subordinate, evaluated units and was evaluated itself during a series of BCTP-run, computer-simulated battles, called “Warfighter Exercises” (WFXs).<sup>5</sup>

The purpose of this note is to share with the operational legal community the steps that the Corps OSJA took to prepare for the WFXs. Reprinted in significant part as an appendix to this note is the *BCTP Study Guide* that the Corps’ Chief of International and Operational Law created, in accordance with the Corps SJA’s guidance, to support the Corps OSJA BCTP preparations. This Guide proved an invaluable reference for the Corps and subordinate command OSJAs, and republishing it for a wider audience will hopefully assist other judge advocates as they prepare for the BCTP or, more importantly, for actual contingency operations.<sup>6</sup> This note’s closing comments summarize salient observations on Corps OSJA WFX preparation and exercise participation.

The *BCTP Study Guide* was the blueprint and foundational document for the Corps OSJA’s four-month WFX training experience. Interspersed among the three WFX training events were various OSJA “brown bag lunch” and other leader development program (LDP) sessions conducted by Corps OSJA leadership, to include: an after-action review (AAR) of the WFX Seminar, AARs of each WFX experience, two “azimuth checks” of exercise operational details (following a checklist lauded by the Corps Commanding General and Chief of Staff as a model of excellence for all other Corps commanders and staff), two reporting and tracking legal issues sessions, a no-notice alert and rucksack march, two equipment layouts in the “OSJA Operational Outload Facility” (OOOF),<sup>7</sup> demonstrations of the Command and Control Personnel Computer (C2PC) system<sup>8</sup> and the Advanced Field Artillery Tactical Data System (AFATDS),<sup>9</sup> military drivers’ license qualification for

1. Formerly Chief, International and Operational Law, XVIII Airborne Corps and Fort Bragg, 2000-2001. Special thanks to the following judge advocates for their assistance in preparing this note: Lieutenant Colonel Rich Whitaker, Lieutenant Colonel Mark Martins, Lieutenant Colonel Tom Ayres, Colonel Marty Mayes, and Brigadier General Dan Wright. The author alone is responsible for any errors or omissions.

2. U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS ¶ 3.2 (1 Mar. 2000) (to be renumbered *FM 1-04*).

3. *Id.* at vii.

4. For a brief history of the BCTP’s inception, see Lieutenant Colonel (Retired) Thomas D. Morgan, *BCTP: Training Leaders*, LXX MILITARY REVIEW 7, 42-52 (July 1990). See CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, IN THE OPERATIONS CENTER: A JUDGE ADVOCATE’S GUIDE TO THE BATTLE COMMAND TRAINING PROGRAM (17 June 1996) [hereinafter *IN THE OPERATIONS CENTER*], for a highly instructive, hypothetical account of legal support during BCTP “Warfighter” training.

5. The XVIII Airborne Corps’ first WFX evaluation as a Corps headquarters took place in FY 2001. Previous WFX evaluation cycles from BCTP’s inception in 1987 onward coincided with major contingency operations, which made WFXs for the Corps staff impossible or impracticable. Operation Mountain Gate was the 10th Mountain Division (Light Infantry) WFX during FY 01, and the initial exercise component of the Corps FY 01 WFX series. Operation Dragon Comet was the culminating exercise, during which the Corps’ FY 01 WFX was “embedded” (higher and lower headquarters simultaneously exercised/evaluated) with the 101st Airborne Division (Air Assault) WFX.

6. Various *BCTP Study Guide* appendices and supporting references are not reprinted in this note (for example, resource materials and concepts derived from *IN THE OPERATIONS CENTER*, *supra* note 4, and the *XVIII Airborne Corps Soldiers Handbook*), but are available on the CLAMO Web page or from CLAMO by e-mail request to CLAMO@hqda.army.mil. Several minor revisions to the original November 2000 *Study Guide* text reflect Army doctrinal changes at the time of this note’s publication (for example, *FM 100-5* revision and republication as *FM 3-0*, changes to *Department of the Army Pamphlet 611-21* and deletion of 71D military occupational specialty (MOS)/creation of 27D MOS).

nearly all OSJA personnel, and a BCTP in-briefing by the senior Observer-Trainer (OT).

The LDP sessions were designed to review and improve the OSJA's delivery of legal services and soldier skills, and addressed the BCTP mission, and how to best accomplish OSJA METL tasks. From this process, the Corps OSJA "revalidated" four fundamental principles of successful training preparation and execution.

### *1. Train as You Fight—and Locate Personnel Where They Will Be Needed*

For the WFXs, the Corps SJA assigned legal staff to locations and elements including (but not limited to) the Corps Main Command Post (CMAIN), the Corps Rear Command Post (CRCP), the Information Operations Working Group, the Deep Operations Coordination Cell, the Combat Service Support Cell, the Battle Management Cell, separate brigade Tactical Operations Centers (TOCs), and all locations where senior commanders and staff officers made critical decisions. This arrangement ensured that legal assets were available where needed.<sup>10</sup> Battle Command Training Program legal OTs from Forts Leavenworth, Kansas and Eustis, Virginia came to Forts Bragg, North Carolina, and Campbell, Kentucky, to educate and evaluate legal staff efforts. The Corps OSJA staffed each TOC or cell with JAs, legal administrators, and paralegal specialists skilled in specialized and general legal support to operations concepts. Corps OSJA staff provided a continuous presence throughout the WFXs at each location. Commanders and senior staff from Corps and major subordinate commands frequently relied upon legal staffs to resolve targeting, rules of engagement, claims, fiscal, contract law, and other issues within the traditional concept of legal support to operations. They also relied upon JA advice on operational planning and execution matters, because JAs had played an integral role in the military decision making process and targeting board processes leading up to execution of each WFX operational plan (OPLAN).

### *2. Train Using Multiechelon Techniques—and Exploit Knowledge Management (KM) Systems and Practices*

The OSJA designed a tactical secret intranet protocol router network (SIPRNET) Web site to consolidate information coming from various sources and levels of command so that legal and other staff members could find it easily. This Web site contained all of the OPLAN annexes, fragmentary orders, SJA critical information, the legal actions log, and other information necessary to foster a legal "common operational picture" (COP). The widely-dispersed Corps and subordinate command legal staffs could access the Web site to gain the current legal COP, see the status of legal opinions, and access necessary information. In accordance with the Corps OSJA *Soldiers' Handbook*, electronic tracking tool data was mirrored in periodically updated paper copies posted on custom-made status chart "wingboards," and augmented with direct e-mails and phone calls to subordinate and higher headquarters legal staffs.<sup>11</sup> In all instances of pre-WFX training and WFX participation, the Corps OSJA leadership stressed that information technology (IT)-based KM technologies and databases are no substitute for the professional judgment and expertise of each JA, legal administrator, and paralegal specialist.

### *3. Train to (Build and) Sustain Proficiency—Make a Self-Fulfilling Prophecy*

Success in a WFX is not accidental. Lessons experienced during the months of preparation for the final exercise must be captured and implemented. To memorialize observations and lessons learned from the Corps OSJA's WFX experiences, the Chief, International and Operational Law, created an AAR shell before the start of the first exercise, and collected AAR comments from all echelons of legal staffs throughout train-up and WFX conduct. Throughout all of the exercises, AAR comments were collected and posted to the tactical Web site. At the end of each exercise, WFX participants discussed their experiences, leading to necessary changes to operating procedures and future training events.<sup>12</sup> Because many Corps OSJA per-

7. The OOF was a converted storage/attic space above the Corps OSJA building, configured and equipped to replicate the CMAIN, CRCP, and brigade operational law team (BOLT) legal operations for equipment layout, inspections, and work center rehearsals.

8. See, e.g., Center for Army Lessons Learned (CALL), *Information Sharing in a Coalition/Joint Headquarters*, CALL Training Techniques List, Training Techniques 1st Quarter FY02, at <http://call.army.mil/products/trngqtr/tq1-02/clan.htm> (last visited Feb. 2, 2002). For a description of C2P2, see Northrup-Grumman's Web site at [http://www.northgrum.com/tech\\_cd/it\\_it\\_c2pc.html](http://www.northgrum.com/tech_cd/it_it_c2pc.html).

9. See, e.g., U.S. DEP'T OF ARMY, FIELD MANUAL 3-09.22, TACTICS, TECHNIQUES, AND PROCEDURES FOR CORPS ARTILLERY, DIVISION ARTILLERY, AND FIELD ARTILLERY BRIGADE OPERATIONS app. G-6 (2 Mar. 2001). For a description of AFATDS, see the Raytheon Web site at <http://www.raytheon.com/c3i/c3iproducts/c3i060/c3i060.htm>.

10. Subordinate command legal staffs were also with: the 2d Armored Cavalry Regiment TOC, the 82d Airborne Division Main (DMAIN) and Division Rear (DREAR) elements at Fort Bragg, North Carolina; the 101st Airborne Division (Air Assault) DMAIN and DREAR at Fort Campbell, Kentucky; and numerous National Guard and reserve units at both Fort Bragg and Fort Campbell. The Corps' higher headquarters for the WFX was U.S. Army Central Command/Third U.S. Army at Fort McPherson, Georgia.

11. Knowledge management has been defined as "cater[ing] to the critical issues of organizational adaption, survival and competence in face of increasingly discontinuous environmental change. Essentially, it embodies organizational processes that seek synergistic combination of data and information processing capacity of information technologies, and the creative and innovative capacity of human beings." *TOOLS@WORK: Deciphering the Knowledge Management Hype*, 21 J. QUALITY & PARTICIPATION 4, 58-60 (July/Aug. 1998).

sonnel would permanently change station a few months after the final WFX and take their WFX-related expertise with them, the Corps OSJA recognized the need to focus on the next team-building events and the means towards achieving and maintaining requisite proficiency levels.

#### 4. Use Performance-Oriented Training— Review and Rehearse Support Requirements Before Deployment

The Corps OSJA CMAIN and CRCP successfully planned and executed the large and small details of getting people, equipment, and work product where and when needed. Brigade Operational Law Team (BOLT) JAs and paralegal specialists also understood what “life support” their units would provide, and what BOLTs were responsible to supply. Brigade operational law teams actively integrated themselves into brigade operations, demonstrated what they would “pack out” with an

OOOF layout,<sup>13</sup> and trained their legal staffs during a one-day legal support to operations seminar led by the Corps OSJA sergeant major. Performance-oriented training helped the Corps OSJA and BOLTs set and adhere to common standards,<sup>14</sup> anticipate the WFX training environment,<sup>15</sup> prevent problems before they arose,<sup>16</sup> and take what was needed where it would be needed to get the job done.<sup>17</sup>

The Corps SJA’s vision for OSJA readiness included the concept that METL-based standards of training and operations would help OSJA personnel “anticipate and fulfill requirements with the highest levels of professional competence, personal integrity, and unflagging dedication to duty.”<sup>18</sup> The Corps OSJA used its WFX experiences to develop future sustainment training, combining theoretical/classroom instruction with practical application and first-hand observation. The ultimate value of WFX training will lie in enhanced deployment readiness and peak performance during future real-world missions.

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12. Practical orientation and education led up to WFX participants deploying on exercises. New soldiers and those not slated to participate in the WFXs made orientation trips to observe OSJA operations in the field. The various training events for WFX participants and other OSJA personnel helped build an exceptionally cohesive team.

13. See *supra* note 7.

14. Deploying OSJA staff must read and keep on hand (not leave back in garrison or in their rucksack) OSJA and command-common policies, procedures and guidance manuals (for example, the *Soldiers’ Handbook* and *BCTP Study Guide*), and basic orders, plans, and execution documents.

15. Anticipating the environment includes: checking power supplies, outlet locations, and keeping surge suppressors and charged battery packs on hand in the event of power supply interruptions; investigating phone line and local area network capabilities; keeping equipment and critical components together (for example, STU III (secure telephone unit, third generation) with key); having back-up systems (for example, systems software, portable lights, and speakers); and protective carrying boxes and equipment covers/protective wrappings. Equipment should have “expansion” capability wherever possible (computer memory, for example). Train to proficiency on baseline systems (for example, MicroSoft (MS) Office applications) and gain familiarity with other systems impacting on legal support to operations (for example, AFATDS). Proactively seek out and use new tools that enhance legal support to operations (for example, FalconView flight planning/mapping software).

16. Put in work orders or seek assistance immediately when there is an automation, power supply, or telephone problem—do not leave for another shift or another person to do. Log the problem and solution. When one system fails, go to an alternate system (for example, if MS FrontPage-based Web Log fails, start a MS Word or paper log).

17. Never underestimate supply consumption rates, or assume you can readily replenish exhausted supplies. Good stewardship of resources starts with soldier accountability for sensitive/hand-receipted items. Mark, maintain, and safeguard your equipment, and seek immediate assistance if equipment is lost, damaged, or stolen.

18. Memorandum, Staff Judge Advocate, XVIII Airborne Corps & Fort Bragg, subject: Introduction to the OSJA XVIII Airborne Corps Soldiers’ Handbook—2000 Edition (10 Oct. 2000).

## Appendix

### XVIII Airborne Corps Office of the Staff Judge Advocate Battle Command Training Program (BCTP) Study Guide

#### Chapter 1 The BCTP Process

##### Defining “Battle Command”

According to FM 3-0, *Operations*:

Battle command applies the leadership element of combat power. It is principally an art that employs skills developed by professional study, constant practice, and considered judgment. Commanders, assisted by the staff, visualize the operation, describe it in terms of intent and guidance, and direct the actions of subordinates within their intent. Commanders direct operations in terms of the battlefield operating systems (BOS). They directly influence operations by personal presence, supported by their command and control (C2) system.

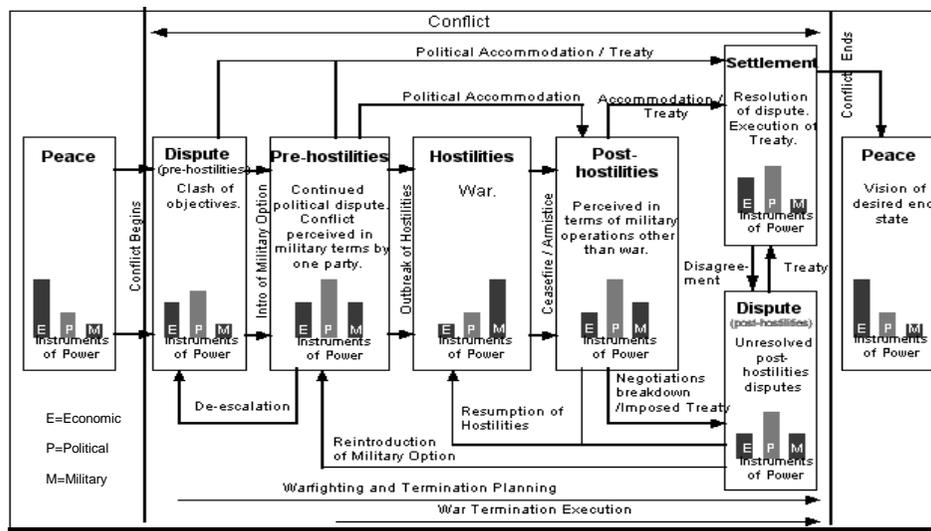
##### The Battlefield Operating Systems

Army forces employ military power in the form of battlefield operating systems (BOS). The BOS are the means by which forces execute the core functions of see, shape, shield, strike, and move. The seven systems are:

- Intelligence.
- Maneuver.
- Fire support.
- Mobility and survivability.
- Air defense.
- Combat service support.
- Command and control.

While legal support to operations does not constitute a BOS, it does impact upon the effective employment of all BOS.

##### Conflict Resolution and the Three Levels of War



The three levels of war are as follows:

- The *strategic level* is concerned with national objectives.
- The *operational level* lies somewhere in between the strategic and the tactical levels. It is concerned with translating strategic objectives into tactical moves, and it usually involves a theater of operations.
- The *tactical level* is concerned with battles and engagements.

The Army's military leaders become proficient in the operational level of war by training military leaders in the art and science of battle command. In spite of post-Cold War employment and deployment of troops for missions such as disaster relief and stability and security operations (SASO), the Army still organizes, trains, and equips to fight and win the nation's wars IAW FM 3-0 and 10 U.S.C. 3062(b). This remains its primary mission, and the Army justifies its focus on warfighting with the rationale that the leadership, organization, equipment, discipline, and skills gained in training for war are also of use to the government in operations other than war.

### ***Army Corps and Divisions***

As currently configured, the Army's Corps and Divisions fight battles and engagements (the tactical level) to achieve success at the operational level. An Army corps is two or more divisions. An Army division is a unit that combines in itself the necessary arms and services required for sustained combat. It is also the largest organization that regularly trains and fights as a team. There are different types of divisions—armored, mechanized, light infantry, airborne, air assault, and medium—and not all of these types are exclusive; for instance, an airborne division is capable of all missions assigned to light infantry divisions.

### ***BCTP's Role to Train Warfighting***

#### **THE COMBAT TRAINING CENTER (CTC) PROGRAM**

**PROVIDE HIGHLY REALISTIC AND STRESSFUL JOINT AND COMBINED ARMS TRAINING ACCORDING TO ARMY DOCTRINE.**

- 1) INCREASE UNIT READINESS FOR DEPLOYMENT AND WARFIGHTING**
- 2) PRODUCE BOLD, INNOVATIVE LEADERS**
- 3) EMBED DOCTRINE THROUGHOUT THE TOTAL ARMY**
- 4) PROVIDE FEEDBACK TO ARMY AND JOINT/COMBINED PARTICIPANTS**
- 5) ACT AS A DATA SOURCE FOR LESSONS LEARNED**

**INCREASE UNIT COLLECTIVE PROFICIENCY ON THE MOST REALISTIC AND CHALLENGING TRAINING BATTLEFIELD AVAILABLE**

The Battle Command Training Program (BCTP) is the Army's capstone Combat Training Center (CTC). BCTP was established in 1987. IAW TRADOC Regulation 350-50-3, BCTP provides command and battle staff training for brigade, division, and corps commanders, their staffs, major subordinate commanders (MSC), and supporting special operations forces (SOF), using simulation centers world wide. It provides the framework to conduct command and control training from brigade to JTF level operations. BCTP provides a "free thinking" opposing force (OPFOR), certified observer controllers/trainers (OTs), and senior observers as mentors and coaches. The CTC provides highly realistic and stressful joint, inter-service, and combined arms training according to Army doctrine.

The four U. S. Army CTCs are:

- The BCTP at Fort Leavenworth, KS, provides training for Army Forces (ARFOR)/Joint Forces Land Component Command (JFLCC), Corps, Divisions and Brigade Commanders and their staffs.
- The National Training Center (NTC) at Fort Irwin, CA, provides training for brigade and battalion task forces. NTC is oriented towards heavy units.
- The Joint Readiness Training Center (JRTC) at Fort Polk, LA, provides training for brigade and battalion task forces. JRTC is oriented towards light units.
- The Combat Maneuver Training Center (CMTC) at Hohenfels, Germany, provides training for battalion task forces (both heavy and light).

The BCTP is the Army's only mobile CTC. They bring training to the unit.

### ***The BCTP Methodology***

IAW TRADOC Regulation 350-50-3, BCTP accomplishes its corps and division training missions by providing Corps and Division commanders a series of six events. These events, conducted sequentially, are the Initial Planning Conference (IPC), site survey (IPC/site survey are done during the same trip to exercise the exercise site), the Start of Exercise (STARTEX) Conference, the Seminar, the Warfighter Exercise (WFX) or Command Post Exercise (CPX), and the Take-Home Package (THP).

The IPC is a planning conference establishing the framework for the seminar and begins the planning process for the exercise; it should occur at the training unit's location. The site survey ensures the unit's facilities are adequate to support the exercise

The STARTEX Conference establishes the framework for the exercise phase of the BCTP rotation. BCTP and the training unit's higher HQ sign a STARTEX Memorandum of Understanding (MOA) to facilitate planning, coordination, and execution of the exercise. The training unit will not participate in the STARTEX Conference, but may send a representative.

The Battle Command Seminar (a/k/a WFX Seminar) is a five-day seminar, conducted at Fort Leavenworth, KS, to assist the commander in building his command and staff team. The seminar is a battle focused, team-building experience for commander, principal staff and major subordinate commanders. IAW Chief of Staff, Army (CSA) guidance, all BCTP seminars are conducted at Fort Leavenworth, KS. The BCTP Seminar Facility (BSF) at Bell Hall, Fort Leavenworth, hosts the seminars for AC units. The Leader Development Center (LDC), Leavenworth, KS, hosts the ARNG seminars. Units who want to conduct the seminar at their home station must receive an exception to policy from the commander of BCTP. As routine exceptions, the 2d Infantry Division hosts its seminars in Korea, due to the distances involved and its unique mission. The ARFOR/JTF seminars are conducted at the unit's home station or contingency location. Exercise units may request their seminars in theater, but BCTP discourages non-standard seminars due to the benefits of training away from home station.

The WFX/CPX/BWFX is a simulation supported, multi-echelon, fully integrated tactical CPX. The BCTP WFXs are not designed to validate war plans. The Corps Battle Simulation (CBS) computer-based training program is an attrition-based training model to exercise battle command. BCTP discourages use of any unit's warplan in a WFX, which the Exercise Director's (EXDIR's) higher HQ must approve for execution. Current simulations are not analytical models. Many warplans do not present a threat or scenario that offers a rigorous/ stressful exercise of full spectrum combat at the mid-to-high-intensity level, to meet the BCTP charter. BCTP discourages classified WFXes. However, many Chairman, Joint Chiefs of Staff (CJCS) directed exercises and contingency operations are classified and are considered on a case by case basis. BCTP approval for a classified exercise is determined at the IPC.

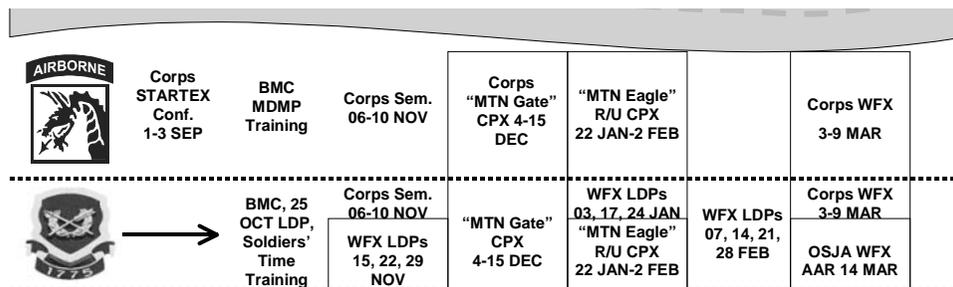
The anticipated unclassified Balkans training Scenario for XVIII ABN Corps' WFX is included at Appendix B. BCTP and the EXDIR develop and agree on scenarios, OPFOR Order of Battle (OB), and force ratios IAW AR 350-2 and TRADOC Deputy Chief of Staff for Intelligence (DCSINT)-approved conventions at the STARTEX conference. The training unit does not fight as the main effort during exercises. This ensures the training unit receives realistic prioritization of support from the higher HQ. The higher HQ allocates support as if all of its units are in the theater of operation.

In setting up for the WFX, the exercised unit(s) and its Major Subordinate Command (MSC) Command Posts (CPs) should displace to alternate field sites as required by the tactical situation. The OSJA's plan for setting up for the WFX will be ICW the OSJA Soldier's Handbook 2000, as adjusted by mission constraints, command direction, and the guidance of the SJA, DSJA, and OSJA SGM. The enclosed concept of legal support (COLS) at Appendix C identifies a tentative list of legal support to operations.

BCTP normally provides a formal After Action Review (AAR) two times during an exercise; Operations Group C (OPSGRP C) conducts one AAR per exercise. The senior OC for each HQ, Battlefield Operating System (BOS), and subject matter expert (SME) schedule a minimum of two informal (counterpart) AARs for each tactical operation ICW the appropriate commander and staff. The WCOPFOR portion of the AAR focuses on OPFOR CDR providing the training unit his perspective of the battle as it progressed. The OSJA AAR Process is set forth in Appendix G to this *Study Guide*.

Active Component (AC) units receive the Final Evaluation Report (FER) NLT 30 days after the conclusion of the exercise. It consists of VHS tapes and paper copy of slides from both formal AARs, summary of events during the WFX, comments on unit performance by BOS and a paper copy of the WCOPFOR AAR. ARFOR/JTF FER's do not include videotapes.

## Chapter 2 The Road to the WFX



### OSJA XVIII ABN Corps WFX Goal:

- **Ensure that unit judge advocates and legal professionals are beneficiaries of first rate training**
- **Ensure that unit leadership & staff receive first rate legal support**

The OSJA XVIII ABN Corps will strive to raise the quality of individual skills and the teamwork of its Divisions and staff sections. Our many skilled legal professionals with diverse backgrounds and experiences work very well together to accomplish legal support to operations; we will work together even better in the future if we successfully maximize the training opportunities inherent in WFX preparation, participation, and the AAR process.

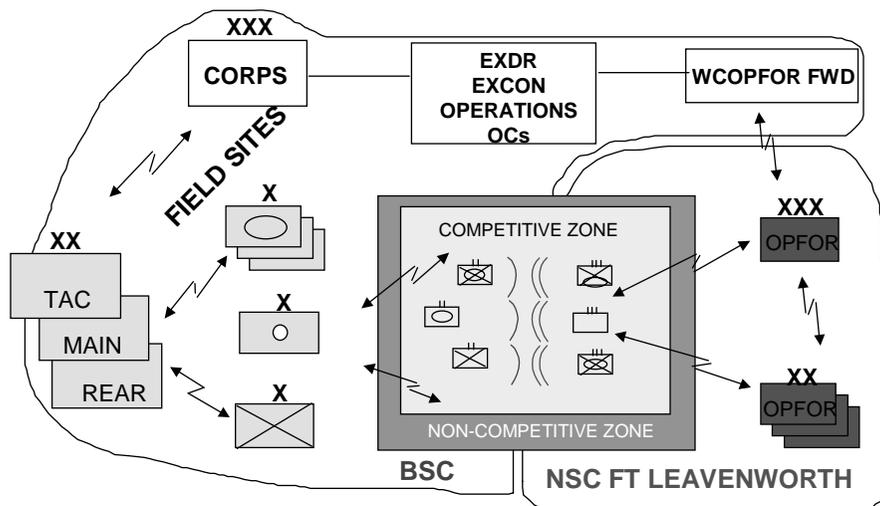
Our training tasks are set forth in Annex E, the Mission Essential Task Lists (METLs) to the current Soldiers' Handbook. The following is a schedule of WFX-related training events and METL-related Leader Development Program (LDP) training which will examine the OSJA METL, and Battle Drills enclosed at Appendix F of this *Study Guide*:

Date	Training
(LDP sessions 12-1300, Dragon BDE Conf. Room)	(Ref: <i>OSJA Soldiers' Handbook; Study Guide</i> )
15 November 2000	WFX Seminar AAR / Soldiers' Handbook Review
22 November 2000	METL Review and Concept of ACP / CMAIN / CREAM Setup
29 November 2000	Reporting & Tracking Legal Issues (reports, logs, briefings)
04-15 December 2000	"Mountain Gate" Command Post Exercise (CPX)
03 January 2001	"Mountain Gate" AAR
17 January 2001	Azimuth Check for "Eagle Gate" Exercise
24 January 2001	Refinement of Reporting and Tracking Legal Issues
28 January – 01 February 2001	"Eagle Gate" Exercise
07 February 2001	"Eagle Gate" AAR
14 February 2001	WFX Azimuth Check
21 February 2001	2 <sup>nd</sup> Iteration of Concept of ACP / CMAIN / CREAM Set-Up and Operations
28 February 2001	Final Preparations for WFX
03 – 09 March 2001	Corps WFX
14 March 2001	Corps WFX AAR

## How WFX Scenarios Become Part of the Exercise

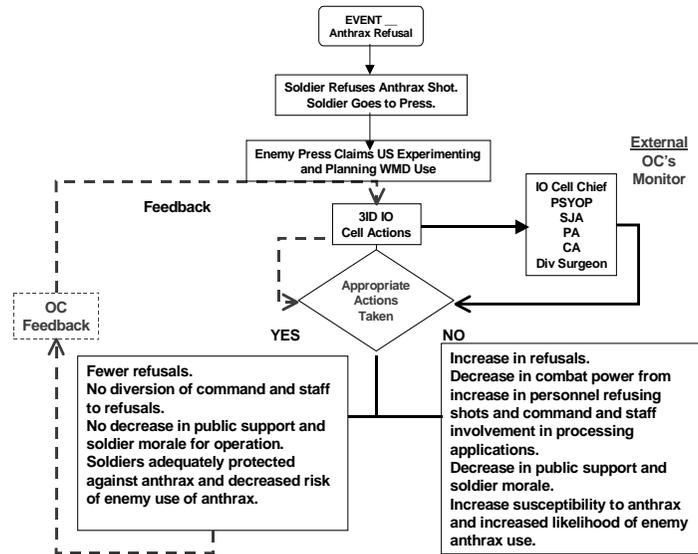
- BCTP employs a computer simulation to model the enemy (as well as the terrain and troops and time factors). The WFX will be a series of training events that will test participants' ability to identify and resolve deficiencies in the very same decision-making processes, command and staff interaction, and staff coordination that would be demanded from a headquarters in a real conflict.
- The computer simulation and scripted processes have four key elements:
- The World-Class Opposing Forces (WCOPFOR) element of BCTP providing the training simulation is the "free-play" component of the Warfighter Exercise simulation. The WCOPFOR can compensate for XVIII ABN Corps' planning and decision-making processes with human reason and intuition, not just artificial intelligence (computer simulation).
- The simulation is "neutral to the decision-making processes" of both XVIII ABN Corps and WCOPFOR. That means there is no artificial "protection" of either Corps or WCOPFOR from unintended consequences (e.g., fratricide), or unforeseen or unheeded conditions (e.g., no protection from ignored or undetected minefields, air defense threats, internally displaced civilian movements, etc.).
- Expect that exercise time and space will have a direct impact on the exercise. Weather, terrain, equipment capabilities, weapon lethality, visibility, time, and space will slow down or speed up conduct of operations, as applicable. The operations tempo (OPTEMPO) will be in real-time of one hour of clock time equaling one hour of exercise) reflected in the simulation.
- There is no interface between Corps command posts ("the training audience") and BCTP computers. Controllers at the computer workstations receive orders and provide results in formats established by the unit's standard operating procedures, and they do so using the tactical communications equipment that the command posts would use in combat. The commanders and staff never see the computers and do not directly input data.

### WHERE BCTP OTs WILL BE IN WFX

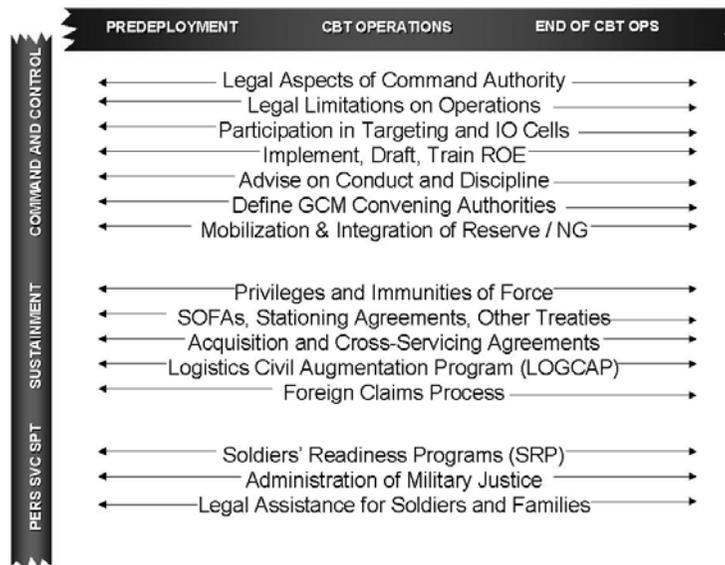


Here is how the WFX "battlefield" is set up. The JA Observer-Trainer (OT) fits in two separate places within the training environment: the "competitive zone" & the "noncompetitive zone." The competitive zone is where the overall training setting (the theater of operations and the Mission –Enemy-Terrain-Troops Available-Time-Civilian Considerations (METT-TC) simply generate events as a natural occurrence. These events may be expected as a natural dynamic of the collision of battlefield conditions and the other events that occur in real-time during conflict, inherent in the OPLAN, or present in the geographical realities of the Area of Operations (AO), but are not scripted. The "noncompetitive zone" is where scripted events are inserted through the "Green Cell." Anticipate that the senior Legal O-T will craft a large number of legal events as part of the Master Event List (MEL) for insertion during the WFX.

This is an example of such a MEL legal event and consequences of action or inaction:



**How XVIII ABN Corps should approach WFX Scenarios**



Above is a graphic depiction of the “Concept of Legal Support in War” text found at Chapter. 5, Par. 5.3, FM 27-100; it is an equally valid portrayal of the continuum of support for the WFX, for operations other than war (OOTW), and for legal support during combat operations. To prepare for the WFX, as well as for day-to-day garrison legal operations and legal support to deployed operations, the OSJA will:

- Study Lessons Learned (CLAMO publications & JAGCnet, Center for Army Lessons Learned (CALL), Army Historical Series, etc.) and historical works with bearing on exercise scenario. Self-paced and individually chosen, as well as LDP-oriented studies, should examine lessons from all the variety of the sub-disciplines of legal support to operations, not just the law of war or military justice issues.
- Study the WFX scenario and operational plan, determining when and where realistic scripted events should occur that would confront commanders and staff, yet remaining flexible enough to allow members of EXCON to insert the events whenever the competitive action could most realistically insert events.
- Study and practice with “battle drill” checklists that identify potential issues and suggested actions with reference to the most commonly encountered scenario and exercise events/issues. (See Appendix F).

- Such “battle drills” are no substitute for primary reference research / consultation, such as Field Manuals (FMs), Tactical SOPs (TACSOPs) and Field SOPs (FSOPs).
- “Share the wealth, reap the wealth” – offer training products “up” to CLAMO and other support organizations, as well as to subordinate units (Divisions, Brigades, Battalions), and ask for feedback, insights, comments, corrections, and other assistance not encumbered by “pride of authorship.”

### **Chapter 3** **Standards to Achieve / Pitfalls to Avoid**

The following are objectives identified by the senior Legal OT during the FY 2001 JAG Worldwide Continuing Legal Education (WWCLE) conference regarding legal support to operations during WFX:

- Continuous staff integration/”staying in the information loop (paper, maps, briefings, websites, electronic collaboration).
- Knowledge of general operational terms & concepts.
- Mastery of the specific unit plan.
- Legal issue tracking.
- Internal vertical & horizontal communication.
- Inclusion of entire staff, especially 27Ds.
- Training junior JAs and 27Ds to be conversant in TOC operations and field SOPs.
- Equipment (acquisition, loadout, setup, recovery).

These are key preparatory tasks as identified by the senior Legal OT:

- Conduct an OPD on concept of exercise, order.
- Draft TOC SOPs that spell out everyone’s job.
- Train your troops in regard to the TOC space and the “battle rhythm.”
- Construct a legal issues tracking system.
- Construct an OSJA horizontal & vertical communication system.
- Draft ROE in “ROE cell” (not “JA vacuum”).
- Reinforce consistent understanding of key terms (e.g., “observed fires, retained authority, & friendly air forces”).
- Teach JAs the JCS SROE methodology.

Those preparatory tasks will help towards avoiding the following commonly-seen pitfalls:

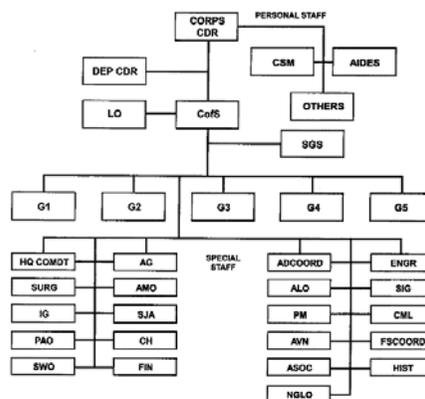
- JAs had not studied the OPORD; OPORD Annexes were not cross-walked (e.g., ROE not staffed with other key staff sections or synchronized with other efforts/products like Chemical or Fires annexes).
- No mechanism to track legal actions (BCTP looks for means that ensure that BDE JAs have same updated information as Corps and Division TOCs, and that the information is updated every 4 or so hours).
- Staff “burnout”/degraded effectiveness due to impractical work/sleep schedule.
- No familiarity with terms and symbols (FM 101-5-1 is a critical reference for this!).
- No integration with other staff elements (working together, sharing information).
- No good use of 27Ds (leadership of people, management of assets & ensuring adequate life support for OSJA).
- No ROE Cell.

#### ***Fundamental Staff Skills and Relationships***

As members of the Corps’ special and personal staff, JAs, Legal Administrators, and Paralegal Specialists / NCOs have key roles in the following five common functions: providing information, making estimates, making recommendations, preparing plans and orders, and supervising the execution of decisions.

Providing Information	The staff collects, collates, analyzes, and disseminates information that flows into the headquarters. The staff rapidly processes and provides significant elements of this information to the commander. The staff is always sensitive to changes in the battle that may warrant the commander's attention.
Making Estimates	The staff prepares estimates to assist the commander in decision-making. A staff estimate consists of significant facts, events, and conclusions (based on current or anticipated situation) and recommendations on how available resources can be best used. Efficient planning depends on continuing estimates by staff officers. Failure to make these estimates may lead to errors and omissions in the development of a course of action.
Making Recommendations	Staff officers make recommendations to assist the commander in reaching decisions and establishing policies. Staff officers also offer recommendations to one another and to subordinate commanders. In the latter case, recommendations are for assistance only; they do not carry implied command authority.
Preparing Plans and Orders	The staff prepares and issues plans and orders to carry out the commander's decisions, ensuring coordination of all necessary details. The commander may delegate authority to staff officers to issue plans and orders without his personal approval.
Supervise the Execution of Decisions	The staff assists the commander by ensuring that subordinates carry out the command decision. Staff supervision relieves the commander of much detail, keeps the staff informed of the situation, and provides the staff with the information needed.

At battalion level and higher, the commander is authorized a staff to assist him. The basic model within the United States Army for staff structures at all levels of unit command is that shown below. This is called the "general staff" structure, which includes a Chief of Staff (executive officer at brigade and battalion), three staff groups (coordinating, special, and personal), and liaison officers.



The number of coordinating, special, and personal staff officers differs between the various levels of command.

The **Chief of Staff** directs, supervises, and ensures coordination of the work of the staff, except in those specific areas reserved by the commander. He frees the commander from routine details. He formulates and announces staff operating policies, ensures that the commander and staff are informed on matters affecting the command, represents the commander, when authorized, maintains the master policy file and monitors the standing operating procedures, and ensures that necessary liaison is established. He also requires that all coordinating and special staff officers, unless instructed otherwise by the commander, inform him of any communications they have with the commander. Finally, he exercises direct supervision over the main Command Post and its operations.

The **Coordinating Staff Group** consists of the principal assistants to the commander. The officers forming the group—the G1, G2, G3, G4, and G5 at Division and Corps, S1, S2, S3, S4, and S5 at Battalion and Brigade—are concerned with broad fields of interest. They coordinate the plans, activities, and operations of the command. Together, they assist the commander with his or her entire field of responsibility, except for those functional areas the commander chooses to control personally or those reserved by law or regulation for specific staff officers, such as the inspector general and the staff judge advocate (SJA). Each coordinating staff officer establishes procedures to ensure that the activities of special staff officers who fall within his or her field of coordination are integrated. Coordinating staff officers are responsible directly to the Chief of Staff, but the commander may consult them directly.

The Assistant Chief of Staff (ACoS), **G1, Personnel**, is the commander's principal staff officer for all matters concerning human resources. The G1 has primary coordinating staff responsibility for unit strength maintenance, personnel service support, discipline, law and order, civilian personnel, administrative support, safety, and headquarters management.

The ACoS, **G2, Intelligence**, is the commander's principal staff officer for all intelligence matters. He acquires information, analyzes it, and presents his or her evaluation and recommendation to the commander. He coordinates with other command and staff elements and uses plans, orders, and SOPs to direct all elements in the unit to support intelligence and counterintelligence functions. He also coordinates intelligence and CI training, as well as the development of intelligence products.

The ACoS, **G3, Operations**, is the commander's principal staff officer in matters concerning operations, plans, organization, and training. The G3 is the staff officer who takes the lead in coordinating with other staff members to get the job done.

The ACoS, **G4, Logistics**, is the commander's principal staff officer for the commander in matters of supply, maintenance, transportation, and services. In order to plan the logistical support of the unit, he must maintain close and continuous coordination with the support command commander, because the latter is responsible for logistic support operations (as opposed to staff coordination). The G4 must also coordinate continuously with the G3 to ensure support of tactical operations, and need to report on the status of procurement contracts to the SJA.

The ACoS, **G5, Civil Military Operations**, is the commander's principal staff officer in matters concerning the impact of civilians on military operations and the political, economic, and social effects of military operations on civilian personnel.

The **Special Staff Group** assists the commander in professional, technical, and other functional areas. Its members assist the coordinating staff officers in preparing plans, orders, and reports. They also plan and supervise training in their own staff sections, and also provide input to the commander on their training and readiness. The size and composition of this group will vary based on the mission of the unit, the level of command, and the desires of the commander. Special Staff Officers may include the SJA, the Inspector General, the Public Affairs Officer, the Chaplain, the Finance Officer, the Division Surgeon, the Fire Support Coordinator (FSCOORD) and Division or Corps Artillery Commander, the Air Defense Artillery Battalion Commander, the Provost Marshal and Military Police Battalion / Brigade Commander, the Signal Battalion / Brigade Commander, the Engineer Battalion / Brigade Commander, and the Aviation Battalion / Brigade Commander.

The **Personal Staff Group** consists of officers who work under the immediate control of the commander and assist him directly, instead of working through the Chief of Staff. Typical members are the SJA, the Command Sergeant Major, the Inspector General, and the chaplain. Personal Staff officers may perform some of their duties as such but other of their duties as special staff officers. For example, the SJA is responsible for operation of his or her staff section and thus is a member of both the personal and special staffs.

**Liaison Officers** are representatives of the commander at other headquarters. The Chief of Staff, the G3, or another designated individual directs them in their duties. Through personal contact, the liaison officers promote cooperation, coordination, and exchange of essential information. Upon arriving at a headquarters, a liaison officer reports to the Chief of Staff or a designated representative.

**Command and Support Relationships**

The BCTP Seminar Decision Exercises presumed that participants completely understood the following four standard command relationships:

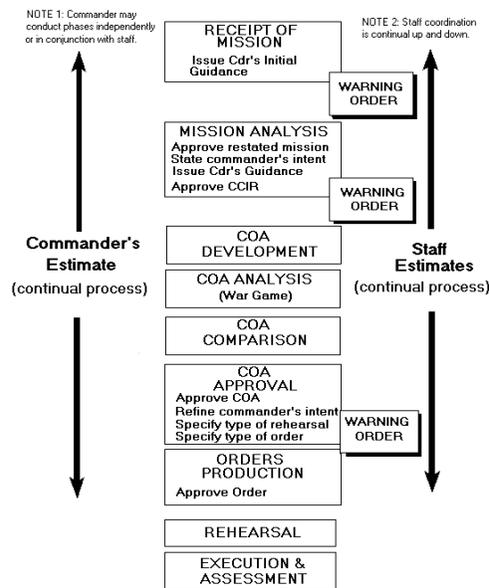
Organic	A unit that forms an essential part of an Army unit and is listed in its table of organization and equipment (TO&E) or table of distribution and allowances (TDA).
Assigned	A unit that is placed in an organization on a permanent basis and is controlled and administered by the organization to which it is assigned for its primary function or the greater portion of its functions.

Attached	A unit that is placed in an organization on a temporary basis. Although subject to limitations specified in the attachment order, the commander to whom the unit is attached exercises the same degree of command and control, as well as responsibility for the attached unit as he does over organic units. However, UCMJ responsibility and promotion of personnel normally will be retained by the original command. The attachment order should state clearly the administrative and support responsibility of the gaining unit to the attached unit.
Operational Control (OPCON)	A unit provided to another commander to accomplish specific missions or tasks that are usually limited by function, time, or location. The commander may deploy the unit concerned and retain or assign tactical control of the unit. OPCON does not include administrative and logistic responsibility, discipline, internal organization, and unit training

The following three standard relationships between supporting and supported units also were presumed knowledge:

Direct Support	A unit in direct support of a specific unit or force is required to give priority of support to that unit or force. The supporting unit will take support requests directly from the supported unit or force, normally will establish liaison and communication, and will provide advice to the supported unit. A unit in direct support has no command relationship with the supported force and therefore cannot be sub-allocated, reassigned, or reorganized by the supported force.
General Support	A unit in general support will provide support to the total force and not to any particular subdivision of the supported force. Subdivisions/subordinate units may request support through the supported force headquarters, but only the supported force headquarters can determine priorities and can assign missions to general support units.
General Support Reinforcing	This relationship is used primarily with artillery units. The GSR artillery unit is required to support the force as a whole and to provide reinforcing fires to another artillery unit as a second priority.

**The Military Decision Making Process (MDMP)**



The MDMP process is an art and science put into practice daily by commanders and staffs, and studied and taught at the basic and advanced levels at Combined Arms and Services Staff School (CAS-3), the Command and General Staff Officer Course

(CGSOC), at the School for Advanced Military Studies (SAMS), and at Senior Service Colleges such as the Army War College. Commanders and staffs will continually face situations involving uncertainty, questionable or incomplete data, and multiple alternatives. They must determine not only what to do, but also whether a decision is necessary. JAs and Paralegal Specialists / NCOs are expected by the SJA, the G-3 Chief of War Plans, and indeed even by the current Corps Commanding General, to actively participate in the Corps' MDMP and provide analytical skills, attention to detail, and subject matter expertise.

Army doctrine is consistent with modern decision theory. According to FM 101-5, amongst other references, finding solutions to problems results from a logical and orderly process that consists of

- Recognizing and defining the problem;
- Gathering the facts and making assumptions needed to determine the scope of and the solution to the problem;
- Developing possible solutions to the problem;
- Analyzing and comparing possible solutions; and
- Selecting the best solution to the problem.

Military command posts typically apply this basic decision making and problem-solving model in two contexts: first, when they are preparing estimates of the situation prior to issuing an operations plan or order, and, second, when they are preparing staff studies in search of solutions to specific problems. The estimate is the principle problem-solving vehicle in tactical and operational settings; the staff study is the norm in administrative settings. Those JAs and Paralegal Specialists / NCOs not familiar with the MDMP, as set out in FM 101-5, *Staff Organization and Operations*, must study and seek out MDMP practical exercise opportunities.

### ***Plans and Orders***

Appendix H of FM 101-5 provides a detailed analysis of plans and orders – JAs and Paralegal Specialists / NCOs will be integrally involved in the planning, drafting, and execution of such documents. Plans and orders are the means by which the commander expresses to subordinates battlefield visualization, intent, and decisions, focusing on the results the commander expects to achieve—a vision of the end state of an operation. This gives subordinates the maximum operational and tactical freedom to accomplish the mission while providing only the minimum restrictions and details necessary for synchronization and coordination. Plans and orders should provide the *what* rather than the *how* to encourage initiative. Plans and orders are the method the commander uses to synchronize military actions. They also help the staff synchronize the commander's decisions and concepts.

Plans and orders:

- Permit subordinate commanders to prepare supporting plans and orders.
- Implement operations derived from a higher commander's plan or order.
- Focus a subordinate's activities.
- Provide tasks and activities, constraints, and coordinating instructions necessary for the successful completion of missions.
- Do not inhibit agility, speed, and initiative in carrying out missions.
- Are communications conveying instructions in a standard, recognizable, clear, and simple format.
- Provide a clear, concise mission statement, based on the mission assigned by the higher headquarters, which includes execution time and date.
- Convey the commander's intent and concept of operations.
- Usually include an overlay.

### ***Principles of Training***

Annex A of the OSJA Soldiers' Handbook is the OSJA's Deployment and Field Standard Operating Procedures. Appendix 8 of that Annex sets forth practical considerations for legal support to Command Posts (CPs), Status Reports, and Briefing Slides. Appendix F of this *Study Guide* contains "battle drills" which are a series of issue-identification checklists for a variety of commonly encountered legal aspects of operations, and the Status Reports and Briefing Slides which should be used to track such legal aspects of operations. The OSJA METL, as identified in Annex E of the OSJA Soldiers' Handbook, sets forth our missions, tasks, and conditions of performance. Field Manual 25-100, *Training the Force*, expresses nine guiding principles of training which should guide our efforts to prepare for, conduct, and evaluate any training.

- ***Train as a combined arms and services team.*** “Combined arms and services” is a technical term referring to military actions that integrate combat functions (infantry, armor, and aviation), combat support functions (field artillery, air defense artillery, engineers), and combat service support functions (logistics, personnel services, and health services). The example provided in *Field Manual 25-100, Training the Force*, is that of the division commander who trains regularly with an entire “slice” of “basic combat, combat support, and combat service support systems.” For JAs, Legal Administrators, and Paralegal Specialists / NCOs, we should conduct collective training with a full “slice” of judge advocate support, and also integrate all the core disciplines of legal claims, legal assistance, military justice, administrative law, and all other aspects of operational law. This principle also means that reserve component legal elements should participate, if possible, in the WFX as they would in a real large-scale deployment of the Corps.
- ***Train as you fight.*** Legal issues, which are some of the most challenging the command and staff will face, will be incorporated into collective training events, just like smoke, noise, chemical attacks, battlefield debris, loss of key leaders, and cold weather. For this reason, every OSJA Division will have a role in participating in the WFX, so superlative garrison performance will be mirrored into field support.
- ***Use appropriate doctrine.*** Training must conform to Army doctrine, and when fighting as a joint (multi-service) or combined (multinational) force, we must train and fight according to joint (e.g., Joint Publications) and combined (e.g., NATO) doctrine. We are a doctrine-based Army. Army doctrine is contained in *Field Manual 3-0, Operations* and supporting doctrinal manuals, such as *Field Manual 27-100, Legal Operations*. Army training doctrine is contained in *Field Manual 25-100* as well as in *Field Manual 25-101, Battle Focused Training*. We can and should seek out expert advice through our technical chains to understand, implement, and ***improve*** Army (and other applicable) doctrine.
- ***Use performance-oriented training.*** Sweat in training saves blood in combat. A large variety of training aids, devices, simulators, and simulations (TADSS) are available to simulate actual conditions. Just as a Chief of Criminal Law will encourage trial counsel to practice opening statements, examinations, motions arguments, or closing arguments, the entire OSJA can and will bring its automation support, legal references and forms, and necessary furniture to the WFX to replicate the full range of legal support to operations expected and required during combat operations.
- ***Train to challenge.*** No matter how proficient or accomplished a JA or Legal Specialist may be, there is always room for personal and professional improvement. Tough, realistic training should present a physical and intellectual challenge. At the same time, repeated “training to muscle failure” (physical and mental) without adequate rest, refreshment, and reflection will cause a degradation in performance rather than an improvement. Leaders within the OSJA should set the example and expect enthusiasm, eagerness to learn, and best personal and professional efforts. Having said that, JAs, Legal Administrators, and Paralegal Specialists / NCOs should *never confuse enthusiasm with capability*.
- ***Train to (build and) sustain proficiency.*** The parenthetical addition to this training tenet reflects the fact that team-building takes time and effort. Much has been done already to build and sustain OSJA Divisional and office-wide capability. Much can and still will be done to ensure that proficiency does not “peak,” then drop as time passed, skills decay, or experience dwindles with PCS and ETS movements. The LDP training done ICW this WFX is designed to sustain collective proficiency.
- ***Train using multiechelon techniques.*** During the WFX, JAs, Legal Administrators, and Paralegal Specialists / NCOs will perform individual tasks (e.g., disassemble and assemble M16 rifle, fill in the blocks of a nonjudicial punishment form, serve as OSJA “battle captains” or “battle NCOs”). They will also perform collective tasks (e.g., process, investigate, adjudicate, and pay a foreign claim, administer the military justice system, etc.). Cross-training between staff sections and legal disciplines, and the ability to work “outside one’s lane” will allow for flexibility and depth of legal support to operations, as well as leader development.
- ***Train to maintain.*** Upkeep of equipment and weapons is as much a part of training as expert use of that equipment. Every soldier, from clerk to SJA, are stewards of valuable resources (the tents, vehicles, weapons, and equipment the OSJA will need in a real deployment). We must ensure that all equipment within our areas of responsibility is used effectively and kept ready for deployment.
- ***Make commanders the primary trainers.*** Leaders are responsible for the training and performance of their units or organizations. Leaders personally ensured that training is based on their unit or organization mission requirements, identify applicable Army (and other applicable) standards, assess the current level of proficiency, provide the required training resources, and develop training plans designed to create proficient individuals, leaders, and units. The SJA is the primary trainer of the OSJA and mentor of all his or her subordinates. Each subordinate leader, whether enlisted, noncommissioned, warrant, or commissioned officer, has a critical training, but an SJA never relegates the responsibility of primary trainer.

## Chapter 4

### The After-Action Review (AAR)

Chapter 5 of FM 25-100 notes that the after-action review provides feedback for all training. An AAR is a structured review process that allows training participants to discover for themselves what happened, why it happened, and how it can be done better. The AAR is a professional discussion that requires the active participation of those being trained. An AAR is not a critique and has the following advantages over a critique:

- Focuses directly on key METL-derived training objectives.
- Emphasizes meeting Army standards rather than pronouncing judgment of success or failure.
- Uses “leading questions” to encourage participants to self-discover important lessons from the training event.
- Allows a large number of individuals and leaders to participate so that more of the training can be recalled and more lessons learned can be shared.

The after-action review (AAR) consists of four parts:

- ***Establish what happened.*** The evaluator and the participants determine what actually happened during performance of the training task. For force-on-force training, OPFOR members assist in describing the flow of the training event and discuss training outcomes from their points of view.
- ***Determine what was right or wrong with what happened.*** The participants establish the strong and weak points of their performance. The evaluator plays a critical role in guiding the discussions so that conclusions reached by participants are doctrinally sound, consistent with Army standards, and relevant to the wartime mission.
- ***Determine how the task should be done differently the next time.*** The evaluator leads the group in determining exactly how participants will perform differently the next time the task is performed. This results in organizational and individual motivation to conduct future sustainment training at desired levels of proficiency.
- ***Perform the task again.*** This is done as soon as possible to translate observation and evaluation into corrective action. Additional training allows the participants to apply the lessons learned during the AAR. Leaders understand that not all tasks will be performed to standard. Therefore, during the short-range and near-term planning process, leaders should plan for flexibility in training events and schedules to allow for additional training immediately following the AAR.

## Note from the Field

### Cold Fusion Confusion The Equal Employment Opportunity Commission's Incredible Interpretation of Religion in *LaViolette v. Daley*

*Captain (Ret.) Drew A. Swank*

Is cold fusion<sup>1</sup> the equivalent of Catholicism? Is believing in extraterrestrials the same as being an Episcopalian? In the recent Equal Employment Opportunity Commission (EEOC) decision of *LaViolette v. Daley*,<sup>2</sup> the EEOC held that the complainant's unusual beliefs regarding cold fusion, cryptic messages from extraterrestrials, and other "scientific" beliefs are entitled to the same protection in the workplace from discrimination as religious beliefs.<sup>3</sup> This note, by examining the facts of the case, the relevant statutes, agency regulations, and case law, will demonstrate that the EEOC's ruling has impermissibly expanded the definition of "religion" to the point that it has created a new cause of actionable discrimination—something the EEOC has neither the power nor the authority to do.

#### Genesis

Paul LaViolette had been a patent examiner with the Patent and Trademark Office (PTO) until he was fired on 9 April 1999.<sup>4</sup> On 28 June 1999, LaViolette filed a formal complaint of discrimination, alleging that the PTO fired and refused to rehire him based upon his "unconventional beliefs about cold fusion

and other technologies."<sup>5</sup> The Department of Commerce, of which the PTO is part, dismissed LaViolette's complaint on 13 September 1999, for failure to state a claim within the purview of Title VII of the Civil Rights Act of 1964.<sup>6</sup>

LaViolette appealed the dismissal, arguing that "discrimination against a person on account of his beliefs is the essence of discrimination on the basis of religion." Therefore, he contends, his scientific beliefs in cold fusion are protected.<sup>7</sup> The EEOC reversed the agency's dismissal of his complaint and remanded it for further processing.<sup>8</sup> While an agency must dismiss a complaint of discrimination that fails to state a claim,<sup>9</sup> here the EEOC held:

In determining which beliefs are protected under Title VII, the Supreme Court has held that the test is whether the belief professed is sincerely held and whether it is, in his own scheme of things, religious. . . . Moreover, in defining religious beliefs, our guidelines note that "the fact that no religious group espouses such beliefs . . . will not determine whether the belief is a religious belief of the employee . . . ."

In the instant case, complainant argues that his unconventional beliefs about cold fusion and other technologies should be viewed as a religion and therefore protected. Complain-

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1. Fusion is a nuclear reaction in which nuclei combine to form more massive nuclei with the simultaneous release of energy. THE AMERICAN HERITAGE DICTIONARY 541 (2d ed. 1982). Two researchers at the University of Utah claimed to have achieved fusion at room temperature. After others were unable to replicate their results, the vast majority of the scientific community discredited the notion of "cold fusion." Peter N. Saeta, *What Is the Current Scientific Thinking on Cold Fusion?*, Scientific American: Ask the Experts: Physics, at <http://www.scientificamerican.com/askexpert/physics/physics6.html> (last visited Feb. 4, 2002).

2. 2000 EEOPUB LEXIS 4858 (EEOC July 7, 2000); see Curt Suplee, *EEOC Backs "Cold Fusion" Devotee*, WASH. POST, Aug. 23, 2000, at A23.

3. *LaViolette*, 2000 EEOPUB LEXIS 4858, at \*4.

4. *Id.* at \*2; Suplee, *supra* note 2, at A23.

5. *LaViolette*, 2000 EEOPUB LEXIS 4858, at \*2. LaViolette's beliefs, as demonstrated in the books he has authored, include finding fundamental flaws with basic physics, relativity, and quantum theory. He also believes that the ancient Egyptians were a remnant of an antediluvian culture showing signs of advanced engineering whose myths are in fact coded information from an earlier, advanced science. PAUL A. LAVIOLETTE, *BEYOND THE BIG BANG* (1995). He further alleges that he discovered an ancient time-capsule cryptogram written in the stellar constellations that relates the galactic cause of the apocalypse that destroyed the ancient Egyptians. PAUL A. LAVIOLETTE, *EARTH UNDER FIRE* (1997). He also believes that pulsars are nonrandomly distributed in the sky, interstellar beacons of intelligent origin. PAUL A. LAVIOLETTE, *TALK OF THE GALAXY* (2000).

6. *LaViolette*, 2000 EEOPUB LEXIS 4858, at \*2; Suplee, *supra* note 2, at A23. 29 Code of Federal Regulation section 1614.107, Dismissal of Complaints, states that prior to a request for a hearing in a case, the agency shall dismiss an entire complaint that fails to state a claim under section 1614.103 or section 1614.106(a). 29 C.F.R. § 1614.107 (2000). Section 1614.103 specifies that individual and class complaints of employment discrimination and retaliation prohibited by Title VII (discrimination on the basis of race, color, religion, sex and national origin) are actionable. *Id.* § 1614.103.

7. *LaViolette*, 2000 EEOPUB LEXIS 4858, at \*3.

8. *Id.* at \*4-5.

9. 29 C.F.R. § 1614.107.

ant claims he was terminated and denied the opportunity to be rehired because of religion, which embodies his cold fusion beliefs. Therefore, under the applicable law noted above, we find that the agency improperly dismissed complainant's claim of discrimination for failure to state a claim.<sup>10</sup>

While the EEOC subsequently stated that it did not determine the validity of LaViolette's complaint,<sup>11</sup> by allowing the case to go forward, it has extended Title VII protection to scientific beliefs. In doing so, the EEOC not only misapplied its own regulations, but also ignored the statutes and case law that govern it and exceeded its statutory mandate as well.

### Numbers

The ultimate question presented by LaViolette's complaint is whether his scientific beliefs deserve the same protection from discrimination as another's religious beliefs. Title VII of the Civil Rights Act of 1964<sup>12</sup> provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."<sup>13</sup> It defines religion to "include all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>14</sup> Title VII has been interpreted "to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs."<sup>15</sup>

The EEOC, responsible for enforcing Title VII,<sup>16</sup> is required by its own regulations to adopt Title VII's definition of religion.<sup>17</sup> As Title VII's definition of religion is circular (religion includes all aspects of religious observance and practice),<sup>18</sup> the EEOC's regulation further adds that

[i]n most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such a belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).<sup>19</sup>

For LaViolette to prove his case of religious discrimination, whether by presenting direct or indirect evidence, he must make a prima facie case by showing four elements: (1) the plaintiff was a member of a protected class; (2) his job performance was satisfactory; (3) his employment was terminated; and (4) after he was fired, his position remained open to similarly qualified applicants.<sup>20</sup> If the plaintiff's membership in a protected class is not readily apparent, to satisfy the first ele-

10. *LaViolette*, 2000 EEO PUB LEXIS 4858 at \*3-4 (citations omitted).

11. Suplee, *supra* note 2, at A23.

12. 42 U.S.C. § 2000e (2000).

13. *Id.* § 2000e-2(a)(1).

14. *Id.* § 2000e(j).

15. *Van Koten v. Family Health Mgmt., Inc.*, 955 F. Supp. 898, 900 (N.D. Ill. 1997).

16. 29 C.F.R. § 1601.1 (2000).

17. *Id.* § 1601.2. This section states that "[t]he terms person, employer, employment agency, labor organization, employee, commerce, industry affecting commerce, State and religion as used in this part shall have the meanings set forth in section 701 of Title VII of the Civil Rights Act of 1964." *Id.*

18. *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (stating that "enactment does nothing to aid courts in determining the breadth of the 'beliefs' and 'practices' to be protected, other than to say they must be 'religious'"); *Brown v. Pena*, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977).

19. 29 C.F.R. § 1605.1.

20. *Van Koten*, 955 F. Supp. at 900-01 (citations omitted).

ment of the prima facie case, LaViolette must demonstrate that (1) his practices are religious in nature, (2) he called the religious practices to the employer's attention, and (3) his religious practices resulted in his termination.<sup>21</sup> While the PTO obviously knew of his beliefs, to be actionable he must show that they were "religious" in nature. To make that determination, it is necessary to examine not only the relevant statutes, but also the case law referenced in them as well.

### Judges

While the Supreme Court has stated that "it is no business of courts to say that what is a religious practice or activity for one group is not religion,"<sup>22</sup> in *United States v. Seeger*<sup>23</sup> and *Welsh v. United States*,<sup>24</sup> the Court did, indeed, say what constitutes religion. Both cases dealt with individuals who applied for conscientious objector status under the Universal Military and Training Service Act, but were denied that status.

In *United States v. Seeger*, three cases were consolidated that questioned the constitutionality of the Act's definition of "religious training and belief," which was used to determine conscientious objector status.<sup>25</sup> Under the Act, "religious training and belief" was defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."<sup>26</sup> The Court created what it characterized as an "objective" test to determine if an individual's beliefs can qualify as "religious training and belief" to gain conscientious objector status.<sup>27</sup> Going beyond the notion of an orthodox God, the

Court held that the definition of "religious training and belief" for the purpose of the statute would include

*all sincere religious beliefs* which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.<sup>28</sup>

While the draft board could not question the validity of the individual's beliefs, whether the beliefs are "truly held" is a legitimate question of fact to be determined.<sup>29</sup> The local draft boards were ultimately to "decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."<sup>30</sup> The Court did not address the Act's prohibition of conscientious objector status to those "disavowing religious belief, decided on the basis of political, sociological or economic considerations" or on a personal moral code "that war is wrong and that they will have no part of it."<sup>31</sup>

The other case cited in 29 Code of Federal Regulations (C.F.R.) section 1605.1, *Welsh v. United States*,<sup>32</sup> also dealt with defining conscientious objection status. One year after *Seeger* was decided, Elliot Welsh was imprisoned for three years for failure to enter the armed services after his application for conscientious objector status was denied;<sup>33</sup> Welsh's beliefs had been determined to be not sufficiently "religious" to qualify.<sup>34</sup> In applying and refining *Seeger*, the Court overturned Welsh's

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21. *Id.* at 901.

22. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). In *Redmond v. GAF Corp.*, the Court of Appeals for the Seventh Circuit noted that courts should avoid being put into a position of having to decide what the tenets of a particular religion are. 574 F.2d at 900.

23. 380 U.S. 163 (1965).

24. 398 U.S. 333 (1970).

25. *Seeger*, 380 U.S. at 164-65.

26. *Id.* at 165 (quoting Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

27. *Id.* at 184.

28. *Id.* at 176 (emphasis added).

29. *Id.* at 184-85.

30. *Id.* at 185.

31. *Id.* at 173, 185.

32. 398 U.S. 333 (1970).

33. *Id.* at 335.

34. *Id.* at 337.

conviction, stating that for a “registrant’s conscientious objection to all war to be ‘religious’ [and qualify under the Act his], opposition to war [must] stem from the registrant’s moral, ethical, or religious beliefs *about what is right or wrong* and that these beliefs are held with the strength of traditional religious convictions.”<sup>35</sup>

Beyond *Seeger* and *Welsh*, however, there have been very few cases which defined the bounds of religion or applied Title VII’s definition of religion. In one case, *Brown v. Pena*,<sup>36</sup> the plaintiff claimed that the EEOC discriminated against him when it dismissed his allegation of religious discrimination.<sup>37</sup> Brown had claimed that it was his “personal religious creed” that “Kozy Kitten Cat Food” contributed to his well-being and work performance.<sup>38</sup> The EEOC, and subsequently the federal district court, determined that Brown’s penchant for cat food was not protected by Title VII despite his characterization of it as a “personal religious creed,” but was at best a “mere personal preference.”<sup>39</sup> While “*all* forms and aspects of religion, however eccentric are protected,”<sup>40</sup> personal, non-religious preferences are not.

In *Edwards v. School Board of the City of Norton, Virginia*, the United States District Court for the Western District of Virginia had to determine whether the plaintiff’s beliefs were cognizable under Title VII.<sup>41</sup> Using various precedents, the court determined that a religious belief

excludes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man’s nature or the scheme of his existence as it related in a theological framework. Furthermore, the belief must have an institu-

tional quality about it and must be sincerely held by plaintiff.<sup>42</sup>

## Revelation

With the holdings of these cases, regulations, and statutes, it is possible to determine first, if LaViolette has a claim recognized by Title VII, and second, if the PTO was correct in dismissing it. Using the standard contained in 29 C.F.R. section 1605.1, it is clear that LaViolette’s views are not “religious” and are not protected by Title VII. Undoubtedly, he is sincere in his beliefs, and holds them with the “strength of traditional religious views.” He is obviously well educated and a well-written individual. The fact that few if any share his beliefs is of no consequence. Furthermore, it is entirely possible that his beliefs are correct—for example, that there is cold fusion and pulsars are interstellar beacons left by extraterrestrials. But unfortunately for his claim of discrimination, his beliefs fail to qualify for protection under Title VII for they do not “include moral or ethical beliefs as to what is right or wrong.”<sup>43</sup> There is no moral component to LaViolette’s views. While the EEOC cited *Welsh v. United States* in its opinion,<sup>44</sup> it ignored the *Welsh* requirement that the beliefs in question must be “about what is right or wrong.”<sup>45</sup> Without this component, the beliefs fail to be religious. If LaViolette’s beliefs are not religious, they cannot be protected by Title VII. If they are not protected by Title VII, the agency must dismiss the complaint of discrimination for failure to state a claim.<sup>46</sup>

Why cannot Title VII be interpreted to provide protection to LaViolette’s scientific beliefs? Title VII was not designed to negate all forms of discrimination—only discrimination based upon race, color, religion, sex, or national origin. As stated in *McDonnell Douglas Corp. v. Green*,

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35. *Id.* at 339-40 (emphasis added).

36. 441 F. Supp. 1382 (S.D. Fla. 1977).

37. *Id.* at 1384.

38. *Id.* at 1383-84.

39. *Id.* at 1385.

40. *Cooper v. General Dynamics*, 533 F.2d 163, 168 (5th Cir. 1976).

41. *Edwards v. School Bd. of the City of Norton, Va.*, 483 F. Supp. 620, 624 (W.D. Va. 1980) (membership in Worldwide Church of God precluded secular work on seven holy days).

42. *Id.* at 624.

43. 29 C.F.R. § 1605.1 (2000).

44. *LaViolette v. Daly*, 2000 EEOPUB LEXIS 4858, at \*3-4 (EEOC July 7, 2000).

45. *Welsh v. United States*, 398 U.S. 333, 339-40 (1970).

46. 29 C.F.R. § 1614.107.

Congress did not intend by Title VII . . . to guarantee a job to every person . . . because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.<sup>47</sup>

Only the forms of discrimination enumerated by Congress are prohibited by Title VII. Discrimination based upon intelligence, sense of humor, or in *LaViolette's* case—scientific beliefs—are not.

What harm is there in the EEOC remanding *LaViolette's* case back to the agency for processing? By expanding Title VII protection beyond what has been mandated by Congress, and by disregarding not only its own regulations but also its professed reliance on Supreme Court precedents, the EEOC has impermissibly created a new form of actionable discrimination—something the EEOC has neither the authority nor power to do.

In the recent Supreme Court case of the *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*,<sup>48</sup> the Court dealt with another agency's determination of its power to extend its regulations. The Food and Drug Administration (FDA) had decided that it had the power to regulate tobacco products. The Court, in determining that the FDA lacked this power, stated that agencies may not "exercise [their] authority 'in a manner that is inconsistent with the administrative structure that Congress passed into law.'"<sup>49</sup> To determine if an agency may regulate an area, whether it is tobacco products or scientific belief

discrimination, the first question to be answered is whether Congress has directly addressed the issue. If so, the Court must give effect to Congress's unambiguously expressed intent.<sup>50</sup> In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, the Court concluded that

no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."<sup>51</sup>

In *LaViolette*, the EEOC ignored Congress's "unambiguously expressed" intent of Title VII. Congress made discrimination an unlawful employment practice only if it took the form of one of five enumerated types. It did not prohibit all forms of discrimination in the workplace. While the EEOC is chartered to enforce Title VII, it has never been given the authority to create new forms of prohibited discrimination.<sup>52</sup> *LaViolette's* beliefs are not deserving of protection from discrimination against religion. Even if the EEOC is sympathetic to him, it is powerless to create new forms of protected activities, and it therefore should have sustained the agency's dismissal of his formal complaint. Only then would Congress's unambiguously expressed intent of Title VII be fulfilled.

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47. 411 U.S. 792, 800-01 (1973) (citations omitted).

48. 120 S. Ct. 1291 (2000).

49. *Id.* at 1297 (citations omitted).

50. *Id.*

51. *Id.* at 1315 (citations omitted).

52. 29 C.F.R. § 1601.1 (2000).

## CLE News

### 1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

### 2. TJAGSA CLE Course Schedule

#### 2002

#### March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-13 March	7th Comptroller Accreditation Program (5F-F14).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).

18-22 March 4th Contract Litigation Course (5F-F102).

18-29 March 17th Criminal Law Advocacy Course (5F-F34).

25-29 March Domestic Operational Law Workshop (5F-F45).

25-29 March 170th Senior Officers Legal Orientation Course (5F-F1).

#### April 2002

2-5 April 6th Comptroller Accreditation Program (5F-F14).

15-19 April 4th Basics for Ethics Counselors Workshop (5F-F202).

15-19 April 13th Law for Paralegal NCO Course (512-27D/20/30).

22-26 April 2002 Combined WWCLE (5F-2002).

29 April-10 May 148th Contract Attorneys Course (5F-F10).

29 April-17 May 45th Military Judge Course (5F-F33).

#### May 2002

6-10 May 3rd Closed Mask Training (512-27DC3).

13-17 May 5th Intelligence Law Workshop (5F-F41).

13-17 May 50th Legal Assistance Course (5F-F23).

29-31 May Professional Recruiting Training Seminar.

#### June 2002

3-5 June 5th Procurement Fraud Course (5F-F101).

3-7 June 171st Senior Officers Legal Orientation Course (5F-F1).

3-14 June	5th Voice Recognition Training (512-27DC4).	12-23 August	38th Operational Law Seminar (5F-F47).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).	26-30 August	8th Military Justice Managers Course (5F-F31).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	<b>September 2002</b>	
10-12 June	5th Team Leadership Seminar (5F-F52S).	9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
10-14 June	32d Staff Judge Advocate Course (5F-F52).	23-27 September	3rd Court Reporting Symposium (512-27DC6).
17-21 June	13th Senior Paralegal NCO Management Course (512-27D/40/50).	16-20 September	51st Legal Assistance Course (5F-F23).
17-21 June	6th Chief Paralegal NCO Course 512-27D-CLNCO).	16-27 September	18th Criminal Law Advocacy Course (5F-F34).

**3. Civilian-Sponsored CLE Courses**

15 March ICLE	The Art of Advocacy Atlanta, Georgia
22 March ICLE	Advocacy & Evidence Atlanta, Georgia

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

- AAJE: American Academy of Judicial Education  
1613 15th Street, Suite C  
Tuscaloosa, AL 35404  
(205) 391-9055
- 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

**July 2002**

8-12 July	33d Methods of Instruction Course (5F-F70).
8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-27DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

**August 2002**

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).

ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990	LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973	LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747	MICLE:	Michigan Institute of Continuing Legal Education 1020 Greene Street Ann Arbor, MI 48109-1444 (313) 764-0533 (800) 922-6516
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662	MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900	NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252	NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080		

TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421	California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 <a href="http://calbar.org">http://calbar.org</a>	-Twenty-five hours over three years of which four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 007-31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 99-31 Jan 02 and every thirty-six months thereafter)
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	Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 <a href="http://www.courts.state.co.us/cle/cle.htm">http://www.courts.state.co.us/cle/cle.htm</a>	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905.			

**4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates**

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>			
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 <a href="http://www.alabar.org/">http://www.alabar.org/</a>	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.	Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040 <a href="http://courts.state.de.us/cle/rules.htm">http://courts.state.de.us/cle/rules.htm</a>	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 <a href="http://www.azbar.org/AttorneyResources/mcle.asp">http://www.azbar.org/AttorneyResources/mcle.asp</a>	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.	Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 <a href="http://www.gabar.org/ga_bar/frame7.htm">http://www.gabar.org/ga_bar/frame7.htm</a>	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January
Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 <a href="http://courts.state.ar.us/clerules/htm">http://courts.state.ar.us/clerules/htm</a>	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.	Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 <a href="http://www.state.id.us/isb/mcle_rules.htm">http://www.state.id.us/isb/mcle_rules.htm</a>	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.

Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 <a href="http://www.state.in.us/judiciary/courtrules/admiss.pdf">http://www.state.in.us/judiciary/courtrules/admiss.pdf</a>	-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.	Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (651) 297-7100 <a href="http://www.mb-cle.state.mn.us/">http://www.mb-cle.state.mn.us/</a>	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076 No web site available	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.	Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 <a href="http://www.msbar.org/meet.html">http://www.msbar.org/meet.html</a>	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (785) 357-6510 <a href="http://www.kscl.org">http://www.kscl.org</a>	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.	Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 <a href="http://www.mobar.org/mobaracle/index.htm">http://www.mobar.org/mobaracle/index.htm</a>	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 <a href="http://www.kybar.org/clerkules.htm">http://www.kybar.org/clerkules.htm</a>	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.	Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 <a href="http://www.montana-bar.org/">http://www.montana-bar.org/</a>	-Fifteen hours per year. -Reporting date: 1 March
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 <a href="http://www.lsba.org/html/rule_xxx.html">http://www.lsba.org/html/rule_xxx.html</a>	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.	Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. A Reno, NV 89502 (775) 329-4443 <a href="http://www.nvbar.org/">http://www.nvbar.org/</a>	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
Maine	Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 <a href="http://www.mainebar.org/cle.html">http://www.mainebar.org/cle.html</a>	-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: 31 July	New Hampshire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 <a href="http://www.nhbar.org">http://www.nhbar.org</a>	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.

New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 <a href="http://www.nmbar.org/mclerules.htm">http://www.nmbar.org/mclerules.htm</a>	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.	Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. FL 35 Columbus, OH 43266-0419 (614) 644-5470 <a href="http://www.sco-net.state.oh.us/">http://www.sco-net.state.oh.us/</a>	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 <a href="http://www.courts.state.ny.us">http://www.courts.state.ny.us</a>	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.	Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 <a href="http://www.okbar.org/mcle/">http://www.okbar.org/mcle/</a>	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
			Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 <a href="http://www.osbar.org/">http://www.osbar.org/</a>	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.
			Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 <a href="http://www.pacle.org/">http://www.pacle.org/</a>	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 <a href="http://www.ncbar.org/CLE/MCLE.html">http://www.ncbar.org/CLE/MCLE.html</a>	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.	Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 <a href="http://www.courts.state.ri.us/">http://www.courts.state.ri.us/</a>	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.	South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 <a href="http://www.commcle.org/">http://www.commcle.org/</a>	-Fourteen hours per year, at least two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.

Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 <a href="http://www.cleln.com/">http://www.cleln.com/</a>	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.	West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 <a href="http://www.wvbar.org/">http://www.wvbar.org/</a>	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 <a href="http://www.courts.state.tx.us/">http://www.courts.state.tx.us/</a>	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.	Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 <a href="http://www.courts.state.wi.us/">http://www.courts.state.wi.us/</a>	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111-3834 (801) 531-9095 <a href="http://www.utahbar.org/">http://www.utahbar.org/</a>	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not practicing in state. -Reporting date: 31 January.	Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 <a href="http://www.wyomingbar.org">http://www.wyomingbar.org</a>	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 January.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 <a href="http://www.state.vt.us/courts/">http://www.state.vt.us/courts/</a>	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.			
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 <a href="http://www.vsb.org/">http://www.vsb.org/</a>	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 30 June.			* Military exempt (exemption must be declared with state) **Must declare exemption.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 <a href="http://www.wsba.org/">http://www.wsba.org/</a>	-Forty-five hours over a three-year period, including six hours ethics. -Reporting date: 31 January.			

## 5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the

examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 October 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

## Current Materials of Interest

### 1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

<u>DATE</u>	<u>TRNG SITE/HOST UNIT</u>	<u>COURSE NUMBER*</u>	<u>CLASS NUMBER</u>	<u>SUBJECT</u>	<u>ACTION OFFICER</u>
2-3 Mar 02	Denver, CO 96th RSC/87th LSO	JA0-21 JA0-31	934 927	Administrative Law (Legal Assistance/Claims)); Criminal Law	LTC Vince Felletter (970) 244-1677 vfellett@co.mesa.co.us
9-10 Mar 02	Washington, DC 10th LSO	JA0-41 JA0-11	927 920	Operational Law; Contract Law	CPT James Szymalak (703) 588-6750 James.Szymalak@hqda.army.mil
9-10 Mar 02	San Mateo, CA 63rd RSC/75th LSO	JA0-41 JA0-11	928 921	International Law (Information Law); Contract Law; Ethics Tape	MAJ Adrian Driscoll (415) 274-6329 adriscoll@ropers.com
16-17 Mar 02	Chicago, IL 91st LSO	JA0-21 JA0-11	935 924	Administrative Law (Claims); Contract Law	MAJ Richard Murphy (309) 782-8422 DSN 793-8422 murphysr@osc.army.mil
12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC	JA0-21 JA0-11	936 922	Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
22-26 Apr 02	Charlottesville, VA OTJAG	5F-2002	002	Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO	JA0-31 JA0-21	929 937	Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov
27-28 Apr 02	Newport, RI 94th RSC	JA0-31 JA0-11	930 923	Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil

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

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

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways.

The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a

profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at (703) 767-9052, (DSN) 427-9052 or [www.dtic.mil/dtic/current.html](http://www.dtic.mil/dtic/current.html).

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The Defense Technical Information Center also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to [bcorders@dtic.mil](mailto:bcorders@dtic.mil).

#### **Contract Law**

- AD A392560 146th Contract Attorneys Deskbook, JA 501, Vol. I, Apr/May 2001.
- AD A392561 146th Contract Attorneys Contract Deskbook, JA 501, Vol. II, Apr/May 2001.
- AD A38746 58th Fiscal Law Course Deskbook, JA 506-2001.

#### **Legal Assistance**

- AD A384333 Soldiers' and Sailors' Civil Relief Act Guide, JA 260-2000.
- AD A326002 Wills Guide, JA 262-1997.
- AD A346757 Family Law Guide, JA 263-1998.
- AD A384376 Consumer Law Guide, JA 265-2000.

- AD A372624 Uniformed Services Worldwide Legal Assistance & Reserve Component Directory, JA 267-1999.
- \*\*AD A374147 Tax Information Series, JA 269-2000.
- AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I, 1998.
- AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II, 1998.
- AD A329216 Legal Assistance Office Administration Guide, JA 271-1997.
- AD A276984 Deployment Guide, JA 272-1994.
- AD A360704 Uniformed Services Former Spouses' Protection Act Guide, JA 274-1999.
- AD A392496 Tax Assistance Program Management Guide, JA 275-2001.

#### **Administrative and Civil Law**

- AD A380147 Defensive Federal Litigation, JA 200-2000.
- AD A327379 Military Personnel Law, JA 215-1997.
- AD A255346 Reports of Survey and Line of Duty Determinations, JA 231-1992.
- AD A397153 Environmental Law Deskbook, JA 234-2001.
- AD A377491 Government Information Practices, JA 235-2000.
- AD A377563 Federal Tort Claims Act, JA 241-2000.
- AD A332865 AR 15-6 Investigations, JA 281-1998.

#### **Labor Law**

- AD A350510 Law of Federal Employment, JA 210-2000.
- \*\*AD A387749 The Law of Federal Labor-Management Relations, JA 211-2000.

## Legal Research and Communications

AD A394124 Military Citation, Seventh Edition,  
JAGS-ADL-P, 2001.

### Criminal Law

AD A302672 Unauthorized Absences Programmed  
Text, JA 301-1995.

AD A303842 Trial Counsel and Defense Counsel  
Handbook, JA 310-1995.

AD A302445 Nonjudicial Punishment, JA 330-1995.

AD A302674 Crimes and Defenses Deskbook,  
JA 337-1994.

AD A274413 United States Attorney Prosecutions,  
JA 338-1993.

### International and Operational Law

\*\*AD A377522 Operational Law Handbook,  
JA 422-2000.

### Reserve Affairs

AD A345797 Reserve Component JAGC Personnel  
Policies Handbook, JAGS-GRA-1998.

The following United States Army Criminal Investigation  
Division Command publication is also available through the  
DTIC:

AD A145966 Criminal Investigations, Violation of the  
U.S.C. in Economic Crime  
Investigations, USACIDC Pam 195-8.

\* Indicates new publication or revised edition.

\*\* Indicates that a revised edition of this publication has been  
mailed to DTIC.

## 3. Regulations and Pamphlets

a. The following provides information on how to obtain  
Manuals for Courts-Martial, DA Pamphlets, Army Regula-  
tions, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribu-  
tion Center (USAPDC) at St. Louis, Missouri, stocks and dis-  
tributes Department of the Army publications and blank forms  
that have Army-wide use. Contact the USAPDC at the follow-

ing address:

Commander  
U.S. Army Publications  
Distribution Center  
1655 Woodson Road  
St. Louis, MO 63114-6181  
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any  
part of the publications distribution system. The following ex-  
tract from *Department of the Army Regulation 25-30, The Army  
Integrated Publishing and Printing Program*, paragraph 12-7c  
(28 February 1989), is provided to assist Active, Reserve, and  
National Guard units.

b. The units below are authorized [to have] publications  
accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a Personnel and Ad-  
ministrative Center (PAC).* A PAC that supports battalion-size  
units will request a consolidated publications account for the  
entire battalion except when subordinate units in the battalion  
are geographically remote. To establish an account, the PAC  
will forward a DA Form 12-R (Request for Establishment of a  
Publications Account) and supporting DA 12-series forms  
through their Deputy Chief of Staff for Information Manage-  
ment (DCSIM) or DOIM (Director of Information Manage-  
ment), as appropriate, to the St. Louis USAPDC, 1655  
Woodson Road, St. Louis, MO 63114-6181. The PAC will  
manage all accounts established for the battalion it supports.  
(Instructions for the use of DA 12-series forms and a reproduc-  
ible copy of the forms appear in *DA Pam 25-33, The Standard  
Army Publications (STARPUBS) Revision of the DA 12-Series  
Forms, Usage and Procedures (1 June 1988).*

(b) *Units not organized under a PAC.* Units that  
are detachment size and above may have a publications ac-  
count. To establish an account, these units will submit a DA  
Form 12-R and supporting DA Form 12-99 forms through their  
DCSIM or DOIM, as appropriate, to the St. Louis USAPDC,  
1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies  
(FOAs), Major Commands (MACOMs), installations, and com-  
bat divisions.* These staff sections may establish a single ac-  
count for each major staff element. To establish an account,  
these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that  
are company size to State adjutants general.* To establish an ac-  
count, these units will submit a DA Form 12-R and supporting  
DA Form 12-99 forms through their State adjutants general to  
the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO  
63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis US-APDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), or the World Wide Web (WWW).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

#### **4. The Legal Automation Army-Wide Systems XXI—JAGCNet**

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

SA 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 OT-JAG staff.

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

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

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

(d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

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

(b) 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.

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

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

(e) 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.

(f) Once granted access to JAGCNet, follow step (b), above.

**5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

The following is a current list of TJAGSA publications available in various file formats for downloading from the LAAWS XXI JAGCNet at [www.jagcnet.army.mil](http://www.jagcnet.army.mil). These publications are available also on the LAAWS XXI CD-ROM set in PDF, only.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA 200	August 2000	Defensive Federal Litigation, January 2000.
JA 210	October 2000	Law of Federal Employment, September 2000.
JA 211	August 2001	The Law of Federal Labor-Management Relations, August 2001.
JA 215	August 2000	Military Personnel Law, June 1997.
JA 221	August 2000	Law of Military Installations Deskbook, September 1996.
JA 230	August 2000	Morale, Welfare, Recreation Operations, January 1998.
JA 231	August 2000	Reports of Survey and Line of Duty Determinations Guide, September 1992.
JA 234	August 2001	Environmental Law Deskbook, August 2001.
JA 235	May 2000	Government Information Practices, March 2000.
JA 241	October 2000	Federal Tort Claims Act, May 2000.
JA 250	September 2000	Readings in Hospital Law, May 1998.
JA 260	August 2000	Soldiers' and Sailors' Civil Relief Act Guide, July 2000.
JA 263	August 2000	Family Law Guide, May 1998.
JA 265	October 2000	Consumer Law Guides, September 2000.

JA 267	May 2000	Uniformed Services Worldwide Legal Assistance and Reserve Components Office Directory, November 1999.
JA 269	January 2002	Tax Information Series, January 2002.
JA 270	August 2000	The Uniformed Services Employment and Reemployment Rights Act Guide, June 1998.
JA 271	August 2000	Legal Assistance Office Administration Guide, August 1997.
JA 275	July 2001	Tax Assistance Program Management Guide, June 2001.
JA 280	May 2001	Administrative & Civil Law Basic Course Deskbook, (Vols. I & II), March 2001.
JA 281	August 2000	AR 15-6 Investigations, December 1998.
JA 301	May 2000	Unauthorized Absences, August 1995.
JA 330	October 2000	Nonjudicial Punishment Programmed Text, August 1995.
JA 337	May 2000	Crimes and Defenses Deskbook, July 1994.
JA 422	January 2002	Operational Law Handbook 2002.
JA 501	August 2001	146th Contract Attorneys Course Deskbook, Vols. I & II, July/Aug. 2001.
JA 506	March 2001	62nd & 63rd Fiscal Law Course Deskbook, March 2002.

**6. TJAGSA Legal Technology Management Office (LTMO)**

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

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

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

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

## 7. The Army Law Library Service

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

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: [lullnc@hqda.army.mil](mailto:lullnc@hqda.army.mil).

## 8. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2001. The point of contact is Major Jeffrey L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

## 9. Visual Information Library Bulletin

This bulletin contains a listing of educational television programs maintained in the Visual Information Library of the Judge Advocate General's School, United States Army. The listing consists of video recordings of actual classroom instruction presented at the School and video productions.

The library is set up to support the continuing legal education mission of the School. Tapes are intended for use by U. S. Army judge advocates and Department of the Army attorneys. They are not appropriate for general education or training and should not be used outside a legal office.

Local reproduction of these tapes is prohibited without prior written permission from The Judge Advocate General's School.

The programs listed in this bulletin are available through a tape duplication service. **TAPES ARE NOT PROVIDED ON LOAN.** Tapes must be requested by title and number and accompanied by a sufficient number of blank tapes. Programs can be reproduced onto 1/2-inch VHS videocassettes. All tapes are dubbed in the standard-play mode only. The length of time listed on the VHS tape is the amount of dubbing time available. (i.e. a T120 VHS tape allows for 120 minutes of taping).

NOTE: The service of duplicating program audio sound tracks to audiocassette tape is no longer offered.

Request and blank tapes should be mailed to:

The Judge Advocate General's School  
U.S. Army  
ATTN: Visual Information Branch (JAGS-ADE-V)  
600 Massie Road  
Charlottesville, VA 22903-1781

Telephone (804) 972-6317

Autovon (934-7115) and ask for extension 317

## Administrative and Civil Law Offerings

### JA-277-1A & 2A

*Advice to Future Staff Judge Advocates, Pts. I & II (5th Annual Charles L. Decker Lecture)*

DATE: March 1981

LENGTH: 50:00/21:00

SPEAKER: Major General (Retired) Lawrence H. Williams.

SYNOPSIS: MG Williams, a former TAJAG, provides unique and practical perspectives on the art and science of practices as a Staff Judge Advocate.

### JA-92-0040A

*State Unfair and Deceptive Acts and Practices Statutes (30th Legal Assistance Course)*

DATE: 12 March 1992

LENGTH: 53:00

SPEAKER: Ms. Kathleen E. Keest, Attorney, National Consumer Law Center, Boston, MA.

SYNOPSIS: Discussion of purpose and application of state unfair and deceptive acts and practices statutes.

**JA-94-0041A**

***Prevention of Battlefield Legal Problems, Pts. I & II (34th Legal Assistance Course)***

DATE: 11 March 1994

LENGTH: 50:00/46:00

SPEAKER: MAJ Richard Barfield, USMC, Deputy Staff Judge Advocate, Marine Corps Recruit Depot, San Diego, California.

SYNOPSIS: The speaker presents a class on the legal problems experienced in Southwest Asia by mobilized military personnel and military lawyers, actions to prevent these problems during peacetime and mobilization processing, and techniques for practicing military law under combat conditions.

**JA-94-0058A**

***Practice Before the Office of Special Counsel, Pts. I & II (45th Federal Labor Relations Course)***

DATE: 25 May 1994

LENGTH: 42:00/31:45

SPEAKER: Mr. James A. Kahl, Deputy Special Counsel, Office of Special Counsel.

SYNOPSIS: Overview of the organization and responsibilities of the various divisions of the Office of Special Counsel. Includes a review of reauthorization legislation, recent case highlights, and future responsibilities of OSC.

**JA-94-0059A**

***Labor-Management Partnership in Government, Pts. I & II (45th Federal Labor Relations Course)***

DATE: 26 May 1994

LENGTH: 53:30/47:30

SPEAKER: Mr. David L. Feder, Deputy General Counsel, Federal Labor Relations Authority.

SYNOPSIS: Discussion of the President's policy of greater labor-management cooperation in Federal agencies. Also includes FLRA position on various disputes, insights into the operation of the National Performance Review Council, and summaries of recent cases of interest.

**JA-95-0048A**

***Role of the Leader as Visionary for Organizational Change, The (1st Hugh J. Clausen Lecture on Leadership)***

DATE: 22 February 1995

LENGTH: 56:00

SPEAKER: BG Dulaney L. O' Roark, Jr. United States Army (Ret).

SYNOPSIS: General O'Roark speaks on the developing role of the leader as a visionary for organizational change. He acknowledges "intuitive leadership" and "leadership by example" as effective senior leadership qualities that served the

needs of the Judge Advocate General Corps in the past. He predicts that the future will offer different challenges that will require a new approach to senior-level leadership. The approach he proposes is "transformational leadership." Transformational leadership, he says, will produce significant changes in our current practice of military law and will compel us to adopt, apply, and maintain pace with technology.

**JA-95-0052A**

***Bankruptcy, Pts. I & II (36th Legal Assistance Course)***

DATE: 28 February 1995

LENGTH: 51:00/42:30

SPEAKER: Mr. Stephen Scott.

SYNOPSIS: Class presented at the 36th Legal Assistance Course focusing on chapters 7 (Straight Bankruptcy) and 13 (Adjustments of Debts of an Individual with Regular Income). Class discussion focused on the mechanics and implications of petitioning for bankruptcy.

**JA-95-0054A**

***Child Custody: The Military Practitioner's Perspective (36th Legal Assistance Course)***

DATE: 02 March 1995

LENGTH: 45:02

SPEAKER: LTC(P) Mark Sullivan, IMA, Instructor, Administrative and Civil Law Division, TJAGSA.

SYNOPSIS: Class presented to the 36th Legal Assistance Course focusing on basic concepts of custody, including forms of custody (sole, joint and split), types of visitation, and current custody trends and issues, with an emphasis on practical decision-making, dispute resolution and clause-drafting.

**JA-95-0055A**

***Advanced Separation Agreements, Pts. I & II (36th Legal Assistance Course)***

DATE: 02 March 1995

LENGTH: 44:50/45:00

SPEAKER: LTC(P) Mark Sullivan, IMA, Instructor, Administrative and Civil Law Division, TJAGSA.

SYNOPSIS: Class presented to the 36th Legal Assistance Course discussing strategies in negotiating separation agreements. Instruction also covered complex property division.

**JA-95-0083A**

***Introduction to Law of Federal Employment (47th Federal Labor Relations Course)***

DATE: 22 May 1995

LENGTH: 59:00

SPEAKER: MAJ Charles Hemicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This presentation provides federal government lawyers with a basic knowledge of the law of federal employment. It covers the organization and structure of the federal civil service system, the employment status of various types of employees, and the impact of veterans' preference rules and other regulatory provisions affecting employee status.

**JA-95-0084A*****Adverse Actions: Misconduct, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 22 May 1995

LENGTH: 53:40/41:00

SPEAKER: MAJ Charles Hernicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This presentation outlines the types of disciplinary actions that may be taken against federal civilian employees and the procedural requirements for taking these actions. It covers the applicable substantive statutory and regulatory standards and judicial interpretations for disciplinary actions.

**JA-95-0085A*****Performance-Based Actions (47th Federal Labor Relations Course)***

DATE: 22 May 1995

LENGTH: 45:36

SPEAKER: MAJ Charles Hernicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This presentation outlines the procedural requirements for taking performance-based actions against federal civilian employees. It covers the applicable standards of proof under 5 USC Chapter 43 and 5 USC Chapter 75.

**JA-95-0086A*****Introduction to Federal Labor-Management Relations (47th Federal Labor Relations Course)***

DATE: 22 May 1995

LENGTH: 47:28

SPEAKER: LTC Allan Pearson, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This presentation discusses the federal labor-management relations program and the role of labor organizations in the civil service system.

**JA-95-0087A*****Representation Process, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 22 May 1995

LENGTH: 49:00/48:30

SPEAKER: LTC Allan Pearson, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This block describes how labor organizations organize employees compel election procedures for union representation.

**JA-95-0088A*****Scope of Bargaining and Impasse Resolution, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 23 May 1995

LENGTH: 46:00/55:00

SPEAKER: LTC Allan Pearson, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: These hours cover the principles governing collective bargaining negotiations and recurrent issues in those

negotiations. It includes major negotiability decisions and the method of analyzing the negotiability of collective bargaining proposals.

**JA-95-0089A*****Unfair Labor Practices, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 23 May 1995

LENGTH: 38:05/50:00

SPEAKER: LTC Allan Pearson, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This presentation covers major issues in federal unfair labor practice cases and the procedural processing of unfair labor practice complaints.

**JA-95-0090A*****Negotiating Grievance Procedures and Arbitration (47th Federal Labor Relations Course)***

DATE: 23 May 1995

LENGTH: 46:00

SPEAKER: LTC Allan Pearson, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The instructor in this block focuses on negotiated grievance procedures and arbitration in federal civil service. It includes the Federal Labor Relations Authority's review of arbitration decisions and how management responds to and prepares for grievance/arbitration.

**JA-95-0091A*****Practice Before the Federal Labor Relations Authority: The Arbitrator's Perspective, Parts I & II (47th Federal Labor Relations Course)***

DATE: 23 May 1995

LENGTH: 46:20/49:30

SPEAKER: Dr. E. William Hockenberry, Arbitrator and Professor of Law.

SYNOPSIS: This presentation addresses the federal grievance process from the perspective of the arbitrator. It provides an overview of the arbitration process and practice tips.

**JA-95-0092A*****Equal Employment Opportunity Practice, Procedure, and New Developments, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 24 May 1995

LENGTH: 48:50/52:42

SPEAKER: MAJ Charles Hernicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This presentation summarizes the principal equal employment opportunity (EEO) statutes and the procedure for processing discrimination complaints at the installation level. Emphasis is on legal theories of discrimination and practical techniques for handling complaints.

**JA-95-0093A**

***Merit Systems Protection Board Practice, Procedure, and New Developments, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 24 May 1995

LENGTH: 44:50/51:00

SPEAKER: MAJ Charles Hernicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This block outlines the procedural and substantive rules applicable to practice before the Merit Systems Protection Board. It also explains case processing, case preparation, appellant defenses, and use of discovery.

**JA-95-0094A**

***Prohibited Personnel Practices and Merit Principles, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 25 May 1995

LENGTH: 50:00/46:00

SPEAKER: MAJ Charles Hernicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This block highlights the role of the Special Counsel in investigating and correcting prohibited personnel practices and disciplining officials who commit such practices. It includes issues under the Whistleblower Protection Act of 1989, particularly the stay and individual right of action provisions.

**JA-95-0095A**

***Reductions in Force and Transfers of Function, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 25 May 1995

LENGTH: 41:00/53:00

SPEAKER: MAJ Charles Hernicz, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: This block explains the statutory and regulatory requirements of a reduction-in-force and the procedural requirements involved in reductions in force and transfers of function.

**JA-95-0096A**

***Merit Systems Protection Board Practice, Pts. I & II (47th Federal Labor Relations Course)***

DATE: 25 May 1995

LENGTH: 47:00/42:00

SPEAKER: Mr. William B. Wiley, Counsel to the Chairman, Merit Systems Protection Board.

SYNOPSIS: This block summarizes appellate review practice and procedures within the Merit Systems Protection Board.

**JA-96-0011A**

***Soldier's and Sailor's Civil Relief Act, Pts. I & II (37th Legal Assistance Course)***

DATE: 16 October 1995

LENGTH: 47:00/45:27

SPEAKER: MAJ Howard McGillin, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The speaker presents an overview of the SSCRA. The class discusses eligibility for the acts' protection, the 6% loan provision, stays of judicial proceedings, default judgments and the statute of limitations.

**JA-96-0012A**

***Involuntary Allotments (37th Legal Assistance Course)***

DATE: 16 October 1995

LENGTH: 47:00

SPEAKER: MAJ Howard McGillin, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: Speaker discusses implementation of involuntary allotments against soldiers for creditor judgments. The class covers post-judgment remedies including garnishment and involuntary allotments.

**JA-96-0029A**

***Negotiating Skills for Judge Advocates***

DATE: 16 February 1996

LENGTH: 40:30

SPEAKER: COL Mark Sullivan, IMA Instructor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: Colonel Sullivan, a Board-Certified Specialist in Family Law and a Fellow of the American Academy of Matrimonial Lawyers, covers the essential aspects of negotiating for fellow judge advocates in family law, legal assistance, claims, procurement and military-justice. No other tape represents such a unique overview of the skills and services performed by the military lawyer in his or her daily duties.

**JA-96-0030A**

***Uniformed Services Former Spouses' Protection Act, Pts. I & II (38th Legal Assistance Course)***

DATE: 29 February 1996

LENGTH: 52:00/44:30

SPEAKER: MAJ Gregory O. Block, Instructor, Administrative and Civil Law Division, TJAGSA.

SYNOPSIS: Major Block discusses the Uniformed Services Former Spouses' Protection Act, and how to interpret the provisions of this Act to determine what rights and benefits former spouses retain following divorce from soldiers.

**JA-96-0031A**

***Introduction to Alternative Dispute Resolution (38th Legal Assistance Course)***

DATE: 29 February 1996

LENGTH: 43:00

SPEAKER: LTC Urs Gsteiger, IMA Instructor, Administrative and Civil Law Division, TJAGSA.

SYNOPSIS: Class presented at the 38<sup>th</sup> Legal Assistance Course covering the forms of alternative dispute resolution (ADR) including negotiation, conciliation, mediation and arbitration. Instruction included discussion of the various forms of mediation, conducting effective mediation, and the principles of human behavior that must be recognized and dealt with to succeed at mediation.

**JA-97-0026A*****Mobilization Legal Assistance Issues (3rd Reserve Component General Officers Legal Assistance Course)***

DATE: 22 January 1997

LENGTH: 48:30

SPEAKER: MAJ Paul Conrad, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: Major Conrad discusses mobilization legal assistance issues, including the Ready Reserve Mobilization Income Insurance Program, Command Legal Assistance Mobilization Planning, the Army Legal Assistance Program Policy for reserve access to services, Reserve Senior Commander responsibilities regarding legal assistance, and a brief overview of the Soldiers' and Sailors' Civil Relief Act.

**JA-97-0027A*****Uniformed Services Employment and Reemployment Rights (3rd Reserve Component General Officers Legal Assistance Course)***

DATE: 23 January 1997

LENGTH: 48:30

SPEAKER: MAJ Paul Conrad, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: Major Conrad discusses the Uniformed Services Employment and Reemployment Act (USERRA), including prerequisites to coverage under the Act, protections provided under the Act, and how the Act is enforced.

**JA-98-0003A*****Overview of Federal Ethics***

DATE: October 1997

LENGTH: 31:30

SPEAKERS: MAJ Herb Ford, Professor, Administrative and Civil Law, TJAGSA and COL Raymond C. Ruppert, Chief, Standards of Conduct Office, Office of the Judge Advocate General, Department of the Army, Washington, D.C.

SYNOPSIS: The speakers discuss the role and responsibilities of ethics counselors, including authority and appointments, opinion writing and resources.

**JA-98-0010A*****Post-Employment Restrictions and Procurement Integrity (4th Ethics Counselors Workshop)***

DATE: 16 October 1997

LENGTH: 46:40

SPEAKERS: MAJ Kathryn Sommerkamp, Professor, Contract Law, TJAGSA and Mr. Alfred H. Novotne, Standards of Conduct Office, Office of the Judge Advocate General, Department of the Army, Washington, D.C.

SYNOPSIS: The speakers discuss job hunting and post-government employment restriction rules and ethics rules unique to the procurement process, with emphasis on office counseling and opinion writing.

**JA-98-0011A*****Use of Government Resources, Pts. I & II (4th Ethics Counselors Workshop)***

DATE: 16 October 1997

LENGTH: 43:30/46:00

SPEAKER: Mr. E. Scott Castle, Senior Assistant to The General Counsel, Office of General Counsel, Department of the Army, Washington, D.C.

SYNOPSIS: Mr. Castle discusses the relationship between the principles of Federal appropriations law and Federal ethics rules relative to the use of government resources, including equipment, personnel, and support to non-Federal entities.

**JA-98-0013A*****Survivor Benefits, Pts. I & II (41st Legal Assistance Course)***

DATE: 21 October 1997

LENGTH: 51:00/47:30

SPEAKER: LTC Mark E. Henderson, Professor, Legal Assistance Branch, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The student will understand the major government programs offering benefits to the survivors of active duty and retired military personnel. Benefits covered include the Survivor Benefit Plan, Social Security, Dependency and Indemnity Compensation, and other DoD and Department of Veterans Affairs programs. The student will also understand how the Army Casualty Assistance System provides personal assistance to the Primary Next of Kin (PNOK).

**JA-98-0014A*****Real Estate Listing Agreements, Pts. I & II (41st Legal Assistance Course)***

DATE: 24 October 1997

LENGTH: 51:30/43:30

SPEAKER: LTC Urs Gsteiger

SYNOPSIS: LTC Gsteiger addresses the major issues and documents involved in selling individually owned real property. He gives practical solutions to problems legal assistance practitioners might face.

**JA-98-0050A*****Overview: Federal Income Tax (42nd Legal Assistance Course)***

DATE: 23 February 1998

LENGTH: 50:30

SPEAKER: LTC Mark E. Henderson, Professor, Legal Assistance Branch, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The student will understand the basic structure of the federal income tax system and recent changes to the Code affecting military taxpayers. The student will also understand current tax issues.

**JA-99-0023A*****Handling Sexual Harassment Complaints (23rd Administrative Law for Military Installations Course)***

DATE: 8 February 1999

LENGTH: 45:00

SPEAKER: MAJ Harold McCracken, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The student will learn to distinguish the different definitions of sexual harassment used in the federal sector,

including Title VII, DoD and 10 USC 1561. The student will learn how to use the existing EO and EEO complaint processes to investigate sexual harassment allegations brought by military and civilian complainants.

**JA-99-0025A**

***Private Organizations (23rd Administrative Law for Military Installations Course)***

DATE: 10 February 1999

LENGTH: 17:00

SPEAKER: MAJ Herb Ford, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: Instruction on private organizations operating on DoD installations, including authorized support, administrative requirements, and command responsibilities.

**JA-99-0026A**

***Army Enlisted Separations (23rd Administrative Law for Military Installations Course)***

DATE: 10 February 1999

LENGTH: 68:07

SPEAKER: MAJ Walter Hudson

SYNOPSIS: The student will understand the regulations and statutes applicable to Army enlisted separations.

**JA-99-0036A**

***Ethics Counselors Fundamentals: Walk Through The Joint Ethics Regulation (1st Basics For Ethics Counselors Workshop)***

DATE: 12 April 1999

LENGTH: 48:00

SPEAKER: Mr. Alfred H. Novotne, Standards of Conduct Office, Office of the Judge Advocate General, DA; Washington, D.C.

SYNOPSIS:

**JA-99-0038A**

***Competition and Privatization (1st Basics for Ethics Counselors Workshop)***

DATE: 15 April 1999

LENGTH: 43:50

SPEAKER: Ms. Elizabeth Buchanan, Office of General Counsel, Department of The Army, Washington, D.C.

SYNOPSIS:

**JA-99-0039A**

***Post Employment Restrictions and Procurement Integrity(1st Basics for Ethics Counselors Workshop)***

DATE: 15 April 1999

LENGTH: 89:00

SPEAKER: MAJ Mary Harney, USAF, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand and apply the job hunting and post-government employment restriction rules and ethics rules unique to the procurement process. Office counseling and opinion writing will be emphasized.

**JA-99-0054A**

***Professional Responsibility: A Philosophy of Lawyering, Pts. I, II & III***

NOTE: THIS PROGRAM IS FOR USE BY ARMY PERSONNEL ONLY.

DATE: 27 September 1999

LENGTH: 56:00/48:00/49:00

SPEAKER: Major Norman F. Allen, Criminal Law Department, TJAGSA and Major Maurice A. Lescault, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The instructors discuss the value of developing a personal philosophy of lawyering to help resolve the difficult ethical issues that can arise under the Rules of Professional Conduct. They go on to propose several factors that such a philosophy might contain and how these factors are reflected in the current rules. The instructors also use case examples to demonstrate how these principles apply to the everyday practice of judge advocates. Included is an update on several areas of professional responsibility and a seminar format hour for use in training.

**JA-00-0006A**

***Issues in Will Drafting (45th Legal Assistance Course)***

DATE: 18 October 1999

LENGTH: 85:18

SPEAKER: Major Curtis A. Parker; Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army.

SYNOPSIS: Current issues arising in the drafting of wills. Included in the discussion will be some review of the basics of will drafting, important clauses that must be considered for inclusion in every will, common legal issues that can be avoided by careful drafting, and the formalities of execution.

**JA-00-0007A**

***Introduction: Use of Trust in Estate Planning (45th Legal Assistance Course)***

DATE: 18 October 1999

LENGTH: 51:40

SPEAKER: LTC Robert R. Church, U.S. Army Reserve, Individual Mobilization Augmentee, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: Current issues arising in the drafting of wills. Included in the discussion will be some review of the basics of will drafting, important clauses that must be considered for inclusion in every will, common legal issues that can be avoided by careful drafting, and the formalities of execution.

**JA-00-0008A**

***Trust Drafting, Pts. I & II (45th Legal Assistance Course)***

DATE: 21 October 1999

LENGTH: 52:00/48:30

SPEAKER: LTC Robert R. Church, U.S. Army Reserve, Individual Mobilization Augmentee, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The student will become familiar with drafting a number of the trusts commonly used in estate planning, including contingent trusts for minors, the living trust, and the Inter-

nal Revenue Code Section 2503 trust. Specific trust provisions and the estate tax implications of the trusts will be discussed.

**JA-00-0009A**

***Fiscal Law for AGR Attorneys (1999 USAR AGR JAG Conference)***

DATE: 27 October 1999

LENGTH: 50:44

SPEAKER: Major Elizabeth D. Berrigan, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class will focus on a variety of current fiscal law issues relevant to the both Army Reserve Component and the National Guard. Emphasis is on new decisions of the General Accounting Office; advisory opinions of the Office of General Counsel, Department of the Army; and regulatory guidance on various fiscal issues.

**JA-00-0010A**

***Freedom of Information and Privacy Act Fundamentals for AGR Attorneys (1999 USAR AGR JAG Conference)***

DATE: 27 October 1999

LENGTH: 54:12

SPEAKER: Major Corey L. Bradley, Professor, Administrative and Civil Law Department, TJAGSA.

SYNOPSIS: The student will review the fundamental principles of the Freedom of Information Act and Privacy Act. Instruction captures changes in the law and regulations resulting from recent amendments to the FOIA. The lecture focuses on the FOIA and PA issues often confronted by Reserve Judge Advocates.

**JA-00-0014A**

***The United States Office of Personnel Management in the New Millennium (20th Charles L. Decker Lecture in Administrative and Civil Law)***

DATE: 17 November 1999

LENGTH: 56:40

SPEAKER: Honorable Janice R. Lachance, Director, United States Office of Personnel Management.

SYNOPSIS: Ms. LaChance spoke about her vision of the federal workforce in the 21st Century. She spoke about the changes to the federal workplace which will occur as a result of technological advances, and highlighted the need for employees to be well-versed in a variety of subjects and no longer specialists in just one area. She also discussed the challenges for employees and managers in evaluating and rating performance as a result of these changes. She presented OPM's initiatives for managing the federal workforce to keep pace with the changes in the workforce and the workplace.

**JA-01-0009A**

***Arbitration and Environmental Differential Pay (54th Federal Labor Relations Course)***

DATE: 30 November 2000

LENGTH: 87:12

SPEAKER: Major Douglas B. Cox, USAF, Trial Attorney, Employment Litigation Branch, Air Force Legal Services Agency, Arlington, Virginia.

SYNOPSIS: A two-hour introduction to the requirements for paying environmental differential pay (EDP) to wage grade employees, especially where it is based on exposure to asbestos, and practical tips for representing a federal agency in an arbitration proceeding involving EDP issues.

**JA-01-0021A**

***Gifts, Pts. I & II (3rd Basics for Ethics Counselors Workshop)***

DATE: 09 April 2001

LENGTH: 45:11/49:41

SPEAKER: Mr. David W. LaCroix, Assistant to the General Counsel, Department of the Navy.

SYNOPSIS: Mr. LaCroix discusses the standards of conduct rules on gifts from outside sources, from foreign governments and between employees.

**JA-01-0022A**

***Travel Related Gifts (3rd Basics for Ethics Counselors Workshop)***

DATE: 09 April 2001

LENGTH: 41:48

SPEAKER: Mr. Mark F. Stone, AFMC Law Office, Wright-Patterson Air Force Base, Ohio.

SYNOPSIS: The speaker discusses the ethics rules and regulations governing the acceptance of gifts related to travel, with emphasis on frequent flyer miles and other travel gratuities.

**JA-01-0023A**

***Outside Activities, Pts. I & II (3rd Basics for Ethics Counselors Workshop)***

DATE: 09 April 2001

LENGTH: 52:12/35:22

SPEAKER: LCDR Vida M. Antolin-Jenkins; Head, Standards of Conduct and Government Ethics Branch, Office of the Judge Advocate General, United States Navy.

SYNOPSIS: The speaker discusses the rules related to outside employment and outside activities of Federal Employees and their family members.

**JA-01-0024A**

***Conflicts of Interest, Pts. I & II (3rd Basics for Ethics Counselors Workshop)***

DATE: 10 April 2001

LENGTH: 51:00/35:48

SPEAKER: CPT. Eric M. Lyon, Special Assistant to the Counsel for the Commandant, United States Marine Corps.

SYNOPSIS: CPT. Lyon presents a class on how to analyze financial conflicts of interest and how to resolve them and what other outside activities may conflict with conscientious duty performance.

**JA-01-0025A**

***Financial Disclosure (3rd Basics for Ethics Counselors Workshop)***

DATE: 10 April 2001

LENGTH: 40:00

SPEAKER: Ms. Gail D. Mason, Senior Attorney, Standards of Conduct Office, Office of the General Counsel, Department of Defense.

SYNOPSIS: The speaker presents a class on proper compilation of financial disclosure reports (SF 278 and SF 450) and ethics counselors review responsibilities.

**JA-01-0026A**

***Fiscal Aspects of Ethics (3rd Basics for Ethics Counselors Workshop)***

DATE: 10 April 2001

LENGTH: 45:00

SPEAKER: Mr. Don W. Fox, Deputy General Counsel, United States Air Force.

SYNOPSIS: The speaker discusses the correlation between fiscal law principles and the JER.

**JA-01-0028A**

***Private Organizations: Relations with Non-Federal Entities (3rd Basics for Ethics Counselors Workshop)***

DATE: 10 April 2001

LENGTH: 56:00

SPEAKER: LTC Sandra B. Stockel, Assistant to the General Counsel, Office of the General Counsel, Ethics and Fiscal Law.

SYNOPSIS: The speaker discusses the rules governing official and personal relationships with non-Federal entities (private organizations), including membership, management, endorsement, and fundraising.

**JA-01-0029A**

***Fundraising (3rd Basics for Ethics Counselors Workshop)***

DATE: 10 April 2001

LENGTH: 53:38

SPEAKER: LTC Sandra B. Stockel, Assistant to the General Counsel, Office of the General Counsel, Ethics and Fiscal Law.

SYNOPSIS: The speaker discusses the rules and prohibitions related to fundraising on the military installation and by military members.

**JA-01-0030A**

***Government Travel and Transportation (3rd Basics for Ethics Counselors Workshop)***

DATE: 11 April 2001

LENGTH: 79:43

SPEAKER: LTC Lisa Anderson-Lloyd, Assistant to the General Counsel, Office of the General Counsel, United States Army.

SYNOPSIS: The speaker discusses selected travel and transportation rules, with emphasis on the proper use of official transportation resources to include vehicles and aircraft.

**JA-01-0031A**

***Advanced Financial Disclosure (3rd Basics for Ethics Counselors Workshop)***

DATE: 11 April 2001

LENGTH: 81:47

SPEAKER: Ms. Gail D. Mason, Senior Attorney, Standards of Conduct Office, Office of the General Counsel, Department of Defense.

SYNOPSIS: The speaker discusses advanced issues related to the proper compilation of financial disclosure reports (SF 278 and SF 450) and ethics counselors review responsibilities.

**JA-01-0033A**

***Nonappropriated Fund Instrumentalities (3rd Basics for Ethics Counselors Workshop)***

DATE: 12 April 2001

LENGTH: 55:45

SPEAKER: Mary L. Hostetter; Counsel, Personal and Family Readiness Division; Headquarters, United States Marine Corps, Quantico, VA.

SYNOPSIS: The speaker discusses the correlation between MWR and NAF activities and the JER.

**JA-01-0034A**

***Ethics Aspects of Outsourcing and Privatization (3rd Basics for Ethics Counselors Workshop)***

DATE: 12 April 2001

LENGTH: 58:07

SPEAKER: Ms. Mary C. Sullivan, Attorney, Office of the Assistant General Counsel; Research, Development and Acquisition, Department of the Navy.

SYNOPSIS: The speaker discusses the A-76 process and the complex ethics issues that derive from this process.

**JA-01-0035A**

***A Walk Through the Joint Ethics Regulation (3rd Basics for Ethics Counselors Workshop)***

DATE: 12 April 2001

LENGTH: 28:35

SPEAKER: Mr. Alfred H. Novotne; Chief, Standards of Conduct Branch, Standards of Conduct Office, Office of the Judge Advocate General, Washington D.C.

SYNOPSIS: The speaker describes the format and content of the JER.

**JA-01-0036A**

***Program Review (3rd Basic for Ethics Counselors Workshop)***

DATE: 13 April 2001

LENGTH: 48:00

SPEAKER: Mr. David W. LaCroix, Assistant to the General Counsel, Department of the Navy.

SYNOPSIS: The speaker discusses the audit process and how to prepare for them.

**JA-01-0043A**

***Automobile Fraud (49th Legal Assistance Course)***

DATE: 20 September 2001

LENGTH: 79:06

SPEAKER: Mr. Tom Domonoske, Private Practitioner; Harrisonburg, Virginia.

SYNOPSIS: The speaker presents a summary of the most prevalent deceptive sales techniques in the retail car industry and the

consumer laws that legal assistance attorneys can use to combat them.

**JA-02-0047A**

***Introduction to Federal Income Tax (5th Tax Law for Attorneys Course)***

DATE: 10 December 2001

LENGTH: 68:30

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand the basic structure of the federal income tax system, tax return filing requirements, filing status choice, and exemptions. The Student will be able to complete lines 1-6 of the Form 1040.

**JA-02-0048A**

***Gross Income (Basic), (5th Tax Law for Attorneys Course)***

DATE: 10 December 2001

LENGTH: 72:20

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand the tax rules relating to reporting all sources of income, including items of military compensation, interest, dividend, and miscellaneous income. The student will be able to complete Schedule B (Form 1040) and lines 7-22 of the Form 1040.

**JA-02-0049A**

***Adjustments to Income (Basic), (5th Tax Law for Attorneys Course)***

DATE: 10 December 2001

LENGTH: 41:50

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will understand the tax rules relating to common adjustments to income, including student loan interest, medical savings account, moving expenses, and alimony. The student will be able to complete Form 3903, student loan interest deduction worksheet, and lines 24-33 of the Form 1040.

**JA-02-0050A**

***Tax Aspects of Real Property, Pts. I & II (5th Tax Law for Attorneys Course)***

DATE: 11 December 2001

LENGTH: 54:00/40:38

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand how the federal income tax rules affect taxpayers who buy and own a home. The student will be able to apply the home mortgage interest rules and the exclusion of gain provisions of the code to common fact situations. The student will also understand the rules relating to holding a home out for rental, to include reporting rental income and claiming rental and depreciation deductions.

The student will understand how to complete Schedule E (Form 1040) and Form 4562.

**JA-02-0051A**

***Tax Aspects of Individual Retirement Accounts (5th Tax Law for Attorneys Course)***

DATE: 11 December 2001

LENGTH: 43:30

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will understand the tax rules relating to traditional IRAs, Roth IRAs, and Educational IRAs. The student will be able to complete Form 8606 and lines 15, 16, 23, and 53 of the Form 1040.

**JA-02-0052A**

***Tax Aspects of Stocks and Mutual Funds (5th Tax Law for Attorneys Course)***

DATE: 11 December 2001

LENGTH: 39:00

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army. : MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will understand the tax rules relating to mutual funds and stocks. The student will be able to complete Schedules B and D (Form 1040) and to report gains and losses on these investments on lines 8, 9, 13, 22, and 40 of the Form 1040.

**JA-02-0053A**

***Deductions and Tax Computation, Pts. I & II (5th Tax Law for Attorneys Course)***

DATE: 12 December 2001

LENGTH: 49:30/44:30

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand the tax rules relating to claiming itemized deductions. The student will be able to complete Schedule A (Form 1040), Form 2106, and lines 34-40 of the Form 1040.

**JA-02-0054A**

***Tax Credits (5th Tax Law for Attorneys Course)***

DATE: 12 December 2001

LENGTH: 39:00

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army. : MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will understand the tax credits available to taxpayers, including the child care credit, earned income credit, child tax credit, education credits, and adoption credit.

The student will be able to complete lines 41-49 of the Form 1040.

**JA-02-0055A**

***Tax Payments, Other Taxes, and Finishing the Return (5th Tax Law for Attorneys Course)***

DATE: 34:35

LENGTH: 12 December 2001

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army. : MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will understand other taxes that can be assessed on taxpayers, such as the self-employment tax, alternative minimum tax, tax on Individual Retirement Arrangements (IRAs), household employment taxes, and the total tax. The student will understand various tax payments that apply to tax returns and completing a tax return. The student will be able to complete lines 50-69 of the Form 1040.

**JA-02-0056A**

***Foreign Tax Issues (5th Tax Law for Attorneys Course)***

DATE: 13 December 2001

LENGTH: 30:20

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand how the tax code affects taxpayers living overseas. The student will understand how to claim the foreign earned income exclusion and the foreign tax credit. The student will be able to complete Form 1040NR, Form 1116, and Form 2555.

**JA-02-0057A**

***Family Childcare Provider Tax Issues (5th Tax Law for Attorneys Course)***

DATE: 13 December 2001

LENGTH: 51:00

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand the tax rules and issues relating to military family childcare providers. The student will be able to complete related tax forms.

**JA-02-0058A**

***Sale of Rental Property (5th Tax Law for Attorneys Course)***

DATE: 13 December 2001

LENGTH: 51:00

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand how to determine and report gain derived from the sale of rental real property. The student will be introduced to the concepts of recaptured and

unrecaptured gain under Internal Revenue Code § 1250. The student will understand recapture of depreciation and gain attributable to the Accelerated and Modified Accelerated Cost Recovery System of depreciation. The student will be able to account for the gain of property qualifying for the capital gain exclusion under I.R.C. § 121 when such property has been rented, either in whole or in part. The student will understand how to complete Form 4797, Schedule D, and the sale of home worksheets.

**JA-02-0059A**

***IRS Practice and Procedure (5th Tax Law for Attorneys Course)***

DATE: 13 December 2001

LENGTH: 38:00

SPEAKER: LTC Curtis A. Parker, Professor, Legal Assistance Branch, Administrative and Civil Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS: The student will understand the new structure of the IRS and how to assist taxpayers in dealing with the IRS. The student will understand recent changes regarding new taxpayer rights and procedures with emphasis on increased appeal rights and early referral to mediation and arbitration.

**JA-02-0060A**

***Divorce Taxation (5th Tax Law for Attorneys Course).***

**DATE: 13 December 2001**

LENGTH: 44:10

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army. : MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will understand principles of federal taxation that impact on those who are divorced or separated. Special emphasis will be devoted to these principles during pre-divorce counseling.

**JA-02-0061A**

***State Taxation of Income and Income Tax Aspects of SSCRA (5th Tax Law for Attorneys Course)***

DATE: 13 December 2001

LENGTH: 24:45

SPEAKER: MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army. : MAJ Janet A. Fenton, Deputy Chief, Legal Assistance Policy Division, Office of the Judge Advocate General, United States Army.

SYNOPSIS: The student will be able to apply the Soldiers' and Sailors' Civil Relief Act to state income tax problems. The student will be introduced to concepts states apply to tax individual income (e.g., domicile, statutory residence, situs of earnings) and some of the reporting methods and requirements used by states.

## Contract and Fiscal Law Offerings

### JA-92-0026K

#### *Choosing a Forum: ASBCA or Claims Court (1992 Government Contract Law Symposium)*

DATE: 15 January 1992

LENGTH: 47:00

SPEAKER: Mr. Ronald A. Schechter; Jones, Day, Reavis & Progue, Washington, D.C. and the Honorable Carol Park-Conroy, Armed Services Board of Contract Appeals, Falls Church, Virginia.

SYNOPSIS: Discussion of practical considerations for a contractor in choosing the claims court or a board of contract appeals as a forum to litigate a claim.

### JA-93-0017K

#### *Application of Antitrust Laws to Corporate Mergers and Acquisitions Involving Government Contractors (1993 Government Contract Law Symposium)*

DATE: 11 January 1993

LENGTH: 42:00

SPEAKER: Professor William E. Kovacic, George Mason University, Arlington, Virginia.

SYNOPSIS: Professor Kovacic explains the basics of antitrust laws and how they affect reorganizations and restructuring by government contractors. Differences between DOJ, FTC, and DOD are explored.

### JA-93-0018K

#### *Historical Perspective on the Government Contracting Process (1993 Government Contract Law Symposium)*

DATE: 11 January 1993

LENGTH: 28:00

SPEAKER: Mr. James F. Nagle, Oles, Morrison & Rinkler, Seattle, Washington.

SYNOPSIS: Mr. Nagle discusses those recurring themes in government contracting that influence today's laws, policies, and practices.

### JA-93-0077K

#### *Debarments and Suspensions, Pts. I & II (10th Contract Claims, Litigation, and Remedies Course)*

DATE: 24 September 1993

LENGTH: 44:00/50:44

SPEAKER: Mr. Dick Finnegan, Defense Logistics Agency, Office of the General Counsel, Washington, D.C.

SYNOPSIS: This block of instruction covers issues related to the application of the government's administrative procurement fraud remedies of suspension and debarment.

### JA-94-0019K

#### *Recognizing/Preventing Antitrust Violations (1994 Government Contract Law Symposium)*

DATE: 13 January 1994

LENGTH: 52:00

SPEAKER: Professor William E. Kovacic, George Mason University School of Law, Arlington, Virginia.

SYNOPSIS: This block of instruction covers issues related to identifying and preventing antitrust violations in a competitive corporate environment.

### JA-94-0031K

#### *Selected Labor Standards, Pts. I & II (132nd Contract Attorneys Course)*

DATE: 01 March 1994

LENGTH: 43:00/53:00

SPEAKER: MAJ Steven Tomanelli, USAF, Instructor and Air Force Representative, Contract Law Division, TJAGSA.

SYNOPSIS: Major Tomanelli explains basic labor standards relating to government contracts, with emphasis on the Walsh-Healey Act, the Davis-Bacon Act, and the Service Contract Act.

### JA-94-0032K

#### *Claims and Remedies, Pts. I & II (132nd Contract Attorneys Course)*

DATE: 01 March 1994

LENGTH: 59:45/53:00

SPEAKER: MAJ Bobby D. Melvin Jr., Trial Attorney, Contract Appeals Division, U.S. Army Legal Services Agency.

SYNOPSIS: Major Melvin explains government and contractor remedies under a government contract, including the procedural aspects of filing and litigating a contract dispute.

### JA-94-0035K

#### *Contracting for Services (132nd Contract Attorneys Course)*

DATE: 02 March 1994

LENGTH: 48:30

SPEAKER: MAJ Douglas P. DeMoss, Instructor, Contract Law Division, TJAGSA.

SYNOPSIS: Major DeMoss discusses service contracting policies, the commercial activities program, special considerations in service contracting (e.g., personal services, inherently governmental functions, and conflicts of interest), source selection issues, and contract administration issues.

### JA-94-0069K

#### *Overview: Litigation in the Court of Federal Claims (1st Federal Courts and Boards Litigation Course)*

DATE: 12 September 1994

LENGTH: 51:00

SPEAKER: Mr. Steven Schooner, Commercial Litigation Division, Department of Justice, Washington, D.C.

SYNOPSIS: Mr. Schooner explains the type of cases litigated in the Court of Federal Claims and how cases are processed.

### JA-94-0070K

#### *Overview: Litigation in the Federal District Courts (1st Federal Courts and Boards Litigation Course)*

DATE: 12 September 1994

LENGTH: 42:30

SPEAKER: Mr. Gill Beck, Assistant U.S. Attorney, Middle District of N.C.

SYNOPSIS: Mr. Beck explains the type of cases litigated in the Federal District Courts and how cases are typically processed.

**JA-94-0071K**

***Review of Claims and Preparing Rule 4 Files (1st Federal Courts and Boards Litigation Course)***

DATE: 12 September 1994

LENGTH: 43:20

SPEAKER: MAJ Karl Ellcessor, Instructor, Contract Law Division, TJAGSA.

SYNOPSIS: Major Ellcessor discusses the roles and responsibilities of the trial attorney and the field attorney in reviewing and investigating contract claims.

**JA-94-0072K**

***Pricing of Claims and Quantum Hearings, Pts. I & II (1st Federal Courts and Boards Litigation Course)***

DATE: 12 September 1994

LENGTH: 44:45/51:30

SPEAKER: MAJ Steven Tomanelli, USAF, Instructor, Contract Law Division, TJAGSA.

SYNOPSIS: Major Tomanelli discusses the cost principles applicable to the pricing of claims and equitable adjustments to contracts.

**JA-94-0073K**

***Depositions (1st Federal Courts and Boards Litigation Course)***

DATE: 13 September 1994

LENGTH: 44:00

SPEAKER: LTC Glen Monroe, Instructor (IMA), Contract Law Division, TJAGSA.

SYNOPSIS: LTC Monroe explains the procedures and techniques used to depose witnesses prior to trial.

**JA-94-0074K**

***Pleadings And Motions, Pts. I & II (1st Federal Courts and Boards Litigation Course)***

DATE: 13 September 1994

LENGTH: 40:13/41:00

SPEAKER: Mr. Richard Parker, Assistant U.S. Attorney, Eastern District of Virginia.

SYNOPSIS: Mr. Parker discusses the practical considerations of preparing pleadings, raising defenses and arguing motions in the Federal District Courts.

**JA-94-0075K**

***Litigation Techniques in the ASBCA (1st Federal Courts and Boards Litigation Course)***

DATE: 13 September 1994

LENGTH: 53:30

SPEAKER: LTC Bobby Melvin, Contract Appeals Division, U.S. Army Legal Services Agency, Washington, D.C.

SYNOPSIS: LTC Melvin discusses the practical aspects of litigating cases in the Armed Services Board of Contract Appeals and various issues of current interest.

**JA-94-0076K**

***Discovery, Pts. I & II (1st Federal Courts and Boards Litigation Course)***

DATE: 14 September 1994

LENGTH: 56:00/41:27

SPEAKER: Mr. James A. Hughes, Jr., Counsel, King and Spaulding, Washington, D.C.

SYNOPSIS: Mr. Hughes discusses the practical aspects of formulating and drafting discovery requests with emphasis on interrogations, requests for production of documents and requests for admissions.

**JA-94-0077K**

***Preparing Evidence and Trial Witnesses for Trial (1st Federal Courts and Boards Litigation Course)***

DATE: 14 September 1994

LENGTH: 40:00

SPEAKER: Ms. Jeri Sommers, Commercial Litigation Division, Department of Justice, Washington, D.C.

SYNOPSIS: Ms. Sommers explains how to prepare testimonial evidence and trial exhibits.

**JA-94-0078K**

***Cross-Examining Expert Witnesses (1st Federal Courts and Boards Litigation Course)***

DATE: 14 September 1994

LENGTH: 41:37

SPEAKER: Ms. Jeri Sommers, Commercial Litigation Division, Department of Justice, Washington, D.C.

SYNOPSIS: Ms. Sommers discusses common techniques used to cross-examine expert witnesses.

**JA-94-0080K**

***Temporary Restraining Orders, Preliminary Injunctions (1st Federal Courts and Boards Litigation Course)***

DATE: 15 September 1994

LENGTH: 51:40

SPEAKER: MAJ Raymond J. Jennings, Jr., Instructor, Administrative and Civil Law Division, TJAGSA.

SYNOPSIS: Major Jennings discusses the practical considerations in responding to motions for temporary restraining orders and preliminary injunctions.

**JA-94-0081K**

***DoJ/Agency Relationship, Pts. I & II (1st Federal Courts and Boards Litigation Course)***

DATE: 15 September 1994

LENGTH: 49:50/15:30

SPEAKER: Ms. Donna Maizel, Commercial Litigation Division, Department of Justice, Washington, D.C.

SYNOPSIS: Ms. Maizel discusses the role of Department of Justice and Federal Agency attorneys in conducting litigation in the federal courts.

**JA-94-0083K**

***Suspensions and Debarments (1st Federal Courts and Boards Litigation Course)***

DATE: 15 September 1994

LENGTH: 53:00  
SPEAKER: Mr. John Farenish, Office of General Counsel, Department of the Navy, Washington, D.C.  
SYNOPSIS: Mr. Farenish discusses the use of the government's debarment and suspension remedies for addressing problems with a contractor.

**JA-94-0084K**

***Qui Tam Litigation (1st Federal Courts and Boards Litigation Course)***

DATE: 15 September 1994  
LENGTH: 44:00  
SPEAKER: LTC Glen Monroe, Instructor (IMA), Contract Law Division, TJAGSA.  
SYNOPSIS: LTC Monroe discusses *Qui Tam* litigation procedures and the roles of the agency attorney, the U.S. Attorney, the Realtors attorney and the contractor's attorney.

**JA-95-0044K**

***Contractor Teaming Arrangements (1995 Government Contract Law Symposium)***

DATE: 12 January 1995  
LENGTH: 48:40  
SPEAKER: Professor William Kovacic, George Mason University, Fairfax, Virginia.  
SYNOPSIS: Professor Kovacic examines the increased use of contractor teaming arrangements, and discusses the effect of these arrangements on competition for the government's requirements.

**JA-95-0045K**

***Ethics in Government Acquisitions (1995 Government Contract Law Symposium)***

DATE: 12 January 1995  
LENGTH: 39:40  
SPEAKER: Honorable William Coleman III, General Counsel, Department of the Army, Washington, D.C.  
SYNOPSIS: Mr. Coleman discusses the importance of ethics in the acquisition process.

**JA-95-0061K**

***Pricing of Contract Adjustments (1995 Government Contract Law Symposium)***

DATE: 13 March 1995  
LENGTH: 52:30  
SPEAKER: MAJ Steven N. Tomanelli, Instructor and Air Force Representative, Contract Law Division, TJAGSA.  
SYNOPSIS: Major Tomanelli explains the various methods of pricing adjustments and the cost principles applicable to the pricing of such adjustments.

**JA-95-0065K**

***Non-Appropriated Fund Contracting (For Air Force Contracting)***

DATE: March 1995  
LENGTH: 44:00

SPEAKER: MAJ Steven N. Tomanelli, Instructor and Air Force Representative, Contract Law Division, TJAGSA.  
SYNOPSIS: Major Tomanelli discusses the laws, regulations, and procedures relating to non-appropriated fund contracting in the Air Force

**JA-95-0067K**

***Environmental Contracting Issues, Pts. I & II (134th Contract Attorneys Course)***

DATE: 15 March 1995  
LENGTH: 45:20/44:00  
SPEAKER: MAJ Steven N. Tomanelli, Instructor and Air Force Representative, Contract Law Division, TJAGSA.  
SYNOPSIS: Major Tomanelli discusses how agencies implement various environmental requirements through the federal procurement process.

**JA-95-0070K**

***Indicators of Fraud (1st Procurement Fraud Course)***

DATE: 27 March 1995  
LENGTH: 48:00  
SPEAKER: MAJ Patrick O' Hare, Instructor, Criminal Law Division, TJAGSA.  
SYNOPSIS: Major O'Hare discusses how to identify fraudulent activity as it arises during the performance of a government contract.

**JA-95-0071K**

***Civil Remedies/Civil Law Update, Pts. I & II (1st Procurement Fraud Course)***

DATE: 27 March 1995  
LENGTH: 51:30/49:00  
SPEAKER: MAJ Patrick O' Hare, Instructor, Criminal Law Division, TJAGSA.  
SYNOPSIS: This presentation addresses the statutory civil remedies available to the procurement fraud advisor to combat procurement fraud. The instruction will also highlight developments involving the Civil False Claims Act and the Qui Tam provision of the False Claims Act. Additionally, this instruction addresses the role of the Department of Justice Civil Division in processing a civil case.

**JA-95-0072K**

***Cost Principles, Pts. I & II (1st Procurement Fraud Course)***

DATE: 29 March 1995  
LENGTH: 51:00/37:50  
SPEAKER: MAJ Steven N. Tomanelli, USAF, Instructor, Contract Law Division, TJAGSA.  
SYNOPSIS: Major Tomanelli, the premier USAF Contract Law instructor at TJAGSA, discusses the fascinating world of cost accounting standards and federal procurement law. In this animated block of instruction, Major Tomanelli addresses the basic principles of cost accounting and then walks the student through a hypothetical problem focusing on how to identify problem areas in cost accounting examinations done as part of a procurement fraud investigation.

**JA-95-0076K**

***Contracting for Commercial Items, Pts. I & II (6th Installation Contracting Course)***

DATE: 01 May 1995

LENGTH: 50:00/45:00

SPEAKER: COL Anthony Gamboa.

SYNOPSIS: COL Gamboa discusses Department of Defense policies and procedures for acquiring commercial items.

**JA-95-0077K**

***State and Local Taxation (6th Installation Contracting Course)***

DATE: 02 May 1995

LENGTH: 39:00

SPEAKER: Mr. Larry Rowe

SYNOPSIS: Mr. Rowe discusses the theories that states rely on to tax government furnished property used by contractors.

**JA-95-0078K**

***Alternative Disputes Resolution Mediation Demonstration, Pts. I, II & III (6th Installation Contracting Course)***

DATE: 03 May 1995

LENGTH: 59:00/59:00/50:00

SPEAKER: A member of the American Bar Association's Public Contract Law Section leads a panel discussion of private attorneys and professional mediators on the use of mediation to settle contract disputes.

SYNOPSIS: The panel demonstrates the use of mediation to resolve a construction contract claim.

**JA-96-0014K**

***Obligating Appropriated Funds: Contract Types, Pts. I & II (43rd Fiscal Law Course)***

DATE: 30 October 1995

LENGTH: 39:00/53:00

SPEAKER: MAJ Timothy Pendolino, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: Students will understand the rules governing the commitment and obligation of appropriated funds. Additionally, students will understand how to compute the quantum of obligations created by the formation and modification of government contracts, and how to adjust obligations when the government modifies or terminates a contract.

**JA-96-0033K**

***Contract Disputes Act and Tucker Act Jurisdiction, Pts. I & II (1st Contract Litigation Course)***

DATE: 25 March 1996

LENGTH: 49:30/22:00

SPEAKER: LTC Richard Bean, USAR, IMA Professor, Contract Law Dept., TJAGSA.

SYNOPSIS: LTC Bean presents the nuances and pitfalls of the Contract Disputes Act and Tucker Act.

**JA-96-0034K**

***Government Accounting Office Bid Protest Practice, Pts. I & II (1st Contract Litigation Course)***

DATE: 25 March 1996

LENGTH: 40:00/54:00

SPEAKERS: Ms Christine Melody, Ms Behn Miller, Office of the General Counsel, Government Accounting Office.

SYNOPSIS: Ms. Melody and Ms. Miller discuss the practical aspects of litigating cases before the General Accounting Office, with emphasis on recent changes to the Bid Protest Rules.

**JA-96-0035K**

***Using Expert Witnesses (1st Contract Litigation Course)***

DATE: 26 March 1996

LENGTH: 51:30

SPEAKER: Mr. John Jones, of Counsel, Bryan, Cave, LLP, Phoenix, AZ.

SYNOPSIS: Mr. Jones discusses how to obtain, prepare, and utilize expert witnesses in contract litigation.

**JA-96-0036K**

***Litigation from Start to Finish: A View from the Trenches (1st Contract Litigation Course)***

DATE: 27 March 1996

LENGTH: 45:00

SPEAKER: MAJ H. Josphph Batey, Trial Attorney, Air Force Legal Services, Commercial Lit Division.

SYNOPSIS: Major Batey discusses the practical aspects of litigation in the Court of Federal Claims in the context of a recently adjudicated case.

**JA-96-0037K**

***Federal Court Litigation: TRO's and PI's (1st Contract Litigation Course)***

DATE: 28 March 1996

LENGTH: 43:00

SPEAKER: Mr. Richard Parker, Assistant U.S. Attorney, Eastern District of Virginia.

SYNOPSIS: Mr. Parker discusses procedural requirements for contractors to obtain injunctive relief in Federal Court, and common defenses used by government attorneys when responding to requests for temporary restraining orders or preliminary injunctions.

**JA-96-0038K**

***Fraud Litigation (1st Contract Litigation Course)***

DATE: 29 March 1996

LENGTH: 42:30

SPEAKER: MAJ Thomas Dworschak, Special Assistant U.S. Attorney, Eastern District of Virginia.

SYNOPSIS: Major Dworschak discusses how the government litigates fraud cases, with emphasis on the commonly litigated fraud issues such as defective pricing, product substitution, false certifications and statements, and bribery.

**JA-96-0042K**

***Availability of Appropriations as to Purpose, Pts. I & II (45th Fiscal Law Course)***

DATE: 13 May 1996

LENGTH: 50:00/44:00

SPEAKER: MAJ Nathanael Causey, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: Students will understand that the government may obligate and expend appropriated funds only for those purposes for which Congress has appropriated the funds, and for reasons that are necessary and incidental to achieving the purposes of the appropriation. Additionally, students will understand the limitations on augmentation.

**JA-96-0044K**

*Construction Funding, Pts. I & II (45th Fiscal Law Course)*

DATE: 13 May 1996

LENGTH: 46:00/42:00

SPEAKER: MAJ Nathanael Causey, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: Students will understand how to differentiate construction from maintenance and repair, to distinguish specified and unspecified construction statutory provisions, and to avoid problems when selecting funding authorizations.

**JA-96-0045K**

*Intragovernment Acquisitions (45th Fiscal Law Course)*

DATE: 15 May 1996

LENGTH: 50:30

SPEAKER: MAJ Nathanael Causey, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: Students will understand the two principal statutes under which agencies obtain goods and services from or through other agencies. Students will understand the mechanics of intra-governmental acquisitions, with a focus on the Miscellaneous Receipts statute, the Purpose statute, and the timing of obligations.

**JA-96-0046K**

*Planning, Programming and Budgeting Systems, Pts. I & II (45th Fiscal Law Course)*

DATE: 15 May 1996

LENGTH: 50:45/24:42

SPEAKER: LTC Thomas Evans, Defense Systems Management College, FT Belvoir, Virginia.

SYNOPSIS: This block of instruction covers issues related to the Army budgeting process. That is, it covers the steps necessary for planning, programming and budgeting Army resources.

**JA-96-0048K**

*Reprogramming (45th Fiscal Law Course)*

DATE: 16 May 1996

LENGTH: 51:30

SPEAKER: MAJ Andy Hughes, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: The student will understand the rules and procedures that allow the government to spend appropriations differently than originally planned.

**JA-97-0030K**

*Contract Types, Pts. I, II & III (138th Contract Attorneys Course)*

DATE: 03 March 1997

LENGTH: 51:00/51:40/47:12

SPEAKER: MAJ Timothy Pendolino, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: The student will understand the various types of contracts used by the government and the restrictions thereon.

**JA-97-0033K**

*Government Information Practices, Pts. I & II (138th Contract Attorneys Course)*

DATE: 06 March 1997

LENGTH: 56:00/41:00

SPEAKERS: LTC Joe Frisk, Professor, Administrative and Civil Law Department, TJAGSA, and Colonel Richard Huff, Attorney, U.S. Department of Justice, IMA, Contract Law Department, TJAGSA.

SYNOPSIS: The student will understand the fundamental relationship between Contract Law, the Freedom of Information Act, and the Privacy Act.

**JA-97-0034K**

*Selected Labor Standards, Pts. I & II (138th Contract Attorneys Course)*

DATE: 10 March 1997

LENGTH: 45:00/41:30

SPEAKER: MAJ Timothy Pendolino, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: The student will understand the basic labor standards applicable to government contracting.

**JA-97-0035K**

*Contract Disputes Act, Pts. I, II & III*

DATE: 11 March 1997

LENGTH: 48:46/50:00/30:00

SPEAKER: LTC Karl Ellcessor, Vice Chair, Contract Law Department, TJAGSA.

SYNOPSIS: This block of instruction focuses on contract litigation under the Contract Disputes Act of 1978.

**JA-97-0036K**

*Deployment Contracting, Pts. I & II (138th Contract Attorneys Course)*

DATE: 13 March 1997

LENGTH: 42:30/38:00

SPEAKER: MAJ Timothy Pendolino, Professor, Contract Law Department, TJAGSA.

SYNOPSIS: The student will understand the basic issues confronting those tasked with providing contracting support to a deployed organization. Topics covered include planning for deployment contracting; fiscal issues during deployments; humanitarian, civic, and security assistance issues during deployments; and contracting during deployments.

**JA-97-0038K*****Alternative Disputes Resolution, Pts. I & II (1st Advanced Contract Course)***

DATE: 24 March 1997

LENGTH: 50:00/26:00

SPEAKERS: Mr. Steven Klatsky, LTC Paul Hoburg, Mr. Mark A. Sagan, Mr. Jeffrey I. Kessler, US Army Materiel Command, Alexandria, Virginia.

SYNOPSIS: The student will understand the programs and procedures currently used by the Army Materiel Command to resolve disputes with contractors prior to litigation.

**JA-97-0039K*****Environmental Contracting (1st Advanced Contract Course)***

DATE: 24 March 1997

LENGTH: 49:00

SPEAKER: LTC Mark Connor, US Army Environmental Center, Alexandria, Virginia.

SYNOPSIS: The student will understand the application of environmental statutes and regulations to environmental remediation contracting and environmental concerns in contracting in general.

**JA-97-0040K*****Historical Perspective on the Court of Federal Claims, A (1st Advanced Contract Course)***

DATE: 25 March 1997

LENGTH: 48:00

SPEAKER: Honorable Eric G. Bruggink, US Court of Federal Claims, Washington, D.C.

SYNOPSIS: Judge Bruggink explores the historical development of jurisdiction at the US Court of Federal Claims.

**JA-97-0041K*****Fiscal Law (1st Advanced Contract Course)***

DATE: 25 March 1997

LENGTH: 51:00

SPEAKER: Mr. Gary Kepplinger, Office of Counsel, US General Accounting Office.

SYNOPSIS: The student will understand the import of recent developments in the area of fiscal law as it pertains to government acquisitions.

**JA-97-0042K*****Government Furnished Property, Pts. I & II (1st Advanced Contract Course)***

DATE: 25 March 1997

LENGTH: 38:00/44:30

SPEAKER: LTC Steven Tomanelli, Office of General Counsel, US Air Force, Washington, D.C.

SYNOPSIS: The student will understand the requirements regarding the provision of and responsibility for government furnished property. Students will also understand the forthcoming changes in the regulations governing this area.

**JA-97-0043K*****New Legal Instruments, Pts. I & II (1st Advanced Contract Course)***

DATE: 25 March 1997

LENGTH: 38:00/53:30

SPEAKERS: Mr. Jay Winchester, US Army Medical Research and Materiel Command, Ft. Detrick, Md., Ms Kathy Anne Kurke, Chief Counsel, NASA Langley Research Center, Hampton, Virginia.

SYNOPSIS: The student will understand the recently enacted statutory authorities that authorize DoD to enter into non-procurement transactions, such as cooperative research and development agreements and partnering agreements, for research and development.

**JA-97-0044K*****Information Technology, Pts. I & II (1st Advanced Contract Course)***

DATE: 26 March 1997

LENGTH: 47:30/51:00

SPEAKER: Mr. Rand Allen, of Wiley, Rein, and Fielding, Washington D.C.

SYNOPSIS: The student will understand the latest developments in the implementation of the Clinger-Cohen Act as it pertains to information technology acquisitions.

**JA-97-0045K*****Contract Litigation, Pts. I & II (1st Advance Contract Course)***

DATE: 27 March 1997

LENGTH: 46:00/48:00

SPEAKERS: Mr. Charles Marvin, Jr., Mr. Paul Debolt, of Enable, Baetjer, Howard and Ciletti, Washington, D.C.

SYNOPSIS: Students will understand strategies and techniques used by the private bar in contract litigation against the government.

**JA-97-0046K*****International Cooperative Agreements (1st Advanced Contract Course)***

DATE: 28 March 1997

LENGTH: 53:00

SPEAKER: LTC James Miller, Office of General Counsel, US Army, Washington, D.C.

SYNOPSIS: The student will understand the laws and regulations that govern sales of defense supplies and services to foreign governments.

**JA-98-0035K*****Contract Law 1997: The Year in Review, Pts I – V (1997 Government Contract Law Symposium)***

DATE: December 1997

LENGTH: 59:00/63:00/59:45/61:00/67:30

SPEAKERS: Faculty, Contract Law Department, TJAGSA.

SYNOPSIS: The student will understand the significant judicial, legislative, and regulatory developments in government contract and fiscal law, bankruptcy, taxation, and environmental law during FY 1997.

**JA-98-0036K*****Adarand Decision, The (1997 Government Contract Law Symposium)***

DATE: December 1997

LENGTH: 68:00

SPEAKER: Honorable John Kane, Judge, US District Court, Colorado.

SYNOPSIS: The student will understand the significant judicial decision of Adarand. This class is taught by the Judge who wrote the decision. This decision has radically changed government procurement law especially in the area of small business and small disadvantaged business concerns.

**JA-98-0037K*****Federal Procurement Process: A Congressional View (14th Gilbert A. Cuneo Lecture - 1997 Government Contract Law Symposium)***

DATE: December 1997

LENGTH: 59:40

SPEAKER: Congressman Thomas M. Davis, US House of Representatives, 11th Congressional District, Virginia.

SYNOPSIS: The student will understand the acquisition reform measures recently mandated by Congress, their implementation, and the concerns of the policy makers regarding acquisition initiatives in this time of government downsizing.

**JA-98-0038K*****Privatization and Outsourcing, Pts. I & II (Panel Presentation - 1997 Government Contract Law Symposium)***

DATE: 8 December 1997

LENGTH: 57:30/51:00

MODERATOR: Ms. Elizabeth Buchanon, US Army Materiel Command.

SPEAKERS (Panelists): Mr. Greg Petkoff, General Counsel's Office, US Air Force, Mr. Jesse Bendahan, General Counsel's Office, US Navy, Mr. Chuck Roedersheimer, Defense Logistics Agency.

SYNOPSIS: The student will understand the impact and challenges associated with government downsizing and the efforts to contract out or privatize activities previously performed by government agencies.

**JA-98-0039K*****Acquisition Issues Panel, Pts. I & II (Panel Presentation - 1997 Government Contract Law Symposium)***

DATE: 9 December 1997

LENGTH: 60:30/51:00

MODERATOR: Mr. Anthony H. Gamboa, Deputy General Counsel, General Accounting Office.

SPEAKERS (Panelists): Mr. Edward Korte, Command Counsel, US Army Materiel Command; COL Bernard Chachula, Chief, Contract Law, US Air Force Materiel Command, Ms. Sophie A. Krasik, Assistant General Counsel, Department of the Navy.

SYNOPSIS: The student will understand the purpose and the advantages and disadvantages of various legislative and executive branch acquisition initiatives from the perspectives of the

major procurement commands within the Department of Defense.

**JA-98-0040K*****Future of Acquisition Reform, The (1997 Government Contract Law Symposium)***

DATE: 9 December 1997

LENGTH: 77:40

SPEAKER: Professor William E. Kovacic, George Mason University School of Law, Arlington, Virginia.

SYNOPSIS: The student will understand the developing trends in government acquisition practices and fiscal law.

**JA-98-0041K*****General Counsel's Panel, Pts. I & II (Panel Presentation - 1997 Government Contract Law Symposium)***

DATE: 9 December 1997

LENGTH: 68:00/45:00

SPEAKERS: Mr. John T. Kuelbs, Vice President and Associate General Counsel, Hughes Aircraft Company; Mr. John E. Preston, Senior Vice President and General Counsel, Litton Industries, Inc; Mr. Edward C. Bruntrager, Corporate Vice President and General Counsel, General Dynamics Corporation; Mr. Michael C. Eberhardt, Vice President, General Counsel and Secretary E Systems, Inc; Mr. Richard R. Molleur, Corporate Vice President and General Counsel, Northrup Grumman.

SYNOPSIS: The student will understand the effects of acquisition reform and the declining defense budget on the American defense industry and the nation industrial base.

**JA-98-0042K*****Future of Technology Acquisitions, The (1997 Government Contract Law Symposium)***

DATE: 10 December 1997

LENGTH: 78:30

SPEAKER: Mr. Rand Allen, Partner, Wiley, Rein &amp; Fielding.

SYNOPSIS: The student will understand the impact of reform and downsizing efforts on the acquisition of information technology as well as current trends and issues involving the procurement of information systems hardware and software.

**JA-98-0043K*****View from the United States Court of Federal Claims, A (1997 Government Contract Law Symposium)***

DATE: 11 December 1997

LENGTH: 68:30

SPEAKER: Honorable Eric G. Bruggink, Judge, United States Court of Federal Claims.

SYNOPSIS: The student will understand the recent acquisition reform efforts and recent developments in the procurement process from the perspective of a Court of Federal Claims (COFC) judge.

**JA-98-0044K*****Acquisition Reform and Competition (1997 Government Contract Law Symposium)***

DATE: 11 December 1997

LENGTH: 70:00

SPEAKER: Mr. Ross Branstetter, Attorney, Miller & Chevalier, Washington, D.C.

SYNOPSIS: The student will understand the significant acquisition developments in the area of competition.

**JA-98-0045K**

*Department of Veteran's Affairs Fraud Program/Debarment and Suspension Program, Pts. I & II (9th Annual Major Frank B. Creekmore Lecture - 1997 Government Contract Law Symposium)*

DATE: 11 December 1997

LENGTH: 55:00/74:00

SPEAKER: Mr. Gary J. Krump, Deputy Assistant Secretary, Acquisition and Materiel Management, United States Department of Veteran's Affairs.

SYNOPSIS: The student will understand the significant judicial, legislative, and regulatory developments in government contract and fiscal law from the perspective of a member of the Veteran's Administration.

**JA-98-0046K**

*Chief Trial Attorneys Roundtable, Pts. I & II (Panel Presentation - 1997 Government Contract Law Symposium)*

DATE: 12 December 1997

LENGTH: 55:00/42:30

MODERATOR: COL Nicholas (Chip) P. Retson.

SYNOPSIS: The student will understand developing trends in Contract Disputes Act litigation and significant decisions issued by the Armed Services Board of Contract Appeals during 1997.

**JA-98-0051K**

*Overview of the Contract Process (140th Contract Attorneys Course)*

DATE: 2 March 1998

LENGTH: 44:30

SPEAKER: LTC Karl M. Ellcessor III, Professor and Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the fundamentals of the federal contract system and the general principles of law applicable to federal contracting. The student will also understand the federal contracting process from requirement identification to receipt of the goods or services by the ultimate user.

**JA-98-0052K**

*Authority to Contract (140th Contract Attorneys Course)*

DATE: 2 March 1998

LENGTH: 50:50

SPEAKER: MAJ Kathryn R. Sommerkamp, Professor and Vice Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the sources of federal contracting authority and the major legal issues that arise in exercising such authority.

**JA-98-0053K**

*Sealed Bidding, Pts. I & II (140th Contract Attorneys Course)*

DATE: 3 March 1998

LENGTH: 50:00/66:30

SPEAKER: M Kathryn R. Sommerkamp, Professor and Vice Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the laws, regulations, and procedures governing sealed bidding procurements.

**JA-98-0054K**

*Bid Protest, Pts. I, II & III (140th Contract Attorneys Course)*

DATE: 5 March 1998

LENGTH: 43:30/51:00/51:50

SPEAKER: LTC Karl M. Ellcessor III, Professor and Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the bid protest procedures and related remedies available to an unsuccessful bidder or offeror before the agency, the General Accounting Office (GAO), the Court of Federal Claims, and federal district courts.

**JA-98-0055K**

*Ethics in Government Contracting (140th Contract Attorneys Course)*

DATE: 5 March 1998

LENGTH: 87:30

SPEAKER: MAJ Kathryn R. Sommerkamp, Professor and Vice Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the procurement integrity provisions of the Office of Federal Procurement Policy Act Amendments of 1988, statutory restrictions on post government employment, and the application of the Joint Ethics Regulation to the contracting process.

**JA-98-0056K**

*Construction Contracting, Pts. I & II (140th Contract Attorneys Course)*

DATE: 5 March 1998

LENGTH: 42:20/45:30

SPEAKER: MAJ M. Warner Meadows, USAF, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the unique requirements of construction contracting and the common legal issues that arise under construction contracts.

**JA-98-0057K**

*Funding and Fund Limitations, Pts. I & II (140th Contract Attorneys Course)*

DATE: 9 March 1998

LENGTH: 47:30/51:00

SPEAKER: LTC Karl M. Ellcessor III, Professor and Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will develop an appreciation of the appropriation and budget process, including types of funds and the use thereof, and the common problems associated with funding government procurements.

**JA-98-0060K**

*Payment and Collection, Pts. I & II (51st Fiscal Law Course)*

DATE: 14 May 1998

LENGTH: 39:20/42:50

SPEAKER: MAJ M. Warner Meadows, USAF, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: Students will understand which fiscal rules apply when dealing with contractor requests for payment of claims against the United States, claims by the United States against contractors, final payment, and assignment of claims.

**JA-98-0062K**

***Liability of Accountable Officers (51st Fiscal Law Course)***

DATE: 14 May 1998

LENGTH: 58:00

SPEAKER: LTC Karl M. Ellcessor III, Professor and Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: Students will understand the basis for liability of accountable officers and how accountable officers may be relieved of pecuniary liability.

**JA-99-0008K**

***Government Contract Law 1998: The Year in Review, Pts. I - V (1998 Government Contract Law Symposium)***

DATE: 7-11 December 1998

LENGTH: 64:00/58:40/57:34/56:00/63:00

SPEAKER: MAJ David Wallace, MAJ Elizabeth Berrigan, MAJ Jody Hehr, MAJ Mary Harney and MAJ Thomas Hong; Professors, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the significant judicial, legislative, and regulatory developments in government contract and fiscal law, bankruptcy, taxation, and environmental law during FY 1998.

**JA-99-0009K**

***Government Contract Law: The Year in Preview - Ten Things to Watch for in FY99 (1998 Government Contract Law Symposium)***

DATE: 7 December 1998

LENGTH: 71:00

SPEAKER: Steven L. Schooner, Professor, George Washington University School of Law

SYNOPSIS: The student will understand upcoming developments and milestones in procurement reform. Professor Schooner, until recently an Office of Federal Procurement Policy official, will cover the likely results of recent policy decisions and regulatory changes.

**JA-99-0010K**

***Commercial Buying Practices: Commercial Offers or Commercial Sales (1998 Government Contract Law Symposium)***

DATE: 7 December 1998

LENGTH: 59:00

SPEAKER: Ms. Marcia G. Madsen, Partner, Miller and Chevalier, Washington D.C.

SYNOPSIS: The student will understand the acquisition reform measures that increase the government's reliance on the commercial marketplace and its use of commercial buying practice. This class will take a hard look at what has been achieved, including: the impact on major systems acquisition,

outsourcing, the explosion of government-wide contracting vehicles, commercial item pricing, and commercial services.

**JA-99-0011K**

***Fraud Remedies: Getting the Dosage Right (10th Annual Major Frank B. Creekmore Lecture - 1998 Government Contract Law Symposium)***

DATE: 7 December 1998

LENGTH: 67:00

SPEAKER: William E. Kovacic, Professor, George Mason University School of Law

SYNOPSIS: The student will understand the impact of the Civil False Claims Act of government procurement markets. This class will address the effectiveness of this Act as well as its deterrent effect on industry participation.

**JA-99-0012K**

***Acquisition Issues, Pts. I & II (Panel Presentation - 1998 Government Contract Law Symposium)***

DATE: 8 December 1998

LENGTH: 59:30/58:30

SPEAKERS: Mr. Anthony H. Gamboa, Mr. Edward J. Korte, Ms. Sophie A. Krasik, Mr. John P. Janeczek

SYNOPSIS: The student will understand the purpose and the advantages and disadvantages of various legislative and executive branch acquisition initiatives from the perspectives of the major procurement commands within the Department of Defense.

**JA-99-0013K**

***Cooperative Agreements and Other Transactions: Background and History, Pts. I & II (1998 Government Contract Law Symposium)***

DATE: 8 December 1998

LENGTH: 48:14/57:30

SPEAKER: Ms. Diane M. Sidebottom, Assistant General Counsel, Defense Advanced Research Projects Agency

SYNOPSIS: The student will understand the inherent advantages and disadvantages of these "non-acquisition" instruments, as well as the recently expanded legislative authority for prototype system development.

**JA-99-0014K**

***Acquisition Reform in Practice: The Warfighting Rapid Acquisition Process (1998 Government Contract Law Symposium)***

DATE: 9 December 1998

LENGTH: 67:00

SPEAKER: BG Joseph L. Yakovac, Assistant Deputy for Systems Management, Office of the Assistant Secretary of the Army.

SYNOPSIS: The student will understand recent attempts to speed up the fielding of urgently needed new technologies to the soldier. This class will address the Warfighter Rapid Acquisition Process and how the accelerated availability of funds

**JA-99-0015K**

***Recent Developments in Contract Litigation (1998 Government Contract Law Symposium)***

DATE: 9 December 1998

LENGTH: 71:40

SPEAKER: Mr. C. Stanley Dees, Attorney; McKenna and Cuneo

SYNOPSIS: The student will understand the impact of recent developments in contract litigation. From the private bar's perspective, the speaker will address significant changes in jurisdiction issues (including sovereign immunity), damages, procedure, contract interpretation, implied-in-fact contracts, terminations, and breaches of contract.

**JA-99-0016K**

***Industry General Counsel, Pts. I & II (Panel Presentation - 1998 Government Contract Law Symposium)***

DATE: 9 December 1998

LENGTH: 63:00/35:30

MODERATOR: Mr. John T. Kuelbs, Senior Vice President, Raytheon Systems Company

SPEAKERS: Mr. Frank C. Marshall, Jr.; Mr. Stephen M. Post, Mr. Stephen E. Smith.

SYNOPSIS: The student will understand the defense industry's view on the current state of government procurement, addressing concerns such as whether multiple award task and delivery contracts take the new post-reform, "streamlined" acquisition process too far.

**JA-99-0017K**

***Affirmative Action in Contracting after Adarand (1998 Government Contract Law Symposium)***

DATE: 10 December 1998

LENGTH: 73:55

SPEAKER: Mr. Mark Gross, Deputy Chief Appellate Section, Department of Justice-Civil Rights Division.

SYNOPSIS: The student will understand the recent Department of Justice efforts to revitalize small disadvantaged business set-aside programs in light of recent adverse judicial decisions.

**JA-99-0018K**

***Army Acquisition Reform (1998 Government Contract Law Symposium)***

DATE: 10 December 1998

LENGTH: 68:00

SPEAKER: Mr. Gregory Doyle, Senior Procurement Analyst, Department of the Army, Acquisition Reform Office.

SYNOPSIS: This block of instruction addresses the application of procurement reform in the Army.

**JA-99-0019K**

***Current Issues and Future Trends in the MAS Program and GWACs, Pts. I & II (Panel Presentation - 1998 Government Contract Law Symposium)***

DATE: 11 December 1998

LENGTH: 52:30/58:30

MODERATOR: Mr. Ron R. Hutchinson, Doyle and Bachman.

SYNOPSIS: This block of instruction discusses current issues and future trends related to multiple award contracting and schedule buys.

**JA-99-0020K**

***A View from the Bench (15th Annual Gilbert A. Cuneo Lecture - 1998 Government Contract Law Symposium)***

DATE: 11 December 1998

LENGTH: 63:00

SPEAKER: Honorable Paul R. Michel, The Court of Appeals for the Federal Circuit.

SYNOPSIS: The student will understand recent holdings on contract issues from the Court of Appeals for the Federal Circuit, as well as an appellate perspective on the adjudication of contract issues by the Court of Federal Claims and other federal courts.

**JA-99-0021K**

***Office of Federal Procurement Policy Perspective (1998 Government Contract Law Symposium)***

DATE: 11 December 1998

LENGTH: 34:40

SPEAKER: Ms. Diedre Lee, Administrator, Office of Federal Procurement Policy.

SYNOPSIS: The student will understand the purpose and the advantages and disadvantages of various legislative and executive branch acquisition initiatives from the perspective of the Office of Federal Procurement Policy (OFPP).

**JA-99-0027K**

***Socioeconomic Policies, Pts. I & II (142nd Contract Attorneys Course)***

DATE: 2 March 1999

LENGTH: 39:40/45:00

SPEAKER: MAJ David Wallace, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class covers socioeconomic policies in federal contracting. Specifically, this block focuses on policies impacting small business, small disadvantaged businesses, and domestic preferences.

**JA-99-0028K**

***Procurement Fraud (142nd Contract Attorneys Course)***

DATE: 8 March 1999

LENGTH: 82:48

SPEAKER: MAJ David Wallace, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class covers issues related to procurement fraud in federal contracting. Specifically, this block covers the four remedies used to combat procurement fraud: criminal, civil, administrative, and contractual.

**JA-99-0029K**

***Inspection, Acceptance, and Warranties, Pts. I & II (142nd Contract Attorneys Course)***

DATE: 8 March 1999

LENGTH: 43:00/54:30

**SPEAKER:** MAJ Dave Freeman, Professor, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** This class covers the rights and obligations of the government and contractors regarding the inspection, acceptance, and warranty of goods and services provided under government contracts.

**JA-99-0030K**

***Contract Terminations, Pts. I & II (142nd Contract Attorneys Course)***

**DATE:** 10 March 1999

**LENGTH:** 81:14/38:38

**SPEAKER:** MAJ David Wallace, Professor, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** This class covers issues relating to terminating government contracts. Specifically, this class covers the rights and obligations of the parties related to terminating government contracts for conveniences and default.

**JA-99-0032K**

***Progressive Business Ventures and Instruments (2nd Advanced Contract Law Course)***

**DATE:** 22 March 1999

**LENGTH:** 51:30

**SPEAKER:** COL James Sutton, USAF, Staff Judge Advocate, Hill Air Force Base.

**SYNOPSIS:** This block of instruction relates to innovative business practices and instruments being used by federal agencies.

**JA-99-0033K**

***GAO Bid Protest (2nd Advanced Contract Law Course)***

**DATE:** 24 March 1999

**LENGTH:** 90:43

**SPEAKER:** Mr. Dan Gordon, Associate General Counsel, Procurement Law Division, General Accounting Office.

**SYNOPSIS:** Students will understand the new rules of procedure applicable to GAO bid protests. Students will also understand the import of selected recent GAO protest decisions.

**JA-99-0034K**

***Developments in Fiscal Law, Parts I & II (2nd Advanced Contract Law Course)***

**DATE:** 24 March 1999

**LENGTH:** 47:26/47:30

**SPEAKER:** Mr. Thomas Armstrong, Assistant General Counsel, Accounting and Information Management Division, General Accounting Office.

**SYNOPSIS:** The student will understand the import of recent developments in the area of fiscal law as it pertains to government acquisitions.

**JA-99-0043K**

***The Antideficiency Act, Pts. I & II (54th Fiscal Law Course)***

**DATE:** 04 May 1999

**LENGTH:** 37:50/75:40

**SPEAKER:** MAJ David Wallace, Professor, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** Students will understand the statutes and agency regulations requiring fiscal control, and how the obligation concepts relate to the control requirements of Title 31 U.S. Code. Additionally, students will understand the investigation and reporting requirements imposed by the Antideficiency Act and related statutes.

**JA-99-0044K**

***Reprogramming (54th Fiscal Law Course)***

**DATE:** 05 May 1999

**LENGTH:** 44:20

**SPEAKER:** MAJ David Wallace, Professor, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** Students will understand the rules and procedures that allow the government to spend appropriations differently than originally planned.

**JA-99-0045K**

***Intra-Government and Required Source Acquisitions (53rd Fiscal Law Course)***

**DATE:** 29 April 1999

**LENGTH:** 50:00

**SPEAKER:** LTC Tony Helm, Professor and Chairman, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** Students will understand the two principal statutes under which agencies obtain goods and services from or through other agencies. Students will understand the mechanics of intra-governmental acquisitions, with a focus on the Miscellaneous Receipts statute, the Purpose statute, and the timing of obligations.

**JA-99-0046K**

***Payment and Collection (54th Fiscal Law Course)***

**DATE:** 06 May 1999

**LENGTH:** 75:23

**SPEAKER:** MAJ Mary Harney, Professor, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** Students will understand which fiscal rules to apply when dealing with contractor requests for payment of claims against the United States, claims by the United States against contractors, final payment, and assignment of claims.

**JA-99-0047K**

***Continuing Resolution Authority (53rd Fiscal Law Course)***

**DATE:** 29 April 1999

**LENGTH:** 38:00

**SPEAKER:** MAJ David Wallace, Professor, Contract and Fiscal Law Department, TJAGSA.

**SYNOPSIS:** Students will understand what happens during funding gaps and when Congress passes a Continuing Resolution Authority statute as an alternative to annual Authorization and Appropriations Acts. Students will be able to solve problems that arise during, and that result from, funding gaps.

**JA-00-0015K**

***1999 – The Year in Review, Pts. I - V (1999 Government Contract Law Symposium)***

**DATE:** 06 December 1999

LENGTH: 67:00/61:30/71:00/50:30/57:00  
SPEAKER: MAJ Jody Hehr, Professor, Contract and Fiscal Law Department, TJAGSA.  
SYNOPSIS: The student will understand the significant judicial, legislative, and regulatory developments in government contract and fiscal law, bankruptcy, taxation, and environmental law during FY 1999.

**JA-00-0016K**

***Panel Presentation: Contractors in the Workplace, Pts. I & II (1999 Government Contract Law Symposium)***

DATE: 06 December 1999

LENGTH: 47:43/57:30

MODERATOR: Mr. Korte, Command Counsel, United States Army Materiel Command

SPEAKERS: Mr. Dominic A. Femino, Jr., Deputy Command Counsel; Mr. Michael Wentink, Esquire; Mr. William Medsger, Esquire; Ms. Diane Travers, Esquire; all of the Office of Command Counsel, United States Army Materiel Command, Alexandria Virginia.

SYNOPSIS: The student will understand the problems associated with contract personnel found in the workplace.

**JA-00-0017K**

***Ethics Aspects of Outsourcing and Privatization (1999 Government Contract Law Symposium)***

DATE: 07 December 1999

LENGTH: 64:00

SPEAKER: Ms. Elizabeth Buchanan, Office of General Counsel, Department of the Army.

SYNOPSIS: The student will understand the background, problem issues, and policy issues, associated with outsourcing and privatization.

**JA-00-0018K**

***Lucas Industries: A Case Study in Fraud, Pts. I & II (11th Annual Major Frank B. Creekmore Lecture - 1999 Government Contract Law Symposium)***

DATE: 07 December 1999

LENGTH: 54:30/41:30

SPEAKER: Mr. John Farenish, Deputy General Counsel, Defense Contract Audit Agency, Washington D.C.

SYNOPSIS: The student will be introduced to a case study of a significant fraud against the government. The student will understand the procurement fraud process and lessons-learned from the case study.

**JA-00-0019K**

***Military Spending (16th Annual Gilbert A. Cuneo Lecture - 1999 Government Contract Law Symposium)***

DATE: 08 December 1999

LENGTH: 91:00

SPEAKER: LTG Paul J. Kern, Director, Army Acquisition Corps.

SYNOPSIS: The student will be introduced to current acquisition reform measures taking place in the Department of Defense (DoD), the complicated interaction of acquisition law

and fiscal law and real-world problems that have occurred recently in DoD.

**JA-00-0020K**

***Litigation: The U.S. Court of Federal Claims (1999 Government Contract Law Symposium)***

DATE: 09 December 1999

LENGTH: 62:30

SPEAKER: Honorable Eric G. Bruggink, United States Court of Federal Claims, Washington D.C.

SYNOPSIS: The student will understand the historical perspective of litigating claims at the Court of Federal Claims and will be introduced to the court's new bid protest jurisdiction and recent decisions.

**JA-00-0021K**

***Types of Contracts, Pts. I, II & III (144th Contract Attorneys Course)***

DATE: 28 February 2000

LENGTH: 44:50/60:30/34:00

SPEAKER: Major Thomas L. Hong, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: Major Hong explains the various types of contracts used by the government and the restrictions therein.

**JA-00-0022K**

***Contract Methods: Negotiations, Pts. I, II & III (144th Contract Attorneys Course)***

DATE: 29 February 2000

LENGTH: 48:00/57:45/40:43

SPEAKER: CPT Scott McCaleb, IMA Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the laws, regulations, and procedures applicable to competitively negotiated procurements.

**JA-00-0023K**

***Environmental Contracting (144th Contract Attorneys Course)***

DATE: 02 March 2000

LENGTH: 45:00

SPEAKER: Major Mary Beth Harney, USAF, Professor Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The student will understand the role of environmental laws, regulations, and executive orders in the procurement process. Topics covered include the role of competition in environmental contracting, the affirmative procurement program, and the Environmental Protection Agency's Comprehensive Procurement Guideline items.

**JA-00-0027K**

***Litigation Risk Assessment (3rd Contract Litigation Course)***

DATE: 22 March 2000

LENGTH: 61:36

SPEAKER: Mr. Craig Miller, President, The Miller Group PLLC, Washington D.C. and Savannah, GA.

SYNOPSIS: Mr. Miller explains the benefits of using litigation risk assessment tools as a means to effectively manage and resolve contract disputes.

**JA-00-0028K**

***Litigating Complex Cases, Pts. I & II (3rd Contract Litigation Course)***

DATE: 23 March 2000

LENGTH: 49:30/55:50

SPEAKER: Mr. Jeff Stacey (USAR), United States Department of Justice, Washington D.C.

SYNOPSIS: Mr. Stacey provides insight on the challenges of litigating a complex contract dispute before a Board of Contract Appeals, to include managing personnel, conducting discovery, presenting the case at a hearing, and writing the post-hearing brief.

**JA-00-0029K**

***A View from the Bench: An ASBCA Perspective (3rd Contract Litigation Course)***

DATE: 24 March 2000

LENGTH: 66:30

SPEAKER: Honorable Carol Park-Conroy, Judge, The Armed Services Board of Contract Appeals

SYNOPSIS: Judge Park-Conroy provides practical tips for attorneys practicing before the Armed Services Board of Contract Appeals.

**JA-00-0031K**

***Availability of Appropriations as to Purpose, Pts. I, II & III (56th Fiscal Law Course)***

DATE: 1 May 2000

LENGTH: 49:00/49:00/47:22

SPEAKER: Major Elizabeth Berrigan, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class addresses the "Purpose" prong of the fiscal law analysis; specifically, that the government may obligate and expend appropriated funds only for those purposes for which Congress has appropriated the funds, and for reasons that are necessary and incidental to achieving the purposes of the appropriation. Additionally, the class addresses the limitations on augmentation and the proper use of representation funds, and addresses numerous problem issues that have resulted in the improper obligation or expenditure of funds.

**JA-00-0032K**

***Availability of Appropriations as to Time, Pts. I & II (56th Fiscal Law Course)***

DATE: 01 May 2000

LENGTH: 48:00/45:30

SPEAKER: Major Mary Beth Harney, USAF, Professor Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class addresses the "Time" prong of the fiscal law analysis; specifically, that the government may obligate and expend appropriated funds only during stated periods of availability and only for the *bona fide* needs of those periods. Additionally, the class addresses the various time limitations on

obligating different types of appropriations and the rules governing the use of expired appropriations.

**JA-00-0033K**

***Obligating Appropriated Funds – Contract Types, Pts. I & II (56th Fiscal Law Course)***

DATE: 02 May 2000

LENGTH: 44:00/54:30

SPEAKER: Major Thomas L. Hong, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class addresses the "Amount" prong of the fiscal law analysis; specifically, the rules governing the commitment and obligation of appropriated funds. The instruction focuses on how to compute the quantum of obligations created by the formation and modification of government contracts, and how to adjust obligations when the government modifies or terminates a contract.

**JA-00-0034K**

***Construction Funding, Pts. I & II (56th Fiscal Law Course)***

DATE: 02 May 2000

LENGTH: 43:30/52:40

SPEAKER: Major Jody M. Hehr, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class addresses the numerous unique rules and requirements relating to the funding of construction contracts. The instruction focuses on how to differentiate construction from maintenance and repair, how to distinguish specified and unspecified construction statutory provisions, and how to avoid problems when selecting funding authorizations.

**JA-00-0035K**

***Availability of Appropriations as to Amount: The Antideficiency Act, Pts. I & II (56th Fiscal Law Course)***

DATE: 02 May 2000

LENGTH: 42:00/89:00

SPEAKER: LTC Tony Helm, Professor and Chair, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: Instruction addresses the statutes and regulations that establish and implement fiscal controls (i.e., the prohibition on obligating or expending in excess of, or in advance of, an appropriation; the apportionment requirement; and formal and informal subdivisions of funds). The class also reviews specific scenarios with a focus on the relationship between the Purpose Statute, Bona Fide Needs Rule, and Antideficiency Act. Finally, the presentation covers investigation and reporting requirements imposed by the Antideficiency Act and agency regulations.

**JA-00-0036K**

***Revolving Funds (57th Fiscal Law Course)***

DATE: 09 May 2000

LENGTH: 48:50

SPEAKER: Major Jody M. Hehr, Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This class addresses unique fiscal law issues involved in the operation of revolving funds and how improper use of revolving funds may result in a violation of the Antide-

iciency Act. Additionally, the class addresses how to solve funding problems resulting from activity purchases involving revolving funds.

**JA-01-0004K**

***Intragovernmental and Required Source Acquisitions (58th Fiscal Law Course)***

DATE: 02 November 2000

LENGTH: 52:11

SPEAKER: Major Louis Chiarella, Professor, Contract and Fiscal Law, TJAGSA.

SYNOPSIS: This block of instruction covers the two principal statutes under which agencies obtain goods and services from or through other agencies. The instruction provides an understanding of the mechanics of intra-governmental acquisitions, with a focus on the Economy Act, the Project Order Statute, and the timing of obligations.

**JA-01-0005K**

***Payment and Collection, Pts. I & II (58th Fiscal Law Course)***

DATE: 02 November 2000

LENGTH: 40:43/42:40

SPEAKER: Major Karen White, USAF, Professor, Contract and Fiscal Law, TJAGSA.

SYNOPSIS: This block of instruction walks students through the fiscal rules to apply when dealing with contractor requests for payment of claims against the United States, claims by the United States against contractors, final payment, and assignment of claims.

**JA-01-0006K**

***Reprogramming (58th Fiscal Law Course)***

DATE: 02 November 2000

LENGTH: 48:00

SPEAKER: LTC Timothy Pendolino, Chair and Professor, Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: This block of instruction covers the rules and procedures that allow the government to move funds between accounts to meet changing requirements.

**JA-01-0007K**

***Liability of Accountable Officers (58th Fiscal Law Course)***

DATE: 03 November 2000

LENGTH: 43:00

SPEAKER: Major Karen White, USAF, Professor, Contract and Fiscal Law, TJAGSA.

SYNOPSIS: This block of instruction provides students with an understanding of the bases for liability of accountable officers and how accountable officers may be relieved of pecuniary liability.

**JA-01-0010K**

***Fiscal Year 2000: The Year in Review, Pts. I - VI (2000 Government Contract and Fiscal Law Symposium)***

DATE: 5, 6, 7 & 8 December 2000

LENGTH: 50:30/54:30/55:30/56:10/46:50/37:50

SPEAKER: COL John Kosarin, IMA Professor; Major John J. Siemietkowski, Professor; Major Louis A. Chiarella, Professor;

Major Jonathan C. Guden, Professor; Major Karen S. White, USAF, Professor; Major Kevin M. Walker, Professor; Contract and Fiscal Law Department, TJAGSA.

SYNOPSIS: The faculty of the Contract and Fiscal Law Department present the highlights of the FY 2000 Year in Review. The most important legislation, cases, and regulatory changes of the year 2000 are covered.

**JA-01-0011K**

***Current Issues and Future Plans, Pts. I & II (The 17th Gilbert A. Cuneo Lecture - 2000 Government Contract and Fiscal Law Symposium)***

DATE: 05 December 2000

LENGTH: 67:40/30:00

SPEAKER: Ms. Deidre Lee, Director of Defense Procurement, Department of Defense.

SYNOPSIS: Ms. Lee discusses the challenges facing the DoD acquisition community in the immediate future and her plans and ideas for dealing with some of those challenges.

**JA-01-0012K**

***Hot Topics (2000 Government Contract and Fiscal Law Symposium)***

DATE: 06 December 2000

LENGTH: 48:36

SPEAKER: LTC Steven Tomanelli, Chief, Contract and Fiscal Law Division, Headquarters AMC/JA, Scott Air Force Base, Illinois.

SYNOPSIS: Lt Col Tomanelli uses fact-based scenarios to lead the audience through a discussion of some of the most troublesome legal issues facing acquisition professionals in their practices.

**JA-01-0013K**

***Civil Fraud Litigation (12th Major Frank B. Creekmore Lecture - 2000 Government Contract and Fiscal Law Symposium)***

DATE: 07 December 2000

LENGTH: 88:00

SPEAKER: Mr. Stuart Schiffer, Deputy Assistant Attorney General, Civil Division, Department of Justice.

SYNOPSIS: Mr. Schiffer discusses the Civil False Claims Act and the coordination that must take place between the Department of Defense and the Department of Justice for such prosecutions to be successful.

**JA-02-0044K**

***Government Contract Law: The Year in Review, Pts. I-V (2001 Government Contract Law Symposium)***

DATE: 4 - 7 December 2001

LENGTH: 46:26/53:00/57:30/54:15/51:17

SPEAKER: MAJ Greg Sharp, MAJ John Siemietkowski, MAJ Kevin Walker, MAJ Tom Modeszto, and LTC Michael Benjamin, Professors, Contract and Fiscal Law Department, The Judge Advocate General's School, United States Army.

SYNOPSIS:

**JA-02-0045K**

*Current Topics in Government Procurement (18th Annual Gilbert A. Cuneo Lecture – 2001 Government Contract Law Symposium)*

DATE: 04 December 2001

LENGTH: 64:00

SPEAKER: Ms. Angela Styles, Administrator, Office of Federal Procurement Policy, Washington D.C.

SYNOPSIS:

**JA-02-0046K**

*The Office of the DoD Inspector General (13th Annual Major Frank B. Creekmore Lecture – 2001 Government Contract Law Symposium)*

DATE: 06 December 2001

LENGTH: 90:22

SPEAKER: Mr. Charles W. Beardall, Deputy Assistant Inspector General, Criminal Investigative Policy and Oversight, Department of Defense, Arlington, Virginia.

SYNOPSIS:

### **Criminal Law Offerings**

**JA-365-1C & 2C**

*Impact of Scientific Evidence on the Criminal Justice System, Pts. I & II (12th Annual Kenneth J. Hodson Lecture)*

DATE: 18 March 1983

LENGTH: 50:00/52:00

SPEAKER: Professor Edward J. Imwinkelried, Washington University, St. Louis, Missouri.

SYNOPSIS: Professor Imwinkelried discusses issues concerning character and scientific evidence on the criminal justice system.

**JA-86-0064C**

*Counsel's Courtroom Ethics, Pts. I & II (29th Military Judge Course)*

DATE: 23 May 1986

LENGTH: 57:41/42:00

SPEAKER: Dean John J. Douglass, Dean of National College of District Attorneys.

SYNOPSIS: Dean Douglass discusses issues concerning ethics and counsel in the courtroom as well as the judicial role in trial ethics.

**JA-87-0092C**

*General Court-Martial: Guilty Plea*

NOTE: THIS PROGRAM IS FOR USE BY ARMY PERSONNEL ONLY.

DATE: July 1987

LENGTH: 42:00

SPEAKER:

SYNOPSIS: A video presentation of an entire general court-martial with the accused pleading guilty to wrongful appropriation as a lesser included offense to larceny of an automobile. JA-88-0001C

*General Court-Martial Procedure: U.S. vs SP4 Michael Child, Pts. I & II*

NOTE: THIS PROGRAM IS FOR USE BY ARMY PERSONNEL ONLY.

DATE: March 1988

LENGTH: 49:30/28:00

SPEAKER:

SYNOPSIS: A video presentation of an entire contested general court-martial in front of an officer and enlisted panel. Includes a motion, voir dire and challenges, opening statements, case on the merits, and sentencing phase of a trial for assault.

**JA-88-0056C**

*Cross-Examination and Advocacy, Pts. I & II (20th Criminal Trial Advocacy Course)*

DATE: 10 February 1988

LENGTH: 60:00/55:00

SPEAKER: Mr. F. Lee Bailey

SYNOPSIS: Mr. F. Lee Bailey, who got his start as a military defense counsel, addresses the purposes, techniques and pitfalls of cross-examination. His discussion is interspersed with teaching points based on cases and situations he has faced. He closes with a lively question and answer session addressing general advocacy and ethics topics.

**JA-89-0026C**

*Trial Advocacy: "Nothing Is Written", Pts. I & II (22nd Criminal Trial Advocacy Course)*

DATE: 06 February 1989

LENGTH: 50:00/62:00

SPEAKER: Mr. Vaughan E. Taylor, Attorney, Taylor, Kripner and Horbaly.

SYNOPSIS: Mr. Taylor addresses a variety of advocacy techniques that defense and government counsels may employ to develop their own skills and to improve the military justice system. These include unlawful command influence by judge advocates, using judges as article 32 investigating officers, mixed plea instructions, and administrative board hearings.

**JA-89-0039C**

*Three Hundred Years of Military Justice, Pts. I & II (Reserve Component SJA Course)*

DATE: 04 April 1989

LENGTH: 58:00/32:00

SPEAKER: COL (Ret) Frederick Bernays Wiener

SYNOPSIS: Tricentennial of the Mutiny Act Presentation. COL Wiener traces the development of military criminal law from the First Mutiny Act in England in 1689 through today. He discusses how military law generally underwent changes following every major armed conflict, he highlights the leading figures and controversies in the development of the military criminal justice system, and he suggests that the Manual for Courts-Martial has become too big and should be reduced in size.

**JA-89-0042C*****Trial Advocacy: Opening Statements***

DATE: May 1989

LENGTH: 35:00

SPEAKER: MAJ Harry L. Williams, Instructor, Criminal Law Division, TJAGSA.

SYNOPSIS: A complete discussion of the preparation and presentation of the opening statement for both trial and defense counsel. An example is included.

**JA-89-0054C*****Criminal Trial Advocacy: Arguments***

DATE: 13 June 1989

LENGTH: 51:30

SPEAKER: MAJ Craig Whittman, Instructor, Criminal Law Division, TJAGSA.

SYNOPSIS: A presentation on basic tactical considerations for structuring and presenting arguments.

**JA-89-0078C*****Psychological Profiling of Criminals, Pts. I & II (13th Criminal Law New Developments Course)***

DATE: 16 August 1989

LENGTH: 53:00/55:00

SPEAKER: Special Agent Edward Sulzbach, FBI.

SYNOPSIS: Presentation discusses the psychological profiling of criminals and the application of this technique to criminal justice and law enforcement.

**JA-90-0004C*****Methods of Instruction: The Three Stage Process***

NOTE: THIS PROGRAM IS FOR USE BY ARMY PERSONNEL ONLY.

DATE: 30 August 1990

LENGTH: 58:30

SPEAKER: LTC Timothy E. Naccarato, Chief, Criminal Law Division, TJAGSA.

SYNOPSIS: LTC Naccarato offers a process that can be used by judge advocates in successfully completing instructional missions. The viewer is asked to imagine being tasked with delivering instruction in a few days to a live audience. Identifying the immediate panic that may grip some of the viewers, LTC Naccarato suggests that if instruction is carried out in a process method, success of the mission will be more likely to occur, and the panic syndrome will be remedied. The instructional process presented involves three stages: Preparation, Rehearsal, and Execution. The viewer is encouraged to use this process and to search for other information which will address successful teaching strategies. Naccarato refers to an article by COL Jack Rice in the May 1988 *The Army Lawyer* in which COL Rice sites four practices used at TJAGSA. In the first stage of LTC Naccarato's process, preparation, an instructor must address six questions in order to address specific factors: needs of the target audience, limitations of teaching environment, and preparation of appropriate materials for the class. These questions are followed up with three actions to complete the preparation stage. Rehearsal is the second stage in the process. On site visits and on site rehearsals are recommended, if

possible. The viewer is informed of the advantages to such an approach to instruction and the possible expenses or errors which may be avoided by a good rehearsal. Execution, the third stage of LTC Naccarato's process, is the time when the instructor actually delivers instruction to the audience. In addition to three general suggestions mentioned by LTC Naccarato (promptness, dress, and schedule), eight specific teaching techniques are highlighted for the viewer in order to overcome some of the problems that an instructor may encounter in front of a live audience.

**JA-90-0032C*****Zingers, Ringers, and Sandbags: Winning Trial Techniques, Pts. I & II (24th Criminal Trial Advocacy Course)***

DATE: 05 February 1990

LENGTH: 50:00/48:00

SPEAKER: Mr. John Lowe, Attorney, Charlottesville, Virginia  
SYNOPSIS: Mr. Lowe presents an overview of fundamental rules of advocacy. Through the use of anecdotes and personal experiences, he teaches the proper method and theory of cross-examination, how to effectively conduct voir dire, theory and practical pointers behind opening statements and closing arguments, and how to conduct effective direct examination.**JA-90-0070C*****Sexual Disorders and Treatment, Pts. I & II (14th Criminal Law New Developments Course)***

DATE: 16 August 1990

LENGTH: 49:00/54:00

SPEAKER: Dr. Frederick Berlin, Director, Sexual Disorders Clinic, Johns Hopkins University.

SYNOPSIS: Presentation includes general description of types of sexual disorders and treatment available for those disorders.

**JA-91-0004C*****Case Preparation and Trial Techniques, Pts. I & II***

DATE: 05 November 1990

LENGTH: 56:00/40:00

SPEAKER: Mr. R. Waco Carter, Attorney, Springfield, Missouri.

SYNOPSIS: The presentation covers effective trial techniques and addresses issues and theories involved in case preparation and presentation.

**JA-91-0042C*****Military Justice for the 90's: A Legal System Looking for Respect, Pts. I & II (20th Annual Kenneth J. Hodson Lecture)***

DATE: 28 March 1991

LENGTH: 46:00/42:00

SPEAKER: Professor David A. Schlueter, Professor of Law, St. Mary's University, San Antonio, Texas.

SYNOPSIS: Professor Schlueter discusses trial issues and procedures and proposes changes to enhance the prestige and respect given to courts-martial.

**JA-92-0034C*****Basic Trial Techniques, Pts. I & II***

DATE: 03 February 1992

LENGTH: 50:00/47:00

SPEAKER: Mr. Henry E. Hudson, U.S. Attorney, Virginia.

SYNOPSIS: Speaker's presentation provides practical trial advocacy techniques to assist attorneys new to the courtroom. His comments address all phases of the trial, beginning with advice on dealing with law enforcement agencies and followed by case preparation and presentation.

**JA-92-0042C**

*Scientific Evidence In Criminal Prosecutions, Pts. I & II (21st Annual Kenneth J. Hodson Lecture)*

DATE: 26 March 1992

LENGTH: 55:21/33:41

SPEAKER: Professor Paul C. Giannelli, Professor of Law, Case Western Reserve University School of Law, Cleveland, Ohio.

SYNOPSIS: Professor Giannelli briefly reviews the history of scientific evidence in the justice system and explains why scientific evidence is so prevalent in criminal prosecutions. He highlights the problems of admissibility of novel as well as routine scientific evidence. He concludes that the major problems with the use of scientific evidence stem from the lack of proficiency testing and regulation of criminal laboratories.

**JA-92-0086C**

*Military Cases in Child Abuse: Evidentiary Issues*

DATE: 11 August 1992

LENGTH: 43:00/43:00

SPEAKER: Professor John E. B. Myers, McGeorge School of Law, University of the Pacific, Sacramento, California.

SYNOPSIS: Presentation on recent developments pertaining to the prosecution and defense of child abuse cases.

**JA-92-0092C**

*Practical Applications of Behavioral Science to Violent Crime Investigations*

DATE: 12 August 1992

LENGTH: 61:30

SPEAKER: Special Agent Steven Mardigan, Investigative Support Unit, National Center for the Analysis of Violent Crime, FBI Academy, Quantico, Virginia.

SYNOPSIS: Lecture covers practical applications of behavioral analysis in violent crime scene analysis.

**JA-93-0035C**

*UCMJ in Wartime: The World War II Experience, Pts. I & II, The*

DATE: March 1993

LENGTH: 50:30/37:00

SPEAKER: Major General (Retired) Kenneth J. Hodson.

SYNOPSIS: Major General Hodson discusses personal experiences of practicing military law in Europe during WWII.

**JA-93-0037C**

*UCMJ in Wartime: The Vietnam Experience, Pts. I & II, The*

DATE: March 1993

LENGTH: 47:30/55:30

SPEAKER: Mr. John Stevens Berry, Esquire, Chief Defense Counsel, II Field Force, Vietnam (1968-1969).

SYNOPSIS: Mr. Berry discusses issues concerning military justice during wartime.

**JA-93-0067C**

*MJ Systems: Courts View, Pts. I & II*

DATE: August 1993

LENGTH: 44:30/45:40

SPEAKER: The Honorable Herman F. Gierke, U.S. Court of Military Appeals, Washington, D.C.

SYNOPSIS: Presentation covers recent developments and trends in military justice and retrospective and prospective looks at the Court of Military Appeals from one of its sitting judges.

**JA-94-0042C**

*Prosecutorial Ethics, Pts. I & II (23rd Annual Kenneth J. Hodson Lecture)*

DATE: March 1994

LENGTH: 59:13/20:20

SPEAKER: Ms. Jo Ann Harris, Assistant Attorney General, Criminal Law Division, United States Department of Justice.

SYNOPSIS: Ms. Jo Ann Harris discusses professional responsibility relating to prosecutorial conduct.

**JA-94-0044C**

*Military Justice During the Vietnam War, Pts. I & II*

DATE: March 1994

LENGTH: 61:00/20:30

SPEAKER: Mr. J. Stevens Berry, Esquire, Chief Defense Counsel, II Field Force, Vietnam (1968-1969).

SYNOPSIS: Mr. Berry discusses issues concerning military justice during wartime.

**JA-94-0052C**

*Trial Advocacy, Pts. I & II (1st Criminal Law Advocacy Course)*

DATE: 01 April 1994

LENGTH: 54:00/45:15

SPEAKER: Professor Thomas Mauet, Professor of Law, University of Arizona School of Law.

SYNOPSIS: Professor Mauet addresses a variety of techniques that counsel may use to improve their advocacy skills.

**JA-95-0016C**

*COMA Watch (18th Criminal Law New Developments Course)*

DATE: 14 November 1994

LENGTH: 43:00

SPEAKER: MAJ R. Peter Masterton, Instructor, Criminal Law Division, TJAGSA.

SYNOPSIS: Instruction covers the interrelationship of recent cases from the Court of Military Appeals, the judicial philosophies behind the court's decisions, and likely directions the court will follow in the future.

**JA-95-0017C*****Court of Appeals of the Armed Forces (18th Criminal Law New Developments Course)***

DATE: 14 November 1994

LENGTH: 47:00/47:00

SPEAKER: Honorable H. F. Gierke, Law Judge, U. S. Court of Military Appeals, Washington, D.C.

SYNOPSIS: Presentation covers recent developments in military justice and a discussion of cases decided by the Court of Military Appeals (recently renamed Court of Appeals of the Armed Forces) by one of its sitting judges.

**JA-95-0029C*****Urinalysis, Pts. I & II (18th Criminal Law New Developments Course)***

DATE: 17 November 1994

LENGTH: 38:30/28:00

SPEAKER: LTC Aaron Jacobs, US Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Hawaii.

SYNOPSIS: Presentation covers procedures employed at military urinalysis drug testing laboratories and scientific issues which frequently arise in urinalysis cases.

**JA-95-0069C*****Solicitor General's Perspective on Military Legal Issues, The, Pts. I & II (24th Annual Kenneth J. Hodson Lecture)***

DATE: 22 March 1995

LENGTH: 48:30/15:00

SPEAKER: Drew S. Days, III, Solicitor General of the United States.

SYNOPSIS: Mr. Days discusses the relationship between the Solicitor General and the Department of Defense and how military justice is viewed.

**JA-96-0017C*****Conceptual Analysis of Criminal Law Issues (19th Criminal Law New Developments Course)***

DATE: 13 November 1995

LENGTH: 42:00

SPEAKER: Honorable Susan J. Crawford, Judge, U.S. Court of Appeals for the Armed Services, Washington, D.C.

SYNOPSIS: Judge Crawford discusses her analysis of criminal law issues.

**JA-96-0028C*****Attributes of a Leader, Pts. I & II (2nd Hugh J. Clausen Lecture on Leadership)***

NOTE: THIS PROGRAM IS FOR USE BY ARMY PERSONNEL ONLY.

DATE: 31 January 1996

LENGTH: 55:00/26:00

SPEAKER: LTG Henry H. Shelton, Commander, XVIII Airborne Corps and Fort Bragg.

SYNOPSIS: LTG Shelton discusses leadership philosophy and a leader's relationship with his or her staff judge advocate. JA-96-0040C

***Trial Advocacy, Pts. I & II***

DATE: 19 April 1996

LENGTH: 47:45/53:30

SPEAKER: Mr. Joseph E. diGenova, Partner, diGenova &amp; Toesing, Washington, D.C.

SYNOPSIS: Mr. diGenova discusses the fundamentals of trial advocacy. In his dramatic style, he comments on high visibility cases in the news and discusses trial ethics.

**JA-96-0041C*****Tribute to MG Kenneth J. Hodson, A (25th Annual Kenneth J. Hodson Lecture)***

DATE: 24 April 1996

LENGTH: 58:00

SPEAKER: MG Michael J. Nardotti, Jr.

SYNOPSIS: Major General Nardotti, The Judge Advocate General discusses the life of Major General Kenneth J. Hodson, Retired, the twenty-seventh Judge Advocate General of the Army. In this twenty-fifth Hodson Lecture, Major General Nardotti delivers a tribute to Major General Hodson, focusing on his contributions to the Army and the military justice system.

**JA-97-0013C*****Evidence in Child Abuse Prosecution, Pts. I & II (20th Criminal Law New Developments Course)***

DATE: 21 November 1996

LENGTH: 49:00/47:00

SPEAKER: Mr. John E. B. Myers, Professor of Law, University of the Pacific.

SYNOPSIS: Speaks on the evidentiary, constitutional and psychological issues involved in prosecuting and defending child abuse cases.

**JA-97-0014C*****Use of Polygraph Evidence in Courts-Martial, Pts. I & II (20th Criminal Law New Developments Course)***

DATE: 22 November 1996

LENGTH: 53:27/30:00

SPEAKER: Mr. Milton O. Webb, Chief, Polygraph Division, U. S. Army Criminal Investigation Command.

SYNOPSIS: Speaks on the practical aspects on laying the foundation to introduce polygraph evidence and discusses the new computer generated polygraph examination.

**JA-97-0028C*****Criminal Investigations and Activities (1st National Security Crimes Symposium)***

DATE: 18 February 1997

LENGTH: 47:20

SPEAKER: Mr. M. E. (Spike) Bowman, Associate General Counsel, Federal Bureau of Investigation, Washington, D.C.

SYNOPSIS: Mr. Bowman speaks on current issues facing agencies involved in the investigation of national security crimes.

**JA-97-0029C**

***Current Issues in National Security Crimes (1st National Security Crimes Symposium)***

DATE: 21 February 1997

LENGTH: 36:40

SPEAKER: Ms. Judith Miller, Department of Defense General Counsel, Washington, D.C.

SYNOPSIS: Ms. Miller speaks on current issues within the Department of Defense relating to the investigation, prosecution, and defense of those individuals suspected of committing national security crimes.

**JA-97-0047C**

***3rd Hugh J. Clausen Lecture on Leadership, Pts. I & II***

DATE: 10 April 1997

LENGTH: 38:40/37:30

SPEAKER: General David A. Bramlett

SYNOPSIS: General David A. Bramlett, Commanding General, U.S. Forces Command, addresses The Judge Advocate General's School on general concepts of leadership and management, and the necessary character traits that make a successful leader.

**JA-97-0048C**

***UCMJ in Combat: Experiences of a Marine JA in Korea and Vietnam, Pts. I & II, The***

DATE: 18 April 1997

LENGTH: 57:00/59:00

SPEAKER: Professor William R. Eleazer, Stetson University College of Law, St. Petersburg, Florida.

SYNOPSIS: Professor Eleazer presents his experiences with military justice in a combat environment.

**JA-97-0050C**

***Lessons from the Junkyard, Pts. I & II***

DATE: May 1997

LENGTH: 46:00/40:00

SPEAKER: Honorable Walter T. Cox, III, Chief Judge, Court of Appeals for the Armed Forces, Washington, D.C.

SYNOPSIS: Judge Cox discusses various aspects of being a trial judge, from training to dealing with specific issues and sentencing. Opening address presented to the 40th Military Judge Course, TJAGSA, 12 May 1997.

**JA-98-0015C**

***Unlawful Command Influence (21st Criminal Law New Developments Course)***

DATE: 17 November 1997

LENGTH: 53:30

SPEAKER: LTC Lawrence J. Morris, Professor and Chair, Criminal Law Department, TJAGSA.

SYNOPSIS: The most significant command influence cases of the past year are placed in the context of the continuing development of the law of unlawful command influence.

**JA-98-0016C**

***Evidence, Pts. I & II (21st Criminal Law New Developments Course)***

DATE: 17 November 1997

LENGTH: 38:21/45:30

SPEAKER: LTC Stephen R. Henley, Vice Chair, Criminal Law Department, TJAGSA.

SYNOPSIS: LTC Henley discusses developments in evidence for 1997 as part of the 21st Criminal Law New Developments Course. Supreme Court, CAAF, and Service Court opinions are highlighted.

**JA-98-0017C**

***Search and Seizure/Urinalysis (21st Criminal Law New Developments Course)***

DATE: 17 November 1997

LENGTH: 50:00

SPEAKER: MAJ Charles N. Pede, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Pede discusses new developments in search and seizure and urinalysis law for 1997 as part of the 21st Criminal Law New Developments Course. Supreme Court, CAAF, and Service Court cases are highlighted.

**JA-98-0018C**

***Crimes and Defenses, Pts. I, II, III & IV (21st Criminal Law New Developments Course)***

DATE: 17 & 20 November 1997

LENGTH: 42:30/38:00/47:50/42:50

SPEAKER: MAJ John P. Einwechter, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Einwechter discusses new developments in the law of pleadings and substantive crimes and defenses under the UCMJ. Includes analysis of statutory amendments to UCMJ and recent decisions of CAAF and Service Courts of Criminal appeals.

**JA-98-0019C**

***Speedy Trial and Pretrial Restraint (21st Criminal Law New Developments Course)***

DATE: 18 November 1997

LENGTH: 46:30

SPEAKER: LTC James K. Lovejoy, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: LTC Lovejoy discussed new developments in speedy trial and pretrial restraint arising from recent CAAF and Service Court opinions.

**JA-98-0020C**

***Sentencing (21st Criminal Law New Developments Course)***

DATE: 18 November 1997

LENGTH: 64:00

SPEAKER: MAJ Norman F. J. Allen III, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Allen discusses new developments in sentencing for 1997 as part of the 21st Criminal Law New Developments Course.

**JA-98-0022C**

***Voir Dire Court Personnel and Challenges, Pts. I & II (21st Criminal Law New Developments Course)***

DATE: 18 November 1997

LENGTH: 48:30/47:40

SPEAKER: MAJ Gregory B. Coe, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Coe discusses new developments in voir dire, causal challenges, and peremptory challenges for 1997 as part of the 21st Criminal Law New Developments Course.

**JA-98-0023C**

***Corrections Update (21st Criminal Law New Developments Course)***

DATE: 19 November 1997

LENGTH: 36:30

SPEAKER: LTC Lawrence J. Morris, Professor and Chair, Criminal Law Department, TJAGSA.

SYNOPSIS: LTC Morris addresses recent developments in classifying, treating, rehabilitating and providing work for military prisoners.

**JA-98-0025C**

***Sixth Amendment/Discovery Pts. I & II (21st Criminal Law New Developments Course)***

DATE: 19 November 1997

LENGTH: 49:50/43:20

SPEAKER: MAJ Edye U. Moran, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Moran reviews history briefly and discusses new developments in the Sixth Amendment, mental responsibility and discovery stemming from the most recent CAAF and Service Courts opinions.

**JA-98-0026C**

***Self-Incrimination/Jurisdiction, Pts. I & II (21st Criminal Law New Developments Course)***

DATE: 19 November 1997

LENGTH: 37:40/46:40

SPEAKER: MAJ Marty Sitler, USMC, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Sitler discusses new developments in self-incrimination and jurisdiction for 1997 as part of the 21st Criminal Law New Developments Course. U. S. Court of Appeals for the Armed Forces and intermediate Service Court cases are highlighted.

**JA-98-0027C**

***Pleas and Pretrial Agreements (21st Criminal Law New Developments Course)***

DATE: 19 November 1997

LENGTH: 42:10

SPEAKER: MAJ Gregory B. Coe, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Coe discusses new developments in pleas and pretrial agreements for 1997 as part of the 21st Criminal Law New Developments Course. U. S. Court of Appeals for

the Armed Forces and intermediate service court cases are highlighted.

**JA-98-0029C**

***Capital Litigation (21st Criminal Law New Developments Course)***

DATE: 20 November 1997

LENGTH: 48:30

SPEAKER: MAJ John P. Einwechter, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Einwechter reviews history and outlines current practice of capital litigation under the UCMJ and 1984 MCM. Discusses significance of recent Supreme Court, CAAF, and Service Court decisions concerning military capital litigation.

**JA-98-0030C**

***Post-Trial Procedure, Pts. I & II (21st Criminal Law New Developments Course)***

DATE: 20 November 1997

LENGTH: 40:00/48:00

SPEAKER: LTC James K. Lovejoy, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: LTC Lovejoy discussed new developments in post-trial procedure stemming from the most recent CAAF and Service Court opinions.

**JA-98-0031C**

***Professional Responsibility (21st Criminal Law New Developments Course)***

DATE: 20 November 1997

LENGTH: 56:40

SPEAKER: MAJ Norman F. J. Allen III, Professor, Criminal Law Department, TJAGSA.

SYNOPSIS: Major Allen discusses new developments in professional responsibility for 1997 as part of the 21st Criminal Law New Developments Course. U.S. Court of Appeals for the Armed Forces and intermediate service court cases are highlighted.

**JA-98-0032C**

***Daubert, Science and Syndromes: A Landscape under Construction, Pts. I & II (21st Criminal Law New Developments Course)***

DATE: 20 November 1997

LENGTH: 47:35/33:50

SPEAKER: COL (Ret) Lee Schinasi, University of Miami.

SYNOPSIS: Professor Schinasi discusses the admissibility of scientific and syndrome evidence.

**JA-98-0033C**

***Use of History in Military Justice Practice, The (21st Criminal Law New Developments Course)***

DATE: 21 November 1997

LENGTH: 50:00

SPEAKER: Honorable Andrew Effron, Associate Judge, Court of Appeals for the Armed Forces, Washington, D.C.

SYNOPSIS: Judge Effron discusses how history can be used as an effective tool and in the practice of military justice.

**JA-98-0034C**

*Media Issues: Trying the High Profile Case (21st Criminal Law New Developments Course)*

DATE: 21 November 1997

LENGTH: 50:00

SPEAKER: LTC Lawrence J. Morris, Professor and Chair, Criminal Law Department, TJAGSA.

SYNOPSIS: In light of the increasing number of military cases receiving public attention, LTC Morris addresses common issues as well as strategies and concerns from both the government and defense perspectives.

**JA-98-0049C**

*Manual for Courts-Martial 20X, Pts. I & II (26th Annual Kenneth J. Hodson Lecture)*

DATE: 10 March 1998

LENGTH: 78:30/20:30

SPEAKER: Brigadier General John S. Cooke

SYNOPSIS: BG Cooke discusses the evolution of our military system and how it may change in the future.

**JA-98-0058C**

*Trial Techniques of Gerald P. Boyle, Pts. I & II (9th Criminal Law Advocacy Course)*

DATE: 27 March 1998

LENGTH: 66:00/62:30

SPEAKER: Gerald Boyle, Civilian Defense Attorney.

SYNOPSIS: Mr. Boyle addresses a variety of techniques that counsel may use to their advocacy skills.

**JA-99-0004C**

*Echoes and Expectations (27th Annual Kenneth J. Hodson Lecture - 22nd Criminal Law New Developments Course)*

DATE: 16 November 1998

LENGTH: 61:00

SPEAKER: Honorable Walter F. Cox, III; Chief Judge, Court of Appeals for the Armed Forces.

SYNOPSIS: Judge Cox reflects upon his tenure as an Appellate Judge with the Court of Appeals for the Armed Forces. He discusses the courts evolution and its role in the future of military justice.

**JA-99-0005C**

*Military Justice Initiatives (22nd Criminal Law New Developments Course)*

DATE: 18 November 1998

LENGTH: 90:00

SPEAKER: Brigadier General Hess, USMC, Staff Judge Advocate to the Commandant, U.S. Marine Corps.

SYNOPSIS: BG Hess discusses the role of military justice in today's military and how the system may change in the future.

**JA-99-0007C**

*The Bill of Rights and the Military Justice System, Pts. I & II (22nd Criminal Law New Developments Course)*

DATE: 20 November 1998

LENGTH: 46:42/52:00

SPEAKER: Dwight Sullivan, Managing Attorney, American Civil Liberties Union.

SYNOPSIS: Mr. Sullivan discusses the application of the protections afforded under the Bill of Rights to servicemembers.

**JA-99-0053C**

*Advocacy and the Judge Advocate, Pts. I & II (12th Criminal Law Advocacy Course)*

DATE: 24 September 1999

LENGTH: 50:00/48:00

SPEAKER: COL (Ret.) Lee Schinasi, Professor of Law, University of Miami.

SYNOPSIS: Professor Schinasi first gives advice to JAG attorneys just starting out as trial or defense counsel. He also provides an overview of the Supreme Court's perceptions (and misconceptions) over the years of military justice and military courts-martial. He notes that the Supreme Court currently views the military justice system in a very favorable light. Professor Schinasi devotes the second half of his lecture to an analysis of particular rules of evidence, to include more overlooked rules such as MRE 103.

**JA-00-0011C**

*Military Justice, Pts. I & II (23rd Criminal Law New Developments Course)*

DATE: 15 November 1999

LENGTH: 42:30/58:00

SPEAKER: COL. (Ret) Lee Schinasi, Professor, University of Miami School of Law; Miami, Florida.

SYNOPSIS: COL Schinasi explored new arguments for the admissibility of propensity evidence and bad character evidence.

**JA-00-0012C**

*Theories of Statutory Interpretation (23rd Criminal Law New Developments Course)*

DATE: 18 November 1999

LENGTH: 78:00

SPEAKER: Mr. Dwight Sullivan, Managing Attorney, American Civil Liberties Union – Baltimore Office; Baltimore, Maryland.

SYNOPSIS: Mr. Sullivan reviewed the general principles of statutory construction and explored how military courts use the principles of statutory.

**JA-00-0013C**

*A View from the CAAF, Pts. I & II (23rd Criminal Law New Developments Course)*

DATE: 19 November 1999

LENGTH: 48:42/59:15

SPEAKER: Honorable H.F. "Sparky" Gierke, Associate Judge, Court of Appeals for the Armed Forces, Washington, D.C.

SYNOPSIS: Judge Gierke reviewed the major decisions of the Court of Appeals for the Armed Forces from 1999.

**JA-00-0025C**

***Psychological Considerations for Jury Selection and Trial Consulting, Pts. I & II***

DATE: 17 March 2000

LENGTH: 43:21/58:00

SPEAKER: Major Rebecca A. Dyer, Ph.D, Brooke Army Medical Center, MCHE-CP (Department of Behavioral Medicine), Fort Sam Houston, Texas.

SYNOPSIS: Major Dyer reviews available psychological literature and research to help attorneys choose the ideal juror, interpret body language and voice patterns, and present evidence persuasively

**JA-00-0026C**

***Concepts of Trial Advocacy, Pts. I & II (13th Criminal Law Advocacy Course)***

DATE: 21 March 2000

LENGTH: 57:15/53:21

SPEAKER: COL (Ret.) John Smith, U.S. Department of Justice, Office of Intelligence and Policy Oversight, Washington D.C.

SYNOPSIS: In this video, COL John Smith, (U.S. Army, retired), tells students that becoming an effective and powerful advocate truly takes a lifetime of work, study, and practice. He presents basic themes of advocacy: the need to persuade, not law professors, but ordinary citizens; the need to develop theories, themes and “themelas”; the duties of trial and defense counsel; and the necessity of pretrial preparation. He also discusses the difference between the “practice” of law and the “art” of advocacy, focusing on key things in voir dire, opening statements, direct and cross examination, and closing arguments.

**JA-00-0030C**

***Advanced Litigation Techniques, Pts. I & II (13th Criminal Law Advocacy Course)***

DATE: 31 March 2000

LENGTH: 48:50/61:30

SPEAKER: LTC (Ret.) Robert E. Nunley, USMC, Assistant Attorney General (Tort Claims Section), State of North Carolina.

SYNOPSIS: In this video, LTC Bert Nunley (USMC, retired), shows to students the importance of demonstrative evidence. Extensively relying upon photographs, drawings, and charts, he demonstrates the importance of visualizing the case for fact-finders. He also supplies students a military judge’s perspective on the importance of such evidence. Finally, LTC Nunley shows students many of the high tech demonstrative aids used by counsel in such high profile cases as *United States v. McVeigh* (the Oklahoma City Federal Building bombing case) and *United States v. Ashby* (the Aviano Gondola disaster) to show the importance of using such evidence.

**JA-00-0037C**

***Judicial Decision Making (28th Kenneth J. Hodson Lecture in Criminal Law)***

DATE: 19 May 2000

LENGTH: 45:30

SPEAKER: Chief Judge Susan J. Crawford, United States Court of Appeals for the Armed Services

SYNOPSIS: Chief Judge Susan J. Crawford of the Court of Appeals for the Armed Forces delivered the 28<sup>th</sup> Kenneth J. Hodson Lecture on Criminal Law. Chief Judge Crawford spoke about judicial decision-making. She described her approach to deciding cases using a hierarchy of sources of rights. At the top of the hierarchy is the U.S. Constitution, followed by federal statutes, executive orders, DoD and service regulations, and then common law. Chief Judge Crawford reviewed several decisions to illustrate her approach to deciding cases.

**JA-00-0042C**

***Cross Examination (14th Criminal Law Advocacy Course)***

DATE: 12 September 2000

LENGTH: 59:49/49:13/74:00

SPEAKER: Mr. Terrance MacCarthy, Executive Director, Federal Defender Program, US Court for the Northern District of Illinois, Chicago, Illinois.

SYNOPSIS: In this video, Mr. MacCarthy gives the students a systematic approach to cross-examination. Mr. MacCarthy shows students through demonstrations and examples, how to successfully cross-examination any witness. He disabuses students of the notion that cross-examination is an art that cannot be taught. Mr. MacCarthy helps students understand the goals of cross-examination, and how achieve those goals by using short leading statements.

**JA-00-0043C**

***Evidentiary Tactics: Making the Most of Your Evidence, Pts. I & II (14th Criminal Law Advocacy Course)***

DATE: 22 September 2000

LENGTH: 45:12/51:00

SPEAKER: Professor David Schlueter, Hardy Professor of Trial Advocacy and Director of Trial Advocacy, St. Mary’s University School of Law, San Antonio, Texas.

SYNOPSIS: Professor Schlueter discusses advanced techniques of presenting evidence at trial, including the art of persuading affective and cognitive decision makers, the role of tactics in presenting evidence, tactics for the proponent of evidence, and tactics for the opponent of evidence. Professor Schlueter also discusses application of these techniques to specific types of evidence, such as character evidence (M.R.E. 404), prior inconsistent statements (M.R.E. 613), and hearsay.

**JA-01-0003C**

***My Lai Courts-Martial: A Retrospective, Pts. I & II (2000 Judge Advocate General’s Corps Worldwide Continuing Legal Education Workshop)***

DATE: 4 October 2000

LENGTH: 50:30/50:55

SPEAKERS: COL (Ret) Carroll J. Tichenor, Yamhill County Deputy District Attorney, Yamhill County Oregon, Trial Coun-

sel in *United States v. Henderson*; Mr. John P. Partin, Hirsch, Partin, Grogan & Grogan, Columbus, Georgia, Trial Counsel in *United States v. Calley*; COL (Ret) Kenneth Alan Raby, Senior Staff Attorney, Central Staff of the Georgia Court of Appeals, Defense Counsel in *United States v. Calley*; COL (Ret) William G. Eckhardt, Clinical Professor of Law, Director of Urban Affairs Outreach, University of Missouri-Kansas City School of Law, Chief Prosecutor, *My Lai* courts-martial.

SYNOPSIS: Four participants in the most famous series of courts-martial in the history of the military justice system share their thoughts and lessons learned.

**JA-01-0017C**

***The Courageous Journey of an American Hero, Pts. I & II (7th Hugh J. Clausen Lecture on Leadership)***

DATE: 26 March 2001

LENGTH: 45:47/49:15

SPEAKER: COL George E. "Bud" Day, United States Air Force (Retired).

SYNOPSIS: COL Bud Day, former POW and Congressional Medal of Honor winner presented the 7<sup>th</sup> Hugh J. Clause lecture on Leadership. In his presentation, COL Day recounts the experiences of his service as an Air Force Pilot in Vietnam. COL Day talks about his shoot-down, capture and experiences as a prisoner of war for 65 months. COL Day shares his insights on leadership and the importance of serving and returning from Vietnam with honor.

**JA-02-0002C**

***Right to Privacy (25th Criminal Law New Developments Course)***

DATE: 05 November 2001

LENGTH: 54:30

SPEAKER: Francis Gilligan, Senior Legal Advisor, Court of Appeals for the Armed Forces.

SYNOPSIS: Overview of the most recent U.S. Supreme Court cases addressing expectations of privacy under the 4th Amendment. The overview includes a discussion of implications of these recent cases for military practitioners.

**JA-02-0003C**

***Forensic Pathology 101, Pts. I & II (25th Criminal Law New Developments Course)***

DATE: 06 November 2001

LENGTH: 90:30/45:40

SPEAKER: Dr. Andrew Baker, Forensic Pathologist

SYNOPSIS: A graphic discussion of what forensic pathology is about, various uses of pathology in the courtroom and what a forensic pathologist can and cannot do for litigators.

## **International and Operational law Offerings**

**JA-85-0134I**

***Experiences of a Prisoner of War, Pts. I & II***

DATE: 24 September 1985

LENGTH: 33:45/49:23

SPEAKER: LTC James N. Rowe

SYNOPSIS: LTC Rowe was captured by the Viet Cong in October 1963 while serving as the executive officer to a Special Forces "A" Detachment. He escaped from his captors five years later in December 1968. During his imprisonment, LTC Rowe endured constant psychological and physical torture and abuse at the hands of the Viet Cong. He witnessed fellow prisoners die of malnutrition and by execution. In this tape, LTC Rowe speaks to the 34th Graduate Class on his experiences while captured. He covers the applicability of the Geneva Conventions and the U.S. Code of Conduct in such situations.

**JA-86-0070I**

***Responsibilities under the DOD Law of War Program***

DATE: 14 July 1986

LENGTH: 60:00

SPEAKER: LTC David Graham, Chief, International Law Division, TJAGSA.

SYNOPSIS: Presentation focuses on the bases of law of war dissemination, including the commander's obligation to ensure instruction in the law of armed conflict and its observance by members of the command.

**JA-89-0057I**

***Regulation of Hostilities: General Principles (42nd Law of War Workshop)***

DATE: July 1989

LENGTH: 45:00

SPEAKER: MAJ Paul Hutter, Instructor, International Law Division, TJAGSA.

SYNOPSIS: Instruction covers the bases and the application of the principles of the law of war and their relation and compatibility with the principles of war and operational concepts.

**JA-89-0059I**

***Law of War Training in an Exercise Environment (42nd Law of War Workshop)***

DATE: July 1989

LENGTH: 38:00

SPEAKER: MAJ Paul Hutter, Instructor, International Law Division, TJAGSA.

SYNOPSIS: Major Hutter discusses various techniques of incorporating law of war training in field and command post exercises.

**JA-89-0060I**

***Tough Questions in the Law of War (42nd Law of War Workshop)***

DATE: July 1989

LENGTH: 40:00

SPEAKER: MAJ Dave O'Neil, U.S. Marine Corps, Instructor, International Law Division, TJAGSA.

SYNOPSIS: Audience will learn to address some of the more difficult law of war questions frequently asked in the classroom and in training areas.

**JA-89-0061I**

***Introduction: The Geneva Conventions (42nd Law of War Workshop)***

DATE: July 1989

LENGTH: 51:00

SPEAKER: MAJ Mark Welton, Senior Instructor, International Law Division, TJAGSA.

SYNOPSIS: Presentation focuses on the purposes of the four Geneva Conventions of 1949, their history and development, and the common articles and recent developments affecting the common articles.

**JA-89-0064I**

***Geneva Conventions: POW's and the Code of Conduct, Pts. I & II (42nd Law of War Workshop)***

DATE: July 1989

LENGTH: 51:00/48:00

SPEAKER: MAJ Dave O'Neil, Instructor, International Law Division, TJAGSA.

SYNOPSIS: An application of the rules of the Geneva Convention of 1949 relating to prisoners of war and an analysis of the relation of these rules to the Code of Conduct.

**JA-90-0034I**

***Prospect for Peace in the Middle East, Pts. I & II (7th Annual Waldemar A. Solf Lecture)***

DATE: 15 February 1990

LENGTH: 48:00/52:40

SPEAKER: Ambassador Moshe Arad, Israeli Ambassador to the United States.

SYNOPSIS:

**JA-90-0036I**

***Regulation of Hostilities, Pts. I & II (44th Law of War Workshop)***

DATE: 19 March 1990

LENGTH: 50:00/50:00

SPEAKER: MAJ David P. O'Neil, U.S. Marine Corps, Instructor, International Law Division, TJAGSA.

SYNOPSIS: Discussion of the Hague Convention No. IV of 1907, the Geneva Protocol of 1925 on Gas, Asphyxiating and Biological Weapons, and the contemporary development of rules concerning weapons and targets. Includes the rules of both of these treaties and of customary international law in regard to: (1) the determination of lawful targets, (2) the regulation of lawful weapons, and (3) the employment of lawful military tactics and ruses.

**JA-91-0018I**

***Operation Desert Shield: Legal Assistance Issues, Pts. I & II (8th Operational Law Seminar)***

DATE: 06 December 1990

LENGTH: 46:00/51:00

SPEAKERS: MAJ Greg Huckabee, Deputy Chief, Army Legal Assistance, OTJAG, MAJ Bernard Ingold, and MAJ James Pottorff, Instructors, Administrative and Civil Law Division, TJAGSA.

SYNOPSIS: The student will be familiar with the legal issues that arose during Operation Desert Shield in the area of legal assistance. Particular emphasis is placed on Soldiers' and Sailors' Civil Relief Act and the Reserve call up.

**JA-91-0019I**

***Operation Desert Shield: Operational and Foreign Legal Issues, Pts. I & II***

DATE: 06 December 1990

LENGTH: 55:30/55:00

SPEAKERS: LTC H. Wayne Elliott, Chief, International Law Division, TJAGSA; MAJ Mark D. Welton, Senior Instructor, International Law Division, TJAGSA; MAJ Gary L. Walsh, Instructor, International Law Division, TJAGSA; and MAJ John T. Jones, Jr., Instructor, Contract Law Division, TJAGSA. SYNOPSIS: Discussion of the international legal issues associated with Operation Desert Shield, including justification for use of force and war crimes. Also included is a discussion of Islamic law and its implications for U.S. forces stationed in Southwest Asia.

**JA-91-0033I**

***Iraqi Aggression Against the State of Kuwait: Background and Implications, Pts. I & II (8th Annual Waldemar A. Solf Lecture)***

DATE: 01 February 1991

LENGTH: 47:00/50:00

SPEAKER: Dr. W. Nathaniel Howell, Former U.S. Ambassador to Kuwait.

SYNOPSIS: Dr. Howell, the U.S. Ambassador in Kuwait at the time of the Iraqi invasion and occupation, discusses the impact of the Iraqi aggression on international law and international relations in the Middle East. Dr. Howell focuses on how the action undercut certain positive trends in Middle East State relations, and ushered in new aspects of regional cooperation.

**JA-92-0006I**

***Wounded and Sick Conventions, Pts. I & II (49th Law of War Workshop)***

DATE: 29 October 1991

LENGTH: 29:00/52:00

SPEAKER: LCDR John W. Rolph, USN, Instructor, International Law Division, TJAGSA.

SYNOPSIS: LCDR Rolph discusses the legal consideration surrounding implementation of the 1st and 2d Geneva Conventions of 1949 dealing with the protections afforded wounded and sick during armed conflict. The protections afforded to wounded and sick in the field, and shipwrecked at sea, are covered as well as the protections afforded to medical personnel, equipment, and hospitals displaying the internationally recognized protected symbols.

**JA-92-0008I**

***Desert Storm Legal Issues, Pts. I & II (49th Law of War Workshop)***

DATE: 31 October 1991

LENGTH: 58:00/46:00

**SPEAKER:** COL Raymond Rupert, CENTCOM Staff Judge Advocate and personal advisor to General Norman Shwartzkopf.

**SYNOPSIS:** Discussion of legal issues encountered at the theater CINC level during operations Desert Shield and Desert Storm.

**JA-92-0012I**

*Legal Aspects of the War on Drugs, Pts. I & II (11th Operational Law Course)*

**DATE:** 03 December 1991

**LENGTH:** 44:00/47:00

**SPEAKER:** LTC Tony Byler, DOD General Counsel, Counter-narcotics Team.

**SYNOPSIS:** Presentation covers counter-drug operations and the legal issues that are frequently encountered in this area. Emphasis is placed on international counter-drug operations.

**JA-97-0049I**

*Aspects of Civilian-Military Coordination During Ops, Pts. I & II (10th Annual Waldemar A. Solf Lecture)*

**DATE:** 23 April 1997

**LENGTH:** 48:30/39:00

**SPEAKER:** Ambassador Robert Oakley, Visiting Fellow, National Defense University, Washington, D.C.

**SYNOPSIS:** Ambassador Oakley relates a series of vignettes and illustrations drawn from throughout his distinguished career. The focus is on the role of the lawyer in advising the Joint Task Force Commander and working with host nations State Department officials. The lecture is an excellent snapshot of how to handle difficult operational issues encountered in Somalia and likely to recur during future deployments.

**JA-98-0047I**

*Changing Nature of the Law of War, Pts. I & II, The (11th Annual Waldemar A. Solf Lecture)*

**DATE:** 9 February 1998

**LENGTH:** 60:28/41:00

**SPEAKER:** Judge Gabrielle Kirk McDonald, President Judge for the International Criminal Tribunal for the Former Yugoslavia.

**SYNOPSIS:** Judge McDonald discusses the work for the International Criminal Tribunals for both Yugoslavia and Rwanda, focusing on both the challenges in bringing these ad hoc tribunals into existence, and the potential impact they will have on the customary international law of war.

**JA-99-0042I**

*Current Issues in International Law, Pts. I & II (12th Annual Waldemar A. Solf Lecture)*

**DATE:** 28 April 1999

**LENGTH:** 61:00/40:45

**SPEAKER:** Michael J. Matheson, Deputy Legal Advisor, U.S. Department of State, Washington D.C.

**SYNOPSIS:** Mr. Michael Matheson, the Deputy Legal Advisor for the Department of State, makes a presentation on recent international legal issues impacting U.S. military operations, to include law of war treaty developments, use of force issues, and

the inter-agency process between the Department of State and the Department of Defense. The presentation also includes an extensive question and answer session.

**JA-00-0024I**

*Present Challenges in International Law, Pts. I & II (13th Waldemar A. Solf Lecture in International Law)*

**DATE:** 01 March 2000

**LENGTH:** 66:00/31:18

**SPEAKER:** Professor Yoram Dinstein, President, Tel-Aviv University

**SYNOPSIS:** Professor Yoram Dinstein, President, Tel-Aviv University, makes a presentation on three of the challenges facing international law. First, he examines humanitarian intervention as a legal basis for the use of force among States, specifically within the context of Kosovo. Next, he discusses some of the problems related to internal armed conflicts. Finally, he examines targeting issues in air and missile warfare. The presentation also includes an extensive question and answer session.

**JA-00-0040I**

*Operation Desert Storm: Prisoner of War Experiences*

**DATE:** 16 August 2000

**LENGTH:** 60:00

**SPEAKER:** COL Rhonda L. S. Cornum, US Army Flight Surgeon.

**SYNOPSIS:** COL Cornum makes a presentation on her experience as a prisoner of war held by Iraq during Operation Desert Storm. COL Cornum reflects upon the treatment she received by her Iraqi captors, the special challenges facing a female prisoner of war, and the value of training she received prior to her captivity. The presentation ends with a question and answer session.

**JA-00-0041I**

*What Happened to Yugoslavia?: A Prosecutor's Perspective, Pts. I & II (2nd Annual Alan E. Sommerfeld Lecture)*

**DATE:** 23 August 2000

**LENGTH:** 59:15/59:46

**SPEAKER:** Mr. Gregory Kehoe, Special Prosecutor for the International War Crime Tribunal for the former Yugoslavia.

**SYNOPSIS:** Mr. Kehoe, normally employed as an Assistant U.S. Attorney, was selected to prosecute one of the alleged war criminals brought before the International Criminal Tribunal for the Former Yugoslavia. In this presentation he relates his experiences as a prosecutor, focusing on the difficulty of proving the defendant's guilt under the theory of command responsibility. He also addresses the problems associated with gathering evidence in an area of active conflict, and the unfamiliar rules under which the Tribunal operates. The presentation ends with a question and answer session.

**JA-01-0015I**

*A Negotiator's Perspective on the International Criminal Court, Pts. I & II (14th Waldemar A. Solf Lecture in International Law)*

**DATE:** 28 February 2001

LENGTH: 59:12/36:12

SPEAKER: Mr. David John Scheffer, Former Ambassador at Large for War Crimes Issues.

SYNOPSIS: In this presentation, Ambassador Scheffer critically examines the Rome Statute of the International Criminal Court. As the Clinton Administrations lead for all war crimes issues, Ambassador Scheffer is especially expert in the treaty and its policy ramifications. Here he addresses the positive and negative aspects of the treaty, and explains the rationale behind the decision of the United States to sign the treaty. The presentation ends with a question and answer session.

**JA-01-0042I**

*Information Operations and the Changing Role for Operational Lawyers (3rd Colonel Alan E. Sommerfeld Lecture)*

DATE: 29 August 2001

LENGTH: 51:00/59:42

SPEAKER: Mr. Richard L. Shiffrin, Deputy General Counsel for Intelligence, Office of the General Counsel, Washington D.C.

SYNOPSIS: Mr. Shiffrin helped author the recent General Counsel's Assessment of International Legal Issues in Information Operations and presents a discussion on the same topic. The presentation includes of recent issues in information operations (IO), including a brief historical look at some of the legal issues in IO. Mr. Shiffrin centers much of his discussion around computer network operations, to include computer network defense and computer network attack. He also deals briefly with the issue of neutrality and how that effects legal responses. The presentation ends with a question and answer session.

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