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Annual Review of Developments in Instructions—1998

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Introduction

This article is the latest in a series of articles that address courts-martial instruction law;[1] it reviews cases decided in fiscal year 1998. The *Military Judges' Benchbook* (*Benchbook*)[2] continues to be a trial practitioner's primary source for drafting instructions. Practitioners, however, should recognize that issues might still arise that involve the lack of an instruction or an incorrectly tailored instruction.

Instructions on Offenses

Rape and Sodomy

In *United States v. Davis*,[3] the accused was tried for raping,[4] sodomizing,[5] and taking indecent acts with his then nineteen year-old adopted stepdaughter, J.D.[6] The victim was thirteen years old when the first of the charged offenses occurred, although the evidence at trial indicated that the abuse began when J.D. was ten or eleven. The judge admitted the earlier acts as uncharged misconduct evidence under Military Rule of Evidence (MRE) 404(b).[7] Substantially following the *Benchbook* instruction, the military judge referenced the other acts while instructing the members on the elements of force and lack of consent.[8]

On appeal, the accused argued that this instruction constituted prejudicial error because it allowed the members to determine the issues of force and consent based, in part, on uncharged similar conduct preceding the date of the charged offenses.[9] In finding this instruction proper, the appellate court first noted that the evidence supported the argument that J.D., having been conditioned to accede to the accused's demands for sex beginning at an early age, continued to labor under the accused's physical and psychological force until she left the home.[10] Second, and more significantly, the court noted that the instructions "did not mandate a finding of parental compulsion but simply permitted the members to understand the implications of such conduct, were they to find it occurred, on the elements of force and consent."[11]

In child sex abuse cases, counsel will often find that the molestation began at a very early age. Although these acts may fall outside the applicable statute of limitations,[12] trial counsel can consider offering these acts under either MRE 404(b) or 414.[13] Additionally, trial counsel can provide a proposed instruction to the military judge that refers to these uncharged acts as relevant to the elements of force and consent.

Communicating a Threat

For the Gillespie family, Independence Day 1995 began with a camping vacation at Padre Island National Seashore,

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1. *See, e.g.*, Lieutenant Colonel Donna Wright & Colonel (Retired) Lawrence Cuculic, *Annual Review of Developments in Instructions–1997*, ARMY LAW., July 1998, at 39.

2. U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) (C1, 30 Jan. 1998) [hereinafter BENCHBOOK].

3. 47 M.J. 707 (N.M. Ct. Crim. App. 1997).

4. The elements of rape are: (1) that the accused committed an act of sexual intercourse, and (2) that the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 45b(1) (1998) [hereinafter MCM].

5. The elements of sodomy are: (1) that the accused engaged in unnatural carnal copulation with a certain person [or with an animal], [One or both of the following may apply] (2) that the act was done with a child under the age of 16; (3) that the act was done by force and without consent. MCM, *supra* note 4, pt. IV, para. 51b.

6. The accused testified that J.D. initiated and instigated the relationship. He denied threatening her or using any kind of force. *Davis*, 47 M.J. at 709.

7. MCM, *supra* note 4, MIL. R. EVID. 404(b). The evidence tended to show a pattern or plan of parental conditioning of J.D., which was relevant on the issue of consent. *Davis*, 47 M.J. at 711.

Corpus Christi, Texas. It ended with the husband facing a general court-martial for assault and battery, disorderly conduct, carrying a concealed weapon, and communicating a threat to a United States Park Ranger.[14] In *United States v. Gillespie*,[15] the Air Force Court of Criminal Appeals addressed the instructional concerns with the offense of communicating a threat, when the alleged threatening language was problematic itself.[16]

The communicating a threat specification against Major Gillespie alleged, in pertinent part, that the accused did: "[W]rongfully communicate to James Bret Morris, a threat, to wit: I know a lot of very important people and know how to work the system by writing letters to my very powerful friends and I'm going to get you in lots of trouble, or words to that effect."[17]

As a fair reading indicates, the specification does not allege that the accused's threat was to make a false allegation against Ranger Morris. The instructional error occurred when the military judge told the members that, as to the third element of the offense,[18] the language used by the accused under the circumstances amounted to a threat—a clear present determination or intent to injure the reputation of the park ranger presently or in the future.[19] The court found that the instruction was insufficiently tailored because the specification could have covered lawful conduct, in other words, simply reporting the ranger to his superiors. Regarding prejudice, the court found a substantial risk that the members did not understand that to convict the accused they had to find that he threatened the ranger with a false allegation. Based on this conclusion, the court dismissed the specification.[20]

Counsel must remain vigilant in identifying cases where the accused is charged with wrongfully communicating a threat on the basis of acts that are ostensibly protected by the First Amendment. Where the alleged threat may also show an intent to do a lawful act in a lawful manner, counsel must ensure that the military judge carefully tailors the instruction. The threat must contemplate the commission of an unlawful injurious act by the accused in an unlawful manner.

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8. The military judge instructed, in pertinent part, that:

> In deciding whether the victim did not resist or ceased resistance because of constructive force in the form of parental compulsion, you must consider all the facts and circumstances, including but not limited to, *the age of the child when the alleged abuse started*, the child's ability to fully comprehend the nature of the acts involved, the child's knowledge of the accused's parental power, and any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands. If [J.D.] did not resist or ceased resistance due to the compulsion or duress of parental command, constructive force has been established and the acts was done by force and without consent.
>
> If [J.D.] submitted to the act of sexual intercourse because resistance would've been futile under the totality of the circumstances, because of a reasonable fear of death or great bodily harm, or because she was unable to resist due to mental or physical inability, sexual intercourse was by force and without consent. If [J.D.] was incapable, due to her tender age and lack of mental development of giving consent, then the act was done by force and without consent. A child of tender years is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences.
>
> In deciding whether [J.D.] had, at the time of the sexual intercourse, the requisite knowledge and mental development, capacity, or ability to consent, you should consider all the evidence in the case including, but not limited to, [J.D.'s] age, education and intelligence level *when the sexual conduct between her and the accused began*. If [J.D.] was incapable of giving consent, and if the accused knew or had reasonable cause to know that [J.D.] was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

Id. at 710 (emphasis in original).

9. As noted by the Navy-Marine Court, with the promulgation of MRE 414, in addition to showing a pattern or plan of parental conditioning as evidence of a lack of consent, the uncharged acts of rape and sodomy would now also be admissible to show the accused's propensity to engage in child molestation. *Id.* at 711 n.4.

10. *See* United States v. Hansen, 36 M.J. 599 (A.F.C.M.R. 1992).

11. *Davis*, 47 M.J. at 711.

12. Generally, a service member who is charged with an offense is not liable to be tried by a court-martial if the offense was committed more than five years before the receipt of sworn charges by the officer exercising summary court-martial jurisdiction. *See* UCMJ art. 43 (1994).

13. *See* MCM, *supra* note 4, MIL. R. EVID. 414 (dealing with evidence of similar crimes in child molestation cases). *See also* United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998); United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998).

14. *See* MCM, *supra* note 4, pt. IV, paras. 54, 73, 110, 112. The acts giving rise to the charges arose from the accused's abusive treatment of his wife and the endless tirades, profanity, and threats he directed towards the U.S. Park Service Rangers called to quell the campsite disturbance.

15. 47 M.J. 750 (A.F. Ct. Crim. App. 1997).

16. *Id.*

17. *Id.* at 757.

Instructions on Defenses

Duress

The military judge must instruct the members on duress when it is in issue, like all affirmative defenses.[21] This defense applies when the accused has a reasonable apprehension that he or another innocent person will immediately suffer death or serious bodily injury if he does not commit the criminal act.[22] Once the defense is raised, the prosecution has the burden of proving beyond a reasonable doubt that the defense does not exist.[23] In *United States v. Vasquez*,[24] the Court of Appeals for the Armed Forces (CAAF) reviewed two elements of the duress defense.

While deployed to Turkey as part of Operation Provide Comfort, Airman Richard Vasquez shared an apartment with Airman Eric Little and Adnan Sert, a local national. Vasquez and Little eventually began social relationships with two women, Dilek Boy and Nazli Acar. Sometime thereafter, the Turkish police investigated a report that Sert was operating a house of prostitution and transported Sert, Boy, and Acar to the police station for questioning.[25] The two women told the police that they were engaged to Vasquez and Little. After returning to the apartment, Boy told the accused that he needed to marry her or they would all go to jail. Vasquez complied; however, he was already married to someone else.[26] He was eventually charged with adultery, bigamy, and signing a false official statement. At trial, Vasquez claimed that he committed the offenses under duress. In particular, he asserted that he had been in fear for his safety and the safety of his friends.[27] While giving the instruction regarding the accused's own safety, the judge refused to give a duress instruction that encompassed Vasquez's concern for his friends.[28] On appeal, the CAAF affirmed the case.[29]

The CAAF held that a reasonable apprehension does not exist if the accused has any reasonable opportunity to avoid committing the act without subjecting himself or another innocent person to the harm threatened.[30] Here, the court noted that the accused had a reasonable opportunity to seek legal advice or information concerning his fears of Turkish jails without relying on a "Hollywood dramatization."[31] This reasonable opportunity negated a reasonable apprehension that another

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18. As stated in the *Benchbook*, the elements of wrongfully communicating a threat are:

> (1) That (state the time and place alleged), the accused communicated certain language, to wit: (state the language alleged), or words to that effect;
> (2) That the communication was made known to (state the name of the person threatened, or a third person, as alleged);
> (3) That the language used by the accused under the circumstances amounted to a threat, that is, a clear, present determination or intent to injure the (person) (property) (reputation) of (state the name of the person allegedly threatened) (presently) (or) (in the future);
> (4) That the communication was wrongful; and
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

BENCHBOOK, *supra* note 2, para. 3-110-1.

19. *Gillespie,* 47 M.J. at 758.

20. *Id.* at 758-59.

21. A defense is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. *See* MCM, *supra* note 4, R.C.M. 920 discussion.

22. *Id.* R.C.M. 916(h).

23. *Id.* R.C.M. 916(b).

24. 48 M.J. 426 (1998).

25. *Id*. at 427.

26. *Id*.

27. The accused testified he feared Turkish jails because he had seen a movie in which an American tourist was wrongfully thrown in prison and repeatedly beaten, tortured, and raped. *Id*.

28. *Id.* at 428.

29. *Id.* at 430.

30. *Id*.

31. *Id*.

person would immediately suffer death or serious bodily injury. The court further held that the "immediacy element of the duress defense is designed to encourage individuals promptly to report threats, rather than breaking the law themselves." This element insures that a nexus exists between the threat and the wrongful act.[32] Here, it was three days after his friends' arrest before the accused decided to get married.

Mistake of Fact

In *United States v. Jones*,[33] the accused was charged, *inter alia*, with raping a fourteen year-old girl.[34] At trial, the accused requested that the judge instruct the members on reasonable mistake of fact regarding the victim's consent.[35] The judge denied this request. In affirming the case, the Air Force Court of Criminal Appeals held: "The appellant did not testify, and there is therefore no evidence that he was under a mistaken belief regarding the consent of K.D., and if that mistaken belief was reasonable. We are unwilling to create a defense for the appellant by attributing thoughts to him by supposition."[36]

The CAAF subsequently affirmed, concluding that a mistake of fact instruction was not warranted.[37] The CAAF, however, emphasized two important points. First, if the evidence reasonably raises all the elements of an affirmative defense, the military judge must give that instruction *sua sponte*.[38] Only the form of a requested affirmative defense instruction is discretionary. Second, the defense may be raised by evidence presented by the prosecution, defense, or the court-martial; an accused need not testify to place the defense at issue.[39]

In *United States v. Barrows*,[40] the Army Court of Criminal Appeals reviewed the mistake of fact defense as it related to the prosecution of a soldier for failing to inform sexual partners of his human immunodeficiency virus (HIV) status prior to intercourse.

In July 1993, Specialist Kevin Barrows was diagnosed as having the HIV antibody, which is the causative agent for acquired immune deficiency syndrome (AIDS).[41] In September, Specialist Barrows met with his company commander, Captain Taft, who counseled him about his responsibilities as an HIV-infected soldier, and gave him the so-called safe-sex order.[42] During the next two years, Specialist Barrows changed company commanders three times; however, none of them repeated Captain Taft's order.[43]

Between December 1994 and November 1995, Specialist Barrows had consensual sex with three different women. Although he periodically wore a condom, he never informed any of the women of his HIV status. In July and November of 1995, because he was feeling well and his T-cell count had increased, Specialist Barrows expressed doubts to Army medical personnel about his HIV-positive status.[44] Medical personnel, however, assured him that he remained HIV-positive.[45] In December 1995, Specialist Barrows told one woman that he was HIV-positive; an investigation ensued. He was subse-

32. *Id*. (quoting United States v. Jennings, 1 M.J. 414, 418 (C.M.A. 1976)).

33. 49 M.J. 85 (1998).

34. The victim, K.D., testified, in part, that she went with the accused to a park where she let him kiss her once, then stopped him because she had a boyfriend. K.D. then went back with the accused to his dormitory bedroom where she drank alcohol the accused gave to her. This made her sick and "wasted" and she started to pass out. The accused took off her bra, placed his mouth on her vagina, inserted his tongue and then tried to insert his penis into her vagina. She said no and he inserted his penis about one inch before she managed to push him away. *Id*. at 87.

35. *See* MCM, *supra* note 4, R.C.M. 916(j) ("It is a defense to an offense the accused held, as a result of an ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.").

36. *Jones*, 49 M.J. at 90.

37. Mistake of fact to a charge of rape requires that a mistake of fact as to consent be both honest and reasonable. *See* United States v. Willis, 41 M.J. 435 (1995). Attempted rape, however, is a specific intent offense so the mistake of fact need only be honest. The instructional error was moot because the accused was acquitted of rape. Although convicted of attempted rape, the CAAF agreed with the lower court that there was no evidence the accused actually believed that K.D. was consenting to his sexual advances.

38. *Jones*, 49 M.J. at 90 (citing United States v. Buckley, 35 M.J. 262, 263 (C.M.A. 1992)).

39. *See* MCM, *supra* note 4, R.C.M. 916(b) discussion; *see also* United States v. Taylor, 26 M.J. 127, 131 (C.M.A. 1988).

40. 48 M.J. 783 (Army Ct. Crim. App. 1998).

41. *Id*. at 784.

42. Part of the oral and written counseling stated: "You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner." *Id*. at 785.

43. *Id*.

44. *Id*. at 786.

quently charged with aggravated assault and violating a lawful order. At trial, Specialist Barrows claimed that Captain Taft's order was no longer valid after Captain Taft left command and none of his successors renewed the order. Specialist Barrows further argued that he did not have the means to cause death or grievous bodily harm because he believed that he was wrongly diagnosed with the HIV virus. The military judge denied the defense request for mistake of fact instructions to all offenses.[46]

Assuming first that the continued validity of the order was a question of fact, the Army Court of Criminal Appeals held that the basis of the safe sex order was Specialist Barrows's diagnosed condition. During his counseling session, Specialist Barrows acknowledged that he understood that preventive measures were necessary to prevent transmission of the virus. In addition, he acknowledged that these measures remained necessary as long as he remained HIV-positive.[47] Captain Taft's departure from the command had no effect on the continued necessity of the preventive measures and, consequently, no effect on the continued validity of the order. Additionally, Specialist Barrows never questioned the order with any subsequent commander, and it was never rescinded or modified. The court held that the accused's assertion that these conditions caused him honestly to believe the order was no longer valid was mere speculation. Consequently, the military judge did not err by refusing to instruct the members on mistake of fact as to Captain Taft's order.[48]

The court then addressed the mistake of fact defense as to the aggravated assault for acts of sexual intercourse occurring after Specialist Barrows expressed doubts about his HIV-status. The court held that Specialist Barrows's doubts, which were based primarily on his feeling healthy, constituted some evidence of an honest mistaken belief that he was wrongly diagnosed as HIV-positive.[49] Thus, the court inferred that if the panel decided that this mistaken belief was also reasonable under the circumstances, he would not be guilty of aggravated assault. The judge erred by not giving the mistake of fact instruction as to the aggravated assault charge.[50]

The court, however, found no prejudice because, even if honest, the mistaken belief was not reasonable. The evidence showed that the accused tested positive twice for the virus and was never told that he was not HIV-positive. The evidence also showed that the accused was told that feeling healthy was consistent with the initial stages of the disease, and not consistent with being HIV-negative. In addition, Specialist Barrows made a sworn statement that the reason he had unprotected sexual intercourse was because he was infatuated with the woman, not because he believed he was wrongly diagnosed.[51]

Evidentiary Instructions

Accomplices

In addition to the instruction on communicating a threat in *Gillespie*, the Air Force Court of Criminal Appeals also reviewed the judge's instruction on accomplice testimony. The witnesses at trial included the accused's wife and a woman at an adjacent campground who testified that the accused dropped a twenty-five foot radio antenna on his wife.[52] The wife, a former Air Force officer herself, denied that the antenna hit her and confirmed her husband's testimony that he did not threaten a park ranger. She also corroborated the accused's claim that he showed his weapons to a park employee to find out if he could keep them in his recreational vehicle.

During a discussion of instructions in an Article 39(a)[53] session, the judge advised counsel that she planned to give an accomplice instruction regarding Mrs. Gillespie's testimony. The defense counsel objected on the grounds that an accomplice instruction should not be given on a defense witness.[54] The judge overruled the objection, pointing out that Mrs.

45. *Id.*

46. *Id*.

47. *Id*. at 787.

48. The court explained that the version of *Army Regulation (AR) 600-20* that was in effect at the time of the offenses required that, upon a change of assignment for an HIV-infected soldier, the counseling form must be forwarded to the gaining commander. *Id.* at 788 (citing U.S. Dep't of Army, Reg. 600-20, Personnel-General: Army Command Policy, para. 2-17 (30 Mar. 1988)). There was no guidance, however, about what to do when the commander departed the unit. The new version of *AR 600-20*, however, requires the successor commander to reissue the order by counseling the HIV-infected soldier in the same manner as that prescribed for a newly identified infected soldier. *See* U.S. Dep't of Army, Reg. 600-20, Personnel-General: Army Command Policy, para. 2-17 (22 Apr. 1994).

49. *Barrows,* 48 M.J. at 788.

50. *Id.*

51. *Id*. at 789.

52. United States v. Gillespie, 47 M.J. 750, 754 (A.F. Ct. Crim. App. 1997). The witness indicated that the accused screamed at his wife to assist him in disassembling the antenna. As his wife ignored him, sitting at a picnic table with her back to him, the accused allowed the pole to fall, hitting her on the back of the head. The accused then commented, "I told you I needed help." The witness stated that the accused had control of the pole at all times. *Id.*

53. UCMJ art. 39(a) (1994).

Gillespie's testimony was both favorable and unfavorable to the accused. The judge gave the standard accomplice instruction from the *Benchbook*.[55]

In reviewing the propriety of this instruction, the Air Force Court summarized the law in this area. According to the court, the judge must give the accomplice instruction when: (1) the evidence raises a reasonable inference that a witness and the accused were accomplices in a crime "with which accused is charged," and (2) the instruction is requested by either side.[56] If neither side requests the instruction, it is not mandatory; however, the judge may give the instruction at her discretion.[57] The judge, however, has a *sua sponte* duty to instruct on accomplices if: (1) the accomplice's testimony is the only evidence on an element of an offense, and (2) a party has significantly impeached that testimony.[58]

After concluding that Mrs. Gillespie could be considered an accomplice, the court considered whether the judge gave the instruction correctly. The court accepted the judge's conclusion that Mrs. Gillespie's testimony "cut both ways," but criticized the judge for failing to tailor the instruction to the circumstances of this case. The Air Force Court explained that when an accomplice testifies both favorably and unfavorably for the accused, the standard *Benchbook* instruction improperly shifts the burden of proof to the defense.[59] In such a case, a judge should also instruct the members that if they believe the accomplice's testimony, and it supports the accused's defense, they can find him not guilty based on the accomplice's testimony alone.[60]

Sentencing Instructions

Matters Presented by the Prosecution

In 1998, a number of cases dealt with instructions during the sentencing phase of the court-martial. In *United States v. Lane*,[61] the accused voluntarily absented himself from his court-martial after arraignment. The trial proceeded in his absence. During the sentencing phase, the trial counsel admitted an Air Force form reflecting the accused's status as absent without leave.[62] Before the Air Force Court of Criminal Appeals, the appellant argued that the judge incorrectly

54. *Gillespie*, 47 M.J. at 754. The defense counsel argued that *United States v. Davis* and *United States v. McCue* supported his position. *Id.* (citing United States v. Davis, 32 M.J. 166 (C.M.A. 1991) and United States v. McCue, 3 M.J. 509 (A.F.C.M.R. 1977)). He also contended that the instruction would unduly prejudice the defense. *Id*.

55. *Id*. at 756. Specifically, the judge instructed the members:

> You are advised that a witness is an accomplice if she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness's believability, that is, a motive to falsify her testimony in whole or in part, because of an obvious self-interest under the circumstances. The testimony of an accomplice, even though it may be apparently credible, is of questionable integrity and should be considered by you with great caution.
> In deciding the believability of Meria Gillespie, you should consider evidence including but not limited to the testimony that she and the accused jointly occupied the motor home in which Connie Schmidt testified the pistol and [shotgun] were located and engaged in conversations in which obscenities were exchanged in public with her husband. Whether or not Meria Gillespie, who testified as a witness in this case, was an accomplice, is a question for you to decide. If Meria Gillespie shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved herself with the offense with which the accused is charged; she would be an accomplice whose testimony must be considered with great caution.

Id. That instruction is directly from the *Benchbook*. BENCHBOOK, *supra* note 2, para. 7-10.

56. *Gillepsie*, 47 M.J. at 755 (citing United States v. Gillette, 35 M.J. 468, 470 (C.M.A. 1992)).

57. *Id.* The court pointed out that accomplice testimony is viewed skeptically because in the case of a prosecution witness, the person might testify out of self-interest to obtain leniency from the prosecution. A defense witness may accept blame for an offense if the person could not be prosecuted for it. The court noted that Mrs. Gillespie was in such a situation because she had left the Air Force by the time of trial. *Id.*

58. *Id.* (citing United States v. Lee, 6 M.J. 96, 97 (C.M.A. 1978); United States v. Sanders, 34 M.J. 1086, 1092 (A.F.C.M.R. 1992)).

59. *Id.* (citing United States v. Rosa, 560 F.2d 149, 156 (3rd Cir.)). The standard instruction suggests that the accomplice's testimony should be disregarded. *See* BENCHBOOK, *supra* note 2, para. 7-10.

60. *Gillespie*, 47 M.J. at 755. The court suggested that an appropriate instruction would be:

> I further charge you that, to the extent, if any, that you find the testimony of an accomplice tends to support the contention of the [accused], that is, tends to show the [accused] to be not guilty, you may consider such testimony in that respect and weigh such testimony, along with the other evidence in the case, under the rules given you in this charge, and you may find the [accused] not guilty based on an accomplice's testimony.

Id. The court, however, found that the instruction given did not prejudice the accused. The court cited several reasons supporting its finding. First, it was an evidentiary instruction and did not involve the elements. Second, in the credibility of the witnesses instruction, the court told the members to consider a witness's interests and biases. The court concluded that evidence of the accused's guilt was so compelling that the erroneous instruction had no effect on the findings. *Id.*

61. 48 M.J. 851 (A.F. Ct. Crim. App. 1998).

instructed the members on the use of this evidence. The appellant argued that the judge should have instructed that the evidence could only be used on the question of rehabilitation potential.

The Air Force Court reviewed the instruction and rejected the appellant's argument. First, the court pointed out that during the findings phase the judge had twice instructed the members not to draw any inference adverse to the accused based on his absence. During the sentencing instructions, the judge told the members that they could use the accused's absence in "assessing his military record." The judge further instructed the members that the accused's punishment should be based only on his convictions.[63] The Air Force Court found no error in the judge's instructions and concluded that "assessing his military record" logically inferred that the absence could be used as a factor in determining rehabilitation potential.

Extenuation and Mitigation

In *United States v. Simmons*,[64] the military judge refused a defense request to instruct the members that the accused had been abused as a child. During the sentencing phase, the accused's wife testified somewhat ambiguously about her husband's unhappy childhood and the abuse he suffered.[65] She also stated that abused children grow up to abuse others.[66] An expert, who had counseled the couple, described the difficulty in treating victims of abuse.

The defense counsel asked the judge to instruct the members that the accused was emotionally and physically abused as a child and that such abuse could be a mitigating factor. The judge refused the request because neither the wife nor the expert had testified that the accused said he had been abused.[67]

The CAAF held that in the absence of any direct evidence that the accused suffered abuse as a child, the judge did not err in refusing to give the instruction.[68] The court pointed out, however, that since the evidence was disputed, the judge should have instructed the members to consider the abuse as mitigating if they found that it occurred.[69]

In *United States v. Perry*,[70] the CAAF reviewed a judge's denial of an instruction on the impact of a requirement to repay the cost of a service academy education.[71] During a discussion on sentencing instructions, the defense counsel asked the judge to instruct the panel that if the accused was sentenced to a dismissal, he could be required to repay the cost of his Naval Academy education, which was approximately $80,000.[72] The defense counsel provided the judge with a memo from the Naval Academy comptroller that cited a law authorizing repay-

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62. *Id.* at 857. Although the trial counsel offered the document under R.C.M. 1001(b)(5) as evidence of rehabilitation potential, the judge admitted it as part of the accused's personnel records under R.C.M. 1001(b)(2). *Id.* (citing MCM, *supra* note 4, R.C.M. 1001(b)(2)).

63. *Id.* at 858 n.1-2.

64. 48 M.J. 193 (1998).

65. *Id.* at 194. The accused had been found guilty of assaulting and kidnapping his wife. His wife testified in extenuation and mitigation that she and the accused had talked about the pain and abuse he had experienced during childhood; however, she was unsure of whether this conversation took place during the assaultive encounter. The judge then interjected and told the defense counsel to move on to a different area. *Id.*

66. *Id.* The accused's wife also testified that she knew the accused had experienced many of the same things he had done to her.

67. *Id.* at 194-95. The trial counsel objected to the instruction on the grounds that it would amount to a determination that the abuse had occured. When the defense counsel argued that the wife testified to that effect, the judge pointed out the wife had said she could not recall. *Id.* Actually what the wife could not recall was the date of any conversation she had with the accused regarding the abuse. As to the expert testimony, the judge correctly noted t hat the expert never testified that the accused said he was abused. *Id.* at 195.

68. *Id.* The court first noted that the test for denial of an instruction is: (1) whether the instruction as given is correct, (2) whether the request addresses something not covered in the instructions as given, and (3) whether failure to give the instruction deprives the accused of a defense or seriously impairs its presentation. *Id.* (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993)).

69. *Id.*

70. 48 M.J. 197 (1998).

71. The court-martial took place in July 1994, some 14 months after the accused graduated from the United States Naval Academy. The accused was found guilty of various offenses including attempted sodomy and indecent acts. *Id.* at 197-98.

72. *Id.* at 198. Counsel proposed the following instruction:

> A dismissal may cause Ensign Perry to be liable to reimburse the U.S. [g]overnment for all or a portion of the costs associated with his education at the U.S. Naval Academy. As computed by the U.S. Naval Academy, the total cost of education for the past four years is approximately $80,000.

Id.

ment.[73] The judge declined counsel's request on the grounds that he had not presented evidence on the matter and the memo, standing alone, was insufficient to show that collection was likely.[74]

In upholding the judge's decision, the CAAF pointed to counsel's failure to produce evidence that collection efforts would actually be initiated against the accused. Specifically, the court noted that such efforts were discretionary with the Secretary of the Navy, and the Navy must satisfy certain procedural steps before it could recoup the costs.[75] In a concurring opinion, Judge Effron agreed with the result, but criticized the majority's language that a financial impact must be "a direct and proximate consequence of the punitive discharge and not merely a potential collateral consequence."[76] In Judge Effron's opinion, such overbroad language was not necessary to resolve this case, and it would result in needless litigation in the future.[77]

In *United States v. Duncan*,[78] the Navy-Marine Court of Criminal Appeals considered the propriety of the judge's response to members' questions. At trial, the members interrupted their sentencing deliberations to ask whether rehabilitation or therapy would be required if the accused was confined and whether parole was available for a life sentence.[79] The judge responded by first explaining that the members were an "independent agency" whose job it was to determine guilt or innocence and impose an appropriate sentence.[80] The judge also told the members that other authorities would review the case, but they should do what they felt was right and not rely on what others might do. The judge concluded this portion of his response by telling the members that they "should not be concerned" about parole. Regarding rehabilitation, the judge told the members that although participation in such programs was not mandatory, treatment was available and incentives existed for the confinee to participate.

The court found no error in the judge's instruction. It rejected appellant's argument that the judge's instruction went beyond merely answering the questions.

Death Penalty

Last year, the CAAF addressed instructions issues in two death penalty cases. The CAAF affirmed the death sentence in one case and reversed the sentence in the other. The CAAF had already reviewed the case of *United States v. Loving*[81] once, and, in 1996, the Supreme Court affirmed the CAAF's comprehensive treatment of some seventy issues. *Loving* is the only military capital case heard by the nation's highest court. Following the Supreme Court's decision, Private Loving requested a writ of mandamus on the grounds that his death sentence was infirm because it was based in part on an invalid aggravating factor. Private Loving appealed to the CAAF after the Army Court of Criminal Appeals refused to grant the writ of mandamus.

Before discussing the merits of appellant's claim, a quick review of death penalty sentencing procedures might be helpful. As Judge Gierke pointed out in his lead opinion in *Loving v. Hart*,[82] the military death penalty procedures involve a four-

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73. The memo stated: "In accordance with PL 96-357, and effective with the Class of 1985, if any individual fails to fulfill their commitment, they may be liable to reimburse the U.S. government for all or a portion of the costs associated with their education at the Academy." *Id.*

74. *Id*. The judge offered counsel the opportunity to present additional evidence on the issue. The judge indicated that without an implementing regulation or some indication that collection efforts would be attempted in this case, he would not give the instruction. The defense counsel declined to present any evidence. *Id.*

75. *Id.* at 199. The court examined the law authorizing collections and noted that it had several procedural requirements: that the individual signed a contract providing for reimbursement of educational expenses, that notice of recoupment had been given to the individual and that a hearing had been conducted. *Id.* (citing 10 U.S.C. § 2005 (1988)).

76. 48 M.J. at 199-200 (Effron, J., concurring).

77. Military justice practitioners, of course, will recognize that Judge Effron views broadly an accused's right to present matters to the sentencing authority. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998); United States v. Jeffery, 48 M.J. 229 (1998); United States v. Grill, 48 M.J. 131 (1998). It is not surprising that he would frown on any language that would encourage the prosecution to fight the admission of this type of evidence. Judge Sullivan's dissenting opinion echoed a familiar refrain—truth in sentencing. In his view, the judge should have given the instruction since the requested instruction was couched in terms indicating that recoupment was possible, not mandatory. Since the defense argued, however, that an appropriate punishment would include a punitive discharge and total forfeitures, the error was harmless. *Perry*, 48 M.J. at 201-02 (Sullivan, J., dissenting).

78. 48 M.J. 797 (N.M. Ct. Crim. App. 1998).

79. *Id.* at 802. The members asked: "Will rehabilitation/therapy be required if Private First Class Duncan is incarcerated?" and "In military justice, is parole granted or are sentences reduced for good behavior? If so do these reductions apply to a life sentence?" *Id.* The trial took place in 1995, before the enactment of Article 56a created the possibility of a sentence of confinement for life without eligibility for parole. *See* National Defense Authorization Act, Pub. L. No. 105-85, § 581(a)(1), 111 Stat. 1759 (1997).

80. *Id.* Before answering the members, the judge held an Article 39(a) session to discuss his proposed instruction with counsel. The defense proposed an instruction that was similar to the instruction as given, except that it was shorter and would have told the members to "assume that no parole or good behavior exists." *Id.*

81. 517 U.S. 748 (1996).

step process. First, the members must unanimously find that the accused committed the capital offense.[83] Second, they must unanimously conclude that at least one aggravating factor exists.[84] Third, any extenuating and mitigating circumstances must be outweighed by any aggravating circumstances, including the aggravating factors found to exist earlier.[85] Finally, the members must unanimously vote for death.[86]

In 1989, Private Loving was convicted of the premeditated murder of Bobby Gene Sharbino and the felony-murder of Christopher Fay. He was also convicted of other offenses, including robbery, related to a two-day crime spree in Killeen, Texas. Both of the individuals he killed were cabdrivers. During the sentencing proceedings, the military judge instructed the members that unless they found at least one of three aggravating factors, they could not impose death as the sentence.[87] The three aggravating factors advanced by the prosecution were:

> (1) The premeditated murder of Bobby Gene Sharpino was committed while the accused was engaged in the commission or attempted commission of a robbery.[88]
> (2) Having been found guilty of the felony murder of Christopher Fay . . . the accused was the actual perpetrator of the killing.[89]
> (3) Having been found guilty of the premeditated murder of Bobby Gene Sharpino, the accused was also found guilty of another violation of Article 118, UCMJ, in the same case.[90]

Although the judge did not define the term "actual perpetrator," the members unanimously found all three factors existed; they sentenced the accused to death.

In his petition for extraordinary relief, the appellant argued that his death sentence was unconstitutional because it was based, in part, on a conviction for felony murder without a finding that he intended to kill Christopher Fay. He also argued that there was no finding that he exhibited a reckless indifference to human life in committing the underlying felony-robbery. In addressing this argument, Judge Gierke thoroughly traced the development of the "triggerman factor."[91] After reviewing the leading Supreme Court cases on this issue, Judge Gierke concluded that the death penalty may be imposed for felony murder only when the accused: (1) actually and intentionally killed the victim or (2) substantially participated in a felony and exhibited reckless indifference to human life. Turning then to the instructions given in *Loving*, the CAAF explained that the "triggerman factor" is constitutional if "it is understood to be limited to a person who kills intentionally or acts with reckless indifference to human life."[92]

Regarding the judge's failure to explain the term "actual perpetrator," the CAAF held that such an omission was not error because the accused's intent in killing Mr. Fay was not an issue in the case.[93] Without any explanation, the court further held

82. 47 M.J. 438 (1998).

83. *Id*. at 442 (citing MCM, *supra* note 4, R.C.M. 1004(a)(2)).

84. *Id*. (citing MCM, *supra* note 4, R.C.M. 1004(b)(4)(A)). Actually it is R.C.M. 1004(b)(7) which states that the vote on the existence of an aggravating factor must be unanimous. *See* MCM, *supra* note 4, R.C.M. 1004(b)(7).

85. *Id.* (citing MCM, *supra* note 4, R.C.M. 1004(b)(4)(C)).

86. *Id*. (citing MCM, *supra* note 4, R.C.M. 1006(d)(4)(A)).

87. United States v. Loving, 41 M.J. 213, 232 (1994). Throughout this portion of the instructions, the judge used the term aggravating circumstance instead of aggravating factor. *Id.* The correct term, however, did appear on the sentencing worksheet. Prior to 1986, R.C.M. 1004 did use the term circumstance; however, Change 2 to the *Manual for Courts-Martial* introduced the term factor to distinguish it from aggravating circumstances that may be introduced in any sentencing case. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 analysis, app. 21, at A21-70 (1984) (C2, 19 Feb. 1986) [hereinafter 1984 MCM].

88. *See* MCM, *supra* note 4, R.C.M. 1004 (c)(7)(B) (providing that in the case of premeditated murder, the murder was committed while the accused was committing or attempting to commit a robbery).

89. *See* MCM, *supra* note 4, R.C.M. 1004 (c)(8). The version in effect at the time of trial provided, "that only in the case of a violation of Article 118(4), the accused was the actual perpetrator." 1984 MCM, *supra* note 86, R.C.M. 1004. In 1991, this provision was changed to add the language "or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life." *Id.* analysis, app. 21, at A21-73 (C5, 27 June 1991).

90. *See* MCM, *supra* note 4, R.C.M. 1004 (c)(7)(J).

91. The "triggerman factor" is commonly used to describe R.C.M. 1004 (c)(8).

92. Loving v. Hart, 47 M.J. 438, 444 (1998).

93. *Id*. at 445. The court described the killing in summary fashion and noted that the defense did not raise accident or unintentional killing as issues in the case. The court concluded that no reasonable factfinder could have found that the killing was other than intentional. *Id*.

that even if it was error, such error was harmless. Finally, to cover all the bases, the court concluded that even if the instructions on the "triggerman factor" were deficient, the finding on the other two aggravating factors clearly met the requirements of the second step of the four-step death penalty process.

Moving on to the third step of the process, the weighing of the aggravating factors, the court concluded that any error here was also harmless. The court reasoned that even if Mr. Fay's killing was not properly an aggravating factor, the members could have properly considered it as an aggravating circumstance; therefore, the result of the weighing would have been unchanged. Finally, the CAAF rejected the contention that Private Loving was improperly sentenced for two capital murders, instead of one, and three aggravating factors, instead of two. The court pointed to the minimal references to the number of offenses and aggravating factors argued by counsel or instructed on by the judge. The court concluded that because neither counsel nor the judge emphasized numbers, this could not have influenced the sentencing deliberations.[94]

Although the CAAF affirmed Private Loving's death sentence, it strongly urged judges to define the term "actual perpetrator" in their instructions on this factor.[95] An upcoming change to the *Benchbook* will contain such language. Along with the "substantially participates" language, instructions on the "triggerman factor" should now be understandable to court members. Trial defense counsel should recognize that aggressive advocacy is essential when contesting the availability of multiple aggravating factors. Appellate courts have not been receptive to the argument that an accused suffers prejudice when he faces the death penalty on multiple factors, and one or more are later deemed invalid.[96] Convincing the trial judge that an aggravating factor does not apply may be the accused's "best shot."

In the other capital case decided this term by the CAAF, *United States v. Simoy*,[97] the court focused on the fourth step of the death penalty deliberation process i.e., the vote on the death penalty itself. The court overturned the death sentence because the judge instructed the members to vote on death first.[98] In a relatively short opinion, the court held that the instruction violated Rule for Courts-Martial 1006(d)(3)(A),[99] which provides that the voting on sentences begins with the least severe offense and continues with the next least severe, until the required concurrence is reached.

The CAAF characterized the instruction as a "plain, clear, obvious error that affected the substantial rights of the appellant."[100] The court pointed out that some members who voted for death might have agreed upon the lesser sentence of life imprisonment and if three-fourths had done so, confinement for life would have resulted. The court rejected the argument that the defense waived the error by failing to object or submit its own instruction.[101]

The court's decision in *Simoy* is not surprising given its earlier opinion in *United States v. Thomas*.[102] Addressing the same issue, the CAAF also overturned the death sentence in that case. Given the clarity of the court's holding in both cases, the judge's instruction should clearly state that once the first three steps are completed, voting on death as a possible sentence is no different than in a non-capital case. In other words, voting begins with the least severe sentence proposed and progresses upward, if necessary.

94. *Id*. at 447. Two other judges joined Judge Gierke in the lead opinion. Judge Sullivan wrote a concurring opinion in which he broadly asserted that as a matter of common sense, any finding that an accused is an actual perpetrator means that he intended to kill. *Id*. at 447 (Sullivan, J., concurring). While the majority limited its holding to the facts of this case and the absence of any issue as to intent, Judge Sullivan would apparently hold that any "actual perpetrator" must have intended the death of his victim. Such a view ignores the scenario mentioned by the majority: an accused who fires a weapon wildly in a crowded room. Such a person may not intend to kill but if he kills someone then he is an "actual perpetrator." Judge Effron joined in denying the appellant's denial of his petition for extraordinary relief but dissented in affirming the death sentence because of concerns over affidavits filed by court members describing irregularities in the sentence voting procedures. *Id.* at 454-60 (Effron, J., concurring in part and dissenting in part).

95. *Loving,* 47 M.J. at 445 n.4.

96. *See* United States v. Curtis, 32 M.J. 252, 270 (C.M.A. 1991); 33 M.J. 101 (C.M.A. 1991), *rev'd. on reconsid.*, 46 M.J. 129 (1997).

97. __ M.J. __, No. 97-7001 (C.A.A.F. Oct. 20, 1998), *rev'g*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

98. *Id*. The judge instructed the members that: "If the aggravating circumstance has been found unanimously by proof beyond reasonable doubt, and if one or more members proposed consideration of the death sentence, begin your voting by considering the death sentence proposal, which have the lightest additional punishment if any." *Id.*

99. MCM, *supra* note 4, R.C.M. 1006(d)(3)(A).

100. *Simoy*, __ M.J. at __.

101. *Id.* This was the government's argument before the CAAF and the position adopted by the Air Force Court of Criminal Appeals in its opinion, which affirmed the death sentence. *Simoy*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

102. 46 M.J. 311 (1997).

Conclusion

The foregoing cases prove that when formulating trial strategy, and deciding what evidence to present, counsel must contemplate panel instructions early in the case and anticipate which substantive instructions the judge will give.

The Password is "Common Sense": The Army's New Policy on Senior - Subordinate Relationships

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Introduction

> *The leader must be counted on to use good judgment, experience and discretion to draw the line between relationships which are "destructive" and those which are "constructive."*[1]

Since 1978, the Army has had a senior - subordinate relationship policy that focuses on the effects of such relationships, rather than on the status of the parties involved.[2] Given differences in service policies, today's increased operations tempo, and the increase in deployments and joint operations, Secretary of Defense (SECDEF) William Cohen determined that all the services should prohibit certain types of relationships.[3] As a result of the SECDEF memo, the Army has changed its policy.[4] This article discusses the new Army policy on senior - subordinate relationships and contrasts it with the policy it replaced.[5]

Background

With the disbanding of the Women's Army Corps in 1978, the Army implemented a policy governing the relationships between soldiers of different ranks.[6] Although the policy came about as a result of an influx of women into a predominantly male organization, both the old Army policy and the new Army policy are gender-neutral.[7]

The Old Army Policy

The old Army policy covered all relationships between seniors and subordinates: officer-officer, enlisted-enlisted, officer-enlisted, male-male, female-female, and male-female. It asked whether the relationship caused an adverse effect on the unit mission, either actual or apparent. If not, the Army did not prohibit relationships between seniors and subordinates. As a result, the old Army policy did not prohibit dating between officers and enlisted soldiers, absent an adverse effect from the relationship.[8]

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1. U.S. Dep't of Army, Pam 600-35, Relationships Between Soldiers of Different Rank, preface (7 Dec. 1993) [hereinafter DA Pam 600-35].

2. *Id.*; U.S. Dep't of Army, Reg. 600-20, Army Command Policy, para. 4-14 (30 Mar. 1988) [hereinafter AR 600-20].

3. "[T]he Services defined, regulated, and responded to relationships between service members differently. Such differences in treatment are antithetical to good order and discipline, and are corrosive to morale, particularly so as we move towards an increasingly joint environment." Memorandum, Secretary of Defense, subject: Good Order and Discipline (29 July 98) [hereinafter SECDEF Memo]. According to Rudy de Leon, Under Secretary of Defense for Personnel and Readiness:

> The Services define, regulate, and respond to unprofessional relationships between service members differently. Given the fact that the members of different services now frequently serve side by side in joint operations, some of the differences in Service policy create confusion, are corrosive to morale. The action being directed today addresses those inconsistencies.

Rudy de Leon, Under Secretary of Defense for Personnel and Readiness, Remarks to the Press regarding the Secretary of Defense's Policy on Good Order and Discipline (29 July 1998) *available at* <www.defenselink.mil>.

4. The Army's new policy became effective on 2 March 1999. Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999) [hereinafter DA Message].

5. Further official guidance is pending, in the form of a new *DA Pam 600-35*. A draft of the new *DA Pam 600-35* is available now. Draft U.S. Dep't of Army, Pam 600-XX, *available at* <www.odcsper.army.mil> [hereinafter Draft DA Pam 600-XX]. It is, however, a draft, which is subject to change prior to the final publication. The Office of the Deputy Chief of Staff, Personnel (ODCSPER) has published briefing slides to assist commanders on training their units on the new policy by 1 October 1999. Those slides can be found at the ODCSPER website, www.odcsper.army.mil/dape/hr. Message, 031706Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Army Policy on Fraternization (Good Order and Discipline)(3 Mar. 1999).

6. DA Pam 600-35, *supra* note 1, para. 1-4.

7. *Id.* para 2-2c; AR 600-20, *supra* note 2, para. 4-14e. The military policy on fraternization (the criminal form of improper senior-subordinate relationships) had its beginning in the male-male friendships from World War II, when the traditional military rank structure had to adapt to the influx of officers and enlisted soldiers from all walks of life. DA Pam 600-35, *supra* note 1, preface.

Other Services[9]

The other armed services focus their polices (at least as they relate to officer-enlisted relationships) on the status of the parties involved, rather than the effect of the relationship. The Air Force policy prohibits gambling between officers and enlisted soldiers and prohibits an officer from borrowing money from, or otherwise being indebted to, an enlisted airman.[10] The Air Force policy also prohibits dating or sexual relations between officers and enlisted soldiers.[11] Similarly, the Navy and the Marine Corps have policies that prohibit relationships between officers and enlisted that are "unduly familiar and that do not respect differences in grade or rank." The prohibitions include: dating, cohabitation, intimate or sexual relations, and private business partnerships.[12] Likewise, the Coast Guard prohibits "romantic" relationships between officers and enlisted members.[13]

The New Army Policy

The new Army policy is essentially the old Army policy with the specific prohibitions (discussed below) required by Secretary Cohen grafted to it. These prohibitions add a first step to the analysis: (1) does the relationship fall into one of the "strictly prohibited" categories directed by Secretary Cohen; (2) if not, does the relationship cause any adverse effects? If both of these questions are answered in the negative, the Army does not prohibit the relationship.

The "Strictly Prohibited" Categories

Officer-Enlisted Business Relationships. Ongoing business relationships between officer and enlisted personnel, such as borrowing or lending money, commercial solicitation, or any other type of ongoing financial or business relationship, are prohibited.[14]

The above prohibition exempts landlord - tenant relationships, or one-time transactions, such as the sale of a house or a car.[15] Army National Guard and U.S. Army Reserve soldiers are also exempt from this prohibition to the extent that the otherwise-prohibited business relationship arises from their civilian occupation or employment.[16] Finally, existing business relationships that would be prohibited under the new policy, but were permitted under the old policy, can continue until 1 March 2000.[17]

8. AR 600-20, *supra* note 2, para. 1-5e.

9. Although the Coast Guard is not part of the Department of Defense and was not covered by SECDEF's July 1998 directive, the Coast Guard policy is generally consistent with the SECDEF's memo. SECDEF Memo, *supra* note 3.

10. U.S. Dep't of Air Force, Secretary of the Air Force Instr. 36-2909 (1 May 1996), para. 5. In addition to the strict prohibitions on officer / enlisted relationships in paragraph 5, the Air Force also has a general, effects-based provision that covers non-paragraph 5 situations (unprofessional relationships). *Id*. paras. 2, 3. The Air Force policy considers relationships between officers, between enlisted, between officers and enlisted, and between military members and civilian employees as "unprofessional" when they (1) detract from the authority of superiors (2) result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests." *Id.* Unprofessional relationships can include sharing of living accommodations, vacations, transportation, and off-duty interests on a frequent or recurring basis. *Id.*

11. *Id.*

12. *See* Chief of Naval Operations Instr. 5370.2A, paras. 5, 6 (14 March 1994) [hereinafter OPNAVINST 5370.2A]; Marine Corps Manual, para. 1100.4 (C3, 13 May 1996). Like the Air Force, both the Navy and the Marine Corps have a general, effects-based provision to cover situations other than those strictly prohibited by paragraph 1100.4. That general provision prohibits relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in rank or grade, when those relationships are prejudicial or of a nature to bring discredit upon the service. Examples include relationships that "(1) call into question a senior's objectivity, (2) result in actual or apparent preferential treatment, (3) undermine the authority of a senior, or (4) compromise the chain of command." OPNAVINST 5370.2A, *supra*, para. 5b. Note that relationships between officers and enlisted that are unduly familiar and that do not respect differences in grade or rank are *presumed* to be prejudicial. (Because of the special status accorded senior enlisted (E-7 and above) in the Navy, the "unduly familiar" relationships (when with junior enlisted within the same command) are "typically" prejudicial. OPNAVINST 5370.2A, *supra,* para 6d.

13. U.S. Coast Guard Personnel Manual, ch. 8.H.2.g (C26, 3 Feb. 1997). The Coast Guard policy defines "romantic" relationships as "[c]ross-gender sexual or amorous relationship[s]." *Id.* para 8.H.2.d.3.b. The Coast Guard policy "accepts [other] personal relationships between officer and enlisted personnel, regardless of gender, if they do not" "either in actuality or appearance: (1) Jeopardize the members' impartiality, (2) Undermine the respect for authority inherent in a member's rank or position, (3) Result in members improperly using the relationship for personal gain or favor, or (4) Violate a punitive article of the UCMJ." *Id.*, at para. 8.H.4.b. and 8.H.2.c. The Coast Guard is within the Department of Transportation, not to the Department of Defense. Accordingly, the Coast Guard was not required to change their policy in response to the SECDEF memo. While the Secretary of Transportation did not issue a similar directive to the Coast Guard, the Coast Guard's position is that their policy is consistent with what Secretary Cohen required of the other armed services. Electronic Interview with Lieutenant Commander Brian F. Binney, Assistant Chief, Office of General Law, Headquarters, Commandant, U.S. Coast Guard (11 Mar. 1999).

14. DA Message, *supra* note 4, para 3c(1).

15. *Id.*

16. *Id.*

17. *Id.*

Although the new prohibition on business relationships between officers and enlisted does not have an exception for married officer-enlisted couples, the intent of the Army policy is not to prohibit "normal joint financial transactions that a husband and wife might enter into."[18] As a result, a married officer-enlisted couple can take out a joint loan for the purchase of a home[19] or operate a business together in their off-duty time.

Officer-Enlisted Personal Relationships. Personal relationships between officers and enlisted members, such as dating, sharing living accommodations (except as required by operational necessity), and intimate or sexual relationships, are prohibited. This prohibition, however, is not designed to infringe on marriages that existed before 2 March 1999 (the effective date of the new Army policy) or are entered into before 1 March 2000. In addition, this prohibition does not prohibit relationships that fall out of compliance with the policy solely because of the promotion or change in status of one party. For example, if two enlisted soldiers get married after 1 March 2000, then one becomes commissioned as a warrant officer, the relationship does not violate the prohibition on personal relationships. On the other hand, this exception is not designed to allow two enlisted soldiers to continue a dating relationship after one becomes a commissioned officer.[20]

Finally, "the intent of the Army policy is not to disrupt existing family relationships."[21] Although a strict reading of the policy might seem to prohibit personal relationships between officers and enlisted who are related (such as parent and child, or siblings), the policy is not intended to prevent an officer from having dinner or going to the movies with his brother, who happens to be an enlisted soldier. Nevertheless, both the officer and the enlisted soldier must maintain proper decorum while in uniform and in public.[22]

What remains is unclear is the effect of marriages between officers and enlisted soldiers after 1 March 2000. The new Army policy does not prohibit such marriages. Marriages between an officer and an enlisted soldier after 1 March 2000, however, raise questions in two areas.[23]

First, what effect does such a marriage have on any *prior* prohibited conduct between the now-married parties?[24] While the Navy, the Marine Corps, the Air Force, and the Coast Guard all address this issue in their policy (and take the position that marriage does *not* insulate the parties from the consequences of prior prohibited conduct), the Army did not address the issue in the new policy.

Second, what effect does such a marriage have on any *subsequent* prohibited conduct between the married parties? The new Army policy does not specifically address this issue. The old Army policy did not strictly prohibit personal relationships (including marriages) between officers and enlisted soldiers.[25] If such relationships (under the old Army policy), however, caused one of the three adverse effects listed in *Army Regulation (AR) 600-20*, paragraph 4-14a, the soldiers would be subject to corrective action from their commanders.[26] If the parties to an officer-enlisted marriage could be subject to corrective action for their conduct under the old, more expansive, Army policy, it follows that the parties to such a marriage could be subject to similar action under the new Army policy, if the relationship caused one of the five adverse effects listed in paragraph 3b of the DA Message.[27]

Officer-Enlisted Gambling. Under the new policy, officer-enlisted gambling is prohibited, without exception. As there is no specific exception for gambling between spouses, the Army policy could be read to prohibit a married officer-enlisted couple from gambling together. Again, the Army policy is not intended to "disrupt typical family activities."[28] Accordingly, a

18. Draft DA Pam 600-XX, *supra* note 5, para. 2-19.

19. *Id.*

20. *Id.* para. 2-25b.

21. *Id.* para. 2-8.

22. *Id.*

23. The Army's senior leadership is currently working through how the new Army policy will apply to marriages between officers and enlisted soldiers that take place after 1 March 2000. The Army will publish further guidance on this issue.

24. Remember that the new Army policy exempts officer-enlisted personal relationships that existed prior to 2 March 1999, until 1 March 2000, provided the relationship was proper under the old Army policy. The new Army policy contains no exemption for officer-enlisted personal relationships that begin after 2 March 1999, or continue past 1 March 2000 (regardless of the date it began).

25. AR 600-20, *supra* note 2, para. 4-14e(2); DA Pam 600-35, *supra* note 4, paras. 1-5b, 1-5e.

26. *Id.*

27. DA Message, *supra* note 4, para. 3b.

28. Draft DA Pam 600-XX, para. 2-22b.

married officer-enlisted couple could, for example, share raffle or lottery tickets, gamble together during a vacation to Las Vegas, and participate in their church's bingo games on Thursday nights.[29]

Recruiter / Recruit Relationships and Permanent Party / IET Trainee Relationships. In both of these areas, the bottom line rule is that if the recruiting mission or the training mission does not require the relationship, the relationship is prohibited. Again, commanders need to apply the policy pragmatically. Although the policy would seem to prohibit all contact between family members (to include spouses) if one is a permanent party soldier and the other an IET trainee, the "intent of the [new Army] policy is not to disrupt existing family relationships."[30] Certainly a Lieutenant Colonel mother can visit with her son who is an IET trainee,[31] and a Master Sergeant assigned to a Miami recruiting office can have his daughter, a member of the Delayed Entry Program, home for the holidays.[32] All parties must remember, however, that while either is on duty or they are in public, they are expected to "maintain the traditional respect and decorum attending the military relationship between them . . . ."[33]

Don't Jettison Common Sense

As can be seen from the discussion of the "strictly prohibited" categories above, common sense plays a major part in interpreting the new Army policy. Even though the new Army policy prohibits certain relationships between officers and enlisted soldiers, the policy is not designed to create a strict caste system in the military, with no contact between officers and enlisted soldiers. In addition to the specific exceptions for each prohibition, the new Army policy contains a general exception as follows:

> These prohibitions [for officer-enlisted business relationships, officer-enlisted personal relationships and officer-enlisted gambling] are not intended to preclude normal team building associations which occur in the context of activities such as community organizations, religious activities, family gatherings, unit-based social functions, or athletic teams or events.[34]

The purpose of this exception is to remind commanders that the new policy is not designed to prohibit team-building activities that are vital to the effectiveness of a military unit. The policy would not prohibit unit picnics on family day, or unit softball teams in the post league. Likewise, the new policy would not require separate officer and enlisted dining-ins. "Right arm" nights are not prohibited because officers and enlisted soldiers may socialize during the event.[35]

This exception also reminds commanders that the Army family benefits from soldiers (both officers and enlisted) participating in community activities. Therefore, an enlisted soldier would not be required to turn down a position as a cubmaster because an officer has one of the dens in the pack.[36] An officer would not be required to worship at another church because an enlisted soldier is an elder. An enlisted soldier would not be required to forego the family reunion because his aunt, a commissioned officer, will also attend.

Commanders should use their common sense and good judgment in determining whether a relationship between an officer and an enlisted soldier falls within this exception. Even though officers and enlisted soldiers may interact in situations that fall within this broad exception, they must "be aware of and continue to observe proper military customs and courtesies."[37]

Other Changes

For those involved in military justice, one of the biggest differences between the new Army policy and the former Army policy is the punitive nature of the new policy. Violations of the new policy may be prosecuted as violations of Article 92, Uniform Code of Military Justice.

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29. Provided, of course, that the bingo nights are not otherwise in violation of local gaming laws. *Id.*

30. *Id.* para. 2-8b.

31. *Id.*

32. *Id.*

33. *Id.*

34. DA Message, *supra* note 4, para. 3d.

35. Draft DA PAM 600-XX, *supra* note 5, para. 2-11.

36. *Id.* para. 2-12b.

37. *Id.*

What Has Not Changed

Although the new Army policy has the strict prohibitions listed above, what if the questioned situation does not fall into one of the "strictly prohibited" categories? For those situations, the analysis under the old Army policy and under the new Army policy is essentially unchanged.

The old Army policy prohibited relationships that involved (or gave the appearance of involving): (1) "partiality or preferential treatment,"[38] (2) "improper use of rank or position for personal gain,"[39] or that created (3) "an actual or clearly predictable adverse impact on discipline, authority or morale."[40] The new Army policy has essentially the same effects-focused prohibition.

Paragraph 4-14b of *AR 600-20* (as revised by the DA Message) now includes two additional prohibited relationships beyond the three from the old Army policy. The new Army policy also prohibits relationships that "[c]ompromise or appear to compromise, the integrity of supervisory authority or the chain of command."[41] A platoon sergeant's personal relationship with the company commander may run afoul of this provision to the extent that the relationship allows the platoon sergeant to make an "end run" around the first sergeant.

The second new prohibition is against relationships that "are, or are perceived to be, exploitative or coercive in nature."[42] The senior party in an otherwise proper relationship should be wary of the perception that he is taking advantage of the junior party, solely by virtue of his rank.

Conclusion

The Army's policy on improper senior-subordinate relationships has undergone a major change. This change was designed to address the potential disparity in treatment, for certain relationships, between the armed services in the Department of Defense. Although for certain categories of relationships (generally officer-enlisted relationships), the Army now looks at the status of the parties rather than the effect of the relationship, the new policy leaves much of the Army's former policy effectively unchanged, with the focus on the effects of relationships, rather than on the status of the parties.

As with any new policy, growing pains are inevitable. Many nuances of the policy remain to be uncovered by those in the field. While the Army has a new policy at the direction of our civilian leadership, those who implement that policy should not forego applying common sense in place of a strict application. The comment from the old version of *AR 600-20*, paragraph 1-14e remains true: "[T]his policy is based on the principle of good judgment."[43]

38. AR 600-20, *supra* note 2, para. 4-14.

39. *Id.* para. 4-14a.

40. *Id.*

41. DA Message, *supra* note 4, para 3b. This provision is nearly verbatim from the prohibitions contained in the Navy and the Marine Corps policies.

42. *Id.* The permanent party-IET trainee prohibition notwithstanding, this now-punitive provision would seem to address the Army Court of Criminal Appeals position that Article 93, UCMJ position does not apply to wholly consensual sexual activity between a supervisor and a subordinate. *See* United States v. Johnson, 45 M.J. 543 (Army Ct. Crim. App. 1995). *But see* United States v. Goddard, 47 M.J. 581 (N.M. Ct. Crim. App. 1997) (holding that Article 93 does apply to make wholly consensual sexual activity between a superior and a subordinate criminal).

43. AR 600-20, *supra* note 2, para. 1-14e.

The FTCA Discretionary Function Exception Nullifies $25 Million Malpractice Judgment Against the DCAA: A Sigh of Relief Concludes the DIVAD Contract Saga

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Introduction: A Welcome Reversal of Fortune

Fortunately, it was kite-flying season at Fort Belvoir when the United States Court of Appeals for the Ninth Circuit decided *General Dynamics Corp. v. United States*.[1] Most observers assume that the collective sigh of relief grew to gale force.[2] In ending two decades of litigation involving the Divisional Air Defense (DIVAD) gun system,[3] the Ninth Circuit reversed a 1996 federal district court decision[4] awarding General Dynamics more than $25 million in damages due to professional malpractice committed by the Defense Contract Audit Agency (DCAA).

The $25 million that remains in the general treasury pales in comparison to the potential impact of the case. Until the Ninth Circuit's decision, the DIVAD case appeared to be the first successful use of the Federal Torts Claims Act (FTCA)[5] by a government contractor to pursue a professional malpractice claim against a federal agency.[6] At least for now, such liability returns to the realm of legal theory and advocacy, rather than harsh reality for the government.

This article: (1) briefly summarizes the history of the *General Dynamics* case, explaining how a routine contractual compliance audit lead to a $25 million malpractice award against the DCAA; (2) introduces the discretionary function exception to the FTCA, which General Dynamics was able to avoid at the trial level in recovering its attorney's fees based upon the DCAA's actions; (3) examines the application of the discretionary function exception in the context of prosecutorial discretion, which led to the Ninth Circuit's decision in *General Dynamics*; (4) discusses two significant cases, analyzed by the Ninth Circuit in *General Dynamics* that demonstrate the fragile boundaries of the discretionary function exception; (5) describes guidance from the Department of Justice (DOJ) for government counsel faced with raising the discretionary function exception to dismiss FTCA actions; and (6) concludes by acknowledging that efforts to "reign in" the scope of the discretionary function exception to the FTCA are sure to continue.

Brief Recitation of a Long History[7]

The DIVAD litigation arose from General Dynamics' competition for a 1978 developmental contract. Following a subsequent compliance audit, the DCAA informed the Naval Investigative Service and the DOJ of suspected labor mischarging by General Dynamics. In conducting that audit, the DCAA failed to distinguish between a firm fixed-price contract and a firm fixed-price (best efforts) contract.[8] The DCAA proceeded to issue an audit report asserting that General Dynamics fraudulently mischarged more than $8 million on the DIVAD con-

1. 139 F.3d 1280 (9th Cir. 1998).

2. *See, e.g.*, *DCAA Director Takes Heart in Reversal of DIVAD Malpractice Award*, 98-4 Costs, Pricing & Accounting Rep. (Fed. Pubs) 26 (Apr. 1998) (reporting that DCAA Director William H. Reed, in a 6 April 1998 memorandum, opined that the appellate court decision "makes it clear that DCAA's referral of suspected wrongdoing or its support of investigative agencies will not be grounds for a successful lawsuit"). *See also DCAA: Auditors Shouldn't Fear Lawsuits in Wake of Reversal of DIVAD Case*, 69 Fed. Cont. Rep. (BNA) 428 (Apr. 20, 1998); *"Discretionary Function" Exemption Shields DCAA – Ninth Circuit Reverses Professional Malpractice Action*, 98-3 Costs, Pricing & Accounting Rep. (Fed. Pubs) 17 (Mar. 1998); Robert M. Cowen, *Ninth Circuit Panel Reverses General Dynamics' $26M Award for DCAA Audit Negligence on DIVAD Contract, Rules U.S. Is Immune From Suit Under FTCA*, 69 Fed. Cont. Rep. (BNA) 370 (Apr. 6, 1998); *Prosecutorial Immunity Shields DCAA–Ninth Circuit Reverses Malpractice Award Against DCAA*, 40 The Gov't Contractor 166, Apr. 8, 1998.

3. Divisional Air Defense (DIVAD) referred to a prototype divisional air defense system. Ford Aerospace Corporation eventually was selected for the DIVAD production contract. The Department of Defense (DOD) invested approximately $1.8 billion and seven years on the DIVAD gun system before cancelling the program in 1985. *See generally Weinberger Scraps DIVAD Program*, 44 Fed. Cont. Rep. (BNA) 508 (Sept. 9, 1985).

4. No. CV 89-6762JGD, 1996 WL 20025 (C.D. Cal. Apr. 5, 1996).

5. 28 U.S.C.A. § 1346(b) (West 1998).

6. This was not the first large-scale attack by a government contractor under the FTCA. Government contracts practitioners may be familiar with the discretionary function exception to the FTCA, discussed at length below, due to recent coverage of *Boyle v. United Technologies Corp*. *See* Boyle v. United Technologies Corp. 487 U.S. 500 (1988) (barring a suit against a Marine Corps contractor for the negligent design of helicopter hatch).

tract. Unfortunately, the DCAA "negligently prepared" the audit report.[9]

Based on the audit report, the DOJ issued a grand jury subpoena and obtained millions of documents relating to the DIVAD contract. In addition, the DOJ interviewed numerous witnesses and conducted an extensive investigation. Eventually, the grand jury indicted General Dynamics and four of its executives and employees on conspiracy and false statement charges.[10] This case, possibly the most high-profile fraud prosecution of its time, generated widespread interest.[11] After years of investigation and litigation (in multiple fora) the DOJ "gained an understanding of the significance of the differences" between the two types of contracts.[12] The DOJ then "forthrightly moved to voluntarily dismiss the indictment."[13]

After the DOJ dismissed the indictment, General Dynamics returned to federal court to recover its massive costs in defending the case. In describing General Dynamics' situation, Judge Fernandez[14] stated: "Fortunately for the cause of justice, General Dynamics and its employees could afford to keep fighting; unfortunately, it cost them a lot of money to do so."[15] This was not hyperbole; General Dynamics sought $29 million for the attorney's fees that it paid to defend the fraud prosecution and a related civil action.[16]

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7. *See* Contract Law Note, *Forewarned is Forearmed: DCAA Held Liable for $25 Million in Damages for Accounting Malpractice*, ARMY LAW., Sept. 1996, at 37 [hereinafter *Forewarned*]. Those interested in additional details of the case or its seemingly endless tour of the court system should consult this earlier coverage or some of the following analyses not referenced elsewhere in this article. *See, e.g.*, *General Dynamics Awarded $26M in DIVAD Case, Court Finds DCAA Negligently Conducted Audit*, 65 Fed. Cont. Rep. (BNA) 392 (Apr. 15, 1996); *General Dynamics' $29M Claim for DIVADS Defense Costs Not Time Barred*, 63 Fed. Cont. Rep. (BNA) 533 (Apr. 24, 1995); *ASBCA Declines to Hear DIVADS Breach Claim Pending Resolution of Tort Claim in Court*, 57 Fed. Cont. Rep. (BNA) 49 (Jan. 13, 1992); *Hearing Set on McKenna Cuneo Disqualification*, 55 Fed. Cont. Rep. (BNA) 688 (May 20, 1991); *McKenna & Cuneo Disqualified from DIVADS Case*, 55 Fed. Cont. Rep. (BNA) 479 (Apr. 15, 1991); *Gov't May Be Held Liable for Professional Malpractice in Conducting DIVAD Audit*, 54 Fed. Cont. Rep. (BNA) 747 (Nov. 19, 1990); *Gov't, General Dynamics Spar Over $29.2M Suit to Recover DIVAD Defense Costs*, 53 Fed. Cont. Rep. (BNA) 740 (May 21, 1990); *General Dynamics Sues to Recover $29.2M in Damages from DIVAD Case*, 52 Fed. Cont. Rep. (BNA) 952 (Nov. 27, 1989); *Judge Dismisses DIVAD Indictment Against General Dynamics Executives*, 47 Fed. Cont. Rep. (BNA) 1155 (June 29, 1987); *General Dynamics Renews Call to Dismiss DIVAD Indictments, Hearing to be Held Today*, 47 Fed. Cont. Rep. (BNA) 1125 (June 22, 1987).

8. General Dynamics Corp. v. United States, 139 F.3d 1280, 1282 (9th. Cir. 1998). "In a pure fixed-price contract, the bargain is stated in terms of a fixed amount of compensation with no formula or technique for varying the price in the event of unforeseen contingencies." JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1080 (3d ed. 1988). "A fixed-price, level-of-effort term contract is similar to a cost reimbursement term type contract except that the price is paid upon the incurrence of the specified number of labor hours." *Id.* at 1180. Federal Acquisition Regulation 16.207-2 explains that, with this type of contract, "payment is based on the effort expended rather than on the results achieved." GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 16.207 (June 1997).

9. "DCAA, unaccountably, failed to recognize, or seek information about, the vast difference between a firm fixed-price contract and a firm fixed-price (best efforts) contract." *General Dynamics*, 139 F.3d at 1282.

10. *Id.* at 1282. The DOJ filed charges pursuant to 18 U.S.C. §§ 371, 1001 (1982).

11. Before its conclusion, the case involved then Attorney General Ed Meese, former Massachussets Governor William Weld (then a senior official in the DOJ), and former General Dynamics executive and NASA Administrator James M. Beggs. Mr. Beggs, one of the named defendants, took a leave of absence from NASA to prepare his defense. *See General Dynamics*, 139 F.3d at 1287; *see also Navy Suspends General Dynamics After Fraud Indictment, Holds Sub Bids Open*, 44 Fed. Cont. Rep. (BNA) 1005 (Dec. 9, 1985).

12. *General Dynamics*, 139 F.3d at 1282. *See Forewarned*, *supra* note 7, at 37-38.

13. *General Dynamics*, 139 F.3d at 1282.

14. Surprisingly, commentators have not addressed Judge Ferdinand F. Fernandez's prior involvement with this litigation. Before moving to the Ninth Circuit Court of Appeals, Judge Fernandez presided over this litigation as a district court judge in California. In 1986, Judge Fernandez, in an effort to obtain clarity on questions related to the type of contract in issue, sought an advisory opinion from the Armed Services Board of Contract Appeals (ASBCA). *See* United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D. Cal. 1986). The list of questions submitted by Judge Fernandez offered some insight into the confusion that must have confounded both the DCAA and the DOJ. Nonetheless, the ASBCA concluded, among other things, that they lacked jurisdiction to render such an advisory opinion. *See* General Dynamics Corp., ASBCA No. 33633, 87-1 BCA ¶ 19,607. "Issuance of advisory type of decisions or recommendations is not the Board's function under either the CDA or its present charter." *Id.* at 99,205. The board previously found that it lacked jurisdiction over this matter because there was no contracting officer's decision and because there was a related criminal action pending in Federal District Court. *See* General Dynamics Corp., Pomona Division, ASBCA No. 32297, 86-2 BCA ¶ 18,903. Subsequently, the Ninth Circuit agreed with the ASBCA that, among other things, the district court lacked the authority to refer these issues to the ASBCA. *See* United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987). *See generally Stay of General Dynamics Case Pending Referal to ASBCA Ruled Improper*, 47 Fed. Cont. Rep. (BNA) 717 (Apr. 27, 1987); *Government Appeals Referral to ASBCA in General Dynamics DIVAD Case*, 46 Fed. Cont. Rep. (BNA) 735 (Oct. 27, 1986); *Federal Judge Refers to ASBCA Questions About General Dynamics' DIVAD Overrun*, 46 Fed. Cont. Rep. (BNA) 483 (Sept. 22, 1986). The Ninth Circuit's 1987 decision was cited frequently before and after the amendment to the Contract Disputes Act of 1978. *See* 41 U.S.C.A. § 609(f) (West 1998), *as amended by* Federal Acquisition Streamlining Act, Pub. L. No. 103-355, tit II, § 2354, 108 Stat. 3323 (1994). The Contract Disputes Act now permits the federal district courts to request advisory opinions from boards of contract appeals (BCAs). *Id. See generally* Albert A. Cortese & Frank M. Rapoport, *Implications of Section 2354 of the Federal Acquisition Streamlining Act of 1994, Which Gives Federal District Courts Authority to Seek Advisory Opinions From Boards of Contract Appeals in Contract Fraud Cases*, 62 Fed. Cont. Rep. 443, 444 (BNA) (Oct. 31, 1994).

15. *General Dynamics*, 139 F.3d at 1282.

In this phase of the proceedings, lacking another legal avenue for the recovery of its attorney's fees, General Dynamics advanced a somewhat novel legal theory. It alleged that, under the FTCA, the DCAA had committed professional malpractice in performing the audit that led to the indictment.[17] In the trial and appellate courts, the government responded that General Dynamics could not recover under the FTCA for professional malpractice committed by the DCAA. The government argued that, because of the FTCA's discretionary function exception, the courts lacked jurisdiction to provide General Dynamics a remedy.[18]

The district court disagreed with the government, finding that the DCAA ultimately caused the damage for which General Dynamics sought recovery. Finding that the DCAA's negligence in preparing and submitting the audit report was not a discretionary function, the district court awarded tort damages to General Dynamics. On appeal, the government continued to assert that the discretionary function exception specifically applied to the DOJ (i.e. the prosecutors). In addition, the government asserted that General Dynamics and the district court had misdirected their focus towards the DCAA. The Ninth Circuit agreed and reversed the lower court's decision.[19] These issues (the relationship between actions taken by the DCAA and the subsequent decisions and steps taken by the DOJ) expose the Achilles heel of the discretionary function exception.

The Discretionary Function Exception to FTCA Liability

The FTCA, like other laws that permit suits against the United States, is a limited waiver of sovereign immunity.[20] "That waiver of sovereign immunity is subject to a number of exceptions. If an exception applies, sovereign immunity is not waived, and no subject-matter jurisdiction exists."[21] The relevant FTCA exception here dictates that the court lacks jurisdiction over claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function."[22]

Because the discretionary function exception clearly covers prosecutorial discretion,[23] General Dynamics recognized that it could not seek recovery solely upon the DOJ's decision to proceed with its cases. Accordingly, General Dynamics "pointed the finger" at the DCAA.[24] The district court "took the bait" and held the DCAA liable under the FTCA.[25]

16. The total amount of reimbursement awarded to General Dynamics by the district court eventually came to $25,880,752. *See id.* at 1281.

17. *See Forewarned*, *supra* note 7, at 38-39; notes 45-52 and accompanying text.

18. The discretionary function exception, states that the FTCA shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*

28 U.S.C.A. § 2680(a) (West 1998) (emphasis added). As the text indicates, section 2680(a) also contains the "due care" exception. *See generally* Lively v. United States, 870 F.2d 296 (5th Cir. 1989); Doe v. Stevens, 851 F.2d 1457 (D.C. Cir. 1988) (discussing the due care exception).

19. One dissenting judge disagreed with the majority's reasoning regarding the discretionary function exception to the FTCA. Nonetheless, the judge would have denied recovery because General Dynamics' claim was time-barred. *See General Dynamics*, 139 F.3d at 1287-88.

20. In the United States, the origins of the doctrine of sovereign immunity, based upon the principle that the king could do no wrong, remains a mystery. Developed primarily through the common law, the doctrine quickly became well entrenched in the legal system. "A sovereign is exempt from suit, because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 348, 353 (1907). *See generally* KENNETH CULP DAVIS, ADMINISTRATIVE LAW 797-98 (1951) (suggesting that this fragmentary, haphazard situation led Congress to enact the FTCA in 1946). "Legal scholars and political scientists have been virtually unanimous in judging most of the legislative and judicial relaxations of sovereign immunity to be fragmentary and haphazard and to allow many occasions for injustice to continue." Paul H. Sanders, *Foreword*, 9 LAW & CONTEMP. PROB. 179 (1942). Sanders also aptly notes that sovereign immunity "has persisted in modern law to a degree which would astonish most citizens." *Id. But see* Joshua I. Schwartz, *Assembling WINSTAR: Triumph of the Ideal of Congruence in Government Contract Law*, 26 PUB. CONT. L.J. 481 (1997); Michael Grunwald, *Lawsuit Surge May Cost U.S. Billions*, WASH. POST, Aug. 10, 1998, at A1 (discussing an example of a successful, large-scale assault based upon sovereign acts of the government).

21. *General Dynamics Corp.*, 139 F.3d at 1283 (citing Sabow v. United States, 93 F.3d 1445, 1451 (9th Cir. 1996)).

22. *Id.* at 1283 (citing 28 U.S.C.A. § 2680(a) (West 1998); *Sabow*, 93 F.3d at 1451). Courts employ two steps to determine whether the discretionary function bars a suit. *See id.* (citing Berkovitz v. United States, 486 U.S. 531, 536-37 (1988)). "First, does the challenged action involve an element of choice or judgment? . . . . Second, is any judgment at issue of the sort Congress intended to shield?" United Cook Inlet Drift Assocs. v. Trinidad Corp. (*In re* Glacier Bay), 71 F.3d 1447, 1450 (9th Cir. 1995). *See* Gaubert v. United States, 499 U.S. 315 (1991). Professor Davis writes that Congress "carefully preserve[d] sovereign immunity with respect to" discretionary functions. DAVIS, *supra* note 20, at 798.

23. On the subject of prosecutorial discretion, the Ninth Circuit stated: "The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability. The exercise of that discretion is by no means easy, and prosecutors do make mistakes." *General Dynamics*, 139 F.3d at 1283 (citations omitted).

The appellate court, however, realized that it could not "simply look at the surface of a complaint for the purpose of ascertaining the true basis of an attack upon something the government has done."[26] The court believed that further examination was required.

Limiting the Reach of the FTCA:
"The Buck Stopped at the Prosecutors"

The appellate court analyzed the nature of prosecutorial discretion and properly concluded that prosecutors, not the investigators upon whom they rely, exercise that discretion. The court refused to believe that the DCAA's actions ultimately injured General Dynamics. Regardless of the plaintiff's carefully structured pleading, General Dynamics had incurred attorney's fees based upon the DOJ's actions (not DCAA's).

The court accepted its responsibility to look at the facts, rather than to accept plaintiff's theory, as pled. "We see no reason to accord amaranthine obeisance to a plaintiff's designation of targeted employees when we refuse to be bound by his choice of claim label."[27] The court realized that General Dynamics *targeted* the DCAA, rather than the DOJ, because General Dynamics knew that the discretionary function exception insulated the DOJ from FTCA liability. "We may take cognizance of the fact that a target has been *selected for the purpose of evading the discretionary choice of the persons who actually caused the damage*—here the prosecutors', who were pushing a criminal (and civil) attack upon General Dynamics and its employees . . . ."[28] In this respect, the court realized that this case was not unusual. "Prosecutors do not usually do all of their own investigation, so a victorious defendant could almost always argue that this or that report was negligently prepared."[29] As a result, the court refused to leave the DCAA exposed to FTCA liability.

The court, however, was neither apologetic for nor unduly deferential to the government's actions.[30] The court stated:

> Perhaps the prosecutors should have listened to General Dynamics' lawyers; perhaps they should have done more of their own investigation and spoken to government employees who really knew what the contract meant; perhaps they were merely mislead by the arcane differences between the [contractual definitions] . . . perhaps reasonable minds could, even today, differ about the true meaning of the contractual words.[31]

Regardless of the quality of the DCAA's work, the DCAA lacked the authority to bring either a criminal or civil action against General Dynamics. The audit report could not evolve into a legal action because it produced no self-executing remedy. Although the prosecutors obviously relied upon DCAA's work, the Ninth Circuit concluded that the ills that befell General Dynamics derived from the discretion exercised by the DOJ. The court makes clear that, as a matter of law and fact, "the buck stopped with the prosecutors."[32] The prosecutors were ultimately responsible for the decisions that prompted the lawsuit. Given the exceptions to the FTCA, however, the human fallibility of the prosecutors could not lead to recovery.[33]

24. "General Dynamics . . . recognizes that it cannot succeed in an attack on that revetment and adopts the ancient tactic of attempting to circumvent it instead. That is, it seeks to posture its case as an attack on the DCAA rather than as an attack on the prosecutors." *Id.*

25. *Id.* at 1282.

26. *Id.*

27. *Id.* To be amaranthine is to be unfading or everlasting. To the extent that obeisance suggests a bodily movement expressing deferential courtesy or homage, one could conclude that Judge Fernandez was disinclined to simply concur with the plaintiff's characterization of its cause of action.

28. *Id.* (emphasis added).

29. *Id.* at 1283-84.

30. "The actions taken . . . will not be recorded as the Department of Justice's finest hour, nor, considering the ultimate candid request for dismissal, was it the Department's darkest one." *Id.* at 1286.

31. *Id*. As the dissent stated: "That the Department is immune from suit in this case does not mean it is immune from criticism." *Id.* at 1287 (O'Scannlain, C.J., dissenting).

32. The court stated:

> Where . . . the harm actually flows from the prosecutor's exercise of discretion, an attempt to recharacterize the action as something else must fail. *And there can be no doubt that the buck stopped with the prosecutors*. True, they had a report from the DCAA, but the decision to prosecute was all their own. They were not required to prosecute, and were not forced to do so. . . . In fact, they gathered a great deal of information and even met with General Dynamics' redoubtable lawyers before the prosecution went forward.

Id. at 1286 (emphasis added).

A Healthy Tension: Expanding and Shrinking The Discretionary Function Exception

In its opinion, the court thoroughly discussed *Fisher Bros. Sales, Inc. v. United States*,[34] and *United Cook Inlet Drift Associates v. Trinidad Corp. (In re The Glacier Bay)*.[35] While both cases "strike a similar chord," they also appear to represent "opposite ends of a spectrum" in defining the bounds of the discretionary function exception.[36] This spectrum offers insight into the interplay between officials that exercise discretion, those that perform duties that influence the exercise of that discretion, and the connection between truly discretionary acts and the injuries incurred by FTCA plaintiffs. In examining these cases, the court concluded that it "cannot wholly ignore causation concepts when a robust exercise of discretion intervenes between an alleged government wrongdoer and the harm suffered by a plaintiff."[37]

Fisher Bros. arose from the 1989 incident involving an allegation of tampering with Chilean fruit. An anonymous caller told the United States Embassy that Chilean fruit being exported to the United States would contain cyanide. As a result, the Food and Drug Administration (FDA) detained incoming fruit from Chile, tested it, found no poison, and declared the call a hoax. A second, more specific call, however, led to additional testing and some evidence of tampering on three Chilean grapes. Based on the information available, the FDA Commissioner refused entry of Chilean fruit into the country and required Chilean fruit to be destroyed in domestic distribution channels.

Chilean growers, exporters, and a shipper, along with American importers and distributors, sued the U.S. government. The plaintiffs alleged that "the lab technicians were negligent . . . [and] but for this negligence, the Commissioner would not have issued his orders and the Chilean fruit business for the spring season of 1989 would not have been destroyed."[38] Both the trial court and the appellate court found that the Commissioner's decisions "were policy decisions protected by the discretionary function exception to the FTCA."[39]

> The reality here is that the injuries . . . were caused by the Commissioner's decisions and, as a matter of law, their claims are therefore, "based upon" those decisions. Any other view would defeat the purpose of the discretionary function exception. In situations like this where the injury complained of is caused by a regulatory policy decision, the fact of the matter is *that there is no difference* in the quality or quantity of interference occasioned by judicial second guessing*, whether the plaintiff purports to be attacking the data base on which the policy is founded or acknowledges outright that he or she is challenging the policy itself*.[40]

The court acknowledged that policy-makers must make judgments regarding "the reliability, adequacy, and significance of the information available to [them]."[41] Such is the nature of exercising discretion. Unlike the court's decision in *Glacier Bay*,[42] this conclusion clearly distinguishes between the official

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33. "A mistake was made, but, because prosecutors do not have ichor in their veins, mistakes can be expected from time to time. Mistakes, however, do not necessarily equal governmental liability." *Id.* at 1286.

34. 46 F.3d 279 (3d Cir. 1995) (en banc), *cert. denied*, 516 U.S. 806.

35. 71 F.3d 1447 (9th Cir. 1995). The dissent in *General Dynamics* relied upon *Glacier Bay* to conclude that "DCAA clearly was not immune." *General Dynamics*, 139 F.3d at 1288 (O'Scannlain, C.J., dissenting).

36. *See* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365 (1995); Barry R. Goldman, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837 (1992); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort*, 38 UCLA L. REV. 871 (1991); Osborne M Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration*, 42 OKLA. L. REV. 459 (1989); Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687; Donald N. Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 MIL. L. REV. 115 (1985).

37. *General Dynamics*, 139 F.3d at 1285.

38. *Fisher Bros.*, 46 F.3d at 282-83. The en banc panel split 7-6. The dissent did not dispute that the Commissioner's action in ordering tests was discretionary. Rather, the dissent accepted "that the decision to withdraw Chilean fruit from the market was proximately caused by the positive test results." *Id.* at 289. The dissent concludes that: "once the decision was made to do the testing, the discretionary function exception should not protect the government from the consequences of the negligence of the laboratory technicians in performing their routine duties." *Id.* at 292.

39. *Id.* at 284.

40. *Id.* at 286 (emphasis added). The court correctly noted that: "The social cost of permitting the inquiries required by the plaintiffs' theory are prohibitive." *Id.*

41. Moreover, "[e]ach responsible decision . . . necessarily reflects the decisionmaker's judgment that it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data." *Id.* at 287.

who exercised discretion and those who influenced the exercise of that discretion.

In 1987, the oil tanker *Glacier Bay* ran aground upon a submerged rock in Cook Inlet, Alaska, causing an oil spill. The local fishing community sued the corporation with interests in the oil tanker, for damage to their livelihood. The government also sued the corporation for clean-up costs. The corporation responded by suing the government for negligence in preparing the nautical charts used by the *Glacier Bay's* captain. The charts, prepared as a public service by National Oceanic and Atmospheric Administration (NOAA), failed to note the existence (and, in effect, failed to warn) of what is now known as "Glacier Bay Rock."[43]

The issues the Ninth Circuit faced in *Glacier Bay* were whether the hydrographers failed to follow mandatory instructions[44] and whether NOAA reviewers erred by approving the charts based upon the faulty surveys. The district court found that the discretionary function exception applied to the NOAA reviewers. As a result, the court dismissed the case because "the persons who have the ultimate responsibility for approving the charts . . . have unfettered discretion in reaching that decision."[45]

The appellate court disagreed with the district court about how to analyze the discretionary function exception. The court concluded that "the analysis of the discretionary function exception must proceed on an act by act basis. Discretion to perform one act cannot bring another nondiscretionary act within the exception's protection."[46] The discretion accorded to the NOAA reviewers "would not shield allegedly negligent non-discretionary acts by the hydrographers."[47] Although the appellate court affirmed in part, it reversed in part and remanded the case to the district court on issues relating to some aspects of the hydrographers' work.[48]

In *General Dynamics*, the Ninth Circuit suggested that, "while *Glacier Bay* and *Fisher Bros.* seem to be in healthy tension, they are not in opposition unless one or the other is read in an overly broad fashion."[49] Whether future courts will read these cases more broadly remains unclear. Almost fifty years ago, Professor Davis suggested that, due to the discretionary exception, FTCA liability was "hardly of consequence in administrative law."[50] As a result, he suggested that "reformers and commentors, who have contributed so much to the winning of the battle to limit sovereign immunity, should probably now direct their efforts to the difficult problems of fixing proper boundaries for sovereign liability."[51] These boundaries remain in flux.[52]

Guidance from the DOJ

These issues rarely confront agency counsel at the field activity level. Interpretation of exceptions to the waiver of sovereign immunity tends to take place in federal district courts. The DOJ, rather than individual agencies, typically controls the development of this body of law. Counsel facing FTCA issues or, more specifically, considering invoking the discretionary function exception, should obtain the most recent copy of the relevant DOJ *Torts Branch Monograph*.[53] The DOJ requests

42. United Cook Inlet Drift Assocs. v. Trinidad Corp. (*In re* The Glacier Bay), 71 F.3d 1447, 1449-50 (1995).

43. *Id.*

44. The corporation claimed that the hydrographers failed to follow instructions regarding how widely to space their bottom soundings and under what circumstances they should investigate bottom anomalies suggesting features such as the now infamous rock. *Id.* at 1450.

45. *Id.* at 1450-51.

46. *Id.* at 1455.

47. *Id.* at 1451.

48. The court concluded that the discretionary function exception did not apply to the hydrographers' work involving the separation of sounding lines (a maximum of 50 or 100 meters), the running of splits (or the use of supplemental sounding lines), failure to develop anomalies during a 1964 survey, and a failure to report all of the above. *See id.* at 1452-54.

49. *See General Dynamics*, 139 F.3d at 1284-85 (analyzing *Fisher Bros.* and *Glacier Bay*). *See also* Varig Airlines v. United States, 467 U.S. 797 (1984) (alleging negligent certification of an aircraft design by the FAA); Dalehite v. United States, 346 U.S. 15 (1953) (involving a devastating explosion in Texas City, Texas, of a ship containing fertilizer produced by contractors at government facilities).

50. *See* DAVIS, *supra* note 20, at 810.

51. *Id.* Professor Davis perceived that, while high ranking officials and "governmental units are generally immune from liability for torts committed in the performance of discretionary acts [lower level] and so called ministerial officers are liable for torts causing physical harm, *and the line between such workers and those exercising discretionary powers is wavering*." *Id*. at 810 (emphasis added).

52. Members of the DCAA may not care that their "lot in life" was found to be more analogous to that of lab technicians than hydrographers; hopefully, they perceive that their case turned upon the Ninth Circuit's conclusion that prosecutorial discretion was more closely aligned with policy level decision making at the FDA than a nautical map review at NOAA.

that: "In the interest of presenting a consistent and coherent defense, *the discretionary function exception should not be raised in any suit without the prior approval of the Torts Branch*."[54]

The DOJ leaves no doubt that it takes these cases very seriously. It emphasizes the importance of a strong record. The DOJ further suggests that "it is critical to identify the agency policy implicated in the claim . . . ."[55] In addition, counsel must be prepared to "articulate the agency's political, economic, social or military policies . . . ."[56] In the *Torts Branch Monograph*, the DOJ articulates several key principles that agency attorneys should consider when raising the discretionary function exception. For example, the plaintiff bears the burden of proof when the government asserts the discretionary function exception.[57] Negligence is not relevant in conducting the discretionary function analysis.[58] Also, although it should be raised expeditiously, the jurisdictional defense of the discretionary function cannot be waived.[59]

Conclusion

Although the government should savor the result in *General Dynamics*,[60] caution remains in order. Cynics could conclude that, while the government "dodged a bullet," there is another "chink in the armor." This issue split the Ninth Circuit, just as it aggravated that court in *Glacier Bay.* Similarly, the *Fisher Bros.* case almost equally split the *en banc* Third Circuit. As a bystander, the lesson from these cases may be no more than to acknowledge that discretionary decision-makers should exercise an appropriate level of care when they rely on the work of others for their decisions.[61] Taxpayers (and, implicitly the courts) have a right to expect that policy-makers will marshal and consider appropriate facts before exercising discretion.

Government counsel, however, cannot afford to be bystanders. In exercising discretion, counsel must rely on the reliable and challenge the unreliable. For others exercising discretion, counsel can offer advice on what requires further examination and investigation. Right or wrong, decisions must be made. Whether counsel make those decisions or support the decision-maker, the taxpayer is entitled to counsel's best judgment.

53. This multi-volume work is dedicated to FTCA issues. The monograph devoted two volumes to the discretionary function exception. Part A (1993) offers an updated analysis of the evolving law. Part B (1997) includes a digest of authorities (since 1984) plus a listing of cases (alphabetically, and by agency). *See* U.S. Dep't of Justice, Discretionary Function Exception, Torts Branch Monograph, pt. A, Forward, 51-52 (1993) (emphasis in original).

54. *Id.* The DOJ implores agencies to "[p]lease keep in mind that the discretionary function defense is not to be used as an 'extra throw-in' defense, and should be asserted only when applicable." *Id.* at 53.

55. *Id.* at 52. The DOJ encourages review of relevant "regulations, guidelines, directives, or policy statements . . . ." *Id.*

56. *Id*.

57. This may seem counter-intuitive to litigators, who assume that the moving party bears the burden. Conversely, while the government is the moving party seeking to dismiss the action, the plaintiff maintains the burden of demonstrating that the court has jurisdiction. "To carry the burden of establishing an unequivocal waiver of immunity under § 1346(b) . . . a plaintiff must plead and prove that § 2680(a) is inapplicable." *Id.* at 28-31.

58. *Id.* at 32-33.

59. *Id.* at 27-28.

60. Conversely, it is difficult to see how this result reconciles with the Supreme Court's statement in *Kosak v. United States*, that the objectives of the FTCA's exceptions are: "[E]nsuring that 'certain governmental activities' not be disrupted by the threat of damage suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available." Kosak v. United States, 465 U.S. 848, 858 (1984).

61. *See* Michael N. Hayes, *Sovereign Immunity in an Economic Theory of Government Behavior*, 12 Law & Pol'y 293 (July 1990) (providing a more in-depth theory on applying the discretionary function exception, from a behavioral standpoint). Professor Hayes suggests that courts follow a "theoretically consistent path" that "[t]he government should be immune from tort suit for monetary damages if and only if it demonstrates that it decided, after weighing social costs and benefits, to risk the occurrence of some loss . . . ." *Id.* at 307 (citing M.L. Spitzer, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. Cal. L. Rev. 515 (1977)). Professor Hayes further suggests that "the presence of an explicit cost-benefit analysis on the part of any specific government agent readily identifies a discretionary function." *Id.* at 308.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

International and Operational Law Note

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Principle 6:

Protection of Cultural Property During Expeditionary Operations Other Than War

Introduction

This note is the seventh in a series[1] that discusses concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense (DOD) Law of War Program.[2]

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01,[3] *Implementation of the DOD Law of War Program*[4] obligates U.S. forces to obey the principles of the law of war during Military Operations Other Than War. Protecting cultural property is a fundamental principle of the law of war, as reflected in international law judgments, scholarly works, and U.S. manuals and policy.[5] Accordingly, U.S. forces must protect cultural property during Military Operations Other Than War. This note defines cultural property, examines sources of law supporting the development of this principle as customary international law, and summarizes requirements to protect cultural property during contingency operations.

Definition

Cultural property includes "buildings dedicated to public worship, art, science, or charitable purposes; and historic monuments."[6] More specifically, "cultural property" means, "irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people . . . , (b) buildings whose main . . . purpose is to preserve or exhibit . . . movable cultural property, [and] (c) centers containing a large amount of cultural property . . . to be known as 'centers containing monuments.'"[7]

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1. International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17. International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov., 1998, at 50; International and Operational Law Note, *Principle 5: Protecting the Force from Unlawful Belligerents*, ARMY LAW., Feb., 1999, at 21.

2. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979) [hereinafter DOD DIR. 5100.77]. *See also* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter CJCSI 5810.01].

3. CJCSI 5810.01, *supra* note 2, para. 4a ("The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however, such conflicts are characterized, and unless directed by competent authorities, will apply law of war principles during operations that are characterized as Military Operations Other Than War."). *Chairman, Joint Chiefs of Staff Instruction 5810.01* cites no specific principle of the law of war for compliance, instead, it states DOD policy and directs forces to comply with the laws of war in both armed conflict and operations other than war. This requires forces to figure out which law(s) of war apply in a particular situation.

4. A cornerstone of the Instruction is *DOD Directive 5100.77*, which directs that U.S. forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized." DOD DIR. 5100.77, *supra* note 2.

5. *See* The Statute of the International Court of Justice (ICJ), 1949, art. 38, para. 1, 59 Stat. 1055, T.S. 993, 3 Bevans 1179 (1945) [hereinafter ICJ Statute]. The ICJ Statute lists sources of international law applied by the ICJ as:

> [I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; [and] . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Id.

6. Morris Greenspan, THE MODERN LAW OF LAND WARFARE 284 (1959). *See* U.S. DEP'T OF AIR FORCE, AIR TRAINING COMMAND PAM 110.4, at 6 (15 Nov. 1985) ("You are required to take as much care as possible not to damage or destroy buildings, or their contents, dedicated to cultural or humanitarian purposes. Examples of such places are buildings dedicated to religion, art, science, or charitable purposes; historical monuments; hospitals . . . ; schools; and orphanages.").

7. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 1, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].

Primary Sources of Law [8]

Protecting cultural property is a law of war principle that is grounded in treaty law,[9] customary international law,[10] and as legal opinions and commentary. Early treaty provisions on the duty to protect cultural property are found in the 1907 Hague Convention IV.[11] These treaty rules are still binding; indeed, they have ripened into customary international law as seen by their influence on later treaties[12] and opinions. The early treaty-based cultural property duties are:

> In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[13]
>
> . . . .
>
> The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when [s]tate property, shall be treated as private property. All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[14]

The most precise expression of this principle is the 1954 Cultural Property Convention.[15] Although the United States has not yet ratified this treaty, U.S. forces comply with the Convention during armed conflict. For example, during the Persian Gulf War, U.S. forces selected targets to avoid cultural objects and religious sites.[16] The Convention seeks to protect[17] cultural property during international armed conflict,[18] internal armed conflict,[19] and occupation.[20] Cultural property should be marked with the convention's distinctive emblem to identify it as protected property.[21] Regarding the distinctive emblem, the Convention provides:

> [The emblem] shall take the form of a shield, pointed below, per saltire blue and white (as a shield consisting of a royal blue square, one of the angles of which forms the point of the shield, and of a royal blue triangle above the square, the space on either side being taken up by a white triangle). . . . The emblem shall be used alone or repeated three times in a triangular formation. . . .[22]

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8. *See* IJC Statute, *supra* note 5.

9. *See, e.g*, 1954 Cultural Property Convention, *supra* note 7.

10. "[S]ome treaty rules have gradually become part of customary law. This . . . applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and . . . to the core of Additional Protocol II of 1977." *Prosecutor v. Tadic*, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted at* 35 I.L.M. 32 (1996).

11. October 18, 1907, annex I [hereinafter Hague IV].

12. The main text of the 1954 Cultural Property Convention states that the "high contracting parties" are "guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of the Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935." 1954 Cultural Property Convention, *supra* note 7. *See* Greenspan, *supra* note 6, at 650 (discussing the 1923 Draft Hague Rules of Warfare).

13. Hague IV, *supra* note 11, art. 27.

14. *Id.* art. 56.

15. *See* 1954 Cultural Property Convention, *supra* note 7. *See also* Captain Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. Rev. 277 (1997) (discussing the treaty development of the principle of combatant duty to protect of cultural property).

16. Major Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. Rev. 41, 51 n.59 (1994).

17. 1954 Cultural Property Convention, *supra* note 7, arts. 2-4, 8-9 (establishing a scheme of protection based on respect for, and safeguarding of, cultural property).

18. *Id*. art. 18.

19. *Id*. art. 19.

20. *Id*. art. 5.

21. *See id.* arts. 6, 10, 16.

22. *Id.* art. 16. *See* Kastenberg, *supra* note 15, at 303 (reproducing the Hague symbol and the *Roerich Pact* symbol).

The 1977 Protocols I and II Additional to the Four Geneva Conventions of 1949 restated the principle of protecting cultural property.[23] Protocol I provides for distinction, or discrimination, by combatants between cultural property and military targets.[24] Combatants must always "distinguish between . . . civilian objects and military objectives and accordingly direct their operations only against military objectives."[25] Furthermore, Protocol I forbids combatants from: "(a) [committing] any acts of hostility directed against the historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples; (b) [using] such objects in support of the military effort; (c) [making] such objects the object of reprisals."[26]

Though less detailed and arguably broader in scope, Protocol II, [27] which deals with internal conflicts, contains similar language protecting cultural property. Protocol II states that "it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort."[28] Reviewing both Protocols, the duty of armed forces to protect cultural property applies to both international and internal armed conflicts. This universal application, during both types of armed conflict, supports the development of the principle as a fundamental principle of the law of war.

International case law is the final primary source of authority relating to the protection of cultural property during military operations. Commenting on the *Prosecutor v. Tadic*[29] opinion, one scholar observed: "The Tribunal concluded that some customary rules had developed to the point where they govern internal conflicts and that they cover such areas as . . . protection of civilian objects, in particular cultural property."[30] *Tadic* reinforced the interplay between treaty and customary law by citing Article 19 of the Hague Cultural Property Convention as an example of "treaty rules that have gradually become part of international law."[31]

Additional Sources of Law

As previously noted, DOD policy requires U.S. armed forces not only to obey the laws of war, but also to "apply law of war principles during operations other than war."[32] Implementing service regulations and manuals reflect this policy. This section explores both Army and Air Force publications protecting cultural property during contingency operations.

Field Manual (FM) 27-10 [33] establishes rules from the law of armed conflict applicable to contingency operations.[34] The United States specifically observes the duty to protect cultural property during war[35] and respects this principle during contingency operations, specifically peacekeeping (PK) and peace enforcement (PE) operations. *Field Manual 100-5* states:

> Because of the special requirement in peace operations for legitimacy, care must be taken to scrupulously adhere to applicable rules of the law of war. Regardless of the nature of the operation (PK or PE) and the nature of the conflict, U.S. forces will comply with the rel-

23. Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* 12 Dec. 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* 12 Dec. 1977, 1125 U.N.T.S. 1391, 16 I.L.M. 1391 [hereinafter Protocol II].

24. Protocol I, *supra* note 23.

25. *Id.* art. 48.

26. *Id.* art. 53.

27. Protocol II, *supra* note 23.

28. *Id.* art. 16.

29. Case no. IT-94-1 AR 72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

30. Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation Of International Humanitarian Law*, 90 AM. J. INT'L. L. 238, 240 (1996).

31. *Tadic*, 35 I.L.M. 32.

32. DOD DIR. 5100.77, *supra* note 5.

33. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10].

34. U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 48 (Dec. 1994). "Regardless of who has authorized the peace operation, international law and U.S. domestic laws and policy apply fully. For example, the laws of war . . . and policy apply to U.S. forces participating in the operation." *Id.*

35. U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-3 (June 1993). "Exercising discipline in operations includes limiting collateral damage—the inadvertent or secondary damage occurring as a result of actions by friendly or enemy forces. *FM 27-10* provides guidance on special categories of objects that international law and the Geneva and Hague Conventions protect." *Id.*

> evant portions of *FM 27-10* and [*Department of the Army*] *Pamphlet 27-1*. In a traditional PK operation, many uses of force may be addressed in the mandate or TOR (terms of reference). In a PE operation, the laws of war may fully apply.[36]

Field Manual 27-10 incorporates several law of war requirements that relate to the protection of cultural property. Using the same wording as Article 27 of the Hague Convention,[37] *FM 27-10* begins by describing cultural property as buildings to be spared.[38] Next, the manual notes the requirement for cultural buildings to display signs specified in Hague IX Concerning the Bombardment by Naval Forces in Time of War.[39] Specifically, *FM 27-10* states: "It is the duty of the inhabitants to indicate such monuments, edifices or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."[40] Another cultural property provision in *FM 27-10* is entitled "Protection of Artistic and Scientific Institutions and Historic Monuments."[41] Here, *FM 27-10* provides: "The United States and certain of the American Republics are parties to the so-called *Roerich Pact*, which accords a neutralized and protected status to historic monuments, museums, scientific, artistic, educational, and cultural institutions in the event of war between such [s]tates."[42] *Field Manual 27-10* then describes "municipal, religious, charitable, and cultural property"[43] by using the exact language of Hague IV, Article 56.[44] The manual describes certain permissible uses of cultural property based on military necessity.[45] The manual then further restricts the use of medical facilities to medical purposes only.[46]

The Air Force approach to protection of cultural property is found in *Air Force Pamphlet 110-31*,[47] which includes cultural property as a category of objectives that receive "special protection."[48] Relying on Article 27 of Hague IV,[49] Article 5 of Hague IX,[50] and the *Roerich Pact*,[51] *Air Force Pamphlet 110-31* states:

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36. *Id.* at 48-49.

37. *See* Hague IV, *supra* note 11.

38. FM 27-10, *supra* note 33, para. 45.

39. 18 Oct. 1907, 36 Stat. 2314 [hereinafter Hague IX].

40. FM 27-10, *supra* note 33, para. 46.

41. *Id.* para. 57.

42. *Id*. *See* Treaty Regarding Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15. 1935, 49 Stat. 3267, 3 Bevans 254 [hereinafter Roerich Pact].

43. *Id*. para. 405(a).

44. *See* Hague IV, *supra* note 11, art. 56.

45. FM 27-10, *supra* note 33, para. 405(b). *Field Manual 27-10* states:

> Use of Such Premises. The property included in the foregoing rule may be requisitioned in case of necessity for quartering the troops and the sick and wounded, storage of supplies and material, housing of vehicles and equipment, and generally as prescribed for private property. Such property must, however, be secured against all avoidable injury, even when located in fortified places which are subject to seizure or bombardment.

Id.

46. *Id*. para. 405(c). *Field Manual 27-10* states:

> Religious Buildings, Shrines, and Consecrated Places. In the practice of the United States, religious buildings, shrines, and consecrated places employed for worship are used only for aid stations, medical installations, or for the housing of wounded personnel awaiting evacuation, provided in each case that a situation of emergency requires such use.

Id.

47. U.S. Dep't of Air Force, Pam 110-31, International Law—The Conduct of Armed Conflict and Air Operations (19 Nov 1976) [hereinafter AF Pam 110-31].

48. *Id.* para. 5-5c.

49. *See supra* note 11, art. 27.

50. *See* Hague IX, *supra* note 39, art. 5.

> Buildings devoted to religion, art, or charitable purposes as well as historical monuments may not be made the object of aerial bombardment. Protection is based on their not being used for military purposes. Combatants have a duty to indicate such places by distinctive and visible signs. When used by the enemy for military purposes, such buildings may be attacked if they are, under the circumstances, valid military objectives.[52]

Air Force Pamphlet 110-31 embraces the principle of distinction[53] and the concept of collateral damage[54] in guiding targeting decisions that may affect cultural property. "Lawful military objectives located near protected buildings are not immune from aerial attack by reason of such location but insofar as possible, necessary precautions must be taken to spare such protected buildings."[55]

Summary

United States policy obligates forces to protect cultural property during Military Operations Other Than War. This duty stems from the emergence of the principle to protect cultural property as a fundamental principle of the law of war. Simply stated, during contingency operations U.S. forces should protect property marked with the distinctive emblems of the 1954 Cultural Property Convention, or property that otherwise seems to be of historical, artistic, scientific, or religious significance. The general guidance in *FM 27-10* remains applicable during contingency operations. For example, U.S. forces should only use cultural buildings for emergencies during times of military necessity.[56] During contingency operations, U.S. forces should act consistent with the occupation rules of the 1954 Cultural Property Convention, and "take the most necessary measures of preservation."[57] Major Larry D. Youngner, Jr.

Consumer Law Note

Legal Assistance Attorneys Must Continue to Educate Soldiers on the Dangers of Excessive Debt

In a recent newsletter article, the National Consumer Law Center (NCLC) reported documented links between increasing consumer debt and the rise in bankruptcies.[58] The article cites studies by a number of government agencies as well as other economists that support a conclusion that deregulation has caused "a loosening of underwriting standards that have caused a rise in consumer bankruptcies."[59]

The growth in credit card debt within the United States is staggering. Seventy-five percent of United States "households have at least one credit card, and three out of four cardholders carry credit card debt from month-to-month."[60] Credit card lenders have issued over a billion credit cards in this country, which amounts to "a dozen credit cards for every household in the country."[61] The most important number, however, may be the dollar value of outstanding loans—$422 billion in 1997.[62] This may not seem impressive until you consider that this is *twice* what the dollar amount was in 1993. The amount doubled in a mere four years.[63] Despite this apparent flooding of the market, the credit industry mailed three billion solicitations in 1997, or about forty-one per household.[64] Over the course of the previous four years, this amounted to about one million dol-

51. *See supra* note 42.

52. *Id.*

53. "Distinction," as a principle, calls for the discrimination between combatant targets and noncombatants, such as civilians and civilian property that if destroyed would offer no military advantage. *See generally* Protocol I, *supra* note 23, arts. 51, 57. For example, Article 51(4) applies "indiscriminate" as a term of art to attacks "of a nature to strike military objectives and civilian or civilian objects without distinction." *Id.* art. 51(4).

54. Collateral damage refers to unintentional or incidental injury or damage to persons or objects other than military objectives or targets. Collaterally damaged persons or objects would not have been lawful military targets in the circumstances ruling at the time, if targeted alone. Collateral damage violates the law of armed conflict when such damage is excessive in relation to the concrete and direct military advantage anticipated. *Id.* art. 51, para. 5(b), art. 57, paras. 2(a)(iii), 2(b).

55. AF PAM 110-31, *supra* note 47, para. 5-5c.

56. FM 27-10, *supra* note 33, para. 405 (a)-(c).

57. 1954 Cultural Property Convention, *supra* note 7.

58. *Facts About Consumer Debt and Bankruptcy*, 17 NCLC REP. BANKR. AND FORECLOSURE ED. (National Consumer Law Center), Sept/Oct. 1998, at 6 [hereinafter NCLC REP.].

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. *Id.*

lars of credit being offered to each household in the United States.[65] These statistics beg the question of why the credit card issuers offer so much credit. The answer is simple—profit. According to the NCLC, "[I]n the third quarter of 1997, credit card banks showed a 2.59 percent return on assets, compared to a 1.22 percent return on assets reported by all commercial banks."[66]

These facts are important to legal assistance attorneys. The NCLC reports that many of the problems with credit card debt predominantly affect low-income consumers. Overall, "one family in nine pays more than 40 percent of its income on debt service. At income levels below $25,000, this number rises to one in six."[67] Many of our junior enlisted soldiers fit into this income category. In the past, attorneys may have assumed that these soldiers would not get credit card solicitations, or that the card issuer would not approve them for credit. That assumption is clearly invalid today. Legal assistance practitioners must be aggressive in educating young soldiers about the dangers of excessive credit and in referring them to other help agencies that can provide training in financial management. Otherwise, practitioners will continue to see the results in our legal assistance offices as we try to pick up the pieces of soldiers' financial messes. Major Lescault.

Debt Collectors Must Report Debts as Disputed, Whether or Not the Consumer Disputes the Debt in Writing

The Fair Debt Collection Practices Act (FDCPA)[68] protects consumers by proscribing a number of abusive and deceptive practices by debt collectors. For instance, the FDCPA prohibits debt collectors from using any false or misleading representations during debt collection.[69] One of these false or deceptive practices in the FDCPA's nonexclusive list[70] is "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."[71] The United States Court of Appeals for the First Circuit recently interpreted this provision in *Brady v. The Credit Recovery Co*.[72]

Prior to 1990, William Brady's then-wife rented an apartment.[73] The lease listed Mr. Brady as a tenant, although Mr. Brady never signed the document.[74] In August 1990, the land-

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 15 U.S.C.A. §§ 1692 (West 1999).

69. *Id.* § 1692e.

70. Congress established a general rule in § 1692e stating that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. Congress went on to list a number of practices that it considered false or misleading, but introduced them with this preface: "Without limiting the general application of the foregoing [general rule], the following conduct is a violation of this section." *Id.*

71. *Id.* § 1692e(8). Among the other listed examples are:

> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
>
> . . . .
>
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
>
> . . . .
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
>
> . . . .
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

Id.

72. 160 F.3d 64 (1st Cir. 1998).

73. *Id.* at 65. Apparently, the Bradys divorced some time in 1990. When the debt collection action began in August of 1990, the court says that the woman involved was now Brady's ex-wife. *Id.*

lord referred the Brady account to The Credit Recovery Company (CRC) for nonpayment of rent. The CRC sent a letter to Mr. Brady attempting to collect the debt.[75] Brady telephoned the CRC and informed them that he had never signed the lease and was not obligated to pay.[76] Although the CRC told him to put his dispute in writing, Mr. Brady never did.[77] After about a year of collection efforts, the CRC reported Mr. Brady's alleged delinquency to various credit reporting agencies. In the report, they did not mention any dispute regarding the debt.[78]

Five years later, in 1996, Mr. Brady had trouble financing a home purchase because of this debt problem on his credit report.[79] He sued the CRC for violating the FDCPA. Mr. Brady asserted that the CRC violated 15 U.S.C.A. § 1692e by failing to report to the credit reporting agencies that he was disputing the debt.[80] The CRC countered that 15 U.S.C.A. § 1692g defined the term "disputed debt" for the entire FDCPA and that the definition required disputes to be in writing.[81] The First Circuit rejected the CRC's proposition.

The court relied on three classic rules of statutory construction. First, they analyzed the plain language of § 1692e.[82] On its face, this provision contains no writing requirement. Second, the court looked to see if the term was defined within the statute.[83] Congress did not define "disputed debt" in the statute's definition section.[84] Third, since Congress did not define the words within the statute, the court looked to the ordinary meaning of those terms and found that "[i]n ordinary English 'dispute' is defined as a 'verbal controversy' and 'controversial discussion.'"[85] Thus, the ordinary understanding of "dispute" did not require a writing.

The First Circuit addressed the CRC's argument that the court did not need to resort to plain language because the "definition" of "disputed debt" in § 1692g applied throughout the Act.[86] The court found that the provision in §1692g(b) supported its conclusion that Congress did not require disputes to be in writing. First, because Congress included a writing requirement in § 1692g, it must have intentionally omitted that requirement from § 1692e.[87] Second, the court noted the different effect of the two provisions. The dispute under §1692g invokes the validation process that stops all collection efforts until the collector validates the debt. Section 1692e has no such effect. Collection efforts may continue; the collector must simply report the dispute. Thus, the conclusion that Congress intentionally omitted the writing requirement in §1692e is logical.[88] Finally, § 1692e requires the collector to report the dispute if the collector "knows or should know" about the dispute.

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 65-66.

81. *Id*. Section 1692g of 15 U.S.C.A. describes requirements placed on debt collectors to validate debts. Among these requirements is the following provision:

> (b) Disputed debts
>
> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

15 U.S.C.A. § 1692g (West 1999).

82. *Brady*, 160 F.3d at 66.

83. *Id.*

84. 15 U.S.C.A. § 1692a.

85. *Brady*, 160 F.3d at 66 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed.1971)).

86. *Id.*

87. *Id.* at 66-67.

88. *Id.* at 67.

The court found that "[t]his 'knows or should know' standard requires no notification by the consumer, written or oral, and instead, depends solely on the debt collector's knowledge that a debt is disputed, regardless of how or when that knowledge is acquired. . . . Applying the meaning of "disputed debt" as used in [§] 1692g(b) to [§] 1692e(8) would thus render the provision's 'knows or should know' language impermissibly superfluous."[89]

This decision is important for legal assistance practitioners. Many soldiers do not come into legal assistance immediately after they receive notice of a collection action. Many try to work through it on their own by calling the collector. A decision to apply the thirty-day written notice requirement throughout the FDCPA would have seriously undermined the FDCPA protections for soldiers. With this decision, legal assistance attorneys can at least help to protect their client's credit rating while disputing a debt in collection. Violation of this section will also provide another tool for the attorney to use in negotiating a settlement of the matter for the soldier. Used in either manner, the decision by the First Circuit is a positive one for all consumers. Major Lescault.

Soldiers' and Sailors' Civil Relief Act (SSCRA) Note

Legal Assistance Attorney Asserts a SSCRA Stay and Is Found In Contempt of Court

Current Army legal assistance practice counsels against military legal assistance attorneys signing SSCRA[90] stay actions on behalf of soldiers.[91] Seasoned legal assistance attorneys base this advice on the rulings of several states that if a legal assistance attorney files a stay request with a court, he has made an appearance in the lawsuit.[92] Some courts may find an appearance even where the legal assistance attorney carefully explains that the request for a stay is not an appearance and that the soldier wishes to preserve all jurisdictional objections.[93] Only a few states take the opposite position and proclaim that an SSCRA stay request does not necessarily constitute an "appearance" in a lawsuit.[94] Failure to follow this advice can result in the client losing his right to reopen a default judgment under the SSCRA. When a court denies a soldier's SSCRA stay request made by a legal assistance attorney, he has "appeared" in the case, and the client may no longer reopen the default judgment.[95]

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89. *Id.*

90. 50 U.S.C.A. App. §§ 501-593 (West 1999).

91. *Id.* § 521. This section states:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as a plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

Id.

92. *See* Blankenship v. Blankenship, 82 So. 2d 335 (Ala. 1955); Skates v. Stockton. 683 P.2d 304, 306 (Ariz. Ct. App. 1984); Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750, 753-754 (Wis. Ct. App. 1989); Marriage of Thompson, 832 P.2d 349, 352-354 (Kan. Ct. App. 1992). *See also* Michael A. Kirtland, *Civilian Representation of the Military C*L*I*E*N*T*, 58 ALA. L. REV. 288, 289 (Sept. 1997); Legal Assistance Note, *Stays of Judicial Proceedings*, ARMY LAW., July 1995, at 68; Mary Kathleen Day, Comment, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 TULSA L.J. 45, 55 (Fall 1991).

93. *Id. See* ROBERT CASAD, JURISDICTION IN CIVIL ACTIONS, Sect. 3.01(5)(a), pp. 3-46 to -47 (2d ed. 1991). "A motion for a continuance or for a stay or extension of time in which to plead usually will be a general appearance." *Id.*

94. *See* O'Neill v. O'Neill, 515 So. 2d 1208 (Miss. 1987); Kramer v. Kramer, 668 S.W.2d 457 (Tex. App. 1984); Marriage of Lopez, 173 Cal. Rptr. 718, 721 (Ca. App. 1981).

95. Major Garth K. Chandler, *The Impact of a Request for Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 102 MIL. L. REV. 169 (1983).

Recently, an Army legal assistance attorney received a scare when he ignored this advice on SSCRA stays. A soldier in Bosnia had a divorce hearing pending in Florida. The soldier's commander wrote a SSCRA stay request to the court. The Florida judge wrote the commander back, claiming only the soldier, as a party to the lawsuit, or a Florida-licensed attorney could assert the SSCRA stay.[96] The legal assistance attorney in Bosnia got on the LAAWS BBS[97] looking for a Florida-licensed judge advocate. A stateside judge advocate (Captain *X*), a Florida bar member, offered to write the SSCRA stay letter for the soldier. Captain *X*'s SSCRA stay letter to the Florida court expressly stated that he was not entering an appearance and referenced the SSCRA statute sections. He mentioned that he was a Florida bar member, and included his Florida bar number. The judge turned down the stay request, and set a hearing date for a case management conference, listing Captain *X* as the attorney of record for the soldier. The judge determined that the stay request was an appearance because: (1) it was signed by a Florida attorney, (2) to a Florida court, (3) on behalf of a Florida resident. The court notified Captain *X* by mail of the date of the case management hearing. Captain *X* attempted to phone the judge and the judge refused to speak to him, demanding that all contact with the court be in writing. Captain *X* wrote the court and opposing counsel stating he was not the soldier's attorney and did not represent him, except to request a stay under the SSCRA.

On the hearing date, the soldier appeared without Captain *X*. The judge ruled that opposing counsel could not discuss the case with the soldier without counsel of record, Captain *X*, being present. The judge found Captain *X* in contempt of court for not appearing at the designated divorce hearing, fined him $500, and ordered him to pay the other party's attorney fees. The judge also referred Captain *X* to the Florida State Bar Professional Responsibility Grievance Committee for breach of his duties to represent his client.

Captain *X* contacted the Office of the Judge Advocate General (OTJAG) Legal Assistance Policy Division through his technical chain of command. Captain *X* moved the court to withdraw from the case (the judge approved), but the judge refused to vacate the contempt finding. Captain *X* was successful in convincing the Florida Bar Professional Responsibility Discipline Board to dismiss the judge's professional responsibility complaint as unjustified. The OTJAG Litigation Division counsel found that Captain *X* was acting within the scope of his duties. They obtained U.S. Department of Justice counsel who represented Captain *X* and removed the contempt citation from Florida state jurisdiction to the federal district court. The federal judge dismissed the contempt action.

What are the teaching points from the unpleasant experiences of Captain *X*?

(1) Judge advocates should never sign a SSCRA stay letter to a court. You create more problems than you solve.[98] Alarms should have gone off when the Florida judge demanded that only the soldier or a Florida licensed attorney could assert the stay request. Such action allowed the court to obtain personal jurisdiction over the soldier. Your inadvertent appearance can be the reason your client may not reopen a default judgment where he has a meritorious defense.

(2) *Commanders may assert SSCRA stays on behalf of their soldiers.*

Generally, the courts give much more credence to the assertions of the soldier's commander, than those of a lawyer.[99] The Florida judge was clearly wrong to indicate to the solider that only a party to a lawsuit or a local attorney may assert a SSCRA stay. The SSCRA says that a lawsuit party or "some person on his behalf"[100] may assert the SSCRA stay request. It does not require that an attorney from the same state request the stay. Of course, judge advocates may assist a commander in drafting a stay request letter for one of his soldiers.[101] Such assistance

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96. The judge's assertion was incorrect. Section 521 of 50 U.S.C.A. states in part, that a stay request may be presented by the plaintiff or defendant, "*or some person on his behalf*"(emphasis added). Neither the statute, its legislative history, or case law require that only an attorney may apply to a court for a stay for a military member. No case or statute requires that the attorney who applies for such a stay, on behalf of a military client, be a member of that state's bar. 50 U.S.C.A. § 521 (West 1999).

97. LAAWS BBS stands for the Legal Automation Army-Wide System Bulletin Board Service.

98. U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program, para. 3-7f (10 Sept. 1995) [hereinafter AR 27-3]. This regulation states in part:

> f. *Legal document filing* . . . (2) *Pro se Assistance*.
> (a) *Pro se* assistance is the help rendered to non-lawyer clients to enable those clients to file legal documents, papers, or pleadings in civil proceedings, such as small claims or uncontested divorces. Legal assistance may include preparing necessary documents and assisting with their submission to local courts. However, only a supervisor may authorize *pro se* assistance . . . .
>
> (b) Those providing legal assistance to clients on civil proceedings covered by the SSCRA are cautioned that a request for a stay of proceedings (or a letter) sent by a client or in the client's behalf may have the unintended effect of constituting consent to a court's jurisdiction.

99. *Id. See* Cromer v. Cromer, 278 S.E.2d 518 (N.C. 1981) (holding that where the commander of sailor requests a SSCRA stay, the court remands the case "in the interests of justice"); Lackey v. Lackey, 278 S.E.2d. 811 (Va. 1981) (holding that where a ship captain sent a sworn affidavit to the court indicating that a service member was unable to appear in court for several months until his ship returned to home port, the affidavit was not an appearance).

100. 50 U.S.C.A. App. § 521 (West 1999).

does not constitute "ghost writing" of *pro se* pleadings by military attorneys, which is prohibited by some state professional responsibility bodies.[102]

(3) Legal assistance attorneys may send a SSCRA stay request to opposing counsel. Legal counsel have an obligation to act with candor towards the tribunal in a lawsuit.[103] If you send an SSCRA stay request to an opposing counsel, he is obligated by his state attorney rules of professional responsibility to notify the court of the military status of the soldier party to the lawsuit.[104] Furthermore, opposing counsel must truthfully comply with the SSCRA affidavit requirement.[105] A SSCRA letter, written by a legal assistance attorney to opposing counsel is not an appearance before a court.[106] A soldier's SSCRA stay rights asserted in this manner preserves the soldier's right to assert jurisdictional defects and to assert his SSCRA right to reopen a default judgment if he has a meritorious defense.[107]

(4) If you are not sure about asserting a SSCRA stay, discuss your options with your technical chain of command. You can work your way out of difficult situations like that of Captain *X* if you discuss your plan with your chief of legal assistance, your deputy staff judge advocate, and your staff judge advocate.[108] You do not compromise client confidentiality by discussing how you wish to proceed on a case within legal assistance channels. If your office cannot resolve a problem, consider contacting the OTJAG Legal Assistance Policy Office staff. They have the advantage of hearing of similar legal assistance problems from all installations Army-wide and among the various services.

Lieutenant Colonel Conrad.

101. Kansas Attorney General Opinion Number 95-85, 1995 WL 813454 (August 15, 1995) (providing that attorneys acting under the authority of the Army legal assistance program may counsel and assist pro se military clients with the preparation of necessary documents to be filed in Kansas courts in specified civil proceedings without obtaining a Kansas law license). A sample legal assistance attorney letter for commanders to assert an SSCRA stay is at <http://www.jagcnet.army.mil>; Lotus Notes database, TJAGSA Publications, JA 260, Soldiers' and Sailors' Civil Relief Act (April 1998).

102. Electronic Message # 250173, LAAWS BBS, Chief, OTJAG Legal Assistance Policy Division, subject: Preparation of Pro Se Pleadings by Iowa Licensed Attorneys (5 Feb. 1997). Military legal assistance attorneys, licensed in Iowa, may not "ghost-write" pro se pleadings for military members, in courts in states where they are stationed, but not licensed, unless the state allows such a practice, the attorney reveals their participation to the court, and the attorney is authorized to practice in that jurisdiction, by that jurisdiction. *Id. See* Iowa Board of Professional Ethics and Conduct Opinions 94-35 (May 23, 1995) and 96-7 (Aug. 29, 1996). None of the above opinions or messages prohibit a military legal assistance attorney from assisting a commander in asserting a SSCRA stay request on behalf of one of their soldiers. A request for a SSCRA stay is not a "pleading," as contemplated by modern rules of civil procedure. Federal Rule of Civil Procedure 7(a), contemplates only a complaint, answer, and reply to a counter or cross claim as actual pleadings. A request for a temporary stay pursuant to the SSCRA is like a motion under Federal Rule of Civil Procedure 7(b). FED. R. CIV. P. 7(b). Military legal assistance attorney preparation of a SSCRA stay request is not addressed by the Iowa ethics opinions.

103. *See* Sacotte v. Ideal-Werk Krug, 359 N.W.2d 393 (Wis. 1984) (holding that a letter to opposing counsel does not confer personal jurisdiction over a defendant. *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1983). This rule states: "In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse." *Id.*

104. *See supra* note 103.

105. 10 U.S.C.A. § 520(2) (West 1999).

106. Sacotte v. Ideal-Werk Krug, 359 N.W.2d 393 (Wis. 1984).

107. A model letter raising the SSCRA stay for opposing counsel is at <http://www.jagcnet.army.mil>; Lotus Notes Database, TJAGSA Publications, JA 260, Soldiers' and Sailors' Civil Relief Act (April 1998).

108. You must have the approval of your legal assistance supervising attorney before you provide assistance to a client by drafting legal documents, such as an SSCRA stay request. *See* AR 27-3, *supra* note 98, para. 3-7f (2)(a).

The Art of Trial Advocacy

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

To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards

In many, if not most staff judge advocate offices, young trial and defense counsel cut their advocacy teeth in administrative separation boards as recorders and counsel for respondents. While supervisors may think that sending rookie advocates into battle at administrative separation boards makes sense because there is less at stake than at a court-martial, counsel assigned such duties should not be misled into thinking they've been relegated to riding the bus in the "minor leagues" of trial advocacy. In fact, the relatively unrestricted and unsupervised nature of administrative separation boards presents additional advocacy challenges for young litigators to overcome. In administrative separation boards, counsel are required to do more than just advocate the facts of their case; they must educate the board members on the substantive *law*,[1] and persuade the board president to follow certain procedures.

Military judges preside over courts-martial. These learned criminal law practitioners serve two important functions. First, by ruling on motions and objections, they ensure that counsel stay within well-defined boundaries during the trial. Second, they provide the members general and specific instructions regarding their role in the proceedings and the law they are to apply in a particular case.[2]

Administrative separation boards, on the other hand, do not have such "parental supervision." In contrast to courts-martial, far fewer evidentiary and procedural rules apply to administrative separation boards.[3] Moreover, administrative separation boards do not have an experienced military judge to enforce or interpret the few rules that do exist.[4] Rather, these proceedings have a board president, who is typically a line officer with little or no experience in legal proceedings. Board presidents may not only be ill-equipped to control the orderly proceedings of an administrative board, they may also be ill-prepared to instruct the board members on the *laws* they are to apply in a particular board. While legal advisors are sometimes appointed to administrative separation boards, they are rarely present during the board. Consequently, the burden of preventing an administrative board from degenerating into an advocacy "free-for-all" falls upon the counsel who are present at the board. Counsel must not only advocate their case, but also educate the board on the procedural rules and substantive *laws* and regulations applicable to the proceeding.

Extra Preparation

The absence of an experienced presiding official imposes two additional preparatory steps upon counsel planning for an upcoming administrative separation board. First, they must gather the laws, regulations, and field manuals relevant to their case. Second, they must prepare themselves to advocate to the board president the specific administrative procedures they want the board to follow.

Substantive Law for Administrative Separation Boards

Gathering the relevant law is not a complicated task. For instance, in a board involving a pattern of minor military misconduct,[5] (for example, failures to repair, short absences without leave (AWOL)) the recorder should come to the proceedings with a copy of Uniform Code of Military Justice, Article 86,[6] and prepared to educate the panel on the elements of failure to repairand AWOL. If the respondent intends to raise the defense of impossibility to report, respondent's counsel must be prepared to teach the board members the definition of impossibility set forth in the *Military Judge's Benchbook*.[7] If the basis for a Chapter 14 separation board for serious miscon-

1. For purposes of this article, the *law* means more than simply case law and the *Manual for Courts-Martial.* In administrative separation proceedings, the *law* may include military regulations, field manuals, training circulars, and other published documents. For example, in a separation action for two consecutive failures to pass the Army Physical Fitness Test, the defense may refer the board to pertinent provisions of *Army Regulation 635-200*, *Enlisted Separations*, as well as to the provisions of *FM 21-20, Physical Fitness Training*, that require commanders to have remedial physical training programs.

2. In a trial before military judge alone, there are no members for the judge to instruct on the law. Nevertheless, judges must follow applicable law themselves during the trial and in their deliberations.

3. *See generally* U.S. Dep't of Army, Reg. 15-6, Procedure for Investigating Officers and Boards of Officers (11 May 1988) (C1, 30 Oct. 1996) [hereinafter AR 15-6].

4. Although the appointment of a legal advisor is required, many board presidents fail to consult their legal advisor for help on routine evidentiary and procedural issues. Many, if not most legal advisors are not nearly as experienced as their military judge counterparts.

5. U.S. Dep't of Army, Reg. 635-200, Enlisted Separations, ch. 14-12b (17 Sept. 1990) (C1, 6 Aug. 1996).

6. UCMJ art. 86 (1998).

duct is a positive urinalysis, counsel for both sides must be equipped to educate the members about the detailed requirements for conducting a proper unit urinalysis, among other things. This may involve education on not only the provisions found in appendix E of *Army Regulation (AR) 600-85*, but also relevant local policies and procedures for conducting a unit urinalysis. When defending a soldier pending separation for two consecutive failures of the Army physical fitness test (APFT), respondent's counsel must be well-versed on the unit's duties under chapter 9 of *AR 350-41* regarding the proper method for conducting the APFT.[8] These are but a few examples of the substantive laws and regulations about which counsel must educate board members. There are countless others, depending on the basis and circumstances of the administrative separation proceeding.

The most fundamental, yet often overlooked, educational duty of counsel is to inform members about the three-part findings and recommendation the board must ultimately provide. Counsel must inform the members of their duty to determine: (1) whether the factual basis for separation exists (for example, respondent committed an act of serious misconduct, respondent's performance was unsatisfactory, or respondent failed to meet Army weight standards); (2) whether such conduct warrants separation; and (3) if separation is warranted, the character of discharge to be awarded (honorable, general under honorable conditions, other than honorable).

Once gathered, counsel must determine the most effective means of communicating this law to the members. The simple direct approach usually works best with line officers. One effective way to educate board members of applicable laws or regulations is through the testimony of a live witness, for example: "Sergeant Snorkel, are you aware of the requirement in *AR 600-85*, that the observer is to place his initials on the white label next to those of the soldier submitting the urine sample"; or "Sergeant Snorkel, are you familiar with the requirements of *AR 600-85*, Appendix E? Please tell the board members what the observer is required to do." Counsel might also simply ask the witness to read a specific provision of the regulation to the members.

Another efficient method is simply to offer the provision of the regulation as an enclosure to the record without benefit of a witness.[9] Rather than offering the entire regulation as an enclosure for the board, copy only the relevant portions of the regulation, and highlight the exact portion you want the board to pay attention to (for example, paragraph 1-18 regarding rehabilitative transfer requirements). If you intend to have the board members read a lengthy portion of the regulation (or any other document for that matter), make sufficient copies for each member (and opposing counsel) to read and take into deliberations.[10] Counsel might also consider having such information blown-up and pasted on poster board, or presented on an overhead projector, or through computer-generated slides to "liven up" otherwise dry regulatory material. Finally, when referring to the applicable laws and regulations during argument, counsel would do well to pick up the actual regulation and quote the precise language. Such deliberate reference to the regulation lends an air of authenticity to your argument that a mere general reference does not provide.

Procedural Rules for Administrative Separation Boards

The educational process involves more than simply informing the members of applicable substantive regulations. Counsel must also be prepared to educate the members on the basic procedural rules governing the process. While the military rules of evidence generally do not apply to administrative separation boards,[11] counsel can still object, and should do so whenever appropriate. Unlike courts-martial, however, where all they have to say to the military judge is "objection—hearsay," or "objection—leading," counsel in administrative boards must be prepared to go one step further when their opponent responds to the board president and says the rules of evidence do not apply. At that point, counsel must once again assume the role of teacher and explain to the president the underlying basis for such rules. While acknowledging that the rules do not automatically apply, counsel should explain to the president the underlying common sense rationale for our evidentiary rules, for example, that leading questions result in excessive coaching of witnesses, that hearsay evidence is inherently unreliable, and that the opportunity to cross-examine this particular witness is necessary for this board to make a fair decision. By convincing the president of the logic behind the evidentiary rules, and the fundamental concepts and application of due process, counsel can ensure the administrative process is fair to both the government and respondent.

Demanding the production of witnesses presents counsel with another advocacy opportunity. Even though the convening authority may have previously denied a request to produce a key witness for the respondent, no rule prohibits respondent's

7. U.S. Dep't of Army, Pam 27-9, Legal Services, Military Judge's Benchbook 216 (30 Sept. 1996).

8. *See* U.S. Dep't of Army, Reg. 350-41, Training in Units, ch. 9 (19 Mar. 1993).

9. Note that such un-authenticated documents and methods of offering evidence would not necessarily work in a court-martial. This is a good example of how counsel must be prepared to educate and advocate the admissibility or inadmissability of such evidence to the board president.

10. This may also ingratiate counsel to the panel for taking a small step to expedite the board proceedings.

11. *See* AR 15-6, *supra* note 3, para. 3-6. Although the rules of evidence generally do not apply, paragraph 3-6c of *AR 15-6* does establish some evidentiary restrictions.

counsel from educating the board president on the Sixth Amendment right to compulsory process of witnesses. Though not applicable to administrative proceedings, an effective advocate can convince the board president of the underlying principle of Sixth Amendment constitutional rights: that it would be unfair to separate, for example, an eighteen-year veteran for a positive urinalysis without first hearing the live testimony of the unit alcohol and drug coordinator who supervised the unit urinalysis. The government recorder, conversely, must do his best to convince the president that if the Army intended for the Sixth Amendment's compulsory process clause apply to such proceedings it would have included a provision in the regulations governing such proceedings. The recorder may also try to persuade the board president that alternate means of testifying are available and satisfy fundamental due process (for example, videotaped testimony, telephonic testimony, live video teleconferencing, affidavits).

Counsel litigating administrative separation boards need to understand that the success of their efforts at administrative separation boards is directly related to their ability to *educate* the board members on the substantive law, and to *persuade* them of the overall fairness and common sense of the procedures they should follow. At courts-martial, an experienced military judge enforces clear rules and procedures. In stark contrast, the advocacy skills of competing counsel in administrative separation boards play much larger roles in determining the ultimate law and procedure to be applied. While the stakes at an administrative separation board may not be as significant as a "major league" court-martial," the additional challenges presented by such proceedings require "major league" advocacy skills. Play ball! Lieutenant Colonel Lovejoy.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 6, number 1, is reproduced in part below.

Lower Courts Taste Bestfoods

In *United States v. Bestfoods*,[1] the Supreme Court addressed whether a parent company can be held liable under the Comprehensive Environmental Response Compensation and Liability Act[2] (CERCLA) as an operator of clean-up sites that are actually owned by a subsidiary. This note focuses on two lower federal court decisions that recently applied *Bestfoods* to other situations involving derivative liability.

In *Bestfoods*, the Supreme Court examined whether a parent corporation can be held liable as either an owner or operator of a hazardous waste site[3] owned by a subsidiary. The court found that CERCLA did not change the general principal of corporate law(that a parent corporation is not liable for the acts of its subsidiaries merely because of the control accorded them through stock ownership or by the duplication of officers.[4] Rather, the Court found that derivative liability of the parent corporation is possible only if the corporate veil can be pierced under applicable state law.[5] On the other hand, the parent corporation may be held directly liable for its own actions as an operator of the facility. In this situation, liability is not based on whether the parent operates the subsidiary, but whether it operates the site.[6] In *Bestfoods*, the Supreme Court remanded the case for the lower court to determine whether the parent corporations acted directly as operators.[7]

In *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*,[8] a district court examined whether a corporate officer (Mr. Ter Maat) could be held individually liable under CERCLA. First, the court determined that under *Bestfoods*, the only way Ter Mat could be held directly liable under CERCLA would be derivatively under Illinois corporate veil-piercing law.[9] The

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1. 118 S. Ct. 1876 (1998).

2. 42 U.S.C.A. §§ 9601 – 9675 (West 1998).

3. *Id.* § 9613. Section 9613 of CERCLA provides that contribution may be sought from any person who is liable or potentially liable under CERCLA section 9607. *See id.* §§ 9613, 9607. Section 9607 of CERCLA lists four groups of potentially responsible parties. These are:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person . . . shall be liable . . . .

Id. § 9607(a)(1)-(4).

4. *Bestfoods*, 118 S. Ct. at 1884.

5. *Id.* at 1885-86.

6. *Id.* at 1186-87.

7. *Id.* at 1890.

8. 13 F. Supp. 2d 756 (W.D. Ill. 1998).

9. *Id*. at 765. Prior to *Bestfoods,* however, the Seventh Circuit held that a corporate officer could be held directly liable as an operator under CERCLA, irrespective of state veil-piercing law. *See* Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420-21 (7th Cir. 1994).

court then examined Mr. Ter Maat's behavior under the Illinois veil-piercing factors. Although some of Mr. Ter Maat's actions supported removal of corporate protection, the court found that the plaintiffs did not meet their substantial burden of showing that the corporation was really a dummy or "a sham" protecting a dominating personality.[10] Even though Mr. Ter Maat was president of two insolvent companies, which were operators of the CERCLA site, the court did not hold him personally liable.

Bestfoods also dealt with "operator" liability under CERCLA. Another recent case concerns the derivative liability of entities that "arrange" for the disposal of hazardous waste. In *AT&T Global Information Solutions Co. v. Union Tank Car Co.*,[11] the district court considered whether a parent corporation[12] could be held derivatively liable as a CERCLA arranger. Although there was no case law directly on this point, the court found that it was implicit in *Bestfoods* that a parent can be held derivatively liable as an arranger if the corporate veil can be pierced.[13] The court also found that it is within the intent of CERCLA to impute derivative arranger liability upon a parent corporation if its corporate veil can be pierced and if its subsidiary can be adjudged an arranger.[14] Applying Ohio's corporate veil-piercing law, the court found the parent company's corporate veil should "be pierced to make certain that the entity who ultimately profited from arranging for the improper disposal of hazardous waste bears some of the burden for its cleanup. Any other decision would be circumventing the broad, expansive, and remedial purposes of CERCLA."[15]

These cases show that attorneys involved in CERCLA cases should look carefully to see if any solvent parents are lurking behind a dissolved or insolvent "orphan" that is a potentially responsible party under CERCLA. If parents or grandparents are present, attorneys should carefully examine their involvement and observance of corporate formalities. Lieutenant Colonel Howlett.

Ecological Risk Assessments and Natural Resource Injuries

Under CERCLA, response authorities are required to address both adverse human health and environmental effects caused by a hazardous substance release. Response authority under CERCLA was delegated to the Department of Defense (DOD) services.[16] This delegation requires services to assess adverse environmental effects or natural resource injuries (NRIs) during the cleanup process. In 1996, the Army, Navy, and Air Force produced the *DOD Tri-Service Procedural Guidelines for Ecological Risk Assessments*.[17] Because more attention is being focused on how to document adverse environmental effects,[18] this note examines how the services can use ecological risk assessments (ERAs) for this purpose.

Natural Resource Injuries

Natural resource injuries are the adverse environmental effects addressed during remediation by CERCLA remedy. Natural resource injuries refer to a measurable adverse change in the chemical or physical quality or viability of a natural resource caused by the release or the threatened release of a hazardous substance.[19] A primary tool for addressing the NRIs is the ecological risk assessment. Services use the ERA to evaluate the likelihood of ecological problems caused by hazardous substance exposure. The Army generally prepares the ERA during the remedial investigation/feasibility study[20] phase of the cleanup process.

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10. *Browning-Ferris*, 13 F. Supp. 2d at 765-66.

11. No. C2-94-876, 1998 U.S. Dist. LEXIS 19316, (S.D. Ohio, Nov. 2, 1998).

12. Vermont American, the corporation in question, was actually a "grandparent," since a dissolved subsidiary stood between it and the subsidiary that sent waste to the site.

13. *AT&T Global Information Solutions*, 1998 U.S. Dist LEXIS at *16 (citing U.S. v. Northeastern Pharm. & Chem. Co., Inc., 810 F.2d 726, 744 (8th Cir. 1986)).

14. *Id*.

15. *Id.* at *39.

16. *See* 42 U.S.C.A. §§ 9604, 9620; Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987) (laying out the DOD's authority).

17. *See* 1 S. RANDELL WENTSEL ET. AL., ARMY, NAVY AND AIR FORCE, DOD TRI-SERVICE PROCEDURAL GUIDELINES FOR ECOLOGICAL RISK ASSESSMENTS 1-16 (1996) [hereinafter TRI-SERVICE ERA GUIDELINES].

18. For example, the Environmental Protection Agency (EPA) is currently revising its guidelines on ERAs. *See Ecological Risk: EPA Floats First-Ever Draft Ecorisk Management Guidance for Comment*, SUPERFUND REP., Aug. 19, 1998, at 9-15.

19. 43 C.F.R. § 11.14(v) (1997). This does not include the concept of natural resource "damages" which focuses on financial compensation for economic losses. *See id.* § 11.14(l).

20. *See generally* 40 C.F.R. § 300.430.

ERA Procedure

Ecological risk assessments should tell the reader which environmental problems should be addressed and why. Ecological risk assessments typically begin with *assessment planning* and *problem formulation*, proceeding to the development of *exposure profiles*, a *characterization of ecological effects*, and a *conceptual model*, which provides the basis for *risk communication*. Here is what this jargon means:

Assessment Planning: The primary purpose of the ERA is to translate scientific data into meaningful information about the risk of human activities to the environment.[21] The risk manager then uses this information to make informed decisions about the environment. Assessment planning is the first step towards "problem formulation."

Problem Formulation: Problem formulation is meant to articulate the purpose behind an assessment. The ERA focuses on things that people care about, such as habitat, watersheds, or scenic beauty.[22] Therefore, ERAs typically examine: (1) ecological susceptibility to known or potential stressors (such as specific contaminants),[23] (2) the ecosystem at risk,[24] and (3) the "ecological effects" of exposure.[25] After the ERA investigator has sketched out the basic issues, he prepares assessment endpoints,[26] which are the environmental values to be protected. Conceptual models[27] discuss these endpoints and may focus on the relationships among different species, ecosystem functions, and how multiple pathways may spread a hazardous substance.

Analysis: Problem formulation is followed by the ERA's "analysis" phase. After evaluating the relevant data, an ERA investigator develops a "characterization of exposure" and a "characterization of ecological effects."[28] The investigator then examines which contaminants are present, from what origin, and at what quantity. Specifically, he looks at how the contaminant moves through the environment. By doing so, he determines how it comes into contact with the species at risk and assesses how long that contact lasts. Often, this means delving into the unknown. For example, many pathways can transport contaminants. Likewise, a researcher may know of the human health effects of a contaminant, but no studies may exist on animals or habitat. Therefore, the ERA must take the existing knowledge of a contaminant's impacts and project them onto selected species or habitat.[29] Adding to the complexity, researchers should also consider latent effects (i.e. impacts over the life cycle process) and the cumulative effects, including breaks in the food cycle. Based on this data and analysis, the ERA investigator may develop an "exposure profile,"[30] a "characterization of ecological effects"[31] and a "conceptual model."[32] These documents show which species are at risk and the circumstances that cause risks to increase or decline. The analysis will also show the ways in which contaminants can cause a chain reaction that affects the target species, related species and their habitat.

Risk Characterization: At this stage, the ERA investigator characterizes the proposed risk to the environment[33] to explain how exposure to a contaminant or related "stressor"[34] could affect a species or habitat "receptor."[35] The study tends to focus on vulnerable periods in the lifecycle, such as nesting times, to

21. *See* TRI-SERVICE ERA GUIDELINES, *supra* note 17, at 6-8 (containing additional information on how the ERA works within the CERCLA context).

22. *Id.* at 28-29.

23. *Id.* at 19-22.

24. *Id.* at 22-23.

25. *Id.* at 23-24.

26. *Id.* at 24-29.

27. *Id.* at 18, 31.

28. *Id.* at 32-47.

29. Adding to the complexity, fact-gathering may involve surrogates. For example, if a rare bird is at risk, a researcher may examine the effect of exposure on a similar bird.

30. TRI-SERVICE ERA GUIDELINES, *supra* note 17, at 46-47.

31. *Id.* at 47-53; *see id.* at 53-77 (discussing specific methods).

32. *Id.* at 90-96; *see id.* at app. A, A1-A43 (containing examples of conceptual models).

33. *See id.* at 53-77 (containing information on how to characterize ecological effects).

34. *See id.* at 19-22 (discussing stressors).

35. *Id.* at 78-101.

determine when a subject is at particular risk. This risk is often projected outward to involve many species(particularly when the food chain is disrupted. Risks may also occur over time. For example, population reductions may occur years after exposure and may affect numerous species. In approaching risk, the ERA writer must "come to grips" with uncertainties at various levels.[36] The ERA writer should then add up all of the resulting data, including assumptions and conjectures. The ERA writer will then incorporate appropriate conclusions into an "exposure-response risk model."[37]

Risk Communication: Next, the ERA writer compiles assessment results into an "ecological risk summary" for use by the risk manager and other interested parties.[38] Risk assessment and risk management are distinct activities. Risk assessments concern a scientific evaluation of whether adverse effects may occur. Risk management involves selecting an action in response to an identified risk.[39] Such identified risks may be based on social, legal, political, or economic issues that are outside of the risk assessment's scope.

Back to Natural Resource Injuries

The ERA's data may be used to identify NRIs, while providing a baseline for addressing adverse environmental effects during the clean-up. Therefore, at the beginning of the ERA process, the ERA investigator should consider how to define and, possibly, mitigate NRIs. When defining NRIs, DOD service representatives should talk to their respective Army, Navy, and Air Force conservation staffs. In addition, they should also speak with natural resource trustees, land managers, and the public to determine what issues they deem important. In particular, communication with federal, state, and tribal trustees[40] will help the lead agent meet its CERCLA section 104 requirement to "coordinate" assessments and investigations.[41]

To request the *Tri-Service ERA Guidelines* within the DOD, contact the Defense Technical Information Center at (800) 225-3842. Requesters outside of the DOD should contact the National Technical Information Service at <http://ntis.gov>. Both should ask for publication #AD A322189. Ms. Barfield.

New DOD Policy for Range Management

Late last year, the Office of the Under Secretary of Defense for Acquisition and Technology requested that a new draft Department of Defense Instruction (DODI) be forwarded for staffing among the DOD services. This proposed DODI[42] would regulate environmental and explosives safety management of active and inactive ranges that are owned, leased, or operated by the DOD, whether located in the United States or overseas.

The DODI has two purposes: (1) ensuring sustainable use and management of these ranges, and (2) protecting all individuals from explosives hazards on these ranges. The DODI will supersede DODI 6055.14, *Unexploded Ordnance (UXO) Safety on Ranges*, while incorporating its explosives safety management principles. Among the DODI's draft provisions are specific environmental requirements. As proposed, the services would be required to: (1) assess the environmental impacts of munitions use on ranges, (2) conduct an inventory of their active and inactive ranges, (3) establish range clearance operations to permit sustainable use of their ranges, and (4) incorporate proposed DODI procedures in local management plans.

The services are currently preparing comments to the draft DODI. The final DODI should be effective no later than this summer. Lieutenant Colonel Grant.

Litigation Division Note

Dead Men Tell No Tales, and Neither Do Missing Ones: Finding the Witness

Military attorneys are well aware of the difficulties of locating and contacting witnesses in today's highly mobile world. Attorneys who are responsible for the initial investigation of a claim or a case must understand what information they must gather when they initially interview the witness. Information they obtain during the initial interview will allow the government to locate the witness years, or even decades later. Attorneys who are responsible for the ultimate litigation of the case must understand the resources available to track down these witnesses using the information gathered earlier. This note outlines these two aspects of locating witnesses, and highlights the

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36. The *Tri-Service ERA Guidelines* provide specific ideas on how to deal with uncertainties. *See id.* at 92-96.

37. *Id.* at 85-96.

38. *Id.* at 96-97.

39. *Id.* at 78-80, 100-101.

40. *See* 42 U.S.C.A. § 9607(f)(2) (West 1998) (defining "public trustees of natural resources").

41. *Id.* § 9604(b)(2).

42. The proposed policy was originally drafted by the Range Management and Use Subcommittee of the Operational and Environmental Executive Steering Committee for Munitions.

resources, both old-fashioned and on-line, that are available to locate witnesses.

Paragraph 3-9e of *Army Regulation (AR) 27-40*[43] requires attorneys to prepare a complete list of witnesses as part of any litigation report. In addition, *AR 27-40* requires that the litigation report contain the name, unit, home address, home and duty phone and social security number (SSN)[44] of every witness.[45] Claims offices should develop a form for gathering this information for every witness. If possible, claims attorneys should also elicit whether the witness plans to retire, separate from the service, deploy, or transfer in the foreseeable future. Additionally, claims attorney's should ask the witness whether there is a stable address through which the witness can be contacted in the future (such as, parents, grandparents, home of record). Finally, when interviewing doctors or other professionals, claims attorneys should find out where they are licensed to practice.

Additional complications arise with cases involving Army Reserve or National Guard units. Many of these units are undergoing restructuring and downsizing, much like the Regular Army. In addition to ensuring that they fully detail the above information, claims attorneys should ensure that they have a record of the organizational structure, to include higher headquarters, of the unit involved in the case. This will enable later attorneys involved in the case to locate retired records from these units, should they become deactivated between the incident giving rise to the claim and the litigation. The claims attorney should include the name, address, and phone number of the higher headquarters of the Army Reserve or National Guard unit in question, as well as the names and phone numbers of any permanent staff.

Typically, years will have passed between the initial investigation and the onset of litigation. *All witness information should be updated and verified in the process of preparing the litigation report.* Two primary methods exist to find the witness again: (1) tracking him down through traditional paper-based records, or (2) using the new on-line resources available on the Internet and subscriber services such as Lexis or Westlaw.

Paper-Based Records

Typically, soldiers who depart an installation must complete a clearing process. This process creates a series of records that may potentially give the investigator a forwarding address. Common sense and following the paper trail are necessary ingredients in a successful search.

Unit Records

The attorney, paralegal, or investigator updating the witness information should initially check any and all unit records to determine if they show the current location of the witness. Many units retain copies of transfer and separation orders, and most require their departing soldiers to complete a mail-forwarding card for the unit mailroom. Units that require top secret security clearances often retain copies of Department of Defense Form 398, which provides references and other identifying information on the soldier. Many times checking with a unit will disclose close friends of the witness who are still in touch through electronic mail or Christmas cards.

Post Records

Post records provide other resources to locate the witness. The installation post office may have a forwarding address on the witness and the DEERS coordinator at the local health care facility may have a more current address for the soldier or his family. Additionally, the local military personnel office will have a current alpha roster (as may many staff judge advocate offices), and a current retirement roster. The retirement roster lists a current address on every Army retiree, and is updated on a quarterly basis. Some retiree associations or alumni groups can also prove helpful in locating former soldiers.

Your local post exchange may have a forwarding address for a soldier, particularly if the soldier is enrolled in the deferred payment plan. Local legal assistance client cards can provide current addresses of clients. In addition, you can ask the legal assistance attorney to forward a letter to the client asking for permission to disclose a current address. Transition and separation points also typically maintain information on forwarding addresses of departing soldiers. Other post facilities, such as education centers, may also have records that may prove useful in tracking down a witness.

If you are looking for a health care provider, you should check with the local credentials coordinator at the hospital. Many of these credentials coordinators receive questions from subsequent employers of doctors and nurses who depart the military. Doctors and nurses may spend many years in a particular hospital. Visiting the particular specialty area of the hospital they worked in can often disclose friends who know where they are currently located.

In two separate cases at Litigation Division, one thirty years old and one fifty years old, valuable witnesses were located by talking to one witness and finding others through their Christmas card lists, golf or poker buddies, or general knowledge of

43. U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, para 3-9(e) (19 Sept. 1994) [hereinafter AR 27-40).

44. If no objection.

45. AR 27-40, *supra* note 43, para. 3-9(e).

where a friend may have moved after leaving the military. People who serve in the Army often stay in touch with friends. The claims attorney can use these friendships to find witnesses critical for the defense of a case. In the thirty year old case, every obstetrician, nurse, and pediatrician involved in a 1970 birth was identified and located through the use of people's memories and personal contacts, despite records that only listed initials for some individuals. Perseverance, common sense, and creativity often yield results.

Local Records

Local civilian post offices may similarly have records on forwarding addresses of departing soldiers. Many state departments of motor vehicles require addresses to license vehicles or drivers. As a final resort, the Department of the Army can forward a letter to the Internal Revenue Service requesting it to forward the letter to the taxpayer's last address of record.

Electronic Based Records

If you cannot find a witness through a paper-based records search, technology can often assist you in locating him. Be aware that there will be times when you will not be able to locate someone, hopefully that will be the exception not the rule. To succeed in a witness search, you should neither give up hope nor be afraid to open your mind to technology(it can be your biggest ally when you prepare a litigation report.

The Internet

The Internet has become a fast and reliable way to access a myriad of information. The most useful website for finding people is <www.infospace.com>. Once you are on the website, choose the white pages and type in the name of the person whom you need to find. This website's search engine searches by name, and can be narrowed by specifying a location. Notably, however, since this website's information is based on white page telephone book entries, the format of the data will depend on how the person signed up for telephone service, and where the telephone company registers the number. Witnesses with unusual names are easier to find using this website.

The detailed information gathered during the initial witness interviews provides the tools to find the witness later. Multiple searches may be necessary using various search configurations, such as the full name, name and first initial, or using the geographical limitation of state only, or state and city. This website has a very useful tool, which is a reverse lookup function. This enables the user to type in an address and find out the person and telephone number for that address. This is especially useful for soldiers who separate after one tour and move into a home with roommates. The telephone number will not always be listed under the soldier's name, but using the forwarding address the soldier gave while out-processing, you could find the telephone number for that address. Although the soldier may have already moved out of that location, former roommates can normally give you more information on the witness, such as, where he now lives or where his parents, grandparents, or siblings live.

Other websites that you should be check are <www.lookupusa.com>, (2) <www.switchboard.com>, (3) <www.anywho.com>, and (4) <newstation.com>,(for domestic and international telephone numbers and addresses). Some of these websites require a registration application, which is free and can be filled out on-line the first time you use the site. There is limited use for electronic mail address searches, because most of the information is user-provided and not protected.

When attempting to track down a doctor, the American Medical Association's website, <www.ama-assn.org>, provides valuable information, but can only be searched one state at a time. Once you are on the website, select "Doctor Finder," which allows searches by name or specialty. The website will often give an office address and phone number, which can then be used to reach the doctor. Alternatively, you can use the location disclosed to find the doctor's home address with the previously discussed websites.

Lexis-Nexis

Lexis is very useful when attempting to locate a witness. Your search will be more effective if you have the witness' SSN. Once you are logged onto Lexis, the most useful libraries are FINDER, ASSETS, ALLREC and P-PROP.

In the FINDER library, you should use the files that most appropriately fit your needs. At a minimum, you should search the EZFIND file. EZFIND is a quick way to attempt to locate witnesses who have left the service. Searching by SSN should yield a current address or the most recent address reported by a creditor. To maximize your search effort, try to include all information that you have about the person. Searching by the witness' first and last name will be helpful if it is not a very common name. Using a state of residence will help narrow the possibilities. This could be the last assignment or a home of residence (for example, jones w/3 john and north carolina)

Also in the FINDER library is the M-FIND database. This is the military locator, which includes all branches of the services. This information is helpful, but not always accurate. At a minimum, it will give you a starting point to look for an active duty soldier.

Once you have a current or recent address, you can switch to the ASSETS library and search for the address. The results will allow you to see who owns the property where your witness lives, or when the property was sold.

ALLREC combines the ASSETS library and the P-FIND file and can be searched. P-FIND is a listing from the white

pages of telephone books and does not include unlisted or unpublished numbers. The P-PROP library is one of the most recent additions to LEXIS' libraries. This library allows the searcher to search thirty-three state motor vehicle administrations to obtain licensing information and registration information. This will be a very efficient way to track someone down using his home of record (for example, jones w/3 john and fayetteville).

Westlaw

While the Litigation Division does not use Westlaw as its main legal research program, Westlaw has the same search features that are available on LEXIS. Once you are logged onto Westlaw, you will choose "select a database." The database that will be most effective is the "Public Records" database, which contains nineteen files.[46] Choose "People Finder," which has an additional ten sub-files. Use the file that will be most effective in your search. You will have to experiment until you develop a feel for what information is contained in each file. Since you will be logging on as a government agency, SSNs are available to you under the "People Finder - Credit Bureau Social Security Number Tracker" file. Follow the prompts in each file to locate your witness. Also available under "Public Records" is the "Asset Locator" file, where you can search for property records. These property records can help locate a witness by identifying property that he owns or through identifying property owners (like landlords) who may assist you in tracking him down.[47] Westlaw also has access to motor vehicle records, which is similar to LEXIS. One added feature, however, is that you can search using tag number or vehicle identification number (VIN). Installation Military Police may have a record of the witness' VIN number or tag number through base vehicle registration or traffic infraction files. The "Professional Licenses" file can be used to find doctors or nurses who have left the military.

Conclusion

No matter how you find a witness, as the final step you should call the witness and verify that he is the person you are searching for, and that he is actually at that address and phone number. The defense of the United States in litigation depends on the claims attorney updating the witness list with current addresses and phone numbers. Identifying and contacting witnesses early allows the government to gain valuable momentum in defensive litigation. Major Brenner-Beck, Ms. Williams.

46. The most helpful for the purposes here are: Motor Vehicle Records, People Finder, and Professional Licenses, and Asset locator. Other helpful files are: bankruptcy records, business & corporate filings, census data, county records, CourtLink Dockets, INFOAM (Information America Databases), and Lawsuit Records.

47. Many landlords will have forwarding addresses to send security deposit checks to the tenant-witness.

Claims Report

United States Army Claims Service

Personnel Claims Note

1998 Table of Adjusted Dollar Value

This table, which is attached at the Appendix, updates the *1997 Table of Adjusted Dollar Value* (ADV) previously printed in the July 1998 issue of *The Army Lawyer*.[1] Paragraph 11-14 of *Army Regulation 27-20*,[2] and paragraph 11-14f(5) of *Department of Army Pamphlet 27-162*[3] state that claims personnel should use this table *only* when no better means of valuing property exists.

Adjudicators should not use this table when a claimant cannot substantiate a purchase price. Additionally, do not use it to value ordinary household items when the value can be determined by using average catalog prices.

To determine an item's value using the ADV table, find the column for the calendar year the loss occurred. Multiply the purchase price of the item by the "multiplier" in that column for the year the item was purchased. Depreciate the resulting "adjusted cost" using the Allowance List-Depreciation Guide (ALDG). For example, the adjudicated value for a comforter purchased in 1990 for $250, and destroyed in 1995, is $219. To determine this figure, multiply $250 times the 1990 "year purchased" multiplier of 1.17 in the "1995 losses" column for an "adjusted cost" of $292.50. Then depreciate the comforter as expensive linen (item number 88, ALDG) for five years at a five-percent yearly rate to arrive at the item's value of $219 (i.e., $250 x 1.17 ADV = $292.50 @ 25% depreciation = $219).

This year's ADV table only covers the past twenty-seven years. To determine the ADV for items purchased prior to 1972 or for any other questions concerning this table, contact Mr. Lickliter, U.S. Army Claims Service, telephone number: (301) 677-7009 ext 313. Mr. Lickliter.

Tort Claims Note

What Constitutes A Proper Tort Claim?

The Federal Tort Claims Act (FTCA) is, by its terms, the exclusive negligence remedy for torts committed by United States employees, which arise in the United States.[4] A person seeking compensation under the FTCA must file an administrative claim before filing suit.[5] While the FTCA itself does not define what constitutes a claim, it permits the Attorney General of the United States to prescribe regulations governing claims.[6]

The Attorney General's Regulations (AGR)[7] define a claim as:

> (1) A demand for money damages in a sum certain;
> (2) Written notification of the incident giving rise to the claim; and
> (3) Signed by the claimant or a person properly authorized to sign, to include evidence of the authority to present a claim as agent, executor, administrator, parent, guardian or other representative.

Failure to present a proper administrative claim deprives the federal court of jurisdiction.[8] Therefore, courts have carefully scrutinized the AGR. Some courts, however, do not require claimants to comply with the AGR as a jurisdictional prerequisite to suit. These courts impose a mere minimal notice standard.[9] Courts, however, have universally accepted Requirements 1 and 2 under the minimal notice standard for federal jurisdiction.[10] Courts and government litigators have been reluctant to enforce AGR requirement 3 (proof of authority) on the grounds that "hyper-technicalities" should not preclude federal jurisdiction.

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1. Personnel Claims Note, *1997 Table of Adjusted Dollar Values*, ARMY LAW., July 1998, at 88.

2. U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES, CLAIMS, para. 11-14 (1 Apr. 1998).

3. U.S. DEP'T OF ARMY, PAM 27-162, CLAIMS PROCEDURES, para. 11-14f(5) (1 Apr. 1998) [hereinafter DA PAM 27-162].

4. *See* Legislative Reorganization Act of 1946, ch. 3, §§ 401-424, Pub. L. No. 79-601, 60 Stat. 812-844, 842.

5. 28 U.S.C.A. §§ 2401(b), 2672, 2675(a) (West 1998).

6. *Id.* § 2672.

7. 28 C.F.R. § 14.2(a) (1998).

8. 28 U.S.C.A. § 2675(a) (providing an exception for third-party complaints).

9. Kanar v. United States, 118 F.3d 527, 529 (7th Cir. 1997).

Three decisions, however, appear to rest on the principle that the claimant need not cooperate with the administrative process. In other words, the claimant must give the government adequate notice to permit the government to investigate, but need not cooperate in the administrative process, for example, by furnishing adequate proof of damages.[11]

In *Warren v. United States Department of Interior Bureau of Land Management*, the Ninth Circuit held that the AGR did not have a jurisdictional effect. In *Warren*, the Bureau of Land Management informed the plaintiff's attorney of the requirement to show his legal authority to present the claim. Although he failed to do so, the Ninth Circuit refused to dismiss the suit, ruling that the agency had considered the claim on its merits, even though the plaintiff did not comply with agency regulations.[12] In *Knapp v. United States*,[13] a wrongful death case, the Seventh Circuit ruled that a plaintiff could present proof of authority prior to filing of suit, even though he presented such proof more than two years after the claim accrued.[14] The court dismissed the argument that the AGR established jurisdictional prerequisites.[15] In *Conn v. United States*,[16] the Sixth Circuit ruled that when an attorney signs an administrative claim without presenting proof of authority to sign, the court is not deprived of jurisdiction even though a non-associated attorney is the one who files suit.

Does the FTCA require plaintiff's to exhaust administrative remedies prior to filing suit? While the circuit court opinions cited above would seem to indicate that it does not, in *McNeil v. United States*[17] the Supreme Court took a different approach. In *McNeil*, the Supreme Court held that the FTCA requirement to present a claim to the appropriate federal agency was evidence of congressional[18] intent that plaintiffs must completely exhaust executive remedies before they invoke the judicial process.

Based on *McNeil*, the Seventh Circuit reconsidered its position in *Kanar v. United States*, holding that the AGR are reasonable and the attorney signing the administrative claim must show evidence of his authority to represent the claimant.[19] Because the attorney refused to send evidence of his authority, the agency refused to proceed further; therefore, the settlement process, as intended by Congress, was frustrated. Implied in *Kanar*, is that if the agency had investigated in spite of the defect, the plaintiff could have filed suit since the administrative settlement process would not have been frustrated. Thus, the agency had authority to waive the signature requirement, based on the presumption that the attorney had a power of attorney. The *Kanar* court did not hold that the AGR are jurisdictional.

In the past, many courts have held that the FTCA statute of limitations is jurisdictional. When the Supreme Court held that the doctrine of equitable tolling applied to the United States,[20] the "jurisdictional" nature of the statute of limitations "fell by the wayside" as lower courts began applying the doctrine of equitable tolling to the FTCA.[21]

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10. Courts have generally upheld the sum certain requirement although they have strained to find a way to do so. *See, e.g.*, Molinar v. United States, 515 F.2d 246 (9th Cir. 1975) (holding that bills attached to the SF 95 state a sum certain); Williams v. United States, 693 F.2d 555 (5th Cir. 1982) (permitting the sum stated in a state suit to act to fill the requirement). *But see* Blue v. United States, 567 F. Supp. 394 (D. Conn. 1983) (awarding damages despite the complete absence of a sum certain). In *Blue*, the plaintiff was the only one of 53 prisoners injured in a fire to fail to name a sum in his claim. Because the government had extensive notice of his injuries as a result of several investigations, the judge permitted the award. *Cf.* Bernard v. Calejo, 17 F. Supp. 2d 1311 (S.D. Fla. 1998) (permitting the suit to proceed despite the complete absence of a sum certain). In *Bernard*, the government had exact information of the injuries as the plaintiff was an immigration detainee who was badly beaten by a guard while in custody. A number of cases have also dealt with the second requirement(written notification of the incident. *See, e.g.*, Wadsworth v. United States, 721 F.2d 503 (5th Cir. 1983); Adams v. United States, 615 F.2d 284 (1980 5th Cir.); Cook v. United States, 978 F.2d 164 (8th Cir. 1982); Tidd v. United States, 786 F.2d 1565 (11th Cir. 1986); Bembenista v. United States, 886 F.2d 493 (D.C. Cir. 1989). Requirement 2 does not require documentation, merely sufficient notice to permit investigation.

11. *See Adams*, 615 F.2d 284.

12. 724 F.2d 776 (9th Cir. 1984). *But see* House v. Mine Safety Appliance, Co., 573 F.2d 609 (9th Cir. 1978) (holding that the plaintiff's attorney had not shown his authority to sign the claim; thus, even though the government had not raised the issue, the plaintiff had not been presented a valid claim); Caidin v. United States, 564 F.2d 284 (9th Cir. 1977) (ruling that FTCA jurisdictional requirements were not met by failure to show authority). The majority in *Warren* neither discussed *House* or *Caidin* nor indicated why it was making a change in circuit case law. *Caiden*, however, involved a class action and is not squarely on point. *Cf.* Lansford v. United States, 570 F.2d 221 (8th Cir. 1977). *Lansford* is another class action suit.

13. 844 F.2d 376 (6th Cir. 1988).

14. Under the FTCA, a claimant must present the administrative claim within two years of the date of accrual. *See* 28 U.S.C.A. § 2401(b).

15. *See Knapp*, 844 F.2d at 378, 379 (citing Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981) and *Adams*, 615 F.2d at 289 (dealing with the plaintiff's failure to document damages)). *See also* Hawa v. United States, 22 F. Supp. 2d 353 (D. N.J. 1998) (holding that the plaintiff need not no present proof of authority).

16. 867 F.2d 916 (6th Cir. 1989).

17. 508 U.S. 105 (1993).

18. 28 U.S.C.A. § 2675(c).

19. *See* Kanar v. United States, 118 F.3d 527 (7th Cir. 1997).

Should an agency proceed with the administrative process without proof of authority to sign? Congress created the administrative process to alleviate the burden on the courts. It has long been the practice of the USARCS to try to settle administrative claims equitably, and to avoid suit. Frequently, the process continues without proof of authority. When a defective claim is acknowledged, the written acknowledgement should include the notice that the claim has not met one or more of the three requirements.[22] If the claim is paid, the claimant and attorney both must sign the release, which includes proof of the plaintiff's authority to sign. If the claim is denied and there is no proof of authority to sign, the claims office should inform the claimant and his attorney that suit may be barred because they did not present authority.

The administrative process provides both the claimant and the government with an economical and efficient way to resolve a claim. This process requires that both sides fully cooperate. When the claimant, through his attorney or otherwise, deliberately fails to comply with the administrative filing requirements, government litigators should try to return the case to the administrative process. Litigation attorneys should seek to dismiss the case only as a last resort. This policy will further the congressional intent that claims be handled administratively, and will avoid forcing courts to dismiss an otherwise meritorious case on a technicality. Mr. Rouse.

Reserve Officer Training Corps (ROTC) Cadet Training Injuries

The Federal Employees Compensation Act (FECA) authorizes benefits for senior ROTC[23] cadets and ROTC applicants[24] who suffer injury, disease, illness, disability, or death in the line of duty while performing any authorized ROTC training or traveling to or from the training site.[25] If the applicant or member is a member of a reserve component, including the National Guard,[26] veteran's benefits preempt his entitlement to FECA benefits. These individuals cannot collect benefits from both sources.

In *Brown v. United States*,[27] an advanced Army ROTC cadet, who was also an inactive reservist, fractured his right femur in a required physical fitness test. He filed suit under the FTCA[28] alleging his injury was aggravated by the negligent care he received in General Leonard Wood Army Community Hospital, where he was admitted as a family member of a retired Army member. He applied for and received the FECA benefits. The FECA benefits, however, stopped when he applied for and received benefits from the Department of Veterans Affairs (VA).[29] The court held that the incident-to-service doctrine barred the plaintiff's suit,[30] despite his plea that he was admitted to the hospital as a family member.[31]

In *Wake v. United States*,[32] an advanced Naval ROTC cadet was seriously injured when her active duty Marine Corps driver

20. Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990).

21. *See, e.g.*, Glarner v. Veterans Admin., 30 F.3d 697 (6th Cir. 1994); Schmidt v. United States, 933 F.3d 639 (8th Cir. 1991).

22. DA PAM 27-162, *supra* note 3, para. 2-8.

23. Senior ROTC (SROTC) is offered at college-level institutions and the college-level element of Military Junior Colleges. *See* U.S. DEP'T OF ARMY, REG. 145-1, 15, SENIOR RESERVE OFFICERS TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION AND TRAINING, Glossary, sec. II, (May 1992) [hereinafter AR 145-1]. The Junior ROTC Program (JROTC) conducted at high-school-level institutions is separate. There is no federal benefit program for JROTC nor can the injured cadet sue the United States under the FTCA for negligent or wrongful acts or omissions of JROTC instructors as such instructors are not federal employees but employees of the institution. *See* Cavazos v. United States, 776 F.2d 1263 (6th Cir. 1985); McFeely v. United States, 700 F. Supp. 414 (S.D. Ind. 1988) (holding that when the JROTC instructor is an active duty Army member, an FTCA suit may be allowed).

24. An applicant for membership is a student enrolled but not contracted during a semester or other enrollment term in a course that is part of SROTC instruction at an educational institution. AR 145-1, *supra* note 23, para. 3-49b.

25. A training site can be on or off campus. *See* 10 U.S.C.A. § 2109 (West 1998). Traditionally, training where FECA was authorized was limited to summer camp and practice cruises. This narrow interpretation of the 10 U.S.C.A. § 2109 resulted in an opinion by Administrative Law Division, OTJAG, pointing out that FECA coverage under 5 U.S.C.A. § 8140 contained no such limitation. FECA, Op. OTJAG (on file with author).

26. Advanced cadets in SROTC are required to be members of the inactive reserve or National Guard except in land grant institutions.

27. 151 F.3d 800 (8th Cir. 1998).

28. 28 U.S.C.A. §§ 1346(b), 1402, 2671-2680 (West 1998).

29. These benefits were in the amount of $1620 per month for permanent disability.

30. *See* Feres v. United States, 340 U.S. 135 (1950).

31. *Army Regulation 145-1* authorizes medical care at an Army medical treatment facility for SROTC cadets who are injured in line of duty. *See* AR 145-1, *supra* note 23, para. 3-49a.

32. 89 F.3d 53 (2nd Cir. 1996).

allegedly caused a vehicle accident while she was returning to her school following a pre-commissioning physical examination at Brunswick Naval Air Station. She sued the United States and various active duty members. She applied for and received VA benefits based on her prior active service. She then applied for and received FECA benefits. She dropped her FECA benefits, however, after discovering that FECA was her exclusive remedy against the United States.[33] The Department of Labor then reversed its award, as she was not entitled to FECA benefits for travel to and from a physical examination.[34] The court held that the incident-to-service doctrine barred her FTCA suit.[35]

In *Hudiburgh v. United States*,[36] an ROTC cadet who was not a reservist was injured in an on-campus rappelling exercise. He filed a claim under the FTCA based on negligent supervision and inadequate training. He was informed that his claim was not payable as his injury was caused by his own negligence. He then filed for and received FECA benefits. He later filed an FTCA suit. The court, however, held that his FTCA suit was barred, as FECA was his exclusive remedy against the United States.[37]

The exclusive remedy for senior ROTC cadets injured in line of duty while training on or off campus or while going to and from training is either FECA, or, if the cadet is a reservist or National Guard member, the VA benefit program. This is true even if the injury results from the negligent or wrongful act or omission of an active duty service member or federal employee. Mr. Rouse.

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33. *See* 5 U.S.C.A. § 8116(c) (West 1998).

34. *See id.* § 8140 (covering only travel to and from training).

35. *Wake*, 89 F.3d at 57.

36. 26 F.2d 813 (10th Cir. 1980).

37. *Id.* at 814.

Appendix

1998 Table of Adjusted Dollar Value

Year Purchased	Multiplier for 1998 Losses	Multiplier for 1997 Losses	Multiplier for 1996 Losses	Multiplier for 1995 Losses	Multiplier for 1994 Losses
1998	1				
1997	1.02				
1996	1.04	1.02			
1995	1.07	1.05	1.03		
1994	1.10	1.08	1.06	1.03	
1993	1.13	1.11	1.09	1.05	1.03
1992	1.16	1.14	1.12	1.09	1.06
1991	1.20	1.18	1.15	1.12	1.09
1990	1.25	1.23	1.20	1.17	1.13
1989	1.31	1.29	1.26	1.23	1.20
1988	1.38	1.36	1.33	1.29	1.25
1987	1.44	1.41	1.38	1.34	1.30
1986	1.49	1.46	1.43	1.39	1.35
1985	1.51	1.49	1.46	1.42	1.38
1984	1.57	1.55	1.51	1.47	1.43
1983	1.64	1.61	1.57	1.53	1.49
1982	1.69	1.66	1.63	1.58	1.54
1981	1.79	1.77	1.73	1.68	1.63
1980	1.98	1.95	1.90	1.85	1.80
1979	1.25	2.21	2.16	2.10	2.04
1978	2.50	2.46	2.41	2.34	2.27
1977	2.69	2.65	2.59	2.51	2.45
1976	2.86	2.82	2.76	2.68	2.60
1975	3.03	2.93	2.92	2.83	2.75
1974	3.31	2.26	3.18	3.09	3.01
1973	3.67	3.61	3.53	3.43	3.34
1972	3.90	3.84	3.75	3.65	3.55

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

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The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services,* paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1998-1999 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riverjj@hqda.army.mil. Major Rivera.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1998-1999 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
6-7 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Herb Ford MAJ Walter Hudson COL Thomas N. Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (301) 394-0558 e-mail: lampat@mail.va.gov
13-14 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG Joseph R. Barnes BG John F. DePue MAJ Mike Berrigan LTC Tony Helm COL Keith Hamack	COL Robert P. Johnston Office of the SJA, 12th LSO Building 13000 Fort Jackson, SC 29207-6070 (803) 751-1223
13-14 Mar	San Francisco, CA 75th LSO Marriott Hotel San Francisco Airport 1800 Old Bayshore Highway Burlingame, CA 94010 (650) 692-9100	AC GO RC GO Int'l - Ops Law Criminal Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Mike Smidt MAJ Walter Hudson Dr. Mark Foley	MAJ Douglas T. Gneiser 2447 Vallejo Street, #6 San Francisco, CA 94123 (415) 673-2347 dgneiser@flash.net
20-21 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John F. DePue LTC Paul Conrad MAJ Norm Allen Dr. Mark Foley	MAJ Tom Gauza 2636 Chapel Hill Dr. Arlington Heights, IL 60004 (312) 886-0480 (312) 886-3514 gauzatom@aol.com
10-11 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	BG Michael J. Marchand BG Thomas W. Eres MAJ Marty Sitler LTC Richard Barfield COL Keith Hamack	LTC Barbara Koll Office of the Commander 213th LSO 1650 Corey Boulevard Decatur, GA 30032-4864 (404) 286-6330/6364 work (404) 730-4658 bjkoll@aol.com

23-25 Apr	Dallas, TX 90th RSC/1st LSO/2nd LSO Crown Plaza Suites 7800 Alpha Road Dallas, TX 75240 (972) 233-7600	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John D. Altenburg BG Thomas W. Eres MAJ Rick Rousseau MAJ Tom Hong Dr. Mark Foley	MAJ Tim Corrigan 90th RSC 8000 Camp Robinson Road North Little Rock, AK 72118-2208 (501) 771-7901/8935 e-mail: corrigant@usarc-emh2.army.mil
24-25 Apr	Newport, RI 94th RSC Army War College 686 Cushing Avenue Newport, RI 02841	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph R. Barnes BG Richard M. O'Meara MAJ Moe Lescault MAJ Geoffrey Corn COL Thomas N. Tromey	MAJ Lisa Windsor/Jerry Hunter OSJA, 94th RSC 50 Sherman Avenue Devens, MA 01433 (978) 796-2140-2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil
1-2 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Boulevard Gulf Shores, AL 36547 (334) 948-4853 (800) 544-4853	AC GO RC GO Int'l - Ops Law Contract Law GRA Rep	BG Michael J. Marchand BG Richard M. O'Meara LCDR Brian Bill MAJ Thomas Hong Dr. Mark Foley	1LT Chris Brown OSJA, 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9303/9304 e-mail: browncr@usarc-emh2.army.mil
14-16 May	Kansas City, MO 8th LSO/89th RSC Embassy Suites (KC Airport) 7640 NW Tiffany Springs Parkway Kansas City, MO 64153-2304 (816) 891-7788 (800) 362-2779	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Thomas J. Romig BG John f. DePue MAJ Janet Fenton MAJ Michael Hargis Dr. Mark Foley	MAJ James Tobin 8th LSO 11101 Independence Avenue Independence, MO 64054-1511 (816) 737-1556 jtobin996@aol.com http://home.att.net/~sckndck/jag/

*Topics and attendees listed are subject to change without notice.
Please notify MAJ Rivera if any changes are required, telephone (804) 972-6383.

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-ZJA-P, 9700 Page Avenue, 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 which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, 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

1999

March 1999

1-12 March	31st Operational Law Seminar (5F-F47).
1-12 March	142nd Contract Attorneys Course (5F-F10).
15-19 March	44th Legal Assistance Course (5F-F23).
22-26 March	2d Advanced Contract Law Course (5F-F103).
22 March-2 April	11th Criminal Law Advocacy Course (5F-F34).
29 March-2 April	153rd Senior Officers Legal Orientation Course (5F-F1).

April 1999

12-16 April	1st Basics for Ethics Counselors Workshop (5F-F202).
14-16 April	1st Advanced Ethics Counselors Workshop (5F-F203).
19-22 April	1999 Reserve Component Judge Advocate Workshop (5F-F56).
26-30 April	10th Law for Legal NCOs Course (512-71D/20/30).
26-30 April	53rd Fiscal Law Course (5F-F12).

May 1999

3-7 May	54th Fiscal Law Course (5F-F12).
3-21 May	42nd Military Judge Course (5F-F33).
10-12 May	1st Joint Service High Profile Case Management Course (5F-F302).
17-21 May	2nd Advanced Trial Advocacy Course (5F-F301).

June 1999

7-18 June	4th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
7 June- 16 July	6th JA Warrant Officer Basic Course (7A-550A0).
7-11 June	2nd National Security Crime and Intelligence Law Workshop (5F-F401).
7-11 June	154th Senior Officers Legal Orientation Course

(5F-F1).

21-25 June	3rd Chief Legal NCO Course (512-71D-CLNCO).
14-18 June	29th Staff Judge Advocate Course (5F-F52).
21 June-2 July	4th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
21-25 June	10th Senior Legal NCO Management Course (512-71D/40/50).
28-30 June	Professional Recruiting Training Seminar

July 1999

5-16 July	149th Basic Course (Phase I-Fort Lee) (5-27-C20).
6-9 July	30th Methods of Instruction Course (5F-F70).
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July-24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).
21-23 July	Career Services Directors Conference

August 1999

2-6 August	71st Law of War Workshop (5F-F42).
2-13 August	143rd Contract Attorneys Course (5F-F10).
9-13 August	17th Federal Litigation Course (5F-F29).
16-20 August	155th Senior Officers Legal Orientation Course (5F-F1).
16 August 1999-26 May 2000	48th Graduate Course (5-27-C22).
23-27 August	5th Military Justice Mangers Course (5F-F31).
23 August-3 September	32nd Operational Law Seminar (5F-F47).

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Basic Course (Phase I-Fort Lee) (5-27-C20).
15 October-22 December	150th Basic Course (Phase II-TJAGSA) (5-27-C20).
12-15 October	72nd Law of War Workshop (5F-F42).
18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November 3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November 3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).

6-10 December — 1999 Government Contract Law Symposium (5F-F11).

13-15 December — 3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January — 2000 USAREUR Tax CLE (5F-F28E).

10-14 January — 2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).

10-21 January — 2000 JAOAC (Phase II) (5F-F55).

17-28 January — 151st Basic Course (Phase I-Fort Lee) (5-27-C20).

18-21 January — 2000 PACOM Tax CLE (5F-F28P).

26-28 January — 6th RC General Officers Legal Orientation Course (5F-F3).

28 January-7 April — 151st Basic Course (Phase II-TJAGSA) (5-27-C20).

31 January-4 February — 158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February — 73rd Law of War Workshop (5F-F42).

7-11 February — 2000 Maxwell AFB Fiscal Law Course (5F-F13A).

14-18 February — 24th Administrative Law for Military Installations Course (5F-F24).

28 February-10 March — 33rd Operational Law Seminar (5F-F47).

28 February-10 March — 144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March — 46th Legal Assistance Course (5F-F23).

20-24 March — 3rd Contract Litigation Course (5F-F102).

20-31 March — 13th Criminal Law Advocacy Course (5F-F34).

27-31 March — 159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April — 2nd Basics for Ethics Counselors Workshop (5F-F202).

10-14 April — 11th Law for Legal NCOs Course (512-71D/20/30).

12-14 April — 2nd Advanced Ethics Counselors Workshop (5F-F203).

17-20 April — 2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May — 56th Fiscal Law Course (5F-F12).

1-19 May — 43rd Military Judge Course (5F-F33).

8-12 May — 57th Fiscal Law Course (5F-F12).

June 2000

5-9 June — 3rd National Security Crime and Intelligence Law Workshop (5F-F401).

5-9 June — 160th Senior Officers Legal Orientation Course (5F-F1).

5-14 June — 7th JA Warrant Officer Basic Course (7A-550A0).

5-16 June — 5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).

12-16 June — 4th Senior Legal NCO Course (512-71D-CLNCO).

12-16 June — 30th Staff Judge Advocate Course (5F-F52).

19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Professional Recruiting Training Seminar

3. Civilian-Sponsored CLE Courses

1999

March

25 March ICLE	Courtroom Techniques Marriott North Central Hotel Atlanta, Georgia
25 March ICLE	Mediation Advocacy Atlanta, Georgia
26 March ICLE	Jury Selection and Persuasion Sheraton Hotel Buckhead, Atlanta

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

For detailed information on mandatory continuing legal education jurisdiction and reporting dates for other states, see the September 1998 issue of *The Army Lawyer*.

Current Materials of Interest

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

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1998 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the September 1998 issue of *The Army Lawyer.*

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3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1998 issue of *The Army Lawyer.*

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1998 issue of *The Army Lawyer.*

5. Article

The following information may be useful to judge advocates:

Paul Brest, *The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasise Method*, 50 Fla. L. Rev. 753 (September 1998).

6. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 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 or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or 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 Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.