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The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the Index to Legal Periodicals, the Current Law Index, the Legal Resources Index, and the Index to U.S. Government Periodicals.

Address changes for official channels distribution: Provide changes to the Editor, The Army Lawyer, TJAGSA, 600 Massie Road, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or e-mail: stroncj@hqda.army.mil.

Issues may be cited as Army Law., [date], at [page number].

Periodicals postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

"To Be or Not to Be, That is the Question" Contemporary Military Operations and the Status of Captured Personnel

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Introduction

On Wednesday, 31 March 1999, somewhere along the border between Yugoslavia and Macedonia, three soldiers from the 1st Infantry Division were captured by Yugoslav forces, and transported to Belgrade.[1] In the first official statements related to the incident the following morning, neither President Clinton nor Secretary of Defense Cohen referred to the three soldiers as prisoners of war.[2] Instead, both leaders referred to the three soldiers as having been "illegally abducted."[3] Later that same day, Department of Defense Spokesman Kevin Bacon stated in response to a question why the three had not been declared prisoners of war: "We consider them to be [prisoners of war]. We consider that–we believe that they are–we assert that they are covered by the Geneva Convention, which, of course, gives them a series of internationally recognized protections. At a minimum they are entitled to [prisoner of war] status."[4] On that same day, Department of State Spokesman James Rubin asserted both points in the same brief–the three U.S. soldiers were entitled to prisoner of war status, but they also had been illegally detained, and therefore must be immediately released.[5] Contrary to U.S. demands, the three soldiers were not immediately released.

Approximately two weeks later, on 16 April 1999, the Kosovo Liberation Army captured a Yugoslav Army lieutenant.[6] According to the *New York Times*: "The Pentagon immediately declared the officer a prisoner of war. Quick to draw a distinction with Yugoslavia's treatment of the three American soldiers captured along Macedonia's border on 31 March, officials here emphasized that the officer would be treated in accordance with the Geneva Convention."[7] Pentagon Spokesman Kevin Bacon indicated that unlike the immediate release that the United States deemed appropriate for the U.S. soldiers in Yugoslav custody, this soldier would "remain in our custody until the hostilities end."[8]

The events surrounding the status and treatment of personnel captured during Operation Allied Force demonstrate the importance of understanding both the conditions that trigger prisoner of war protections, and the procedures that the Department of Defense established for implementing these protections. The purpose of this article is to summarize the relevant international law and domestic policy related to prisoner of war issues. The first section addresses the conditions which, as a matter of international law, bring the protections afforded to prisoners of war into force. The second section of this article examines the key provisions of this law, which must be complied with during military operations.

Enhancing this understanding is critical for a very simple reason: to reduce the potential risk for members of the Armed Forces of the United States who are captured and might be denied the benefits of this law.[9] Confused or conflicting assertions made by national level authorities regarding the legal status of captured U.S. personnel increases the risk that these personnel will be denied the benefits of the law related to prisoners of war. This risk will probably also increase if the detain-

1. Office of the Assistant Secretary of Defense (Public Affairs), Department of Defense News Briefing, 1 Apr. 1999 [hereinafter DOD Press Briefing].

2. Laurie Asseo, *The Kosovo Conflict: 3 POWs Could Be In Serbia For A While*, STAR-LEDGER (Newark, N.J.) Apr. 2, 1999, at 16.

3. *Id.*

4. DOD Press Briefing, *supra* note 1.

5. United States Department of State, Daily Press Briefing (DPB #42), Apr. 1, 1999 [hereinafter DOS Press Briefing].

6. Stephen Lee Myers, *Serb Officer, Captured By Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999, at A6.

7. *Id.*

8. Office of the Assistant Secretary of Defense (Public Affairs), Department of Defense News Briefing, 17 Apr. 1999.

9. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3364 [hereinafter GPW].

ing power perceives that the U.S. military is failing to comply with legal obligations owed to their personnel held in U.S. custody. In short, whenever U.S. military personnel are placed at risk of capture by a belligerent force, leaders at all levels must be fully informed of what the law of war requires, and the consequences of sending conflicting signals about the status of U.S. personnel.

Do Labels Matters?

Placing the interests of captured personnel above political or diplomatic concerns is not a novel concept. Indeed, the Official Commentary to the Prisoner of War Convention[10] embraces this approach when it states that "it must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve [s]tate interests."[11] As the debates surrounding the status of personnel captured during Operation Allied Force demonstrate, this is a principle that is more likely to be challenged today than ever before.

Controversies over the legal basis for military operations seem to be continually bleeding over into the issue of what law applies to the combatants involved in such operations. A recent statement made by an International Committee of the Red Cross (ICRC) representative emphasized that such considerations should not determine when the law of war applies. The ICRC representative made this statement in response to the debate over whether the capture of the three U.S. personnel was "illegal," which is an issue that turns on the nature of the conflict between the North Atlantic Treaty Organization (NATO) member states and Yugoslavia. According to the ICRC representative:

> On the basis of the Geneva Conventions, we are not seeking release–we are seeking protection . . . Our view is that when two different countries are at war with each other, then the members of their armed forces are considered enemy forces. And if they are captured, they are under this protection. What is legal, what is illegal? We are not the institution who decides that. We are the ones who say 'You captured them, you have to treat them in a humane way.'[12]

This trend is apparently the result of the changing terminology related to the conduct of military hostilities. Before the end of the Cold War, U.S. forces fought in "wars": the World Wars, the Korean War, and the Vietnam War. As a result, there was little difficulty understanding what law applied to such situations: the law of war. Americans now, however, refer to hostilities as "operations": Operation Urgent Fury, Operation Just Cause, Operation Restore Hope, Operation Deny Flight, and Operation Deliberate Force. Even "operations" that take on all the characteristics of state-on-state conflict, and therefore seem to meet the pragmatic definition of war, are not labeled "wars." Instead, we remember Operations Desert Storm, and now Operation Allied Force.

While such terminology nuances should not be relevant to determining what law applies to protect captured personnel, Operation Allied Force demonstrates the confusion caused by asserting that the "law of war" applies to "operations" not acknowledged as war. The following exchange from a recent Department of State Press Briefing exemplifies this point:

> QUESTION: Have you been working with the Swedes, the protecting power in Belgrade? Have you heard back from them?
> MR. RUBIN**:** I don't have any new information to report. Clearly, under the Geneva Convention which would apply–whether or not we're at a state of war it applies–the Serb authorities are responsible to, under the convention, to pursue through the protecting power, allowing access to them, and also access through the ICRC. That is required.
> QUESTION: You sort of got into it just there, the crux of the whole question here. You don't think these men are prisoners of war? The Serbs aren't calling [them] prisoners of war. Can you explain what's behind all of that?
> MR. RUBIN: Well, obviously there's armed conflict between NATO forces and the Serbs in Serbia and in Kosovo. But as far as the legal definition of a state of war and all that would apply, it's just not relevant to this circumstance. All I'm saying is that there is very clear international law that applies here
>
> . . . .
>
> QUESTION: Jamie, I may have missed this at the beginning but did you say that they are to be treated as prisoners of war under the Geneva Convention?
> MR. RUBIN**:** What I said was they are prisoners, clearly. The Geneva Convention provides for certain treatment. We're not at a state of war but, nevertheless, the international lawyers advised me that the require-

10. COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet et al. eds., 1958) [hereinafter OFFICIAL COMMENTARY].

11. *Id.*

12. Stephen Lee Myers, *Serb Officer, Captured By Rebels, Held by U.S.*, N.Y. TIMES, Apr. 17, 1999, at A6 (quoting Doris Pfister, spokeswoman for the ICRC).

ments – that they be treated humanely, that they get necessary medical attention, that they're protected from any form of coercion, that they get adequate food and clothing, that they get access by our protecting power and the International Committee of the Red Cross–still pertain.[13]

Mr. Rubin had it right–the entitlement to prisoner of war status under the law of war is in no way contingent on acknowledging a state of war between belligerents. Perhaps more importantly, asserting that prisoner of war status applies for captured U.S. personnel should not be considered acknowledging a state of war between the U.S. and the detaining power. The following exchange between Pentagon Spokesman Kevin Bacon and a Pentagon correspondent on the day the capture of the three U.S. soldiers was announced highlights this commonly held misconception:

> Q: Ken, is the United States at war with Yugoslavia?
> A: We are–without getting into the technicalities, we have made very clear what our goals are, and we will continue to attack the Federal Republic of Yugoslavia until our military goals are met.
> Q: If I could just follow up. By asserting prisoner of war status for these three captured soldiers, isn't that a tacit admission that the United States is at war with Yugoslavia?
> A: Absolutely not. By international law the Geneva Convention applies to all periods of hostilities.
> Q: Can I follow up on that? The Secretary in Norfolk, before you just said what you did from the podium, called them "illegal detainees." Why the sudden change?
> A: He said that their status was subject to review, and it's been reviewed, and the government has decided that the Geneva Convention applies.[14]

In short, labels do not matter. Instead, the *de facto* state of hostilities between two states is all that is required to trigger the Prisoner of War Convention. This is not only the clear intent of the law, but also a point that the U.S. District Court for the Southern District of Florida emphasized in *United States v. Noriega*,[15] discussed below.

What Triggers Prisoner of War Protections?

Controversy over when the protections of the law of war would apply to captured combatants is not a new trend.[16] According to the first comprehensive multi-lateral law of war treaty, The Hague Convention of 1899,[17] the "Laws and Customs of War on Land were applicable 'in case of war.'"[18] Although neither the Hague Convention of 1907[19] nor the 1929 Prisoner of War Convention[20] contained a similar explicit reference to war, "the very title and purpose of the Conventions made it clear that they were intended for use in war-time, and the meaning of war seemed to require no definition."[21] What constituted "war," however, was defined by general international law, and did not always apply to conflict between the armed forces of two states, particularly when one or both of the states denied that a state of war existed between them.[22]

After World War II, the confusion over when the law of war related to prisoners of war came into force was rectified. According to the Official Commentary to the Third Geneva Convention:

> It was necessary to find a remedy to this state of affairs and the change which had taken place in the whole conception of such Conventions pointed the same way . . . .
>
> The Preliminary Conference of National Red Cross Societies, which the International

13. DOS Press Briefing, *supra* note 5.

14. DOD Press Briefing, *supra* note 1.

15. 806 F. Supp. 791 (S.D. Fla. 1992).

16. OFFICIAL COMMENTARY, *supra* note 10, at 19-23.

17. Hague Convention No. II Respecting the Laws and Customs of War on Land, (1899) [hereinafter Hague II], *reprinted in* SHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT 63 (1988) (this first Hague Convention "succeeded in adopting a Convention on land warfare to which the *Regulations* are annexed").

18. OFFICIAL COMMENTARY, *supra* note 10, at 19 (quoting Hague II, *supra* note 17, art. 2).

19. Hague Convention No. IV Respecting the Laws and Customs of War on Land, (1907) [hereinafter Hague IV] *reprinted in* DEP'T OF THE ARMY, PAM 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

20. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, *reprinted in* SHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT 339 (1988).

21. OFFICIAL COMMENTARY, *supra* note 10, at 19.

> Committee of the Red Cross convened in 1946, fell in with the views of the Committee and recommended that a new Article, worded as follows, should be introduced at the beginning of the Convention: "The present convention is applicable between the High Contracting Parties from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take."
>
> The Conference of Government Experts recommended in its turn that the Convention should be applicable to "any armed conflict, whether the latter is or is not recognized as a state of war by the parties concerned," and also to "cases of occupation of territories in the absence of any state of war."[23]

As the Official Commentary indicates, "There was no discussion at the 1949 Diplomatic Conference, on the Committee's proposal . . . the experience of the Second World War had convinced all concerned that it was necessary."[24]

Common Article 2 of the Four Geneva Conventions of 1949 implemented this recommendation.[25] This article states:

> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[26]

Addressing the pragmatic significance of this new "armed conflict" standard dictating the scope of application, the Official Commentary states:

> By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.[27]

The Official Commentary also explains that the term "armed conflict" was used specifically for the purpose of ensuring law of war application was based on pragmatic, and not political or diplomatic considerations:

> It remains to ascertain what is meant by "armed conflict." The substitution of this much more general expression for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war." A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. *Any difference arising between two States*

22.

> Since 1907 experience has shown that many armed conflicts displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions.

OFFICIAL COMMENTARY, *supra* note 10, at 19-20.

23. *Id.* at 20 (quoting REPORT OF THE WORK OF THE PRELIMINARY CONFERENCE OF NATIONAL RED CROSS SOCIETIES FOR THE STUDY OF THE CONVENTIONS AND OF VARIOUS PROBLEMS RELATIVE TO THE RED CROSS (Geneva, July 26-August 3, 1946); REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS (Geneva, April 14-26, 1947)).

24. *Id.* at 20-21.

25. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2-3, T.I.A.S. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, art. 2-3, T.I.A.S. 3363 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 2-3, T.I.A.S. 3364; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, art. 2-3, T.I.A.S. 3365 [hereinafter GC].

26. *See supra* note 25.

27. OFFICIAL COMMENTARY, *supra* note 10, at 22-23.

> *and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2.*[28]

Finally, the Official Commentary specifically addresses the all too frequent occurrence of not just one, but both states involved in an armed conflict denying that a state of war exists between them:

> The Convention provides only for the case of one of the Parties denying the existence of a state of war. What would the position be, it may be wondered, if both Parties to an armed conflict were to deny the existence of a state of war? Even in that event it would not appear that they could, by tacit agreement, prevent the Conventions from applying. *It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.*[29]

This evidence, when coupled with the plain language of Article 2 of the Prisoner of War Convention, clearly indicates that applying prisoner of war protections is intended to be based on a purely *de facto* standard, with no "political" influence whatsoever.[30] Interestingly, this has long been the position of a distinguished Department of Defense (DOD) law of war expert, Mr. Hayes Parks.[31] Mr. Parks has advised The Judge Advocate General of the Army on every major prisoner of war issue to arise since Operation Urgent Fury in 1983.

In a recent interview with the authors, Mr. Parks asserted his support for applying prisoner of war protections based on a purely *de facto* standard. This standard rejects the relevance of whether the United States, or an adversary, considers hostilities to amount to a state of war. Less relevant is whether the operation in question is considered a war for domestic legal purposes, such as the War Powers Resolution.[32] According to Mr. Parks, he has provided advice consistent with this *de facto* standard on numerous occasions.[33] These included the treatment of captured Cuban personnel during Operation Urgent Fury; the status of downed U.S. Navy Lieutenant Robert Goodman upon capture by Syrian forces; the treatment of captured personnel during Operation Just Cause in 1989; the treatment of captured personnel, and the status of U.S. personnel captured by Iraqi forces during Operation Desert Storm in 1991; and the status of personnel captured during Operation Allied Force in 1999.[34]

For the U.S. government, the opportunity to test the validity of the proposition that a pure *de facto* standard dictates when the law of war applies arose as a result of the capture of General Manuel Noriega during Operation Just Cause in 1989. In that case, the Federal District Court for the Southern District of Florida confronted the issue of whether General Noriega, then in U.S. custody pending sentencing for violations of U.S. law, was entitled to prisoner of war status.[35] In this rare opportunity for the judicial branch to address when the law of war applies to a particular conflict, the court framed the issues as follows:

> Before the Court are several questions, but the ultimate one appears to be whether or not the Geneva Convention prohibits incarceration in a federal penitentiary for a prisoner of war convicted of common crimes against the United States. To resolve this issue the Court must consider three interrelated questions: (1) what authority, if any, does the Court have in this matter; (2) *is Geneva III applicable to this case*; (3) if so, which of its provisions apply to General Noriega's confinement and what do they require?[36]

In addressing whether Geneva III applied, the court noted that, throughout the case, the government had "obviated the need for a formal determination of General Noriega's status"[37] by indi-

28. *Id.* at 23 (emphasis added).

29. *Id.*

30. *See* GPW, *supra* note 9, arts. 2-3.

31. Mr. W. Hayes Parks (Colonel Retired, United States Marine Corps), has occupied the position of Special Assistant to the Judge Advocate General of the Army for Law of War Matters during all conflict operations since the war in Vietnam. Mr. Parks also serves as an Adjunct Professor of Law, George Washington University School of Law, and American University School of Law. Mr. Parks has written and lectured extensively on law of war related issues.

32. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

33. Interview conducted with W. Hayes Parks, Special Assistant to The Judge Advocate General of the Army for Law of War Matters, Office of the Judge Advocate General, U.S. Army, Rosslyn, Va. (Apr. 23, 1999).

34. *Id.*

35. *See* United States v. Noriega, 806 F. Supp. 791 (S.D. Fla. 1992).

36. *Id.* at 793 (emphasis added).

37. *Id.* at 794.

cating that "Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention."[38] The court also noted, however, that the government had never "agreed that [Noriega] was, in fact, a prisoner of war."[39] Instead, the government asserted that it had never made a formal decision on the issue of whether personnel captured during Operation Just Cause were legally entitled to prisoner of war status.[40] The court then identified the limited value of this type of policy-based application of the law of war[41] without a formal acknowledgment of its binding nature:

> The government's position provides no assurances that the government will not at some point in the future decide that Noriega is *not* a [prisoner of war], and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against.[42]

Based on the conclusion that this policy-based application of the law of war did not definitively resolve the issue of General Noriega's status, the court went on to determine whether Geneva III applied. In holding that the Convention applied to the General, the court indicated the significance of the language of Article 2 and the Official Commentary related thereto and the irrelevance of the "label" used by the government to characterize the conflict:

> The Convention applies to an incredibly broad spectrum of events. The government has characterized the deployment of U.S. Armed Forces to Panama on [20 December] 1989 as the "hostilities" in Panama (citation omitted). However the government wishes to label it, what occurred in late 1989-early 1990 was clearly an "armed conflict" within the meaning of Article 2. Armed troops intervened in a conflict between two parties to the treaty.[43]

In reaching the conclusion that Operation Just Cause triggered the protections of the Geneva Conventions, the court relied heavily on the Official Commentary. Perhaps more importantly, the court also relied on the fact that "the government has professed a policy of liberally interpreting Article 2."[44] The court then cited the following Department of State position regarding applying the Geneva Conventions:

> The United States is a firm supporter of the four Geneva Conventions of 1949 . . . . As a nation, we have a strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. Armed Forces. Consequently, the United States has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions contained in common Article 2 are not met. In this respect, we share the views of the International Committee of the Red Cross that Article 2 of the Conventions should be construed liberally.[45]

The court went on to hold that General Noriega was indeed legally entitled to prisoner of war status under Geneva III.

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38. *Id.*

39. *Id.*

40. The court cited the following language from government filings in support of this conclusion: "the United States has made no formal decision with regard to whether or not General Noriega and former members of the PDF charged with pre-capture offenses are prisoners of war . . . ." *Id.* at n.4 (quoting Government Resp. to Def. Post-Hearing Memo. of Law, Sept. 29, 1992 at 8).

41. This seems to be exactly what is required by the DOD Law of War Program, as implemented by Chairman of the Joint Chiefs of Staff Instruction 5810.01, which requires:

> 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 otherwise directed by higher competent authorities, will apply law of war principles during all operations that are categorized as Military Operations Other Than War.

CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01].

42. *Id.* In a supporting footnote, the court stated: "There appears to be some cause for concern about the government changing its position. After consistently stating that the General has been, and will continue to be, treated as a prisoner of war, the court detected a slight shift in the government's argument at the post-sentencing hearing." *Id.* n.5.

43. *Id.* at 795.

44. *Id.*

45. *Id.* (quoting Letter from the State Dept. to the Attorney General of the United States, Jan. 31, 1990, at 1-2).

This case seems to establish a clear precedent on the issue of when the United States is obligated to acknowledge that the law of war applies to captured personnel. The court rejected any "political" considerations as to the nature of the conflict between U.S. forces and the Panamanian Defense Forces. Instead, the court followed the Official Commentary guidance to apply a *de facto* test for determining applicability. The court succinctly rejected the significance of the label provided by the executive branch for the conflict. This unusual judicial interpretation of the law of war should serve as a guide for all future national level decisions related to when the law of war applies to specific military operations. Based on the "principles and spirit" of the law of war, this approach will enhance the likelihood that captured U.S. personnel will be treated as prisoners of war in accordance with international law.

Prisoner of War Issues at the Operational and Tactical Level

As discussed above, there may be a host of political and legal reasons to classify a crisis or military operation as something other than "international armed conflict." These pressures at the national level may leave soldiers in the field with a less than precise legal description of the conflict that they are about to enter.

Therefore, commanders and their legal advisors at the operational and tactical level may be confused as to what law applies in a given military operation. Commanders at these levels cannot afford to play guessing games as to what type of conflict they are entering. Their legal advisors should not be expected to decipher the applicable law. Therefore, national level leaders drafted policy gap-fillers, which nullify the need to define the nature of a conflict at commands below the strategic level. The purpose of this section is to highlight this national policy, and discuss the key provisions of the law related to prisoner of war treatment that U.S. forces must comply with at all times.

When the national level authorities conclude that a conflict is an international armed conflict, determining what law applies is relatively easy. The entire body of the law of war applies. It is less clear when the national command authority refuses to classify the operation as such. Regardless of how a conflict is defined at the strategic or national level, there is no shortage of guidance on how tactical and operational commands must handle captured personnel.[46]

Until otherwise directed by competent higher authority, commanders and their legal advisors should assume that the full body of the law of war regarding the treatment of captured personnel applies in all military operations. This baseline rule is not contingent on how the operation might later be characterized.[47]

Initial Disposition

The Secretary of the Army is the executive agent for administering the DOD Prisoner of War Program.[48] Personnel captured or detained by U.S. Armed Forces are to be handed over to the U.S. Army Military Police as soon as practical.[49] Once in the "care, custody, or control"[50] of U.S. forces, captured or detained personnel may not be transferred to any other entity outside the DOD without the approval of the Assistant Secretary of Defense for International Security Affairs (ASD (ISA)). The Judge Advocate General of the Army, in coordination with the Army General Counsel and the General Counsel of the

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46. Part of the impetus for this article was the numerous questions that the International and Operational Law Department at The Judge Advocate General's School received "from the field" regarding the law of war relative to the treatment of prisoners of war as a result of the American and Serbian soldiers captured in and around Kosovo. Questions came from every level within the DOD. While the International and Operational Law Department is a resource, it does not have the authority to provide official opinions on behalf of the DOD, the U.S. Army or The Judge Advocate General.

47. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998) [hereinafter DOD DIR. 5100.77]. "The Heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." *Id.* para. 5.1, 5.3. The directive requires, therefore, as a matter of policy, that the law of war apply to all conflicts. Although "conflict" is not defined, a plain meaning interpretation suggests that DOD personnel are to comply with the full body of the law of war whenever they are involved in hostilities or where hostilities are likely. In military operations where there is less of a chance of actual combat, the "principles and spirit of the law of war" must be followed. The Directive does not explain what constitutes the principles of the law of war. Therefore, at the operational and tactical level, the law of war should be applied in non-conflicts unless and until directed otherwise. In implementing this directive, the Chairman of the Joint Chiefs of Staff established:

> 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 otherwise directed by competent authorities, will apply the law of war principles during all operations that are categorized as Military Operations Other Than War.

JCS INSTR., *supra* note 41, para. 4a.

48. DEP'T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES, para. D2 (Aug. 18, 1994) [hereinafter DOD DIR. 2310.1]. The principal assistant to The Judge Advocate General in this area is the Chief, International and Operational Law, Office of the Judge Advocate General.

49. *Id.* para C4.

50. *Id.* para. C3.

DOD, is specifically designated as the legal advisor for the Enemy Prisoner of War Program.[51] Commanders of the Unified Combatant Commands have the overall responsibility for prisoner of war operations in their theaters and are directed to issue appropriate plans, policies, and directives, consistent with this DOD program.[52]

As the DOD executive agent, the Secretary of the Army has promulgated a multi-service regulation covering how enemy prisoners of war, retained personnel, civilian internees and other detainees are handled. This regulation applies to the Army, Navy, Air Force, and Marine Corps and their reserve components when on active duty in a Title 10 status.[53] This regulation seeks to implement international law, "both customary and codified,"[54] related to captured and detained personnel during military operations, including military operations other than war. In cases where there are discrepancies or conflicts between the regulation and codified international law, however, the codified law (usually in the form of treaties) takes precedence.[55]

As Executive Agent, the Secretary of the Army's policy is that all persons "captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation."[56] Moreover, all persons taken into custody are to be afforded the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)[57] until their legal status is determined by competent authority.[58]

This regulation, therefore, establishes a clear mandate: U.S. forces must comply with the full body of the law of war with respect to captured enemy personnel, regardless of the type of conflict. Thus, commanders at the operational and tactical level need not engage in "conflict characterization" for the purposes of handling captured or detained personnel.[59] These command levels must be prepared to comply with all of the law in this area during military operations.

Primary Protections Required by the Law of War

The policies cited above are silent as to what requirements in the law of war rise to the level of "principle." The significance of this silence is that it results in an absence of definition of what law of war rules are cognizable under this national level mandate. This lack of specific policies is beneficial in that it provides flexibility to the commander on the ground. From the perspective of the legal advisor, however, the benefit can also be a curse, due to the lack of specificity regarding what the commander *must* do. Therefore, this article offers the following as "primary protections" that must be afforded to all captured personnel in all military operations.

The GPW establishes the protections owed to captured enemy personnel by a detaining power.[60] This comprehensive treaty contains 143 articles and numerous annexes. While all of these provisions are technically binding during international armed conflict, some are logically more significant than others. These core provisions are the "primary protections" or "principles of the convention."

In operations short of armed conflict, some of the less significant protections[61] arguably fall short of being "principles" of the law of war.[62] Instead, they may be more accurately described as the "details" or "specifics" of the law of war.

51. *Id.* para. D2g.

52. *Id.* para. D4.

53. U.S. DEP'T OF ARMY, REG. 190-8, U.S. DEP'T OF NAVY INSTR. 3461.6, U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 31-304, U.S. MARINE CORPS ORDER 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (Oct. 1, 1997) [hereinafter AR 190-8].

54. *Id.* para. 1-1b.

55. *Id.* para. 1-1b(4).

56. *Id.* para. 1-5a(1).

57. GPW, *supra* note 9.

58. AR 190-8, *supra* note 53, para. 1-5a(2).

59. GPW, *supra* note 9. Article 2, referred to as Common Article 2 because it is common to all four of the 1949 Geneva Conventions, explains that the Geneva Conventions apply in declared wars and in any other conflict between two or more contracting parties "even if the state of war is not recognized by one of them." *Id.* This does not mean, however, that the characterization issue is irrelevant. Requirements based on policy, rather than law, arguably give the commander more flexibility. Therefore, judge advocates should be prepared to characterize the conflict–to inform a commander when he is required to act as a matter of law, rather that policy, or vice versa.

60. AR 190-8, *supra* note 53, para. 1-1a(3). Although the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) includes provisions on prisoners of war, the United States is not a party to Protocol I. Furthermore, the articles related to prisoners of war in Protocol I focus more on prisoner of war "status" rather than the protections owed to prisoners of war. Hague IV, Annex to the Convention, also contains rules regarding the treatment of prisoners of war. This Convention, however, was expanded and modified by the GPW.

It may not always be possible, or even proper, to comply with every requirement of the GPW in all military operations short of war. In such cases, the commander should try to adhere to the "spirit"[63] of the GPW, and should, at a minimum, provide the primary protections, or principles, delineated therein. What follows, then, is a suggested list of the core protections provided by the law of war, that is, those that may be viewed as the principles of the law of war relative to the treatment of prisoners of war.

Non-Combatant Status—Perhaps the most important of all the benefits afforded to a prisoner of war is that of non-combatant status[64]–the prohibition against killing or wounding an enemy who has laid down his arms.[65] This prohibition applies for the duration of detention. Thus, not only is the detainee no longer a legitimate target, the detaining party may not kill captive prisoners.[66]

Humane Treatment—Prisoners must be treated humanely at all times.[67] Captured personnel should be protected from murder, mutilation, violence, torture, corporal punishment, sensory deprivation, collective punishment, and humiliation.[68] Prisoners must, upon request, provide their name, rank, service number, and date of birth.[69] No force or coercion may be used to compel a prisoner to provide this information, however. Instead, such a prisoner should be treated as if he holds the lowest enlisted rank.[70] Prisoners may also be interrogated and asked any question concerning anything believed by a commander or intelligence operative to be within the prisoner's knowledge. The use of physical or mental coercion to acquire information is prohibited, no matter how valuable that information may be.[71]

This seemingly vague and ambiguous standard of humane treatment is actually the crux of the Geneva Conventions.[72] In creating guidelines for the handling of captured enemy personnel, U.S. personnel should adopt a "do unto others" approach. Humane treatment will usually be provided if U.S. personnel "test" their actions against a simple standard: would they consider their treatment of captured enemy personnel objectionable if similar treatment was afforded their fellow soldiers or subordinates in the hands of the enemy? Importantly, captured enemy personnel are generally referred to as prisoners of war; they are not to be thought of as "criminals."

No Medical or Scientific Experiments—Largely as a result of wholly meritless medical experiments conducted on prisoners of war during World War II,[73] the GPW prohibits conducting

61. *See, e.g.*, GPW, *supra* note 9, art. 28 ("Canteens be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use."; *id.* art. 38 ("The Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment."); *id.* art. 120 (stating that prisoners are to have wills drawn up so as to satisfy the conditions of validity imposed by their own country); *id.* art. 77 (stating that the will should be drafted after consulting with an attorney).

62. DOD DIR. 5100.77, *supra* note 47.

63. *Id.*

64. 'Prisoner of war status" is a legal term of art. To receive the full benefits of the law of war relative to the treatment of prisoners of war, a captured enemy must meet the conditions laid out in Articles 2 and 4 of the GPW. Article 2 describes the type of conflict that must be involved to trigger the convention. Assuming the Article 2 requisite conflict requirement is met, the captive must then meet the individual criteria laid out in Article 4. Where status is questionable, the captive must be treated as a prisoner of war with all the protections that status provides, unless and until he or she is determined to not be entitled to status by a competent tribunal. GPW, *supra* note 9, art. 5. The proper procedures for conducting an "Article 5 Tribunal" are established in AR 190-8, *supra* note 53, para. 1-6. This article presupposes that the requirements of status are met or, that as a result of policy reflected in the DOD Law of War Program, DOD DIR. 5100.77, *supra* note 47, that treatment as a prisoner of war is extended even though the captive may not be entitled to status as a matter of law.

65. *Id.* art. 13; Hague IV, *supra* note 19, art. 23(c).

66. GPW, *supra* note 9, art. 13; *but see* GPW, *supra* note 9, ch. III. Prisoners of war may be charged and punished by the detaining power for post capture violations of the detaining power's law, providing that its own personnel are subject to the same laws and procedures. This may include the imposition of the death penalty for particularly egregious offenses, such as the murder of fellow prisoners of war. *Id.* art. 42. Deadly force may used to prevent escape after warnings appropriate to the circumstances are given. According to the official commentary, warnings may be given verbally, may be given by means of whistles, bells, etc., or given by warning shots. The official commentary points out that since the GPW requires "warnings," at least two should be given. OFFICIAL COMMENTARY, *supra* note 10, at 246.

67. *Id.* art. 13.

68. *Id.*; *see also* AR 190-8, *supra* note 53, para. 1-5(b), (c).

69. GPW, *supra* note 9, art. 17.

70. OFFICIAL COMMENTARY, *supra* note 10, at 158-61. While this may appear an insignificant consequence for obstinate prisoners, there are many benefits accorded to prisoners of war based on rank. For example, privates may be forced to perform manual labor, while noncommissioned officers and officers may not. *See infra* note 93.

71. GPW, *supra* note 9, art. 17; *see also* OFFICIAL COMMENTARY, *supra* 10, at 163-64.

72. OFFICIAL COMMENTARY, *supra* note 10, at 140.

medical and scientific experiments on prisoners or war.[74] Prisoners are not to be used as "guinea-pigs."[75] The GPW does not, however, prevent the use of experimental medicines or techniques where the sole object of the proposed treatment is the prisoners' health or dental care.[76] For example, a new drug developed to combat the harmful effects of nerve agents, administered to U.S. forces before approval by the Federal Drug Administration, might also be issued to enemy prisoners of war.

Protection from Insults and Public Curiosity—Captive enemy personnel are to be treated with honor and respect.[77] "The prisoner of war must be viewed by his guard as an unhappy enemy and must be treated accordingly: administrative officials and guards alike must be considerate of the sensibilities of soldiers who have tasted defeat, and any persecution based on their misfortune is prohibited."[78] To protect their honor, captured enemy personnel must be protected from insults and "public curiosity."[79]

Although the GPW indicates that this prohibition includes parading prisoners of war through towns or caging them in areas accessible to the general public, the question of whether to allow the media to film enemy captives in U.S. control is not specifically addressed. The GPW does not specifically forbid filming or photographing prisoners of war. Commanders may desire to use such a technique to prove that prisoners are being treated properly. Commanders may also believe enemy soldiers are more likely to surrender if they are convinced that they will be treated humanely, and may therefore see the media as the medium to convey this message to enemy troops.

Captured prisoners of war are not always considered heroes by their own leaders, however.[80] Prisoners returning home are often subject to severe punishment.[81] Furthermore, an enemy soldier's family may be placed at risk if the soldier is known to be a prisoner of war.[82] Therefore, there are significant policy concerns related to using the media to display captured enemy personnel.[83] A significant "reciprocity" concern also exists: an enemy might respond by compelling U.S. prisoners to publicly "confess to war crimes" or make similar statements.[84]

Army regulations now prohibit the filming, photographing, and video taping of individual captured enemy personnel for other than facility administration or intelligence purposes.[85] Group, area wide, or aerial photographs of the facilities may be taken only if the senior military police officer in the facility commander's chain of command approves it.[86]

Equality of Treatment—As a general rule, all prisoners must be treated alike, without distinction based on race, nationality, religious belief, political opinions, or "any other distinction founded on similar criteria."[87] There are some specific exceptions to this rule of non-discrimination, however. Absolute equality, without considering the relevant circumstances of the individual, is itself a form of discrimination.[88] For example, dissimilar treatment may be based on rank,[89] sex,[90] religious accommodation,[91] aptitude for work,[92] age,[93] or state of health.[94] Further, the Official Commentary explains that additional crite-

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73. A. Brackman, The Other Nurembberg: The Untold Story of the Tokyo War Crime Trials (1987); George J. Annas & Michael A. Grodin, The Nazi Doctors and the Nuremberg Code, Human Rights in Human Experimentation (1992); United States v. Karl Brandt, *in* 1 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 13 (1950); Jon M. Harkness, *Nuremberg and the Issue of War-Time Experiments on U.S. Prisoners*, 276 JAMA 1672 (1996); Official Commentary, *supra* note 10, at 141.

74. GPW, *supra* note 9, art. 13.

75. Official Commentary, *supra* note 10, at 141.

76. *Id.*; GPW *supra* note 9, art. 13.

77. GPW, *supra* note 9, art. 14.

78. Official Commentary, *supra* note 10, at 145.

79. *Id.* at 141; *see also* GPW, *supra* note 9, art. 13; Trial of Lieutenant General Kurt Maelzer, Case No. 63, *reprinted in* United Nations War Crimes Commission, XI Law Reports of Trials of War Criminals 53 (1949) (noting that Maelzer was convicted for parading U.S. prisoners of war through Rome).

80. Rev. Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War,* Studies in Sacred Theology, n.218, The Catholic University of America; Official Commentary, *supra* note 10, at 512; R.C. Hingorani, Prisoners Of War 180-186 (1982).

81. *Iraqi Deserters Weary of Bombing*, Ft. Worth Star-Telegram 1, Feb. 12, 1991 (noting that surrendering Iraqi soldiers were threatened with execution upon return).

82. U.S. Dep't of Defense, Conduct of The Persian Gulf War: Final Report to Congress O-18 (1992) [hereinafter Final Report]; *Prisoners of War*, Gannett News Serv., Feb. 27, 1991, *available in* WESTLAW, ALLNEWS database (noting that Saddam Hussein threatened to kill the families of Iraqi soldiers that surrendered).

83. Final Reort, *supra* note 82; *see also* W. Hayes Parks, *The Gulf War: A Practitioners View*, 10 Dick. J. Int'l L. 393, 418 (1992); Memorandum, Assistant Secretary of Defense for Public Affairs, subject: Photography of Enemy Prisoners of War (Feb. 2, 1991); Gordon Risius & Michael A. Meyer, *The Protection of Prisoners of War Against Insults and Public Curiosity*, 295 Int'l Rev. Red Cross 298 (July-Aug. 1993).

ria could be established.[95] In short, discrimination is not permitted when it is of an adverse nature, but it is acceptable if the purpose is a good faith attempt to further the notions of respect and protection.

Free Maintenance and Medical Care—Prisoners have a right to quarters,[96] food and water,[97] clothing,[98] hygiene facilities,[99] and medical care.[100] These obligations require enemy prisoner of war projections and planning by each level of command.

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84. FINAL REPORT, *supra* note 82; *see also The Fragile Rules of War*, ECONOMIST, Jan. 26, 1991, at 22. This article discusses the GPW and the display of battered and bruised American pilots on television advocating that the U.S. end the war with Iraq. The article speculates that torture may have been used to obtain statements, noting the obvious injuries and trauma, and that one pilot had mocked his captors' accent. In Operation Allied Force in Kosovo, captured American soldiers were shown on Serbian television within hours of sending a radio message that they were under fire and being listed as missing. *See* John H. Cushman, Jr., *3 G.I.'s Missing in Macedonia After They Reported Attack*, N.Y. TIMES, Apr. 1, 1999, at A1; *see also* Bradley Graham & Daniel Williams, *U.S. Soldiers in U.N. Force Apparently Captured*, WASH. POST, Apr. 1, 1999, at A22. President Clinton, British Foreign Secretary Robin Cook, and others, protested the showing of the soldiers on television. Some argued that doing so was a violation of Article 13, GPW. The soldiers had obvious injuries that appeared consistent with some sort of physical struggle. *See President Clinton on Kosovo*, Excerpts from Remarks Made in Washington DC, Apr. 2, 1999, <http://www.state.gov/www/regions/eur>; *see also NATO Will Hold Milosevic Responsible for Safety of Captured US Soldiers*, AGENCE FRANCE-PRESSE, Apr. 1, 1999, *available* on WESTLAW, ALLNEWS.

The assertion that showing the prisoners on television is illegal, absent being coerced into making statements or being shown in a humiliating fashion, is questionable. In this case, the benefits to the prisoners of being shown on television arguably outweighed any "insult" or "humiliation" they may have experienced. They were accounted for, the fact they were in Serb control was irrefutable, a record of their condition upon capture was to a degree preserved, and they had the satisfaction of knowing that the world, the United States and their families knew all this as well. The protections of the GPW against public insult and humiliation belong to the prisoner of war, not to the sending state and its policies. In cases such as this, where the prisoners do not appear to have been coerced into to making anti-American statements, protests against showing American captives on television may ultimately prove to be counterproductive.

85. AR 190-8, *supra* note 53, para. 1-5d.

86. *Id.*

87. GPW, *supra* note 9, art. 16; *see also* AR 190-8, *supra* note 53, para. 1-5b. Unlike the GPW, AR 190-8 also lists sex as a criterion for which different treatment is not appropriate. *See infra* note 93. However, the drafters of the treaty clearly saw times when discrimination based on gender was appropriate or even required. It is possible that in the future, U.S. forces may capture prisoners of war from many different cultures. Certain cultures may demand some gender based discrimination. For example, some may desire segregated housing or hygiene facilities, both of which are required by the GPW. The GPW protects the prisoners honor, not necessarily U.S. social and cultural norms and policies. It is appropriate, therefore to read the Army regulation prohibiting discrimination based on sex in the spirit of the GPW, which allows discrimination based on gender where it is not of an "adverse nature." OFFICIAL COMMENTARY, *supra* note 10, at 154.

Moreover, the GPW does, in the area of housing, also allow for segregation based on nationality, language, and customs so long as they are not separated from their sending state armed forces. GPW, *supra* note 9, art. 22. In World War II, many Jewish Americans were separated from other American prisoners and were sent to work in lave labor camps. *See* MITCHELL G. BARD, FORGOTTEN VICTIMS: THE ABANDONMENT OF AMREICANS IN HITLER'S CAMPS (1994). The official commentary to the GPW explains however, that a facility commander may separate soldiers of the same army where it is necessary to prevent hostile activities. OFFICIAL COMMENTARY, *supra* note 10, at 185. Not all soldiers in a given army come from the same culture or political background. Some may be conscripts and personally opposed to their nation's policies. During the Korean conflict, in one UN prisoner of war camp, North Korean activist prisoners murdered a number of their fellow prisoners who were sympathetic to South Korea and captured the camp commander. *See* WALTER G. HERMES, TRUCE TENT AND FIGHTING FRONT 232-63 (1966).

88. OFFICIAL COMMENTARY, *supra* note 10, at 154.

89. GPW, *supra* note 9, arts. 39, 40, 43, 45, 49, 60, 89, 97, 98.

90. *Id.* arts. 14, 25, 29, 49, 88, 97, 108.

91. *Id.* arts. 22, 26, 34.

92. *Id.* arts. 49, 53, 62.

93. *Id.* arts. 49, 45.

94. *Id.* arts. 30, 49, 55, 92, 98, 108, 109, 110, 114.

95. OFFICIAL COMMENTARY, *supra* note 10, at 154.

96. GPW, *supra* note 9, art. 25. The quarters must be as a favorable as those of the soldiers running the facility. The prisoners may be compelled to construct their own quarters with materials provided by the detaining party if all the requirements with regard to labor are met. *Id.* arts. 49-54; OFFICIAL COMMENTARY, *supra* note 10, at 193.

97. GPW, *supra* note 9, art. 26. Prisoners should be allowed to participate in preparing their food. Collective punishment involving the withholding of food is prohibited. Camp commanders must take into account the prisoners' unique dietary needs. *Id.*

98. *Id.* art. 27. Commanders must take into account the weather and work being performed by the prisoner. Prisoners must also be allowed to wear their badges of rank, nationality, and decorations. *Id.* art. 40.

Early in a conflict, when only expedient prisoner of war camps have been established, commanders may want to house captured enemy personnel in civilian or military confinement or correctional facilities. It may be in the prisoners' best interests to be temporarily held in a confinement facility. Such a facility would be capable of providing for them shelter, food, and medical care. However, as with the other GPW protections, it is the prisoners' best interests, not the detaining power's convenience that must be considered. Therefore, such facilities may be used only if in the prisoners' best interests.[101]

No Reprisals on Prisoners of War—Prisoners of war may not be the objects of reprisal.[102]

> Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.[103]

The law of war has not always forbidden reprisals against prisoners of war. Because of their availability to the enemy and their helpless and vulnerable situation, prisoners of war frequently were subjected to acts of reprisal. The prisoners in custody, however, are likely completely innocent of alleged ongoing violations of the law of war committed by the sending state. Now, the GPW clearly states that prisoners of war cannot be made the objects of reprisal.[104]

The Protecting Power and the ICRC—Traditionally, a protecting power is a neutral third state, agreed upon by the state parties to a conflict, which seeks to protect the rights and welfare of the prisoners of war.[105] The GPW codified the concept of the protecting power as it relates to prisoners of war.[106] In this century, however, there have been few occasions where protecting powers have been appointed.[107]

The drafters of the GPW recognized that prisoners of war might not be afforded oversight when parties to the conflict either would not or could not agree on a protecting power. As a result, subject to the consent of the parties to the conflict, the GPW allows the ICRC, or any other acceptable private organization, to perform the protecting power function.[108]

Representatives of the protecting power are to be allowed to visit all places and premises where prisoners of war are being held. The protecting power representatives are to have full power to choose where to visit. They are to be allowed to interview prisoners without witnesses present. Their visits may not

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99. *Id.* art. 29. This includes baths or showers, sanitation facilities, sufficient water and soap for their person and their laundry. The facilities must be maintained in a clean condition. The facilities must be open during the day and at night. *Id.*

100. *Id.* art. 30. Every camp must have an adequate infirmary with separate wards for contagious or mental disease. The detaining power must attempt to procure whatever medical or hospital care a prisoner may need, at no cost to the prisoner. *Id.*

101. *Id.* art. 22. There may be other benefits to using such facilities. For example, virtually all prisoners are instructed to attempt escape on capture. Arguably, holding them in a secure facility would provide a greater level of physical protection, because the guards are trained and the physical obstacles established to prevent inmates from escaping are such that the guards are less likely to have to use deadly force to thwart such attempts to do so. However, not only might a prisoner fall victim to the criminal inmates or overzealous guards unable to distinguish the difference between prisoners of war and criminals, the GPW is clearly concerned with the psychological well being of the prisoner of war. *See* OFFICIAL COMMENTARY, *supra* note 10, at 182-183. At a minimum, however, a prisoner of war in a confinement facility must be segregated from the criminal population, must be allowed to wear his or her uniform and decorations, and should be given as much freedom within the facility as is feasible, based on security and safety considerations. Finally, such a situation should only be temporary in nature.

102. *Id.* art. 13.

103. U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, REPRISALS 177 (1956).

104. OFFICIAL COMMENTARY, *supra* note 10, at 141-142. The commentary also points out that reprisals rarely solve the abuse on the other side and merely generate a vicious circle of reprisal and counter-reprisal.

105. HOWARD S. LEVIE, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 255-293 (1977); HINGORANI, *supra* note 80, at 158-161.

106. GPW, *supra* note 9, art. 8.

107. LEVIE, *supra note* 105; HINGORANI, *supra* note 80.

108. GPW, *supra* note 9, arts. 9, 10.

> It must be remembered that the International Committee of the Red Cross is today, as when it was founded, simply a private association with its headquarters at Geneva, composed solely of Swiss citizens recruited by co-option. It is therefore neutral by definition and is independent of any Government and political party. Being the founder body of the Red Cross and the promoter of all the Geneva Conventions, it is by tradition and organization better qualified than any other body to help effectively in safeguarding the principles expressed in the Conventions.

OFFICIAL COMMENTARY, *supra* note 10, at 107.

be prohibited except for reasons of "imperative military necessity, and then only as an exceptional and temporary measure."[109] The ICRC is to enjoy these same rights and access to prisoners of war.[110] Commanders must understand that facilitating such unlimited access is the legally sanctioned method of "showing the world" that the prisoners are being well treated and cared for.

No Renunciation of Rights—Under "no circumstances" may a prisoner renounce, in whole or in part, any right or protection provided by the GPW.[111] Prisoners are in very coercive environments in which their ability knowingly and voluntarily to renounce certain of their rights is questionable.[112] In such an environment, it is possible to imagine a prisoner being willing to participate in medical experiments[113] or to labor in direct support of the detaining power's military effort.[114]

The under "no circumstances" rule may be overly simplistic, however.[115] Read in conjunction with GPW, Article 6, it appears that a prisoner may not renounce his rights but may agree to an advancement of rights.[116] For example, prisoners of war have the right to repatriation immediately upon the end of hostilities.[117] Must a commander forcibly repatriate a prisoner of war when the prisoner does not want to return home out of fear for his safety? There are examples of prisoners being allowed to seek asylum rather than be repatriated.[118]

The right of repatriation however, is based on the premise that it will be the prisoner's natural desire.[119] In demanding that a prisoner be repatriated at the end of hostilities, the drafters also considered the possible need to protect prisoners from themselves. Accepting offers from the detaining power to remain after hostilities have ceased may at the time seem advantageous; but may, in the long run, be less than desirable.[120] Finally, a prisoner of war continues to be a member of his country's armed forces and therefore owes a duty of allegiance to those armed forces.[121]

A prisoner's request not to be repatriated should be granted only if the captive, upon return, may be subject to, "unjust measures affecting his life, liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being."[122] No propaganda may be used to convince the prisoner to object to repatriation; supervisory bodies must be able to satisfy themselves that the requests have been made freely and in all sincerity.[123]

Combatant Immunity—Indelibly linked to non-combatant status is combatant immunity. Ordinarily, nation states are free to define and to prosecute criminal activity engaged in within their borders or committed by or against their citizens. Obvi-

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109. GPW, *supra* note 9, art. 126.

110. *Id.*

111. *Id.* art. 7.

112. OFFICIAL COMMENTARY, *supra* note 10, at 89.

113. HINGORANI, *supra* note 80, at 111.

114. United States and Others v. Herman W. Goering and Others, International Military Tribunal, Nuremberg, 22 TRIAL OF MAJOR WAR CRIMINALS 411 (1946); United States v. Erhard Milch, U.S. Military Tribunal, Nuremberg, 2 TRIAL OF MAJOR WAR CRIMINALS 773 (1947).

115. LEVIE, *supra* note 105, at 92.

116. *Id.* at 91-93; OFFICIAL COMMENTARY, *supra* note 10, at 90-91; HINGORANI, *supra* note 80, at 183-84.

117. GPW, *supra* note 9, art. 118.

118. *See* David J. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, 880-888 (1996); Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391-515 (1953); Howard W. Levie, *International Aspects of Repatriation of Prisoners of War During Hostilities: A Reply*, 67 AM. J. INT'L L. 232-43 (1973). However, as Pictet points out, at the time of the Korean Conflict, none of the parties had ratified the Geneva Conventions and therefore were not binding on the parties. While the parties did state their intention to apply the "principles" of the Conventions, the Official Commentary makes it clear that the Korean War must not in anyway be considered precedent to the application of Article 118. OFFICIAL COMMENTARY, *supra* note 10, at 543-546.

119. *Id.* at 547.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 548. Individuals forced to enlist in the enemy state's military, such as during occupation, and deserters that have gone over to the enemy side, are not covered by Article 118.

ously, before capture, many prisoners of war participate in activities that are, during times of peace, generally considered criminal. For example, it is foreseeable that soldiers will be directed to kill, maim, assault, kidnap, sabotage, and steal in furtherance of their nation state's objectives. In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts.[124]

The receipt of combatant immunity upon capture comes with a heavy pre-capture price. The protections of the GPW and combatant immunity are available only to those involved in an armed conflict of an international nature where they clearly distinguished themselves as combatants before capture.[125] In other words, there is a *quid pro quo* element to combatant immunity. That is, persons entitled to immunity for pre-capture war-like acts must have made themselves legitimate targets while performing those acts.

Before capture, the captive must have been a member of the regular armed forces of a party to a conflict or be a member of a militia or organized resistance movement belonging to a party to the conflict.[126] Members of militias and resistance organizations must meet four additional criteria for prisoner of war status.[127] These criteria are:

> (1) Commanded by a person responsible;
> (2) Have a fixed distinctive sign recognizable at a distance;
> (3) Carry arms openly; and
> (4) Conduct operations in accordance with the laws and customs of war.[128]

As a general rule, this immunity is not available to combatants involved in internal armed conflicts such as civil wars.[129] Insurgents threaten the very essence of the state; therefore, if the state has the authority to prosecute anyone, it should be

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124. *See* HINGORANI, *supra* note 80, at 9; Christopher C. Burris, *Re-Examining the Prisoner of War Status of PLO Feaydeen*, 22 N.C. J. INT'L L. & COM. REG. 943, 967-979 (1997); Robert K. Goldman, *International Humanitarian Law: Americas Watches Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 56-58; Laura Lopez, *Uncivil Wars: The Challenge of Allying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 933-936 (1994); Waldemar A. Solf, *Non-International Armed Conflicts*, 31 AM. U. L. REV. 927, 928-933 (1982); Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic and Transnational Practice*, 33 AM. U. L. REV. 53, 57-61 (1983); Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 68-72 (1997).

The GPW does not specifically mention combatant immunity. As discussed in the above listed articles, it is considered to be customary international law. Moreover, it can be inferred from the cumulative affect of protections within the GPW. For example, Article 13 requires that prisoners not be killed, and Article 118 requires their immediate repatriation after the cessation of hostilities. Although Article 85 does indicate that there are times when prisoner of war may be prosecuted for pre-capture violations of the laws of the detaining power, the Official Commentary accompanying Article 85 limits this jurisdiction to only two types of crimes. A prisoner may be prosecuted only for: (1) war crimes, and (2) crimes that have no connection to the state of war. For example, the prisoner of war may have been involved in selling illegal drugs in the detaining power's territory prior to hostilities. *See* United States v. Noriega, 806 F. Supp. 791 (S.D. Fla. 1992).

125. GPW, *supra* note 9, arts. 2, 4.

126. *Id.* art. 4.

127. *Id.* The GPW does not specifically state that members of the regular forces must wear a fixed insignia recognizable from a distance. However, as with the requirement to be commanded by a person responsible, this requirement is arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member of the militia or resistance groups cannot. Should a member of the regular armed forces do so, it is likely that he would loose his claim to immunity and be charged as a spy or as an illegal combatant. LEVIE, *supra* note 105, at 36-38.

128. *Id.* The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) significantly reduces these requirements for militias and resistance groups. Article 44 of Protocol I requires only that members of these groups involved in international armed conflict distinguish themselves from civilians by carrying their arms openly during and immediately proceeding an attack. Most significantly, this means that there is no requirement for members of guerrilla groups to wear uniforms or distinctive emblems. This allows members of guerrilla forces to clandestinely move in and out of the civilian population except during actual combat operations. This blurring of the line between civilians and combatants would have the tendency of placing civilians at greater risk.

> Inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their prisoner of war status if captured. Innocent civilians would therefore be made more vulnerable by application of the Protocol.

Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont.)*, 82 AM. J. INT'L L. 784, 786 (1988). The United States has officially objected to the relaxation of the rules concerning distinction in Protocol I. *Id.;* Abraham D. Sofaer, The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, United States Department of State (January 22, 1987), *in* 2 AM. U.J. INT'L L. & POL'Y 460, 463 (1987); Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469, 473-477 ((1993). For a contrary opinion by a high ranking U.S. Department of State official, *see* George H. Aldrich, *Civilian Immunity and the Principles of Distinction: Guerrilla Combatants and Prisoner of War Status*, 31 AM U. L. REV. 871 (1982); George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

129. *See* HINGORANI, *supra* note 80, at 9; Burris, *supra* note 124; Goldman, *supra* note 124; Lopez, *supra* note 124; Solf, *Non-International Armed Conflicts*, *supra* note 124; Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic and Transnational Practice*, *supra* note 124; Tittemore, *supra* note 124.

those who are seeking to destroy it. The insurgent is arguably the arch criminal of the state in the international state system. The law of war reflects this reality. Although Common Article 3, GPW and Protocol II apply to such conflicts, neither extends, either explicitly or implicitly, prisoner of war status to insurgents.[130]

This dichotomy, based on conflict characterization, may cause difficulty for commanders. Although combatant immunity is available under the law of war only to participants in international, rather than internal armed conflicts, the DOD Law of War Program directs that the law of war apply to all armed conflicts, however characterized.[131] It also mandates that the principles and spirit of the law of war extend to operations other than war.[132]

Imagine a U.S. operation in support of a host nation's counter-insurgency. Assume that following a fire-fight between U.S. forces and insurgent forces, a member of the insurgent force is captured by U.S. personnel. How is the mandate of the DOD Law of War Program applied to this situation? Certainly, U.S. forces are engaged in armed conflict. Thus, regardless of the characterization of the conflict as internal, the U.S. commander is directed to apply not just the "principles and spirit" of the law of war, but simply the "law of war." Under the law of war, an individual meeting the criteria of a privileged combatant who falls into the hands of the enemy is entitled to prisoner of war status. Does this mean that the U.S. commander must treat the captured insurgent as a prisoner of war, provide immunity for the insurgent, and refuse to hand him over to the host nation authorities for prosecution? Or should the U.S. commander conclude that the captured insurgent is not entitled to combatant immunity by the law of war because the requirement of international armed conflict is not satisfied?

The answer to this question depends on how the DOD Law of War Program is interpreted. One possible conclusion is that the mandate of this Program essentially "trumps" international law, vitiating the significance of the nature of the conflict for purposes of the U.S. commander's decision-making process. Such a conclusion seems justified based on the plain language of the Law of War Program Directive, which mandates applying the law of war to any conflict, and makes the characterization of the conflict irrelevant. Any other interpretation arguably renders the Directive meaningless.

Based on this interpretation, applying the law of war to any conflict (and arguably even the "principles" of the law of war to non-conflict operations), should result in a grant of combatant immunity. This is a benefit afforded to enemy personnel captured after a "fair fight" under the law of war. The difficulty with adopting this interpretation is that it requires the commander to place U.S. domestic policy in a position that trumps the clear dictates of international law (specifically the law of war requirement that combatant immunity is a benefit afforded *only* during international armed conflict). It also requires domestic policy to trump the dictates of host nation law (which regards insurgent activity as criminal activity directed against the state).

The alternate interpretation of the Law of War Program Directive is that with regard to "enemy" personnel captured during the course of an (internal armed conflict) operation, U.S. commanders must treat such personnel as if they were prisoners of war *while they are in U.S. custody*, but not extend combatant immunity to them. Thus, such captured personnel must be turned over to host nation authorities upon demand, and may, without any U.S. objection, be lawfully subjected to host nation criminal penalties for their warlike activities.

This interpretation strikes a balance between two competing interests. On the one hand, it accommodates the interest of the United States, which is to ensure that U.S. personnel apply a consistent standard of treatment to captured personnel within their custody. At the same time, it accommodates the interest of international law, which protects the fundamental interests of states fighting against an insurgency by preserving for the state the right to treat insurgents as criminals.

Thus, in the hypothetical provided above, the U.S. commander must apply more than just the law of war applicable to internal armed conflict (Common Article 3 and Geneva Protocol II), while the insurgent is in U.S. custody. The commander, however, may not assert the DOD Law of War Program as a basis for refusing to comply with a host nation demand to turn over the insurgent for criminal prosecution.[133]

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130. GPW, *supra* note 9, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). The United States, however, is not a party to Protocol II.

131. DOD DIR. 5100.77, *supra* note 47.

132. *Id.*

133. In fact, there may be bilateral agreements, such as a Status of Forces Agreement, that requires U.S. forces to transfer host nation enemies of the state to state authorities. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1967, art. XXII, 17 U.S.T. 1677. Using the Korean status of forces agreement as an example, U.S. forces have no jurisdiction over Korean nationals or residents of the Republic of Korea involved in sabotage, espionage, treason, against the Republic of Korea, or that have allegedly violated any law relating to the official secrets of Korea, or secrets relating to its national defense. Persons involved in such activities against the republic of Korea may not be held by U.S. forces.

The second interpretation offered above, which reconciles the Law of War Program and international law, results in a certain degree of risk for a U.S. commander. If the commander turns over a captured insurgent, and the insurgent is subsequently executed or sent to prison for an extended period (which is legal under the law of war), it is possible that the insurgents might subject captured U.S. forces to the same treatment.[134] Because of this risk, a U.S. commander may want to refuse to hand over insurgents to the host nation government. As noted above, however, it is unlikely that the DOD Law of War Program provides a basis to do so. Instead, this concern for reciprocal treatment suggests a need for the United States to consider negotiating an agreement with the host nation extending combatant immunity to captured insurgents as a matter of domestic, vice international, law. Thus, while there may exist a significant policy reason why a ground commander should be cautious in turning over captured insurgents to host nation authorities, legal advisors should consider such turn over required unless and until the host nation agrees to some alternate disposition.

While such a resolution may be ideal, it is also unlikely. General guidance exists, however, for commanders at the operational and tactical level concerning how to respond to a demand to turn captured insurgents over to the host nation. Insurgents in the care, custody, or control of U.S. forces should not be turned over to host nation authorities absent authority from the Secretary of Defense.[135]

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134. *See* Neil Sheehan, *Reds' Execution of 2 Americans Assailed by U.S.*, N.Y. TIMES, A1 (Sept. 28, 1965). United States Army Captain Humbert R. Versace and Sergeant Kenneth Roarback were executed in retaliation for the United States handing over Viet Cong to the South Vietnamese authorities for prosecution and probable execution. In response, the United States changed its policy and began granting prisoner of war status and immunity for Viet Cong captured on the "field of battle." *See also* U.S MILITARY ASSISTANCE COMMAND, VIETNAM, DIR. 381-11, EXPLOITATION OF HUMAN SOURCES AND CAPTURED DOCUMENTS (Aug. 5, 1968); THE HISTORY OF MANAGEMENT OF POW'S, A SYNOPSIS OF THE 1968 U.S. ARMY PROVOST MARSHAL GENERAL'S STUDY ENTITLED "A REVIEW OF UNITED STATES POLICY ON TREATMENT OF PRISONERS OF WAR 49-55 (1975).

135. DOD DIR. 2310.1, *supra* note 48, para. C4; AR 190-8, *supra* note 53, para. 3-11. Captives in the custody or control of U.S. forces may only be transferred to another government or agency only with secretary of defense approval.

Operation Allied Force and the Question of Prisoner of War Status

During Operation Allied Force, the United States initially asserted that the three U.S. soldiers captured by Serbia were not involved in combatant activities, and were therefore, illegally abducted and demanded their immediate release.[136] At the time of their capture, however, the operation in Macedonia was part of the NATO mission and, therefore, the assertion that they were non-combatants is questionable.[137]

When the mission in Macedonia changed from a United Nations (UN) to a NATO operation in February of 1999, the units in Macedonia traded in their traditional UN blue peacekeeping helmets for green kevlars, donned flack jackets, and began to affix crew-served weapons to their vehicles.[138] On the day NATO began bombing in Serbia, cavalry units in Macedonia began scouting the border between Macedonia and Kosovo (Serbia) as a measure of force protection for the NATO forces in Macedonia.[139] There had been border clashes between Serbian troops and members of the Kosovo Liberation Army.[140] During one such incident, a soldier from Macedonia was killed by fire from the Serbian side of the border.[141]

At the time of their capture, the Americans soldiers were conducting a reconnaissance patrol along the Kosovo-Macedonia border.[142] They were carrying small arms and had a .50 caliber machine gun mounted on their vehicle.[143] It is foreseeable that their rules of engagement would have allowed, or even directed, that they return fire, if fired on and that they could have used deadly force in the face of demonstrated enemy hostile intent.[144] According to media reports, 12,000 NATO troops had massed in Macedonia for potential ground operations in Kosovo.[145] The captured American soldiers looked like combatants, were armed like combatants, were performing a mission that supported ongoing combat operations in Serbia, and were located in close proximity to those combat operations. To the Serbs, they may have looked like the lead element of an invading force of an offensive ground operation.

Even if the captured American soldiers were involved in non-combatant operations at the time of their capture, they were arguably legitimate military targets. They were captured during a time when the United States was conducting combat operations against the Former Republic of Yugoslavia. Although NATO was limiting its attacks to air operations in Serbia, there is nothing in the law of war that requires a party to

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136. James P. Rubin, U.S. Dep't Of State, Office Of The Spokesman, Press Statement, *U.S Servicemen Abducted In Macedonia*, Apr. 1, 1999; Hugh Dellios & Charles M. Madigan, *By Capturing 3 GI's, Serbs Score Propaganda Victory*, CHI. TRIB., Apr. 2, 1999, at 1; Tony Mauro & Andrea Stone, *Definition of Soldier's Situation Could Determine Their Treatment*, USA TODAY, Apr. 2, 1999, at 3A; *Trial of US Troops Illegal: State Department*, AGENCE FRANCE-PRESSE, Apr. 1, 1999, *available* WESTLAW ALLNEWS.

It is unclear as to why the U.S. government believed that the soldiers were unlawfully abducted. The assertion that there were involved in non-combat activities in Macedonia may have stemmed from the fact that just previously to the capture, the U.S. forces in Macedonia were involved in a UN peacekeeping mission. U.N.S.C. Res. 1186, 3911th Meeting (July 21, 1998). However, the UN Security Counsel later refused to extend the mission beyond February 28, 1999, and it, therefore, ended the month before the capture. U.N.S.C. Press Release 6648, 3982nd Meeting (Feb. 25, 1999).

Had this been a UN peacekeeping mission, immediate repatriation may have been appropriate. Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (Feb. 13, 1946); Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, 49 GAOR. Supp. (No. 49) at 299, UN Doc. A/49/49 (1994). However, in UN missions involving combat, the requirement for repatriation is questionable. The Convention on the Safety of United Nations and Associated Personnel does not apply in Chapter VII actions. *Id.* art. 2. In an international armed conflict, the detaining party must protect the prisoner but has the legal right to detain the prisoner until the cessation of hostilities. GPW, *supra* note 9, art. 118. The detaining power may not kill the prisoner, but may prevent him from rejoining his unit to fight another day. *See generally* Tittemore, *supra* note 124.

137. Patrick J. Sloyan, *Crisis in Yugoslavia, Higher Stakes, Serbs to Try 3 Captured GI's Drawing Clinton Rebuke*, NEWSDAY, Apr. 2, 1999, at A3; Jennifer Bjorhus, *Oregonians Suddenly at Edge of War, What Started as a U.N. Peacekeeping Mission for Two Young Soldiers Takes a Dangerous Turn*, PORTLAND OREGONIAN, Apr. 27, 1999, at A1.

138. *Id.*

139. Charles M. Sennot, *Platoon Frets for 3 Held Captive, Not Enough Being Done to Free Them Other Soldiers Fear*, BOSTON GLOBE, Apr. 15, 1999, at A29.

140. *Bid to Free Soldiers Fails, Clashes Intensify; Russian Missile Threat Reported*, SEATTLE TIMES, Apr. 9, 1999, at A1.

141. *Id.*

142. Dellios & Madigan, *supra* note 136.

143. *Latest Developments in Kosovo*, A.P. ONLINE, May 7, 1999, *available* WESTLAW ALLNEWS; *Balkans Notebook Day 45*, SEATTLE TIMES, May 7, 1999, A19; *Latest Developments Relating to Kosovo Crisis*, TIMES UNION, May 8, 1999, at A6.

144. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, JCS STANDING RULES OF ENGAGEMENT, encl. A (Oct. 1, 1994) *reprinted in* INT'L AND OPS L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, ch. 8 (2000). Enclosure A is an unclassified portion of an otherwise secret document.

145. Sennott, *supra* note 139.

a conflict to restrict its counter-offensive to the same type of military operation in the same general location.[146]

There is potential danger for troops on the ground when the national command authority insists that soldiers captured during military operations are not, as a matter of law, prisoners of war. If the triggering mechanisms of the GPW are not met, then the protections are not applicable, including the concept of combatant immunity. Leaders of countries launching aggressive wars may improperly capitalize on the U.S. government's assertion that captured U.S. service members are not prisoners of war and should thus be immediately released. A regime already determined to ignore the law of war may use such a statement as grounds to withhold the protections of the GPW, to include combatant immunity. Such a regime may agree that the captured soldiers are not prisoners of war and then try them for domestic crimes rather than release them, even in cases where combatant immunity is clearly warranted.

146. *See generally* Hague IV, *supra* note 19; GWS, *supra* note 23; GWS Sea, *supra* note 23; GPW, *supra* note 9; GC, *supra* note 23. Soldiers of a party to a conflict, no matter where they are located, represent legitimate targets because they could easily become reinforcements or replacements to those in the theater of operations.

Proposed Changes to Rules For Courts-Martial 804, 914A and Military Rule of Evidence 611(d)(2): A Partial Step Towards Compliance with the Child Victims' and Child Witnesses' Rights Statute

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Introduction

Imagine a five-year-old little girl named Mary. She is cute, precocious, and has above average intelligence. Mary lives near a large military installation but her parents are not in the military. Unfortunately, you meet Mary as she enters the criminal justice system. Mary alleges that a military member sexually assaulted her. The assault occurred in a day-care center located in a federal office building. Mary's treatment by the court and the parties will vary greatly depending upon which criminal justice system she enters–the federal system or the military justice system.

If you met Mary as she entered the federal system, she would likely have a guardian *ad litem* whose sole concern is Mary's best interest. Additionally, an adult attendant would be with Mary in court. The role of the adult attendant is to offer Mary emotional support during court proceedings. Mary has the statutory right to testify remotely by closed circuit television or through a videotaped deposition. Mary's right to testify remotely is predicated upon the prosecutor, Mary's parents, or the guardian showing that testifying in court, in the accused's presence, would emotionally harm Mary. In the federal system, Mary benefits from numerous statutory privacy protections designed to protect her dignity.

In contrast to Mary's status in federal court, if you met Mary as she enters the military justice system she would be in a much different position. Mary would be totally dependent upon the trial counsel to protect her interests. She does not have any statutory protections. Mary does not have a guardian. If she has an adult attendant, it is the result of the military judge's discretion–it is not a right. Mary does not have the statutory right to testify remotely nor to offer her testimony through a videotaped deposition. Finally, in contrast to federal court, Mary has far fewer privacy protections.

Although the scenario described above may seem illogical or unfair, it reflects the striking differences in the way the federal courts and the military justice system handle child abuse cases. Child abuse remains a growing national problem and the military is not immune.[1] In fact, courts-martial commonly try cases involving child abuse. Children are frequently forced to testify in military trials.

Recognizing that federal prosecutions involving allegations of child abuse were becoming more frequent, Congress enacted the Child Victims' and Child Witnesses' Rights Act (the Act). Congress passed the Act in response to concerns expressed by advocates for children and the judiciaries regarding the impact normal court procedures have on children.

> Children most often become confused in cases when they are testifying as victims of a crime, and unfortunately, this confusion often hides emotional trauma. The psychological impact on a child from testifying against a defendant can be devastating, and may be debilitating when the defendant is a parent or a family member.[2]

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1. C.T. Wang & D. Daro, National Committee to Prevent Child Abuse, Current Trends in Child Abuse Reporting and Fatalities: The Result of the 1997 Annual Fifty State Survey (1998).

> In 1997, over 3 million (3,195,000) cases that were reported for child abuse and neglect to child protective (CPS) agencies in the United States. This is a 1.7% increase over the number of children reported in 1996. Child abuse reporting has increased 41% between 1988 and 1997. In 1997, CPS confirmed 1,054,000 children as victims of child maltreatment–15 out of every 1000 U.S. children. For 1997, physical abuse represented 22% of confirmed cases, sexual abuse 8%, neglect 54%, emotional maltreatment 4% and other forms of maltreatment 12%. In 1996, 1185 child abuse and neglect fatalities were confirmed by CPS agencies. Thus, the data confirms that three children die every day from abuse or neglect. Since 1985, the rate of child abuse fatalities has increased by 34%. Of the children who died, 78% were less than five-years-old at the time of their death, while 38% were under one year of age. Finally, in 1997, 84,320 new cases of child sexual abuse were accepted by CPS agencies for service, accounting for 8% of all confirmed victims.

Id.

2. Hon. Barbara Gilleran-Johnson, *Judicial Conference: Essay: The Criminal Courtroom: Is It Child Proof?*, Loy. U. Chi. L.J. 681, 686 (Summer 1995).

The Act was part of the Omnibus Crime Control Act of 1990, which was codified at 18 U.S.C. § 3509.[3] The purpose of the Act was to establish procedures to protect children from being traumatized by the legal process.[4] Are children who testify in courts-martial protected by the Act? The Court of Appeals for the Armed Forces (the CAAF) has expressly refused to decide whether the Act applies to the military justice system.[5] Therefore, children caught-up in courts-martial have less protection.

This article addresses whether the full range of the Act's statutory protections should apply to courts-martial practice and concludes by arguing that the Act does indeed apply to the military justice system. This article also analyzes the proposed changes to the Rules for Courts-Martial (R.C.M.) 804 and 914A and the Military Rule of Evidence (MRE) 611 that apply selected portions of the Act to courts-martial. Finally, this article suggests additional procedural rules designed to fully implement the Act.

Background

The catalyst for the Act was the Supreme Court's decision in *Maryland v. Craig*.[6] In *Craig*, the Court held that a criminal defendant's Sixth Amendment Confrontation rights were not absolute.[7] The important public policy of protecting children from trauma could override these rights.[8]

The Court held that in child abuse cases, the Confrontation Clause is satisfied when: (1) the proponent makes a case-specific showing of necessity that the child's testimony, in the presence of the accused, would result in serious emotional distress for the child such that the child would not be able to communicate; (2) the child's emotional distress would be more than *de minimis*; and, (3) the accused and the jury have the opportunity to observe the child's demeanor.[9]

In *Craig*, the Court approved the child victim testifying via closed-circuit television. The Court noted that the three important components of the Confrontation Clause were satisfied in *Craig*.[10]

3. 18 U.S.C.A. § 3509 (West 1998).

4. "Summary and Purpose . . . . Title XX [the Act] contains provisions to protect the rights of victims of crime, establish a Federal victims' bill of rights for children, and improve the response of the criminal justice system and related agencies to incidents of child abuse." Crime Control Act of 1990, H.R. 5269, 6478, 101st Cong. (1990).

5. United States v. Longstreath, 45 M.J. 366, 372 (1996).

6. 497 U.S. 836 (1990).

7. *But see* Coy v. Iowa, 487 U.S. 1012, 1020 (1988). Two years before deciding *Craig*, the Court held that placing a screen between a testifying child victim and the defendant violated the defendant's Confrontation Clause rights. The Court rationalized its decision noting "it is a truism that constitutional protections have costs [traumatized children]." *Id.*

8. *See generally* Case Comment, *Maryland v. Craig: The Cost of Closed Circuit Testimony in Child Sexual Abuse Cases*, 25 GA. L. REV. 167, 186 (1990) ("*Maryland v. Craig* represents a liberal v. strict constructionist view of constitutional interpretation. The Sixth Amendment expressly provides for face-to-face confrontation. The Court made a functional interpretation to promote a policy consideration, namely protecting children.").

9. *Craig*, 497 U.S. at 856-57.

10. *Id.* at 836 (noting that the important components of the Sixth Amendment Confrontation Clause are oath, ability to observe the witness's demeanor, and cross-examination).

Congress swiftly responded to the Supreme Court's decision in *Craig* and passed the Act. This swift response was also due to the alarming increase in child sexual abuse cases.[11] Congress drafted the Act using the three-part *Craig* test as a template

The primary statutory protection afforded children under the Act is two alternatives to the child's in-court testimony.[12] The Act provides for (1) remote two-way closed circuit televised (CCTV) testimony[13] or (2) a video deposition conducted under the supervision of the trial judge.[14]

A trial judge may permit CCTV testimony only after a finding on the record that the child is unable to testify in open court in the presence of the accused. The child's inability to testify in the presence of the accused must be the result of fear, a substantial likelihood of emotional trauma, mental or other infirmity, or because of the conduct of the accused or defense counsel.[15] If the judge makes such findings, the CCTV statutory procedure allows the prosecutor, defense counsel, the child's guardian *ad litem*, a judicial officer, and equipment technicians to be present when the child testifies. The child testifies at a location removed from the courtroom, and is subject to direct and cross-examination.[16]

The second alternative to the child's live testimony is a videotaped deposition. The judge must issue a court order authorizing the videotaped deposition,[17] and the order must be based on the same reasons supporting CCTV testimony. The judge may order a videotaped deposition if the child cannot testify in the presence of the accused because of fear, a substantial likelihood of emotional trauma, mental or other infirmity, or because of the conduct of the accused or defense counsel.[18] If the judge orders a videotaped deposition based upon the risk of emotional trauma to the child, or based upon the child's fear of the accused, the judge can exclude the accused from the deposition.[19] Unlike current military practice that provides for deposition officers who cannot rule on objections or motions,[20] the Act requires the trial judge to preside over the deposition, as if at trial.[21]

In addition to the two alternatives to live in-court testimony of children, the Act also provides significant privacy protections for children. The Act directs that all documents submitted to the court which disclose the name or other information concerning the child are to be *automatically* (no need for a court order) placed under seal.[22] The trial court may also close the courtroom during the child's testimony.[23] The judge may exclude anyone, including the press, who do not have a direct

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11. H.R. REP. NO. 101-681(I) at 6571 (1990).

> As the number of child abuse cases continues climbing each year, it has become increasingly urgent that America design special procedures to protect child victims and witnesses in court. A few key figures give an indication of the severity of America's child abuse crises: over 2 million children are reported abused and neglected each year; between 1980 and 1986, the number of sexual abuse cases tripled; over 675,000 children were known by professionals to be abused in 1986 alone.

Id.

12. The Act should not be confused with the Victim and Witness Protection Act of 1982 codified at 18 U.S.C.A. § 1503 (West 1998) and the Victims of Crime Act of 1984 codified at 42 U.S.C.A. §§ 10606-07 (West 1998). The Act is separate and distinct from these statutes. These laws are intended to ensure that victims have some access to decision-makers during the investigation and trial phases of their case. These statutes impose affirmative obligations upon the government to inform victims of certain matters and to consider the victim's wishes before taking action (e.g., a victim must be informed that a pre-trial agreement is being considered and the convening authority should consider the victim's reaction to such an agreement). The various service Victim & Witness Assistance Programs implement these statutes. *See* U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5800.11A, VICTIM AND WITNESS ASSISTANCE PROGRAM (16 June 1995); U.S. MARINE CORPS, ORDER 5800.15A, VICTIM AND WITNESS ASSISTANCE PROGRAM (3 Sept. 1997); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 18 (24 June 1996); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 51-201, VICTIM AND WITNESS ASSISTANCE, ch. 7 (25 Apr. 1997).

13. 18 U.S.C.A. § 3509 (b)(1).

14. *Id.* § 3509 (b)(2).

15. *Id.* § 3509 (b)(1)(B). *See* Scott M. Smith, Annotation, *Validity, Construction and Application of Child Victims' and Child Witnesses' Rights Statute* (18 U.S.C. § 3509), 121 A.L.R. FED. 631, 637 (1998).

16. 18 U.S.C.A. § 3509 (b)(1)(D); *see* Smith, *supra* note 15, at 638.

17. 18 U.S.C.A. § 3509 (b)(1)(A); *see* Smith, *supra* note 15, at 638.

18. 18 U.S.C.A. § 3509 (b)(1)(B); *see* Smith, *supra* note 15, at 638.

19. 18 U.S.C.A. § 3509 (b)(1)(iv). *But see* United States v. Daulton, 45 M.J. 212 (1996). The CAAF held that the military judge denied the accused his Sixth Amendment right to confrontation when he excluded the accused from the courtroom during the child victim's testimony. The CAAF focused upon the accused's inability to contemporaneously communicate with his defense counsel. The Act's videotape deposition section avoids this problem by mandating the use of CCTV procedures whenever the accused is excluded from the deposition.

20. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 702 (f) (7) (1998) [hereinafter MCM].

21. Smith, *supra* note 15, at 638.

interest in the case.[24] Closure requires a finding of necessity: "substantial psychological harm," or "inability to effectively communicate" in the presence of the accused.[25]

Another of the Act's important statutory protections provides for appointing a guardian *ad litem.* The trial court "may appoint a guardian *ad litem* for a child victim of, or witness to, a crime involving abuse or exploitation to protect the best interests of the child."[26] The primary role of the guardian "is to marshal and coordinate the delivery of resources and special services to the child."[27] The guardian has access to all court documents, except attorney work product, so he or she may effectively advocate on behalf of the child.[28] Neither side may compel the guardian to testify concerning information the guardian received from the child.

In addition to the appointment of a guardian *ad litem,* the Act further provides for an "adult attendant" to accompany the child during court appearances. The role of the adult attendant is different from the role of the guardian. Whereas the guardian is an advocate for the child, the adult attendant's purpose is to provide comfort and emotional support.[29] A child has the right to have an adult attendant when testifying or appearing in court or any other judicial proceeding.[30] The attendant may remain in close proximity to or in physical contact with the child, while the child testifies. If CCTV or videotape alternatives are used, the adult attendant must also appear on the CCTV screen and the videotape.[31]

The Act's final protection is a statutory speedy trial provision. The speedy trial provision permits government counsel or the guardian to file a motion to have the case designated "of special public importance."[32] Such cases must take precedence over all other docketed cases. The trial court must ensure a speedy trial in order to minimize the length of time the child must endure the stress of being involved with the criminal process. The court must consider, in written findings, the child's age and well being when considering any continuance requests.[33] The purpose of this provision is to force the judge to consider, on the record, how a delay will affect the child.

Scope of the Act: Does It Apply to the Military?

Does the Act apply to courts-martial? The answer to this question is important to the military justice bar. If the Act does apply, significant procedural changes will be necessary to comply with its requirements. The legislative history of the Act strongly suggests that Congress did intend that the Act would apply in courts-martial. In floor debates, the House sponsors of the Act referred to it as a "federal victims' bill of rights for children."[34] Representative DeWine of Ohio, the drafter of the Act, was clear on the scope of the Act during floor debates. Representative DeWine stated:

> While there are a limited but rising number of child abuse cases tried in the Federal courts, many states have adopted innovative procedures that have far outpaced Federal law, leaving those children who do enter the system through *military bases*, Indian reservations, and other Federal lands and facilities inadequately protected.[35]

22. 18 U.S.C.A. § 3509 (d) (1)-(4).

23. *Id.* § 3509 (b)(2)(iii). Under the Act, videotaped depositions are always closed. The Act expressly states that the only persons who may attend a videotaped deposition are government counsel, defense counsel, the child's attorney or guardian ad litem, video equipment technicians, the accused (but only in limited circumstances), and others deemed necessary by the judge for the child's welfare.

24. *Id.* § 3509 (e).

25. *Id.*

26. *Id.* § 3509 (h).

27. *Id.* § 3509 (h)(2) (duties of guardian *ad litem*).

28. *Id.* § 3509 (h).

29. *Id.* § 3509 (i).

30. *Id.*

31. *Id.*

32. *Id.* § 3509 (j).

33. *Id.*

34. Crime Control Act of 1990, H.R. 5269, 101st Cong. 6478 (1990).

Representative DeWine's floor statements, which expressly refer to military bases, strongly suggest that the Act was intended to apply to all children in any type of federal court. The obvious intent of the legislative drafter was to create procedures designed to protect children. Nowhere in the Act's legislative history is there any suggestion that children who appear at courts-martial are categorically excluded from the Act's protections.

Had Congress expressly stated that "this Act applies to courts-martial," the issue concerning the scope of the Act would have been resolved. If Congress had used such language, military judges would have had the authority to apply the Act. Congress, however, did not expressly state that the Act applies to courts-martial. The issue, therefore, becomes one of incorporation. Has the Act been incorporated into the military criminal justice system?

Article 36(a) of the UCMJ requires the President, so long as he considers it practicable, "to apply the criminal law and rules of evidence generally recognized in United States district courts."[36] The federal courts have recognized the Act.[37] The plain meaning of Article 36(a) again suggests that the Act applies to courts-martial. The Act is clearly a principle of law recognized in the federal courts. Does it follow, however, that if the President fails to promulgate rule changes to incorporate new statutory requirements, he has by virtue of his silence deemed the new requirements impracticable for the military justice system?

The CAAF has developed standards of review to determine whether to incorporate a federal statute. The CAAF has clearly stated that the UCMJ is the primary statutory authority of the military justice system. "The Code establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in U.S. district courts."[38]

The CAAF also notes, however, that the military justice system is similar to civilian criminal procedures, and military appellate courts frequently look to parallel civilian statutes for guidance. The systems, however, are separate as a matter of law.[39] In *United States v. Dowty*,[40] the CAAF held that changes to Title 18 of the Federal Criminal Code do not affect proceedings under the UCMJ "except to the extent that the Code or the Manual for Courts-Martial specifically provides for incorporation of such changes."[41]

In *Dowty*, the CAAF outlined a major exception to the rule that amendments to Title 18 are not incorporated into the military justice system without a specific authorization. This exception is the "valid military purpose test." The CAAF stated the emphasis of the exception is on whether there is a valid military reason not to incorporate.[42] Generally applicable statutes, such as the Act, must "be viewed in the context of the relationship between the purpose of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to courts-martial proceedings."[43] Stated more simply, statutes of general applicability also apply to the military justice system unless there is a valid military reason not to incorporate.

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35. 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. DeWine) (emphasis added).

36. UCMJ art. 36(a) (West 1998):

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

Id.

37. *See, e.g.*, United States v. Quintero, 21 F.3d 885 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885 (9th Cir. 1993); United States v. Grooms, 978 F.2d 425 (8th Cir. 1992); United States v. Rouse, 111 F.3d 561 (8th Cir. 1997); United States v. Broussard, 767 F. Supp. 1545 (D. Or. 1991).

38. United States v. Dowty, 48 M.J. 102, 106 (1998). The CAAF addressed how comprehensive statutes of general application become incorporated into the military justice system. In *Dowty*, the CAAF analyzed the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422, and determined that the RFPA had been incorporated.

39. *Id.*

40. 48 M.J. 102 (1998).

41. *Id.*

42. *Id.* at 107 (citing United States v. Noce, 19 C.M.R. 11 (C.M.A. 1955)).

43. *Id.*

To illustrate the valid military purpose test, the CAAF has noted that federal wiretap statutes,[44] the All Writs Act,[45] and the Right to Financial Privacy Act,[46] are all comprehensive statutes that have been incorporated into the military justice system.[47] Despite the lack of presidential action or statutory authority to incorporate these statutes, no valid military purpose existed to prevent incorporation.[48] The CAAF cryptically defines the valid military purpose test as a type of balancing test:

> A general applicable statute must be viewed in the context of the relationship between the purposes of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to military personnel and court-martial proceedings.[49]

In *dicta*, the CAAF stated that Congress does not have to use specific language or magic words when it enacts new legislation that modifies prior legislation.[50] The CAAF emphasized that the issue "is whether the new legislation can be fairly read to modify a prior statute."[51] The UCMJ is the prior legislation the CAAF refers to; therefore, the question, according to the CAAF, is whether the Act "can be fairly read to modify the Code."[52]

Did the Act modify the Code? The CAAF had an opportunity to decide whether the Act applies to courts-martial proceedings in *United States v. Longstreath*.[53] The case involved allegations of child sexual abuse.[54] Trial counsel unsuccessfully, in a pretrial motion *in limine*, requested CCTV procedures for the victims. The military judge denied the motion so the trial counsel was forced to call the sixteen-year-old stepdaughter during the government's case-in-chief.[55] After three days of on-again and off-again testimony, the teenage stepdaughter was eventually able to complete her direct testimony. The stepdaughter, however, was unable to testify during the defense's cross-examination. The military judge eventually held that the stepdaughter's inability to communicate was the result of fear caused by the presence of the accused.[56] Defense counsel moved to strike the stepdaughter's entire direct testimony. The military judge *sua sponte* reconsidered and granted the CCTV motion. The stepdaughter was allowed to complete her cross-examination using one-way CCTV.[57]

In its opinion, the CAAF noted that the Act authorizes federal courts to order two-way CCTV in child sexual abuse cases. The CAAF acknowledged that the legislative history of the Act reflects Congress' intent that the Act apply to all children who enter the federal system. The CAAF stated that it was unclear whether the Act applies to courts-martial; however, it noted that the Navy court held that the statute was applicable and provided "guidance."[58] Without explanation, the CAAF expressly refused to decide whether the Act applies to courts-martial.[59]

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44. *Id.* (citing United States v. Noce, 19 C.M.R. 11 (C.M.A. 1955); Chandler v. United States Army, 125 F.3d 1269, 1299 (9th Cir. 1997); 18 U.S.C.A. §§ 2510-2522 (West 1998)).

45. *Id.* at 106 (citing United States v. Frishholz, 36 C.M.R. 306 (C.M.A. 1966); 28 U.S.C.A. § 1651(a) (West 1998)).

46. *Id.* at 109 (citing United States v. Curtin, 44 M.J. 439 (1996); 12 U.S.C.A. § 3419 (West 1998)).

47. *Id.* at 106-07.

48. *See* United States v. Simoy, 50 M.J. 1 (1998) (Sullivan, J., concurring) (discussing an accused's right to present mitigation evidence in a capital case is controlled by 18 U.S.C.A. § 3592(a)(4) (West 1998) and 21 U.S.C.A. § 848(m)(8) (West 1998)–federal statutes incorporated into substantive military law).

49. United States v. Dowty, 48 M.J. 102, 107 (1998).

50. *Id.*

51. *Id.*

52. *Id.*

53. 45 M.J. 366 (1996).

54. *Id.* at 367. In a judge alone trial at Naval Station San Diego, California, Gunner's Mate Second Class Longstreath, U.S. Navy, was charged with rape, carnal knowledge, sodomy, committing indecent acts on his stepdaughter, and committing indecent acts on his two natural daughters. He was convicted of two specifications of indecent acts–an indecent act with his stepdaughter and a single indecent act with one of his natural daughters.

55. *Id.* at 370-71.

56. *Id.* at 371.

57. *See* Maryland v. Craig, 497 U.S. 836 (1990) (permitting the use of one-way CCTV). *But see* 18 U.S.C.A. § 3509 (b) (West 1998) (requiring two-way CCTV).

58. United States v. Longstreath, 45 M.J. 366, 372 (1996).

The CAAF's refusal to hold that the Act applies to courts-martial leaves children caught up in the military justice system less protected. The result is that a child sexually abused in government quarters located on a military base does not have the same statutory protections as a child who is abused in a national park, on an Indian reservation, or in a federal office building. Surely, limiting the protections afforded to a child forced to appear in a court-martial is not the result Congress intended. "The military is not the fifty-first state. Our military is governed by the law of the land."[60]

Proposed Changes to the *Manual for Courts-Martial* and the Military Rules of Evidence

Despite the CAAF's refusal to directly rule on the applicability of the Act to courts-martial, the service appellate courts are appropriately following *Craig* and upholding the proper use of alternatives to traditional in-court testimony.[61] In an apparent attempt to bring military practice into closer compliance with the Act, the Joint Services Committee on Military Justice has proposed rule changes that will soon go into effect.[62] The Joint Services Committee anticipates that the new rules will become effective sometime in the year 2000.[63]

The Joint Services Committee has proposed three major rule changes. First, an amendment to R.C.M. 804(c) will allow an accused to elect to remove himself from the courtroom when CCTV procedures are used.[64] Second, a new rule, R.C.M. 914A, will authorize military judges to use CCTV testimony in child abuse cases.[65] Finally, MRE 611(d) will establish an evidentiary rule that recognizes CCTV procedures.[66]

The amended R.C.M. 804(c) will permit an accused, in a child abuse case, to elect to remove himself from the courtroom if the military judge grants a CCTV motion. If the accused makes such an election, the child's testimony may not be taken remotely by CCTV–she must testify from the stand.

The analysis to R.C.M. 804(c) asserts that the Supreme Court in *Maryland v. Craig*[67] approved the use of CCTV to further the important public policy of preventing trauma to children.[68] The intent of the new R.C.M. 804(c) is to give the accused a greater role in determining how the CCTV issue will be resolved.[69] Now the accused and defense counsel will have the tactical choice of the accused removing himself and forcing the child to testify on the stand, or remaining in the courtroom alone with all of the CCTV equipment while the child testifies remotely.[70]

The Joint Services Committee also approved the creation of a new rule–R.C.M. 914A.[71] This new rule outlines the procedures to be used if the trial court orders an alternative to live in-court testimony. Under R.C.M. 914A, the military judge is to determine the procedures to be used based on the exigencies of the situation; however, such testimony should normally be taken via two-way CCTV.[72]

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59. *Id*. ("We need not and do not decide if 18 U.S.C. § 3509 applies to courts-martial.").

60. United States v. Dowty, 48 M.J. 102, 113 (1998).

61. *See, e.g.*, United States v. Anderson, 1997 CCA LEXIS 186, No. 31996 (A.F. Ct. Crim. App. 1997) (permitting a child to testify from behind a screen in the courtroom); United States v. Williams, 37 M.J. 289 (C.M.A. 1993) (permitting child to testify from a specially positioned chair in the courtroom); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990) (allowing child to testify with back facing the accused).

62. Memorandum, Department of Defense, Office of the Secretary, Joint Services Committee on Military Justice, subject: Notice of Proposed Amendments (8 May 1996) [hereinafter Proposed Rules]. These proposed rules are attached *infra* at Appendix.

63. Telephone Interview with Lieutenant Colonel Thomas C. Jaster, Judge Advocate, United States Air Force, Executive Secretary, Joint Services Committee on Military Justice, at the Military Justice Division, Air Force Legal Services Agency, Bolling Air Force Base, Washington, D.C. (Feb. 9, 1999). The Joint Services Committee voted five to zero to approve the 1997 proposed rules on 1 February 1999. The Joint Services Committee forwarded the proposed rules to the Department of Justice (DOJ) and (OMB) for comment. Once the DOJ and OMB have completed their comments, the Committee will either modify or forward the proposed rules to the office of White House Counsel recommending enactment.

64. Proposed Rules, *supra* note 62. *See infra* Appendix.

65. *Id.*

66. *Id.*

67. 497 U.S. 836 (1990).

68. Proposed Rules, *supra* note 62. *See infra* Appendix.

69. Proposed Rules, *supra* note 62. *See infra* Appendix.

Pursuant to the proposed R.C.M. 914A, the following procedures apply to CCTV: (1) the witness will testify from a closed location outside the courtroom; (2) the only person present at the remote location will be the witness, counsel for each side (not including an accused *pro se*), equipment technicians, and other persons such as the child's adult attendant,[73] whose presence is deemed necessary by the military judge; (3) the military judge, the accused, members, the court reporter, and all other persons viewing or participating in the trial are to remain in the courtroom; (4) sufficient monitors are to be placed in the courtroom to allow the accused and the fact finder to view the testimony; (5) the voice of the military judge will be transmitted to the remote location to allow control of the proceedings; and, (6) the accused shall be permitted audio contact with defense counsel, or the court will recess as necessary to provide the accused an opportunity to confer with counsel.[74]

Finally, the Joint Services Committee also approved an amendment to MRE 611.[75] A new subsection (d) will be added to create an evidentiary rule that recognizes remote CCTV procedures.[76] Under MRE 611(d)(2), the military judge must make a finding on the record, following expert testimony,[77] that either: (a) the child is likely to suffer substantial trauma if made to testify in the presence of the accused; or, (b) the prosecution will be unable to elicit testimony from the child in the presence of the accused.

More Procedural Changes Needed

The proposed rule changes are a good initial step toward full compliance with the Act; however, more procedural changes are necessary to fully comply with the Act. One such needed change is giving military judges the authority to appoint a guardian *ad litem.* Some method must be devised for appointing guardians to protect the interests of children who appear as victims and witnesses in courts-martial. A guardian who has full access to the proceedings and court papers is one of the bedrock protections of the Act.

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70. *See* Gilleran-Johnson, *supra* note 2, at 698:

> Some defense attorneys suggest that the court remove the defendant to a separate room instead of the child, thus allowing the jury to see the child testifying. This suggestion should be seriously considered, because a child testifying in chambers in front of a closed circuit television may not exhibit certain body language that the jury would otherwise observe. The lack of body language may add to the credibil ity of the child's testimony, because the child appears relaxed. On the other hand, the child may exhibit a false sense of confidence, which the jury could misinterpret as a lack of credibility. The presence of the child in front of the jury, outside the presence of the defendant probably provides the most realistic conditions for the fact-finding process.

Id.

71. Proposed Rules, *supra* note 62. *See infra* Appendix.

72. Proposed Rules, *supra* note 62. *See infra* Appendix.

73. The term "adult attendant" was obviously borrowed directly from 18 U.S.C.A. § 3509 (i) (West 1998). A plain reading of R.C.M. 914A (a) (2) shows that the military judge has the discretion to deem an adult attendant unnecessary. MCM, *supra* note 20, R.C.M. 914A(a)(2). Compare the military judge's discretionary authority contained in R.C.M. 914A (a) (2) with the statutory language in Section (i) of the Act: "a child testifying or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support." *Id.*

74. Proposed Rules, *supra* note 62. *See infra* Appendix.

75. Proposed Rules, *supra* note 62. *See infra* Appendix.

76. Proposed Rules, *supra* note 62. *See infra* Appendix.

77. *Compare* proposed MIL. R. EVID. 611(d)(2) (requiring expert testimony) *and* 18 U.S.C.A. § 3509(b)(1)(B)(ii) (supporting expert testimony), *with* United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997) (holding expert testimony not required to support a "because of fear" finding. "The court may judge with its own eyes whether the child is suffering the trauma required to grant the requested [CCTV] order.") *and* United States v. Longstreath, 45 M.J. 366, 373 (1996) ("It does not take an expert to conclude that a witness who trembles and cries on the witness stand is 'traumatized.'").

How can guardians be appointed in courts-martial? Who has the authority to make such appointments? Unfortunately, there is very little legislative or judicial guidance on these questions. Military case law is virtually silent on the issue. The military courts have limited these cases to the post-trial representation of incompetent military appellants.[78] The Act fails to provide guidance concerning what procedures should be used to appoint a guardian *ad litem.*

Congress's failure to specify appointment authority for guardians poses little problem for Article III courts. Per Federal Rule of Civil Procedure (FRCP) 17(c), federal district courts have the power to appoint guardians.[79] It is doubtful, however, that military courts, without additional statutory authority, have the power to appoint guardians.[80] Congress must fill the statutory void it has created and amend the Uniform Code of Military Justice (UCMJ). Congress should authorize convening authorities and military judges to appoint a guardian *ad litem* or devise some type of referral procedure to the federal district courts for guardian appointments.

Such statutory authority does not have to be complex. Simply dividing UCMJ, Article 46 into subsections would be sufficient to authorize the appointment of guardians. The new subsection would merely have to tailor the Act's language to make it appropriate for use in courts-martial:

> **§ 846. Art 46. Opportunity to Obtain Witnesses and Other Evidence:**
>
> (b) Guardian ad litem –
>
> (1) In General: The military judge may appoint a [commissioned officer] [judge advocate] as guardian *ad litem* for a child who was a victim of, or a witness to, an offense involving any type of abuse or exploitation to protect the best interests of the child. Prior to referral, the convening authority may appoint a [commissioned officer] [judge advocate] as a guardian to protect the best interests of the child. The guardian *ad litem* shall not be a person who is or may be a witness in the proceeding involving the child for whom the guardian is appointed.
>
> (2) Duties of the Guardian: A guardian *ad litem* may attend all the depositions, hearings and court-martial proceedings in which the child participates, and make recommendations to the military judge concerning the welfare of the child. The guardian *ad litem* may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. A guardian shall marshal and coordinate the delivery of resources and special services to the child. A guardian shall not be compelled to testify in any proceeding concerning any information or opinion received from the child in the course of serving as a guardian *ad litem*.
>
> (3) Immunities: Guardians appointed under this section shall have the same immunities from civil and criminal liability, and shall enjoy the same presumption of good faith, as guardians appointed under 18 U.S.C. § 3509(h)(3).[81]

Referral to federal district court or a federal magistrate is another possible solution. Since these courts are already vested with the power to appoint a guardian *ad litem*, appointment

78. *See* United States v. Bell, 20 C.M.R. 108 (C.M.A. 1955) (holding that military appellate defense counsel are the functional equivalents of guardians *ad litem* appointed in accordance with Federal Rule of Civil Procedure 17(c) for military appellants that become incompetent after trial) *overruled by* United States v. Korzeniewski, 22 C.M.R. 104, 107 (C.M.A. 1956) ("The opinion in *Bell* established a rule which was unsound and which would work a substantial injustice."). *See also* United States v. Phillips, 13 M.J. 858, 863 (N.M.C.M.R. 1982) (recognizing that a guardian appointed by a state probate court is an equivalent procedure to Federal Rule of Civil Procedure 17(c), thus post-trial actions must be served on the guardian of an incompetent accused).

79. FED. R. CIV. P. 17(c) reads as follows:

> Infants or Incompetent Persons:
>
> Whenever an infant or an incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

80. As Article I courts, military courts have very limited subject matter jurisdiction. The UCMJ, Articles 2 and 3, confer criminal jurisdiction over a very narrow class of persons. In UCMJ, Article 47, Congress expressly expanded the reach of military courts to compel civilian witnesses to appear and testify at courts-martial; however, violations of UCMJ, Article 47, are enforced in the federal district courts. Under UCMJ, Article 48, a military judge may exercise contempt power over a civilian. The ability of courts-martial to compel the appearance of civilians and to exercise contempt powers over civilians is expressly authorized by statute. It would be inappropriate to argue by analogy that these provisions give military judges the authority to appoint guardians. *See* UCMJ art. 2-3, 47-48 (West 1998).

81. 18 U.S.C.A. § 3509 (h) (West 1998). The suggested rule is modeled exactly after the language contained in the Act.

authority would not have to be created. It would be naïve, however, to believe that these federal judges will be sympathetic to such issues as deployment requirements and the military's unique speedy trial rules.[82] The potential exists for military cases to be held hostage awaiting a guardian decision from federal district courts. Such a system would necessarily involve surrendering a degree of control over the military justice process. Therefore, the best approach is to amend the UCMJ to give convening authorities and military judges the statutory authority to appoint guardians.

Drafting the language to amend the UCMJ to authorize appointing guardians is relatively simple. The more difficult problem is determining who should be appointed. Is serving as a guardian another Judge Advocate General's (JAG) Corps mission or could line officers adequately serve as guardians? Intuitively, acting as a guardian seems most appropriate for someone with legal training.[83] Arguably, JAG Corps officers would be the most effective advocates for child victims and witnesses entangled in the military justice system. Military attorneys have the training, background, and independence to be the most effective advocates for children involved with the military justice system.

If serving as a guardian is to become a JAG mission, Title 10 of the U.S.C.[84] and the various service regulations[85] will have to be amended. Appointing legal assistance officers as guardians is beyond the scope of the current legal assistance statute. Legal assistance officers appointed as guardians must have the authority to represent the child's interest in court.[86] To comply fully with the Act, Congress must statutorily authorize legal assistance officers to represent children who have no military connection (for example, a child from a civilian family who is molested by a service-member in an off-base neighborhood).

In addition to the statutory and rule changes required to implement the Act's guardian provisions, more procedural changes are necessary to permit videotaped depositions. The proposed rule changes are silent on the issue of video depositions.

The ability of the prosecutor, the guardian, or the child's parent to request a videotaped deposition is one of the most important protections the Act affords. Videotaped depositions minimize the amount of time a child has to remain in the criminal justice system. Military procedures should be changed to accommodate the Act's deposition provisions.

Videotaped depositions are an important protection because an interested party can request the procedure at anytime.[87] Once a party requests a deposition, the trial court conducts a hearing to determine if the child will be unable to testify in open court in the presence of the accused.

A judge may order a videotaped deposition if he finds: (1) the child will be unable to testify because of fear;[88] (2) there is a substantial likelihood, established by expert testimony, that the child will suffer emotional trauma from testifying in open court;[89] (3) the child suffers from a mental or emotional infirmity;[90] or, (4) the conduct of the accused or defense counsel

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82. MCM, *supra* note 20, R.C.M. 707.

83. *See generally* Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).

> A guardian *ad litem* [in the context of civil litigation] is appointed as a representative of the court to act for a minor in a cause, with the authority to engage counsel, file suit and to prosecute, control and direct litigation, and as an officer of the court a guardian *ad litem* has full responsibility to assist the court to secure the just, speedy and inexpensive determination of the action.

Id. See also 18 U.S.C.A. § 3509 (h) (1) ("In making the [guardian] appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues.").

84. 10 U.S.C.A. § 1044(a) (West 1998) (providing the statutory authority for military legal assistance). The statute defines who is eligible to receive legal assistance: (1) active duty members, (2) retirees, (3) Public Health Service officers, and (4) dependents of active duty and retired members).

85. *See* U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL'S INSTR. 5801.2 (11 Apr. 1997), NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM; U.S. DEP'T OF ARMY, REG. 27-3 (10 Sept. 1995), ARMY LEGAL ASSISTANCE PROGRAM; U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTATIVE LAW PROGRAM (Nov. 1996).

86. *See* United States v. Rouse, 111 F.3d 561, 567-68 n.4 (8th Cir. 1997). A child sex abuse case in which the defense filed a pretrial motion requesting access to the child for the purpose of conducting defense interviews, psychological and medical testing. The guardian *ad litem* opposed the defense's request for access to the child. In dicta, the 8th Circuit suggests that if testing is required to ensure a fair trial and no alternative can be devised, then the case should be dismissed to protect the best interests of the child. The case underscores the need for an independent guardian whose sole focus is protecting the child.

87. 10 U.S.C.A. § 3509(b)(2)(A) (West 1998).

> In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian or the guardian ad litem . . . may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

Id.

88. 18 U.S.C.A. § 3509 (b)(2)(B)(i)(I).

causes the child to become unable to continue testifying.[91] If the judge makes one of the required findings, then he may order a deposition.[92]

The Act's deposition provision gives substantially more protection than current military deposition practice affords.[93] As previously noted, the Act requires the trial judge to preside over the deposition, *as if at trial*. The requirement that the judge preside over the deposition guarantees control of the proceedings and the proper application of the rules of evidence.[94]

Adhering to the Act's deposition provisions expedites the child's exit out of the military justice system. Why should a child be forced to remain in the system if a showing can be made that the child is too afraid to testify in open court, or if expert testimony will support the likelihood of trauma? Implementing the Act's deposition provisions will place an additional burden upon the time and resources of the military trial judiciary. It may be necessary to provide the military trial judiciary additional resources to fully implement the Act's deposition provisions.

The use of videotaped depositions will also require an amendment to R.C.M. 702. Drafting an amendment to R.C.M. 702 to incorporate the Act's deposition provisions would not be difficult. Again, the language of the Act can be used and tailored to fit the military rule. The following is a suggested military rule modeled exactly on the Act:

> R.C.M. 702(j) *Child Abuse:*
>
> (1) *Generally*: After the referral of charges, in a case involving an alleged offense against a child, trial counsel, the child's attorney, the child's parent or legal guardian, or the guardian *ad litem* may request that the military judge order a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.
>
> (2) *Required Findings*:
>
> (A) The military judge shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the accused, the members, the military judge, and the public for any of the following reasons:
>
> (i) The child will be unable to testify because of fear.
>
> (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
>
> (iii) The child suffers from a mental or other infirmity.
>
> (iv) The conduct of the accused or defense counsel causes the child to be unable to continue testifying.
>
> (B) If the military judge finds that the child is likely to be unable to testify in open court for any of the reasons stated above, the military judge shall order that the child's deposition be taken and preserved by videotape.
>
> (C) The military judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be present during the deposition are:
>
> (i) the trial counsel;
> (ii) defense counsel;
> (iii) the child's attorney or guardian *ad litem;*
> (iv) persons necessary to operate the videotape equipment;
> (v) subject to clause (iv) the accused; and,
> (vi) other persons whose presence the military judge determines is necessary to the welfare and well-being of the child.
>
> (D) If the preliminary finding of inability is based upon evidence that the child is unable to testify in the physical presence of the accused, the military judge may order that the accused, including an accused repre-

89. *Id.* § 3509 (b)(2)(B)(i)(II).

90. *Id.* § 3509 (b)(2)(B)(i)(III).

91. *Id.* § 3509 (b)(2)(B)(i)(IV).

92. *Id.* § 3509 (b)(2)(B)(ii).

93. *See* MCM, *supra* note 20, R.C.M. 702(f)(7) (stating deposition officers note, but do not rule upon objections or motions).

94. It has been the author's experience that in the naval service it is not uncommon to detail junior judge advocates as deposition officers. Frequently, such officers struggle to maintain control over the parties.

sented pro se, be excluded from the room in which the deposition is conducted. If the military judge orders that the accused be excluded from the deposition room, the military judge shall order that two-way closed circuit television equipment be employed to relay the accused's image into the room in which the child is testifying, and the child's testimony into the room in which the accused is viewing the proceeding, and that the accused be provided a means of contemporaneous communication with defense counsel during the deposition.[95]

Modifying the rules will ensure that the military justice system does not harm the child a second time.

Preventing harm to children necessarily entails protecting their privacy. The proposed new rules fail to address the Act's significant privacy protections. The Act requires courts to seal all documents that personally identify the child.[96] The Act's privacy protections insure that only those with a legitimate "need to know" are permitted access to such intimate and embarrassing information.

The Act's privacy safeguards also provide for protective orders. "Any person" can move that the child's name or other personal information be protected from public disclosure. The judge can close the courtroom to protect the child's identity.[97] Protecting the privacy–the dignity–of child victims is essential. A military rule that mandates the Act's privacy protections is necessary to comply with the Act. Using the language of the Act, such a rule could be incorporated into a newly subdivided R.C.M. 108:

(b) *Protective Orders – Child Abuse:*

(1) On motion from the trial counsel, defense counsel, the child's parent or guardian, or the guardian *ad litem*, the military judge may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the court-martial, if the military judge determines that there is a significant possibility that such disclosure would be detrimental to the child.

(2) A protective order issued under this rule may:

(A) Provide that the testimony of a child witness, and the testimony of any other witness, when the party who calls the witness has reason to anticipate that the name of or any other information concerning the child may be divulged in the testimony, be taken in a closed courtroom; and,

(B) provide for any other measures necessary to protect the privacy of the child.

(3) *Disclosure of Information Subject to a Protective Order:* This rule does not prohibit disclosure of the name or other information concerning the child to the accused, defense counsel, a guardian *ad litem*, an assigned adult attendant, the staff judge advocate, the convening authority, detailed military appellate counsel, appellate review authorities, or to anyone to whom, in the opinion of the military judge, disclosure is necessary to the welfare and well-being of the child.

Conclusion

The CAAF missed an excellent opportunity to improve the military justice practice when it decided *Longstreath*.[98] By refusing to hold that the Act applies to courts-martial, military judges must confront child abuse cases on an ad hoc basis. If the CAAF had applied the doctrine of incorporation that it later established in *Dowty*,[99] it would have ruled that the Act applies. No valid military purpose exists to prevent incorporating the Act into the military justice system. Until the Act is incorporated, trial counsel and victims can never be certain when, or if, the protections of the Act will apply. The CAAF's shortsighted decision in *Longstreath* has resulted in the victims of military offenders having far fewer protections than child victims who appear in federal district courts.

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95. *But see* United States v. Daulton, 45 M.J. 212, 219 (1996). The CAAF held that it was a violation of the accused's Sixth Amendment Confrontation rights to exclude the accused from the courtroom while the child victim testified. The military judge excluded the accused instead of having the victim testify from a remote location. The CAAF also held when remote video testimony is used, the accused must be provided a contemporaneous means of communication with defense counsel. The proposed rule, modeled entirely upon the Act, addresses the concerns expressed by the CAAF in *Daulton*.

96. 18 U.S.C.A. § 3509 (d)(1)-(4) (West 1998).

97. *Id.* § 3509 (d)(3)(B)(i)-(ii).

98. 45 M.J. 366 (1996).

99. 48 M.J. 102 (1998).

The CAAF's refusal to hold that the Act applies to the military has inexcusably delayed extending the full protections of the Act to child victims who appear in courts-martial. If the CAAF had ruled that the Act applies, the services would have quickly drafted uniform rules to incorporate the entire Act into military practice. Instead, the Joint Services Committee on Military Justice now has the task of fashioning rules they deem appropriate.

Is the Joint Services Committee the best body to devise new rules to incorporate the Act? Yes, probably they are; however, they are slow and their work is the product of a committee. One can only assume that, like all committees, consensus is the goal. The need for consensus among the services may explain why so many of the important sections of the Act are conspicuously absent in the proposed rules (for example, guardian *ad litem*, videotaped depositions, and privacy protections). The need for consensus may also explain why it is taking so long to implement the proposed rules. Unfortunately, the delay leaves children who are victims without the protections Congress has extended through the Act.

The proposed changes to R.C.M. 804 and 911A, and MRE 611(d)(2) are a partial step towards compliance with the Act. The proposed changes and the additional rules this article suggests would bring the military justice system into compliance with the Act. The guardian *ad litem* provisions would require new statutory authority. Obtaining such legislative authority is an ideal mission for the Joint Services Committee on Military Justice and the Legislative Affairs Division of each service. The President can use his rule making authority to implement the remaining rules.[100]

In summary, the legislative history of the Act expressly states that the statute is to apply to all children who are victims and witnesses in the federal system.[101] Floor statements of the drafters refer to children on military bases when debating the scope of the Act.[102] Review of the legislative history leaves little doubt that the Act is applicable to courts-martial. To say that the Act does not apply to the military results in the creation of second class victims. Are the children who military members abuse less worthy of protection?

Since the CAAF has refused to hold that the Act applies to courts-martial, Congress and the services must work together to fully apply the Act. The new rules should strive to offer equal protection to the children who appear in military courts. There simply is no good reason not to fully apply the Act. The military's refusal or reluctance to put the Act into practice sends the wrong message. It sends a message to the civilian bar that military justice remains unsophisticated and incapable of adjusting to advances in the law. It also sends a message to children who are victims that they have fewer rights and protections simply because their alleged tormentor is on active duty in the armed forces.

In *Longstreath*,[103] the CAAF had the opportunity to rule that the Act is a comprehensive statute that the military justice system has incorporated. Presumably, the services would have already fully implemented the Act if the CAAF had made such a ruling. Since the CAAF has refused to apply the Act to courts-martial, the services should strive to enact all of the Act's protections. Congress will need to cooperate and prod the services into implementing the Act. The children who appear in our courts are worth the effort.

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100. *See* UCMJ art. 36 (West 1998).

101. *See supra* note 4.

102. *See* 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. DeWine).

103. 45 M.J. 366 (1996).

Appendix

The rule changes purposed by the Joint Services Committee on Military Justice:

R.C.M. 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting the following as subsection (c):

(c) Absence for the limited purpose of child testimony.

(1) *Election by the accused.* Following a determination by the military judge in a child abuse case that remote testimony of a child is appropriate pursuant to MRE 611(d)(2), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of the procedures described in R.C.M. 914A.

(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. A two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. The accused will also be provided contemporaneous audio communication with his counsel, or recesses will be granted as necessary in order to allow the accused to confer with counsel. The procedures described herein will be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) *Effect on accused's rights generally.* Exercise by the accused of the procedures under subsection (c)(2) will not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

The analysis accompanying R.C.M. 804 is amended by adding the following:

199_ Amendment: The amendment provides for two-way closed circuit television to transmit the child's testimony from the courtroom to the accused's location. The use of two-way television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to the victim who must view his or her alleged abuser. In such cases, the judge has discretion to direct one-way television communication. The use of one-way television was approved by the Supreme Court in *Maryland v. Craig,* 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

R.C.M. 914A is created as follows:

Rule 914A. Use of remote live testimony in child abuse cases.

(a) *General procedures.* A child witness in a case involving abuse shall be allowed to testify out of the presence of the accused after appropriate findings have been entered in accordance with MRE 611(d)(2). The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. When a television system is employed, the following procedures will be observed:

(1) The witness will testify from a closed location outside the courtroom;

(2) The only person present at the remote location will be the witness, counsel for each side (not including an accused *pro se*), equipment operators, and other persons, such as the attendant for the child, whose presence is deemed necessary by the military judge;

(3) The military judge, the accused, members, the court reporter, and all other persons viewing or participating in the trial will remain in the courtroom;

(4) Sufficient monitors will be placed in the courtroom to allow viewing of the testimony by both the accused and the fact finder;

(5) The voice of the military judge will be transmitted into the remote location to allow control of the proceedings;

(6) The accused will be permitted audio contact with his counsel, or the court will recess as necessary to provide the accused an opportunity to confer with counsel.

(b) *Prohibitions.* The procedures described above will not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c).

The analysis accompanying R.C.M. 914A is as follows:

199_ Amendment: This rule allows the military judge to determine what procedures to use when taking testimony under MRE 611(d)(2). It states that normally such testimony should be taken via a two-way closed circuit television system. The rule further prescribes the procedure to be used if a television system is employed. The use of two-way television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to the victim who must view his or her alleged abuser. In such cases, the judge has discretion to direct one-way television communication. The use of one-way television was approved by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

Military Rule of Evidence 611 is amended by adding the following subsection:

(d) ***Remote examination of child witness.***

(1) In a case involving abuse of a child under the age of 16, the military judge shall, subject to the requirements of section (2) of this rule, allow the child to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) Remote examination will be used only where the military judge makes a finding on the record, following expert testimony, that either:

(A) The child witness is likely to suffer substantial trauma if made to testify in the presence of the accused; or

(B) The prosecution will be unable to elicit testimony from the child witness in the presence of the accused.

(3) Remote examination of a child witness will not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c).

The analysis accompanying MRE 611 is amended by adding the following:

199_ Amendment: This amendment to MRE 611 gives substantive guidance to military judges regarding the use of alternative examination methods for child abuse victims. The use of two-way television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to the victim who must view his or her alleged abuser. In such cases, the judge has discretion to direct one-way television communication. The use of one-way television was approved by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract and Fiscal Law Note

Post-Award Mistakes under the Buy American Act

A case before the General Services Administration Board of Contract Appeals (GSBCA), *Integrated Systems Group, Inc. v. Social Security Administration*, raised some interesting questions regarding how to apply the Buy American Act requirements after the contract award.[1] Integrated Services Group (ISG) challenged the Social Security Administration's (SSA) decision to terminate its supply contract for cause[2] after ISG failed to furnish various computer cabling products by the stated delivery date. The Integrated Systems Group contended that the SSA's termination for cause was improper for several reasons. The ISG argued that it made a unilateral mistake by certifying that it would provide domestic end products pursuant to the Buy American Act.[3]

After award of the contract, the ISG attempted to verify the country of origin of the products it intended to supply to the government. That is, ISG wanted to insure that the computer cabling products were domestic end products. The ISG learned, much to its chagrin, that it had actually proposed foreign end products for a number of the contract line items.[4] The ISG immediately notified the contracting officer of the problem. According to the ISG, supplying domestic end products would significantly increase its costs under the contract. The ISG asked the contracting officer to reevaluate the items as foreign end products. The contracting officer, however, declined to do so because the award had already been made. The Integrated Systems Group had received the evaluation preference for offering domestic end products; and the contracting officer stated that she *could not* reevaluate the ISG's proposal after award.[5]

The next day the contracting officer called the ISG and reiterated that the ISG must deliver the computer cabling in accordance with the terms and conditions of the contract. The ISG informed the contracting officer that all purchasing activity had stopped once it discovered the mistake.[6] The contracting officer proceeded to terminate the contract for cause because of the ISG's failure to deliver acceptable products in accordance with the delivery schedule.[7]

The ISG appealed the contracting officer's decision, requesting the GSBCA convert the termination for cause to a termination for convenience.[8] The ISG argued that its inadvertent Buy American Act miscertification either excused its nonperformance or rendered the contract void ab initio.[9]

The GSBCA held that the ISG's contentions were not supported by either the facts or law. In making its decision, the GSBCA relied on a similar case decided by the Armed Services Board of Contract Appeals (ASBCA).[10] In that case, *Sunox Inc.*, the ASBCA found that a contractor's unilateral mistake in providing non-domestic goods after certifying the products were Buy American compliant is not the type of mistake which warrants relief from a termination for default. The ASBCA specifically noted that "A unilateral mistake of this sort is not beyond the control or without the fault or negligence of the contractor and therefore is not the basis for relief from the default on the contract."[11]

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1. Integrated Systems Group, Inc. v. Social Security Admin., GSBCA 14054-SSA, 98-2 BCA ¶ 29,848.

2. General Servs. Admin. et al., Federal Acquisition Reg. 52.212-4(m) provides, in pertinent part, "Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance."

3. 41 U.S.C.A. §§ 10-d (West 1998). Generally, the Buy American Act establishes a preferences for the acquisition of domestic "articles, materials, and supplies" when they are being purchased for use in the United States. The Buy American Act was a depression-era statute designed to protect American capital and jobs.

4. *Integrated Systems Group, Inc.*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848.

5. *Id.* at 147,741.

6. *Id.*

7. *Id.* at 147,742.

8. *Id.*

9. *Id.*

10. 98-2 BCA ¶ 147,742 (citing Sunox, Inc., ASBCA No. 30025, 85-2 BCA ¶ 18,077).

Applying these principles to the instant case, the GSBCA concluded that ISG's failure to supply products in accordance with the terms and conditions of the contract justified the termination for cause.[12] Additionally, the GSBCA stated that the agency's termination for cause was justified due to the ISG's miscertification. That is, the ISG's failure to inquire of its subcontractors is not a "mistake." A proper certification requires an inquiry by the contractor in order to provide a basis for the certification.[13] Major Wallace.

International and Operational Law Note

Principle 7: Distinction Part II

The following note is the seventh in a series of practice notes[14] that discuss 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.[15]

"Strikes Hit Civilians, Iraq Says."[16] This front page headline in the *Washington Post* highlighted an article describing the civilian casualties resulting from an apparent stray U.S. missile fired at military targets in Southern Iraq. Later in the article, the author cited General Anthony Zinni, the Central Command (CENTCOM) Commander, as laying blame for the incident on Saddam Hussein. According to General Zinni, "the ultimate reason and cause for these casualties"[17] was the Iraqi tactic of locating military targets in civilian areas.[18] While most practitioners recognize the significance of the principle of distinction,[19] this incident highlights an often-overlooked aspect of that principle–the obligation of a defender to facilitate the distinction process.

This obligation is manifested in Article 58 of Protocol I Additional to the Four Geneva Conventions of 1949.[20] Article 58, entitled "Precautions against the effects of attacks,"[21] requires *all* parties to a conflict (not just the attacking force) to:

> (1) Endeavor to remove civilians and civilian objects *under their control* from the vicinity of military objectives;
> (2) Avoid locating military objectives within or near densely populated areas;
> (3) Take other precautions to protect civilians *under their control* from the dangers of military operations.[22]

In essence, these provisions represent a mandate directed toward a force anticipating enemy attack to separate itself from the civilian population. As the Official Commentary to Geneva Protocol (GP) I indicates, "Belligerents may expect their adversaries to conduct themselves fully in accordance with their treaty obligations and to respect the civilian population, *but they themselves must also cooperate by taking all possible precautions for the benefit of their own population . . . .*"[23]

The measures required under Article 58 of GP I have the stated purpose of enhancing the protections afforded the civilian populations. Undeniably, however, the consequence of

11. *Id.* (citing *Sunox*, 85-2 BCA at 90,752).

12. *Integrated Systems Group, Inc.*, GSBCA at 147,743.

13. *Id*. (citing H&R Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373).

14. *See* 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 [hereinafter *Principle 2*]; 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 22; International and Operational Law Note, *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1998, at 25.

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

16. Bradley Graham, *Strikes Hit Civilian Targets, Iraq Says*, WASH. POST, Jan. 26, 1999, at A1.

17. *Id.* at A16.

18. *Id.*

19. *See Principle 2*, *supra* note 14, at 35.

20. 1977 Protocol I Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter GP I].

21. *Id.*

22. *Id.*

23. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 692 (1987) (emphasis added).

such measures will be to facilitate an opponent's ability to lawfully target military objectives. While this might seem illogical to some, it is an aspect of the principle of distinction that the United States considers fundamental and essential.

This aspect of the principle of distinction is best illustrated by considering the issue of entitlement to prisoner of war (PW) status. While this may at first seem an unlikely paradigm for this proposition, it is the classic example of the requirement that armed forces distinguish themselves from non-combatants at all times, even if it results in facilitating an opponent's ability to identify targets.

The standard for determining who qualifies for PW status is established in the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[24] Article 4 of the GPW identifies several categories of individuals who satisfy the "status" test. The common thread that runs through all these categories is the requirement that before capture, the individuals are identifiable as combatants.[25]

The "identifiable as combatants" requirement is best illustrated by the Article 4 requirement that militia members are entitled to PW status *only* if they, among other things, wear a "fixed and distinctive sign recognizable from a distance," and carry arms openly.[26] Even the concept of giving PW status to captured civilian members of a *levee en masse*[27] (spontaneous resistance) is consistent with this thread. Their status is contingent on their carrying arms openly, thus facilitating the ability of the opponent to distinguish them from civilians not participating in the spontaneous resistance.

Thus, Article 4, which is considered a reflection of the customary international law of war, establishes an implied *quid pro quo*–obtaining the benefit of PW status once in the hands of an opponent is contingent on ensuring your opponent could distinguish you from non-combatants before capture. The undeniable consequence of facilitating your opponent's ability to identify you as a lawful target is the price paid for gaining the benefit of the law of war upon capture.

The significance for the United States of ensuring an opponent's ability to distinguish between lawful and unlawful targets is also reflected in an issue related to PW status. The GP I Article 44(3) dilution of the requirement that those entitled to PW status distinguish themselves before capture was a major factor in President Reagan's decision not to submit GP I to the Senate for advice and consent. According to Judge Abraham D. Sofaer, who was serving as the Legal Advisor to the Department of State:

> Our extensive interagency review of Protocol I has, however, led us to conclude that the Protocol suffers from fundamental shortcomings that cannot be remedied through reservations or understanding . . . .
>
> Equally troubling [after discussing the politicization of applicability of the law of war] is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to "national liberation" movements in general, but in particular the inhumane tactics of many of them. Article 44(3) grants combatant status to armed irregulars, *even in cases where they do not distinguish themselves from noncombatants, with the result that there will be increased risk to the civilian population within which such irregulars often attempt to hide* . . . .
>
> A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying weapons openly . . . The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeapordy . . . .
>
> These changes [the modification of who qualifies for PW status contained in Article 44(3)] undermine the notion that the Protocol has secured an advantage for humanitarian law by granting terrorist groups protection as combatants.[28]

24. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2-3, T.I.A.S. No. 3364 [hereinafter GPW], *reprinted in* U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

25. There are some minor exceptions to this rule. For example, Article 4(A)(4) grants PW status to civilians accompanying the force. However, this seems to be a recognition that should such individuals fall into the hands of an enemy, the detaining power is authorized to refuse to allow them to go back to the force they were supporting. It does not seem relevant to the distinction issue, because they ostensibly would not be taking actions that would be tantamount to "direct part in hostilities," and therefore an opponent would not incur a risk by assuming they were ordinary civilians until the time they were captured.

26. GPW, *supra* note 24, art. 4.

27. The act of a local population of a non-occupied territory spontaneously taking up arms to resist an armed invasion without having time or opportunity to organize into regular units. *See id.* art. 4 (A)(6).

28. Symposium, *Humanitarian Law Conference*, 2 AM. U.J. INT'L. L. & POL'Y 415, 463-66 (1987) (The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, United States Department of State, January 22, 1987) (emphasis added).

This quote is clear evidence of the premium the United States places on both sides of a conflict, enhancing the prospects of distinction between lawful and unlawful targets.

At the operational level, this "opponent distinction" obligation is often the most troubling aspect of enemy law of war compliance or lack thereof. The expanded "battle-space" of contemporary military operations, and the ever improving capability of projecting lethality deep into enemy territory only serve to exacerbate this problem. This is particularly true when U.S. forces confront an enemy who perceives that the United States is determined to adhere to the law of war and minimize incidental civilian injury as a means of negating our technical and tactical superiority, resulting in intentional co-mingling of military assets with civilian population centers.[29]

Although it is likely that enemy forces will, as they often have in the past, continue to disregard this obligation, from the judge advocate's perspective, it remains a critical aspect of distinction. The most obvious reason for this assertion is that U.S. forces do not operate in "sterile" environments. Recent history demonstrates that during both military operations other than war and combat operations, U.S. forces often find themselves in the midst of large host nation population concentrations. In such situations, commanders must remain cognizant of the obligation derived from Article 58. This requires that they avoid, whenever possible, establishing positions near civilian populations. It also requires that commanders consider methods for evacuating civilians from areas of likely conflict,[30] and methods of reducing risk to surrounding populations (such as warnings, assistance to civil defense efforts, and possibly even coordinating with ICRC representatives for the establishment of "neutralized zones"[31]).

The second critical, albeit less obvious, reason why judge advocates must be familiar with this aspect of the principle of distinction is to assist commanders in articulating which party is culpable for incidental injury caused by U.S. military operations. General Zinni's comment validates this imperative.

United States forces must expect to be the object of intense media and non-governmental organization scrutiny during current and future combat operations.[32] This scrutiny will be most intense in response to inflicting incidental injuries to civilians and their property during the course of operations. When the culpability for such injuries properly belongs with the enemy for failure to take adequate measures to distinguish his own forces and facilities from local civilian populations, judge advocates must assist commanders in expressing the nature of the enemy violation. This obviously requires a thorough knowledge of the principle of distinction, and in particular those aspects of the principle binding on a defending force. Major Corn.

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29. *See* Michael Shmitt, *Bellum Americanum: The U.S. View of Twenty-First-Century War and Its Possible Implications for the Law of Armed Conflict*, *in* 70 INT'L LAW STUDIES: U.S. NAVAL WAR COLLEGE 389 (1998) (discussing the probability of enemy resort to "human shield" tactics in future wars as a method of compensating for overwhelming U.S. military superiority).

30. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 17, T.I.A.S. No. 3364, *reprinted in* U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) (providing procedures for the evacuation of civilians from the vicinity of combat operations).

31. *Id.* art. 15 (providing procedures for establishing neutralized zones for the protection of civilian populations in the vicinity of combat operations).

32. *See* Shmitt, *supra* note 29, at 389.

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 issues, volume 6, numbers 2 and 3, are reproduced in part below.

Fourth Circuit Looks at NEPA Cost Benefit Analysis

In a recent decision, *Hughes River Watershed Conservancy v. Johnson*,[1] the Fourth Circuit Court of Appeals looked at the adequacy of a cost and benefit analysis in an environmental impact statement (EIS). The case provides guidance on the level of detail that is required for economic benefit information in an environmental analysis prepared under National Environmental Policy Act of 1969 (NEPA).[2]

In this case, federal agencies prepared an EIS for construction of a dam in West Virginia. That EIS came under scrutiny in a 1996 decision, *Hughes River Watershed Conservancy v. Glickman*.[3] In *Glickman*, the plaintiffs asserted that the agencies had not provided fair consideration of the project's adverse environmental effects because they had overestimated the economic benefits to be gained from the dam's recreational use. The court of appeals disagreed and determined that the agencies had not violated NEPA.[4] The court remanded this case for the agencies to reevaluate their estimates of recreational benefits. Subsequent EIS analysis was to be based upon net benefits, rather than gross benefits.[5]

The federal agencies obtained a new economic study of the project. This study evaluated all additional recreational benefits provided by the proposed dam and changes in activity mix, and also considered non-use values. The study showed an overall positive benefit-cost ratio for the dam, which supported the project's economic feasibility. The agencies incorporated the study's conclusions into a supplemental EIS, which was again challenged.[6]

In *Hughes River Watershed Conservancy v. Johnson*, the court reviewed Supreme Court cases that addressed NEPA analyses of economic issues. It concluded that an agency is first vested with discretion to determine that certain values–such as recreation–outweigh environmental costs.[7] The court also determined that NEPA requires agencies to balance a project's economic benefits against its environmental effects.[8] Although an agency could choose to go forward with a project that does not make economic sense, it must nevertheless take a "hard look" at the issue.

Looking at the supplemental EIS, the court found that the federal agencies, "in making their economic recreational benefits determinations, considered the total number of visitors to the [p]roject, the number of visitors who would be diverted to the [p]roject from existing facilities, the consumer surplus figure, and non-use values."[9] Such a non-use value would include the value that a person places on knowing the river exists in its free-flowing state and knowing the river will be protected for future generations. The agencies' weighing of these factors led the court to determine that the agencies' decision to implement the project was not arbitrary or capricious.[10]

This case demonstrates that economic benefit information in a NEPA document must be thorough and even-handed. The

1. 165 F.3d 283 (4th Cir. 1999).
2. 42 U.S.C.A. § 4321 (West 1999).
3. 81 F.3d 437 (4th Cir. 1996).
4. *Id.* at 447.
5. *Id.*
6. *Johnson*, 165 F.3d at 287.
7. *Id.* at 288 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)).
8. *Id.* at 289 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).
9. *Id.* at 290.
10. *Id*.

fact that certain factors are imprecise or unquantifiable will not render the result inadequate.[11] Lieutenant Colonel Howlett.

EPA Proposes New Rules for Lead-Based Paint Debris

The Environmental Protection Agency (EPA) has proposed a new rule on lead-based paint (LBP) demolition debris.[12] Under the latest proposal, LBP demolition debris that fails the toxicity characteristic leaching procedure would no longer be subject to regulation under the Resource Conservation and Recovery Act (RCRA).[13] The trade-off, however, is that all LBP demolition debris, regardless of the hazard, would be subject to regulation under the Toxic Substances Control Act (TSCA).[14]

The TSCA regime would require that: (1) the LBP debris be stored for up to 180 days in an inaccessible container (or seventy-two hours if it is accessible), (2) the LBP debris be disposed in construction/demolition waste landfills (not municipal landfills) or hazardous waste disposal facilities, and (3) disposal facilities be notified that the waste that contains LBP demolition debris with information on the date the debris was generated. The generator and the landfill would have to keep records for three years.[15]

The proposed rule includes a household waste exemption.[16] Accordingly, wastes from a resident's home renovations would not be included in the rule's purview.[17] The Army, as the executive agent, is currently coordinating comments from all of the services for a single DOD submittal. Major Egan.

ELD Fines and Settlements Report

In January, the ELD published its *Fines and Settlements Report* for the first quarter of fiscal year 1999.[18] This report indicated that Army installations received two new fines and settled seven cases during the quarter. In addition, for the first time, the report deemed five other cases closed because states failed to pursue fines after installations raised a sovereign immunity defense.

Each of the sovereign immunity cases deemed closed in the *ELD Quarterly Fines and Settlements Report* involved asserted violations of the Clean Air Act (CAA).[19] Sovereign immunity has been waived for CAA enforcement by state regulators, but not for payment of state punitive fines.[20] In each of the closed cases discussed in the ELD's report, Army installations had invoked sovereign immunity under the CAA, and heard nothing further from their respective state regulators.

The decision to close these pending cases was made on an individual basis. Accordingly, it does not mean that all cases involving sovereign immunity are deemed resolved. The decision to close each case was made on a variety of factors. Such factors include the length of time that has passed since the violation, the lack of contact from the state, and the likelihood that the state will revive the action in the future.

A number of installations are currently facing uncertainty in determining closure for specific cases that may involve sovereign immunity. In most of these cases, the installation sent a letter to the state regulators informing them that sovereign immunity precludes payment of fines. In each case, the states have simply not responded to the letters. In general, the best practice under these circumstances is to maintain contact with state officials and attempt to receive official acknowledgment (by letter, motion, or otherwise) that the fine is no longer pending.

In some cases, however, it may be wise to "let sleeping dogs lie." Over time, the failure of the state regulators to pursue an outstanding notice of violation may be deemed acquiescence to

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11. *Id*. (quoting Sierra Club v. Lynn, 502 F.2d 43, 61 (5th Cir. 1974)).

12. Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, Part II, 63 Fed. Reg. 70,233 (Dec. 18, 1998).

13. 42 U.S.C.A. § 6900 (West 1999).

14. 63 Fed. Reg. 70233, 70235.

15. Temporary Suspension of Toxicity Characteristic Rule for Specified Lead-Based Paint Debris, Part II, 63 Fed. Reg. at 70,235.

16. *Id.* at 70,241.

17. *Id.* at 70,241-42.

18. Environmental Law Division, U.S. Army Legal Services Agency, Quarterly Fines and Settlements Report (1st quarter, 1999). For a copy of this report, please contact the author at <cotelrj@hqda.army.mil>.

19. 42 U.S.C.A. §§ 7401-7671q (West 1999).

20. The Supreme Court first articulated this view in *United States Department of Energy v. Ohio*, where it interpreted a congressional waiver of sovereign immunity for the Clean Water Act (CWA), which was similar to the CAA. *See* United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992) (citing 33 U.S.C.A. § 1251-1277 (West 1999)). The Supreme Court's decision was formally extended to the CAA in *United States v. Georgia Department of Natural Resources. See* United States v. Georgia Dep't of Natural Resources, 897 F. Supp. 1464 (N.D. Ga. 1995).

the United States' position on sovereign immunity. Major Cotell.

Invoking Sovereign Immunity in Clean Air Act Issues

As the previous note discussed, states have failed to close CAA cases that are pending against installations–even though the installations have raised the sovereign immunity defense. The reasons for this varies. Some states are unfamiliar with the concept of sovereign immunity, believing that dismissal of a case will somehow affect their "rights." Others believe that they may be able to resurrect an action if the CAA cases that are currently under appeal are decided in their favor. There is some truth to these assertions.

One invalid reason that states keep cases open, however, results from the installation's failure to adequately explain the scope of sovereign immunity. Once a state is told that the federal government is invoking "immunity" from state action, some regulators experience undue panic. Often, states incorrectly jump to the conclusion that they are powerless to regulate an installation.[21] This issue becomes particularly dangerous when state regulators believe that their only regulatory recourse is to deny CAA permits after an installation invokes sovereign immunity.

Accordingly, it is important for the installation environmental law specialist (ELS) to adequately explain the sovereign immunity issue when an installation receives a CAA notice of violation from a state regulator. The ELS should stress to the regulator that, under the CAA, sovereign immunity applies only to the imposition of fines. In all other areas of the CAA, immunity has been waived. States may require corrective action and other measures to compel immediate compliance. It is in the best interest of the installation to acknowledge these requirements and express a willingness to cooperate. In addition, it is important to note that the installation is powerless to effect a waiver of sovereign immunity. This power rests only with Congress. Accordingly, a diplomatic letter can express to the state that this issue is beyond an installation's control. This will likely have a positive effect on future dialogue with the regulators. Attached as an appendix to this note is a sample letter that should be used by installations to invoke sovereign immunity. Obviously, the letter must be tailored by each installation to address the specifics of its case. Major Cotell.

21. One recent case required a detailed letter from the Department of Defense Deputy General Counsel (Installations and Environment) explaining the concept of sovereign immunity to state regulators and addressing their erroneous assumptions about the immunity's scope.

Sample Letter to State Regulators Invoking Sovereign Immunity for Cases Concerning the Clean Air Act

Date

Address of state regulatory agency

Dear _____,

This is in response to a Notice of Violation (NOV) issued from your office on (***date***) to (***Installation***) for violations of (***cite state reference)*** pursuant to the Clean Air Act (CAA) and for demand of a fine in the amount of (***amount***).

The (***Installation***) takes very seriously its obligation to maintain compliance with environmental laws and regulations. In the area of environmental law, Congress has frequently waived sovereign immunity to require federal agencies to comply with state, interstate, and local pollution control laws. Indeed, the CAA's federal facilities provision (42 U.S.C Section 7418(a)) contains a partial waiver of sovereign immunity that directs federal agencies to comply with air pollution control programs "to the same extent as any non-governmental entity." In addition, it subjects federal facilities to administrative fees or charges to defray the costs of air pollution control programs, as well as the "process and sanctions" of air program regulatory agencies.

In light of the above, to the extent that (***Installation***) has violated the CAA, it has a duty and obligation to correct the deficiencies expeditiously and in accordance with all applicable state laws. The violations in the above noted NOV are being handled by (***Director of Installation Environmental Program***) and specific action is being taken to bring (***Installation***) into immediate compliance and to correct deficiencies.

Please note that although the waiver of sovereign immunity in the CAA includes subjecting federal facilities to "process and sanctions," the precise meaning of these words has been the subject of litigation in federal courts. Indeed, the position of the United States taken in pending litigation on this matter will prevent (***Installation***) from paying the fines requested in the NOV in this case. The terms "process and sanctions" were first interpreted by the United States Supreme Court when it examined the federal facilities provision of the Clean Water Act (CWA) in U.S. Department of Energy v. Ohio, 503 U.S. 607 (1992). The Court found that this aspect of the CWA's waiver of sovereign immunity, which is virtually identical to the waiver in the CAA, did not subject federal facilities to "punitive fines" imposed as a penalty for past violations. This was based on a finding that the CWA did not contain a clear and unequivocal congressional waiver of sovereign immunity on that point.

The Supreme Court's decision in Department of Energy v. Ohio was formally extended to the CAA in United States v. Georgia Department of Natural Resources, 897 F. Supp. 1464 (N.D. Ga. 1995), holding that the CAA does not authorize Federal agencies to pay punitive fines. More recently, a federal district court in California similarly held that the CAA does not authorize federal agencies to pay punitive fines. Sacramento Metropolitan Air Quality Control District v. United States, 29 F. Supp. 652 (E.D. Cal. 1998). Although a contrary result was reached in another federal court case where a district court judge deviated from the model analytical approach of the U.S. Supreme Court, that case is currently pending appeal before the Federal Court of Appeals for the 6th Circuit. United States v. Tennessee Air Pollution Control Board, 967 F. Supp. 975 (M.D. Tenn. 1997), *appeal pending*, No. 97-5715 (6th Cir.). The position of the United States, as articulated by the Department of Justice in defense of litigation on this matter, is that Congress has not waived sovereign immunity under the CAA for the payment of punitive fines imposed by states.

(***Installation***) is bound by this position. No individual installation may waive sovereign immunity. Indeed, not even an agency such as the Army or the Department of Defense may waive sovereign immunity. Only Congress has that power, and, until Congress exercises it, (***Installation***) cannot legally pay the fines requested in the NOV.

The lack of a waiver of sovereign immunity for punitive fines in no way exempts federal agencies from full compliance with the CAA. Federal agencies are bound to comply with all laws and regulations for air pollution control, and are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a federal facility's air pollution control activities, the facility has the same obligation as non-governmental entities to expeditiously correct all infractions. Again, (***Installation***) remains firmly committed to environmental compliance and will work closely with your agency to assure all compliance issues related to this matter are quickly resolved.

Sincerely,

Installation Commander/Staff Judge Advocate

Puerto Rican Case Explores CERCLA Jurisdictional Limit

A recent case[22] in the Federal District Court in Puerto Rico explores the jurisdictional limits of section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[23] In *M.R. (VEGA ALTA), Inc. v. Caribe General Electric Products, Inc.*, the plaintiffs sued both private defendants and the United States EPA, alleging that these parties were responsible for solvent contamination in plaintiffs' water supply.[24] In addition to bringing CERCLA claims, and a variety of tort claims, against private defendants, the plaintiffs also used CERCLA's citizen suit provision, to challenge the EPA.[25] This precedent is important to because the Army has been delegated the same authority that the EPA exercised in this case.[26]

In 1988, the EPA ordered the private defendants to implement a remedial action. The EPA modified its remedial approach several times over the next ten years, although the remedial action was still underway. The plaintiffs brought suit to compel the private defendants to carry out the agency's remediation order under CERCLA's citizen suit provision, CERCLA section 310(a)(1). In addition, the plaintiffs sued the EPA under CERCLA section 310(a)(2), alleging that the EPA: (1) had not selected an adequate remedy, (2) had not implemented selected remedies, and (3) had failed to perform required five-year reviews.[27] The plaintiffs also sued the EPA under the Administrative Procedure Act.[28]

The court began its discussion of the citizens' suit claims by stressing that CERCLA's grant of federal jurisdiction is limited by CERCLA section 113(h).[29] As for the claim against the private defendants, the court found that it was allowable since that claim sought to enforce an EPA order issued under CERCLA section 106.[30] Regarding the claim against the EPA, the district court began by examining CERCLA's legislative history. The court determined that, according to CERCLA section 113(h)(4), it had no jurisdiction over the plaintiffs' challenge to an ongoing response stating:action. The court stated:

> Plaintiffs wish to require the EPA immediately to (1) initiate control of soil contamination by use of certain technologies, (2) initiate extraction and treatment of contaminated groundwater, and (3) conduct and act upon the findings of a remedy review. In order to provide this type of relief, we could not avoid interfering with the EPA's cleanup efforts and running afoul of the mandate of section 113(h).[31]

The court also found that the Administrative Procedure Act claim was barred since CERCLA section 113(h) refers to "any

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22. M.R. (VEGA ALTA), Inc. v. Caribe Gen. Elec. Prods., Inc., 31 F. Supp. 2d 226 (D.P.R. 1998).

23. 42 U.S.C.A. §§ 9601-9675 (West 1999).

24. Plaintiffs were represented by Ms. Margaret Strand, a Washington, D.C., practitioner, who is familiar to many Army lawyers through her educational activities.

25. CERCLA § 310(a)(1) (codified at 42 U.S.C.A. § 9659(a)(1)). This note does not discuss the private defendant claims or the Federal Tort Claims Act count against the EPA.

26. *See* Exec. Order No. 12580, 52 Fed. Reg. 2923 (1987).

27. The EPA is required to review all remedial actions that result in hazardous substances remaining on the site no less than every five years after the remedial action is initiated. Such review is meant to assure that human health and the environment are being protected by the remedial action being implemented. 42 U.S.C.A. § 9621(c). *See* 40 C.F.R. § 300.430(f)(4)(ii) (1998).

28. 5 U.S.C.A. § 706 (West 1999).

29. 42 U.S.C.A. § 9613(h). This section states:

No Federal court shall have jurisdiction under Federal Law . . . to review any challenges to removal or remedial action . . ., or to review any order . . . , in any action except one of the following:

> (1) An action under section 9607 of this title [CERCLA] to recover response costs or damages or for contribution.
> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
> (3) An action for reimbursement under section 9606(b)(2) of this title.
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this [Act]. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

An action under section 9606 of this title in which the United States has moved to compel a remedial action.

Id.

30. *See id.*

31. M.R. (VEGA ALTA), Inc. v. Caribe Gen. Elec. Prods., Inc., 31 F. Supp. 2d 226, 235 (D.P.R. 1998).

challenges" to a removal action(not just those that are brought under CERCLA.[32]

On the other hand, the court found that the request for a five-year review did *not* constitute a challenge to the ongoing response action. On this matter, the court stated that "[r]equiring the EPA to produce a five-year review in accordance with CERCLA § 121(c), 42 U.S.C. § 9621(c), would not affect the remedial action or unduly compromise the EPA's limited resources, in contravention of congressional policy behind section 113(h)."[33]

Under the logic of this case, a challenge can be brought to compel CERCLA procedural requirements as long as there is no interference with the implementation of the remedy. This could require an inquiry into whether the requested relief interferes with a remedy and is not preferable to a "bright-line" rule that would bar all CERCLA challenges to an ongoing remedy. This decision represents an erosion of CERCLA section 113's protections. Lieutenant Colonel Howlett.

Longhorn Pipeline Settlement Reached

On 5 March 1999, the United States District Court for the Western District of Texas approved a settlement among the parties to the Longhorn Partners Pipeline (LPP) dispute.[34] Originally, the plaintiffs sued to stop the operation of a proposed 700-mile pipeline, claiming that the project violated the requirements of the national Environmental Policy Act.[35] The suit named several federal defendats: the Army, the EPA, the Department of Transportation (DOT), and the Federal Energy Commission. Among other things, the plaintiff's alleged that the Army's involvement inthe case stemmed from an LPP application for a six-mile right-of-way across Fort Bliss, Texas, and from actions by the plaintiffs that fell within the jurisdiction of the Army Corps of Engineers.

The District Court granted the injunction in August 1998 and ordered the EPA "and/or" DOT to prepare an Environmental Impact Statement addressing the construction and operation of the pipeline. Under the terms of the settlement, the plaintiffs have agreed to accept preparation of an Enviornmental Assessment (EA) by EPA and DOT. This EA will include an analysis of the affected enviornment and a consideration of alternatives to construction (such as -re-rerouting the pipeline around environmentally sensitive areas), as well as alternative measure to mitigate any identified impacts. The EPA and DOT expect the EA to be completed in a seven-month period. The Army will be a cooperating agency under the agreement. Major DeRoma.

Litigation Division Note

Y2K Legal and Litigation Issues

Introduction

By now, anyone who is not aware of the Year 2000 computer problem, known as "Y2K," has been living in a cave. Some of the more paranoid commentators predict that the Y2K bug will spawn a worldwide depression or recession, resulting in riots, blackouts, looting, food shortages, and violence.[36] This has created a cottage industry for firms catering to survivalists. In preparation for the millennium, these firms are selling the public such items as freeze-dried food, alternate energy sources, and weapons.[37] Many fear that, after the dust settles and the fires are extinguished, lawyers will move in like vultures to feast on the remains of civilization. Some predict the litigation fallout from Y2K to be the next asbestos or tobacco. Whether one thinks that Y2K is the next apocalypse or the biggest "non-event" of the century, prudence dictates that judge advocates prepare their clients for the potential legal issues stemming from the Y2K bug. This note is not an in-depth analysis of the legal issues involved; rather, it provides an overview of the Y2K problem, the remediation efforts underway in the Army and the Department of Defense (DOD), and the potential legal issues involved.

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32. *Id*. (quoting McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995)).

33. *Id*.

34. Spiller v. Walker, No. A-98-CA-255-SS (W.D. Tx. Mar. 5, 1999).

35. 42 U.S.C.A. §§ 4321-4370d (West 1999).

36. *See* James K. Glassman, *Bonkers Over Y2K*, WASH. POST, Dec. 1, 1998, at A25.

37. *See id*. *See also Real-World Contingency Plan* (visited Mar. 24, 99) <http://www.y2knewswire.com/plan.htm>.

The Source and Scope of the Problem

Over the past several decades, computer programmers have written software and designed computer systems using two digit numbers to represent dates (for example, a computer would store 1998 as "98"). This practice increased processing capabilities and saved expensive memory space within the systems. Unfortunately, it also resulted in systems that are unable to distinguish the year 2000 from the year 1900, 2001 from 1901, and so on.[38] On the stroke of midnight, 1 January 2000, these systems may malfunction or completely shut down. Operational and strategic military systems, telecommunications, pay and finance, personnel systems, security systems, weapons systems, and a myriad of other functions that are dependent on computers could fail and disrupt military operations.[39]

The problem, however, goes far beyond computers. Many electronic devices contain internal processors (often referred to as "embedded chips") that may also fail or malfunction on 1 January 2000. The failure of these embedded chips could also disrupt normal operations for days, shutting down traffic lights, elevators, heating and air-conditioning systems, medical devices, security locks, and fire alarms.[40]

Just how big is the problem? The White House Office of Management and Budget currently estimates that it will cost the federal government $6.8 billion to fix its most important computers.[41] Within the DOD, the cost to repair the mission-critical systems for Fiscal Years (FY) 1996-2000 was $2.61 billion, with an estimated $1.92 million in FY 2001 costs.[42] As of 31 December 1998, eighty-one percent of the DOD's mission-critical systems were validated as being Y2K-compliant, with an anticipated ninety-three percent fix by 31 March 1999.[43] Nevertheless, Congress has expressed serious concerns regarding the DOD's Y2K remediation progress.[44]

The Army's figures are similar. As of 15 October 1998, the Army had 638 mission-critical systems, seventy-six percent of which were Y2K compliant.[45] More than ninety-four percent of the Army's weapons systems are compliant.[46] There are also over 13,900 non-mission-critical Army information systems and 444,196 information technology (IT)-controlled devices throughout the Army. The Army estimates that there are 6740 weapon and automation systems, which must be repaired, at a projected cost of $233 million. Additionally, the Army estimates that there are 153,445 infrastructure devices with the Y2K problem, with a projected repair cost of $126 million.[47] Fortunately, the Army has a systematic plan for identifying and

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38. UNITED STATES GENERAL ACCOUNTING OFF., DEFENSE COMPUTERS: YEAR 2000 COMPUTER PROBLEMS THREATEN DOD OPERATIONS, GAO/AIMD-98-72, B-278156 (Apr. 30, 1998) at 5-6.

39. *Id*. at 5-7.

40. *Id*. at 6. *See also* Miriam F. Browning, *Winning the First War of the Information Age: Year 2000*, ARMY RD&A, Jan.–Feb. 1999, at 2, 5.

41. UNITED STATES OFF. OF MGMT. AND BUDGET, 8TH Q. REP.: PROGRESS ON YEAR 2000 CONVERSION, (Mar. 18, 1999), at Executive Summary [hereinafter OMB REP.], *available at* <http://www.cio.gov/8thQuarterlyReport.doc>.

42. *Id.* at app. A, tbl. 1. *See* Stephen Barr, *A Fix in Time to Keep Agencies Running*, WASHINGTON POST, Aug. 3, 1998, at A01 (containing the Army's definition of a "mission-critical system").

43. *Oversight of the Year 2000 Problem at the Department of Defense: How Prepared is our Nation's Defense?*: *Hearing Before the Subcomm. on Government Management, Information, and Technology,* 106th Cong. (1999) (statement of John Hamre, Deputy Secretary Of Defense) [hereinafter Hamre Statement], *available at* <http://www.house.gov/reform/gmit/hearings/testimony/990302jh.htm>. The recent OMB quarterly report, however, indicated that the DOD had only fixed 72 percent (1670 of 2306) of its mission-critical systems. *See* OMB REP., *supra* note 41, at App. A, tbl. 1. The discrepancy in numbers (81% vs. 72%) prompted congressional criticism.

44. Representative Stephen Horn, *The Progress of the Executive Branch in Meeting the Year 2000 (Y2K) Problem* (Feb. 22, 1999), *available at* <http://www.house.gov/reform/gmit/y2k/990222.htm>. Representative Horn, Chairman of the Subcommittee on Government Management, Information, and Technology, House Committee on Government Reform, made the following observation in the latest House assessment of the federal government's Y2K remediation progress:

> Six organizations lowered an otherwise stellar [overall federal government] grade to mediocrity. But together, these agencies–the Departments of Agriculture, Defense, Health and Human Services, State, and Transportation, and the Agency for International Development–are responsible for more than 50 percent of all mission-critical computer systems in the federal government. Our concerns about these agencies are plentiful. For example, last December the Department of Defense reported that 81 percent of its mission-critical systems were Year 2000 compliant. But in the department's quarterly report this month, officials stated that only 72 percent were compliant. Either the department has a serious internal communications problem, or it has taken a very big step backward in its Year 2000 efforts. Either way, the situation is alarming. Today, DOD's biggest battle is fixing its own computer systems.

Id. Representative Horn gave the DOD a grade of a "C-" This was up from a "D-" on 13 November 1998. *See id.*

45. Browning, *supra* note 40, at 3. Mission-critical systems are those major weapon systems and IT systems that "directly affect the Army's go-to-war mission and are necessary for commander-in-chief (CINC) deployments and exercises." *Id*. Examples of mission-critical weapons systems include the Patriot Missile System, the Apache Attack Helicopter, and the Single Channel Ground and Airborne Radio System. Examples of mission-critical IT systems include the Army Total Asset Visibility System and the Standard Depot System. *Id.*

46. *Id*.

repairing noncompliant systems and developing contingency plans to address the potential fallout from Y2K-related systems failures.[48]

Litigation

The repair costs, however, pale in comparison to the estimated litigation costs. Companies in the United States will spend an estimated $300 to $600 billion dollars making their systems Y2K complaint.[49] In addition, some commentators are predicting a "litigation explosion with predicted costs estimated as high as $1.5 *trillion*."[50] The federal government will certainly become involved in many types of litigation, but two types will probably dominate the government's time: contract litigation and tort litigation.

One category of government Y2K litigation will probably involve affirmative claims by the government against contractors that have provided IT that is not Y2K compliant. Since 1997, Part 39 of the Federal Acquisition Regulation (FAR) has required agencies to ensure that IT contracts contain provisions that require the IT to be Y2K compliant.[51] In addition to the FAR provisions, there are also statutory and other constraints on purchasing IT that is not Y2K compliant.[52]

Information technology is Y2K compliant if:

> [It] accurately processes date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date/time data with it.[53]

There are, however, two broad limitations to the scope of Part 39. First, it applies only to "information technology," the definition of which expressly excludes embedded chips.[54] Second, a system only has to be compliant "to the extent that other information technology . . . properly exchanges date/time data

47. *Id*. at 3-4. The "infrastructure devices" include communications hardware and software; personal computers and servers; and facilities/infrastructure. *Id*. at 4.

48. *See id*. *See also* Lieutenant General William H. Campbell and Captain Shurman L. Vines, *Year 2000 Operational Evaluations*, ARMY RD&A, Jan.–Feb. 1999, at 7. Lieutenant General Campbell, the Director of Information Systems for Command, Control, Communications and Computers, Headquarters, Department of the Army, designated Y2K as his top priority. *Id*.

49. *See* Glassman, *supra* note 36.

50. Clyde Wilson, *The Year 2000 Litigation Explosion: Prevention, Mitigation and Planning, available at* <http://www.itpolicy.gsa.gov/mks/yr2000/y2kconf/papers/paper23fp.htm>, (visited Mar. 16, 1999) (emphasis added) (citing Warren S. Reid, *The Year 2000 Crisis: What Surprises are Left*, CYBERSPACE LAW., Sept. 1997). *See* Stephen Barr, *Study Says Y2K Risks Widespread*, WASH. POST, Feb. 24, 1999, at A1 (quoting Representative Dreirer, who estimated litigation costs to be $1 trillion.).

51. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 39.106 (June 1997) [hereinafter FAR]. This regulation states:

> 39.106–Year 2000 Compliance
> When acquiring information technology that will be required to perform date/time processing involving dates subsequent to December 31, 1999, agencies shall ensure that solicitations and contracts—
> (a)(1) Require the information technology to be Year 2000 compliant; or
> (2) Require that non-compliant information technology be upgraded to be Year 2000 compliant prior to the earlier of
> (i) The earliest date on which the information technology may be required to perform date/time processing involving dates later than December 31, 1999, or
> (ii) December 31, 1999; and
> (b) As appropriate, describe existing information technology that will be used with the information technology to be acquired and identify whether the existing information technology is Year 2000 compliant.

Id.

52. Strom Thurmond National Defense Authorization Act of Fiscal Year 1999, Pub. L. No. 105-261, § 333(a), 112 Stat. 1920 (1998). The Act states:

> (a) Funds for Completion of Year 2000 Conversion.—None of the funds authorized to be appropriated pursuant to this Act may (except as provided in subsection (b)) be obligated or expended on the development or modernization of any information technology or national security system of the Department of Defense in use by the Department of Defense (whether or not the system is a mission critical system) if the date-related data processing capability of that system does not meet certification level 1a, 1b, or 2 (as prescribed in the April 1997 publication of the Department of Defense entitled "Year 2000 Management Plan").

Id. See Department of Defense Appropriations Act, Pub. L. 105-262, § 8116, 112 Stat. 2279 (1998) (identical provision). The Secretary of Defense has also restricted the use of funds for noncompliant systems. *See also* Memorandum, The Secretary of Defense, subject: Year 2000 Compliance (7 Aug. 1998) (prohibiting the obligation of funds for all mission-critical and IT systems that are not Y2K compliant).

53. FAR, *supra* note 51, at 39.002.

with it."[55] This latter exception could make it difficult for the government to prove that a particular IT system is not Y2K compliant. This difficulty arises because the government may have to first prove that all other IT systems feeding data into the system are compliant.[56]

Once the government has accepted noncompliant IT, its remedies against the contractor will be severely limited, absent "latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract."[57] Because of these limitations, much of the litigation regarding noncompliant IT may involve disputes over whether the Y2K defect was a latent or patent defect.[58]

To expand the Army's remedies in the event IT is not compliant, the Office of the Assistant Secretary of the Army for Research, Development, and Acquisition (SARDA) issued a memorandum in October 1997 encouraging contracting officers to incorporate Y2K warranty clauses into IT solicitations.[59] In so doing, the SARDA intended to provide remedies for noncompliant IT that are beyond those contained in standard inspection and acceptance clauses.[60] The additional remedies that are available will depend on the language incorporated into the warranty.

Year 2000-related tort claims may be another potential area of litigation for the government. Under the Federal Tort Claims Act (FTCA), individuals may recover for personal injury, death, or property damage caused by the negligent acts of government employees acting within the scope of their employment.[61] Given the wide range of potential tort suits (and the equally wide range of personal injury attorneys), Y2K-related litigation will likely span the spectrum from traffic accidents to wrongful death suits. One possible area of litigation is personal injury litigation brought on by Y2K-related medical equipment failures. For example, imagine that a noncompliant embedded chip in a heart monitor locks up at midnight on 1 January 2000 and causes the monitor to shut down. The monitor then fails to alert the nurse's station of the patient's heart attack, and the patient subsequently dies. The family later discovers that the hospital staff knew or should have known that the monitor was not

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54. *Id.* at 2.101. This regulation defines information technology as:

> [A]ny equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.
> (a) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency which–
> (1) Requires the use of such equipment; or
> (2) Requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product.
> (b) The term *information technology* includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.
> (c) The term *information technology* does not include–
> (1) Any equipment that is acquired by a contractor incidental to a contract; or
> (2) Any equipment that contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.

Id.

55. *Id.* at 39.002.

56. *See* RICHARD O. DUVALL ET AL., YEAR 2000 ISSUES IN GOVERNMENT CONTRACTS 26-27 (1999).

57. FAR, *supra* note 51, at 46.501 ("Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this subpart and subject to other terms and conditions of the contract."). *See id.* at 52.246-2(k) ("Inspections and tests by the government do not relieve the contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract."). *See also* JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 866-99 (3d ed. 1995) (providing a thorough discussion of the effect of final acceptance on the government's rights).

58. A latent defect is "a defect which exists at the time of the acceptance but cannot be discovered by a reasonable inspection." FAR, *supra* note 51, at 46.101. A patent defect is "any defect which exists at the time of acceptance which is not a latent defect." *Id*. *See* DUVALL ET AL., *supra* note 56, at 35-38 (discussing the potential "latent" vs. "patent" defect issue in the Y2K setting).

59. Memorandum, Assistant Secretary of the Army for Research, Development, and Acquisition, subject: Assuring Year 2000 Compliance in Information Technology (IT) Contracts (21 Oct. 1997).

60. *Id*. *See* FAR, *supra* note 51, at 52.246-2(k), 46.501.

61. *See* 28 U.S.C.A. § 1346(b) (West 1999). The law of the state where the act or omission occurred determines the liability of the United States. *Id*. *See also id* § 2672 (providing a thorough discussion of the Federal Tort Claims Act). *See generally* ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-241, FEDERAL TORT CLAIMS ACT (May 1997).

Y2K-compliant, and sues the hospital for failing to correct the problem.

What makes this particular area of tort litigation such a concern? Senator Robert F. Bennett, Chairman of the Senate Special Committee on the Year 2000 Technology Problem, recently released a committee report that "singles out health care as the worst-prepared industry for the Y2K glitch."[62] The Senate report cites the pharmaceutical supply chain and medical diagnostic equipment as two major risks within the industry.[63] Claims judge advocates (CJA) can be assured that, according to the Deputy Secretary of Defense, the DOD is far ahead of the rest of the healthcare industry in risk management.[64] Nevertheless, the CJA should determine what Y2K remediation efforts are underway at the local military medical treatment facility.

Finally, there may be some legislative relief on Y2K litigation, although not in the area of personal injury law. Both the House and the Senate are considering versions of the Year 2000 Fairness and Responsibility Act.[65] If it becomes law, the Act would require ninety-day waiting periods for certain Y2K suits, create a duty for plaintiffs to mitigate damages, and limit economic awards to those provided for by contract or incidental to personal injury or property damage claims.[66] The Act would also give federal district courts original jurisdiction over Y2K class action lawsuits.[67] Besides federal efforts, there are over 100 bills in various state legislatures concerning Y2K.[68]

Other Legal Issues

Besides litigation, the Y2K problem may create legal issues in other areas. Criminal investigations and courts-martial may be adversely affected by Y2K-related errors at forensic laboratories. There may be criminal or civil procurement fraud actions against contractors who defraud the government.[69] Legal assistance offices may be inundated with soldiers seeking assistance with pay, credit, and other date-related financial problems.[70] There may be employment actions involving federal civilian employees or contractor employees who failed to take appropriate measures relating toY2K remediation. Failures at chemical sites may cause massive environmental hazards.[71] The most immediate and largest-scale legal issues, however, may come not from within, but from off-post. Specifically, on 1 January 2000 the Army may see a flood of requests for civil assistance from local and state officials.

Many installations have dealt with natural or human disasters that result in time-sensitive requests for support (for example, a heavy winter storm or the bombing of a federal building).[72] Typically, these disasters are localized; however, if the Y2K problem results in disaster-level disruptions, they will strike simultaneously across the nation and the world. This has the potential to greatly stress the ability of the DOD to respond to these emergencies while maintaining operational readiness.[73] To counter these stresses, the Deputy Secretary of Defense has issued specific guidance relating to support to civil authorities for Y2K-related problems.

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62. United States Senate Special Committee on the Year 2000 Technology Problem, *Investigating the Impact of the Year 2000 Problem*, *available at* <http://www.senate.gov/~y2k/> (explaining that health care in the international community is at high risk for Y2K failures).

63. *Id*.

64. In testimony before the House committee, the Deputy Secretary of Defense stated:

> [Department of Defense] biomedical equipment is currently 96 percent Y2K compliant. The remaining 4 percent will be compliant by March 31, 1999. "Biomedical" means instruments and equipment typically found in a clinic, hospital, doctor's or dentist's office. As an example, some electrocardiogram (EKG) machines have a date function that could be affected by Y2K. The EKG equipment, however, records analog signals that are not date-dependent. Thus, the equipment deals with dates only to tag the data.

Hamre Testimony, *supra* note 43. *See* Lieutenant Colonel James B. Crowther, *The U.S. Army Medical Command's Cure for the Millennium Bug*, ARMY RD&A, Jan.–Feb. 1999, at 13 (providing details on the U.S. Army Medical Command's Y2K efforts). *See also* The Tri-Service Infrastructure Program Office Year 2000 Knowledge Center (visited 29 Mar. 1999), *available at* <http://www.timpo.osd.mil/y2k/>.

65. *See* H.R. 775, 106th Cong., (1999) *available at* <http://www.ogc.doc.gov/ogc/fl/cld/hi/hr775.html>; S. 461, 106th Cong. (1999), *available at* <http://www.ogc.doc.gov/ogc/fl/cld/hi/s461.html>.

66. *See* Martha L. Cochran & David B. Apatoff, *The Clock is Ticking: Congress Scrambles to Limit Y2K Liability Before Wave of Lawsuits*, LEGAL TIMES, Mar. 8, 1999, at 22, 24.

67. *Id*.

68. *Id*.

69. *See, e.g.*, 18 U.S.C.A. § 286 (West 1999) (pertaining to conspiracy to defraud the government with respect to claims); *Id.* § 287 (pertaining to false, fictitious, or fraudulent claims); *Id.* § 1001 (pertaining to false statements); *see generally* 31 U.S.C.A. §§ 3729-3733 (pertaining to civil false claims).

70. The Deputy Secretary of Defense has stated that there will be no pay problems for DOD military and civilian personnel. *See* Jim Garamone, *Hamre: Y2K won't stop DOD pay*, GOV'T EXECUTIVE, Jan. 20, 1999, *available at* <http://www.govexec.com/dailyfed/0199/012099t1.htm>.

71. Lee Davidson, *Y2K Threatens Chemical Plants*, DESERET NEWS, Mar. 15, 1999, *available at* <http://www.deseretnews.com/dn/view/0,1249,70001583,00.html>.

First, local commanders in the United States may still "undertake immediate, unilateral, emergency response actions that involve measures to save lives, prevent human suffering, or mitigate great property damage, only when time does not permit approval by higher headquarters."[74] Overseas commanders may respond immediately "when time is of the essence and humanitarian considerations require action."[75] Beyond this immediate response authority, commanders may only respond to requests submitted through the Federal Emergency Management Agency (within the United States) or the Department of State (overseas).[76] The DOD has also limited the ability of certain military units with high-priority national security missions to respond to Y2K emergencies in ways that would compromise operational readiness. Finally, the DOD has prioritized the types of emergencies that units will respond to (for example, maintenance of domestic public safety has a higher priority than maintenance of the economy).[77] Judge advocates can and should play an important role in assisting commanders in navigating the myriad of legal authority guiding the assistance rendered.

Conclusion

The Y2K problem is getting more and more coverage in the press as the end of the millennium grows near. Commanders and staff are likely to grow more interested in all aspects of Y2K; to include the legal issues involved with the problem. Judge advocates should begin to take steps to answer that need. Staff judge advocates and command judge advocates should consider appointing an attorney to be the main point of contact for all Y2K legal issues. Different branches of the staff judge advocate's office should plan not only for the effects of Y2K on internal office operations but should also plan for community-wide effects within their areas of responsibility. The Y2K bug may not be the end of the world, but it will undoubtedly cause disruptions, and judge advocates should be prepared to address the legal issues involved. Major Gross.

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72. Fort Sill and Tinker Air Force Base in Oklahoma both responded to the blast that destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma on 19 April 1995. *See* Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., Jul. 1997, at 3 (providing a thorough overview of the legal authorities affecting both military support to civil authorities and civilian law enforcement agencies). *See* INTERNATIONAL & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S ARMY, JA-422, OPERATIONAL LAW HANDBOOK, chs. 21, 22 (1997).

73. *See* Memorandum, Deputy Secretary of Defense, to The Secretaries of the Military Departments et al., subject: DOD Year 2000 (Y2K) Support to Civil Authorities (22 Feb. 1999) *available at* <http://www.army.mil/army-y2k/depsecdef_dod_civil_support.htm>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

Claims Report

United States Army Claims Service

Tort Claims Note

Finality of Military Claims Act Decisions

A decision to deny or make a final offer under the Military Claims Act (MCA)[1] is subject to an administrative appeal to the next higher claims authority.[2] If the appeal is denied, the action is final and conclusive.[3] Federal courts have uniformly upheld this finality provision.[4] For claims that are only considered under the MCA, however, the finality of a decision depends on whether jurisdiction over the claim exists under another federal statute. For this reason, claims that are denied under the non-combat activity provision of the MCA[5] should always be denied under the Federal Tort Claims Act (FTCA), [6] even though no negligent or wrongful act or omission is apparent. For example, claims offices should deny non-payable claims for blast damage under both the MCA and the FTCA.

The matter does not end there. In *Miller v. Auto Craft Shop*,[7] an off-duty soldier had the engine on his car overhauled in mid-January 1995 at the Fort Rucker, Alabama, auto-craft shop–a nonappropriated fund activity. The shop provided him with a written warranty. In April 1995, his mother in Tennessee reported that the car stopped running. Miller had the car towed back to Alabama, where the auto-craft shop could not determine the problem. Miller then had the car repaired at an outside repair shop, which diagnosed the problem as stemming from the January repair. Miller made a claim for the outside repairs, the cost of the original auto-craft repairs, the towing costs, and the diagnostic costs. The U.S. Army Claims Service (USARCS) offered to pay for the outside repairs, but not for the towing or diagnostic costs. The USARCS informed him that reimbursement for the auto-craft repair was a contract claim under the warranty. The USARCS also informed the claimant that his claim for the costs of the second repair, towing and diagnostic tests was *Feres* barred; therefore, the MCA was his sole remedy for these repairs.

Miller then brought suit in federal court. The court agreed that the claim for the second repair, towing and diagnostic costs were *Feres* barred.[8] Further, it held that the warranty claim was not *Feres* barred and constituted a separate contractual claim.[9] The court cited four federal cases to support its holding that the claimant was not entitled to a remedy under the MCA.

The first case that the court cited was *United States v. Huff*.[10] In *Huff*, the plaintiffs were permitted a remedy under the Tucker Act[11] for loss and damage to livestock on leased property that

1. 10 U.S.C.A. § 2733 (West 1999).

2. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 3-6 (31 Dec. 1997) [hereinafter AR 27-20].

3. 10 U.S.C.A. § 2735. The finality provision also applies to claims under 10 U.S.C. § 2734 (The Foreign Claims Act), SOFA claims, and 10 U.S.C. § 2737 (The NonScope Claims Act).

4. *See, e.g.*, Towry v. United States, 620 F.2d 568 (5th Cir. 1980); Armstrong & Armstrong Inc. v. United States, 356 F. Supp. 514 (E.D. Wash. 1973); Barlow v. Collins, 397 U.S. 159 (1970); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978); Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1970); Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970); Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978); Broadnax v. U.S. Army, 710 F.2d 865 (D.C. Cir. 1983); LaBash v. Department of the Army, 668 F.2d 1153 (10th Cir. 1982). *See also* Hata v. United States, 23 F.3d 230 (9th Cir. 1994) (holding that the denial of claim under the Military Claims Act as incident to service withstands Constitutional challenge—suit for wrongful death of active duty service member in Navy hospital in Japan); Rodriguez v. United States, 968 F.2d 1420 (1st Cir. 1992) (holding that an MCA incident-to-service determination not subject to judicial review); Hass v. U.S. Air Force, 848 F. Supp. 926 (D. Kan. 1994) (holding that the denial of a claim for attorney fees by airman under Military Claims Act is not subject to review due to finality provisions of 10 U.S.C.A. § 2735); Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994) (holding that the denial of an MCA claim arising in Okinawa does not create Constitutional claim); Collins v. United States, 67 F.3d 284 (Fed. Cir. 1995) (holding that the denial of a claim for attorney fees under MCA is final and conclusive); Duncan v. United States, No. CA 96-1648-A (4th Cir. 24 June 1998) (holding that six objections to the finality of an MCA decision did not raise Constitutional issues).

5. 10 U.S.C.A. § 2733(a)(3).

6. 28 U.S.C.A. §§ 1346, 2401(b), 2671-2680 (West 1999).

7. 13 F. Supp. 2d 1220 (M.D. Ala. 1997).

8. *Id.* at 1223.

9. *Id.*

10. 165 F.2d 720, 725-26 (5th Cir. 1948).

11. 28 U.S.C.A. § 1491.

was used for artillery firing and maneuvers. The court permitted this remedy even though the claim was cognizable under the MCA.

The second case cited was *Hass v. United States*.[12] In *Hass*, an active duty Air Force member allegedly used her military security clearance to obtain information in her off-duty job with a private investigations firm. She was ordered to discontinue her off-duty employment. She then filed a claim seeking, among other things, the $150 fee that she paid to obtain her private investigators license. The Air Force denied her MCA claim. The court held that her claim was cognizable under the FTCA. The court, however, dismissed the FTCA claim for failure to pursue her administrative remedy.[13]

The third case that the court cited was *Bryson v. United States*.[14] *Bryson* involved an intoxicated soldier who was unable to remove himself from the men's room in a barracks at Bad Hersfeld, Germany. The drunken soldier killed a fellow soldier who was attempting to help him, by repeatedly bashing his head on the floor. The decedent's family brought a claim against the government under both the MCA and the FTCA. The court, however, denied the MCA claim because the drunken soldier's actions were not incident to service. The court permitted an FTCA suit based on negligent hiring and retention, a so-called "headquarters tort" as it was based on actions which occurred in the United States, not in a foreign country.

The final case cited by the *Miller* court was *Arkwright Mutual Ins. Co. v. Bargain City USA Inc*.[15] *Arkwright* involved a U.S. Navy jet aircraft that crashed into a Bargain City store resulting in a loss of rental income in excess of $100,000. The Navy settled the claim under the MCA for $285,106.30; this amount included $156,000 for loss of rental income. The Navy then sent the claim to Congress for supplemental appropriation, as required at that time. In March 1962, on the strength of the settlement, Arkwright loaned Bargain City $100,000. On 19 October 1962, Bargain City filed for bankruptcy and, upon payment by Congress, the entire sum became part of the bankruptcy estate. Arkwright's claim for a $100,000 equitable lien, however, was defeated because Bargain City had a property damage claim under the FTCA, which was not negated by the MCA settlement. Such property damage was held to be part of its estate.

As a practical matter, claims arising in foreign countries will be considered under either the MCA or the Foreign Claims Act (FCA),[16] depending on whether the claimant is a foreign inhabitant.[17] The FTCA comes into play only if the claimant alleges a headquarters tort, as in *Bryson*. In this event, any final action should include final action under the FTCA. Claims arising in the United States normally fall under the FTCA except for soldiers' claims incident to service for property loss. Such claims fall under the Personnel Claims Act (PCA)[18] or the MCA(with the PCA taking priority. The problem arises when a non-combat MCA claim is filed. In such a case, final action should be taken under both the MCA and FTCA.

The *Miller* case presents special problems due to the lack of authority to pay non-appropriated fund (NAF) contractual claims out of NAF claims funds. The automotive craft/skills program is designed to provide a self-help alternative to commercial repair facilities. *Army Regulation (AR) 215-1*,[19] sets out in detail how the program is designed to provide both training and a facility where eligible patrons can repair their own vehicles. Recent claims arising out of these facilities indicate that the operation has become akin to a commercial operation as in the *Miller* case. A warranty guaranteeing proper repair does not provide a basis for paying a tort claim under *AR 27-20*, chapter 12. Equally true, there is no authority to use NAF claims funds to pay a warranty claim. Corrective action is a matter to be resolved by the Army Community and Family Support Center. Local judge advocates should caution craft shops and other NAFs against repair warranties unless funds are available to pay such warranties.

In conclusion, each claim must be considered under all statutes that are implemented by *AR 27-20*.[20] A denial notice should reflect such consideration. If the claim does not fall under a statute governed by *AR 27-20*, the claims office should direct the claimant to the correct remedy in the denial notice.[21] Mr. Rouse.

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12. 848 F. Supp. 926, 933 n.6 (D. Kan. 1994).

13. This dismissal is specious as she had already filed an administrative claim.

14. 463 F. Supp. 908, 910 (E.D. Pa. 1978).

15. 251 F. Supp. 221, 227-28 (E.D. Pa. 1966). The court does not explain why an MCA property damage claim is not part of Bargain City's estate.

16. 10 U.S.C.A. § 2734 (West 1999).

17. Unless the claim falls under a status of forces agreement. *See* AR 27-20, *supra* note 2, para. 7-1c.

18. 31 U.S.C.A. § 3721 (West 1999).

19. U.S. DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES (29 Sept. 1996).

20. AR 27-20, *supra* note 2, para. 2-18.

Personnel Claims Notes

Compensation for Repairable Porcelain Figurines

The USARCS continues to see claims involving payment of full replacement value for expensive figurines that may have been repairable (for example, a claimant brings in a $700 Hummel figurine of a horse and rider with one leg broken off of the horse. The break is clean with no pieces missing). Porcelain figurines that are damaged in this way do not always need to be replaced. If the damage is a clean break, and the broken piece is available, repair is usually possible. The claimant should first attempt to have the item repaired. If the damage can be repaired, the claimant is due only the repair cost plus a reasonable loss of value, as determined by a qualified appraiser. The claims examiner should, of course, inspect the damaged figurine before sending the claimant to get an estimate. Mr. Lickliter.

Posting Payments to Claims Involving Insurance Payments

The USARCS has received several claims with very detailed and time consuming entries to explain insurance payments. A very simple procedure for posting these payments has been developed. If it is followed, this procedure will save a lot of time.

Insurance settlements involving only one item pose no problem, and can be copied directly from the insurance notice. Those containing more than one item, however, can be confusing.

First, claims adjudicators should determine the amount that they actually paid for each line item. If there has been a settlement that did not involve a deductible amount, adjudicators can use the amounts listed by the insurance company. If there was a deductible involved, however, some extra work will be needed, because the amount listed by each item is the amount payable before deduction of the deductible amount.

To determine the amount paid for each individual line item after deduction for the deductible,[22] claims adjudicators must divide the amount actually paid by the amount adjudicated before subtracting the deductible (divide the little number by the big number),[23] and get a six digit decimal figure. Then multiply each line item payment by that decimal figure to get the actual amount paid for that individual item.

Second, claims personnel must adjudicate each item claimed on DD Form 1844, List of Personal Property and Claims Analysis Chart, to determine what to actually pay for that item. Then you compare the two amounts and post them both to the line item on DD Form 1844. The amounts paid by insurance will always be in parentheses (and your amounts without parentheses). Adjudicators must then post the higher of these two amounts in the amount allowed column (#25) and the lesser amount in the adjudicator's remarks column (#26).

Third, adjudicators should add up all the figures in the amount allowed column, regardless of whether they are insurance payments or not, and enter the total in block #30. Next, go through again and add up all of the figures in parentheses (include both columns 25 and 26), and enter this figure in block #30. Subtract these amounts and the balance remaining is the amount payable to the claimant.

This procedure not only simplifies the work of the claims adjudicator, but assists the recovery people in identifying amounts to be returned to the insurance company after settlement with the carrier. Mr. Lickliter.

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21. U.S. DEP'T OF ARMY, PAM 27-162, CLAIMS PROCEDURES, para. 2-28 (1 Apr. 1998) [hereinafter DA PAM 27-162].

22. AR 27-20, *supra* note 2, para. 11-11f(2).

23. DA PAM 27-162, *supra* note 21, para. 11-21a(2).

CLAMO Report

Center for Law and Military Operations, The Judge Advocate General's School

Combat Training Centers: Lessons Learned for the Judge Advocate

Introduction

This is the first of a series of periodic reports that will summarize lessons learned by judge advocates (JAs) who have participated in rotations through the Army's four combat training centers (CTCs)—the Joint Readiness Training Center (JRTC) at Fort Polk, Louisiana; the National Training Center (NTC) at Fort Irwin, California; the Combat Maneuver Training Center (CMTC) at Hohenfels, Germany; and the Battle Command Training Program (BCTP) at Fort Leavenworth, Kansas. Lessons learned from the Joint Warfighting Center (JWFC),[1] Suffolk, Virginia, will also be included.

The Center for Law and Military Operations (CLAMO) has collected lessons learned from various operations since it began ten years ago. Only in the past several years, however, has CLAMO positioned JA observer/controllers (O/Cs) and observer/trainers[2] at the CTCs. In 1998, CLAMO began collecting, in earnest, lessons learned for JAs from the CTCs.

In 1995, the General Accounting Office (GAO) issued a report entitled, *Military Training: Potential to Use Lessons Learned to Avoid Past Mistakes is Largely Untapped*.[3] While the report was generally favorable to the Army, a few of its remarks best express the rationale behind this series of CLAMO reports:

> Military training exercises and operations provide an unparalleled opportunity for the military services to assess the performance and capabilities of their forces under realistic conditions. Moreover, these experiences often result in lessons learned information, which can identify and publicize recurring problems and be used to develop corrective actions so that others can avoid repeating past mistakes.[4]

The GAO Report noted the hallmarks of a good lessons learned program:

> (1) Include all significant information from training exercises and operations;
> (2) Routinely analyze lessons learned information to identify trends in performance weaknesses;
> (3) Ensure widest possible distribution;
> (4) Ensure lessons learned information is used to its fullest potential; and
> (5) Implement adequate remedial action processes to follow up and validate that problems have been corrected.[5]

The Army's Center for Lessons Learned and CLAMO have historically fulfilled these tenets. By examining the CTC rotations, in addition to real world operations, for lessons learned CLAMO has further advanced these goals.[6] Additionally, CLAMO's work with the Combat Developments Department and the academic departments in The Judge Advocate General's School, U.S. Army (TJAGSA) will ensure the most effective use of the information gained. All of these efforts will amount to very little, however, unless JAs in the field both

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1. Formerly known as the Atlantic Command's Joint Training Analysis and Simulation Center (JTASC), the JWFC has now subsumed JTASC. This joint training center, through extensive use of computer simulations, trains joint task force commanders and their staff.

2. For the purpose of this report, both the observer/controllers and observer/trainers will be referred to as O/Cs. The judge advocates are called O/Cs at JRTC, NTC, and CMTC. At the BCTP, they are called observer/trainers or O/Ts.

3. *See* General Accounting Office, Military Training: Potential to Use Lessons Learned to Avoid Past Mistakes is Largely Untapped (Aug. 1995) (on file with author).

4. *Id.*

5. *Id.*

6. The process for collecting, reporting, and publishing lessons learned is as follows. Observer/controllers at each CTC collect observations and record them in a written after action report (AAR). They then submit an AAR, after each exercise rotation, to CLAMO. This AAR is distinct from the take home packets prepared for a unit's use at its home station. The Center collects, reviews, and analyzes these AARs, against the backdrop of raw data, lessons learned, and AARs gathered from prior exercises and operations. The Center then sends lessons learned through periodic articles in *The Army Lawyer* and through the Lotus Notes CLAMO databases, accessible through local staff judge advocate (SJA) servers and through the Internet, at <*www.jagcnet.army.mil*>. The Center also shares key trends and distilled lessons learned with the Combat Developments Department at TJAGSA, to assist in them in developing new doctrine and organization for the JAG Corps, and with the academic departments at TJAGSA, for use in developing curricula.

apply these lessons learned and provide input and feedback to what CLAMO makes available.

Disclaimer

Lessons learned will be addressed in general terms. They are not meant to be a statement about, or criticism of, any one particular unit or JA, nor of JAs as a whole.[7] When specific vignettes are discussed, CLAMO intends them as constructive examples from which all JAs can learn.

The scope of CTC lessons learned will often be confined to the brigade JA and the brigade operational law team (BOLT), due to the level of units usually exercised at JRTC, NTC, and CMTC. Many of the lessons learned, however, particularly those derived from BCTP, are useful to judge advocates at division, corps, and joint levels.

Lessons Learned Format

The following format will be used to discuss lessons learned:

> *Lesson(s) Learned*: A statement of the lesson(s) to take away.
>
> *Observations:* A brief summary of pertinent observations made at the CTCs.
>
> *Discussion*: Details of observations and their implications. Possible approaches (tactics, techniques, and procedures) to address Lessons Learned.

The following lessons learned topics are addressed in this report: Integration and Synchronization; Battle Tracking and Continuity; Planning; Information Operations; Fratricides; Civilians on the Battlefield; Rules of Engagement; Public Affairs; Judge Advocate Strength and Disposition; Battle Box–References; Basic Soldiering Skills

Integration and Synchronization.

Lesson Learned

Judge advocates and legal noncommissioned officers (NCOs) and specialists must integrate and synchronize with the command and staff *before* they deploy on an exercise or operation.

Observations

Judge advocates and legal NCOs have not been well integrated with their commanders and staff when they arrive at the training centers. Some recent international deployments have witnessed the same problem. The result is less than optimal legal support to operations–particularly early on in operations. Judge advocates do not know commanders and staffs well, to include commanders of task-force slice elements. They do not understand how the unit does business in the field–the unit's standing operating procedures (SOPs), to include the field SOP (FSOP), tactical SOP (TACSOP), and tactical operations center SOP (TOCSOP). These documents often do not address the legal personnel, their locations, their duties, and key legal issues. Judge advocates also do not know the military decision making process (MDMP) and the role that they should play in the process. Finally, JAs are not familiar with key points of contact and available resources outside of their immediately supported unit.

The essential elements of integration and synchronization are team building, attending the leadership training program, learning the MDMP, and understanding the various SOPs. These areas will be discussed below.

Discussion

Team Building—Judge advocates and the legal NCOs must team build with the commander, staff, and slice element commanders, at home station.

To increase team building, JAs should attend an occasional command and staff meeting, not just at the supported unit's level, but also at subordinate and slice units. They should learn what the staff and slice element commanders do. To gain a basic understanding of staff organizations and operations, JAs should read *Field Manual (FM) 101-5*.[8] To better understand field operations, JAs should learn the capabilities of the equipment that is used in the field, such as the Q-36 and the TLQ-17, and look to subject matter experts on the staff or field manuals that detail particular capabilities. In particular for team building, JAs should meet with the headquarters and headquarters

7. The Center will preserve the anonymity of all units concerned. As described in four previously published reports in *The Army Lawyer*, each CTC has at least one JA assigned permanently as an O/C. *See* CLAMO Report, *The Best Job in the JAG Corps*, ARMY LAW., Feb. 1998, at 63 (discussing the JRTC); CLAMO Report, *The Shifting Sands at NTC*, ARMY LAW., Mar. 1998, at 46 (discussing the NTC); CLAMO Report, *Battle Command Training Program*, ARMY LAW., June 1998, at 36 (discussing the BCTP); CLAMO Report, *Combat Maneuver Training Center: Training in Transition*, ARMY LAW., OCT. 1998, at 75 (discussing the CMTC). These JAs strive to keep the AAR process a fully open forum, aimed at learning. The Center gives the exercised units a THP (or final exercise report, at BCTP) to review and use at their home stations. Other than the THP, nothing else is published that would identify the unit with specific successes or failures, absent unit coordination. These *CTC Lessons Learned for the Judge Advocate* reports will preserve anonymity by listing lessons learned without referencing the unit or rotation concerned. The CLAMO welcomes submissions and input for these articles, as well as for the CLAMO Lotus Notes repository as a whole.

8. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997) [hereinafter FM 101-5].

company commander. In the field, that commander is the key for food, a place to sleep, and transportation.

Participating in home station field training exercises[9] can also create team building. Even if legal personnel cannot deploy to the field for the duration of an exercise, a half day's time will enable them to see how the unit sets up and operates in the field. This can make a critical difference. Judge advocates must observe how supported units set up and run a tactical operations center (TOC) as often as possible. Tactical operations center configurations often change from unit to unit as well as by the exercise. If JAs are not familiar with their unit's TOC configuration, they will quickly find themselves left out of this process.

CTC Leadership Training Programs (LTPs)/Warfighter Seminars—Judge advocates and their legal NCOs must attend the LTP (known as the warfighter seminar, at the BCTP). The LTP programs usually occur a few months before the actual field exercise. Thus, early planning and coordination with the command and staff is essential to ensure that the JA is included. Participating in LTPs may be limited at NTC, however. Nonetheless, the NTC JA O/C will conduct an informal LTP over the telephone and the Internet. *Training and Doctrine Command Regulation 350-50-3*[10] requires that the staff judge advocate (SJA) and the operational law attorney attend the BCTP warfighter seminar. A large part of the value of these seminars is the focus on command and staff team building and the extensive use of the MDMP.

The Military Decision Making Process—Judge advocates must learn the MDMP. The MDMP is how the Army plans operations; all commanders follow its basic tenets. Each commander, however, also conducts business, in his unit, in a particular way. Thus, JAs must not only learn the Army's MDMP doctrine and tenets, but also the nuances of how the supported commander(s) executes this process. *Field Manual 101-5* addresses the basics of the MDMP.

Standing Operating Procedures (SOPs)

It is important for JAs to read and know the unit's SOPs and the higher headquarters' SOPs. When reviewing these SOPs, ensure that JAs are addressed. The SOPs should list the personnel expected to man the TOC and their locations, to include the JA and legal NCO or specialist. Many JAs find being located next to the civil affairs cell to be most useful, due to the need to coordinate many operational law issues with civil affairs personnel.

The SOP should list the JA's essential duties and responsibilities. The JA should be on the distribution list for operations orders, fragmentary orders, and maps. The JA should be in the briefing order for commander's updates and battle update briefs. The JA should participate in course of action (COA) development, provide input to the commander during mission analysis (facts, assumptions, express tasks, and implied tasks), attend the COA brief and COA wargaming, conduct a legal review of operations plans and orders, and attend other key meetings and rehearsals. Standard operating procedures should detail reporting requirements and formats for fratricides, law of war violations, civilian casualties, maneuver damage, and requests for temporary refuge. Finally, the JA should know the next higher unit's SOPs and reporting requirements.

While at the CTCs, JAs should work with the O/Cs. To the extent that your desire for added training opportunities does not interfere with the rotation, the JA O/Cs will accommodate you. One JA rotating through NTC told the O/C that he wanted to test the new office of the SJA FSOP. The O/C, acting as the division SJA, adopted the unit FSOP in lieu of the standard NTC 52d ID procedures.

Battle Tracking and Continuity

Lesson Learned

Judge advocates must develop and use methods to track the battle and ensure continuity of legal support to operations.

Observations

Successful legal support to operations requires constant monitoring of the battlefield and operations. Judge advocates and legal NCOs who do not watch the battle map, listen to the TOC radios, and interact with the various battlefield operating systems[11] will miss many pertinent legal issues. By the time a "legal issue" is brought to the attention of the JA by a commander or staff member, it has usually reached crisis proportions and requires reaction.

Discussion

Rather than adopt a "sit back and wait" approach, JAs should track operations and plans for future operations and practice preventive law. Judge advocates must also ensure continuity of the legal mission and continuity between legal personnel. If a JA is killed, incapacitated, or called away on a mission, the remaining legal specialist or legal NCO must be

9. Field training exercises are commonly referred to as FTXs; situational training exercises are commonly referred to as STXs.

10. U.S. DEP'T OF ARMY, TRAINING AND DOCTRINE COMMAND, REG. 350-50-3, BCTP (July 1998).

11. Commonly referred to by the acronym BOSs.

aware of the current situation, outstanding issues, and where to look for answers. The JA must not become indispensable as an individual. When in the field, the JA should ask, "If I die today, can a replacement JA walk into the TOC tomorrow and pick up where I left off?"

Here are some ideas for battle tracking and continuity that have worked for JAs on CTC rotations:

(1) Keep a daily log of actions, issues, and communications. Memories grow weary and quickly become overloaded with the battle rhythm. Write it down, to include the specifics: times, references, and points of contact.

(2) Keep charts posted (separate from the daily log) for each of the following, and their status: significant acts (SIGACTs), investigations, fratricides, and claims. These charts are of enough importance and interest to warrant posting on the tent wall over the JA station.

(3) Keep a binder or binders (smartbooks), with tabs, to organize papers and messages into topics such as these: log, SIGACTs, investigations, rules of engagement, targeting, international agreements, fratricides, fiscal law and contracts, administrative law, claims, military justice, legal assistance, intelligence law, environmental law, media, and civil affairs. While the battle captain should maintain a file of all operations orders, fragmentary orders, and message traffic, the JA should consider keeping copies of particularly pertinent documentation in his binder, for ready reference. Judge advocates who attempt to keep everything in one file folder lose documents, become disorganized, and miss pertinent issues.

(4) Hot Lists for Battle Captains and radio/telephone operators (RTOs). One JA developed a particularly useful TTP (tactic, technique or procedure). He made a simple list of ten to twelve key legal issues (for example, use of force against and detention of civilians, fratricides, law of war violations, claims). He gave this list, on an index card, to the battle captains and the RTOs, and asked them to alert the legal section any time that these issues arose in message traffic. The enlisted RTOs were especially interested and responsive. They appreciated the active participation and the interest of a staff officer in what they were doing. Ensure that the users of the "hot list," however, know that it is not exclusive.

(5) Do not be afraid to ask questions. Take advantage of the relationships you have established with the commanders and staffs that you have advised as a trial counsel. Use the rapport you have established to cajole a professional development course on TOC operations. You will usually discover that those operating in the TOC are not only happy to explain what they do, but are also flattered that a JA is interested enough to ask.

Planning

Lesson Learned

In addition to tracking current operations, JAs need to participate in the planning process.

Observations

The CTCs present commanders and JAs with a rapid pace of operations. Judge advocates often become so consumed in reacting to current crises that they fail to look ahead and plan for future phases and missions. Many JAs, when questioned at the CTCs, could not discuss details of the next operation, or the commander's concept of operations more than a few days out. Prior planning prevents oversights from becoming last minute legal obstacles to a commander's plans and reduces future crises.

Discussion

Just as the commander plans and thinks of military operations in phases, so must the JA approach legal issues. Priorities change as the JA goes through pre-deployment, deployment, operations, and re-deployment. Issues that are a priority in pre-deployment, such as the troops' legal assistance needs for wills and powers of attorney, give way to command and control issues, such as rules of engagement as the unit goes through deployment, and targeting during operations.

Each phase of an operation will also see legal issues and priorities change. For example, the handling of displaced civilians may be an essential issue in one phase of an operation, while the handling of large numbers of enemy prisoners of war (EPWs) may be an issue in a later phase. With forethought, a JA might be able to request and obtain humanitarian and civil assistance funds to provide food and support to local nationals, thereby currying their favor, cooperation, and good will. The JA should actively participate in the commander's planning process and should independently brainstorm potential legal issues to conduct a "legal preparation of the battlefield."[12]

Information Operations

Lesson Learned

Get involved in information operations (IO) and recognize the impact that an IO cell at division level can have.

12. Major Geoffrey Corn of the International and Operational Law Department, The Judge Advocate General's School, developed the concept of "Legal Preparation of the Battlefield" (LPB), a methodical approach to anticipating and planning for legal issues through each phase of an operation. *See* International and Operational Law Note, *A Problem Solving Model for Developing Operational Law Proficiency: An Analytical Tool for Managing the Complex*, ARMY LAW., Sept. 1998, at 43. Copies of this note and a sample chart, with legal issues and solutions, are also available through the International and Operational Law Department or CLAMO.

Observations

As units such as the 4th Infantry Division (Mechanized) reorganize, equip, and train to move toward "Division XXI,"[13] JAs continue to appear on the field table of organization and equipment in the TAC1 command post, G3 operations and plans, and the main command post. Exercises have JAs present in the G3 plans cell, the G3 operations cell, the sustainment cell, the main, and the IO cell. In one exercise, the deputy SJA (DSJA) essentially ran the IO cell.

Discussion

While the G3 was tasked with running the IO cell in one exercise, his operations tempo resulted in the DSJA being in charge of the cell. In the IO cell, the DSJA worked closely with civil affairs,[14] psychological operations,[15] public affairs, electronic warfare, and most importantly, the targeting cell. In his capacity as chief of the IO cell, the DSJA briefed at the battle update briefs twice a day. He also ran the daily IO cell meeting, chaired by the chief of staff or the assistant division commander. The DSJA also attended corps IO-cell meetings, when time permitted.

While the DSJA was doctrinally in the G3 operations cell, this arrangement (the DSJA as the chief of the IO cell) worked very well. The G3 operations cell was physically located next to the IO cell. The DSJA's position and responsibilities in the IO cell allowed him to effectively perform G3 operations functions and IO cell functions (as such, the targeting cell briefed everything to the IO cell, and the chief of the IO cell–the DSJA–sat in on all targeting cell briefings).

Even if the DSJA had not served as the chief of the IO cell, he would have attended all targeting cell meetings. Having the DSJA serve as the IO chief was a true combat multiplier. The SJA section was a prime player in IO plans and actions, and the command, staff, and other JA cells gained information that gave them the ability to foresee events on the battlefield, and plan accordingly.

Warfighter exercises recently emphasized the JAs participation in an IO cell. For example, an enemy farmer reports several dead EPWs, and the enemy's psychological operations forces allege that United States forces executed them. If the right players–the IO cell, the SJA, public affairs, civil affairs, psychological operations, G2–take responsive actions, positive effects result, such as calmed EPWs divulging valuable intelligence. On the other hand, if the event goes unreported or not addressed, negative consequences result, such as unrest by EPWs–requesting diversion of troops to control them–and increased resistance from enemy combat units.

Fratricides

Lesson Learned

The commander must personally intervene to implement fratricide prevention measures, to ensure that fratricides are properly reported and investigated, and to implement appropriate risk reduction measures, if necessary.

Observations

Fratricides occur frequently at the CTCs. More than two-thirds of the "dirt"[16] CTC fratricides are caused not by indirect fires, but by direct and small-arms fires. Most occur because of a lack of awareness of the situation and battle tracking–not knowing the location of friendly units and personnel. Over three-fourths of fratricides are not reported by the units. The O/Cs, however, usually observe the fratricides and report them if the unit fails to do so. Fratricide investigations are usually late and incomplete.

Discussion

Fratricide prevention is a command responsibility. It requires thoughtful use of maneuver, fire control measures, and rules of engagement. Because the JA always advises and monitors investigations and the commander's inquiries, there is often a misconception that fratricides are the JA's problem.

While the legal implications of a fratricide do require JA involvement *after* they occur, the best approach is to prevent them from occurring. One way to prevent fratricides is to ensure that investigations are completed in a timely manner, so that commanders can use the findings and recommendations to prevent similar incidents. The mishandling of fratricides can cause public affairs challenges and even degrade troop morale. Because the JA is intimately involved in use of force issues, he often can contribute to fratricide awareness and prevention. The JA can tactfully help the command and staff understand the effect that a real fratricide would have on a deceased soldier's

13. Division XXI is a new divisional structure designed to be a knowledge and capabilities-based, power projection force capable of land force dominance across 21st century joint military operations. The 4th Infantry Division is the first Force XXI Digital Division.

14. The civil affairs cell is commonly referred to by the initialism CA.

15. Psychological operations is commonly referred to by the acronym PSYOP.

16. "Dirt" fratricides are those fratricides resulting from friendly ground force fires, direct and indirect, and not to fratricides inflicted by friendly air asset fires, such as rotary wing and fixed wing close-air support fires.

friends and family, troop morale, the media, public opinion, and unit discipline.

Many commanders rotating through the CTCs view fratricide investigations as a "training distracter." These commanders have a valid point. Ongoing combat operations cannot be halted for an investigation. The JA should minimize the impact of investigations, for training at the CTCs and in "real" operations, by standardizing a format and process for reporting and investigating fratricides. Prepare investigation packets in advance, with pre-formatted appointment letters and a sample report of investigation that advises the investigating officer(s) of the minimum standards. These measures will minimize the "distraction" factor.

Normally, *Army Regulation (AR) 15-6*[17] requires the general court-martial convening authority to appoint the fratricide investigating officer.[18] The CTCs build in an artificial incentive system that assists JAs in motivating commanders to promptly report and investigate fratricides. If a fratricide is reported immediately, and followed up quickly with a report of a commander's inquiry (within twenty-four hours), the requirement for an *AR 15-6* investigation may be waived by the notional higher headquarters (division or corps), saving the commander and an investigating officer very valuable time.

Civilians on the Battlefield[19]

Lesson Learned

Units must conduct unit and individual training on the handling of civilians on the battlefield, to include lane training and situational training exercises.[20]

Observations

Virtually every rotation at the three CTCs (JRTC, NTC and CMTC) using civilian role players sees several incidents of mishandling and maltreatment of civilians. A tank turret machine gunner fired on civilians for refusing to move on when told to do so. A garbage man was shot when he happened to be collecting garbage outside the perimeter of a support area when mortar shells started falling onto the support area (troops immediately assumed he called in the fires). Troops who suspected a local farmer of harboring snipers assaulted up his driveway and into the yard with a platoon of M1 tanks, a few Bradley fighting vehicles, and a helicopter gunship hovering overhead for backup. This seemed to be a "hooah" approach, at least until the International Network News[21] aired a video of the whole ordeal that night, complete with the old man cowering with his wife, waving a white flag, on his front door step. Needless to say, the troops found no snipers.

Discussion

Training centers used to have "sanitized" battlefields (that is, rolling or open terrain uninterrupted by towns, villages, civilian vehicles, livestock, schools, churches, hospitals). Such scenes allowed commanders and troops to fully exercise the basic principles of shoot, move, and communicate. These training centers failed to prepare commanders and troops for the realities encountered in most present-day operations. Today's CTC battlefields are more realistic, with towns, structures, and civilian role-players as locals, police, sheriffs, governors, non-governmental organizations, and the like.

The biggest challenge that a commander and his staff, to include the JA, has today is to train an eighteen-year-old private, armed with a rifle and grenades, to properly react to a variety of situations on the battlefield and in "peaceful" areas of operations. Civilians on the battlefield often present the greatest confusion and challenge to a young soldier. That soldier must quickly ascertain whether the civilian is a combatant or not, represents a hostile threat or intent, or is a security risk. The soldier must balance preservation with the requirement of properly treating noncombatants and civilians.

As with rules of engagement, discussed next, the best way to prepare soldiers for handling civilians on the battlefield is through training. Classroom training is sufficient for introducing the issues that soldiers will face and the general rules and principles that should guide them. No substitute exists, however, for putting the rules in practice.

The best training is lane training and situational training exercises at the individual and small unit level. Tasks, conditions, and standards can be created to test soldiers' reactions in a variety of situations, such as an armed farmer angry that military vehicles just killed his livestock, an apparently unarmed person crawling under the perimeter wire, a civilian or host nation law enforcement roadblock, a demonstration, International Committee of the Red Cross members demanding access to prisoners, and media members who refuse to leave a dangerous area.

17. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 2-1a(3) (11 May 1988) (C1 30 Oct. 1996).

18. *See id.* para. 2-1a(3).

19. While this section concerns rules of engagement as well, the number of issues that arise concerning civilians dictates this separate section.

20. Commonly referred to by the initialism STX.

21. The International Network News, or INN, is the notional news station, which is equivalent to the real world CNN.

Judge advocates must help devise mission-oriented scenarios and the standards by which soldier reactions will be judged. When possible, JAs should actively participate in the training. Numerous "hip pocket" or preplanned situational training exercise opportunities exist–for example: during "down time" at the ranges, as an added station during expert infantryman's badge training, or as part of the required law of war training. Civilians on the battlefield events occur across the entire battlefield and spectrum of operations. Thus, combat maneuver, service, and service-support soldiers must all be trained.

Rules of Engagement

Lesson Learned

Rules of engagement (ROE) must be trained, trained, and trained some more.

Observations

Many soldiers are not trained on the ROE. During every CTC rotation at least hundreds, sometimes thousands, of soldiers have not had ROE training. Often, JAs do not prepare, disseminate ROE products, or train the ROE before deployment. In addition, JAs and commanders do not conduct sufficient training on mission-specific ROE and law of war principles, in general. The result has been civilian deaths due to improper use of force and friendly deaths when untrained soldiers hesitate or do not react to hostile threats and acts.

Discussion

Rules of engagement are the commander's tool for controlling the use of force. Because law of war is intimately involved with the ROE, commanders and other staff members often turn to the JA to take the lead in ROE development and training. Even if the commander and his operations staff take the lead, the JA still has an important role in developing, reviewing, and revising the ROE for each mission.

In today's operations, every soldier has the potential to be a "strategic soldier." The incorrect use of force by a soldier can turn the sentiment of a crowd, a town, or a nation against that soldier's forces and the nation's or coalition's efforts. Similarly, the judicious application of force at the right moment can quell an otherwise explosive situation and prevent casualties or death. If the JA or commander could be at the soldier's side at the crisis moment, the task would be simple. Unfortunately, this is not possible. The CTCs, however, can replicate the realities of the "strategic soldier" concept through the media and through changes in the attitudes and actions of the civilian role players.

Each soldier in an area of operations must not only be briefed or provided a card on the ROE, but *trained* on the ROE. Do not forget to train support and service support–not just combat arms–soldiers on ROE. A supply truck convoy is as or more likely than a combat arms soldier to encounter a roadblock or riot in a peace operation, like Bosnia. Even in combat operations such as Desert Storm, support personnel are as far forward as the maneuver forces and face similar dangers and situations. The only way to evaluate whether a soldier understands the ROE is to present him with a situation, and observe how he reacts. Situational training exercises, as discussed in the lesson on civilians on the battlefield above, are the best ROE training method.

Rules of engagement training is not "one time fire-and-forget." Rules of engagement should be trained at every opportunity, for example: at guard mount, convoy briefings, and before moving to tactical assembly areas.

Rules of engagement are partly communicated to the commanders and soldiers through ROE products–the ROE annex to the operations order and ROE cards issued to every soldier.

The correct length of a ROE annex is essential to its effectiveness at the CTCs. Some rotations have tried to reduce the ROE to a one-page matrix of phrases. Commanders did not understand the one-page matrix. Other rotations have inserted thirty pages of text into a brigade task force operations order that itself was only thirty pages or less. Commanders did not have the time, and did not bother to read, the thirty page annexes, let alone attempt to disseminate their content to the troops. The successful answer lies somewhere in the middle.

Much paper can be saved by putting definitions and other generic provisions and material that remains constant in the unit SOP. Judge advocates should remember, when writing and organizing ROE, at least for ground forces, the ultimate consumers of ROE are the combat soldiers–the "trigger pullers" and the "cannon cockers." Rules of engagement cards must be short, simple, clear, and either weather proof or available in great numbers.

For purposes of training at the CTCs, the notional higher headquarter ROE are usually available from the CTC before the training unit deploys. Thus, a ROE card should be produced, and mission-specific ROE should be trained at home station. When specific ROE for a mission are not available before deployment, situational training can still be used to train the general principles on the use of force.

Public Affairs

Lesson Learned

Judge advocates should be media savvy and prepare their commanders to handle questions on legally complex issues.

Observations

Judge advocates at the CTCs have traditionally done well in handling media relations. In fact, several units that have deployed without a public affairs officer (PAO) have designated the JA as the *de facto* PAO.

Discussion

The JA's legal mission and involvement in other aspects of operations should usually preclude him from acting as the PAO. The JA, however, should be familiar with the general principles on handling the media. At the CTCs, as in "real world" operations like Bosnia, JAs frequently face a camera and prying questions from the media. Many CTC rotations feature one or more formally scheduled interviews with the JA.

The JA should be a subject-matter expert on many legal issues, such as the legal basis for the force's presence and operations, status of investigations, and status of forces agreements. The JA must be adept at fielding questions on every aspect of the unit's mission. Before deploying, JAs should seek some informal training from the home station PAO. The JA must also prepare the commanders to handle questions and to use affirmatively the media to advance the mission. One successful technique employed by JAs at the CTCs has been to keep a stack of "smart cards" available for the commander's review. These are index card on key topics, with a short explanation and recommended statement points as bullets.

Judge Advocate Strength and Disposition

Lesson Learned

Judge advocates should deploy with their supported unit, take their legal NCOs and specialists, and position themselves in the TOC or TAC (forward), as appropriate.

Observations

At least one JA now deploys to every CTC rotation. Usually, one or two legal NCOs, or specialists, accompany the JA(s). At JRTC and CMTC, JAs are almost always positioned in the TOC. At NTC, JAs are pushed to the rear, usually to the brigade support area (BSA). The S1 (personnel) section often usurps the enlisted legal personnel.

Discussion

Old practices of the JA staying behind when the unit deploys have mostly died with the emergence of legally intense operations.[22] The key issues are now where the legal personnel should physically locate to provide optimal legal support to operations, and the proper use of enlisted personnel.

Strength—Recent rotations at the CTCs have seen more than one JA accompany a brigade or brigade task force. The military readiness exercises that prepare units for deployment to Bosnia, for example, have had one JA assigned per battalion task force base camp, just as it is done in the Bosnia theater. The O/Cs have reported very favorable results. With two, even three JAs per brigade, all remain fully employed and utilized. Judge advocates miss fewer legal issues and do not have to choose which meetings to miss. Responding to crises, attending meetings with host nation civilians, planning groups, targeting meetings, do not cause a lapse in battle tracking. Additionally, JAs are proactive in training troops on ROE.

Of course, Judge Advocate General (JAG) Corps numbers and overall disposition cannot support such JA strength on the ground in all operations. When the need arises, however, and the ability is there, the extra JA makes an immense difference. The JAG Corps has met the need for JAs at the battalion level in Bosnia base camps, and their presence has greatly assisted mission accomplishment.

Disposition—The JA, and at least one legal NCO or specialist, should be positioned in the TOC. Commanders who favor placing JAs in the BSA or ALOC[23] only account for the service support functions of the JA (for example, legal assistance, military justice, and personnel claims). To properly perform the JA's command and control functions (for example, targeting, rules of engagement, law of war) and many sustainment functions (for example, fiscal and contract issues, foreign claims) the JA must be where the battle is tracked. Usually, this means the TOC or the TAC, if one is sent forward. One way to assure your forward presence–and to improve your legal support to operations–is to learn other skills that make you invaluable to the commander.[24]

Another lesson is to deploy whenever practical. Judge advocates, legal specialists, and legal NCOs should deploy with their normally supported unit. The training unit should task organize to reflect deployment task organization, when possible. This ties directly into the integration and synchronization lesson learned, discussed earlier.

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22. There have been several BCTP rotations in which brigade JAs failed to fully participate. This is a loss of a great training opportunity. Division SJA sections and BOLTs do not often have the opportunity to rehearse and operate together.

23. The ALOC (pronounced "A Loc") is the common acronym used for the admin-logistics center.

24. *See supra* Integration and Sychronization section. If JAs learn battle captain functions, the physical set up of the TOC or TAC, the communications equipment within the TOC or TAC, or information operations, they become more valuable to the commander.

Enlisted Personnel—All enlisted personnel are often not taken to the CTCs–SJAs who do send enlisted personnel usually deploy only one or two legal NCOs or legal specialists. The legal specialists doctrinally assigned at battalion level rarely accompany the force. Aside from forcing the brigade operational law team (BOLT) to perform their functions while understrength, failing to take enlisted legal soldiers is a great training opportunity lost. The deployed environment exposes legal specialists and NCOs to legal work that takes them out of the "artificial box" created in garrison. They must become office managers and "jacks of all trades." During deployments, they suddenly become essential for more than military justice matters—for example, they become ROE trainers and foreign claims processers.

A recurring problem is effective JA control over legal specialist and legal NCO assets. Due to the their normal affiliation with the S1 (personnel shop) in garrison, S1 personnel often attempt to appropriate these legal specialists and NOCs for non-legal use. This has not only been a problem on exercises, but also on recent real world deployments, such as the Hurricane Mitch relief operations in Central America. Real world experience and CTC rotations clearly demonstrate that the legal mission makes full use of legal specialists and NCOs. Legal support to operations suffers significantly if the S1 seizes them.

Battle Box—References

Lessons Learned

Back up your digital library with hard copies of essential references. Do not assume there will be access to the Internet.

Observations

Computers, diskettes, CD-ROMs, and the Internet are wonderful, but often fail. Rotations to CTCs have seen computers become inoperable due to cracked screens, too much dust and dirt, moisture, and viruses. Frequently, the JA cannot access the Internet.

Discussion

Judge advocates should have certain key references available,[25] not just on a compact diskette or on a computer hard drive, but also in hard copy. They can either be stored in a traditional footlocker "battle box" or in a large ammo can. A footlocker can also serve as a seat in the TOC, but ammo cans offer better weather and abuse protection for battle box items like the rucksack deployable law office/library, references, and office supplies.

Basic Soldiering Skills

Lesson Learned

All legal personnel need to train on common soldier skills.

Observations

Most legal personnel are weak in several common soldier-skills areas. This puts them and their fellow soldiers at greater risk of injury or death on the battlefield, hampers performance of the legal mission, and can hurt their credibility in the eyes of other soldiers.

Discussion

Below are several soldier skills and issues that have proven to be problem areas for JAs deployed to CTCs.

Map reading—Too many JAG Corps personnel demonstrate a lack of map and compass skills. While JAs may not expect to navigate on the battlefield, they should expect to assist with navigation in various ways. Often, soldiers will look to JAs, as officers, for navigation assistance. More than one rotation has seen the JA as the sole survivor of a firefight, left to get himself, and at times, some wounded, out of the area. Additionally, battle tracking, monitoring protected targets, and many other TOC functions require a detailed understanding of maps and their symbols.

Weapons maintenance, qualification, and handling—Rotation after rotation, JAs and enlisted alike neglect their weapons. Even when prompted by the O/Cs, legal personnel ignore weapons maintenance. Because of the CTC anomaly that only M16s, not M9s, accept MILES equipment,[26] and thus are capable of "killing" the enemy, most JAs *do* deploy with M16s.

Many JAs do not take the time or make the effort to zero their weapon with the MILES. A non-functioning and inaccurate weapon not only risks the life of its owner, but the lives of those soldiers who will look to its owner to protect their flank. An unwanted side effect is the less than professional impression that a rusty, dirty weapon gives. Finally, legal personnel must practice safe weapon handling. There is nothing worse for a JA than to have an accidental discharge–an offense he prosecutes as a trial counsel.

Drivers' Licenses—Judge advocates almost never possess a military driver's license. Enlisted legal personnel usually have their HMMWV license. Officers must then rely upon a driver to move around the battlefield. This becomes a problem when

25. For example, the *Operational Law Handbook*, the *Manual for Courts-Martial*, *AR 27-10*, *AR 15-6*, *FMs 27-1*, and *27-10*.

26. MILES, the acronym for the multiple integrated laser engagement system, is akin to "laser tag" equipment. It records notional casualties and deaths.

the JA has to call upon the only legal NCO in the TOC, a move that results in no legal coverage.

Vehicle(s)—Most SJA offices do not have assigned vehicles in sufficient numbers to provide one to each JA, and the supported units almost never want to give up one. Numerous prepositioned vehicles, however, are located at the CTCs. If a JA coordinates early with the deploying unit, he may be able to have an assigned vehicle for the rotation. Apart from this, JAs have fared best by keeping their "eyes and ears open" for drivers, vehicles, and couriers going to places that they or their messages need to travel.

Night Observation Devices (NODs)—Night observations devices are key when legal personnel are to be driving or maneuvering at night. Legal personnel should always seek to deploy with at least one set of NODs for the BOLT. Accordingly, knowing how to wear, use, and maintain NODs is indispensable. More than one JA has been seen wandering into the wire around the TOC perimeter on a dark night.

Nuclear, Biological Chemical (NBC) Skills—The "dirt" CTCs (JRTC and NTC) use CS gas to replicate the threat of chemical agents in operations. However, CS cannot replicate the fear of the actual use of chemicals when a NBC alarm goes off in the middle of a combat environment, or their horrible effects. Just as with weapons maintenance and skills, legal soldiers must know NBC skills, not just for self-preservation, but to aid others and to ensure that the mission continues. Most legal personnel can don a mask and NBC suit, though not always to time standards. But, many do not know decontamination procedures, mask maintenance, or, as at least one JA has had to know in the absence of the chemical officer, how to render an NBC-1 report and conduct an M8/M9 detector test for the presence of agents.

Your Comments, Please

The Center invites your comments as to the format and content of this first article, and your ideas for future articles.[27] Additionally, CLAMO asks, that you provide all AARs, memoranda, raw data, messages, books, and guides that might contribute to operational law training of fellow JAs.

Contact CLAMO by e-mail: Captain Tyler L. Randolph, at *randot@hqda.army.mil*; Major John W. Miller II, at *millejw@hqda.army.mil*; or Major William H. Ferrell, USMC, at *ferrewh@hqda.army.mil*; by phone: (804) 972-6339/6448; or by mail: The Center for Law and Military Operations, The Judge Advocate General's School, 600 Massie Road, Charlottesville, Virginia 22902-1781. Captain Randolph

27. While CLAMO only began collecting legal lessons learned from the CTCs short time ago, CLAMO cannot address all of the lessons learned in this report. The following is a sample of other lessons learned that CLAMO is considering for future reports: preparation for deployment, to include a detailed pre-deployment checklist; personal packing lists; the rucksack deployable law office/library–components, maintenance, use and training; communications modes and means; detention of civilians and their release to host nation authorities; indicators of hostile intent–Read the Country Study (for example, open carry of weapons allowed in Mojavia (NTC); weapons confiscation; fratricide investigations; fiscal law training and issues; handling of friendly and enemy dead; legal Assistance and notary functions; ROE: what constitutes "observed" fires?; medical treatment of EPWs; the EPW cage; non-governmental organizations inspections of EPW cages, displaced civilian routes, collection points, etc.; interaction with host nation police and authorities; verbal claims; integration with civil affiars and "team village."

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

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).
23-25 June	Career Services Directors Conference

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).
6-9 July	Professional Recruiting Training Seminar
12-16 July	10th Legal Administrators Course (7A-550A1).
16 July-24 September	149th Basic Course (Phase II-TJAGSA) (5-27-C20).

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

June

4 June ICLE	The Jury Trial Sheraton Buckhead Atlanta, Georgia

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 April 1999 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

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

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. Articles

The following information may be useful to judge advocates:

Stephen Jones & Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America"*, 51 OKLA. L. REV. (winter 1998)

Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143 (April 1999).

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.

The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

US Army Corps of Engineers
215 North 17th Street
ATTN: Ms. Karen Stefero, Librarian
Omaha, NE 68102-4978
Commercial: (402) 221-3229
e-mail: karen.1.stefero@usace.army.mil

Comptroller General Decisions, Vols. 1-72
US Court of Claims Reports, Vols. 104-159
US Court of Claims Reports, Vols. 160-210
West's Federal Digest, Vols. 1-72
West's Federal Practice Digest, Vols. 1-92
Modern Federal Practice Digest, Vols. 1-60
Northeastern Reporter, Vols. 1-200
Northeastern Reporter Digest, Vols. 1-68
Pacific Reporter, 1st SE, Vols. 1-300
Pacific Digest, 1st SE, Vols. 2-15
Pacific Digest, Beginning 1-100, P 2D, 1-40
Southewestern Reporter, 2d, Vols. 265-554.