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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.

Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application

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Introduction

I know not whether Laws be right,
Or whether Laws be wrong;
All that we know who lie in gaol
Is that the wall is strong;
And that each day is like a year,
A year whose days are long.[1]

These words of a prisoner long ago capture the impact of a single day of confinement. With this quote in mind, military practitioners cannot treat sentence credit as a trivial presentencing matter.[2] Instead, they must recognize the types of sentence credit available and understand how the credit is applied.

The purpose of this article is to analyze available sentence credit and to propose a uniform approach to its application. The article is divided into three main parts. First, it will discuss sentence credit in detail, including the four available types of sentence credit.[3]

The second part of this article examines Article 13 credit in more depth. Today, nearly all sentence credit is applied against the sentence ultimately approved by the convening authority[4] (except for *Pierce* credit[5]) with one major exception: credit for illegal pretrial punishment in violation of Article 13, Uniform Code of Military Justice (UCMJ).

In this area, sentence credit can be applied against either the adjudged or the approved sentence.[6] For instance, consider the cases of two service members who both suffer Article 13 pretrial punishment. In one case, the military judge considers the violation to adjudge an appropriate sentence at trial.[7] In the other case, however, the judge orders an administrative credit, which is assessed against the approved sentence.[8] Although both applications are proper, their impacts on soldiers differ and can result in unequal treatment.[9] This anomaly stems from the current state of the law in military sentence credit–a mosaic of

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1. OSCAR WILDE, THE BALLAD OF GAOL, pt. 5, stanza 1 (1896), *quoted in* United States v. McCarthy, 47 M.J. 162, 168 (1997).

2. *See generally* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 58 (30 Sept. 1996) [hereinafter BENCHBOOK] (outlining presentencing session for courts-martial).

3. The four categories of sentence credit are: (1) *Allen* and *Mason* credit, (2) R.C.M. 305(k) credit, (3) Article 13, UCMJ credit, and (4) *Pierce* credit. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (providing credit for time spent in pretrial confinement); United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (providing credit for pretrial restraint equivalent to confinement); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(k) (1998) [hereinafter MCM] (including *Suzuki* credit, United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983)); UCMJ art. 13 (West 1998). Article 13 provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Id. See also United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (providing the service member with the choice between having credit for prior nonjudicial punishment considered by the judge at trial, or allowing the convening authority to administratively apply the credit against the approved sentence).

4. *See generally Allen*, 17 M.J. at 126; *Mason*, 19 M.J. at 274; MCM, *supra* note 3, R.C.M. 305(k).

5. *See generally Pierce*, 27 M.J. at 367. *Pierce* credit applies in the unusual case of a service member who is court-martialed for an offense that was already punished under Article 15, UCMJ; therefore, this article treats this area as a minor exception. *Id.* at 369.

6. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 629 (Army Ct. Crim. App. 1997).

7. *See id*.

8. *See id*.

9. *See generally* United States v. Larner, 1 M.J. 371, 375 (C.M.A. 1976) (observing that the two possible methods to deal with illegal pretrial confinement are (1) applying sentence credit administratively against the approved sentence to confinement, or (2) having the judge consider the illegal confinement to adjudge a sentence at trial). Because of the way good time abatement credit is earned at the confinement facility, the latter method may result in a service member serving more time in confinement. The former method is a "fully adequate remedy." *Id.* at 372.

common law, executive order, and statute.[10] After critically reviewing *Coyle v. Commander*,[11] a recent case addressing the sentencing credit status quo, this article discusses the anomalous impact that the different methods of applying credit can have on service members.

The third part of this article is a proposal for uniformity. This article proposes that all Article 13 sentence credit be administratively applied against the approved sentence to confinement.[12] This approach would cause all illegal pretrial confinement and punishment to be treated the same for credit purposes.

In short, this article examines giving service members the credit they deserve by critically reviewing the status quo and recommending a system where a tangible credit would attach to every finding of sentence credit at trial.

Available Types of Sentence Credit

Sources of available sentence credit fall into four broad categories: (a) *Allen*[13] and *Mason*[14] credit; (b) Rule for Courts-Martial (R.C.M.) 305(k) credit,[15] which includes *Suzuki* credit;[16] (c) Article 13, UCMJ credit;[17] and (d) *Pierce*[18] credit. The military practitioner must ask three questions when analyzing each type of sentence credit. First, what triggers the credit? Second, how is the credit applied? Finally, what are the practical issues to consider? Using this analysis, this section examines the four categories of sentence credit. First, however, this section will briefly discuss the two methods of applying sentencing credit. Note that this section offers, for use by practitioners, a sentence credit guide that can be found at the Appendix to this article.[19]

The Two Methods of Applying Sentencing Credit and its Terminology

"In the military a substantial difference exists between an adjudged and an approved sentence. The former is the sentence imposed by the military judge or court-martial members. The latter is the sentence ultimately approved by the convening authority."[20] As simple as this distinction may seem, its precise meaning is easily lost in semantics;[21] therefore, a brief background discussion is necessary.

Judicial Credit—Credit that is applied against the adjudged sentence means that the sentencing authority reduces the sentence at trial.[22] In court-martial practice, the credit is considered as mitigation by the military judge or the panel in adjudging an appropriate sentence.[23] For example, what would

10. *See generally* UCMJ art. 13 (West 1998); MCM, *supra* note 3, R.C.M. 304, 305; United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason, 19 M.J. 274 (C.M.A. 1985); United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

11. *Coyle*, 47 M.J. at 629.

12. This approach would require military judges to order additional administrative credit against the approved sentence to confinement for all illegal pretrial punishment in violation of Article 13, UCMJ.

13. *Allen*, 17 M.J. at 126 (providing credit for time spent in pretrial confinement).

14. *Mason*, 19 M.J. at 274 (providing credit for pretrial restraint equivalent to confinement).

15. MCM, *supra* note 3, R.C.M. 305(k).

16. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

17. UCMJ art. 13 (West 1998).

18. United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (providing the service member with the choice between having credit for prior nonjudicial punishment considered by the judge at trial, or allowing the convening authority to administratively apply the credit against the approved sentence).

19. *See infra* Appendix. The concept for this guide is based on a sentencing credit matrix developed by Colonel Keith Hodges, Trial Judge, 2d Judicial Circuit, U.S. Army, Fort Benning, Georgia.

20. *See* United States v. Gregory, 21 M.J. 952, 957 (A.C.M.R. 1986).

21. *See, e.g.*, United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (referring to pretrial confinement credit applied on the "sentenced adjudged," but describing administrative credit that reduces sentence ultimately approved by the convening authority); *Gregory*, 21 M.J. at 956 (noting that the loose usage of the term "adjudged" by the drafters of R.C.M. 305(k) to describe an administrative scheme of credit blurs the distinction between sentence credit imposed at trial and credit applied against the approved sentence).

22. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 628-630 (Army Ct. Crim. App. 1997).

23. *See* MCM, *supra* note 3, R.C.M. 1001 (b)(1) (requiring the "duration and nature of any pretrial restraint" be presented by the prosecution to the sentencing authority), R.C.M. 1001(c)(1)(B) (defining a "matter in mitigation" as evidence that is "introduced to lessen the punishment to be adjudged by the court-martial"); BENCHBOOK, *supra* note 2, at 91 (sentencing instructions include giving due consideration to "all matters of extenuation and mitigation").

have been a twenty-four month sentence at trial becomes a twenty-two month sentence due to the credit.[24] Accordingly, the term "judicial credit,"[25] which this article uses throughout, describes applying credit against the adjudged sentence at trial by factoring-in credit as mitigation.

Administrative Credit—Credit applied against the approved sentence to confinement is "administrative credit."[26] Instead of reducing the adjudged sentence at trial, the military judge orders an administrative credit,[27] which is annotated in the report of result of trial.[28] Next, using the administrative credit indicated in the report, confinement officials reduce the term of confinement in the appropriate amount.[29] Finally, when the convening authority approves the sentence,[30] at a minimum, the promulgating order must account for any administrative credit ordered by the military judge.[31] After the promulgating order is published, confinement officials make further adjustments to the sentence, if necessary.[32]

Credit for Pretrial Confinement or its Equivalent: Allen and Mason Credit

Military pretrial confinement or its equivalent triggers *Allen* credit,[33] for time spent in actual confinement;[34] or *Mason* credit,[35] for restriction "tantamount to confinement."[36] Both *Allen* and *Mason* credits are administrative credit, applied against the approved sentence to confinement.[37] Credit for time spent in civilian pretrial confinement is the practical issue to consider in this area.

What Triggers Allen and Mason Credit?—Before 1984, service members in pretrial confinement were not entitled to administrative credit.[38] After *United States v. Allen*,[39] however,

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24. *See Coyle*, 47 M.J. at 628.

25. *See* United States v. Larner, 1 M.J. 371, 375 n.13 (C.M.A. 1976) (drawing a distinction between "judicial reduction" of a sentence and "judicially ordering an administrative credit").

26. *See id*. at 375 n.13.

27. *See Coyle*, 47 M.J. at 628-630.

28. *See* U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice, para. 5-28a. (24 June 1996) [hereinafter AR 27-10] (requiring that DA Form 4430-R, Report of Result of Trial, include all administrative credits). Specifically, a report must contain "all credits against confinement adjudged whether 'automatic' credit for pretrial confinement under [*Allen*], or judge-ordered additional administrative credit under R.C.M. 304, R.C.M. 305, [*Suzuki*], or for any other reason specified by the judge." *Id.*

29. *See* U.S. Dep't of Army, Reg. 633-30, Apprehension and Confinement: Military Sentences to Confinement, para. 4a. (6 Nov. 1964) (C1, 13 April 1984) [hereinafter AR 633-30]; U.S. Dep't of Army, Reg. 190-47, Military Police: The Army Corrections System, para. 3-5 (15 Sept. 1996) [hereinafter AR 190-47]; Telephone Interview with Mr. Terry Rush, Confinement Administrator, United States Disciplinary Barracks, Fort Leavenworth, Kansas (Jan. 26, 1999; Mar. 23, 1999) [hereinafter Rush Interview]; *see generally* UCMJ art. 57 (West 1998) (sentence to confinement begins on date adjudged unless deferred by convening authority). In the usual case, the accused will immediately begin serving a sentence to confinement adjudged at trial, awaiting subsequent approval of the sentence by the convening authority.

30. *See generally* MCM, *supra* note 3, R.C.M. 1107(a) (promulgating the convening authority's broad command discretion to act on findings and sentence).

31. *See id*., R.C.M. 1107(f)(4)(D) (requiring the convening authority to direct R.C.M. 305(k) credit in his action on the sentence when the military judge orders it at trial); AR 27-10, *supra* note 28, para. 5-28a. ("The convening authority will show in his or her initial action all credits against a sentence to confinement."); *see generally* United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983) ("A convening authority . . . has no power to ignore a ruling by the military judge and unilaterally act on his own.").

32. *See* AR 633-30, *supra* note 29, para. 6a. (5); Rush Interview, *supra* note 29 (explaining that because of the way good conduct abatement is calculated, a further sentence reduction by the convening authority or the appellate courts could ironically result in a later release date; in such situations, the earlier release date is selected for the prisoner affected).

33. United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

34. *See id*. at 127-28.

35. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

36. *See Mason*, 19 M.J. at 274 (defining standard as "equivalent to confinement"); United States v. Smith, 20 M.J. 528, 529 (A.C.M.R. 1985).

37. *See Allen*, 17 M.J. at 128-29; *Mason*, 19 M.J. at 274; Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 629-30 (Army Ct. Crim. App. 1997).

38. *See generally* United States v. Larner, 1 M.J. 371, 374 n.11 (C.M.A. 1976) ("The convicted accused in our system is not entitled by right to credit on his sentence for pretrial confinement."); United States v. Davidson, 14 M.J. 81, 84-88 (C.M.A. 1982) (documenting that before 1951, pretrial confinement in the military system was viewed differently than confinement imposed by a court-martial sentence). Before the UCMJ was enacted, prisoners could not be legally punished until convening authority action; however, when the 1951 *MCM* was promulgated, the President provided that pretrial confinement had to be brought to the attention of the court-martial in adjudging an appropriate sentence. *Id*. at 84-88.

the Court of Military Appeals (CMA)[40] began to award day-for-day credit for time spent in pretrial confinement.[41] *Allen* credit was not purely a function of common law. The CMA adopted a plain meaning interpretation of *Department of Defense Instruction (DODI) 1325.4*,[42] which "voluntarily incorporated the pretrial-sentence credit extended to other Justice Department convicts"[43] via 18 U.S.C. § 3568.[44] Today, even though *DODI 1325.4* and 18 U.S.C. § 3568 have been replaced,[45] the Court of Appeals for the Armed Forces (CAAF) has not revisited *Allen*.

Mason credit[46] is derived from *Allen*.[47] In cases of pretrial restraint that are "tantamount to confinement,"[48] day-for-day administrative credit is required "in light of *Allen*."[49] Whether pretrial restriction rises to the level of confinement is a question of fact based "on the totality of the conditions imposed."[50] Relevant factors include "the nature of the restraint (physical or moral), the area or scope of the restraint . . . , the types of duties, if any, performed during the restraint . . . , and the degree of privacy enjoyed within the area of restraint."[51]

How are Allen and Mason Credits Applied?—Both *Allen* and *Mason* credit are applied against the approved sentence to confinement.[52] Although not facially apparent,[53] the statutory requirement incorporated by *Allen*, and the distinction between "judicial" and "administrative" credit,[54] both support applying these credits against the approved sentence.[55]

First, the statutory requirement incorporated by *Allen* provided that "the Attorney General shall *give* . . . credit"[56] against a sentence to confinement when allowable.[57] As a practical

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39. 17 M.J. 126 (C.M.A. 1984).

40. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (renaming the United States Court of Military Appeals (CMA) to the United States Court of Appeals for the Armed Forces (CAAF)).

41. *Allen*, 17 M.J. at 128.

42. U.S. DEP'T OF DEFENSE, INSTR. 1325.4, TREATMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTION FACILITIES (7 Oct. 1968) [hereinafter DODI 1325.4], *superseded by* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (19 May 1988) [hereinafter DODD 1325.4].

43. *Allen*, 17 M.J. at 128.

44. Act of June 22, 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217 (providing that credit shall be given for "any days spent in custody in connection with the offense or acts for which sentence was imposed"), *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984) (codified as 18 U.S.C. § 3585 (1994)).

45. *See* DODD 1325.4, *supra* note 42; 18 U.S.C. § 3585 (1994).

46. United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

47. *Allen*, 17 M.J. at 126.

48. *See* United States v. Smith, 20 M.J. 528, 529 (A.C.M.R. 1985).

49. *See Mason*, 19 M.J. at 274.

50. *See Smith*, 20 M.J. at 529.

51. *See id*. at 531. *See also* Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R. 1985); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985).

52. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626, 629-630 (Army Ct. Crim. App. 1997).

53. *See, e.g.*, United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (referring to pretrial confinement credit applied on the "sentence adjudged"); United States v. McFarland, 17 M.J. 408 (C.M.A. 1984) (referring to administrative credit on the "adjudged sentence" for pretrial confinement); United States v. Mattingly, 17 M.J. 411 (C.M.A. 1984) (referring to administrative credit on the "adjudged sentence"); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (remanding for "purposes of receiving credit on a adjudged sentence"). *But see, e.g.*, United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) ("All pretrial confinement served is now credited against any sentence ultimately adjudged.").

54. *See* discussion *supra* notes 22-32 and accompanying text.

55. *See generally* United States v. Davidson, 14 M.J. 81, 84-88 (C.M.A. 1982) (observing that paragraph 88b, 1969 *MCM*, provided for the consideration of pretrial confinement as a factor for a court-martial to consider in adjudging a sentence at trial). The judicial method of applying sentence credit was already being used for pretrial confinement sentence credit when *Allen* was decided. *Id*. at 84-88.

56. *See* 18 U.S.C. § 3568 (1966) (providing that credit shall be given for "any days spent in custody in connection with the offense or acts for which sentence was imposed"), *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984) (codified as 18 U.S.C. § 3585 (1994)) (expanding the reach of 18 U.S.C. § 3568). Further, section 3585 provides that "a defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." *Id*.

matter, administrative credit is the only alternative that ensures statutory compliance. Otherwise, service members may not receive tangible credit for time spent in pretrial confinement.[58] Arguably, judicial credit also meets the statutory requirement; however, this expansive view must be rejected, because "simply reducing the adjudged sentence proportionately for time actually served is not a full remedy."[59]

Second, the distinction between judicial and administrative credit also supports applying these credits against the approved sentence. Simply stated, the statutory credit scheme incorporated by *Allen* was–and still is–based on administrative, not judicial credit.[60] Hence, both logically[61] and legally, *Allen* and *Mason* credit are administratively applied against the sentence ultimately approved by the convening authority.[62]

Practical Issue: Credit for Civilian Pretrial Confinement—What happens when civilian authorities confine a service member who is awaiting court-martial? Practitioners should note that 18 U.S.C. § 3568, upon which CMA originally relied on in *Allen*,[63] was replaced by 18 U.S.C. § 3585.[64] This change extends the reach of *Allen* credit in the civilian pretrial confinement context.[65] Moreover, a split exists among service courts in this area.[66] Although the CAAF has yet to readdress this issue, the trend is toward the *Murray* approach,[67] which extends *Allen* credit to civilian confinement. *Allen*'s statutory underpinnings have changed.[68] Computing federal confinement sentences is now governed by 18 U.S.C. § 3585 (b), which states:

> *Credit for prior custody.* A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

57. *See Allen*, 17 M.J. at 127-129.

58. *See id*. at 129 (Everett, C. J., concurring) (explaining that uncertainty of mitigation means that some sentencing authorities may not give any credit at all and the construction adopted by the majority provides certainty that was lacking under the practice of allowing the sentencing authority to merely consider pretrial confinement when adjudging a sentence).

59. *See* United States v. Larner, 1 M.J. 371, 374 (C.M.A. 1976) (comparing the credit application methods of judicial versus administrative credit in the illegal pretrial confinement context).

60. *See* 18 U.S.C. § 3568 (1966) (providing that credit shall be given by the Attorney General), *repealed by* Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984) (codified as 18 U.S.C. § 3585 (1994)) (dropping the "Attorney General" language). A plain reading analysis supports the conclusion that credit must be applied administratively against the approved sentence; the statute mandates credit which is implemented by executive agency, not judicially administered. Although the military judge orders the credit, the credit is administered by the confinement facility and convening authority. *See* DODD 1324.5, *supra* note 42; MCM, *supra* note 3, R.C.M. 1107; United States v. Wilson, 503 U.S. 329 (1992) (holding that former 18 U.S.C. § 3568 expressly required the Attorney General to award credit). When Congress recodified the statute as 18 U.S.C. § 3585, it did not intend to transfer computing sentence credit to the district courts. The statute still retains its executive administration character. Since federal defendants do not serve their sentences immediately, any calculation by the district courts would be speculative. *Id.* at 331-337.

61. *See generally Davidson*, 14 M.J. 81, 84-88. Since the judicial method of applying sentence credit was already being used for pretrial confinement sentence credit, logically, *Allen*'s only alternative was establishing an administrative credit remedy.

62. *See* 18 U.S.C. § 3585 (1994) (repealing 18 U.S.C. § 3568 (1966) by Act of Oct. 12, 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(1), 98 Stat. 1987 (1984)); *Davidson*, 14 M.J. at 84-88.

63. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

64. 18 U.S.C. § 3585 (1994) (part of Sentencing Reform Act of 1984, Pub. L. 98-473 § 212 (a) (2), 98 Stat. 2001 (1984), superseding 18 U.S.C. § 3568 (1966)).

65. *See id.*; DODD 1325.4, *supra* note 42. Practitioners must not confuse *Allen* credit with R.C.M. 305(k) credit. These are two distinct types of credit. Rule 305(k) credit is governed by United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989).

66. *See* United States v. Murray, 43 M.J. 507 (A.F. Ct. Crim. App. 1996) (extending *Allen* credit to civilian confinement based on incorporating of 18 U.S.C. § 3585 language into DODD 1325.4); *see also* United States v. Dave, 31 M.J. 940 (A.C.M.R. 1990) (extending *Allen* credit to civilian confinement only when civilian custody is in connection with acts solely for which military sentence is imposed); Major Amy M. Frisk, *Military Justice Symposium: New Developments in Pretrial Confinement*, ARMY LAW., Mar. 1996, at 31-32 (noting that service courts disagree on the issue of whether service members who spend time in civilian pretrial confinement before military pretrial confinement are entitled to *Allen* credit).

67. *See Murray*, 43 M.J. at 513-515; United States v. Martin, No. 9700900 (Army Ct. Crim. App. June 18, 1998) (signaling the Army Court of Criminal Appeals' (ACCA) shift towards the *Murray* approach by employing a 18 U.S.C. § 3858 analysis to deny appellant credit for time spent in civilian pretrial confinement).

68. *See Murray*, 43 M.J. at 514 (explaining that new DODD 1325.4, dated 19 May 1988, left language incorporating federal sentence computation standards virtually unchanged and that the standards now incorporated are governed by 18 U.S.C. § 3585, which replaced 18 U.S.C. § 3568, the statute initially incorporated by *Allen*).

that has not been credited against another sentence.[69]

According to the United States Supreme Court,[70] 18 U.S.C. § 3585(b) altered 18 U.S.C. § 3568 in three ways. "First, Congress replaced the term 'custody' with the term 'official detention.' Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit." [71]

The impact of these changes on the extension of *Allen* credit is twofold. First, Congress expanded *Allen* credit to service members who initially find themselves confined by civilian authorities on a state charge, but who are ultimately tried for a UCMJ offense committed before the state charge.[72] Second, the changes can extend *Allen* credit to offenses that have no military connection.[73]

Despite these statutory changes, service courts are split on extending *Allen* credit to civilian pretrial confinement.[74] In *United States v. Murray*,[75] the Air Force Court of Criminal Appeals (AFCCA) adopted an approach based on the plain meaning of 18 U.S.C. § 3585 to award an airman credit for time spent in state custody.[76] The Army Court of Military Review (ACMR)[77] used a military-connection type analysis.[78] A service member earns *Allen* credit for time spent in civilian confinement at the behest of the military[79] or civilian custody "in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed."[80] The Army's approach, however, appears to be headed in the direc-

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69. 18 U.S.C. § 3585 (1994) (part of Sentencing Reform Act of 1984, Pub. L. 98-473 § 212 (a) (2), 98 Stat. 2001 (1984), superseding 18 U.S.C. § 3568 (1966)).

70. *See* United States v. Wilson, 503 U.S. 329, 337 (1992).

71. *See id.* at 337. The prevention of double credit refers to the language of 18 U.S.C. § 3585 that provides: "has not been credited against another sentence." *Id*. at 334. Query, how would double credit be prevented if a soldier is court-martialed and later tried by the state? For instance, a soldier is apprehended on unrelated state charges and later transferred to the military on UCMJ charges. Although the soldier is not tried for the unrelated state charges, he receives credit, under the 18 U.S.C. § 3585 scheme, for the time spent in state custody before court-martial. After court-martial, the soldier is tried by the state for the state charges. The state court may also give credit for the state pretrial custody (this assumes state authorities will be unaware of the credit already given by the military at the first trial). In such a case, what happens at the confinement facility. Do they deduct one of the credits?

72. *See Murray*, 43 M.J. at 514-515. *Cf.* United States v. Richardson, 901 F.2d 867 (10th Cir. 1990) (holding that plain meaning of 18 U.S.C. § 3585 permits federal credit for state custody); United States v. Wilson, 916 F.2d 1115 (6th Cir. 1990), *rev'd on other grounds*, 503 U.S. 329 (1992) (leaving intact 6th Circuit's interpretation that 18 U.S.C. § 3585 requires credit for time spent in state pretrial custody not previously credited); United States v. Dowling, 962 F. 2d 390 n.3 (5th Cir. 1992) ("It is uncontroverted . . . that Dowling's 74-day stay in Orleans Parish [state] Prison constituted 'official detention' for purposes of 18 U.S.C. § 3585(b)."); Mitchell v. Story, 68 F.3d 483 (10th Cir. 1995) (indicating that U.S. Bureau of Prisons credits state pretrial custody when calculating credit under 18 U.S.C. § 3585).

73. *Cf. Richardson*, 901 F.2d at 867-869 (noting that a defendant was credited for custody on a state charge that was unrelated to the federal charge he was sentenced for). Because the defendant's federal crime pre-dated the unrelated state offense for which he was initially jailed, the plain meaning of 18 U.S.C. § 3585 required credit. *Id*. at 868. Hypothetically, an accused flees the scene of a larceny and is taken into state custody on a traffic violation. Three days later, the accused is charged for the larceny and continues to be held in confinement. Jurisdiction is later transferred to the military, and the accused is convicted of larceny, but the traffic offense is not tried. Under the old 18 U.S.C. § 3568 scheme, the accused would not be entitled to credit for the initial three days in confinement due to the lack of a connection to the offense for which sentence was imposed. Conversely, under 18 U.S.C. § 3585(b)(2), the three days would be creditable.

74. *See* Frisk, *supra* note 66, at 31-32 (noting that service courts disagree on the issue of whether service members who spend time in civilian pretrial confinement before military pretrial confinement are entitled to *Allen* credit).

75. 43 M.J. 507 (A.F. Ct. Crim. App. 1996).

76. *Id.*; United States v. Harris, ACM 32237 (A.F. Ct. Crim. App. Jan. 21, 1997) (holding that an accused was not entitled to credit on an offense for which he was charged but not sentenced, under an 18 U.S.C. § 3585 analysis); United States v. Gazurian, ACM 31372 (A.F. Ct. Crim. App. Feb. 20, 1997) (granting five days civilian pretrial confinement credit under the 18 U.S.C. § 3585 analysis); ; United States v. Taylor, (ACM 31574) 1996 CCA LEXIS 200 (A.F. Ct. Crim. App. June 20, 1996). *But see* United States v. Lassiter, 42 M.J. 538 (A.F. Ct. Crim. App. 1995) (denying credit for time spent in a civilian pretrial confinement using the rationale that the Air Force had to play an active role in the confinement to warrant *Allen* credit).

77. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (designating the Army Court of Military Review (ACMR) as the Army Court of Criminal Appeals (ACCA)).

78. See United States v. Dave, 31 M.J. 940 (A.C.M.R. 1990).

79. *See* United States v. Huselkamp, 21 M.J. 509 (A.C.M.R. 1985) (holding that an accused was entitled to *Allen* credit for civilian pretrial confinement that was directed by military authorities); United States v. Davis, 22 M.J. 557 (A.C.M.R. 1986) (holding that *Allen* credit was awarded for time spent in civilian pretrial confinement at the insistence of federal authorities in connection with the offense for which a sentence to confinement by court-martial was ultimately imposed).

80. *See Dave*, 31 M.J. at 942 (establishing the test that *Allen* credit for time in civilian pretrial confinement is awarded if the confinement is in connection with an offense *solely* for which sentence to confinement by court-martial is ultimately imposed). *See also* United States v. McCullough, 33 M.J. 595 (A.C.M.R. 1991) (citing *Dave*, no *Allen* credit is given where an accused who is held for state and military offenses was given time-served for state offense before the military took control). *Allen* credit only applies for civilian pretrial custody when in connection with the offense solely for which a sentence to confinement by court-martial is ultimately adjudged. *Id*. at 597.

tion of *Murray*.[81] Even though most cases would reach the same result under either service court's rationale,[82] the potential for inconsistency looms.

The *Murray* approach is superior for three reasons. First, it is the only approach consistent with *Allen*'s analysis.[83] *Department of Defense Directive 1325.4* still requires the armed forces to follow Department of Justice sentence credit rules.[84] These rules are now governed by 18 U.S.C. § 3585.[85] Second, the *Murray* approach comports with the broader scope of 18 U.S.C. § 3585.[86] Extending *Allen* credit to civilian pretrial confinement does not turn on a military connection;[87] the statute plainly credits any time "spent in *official* detention . . . as a result of the offense for which sentence was imposed."[88] Third, the *Murray* approach has sound legal backing. Federal courts have interpreted 18 U.S.C. § 3585 to require federal credit for state pretrial confinement.[89]

R.C.M. 305(k) Credit

The President gave another source of credit with R.C.M. 305(k),[90] which provides additional credit for the failure to comply with a host of pretrial confinement safeguards.[91] The credit is administratively applied against the approved sentence to confinement.[92] The 1998 *Manual for Courts-Martial* includes two additional grounds that trigger R.C.M. 305(k) credit. These changes comprise the practical issue in this area.

What Triggers R.C.M. 305(k) Credit?—The modern military pretrial confinement system[93] give service members placed into pretrial custody many substantive and procedural safeguards.[94] The failure to comply with four enumerated R.C.M. 305 safeguards results in a day-for-day sentence credit in addition to any *Allen* or *Mason* credit received.[95] These four include: (a) R.C.M. 305(f), the confinee's right to military counsel; (b) R.C.M. 305(h), the commander's review of pretrial confine-

81. *See* United States v. Martin, No. 9700900 (Army Ct. Crim. App. June 18, 1998) (holding that an accused was not entitled to credit under a 18 U.S.C. § 3585 analysis). This memorandum opinion indicates a shift in ACCA's approach and may signal the future adoption of the *Murray* approach. The appellant was absent without leave (AWOL) from his military unit when he was apprehended by civilian authorities on offenses totally unrelated to his subsequent court-martial. After three days in civilian custody, the military filed a detainer requesting that he be held to face UCMJ charges; four days later, the appellant was transferred to military custody. At trial, the appellant was denied credit for the initial three days of custody. On appeal, the appellant argued that he was entitled to credit for these days under section 3585 since the military offense predated the state offenses. The court found the legal argument "appealing" (no mention of *Dave*), but denied relief on factual grounds; nothing in the record indicated that the appellant had not already been credited by state authorities under section 3585. *Id*. at 2-3.

82. *See, e.g*., *Dave*, 31 M.J. at 940; *McCullough*, 33 M.J. at 595. Both cases, decided after 18 U.S.C. § 3585 took effect, would have reached the same credit result under either analysis.

83. United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

84. *See* DODD 1325.4, *supra* note 42, para. H.5; *Murray*, 43 M.J. at 514.

85. 18 U.S.C. § 3585 (1994) (part of the Sentencing Reform Act of 1984, Pub. L. 98-473 § 212 (a)(2), 98 Stat. 2001 (1984), superseding 18 U.S.C. § 3568 (1966) and reestablishing term of imprisonment computation rules for Department of Justice prisoners); *Murray*, 43 M.J. at 514.

86. *See* United States v. Wilson, 503 U.S. 329, 337 (1992) (noting that Congress intended to expand the class of defendants who are eligible for credit, and replaced the term 'custody' with 'official detention'); *Murray*, 43 M.J. at 514 (citing United States v. Garcia-Gutierreez, 835 F.2d 585 (5th Cir. 1988); United States v. Blankenship, 733 F.2d 433 (6th Cir. 1984)). Under the former scheme of 18 U.S.C. § 3568, some federal courts limited credit to federal pretrial detention only. *Id*. at 514-15.

87. *See Dave*, 31 M.J. at 940 (using a military-connection type analysis to extend *Allen* credit for time spent in civilian pretrial confinement). To receive credit, pretrial confinement must be in connection with an offense solely for which sentence to confinement by court-martial is ultimately imposed. *Id*. at 942.

88. *See* 18 U.S.C. § 3585(b). Note that the new term, "official custody" is not limited to a particular sovereign.

89. *Accord* United States v. Richardson, 901 F.2d 867 (10th Cir. 1990); United States v. Wilson, 916 F.2d 1115 (6th Cir. 1990), *rev'd on other grounds*, 503 U.S. 329 (1992); United States v. Dowling, 962 F.2d 390 n.3 (5th Cir. 1992); United States v. Benefield, 942 F.2d 60 (1st Cir. 1991). *See also* Mitchell v. Story, 68 F.3d 483 (10th Cir. 1995) (showing that U.S. Bureau of Prisons credits state pretrial custody when calculating credit under 18 U.S.C. § 3585).

90. MCM, *supra* note 3, R.C.M. 305(k).

91. *See generally id*. R.C.M. 305(k).

92. *See generally* United States v. Gregory, 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

93. *See* Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984), *amended by* Exec. Order 12,484, 49 Fed. Reg. 28,825 (1984) (promulgating the 1984 *MCM* with the R.C.M.).

94. *See generally* MCM, *supra* note 3, R.C.M. 305.

95. *See id*. R.C.M. 305(k).

ment; (c) R.C.M. 305(i), military magistrate reviews;[96] and (d) R.C.M. 305 (j), the military judge's review, if any.[97]

In addition to these enumerated safeguards, R.C.M. 305(k) credit can be triggered by an R.C.M. 305(*l*) violation,[98] or a violation of the grounds added by the 1998 *Manual*,[99] which now includes *Suzuki* credit.[100] Rule 305(k) credit can also extend to service members awaiting court-martial in civilian custody, but only if "a military member is confined by civilian authorities for a military offense and with notice and approval of military authorities."[101]

How is R.C.M. 305(k) Credit Applied?—Rule 305(k) is an administrative credit applied against the approved sentence to confinement, but the language of R.C.M. 305(k) is misleading. It provides that "noncompliance with subsections (f), (h), (i), or (j) shall be an administrative credit against the sentence *adjudged*."[102] Counsel, however, must not narrowly construe its meaning, for a "cursory reading of the rule may result in the erroneous conclusion that R.C.M. 305(k) is to be applied only against an adjudged sentence."[103] Instead, practitioners must read the rule as a whole and focus on the distinction between "judicial" and "administrative" credit.[104]

First, the rule must be read as a whole. The ACMR tackled the R.C.M. 305(k) interpretation challenge in *United States v. Gregory.*[105] Despite the use of the word "adjudged" in the rule, credit is administratively applied; in fact, if it were judicially applied, service members may not receive "meaningful R.C.M. 305(k) credit at all."[106] Administrative credit not only avoids potential "absurdity,"[107] it "most 'accurately reflects the intention of' the President, 'is more consistent with the structure of the' rule, 'and more fully serves the purpose of' R.C.M. 305."[108]

Second, the distinction between administrative credit and judicial credit is critical. Rule 305(k) characterizes the credit as "administrative," not one adjudged at trial.[109] Moreover, R.C.M. 305(k) credit is based on *United States v. Larner*,[110] where CMA held that administrative credit was the only adequate and legal remedy for illegal pretrial confinement.[111]

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96. *See id*. R.C.M. 305(i) (including two military magistrate reviews, a 48-hour probable cause determination, and a seven-day pretrial confinement review); United States v. McCants, 39 M.J. 91 (C.M.A. 1994) (failing to timely deliver the magistrate review decision to the defense counsel, after request, results in R.C.M. 305(k) credit for violating R.C.M. 305 (i)).

97. *See* MCM, *supra* note 3, R.C.M. 305 (j) (requiring a motion for appropriate relief to initiate military judge's review of pretrial confinement once the charges are referred to trial).

98. *See* United States v. Williams, 47 M.J. 621, 623 (Army Ct. Crim. App. 1997) (awarding R.C.M. 305(k) credit for violating R.C.M. 305(*l*) when the military judge erred in returning the appellant to pretrial confinement without "new evidence" or "additional misconduct"). Violations of R.C.M. 305(*l*) fall within the "other situations" that the drafters of R.C.M. 305 envisioned as triggering additional R.C.M. 305(k) relief out of a policy to deter violations. *Id*. at 633.

99. *See* discussion *infra* notes 112-115 and accompanying text.

100. *See* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

101. *See* United States v. Lamb, 47 M.J. 384, 385 (1998) (citing *Ballesteros*, accused denied *Rexroat* credit by failing to show that he was confined solely for a military offense); *see also* United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989); United States v. Stuart, 36 M.J. 746 (A.C.M.R. 1993) (awarding R.C.M. 305(k) credit to AWOL accused held by civilian authorities at request of the military).

102. MCM, *supra* note 3, R.C.M. 305(k) (emphasis added).

103. *See* United States v. Gregory, 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

104. *See* discussion *supra* notes 22-32 and accompanying text.

105. 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

106. *See id*. at 957.

107. *See id*. at 957 n.13 (applying 31 days of R.C.M. 305(k) credit against the accused's five month adjudged sentence at trial would have the "absurd" result of allowing no meaningful credit in light of convening authority's approved sentence to confinement of three months).

108. *See id*., 21 M.J. at 957 (quoting United States v. Leonard, 21 M.J. 67, 69 (C.M.A. 1985)).

109. MCM, *supra* note 3, R.C.M. 305(k) ("The remedy . . . shall be an administrative credit.").

110. 1 M.J. 371 (C.M.A. 1976). *See* MCM, *supra* note 3, R.C.M. 305(k) analysis, app. 21, at A21-20 ("The requirement for an administrative credit for violations . . . is based on *United States v. Larner*.").

111. *See Larner*, 1 M.J. at 373-75 (noting two sources of credit for the illegal pretrial confinement suffered by the appellant). The *Larner* opinion lacks a factual account explaining why appellant's pretrial confinement was illegal. The court cites Article 13, UCMJ, and *United States v. Nixon*, 45 C.M.R. 254 (1970) (recognizing illegal pretrial confinement as a lack of probable cause, or for purposes other than to insure an accused's presence at trial, or to protect the person and property of others) when referring to appellant's illegal pretrial confinement. *Id.* at 372 n.1.

Practical Issue: 1998 Manual Changes—The 1998 *Manual for Courts-Martial* adds two additional grounds for awarding R.C.M. 305(k) credit.[112] The amended R.C.M. 305(k) provides that "the military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."[113] These new grounds also apply in addition to any *Allen* or *Mason* credit.[114] Unlike violations of R.C.M. 305 (f), (h), (i), and (j), however, the two new grounds are not limited to day-for-day credit as a remedy; the amount of credit is at the military judge's discretion.[115]

Credit for the Abuse of Discretion—Substantively, the "abuse of discretion" ground is not new; it appears in R.C.M. 305(j)(2) and has been there since the inception of R.C.M. 305.[116] Although redundant, the 1998 amendment included the "abuse of discretion" language in R.C.M. 305(k) for consistency and clarity.[117]

Rule 305(j)(2) was inconsistent with the 1995 version of R.C.M. 305(k). Rule 305(j)(2), not limited by a day-for-day remedy, directed the military judge to apply credit via R.C.M. 305(k).[118] The former R.C.M. 305(k), however, only specified day-for-day credit and did not include the "abuse of discretion" language.[119] This led to different interpretations of how to apply the credit.[120] The new language of amended R.C.M. 305(k) clarifies the amount of credit that can be awarded,[121] and it serves notice to convening authorities that egregious conduct can lead to more than day-for-day credit against an approved sentence.[122]

Credit for Unusually Harsh Circumstances: Suzuki Credit—The second ground, pretrial confinement that involves "unusually harsh circumstances,"[123] is also not a new substantive standard. This provision codifies *United States v. Suzuki*,[124] where the CMA awarded more than day-for-day administrative credit for pretrial confinement under "unusually harsh circumstances."[125] While including the "unusually harsh circumstances" language in R.C.M. 305(k) did not create a new basis for relief, [126] it resolved the issue of where to categorize *Suzuki* credit.[127]

Credit for Violations of Article 13, UCMJ

Article 13, UCMJ provides two bases of sentence credit for service members "held for trial":[128] (a) pretrial punishment, and (b) credit for "unduly rigorous circumstances."[129] Article 13 credit is applied two ways–either judicially or administratively–depending on the circumstances of the case.[130] In addition, this section discusses the practical issue of waiver–when

112. *See* MCM, *supra* note 3, Exec. Order No. 13086, 1998 Amendments to the *Manual for Courts-Martial*, app. 25, A25-36.

113. *Id*. R.C.M. 305(k).

114. *See id*.

115. *See id*.

116. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (1984) [hereinafter 1984 MANUAL].

117. *See* Memorandum, Joint Service Committee on Military Justice Working Group, Criminal Law Division, Office of The Judge Advocate General, 2200 Army Pentagon, DAJA-CL, to The Judge Advocate General, subject: 23 August Meeting of the Joint Service Committee (JSC) on Military Justice, para. II. F. (28 Aug. 1995) (on file with author) [hereinafter JSC Memo] (noting the reasons for the proposed changes to R.C.M. 305).

118. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(j)(2) (1995) [hereinafter 1995 MANUAL].

119. *See* 1984 MANUAL, *supra* note 116, R.C.M. 305(j)(2).

120. *See* JSC Memo, *supra* note 117, para. II. F.

121. *See id*.

122. *See id.* (according to the JSC Air Force representative, one reason the "abuse of discretion" language was included in R.C.M. 305(k) was motivated by United States v. Tilghman, 1995 CCA Lexis 171, ACM 30542 (A.F. Ct. Crim. App. Jun. 20, 1995, *aff'd*, 44 M.J. 493 (1996). In *Tilghman*, a post-trial military judge granted an additional 18 month sentence credit for the unlawful intervention of the government, who in defiance of the trial judge's ruling, ordered the accused into confinement after conviction , but before a sentence was adjudged. *Tilghman*, 44 M.J. at 494.

123. *See* MCM, *supra* note 3, R.C.M. 305(k).

124. 14 M.J. 491 (C.M.A. 1983); Telephone Interview with Lieutenant Colonel Frederic Borch, Standing Member, Joint Service Committee on Military Justice, 1994-1996, (Nov. 9, 1998) (stating intent of including language was to incorporate *Suzuki*) [hereinafter Borch Interview].

125. *See Suzuki*, 14 M.J. at 491-493. "On the first day of this segregation, appellant's clothes were taken from him and he remained in a cell approximately 6 X 8 feet in size, clothed only in his underwear. In his cell was a bed resting on a piece of plywood, an open toilet, a sink, and a single light." *Id*. at 491-92.

126. Borch Interview, *supra* note 124 (including additional language in R.C.M. 305(k) provided military judges with all illegal pretrial confinement options in one location). Note that R.C.M. 305(k) contains no provision for awarding credit for violations of Article 13, UCMJ.

does the accused's failure to timely complain waive an Article 13 remedy?

What Triggers Article 13, UCMJ Credit?

The McCarthy Test—In *United States v. McCarthy*,[131] the CAAF provided a two-pronged test for Article 13 violations.[132] This test established a framework for determining when Article 13 sentence credit is triggered. This section examines *McCarthy*'s two-pronged test and discusses the parameters of Article 13 credit with this framework in mind.

Article 13, UCMJ, prescribes that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement . . . nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence."[133] In *McCarthy*, the CAAF explains that Article 13 prohibits two types of activities: (a) "punishment or penalty prior to trial"[134] (the punishment prong), and (b) "unduly rigorous circumstances during pretrial detention" (the rigorous circumstances prong).[135]

The punishment prong focuses on intent; it requires "a purpose or intent to punish an accused before guilt or innocence has been adjudicated."[136] There is "no single standard as to what constitutes punishment";[137] the intent inquiry is a "classic question of fact."[138] The rigorous circumstances prong, however, focuses on conditions; an inference of punishment may arise from "sufficiently egregious circumstances"[139] that may be "so excessive as to rise to the level of punishment."[140]

The Parameters of Article 13 Credit—Specific conduct that triggers Article 13 credit has shifted over time.[141] Therefore,

127. A nagging question in sentencing credit has been whether *Suzuki* credit is a substantive basis of credit apart from Article 13 credit. This question arises because the egregious facts in *Suzuki* seem a logical violation of Article 13, but the CMA did not mention Article 13 in its opinion. One view is that *Suzuki* is an Article 13 case. First, *Suzuki*'s facts fall squarely within the ambit of Article 13's prohibitions. *See* discussion *infra* notes 131-140 and accompanying text. Second, the CMA described the essential facts of the case by citing *United States v. Bruce*, 14 M.J. 254 (C.M.A. 1982), an Article 13 commingling case, as the basis for the trial judge's finding that the accused was subjected to illegal pretrial punishment. Third, the primary issue decided by *Suzuki* was grounded in Article 13. At issue was the remedial rule of *United States v. Larner*, 1 M.J. 372 n.1 (C.M.A. 1976), which initially established administrative credit as the appropriate remedy for illegal pretrial confinement (in violation of Article 13 and *United States v. Nixon*, 45 C.M.R. 254 (C.M.A. 1970)). Finally, it is doubtful that *Suzuki* was created from "whole cloth." Viewing *Suzuki* from a historical perspective, no basis other than Article 13 existed at the time of the decision to justify a remedy for the egregious conditions of pretrial confinement in the case. *See generally* UCMJ art. 9(d) (1964) (requiring probable cause); UCMJ art. 10 (1964) (requiring pretrial confinement if charged with an offense "as circumstances may require," but normally summary court-martial charges do not warrant pretrial confinement); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, ¶ 20c. (1969) (preventing flight and the "seriousness of the offense charged" are grounds for pretrial confinement); United States v. Heard, 3 M.J. 14, (C.M.A. 1977) (pretrial confinement justified for foreseeable serious criminal misconduct, but rejected "seriousness of the offense charged" as an independent basis for pretrial confinement apart from the prevention of flight and preventing criminal misconduct).

128. *See* United States v. Combs, 47 M.J. 330, 333 (1997).

129. *See* United States v. McCarthy, 47 M.J. 162, 165 (1997).

130. *See generally* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (Army Ct. Crim. App. 1997).

131. *McCarthy*, 47 M.J. at 162.

132. *See id*. at 165.

133. UCMJ art. 13 (West 1998).

134. *See McCarthy*, 47 M.J. at 165.

135. *See id*.

136. *See id*. at 165 (citing *Bell v. Wolfish*, and the constitutional dimension raised by illegal pretrial punishment); Bell v. Wolfish, 441 U.S. 520, 537-538 (1979) (holding that the Due Process Clause provides pretrial detainees the right to be free from punishment). To determine whether particular conditions rise to the level of punishment, "a court must decide whether the disability is imposed for the purpose of punishment." *Id*. at 537.

137. *See* United States v. Huffman, 40 M.J. 225, 227 (1994).

138. *See McCarthy*, 47 M.J. at 166.

139. *See id*. at 165.

140. *See id*. (citing United States v. James, 28 M.J. 214, 217 (C.M.A. 1989)). This prong of *McCarthy* appears synonymous with *Suzuki*. However, *Suzuki* occurred in pretrial confinement, and the rigorous circumstances prong of *McCarthy* applies to "pretrial detention," an arguably broader standard. Conceptually, based on one's view of whether or not *Suzuki* is an Article 13 case, *Suzuki* can fall within either prong of the *McCarthy* analysis. Nevertheless, despite the logical appeal of placing *Suzuki* in the Article 13 category, *Suzuki* credit is now incorporated into R.C.M. 305(k) credit. *See* discussion *supra* notes 123–127 and accompanying text.

141. *See generally* United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985) (providing an historical overview of what conduct was considered pretrial punishment, beginning with the legislative history of Article 13 to the court's adoption of an intent-based standard in this decision).

when presented with an Article 13 credit issue, practitioners should ask two questions to determine if one or both of the *McCarthy* prongs have been triggered: (a) what conduct per se violates Article 13? and, (b) how far does Article 13 extend?

What conduct per se violates Article 13? Practitioners should consider R.C.M. 304(f), the commingling of pretrial detainees with sentenced prisoners, regulations, and "harsh" confinement conditions. First, a violation of R.C.M. 304(f) can violate either *McCarthy* prong. The President amplifies Article 13 in R.C.M. 304(f) by providing that "prisoners being held for trial shall not be required to undergo punitive duty hours training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners."[142] These prohibitions are grounded in the genesis of Article 13 and essentially equate to per se violations.[143]

The mere commingling of pretrial confinees with sentenced prisoners, however, does not per se violate either prong of Article 13.[144] Before 1985, pretrial confinees suffered illegal pretrial punishment by working with sentenced prisoners–regardless of "the type of work involved."[145] The CMA ended this "commingling" rationale in *United States v. Palmiter* and adopted an "intent" based approach.[146] Commingling is now just a factor to consider; the question to be resolved now is "whether any condition of . . . confinement was intended to be punishment."[147]

Likewise, a regulatory violation does not automatically trigger one of the Article 13 prongs. Under the *McCarthy* analysis, the issue is one of intent and the nature of conditions. The government's mere failure to follow regulations does not per se violate Article 13;[148] however, implementing a defective policy may constitute an Article 13 violation.[149]

Finally, beware of labels. A service member's complaint of "harsh" conditions does not alone trigger Article 13 sentence credit. In *McCarthy*, the appellant was denied credit even though he was placed into "maximum" pretrial custody.[150] The bottom line in this area: practitioners must focus on *McCarthy's* two-pronged analysis.

How far does Article 13 extend? On its face, Article 13 is not limited to pretrial confinees; it broadly applies to service members "held for trial."[151] This includes cases of public denunciation and military degradation,[152] as well as unlawfully reducing a service member's rank.[153] Furthermore, pretrial confinement does not have to be in a military facility; "pretrial confinement in a civilian facility is subject to the same scrutiny."[154] Lastly, service members in pretrial confinement cannot waive their Article 13 protections,[155] but they can voluntarily subject themselves to certain confinement conditions, "so long as those conditions do not rise to the level of pretrial 'punishment'."[156]

How is Article 13 Credit Applied?—Applying Article 13 credit is problematic.[157] A service member who suffers an Arti-

142. MCM, *supra* note 3, R.C.M. 304(f), analysis, app. 21, at A21-15 ("This section is based on Article 13.").

143. *See Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong., 1st Sess. 916-917 (1949) (stating that the intent of Article 13 was to prohibit imposing hard labor as punishment on pretrial detainees until they were convicted and sentenced to perform such labor), *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 384-385 (1949) [hereinafter *Hearings on H.R. 2498*]; United States v. Bayhand, 21 C.M.R. 84 (C.M.A. 1956) (noting that the drafters of 1951 *MCM* wrote, and the President promulgated, the present day R.C.M. 304(f) prohibitions to amplify Article 13).

144. *See Palmiter*, 20 M.J. at 95-96.

145. *Id.* at 94; *see* United States v. Nelson, 39 C.M.R. 177 (C.M.A. 1969); United States v. Pringle, 41 C.M.R. 324 (C.M.A. 1970).

146. *See Palmiter*, 20 M.J. at 95-96.

147. *See id*. at 95.

148. *See* United States v. Moore, 32 M.J. 56, 60 (C.M.A. 1991) ("We hold that a violation of applicable service regulations do not per se require additional credit."); United States v. Phillips, 42 M.J. 346 (1995) (erroneously denying religious materials to service member confined in civilian facility did not violate Article 13).

149. *See* United States v. Anderson, 49 M.J. 575 (N.M. Ct. Crim. App. 1998) (awarding 77 days of credit for arbitrary unwritten policy that violated Article 13). The Marine Corps Base at Camp Pendleton had an unwritten policy that all pretrial confinees were placed in a maximum-custody status based solely on whether the pretrial confinee faced more than five years of confinement. *Id.* at 576.

150. *See* United States v. McCarthy, 47 M.J. 162 (1997) (placing pretrial confinee in maximum confinement does not in and of itself violate Article 13).

151. *See* United States v. Combs, 47 M.J. 330, 333 (1997).

152. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (humiliating soldiers in public and military degradation by command in infamous "peyote platoon" case constituted Article 13 pretrial punishment); United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991) (posting on a unit bulletin board a serious incident report, which identified the accused, violated Article 13); *Combs*, 47 M.J. at 330 (1997) (forcing an airman to wear E-1 rank while he was awaiting rehearing violated Article 13).

153. *See Combs*, 47 M.J. at 333.

154. *See* United States v. James, 28 M.J. 214, 216 (C.M.A. 1989).

cle 13 violation while in pretrial confinement receives administrative credit.[158] Outside of pretrial confinement, however, a service member will generally receive judicial credit.[159] A recent Army Court of Criminal Appeals decision, *Coyle v. Commander*,[160] attempts to clarify this area.

At a minimum, the CAAF provided in *Suzuki* that "unusually harsh circumstances"[161] of pretrial confinement deserve administrative credit.[162] Whether *Suzuki* remedied an Article 13 violation is a subject of debate,[163] but it provides a starting point to determine how Article 13 credit is applied. The remedy for such violations is "not framed in concrete";[164] therefore, military judges are not limited to a day-for-day credit.

Applying Article 13 credit for violations in other circumstances, especially outside of pretrial confinement, however, is murky. No cogent credit scheme exists.[165] In pretrial punishment cases outside the confinement context, the CAAF has not provided any bright lines on how to apply Article 13 credit.[166] Exercising its broad power to reassess sentences on appeal,[167] the CAAF has fashioned varied remedies in these cases.[168] This includes the landmark "peyote platoon" case, *United States v. Cruz*,[169] where the CMA ordered a full sentence rehearing to bring the prior punishment to the attention of the court-martial.[170]

Given the lack of authority in the non-pretrial confinement context, the military judge must decide whether to order an administrative credit or consider illegal pretrial punishment as mitigation in adjudging a sentence.[171] In fact, military judges have taken both routes.[172] To provide some direction, the court in *Coyle v. Commander*[173] divided the current law of sentence credit into two categories: "confinement credit" and "punishment credit."[174] Confinement credit includes "*Allen* credit,

155. *See* United States v. Palmiter, 20 M.J. 90, 96 (C.M.A. 1985) ("It should be noted that a prisoner cannot 'waive' his Article 13 protections prior to trial because no one can consent to be treated in an illegal manner.").

156. *See* United States v. Huffman, 40 M.J. 225, 227-28 (1994) (referring to the "punishment" standard of *Bell v. Wolfish*, 441 U.S. 520 (1979), where the "significant factor in the judicial calculus is the intent of detention officials").

157. The last two sections of this article examine this proposition in more detail and propose the uniform application of all Article 13 violations administratively against the approved sentence to confinement.

158. *See* United States v. Larner, 1 M.J. 371 (C.M.A. 1976); United States v. Suzuki, 14 M.J. 491 (C.M.A 1983).

159. *See* Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (Army Ct. Crim. App. 1997).

160. *Id.* (instructing that a categorical approach to Article 13 credit be followed). The categorical approach comports with the status quo vis a' vis precedent.

161. *See Suzuki*, 14 M.J. at 493.

162. *See id*. at 493 (expanding *Larner* beyond a day-for-day formula to remedy "unusually harsh conditions of pretrial confinement"); United States v. Larner, 1 M.J. 371, 372 n.1 (C.M.A. 1976) (administratively applying credit only remedy that legally and adequately provides relief for illegal pretrial confinement, citing Article 13 and United States v. Nixon, 45 C.M.R. 254 (C.M.A. 1970), as a bases for appellant's illegal pretrial confinement); *see also* United States v. Nelson, 39 C.M.R. 177 (C.M.A. 1969) (meaningful relief due for accused wearing same uniform as sentenced prisoners, governed by same rules and regulations, and being used indiscriminately with sentenced prisoners to perform labor); United States v. Pringle, 41 C.M.R. 324 (C.M.A. 1970) (meaningful sentence relief is the remedy for violating standards now contained in R.C.M. 304(f)).

163. *See supra* note 127.

164. *See Suzuki*, 14 M.J. at 493.

165. *See* UCMJ art. 13 (West 1998); MCM, *supra* note 3, R.C.M. 305(k); United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); United States v. McCarthy, 47 M.J. 162, 166 (1997); *Coyle*, 47 M.J. at 626.

166. *See generally Coyle*, 47 M.J. at 628-30.

167. *See generally* UCMJ art. 67; *Larner*, 1 M.J. at 373; United States v. Valead, 32 M.J. 122 (C.M.A. 1991).

168. *See* United States v. Villamil-Perez, 32 M.J. 341, 343-344 (C.M.A. 1991) (awarding no credit for the improper public posting of an incident report). Although it found the three-day posting of the report constituted pretrial punishment, the court held that the appellant suffered no substantial prejudice. The appellant had already received significant relief from the convening authority in the form of a 23-month sentence suspension, which considered the improper posting of the report, among other factors. *Id*. at 343-444; United States v. Combs, 47 M.J. 330 (1997) (awarding an illegally demoted airman a 20-month reduction against his approved sentence to confinement on a day-for-day basis).

169. 25 M.J. 326 (C.M.A. 1987) (holding that mass apprehension and public humiliation of soldiers violated Article 13). Soldiers suspected of drug offenses were called out of a brigade formation. The suspected soldiers were escorted to the brigade commander, saluted, and had their unit crests removed. The brigade commander did not return their salutes. The soldiers were then arrested and handcuffed by CID in front of the formation. Thereafter, the suspected soldiers were segregated from the unit and were allegedly marched in the unit area to the cadence of "peyote, peyote, peyote." *Id*. at 328-29.

170. *Cruz*, 25 M.J. at 331.

Mason credit, R.C.M. 305(k) credit, [and] *Suzuki* credit,"[175] which must be administratively assessed.[176] "[I]n 'punishment credit' cases not involving confinement,"[177] however, credit is usually assessed judicially,[178] although credit must be administratively assessed "under some circumstances."[179] In sum, *Coyle* shows that applying non-confinement related Article 13 credit is largely a function of military judge discretion.

Practical Issue: Waiver of Article 13 Claims—Does an accused waive his Article 13 claim if he fails to raise the conditions of his confinement before trial?[180] Does the "failure of an accused to raise the question at trial bar raising the issue on appeal"?[181] The direct answer to both questions is no, but the failure to timely complain in effect disables any claim of illegal pretrial punishment.[182]

Before trial, "if an accused fails to complain of the conditions of his pretrial confinement to the military magistrate or his chain of command, that is strong evidence that the accused is not being punished in violation of Article 13."[183] Likewise, an accused that raises the issue for the first time on appeal faces the same uphill battle. While the claim is not barred per se, the failure to raise it at the trial level is "strong evidence"[184] that no illegal punishment occurred.[185]

Moreover, the evidentiary weight raised by the timely failure to complain does not function "in reverse." In *McCarthy*, the appellant argued that his timely complaint of pretrial confinement conditions amounted to "strong evidence"[186] of illegal Article 13 punishment. Dismissing this rationale, the CAAF noted that "few people keep silent when they have cause to complain, many complain when they have no cause."[187] A timely complaint merely preserves the claim; it does not amount to a per se finding of impermissible punishment.[188]

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171. *See Coyle*, 47 M.J. at 626 (instructing that military judges must distinguish between punishment credit and confinement credit; punishment credit should be announced on the record, informing the accused that but for the adjudged credit, his sentence would have been increased by the amount of credit); *see also* MCM, *supra* note 3, R.C.M. 1001(c)(1)(B) (defining mitigation as any matter introduced that may lessen the punishment). *See also* BENCHBOOK, *supra* note 2 (containing no sentencing instruction for Article 13 violations).

172. *See* United States v. Moore, 32 M.J. 774 (A.C.M.R. 1991) (although military judge announced that he had considered pretrial punishment in hisits sentence deliberation, more credit was awarded on appeal in an abundance of caution); United States v. Latta, 34 M.J. 596 (A.C.M.R. 1992) (noting that the military judge considered pretrial punishment in the sentence adjudged); *Coyle*, 47 M.J. at 626 (noting that the trial judge applied the punishment remedy as mitigation on sentencing, and announced such on the record). *But see* United States v. Russel, 30 M.J. 977 (A.C.M.R. 1990) (noting that at sentencing the military judge awarded pretrial punishment credit in restriction case and ordered as an administrative credit); United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994) (awarding administrative sentence credit at trial for restriction that was not tantamount to confinement, but constituted illegal pretrial punishment for routine disparaging remarks by commander).

173. 47 M.J. at 626; Telephone Interview with Colonel Wayne Johnston, Appellate Judge, Army Court of Criminal Appeals, author of *Coyle* opinion (Nov. 13, 1998) [hereinafter Johnston Interview].

174. *See Coyle*, 47 M.J. at 628-630 (establishing "confinement credit" and "punishment credit" categories).

175. *See id*. at 629.

176. *See id*. (holding that confinement credit "must be assessed against the approved sentence").

177. *See id*.

178. *See id*.; United States v. Stamper, 39 M.J. 1097, 1099 (A.C.M.R. 1994) ("It is usually sufficient if some allowance for prior punishment is made in assessing or reassessing the sentence.").

179. *See Coyle*, 47 M.J. at 630 (referring to *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) as "some circumstances"). This indicates a broad view of *Suzuki*. Clearly, *Suzuki* mandates administrative credit for "unusually harsh circumstances" in the pretrial confinement context. *Coyle*, however, apparently does not view *Suzuki* as authorizing credit solely in the pretrial confinement context, but envisions situations where "unusually harsh circumstances" imposed on a service member under pretrial restriction may warrant administrative credit.

180. *See* United States v. Huffman, 40 M.J. 225, 226-27 (C.M.A. 1994).

181. *See id*. at 227.

182. *See id*. at 227-28.

183. *See id*. at 227; *see also* United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985); United States v. James, 28 M.J. 214 (C.M.A. 1989).

184. *See Palmiter*, 20 M.J. at 97; *Huffman*, 40 M.J. at 227. *But see* United States v. Combs, 47 M.J. 330 (1997) (describing case as unusual, failing to raise illegal rank reduction by accused at rehearing did not amount to waiver on appeal).

185. *See Huffman*, 40 M.J. at 228.

186. United States v. McCarthy, 47 M.J. 162, 166 (1997).

187. *See id*. at 166.

Credit for Prior Nonjudicial Punishment: Pierce Credit

Pierce credit[189] is triggered in the "rare case"[190] where a service member is court-martialed for the same offense he was previously punished for under Article 15, UCMJ.[191] Service members can elect to have this credit applied against either their adjudged sentence at trial or against the sentence approved by the convening authority.[192] Also, practitioners should be wary of the limited use of prior nonjudicial punishment at trial[193] and understand the credit impact of Article 58b, UCMJ.[194]

What Triggers Pierce Credit?—Pierce credit is triggered when a command tries a service member after he has received nonjudicial punishment for the same offense.[195] Even though military due process allows service members to be court-martialed after receiving nonjudicial punishment under Article 15,[196] a double penalty for the same conduct is prohibited.[197] Therefore, these cases require "complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe."[198] Of course, the types of nonjudicial punishment may not match the types of judicial punishment.[199] In this case, counsel, courts, and convening authorities must fashion equivalent credit via sentence conversion.[200]

How is Pierce Credit Applied?—Unlike all other sentence credits, *Pierce* credit presents an option to the service member. The convening authority applies any credit due for previous nonjudicial punishment at initial action on the sentence,[201] unless the accused "reveal[s] the prior punishment to the court-martial for consideration on sentencing."[202] The military judge can determine and apply the credit at trial only if the accused specifically requests the judge to do so.[203]

Practical Issues: Using Records of Nonjudicial Punishment and Article 58b, UCMJ—Two practical issues in this area deserve attention: the use of prior nonjudicial punishment at trial and the automatic forfeiture provisions of Article 58b, UCMJ. Simply stated, trial counsel cannot introduce a prior record of nonjudicial punishment once *Pierce* is triggered.[204] Unless the accused consents, a prior record of nonjudicial punishment for the same offense cannot be used for "any purpose at trial";[205] it "simply has no legal relevance to the court-martial."[206]

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188. *See id*.

189. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

190. *See id.* at 369. *But see* United States v. Self, No. 9800614 (Army Ct. Crim. App. Feb. 26, 1999) (indicating frustration over the review of *Pierce* cases, which are becoming an "all too common occurrence").

191. *See generally* UCMJ art. 15(f) (West 1998).

192. *See Pierce*, 27 M.J. at 369; United States v. Edwards, 42 M.J. 381 (1995).

193. *See Pierce*, 27 M.J. at 369.

194. *See generally* UCMJ arts. 57(a), 58b. (requiring the automatic forfeiture of pay and allowances 14 days after the sentence is adjudged or the convening authority acts, whichever is earlier, for a sentence of confinement in excess of six months or a sentence of confinement for six months or less and a punitive discharge).

195. *See Pierce*, 27 M.J. at 369.

196. *See* UCMJ art. 15(f) (stating that a subsequent court-martial for a serious crime or offense is not barred).

197. *See Pierce*, 27 M.J. at 369.

198. *See id.*

199. *See generally* UCMJ art. 15(a); MCM, *supra* note 3, R.C.M. 1003(b).

200. *See Pierce*, 27 M.J. at 369 (using a "Table of Equivalent Punishments, similar to that provided in paragraph 127c(2) or 131d, *Manual for Courts-Martial*, United States, 1969, would be helpful."). *See generally* MCM, *supra* note 3, R.C.M. 1107 (discussing the action on sentence by convening authority).

201. *See* MCM, *supra* note 3, R.C.M. 1107(d).

202. *See Pierce*, 27 M.J. at 369; United States v. Edwards, 42 M.J. 381 (1995).

203. *See Edwards*, 42 M.J. at 382-83. *But see* United States v. Gibson, No. 9700619 (Army Ct. Crim. App. July 1, 1998) (noting that the accused's discretion to choose a remedy was preempted by the trial counsel's improper introduction of a prior Article 15–prompting the military judge to adjudge credit without a specific request).

204. *See Pierce*, 27 M.J. at 369.

205. *See id.*

Article 58b, UCMJ presents a potential post-trial pitfall in this area. When a case is forwarded to the convening authority for initial action,[207] justice managers and staff judge advocates must guide the convening authority through the automatic forfeiture minefield.[208] The convening authority must give meaningful credit; he cannot award *Pierce* credit and allow it to be preempted by Article 58b.[209] In such a case, the convening authority should select an alternative that accounts for the impact of Article 58b.[210]

Summary of Available Types of Sentence Credit

This section of the article pieced together the mosaic of case law, executive rule, and statute that make up available sentence credit.[211] A quick reference guide is found at the Appendix. To recap, there are four main categories of sentence credit: (a) *Allen* and *Mason* credit, which entitle service members to day-for-day administrative credit for time served in pretrial confinement or its equivalent;[212] (b) R.C.M. 305(k) credit, which provides administrative credit in addition to *Allen* and *Mason* for violating R.C.M. 305 safeguards, and "pretrial confinement that involves an abuse of discretion or unusually harsh circumstances";[213] (c) Article 13 credit,[214] which remedies illegal pretrial punishment and "unduly rigorous circumstances during pretrial detention;"[215] and (d) *Pierce* credit, which gives service members the option to receive credit judicially or administratively when court-martialed for an offense previously punished under Article 15, UCMJ.[216]

After surveying available sentence credit, the entire credit scheme comes into focus. Service members receive tangible administrative credit for the time they spend in pretrial confinement and for any violations of pretrial confinement safeguards,[217] with one caveat: Article 13 credit.[218] Why isn't Article 13 credit administratively applied in every case? This article discusses Article 13 credit in the next section, and explores a proposed solution.

The Article 13 Credit Anomaly

A service member who receives judicially-applied Article 13 credit under the current scheme may not receive any tangible sentence credit, and in some circumstances, may serve a longer sentence than a similarly situated service member who receives administrative credit. These unsettling propositions, however, reflect the reality of the Article 13 credit anomaly and deserve attention. This section examines this problem in-depth. First, this section reviews the status quo of sentencing credit application offered by *Coyle v. Commander*,[219] and identifies its deficiencies in the Article 13 context. Second, this section examines the anomalous impact of the status quo on service members by hypothetical, which calls into question sentence credit philosophy.

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206. *See id*.

207. *See* MCM, *supra* note 3, R.C.M. 1107.

208. *See* UCMJ arts. 57(a), 58b (West 1998) (requiring the automatic forfeiture of pay and allowances 14 days after a sentence is adjudged or the convening authority acts, whichever is earlier, for (i) a sentence to confinement in excess of six months, or (ii) a sentence to confinement for six months or less and a punitive discharge).

209. *See* United States v. Ridgeway, 48 M.J. 905 (Army Ct. Crim. App. 1998) (observing that implicit in *Pierce* is the "principle that the convening authority must, whenever possible, grant credit which gives meaningful relief").

210. *See Ridgeway*, 48 M.J. at 907 (listing alternative convening authority options). Options include deferment under Article 57(a)(2), waiver of pay forfeitures under Article 58b(b), or additional sentence credit through sentence conversion with one day of pay equal to one day of confinement. *Id*. at 907.

211. *See generally* UCMJ art. 13; MCM, *supra* note 3, R.C.M. 304, 305; United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983); United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason 19 M.J. 274 (C.M.A. 1985); United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

212. *See Allen*, 17 M.J. at 126; *Mason*, 19 M.J. at 274.

213. *See* MCM, *supra* note 3, R.C.M. 305(j), 305(k). *See also Suzuki*, 14 M.J. at 491; United States v. Williams, 47 M.J. 621, 623 (Army Ct. Crim. App. 1997).

214. UCMJ art. 13.

215. *See* United States v. McCarthy, 47 M.J. 162, 165 (1997).

216. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

217. *See* discussion *supra* notes 33-127 and accompanying text.

218. *See* discussion *supra* notes 157-179 and accompanying text.

219. Coyle v. Commander, 21st Theater Area Army Command, 47 M.J. 626 (Army Ct. Crim. App. 1997).

The Sentence Credit Application Status Quo and its Deficiencies

A Review of the Status Quo—Coyle v. Commander[220] exposes the deficiencies inherent in the current Article 13 credit scheme. In review, *Coyle* notes that sentencing credit law differentiates between "confinement credit" and "punishment credit."[221] "Confinement credit" consists of "*Allen* credit, *Mason* credit, R.C.M. 305(k) credit, [and] *Suzuki* credit";[222] while "punishment credit" involves illegal pretrial punishment that occurs outside of confinement.[223] Confinement credit is administratively applied; punishment credit is judicially determined.[224]

This categorical analysis splits the application of Article 13 credit apart. *Coyle* notes that at a minimum, Article 13 credit is judicially applied, but there are circumstances–like *Suzuki*–where the credit must be administratively applied.[225] In sum, Article 13 credit is largely a matter of sentencing authority discretion.[226]

Status Quo Deficiencies in Applying Article 13 Credit—The status quo suffers in three respects: (1) it lacks a solid legal foundation for applying Article 13 credit, (2) it makes inconsistent policy, and (3) it is uncertain and complex.

First, there is no firm legal foundation for treating Article 13 cases outside of confinement different than Article 13 cases in pretrial confinement. The language of Article 13 is silent here,[227] and its legislative history provides little remedial insight.[228] Therefore, the CAAF precedent remains the guiding light. But unfortunately, the light does not shine brightly in one specific direction.

Although *Larner* and *Suzuki* provide a foundation for an administrative remedy in the confinement context,[229] the CAAF decisions are unclear elsewhere.[230] These decisions must be viewed within their appellate context, where broad reassessment powers exist,[231] and the remedy is often a function of time and equity.[232] Service courts have relied on CAAF's denial of a "drastic remedy" in *United States v. Villamil-Perez*[233] to fashion their own appellate remedies,[234] but this does not dictate a particular method of credit at trial. In fact, trial judges have applied credit both ways to remedy Article 13 violations outside of confinement[235] and continue to do so in the field.[236]

Second, the current application of Article 13 credit creates inconsistent sentence credit policy. The remedy for violating any of the R.C.M. 305 safeguards is tangible administrative credit.[237] This credit, unlike confinement credit, is not grounded in equity;[238] instead, R.C.M. 305(k) credit is driven by a policy of deterrence.[239] The Article 13 status quo is incon-

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220. *Id.*

221. *Id.* at 628-29.

222. *See id*. at 629.

223. *See id*. at 628-29.

224. *See id*.

225. *See id*.

226. *See* discussion *supra* notes 157-179 and accompanying text.

227. *See* UCMJ art. 13 (West 1998).

228. *See Hearings on H.R. 2498*, *supra* note 143 (expressing concern for the performance of hard labor by pretrial detainees, but no remedial measures beyond prohibiting such conduct is discussed).

229. *See* United States v. Larner, 1 M.J. 371 (C.M.A. 1976); United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

230. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987); United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991); United States v. Combs, 47 M.J. 330 (1997).

231. *See* UCMJ arts. 66, 67; s*ee also Larner*, 1 M.J. at 373; United States v. Valead, 32 M.J. 122 (C.M.A. 1991).

232. *See Larner*, 1 M.J. at 371 (noting that the appellate remedy cannot increase the severity of the sentence); *Villamil-Perez*, 32 M.J. at 343-44 (granting an additional appellate remedy would result in double credit since the appellant already benefited from the convening authority's action for the Article 13 violation). *See also* United States v. Latta, 34 M.J. 596 (A.C.M.R. 1992) (giving meaningful relief for illegal pretrial punishment by reassessing adjudged forfeitures since appellant had already completed confinement).

233. *See Villamil-Perez*, 32 M.J. at 344 (reversing the service court's finding that the appellant did not suffer Article 13 punishment for publicly posting a serious incident report, the CAAF refused to grant appellant "drastic remedy" of setting aside his punitive discharge).

234. *See* United States v. Hatchell, 33 M.J. 839 (A.C.M.R. 1991) (finding that mass apprehension at formation was violation of Article 13, no relief on appeal citing *Villamil-Perez* and noting that convening authority substantially reduced confinement per pretrial agreement); United States v. Foster, 35 M.J. 700 (N.M.C.M.R. 1992) (citing *Villamil-Perez*, additional Art. 13 credit was denied on appeal because the defense counsel made tactical decision to present the violation as mitigation).

sistent with this policy rationale since pretrial punishment credit is applied, in large part, judicially.[240] Why should pretrial punishment be treated differently? If the system deters violations of R.C.M. 305(k) safeguards with additional administrative credit, why should we allow illegal pretrial punishment–arguably more severe–to be left to the uncertainty of discretion and mitigation?

Finally, the status quo is uncertain and complex. In his concurring opinion in *Allen*, Chief Judge Everett addressed the uncertainty of applying sentence credit judicially rather than administratively.[241] Although *Allen* involved credit for pretrial confinement, Judge Everett's rationale also applies in this context, because "no one can foresee exactly what weight . . . various sentencing authorities and convening authorities" [242] will give to pretrial punishment cases.[243]

Uncertainty also extends to procedure. Military judges can account for Article 13 credit by announcing on the record how an adjudged sentence is reduced.[244] Member sentencing, however, is troublesome and raises a host of questions. How does a panel factor an accused's pretrial punishment into an adjudged sentence?[245] Does the military judge instruct the members, or is the prior pretrial punishment kept from them?

Moreover, the status quo is complex; in fact, in a case with both pretrial punishment[246] and unusually harsh circumstances,[247] applying Article 13 credit would be bifurcated. For instance, in a case like *United States v. Hoover*,[248] *Coyle* suggests that credit would be applied both administratively and judicially. In *Hoover*, the accused was forced to erect a pup tent on the unit lawn each night for three weeks, surround it with concertina wire, and remain there from 2200 until 0400.[249] In *Hoover*, ACMR held that the accused's "restraint was tantamount to confinement and that it was intended to be punishment."[250]

How would these violations of Article 13 receive credit today in light of the two-pronged *McCarthy* analysis?[251] *Coyle* suggests a bifurcated approach.[252] The punishment prong violation would be considered by the sentencing authority to arrive at an adjudged sentence.[253] The military judge, however, would order an administrative credit for the unusually harsh conditions tantamount to confinement.[254] While such a system could

235. *See* United States v. Russel, 30 M.J. 977 (A.C.M.R. 1990) (awarding administrative credit at trial for pretrial punishment in restriction case); United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994) (awarding 40 days administrative credit at trial for routine disparaging comments by the unit commander). *But see* United States v. Moore, 32 M.J. 774 (A.C.M.R. 1991) (considering non-confinement related pretrial punishment as mitigation in arriving at a sentence); *Latta*, 34 M.J. at 596 (considering pretrial punishment in sentence adjudged); United States v. Rothhaas, ACM 32277 (A.F. Ct. Crim. App. Feb. 24, 1997) (degrading comments by commander considered as mitigation by military judge).

236. Electronic Interviews of U.S. Army Trial Judges, compiled by Colonel Gary Smith, Chief Trial Judge, U.S. Army, (Mar. 15, 1999) (on file with author) [hereinafter Army Trial Judge Poll] (requesting that positions on credit issues not be attributed to specific military judges).

237. *See* MCM, *supra* note 3, R.C.M. 305(k).

238. *See generally* United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (Everett, C. J., concurring) (stating benefits of administrative credit for legal pretrial confinement include placing military pretrial confinees in the same position as other federal detainees and eliminating the concern that the aggregate of pretrial and post-trial confinement can exceed the maximum sentence authorized by the *Manual*).

239. *See* MCM, *supra* note 3, R.C.M. 305(k) analysis, app. 21, at A 21-20 (credit under R.C.M. 305(k) "is intended as an additional credit to deter violations of the rule").

240. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997).

241. *See* United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (Everett, C. J., concurring).

242. *See id*.

243. *See id*. Chief Judge Everett's rationale applies via analogy to the pretrial punishment context.

244. *See, e.g.*, *Coyle*, 47 M.J. at 628-29 (encouraging the military judge to announce on the record how much the adjudged sentence is reduced for punishment credit); Army Trial Judge Poll, *supra* note 236 (indicating that at least three trial judges follow this approach for Article 13 credit).

245. *Cf. Allen*, 17 M.J. at 129 (Everett, C. J., concurring) ("It is impossible, even after the fact, to determine how an accused's pretrial confinement fits into [a sentencing authority's] determination of an appropriate sentence.").

246. United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (holding that intentional public humiliation and military degradation violated Article 13).

247. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

248. 24 M.J. 874 (A.C.M.R. 1987).

249. *See id*. at 876.

250. *See id*.

function, it is complex and increases the risk that a service member will receive either a windfall or no credit at all.

The Impact on Service Members

The most significant deficiency of the Article 13 credit status quo is the anomalous impact it can have on service members. Some service members who get judicial credit for pretrial punishment may not receive any tangible credit. Even worse, some may actually serve more time in confinement than a similarly sentenced service member who gets administrative credit.

Consider this hypothetical: two soldiers are facing court-martial. Soldier *A*, while in pretrial confinement, endures conditions that violate the rigorous circumstances prong of Article 13.[255] Soldier *B*, not in pretrial confinement, suffers routine public humiliation at formation from his commander that violates the punishment prong of Article 13.[256] Soldier *A* receives administrative credit, which will be subtracted from the approved sentence by the convening authority. Soldier *B* receives credit in the form of mitigation; the public humiliation is factored into his sentence at trial by the sentencing authority. Although, both soldiers suffered intentional punishment in violation of Article 13, they are credited differently.[257]

This disparity is pronounced in the common pretrial agreement scenario, where it can deprive soldier *B* of tangible credit. Assume both soldiers receive an adjudged sentence of thirty-six months, have pretrial agreements limiting confinement to eighteen months, and are given thirty days credit for their respective pretrial punishment. When the convening authority approves the eighteen month sentence, soldier *A*'s term of confinement is administratively reduced to seventeen months.[258] Soldier *B*, however, receives the full eighteen-month approved sentence. While the military judge reduces his adjudged sentence to thirty-five months, the convening authority still approves the pretrial agreement limitation of eighteen months. Whether or not one considers soldier *B*'s result as just,[259] soldier *A* received a bonafide credit, while soldier *B*'s credit was preempted by the pretrial agreement.[260] Soldier *B* received "no meaningful . . . credit at all."[261]

The potential impact of soldier *B* serving more time in confinement than soldier *A*, however, presents an even greater anomaly. Assume both soldiers receive a six month sentence to confinement without any pretrial agreement, and both soldiers earn all the good time credit allowable. Because of the way good time abatement credit is earned at the confinement facility, soldier *A* would serve a total of four months in confinement; but soldier *B*, who also received thirty days of credit for pretrial punishment, would serve four months and five days.[262] This occurs because the basis for earning good time credit is the adjudged sentence at trial adjusted for any pretrial agreement limitations.[263]

Here, soldier *A* earned thirty days good time credit based on his six month adjudged sentence (good time credit rate is five

251. *See* United States v. McCarthy, 47 M.J. 162, 165 (1997). The facts of *Hoover* seemingly trigger both of the *McCarthy* prongs. The intentional fatigue duty of erecting the tent violated the punishment prong, while the conditions were "unduly rigorous circumstances imposed during pretrial detention." *Id*. at 165.

252. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997).

253. *See id*.

254. *See id*. The "tantamount to confinement" scenario envisions the "other circumstances" or *Suzuki*-like situation were credit would be administratively applied. *Id.*

255. *See McCarthy*, 47 M.J. at 165.

256. *See id*. at 165.

257. *See generally Coyle*, 47 M.J. at 628-29. This is the result produced by the sentencing credit status quo.

258. *See* AR 633-30, *supra* note 29; AR 27-10, *supra* note 28, para. 5-28a. (requiring that DA Form 4430-R, Report of Result of Trial, include "all credits against confinement adjudged"); Rush Interview, *supra* note 29 (opining that maximum term of confinement would be adjusted forward for administrative credit and pretrial agreement term would equal the maximum term of confinement).

259. Some may view soldier *B*'s result as "just" since he received the benefit of his pretrial agreement.

260. *See also* United States v. Perry, No. 9500270 (Army Ct. Crim. App. Dec. 4, 1995) (leaving intact the judicial application of Article 13 credit despite pretrial agreement). The military judge reduced the adjudged sentence at trial by two years for pretrial punishment that occurred at the unit, which reduced the appellant's adjudged sentence to seven years. The pretrial agreement was for six years; no credit was deducted from the approved sentence. *Id.* at 2-3. Note that the same disparity would exist if soldier *A* was given credit under R.C.M. 305(k), *Allen*, or *Mason*.

261. *See* United States v. Gregory, 21 M.J. 952, 957 (characterizing the application of R.C.M. 305(k) credit against the appellant's adjudged sentence as "absurd" because no "meaningful" credit would result). The appellant received a five-month adjudged sentence, and convening authority approved three months of confinement. At issue was 31 days of R.C.M. 305(k) credit. *Id.* at 954-57. This rationale applies to the Article 13 context by analogy.

262. *See* AR 633-30, *supra* note 29; Rush Interview, *supra* note 29 (opining that good time credit of five days per month would be earned using the adjudged sentence as the basis).

263. Rush Interview, *supra* note 29.

days per month for confinement term of less than one year).[264] This good time credit combined with the thirty days of administrative Article 13 credit reduces the total term of confinement to four months. Soldier *B*, however, can only earn twenty-five days of good time credit. Because soldier *B* received judicial Article 13 credit, which reduced his adjudged sentence to five months, his basis for earning good time credit was only five months. Therefore, soldier *B* earned twenty five days of good time credit, which reduced his total term of confinement to four months and five days.

These hypotheticals call into question the underlying philosophy of sentence credit–that the remedy "be effective."[265] Do we want a system that allows such results?

Summary of the Article 13 Credit Anomaly

The status quo of applying Article 13 credit is unlike *Allen*, *Mason*, or R.C.M. 305(k) credit. *Coyle* submits that service members generally receive Article 13 credit judicially, but there may be instances where credit is received administratively.[266] This approach lacks a solid legal foundation, makes inconsistent policy, and is uncertain and complex. Yet, this is the approach generally permitted by CAAF precedent.[267] Moreover, service members can suffer anomalous results from the judicial application of sentencing credit. Together, these deficiencies call for a solution.

Adopting a Uniform Administrative Approach

The only approach that adequately corrects the status quo deficiencies and eliminates disparate impact is a uniform administrative approach, which credits all illegal pretrial punishment like *Allen*, *Mason*, and R.C.M. 305(k) credit.[268] This section identifies alternative methods of applying Article 13 credit, discusses how a uniform administrative approach corrects the deficiencies identified above, and recommends a method of implementation.

Alternative Methods of Applying Article 13 Credit

A poll of current trial judges indicates that they use two methods to apply Article 13 credit, judicial and administrative.[269] A *Pierce* [270] approach creates a third alternative. The trial judge in *Coyle* used the judicial method.[271] Essentially, the military judge grants and issues the credit by announcing on the record how the adjudged sentence is reduced.[272] Conversely, other military judges use an administrative method. In their view, applying Article 13 credit is better left to the convening authority; therefore, they order an administrative credit after announcing the adjudged sentence.[273]

A third alternative can be derived from *Pierce*.[274] If the military judge finds that a violation of Article 13 has occurred, the service member could be given the option of how to apply the credit. This method, however, does not appear widespread.[275] Despite the "let the accused decide" nature of this alternative, the administrative method is the only alternative that corrects the status quo deficiencies and eliminates the potential disparate impact on service members.

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264. *See* AR 633-30, *supra* note 29, para. 13.

265. *See* United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983) (indicating a philosophy that the remedy be effective to cure "unusually harsh conditions" in pretrial confinement); *cf. Gregory,* 21 M.J. 952, 956 (citing the *Suzuki* philosophy of providing an "effective remedy" to argue that R.C.M. 305(k) credit must be applied administratively); United States v. Stamper, 39 M.J. 1097, 1099 (A.C.M.R. 1994) (citing the *Suzuki* concern of an effective remedy to reassess credit for a violation of Article 13–public denunciation of appellant by commander at unit–on appeal). Query, is it time to extend this "effective remedy" rationale to include all forms of pretrial punishment?

266. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997).

267. *See* discussion *supra* notes 157-179 and accompanying text.

268. Procedurally, this envisions applying Article 13 credit as an additional administrative credit in a manner consistent with R.C.M. 305(k) credit.

269. *See* Army Trial Judges Poll, *supra* note 236 (indicating that two major approaches are being used by military judges in the field to apply Article 13 credit).

270. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

271. *See Coyle*, 47 M.J. at 628-629.

272. *See, e.g.*, *Coyle*, 47 M.J. at 627 ("But for the credit that I put into my sentence, the sentence to confinement would have been for a period of 24 months.").

273. Army Trial Judges Poll, *supra* note 236 (using the following instruction: "The accused will be credited with (__days of pretrial confinement credit) (and) (an additional ___days of administrative credit based on upon (Article 13) (RCM 305(k)) against the accused's term of confinement)"). *Id*.

274. *See Pierce*, 27 M.J. at 367.

275. Army Trial Judges Poll, *supra* note 236.

Correcting the Status Quo Deficiencies and Eliminating Anomalous Impact

The status quo deficiencies of Article 13 credit can be corrected by adopting a uniform administrative approach. This would eliminate anomalous impacts on service members as well as solidify the sentence credit philosophy. A legitimate concern to this proposal is the potential for double credit. This concern, however, can be addressed through sound implementation.

First, whether through common law or by rule, a uniform approach would establish a solid legal foundation. The CAAF could expand *Suzuki*'s horizons to include pretrial punishment cases outside of confinement.[276] Alternatively, the President could build upon the "unusually harsh circumstances" language recently added to R.C.M. 305(k),[277] by including a provision that applies to all Article 13 pretrial punishment.[278]

Second, a uniform administrative credit approach erases the policy inconsistencies of the sentence credit status quo. Tangible administrative credit would deter violations of all pretrial safeguards, whether it be the failure to conduct a timely magistrate review[279] or public humiliation at the unit.[280] Moreover, this approach bolsters the overall integrity of the system. Illegal pretrial punishment, which assaults fundamental due process rights,[281] would be treated the same for credit purposes as the pretrial safeguards of R.C.M. 305(k), which protect those same due process rights.[282]

Third, a uniform administrative approach yields certainty and simplicity. A bonafide administrative credit would remove uncertainty at the outset. Before key decisions are made or any pretrial agreements are reached, both the convening authority and the accused would know in advance that any illegal pretrial punishment must be "credited in full against any sentence to confinement."[283] Furthermore, pretrial punishment cases would no longer depend on the imprecision of discretion and mitigation, where one court-martial may reduce adjudged confinement with a formula, another may reduce without any formula, and yet another may give "no reduction."[284]

A uniform approach also means simplicity. The mechanical difficulty raised by hybrid Article 13 cases–those with both illegal pretrial punishment and unusually harsh circumstances–would cease.[285] Procedurally, the military judge would handle all pretrial punishment cases like other requests for additional sentence credit.[286] This envisions a procedure similar to R.C.M. 305(k) where "additional credit . . . deter[s] violations of the rule."[287] Upon request, the judge must find that an Article 13 violation occurred, and if so, determine the appropriate amount of administrative credit to award.[288]

Significantly, administrative Article 13 credit would eliminate the disparate impacts that some service members may suffer.[289] Like all other administrative credits, credit would *mean* credit in every situation,[290] and the longer confinement anomaly created by good time credit would be eliminated.[291] Moreover,

276. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983) (allowing more than day-for-day credit for "unusually harsh conditions" in pretrial confinement).

277. Borch Interview, *supra* note 124 (stating intent of including "unusually harsh circumstances language" was to incorporate *Suzuki* into available remedies of R.C.M. 305(k)).

278. One alternative is to amend the third sentence of R.C.M. 305(k) to read: "The military judge may order additional credit for violations of Article 13, UCMJ and for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."

279. *See generally* MCM, *supra* note 3, R.C.M. 305(i).

280. *See, e.g.*, United States v. Cruz, 25 M.J. 326 (C.M.A. 1987); United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991); United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994).

281. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (holding that punishment of pretrial detainees violates the Due Process Clause of the Fifth Amendment); United States v. McCarthy, 47 M.J. 162 (1997) (citing *Bell* as the authority for the "punishment prong" of Article 13).

282. *See generally* MCM, *supra* note 3, analysis R.C.M. 305, app. 21, A21-16-20 (explaining the grounds for R.C.M. 305 protections); United States v. Gregory, 21 M.J. 952, 959 (A.C.M.R. 1986) (noting that the procedures of R.C.M. 305 (k) are "designed to protect both due process and military due process rights").

283. *See* United States v. Allen, 17 M.J. 126, 129-130 (C.M.A. 1984) (Everett, C. J., concurring) The rationale applies to pretrial punishment context by analogy.

284. *See id*. at 129 (Everett, C. J., concurring). The rationale applies to the pretrial punishment context by analogy.

285. *See* discussion *supra* notes 230-257 and accompanying text.

286. *See generally* MCM, *supra* note 3, R.C.M. 906 (discussing motions for appropriate relief).

287. *See id.* analysis R.C.M. 305(k), app. 21, A21-20.

288. *See generally id.* R.C.M. 100 (1)(B)(c) (supporting that if no violation of Article 13 is found, the condition complained of may be considered as mitigation by the sentencing authority as a matter that could "lessen punishment").

289. *See* discussion *supra* notes 255-265 and accompanying text.

the troubling question of sentence credit philosophy would be resolved.[292]

A legitimate concern raised by a uniform administrative approach is the potential for double credit. The accused could receive "two bites at the apple" if illegal pretrial punishment was considered as mitigation by the sentencing authority, and awarded as an administrative credit by the convening authority.[293] The solution to this problem is procedural–and is best left to the military judge, which will be discussed next.

Implementing a Uniform Approach at Trial

No proposal is complete without discussing how to implement it. Here, the panel forum presents the greatest challenge since military judges can keep their sentence deliberations separate from any award of administrative credit. The concern here is whether or not the panel should be informed of the additional credit, and if so, how? Trial judges in the field tackle this problem in many ways.[294] Ultimately, the ideal procedure should be simple to implement, reduce panel confusion, and prevent double credit.[295]

Procedurally, the problem of applying additional administrative credit for Article 13 parallels the award of R.C.M. 305 (k) credit in the panel forum. Although there is an instruction for *Allen* credit,[296] no specific procedure exists for the others.[297] In fact, military judges in the field employ a number of ways to implement additional credit, which distill down to two basic procedures.[298]

The most widely used procedure is to keep *Allen* credit separate from any additional credit.[299] For instance, if an accused is entitled to both *Allen* credit and additional credit, such as R.C.M. 305(k) or Article 13, the military judge instructs the panel on *Allen* credit,[300] but does not inform or instruct them on the additional credit.

The other basic procedure is a balanced approach. Generally, additional credit information does not go before the panel.[301] An instruction, however, is triggered once the information becomes relevant mitigation, either by accused request

290. *See, e.g.*, United States v. Perry, No. 9500270 (Army Ct. Crim. App. Dec. 4 1995) (leaving intact judicial application of Article 13 credit, although preempted by pretrial agreement thereby depriving accused of any tangible benefit from the credit).

291. *See generally* AR 633-30, *supra* note 29, sec. III. (providing rates for good time abatement).

292. *See generally* United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986) (indicating underlying sentence credit philosophy of *Suzuki* is that the remedy be effective).

293. *See generally* MCM, *supra* note 3, R.C.M. 1001(c). Herein lies the concern: "pretrial punishment" falls within the broad definition of matters that can be presented by the accused as mitigation at sentencing. Note that the same concern arises in R.C.M. 305(k) credit situations. R.C.M. 1001(c) does not address the issue of sentence credit. Query, is it time to modify R.C.M. 1001(c)?

294. Army Trial Judge Poll, *supra* note 236; Telephone Interview with Colonel Gary Smith, Chief Trial Judge, U.S. Army (Feb. 8, 1999) (largely viewed as a judge's issue in the field; generally, the military judge has no obligation to instruct the members on additional administrative credit that has been awarded); Telephone Interview with Colonel McShane, Chief Trial Judge, U.S. Air Force, (Feb. 9, 1999) (prevailing practice in the Air Force is to keep additional credit matters from the panel, informing the panel of these matters risks confusion and double credit); Telephone Interview with Captain MacLaughlin, Chief Trial Judge, U.S. Navy-Marine Corps, (Feb. 9, 1999) (opining that members are generally not informed in the Navy-Marine Corps, a separate issue handled by the military judge) [hereinafter Chief Trial Judge Interviews].

295. Note that the mere fact that the panel is aware of an accused's pretrial punishment does not mechanically result in double credit. After all, this is the approach used for *Allen* credit. United States v. Allen, 17 M.J. 126 (C.M.A. 1984). The members are instructed to consider any pretrial confinement in reaching an appropriate sentence at trial and that the accused will also receive administrative credit. Does the accused receive double credit in this scenario? No one really knows; deliberation is secret and mitigation is intangible. Presumably, the members make an informed decision knowing administrative credit will be awarded, thereby preventing double credit.

296. *See* BENCHBOOK, *supra* note 2, 94 (instruction entitled "Pretrial Confinement Credit, If Applicable").

297. Chief Trial Judge Interviews, *supra* note 294 (noting the opinion by the Army's Chief Judge that no set procedure currently exists for presenting R.C.M. 305(k) or *Suzuki* credit in a panel forum). *See generally* BENCHBOOK, *supra* note 2 (indicating that other than *Allen* credit, there is no specific sentencing instructions for sentence credit).

298. Army Trial Judge Poll, *supra* note 236 (noting that other procedures include: (a) treating Article 13 credit like *Allen* credit by instructing on it in every case, and (b) informing the members of the total amount of administrative credit an accused will receive, regardless of its source).

299. Army Trial Judge Poll, *supra* note 236; Chief Trial Judge Interviews, *supra* note 294.

300. *See* BENCHBOOK, *supra* note 2, at 94 (instruction entitled "Pretrial Confinement Credit, If Applicable").

301. *See generally* MCM, *supra* note 3, R.C.M. 1001(a); BENCHBOOK, *supra* note 2, at 94 (containing *Allen* credit instruction). During presentencing, the panel receives information about pretrial restraint when the personal data sheet of the accused is read. Therefore, the panel knows about time spent in pretrial confinement up front (but not any pretrial punishment or R.C.M. 305(k) violation). The *Allen* credit instruction informs the panel about the time already spent in confinement and that administrative credit will be given.

or counsel argument. In such a case, an instruction similar to the *Allen* credit instruction can be used.[302]

Which procedure is better? The former is a bit simpler, but the flexibility of the balanced approach meets all three of the criteria outlined above. Both procedures are relatively simple to implement, and both prevent confusion initially by keeping the additional credit from the panel.[303] Only the balanced approach, however, is equipped to deal with the potential double credit generated by the disclosure. For instance, if a savvy defense counsel, knowing that the accused will receive administrative credit for pretrial punishment, presents information about the prior punishment to the panel, the accused may receive double credit if the panel is not properly instructed.

Summary of the Uniform Administrative Approach

Adopting a uniform administrative sentence credit scheme that awards additional credit to service members for pretrial punishment holds many advantages. Administratively treating Article 13 similar to *Allen*, *Mason*, and R.C.M. 305(k) for credit purposes would lay a better legal foundation for applying Article 13 credit, create consistent sentence credit policy, and inject certainty and simplicity into the system.[304] Moreover, anomalous impacts on service members would disappear.[305] Procedurally, Article 13 credit should be implemented as an additional administrative credit in a manner similar to R.C.M. 305(k). In member trials, military judges should award Article 13 credit independent of the panel, unless the information is revealed. In that case, an appropriate instruction should be given.[306]

Conclusion

A good criminal justice system should readily expend its resources to "remedy even one day of unjust confinement."[307] Indeed, the military justice system has come a long way in recent decades to provide appropriate sentence credit to service members facing confinement.[308] As a result, military practitioners must familiarize themselves with the terrain of sentence credit and its application. Service members are entitled to administrative credit for each day they spend in pretrial confinement or its equivalent,[309] whether held by military or civilian authorities, so long as the time spent in detention results from an offense for which the sentence is received.[310]

Moreover, service members are entitled to additional administrative credit when pretrial confinement safeguards enumerated in R.C.M. 305(k) are violated.[311] They also receive full credit at court-martial for any previous nonjudicial punishment.[312]

Despite the progressive credits available today, service members still face inconsistent treatment for illegal pretrial punishment in violation of Article 13, UCMJ.[313] Although the current system deters violations of R.C.M. 305(k) through additional administrative credit, pretrial punishment does not receive equal treatment.[314] A uniform administrative system of sentence credit will ensure service members get the credit they deserve. The system would benefit from consistency, integrity, and simplicity, and the service member facing trial would receive some degree of certainty. Even if the end result is but a single day of administrative credit, it will be one less day that seems "like a year."[315]

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302. *See* BENCHBOOK, *supra* note 2, at 94 (instruction entitled "Pretrial Confinement Credit, If Applicable"); Army Trial Judge Poll, *supra* note 236 (noting that this instruction can be tailored to fit many factual circumstances by referring to the credit the convening authority is to award).

303. Chief Trial Judge Interviews, *supra* note 294 (observing that if members are not aware that a service member has suffered pretrial punishment, instructing the members on a credit might confuse them and require the military judge to present information not previously admitted).

304. *See* discussion *supra* notes 276-293 and accompanying text.

305. *See id.*

306. *See* discussion *supra* notes 294-303 and accompanying text.

307. *See* United States v. McCarthy, 47 M.J. 162, 168 (1997) (Sullivan, J., concurring).

308. *See generally* discussion *infra* Part II.B-C.

309. *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

310. *See* 18 U.S.C. § 3585 (1994); discussion *infra* Part II.B.3.

311. *See* MCM, *supra* note 3, R.C.M. 305(k).

312. *See* United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

313. *See* discussion *infra* Part III.A-B.

314. *See* Coyle v. Commander 21st Theater Army Area Command, 47 M.J. 626, 628-29 (Army Ct. Crim. App. 1997); MCM, *supra* note 3, R.C.M. 305(k).

315. WILDE, *supra* note 1, pt. 5, stanza 1.

Appendix

Sentence Credit Guide

Type	Basis	Authority	Amount	How Applied	Issues (*see* Sentence Credit Issues below)
Allen	Pretrial Confinement	*Allen*, 17 M.J. 126 (C.M.A. 1984).	Day-for-day	Approved Sentence	A. Civilian pretrial confinement credit
Mason	Restriction tantamount to confinement	*Mason*, 19 M.J. 274 (C.M.A.1985)	Day-for-day	Approved Sentence	
R.C.M. 305(k)	Violation of: 1. 305(f) 2. 305(h) 3. 305(i) 4. 305(j) 5. 305(*l*) 6. R.C.M. 305(j)(2); (k) 7. Unusually harsh circumstances	1-4 R.C.M. 305(k) 5. *Williams*, 47 M.J. 621 6. R.C.M. 305(j)(2); (k) 7. R.C.M. 305(k); *Suzuki*, 14 M.J. 491 (C.M.A.)	1-4. Additional, Day-for-day 5-7. Additional, as appropriate	Approved Sentence. *See Gregory*, 21 M.J. 952 (A.C.M.R. 1986)	B. 1998 Amendments
Article 13, UCMJ	1. Pretrial or intential punishment 2. Unduly rigorous circumstance of detention	*McCarthy*, 47 M.J. 162 (1997); *Suzuki*, 14 M.J. 491 (C.M.A. 1983)	Additional, as appropriate	1. Adjudged or Approved *See Coyle*, 47 M.J. 626 (Army Ct. Crim. App. 1997). 2. Approved Sentence *See Coyle*.	C. Waiver
Pierce	Prior nonjudicial punishment	*Pierce*, 27 M.J. 367 (C.M.A. 1989)	Complete: Day-for-day, dollar-for-dollar, stripe-for-stripe	Adjudged or Approved per accused's election	D. Use of nonjudicial punishment at trial. E. Impact of Article 58b, UCMJ.

Sentence Credit Issues

A. Two approaches extending *Allen* credit to civilian pretrial confinement:

(1) ACCA: A service member earns *Allen* credit for time spent in civilian confinement at the request of the military[1] or civilian custody "in connection with the offense or acts solely for which a sentence to confinement by a court-martial is ultimately imposed."[2]

(2) *Murray*, 43 M.J. 507 (A.F. Ct. Crim. App. 1995): Credit determined by 18 U.S.C. § 3585 (b):

> **Credit for prior custody**. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences–

1. *See* United States v. Huselkamp, 21 M.J. 509 (A.C.M.R. 1985); United States v. Davis, 22 M.J. 557 (A.C.M.R. 1986).

2. *See* United States v. Dave, 31 M.J. 940 (A.C.M.R. 1990); United States v. McCullough, 33 M.J. 595 (A.C.M.R. 1991).

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

B. 1998 Amendments to R.C.M. 305(k):

(1) Abuse of discretion: "The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion."

(2) Unusually harsh circumstances: "The military judge may order additional credit for each day of pretrial confinement that involves . . . unusually harsh circumstances."

C. Waiver of Article 13 claims:

(1) Failure to raise before trial. Failure to complain before trial "is strong evidence that the accused is not being punished in violation of Article 13."[3]

(2) Failure to raise at trial. The claim is not barred per se, but the failure to raise it at the trial level is "strong evidence" that no illegal punishment occurred.[4]

D. Use of prior nonjudicial punishment at trial: Unless the accused consents, a prior record of nonjudicial punishment for the same offense cannot be used for any purpose at trial; it "simply has no legal relevance to the court-martial."[5]

E. Impact of Article 58b, UCMJ: Where *Pierce* credit may be preempted by the automatic forfeiture provisions of Article 58b, the convening authority should select an alternative that accounts for the impact of Article 58b. These alternatives include deferment under Article 57(a)(2), waiver of pay forfeitures under Article 58b(b), or additional sentence credit through sentence conversion with one day of pay equal to one day of confinement.[6]

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3. *See* United States v. Huffman, 40 M.J. 225, 228 (1994); United States v. James, 28 M.J. 214 (C.M.A. 1989); United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985).

4. *See Palmiter*, 20 M.J. at 97-98; *Huffman*, 40 M.J. at 228. *But see* United States v. Combs, 47 M.J. 330 (1997) (describing case as unusual, failing to raise illegal rank reduction by accused at rehearing did not amount to waiver on appeal).

5. *See* United States v. Pierce, 27 M.J. 367, 369 (CMA 1989).

6. *See* United States v. Ridgeway, 48 M.J. 905 (Army Ct. Crim. App. 1998) (listing alternative convening authority options).

The Admissibility of False Confession Expert Testimony

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Introduction

In 1995, Nassau County police proudly announced the arrest of Robert Moore for the murder of a Long Island taxicab driver. Moore had confessed to being with two acquaintances as they robbed and killed the cab driver and father of two children. Prosecutors talked of seeking the death penalty.

There was a problem with Robert Moore's confession, however. Not a word of it was true.

> Three weeks later, the prosecutors sheepishly revealed they had caught the real killers, who produced the murder weapon and said they had never heard of a Robert Moore . . . . Moore said he falsely confessed only because investigators grilled him for [twenty-two] hours, threatened him with the death penalty and even brought in a cousin to urge him to come clean. He had been tired, lonely, and scared. "I wanted to go home," he said.[1]

False confessions may seem to be a recent phenomenon in criminal law, but American history is replete with examples of false confessions. Many colonists falsely confessed to being witches in Salem, Massachusetts, in 1692. The trials resulted in at least nineteen executions before they stopped.[2] When the nineteen month-old baby of Charles Lindbergh was kidnapped and murdered in 1932, over 200 innocent people came forward to confess to the crime.[3] Even today, Mohammed Saddiq Odeh, a prime suspect in the bombings of the United States embassies in Kenya and Tanzania on 7 August 1998, claims Pakistani investigators used coercion to obtain a false confession from him about his involvement in the bombings.[4]

Despite the long history of false confessions in American jurisprudence, only in the last decade have persons with any degree of expertise in this area emerged. At the same time, the United States Supreme Court liberated local judges to admit whatever expert testimony the courts determined relevant and reliable using the guidelines contained in three landmark decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc*,[5] *General Electric Company v. Joiner*,[6] and *Kumho Tire Company v. Carmichael*.[7]

Confronted with a new type of expert testimony and a new standard to determine its admissibility, courts throughout the country have grappled with the complex question of whether expert testimony should be admitted on the subject of false confessions. The work of false confession theorists and the court opinions that admit or deny their testimony has created one of the hottest legal issues in years.[8] This article focuses on the psychology of false confessions, the experts behind the false confession theory, and the applicable law in this area. Further, this article argues that expert testimony on false confessions may be admissible in military courts-martial under highly limited circumstances.

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1. Jan Hoffman, *As Miranda Rights Erode, Police Get Confessions From Innocent People* (visited Jan. 20, 1999) <http://www.uiowa.edu/~030116/158/articles/hoffman2.htm>. *See* Jan Hoffman, *Court Says Its OK To Lie* (visited Jan. 20, 1999) <http://w1.480.telia.com/~u48003561/courtsayslie.htm>.

2. A total of 50 people actually confessed to being witches, but the tribunal executed only one of the confessed witches. The remainder of executions consisted of persons who were accused of being witches and either plead not guilty or refused to enter any plea at all. Nineteen died at the gallows and two perished in prison awaiting trial. One man, Giles Cory, died when he was "pressed" after refusing to enter a plea to the charge of practicing witchcraft. The colonial practice of "pressing" consisted of applying increasing weight to the body until the person being pressed relented. Cory died after two days of such torture. He never entered a plea. *See* Martha M. Young, Comment, *The Salem Witch Trials 300 Years Later: How Far Has The American Legal System Come? How Much Further Does It Need To Go?*, 64 TUL. L. REV. 235 (1989).

3. *See* Alan W. Scheflin, *Books Received*, 38 SANTA CLARA L. REV. 1293, 1296 (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME (David V. Carter & Lawrence J. Allison ed., 1997), and IAN BRYAN, INTERROGATION AND CONFESSION: IMAGES OF POLICE-SUSPECT DYNAMIC (1997)). *See also* DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977)).

4. Michael Grunwald, *Bombing Suspect Alleges He Was Bullied Into Confession*, WASH. POST, Sept. 4, 1998, at A08.

5. 113 S. Ct. 2786 (1993).

6. 118 S. Ct. 512 (1997).

7. 119 S. Ct. 1167 (1999). These three cases outline the admissibility of expert testimony under the Federal Rules of Evidence (FRE).

8. The Court of Appeals for the Armed Forces recently decided a case concerning the admission of expert testimony in the area of false confessions in *United States v. Griffin*, 50 M.J. 278 (1999).

False Confession Theory

The seed of the false confession theory germinated first in Great Britain. There, Dr. Gisli H. Gudjonsson[9] compiled several studies of cases involving suggestibility and confessions. His book, *The Psychology of Interrogations, Confessions, and Testimony*,[10] ignited the false confession theory, which soon spread across the Atlantic to the United States. Gudjonsson assembled a small library of studies on police interrogation methods and anecdotal evidence of false confessions in real life. These studies illustrate a coherent theory to explain the counter-intuitive act of persons who falsely confess. He also endorsed a classification system for false confessions that was originally developed by American Professors Saul M. Kassin[11] and Lawrence S. Wrightsman[12] in 1985.[13]

While Gudjonssons's groundbreaking work explained the thought process of those who are undergoing interrogation by law enforcement officials, it had limited applicability in America. In Great Britain, criminal suspects cannot invoke a Fifth Amendment right to remain silent, the police do not read a suspect any rights under *Miranda v. Arizona*,[14] interrogators cannot resort to trick or deceit,[15] and the exclusionary rule is non-existent.

Thus, the tactics employed by American law enforcement officials during interrogation differ somewhat from those of their British counterparts, which were studied by Gudjonsson. American professors took the lead from Gudjonsson and have now assembled a significant body of anecdotal evidence and experimental data about false confessions and police interrogation tactics in the United States.[16]

Kassin conducted the only known laboratory experiment on false confessions in 1996.[17] He offered the following hypothesis: "The presentation of false evidence can lead individuals who are vulnerable (that is, in a heightened state of uncertainty) to confess to an act they did not commit," and whether it would cause those individuals to "internalize their confession and perhaps fabricate details consistent in memory consistent with that belief."[18]

The experiment consisted of seventy-five college students who were given a typing test on a computer. The subjects typed at two different speeds and were instructed not to touch the "ALT" key because it would crash the computer program and ruin the experiment. At approximately one minute into the typing test, the test team made the computer crash. The team then blamed the computer failure on the subject's pressing of the "ALT" key. Kassin's team then used several modern interrogation techniques on the subjects. Some were falsely told that the experimenter had seen them touch the "ALT" key. Other subjects were asked directly if they had hit the "ALT" key when the computer crashed. Eventually the subjects were asked to sign a statement acknowledging that they had touched the "ALT" key and caused the computer to crash. Amazingly, sixty-nine percent of the subjects signed the false confession, twenty-eight internalized[19] their guilt just by seeing the computer crash and being asked "what happened?" by the test team, and nine percent actually fabricated specific details to fit the allegation that they had touched the "ALT" key.[20]

While Kassin had proven his hypothesis, he recognized the inherit limitations of this experiment.[21] The subjects were not accused of an actual crime–merely negligence for a relatively trivial matter. Far higher stakes await a criminal suspect in a

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9. Dr. Gudjonsson hails from the Institute of Psychiatry in London. He is a published author in the fields of suggestibility and police interrogation in Great Britain. Gudjonsson also has testified in several criminal trials as an expert witness in the fields of police interrogation and false confessions. He is a forensic psychologist and a former police officer from Iceland.

10. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY (1992).

11. Professor of Psychology, Williams College, Williamstown, Massachusetts.

12. Professor of Psychology, Kansas State University, Manhattan, Kansas.

13. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF CONFESSION EVIDENCE AND TRIAL PROCEDURE 67-94 (1985).

14. 384 U.S. 436 (1966).

15. In Britain, Sections 76 and 78 of the Police and Criminal Evidence Act 1984, make the use of deliberate deception on the part of law enforcement personnel a reason to find a confession "unreliable" and thus not admissible in the British courts. No counterpart to this law exists in American jurisprudence.

16. *See* KASSIN & WRIGHTSMAN, *supra* note 13; Saul M. Kassin & Katherine L. Kiechel, *The Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (May 1996); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. OF CRIM. L. AND CRIMINOLOGY 429 (1998) [hereinafter *The Consequences of False Confessions*]; Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DEN. U. L. REV. 979 (1997) [hereinafter *The Decision to Confess Falsely*]; Richard A. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of False Confessions*, 16 STUD. IN L. POL. & SOC'Y 189 (1997) [hereinafter *The Social Psychology of Police Interrogation*].

17. Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, AM. PSYCHOL. 227 (Mar. 1996).

18. KASSIN & WRIGHTSMAN, *supra* note 13, at 126.

murder investigation. But Kassin also points out that the test subjects in his study possessed high intelligence[22] and were under very little pressure. Additionally, they were not subjected to a grueling, hours long, hostile interrogation by well trained investigators–factors that could also affect a suspect's likelihood to confess. As Kassin stated:

> An obvious and important empirical question remains concerning the external validity of the present results: To what extent do they generalize to the interrogation behavior of actual criminal suspects? . . . In this paradigm, there was only a minor consequence for liability. At this point, it is unclear whether people could similarly be induced to internalize false guilt for acts of omission (i.e. neglecting to do something they were told to do) or for acts that emanate from the conscious intent . . . . It is important, however, not to overstate this limitation. The fact that our procedure focused on an act of negligence and low consequence may well explain why the compliance rate was high.[23]

Kassin believes that additional research in this area is needed, especially if false confession testimony becomes admissible in court.[24] Unfortunately, he, and every other false confession theorist, may be prohibited from such experimental research due to the ethical constraints of the mental health profession.[25] Such an experiment entails knowingly extracting a false confession to a criminal act from one or more test subjects whom the test team *knew* to be innocent of any crime. The emotional and psychological damage inflicted on test subjects to falsely confess to a murder or rape they did not commit exceeds the tolerance of most people.[26] It might also subject the experimenters to legal liability for the tort of intentional infliction of emotional distress[27] or as a deprivation of civil rights.[28] Therefore, adopting Kassin's experiment to more closely approximate the conditions faced by the typical criminal suspect may not be possible.

With the gathering of empirical data severely limited by ethical and liability considerations, researchers must turn to anecdotal evidence to explain and to understand the issue of false confessions. In the article *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*,[29] Professors Richard A.

19. "Internalize" means to adopt privately a true belief one is guilty, despite having no personal knowledge whether they are indeed guilty. This typically occurs when people do not remember an incident and are confronted with evidence of their guilt, regardless of whether the evidence is feigned or real. In the Kassin study 28% of the subjects assumed they were guilty just because the computer crashed and the test evaluator asked "what happened?" These people sincerely believed they were guilty solely because of the evidence they were confronted with, not because they knew for a fact they had caused the computer to crash. The process of persons replacing gaps in their memory with imaginary experiences which they believe to be true is referred to as "confabulation." *See* GUDJONSSON, *supra* note 10.

20. Kassin & Kiechel, *supra* note 16, at 125-28.

21. *Id.* at 127.

22. *Id.* The SAT scores of the test subjects were 1300 or better.

23. *Id.*

24. Saul Kassin, *The Psychology of Confession Evidence*, AM. PSYCHOL. 221, 231 (Mar. 1997).

> The topic of confession evidence has been largely overlooked by the scientific community. As a result of this neglect, the current empirical foundation may be too meager to support recommendations for reform or qualify as a subject of "scientific knowledge" according to the criteria recently articulated by the U.S. Supreme Court (*Daubert v. Merrell Dow Pharmaceuticals Inc.* 1993). To provide better guidance in these regards, further research is sorely needed.

Id. Kassin left open, however, the possibility of admitting such evidence as "other specialized knowledge" under FRE 702.

25. Telephone Interview with Saul M. Kassin, Professor of Psychology, Williams College, Williamstown, Mass. (Nov. 24, 1998) [hereinafter Kassin Interview].

26. Professor Richard Ofshe claims, however, to have induced just such a confession. In the *Paul Ingraham* case, Ofshe (working as a consultant for the prosecution) first confirmed that at no time did Ingraham force his son and daughter to have sex. Suspecting Ingraham was delusional, Ofshe asked Ingraham whether he had indeed forced his son and daughter into having sex with each other and told Ingraham to think about it. Ofshe then permitted Ingraham to return to his cell. Ingraham later admitted to Ofshe that he had ordered his son and daughter to have sex. Ingraham even fabricated a detailed scenario to this effect and signed a confession to an incident which never occurred. Interview with Richard J. Ofshe, Professor of Sociology, University of California, Berkeley, at Fort Hood, Tex. (June 22, 1998). Paul Ingraham unsuccessfully appealed his guilty plea, conviction, and 20 year sentence. He remains in jail.

27. The elements of this tort include: (1) extreme and outrageous conduct on the part of the defendant; (2) the defendant's conduct was in an intentional or reckless manner; and (3) the defendant's acts caused severe emotional distress which resulted in bodily harm. RESTATEMENT (SECOND) OF TORTS §§ 46-47, 312, 313 (1965). "Liability has been found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." St. Anthony's Medical Center v. H.S.H., 974 S.W.2d 606 (Mo. App. 1998). The Supreme Court of Alaska held that the "bodily harm" is not required to complete the tort of intentional or negligent infliction of emotional distress in *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995), where a doctor incorrectly diagnosed a woman had contracted the AIDS virus.

28. *See* 42 U.S.C.A. §§ 1983, 1985 (West 1998).

Leo,[30] and Richard J. Ofshe[31] make a rare study of some sixty cases of alleged false confessions in the last quarter century. Of those, they categorize thirty-four as "proven" false confessions,[32] eighteen as "highly probable" false confessions,[33] and eight as "probable" false confessions.[34] The sixty cases break down as follows: five of the cases (eight percent) ended in arrest, twenty six of the cases (forty-three) ended with a dismissal of charges before trial, and the remaining twenty nine cases (forty-eight percent) ended in conviction.

They dissected each case to discover what creates false confessions and how false confessions differ from one another. Their primary method for determining guilt or innocence in these cases (not to mention the accuracy of the confessions) seems both unscientific and highly subjective. Leo and Ofshe typically read the defendant's post-admission narrative statement[35] and search for corroborating evidence in the case. The thirty-four proven cases also served as the foundation for their other article on false confessions, *The Decision to Confess Falsely: Rational Choice and Irrational Action.*[36]

Leo and Ofshe use a modified version of the classification system originally created by Kassin and Wrightsman. With this model they identify three different types of false confessions found in their sixty sample cases.[37] First is the "stress-compliant" false confession, which occurs when a suspect "makes his choice to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing because it has gone beyond the bounds of a legally proper interrogation,"[38] (that is, actual use of physical force to obtain a suspect's confession). Second is the "coerced-compliant" confession where a suspect confesses "in response to classically coercive interrogative techniques such as threats of harm and/or promises of leniency."[39] Next is the "persuaded false confession,"[40] which occurs when a suspect has no memory of a crime, yet he readily admits that he committed the crime and adopts a sincere belief that he is guilty. This category of false confessions may be *coerced* or *non-coerced* depending on whether police interrogators used any actual or threatened harm toward the suspect or offered promises of leniency.

Each of these categories can be further broken down into sub-categories of compliant or persuaded false confessions. In "compliant" false confessions the suspect admits to incriminating facts that he knows are false. In "persuaded" false confessions the suspect admits to incriminating facts, not knowing whether they are true. In both cases, the suspect adopts the facts presented to him as the truth or believes himself to be guilty due to the persuasion of the interrogator or a lack of confidence in his own memory.[41] Gudjonsson refers to the latter as the character trait of "suggestibility."[42]

The studies of Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe create an amalgam theory of false confessions. The theory embraces the existence of false confessions as a result of sophisticated psychological interrogation methods employed

29. *The Consequences of False Confessions, supra* note 16, at 429.

30. Assistant Professor of Criminology, Law and Society, University of California, Irvine.

31. Professor of Sociology, University of California, Berkeley.

32. *The Consequences of False Confessions, supra* note 16, at 435-438. Leo and Ofshe claim a "proven" false confession exists when an independent piece of evidence clearly exonerates the defendant (i.e., DNA test finds they are innocent, the murder victim is found alive, or the true perpetrator is caught and confesses).

33. Leo and Ofshe claim a "highly probable" false confession exists when no credible independent evidence supported the conclusion that the confession was true. "The evidence led to the conclusion that his innocence was established beyond a reasonable doubt." *Id.* at 437.

34. Leo and Ofshe claim a "probable" false confession exists where, although "the evidence of innocence was neither conclusive or overwhelming, there were strong reasons–based on independent evidence–to believe that the confession was false." *Id.*

35. A written statement made by the suspect after the initial interrogation has been completed and the suspect admits: "I did it." The purpose of the statement is to flesh out the details of the crime and memorialize the confession in writing. *See The Decision to Confess Falsely, supra* note 16, at 991-94 (referencing the use of the post-admission narrative statement). In *United States v. Hall*, 974 F. Supp. 1198 at 1204 (C.D. Ill. 1997), the court specifically found "Dr. Ofshe hypothesizes, and his peers appear to agree, that the major analytical method for determining the existence of a false confession is the post-admission narrative statement."

36. *The Decision to Confess Falsely, supra* note 16, at 979.

37. It is important to note that Leo and Ofshe studied only capital murder cases in their survey of 60 convictions by false confession. Other crimes such as rape, robbery, DUI, or even simple assault were not studied.

38. *Id*. at 997.

39. *Id*. at 998.

40. *Id*. at 999.

41. Kassin and Wrightsman, Gudjonsson, and Leo and Ofshe do not agree completely on the classification system. This article uses the classification system of Leo and Ofshe because it seemed more comprehensive and builds upon the work of Kassin and Wrightsman. They were the first to classify false confessions in 1985. *See The Social Psychology of Police Interrogation, supra* note 16, at 189.

by police. These methods produce confessions, both true and false.[43] Absent substantial corroborating evidence, the police cannot tell a true confession from a false confession.[44] Social scientists and psychologists skilled in police interrogations, however, can recognize certain factors that may cause a person to falsely confess, and, in limited cases, opine whether a confession is indeed false, or at least unreliable.[45]

The false confession theory is not without critics. Professor Paul Cassell[46] has repeatedly assailed the numbers used by Leo and Ofshe. He states that the "empirical lynchpin for their proposals is simply missing"[47] and derides the anecdotal evidence collected by Leo and Ofshe as having little information.[48] Cassell points out that Leo and Ofshe cannot presently quantify the number or the percent of false confessions.[49] A potentially fatal flaw for a theory that is based on science.

Cassell attacks the premise offered by Leo and Ofshe, that false confessions "occur regularly"[50] by simply looking at the numbers. By his estimate, some 386,000 police interrogations for murder occurred during the period of Leo and Ofshe's sixty false confessions.[51] Cassell calculates the odds of a false confession during a police interrogation in this country at between 1 in 2400 and 1 in 90,000.[52] Of course, Leo and Ofshe could not examine all 386,000 interrogations during this period. But the infinitesimal number of alleged false confessions during this period demonstrates Cassell's argument: Leo and Ofshe may have identified a potential problem with the way interrogations are conducted in this country, but it is premature to come to any conclusions about false confessions. Like Kassin, he believes this phenomenon needs further study.

Cassell also proposes an empirical study using a random sample of criminal cases to determine the frequency of false confessions in this country. He details a method for conducting such a study.[53] This study might uncover the frequency of false confessions and demonstrate whether it is an anomaly in criminal law enforcement or a pervasive problem for the courts in the criminal justice system that can be remedied.

Leo and Ofshe acknowledge the problems associated with such a small representative sample of only sixty cases and state:

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42. GUDJONSSON, *supra* note 10, 104-13. Gudjonsson also devised the "Gudjonsson Suggestibility Scales," which measure the degree of susceptibility of a person to suggestion. *Id.* at 131-36.

43. According to Kassin, these methods include deception, trickery, and psychologically coercive methods of interrogation. *See* Kassin, *supra* note 24, at 221. Ofshe and Leo give good examples of these methods. Their list includes: polygraph tests, false claims of strong evidence or eyewitness accounts, pseudo-scientific evidence (e.g., proton-neutron test), feigned co-conspirator statements, exaggerated scientific evidence (e.g., DNA testing), and actual or implied promises of threats or leniency. *See The Decision to Confess Falsely*, *supra* note 16, at 1008-88. Excellent examples of the "ploys" used in interrogation follow their definitions.

44. Saul M. Kassin & Christina T. Fong, "I'm Innocent!": Effects of Training on Judgements of Truth and Deception in the Interrogation Room (Oct. 1998) (unpublished manuscript, on file with the author).

45. Ofshe has testified in the past on the issue of whether a confession is false. An example of his opinion testimony can be found at the web site for the West Memphis 3. *Jessie Misskelley's Trial: Transcript of Dr. Richard Ofshe's Testimony* (visited Jan. 6, 1999) <http://www.wm3.org/html/confession_analysis.html>. Ofshe does not always offer such an opinion, however. *See* Susan Gembrowski, *Murder Confessions Coerced, Expert Testifies in Crowe Case*, SAN DIEGO TRIB.-UNION, Aug. 11, 1998, at B-3: 7-8. In one situation, Ofshe testified that a confession was coerced but declined to opine as to whether the confession was true or false. Kassin refuses to give an opinion concerning whether a confession is false. He does not believe he (or anyone else for that matter) is qualified to give such and opinion. Kassin Interview, *supra* note 25. This limitation on expert testimony is consistent with *United States v. Birdsall*, 47 M.J. 404, 410 (1998), where the court held the expert cannot act as a "human lie detector" and opine as to the credibility of a witness or their statements.

46. Professor of Law, University of Utah College of Law.

47. Paul Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alshuler*, 74 DEN. U. L. REV. 1123, 1125 (1997).

48. Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions–And from Miranda*, 88 J. CRIM. L. AND CRIMINOLOGY 497, 505 (1998).

49. Cassell, *supra* note 47, at 1126. Cassell also points out that the "null hypothesis" might explain this. In other words, false confessions cannot be quantified because they occur so infrequently as to be insignificant.

50. *The Social Psychology of Police Interrogation*, *supra* note 16, at 191.

51. *See* Cassell, *supra* note 48, at 506. Cassell uses a conservative figure extrapolated from FBI and DOJ crime statistics for homicide and interrogation rates nationwide during the relevant time periods.

52. *Id.* at 502. Cassell also estimates that the total number of people actually being convicted by false confessions may number between 10 to 45 people annually in the United States. By comparison, only 50 people die from lightning strikes in any given year in the United States. *Id.* at 519-21.

53. *Id.* at 507-13. Cassell's detailed proposal includes complex sampling methodologies and statistical analysis which any social scientist would envy. He proposes using a random sample of recorded confessions (preferably videotaped) and then examining each of these cases individually. The sampling base would have to be incredibly large (at least 1,000 confessions or more), however, to capture at least one or more allegations of a false confession. Further the subjective determination of whether a "probable" false confession actually exists could wreak havoc with making objective analysis of the data. Cassell conducted a similar study in Salt Lake City in 1984 with Brent Hayman. They studied 173 cases at random and found no allegations of a false confession. *Id.* at 509. *See* Paul G. Cassell & Brent S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. REV. 839 (1996).

> The sixty cases discussed below do not constitute a statistically adequate sample of false confession cases. Rather they were selected because they share a single characteristic: an individual was arrested primarily because police obtained an inculpatory statement that later turned out to be a proven, or highly likely, false confession.[54]

Leo and Ofshe concede that they cannot determine the frequency of false confessions. They reiterate that their hypothesis cannot be tested by empirical means for three reasons: (1) a lack of police audio or video recordings of interrogations,[55] (2) a failure to keep law enforcement records concerning the frequency of interrogations in America, and (3) cases of false confessions do not enjoy wide attention in the media.[56] They also reject Cassell's assertion that quantification is necessary or even possible because of concerns of methodology in such a study.

> Cassell criticizes the false confession literature for failing to provide a ballpark estimate of the frequency of confessions, as if empirical researchers somehow bear this burden. However one might view the absence of any such estimates as resulting from most researchers' preference for an honest "I don't know" to the use of guesswork to arrive at specious estimates of real world facts. Until it becomes possible to draw a random sample of confession cases from a definable universe and accurately determine both the ground truth of the interrogation and the validity of the confession statement in each case, it will not be possible to arrive at a methodologically acceptable estimate of the annual frequency of wrongful convictions.[57]

Thus, the experts find themselves in an intellectual stalemate over whether further empirical research in the area of false confessions is even possible. Yet, Cassell's critique of the theories of Leo and Ofshe does not stop there.

Cassell attacked the sixty cases that Leo and Ofshe use in their study to map the false confession theory.[58] He examined the twenty-nine cases of alleged false confessions that resulted in conviction[59] and concluded that nine were indeed guilty,[60] and their confessions essentially true. Of the remaining twenty cases, Cassell asserts that an additional nine cases were undisputed false confessions,[61] which all parties agreed were false. Therefore, of the twenty disputed cases, Leo and Ofshe were wrong nine times by Cassell's accounting.[62] A fifty-five percent accuracy rate, or conversely, a forty-five percent rate of error. A coin toss would almost prove as accurate.

This presents two problems for the Leo and Ofshe theory. First, it underscores the high level of subjectivity present when analyzing allegations of false confessions. In each case, Cassell presumably looked at the same evidence as Leo and Ofshe. How then could three intelligent, well-educated, and legally savvy persons find such dissimilar results when confronted with the same evidence? Second, Cassell's finding also questions the foundation of Leo and Ofshe's theory itself. How much of the rational decision-making model for false confessions was based on these nine questionable cases? Should these cases remain part of the representative sample or be discarded? Does this potential problem extend to the thirty-one other cases Cassell did not examine? At the very least, the debate between Leo and Ofshe, and Cassell pinpoints the real problem of accurately identifying false confessions in an objective manner and poses some important questions for researchers in this area.

Armed with the facts they have, many of the false confession theorists have marched to the courtroom where many appear as consultants to the defense and even as expert witnesses.[63] Psychologists, social psychologists, psychiatrists, and other professionals are now using those theories to evaluate an accused's

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54. *The Consequences of False Confessions*, *supra* note 16, at 435-36.

55. Currently only two states require recording of police interrogations, Alaska and Minnesota. *See* Mallot v. State, 608 P.2d 737 (Alaska 1980); Stephan v. State, 711 P.2d 1156 (Alaska 1985); Scales v. Minnesota, 518 N.W.2d 587 (Minn. 1994). No federal or military courts have such requirements. Texas law requires the electronic recording of any confession as a prerequisite to admission at trial, but the interrogation preceding the confession itself does not have to be recorded. *See* TEX. CODE OF CRIM. PRO. § 38.22(3) (West 1998).

56. Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. AND CRIMINOLOGY 557, 560 (1998).

57. *Id*. at 561.

58. Paul G. Cassell, *The Guilty and The Innocent: An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

59. Cassell did not examine the other 31 cases of alleged false confessions that ended in dismissal, arrest, or acquittal.

60. *Id.* at 523-26.

61. *Id.* at 587.

62. *Id.* at 587-89.

confession.[64] Is this just a novel theory based on "junk science,"[65] or is it reliable enough to be admissible in court through the use of expert testimony to guide a jury in weighing the confession of an accused?

The Subject of False Confessions: A Place for Experts?

Elliot Aronson[66] was probably the first expert to testify in this area. In the late 1980s, this professor of psychology from the University of California testified for the defense in the murder case of *People v. Bradley Nelson Page*.[67] His testimony supported the defendant's allegations of false confession and the coercive interrogation tactics used to interrogate the defendant.[68] For the first time in recorded American jurisprudence, a defense attorney offered, and a court admitted into evidence, the substantive testimony of an expert witness on the subject of false confessions. Aronson's testimony seems all the more dramatic when considering the difficult test of admissibility for scientific evidence at the time of trial and appeal.[69]

Since 1923, state and federal courts subscribed to the standard of expert testimony admissibility as outlined in *Frye v. United States*.[70] *Frye* excluded expert opinion testimony based on a scientific technique unless the relevant scientific community "generally accepted" the technique as being reliable.[71] Seventy years later, everything changed when the United States Supreme Court dispensed with the rigid *Frye* test and replaced it with a more flexible test espoused in the *Daubert*,[72] *Joiner*,[73] and *Kumho Tire Co*.[74] cases. Federal courts were no longer bound by the "general acceptance" test. In its place, the Supreme Court turned to the Federal Rules of Evidence (FRE).[75] State courts remained free to adopt either standard and some jurisdictions, such as New York,[76] still adhere to the *Frye* test.

For those jurisdictions using the FRE or an analog to those rules (as does the military), *Daubert* and *Kumho Tire Co.* dramatically changed the admissibility of expert testimony. Congress approved the FRE long after the *Frye* decision and incorporated in the FRE a specific provision addressing expert witnesses, FRE 702.[77] The text of FRE 702 makes no mention

63. Kassin and Ofshe have appeared as expert witnesses on this subject matter. The most notable case probably is *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997), where Dr. Ofshe testified as an expert witness in this area. Ofshe also testified at a court-martial at the 4th Infantry Division at Fort Hood, Texas.

64. The defense psychotherapist in *Beltran v. Florida*, 700 S.2d 132, 133-34 (Fla. Dist. Ct. App. 1997), unsuccessfully cited the Kassin experiment in an attempt to get admitted as an expert witness on false confessions.

65. Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not To Junk?*, 40 WM. & MARY L. REV. 1, 3 (1998).

66. Professor of Psychology, University of California at Santa Cruz.

67. 2 Cal. Rptr. 2d 898 (1991), *rehearing denied* 1992 Cal. App. LEXIS 76 (1992), and *review denied* 1992 Cal. LEXIS 1516 (1992).

68. *Id*. at 908-12.

69. Professor Aronson's expert testimony was admitted under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The court constrained his testimony, however, by not permitting him to testify as to the veracity of the defendant's confession. *Id.* at 911. The trial court judge also conducted a hearing out of the presence of the hearing of the jurors to determine what facets of Professor Aronson's testimony should be admitted. *Id.* at 909-11. Profesor Aronson did not have the benefit of the theories of Gudjonsson, Kassin, Wrightsman, Leo, or Ofshe. He cited a few experiments to the court for scientific validity, including the famous Milgram experiment, where test subjects delivered electric shocks to fictional test subjects at the urging of the test administrators. No studies cited by Arnonson bore directly on the issue of false confessions or even police interrogation.

70. 293 F. 1013 (D.C. Cir. 1923).

71. *Id.* at 1014.

72. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). This case involved the use of expert witnesses to prove or disprove that a drug called "Bendectin" manufactured by Merrell Dow caused birth defects in children when their mothers took the drug during pregnancy. Both the district court and the Court of Appeals incorrectly used the *Frye* test when weighing the admissibility of such testimony.

73. General Electric Co. v. Joiner, 118 S. Ct. 512 (1997). This case concerned whether PCBs could cause cancer in electricians exposed to the chemical. The trial court excluded the testimony of plaintiff's proffered expert because it found the studies of laboratory mice upon which his expertise was based was too attenuated to the predicament of human beings. The Supreme Court upheld the district court's findings, holding that the trial judge did not abuse his discretion in excluding the expert testimony.

74. Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999). This case addressed whether a witness in tire manufacture and defects was qualified as an expert in "scientific" or "other specialized knowledge." The Supreme Court erased the distinction between the two and identified "reliability" as the trial court's mission in evaluating the testimony of proffered experts.

75. *Daubert*, 113 S. Ct. at 2793.

76. *See* People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998). The court upheld the exclusion of false confession expert testimony under the *Frye* test, citing New York's refusal to follow *Daubert*.

of the term "general acceptance." The *Daubert* Court also found that the drafter's comments were devoid of any reference to the *Frye* case or the "general acceptance" standard.[78] The Court held:

> Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive standard for admitting scientific expert testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.[79]

Trial court judges no longer needed to consider whether the scientific evidence had reached "general acceptance" in the scientific community. Instead the Court installed trial court judges as "gatekeepers," who must decide whether scientific evidence or testimony was both relevant and reliable.[80] Relevancy posed no problems. Judges typically rule whether evidence is relevant. Reliability was another matter. The *Daubert* Court carefully laid out a road map for reliability that trial court judges could use to evaluate the scientific validity of any proffered evidence based on a scientific method. The Court identified four factors to weigh when determining whether such evidence would be "reliable" to the trier of fact.[81]

The first factor is whether a theory or technique constitutes "scientific knowledge," which may be determined by whether it can be tested.[82] In other words, can the evidence be proven by empirical testing that ascertains the truth or falsity of the hypothesis being advanced?

Second, whether the pertinent theory or technique has been subjected to peer review or publication?[83] The *Daubert* Court clearly stated that publication "does not necessarily correlate to reliability" and that "publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive,[84] consideration in assessing the scientific validity"[85] of a particular theory or technique.

Third, what is the known or potential rate of error for a specific scientific technique? Fourth, the *Daubert* Court took a bow to the *Frye* test and stated, "general acceptance" can yet have a bearing on the inquiry"[86] in determining whether a theory or technique is indeed scientifically valid. Unless the trial court finds that the theory is scientifically valid, it has no evidentiary reliability or relevance and should not be admitted under FRE 702.

The Court also cautioned trial judges to consider the other Rules of Evidence in weighing the decision to admit or deny such evidence. The Court pointed out that vigorous cross examination, presentation of contrary evidence, and well-tailored instructions to the jury may attack the shaky but admissible evidence.[87]

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77. FED. R. EVID. 702 (governing testimony by expert witnesses). Rule 702 is identical to Military Rule of Evidence 702. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

78. *Daubert*, 113 S. Ct. at 2794.

79. *Id.*

80. *Id.* at 2795. Military courts had already been released from the *Frye* standard of "general acceptance" and told to follow MRE 702 as far back as 1987 in *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), when the Court of Military Appeals ruled that MRE 702 superceded the *Frye* test.

81. *Daubert*, 113 S. Ct. at 2796.

82. *Id.*

83. *Id.* at 2797.

84. The Supreme Court identified this factor as not being dispositive, but did not identify which of the four factors were dispositive.

85. *Daubert*, 113 S. Ct. at 2797.

86. The Court cautioned that,

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity–and thus the evidentiary relevance and reliability–of the principles that underlie a proposition. The focus of course must be solely on the principles and the methodology, not on the conclusions that they generate.

Id.

87. *Id*. at 2798.

Four years later in the case of *General Electric Co. v. Joiner*,[88] the Supreme Court reaffirmed its holding in *Daubert* and held that the decision of a trial court judge to admit or deny expert testimony under FRE 702 (or any other evidentiary ruling) would be reviewed only for an abuse of discretion.[89]

This year, in *Kumho Tire Co. v. Carmichael*,[90] the Supreme Court extended the potential use of some or all of the *Daubert* factors to evaluate the reliability of any expert witness testimony under FRE 702.[91] The Court declared that judges serve as "gatekeepers" for *all* expert testimony, not just scientific evidence.[92] This ended the distinction between "scientific" and "nonscientific" expert testimony under FRE 702.[93] The Court stated that trial judges "may" use the *Daubert* factors in arriving at a decision to find expert testimony reliable. The Court emphasized, however, that the *Daubert* factors were not a checklist or a test[94] and that the district court's approach to determining the reliability of a witness must be a "flexible"[95] one, dependent on the facts and circumstances of each particular case.[96] The Court remarked:

> The conclusion, in our view, is that we can neither rule out nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by the kind of evidence. Too much depends on the particular circumstances of the particular case at issue.[97]

The *Daubert* factors are not an inclusive or exclusive list of factors to determine the reliability of every expert's testimony. They serve primarily as an illustration or guideline of the reliability inquiry each trial court judge must make.[98] Judges now must ascertain not only the reliability of a proffered piece of expert testimony, but the *means* to determine the reliability of that testimony.[99] That may entail using the *Daubert* factors, and sometimes it will preclude the use of some or all of them. The trial court's decision will be reviewed only for an abuse of discretion.[100] Regardless, the Court entreated the district courts to require expert witnesses to employ the "same intellectual rigor" used by experts in the relevant field.[101]

Through *Daubert*, *Joiner*, and *Kumho Tire Co.*, the Supreme Court clarified FRE 702 for federal courts and any state courts that followed FRE 702. Appellate courts would not dictate to the trial courts which expert testimony could or could not be admitted, or what constitutes an appropriate means to determine the reliability of an expert witness. Appellate courts could not overturn a trial judge's decision unless he abused his discretion in admitting or excluding such evidence. That same rule applies to military courts-martial, which follow FRE 702. Relevance and reliability became the sole benchmark of admissibility for expert testimony.

In the six years since Gudjonsson's theory of false confessions and the Supreme Court's decision in *Daubert*, many courts have evaluated the reliability of the theory underlying the expert testimony of psychologists, sociologists, and other trained professionals in the areas of false confessions.[102] These

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88. 118 S. Ct. 512 (1997).

89. *Id.* at 517, 519.

90. 119 S. Ct. 1167 (1999).

91. *Id.* at 1175.

92. *Id.* at 1174.

93. *Id.* at 1174-75.

94. *Id.* at 1171.

95. *Id.* at 1175.

96. *Id.*

97. *Id.* at 1175.

98. Indeed the Court stated the *Daubert* factors were "meant to be helpful, not definitive. Indeed, those factors do not all apply in every instance in which the reliability of scientific evidence is challenged." *Id.* at 1175.

99. *Id.* at 1176.

100. *Id.* at 1176-77.

101. *Id.* at 1176.

102. Two federal circuit courts have ruled on this matter, the 7th Circuit in *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), and the 1st Circuit in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995). Only thirteen state courts have ruled on this matter. *See infra* notes 125-137 (providing a complete listing of how each state ruled).

cases often raised more questions than they answered. While the *Daubert* factors might work in evaluating "hard" science such as medicine, what about "soft" sciences like psychology and sociology where empirical data is scarce and anecdotal evidence is routinely used to predict the erratic nature of human behavior? Would *Daubert* be too harsh a standard if it were applicable to such studies? If so, what *Daubert* factors, if any, might be useful in evaluating this new form of expert testimony? Could courts use any other inquiry or factors to determine this new theory's reliability?

As in the Kassin Study, scientific principles of controlled experimentation and hypothesis testing are clearly at work in the false confession theory, but much of the theory is also based on anecdotal evidence. In many of those cases, the theorists themselves were personally involved and observed the false confession phenomenon at close range. Gudjonsson and Ofshe frequently testified or worked as experts for the defense, observing or conducting hundreds of police interrogations. From where should expertise spring–scientific study, personal observation, or both? The First and Seventh Circuits Courts of Appeals found that expertise is grounded in science and that the *Daubert* factors can measure the reliability of the false confession theory.[103]

The Seventh Circuit, in *United States v. Hall*,[104] overturned the district court's decision to exclude the testimony of Dr. Richard Ofshe as an expert in the area of false confessions. On a *de novo* review,[105] the Seventh Circuit found that the district court failed to apply the *Daubert* factors in evaluating the validity of Ofshe's theory and testimony. The court recognized that "[s]ocial science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply [FRE] 702 and *Daubert.*"[106] But this did not excuse the district court's duty to treat it as any other form of *scientific*[107] expert testimony under FRE 702.[108] The Seventh Circuit remanded the case for an evidentiary hearing at the district court which later applied the *Daubert* factors in part, reversed itself, and admitted a large portion of Dr. Ofshe's testimony.[109] By subjecting Dr. Ofshe's expert testimony to the *Daubert* litmus test, the Seventh Circuit found it to be scientific in nature.

Years ahead of its time, the district court, on remand, used the "flexible" approach, later espoused by the Supreme Court in *Kumho Tire Co.*, to assess the reliability of Dr. Ofshe's theory. In a lengthy opinion, the court stated that the *Daubert* factors might apply to "non-Newtonian" science or other specialized knowledge, but to different degrees.[110] The court also found that the "science of social psychology, and specifically, the field involving the use of coercion in interrogations, is sufficiently developed in its methods to constitute a reliable body of *specialized knowledge* under [FRE] 702."[111] The court cited the work of Professor Edward J. Imwinkelried's epistemological[112] analysis of expert testimony[113] and used the *Daubert* factors as a guideline, not a litmus test, for admissibility. This flexible analysis was a precurser to the Supreme Court's later holding in *Kumho Tire Co.*[114]

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103. *Id.*

104. 93 F.3d 1337 (7th Cir. 1996), *on remand, motion denied in part*, 974 F. Supp. 1198 (C.D. Ill. 1997).

105. The Seventh Circuit followed a two-step analysis of the district court's action. First it determined whether the district court judge had used the correct legal standard in evaluating Dr. Ofshe's proffered theories and testimony. This was a review of the applicable law and, as such, was *de novo*. Then, if the Seventh Circuit found the district court applied the correct legal standard (*Daubert* and FRE 702), it would review the district court's decision to exclude Dr. Ofshe's testimony for an abuse of discretion. *Id.* at 1342. This would be consistent with *Joiner*, decided a year later by the Supreme Court. The district court in this case utterly failed to mention *Daubert* or to articulate its reasons for denying Dr. Ofshe's testimony within the *Daubert* framework. *Id.*

106. *Id.* at 1342.

107. Since the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), the distinction between "scientific" and "nonscientific" expert testimony under FRE 702 has been largely eviscerated.

108. *Hall*, 93 F.3d at 1342-43.

109. United States v. Hall, 974 F. Supp. 1198, 1199-1206 (C.D. Ill. 1997).

110. *Id.* at 1202. The court did not refer to psychology and social psychology as a "soft" science, but it did refer to classical "Newtonian science" (i.e., physics, chemistry, etc.) as "hard" science, thus implying that the other sciences which cannot avail themselves of demonstrable, empirical proof were "soft." *Id.* at 1203.

111. *Id.* at 1205.

112. Epistemological: Of or relating to "the branch of philosophy that studies the nature of knowledge, its presuppositions and foundations, and its extent and validity." THE AMERICAN HERITAGE DICTIONARY 619 (3d ed. 1992).

113. *Hall*, 974 F. Supp. at 1202 (citing Imwinkelried, *The Next Step After Daubert: Developing A Similarly Epistemological Approach To Ensuring The Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271 (1994)). Professor Imwinkelried cites four potential standards for evaluating such testimony for reliability. They include: extending the *Daubert* standard to non-scientific expert testimony, using the old *Frye* test of "general acceptance," amending FRE 702 to define "reliability," and epistemological analysis. Of the former, Professor Imwinkelried calls for creating objective standards to measure the reliability of an expert's testimony. This is a tall order and one as diverse as the number of experts who might testify.

The district court then placed significant limitations on Dr. Ofshe's testimony.[115] It permitted him to testify "that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of those techniques"[116] were used in the case of the defendant.

The court, however, prohibited Dr. Ofshe from testifying about whether the interrogation techniques caused the defendant to falsely confess, and prohibited him from testifying about the specifics of the defendant's statement to the police. The court left these matters to the jury.[117] In so doing, the court prevented Ofshe from addressing the credibility of the defendant's confession.

The court also predicated the admission of Ofshe's testimony on a defense admission of evidence of coercive police interrogation tactics and evidence from the accused that he believed his confession was coerced.[118] This foundation seems to be a prudent measure in any case where the accused raises an issue of false confession. Otherwise, the expert could testify about the hearsay statements that the accused made to him and get those statements before the jury without the accused being cross-examined by the prosecution or testifying under oath.

Other courts have wrestled with the issue of "soft" versus "hard" science under *Daubert*, particularly in the area of false confessions. In *United States v. Shay*,[119] the First Circuit Court of Appeals held the district court erred when it excluded the expert testimony of Dr. Robert Phillips, a psychiatrist. The defense proffered that Dr. Phillip's testimony would indicate that the defendant suffered from "pseudologia fantasica,"[120] which might explain his alleged false confession to another prisoner. The trial court reasoned that the jury could determine the credibility of the defendant's statements without the testimony of Dr. Phillips.[121]

The First Circuit did not address the *Daubert* reliability factors, but it determined that evidence concerning the credibility of the defendant's statements could not justify automatic exclusion of Dr. Phillips' testimony under FRE 702.[122] The court remanded the case to the district court for a full evidentiary hearing concerning the admissibility of Dr. Phillips' testimony. In so doing, the court implied that the use of the *Daubert* factors might be appropriate to evaluate the expert testimony.[123] Thus, the only two federal circuit courts to address the issue of false confession expert testimony have used the *Daubert* factors to assess the admissibility of such evidence, albeit in a relaxed fashion. No other federal circuit court has held differently.[124]

State courts have also addressed the admissibility of false confession expert testimony. Maine,[125] New Hampshire,[126] New York,[127] Florida,[128] Illinois,[129] Minnesota,[130] and Wyoming[131] have ruled that such testimony is inadmissible. Indiana,[132] Nebraska,[133] Ohio,[134] North Carolina,[135] Texas,[136] and Washington[137] have ruled that the testimony is admissible. The courts that have admitted this evidence have uniformly placed great limits on the scope of the expert's testimony. Few of these cases conducted a full analysis under *Daubert*, some still relied

114. 119 S. Ct. 1167 (1999).

115. United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997).

116. *Id.* at 1205.

117. *Id*.

118. *Id.* at 1206. This requirement from the court entices the accused to testify on the merits if he wishes to raise the issue of a false confession and get his expert to testify before the jury.

119. 57 F.3d 126 (1st Cir. 1995).

120. A mental condition (often characterized as an extreme form of pathological lying) in which one lies or exaggerates in order to achieve popularity or notoriety. It is often referred to as "Munchaussen's Disease" after Baron Von Munchaussen who wandered the countryside spinning tall tales. AMERICAN PSYCHIATRIC ASSOCIATION, THE DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 471-75 (4th ed. 1994) has classified this condition as a "factitious disorder."

121. *Shay*, 57 F.3d at 130.

122. *Id.* at 133.

123. *Id.* at 132-33.

124. *See* United States v. Raposos, 1998 U.S. Dist. LEXIS 19551 (S.D.N.Y. Dec. 14, 1998) (applying an extensive *Daubert* analysis and permitting an expert on false confessions (a clinical psychologist named Sanford Drob) to testify on everything, including the credibility of the confession).

125. State v. MacDonald, 718 A.2d 195, 197-198 (Me. 1998) (holding that a psychologists' expert testimony as to whether children of alcoholics suffer from a syndrome which may explain why they would falsely confess, the court weighed the *Daubert* factors and found such testimony unreliable).

126. State v. Monroe, 718 A.2d 878 (N.H. 1998) (upholding the trial court's decision to deny funds for an expert witness in the area of false confessions).

127. People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although expert testimony on false confession may be admissible under the *Daubert* factors, New York still follows the *Frye* test for "general acceptance," thus the expert testimony concerning false confessions must be excluded under that test).

on the *Frye* test, and many permitted or excluded the expert testimony upon a simple reading of FRE 702 or FRE 403,[138] without regard to the *Daubert* factors. Thus, state courts remain divided about what reliability test applies to false confession expert testimony and whether or not it is admissible. This exposes one consequence of the *Daubert-Kumho* analysis for the reliability of expert testimony. Different judges using a flexible reliability standard may come to different conclusions as to the admissibility of controversial expert testimony. Admissibility becomes highly judge-dependent as each court is left to its own discretion to ascertain reliability.

Military courts have treated psychological evidence in different ways. Eyewitness identification expert testimony has been subjected to tests under the *Daubert* standards for admissibility,[139] but military courts have admitted expert testimony on rape trauma syndrome simply upon a judge's finding that the testimony is "relevant" and reliable under MRE 702.[140] Expert testimony concerning child sexual abuse accommodation syndrome only needed to be "helpful" to be admitted under MRE 702 in one case.[141] A military court also admitted expert testimony on post-traumatic stress disorder caused by child abuse.[142]

Military appellate courts have addressed false confession expert testimony on at least two occasions. In *United States v. Koslosky*,[143] the Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in excluding expert testimony in the area of false confessions. Four years later, in *United States v. Griffin*,[144] the Court of Appeals for the Armed Forces also addressed the issue of false confession expert testimony.

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128. *See* Bullard v. State, 650 S.2d 631 (Flor. 1995) (upholding the trial court's denial of an expert in police interrogation and coercion to prove the defendant's testimony was coerced); Beltran v. State, 700 S.2d 132 (Flor. 1997) (holding the *Kassin* study was not enough to establish relevance of false confession expert testimony in a trial for sexual battery).

129. People v. Gilliam, 670 N.E.2d 606 (Ill. 1996) (upholding trial court's decision to grant prosecution's motion in limine preventing psychologist from testifying about the defendant's confession, the voluntariness of the confession, or the circumstances under which it was taken). This opinion can also be cited for the limited proposition that the court permitted the expert to testify to some degree.

130. Bixler v. State, 582 N.W.2d 252 (Minn. 1997) (holding the trial court judge did not abuse his discretion in excluding the expert testimony on false confessions).

131. *See* Madrid v. Wyoming, 910 P.2d 1340 (Wyo. 1996) (where the court declined to address the denial of an expert witness in false confessions); Kolb v. Wyoming, 930 P.2d 1238 (Wyo. 1996) (holding the trial court did not abuse its discretion in excluding false confession expert testimony).

132. Cassis v. State, 684 N.E.2d 233 (Ind. App. 1997) (admitting but limiting the testimony of Dr. Ofshe as an expert witness on police interrogation tactics). Interestingly the state did not object to Dr. Ofshe's expertise or methodology, merely to his opinion testimony concerning the confession. *Id.* The trial court sustained the objection, which was affirmed on appeal. *Id.*

133. State v. Buechler, 572 N.W.2d 65 (Neb. 1998) (holding the trial court committed prejudicial error when it excluded expert testimony on false confessions).

134. State v. Wells, (No. 93 CA 9) 1994 Ohio App. LEXIS 4122 (1994), *appeal not allowed by* 673 N.E. 2d 138 (Ohio 1996) (admitting the expert testimony on false confession, the expert was prohibited from commenting on the credibility of the accused or the reliability of the confession).

135. Baldwin v. State, 482 S.E.2d 1, 10-13 (N.C. Ct. App. 1997), *review granted*, 485 S.E.2d 299 (N.C. 1997), *review dismissed*, 492 S.E. 2d 354 (N.C. 1997) (holding the exclusion of a psychiatrist (Dr. Gary Hoover) who opined the defendant would have been susceptible to giving a false confession in response to the police interrogation tactics used against him, was error).

136. Lenormand v. State, (No. 09-97-150 CR) 1998 Tex. App. LEXIS 7612 (Dec. 9, 1998) (admitting expert testimony concerning the defendant's state of mind at the time of the interrogation and his susceptibility to coercion, but prohibiting any discussion of the defendant's guilt or veracity).

137. State v. Miller, (No. 15279-1-III) 1997 Wash. App. LEXIS 960 1997), *review denied by* 953 P.2d 95 (Wash. 1998) (remanding the case for a new trial with the finding that the excluded false confession expert testimony would have been "helpful" to the jury).

138. FED. R. EVID. 403 (excluding evidence when its prejudicial effect substantially outweighs its probative value); MIL. R. EVID. 403 (same).

139. *See* United States v. Brown, 45 M.J. 514, 517 (Army Ct. Crim. App. 1996), *affirmed by* United States v. Brown, 49 M.J. 448 (1998) *and* United States v. Garcia, 40 M.J. 533 (A.F. Ct. Crim. App. 1994).

140. United States v. Houser, 36 M.J. 392, 398-400 (C.M.A. 1993). This case was decided before the Supreme Court decided *Daubert*, but the "relevant and reliable" standard could have been lifted verbatim from *Daubert* even if all four of the factors were not accounted for to determine reliability.

141. United States v. Hansen, 36 M.J. 599, 604 (A.F. Ct. Crim. App. 1992).

142. United States v. Johnson, 35 M.J. 17 (C.M.A. 1992).

143. (No. ACM 30865) 1995 CCA LEXIS 254 (A.F. Ct. Crim. App. 1995).

144. 50 M.J. 278 (1999).

In *Griffin*, the military judge conducted a lengthy pre-trial hearing to determine the merits of expert testimony on false confessions.[145] The defense proffered Dr. Rex Frank as an expert witness on false confessions. Dr. Frank's background included a review of false confession research materials, a battery of psychological tests on the accused, and a six-hour interview with the accused.[146] Despite this background, the military judge found the evidence unreliable.

> I conclude that Dr. Frank knows a lot about the subject, but that this is not a proper subject matter for expert testimony in that this information will be more confusing to the members than helpful to them. The evidence he has does not have the necessary reliability to be of help to the trier of fact. Finally, under MRE 403, I conclude that any probative value of this evidence is substantially outweighed by the danger of confusion of the members and also by consideration of waste of time.[147]

Like many of their civilian counterparts, military courts may use the *Daubert* factors to determine whether expert testimony is reliable. Under *United States v. Houser*,[148] military judges must probe several fields, including: the qualifications of the expert witness, the subject matter of the expert testimony, the basis for the expert testimony, the legal relevancy of the expert testimony, the reliability of the scientific expert testimony, and the probative value of the expert testimony for the court.[149] The court articulated a standard of reliability parallel to the *Daubert* factors, stating that "when determining the reliability of scientific evidence, it is appropriate to determine whether the evidence embraces a new technique or theory and the potential rate of error, as well as the existence of any specialized literature and cases on the subject."[150]

The *Houser* court accounted for all but one of the *Daubert* factors–whether the method or theory has been or can be tested.[151] The *Houser* guidelines worked well before the *Daubert* factors and should perform well in light of the *Kumho Tire Co.* decision, especially since both *Houser* and *Kumho Tire Co.* analyze the reliability issue in the fact-specific context of a particular case.

In *United States v. Griffin*, the Court of Appeals for the Armed Forces used the *Houser* and *Daubert* factors to evaluate the military judge's decision to exclude Dr. Frank's expert testimony.[152] The court focused solely on the reliability of Dr. Frank's testimony in the context of the particular case. The court found that his testimony was unreliable because Dr. Frank could not reliably apply his studies of British prisoners to American military personnel.[153] Also, he could not opine whether the accused's confession was either coerced or false.[154] Even if Dr. Frank could give such an opinion, he would run afoul of the court's prohibition of "human lie detectors"[155] and such testimony would likewise be inadmissible.[156] Finally, the court found that the military judge properly exercised his "gatekeeping" responsibilities and did not abuse his discretion in excluding Dr. Frank's testimony.[157]

Does the court's holding in *Griffin* deter false confession expert testimony in military courts-martial? Perhaps, but the decision did not create a per se exclusion of such evidence, which was done with evidence of polygraph examinations in *United States v. Scheffer.*[158] The court did find that Dr. Frank's testimony might be relevant to the accused's mental state at the time he gave the confession,[159] particularly if the defense could

145. *Id.* at 281.

146. *Id.* at 281-282.

147. *Id.* at 283.

148. 36 M.J. 392 (C.M.A. 1993).

149. *Id.* at 398-400.

150. *Id.* at 399.

151. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2797 (1993).

152. United States v. Griffin, 50 M.J. 278, 283-84 (1999).

153. *Id.* at 285.

154. *Id.* at 284.

155. *See* United States v. Birdsall, 47 M.J. 404 (1998).

156. *Griffin*, 50 M.J. at 284.

157. *Id.* at 285.

158. 118 S. Ct. 1261 (1998).

draw a correlation between the accused's mental state and the possibility of giving a false or coerced confession.[160] The court still found, however, problems with the underlying studies and research into false confessions and determined they were too unreliable to constitute a basis for expert testimony.[161] A case with different facts might be a good candidate to test the admissibility of false confession expert testimony, especially where the accused's mental state is at issue.

The Reliability of the Psychology of False Confessions under *Daubert* and *Kumho*

The trend in many state courts and all federal appellate courts is to treat expert testimony concerning the psychology of false confessions as "scientific." This distinction may be irrelevant under the *Kumho Tire Co.* decision. Still, two questions remain. Is the psychology of false confessions reliable enough to support the admission of expert testimony on the subject? If so, should courts admit such evidence and with what restrictions? While a complete analysis is not possible without a real case, objectively applying the *Daubert* factors to false confession expert testimony can be done by looking at the available material. Although experts may debate whether all four *Daubert* factors apply to this field, an analysis can still be done.

The Publishing and Peer Review Factor

Daubert's requirement that a theory must be subjected to peer review and publishing seems well founded for the false confession proponents. Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe have collectively penned almost a dozen works on the issue of false confessions.[162] While the field is not as well developed as other areas, such as rape trauma syndrome or eyewitness identification expert testimony,[163] the proponents have clearly placed the theory and methodology before their peers, as evidenced by the criticism of Professor Cassell. The science of false confessions appears to meet the publishing and peer review threshold.

Known or Potential Rate of Error

As the remarks of Professors Cassell, Leo, and Ofshe indicate, the "science" of false confessions has yet to produce a frequency or quantity of false confessions. Thus, experts cannot calculate a known or even a potential rate of error. While psychology and social psychology cannot predict human behavior to a mathematical certainty, it should be able to determine whether the data contains flaws or is so incomplete as to cast doubt on the reliability of the hypothesis being advanced by the false confession theory proponents.

The Kassin experiment could easily give an error rate, but the anecdotal and sometimes subjective evidence collected by the other researchers in this field does not avail itself to such analytical methods. Indeed, substantial questions have been raised about some of the sixty alleged "false confessions" in the studies of Leo and Ofshe. Cassell examined nine of the twenty-nine persons convicted with an alleged "false confession."[164] He claims that significant, if not substantial evidence, pointed to the guilt of those nine accused despite their allegations of a false confession.[165] The failure to give even a "ballpark figure" for a rate of error does not help this fledgling theory or its proponents prove the theory reliable under *Daubert*.

The Testing Factor

The lack of empirical data in the testing field presents another obstacle to assessing the reliability of the theory of false confessions. The Kassin experiment demonstrated that the false confession phenomenon existed, and could be replicated in a controlled environment. But Kassin's is the sole experiment in this field and even he questions whether the experiment

159. United States v. Griffin, 50 M.J. 278 (1999).

160. *Id.* at 22-23. Dr. Saul Kassin believes minority or mental disease/impairment may account for as much as 90% of all false confessions. Kassin Interview, *supra* note 25.

161. *Id.* at 22. It is unclear just what studies or research Dr. Frank based his opinions. Perhaps the court would have ruled differently if someone of Dr. Saul Kassin's or Dr. Richard Ofshe's experience had been the proffered expert. The reference to a study of British prisoners seems to imply Dr. Frank relied on the work of Dr. Gisli Gudjonsson.

162. *See* GUDJONSSON, *supra* note 10; *The Decision to Confess Falsely*, *supra* note 16, at 979; *The Consequences of False Confessions*, *supra* note 16, at 429; Kassin & Kiechel, *supra* note 16, at 125; KASSIN & WRIGHTSMAN, *supra* note 13; Kassin, *supra* note 24, at 221; Kassin & Kiechel, *supra* note 17, at 227; *The Social Psychology of Police Interrogation*, *supra* note 16, at 189; Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DEN. U. L. REV. 1135 (1997); Leo & Ofshe, *supra* note 56, at 557.

163. Kassin Interview, *supra* note 25.

164. Cassell, *supra* note 58, at 523.

165. *Id.* at 524-26. Cassell does not focus on all 60 cased cited by Leo and Ofshe because only 29 resulted in wrongful convictions. The other 31 cases demonstrate the system works at ferreting out false confessions by dismissal or acquittal.

and the anecdotal evidence alone are enough to clear the *Daubert* threshold for reliability.[166]

Cassell, Leo, and Ofshe disagree about whether a random study of criminal cases could adequately study the false confession phenomenon. Any random study, imperfect though it may be, is better than no study at all. The lack of empirical research in this area leaves courts with little guidance. If false confessions do "occur regularly" as Leo and Ofshe propound, then even the most elementary random study, conducted properly, should reveal the nature and frequency of false confessions. "Another reason for ensuring that psychiatric testimony is subjected to adversarial testing is to prod the research community to perform better."[167] The lack of such testing handicaps the reliability of the false confession theory.

General Acceptance

Ironically, much of the theory of false confessions passes the "general acceptance" part of *Daubert* and possibly the *Frye* test too. No scholar on the subject debates whether false confessions exist. The classification systems of Kassin and Wrightsman, while modified by others, remains largely intact after thirteen years of scrutiny. By "reverse engineering" dozens of cases of alleged false confessions, theorists have a good idea about the cause of false confessions, but not the frequency.[168] Nevertheless, the frequency of false confessions remains a hot topic–and for good reason. It correlates to the fundamental issue of whether false confessions occur so regularly they can be readily identified and understood (even prevented) or whether they are a rare anomaly of the criminal justice system and human nature, incapable of being explained by experts. Furthermore, many of the tactics which the theorists claim create false confessions are largely successful at obtaining true confessions as well.

One cannot ignore the *Frye* test either. In California, the trial court admitted Professor Eliot Aronson's historic first-time testimony as an expert on the psychology of false confessions under the "general acceptance" constraints of the *Frye* test.[169] This occurred before the research of Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe existed to demonstrate "general acceptance." New York never abandoned the *Frye* test.[170]

Other Tests for Reliability

The last question about the psychology of false confessions concerns how else a court can effectively probe the reliability of the expert's theory. No clear method exists yet. One commentator suggests that experts be required to use the "same intellectual rigor"[171] to establish the reliability of their non-scientific evidence as they would to prove their point to their peers.[172] Other possibilities include extending *Daubert* to the "soft" sciences of human behavior in a more relaxed manner, as the court did in *United States v. Hall*.[173] Although one must ask why the distinction is drawn between scientific and non-scientific evidence if they would be evaluated by the same standard under *Kumho Tire Co.*

A potential amendment to FRE 702 looms as a possibility,[174] but the proposed amendment would not define reliability or establish the factors, which would govern reliability. Another solution might be an "epistemological" view of determining how the expert knows what he knows and the reliability of his gathering of observations.[175] The Ninth Circuit Court of Appeals identified just such a standard, applicable to all experts, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[176]

None of these standards, however, has achieved preeminence. This flexibility may be warranted for the district courts

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166. Kassin, *supra* note 24, at 231.

> The topic of confession evidence has been largely overlooked by the scientific community. As a result of this neglect, the current empirical foundation may be too meager to support recommendations for reform or qualify as a subject of "scientific knowledge" according to the criteria recently articulated by the U.S. Supreme Court (*Daubert v. Merrell Dow Pharmaceuticals Inc.*). To provide better guidance in these regards, further research is sorely needed.

Id. Professor Kassin believes, however, that the "other specialized knowledge" threshold can be met by the experts in this field and he has been certified as an expert on the false confession phenomenon in various criminal trials using the "other specialized knowledge" moniker. Kassin Interview, *supra* note 25.

167. Slobogin, *supra* note 65, at 51-52.

168. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.–C.L. L. REV. 105, 131 (1997).

169. People v. Page, 2 Cal. Rptr. 2d 898 (1991), *rehearing denied* 1992 Cal. App. LEXIS 76 (1992), *review denied*, 1992 Cal. LEXIS 1516 (1992).

170. People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although expert testimony on false confession may be admissible under the *Daubert* factors, New York still follows the *Frye* test for "general acceptance," thus the expert testimony concerning false confessions must be excluded under that test).

171. *See* Brown v. Lorillard Inc., 84 F.3d 230, 234 (7th Cir. 1996).

172. J. Brook Lathram, *The "Same Intellectual Rigor" Test Provides an Effective Method for Determining The Reliability of All Expert Testimony, Without Regard To Whether The Testimony Comprises "Scientific Knowledge" or "Technical or Other Specialized Knowledge,"* 28 U. MEM. L. REV. 1053, 1068-1070 (1998).

173. 974 F. Supp. 1198 (C.D. Ill. 1997).

and would maintain the *Daubert-Kumho* tradition of simply admitting all expert testimony that is relevant and reliable under FRE 702. Courts have long determined relevancy without much guidance or interference from the appellate courts. Determining the reliability of expert testimony should prove no more difficult. While this is an imperfect method, it would be unrealistic to assume the appellate courts can adequately address the reliability factors for every instance of expert testimony in the myriad of cases encountered nationwide. The categories are simply too broad and the number of cases too diverse. But the analysis does not stop there. Applying a balancing test under FRE 403[177] may find that the relevance of false confession expert testimony is substantially outweighed by danger of unfair prejudice, and hence excluded it, as the court did in *United States v. Griffin*.[178] In the end, the trial courts must decide for themselves what is relevant and reliable under FRE 702.

The Form of Expert Testimony

Some courts have admitted expert testimony on false confessions, but almost always with limitations. Even in the historic first testimony by Professor Aronson over a decade ago, the court prohibited him from commenting on the interrogation of the accused or opining about the reliability of the defendant's confession.[179] Dr. Ofshe faced even greater restrictions when he was finally allowed to testify in the *Hall* case. The judge prohibited him from discussing the post-admission narrative statement.[180] An Ohio appellate court upheld identical limitations placed on the expert witness in *State v. Wells*.[181] These courts address the concern that others have cited in excluding expert witness testimony on false confessions: that the expert would, in effect, become a "human lie detector." Civilian[182] and military[183] courts draw a clear line against such opinion testimony from experts.[184]

An expert witness who gives an opinion as to the veracity of another witness engages in speculation. Such testimony cannot be helpful to the factfinder and should be excluded. While the testimony of experts about the effect of police interrogation tactics and the psychology behind them may prove helpful to a jury, a blank opinion on the veracity of the accused does not. Likewise, anecdotal evidence of other instances of false confessions is not relevant and should be excluded. Finally, the use of the post-admission narrative statement by the expert in court is disturbing. Examining the post-admission narrative statement for veracity or corroboration is a function for the jury. This is not unusual. Indeed, military courts prohibit experts with polygraph machines from coming into the courtroom and usurping the panel's[185] role to weigh the evidence and testimony before it.[186]

Another problem is the split between state and federal courts on the admissibility of false confession expert testimony itself. For instance, a federal court located in New York with criminal

174. The proposed text of the amendment reads: "If scientific or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Proposed amendment underlined) COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMNARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE (August 1998) (on file with the Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

175. *See* Imwinkelried, *supra* note 113, at 2271.

176. 43 F.3d 1311, 1317 (9th Cir. 1995). This case is commonly referred to as "*Daubert II*."

177. FED. R. EVID. 403.

178. 50 M.J. 278, 283 (1999).

179. People v. Page, 2 Cal. Rptr. 898 (Cal. App. 1st Dist. 1991), *rehearing denied*, 1992 Cal. App. LEXIS 76 (Cal App. 1st Dist. 1992), *review denied*, 1992 Cal. LEXIS 1516 (Cal. 1992).

180. United States v. Hall, 974 F. Supp. 1198, 1205 (C. D. Ill. 1997).

181. (No. 93 CA) 1994 Ohio App. LEXIS 4122 1994), *appeal not allowed by* 673 N.E. 2d 138 (Ohio 1996).

182. *See* United v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996).

183. *See* United States v. Birdsall, 47 M.J. 404, 406 (1998). *See also* United States v. Petersen, 24 M.J. 283, 284-285 (1985); United States v. Partyka, 30 M.J. 242, 247 (1990).

184. *See* United States v. Scheffer, 118 S. Ct. 1261, 1267 (1998) (upholding the exclusion of a polygraph expert under MRE 707, which expressly forbids such evidence in military courts-martial citing "the jury's role in credibility determinations").

185. Military courts-martial refer to the jury as a "panel."

186. Testimony concerning the taking of, refusal to take, or results of a polygraph test are inadmissible in military courts-martial pursuant to MRE 707. There is *no* federal counterpart to MRE 707.

jurisdiction over a defendant will probably permit the use of expert testimony to buttress a claim of false confession.[187] The same defendant would be unable to present such evidence in the New York state court.[188] This is one of the drawbacks of the *Daubert-Joiner-Kumbo Tire Co.* decisions.

While the *Frye* test may have been less permissive in admitting evidence, it at least had the benefit of being consistent by requiring "general acceptance" as a prerequisite to the admission of scientific evidence. Some jurisdictions continue to follow the *Frye* test and others may find one or all of the *Daubert* factors inapplicable. The days of consistency, however, are gone. The *Daubert* analysis has already led to a split of opinion on the admissibility of expert testimony in state courts. That trend will likely continue after the *Kumho Tire Co.* decision.

Conclusion

The unusual nature of the social sciences like psychology and social psychology may require a somewhat lower standard of scrutiny than the "hard" sciences like physics or chemistry, but *Daubert* remains a valid guideline for most scientific evidence, both hard and soft. For too long the behavioral sciences and the criminal justice system have neglected the phenomenon of false confessions. Professors Gudjonsson, Kassin, Wrightsman, Leo, and Ofshe, have opened a door on a new and little understood aspect of the interrogation process. This is not "voodoo science" but it is not yet ready for "prime time" either.

The false confession theory needs further study and refinement. Consequently, the admission of expert testimony based on this new theory is premature and therefore unreliable. Currently, the empirical base that supports the theory has too many unanswered questions, no known error rate, and just one laboratory experiment to back it up. This foundation cannot support reliable conclusions just yet. Cassell's proposal to conduct a random survey of confessions could help to alleviate this problem. Nevertheless, the proponents of the theory seem to spend more time defending themselves from Cassell's critiques than finding ways to conduct additional studies that are both empirically accurate and ethically acceptable.

Gudjonsson, Leo, and Ofshe present haunting tales that clearly establish the *existence* of false confessions. While every case of wrongful conviction from a false confession is a travesty of justice, these cases cannot be viewed in the abstract. Many of the tactics used by police that create false confessions typically result in true confessions as well. The search for corroborating evidence that fits with the post-admission narrative statement may be one "acid test" for the reliability of a confession, but it appears to be fact-finding, not scientific analysis. A lack of corroborating evidence may also be a sign of a weak case or a lack of evidence, but it does not necessarily mean the confession was false. To encourage further study in this area, courts should exercise their discretion as the "gatekeepers" of expert testimony and find the psychology of false confessions unreliable at this time.

Still, the admissibility of expert testimony based on the psychology of false confessions cannot be ruled out. Two federal appellate courts have found this testimony admissible and the state courts are split on the issue of the reliability of this theory. In light of the *Kumho Tire Co.* case, no trial court judge should fear the appellate courts on the reliability issue. Almost every trial judge who found this evidence reliable or unreliable has been upheld on appeal. Few have been found to abuse their discretion.[189] However, if courts-martial choose to admit such evidence, they should take measures to restrict the nature and scope of the expert's testimony, keeping in mind that the panel members, not the expert, determine the veracity of a confession once it is admitted.

The highest court in the armed forces recently decided the complex question of expert testimony on the issue of false confessions in the case of *United States v. Griffin.*[190] The Court of Appeals for the Armed Forces ruled the military judge did not abuse his discretion by excluding expert testimony on the psychology of false confessions.[191] This decision follows the reasoning of the Supreme Court's *Kumho Tire Co*. decision. However this does not mean trial courts should abandon their role as the "gatekeepers" of expert testimony in this area and blindly exclude or admit such evidence. To the contrary, the *Kumho Tire Co.* decision tasks the trial courts to be more vigilant about the evidence they admit. Military and civilian courts alike should weigh the reliability of the false confession theory for themselves and exercise their own discretion whether to admit such expert testimony irrespective of the decisions of other courts.

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187. *See* United States v. Raposos, (98 Cr 185 (DAB)) 1998 U.S. Dist. LEXIS 19551 (S.D.N.Y. 1998) (applying an extensive *Daubert* analysis and permitting an expert on false confessions a clinical psychologist named Sanford Drob, to testify on everything, including the credibility of the confession).

188. People v. Gilliam, 670 N.E. 2d 606 (Ill. 1996); People v. Green, 250 A.D.2d 143 (N.Y. App. Div. 1998) (ruling that although expert testimony on false confession may be admissible under the *Daubert* factors, New York still follows the *Frye* test for "general acceptance," thus the testimony under that test must be excluded).

189. The case of *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), and other cases were overturned not because the judge declined to admit the expert testimony on false confessions, but because they did not conduct an evidentiary hearing or find the factors of reliability as required by FRE 702.

190. 50 M.J. 278 (1999).

191. *Id.* at 285.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Reserve Component Note

Professional Liability Protection for Attorneys Ordered to Active Duty

Section 592 of the Soldiers' and Sailors' Civil Relief Act (SSCRA)[1] provides professional liability protection for certain persons ordered to active duty (other than for training). Specifically, it allows for suspension and subsequent reinstatement of existing professional liability insurance coverage for designated professionals serving on active duty.

The Secretary of Defense recently designated legal services provided by civilian lawyers as professional services under Section 592 for purposes of the Kosovo operation. Therefore, reserve component (RC) judge advocates (JAs) called to active duty under 10 U.S.C. § 12301(d) or § 12304 in support of the Kosovo operation, who provide professional legal services in their civilian occupation, shall be afforded professional liability insurance protection on the same basis as health care providers under 50 U.S.C. app 592.[2] Consequently, RC JAs called to active duty in support of the Kosovo operation *may* request their professional liability insurance carrier suspend the premiums owed on the policy.

Reserve component JAs will recognize that this protection does not create immunity. Indeed, attorneys inclined to take advantage of the premium waiver provision should proceed very cautiously and review their insurance policy. Many policies contain provisions that suggest that if the coverage were suspended during a period of active duty, the claim would not be covered although it might have occurred during a period when the coverage was in effect. The result–the RC JA would be without liability protection if he did not keep the policy in force during the entire period of active duty. Moreover, the exact meaning of "*failure to take any action in a professional capacity*"[3] is unclear.

In the health professional context, Section 592 provides in part:

> A professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a person that occurs during a period of suspension of that person's professional liability insurance under this subsection. *For the purposes of the preceding sentence, a claim based upon the failure of a professional to make adequate provision for patients to be cared for during the period of the professional's active duty service shall be considered to be based on an action or failure to take action before the beginning of the period of suspension of professional liability insurance under this subsection,* except in a case in which professional services were provided after the date of the beginning of such period.[4]

Any RC JA taking advantage of the premium waiver should notify clients, arrange for other counsel, and/or take other prudent actions to ensure that clients' matters are properly handled during the RC JA's unavailability. Reserve component JAs must recognize that they remain potentially liable even with these efforts, particularly when the "failure to act" as applied to legal professionals is undefined in the SSCRA. Accordingly, RC JAs may do better for themselves financially by negotiating reduced malpractice protection coverage or limiting coverage to the failure to act protection.

Sole practitioners may find the outline on JAGCNet, Legal Assistance database useful if deploying.[5] The SSCRA, Section 592, is also on JAGCNet.[6]

Army Regulation 27-1[7] requires RC JAs ordered to active duty for more than thirty days to obtain prior written approval from The Judge Advocate General before engaging in the private practice of law.[8] The Office of Secretary of Defense documents announcing the Secretary's determination are also on

1. 50 U.S.C.A. §§ 501-593 (West 1999).

2. Under Section 592, a professional liability insurance carrier shall not be liable with respect to any claim that is based on professional conduct (including any failure to take any action in a professional capacity) of a person that occurs during a period of suspension of that person's professional liability insurance.

3. 50 U.S.C.A. § 592(b)(3).

4. *Id.* § 592(b)(3) (emphasis added).

5. *See JAGCNet* (last modified July 19, 1999) <http://www.jagcnet.army.mil/JAGCNET/LALAW1.nsf/> (key word: Law Practice).

6. *Id.* (keyword: SSCRA).

7. U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES, para. 4-3c (3 Feb. 1995) [hereinafter AR 27-1].

JAGCNet.[9] Colonel Hancock, Lieutenant Colonel Conrad, and Major Jones.

Professional Responsibility Note-Legal Assistance

E-mail and Confidential Information

For the reasons discussed below, judge advocates who form individual attorney client relationships (that is, legal assistance and trial defense attorneys) as a matter of practice may want to obtain their client's consent to the use of e-mail as a communication medium at the beginning of the attorney client relationship.

E-mail is quickly becoming a standard method of communication. More and more lawyers use e-mail as a means of communicating with other lawyers and clients. While judge advocates should use technological advances, they should consider the obligation to maintain client confidentiality when making the decision whether to use e-mail to convey client information. Initially, some jurisdictions severely restricted an attorney's use of e-mail to convey client confidential information.[10] Lately, the restrictions have lessened.[11] Nonetheless, attorneys must weigh the use of e-mail, or any means of communication, against the interest in maintaining client confidentiality.

To determine one's duty regarding client confidentiality and the use of e-mail, one should use the following analyses. First, is the information to be conveyed "confidential" within the meaning of Rule 1.6?[12] Second, if the information is confidential, what is the attorney's duty to maintain the confidentiality of the information; that is, to what lengths must the attorney go to ensure the information is not improperly disclosed? Third, given that duty, may the attorney convey the information using e-mail?

Army Rule of Professional Responsibility 1.6 states:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).
>
> (b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.
>
> (c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
>
> (d) An Army lawyer may reveal such information when required or authorized to do so by law.

The first step is determining what information is confidential. Interestingly, Rule 1.6 does not use the term "confidential." The rule uses the phrase "shall not reveal." Thus, confidential client information is information that the lawyer must not reveal or disclose, except as permitted by the rule. The rule does not specifically define information as "confidential" or "non-confidential." Rather, the rule begins with the premise that no "information relating to the representation of a client shall be revealed." Thus, all information relating to the representation is confidential information.[13]

All client information is confidential information, however, it need not all remain confidential. The rule carves out one category of client information that must be revealed and four cat-

8. Requests should be submitted to Office of The Judge Advocate General, Chief, Personnel, Plans, and Training Office, 1777 North Kent Street, Suite 10100, Rosslyn, Va. 22209-2194.

9. *See JAGCNet*, *supra* note 5 (keyword: Kosovo).

10. *See* Tenn. Bd. of Prof. Resp. Advisory Op. 98-A-650 (1998) [hereinafter Tenn. Op. 98-A-650] (requiring encryption or client consent); Iowa Bar Ass'n Op. 96-01 (1996) [hereinafter Iowa Op. 96-01](requiring encryption); Pa. Bar Ass'n Comm. on Legal Ethics Op. 97-130 (1997) (requiring client consent); Ariz. St. Bar Advisory Op. 97-04 (1997); N.C. St. Bar Op. 215 (1995) (cautioning against using e-mail).

11. *See* ABA Comm. on Ethics and Prof. Resp. Op. 99-413 (1999); Alaska Bar Ass'n Op. 98-2 (1998); D.C. Bar Op. 281 (1998) (individual circumstances may require heightened security or use of other form of communication); Iowa Bar Ass'n Op. 97-01 (1997) (encryption not required but client consent is); Ky. Bar Ass'n Ethics Comm. Advisory Op. E-403 (1998); N.D. St. Bar Ass'n Ethics Comm. Op. 97-09 (1997); S.D. St. Bar Ethics Op. 97-08 (1997); Tenn. Bd. of Prof. Resp. Advisory Op. 98-A-650(a) (1998).

12. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.6 (1 May 1992) [hereinafter AR 27-26].

egories that may be revealed.[14] First, a lawyer must reveal information to prevent the client from committing certain criminal acts.[15] Second, a lawyer may reveal information that the client specifically permits the lawyer to disclose. Third, a lawyer may disclose information he believes that he should reveal to advance the representation of the client, unless specifically prohibited by the client. Fourth, a lawyer may reveal client information to defend himself in transactions arising out of the representation. Fifth, a lawyer may reveal information as required or authorized by law. If the information fits into one of these categories, the method of communicating the information does not matter.

The next issue is what must a lawyer do to prevent unauthorized disclosure. Reasonableness, as in so many things, is the watchword. A lawyer has a duty to take reasonable steps to protect client information.[16] Closely linked to this concept is the evidentiary concept of a reasonable expectation of privacy. A lawyer may use a means of communication in which he has a reasonable expectation of privacy.[17]

A lawyer's reasonable expectation of privacy is inextricably linked to our common experiences of privacy in older forms of communication and our understanding of how each works.[18] Some of the earlier opinions that limited the use of e-mail were based on an incomplete understanding of e-mail and the perception that (1) e-mail is easier to intercept than other means of communication and (2) those who are in a position to intercept e-mail are more likely to do so than those who are in a position to intercept other forms of communication.[19]

More recent opinions reflect a better understanding of the mechanics of e-mail and the realization that those with access to others' e-mail are under the same legal constraints as those with access to others' telephone conversations, facsimile transmissions, and mail.[20] Some states permit virtually uninhibited use of e-mail to convey confidential information finding that persons do have a reasonable expectation of privacy in e-mail.[21] Others states require consent from a client or require that the lawyer balance the sensitivity of the information with the risk of disclosure inherent in the form of communication.[22]

Missing from all of the opinions on the topic thus far is the unique setting of government e-mail systems. Early opinions were that systems operators and others had unlimited access to e-mail, and these operators could and would intercept e-mail at will. Research, consideration, and changes in statutes, have brought most commentators to the point of view that systems operators and others do not have unfettered access to a person's e-mail. Systems operators have access to e-mail for particular reasons under statute, but their access to e-mail is no more than that which telephone operators or couriers have to those forms of communication. Unfortunately, government e-mail systems administrators do not operate under the same rules and e-mail users probably do not have the same level of expectation of privacy.

By using government e-mail, users consent to its monitoring.[23] Having consented to its monitoring, a user likely has a reduced expectation of privacy. Granted, the sheer volume of e-mail makes it unlikely that a systems operator will pick-out

13. *Id.* ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). *See also* ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.1 ("'[C]onfidential client information' denotes 'information relating to the representation of a client' . . . .")

14. The ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) has proposed substantial changes to Model Rule 1.6 that would expand the situations in which a lawyer may reveal otherwise confidential information. Model Rule of Prof. Conduct 1.6 (ABA Ethics 2000 Proposed Draft Changes, Mar. 23, 1999) *available at* <http://www.abanet.org/cpr/e2k/draftrules.html)>. The rule, if amended, would permit lawyers to reveal information "to prevent reasonably certain death or substantial bodily harm" without regard to criminal activity. The committee suggested allowing lawyers to reveal information to prevent "a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services" or to rectify such injury. Lastly, the committee recommended adding an exception to state the current practice of allowing a lawyer to discuss confidential information to obtain guidance on ethical issues.

15. The mandatory nature of this exception is often in conflict with State rules. For example, ABA Model Rule of Prof. Conduct 1.6(b)(1) states that a lawyer "may" reveal information to prevent certain crimes.

16. *See* ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.4.

17. *Id.* n.6.

18. *See id.* (providing a concise discussion of these issues).

19. *See* Iowa Bar Ass'n Op. 97-01 (1997); Tenn. Bd. of Prof. Resp. Advisory Op. 98-A-650(a) (1998).

20. *See* ABA Comm. on Ethics and Prof. Resp. Op. 99-413.

21. *See* United States v. Maxwell, 42 M.J. 568, 576 (A.F. Ct. App.), *aff'd in part and rev'd in part*, 45 M.J. 406 (1996) (one has a reasonable expectation of privacy in e-mail through an on-line service provider) (cited in ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.18).

22. ABA Comm. on Ethics and Prof. Resp. Op. 99-413, at n.40.

23. Joint Ethics Regulation 2-301a(3), (4).

the one piece of e-mail that you wish to remain confidential, yet the risk exists.

Although judge advocates are not regulated on use of e-mail with client information, the best advice for judge advocates is to follow the caution in a New York ethics opinion:

> [L]awyers must always act reasonably in choosing to use e-mail for confidential communications, as with any other means of communication. Thus, in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinary sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyers control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail. . . . It is also sensible for lawyers to discuss with clients the risks inherent in the use of Internet e-mail and lawyers should abide by the clients wishes as to its use."[24]

Major Nell, USAR.

Contract and Fiscal Law Note

The Supreme Court "Outfoxes" the Ninth Circuit

The United States Supreme Court rarely grants certiorari in a government contract case. Yet, in *Department of the Army v. Blue Fox, Inc.*,[25] the Court granted certiorari in a government contract case to determine whether the Administrative Procedures Act (APA)[26] waives the government's sovereign immunity from suits to enforce equitable liens.[27] In a unanimous decision, the Court reversed a Ninth Circuit decision that improperly held that the APA compelled it to allow an unpaid subcontractor to sue the United States Army to enforce an equitable lien.[28] In so doing, the Court reinforced the "long settled rule" that a waiver of sovereign immunity must be "unequivocally expressed" and strictly construed.[29]

Background

The facts of the case are very straightforward.[30] The Army awarded a contract to the United States Small Business Administration (SBA) in September 1993, to install and to test a telephone switching system at the Army Depot in Umatilla, Oregon. The SBA then subcontracted with Verdan Technology, Inc. (Verdan), pursuant to Section 8(a) of the Small Business Act.[31]

Among other things, the contract required Verdan to construct a facility to house the telephone switching system. However, Verdan chose not to perform this work itself. Instead, Verdan chose to subcontract this work to Blue Fox, Inc., at a cost of $186,347.80.[32]

Blue Fox did not know until after it had completed the subcontract that Verdan's contract did not require it to furnish a payment bond. The Miller Act normally requires a contractor to provide such a bond for construction contracts,[33] but the

24. N.Y. St. Bar Ass'n Comm. on Prof. Ethics Op. 709 (1998).

25. 118 S. Ct. 2365 (1998).

26. 5 U.S.C.A. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (West 1999).

27. An equitable lien is "[a] right, not existing at law, to have specific property applied in whole or in part to payment of a particular debt or class of debts." A court of equity can declare such a lien "out of general considerations of right and justice as applied to relations of the parties and circumstances of their dealings." Black's Law Dictionary 539 (6th ed. 1990).

28. Department of the Army v. Blue Fox, Inc., 119 S. Ct. 687 (1999).

29. *Id.* at 688.

30. *See generally* Blue Fox, Inc. v. United States Small Bus. Admin., 121 F.3d 1357 (9th Cir. 1997) (reversing Blue Fox, Inc. v. United States Small Bus. Admin., 1996 U.S. Dist. LEXIS 8264 (D. Or. May 24, 1996)).

31. 15 U.S.C.A. § 637(a) (West 1998). This provision and its implementing regulations establish a business development program for small disadvantaged firms. The underlying purpose of the "8(a)" program is to assist small businesses owned and controlled by socially and economically disadvantaged individuals. 13 C.F.R. § 124.1(a) (1998).

32. *Blue Fox*, 121 F.3d at 1359-60.

Army had decided to treat Verdan's contract as a service contract. Consequently, the Army had amended the original solicitation and deleted the bond requirements.[34]

Verdan subsequently failed to pay Blue Fox $46,586.14 of the $186,374.80 subcontract price. In response, Blue Fox twice notified the Army and the SBA, in writing, that it had not been paid–once on 26 May 1994, and once on 15 June 1994. The Army nevertheless disbursed an additional $86,132.33 to Verdan between 5 July 1994, and 11 October 1994. Then, on 3 January 1995, the Army terminated Verdan's contract for default because of Verdan's failure to complete the contract on time and Verdan's failure to submit required data items.[35]

Less than two weeks later, Blue Fox obtained a default judgment against Verdan and its officers in the Tribal Court of the Yakima Indian Nation. Unfortunately, Verdan and its officers were essentially "judgment proof"[36] since Verdan was insolvent and the judgment exceeded its officers' net worth. As a result, Blue Fox was not able to collect on the judgment.[37]

Next, Blue Fox sued the Army and the SBA in the United States District Court for the District of Oregon. Blue Fox sought to obtain an equitable lien against any funds that the Army or the SBA had retained or any funds available or appropriated to complete the telephone switching system at the Umatilla Army Depot.[38]

Lower Court Decisions

The United States District Court for the District of Oregon—The parties filed motions for summary judgment, and the district court granted the government's motions.[39] With respect to Blue Fox's claim against the Army, the district court concluded that it lacked jurisdiction because neither 28 U.S.C. § 1331,[40] nor the APA[41] constituted a waiver of sovereign immunity given the facts of the case.[42] According to the district court, the issue was whether the Miller Act gave Blue Fox a right to recoup the money that Verdan owed to Blue Fox from the Army. The district court concluded that it did not.[43] The district court held that the Miller Act neither placed a duty on the government to ensure that Verdan furnished the required payment and performance bonds, nor established privity of contract between the Army and Blue Fox.[44] Therefore, the APA waiver of sovereign immunity did not apply to Blue Fox's suit against the Army.[45]

33. 40 U.S.C.A. §§ 270a-270f (West 1998). The Miller Act currently requires a contractor to provide performance and payment bonds for construction contracts over $100,000. 40 U.S.C.A. §§ 270a, 270d-1. However, the threshold before 1994 was $25,000. *See* Federal Acquisition Streamlining Act, Pub. L. No. 103-355, § 4104, 108 Stat. 3243, 3341-42 (1994) (striking the phrase "exceeding $25,000 in amount" from 40 U.S.C. § 270a and adding 40 U.S.C. § 270d-1).

34. *Blue Fox*, 121 F.3d at 1359.

35. *Id.* at 1360. Even though the Army terminated Verdan for reasons unrelated to Verdan's failure to pay Blue Fox, the contracting officer specifically noted in the termination notice that one of the Army's "most severe items of concern" was Verdan's failure to pay Blue Fox. *Id.*

36. The term "judgment proof" is "descriptive of all persons against whom judgments for money recoveries have no effect, for example, persons who are insolvent, who do not have sufficient property within the jurisdiction of the court to satisfy the judgment, or who are protected by statutes which exempt wages or property from execution." BLACK'S LAW DICTIONARY 845 (6th ed. 1990).

37. *Blue Fox*, 121 F.3d at 1360.

38. Blue Fox, Inc. v. United States Small Bus. Admin., 1996 U.S. Dist. LEXIS 8264, at *2 (D. Or. May 24, 1996). After the Army terminated Verdan's contract for default, the Army arranged to complete Verdan's contract by modifying an existing services contract with Dynamic Concepts, Inc. The Army partially funded this modification with the undisbursed balance of Verdan's contract (i.e., $84,910.52). *Id.*

39. *Id.* at *5. In addition to granting the Army's motion for summary judgment, the district court granted the SBA's motion for summary judgment because the SBA did not have any identifiable property in its possession and control to which an equitable lien could attach. *Id.*

40. This code section provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West 1998).

41. Section 702 of the APA provides that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee therefore acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C.A. § 702 (West 1998) (emphasis added).

42. *Blue Fox*, 1996 U.S. Dist. LEXIS 8264, at *3-*5.

43. *Id.* at *4.

44. *Id.*

The United States Court of Appeals for the Ninth Circuit—A divided Ninth Circuit reversed based on a three-tiered analysis.[46] First, the court concluded that the APA waiver of sovereign immunity applied to both statutory and non-statutory requests for specific relief.[47] Therefore, the Ninth Circuit held that the district court erred in assuming that the APA waiver of sovereign immunity did not apply to Blue Fox's suit against the Army simply because the Miller Act did not give Blue Fox a right to the specific requested relief.[48]

Next, the Ninth Circuit concluded that an equitable lien claim is a "non-damages" claim analogous to a surety's equitable right to subrogation.[49] Relying on *Henningsen v. United States Fidelity & Guaranty Co*.[50] and its progeny,[51] the court found that a subcontractor could have an equitable right against the government under certain circumstances.[52] For example, a subcontractor could have an equitable right against the government where: (1) the prime contractor did not pay the subcontractor; (2) the government knew that the prime contractor had not paid the subcontractor; and (3) the government failed to either pay the subcontractor directly, or withhold payments from the prime contractor.[53] As a result, the Ninth Circuit held that "[s]ince the APA waives immunity for equitable actions, the district court had jurisdiction under the APA."[54]

Finally, the Ninth Circuit held that Blue Fox's equitable lien attached to the undisbursed contract funds as soon as Blue Fox notified the Army that it had not been paid.[55] According to court, the fact that the Army subsequently paid those funds to Verdan was irrelevant since "[t]he Army cannot escape Blue Fox's equitable lien by wrongly paying out funds to [Verdan] when it had notice of Blue Fox's unpaid claims."[56]

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45. *Id.* at *5. In his 1997 article, Major Risch succinctly captured the essence of the district court's analysis:

> The district court initially looked to Bowen v. Massachusetts and the analysis employed by the United States Supreme Court when determining if a suit seeks money damages and is thus barred. In Bowen, the Court held if the damages sought were compensation for a suffered loss, the suit sought money damages. Conversely, if the suit was simply a claim for "the very thing to which the plaintiff was entitled," the suit sought specific relief, not money damages, and sovereign immunity was waived under the APA. Accordingly, the district court's analysis focused on whether Blue Fox was entitled to the unpaid contract funds under the Miller Act.
>
> Upon review of the Miller Act's requirements, the district court determined that Blue Fox was not entitled to reimbursement from the Army for Verdan's failure to pay the subcontractor. The court found that the act "neither places a duty on the government to insure that a bond is furnished, nor places the government and the subcontractor in privity of contract." Since the court interpreted the act as imposing no statutory or contractual obligation on the Army to pay the subcontractor, it held that Blue Fox could not seek specific relief under the act and that Blue Fox's claim was for money damages. Accordingly, the court held that Blue Fox's claim was not cognizable under the APA.

Major Stuart Risch, *Recent Decision: Blue Fox, Inc. v. The United States Small Business Administration and the Department of the Army,* ARMY LAW., Nov. 1997, at 53 (citations omitted).

46. *Blue Fox*, 121 F.3d at 1363. The Ninth Circuit predicated its analysis on the following language in Bowen v. Massachusetts, 487 U.S. 879, 895 (1988) (quoting Maryland Department of Human Resources v. Department of Health and Human Services, 763 F.2d 1441, 1446 (D.C. Cir. 1985)):

> We begin with the ordinary meaning of the words Congress employed. The term 'money damages,' 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, where specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' (citation omitted) Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specific remedy.' (citation omitted) Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms.

Id. at 1361. However, the Ninth Circuit improperly concluded that Blue Fox was only seeking the very thing to which it was entitled. *See Blue Fox*, 119 S. Ct. at 691-92.

47. *Blue Fox*, 121 F.3d at 1361.

48. *Id.*

49. *Id.*

50. 208 U.S. 404 (1908).

51. *See, e.g.*, Pearlman v. Reliance Ins. Co., 371 U.S. 131 (1962); Aetna Casualty and Surety Co. v. United States, 71 F.3d 475 (2d Cir. 1995).

52. *Blue Fox*, 121 F.3d at 1362.

53. *Id.* at 1361 (citing Wright v. United States Postal Service, 29 F.3d 1426 (9th Cir. 1994)).

54. *Id.*

55. *Id.* at 1362.

56. *Id.*

Supreme Court Decision

In a unanimous decision, the Supreme Court reversed the Ninth Circuit.[57] In writing for the Court, Chief Justice William H. Rehnquist held that:

> Section 702 [of the APA] does not nullify the long settled rule that, unless waived by Congress, sovereign immunity bars creditors from enforcing liens on Government property. Although § 702 [of the Administrative Procedures Act] waives the Government's immunity from actions seeking relief "other than money damages," the waiver must be strictly construed, in terms of its scope, in the sovereign's favor and must be "unequivocally expressed" in the statutory text.[58]

In so doing, Chief Justice Rehnquist and the rest of the Court disagreed with the Ninth Circuit's interpretation of its decision in *Bowen v. Massachusetts*.[59] The Ninth Circuit had interpreted *Bowen* to mean that the APA waiver provisions applied to all equitable actions.[60] Yet, the Supreme Court's decision in *Bowen* did not depend on the distinction between equitable and non-equitable actions. The Supreme Court's decision in *Bowen* hinged on the distinction between specific and substitute relief.[61]

The Supreme Court then concluded that Blue Fox's equitable lien claim was really a claim for substitute relief because an equitable lien merely gives the claimant a security interest in property that the claimant can use to satisfy an underlying monetary claim–it does not give the claimant "the very thing to which he [is] entitled."[62] As such, Blue Fox's claim constituted a claim for monetary damages that fell outside the scope of the APA's waiver provisions.[63]

Finally, the Supreme Court addressed the *Henningsen* line of cases upon which the Ninth Circuit and Blue Fox had relied to support the proposition that subcontractors and suppliers could seek compensation directly from the government.[64] The Supreme Court noted that none of these cases involved a question of sovereign immunity.[65] Therefore, the Supreme Court had no difficulty distinguishing these cases and concluding that "[t]hey do not in any way disturb the established rule that, unless waived by Congress, sovereign immunity bars subcontractors and other creditors form enforcing liens on [g]overnment property or funds to recoup their losses."[66]

The Future

Each court involved in the Blue Fox case implicitly or explicitly noted that there is a "gap" in the Miller Act. Quoting the United States Court of Appeals for the Seventh Circuit in *Arvanis v. Noslo Engineering Consultants, Inc.*, the district court stated that: "There does seem to be a gap in the statute; there is no provision for the contingency that both the contractor and the government contracting officer will ignore the bonding requirement."[67] Judge Rymer, the Ninth Circuit judge who issued the dissenting opinion in Blue Fox, noted that "[u]nder the Miller Act there is no question the Army should not have approved the Verdan contract without ensuring that there was an adequate surety bond, but its failure to do so is not actionable."[68] Then, quoting the same case that the district court had quoted, Judge Rymer stated that:

> The result is . . . unjust. A subcontractor who fulfills his part of the bargain should not suffer because the prime contractor defaulted, and the government contracting officer had not insisted on compliance with the Miller Act. We agree that there is a practical prob-

57. *Blue Fox*, 119 S. Ct. at 693.

58. *Id*. at 688.

59. *Id.* at 691.

60. *Id.*

61. *Id.*

62. *Id.* at 692.

63. *Id*. at 692.

64. *Id.* at 693.

65. *Id.*

66. *Id.*

67. Blue Fox, Inc. v. United States Small Bus. Admin., 1996 U.S. Dist. LEXIS 8264, at *5 (D. Or. May 24, 1996) (quoting Arvanis v. Noslo Eng'g Consultants, Inc., 739 F.2d 1287, 1288 (7th Cir. 1984)).

68. *Blue Fox*, 121 F.3d at 1364 (Rymer, J., dissenting in part).

> lem (how widespread we do not know) that is no addressed by the Miller Act, but that is a problem that can only be addressed, and redressed by Congress.[69]

Finally, the Supreme Court noted that "the Miller Act by its terms only gives subcontractors the right to sue on the surety bond posted by the prime contractor, not the right to recover their losses directly from the [g]overnment."[70]

Interestingly enough, Congress took preliminary steps to address this "gap" during the 105th Congress. On 12 November 1997, Representative Carolyn Maloney (D-N.Y.) introduced a bill to amend the Miller Act.[71] Among other things, this legislation would permit a subcontractor to sue the government if a contracting officer failed to obtain Miller Act payment bonds and ensure that they remained in effect during the administration of the contract.[72]

To date, Congress has not acted on Representative Maloney's original bill. Instead, Representative Maloney recently introduced a new bill that excluded the government liability provision she had originally proposed.[73] According to a recent article, this new legislation "is largely based on a memorandum of understanding signed by representatives of numerous trade organizations," and it eliminates the "troublesome provisions" of the previous legislation.[74] However, not all trade organizations objected to the government liability provision in the original bill. Indeed, the Painting and Decorating Contractors of America and the American Subcontractors Association, Inc., strongly supported this provision, arguing that a contracting officer's failure to ensure that a prime contractor obtains the required Miller Act bonds is the "ultimate abrogation of Congressional intent."[75]

At this point, it is fair to say that the future of *Blue Fox* is uncertain. If Congress enacts the language Representative Maloney originally proposed, it will effectively overturn the Supreme Court's specific holding in *Blue Fox*. However, given the opposition to this language[76] and its absence from Representative Maloney's new bill, it is unlikely that Congress will include a provision in the Miller Act that waives the government's sovereign immunity anytime soon. Majors Hehr and Wallace.

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69. *Id.* (quoting *Arvanis*, 739 F.2d at 1293).

70. *Blue Fox*, 119 S. Ct. at 692-693.

71. H.R. 3032, 105th Cong. (1997).

72. *Id.* The proposed legislation included the following provision:

> (h) ACCOUNTABILITY OF CONTRACTING OFFICERS–The first section of the Miller Act (40 U.S.C. § 270a) is further amended by adding at the end of the following new subsection:
>
> (f)(1) The contracting officer for a contract shall be responsible for –
>
> (a) obtaining from the contractor the payment bond required under subsection (a); and
>
> (b) ensuring that the payment bond remains in effect during the administration of the contract.
>
> (2) In any case in which a person brings suit pursuant to section 2 and the court determines that the required payment bond is not in effect because the contracting officer has failed to perform the responsibilities required by paragraph (1), upon petition of the person who brought the suit the court may authorize such person to bring suit against the United States for the amount that the person would have sued for under section 2.

Id.

73. H.R. 1219, 106th Cong. (1999).

74. *Miller Act: Rep. Maloney Offers Miller Act Reform Bill Backed by Primes, Subcontractors, Sureties*, Fed. Cont. Daily (BNA), March 25, 1999, *available in* WESTLAW, March 25, 1999 FCD d2.

75. *Prompt Payment of Federal Contractors: Hearings on H.R. 3032 Before the Subcomm. on Gov't Mgt Info. and Tech. of the House Gov't Reform and Oversight Comm. and the Subcomm. on Commercial and Admin. Law of the House Judiciary Comm.*, 105th Cong. (1998) (statements of the Painting and Decorating Contractors of America and Robert E. Lee, American Subcontractors Association, Inc.), *available in* 1998 WESTLAW 18088354 and 1998 WESTLAW 18088356, respectively.

76. *Id.* (statement of Deidre A. Lee, Administrator, Office of Federal Procurement Policy) (stating that "the Administration strongly opposes this provision"), *available in* 1998 WESTLAW 18088349. *See also id*. (statement of Lynn Schubert, The Surety Association of America) (stating that: "Whether the United States should be liable in such a circumstances . . . is an interesting but academic point [because] the 'problem' is so unusual it does not justify legislation), *available in* 1998 WESTLAW 18088355.

USERRA Note

The 1998 USERRA Amendments[77]

On 10 November 1998, Congress amended the Uniformed Services Employment and Reemployment Rights Act (USERRA).[78] The amendments, part of the Veterans Programs Enhancement Act of 1998,[79] made three significant changes to the USERRA. First, Congress provided a specific procedure for state employee Reservists to sue their state government employers for USERRA violations in the name of the United States, through the Attorney General of the United States.[80] Second, Congress extended the reach of the USERRA to United States citizen-soldiers working in foreign lands for United States owned employers.[81] Third, Congress extended the right of federal employees to have their USERRA claims heard by the Merit Systems Protection Board (MSPB), "without regard as to whether the complaint accrued before, on, or after 13 October 1994 "[the date the USERRA was enacted].[82] This extension of time for the MSPB to hear complaints allows the Office of Special Counsel to represent federal employees for all USERRA complaints filed with the MSPB on or after 13 October 1994.[83]

While these amendments have only been in effect since November of 1998, already one of the new provisions has been effectively declared unconstitutional by the United States Supreme Court in their June 1999 decision, *Alden v. Maine*.[84] The USERRA empowered state employees to sue their state employers for reemployment rights violations either by filing a complaint with the U.S. Department of Labor, which would be prosecuted by the U.S. Justice Department, or by hiring private counsel and suing in federal district court.[85]

In 1996, the United States Supreme Court ruled in *Seminole Tribe v. State of Florida*[86] that Congress did not have the authority to waive state sovereign immunity by federal legislation to allow Indian tribes to sue state governments for violations of the Indian Gaming Regulatory Act (IGRA).[87] The Court further declared, in a 5-4 vote, that Congress may not use its powers under Article I of the U.S. Constitution to authorize private citizen lawsuits against States in federal court.[88] The Court declared such lawsuits violate the Eleventh Amendment to the United States Constitution.[89] What does this have to do with the USERRA?

Several states seized upon the *Seminole Tribe* case as a defense to USERRA claims raised by state employees.[90] In the 1996 case of *Diaz-Gandia v. Dapena-Thompson*,[91] the Commonwealth of Puerto Rico argued that the Reservist-plaintiff could not sue the Commonwealth, since under *Seminole Tribe*[92] and the Eleventh Amendment,[93] the court had no jurisdiction to hear the case.[94] The Commonwealth claimed that it had not vol-

77. Uniformed Serviced Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994), codified at 38 U.S.C.A. §§ 4301-33 (West Supp. 1999), *as amended by* The Veterans Program Enhancement Act of 1998, Pub. L. No. 105-368, §§ 211-213, 112 Stat. 3325, 3329-3332 (1998).

78. *Id.*

79. The Veterans Program Enhancement Act of 1998, §§ 211-213.

80. *Id.* § 211 (codified at 38 U.S.C.A. § 4323).

81. *Id.* § 212 (codified at 38 U.S.C.A. §§ 4303(3), 4319).

82. *Id.* § 213 (codified at 38 U.S.C.A. § 4324(c)(1)).

83. 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans).

84. Alden v. Maine, 119 S. Ct. 2240 (1999) (holding that the states do not have to enforce federal laws which allow money damage suits against state agencies in state courts, as a violation of state sovereign immunity and the Eleventh Amendment).

85. 38 U.S.C.A. § 4323.

86. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

87. *Id.* The Indian Gaming Regulatory Act may be found at 25 U.S.C. § 2702 (1994). This legislation was passed pursuant to the U.S. Constitution, Article I, Section 8, Clause 2 ("Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . .").

88. *Seminole Tribe*, 517 U.S. at 72-73.

89. *Id.* Chief Justice Rehnquist's theory is that any part of the Constitution enacted prior to the Eleventh Amendment [Article I] cannot be the basis for abrogating state sovereign immunity, as Congress intended to maintain the state-federal status quo. *Id*. at 65-66.

90. *See* Forster v. SAIF Corporation, 23 F. Supp. 2d 1196 (D. Ore. 1998); Palmatier v. Michigan Dep't of State Police, 981 F. Supp. 529 (W.D. Mich. 1997); Velasquez v. Frapwell, 994 F. Supp. 1138 (S.D. Ind. 1998), *aff'd*, 160 F.3d 389 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999). *But see* Diaz-Gandia v. Dalpena-Thompson, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (noting that the Supreme Court's *Seminole Tribe* holding does not apply to the USERRA state employee lawsuit provision).

91. *Diaz-Gandia*, 90 F.3d at 609.

untarily waived its sovereign immunity and Congress had no authority to waive it, using their Article I War Powers.[95] The First Circuit soundly rejected the Commonwealth's defense, observing that *Seminole Tribe* dealt with the Indian Commerce Clause of Article I, U.S. Constitution,[96] and that it "does not control the war powers analysis" under Article I.[97] However, several other states successfully raised the *Seminole Tribe*-Eleventh Amendment defense to state employee lawsuits.[98] Congress was alarmed by this turn of events and revised the USERRA to protect the reemployment rights of state employee reservists.[99]

In November 1998, Congress passed Section 211 of the Veterans Programs Enhancement Act to "fix" the state employee remedy against state employers.[100] The legislation amends Section 4323 of the USERRA, by allowing the U.S. Department of Justice to sue on behalf of state employees in the name of the United States.[101] This remedy for state employees relies upon the U.S. Departments of Labor and Justice finding that the complainant's case has legal merit.[102] If so, the Department of Justice sues the state in the name of the United States, avoiding the Eleventh Amendment issue.[103] Upon recovery of damages, the federal government pays the money won to the reservist.[104]

What if the state employee wishes to sue his state employer using private counsel, or the Departments of Justice or Labor find that his suit has no merit? The change in the law indicates that the action "may be brought in a [s]tate court of competent jurisdiction in accordance with the laws of the [s]tate."[105] Can the Reservist still file his case in federal court, hoping to get a favorable ruling against the *Seminole Tribe*-Eleventh Amendment defense, like that obtained in *Diaz-Gandia*? The language

92. *Seminole Tribe*, 517 U.S. at 44.

93. U.S. CONST. amend. XI.

94. *Diaz-Gandia*, 90 F.3d at 616.

95. *Id*. The War Powers are generally found in Article I, the U.S. Constitution, at Section 8, clause 1 ("Congress shall have Power To . . . provide for the common Defence[sic]"); clause 11 (". . . To declare War . . ."); clause 12 (". . . To raise and support Armies . . ."); clause 14 ("To make Rules for the Government and Regulation of the land and naval Forces . . ."); clause 15 (". . . To provide for calling forth the Militia to execute the Laws of the Union . . ."); and clause 16 ("To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .").

96. *See supra* note 87.

97. *Diaz-Gandia*, 90 F.3d at 616 n.9. A strong argument can be made that the U.S. Supreme Court should reverse *Palmatier* and *Velasquez* as an exception to the *Seminole Tribe* sovereign immunity bar. There is a clear line of case law and constitutional history to justify such a result. *See* Peel v. Florida Dep't of Transportation, 600 F.2d 1070 (5th Cir. 1979); Reopell v. Commonwealth of Massacussetts, 936 F.2d 12 (1st Cir. 1991). These cases held that the Constitutional War Powers in Article I, U.S. Constitution, were a source of constitutional authority over the States to enforce veterans' reemployment rights. The War Powers were never mentioned or considered as an independent source of federal authority to waive state sovereign immunity by either the majority or dissenters in *Seminole Tribe*. *See* Alden v. Maine, 119 S. Ct. 2240 (1999).

98. *See supra* note 90.

99. H.R. REP. NO. 105-448, at 2-5 (1998) (Committee Report on H.R. 3213, which was incorporated by H.R. RES. 592 into H.R. 4110, §§ 211-213, 105th Cong. (1998) (enacted)). *See also* 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans); *Hearing on Pending Legislative Proposals in the Areas of Education, Training and Employment Before the Subcomm. On Benefits of the House Comm. on Veterans' Affairs*, 105th Cong., 12-13, 92-93 (1997) (Testimony and written statement of Espiridion A. (Al) Borrego, Acting Assistant Secretary Department of Labor Veterans' Employment and Training Service); *Hearing on USERRA, Veterans' Preference in the VA Education Services Draft Discussion Bill Before the Subcomm. on Education, Training, Employment and Housing of the House Comm. on Veterans' Affairs*, 104th Cong. 14-23, 82-90 (1996) (testimony and written statement of Jonathan R. Siegel, Associate Professor of Law, George Washington University Law School) [hereinafter Siegel Testimony].

100. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211, 112 Stat. 3315, 3331 (codified at 38 U.S.C.A. § 4323 (West 1999)).

101. *Id.*

102. 38 U.S.C.A. § 4323(a)(1).

103. *Id. See* Siegel Testimony, *supra* note 99. The 5-4 Court majority in *Alden v. Maine*, endorsed the idea of the federal government suing in its name on behalf of state employees against state agencies in federal employment law matters. *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *32) ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a [s]tate, a control which is absent from a broad delegation to private persons to sue nonconsenting [s]tates.") *Id*. The issue arises whether the U.S. Department of Justice, through the U.S. Attorney Offices, has the manpower and financial resources to adequately prosecute all state employee cases. *Cf.* Joanne C. Brant, *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPL RTS. & EMPL POL'Y J. 175, 178-179, 217 (1998); *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *56-*57) (Souter, J., dissenting). *But see* H.R. REP. 105-448 at 8 (Congressional Budget Office (CBO) indicates very little financial impact on the federal district courts would result from the federal government representing state employees in the name of the United States. The CBO indicated only five cases were filed in federal court in 1997, out of about 1200 claims investigated by DOL-VETS).

104. 38 U.S.C.A. § 4323(d)(2)(B). No regulations currently exist to implement this provision.

105. 38 U.S.C.A. § 4323(b)(2).

of the new amendment is unclear.[106] The amended language states that such an action "*may*" be brought in state court [emphasis added].[107] The question also remains whether state employees have the authority to seek equitable relief in federal courts under the *Ex Parte Young*[108] exception to the *Seminole Tribe* denial of federal court jurisdiction?[109]

The Seventh Circuit reviewed the new USERRA language in *Velasquez v. Frapwell*,[110] and rejected a plaintiff's argument that the amended language does not repeal general federal question jurisdiction of the federal courts[111] to hear a USERRA case for a state employee.[112] The Seventh Circuit's reasoning in *Velasquez* is disturbing. Nowhere in the legislative history of the amended provision did Congress indicate that it wished to limit state employee lawsuits to state courts.[113] State employees not represented by the Department of Justice or rejected for representation would not get the same access to the federal courts as USERRA plaintiffs suing private employers or local government employers.[114] Congress never intended that state employees receive less protection from reserve status employment discrimination and unequal reemployment remedies compared to private industry or local government employees.[115]

What can a state employee plaintiff expect if he does sue in state court under the amended USERRA? A state employee plaintiff will face a "common law" state sovereign immunity defense. At common law, state governments are not subject to suit by their citizens without their consent or waiver of sovereign immunity.[116] Would the U.S. Supreme Court reverse a dismissal of a state court claim asserting USERRA rights, based upon a common law sovereign immunity defense? The answer is probably no.

The 5-4 Supreme Court majority in *Alden v. Maine* held that the states do not have to entertain federal law based state employee damage suits filed against them in their state

106. Section 4323(b)(1) allows that "an action against a [s]tate (as employer) . . . commenced by the United States . . . *shall*" be brought in federal district court [emphasis added]. Section 4323(b)(2) provides that a cause of action "*may*" be brought against a [s]tate (as employer) by a person, "in a [s]tate court of competent jurisdiction in accordance with the laws of the [s]tate"[emphasis added]. Section 4323(b)(3) provides that federal district courts "*shall*" have jurisdiction over a USERRA suit brought by a person against their private employer [emphasis added]. The use of the word "may" connotes that a state employee has permission to use state courts to sue on USERRA grounds, but that it is not the sole forum for USERRA lawsuits. "In construction of statutes . . . , the word "may" as opposed to "shall" is indicative of discretion or choice between two or more alternatives, but context in which the word appears must be controlling factor." United States v. Cook, 432 F.2d 1093, 1098 (7th Cir. 1970), BLACK'S LAW DICTIONARY 979 (6th ed. 1990). Congress did not make clear that federal district courts now lack jurisdiction over state employee USERRA cases. *But see* Velasquez v. Frapwell, 165 F.3d 593 (7th Cir. 1999) (holding that the 1998 amendments to Section 4323 "confer only on state courts jurisdiction over suits against a state employer," finding Congress's intent to so limit state employee USERRA lawsuits as "unmistakable"). The Seventh Circuit did not explain the basis for their conclusion. The legislative history of the amendment does not indicate that Congress intended to bar state employees from using the federal courts to resolve USERRA issues. *See supra* note 99.

107. *Id.*

108. 209 U.S. 123 (1908) (noting that an individual may sue a state official for injunctive relief in federal court to remedy a state officer's violation of federal law.). *See Seminole Trib*e, 517 U.S. at 71, n.14, 72, n.16. The Court further suggested that where an extensive federal administrative remedial scheme is provided for the enforcement against a state of a federal statutory right, that an individual may not rely on the *Ex Parte Young* doctrine. *Id.* at 74. The USERRA does not have a detailed remedial scheme compared to the IGRA in *Seminole Tribe*, therefore USERRA state employee plaintiffs are not precluded from relying on the *Ex Parte Young* doctrine to get into federal court for equitable prospective relief. *See also* Brant, *supra* note 103, at 203-208; Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws and State Employees: Rights Without Remedies?* 78 B.U.L. REV. 621, 647-650 (1998).

109. 38 U.S.C.A. § 4323(e) (West 1999) states in part: "(e) Equity Powers. The court may use its full equity powers . . . to vindicate fully the rights or benefits of persons under this chapter."

110. Velasquez v. Frapwell, 160 F.3d 389 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999).

111. 28 U.S.C.A. § 1331 (1998).

112. *Id.*

113. *See supra* note 99 and the accompanying text.

114. Congress in passing the 1998 amendments to USERRA explicitly provided for the broadest coverage of reservists, including those living and working overseas, and those federal employees who had claims that arose prior to USERRA's passage in 1994. It is inconsistent for the Seventh Circuit in *Velasquez* to read the intent of Congress so narrowly as to preclude state employee Reservist USERRA claim access to the federal courts. In *Palmatier v. Michigan Dep't of State Police*, 1999 Dist. LEXIS 5258 (W.D. Mich. 26 Mar. 1999), the federal district judge declined to follow the 7th Circuit in *Velasquez.* The Michigan federal judge found that the plaintiff did have jurisdiction to have his state employee USERRA case heard in federal court.

115. *See supra* note 99 and accompanying text. There is every reason to believe that the state courts will be less receptive to USERRA plaintiffs, as state judges are less familiar with federal law and remedies. State judges are more inclined to be biased in favor of the state government being sued. State courts often have heavier dockets, slowing the hearing of such cases. Brant, *supra* note 103, at 178. In addition, some states argue that they should not be subject to U.S. Supreme Court review as to how they enforce federal law in their courts. *See* Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?* 106 YALE L.J. 1683, 1786-1790 (1997).

116. Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857); Alden v. Maine, 119 S. Ct. 2240 (1999); Will v. Michigan Dep't of State Police, 491 U.S. 58, 66-67 (1989); AFSCME v. Virginia, 949 F. Supp. 438, 443 n.4 (W.D. Va. 1996), *aff'd sum nom*., Abril v. Virginia, 1998 U.S. App. LEXIS 10281 (4th Cir. 1998). *See also* Rubenstein, *supra* note 108, at 657-659.

courts.[117] *Alden* seems to override the proposition that "where a federal statute imposes liability upon the [s]tates, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."[118] The Court could conclude that such action violates the Tenth Amendment to the U.S. Constitution.[119] The states could argue that Congress has no authority to impose USERRA on the states in their courts, when the federal appellate courts have ruled that state employees cannot file USERRA suits in federal court.[120]

Finally, each state interprets the USERRA differently, resulting in inconsistent application of the law in each state. The language of the amendment indicating that state employee lawsuits will be filed "in accordance with the laws of the [s]tate"[121] guarantees different results in each state, as each state interprets USERRA against its state law.[122] This amendment invites guaranteed confusion of state case law, as each state attempts to sort out how to handle these cases. Will the right to a jury trial, available for USERRA plaintiffs in federal court,[123] apply in each state court case? Currently, no one knows.[124] A state may claim that analogous state law claims of wrongful discharge are not eligible for jury trials and refuse to uphold the federal case law.[125] Are state courts required to follow federal USERRA case law for cases tried in their courts? The state courts would have to follow federal court interpretations of the substance of the USERRA, but what about procedural issues?[126] In light of *Alden*,[127] this concern may be moot.

The second major amendment of USERRA, by the Veterans Programs Enhancement Act of 1998,[128] was the extension of USERRA protections to any reservist who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States.[129] The amended law further covers foreign corporations or businesses as employers under USERRA, if they are "controlled" by a United States employer.[130] The determination of whether a United States employer controls a foreign business is based

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117. *Alden*, 119 S. Ct. at 2240.

118. Hilton v. South Carolina Railways Comm'n, 503 U.S. 197, 207 (1991). *See also* Howlett v. Rose, 496 U.S. 356, 367-368 (1990), Whittington v. New Mexico Dep't of Safety, 966 P.2d. 188 (N.M. 1988); McGregor v. Goord, 1999 N.Y. Misc. LEXIS 242 (1999) (holding that the Supremacy Clause of the U.S. Constitution supersedes state sovereign immunity and therefore requires state courts to enforce federal law). *But see Alden*, 119 S. Ct. at 2240 (holding that state courts do not have to entertain citizen money damage suits against state governments to enforce federal laws, where the state has not expressly waived its common law sovereign immunity.) As the result of *Alden*, state employees cannot be sure they can get into state court to raise their USERRA claim. *Alden* leaves 38 U.S.C.A. § 4323(b)(2) unenforceable. Section 4323(b)(2) authorized state employees to sue their state agencies in state courts, instead of seeking federal Department of Justice representation in federal district court.

119. *See* National League of Cities v. Usery, 436 U.S. 833 (1976) (holding that the Tenth Amendment prohibited application of the Fair Labor Standards Act minimum wage laws to the states); Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528, 579-580 (Rehnquist, J., disssenting) (1985) (*Garcia* overruled the 5-4 decision of the Court in *National League of Cities* by a 5-4 margin). Justice Rehnquist noted in his *Garcia* dissent that his views of federalism would soon "command the support of a majority of this Court." *Id.* With the current Court members, it looks very likely that *Garcia* is soon to be replaced by a Tenth Amendment analysis like that in *National League of Cities* which prohibited federal laws that regulated "the [s]tates as [s]tates," where they encroached on areas of "traditional governmental functions" such as the reemployment of state agency employees. *National League of Cities*, 426 U.S. at 842, 851-852. *See also* Brant, *supra* note 103, at 176 n.11, 210 n.157. Professor Brant observed that only Justice Stevens who sided with the majority in *Garcia* is still on the Court, but two of the most vocal *Garcia* dissenters, Chief Justice Rehnquist and Justice O' Connor, are still active.

120. *Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *30). *See supra* note 97; Siegel Testimony, *supra* note 99, at 18-23, 89-90. *See also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 67 (1989) ("The principle is elementary that a State cannot be sued in its own courts without its consent."). *See also* Alden v. State, 715 A.2d 172 (Me. 1998), *cert. granted*, 119 S. Ct. 443 (1998).

121. 38 U.S.C.A. § 4323(b)(2) (West 1999).

122. *See* Brant, *supra* note 103, at 177-79, 216-21. Professor Brant observed that while the Supremacy Clause requires the states to enforce federal law, states have no obligation to make a single forum available for all claims. A state does not have to follow federal law in construing its common law defense of sovereign immunity resulting in inconsistent enforcement of USERRA among the states, depending upon how they characterize the relief authorized by the statute. She finds this result "indefensible."

123. Spratt v. Guardian Automotive Products, Inc., 997 F. Supp. 1138 (N.D. Ind. 1998).

124. No reported state cases based upon 38 U.S.C.A. § 2323 (b) (2) have raised this issue since the amendment of USERRA in November 1998.

125. *Cf.* Keller v. Dailey, 1997 Ohio App. LEXIS 5727 (Ohio Ct. App. Dec. 16, 1997) (Federal Fair Labor Standards Act case tried in state courts). *See* Brant, *supra* note 103, at 217-221.

126. *Id.*

127. Alden v. Maine, 119 S. Ct. 2240 (1999).

128. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 212, 112 Stat. 3331 (1998), codified at 38 U.S.C.A. §§ 4303(3), 4319 (West 1999).

129. 38 U.S.C.A. § 4303 (3).

upon "the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity."[131] United States employers operating overseas and those foreign businesses they control may be exempted from USERRA coverage, if the employer's compliance with USERRA would violate the law of the foreign nation workplace.[132] Congress included the exemption to reassure foreign governments that the United States was not attacking their sovereign authority to regulate employment[133]

Why was this explicit language necessary to cover overseas reservists under USERRA? In 1991, the United States Supreme Court ruled that extraterritorial application of United States employment discrimination law will be presumed not to apply, unless Congress provides a clear expression of Congressional intent that such a law is to apply overseas.[134] Congress wanted to ensure that the courts understand their intent that USERRA provides universal coverage for all United States employees.[135]

Who would investigate overseas complaints and initially determine whether a foreign business is controlled by a United States entity? Presumably, the United States Department of Labor Veterans Employment and Training Service (DOL-VETS) would conduct this investigation and initial determination.[136] Currently VETS has no overseas investigators. Where would someone file a lawsuit to enforce this new provision? Presumably, in any federal court district where the United States employer "maintains a place of business."[137] Currently, few regulations address this new USERRA jurisdiction.[138] Would reservists who work for the federal government overseas be covered? Yes. The U.S. Merit Systems Protection Board (MSPB) would have jurisdiction to hear their complaints.[139]

Finally, Congress amended the USERRA to give specific authority to the MSPB to hear federal employee USERRA complaints, regardless of when the complaint arose, even if the discriminatory event arose before USERRA was enacted in 1994.[140] This change in law was initiated by *Monsivias v. Department of Justice.*[141]

The U.S. Bureau of Prisons allegedly disciplined Sergeant Monsivias for absence without leave from his federal prison guard job, for attending reserve military drill, after giving the agency proper prior notice.[142] The Bureau refused to grant Sergeant Monsivias military leave to attend his reserve training.[143] On 17 March 1997, the Office of Special Counsel (OSC) determined that although the agency's alleged actions would have violated the predecessor law to USERRA, it was unable to represent Sergeant Monsivias before the MSPB.[144]

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130. *Id.* § 4319(a).

131. *Id.* § 4319 (c).

132. *Id.* § 4319 (d).

133. *See supra* note 99, 144 CONG. REC. H 1399 (daily ed. March 24, 1998) (statement of Representative Evans).

134. EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

135. 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans). *See also* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 546, 110 Stat. 2422, 2524 (1996) (stating that USERRA needs to be amended to protect U.S. citizens employed overseas who are members of the reserve component of the U.S. armed forces).

136. 38 U.S.C.A. § 4321.

137. 38 U.S.C.A. § 4323 (c)(2).

138. *See* Restoration to Duty From Uniformed Service, 64 Fed. Reg. 31, 485, 31, 487 (June 11, 1999) (to be codified at 5 C.F.R. § 353.103) (stating that federal agency USERRA rules apply to overseas employees). No other regulations exist to flesh out the procedure for investigating overseas employers.

139. *Id.*

140. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 213, 112 Stat. 3331 (1998), codified at 38 U.S.C.A. § 4324(c)(1) (West 1999). This section of the Act, as amended, reads:

> The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to . . ., without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

141. Monsivias v. Department of Justice, complaint with the Office of the Special Counsel. *See also* 144 CONG. REC. H1396-02, H1398 (daily ed. March 24, 1998) (statement of Representative Evans).

142. *Id.*

143. *Id.*

The OSC opined that the alleged violation occurred before USERRA was enacted in 1994.[145] Under pre-USERRA reemployment rights law, the OSC did not have authority to represent federal employees before the MSPB on reemployment rights cases.[146] This amendment is intended to resolve the issue of OSC representation of federal employees with pre-USERRA reemployment rights cases before the MSPB, and to extend MSPB jurisdiction over pre-USERRA reemployment rights cases.[147] Congress did not address whether this new provision overrules the MSPB's 180 day [from the date of alleged violation] filing date regulation.[148] The MSPB has not yet addressed this issue in any published opinions or by revising its filing time limit regulations.[149]

Because of the U.S. Supreme Court's ruling in *Alden*,[150] Congress must again look at remedies for state employees who suffer USERRA violations at the hands of their state employers.[151] Congress must meet the challenge and formulate a constitutionally viable remedy for state employees. Perhaps Congress should consider enacting an explicit conditional waiver provision in state National Guard funding legislation, providing that a state will not receive any federal funds for its National Guard until it enacts a statute waiving sovereign immunity in state and federal courts for USERRA money damage suits from state employees [38 U.S.C.A. § 4323]. The Supreme Court in *Alden* cited with approval such a funding incentive to obtain state voluntary waiver of sovereign immunity.[152] The Supreme Court has already recognized the substantial funding provided by the federal government for state National Guard entities.[153] Such a funding proviso has been very successful in getting state universities to reconsider their bans on military recruiting.[154] The federal government could argue that if the states want money for their National Guard, then they should waive their USERRA sovereign immunity defenses so state employee reserve and National Guard soldiers have a remedy against state agency misconduct. Legal counsel should be looking for new Congressional legislation and new regulations by the Department of Labor, the OSC, the Office of Personnel Management, and the MSPB to implement these new USERRA changes, and to respond to *Alden v. Maine*.[155] Lieutenant Colonel Conrad.

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. 5 C.F.R. § 1201.22(b)(2) (1999).

149. *Id.*

150. Alden v. Maine, 119 S. Ct. 2240 (1999).

151. In light of *Alden v. Maine*, it would appear that a slim majority (5-4) of the current U.S. Supreme Court is poised to void individual state employee enforcement of USERRA. This cannot be good news for state employee veterans and reservists seeking money damages for past wrongs from their state agency employer under USERRA. State employees with valid USERRA claims who cannot get federal representation are now without any effective remedy other than suing their state agency officials, in a non-official capacity for misconduct. This remedy is not very useful when you compare the "shallow pockets" of state agency managers versus the "deep pockets" of State treasuries. *See Alden*, 119 S. Ct. (1999 U.S. LEXIS 4374, at *33, *57). *See also* Marbury v. Madison, 5 U.S. (5 Cranch) 137, 163 (1803) [Marshall, C.J.]. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

152. *Alden*, 119 S. Ct. (U.S. LEXIS 4374, at *32) ("Nor, subject to constitutional limitations, does the [f]ederal [g]overnment lack the authority or means to seek the [s]tates voluntary consent to private suits. *Cf.* South Dakota v. Dole, 483 U.S. 203 (1987)."). *See* Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793 (1998); Vaszquez, *supra* note 115, at 1707, 1707 n. 112; South Dakota v. Dole, 483 U.S. 203 (1987) (upholding use of congressional spending power to "encourage" states to adopt minimum drinking age statutes). *But see* Anthony Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (May 1987); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 191-194 (1998) (Congress may not induce states to act using its Spending Clause [U.S. Const. art. I, § 8, cl. 1] powers, if Congress could not require the states to act under Congress's enumerated powers).

153. Perpich v. Department of Defense, 496 U.S. 334, 351 (1990) ("The [f]ederal [g]overnment provides virtually all of the funding, the materiel, and the leadership for the [s]tate Guard units.")

154. *See* Brett S. Martin, *Military Bans Cost Schools Federal Funds*, NAT'L JURIST, Oct. 1997, at 8; Bob Norberg, *New Law Imperils SSU Funding; Military Recruiting Ban Sticking Point*, PRESS DEMOCRAT (Santa Rosa, Cal.), Dec. 14, 1996, at B1; George Snyder, *Sonoma State Lifts Ban on Military Recruiters*, S.F. CHRON., Dec. 18, 1996, at A26; Terry Carter, *Costly Principles: Pentagon Forces Law Schools to Choose Between Federal Funding and Backing of Gay Rights*, ABA J., Dec. 1997, at 30, 31. *See* Pub. L. No. 104-208, Div. A, Title I, § 101(e) [Title V, § 514], 110 Stat. 3009-270 (1996) (added as a note to 10 U.S.C. § 503) (stating the language of the military recruiting ban conditional federal funding waiver).

155. Alden v. Maine, 119 S. Ct. 2240 (1999).

Note from the Field

Customer, Contracting, and Commerce (C3) Process: Acquisition Reform and Partnering with Industry

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Introduction

Since 1991, the United States Army, Europe (USAREUR), has experienced significant reductions in force.[1] The lack of force structure has resulted in many other reductions throughout the USAREUR theater. One of those areas of particular interest to a contracting office is the number of customer personnel with technical skills that provide support to the contracting office. For example, the number of Directorate of Public Works (DPW) engineers available to draft statements of work and specifications for engineer related projects has plummeted severely.[2]

The contracting office challenge is the same as most other activities within the Army structure–"do more with less." The Regional Contracting Office (RCO) of the United States Army Contracting Command, Europe, located in Seckenheim, Germany, was faced with the question, "How does a contracting office support the DPW customer when the DPW no longer has the capability of researching and designing projects?" The lack of internal DPW assets in Fiscal Year (FY) 1996 resulted in the RCO not receiving a single DPW project that year.[3] In FY 1997, the RCO began the C3 process and received sixty-four DPW-type projects that were processed without internal DPW assets.[4] Through FY 1998, the RCO processed approximately 250 DPW-type projects.[5] This represents an incredible growth curve for the RCO's workload.

This growth in the RCO's workload came from the RCO having a series of discussions with its DPW customers and with various industry and commerce representatives to determine partnering possibilities.[6] Commerce responded overwhelmingly to the inquiries.[7] Every aspect of the DPW process is mirrored in commerce and is readily available. Industry has many approaches to completing actions that range from off the shelf applications to state of the art. hThe choice for the three parties–customer, contracting, and commerce–was obvious. It involved a teaming or partnering arrangement that ultimately was titled the C3 partnering process.[8] While the concept originated with the DPW customer in mind, it works as well with service activities other than DPWs.[9] Because the concept shows promise of increasing application, contract law practitioners should be familiar with the essential elements, summarized below.

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1. The most notable example is VII Corps, which deployed to the Persian Gulf but did not return to Germany. Currently, only the 1st Armored Division and 1st Infantry Divison remain in Germany.

2. For example, implementing the Directorate of Engineering and Housing 2000 standard within the 26th Area Support Group (Heidelberg, Mannheim, Kaiserslautern, and Darmstadt Base Support Battalions) eliminated the design branches from each of the DPWs.

3. Reporting statistics from FY 1996 for RCO Seckenheim.

4. *Id.*

5. *Id.*

6. These discussions resulted from an Acquisition Development Assistance Team that the RCO created for discussions with its customers and industry representatives. The team members consist of at least one contracting officer, at least one contracting specialist, and an attorney advisor.

7. During FY 1997 and FY 1998, discussions were held with industry representatives in construction and service fields.

8. To overcome the lack of personnel resources in the government, teaming with industry to use their personnel resources instead was the goal.

9. The C3 process works with those contracting actions in which an adequate statement of work does not exist. It has been successfully used with custodial, demolition, shipping, and other service type actions.

The Process[10]

The partnering process is a modified version of the Federal Acquisition Regulation (FAR) Part 14.501[11] two-step solicitation process. It focuses on blending industry into the acquisition process, using industry's resources, and easing the burden on the customer. The process provides its own market research. It mirrors industry's approach to business, and is performance based. The process reduces the workload on the RCO's customers, provides a high-speed avenue for contracting, and transfers the burden of ambiguous statements of work to the contractor.

The process starts with a short, simple request from the customer for a particular product or service. The request is usually less than one full page and sometimes as little as a single paragraph. The request only gives the bare outline of the proposed project. The intent is that industry will fill in the gaps.

Typically, on the same day the request is received at the contracting office, the synopsizing requirements are completed and a request for technical proposals is sent to industry. The request for technical proposals requires very little change from one solicitation to the next and consists primarily of boilerplate language. As a result, the effort involved in starting a solicitation is minimal. The request also establishes the date for the site visit.

The site visit, which usually occurs only five to ten days after the issuance of the request for technical proposals, is attended by the customer, contracting office personnel from both the contracting and administration branches, and numerous industry representatives. On more complex projects, the contracting officer and the legal advisor attend the site visit. The site visit is critical to establishing common knowledge among the three parties.

At the site visit, the customer escorts the industry representatives through the project area. Industry is able to engage in a free flowing discussion of the project requirements. The information flow is monitored by the contracting office representatives but is rarely hindered by them. It is natural for the contracting office personnel to address relevant issues that are important to the acquisition process, such as making sure all questions are fully answered and the same information is given to all of the contractors. This gives all of the parties the opportunity to see the entire project. Industry representatives typically take photographs or make on-site drawings during the visit.

This site visit approach involves the industry representatives in the planning phase of each project. If the project is phased into separate future requirements, industry is informed on how the current project impacts future ones. Industry is allowed to make suggestions on how to integrate the current project into future projects and save the customer time and money. In essence, industry is asked not only for its input into how the current project should be worked but also how the current project will fit into the overall operations of the customer.

At the end of the site visit, industry representatives are queried as to how much time is necessary for the submission of their technical proposals. They are cautioned that their proposals will form the basis of the contract's statement of work and will be binding on them. The time chosen by industry for submission of the technical proposal is typically less than thirty days and quite often as short as ten days, depending on the complexity of the requirement.

On receipt of the technical proposals by the contracting office, the proposals are immediately forwarded to the customer for review. Seven to fourteen days has been the range of time for technical review. The customer is allowed to communicate with industry with oversight from the contracting office either with individual contractors or groups. Industry representatives are welcome to engage in discussions with all government representatives, submit oral presentations or any other means they believe will enhance the understanding of their proposal. Once all discussions are completed, all questions are answered, and industry has submitted their final technical proposals, the invitation for bids (IFB) is issued to begin the second step. The first step is typically completed within four weeks.

The second step is a standard sealed bid solicitation package. Industry once again decides the length of time for submission of bids. The time is normally about one week. Once the bids are received, they are analyzed and the award is made to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the government considering only price and the price-related factors specified in the solicitation. The entire process averages about six weeks with simpler packages being processed in as little as three to four weeks and more complex packages averaging about three months.

The Advantages

Partnering

"Partnering with industry" has become a new buzz phrase in government acquisition.[12] The C3 process extends that concept

10. The C3 process detailed in this section was developed at the RCO in Seckenheim, Germany. The C3 process is not a formal regulation. This section explains the process and gives various deadlines; these were developed based on the needs of this RCO, and may be adopted or adapted to suit the needs of other RCOs or contracting offices. There is no formal standard operating procedure for the process although the RCO has created training slides for classroom instruction and maintains an aggressive "on the job" training program.

11. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.501 (June 1997) [hereinafter FAR].

12. William J. Myslowiec, Chief, Contracting Branch, RCO Seckenheim.

to the internal government system. The contracting office is the channel that administers the procurement of goods and services, the customer is the activity that generates the requirements, and industry is the source for satisfying those requirements. In all informal partnering, there has to be some sense of trust between the parties. Typically, trust is based in communication. The process uses site visits, oral discussions, and visual information to facilitate communication and partnering.

Market Research

Market research is required by FAR 10.001 and common sense.[13] The first step of the two-step process automatically satisfies the requirements for market research on each project. By including industry in the solicitation process, the contracting officer obtains the best and most current product information available in the market place. The site visit and subsequent technical proposals provide all of the information necessary to make intelligent procurement decisions.

Commercial Business Approach

The focus of the C3 process is adopting industry's normal commercial approach, minus up-front pricing. When industry approaches a civilian customer, it prepares a proposal and submits it for review. The customer reviews the proposals from several sources, considers the different approaches and weighs the cost of each, ultimately selecting the best overall value. The C3 process allows the same approach for receiving technical proposals, reviewing them and applying cost-related factors to obtain the best overall value for the customer.

State of the Art

The process authorizes industry to submit solutions that provide the most recent information and products available. Instead of relying on descriptions that are potentially years out of date, the customer obtains the latest products and methodologies available in the market place. Industry remains competitive and survives by keeping up with those things that make them more efficient and productive in the commercial world. The C3 process allows industry to suggest whatever may be the newest approach to solving a problem and then uses that approach inside the government.

Performance Based Contracting

To obtain performance based contracting, the ultimate goal of the contract is described, but the method of accomplishment is left to industry to devise. The C3 process obtains the same result by providing a simplified job description to industry and not telling industry how to proceed. In most cases, even for complex projects, the job description is a simply written, short paragraph that gives a general overview of the desired project end-state. It allows industry to establish the means to achieve the end and also allows industry to identify more than one method. This allows industry to be creative in its approach to solving the government's problems.

Reduced Customer Workload

In the past, the contracting customer had to prepare a lengthy statement of work (SOW) and a detailed independent government estimate (IGE). This usually took months to accomplish and caused the customer to use off-the-shelf statements of work (which were typically very old) to save effort. These statements of work also invariably allowed errors and ambiguities to creep into the process. Those problems had to be solved using non-budgeted money. The C3 process shifts the burden of preparing the statement of work to industry and also shifts the liability for ambiguities to industry. It also places the burden for inspection of work on industry. The technical proposals establish a self-inspection system, which enables the customer to inspect the inspection system rather than the entire performance of the contractor.

High Speed Contracting

Normal solicitation time, including the time associated with a customer generating a SOW and IGE, can be six to nine months.[14] The C3 process has produced awarded contracts in four to six weeks on average.[15] This happens in part because the solicitation typically starts the day after the customer provides the simplified job description to the contracting office and proceeds without waiting for funding and other bureaucratic approvals.[16] It does not eliminate these obstacles. Instead, it starts the solicitation and allows the funding and approval process to catch up before award.

13. FAR, *supra* note 11, at 10.001.

14. FY 1996, 1997 and 1998 statistical reports from RCO Seckenheim.

15. *Id.*

16. The solicitations all contain a subject to availability of funds clause. There is no requirement to have funds available at the beginning of the solicitation process. Likewise, most administrative approvals, such as the DA Form 4283 for facilities engineering work requests, must be approved before award but do not require approval before the solicitation begins. Past practice at RCO Seckenheim was to hold a solicitation until all administrative approvals and funding were received from the requiring activity.

Contra Proferentum
(Ambiguities are Construed Against the Drafter)

Claims, especially in DPW-type projects, typically arise from problems in the SOW. By transferring the drafting of the SOW to industry, the legal burden for ambiguities is also transferred. When an ambiguity arises, the government is entitled to its reasonable interpretation of the industry drafted SOW.[17] With the burden shifted to industry, the number of claims for equitable adjustment decrease dramatically. In the approximately 250 C3 contracts, with an average value of $98,000, awarded to date by RCOS, there have been no claims for equitable adjustment.[18]

Part 15 Access

Two-step sealed bidding accesses the additional flexibility contained in the new Part 15 of the FAR.[19] The first step of the procedure allows the contracting officer to use any of the procedures contained in Part 15 that are helpful in completing a solicitation action so long as pricing is reserved to the second step. This hybrid approach to contracting gives the contracting officer great flexibility and latitude in solving problems for the customer.

Simplified Acquisition Procedures

The process is not dependent on whether the acquisition is above or below the simplified acquisition procedures threshold. If an assessment can be made during the site visit that the value of the project will be below the threshold, the acquisition can proceed as a request for quotations or other simplified procedure. Likewise, the process does not prevent the use of the commercial products acquisition procedures.

The Rules

The authority for two-step sealed bidding is contained in FAR 14.501.[20] It allows a combination of Parts 14 and 15 of the FAR when adequate specifications are not available. Its objective is the development of a descriptive statement of the government's requirements and is used particularly for complex items. The first step is the request for technical proposals, which are submitted by industry and then evaluated by the customer for technical acceptability.[21] This step allows for site visits, clarifications, questions, presentations, and any other reasonable action that the contracting officer might take to clarify the technical requirements. The second step provides for submitting prices and considering price related factors,[22] which allows the customer to obtain the best overall value.

The request for technical proposals describes the supplies or services required; informs industry that the C3 two-step solicitation process will be used; states the requirements of the technical proposal; establishes the evaluation criteria for the technical proposals; and sets the date and time for receipt of the technical proposals.[23] The request also informs industry that only those technical proposals that are determined as acceptable will submit prices in the second step.[24] Because the possibility exists that there will be differences between the technical proposals submitted by the various industry representatives, the letter informs them that they are submitting their bids on the basis of their own technical proposals.[25] Vendors can also submit more than one technical proposal if the request indicates that multiple proposals are allowed.[26]

Vendors must be informed that their technical proposals should be acceptable as submitted without clarifications as a determination on acceptability may be made on the basis of the original submissions.[27] Vendors that submit unacceptable proposals must be notified that they are unacceptable and must be given a debriefing if one is requested in writing.[28]

17. International Fidelity Ins. Co., ASBCA No. 44256, 98-1 BCA 29,564.

18. *See supra* note 14.

19. Pacific Utility Equipment Co., B-259942, May 16, 1995, 95-2 CPD ¶ 114.

20. FAR, *supra* note 11, at 14.501.

21. *Id.* at 14.501(a).

22. *Id.* at 14.501(b).

23. *Id.* at 14.503-1.

24. *Id.* at 14.503(a)(7).

25. *Id*.

26. *Id.* at 14.503(a)(10).

27. *Id.* at 14.503(a)(8).

28. *Id.* at 14.503(g).

The second step begins if there are sufficient acceptable technical proposals to ensure adequate price competition.[29] If not, the contracting officer can authorize additional time to make additional proposals acceptable.[30] Under any circumstances, technical proposals are not discussed with any offeror other than the one that submitted the proposal.[31] If it is necessary to discontinue the two-step solicitation, all of the vendors must be notified.[32] If the first step resulted in no acceptable technical proposals or if only one proposal was determined to be acceptable, the solicitation can be continued through negotiation methods.[33]

An identical IFB is issued in the second step to all of the offerors even though there may be minor differences in the various technical proposals, and it proceeds as a normal Part 14 solicitation.[34] If more than one technical proposal was submitted by a single offeror, a bid is submitted on each acceptable technical proposal.[35]

The General Accounting Office

The General Accounting Office (GAO) has dealt with a number of different issues within the two-step bidding process. Since the C3 partnering process derives from Part 14.501 of the FAR, the decisions from the GAO on Part 14.501 apply.[36]

A common issue that arises is the extent of revision to the technical proposal that an offeror is allowed to make. The intent of the C3 and two-step processes is to include as many offerors in the second pricing step as possible through the Part 15 negotiation procedures. The contracting officer, however, is not obligated to include a technical proposal in the second step that requires extensive revision.[37] In determining whether a technical proposal requires extensive revision, the contracting officer is held to a "reasonableness standard."[38] Protests for improprieties in requests for technical proposals must be filed by the date set for receipt of the proposals.[39] This rule is the same whether the solicitation is in the two-step format or the negotiated format.

The site visit plays an important role in the entire C3 partnering process. A vendor is not excluded, however, from a solicitation simply on the basis that it did not attend a site visit.[40] Attending a site visit, or not, is a matter of responsibility for the contracting officer to determine, and attendance at the site visit is not a precondition of a responsibility determination.[41]

Likewise, the review of technical proposals by customer specialists and technicians that find a proposal to be not acceptable is sufficient if the review was performed in a fair and reasonable manner.[42] The standard for overturning a technical review follows the customary bases: erroneous, arbitrary, or not made in good faith.[43] A past successful offeror cannot rest on its laurels of past performance when it comes to submitting a technical proposal on a current solicitation no matter how capable that offeror may be.[44]

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29. *Id.* at 14.503(f)(1).

30. *Id.* at 14.503(f)(2).

31. *Id.* at 14.503(f)(1).

32. *Id.* at 14.503-1(i).

33. *Id.* at 14.503(i).

34. *Id.* at 14.501(b).

35. *Id.* at 14.201-6(s), 14.503-1(a)(10), 52.214-25(c).

36. *See infra* footnotes 37 through 46.

37. Shughart & Assocs., Inc., B-226970, July 17, 1987, 87-2 CPD ¶ 56.

38. *Id*.

39. *Id*.

40. Gebruder Kittelberger GmbH & Co., Comp. Gen., B-278759 (Dec. 8, 1997). This protest directly involved the C3 Partnering Process although the GAO made reference to FAR 14.501 rather than "C3."

41. A contracting officer cannot simply make a determination that a failure to attend a site visit automatically makes a bidder non-responsible. The contracting officer must also determine, based on reasonable and relevant factors such as scope and complexity, that the site visit was critical to understanding the project and that a failure to attend would prevent the bidder from obtaining information that was crucial to successfully completing the contract.

42. Baker & Taylor Co., B-218552, June 19, 1985, 85-1 CPD ¶ 701.

43. *Id*.

It is common to insert additional requirements in the second step of the solicitation. There is no objection to doing this even if it means that an acceptable second step bidder might withdraw from the solicitation. The GAO addressed this issue in a solicitation that added bonding requirements in the second step.[45] An offeror with an acceptable technical proposal withdrew from the solicitation before submitting bids because it could not obtain the required bonding. The offeror protested the inclusion of the new bonding requirement without any notice of it in the first step and asked for proposal preparation costs. The GAO denied the proposal preparation costs under the theory that delivery or performance requirements may be presented in the first step but are not legally required. The GAO held that there is no objection to combining separate first step actions into a single second step invitation for bids if the facts and circumstances of the different combined projects logically flow into a single action.[46]

The IFB makes use of price related factors to distinguish between acceptable proposals that offer substantially different approaches to the requirement. The FAR lists price related factors, in what appears to be an exclusive list.[47] The GAO, however, has interpreted the list to be non-exclusive and expandable by the contracting officer if there is a reasonable basis for doing so.[48] In essence, any reasonable and relevant cost-related factor, such as life cycle, time, or efficiency, can be factored into a contract to determine the overall lowest cost to the government.

Conclusion

The C3 partnering process is a valuable tool for a contracting office. It is not an end all to the contracting process. It does not replace the standard invitation for bids or request for proposals as those tools still have viable places in a contracting office; however, it can be used for an extremely wide range of contract actions. The RCO in Seckenheim has used it on actions as diverse as construction, custodial, job order contracts, vehicle repair, asbestos abatement and computer operations. The process can be applied to most contract-type actions and is especially suitable when communication is critical, when the customer does not have adequate resources, or when time is of the essence.

44. *Id.*

45. Diversified Contract Servs., Inc., B-234660, June 22, 1989, 89-1 CPD ¶ 590.

46. Gebruder Kittelberger GmbH & Co., Comp. Gen., B-278759 (Dec. 8, 1997).

47. FAR, *supra* note 11, at 14.408-1(a)

48. ACS Const. Co., Inc., B-250372, Feb. 5, 1993, 93-1 CPD 106; Tek-Lite., B-230298, Mar. 8, 1988, 88-1 CPD ¶ 241.

The Art of Trial Advocacy

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

It is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews

Introduction

Witness are at the heart of virtually every criminal investigation and trial. Through them it can be learned whether a crime occurred, when it occurred, and who might have committed the crime. Even if there is physical evidence, a witness is necessary to introduce that evidence at trial. In fact, without witnesses (or without a stipulation from both parties) it would be impossible to present a case. Yet, despite the obvious importance of witnesses and the information they possess, little attention is given to how attorneys get information from witnesses. This article focuses on the art of interviewing witnesses and, in particular, on the process of building rapport during an initial interview.

Rapport and the Interview

Many attorneys believe that by simply asking the right questions, they can elicit all the relevant information that a witness knows. Certainly, asking the right questions is important, but the method of asking questions is often just as important as the questions themselves. How a witness feels about an attorney will likely affect the quality of his answers. The interview, especially the initial interview, is an opportunity for the attorney to forge a connection or rapport with the witness. This rapport should encourage a greater flow of information from the witness and greater cooperation throughout the case.

An attorney's method of building rapport is very personal, and differs from one person to another. An attorney must use a method that feels natural and then practice it. Like any other advocacy skill, rapport building must be thought about, practiced, and refined. Although styles of rapport-building are very different, there are some techniques, which are discussed below, that will aid in this process.

Empathy

Empathy is defined as "the projection of one's own personality into the personality of another in order to understand the person better."[1] To build good rapport, trial advocates should try to empathize with the witness. Most witnesses find being interviewed stressful, but some will find the interview more stressful than others. For example, if the witness is a junior enlisted soldier, the stress of the interview will likely be compounded because an officer is conducting the interview. For most junior enlisted soldiers, their interaction with officers is limited. They see officers at unit formations or around the battalion area, but they rarely have conversations with officers. If a junior enlisted soldier is having a conversation with an officer, it is usually because he has done something really good or really bad. Attorneys who interview junior enlisted soldiers should be sensitive to this potential added stress.

Because interviews are stressful for witnesses, it is not surprising that the chief objective of most witnesses is to leave the interview as quickly as possible, regardless of whether they have provided all the relevant information. If you add into this formula a witness who has had some negative experience with the criminal justice system or has some private agenda, the process of getting relevant information becomes that much harder. By adjusting your interview technique to empathize with the witness, you can increase the likelihood that you are getting the greatest amount of information from the witness.

Clueing the Witness In

This approach links with empathizing with the witness. When you look at the interview from the witness' perspective, you will see that much of the stress of the interview comes from the unknown. Often witnesses will come to your office never having met you, and never having been interviewed by a lawyer. Witnesses do not know what to expect from you or what you expect from them. They may have preconceptions about lawyers that make them wary. Let them know who you are, why they are in your office, and who you represent. Let the witness know that all that is important to you is the truth. Some witnesses believe if you represent the government, you are only interested in convicting the accused. Some witnesses believe that if you represent the accused, all you want is to get your client "off." Truth is nowhere in the equation. Let all your witnesses know that the truth is at the heart of your endeavor. Tell your witnesses that all you ask of them is that they are truthful and complete in their answers. By "clueing witnesses in," you will be giving them the courtesy of an orientation statement and letting them know that you will not ask them for anything that they cannot give.

Demeanor and Body Language

When conducting an interview, remember that witnesses are learning about you through observation, just as you are about them. Through your demeanor and body language, you will be telling witnesses things about yourself and your case. It is

1. WEBSTER'S NEW WORLD DICTIONARY 445 (1995).

therefore important that you tell them, through your demeanor, what you want them to hear.

You want to convey confidence in yourself and interest in what the witness is saying. To that end, your demeanor should be even-tempered, polite, and objective.[2] You should sit erect or leaning slightly forward with your feet flat on the floor. Make sure that you are facing the witness, not your computer screen. Do not swivel in your chair, bounce your leg, or tap things–these behaviors convey that you are nervous. Try not to slouch or cross your arms, which may convey disinterest or a lack of openness to what the witness is saying.

The bottom line is that you do not want to sabotage your interview through your demeanor or body language. Be aware of your body language and demeanor, and use it to encourage your connection with the witness.

Eye Contact

It may seem obvious that eye contact is important to building rapport, but appropriate eye contact is an interpersonal skill that many attorneys neglect and need to develop. Good eye contact will be one of the first bridges you build in the process of creating rapport with a witness. New counsel may feel uncomfortable in witness interviews; they either avoid eye contact or they exaggerate eye contact and start staring. How much eye contact is enough? Think of the interview as a conversation. The natural eye contact you give people during an interesting, one-on-one conversation, is the kind of eye contact you want.

Of course, just because you want to have eye contact with a witness does not mean that the witness wants it with you. Often witnesses do not want to have eye contact during interviews. They would much rather look at the floor or out the window than into your eyes. You can use specific techniques to encourage eye contact and help build rapport. First, sit close enough to the witness so that eye contact with you is natural. Usually two to four feet is a good distance to encourage eye contact. Less than two feet will encroach on the witness's personal space, and further than four feet gives the witness lots of other places to look instead of at you. Talk to the witness, not to your computer screen or at the piece of paper on your desk. Make sure your focus and your vocal energy is directed at the witness. If the witness refuses to make eye contact, continue to offer your eye contact and continue the interview.

Location of the Interview

The location of the interview should encourage the rapport you seek to build. Experts suggest that the interview room should be ten feet by ten feet, with overhead lighting and neutral colored walls;[3] in reality, however, you may not have many options for the interview room. It is likely that you will have to use your office, so you should prepare the office before the interview. Your office should be clean, with enough chairs for those who will be present. Do not set the desk up between you and the witness as that will interfere with the rapport you want to create. Forward or disconnect the telephone, and place a sign on your door to prevent interruptions. The idea is to have privacy and as few distractions as possible.

To Script or not to Script

New counsel often want to use a script of questions during an interview. Scripts give the attorney a kind of security blanket, especially when tension rises during the interview. Ideally, you will not use a script of questions during your interview. Following a script severely interferes with the building of rapport with the witness. An attorney who is following a script has less eye contact and displays less confidence than one without a script. Scripted questions often cause counsel to doggedly shuffle from question to question, rather than follow the natural flow of the interview. A flowing interview is critical to getting all the relevant information possible from a witness. An interview simply will not flow when the interviewer is following a script. At times, with a reluctant witness, the attorney must build a rhythm of questioning and have the witness answer questions without sanitizing the replies. Such a rhythm is virtually impossible when working from a script. If there are critical questions that must be answered and you are afraid you will forget them, write them down and ask them at the end of the interview.

There is an important distinction between not using a script in an interview and not preparing. To conduct an interview properly without a script will take more preparation time than scripting the interview. New attorneys may want to script out their questions, turn that script into an outline, and then use the outline in the interview. If the attorney feels the interview is going badly or he is missing critical questions, the attorney can take a break and review his notes. The fruits of thoroughly preparing for interviews will be the time saved in not having to re-interview witnesses, and the added rapport the attorney will build with each witness.

Having a Third Person at the Interview

The argument in favor of having a third person present during your interviews is that the third person can testify about what the witness said during the interview, if the person you interviewed changes his story at trial. The argument against having a witness present is that it interferes with the building of rapport between the attorney and the witness.

2. John E. Reid & Associates, The Reid Technique, Interviewing and Interrogating 6 (1989) (unpublished seminar materials) (on file with author).

3. *Id*. at 4.

Although having a third person present may make witnesses a bit more reluctant to give information, it does provide a safety net. You simply cannot tell when witnesses are going to change their testimony at trial. The presence of a third party gives the attorney the option of refuting a witness's testimony. The presence of a third party also offers the attorney the opportunity to get another person's opinion on the witness's demeanor and believability.

Time

Another factor that will affect your efforts to create rapport is time. Building a connection takes time. Make sure to schedule your interviews for a time when you can conduct the interview completely. Interviews often take longer than expected; you should schedule your interviews so that you can go past the time you planned without missing other scheduled events. For example, if you have an interview that you expect to take an hour and a half, do not schedule it for the two-hour block before an important meeting. Instead, consider scheduling it for a part of the day where you have no other scheduled commitments.

Preparation

It has been said, "Nothing so undermines the confidence of a court or jury in a lawyer as his constant groping and fumbling."[4] This comment is equally true of interviewing witnesses. If an attorney is unclear on the facts or fumbles the facts, the witness will lose confidence in the attorney and the rapport will likely weaken. You must read the entire investigation file and know the contents of all witness statements. If the witness you are about to interview has made a statement, you must know its content and have a copy available for the witness as well as for yourself. If relevant to the interview, you should have visited the crime scene. By thoroughly preparing for the interview, you will know what questions to ask and when the answers do not make sense.

Suggestions, not Commandments

Any of the suggestions in this article can be taken to an extreme and become ineffective or harmful. For example, eye contact is important, but taken to an extreme it will unnerve your witness. Instead of conveying that you are an attorney who is interested in the witness, you are conveying that you are a psychopath. Another example could be made with empathy. By properly empathizing with the witness's situation an attorney can adjust their interview technique to relate better to the witness; but too much empathy may cause an attorney not to ask necessary questions. Ultimately any suggestions in this article must be applied according to your personality, and common sense.

Conclusion

At the heart of every criminal trial are witnesses. The information they possess can be the difference between conviction and acquittal. Improving how advocates get that information from witnesses deserves thought and effort. A good rapport will lead to a greater, free-flow of information between attorneys and witnesses. This flow of information will allow attorneys to better represent their clients. Major MacDonnell.

4. JAMES W. MCELHANEY, TRIAL NOTEBOOK 4 (1994); SUCCESSFUL JURY TRIALS 100 (J. Appleman ed., 1952).

Environmental Law Division Notes

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

CERCLA Non-Time Critical Removal Actions

The Comprehensive Environmental Response, Compensation and Liability Act,[1] (CERCLA) addresses the identification, characterization, and–if necessary–the cleanup of releases of applicable hazardous substances into the environment.[2] Specifically, CERCLA authorizes the undertaking of cleanups (response actions) that are consistent with the National Contingency Plan (NCP).[3] There are two basic types of CERCLA response actions–remedial actions and removal actions.[4] This article focuses on non-time critical removal actions.

Generally, removal actions involve "removing" contamination that resulted from a CERCLA hazardous substance release. Many removals are emergency or time-critical actions. But, with non-time critical removals, decision makers have more time to plan their approach.[5] Given the possibility of more planning, non-time critical removal actions can raise some interesting questions. One issue that arose recently was whether the NCP's requirements for considering a full-blown response action would apply to discrete non-time critical removal actions. In short, the answer is no. Here is why.

Under the NCP, there are nine criteria[6] for assessing response actions, which include threshold criteria, primary criteria, and modifying criteria. Specifically, the threshold criteria are: (1) overall protection of human health and the environment; and (2) compliance with applicable, relevant, and appropriate requirements (ARARs) or the eligibility of a waiver. The primary criteria are: (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility or volume through treatment; (5) short term effectiveness; (6) implementability; and (7) cost. The modifying criteria are: (8) state acceptance, and (9) community acceptance.

With non-time critical removal actions, such an in-depth analysis is not necessary. Accordingly, EPA Guidance recommends that decision-makers consider only three criteria when assessing a non-time critical removal action.[7] These are effectiveness, implementability, and cost.

The main difference between the NCP's nine criteria and the EPA's three criteria is that the EPA's version is shorter. It calls for a more streamlined analysis, without the NCP's modifying criteria. There is also another important distinction, though less obvious, regarding the use of "applicable requirements" and "relevant and appropriate requirements" (ARARs).[8] CERCLA on-site remedial actions must comply with the substantive requirements contained in ARARs. Removal actions are only required to attain ARARs "to the extent practicable."[9] Lead agencies are permitted to consider whether compliance is practicable by examining the urgency of the situation and the scope of the removal action.[10] Hence, one more reason that the NCP's nine criteria do not apply to these actions. Kate Barfield.

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. *See* 42 U.S.C. §§ 9601(14), (22) for definitions of key terms, such as what constitutes a "release" or a "hazardous substance."

3. *See generally*, 40 C.F.R. pt. 300 (1999).

4. 42 U.S.C. § 9604(a).

5. The administrative record requirements for a removal action can be found at 40 C.F.R. § 300.820.

6. 40 C.F.R. § 300.430(e)(9)(iii).

7. EPA Guidance, OSWER No. 9360.0-32, *Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, Aug. 1993.

8. 42 U.S.C. § 9621(a), (d).

9. Note that the removal action must be fund-financed. 40 C.F.R. § 300.415(j).

10. 40 C.F.R. § 300.415(j)(1), (2).

District Court Rejects *Eastern Enterprises* Argument

In *United States v. Alcan Aluminum Corporation*,[11] a federal district court examined whether retroactive application of the Comprehensive Environmental Response, Compensation and Liability Act[12] (CERCLA) constituted a taking under the Fifth Amendment of the Constitution. Retroactive application of CERCLA would require Alcan Aluminum Corporation to pay for the clean up of toxic waste that the company had previously disposed of lawfully at a hazardous waste site.[13] The district court concluded that the Supreme Court's retroactivity analysis in *Eastern Enterprises v. Apfel*[14] did not apply to CERCLA.[15]

In *Eastern Enterprises*, the Supreme Court examined whether the Coal Industry Retiree Health Benefit Act of 1992[16] (Coal Act), when applied retroactively, constituted a taking under the Fifth Amendment.[17] The Coal Act would have forced Eastern to pay to its former employees' retirement funds in addition to those that their retirement plan had already established, in compliance with then-current legislation.[18] The Supreme Court held that the Coal Industry Retiree Health Benefit Act of 1992, constituted a taking under the Fifth Amendment, and thus violated the constitutional rights of Eastern.[19]

In a plurality decision, the Court held that the constitutionality of retroactive application of legislation depends upon the "justice and fairness" of the statute.[20] Under this analysis, three factors are used in order to determine whether a regulation constitutes a taking: (1) what is the economic impact which the regulation has upon the defendant? (2) does the regulation interfere with the reasonable investment backed expectations of the defendant? (3) what is the character of the government action?[21]

Based on this test, four Justices concluded that the Coal Act violated Eastern's Fifth Amendment rights. Eastern's liability under the Coal Act would have been highly disproportionate to its experience with the retirement plan, and therefore would have constituted an unjust economic burden.[22] Furthermore, the retroactive nature of the legislation interfered with the expectations of Eastern, because Eastern had not contributed to the problem that made the legislation necessary, and Congress had never before become involved with the coal industry in such a manner.[23] In a concurring opinion, Justice Kennedy concluded that the retroactive impact of the Coal Act was unconstitutional based upon its violation of the due process clause.[24]

In considering Alcan's CERCLA challenge, the district court first concluded that *Eastern* could not be employed as precedent for the *Alcan* case. The court pointed to the fact that the holding in *Eastern* was based upon a plurality decision, in which only four Justices had ruled that retroactive application of the Coal Act constituted a taking.[25] ecause the other five Justices, including Justice Kennedy in his concurring opinion, rejected this analysis, the ruling in *Eastern* did not constitute binding precedent.[26]

This left the due process claim of Alcan to the "well settled rule that economic legislation enjoys a 'presumption of constitutionality' that can be overcome only if the challenger estab-

11. United States v. Alcan Aluminum Corp., No. 87-CV-920, 1999 U.S. Dist. LEXIS 7103 (N.D.N.Y. May 11, 1999).

12. 42 U.S.C.A. § 9607 (West 1998).

13. *Alcan Aluminum Corp*., 1999 U.S. Dist. LEXIS at *5.

14. Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998).

15. *Alcan Aluminum Corp*., 1999 U.S. Dist. LEXIS at *5-*13.

16. 26 U.S.C. §§ 9701-9722 (1994).

17. *Eastern Enterprises*, 118 S. Ct. at 2150-51.

18. *Id.* at 2141.

19. *Id.* at 2150-51.

20. *Id.* at 2146 (citing Andrus v. Allard, 444 U.S. 51, 65 (1979)).

21. *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

22. *Id.* at 2149-51.

23. *Id.* at 2151-53.

24. *Id.* at 2154.

25. United States v. Alcan Aluminum Corp., No. 87-CV-920, 1999 U.S. Dist. LEXIS 7103, at *5 (N.D.N.Y. May 11, 1999) (citations omitted).

26. *Id.*

lishes that the legislature acted in an arbitrary and irrational way."[27] Relying on persuasive precedent, the court concluded that retroactive application of CERCLA was neither arbitrary nor irrational in basis.[28]

The district court went on to reason that even if *Eastern* were valid precedent for holding that retroactive use of CERCLA constituted a taking, the specific fact situation in *Alcan* would not pass the three-part test. Rather than finding an insurmountable economic burden, the district court stated that any economic impact that CERCLA would have on Alcan would be diminished by apportionment between responsible parties.[29] In addition, even if apportionment were not available, Alcan's potential liability was considerably less than the sum for which Eastern Enterprises would have been liable.[30]

Furthermore, liability was imposed on Alcan because of actions that it had taken in the past. While Alcan claimed that it had not caused the pollution of the site, that fact remained to be determined. Despite this, Alcan had indeed dumped toxic substances in the area that was now contaminated.[31]

The Army is subject to liability under CERCLA in the same way as a private party.[32] The Army does not, however, have Fifth Amendment rights. A finding that CERCLA violates the Fifth Amendment rights of private parties could leave the Army responsible for a greater allotment of site clean-up costs. Although CERCLA survived the retroactivity challenge in *Alcan*, the issue may be raised continually until it is ultimately resolved by the Supreme Court. Christine Azzaro.[33]

Litigation Division Note

Voluntary Resignation: A Common Settlement with an Ever Present Pitfall

A Common Scenario

Following a string of misconduct and progressively harsher discipline, a federal employee is finally removed from his position. The employee contests the removal before the Merit Systems Protection Board (MSPB), and threatens to proceed before the Equal Employment Opportunity Commission (EEOC) and federal district court, if necessary. In lieu of incurring the expense and delay of pursuing the dispute before these forums, the former employee and the Army ultimately agree to settle the dispute. The former employee "voluntarily" resigns his federal position in exchange for the Army expunging evidence of an involuntary removal from his Official Personnel File (OPF).[34]

Such a "divorce" between the parties appears to present an amicable and conclusive resolution for all. However, when the former employee's future plans fail because potential employers became aware of the proposed involuntary removal and underlying misconduct through criminal investigation and finance records located somewhere other than in the OPF, the dispute arises anew. The former employee then petitions the MSPB or sues in federal court for enforcement of the settlement agreement.

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27. *Alcan Aluminum Co*., 1999 U.S. Dist. LEXIS 7103, at *14.

28. *Id.* (citations omitted).

29. *See Alcan Aluminum Corp*., 1999 U.S. Dist. LEXIS 7103, at *3-*4.

30. While Eastern Enterprises would have been liable for $50 to $100 million, Alcan's liability was in the approximate range of $5 million. *See id.* at *10.

31. "CERCLA liability has not been imposed on Alcan for no reason; rather, it has resulted from Alcan's conduct in disposing of waste where hazardous substances have been found. Consequently, Alcan's liability is predicated on the link between its waste disposal activities and the environmental harms caused at [the sites]." *Id.* at *11.

32. 42 U.S.C.A. § 9620 (a)(1) (West 1998).

33. Ms. Azzaro is a summer intern at the U.S. Army Environmental Law Division. In August she will be a second year law student at St. John's University School of Law in New York.

34. A civilian employee's OPF is a permanent personnel file that contains the primary records of their employment history with the federal government including Standard Form 50s reflecting when he or she was hired, promoted, demoted, resigned, or terminated. In the Army, an employee's OPF is located at the servicing Civilian Personnel Operations Center (CPOC).

Judicial Treatment

Historically, the Army easily prevailed in such scenarios by simply showing that the OPF was in fact expunged and was not the source of the adverse information. However, the U.S. Court of Appeals for the Federal Circuit no longer endorses this position. The court has embarked on a course that is tantamount to finding federal agencies strictly liable for any "ambiguities" in the resignation-in-lieu-of-removal settlement agreement.

In *King v. Department of the Navy*,[35] the Federal Circuit held that the settlement language "remove all reference to the removal action from her Official Personnel File," required the Navy not only to purge documents from the appellant's OPF, but also from her files at the Office of Personnel Management (OPM), the Defense Finance and Accounting Service (DFAS), and any other records outside the Navy's control.

In justifying this broad expansion, the court went beyond the four corners of the agreement and reasoned that when an employee voluntarily resigns in exchange for purging the OPF of prior adverse action, his goal is to eliminate this information from affecting future employment with the government or elsewhere.[36] The court went on to note that by correcting only those files in the hands of the Navy, and retaining references to the action that was subsequently revoked in other official government files, the former employee was denied the intended benefit of his assent to the agreement.[37]

Such a broad expansion of the settlement burden placed upon the agency is the result of the court applying contract interpretation rules to a settlement contract that was, in the court's opinion, too vague in its terms.[38] In interpreting a written agreement or contract, the court will first ascertain whether the written understanding is clearly stated and was clearly understood by the parties.[39] Words used by the parties to express their agreement are given their ordinary meaning, unless it is established that the parties agreed to some alternative meaning. If ambiguity is found, or arises during performance, the court looks to the intent of the parties at the time the agreement was made.[40] This intention controls over any ambiguity or subsequent dispute over the terms of the agreement.[41] In *King*, because the court found that the settlement language was ambiguous, the court was free to expand the Navy's purging requirement to enable the former employee to realize his intent of eliminating the information from any source that may influence his future employment with the government or elsewhere.[42]

Still Not Clear Enough

In *Newton v. Department of the Army*,[43] the U.S. Court of Appeals for the Federal Circuit had an opportunity to review the terms of a more specific Army settlement. The settlement tried to avoid future problems by more specifically agreeing to purge documents related to the appellant's removal. Following an investigation and the release of a Criminal Investigation Division (CID) report, the appellant, Mr. Newton, was removed from his position for submitting false claims for living quarters allowance. During the MSPB appeal, he agreed to voluntarily resign, and the Army agreed to "Purge from the records of management and from the Seoul Civilian Personnel Office and the Office of the Civilian Personnel Director, United States Forces

35. 130 F.3d 1031 (Fed. Cir. 1997).

36. *Id.* at 1033.

37. *Id.* The court also cited for support its earlier decision in *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997), where it explained that the agency's agreement to deny the truth about the appellant's performance at HUD to potential future employers, including other agencies of the U.S. government, was the major benefit that the appellant received in exchange for agreeing to resign from his position.

38. The interpretation of settlement agreements, or any contract, by the federal courts is a question of law that is reviewed *de novo*. Greco v. Department of the Army, 852 F.2d 558, 560 (Fed. Cir. 1988); Perry v. Department of the Army, 992 F.2d 1575, 1578 (Fed. Cir. 1993).

39. *King*, 130 F.3d at 1033.

40. *Id.*

41. *Id.*

42. Interestingly, two months earlier in *Thomas*, the U.S. Court of Appeals for the Federal Circuit foreshadowed the problems that federal agencies might have adhering to such settlement agreements in light of the court's interpretation favoring the appellant's intent and their benefit bargained for analysis:

> It may well be that it is virtually impossible for agencies to ensure that settlement agreements such as this, requiring the whitewashing of an employee's disciplinary record, can be performed to the letter.
> . . .
> Perhaps as a matter of sound governmental administration such agency agreements should be prohibited.

Thomas, 124 F.3d at 1442.

43. No. 99-3021, (Fed. Cir. Mar. 5, 1999).

Korea, all documents connected with the appellant's removal."[44]

After resigning from his Army employment, the appellant submitted a petition for enforcement to the MSPB and then appealed to the U.S. Court of Appeals for the Federal Circuit. The appellant sought to compel the Army to purge its records located outside of Korea of all references to the appellant's original removal and associated investigation.[45] The Army admitted that copies of the CID investigation were located at CID Command, Fort Belvoir, Virginia, and at the Central Clearance Facility (CCF), Fort Meade, Maryland, but argued that it had not agreed to purge any records located outside of Korea.

Although the settlement language in *Newton*, which set out the records to be removed and their location, was much more specific than that in *King*, the Federal Circuit was still troubled by the meaning of the phrase "purge from the records of management and from the Seoul Civilian Personnel Office and the Office of the Civilian Personnel Director, United States Forces Korea."[46]

The court found that this language was ambiguous because it was subject to two reasonable interpretations. One interpretation is that the purging applies to *all* Army records, wherever located, *and* to the records maintained in Korea. Another reasonable interpretation is that the purging is to apply to all records held by Newton's supervisors, the Seoul Civilian Personnel Office and the Office of the Civilian Personnel Director located within the jurisdiction of United States Forces Korea, that is, within Korea.[47]

Because of this "ambiguous" language, the court stated that it must discern the intent of the parties at the time of contracting the agreement. In light of the decision in *King*, which only considered the intent of the employee-appellant in making its determination, the court could have easily found that the appellant bargained for eliminating the effect that this information would have on his future employment with the government or elsewhere. Thus, requiring the Army to purge the CID Command records at Fort Belvoir and the CCF records at Fort Meade, as well as any records that may be located at OPM and DFAS.

Fortunately for the Army, the court was able to glean enough additional evidence from the employee's pleadings to determine that such an expansive reading of the settlement agreement was in fact not what the appellant had bargained for. The court found that the appellant was aware of the existence of records outside of Korea relating to his fraudulent activity before he entered into the settlement agreement.[48] Additionally, since the appellant required that all inquiries from prospective employers be directed to the Seoul Civilian Personnel Office, it was apparent to the court that the appellant intended that the Army purge the records at that office and prospective employers be directed to the sanitized records at that office rather than to unsanitized records elsewhere.[49] Although the Army prevailed in this case, but for the admission in the plaintiff's pleadings, the "ambiguous" settlement language may well have resulted in Army liability for a breach of that agreement and the requirement to purge the records located outside Korea.

The Ever Present Pitfall

Records on an individual employee can be as extensive as they are diverse. The former employee's OPF and his supervisor's files may be just the tip of the iceberg. If the CID investigated the employee, there will be records located at the servicing CID office and at the CID Command at Fort Belvoir, Virginia. If the employee held a security clearance, there will be records in the CCF at Fort Meade, Maryland. If the dispute or misconduct giving rise to an employee's removal resulted in an inspector general (IG) inquiry, there will be records at the servicing IG office and at the Department of the Army Inspector General Headquarters in Washington, D.C.

Records are also maintained by agencies outside the Department of the Army. The OPM and the DFAS may maintain records referencing a federal employee's removal. Depending on the extent of the misconduct, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms and even local law enforcement authorities may also maintain records on the former employee. For the unwary or careless labor counselor, agreeing to expunge a former employee's "record" or even "Official Personnel File" could result in the requirement to expunge the former employee's files at every one of these record locations.

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44. *Id.* at 2. The agreement also stated that the documents removed shall include, but not be limited to, the CID investigation, the notice of proposed removal, the reply to the proposed removal and the decision to remove; that appellant would be provided with a neutral reference which states only his dates of employment, positions held, rates of pay, and that he was performing at a satisfactory level at the time of his resignation; and, that all inquiries from prospective employers were to be directed to the Seoul Civilian Personnel Office for this neutral reference.

45. *Id.*

46. *Id.*

47. *Id.* at 5 (emphasis added).

48. In his reply brief, the appellant stated that "[w]hile subconsciously I may have known that files [outside of Korea] did exist, no one specifically stated what type of files or where the files were specifically located." *Id.*

49. *Id.* at 5-6.

The Obvious Solution

Government counsel who agree to purge a complainant's records and enter into a resignation-in-lieu-of-removal settlement agreement must make every effort to detail what documents will be purged from which employee records. Even more important, counsel must specifically set out the location of those records. Using personnel or legal jargon, even a term as specific as "OPF," to refer to files and their locations will be found to be too ambiguous and result in the court examining the former employee's intent and using the benefit of the bargain analysis to favor the former employee. Specifically identifying the location of the records to be purged should not only avoid a suit for enforcement of the settlement agreement in the future, but if a suit for enforcement is filed, it will avoid the court's broad expansion of the record cleansing requirement to other agency records. Finally, for policy reasons labor counselors should never agree to purge CID, IG, or CCF records.[50] Major Berg.

50. The importance of the Army's maintaining investigative records goes beyond the re-employment concerns contained in the typical settlement agreement of this nature and should therefore not be curtailed by such an agreement. While such agreements may be enforceable, they give relief that the employee could not get even if the appeal to the MSPB was successful. A labor counselor faced with the proverbial unique case where such an agreement actually might be in the Army's best interest should coordinate, through his respective MACOM labor counselor, and with the Labor and Employment Law Division of the Office of The Judge Advocate General.

Claims Report

United States Army Claims Service

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Managing Personnel Claims

Introduction

> *Claims has the greatest impact on soldier morale of all that SJA offices do. It can make it or it can break it.*[1]

Among soldiers, family members, and civilians, the reputation of a legal office is largely based on the services its claims office provides. No other part of a legal office has contact with such a broad range of soldiers and civilians as the claims office. Newly arrived soldiers, family members, and civilian employees invariably contact the claims office if they need to obtain information on filing a claim for damage to household goods. For most of these personnel, this is the first contact they have with the legal office; the impressions they form will last a long time. In addition to claims for household goods during moves, the claims office is at the forefront of disaster relief efforts after a flood, hurricane, or other disaster. Therefore, it is critical for the claims office to provide the best service possible.

The vast majority of claims processed by most military legal offices are "personnel claims." Soldiers and civilian personnel file these claims for loss and damage of personal property sustained incident to service, such as damage to household goods during a permanent change of station move.[2] Properly managing these claims helps to ensure that the claims office and the legal office have an outstanding reputation.

This article will assist staff judge advocates, claims officers, senior claims adjudicators, and other claims office managers, to manage personnel claims.[3] The recommendations contained in this article are an accumulation of ideas and practices that have improved the effectiveness of claims offices throughout the world.

Standard Operating Procedures

Develop standard operating procedures (SOPs) that clearly describe the tasks involved in each step of the claims process. The SOP should be as detailed as a cookbook, telling claims personnel what tasks to perform and in what order. The SOP must be tailored to your office; a generic SOP or one obtained from another office is not sufficient. Copies of SOPs, which can be tailored for your office, are available in the materials distributed at the U.S. Army Claims Service Annual Claims Training Conference.[4]

An SOP is not very useful if it simply sits on a shelf. Each person should have his own copy of the portion of the SOP that pertains to his own duties. Make each person responsible for updating the SOP if it does not accurately reflect proper office procedures. These make excellent tools for training new personnel and establishing uniform office practices.

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1. Major General Walter B. Huffman, The Judge Advocate General, U.S. Army, Keynote Address to U.S. Army Claims Training Conference (Oct. 1997).

2. The Personnel Claims Act permits government agencies to settle claims made by members of the uniformed services and agency employees for damage to or loss of personal property incident to service. 31 U.S.C. § 3721 (1994). *See* DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES, CLAIMS ch. 11 (31 Dec. 1997) [hereinafter AR 27-20]; DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS PROCEDURES, ch. 11 (1 Apr. 1998) [hereinafter DA PAM. 27-162].

3. Other important aspects of claims office management include management of tort claims, affirmative claims, and claims under UCMJ art. 139 (1998). These topics are beyond the scope of this article.

4. U.S. ARMY CLAIMS SERVICE, WORLDWIDE CLAIMS TRAINING COURSE, PERSONNEL CLAIMS MATERIALS, TAB 4: CLAIMS OFFICE MANAGEMENT (Nov. 1998). For a copy of these materials, contact the Administrative Branch, U.S. Army Claims Service, Building 4411 Llewellyn Avenue, Fort George G. Meade, Maryland 20755, telephone (301) 677-7009, extension 206.

Claims Policies and Guidance

Keep abreast of current claims guidance and policy. Read and distribute claims articles and notes published in *The Army Lawyer*.[5] Check the Claims Forum on the Legal Automation Army-Wide System Bulletin Board Service (LAAWS BBS) and Judge Advocate General's Corps Lotus Notes network.[6] Ensure that everyone in your office has a copy of the current Army claims regulation and claims pamphlet,[7] access to *The Army Lawyer*, and other claims information.

Do not rely on memory, either yours or that of your more experienced personnel. Policies change and memory does not always keep pace. If you are not sure, look it up!

Instructions to Claimants

Develop clear, user-friendly instructions for local claimants to follow when reporting damage and filing claims.[8] These instructions should explain, in bold lettering, that the claimant is required to notify the claims office of loss and damage within seventy days of delivery.[9] This is typically done by turning in a pink DD Form 1840R, Notice of Loss or Damage.[10] The instructions must also explain in clear, unambiguous language, that this notice is not equivalent to filing a claim and that an actual claim must be filed within two years of delivery (not two years of turning in the DD Form 1840R).[11] Appendix A contains an example of a suggested opening paragraph for claimant instructions.

The instructions should include a list of local repair firms.[12] Keep this list up to date by checking with local repair firms and claimants who have used them. Your instructions should also explain in detail the need for estimates and the criteria for a proper estimate.[13] Provide examples of repair and replacement estimates, or blank forms for claimants to show repairmen. This is especially critical for electronic items and computers.

Develop a separate set of instructions for claimants who are not local and will likely have no personal contact with the claims office. These instructions should be even clearer and more detailed than the instructions provided for local claimants.

DD Form 1840R

Unlike most civilian moves where loss and damage must be reported at delivery, military claimants have up to seventy-five days to notify the carrier of loss and damage. Claimants document loss and damage noticed at delivery on the DD Form 1840, Joint Statement of Loss or Damage at Delivery.[14] Claimants may annotate additional loss and damage later on the reverse side of the form, which is the DD Form 1840R, Notice of Loss or Damage.[15] They must turn this form in to the local military claims office within seventy days of delivery.[16] Your office has an additional five days to dispatch the form to the carrier.[17] If the claimant turns the DD Form 1840R in late, your office may be unable to recover from the carrier[18] and may not be able to pay the claimant for items the carrier was not notified of within seventy-five days.[19] Consequently, *it is critical to*

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5. *See, e.g.*, Lieutenant Colonel Kennerly, *Personnel Claims Notes, Claims Information and the Installation Transportation Office Outbound Shipping Counselor,* ARMY LAW., Mar. 1995, at 56.

6. The LAAWS BBS is not "Y2K compliant" (*i.e.* it does not properly process dates after the year 1999). It is scheduled to be replaced by the Judge Advocate General's (JAG) Corps Lotus Notes network by the end of 1999. There is currently a claims forum on both the LAAWS BBS and the JAG Corps Lotus Notes network. JAG Corps personnel can access the LAAWS BBS and JAG Corps Lotus Notes network through the JAG Corps Internet web page at <www.jagcnet.army.mil>.

7. AR 27-20, *supra* note 2; DA PAM. 27-162, *supra* note 2.

8. *See* AR 27-20, *supra* note 2, para. 11-21b(2); DA PAM. 27-162, *supra* note 2, para 11-21f(3).

9. *See* AR 27-20, *supra* note 2, para. 11-21a(3); DA PAM. 27-162, *supra* note 2, para. 11-21g.

10. DA PAM. 27-162, *supra* note 2, fig. 11-8B.

11. *See* DA PAM. 27-162, *supra* note 2, para. 11-7a(1).

12. Every field claims office should maintain a current list of local firms that repair various types of property at a reasonable cost, which can be provided to claimants. At a minimum, claims offices should maintain lists of firms that will repair furniture and vehicles, preferably with at least three names on each list. Advise claimants that a firm's inclusion on the list is not an endorsement of the firm or a guarantee of quality. DA PAM. 27-162, *supra* note 2, para. 11-21f(4).

13. An estimate of repair should: (1) be legible; (2) be from a company willing to stand behind the estimate and complete repairs indicated; (3) differentiate between shipment damage and normal wear and tear or preexisting damage; (4) include the date made, identify the item being evaluated, and fully identify the individual and firm preparing the estimate; (5) state whether the cost of the estimate will be deducted from the work to be performed or if this is a separate charge; (6) be prepared by a firm with expertise in repairing the items damaged; and (7) include drayage fees, when appropriate. DA PAM. 27-162, *supra* note 2, para. 11-14e.

14. DA PAM. 27-162, *supra* note 2, fig. 11-8A.

15. DA PAM. 27-162, *supra* note 2, fig. 11-8B.

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

inform potential claimants of the requirement to turn in the DD Form 1840R in a timely manner.

When a claimant turns in the DD Form 1840R, review the form carefully to ensure that it was properly completed.[20] Advise the claimant of the importance of the seventy-day reporting requirement and ask if all loss and damage is listed on the form. Ask to see the claimant's inventory to make sure that he has not given you the wrong form. A claimant who has received two shipments may accidentally list damage to a household goods shipment on the DD Form 1840R for a hold-baggage shipment. If you do not catch this mistake, you will not be able to recover against the household goods carrier, since you never provided the carrier notice of loss.

When you review the DD Form 1840R, take the opportunity to explain the two-year deadline for filing a claim. *Be sure to emphasize that the two years begins on the date of delivery, not the date the DD Form 1840R was turned in to the claims office*.[21]

You must always dispatch the DD Form 1840R immediately, even if you receive it after the seventieth day. As long as you dispatch the form before the seventy-fifth day, you should be able to recover from the carrier responsible for the loss and damage.[22] Even if you dispatch it after the seventy-fifth day, you may still be able to recover if the claimant has a legitimate excuse for the delay in turning in the form, such as temporary duty or hospitalization.[23] In addition, if any lost items are listed, the form will alert the carrier to initiate tracer action to attempt to find them.[24]

Give the claimant a copy of the DD Form 1840R before he leaves. Keep a copy of the form in your files.[25] Your file copy will come in handy if the claimant loses the form or disputes what was written on the form when it was dispatched.

Adjudication

Claims adjudication is one of the most critical parts of a claim's office's mission. Ensure that your adjudicators provide professional, prompt, and courteous service. Processing time should not be your main concern, however. Above all, ensure that claims personnel are adjudicating claims properly.

Small claims should be processed differently from other claims. Small claims are those that can be settled for less than $1000 or do not need extensive investigation (even though more than $1000 may be claimed). Identify these claims during the initial screening of claimants so that these claims can be processed as quickly as possible. "First in-first out" processing of all claims, large and small, is contrary to Army claims policy.[26]

Formal adjudication techniques should be set aside for small claims. An experienced adjudicator should process these claims on the spot with the claimant present. This permits the adjudicator to ask the claimant questions and explain the adjudication. To arrive at settlement, relax evidentiary requirements, emphasizing personal inspection of damaged items, catalogs, and telephone calls. The adjudicator should make full use of loss of value and agreed cost of repairs for minor furniture damage. The small claims procedure is not a give-away program, but a means for claims personnel to concentrate their efforts on those claims that need investigation, regardless of amount, and still accomplish the overall mission of processing claims promptly and fairly.[27]

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17. *Id.*

18. DA PAM. 27-162, *supra* note 2, para. 11-26b(2). This 75-day rule was negotiated with the carrier industry and is contained in the Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules, effective Jan. 1, 1992, *reproduced in* DA PAM. 27-162, *supra* note 2, fig. 11-5.

19. AR 27-20 *supra* note 2, para. 11-21a(2); DA PAM. 27-162, *supra* note 2, para. 11-21g. The 75-day time limit will be met as long as the DD Form 1840R is dispatched (*i.e.* mailed or faxed) to the carrier within 75 days of delivery. Field claims personnel type the dispatch date in block 3b of the form. Field claims personnel must ensure that the form is properly mailed or faxed on the date listed on the form. *See id.* para. 11-21g(3)(b).

20. DA PAM. 27-162, *supra* note 2, para. 11-21g(6).

21. DA PAM. 27-162, *supra* note 2, para. 11-7b(2).

22. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules, effective Jan. 1, 1992, *reproduced in* DA PAM. 27-162, *supra* note 2, fig. 11-5.

23. Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules, effective Jan. 1, 1992, *reproduced in* DA PAM. 27-162, *supra* note 2, fig. 11-5. The memorandum includes exception for "good cause" such as "officially recognized absence or hospitalization of the service member during all or a portion of" the 75-day notice period. *Id.* The Army has interpreted this to mean absence on official duty or hospitalization that either overlaps the end of the notice period or exceeds 45 days. *Id.* para. 11-21g(2).

24. *See* Mr. Lickliter, *Dispatch of DD Form 1840R After the Seventy-Five Day Limit*, ARMY LAW., Sept. 1998, at 57.

25. A signed and dated copy of each dispatched DD Form 1840R must be filed alphabetically by claimant's name for each fiscal year. These files may be subdivided by month. When a claim is submitted, the form will be incorporated into the claim. Forms for which no claim is submitted must be maintained for two years after dispatch. DA PAM. 27-162, *supra* note 2, para. 11-21g(7).

26. *Id.* para. 11-10b.

Files

Set up and oversee a simple, user-friendly system for storing and moving claim files through the office. It should not be labor intensive to manage. All claims should be placed inside filing cabinets in their respective categories at the end of each workday. Having files laying around your claims office is likely to result in lost claims and major problems for your office.

File all personnel claims together in one area. Within these files, create separate sections based on the stage of processing. Create one section for claims pending adjudication. Subdivide this section into small claims (this should be a fast-moving category) and large claims.[28] Create another section for claims awaiting documentation. These are claims that the adjudicator cannot process due to lack of essential evidence. Tell the claimant what is needed, and give him a deadline for providing it. Create a third section for settled claims awaiting the comeback copy of the payment voucher.

The final section should be for recoveries. Subdivide this further into those claims that will be forwarded for centralized recovery[29] and claims where recovery will be settled locally.[30] Carrier recovery files should be filed by the month their suspense expires. Check these files on a regular basis to ensure timely dispatch.

Office Hours

Establish office hours and procedures that allow claims adjudicators to be available to as many claimants as possible, but also allow them to complete their adjudications without constant interruptions. Consider local mission requirements when establishing your office hours to ensure that claimants can come to see you when it is most convenient for them. Consider whether it is appropriate to establish special periods for claims processing on weekends or during the command's "family time."

To make claims adjudicators more accessible you should have them see claimants both by appointment and on a walk-in basis. The appointments are convenient for most claimants, who are able to schedule their time in advance. Allowing twenty to thirty minutes for each appointment will permit claims adjudicators to settle many small claims on the spot while the claimant is present. The same twenty to thirty minutes is sufficient to ensure that large claims are sufficiently documented. The walk-in periods are best for soldiers who need to drop off their DD Form 1840R or file their claim immediately. Seeing claimants only on a walk-in basis is counterproductive. Soldiers waste valuable training time waiting, and claims personnel are unable to adequately schedule their time.

All claims offices should be closed to claimants during a portion of the week (about eight hours is best) to permit adjudicators to tackle difficult claims without interruption. It is counterproductive to be accessible to claimants at all times, because adjudicators will have no time to settle the claims they receive, conduct needed inspections, coordinate visits to the transportation and finance offices, or to conduct claims briefings. When the office is closed to claimants, make exceptions for soldiers who need to turn in DD Forms 1840R before the seventy-day notice period expires, soldiers who need to file a claim before the two-year statute of limitations runs, and true emergencies.

Publicity

Regularly publish articles informing the community of claims policies and procedures.[31] The claim's system is not an insurance system; articles are an excellent means of explaining the importance of protecting oneself from unnecessary financial loss. Use notes from *The Army Lawyer*[32] and claims prevention information to brief local commanders and to publish in the local media. Appendix B contains an example of an article informing the public of claims issues related to household goods shipments.

Include a booklet that briefly explains claims procedures in the installations welcome packet, which is provided to incoming personnel. Ensure that the booklet stresses the importance of notifying your office of loss and damage within seventy days of household goods delivery as well as the importance of filing claims within two years of delivery.

27. *Id.*

28. Small claims are those that can be settled for $1000 or less and those that do not need extensive investigation, even though more than $1000 may be involved. *See supra* note 26 and accompanying text.

29. Generally, recovery actions that exceed $500 are forwarded to the U.S. Army Claims Service for centralized recovery. *See* DA PAM. 27-162, *supra* note 2, para. 11-32 (detailing recovery procedures). Centralized recovery files should be organized as described in DA PAM. 27-162, *supra* note 2, fig. 11-35.

30. The procedure for filing claims was described in the previous version of the claims pamphlet. *See* DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES, CLAIMS, para. 11-12 (15 Dec. 1989).

31. DA PAM. 27-162, *supra* note 2, para. 11-21d.

32. *See, e.g.*, Mr. Lickliter & Lieutenant Colonel Masterton, *Vehicle Theft and Vandalism Off-Post*, ARMY LAW., Feb. 1999, at 50; Lieutenant Colonel Masterton, *Use of Privately Owned Vehicles (POVs) for the "Convenience of the Government,"* ARMY LAW., Feb. 1999, at 50.

Briefings

Inquire about newcomer briefings and get on the schedule to brief incoming personnel on claims issues. When units are deploying, make sure you brief them on claims issues before they deploy. Brief commanders of deploying units as well, to ensure that they do not give out guidance that conflicts with Army claims policy. This is particularly important when a command establishes limitations on the types of personal property that soldiers may take into an operational area.

Brief deploying and incoming personnel in groups. Group briefings are better than individual briefings because they are more complete. When briefing large numbers of people individually, you may be tempted to give more cursory briefings and miss important information.

Alternatively, videotape one of your claims experts carefully explaining the forms and instructions to an imaginary claimant. This way you can review the briefing to ensure it is complete and there will be no question about what the claimant is told. Such a video can be especially helpful during busy times, when your personnel would not otherwise be able to conduct briefings. If your installation has a local cable channel, run the video as a public service. This does not take the place of personalized service, but is an effective way of supplementing your services.

Transportation Counseling

Involve the claims office in the transportation office briefings for departing personnel.[33] Encourage transportation counselors to provide claimants with tips, such as taking photographs and videotapes of property before shipment, especially large collections of valuable items, such as compact disks. Soldiers should be told to photograph not only the compact disk jewel covers, but also the disks themselves, to show what is inside the covers. Counselors should advise soldiers to keep receipts and ship them separately from the household goods. Counselors should also explain the importance of the inventory and tell soldiers how to annotate it to object to the carriers' preexisting damage notations. Finally, the counselors should explain the need to annotate fully the DD Form 1840 at delivery and to turn in the DD Form 1840R within seventy days of delivery.

Provide transportation counselors with the counseling checklist published in the claims pamphlet.[34] This checklist contains much of the advice mentioned above and can be reproduced and handed out to claimants. The counselors should also give claimants the pamphlet *It's Your Move*,[35] which describes many claims aspects of a household goods move. However, simply handing the soldier a few pieces of paper is not enough; ensure that the counselors are also providing soldiers good advice on safeguarding property and documenting damage.

Automation

Familiarize yourself with the Personnel Claims Management Program. This program assists the U.S. Army Claims Service to track claims and provide statistics to develop its budget.[36] The program allows managers to manage claims within their offices. It offers many features that, if used, will provide a wealth of information about the number and type of claims in your office.

Processing time should not dictate how you use the Personnel Claims Management Program. You must always log in claims the day you receive them.[37] If a claimant does not have all of the necessary documentation, do not hand the claim back to him or delay logging-in the claim. Accept the claim and log it in to the database; the program has a feature that permits you to stop the calculation of processing time while the claimant obtains the necessary documentation.

Fiscal Integrity

All claims are paid from a central open allotment, managed by the U.S. Army Claims Service.[38] The Army Claims Service provides each field claims office with a spending target, known as a claims expenditure allowance (CEA).[39] Keep track of your CEA so you know whether you have funds to pay claims.[40] Bal-

33. DA PAM. 27-162, *supra* note 2, para. 11-24. *See also* Lieutenant Colonel Kennerly, *Personnel Claims Note, Claims Information and the Installation Transportation Office Outbound Shipping Counselor,* ARMY LAW., Mar. 1995, at 56.

34. DA PAM. 27-162, *supra* note 2, fig. 11-12. This checklist explains claims aspects of moves. It provides claimants with advice on documenting ownership of property before the move, completing the inventory and other documents during the move, and filing the DD Form 1840R after the move.

35. DEP'T OF ARMY, PAM. 55-2, IT'S YOUR MOVE (1994).

36. DA PAM. 27-162, *supra* note 2, paras. 11-32c(1), 13-1b.

37. *Id.* para. 13-1b(6)(a).

38. *Id.* para. 13-11a.

39. *Id.* para. 13-11b.

40. *See id.* para. 11-21i.

ance your budget weekly. Ensure that the CEA balance in your claims database accurately reflects your actual expenditures. Overseas field offices should ensure that their figures match those of the servicing finance office.

Report your expenditures, recoveries, and projected needs to the U.S. Army Claims Service Budget Office. Your office is required to submit a status of funds report by the seventh calendar day of each month.[41]

Ensure that you are using the correct claims payment procedures. Most claims offices now pay claims electronically. Ensure that your office's payment procedures comply with Army Claims Service guidance and provide the quickest possible payments to claimants.[42] Coordinate with your servicing-finance office to resolve any payment problems.

You must also ensure that your office properly safeguards valuable items, such as incoming checks. All recovery checks must be inside a locked box inside a file cabinet between the time that the office receives them and the time that they are deposited or returned as insufficient. You must either deposit or return checks within seven calendar days.[43]

Claims Survey

Create and use an effective survey to determine how your office is performing. Also, select several claimants at random each month and contact them. These are excellent ways to monitor your claims operation and claimants' opinions of it. Remember that your office exists to provide a service. You owe it to the claimants and yourself to monitor the quality of that service.

It is important to distribute surveys to every claimant. Do not simply make surveys available to claimants if they wish to take one. A "take one" procedure will ensure that you only get responses from the angriest claimants and those who have a specific problem to identify. Place the survey in your instruction packet and ask all claimants to complete it. This is especially effective if your office adjudicates claims "on the spot."

Ensure that your survey has tailored questions that will help you determine if your claims operation is effective. You should ask claimants if they were able to understand your office's instructions and whether the list of repairmen was adequate. Appendix C contains examples of effective claimant surveys.

Training

Train all of the new claims personnel. Be available to answer their questions, and to provide guidance. Do not rely on the claims staff to train one another. Keep yourself in the information loop. Provide inter-office cross training.

Budget for claims training, as well as courses that will improve the overall effectiveness of your office. Never assume that because some of your staff have "been here forever" they cannot benefit from training. Even experienced personnel need a refresher, just like professional baseball players need to return to spring training to refocus on the fundamentals.

The U.S. Army Claims Service hosts regular video-teleconferences for claims offices in the United States.[44] Important new claims policies and other guidance are disseminated at these teleconferences. The teleconferences are announced on the Legal Automation Army Wide System Bulletin Board Service (LAAWS BBS) and the Judge Advocate General's Corps Lotus Notes network.[45] You and the claims office staff should go to these teleconferences, even if that means traveling to another installation's teleconference center.

The U.S. Army Claims Service currently offers two training courses: the Annual Claims Training Course in the fall and the Personnel Claims Basic Training Course in the spring. The Annual Claims Training Course provides an excellent refresher and update for experienced claims personnel.[46] Send as many of your claims professionals as possible to this course. At a minimum, the claims judge advocate and senior claims adjudicator should always attend this course. The course is designed to be a "train the trainer" course, so those returning from the course should pass on the lessons learned to others in the office. The Personnel Claims Basic Training Course provides a hands-on training for new personnel and experienced personnel who need a refresher in claims adjudication and recovery.

The U.S. Army Claims Service–Europe and the U.S. Armed Forces Claims Service–Korea both offer their own annual claims training courses.[47] Claims professionals in Europe and

41. *Id.* para. 13-12c.

42. *Id.* para. 11-21j (discussing the general payment procedures). The Standard Financial System Redesign (STANFINS SRD1), described in this paragraph, is being replaced by the Computerized Accounts Payable System-Windows (CAPS-W), a new method of authorizing claims payments. This new system permits claims offices to electronically authorize payment of claims. The other procedures described in paragraph 11-21j are still accurate.

43. *Id.* paras. 11-28c through f (describing the procedures to be followed for accepting checks and returning them to carriers).

44. *Id.* para. 1-15a(2).

45. *See supra* note 6 and accompanying text.

46. *See* DA PAM. 27-162, *supra* note 2, para. 1-15a(2).

the Far East should attend these conferences to the maximum extent possible.

The U.S. Army Claims Service also offers claims assistance visits to field claims offices. During these visits, one or more claims experts from the Army Claims Service will visit your office, analyze your office procedures, and provide suggested improvements. These visits permit offices and the Army Claims Service to share successful time and work management practices and ensure claimants receive consistent, high-quality service throughout the Army.[48]

Resources

Make every effort to ensure that claims staff has the tools that they need to do their job: a copier; a lock-box or safe for recovery checks; a vehicle, time, and funds to perform inspections; and a camera to record damage during inspections. Digital cameras permit integrating photographs into the claims adjudication packets. They also eliminate potential difficulties associated with processing film. Make sure your staff judge advocate knows what your office needs. Ask him to budget for claims requirements.

If your office has a temporary backlog of carrier recoveries, contact the Budget Office of the U.S. Army Claims Service to determine if you qualify for the temporary carrier recovery clerk program. The Army Claims Service has limited funding to provide field claims offices with carrier recovery clerks to assist with a temporary recovery problem. This funding may enable you to hire a temporary clerk to eliminate a carrier recovery backlog. Do not cut your permanent recovery clerk positions based on this program. The Army Claims Service can only provide limited funding to resolve a temporary problem.

People

People are your most important assets–take care of them. Let them know you appreciate their efforts. Reward them any way you can, with civilian recognition awards or just a pat on the back. You cannot successfully manage a claims office without a loyal staff.

One way to recognize your people is to apply for The Judge Advocate General's Award for Excellence in Claims.[49] This award is given annually to the best claims offices in the world. The criteria for the award are published in the Claims Forum of the Legal Automation Army-Wide System Bulletin Board Service (LAAWS BBS) and *The Army Lawyer*.[50] Most of the suggestions mentioned in this article are included as criteria for the award.

Conclusion

The goal of the Army personnel claims system is to improve morale. Proper management of personnel claims is critical to realize this goal.

The first step to proper management is developing proper procedures. Develop clear instructions for claimants, process DD Forms 1840R promptly, adjudicate claims fairly, and ensure claims are filed properly. Establish office hours that are convenient for claimants but allow your adjudicators time to complete their work. Publicize claims information whenever possible and become involved in newcomer briefings and transportation counseling. Use claims automation programs appropriately and keep track of your claims funds. Survey claimants to see where you can improve. Equally important is taking care of claims personnel: ensure they are properly trained, have adequate resources, and are rewarded for good work.

If you properly manage your claims office and ensure it provides the best service possible, you will not only increase morale, but also improve the reputation of your entire legal office.

47. *Id.* para. 1-15b.

48. *Id.* para. 1-16.

49. *Id.* para. 1-17.

50. The award criteria for Fiscal Year 1998 were published on the Claims Forum of the LAAWS BBS in July 1998. They were also published in the November edition of *The Army Lawyer. See* Lieutenant Colonel Masterton, *Claims Management Note, The Judge Advocate General's Excellence in Claims Award*, ARMY LAW., Nov. 1998, at 69.

Appendix A

Suggested Opening Paragraphs for Claims Instructions

We are sorry you sustained damage and/or loss in your recent move. The mission of the Claims Office is to assist you in filing your claims and to settle your claim fairly and without undue delay. We will then try to make the carrier pay the Army for the damage and/or loss it caused. In order for us to do this, it is important that you read and follow these instructions carefully.

THERE ARE TWO DIFFERENT TIME LIMITATIONS THAT AFFECT YOUR CLAIM:

1. WITHIN 70 DAYS OF DELIVERY YOU MUST NOTIFY OUR OFFICE IN WRITING OF ALL DAMAGED AND MISSING ITEMS. This allows us to comply with contractual requirements and inform the carrier of damaged items and request tracer action for missing items. You should use the pink DD Form 1840R to do this. If you do not notify us we must deduct from your payment the amount of money we could have recovered from the carrier. This may mean that you will be paid nothing on your claim. **THIS NOTICE OF DAMAGE OR LOSS IS NOT A CLAIM AGAINST THE GOVERMENT.**

2. WITHIN TWO YEARS OF THE DATE YOU RECEIVED YOUR GOODS YOU MUST FILE YOUR CLAIM AGAINST THE GOVERNMENT. You should do this by completing the attached DD Forms 1842 and 1844. This two-year requirement is established by law. **It cannot be waived.**

Appendix B

Sample Claims Article

FAIR COMPENSATION FOR DAMAGES DURING PCS MOVES

Moving is something with which all soldiers are familiar. Unfortunately, moves often result in loss and damage of the items being shipped. Whether it is a scratch on a family heirloom or a box of your favorite compact disks that disappears during the move, such losses can be traumatic.

The military claims system is designed to help soldiers recover for such losses. It is also designed to ensure that the carrier responsible for the loss and damage is held accountable. This article will explain the military claims system and explain ways you can ensure fair compensation for any loss and damage you suffer during a PCS move.

Before the Move

The best way to ensure you will be compensated for loss and damage during a move is to take a few precautions before the move. This is the best time to document what you own and to ensure that you have the insurance coverage that you need.

The first thing to consider is whether you need additional insurance protection. You can either purchase your own insurance or, for moves within the continental United States, you can buy additional insurance protection through the transportation office. If you do not purchase insurance, the Army claims office can only pay the depreciated replacement or repair cost of your lost and damaged items. This is because the relevant claims statute only allows payment for current market value and not full replacement cost. In addition, the claims office has certain maximum amounts payable for specific items; for example, the maximum for stereo equipment is $1000 per item and $4000 per shipment. If you need more protection, you should consider buying insurance.

Most private insurance contracts will reimburse you only for items lost or destroyed during shipment; they usually will not cover damaged items (items which can be economically repaired). Some insurance companies provide “full replacement” cost protection; this means that if your ten year old television is destroyed they will pay to replace it with a comparable new television. Each insurance policy is different; it is important to find out if the coverage satisfies your needs before your move.

For moves within the continental United States you can also arrange for two types of insurance through the transportation office. “Option 1” or “higher increased released value” insurance will provide you with a greater dollar amount of protection for individual items. For example, if you purchase “Option 1” insurance and your stereo is destroyed, the carrier will pay you the depreciated value of your stereo up to the full amount the protection you purchased, regardless of the $1,000 maximum amount allowable for stereo items. “Option 2” or “full replacement protection” entitles you to the full un-depreciated value of your lost and destroyed items. For example, if you purchased “Option 2” insurance and your stereo was destroyed, the carrier should pay you the cost of a comparable new stereo. If your stereo is merely damaged, however, the carrier has the option of repairing it. Both “Option 1” and “Option 2” insurance are purchased from the carrier, so your payment will ultimately come from the carrier. Your local transportation office or claims office can explain the procedures for filing an insurance claim against the carrier.

Documenting what you own is perhaps the most important thing to do before your move. Ensure that you save receipts, bills, appraisals, high value item inventories, and other proof of ownership. These important documents should never be shipped with your household goods. Ship them separately or, better yet, hand-carry them. This way, if your entire shipment is lost, your proof of ownership will not be lost as well.

An excellent way to document what you own is to take pictures or videotape of the items in your house immediately before the move. If you have an extensive compact disk collection, or a number of Hummel or Lladro figurines, this is an excellent way of demonstrating the extent of your collection. Ensure that you videotape the open jewel covers of your compact disks, showing the disks inside. Pictures and videotapes have an added benefit; not only will they show what you own, but they will also demonstrate the condition of your items. If the movers scratch your dining room table, you will have a much easier time proving that the scratch occurred during the move if you have a picture of the table taken immediately before the move. Carry the photos and videotapes with you; do not ship them.

During the Move

When the packers arrive to pick-up your household goods, you should be ready for them. You should have already decided what items you want the movers to pack and what items you will hand-carry to your new assignment. It is critical to lock items you plan to hand-carry in a separate room or in your car, where they are not accessible to the movers.

It is best to hand-carry small, valuable items such as jewelry, rather than to allow the movers to pack them. If you decide to have the movers pack your jewelry, ensure that **each** item is listed **separately** on the inventory. **Cash, coin collections**, and similar items should never be packed; you *will* **not be paid** for these items if they are lost. As mentioned above, receipts and similar proof of ownership should either be hand-carried or, at a minimum, shipped separately.

When the movers have completed packing up your household goods and loading them onto the truck, they will present you with an inventory of all of your belongings. You should check this document carefully to ensure that it is accurate. Each line item of the inventory will contain a description of what it is (such as "3.0 cubic foot carton" or "chair"). For items of furniture, preexisting damage will be listed using a code found at the top or bottom of the form (for example "sc, ch - 6, 8, 9" means that the legs and right side of your chair are scratched and chipped). Examine the preexisting damages carefully; if the movers have exaggerated the amount of preexisting damages, you should state your disagreement directly on the inventory, in the "remarks" section directly above your signature. Do not argue with the movers; simply list your disagreement on the form.

When the movers deliver your household goods, make sure that they have delivered everything. Have a copy of the inventory handy and check off the numbers of items when the movers bring them into your new home.

If you notice that any items are missing or damaged, note this on the pink form (DD Form 1840), which the movers will give you. Do not leave this form blank if you have missing or damaged items; the government uses this form later to evaluate whether the carrier did a good job. There is no need to unpack all of your items at this time; you can note additional missing and damaged items later on the reverse side of the pink form (the reverse side is the DD Form 1840R).

After the Move

Unlike most civilian moves, where loss and damage must be noted immediately after delivery, soldiers have seventy days to notify the local claims office of loss and damage. This means that after your household goods have been delivered, you have seventy days to unpack them and note any loss and damage on the reverse side of the pink form (the DD Form 1840R). Thoroughly inspect your items: turn on electrical items to ensure they still operate; open the jewel covers of your compact disks to ensure the disks are still there; check your figurines to ensure they are not chipped. At this point, it is sufficient to state the general nature of the damage, such as "stereo–does not work." There is no need to get a repair estimate at this stage.

You must turn in the reverse side of the pink form (the DD Form 1840R) to your nearest Army claims office within seventy days of the delivery of your household goods. Failure to do so will make it impossible for the claims office to collect from the carrier responsible for your loss. As a result, the claims office will not be able to pay you for any items that you failed to report within seventy days.

When you turn in your DD Form 1840R, the claims office will provide you with forms and information on filing your claim. At this point, you will need to get repair estimates and other documentation to substantiate the amount of your loss. You have two years from the date of the **original delivery** (not from the date you turned in your DD Form 1840R) to file a claim. If you are late in filing your claim, the government will not be able to pay you anything.

The Army claims system is designed to help you. However, you also have a responsibility to protect yourself. If you keep proper records of what you own and promptly document damages that occur during the move, you should be able to recover the fair value of your loss. If you have questions, your local transportation office and local claims office can provide the answers.

Appendix C

Sample Claims Questionnaires

DEPARTMENT OF THE ARMY
Office of the Staff Judge Advocate
Headquarters, 44th Infantry Division and Fort Swampy
Fort Swampy, Vermont 11111

Dear Claimant:

The mission of the Claims Division of the Office of the Staff Judge Advocate is to process and settle claims received in a timely and fair manner consistent with applicable regulations. We want to ensure that claimants are receiving service consistent with this mission. This questionnaire is being furnished to you so that you can evaluate the service you received when you submitted your claim.

Please take a few minutes to complete the questionnaire and to include any additional comments you would like to make. Please return it to this office in the stamped, self-addressed envelope enclosed.

Your cooperation in completing this questionnaire is very important to us. We need feed-back from claimants so we may continue to improve the manner in which we process claims and so we can provide the best service possible. Thank you for your cooperation.

Sincerely,

THE CLAIMS DIVISION

Encl

QUESTIONNAIRE

PLEASE COMPLETE THIS FORM AND RETURN IT IN THE SELF-ADDRESSED ENVELOPE SO WE CAN EVALUATE THE SERVICES WE PROVIDED YOU.

1. The service I received on my claim was: (check one)

___EXCELLENT___GOOD___FAIR___POOR

2. What source informed you of the correct method of filing a claim against the U.S. Government?

___Transportation Office___Unit___Claims Office
___HHG Office___Friends___Other

PLEASE CIRCLE, WHEN APPLICABLE, ONE OF THE FOLLOWING: 1-EXCELLENT; 2-GOOD; 3-ADEQUATE; 4-INADEQUATE; 5-POOR

1. Were the instructions you received from the claims office, along with the instruction book, clear enough to enable you to file your claim?

1 2 3 4 5

2. Was your claim processed expeditiously (in a speedy and efficient manner)?

1 2 3 4 5

3. Were the reasons for your settlement thoroughly explained to you?

1 2 3 4 5

4. Did you find the claims personnel to be courteous, knowledgeable, and professional individuals?

1 2 3 4 5

5. If you were not satisfied with your settlement, were you informed of your right to submit new evidence and request reconsideration?

___Yes ___No

6. Further comments: _____

QUESTIONNAIRE

Please answer the questions below and provide comments to assist us. If the space provided for your comments is insufficient, please continue your comments on the reverse of this sheet or attach an additional sheet.

1. My overall evaluation of the assistance and services I received at the claims office is:

___Excellent ___Good ___Fair ___Poor

2. Do you believe your claim was settled in a fair manner:___Yes___No
If not, why not? _____

3. Were you treated courteously by the staff?___Yes___No
If not, with whom did you deal and what was the problem? _____

4. When you received your claims packet, did the written instructions and the directions from the claims clerk adequately explain how you were to prepare the forms? ___Yes ___No

5. If your claim could not be paid in full, were you given a thorough explanation of the method used to settle the claim? ___Yes___No
If not, what did we fail to explain?_____

6. If you had repair work accomplished on your damaged items, please rate the repair facility below:

FIRM	ITEMS REPAIRED	RATING	COMMENTS
a.			
b.			
c.			
d.			

7. Please provide comments on any other areas of the claims office that you feel are worthy of praise or need improvement.

_____ _____
Date Name (optional)

CLAMO Report

Center for Law and Military Operations (CLAMO)
The Judge Advocate General's School

CLAMO Personnel Additions

The Center welcomes the addition of a second judge advocate observer-controller (O/C) to the National Training Center (NTC), Fort Irwin, California.[1] This O/C will join the NTC Mustang Team in dealing with civilians on the battlefield and will assist the Lizard Team in scripting the scenarios and events that confront units during their rotations.[2] The Center also welcomes a third O/C at the Joint Readiness Training Center (JRTC), Fort Polk, Louisiana.[3]

CLAMO Databases

The Center for Law and Military Operations continues to expand its electronic databases in support of its mission to examine legal issues that arise during all phases of military operations and to devise training and resource strategies for addressing those issues. These databases are accessible through your local Army office of the staff judge advocate Lotus Notes servers, or through the Internet at The Judge Advocate General's Corps' website, <www.jagcnet.army.mil>.

Since the posting of the last CLAMO Lotus Notes database update, the following databases have been developed:

CLAMO–War Crimes. This database contains United Nations (UN) Conventions and UN Security Council Resolutions pertinent to war crimes; Rules of Procedures and Evidence for the two International Criminal Tribunals; and war crimes materials relevant to Yugoslavia and Kosovo, Bosnia, Rwanda, and Desert Shield/Storm.

CLAMO–NEO. Created by CLAMO's Marine representative, the non-combatant evacuation operations (NEO) database includes after action reports (AARs) from non-combatant evacuation operations, Department of Defense and Department of State guidance and information, information papers, and NEO-focused training vignettes (scenarios).

CLAMO–71D Ops. This database is intended to provide a needed forum for enlisted judge advocate personnel to share resources and lessons learned. It was developed with the assistance of the Combat Developments Department. It includes AARs authored by enlisted legal personnel (71Ds) or containing information specific to 71Ds, sample legal products, and information on the rucksack deployable law office and library (RDL).

CLAMO–Korea. This database was created to provide Korea-specific operational law materials. To date, it includes an electronic version of the U.S.-ROK Status of Forces Agreement, with Minutes and Understandings On Implementation, all procedures for disposition of serious crimes, and the Department of State Human Rights Reports for North and South Korea.

CLAMO–Kosovo. This database contains materials pertinent to operations undertaken in the Balkan region in support of the peace operation in Kosovo.

In the near future, the following databases will also be added:

CLAMO–OJF. This database will contain documents and materials from the continuing mission in Bosnia (Operation Joint Forge) that will supplement the previously released databases CLAMO–OJE and CLAMO–OJG, dealing with Operations Joint Endeavor and Joint Guard, respectively.

CLAMO–ROE. This database will be launched in conjunction with the to-be-published CLAMO publication, *The ROE Handbook*. It will include materials on rules of engagement (ROE) development and training, and problem areas, to include sample annexes and training vignettes for situational training

1. To contact the NTC O/Cs, call CPT Nicholas (Nick) King at (760) 380-6412 or e-mail him at Bronco70@irwin.army.mil.

2. *See* CLAMO Report, *The Shifting Sands at NTC*, ARMY LAW., Mar. 1998, at 46 (discussing the NTC).

3. To contact the JRTC O/Cs, call MAJ Paul Wilson at (318) 531-0286 or e-mail him at WilsonPS@emh2.army.mil.

CLAMO–CTCs. This database will provide information concerning the four Combat Training Centers (CTC), to include the Battle Command Training Program (BCTP), the NTC, the JRTC, and the Combat Maneuver Training Center (CMTC). It will include photographs depicting the training conditions, descriptions of the training that occurs at each CTC, and sample legal products (such as legal and ROE annexes, operational law training scenarios, pre-deployment checklists, packing lists, and more).

Figures 1 and 2 at the end of this article depict the CLAMO Lotus Notes databases, as seen when replicated on a Lotus Notes server, and the CLAMO database on the Internet at the JAGCNet web site, respectively. The Center posts a wide range of material to assist the operational law attorney, to include the text of international agreements, Power Point presentations, formal AARs, draft memoranda, and other documents. The Center obtains these materials from judge advocates and soldiers in garrison, in the field, and those deployed in operations. The Center solicits judge advocates to submit all materials that may assist other legal personnel to better perform their mission and to provide legal support to operations.

In an effort to improve operational readiness and the speed and quality of legal support to operations, the Center requests that judge advocates in the field submit legal products to add to the upcoming CLAMO–CTCs database. One of the sample legal products that will be included in the CLAMO–CTCs database is the *Judge Advocate Field Guide*[4] developed by the 101st Airborne Division, Fort Campbell, Kentucky. The *Field Guide* was developed as a form of a judge advocate "ranger handbook." This guide is described further in the accompanying CLAMO Note from the Field. The judge advocate *Field Guide* will be available on the CLAMO–CTC database. Major Randolph.

CLAMO Note From the Field:

Judge Advocate Field Guides: An Operational Law Method for Organizing Legal Problem Solving

Introduction

This note introduces the operational law *Field Guide*, or "smart book," for attorneys assigned as brigade judge advocates and division operational law attorneys. The Office of the Staff Judge Advocate (OSJA), 101st Airborne Division (Air Assault), conceived this method for issue development and resolution, which should benefit all judge advocates in operational law assignments.

The *Field Guide* is an "SOP[5] *plus*." Brigade judge advocates may not have the room to deploy with their OSJA field standard operating procedures (FSOP). However, if an OSJA has properly developed and implemented an FSOP, the *Field Guide* will be the extract from the FSOP that is relevant to that OSJA's brigade operational law teams (BOLTS). Honing the OSJA FSOP into those elements specific to the BOLTS will create the "heart" of the *Field Guide*.

The *Operational Law Handbook* is the self-described "'how to' guide for judge advocates practicing operational law."[6] Although it is a "focused collection of diverse legal and practical information," the *Operational Law Handbook* does not provide a methodology for judge advocates to follow from issue determination through resolution.[7] During operations, a deployed judge advocate will, in addition to having limited resources available for problem solving, be constrained by METT-T (mission, enemy, time, terrain, and troops) factors and by limited communications with higher echelon judge advocates.

The 101st Airborne Division (Air Assault) OSJA has learned that establishing, training, and employing a series of issue resolution procedures overcomes many of the obstacles judge advocates encounter while attempting to resolve legal issues in an operational setting. A unit-specific operational law *Field Guide* greatly assists deployed judge advocates in providing accurate and timely issue resolution. Important to note is that this *Judge Advocate Field Guide* does not provide legal answers. Rather, this *Field Guide* provides procedural steps that should be followed to provide accurate and timely issue resolution. Legal research and analysis are still required for ultimate issue solving.

Implementing the Field Guide

The *Field Guide* is designed to provide a systematic research starting point for brigade judge advocates and legal specialists faced with operational law issues. Each issue addressed within the *Field Guide* provides a list of procedures, contacts, and references for addressing and initially solving "common" battlefield issues. These procedures, contacts and references are the crux of the *Field Guide* and are developed from *FM 27-100*, *Legal Operations*, doctrinal requirements, division tactical

4. Captain Eric Young, Judge Advocate Field Guide (1999) (unpublished manuscript on file with the Operation Law branch of the Office of the Staff Judge Advocate, 101st Airborne Division, Fort Campbell, Kentucky) *available at* <www.jagcnet.army.mil>.

5. SOP is standard operating procedure.

6. *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, preface (1998).

7. *Id*.

standard operating procedures (TACSOP) requirements, OSJA FSOP standards, *Operational Law Handbook* guidance, and judge advocate experience.

Due to the diverse nature of both conventional operations and military operations other than war (MOOTW), this *Field Guide* is not designed to be all-inclusive of the numerous legal issues that could arise on the modern battlefield. Rather, this *Field Guide* incorporates several of the more "common" issues that might be encountered during operations and outlines the "steps" that should be followed to resolve those issues. In addition, the *Field Guide* provides a starting point for resolving issues similar to those outlined in the *Field Guide*.

The *Field Guide* includes the following substantive areas: law of armed conflict issues, fratricide reporting and investigating procedures, select criminal law procedures, civilian property damage resolution procedures, and select administrative law issues. In addition, the *Field Guide* explains procedures (including notification procedures to higher headquarters judge advocates, with whom to investigate and/or coordinate for issue resolution, and how to follow-up and ultimately close-out an issue) that the brigade judge advocate should follow when handling various issues. Further, the *Field Guide* outlines the general responsibilities that the division main command post (DMAIN) OSJA cell and the division rear command post (DREAR) OSJA cell have with regard to issue tracking, reporting, and resolution.

Issue Resolution

Recent Battle Command Training Program (BCTP) Warfighters, as well as rotations at the NTC and the JRTC, demonstrated that similar issues arise during any operation. However, each time an issue arose, judge advocates at the brigade and division levels "re-invented the wheel" to resolve the issue, or attempted to locate and question another judge advocate who had resolved a similar issue. These "procedures" were very time consuming and cumbersome, particularly for inexperienced operational law judge advocates. The *Field Guide* assists in resolving this recurring problem.

To illustrate how the *Field Guide* outlines procedures for issue resolution, see the excerpt from the *Field Guide* at Appendix A (at the end of this Note). It reflects how a division's operational law attorneys at the brigade and division levels work to resolve fratricide issues.

Reports

The Appendix A example from the *Field Guide* references a "JAG 4 Report." Because of the operational constraints under which judge advocates are often required to operate, a reporting system was developed that is designed to aid communications between the brigade judge advocates and the operational law attorneys at the division command posts. These reports are referred to as the "JAG Reports," as they are unique to the OSJA and legal operations.

Four JAG reports were created, and each serves a uniquely different purpose. The "JAG 1 Report" is the law of armed conflict incident report. The "JAG 2 Report" is the serious incident report, and mirrors the serious incident reporting requirements contained in the division TACSOP. The "JAG 3 Report" is the daily report of legal actions in the area of operations, which each brigade judge advocate is required to submit to the DREAR OSJA cell during every twenty-four-hour period. The "JAG 4 Report" is the fratricide report, which also mirrors the reporting requirements contained in the division TACSOP.

These reports are necessary, as judge advocates have limited communications options when deployed. Most judge advocates at the brigade level do not have direct communications with their higher echelon judge advocates at division level and must "borrow" another staff section's radios, secure fax, or other communications medium in order to transmit information. Since the simple solution (providing judge advocates with their own communications devices) is not always the easiest to achieve, another method was required in order to enable judge advocates to transmit significant information in a timely and concise manner that would not significantly interfere with tactical operations center (TOC) operations.

Balancing the need for timely information against limited communications resources, it was determined that a concise set of reports would streamline the information flow between brigade and division level judge advocates. The JAG reporting system allows the brigade judge advocate to use almost any communications device (SINCGARS, FM, LAN, TAC phone, secure fax, and the like) to send a concise, formatted report that the receiver will be able to easily understand. A brigade judge advocate simply has to identify which report is being sent, and then identify the line number and the corresponding information. The excerpt from the *Field Guide* at Appendix B (at the end of this Note) shows the format for a JAG 4 report.

Reporting times (such as the "NLT 30 minutes") are guidelines, but will actually be dictated by the events surrounding the event being reported. Judge advocates are taught to gather information quickly, make an initial JAG report as close to the reporting time as possible, and then, as more information becomes available, submit subsequent JAG reports as necessary.

Sustainment

These procedures work because each judge advocate is trained to resolve operational law issues by following the *Field Guide*. Initial familiarization training with the *Field Guide* occurs within the OSJA leader professional development (LPD) program. Judge advocates are advised that if each step for an issue outlined in the *Field Guide* is followed, and the

judge advocate conducts the necessary legal research and analysis, the issue will be resolved in an expeditious manner. In addition, the procedures outlined in the *Field Guide* are included in the OSJA FSOP, and, as such, become OSJA "tactics, techniques, and procedures." Sustainment training occurs through LPD exercises and OSJA TOC "mini-exercises."[8]

Additional Information

The *Field Guide* is a tool designed to assist judge advocates at all experience levels. Accordingly, it includes additional reference information that goes beyond the initial operational law procedures. Due to limited LPD time available to devote to basic soldier skills, the *Field Guide* also includes reference information concerning skills such as challenge and password procedures, how to construct fighting positions, range card development, and hot/cold weather injury first aid. Also included are a tactical packing list and a pre-combat equipment inspection checklist. To further assist the brigade judge advocate with operational law issues, the *Field Guide* also includes the following: a selected weapons' ranges reference guide (for targeting issues); a daily inspections checklist for the BOLT; a common graphics control measures reference guide; and a recommended guide for daily brigade judge advocate duties, coordination and activities.

How large is this *Field Guide*? Because the 101st is a light division, any operational law product developed has to be lightweight, easily transportable, and user friendly. The current *Field Guide* is approximately one-quarter inch thick, six inches wide, and nine inches long, held together with binder rings, and fits within the BDU cargo pocket. Further, to increase its survivability, the *Field Guide* can either be laminated or inserted into the durable, weather resistant, multipurpose blue aviator's "flight crew check lists" book. Other units, particularly heavy divisions not limited in load carrying capacity, may determine that a *Field Guide* might be larger.

Conclusion

The principal feature making the *Field Guide* a valuable asset is that it is a "living" document now imbedded within the division's OSJA. The *Field Guide* is successful because it provides a standard, established, and rehearsed method that coincides with the OSJA FSOP through which a judge advocate will be able to resolve, with the help of tried and true legal research, numerous legal issues that consistently arise during military operations. The current contents of the 101st Airborne Division (Air Assault) *Field Guide* will be posted on the CLAMO database "CLAMO-CTCs," available on your local Lotus Notes server or through the JAGCnet at <www.jagcnet.army.mil> in the near future. CPT Young.[9]

How Can I Contact the Center?

The Center invites contributions of operational law materials from the field by telephone, e-mail, or by correspondence.

Telephone: DSN 934-7115, extension 339/448 or commercial (804) 972-6339/448.

E-mail *Sharon.Riley@hqda.army.mil*, *Tyler.Randolph@hqda.army.mil*, or *William.Ferrell@hqda.army.mil*.

Or, write the Center for Law and Military Operations, The Judge Advocate General's School, 600 Massie Road, Charlottesville, Virginia, 22903-1781.

8. To capitalize on the benefits of Warfighter and other TOC exercises, an OSJA specific "mini-exercise" was developed. This mini-exercise was conducted along the lines of a BCTP Warfighter exercise through the use of inputted legal master event scenario lists (MESLs). This mini-exercise occurred over an approximately three-hour period and was held within the OSJA. Judge advocates and legal specialists staffed the various division and brigade TOCs, as they would have in an actual deployment. Other judge advocates role-played the commanders, observer/controllers, and various "actors" who contacted their judge advocates for advice on operational law legal issues. In addition, legal issues were embedded throughout the exercise and were "hidden" within the operation's orders, FRAGOs, and planned target lists. This mini-exercise used full TOC set-ups (maps, battle boards, operational overlays, LAN between the DMAIN and DREAR CPs, and phone communications between the "units") and evaluated judge advocate and legal specialist abilities to identify, report, and resolve operational law legal issues. Using all available resources found within their TOCs (*Op Law Handbook*, the OSJA *Field Guide*, regulations, Lotus Notes databases, etc.), judge advocates were required to fully research and resolve issues as they arose during the exercise. Similar training programs were developed and implemented by the 3d Legal Support Organization in Boston and by The Judge Advocate General's School's International and Operational Law Department, U.S. Army, Charlottesville, Virginia. All three of these training package scenarios will soon be posted on the CLAMO database CLAMO-CTCs, available on your local Lotus Notes server or through the JAGCNet at <www.jagcnet.army.mil.>

9. Captain Eric Young is an operation law attorney at the 101st Airborne Division (Air Assault), Fort Campbell.

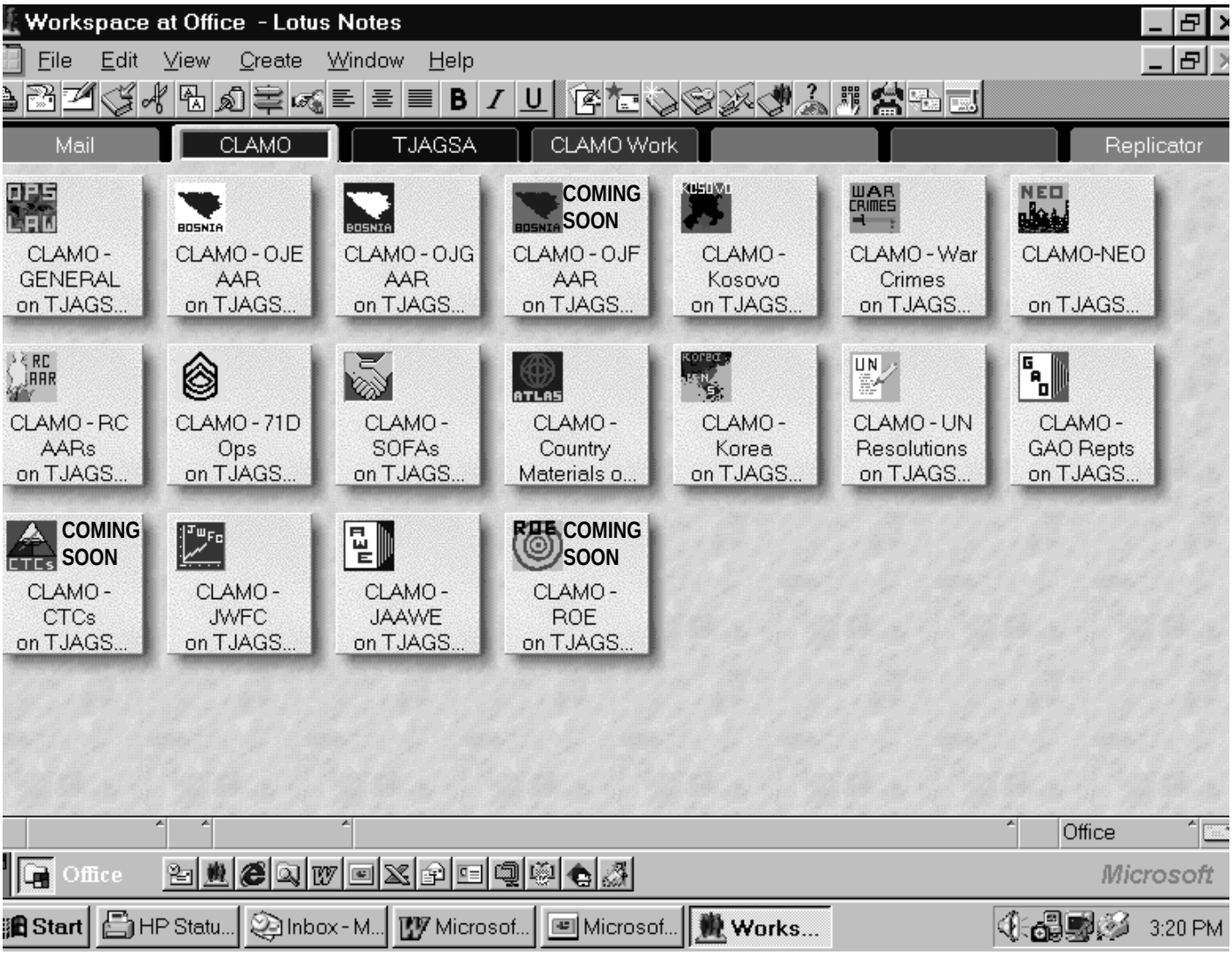

Figure 1: CLAMO Databases as they appear when added to your Lotus Notes folder.

The Center for Law and Military Operations Information Repositories

The Center for Law and Military Operations examines legal issues that arise during all phases of military operations and devises training and resource strategies for addressing those issues. Created in 1988, at the direction of the Secretary of the Army, CLAMO is located at The Judge Advocate General's School of the Army in Charlottesville, Virginia. All of the Center's work seeks to improve the practice of operational law, which involves the application of domestic, international and foreign law to every phase of military operations.

Select an Information Repository:

- 71D Operations
- Country Materials
- General Military Operational Law Materials
- JAAWE Data
- Korea Materials
- Kosovo Materials
- Noncombatant Evacuation Operations
- Operation Joint Endeavor Materials
- Operation Joint Guard Materials
- Reserve Component Judge Advocates After-Action Reports
- Status of Forces Agreements
- UN Resolutions
- USACOM Joint Warfighting Center
- War Crimes

All About Clamo

Figure 2: CLAMO Databases as they appear when accessed through the "www.jagcnet.army.mil" Internet site.

Appendix A: Excerpt from 101st Airborne Division *Judge Advocate Field Guide*
Actions to Take On a Fratricide

FRATRICIDE

When a report is received that U.S. soldiers have been killed or wounded by friendly fire, the following actions must be taken in order to quickly and accurately determine the cause of the incident and to provide "damage control" for the operational command:

1. **Brigade Trial Counsel:**

    a. Confirm this information at your BDE TOC.
    b. Immediately notify the SJA cell at the DMAIN [DREAR is alternate notification point].
    c. Send JAG 4 Report to DMAIN SJA Cell within 30 min after receiving initial report.
    d. Notify BDE commander.
        1. Advise that an investigation will be initiated through Division SJA Cell.
        2. If operating independently, advise that an investigating officer must be appointed to investigate the cause of the fratricide. Conduct IAW AR 15-6.
            a. Model appointment order on RDL.
            b. Get I.O. name from BDE S-1.
            c. Brief I.O. on AR 15-6 duties.
            d. Review I.O. Findings and Recommendations IAW AR 15-6.
            e. Ensure investigation completed IAW AR 15-6.

2. **SJA cell located at the DMAIN does the following:**

    a. Immediately notify the DREAR in order to begin AR 15-6 investigation. Provide the reported information to the DREAR at this time. [If DREAR received the report, then notify DMAIN.]
    b. Begin coordination with the following staff sections:
        1. G-1.
        2. Chaplain.
        3. PAO.
    c. Notify XVIII ABN Corps SJA cell.
    d. Follow up the investigation conducted through the DREAR SJA cell in order to brief the Division commander as necessary.

3. **SJA Cell** located at the **DREAR** does the following:

    a. Draft request for appointing investigating officer to Chief of Staff / ADC(S).
        1. Model request on RDL computer.
    b. Draft appointment order.
        1. Model order on RDL computer.
        2. Get I.O. name from G-1.
    c. Notify DMAIN SJA cell when IO appointed and investigation is initiated IAW OSJA FSOP.
    d. Coordinate with DREAR units (graves registration, chaplain).
    e. Track the investigation until completed.
    f. Provide investigation information to SJA at the DMAIN ASAP after completion.
    g. Forward completed investigation through SJA to XVIII ABN Corps SJA cell NLT 24 hours after investigation completed.

Appendix B: Excerpt from 101st Airborne Division *Judge Advocate Field Guide*

Reporting Format for a Fratricide

JAG 4 Report **FRATRICIDE REPORT**

This report must be sent to the DMAIN SJA NLT 30 minutes after receiving information that a fratricide has occurred in your BDE area of operations.

LINE 1: Unit: _____

LINE 2: DTG of incident: _____

LINE 3: Location of fratricide: _____ (6-digit grid)

LINE 4: # / Type of Casualties / unit assigned to

a. KIA: #_____; unit: _____

b. WIA: #_____; unit: _____

LINE 5: Unit controlling location:

a. Now _____

b. When incident occurred _____

LINE 6: Unit (BN, Co, Plt,) reporting the fratricide: _____

LINE 7: Battle operating system / weapons involved (armor, artillery, small arms, naval gunfire) if known: _____
_____

LINE 8: Cause (if known / determined): _____

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

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 Managers 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).

Note: The 72nd Law of War Workshop course has been cancelled. The 73rd Law of War Workshop is the next scheduled course from 7-11 February 2000.

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 January-29 February	Class 001, Court Reporter Course (512-71DC5)
9-21 January	2000 JAOAC (Phase II) (5F-F55).

Note: See paragraph 4 below for adjusted JAOAC suspense dates. The course was scheduled originally for 10-21 January 2000.

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

July

17 July-1 September	Class 002, Court Reporter Course (512-71DC5)

3. Civilian-Sponsored CLE Courses

20 August ICLE	Nuts and Bolts of Family Law Mariott Riverfront Hotel Savannah, Georgia
3 September ICLE	Criminal Law Clayton College and State University Atlanta, Georgia
9 September ICLE	U.S. Supreme Court Update Sheraton Buckhead Hotel Atlanta, Geogia

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

All students currently enrolled in the RC-JAOAC Phase I (Correspondence Phase), who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) this coming 9-21 January 2000, must submit all Phase I requirements to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 1 November 1999***. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

If you have to retake any subcourse examinations or "re-do" any writing exercises, you must submit them to the Non-Resident Instruction Branch, TJAGSA for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 1999***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense. Students who fail to complete Phase I correspondence courses and writing exercises by these deadlines, will not be allowed to enroll for Phase II (Resident Phase), RC-JAOAC, 9-21 January 2000.

If you have any further questions, contact LTC Paul Conrad, JAOAC Course Manager, (800) 552-3978, extension 357, or e-mail <conrape@hqda.army.mil>. LTC Goetzke.

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:

Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT'L. & POL'Y 239 (Summer 1999).

Joseph H. King, Jr., *Reconciling the Exercise of Judgment and the Objective Standard of Care in Medical Malpractice*, 52 OKLA. L. REV. 49 (Spring 1999).

Peter W. Martin, *The Internet: "Full and Unfettered Access" to Law*, 26 N. KY. L. REV. 181 (Summer 1999).

Gerald T. Wetherington, Hanson Lawton & Donald L. Pollock, *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. (July 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
Southwestern Reporter, 2d, Vols. 265-554.