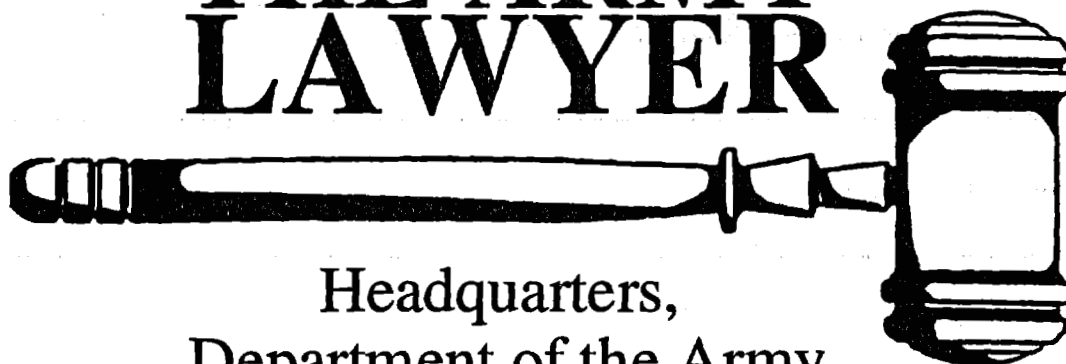


# THE ARMY LAWYER



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# America's Most Recent Prisoner of War: The Warrant Officer Bobby Hall Incident

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## Introduction

This article reviews the facts and analyzes the legal issues relating to the shooting down of an American observation helicopter (OH-58) over North Korea on 17 December 1994. Many aspects of the events remain classified, and therefore, the full rendition of the events will not be known for years.<sup>1</sup> Consequently, the following analysis relies on public domain sources.<sup>2</sup>

The intent of this article is threefold. First, it informs the reader about the incident. To date, no publication has compiled the publicly known facts in one document. Second, it analyzes the international law issues germane to the incident and highlights the diversity of issues that operational lawyers face. Third,

it demonstrates the continuing need to educate the military community about the code of conduct and evaluate its contemporary meaning and spirit.

## General Historical Background

The Korean Demilitarized Zone (DMZ) is a vestige from the Cold War era.<sup>3</sup> The emerging post-World War II geo-political tensions that arose between the United States and the Soviet Union set the stage for the first limited war.<sup>4</sup> After the North Korean surprise attack across the 38th parallel on 25 June 1950, the United Nations (U.N.) authorized the use of force to repel the invasion.<sup>5</sup> By 15 July 1950, the United States and both Koreas agreed to apply the principles of the 1949 Geneva Conventions.<sup>6</sup>

\* The opinions and conclusions in this article are my own and do not necessarily reflect the views of the Army, The Judge Advocate General's Corps, or any government agency.

<sup>1</sup> The Army routinely conducts investigations into various matters. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (24 Aug. 1977) (C1, 15 June 1981) provides investigating officers with guidance on their duties. The term "15-6 investigation" refers to investigations conducted under this regulation. The Army used this format to investigate this incident. The full report is classified, but the Army did release a sanitized version for the public. However, even the publicly released excerpts of the Army's internal investigation (called a "15-6 investigation") provided little information for legal analysis. See Excerpt from Dep't of Army, DA Form 1574, Report of Proceedings by Investigating Officer/Board of Officers, subject: Facts and Circumstances Leading Up to the OH-58A Crossing of the Military Demarcation Line (MDL) (21 Dec. 1994) and approved by Lieutenant General Richard F. Timmons on 23 Jan. 95 [hereinafter Bobby Hall 15-6].

<sup>2</sup> The Joint Services Survival, Evasion, Resistance, and Escape Agency (JSSA) provided me with an unclassified extract of the SERE DEBRIEFING SUMMARY, CW2 BOBBY WAYNE HALL, II, CONDUCTED 2-3 JANUARY 1995, COMMAND POST, MCDILL, AFB, FLORIDA (SECRET) [hereinafter HALL DEBRIEFING SUMMARY]. This extract was released to me for purposes of educating the military community about the Code of Conduct and survival, evasion, resistance, and escape (SERE) matters. It illuminated many of the facts surrounding WO Hall's conduct while captured. The actual debrief and the classified debrief summary are located at the JSSA, Fort Belvoir, Virginia. Many thanks to the staff of the JSSA, particularly Mr. Mitchell and Air Force Master Sergeant Russell. Their assistance in my research enabled me to provide a balanced factual picture of the events in this incident.

The JSSA mission is "[t]o ensure the American warrior is trained and equipped to evade and escape the enemy and, if captured, is prepared to endure, exploit, and survive the capture experience and return with honor." See JSSA Pamphlet (undated), on file with the JSSA. The JSSA is the Executive Agent Office of Primary Responsibility for executing three Department of Defense programs. The JSSA is responsible for operational Prisoner of War (POW) and missing in action matters, Code of Conduct training, and joint evasion and escape matters.

The vast majority of facts from this case were retrieved primarily from documents contained in the LEXIS and NEXIS electronic databases.

<sup>3</sup> At the end of World War II, the United States and the Soviet Union agreed to divide responsibilities on the Korean peninsula. Soviet forces would accept Japanese surrenders north of the 38th parallel and the United States would administer surrenders south of this militarily convenient line. As occurred in Germany, subsequent unification attempts in Korea failed even after free elections. The Soviets refused to allow noncommunist rule within the territories it occupied. See generally, Howard S. Levie, *The Korean Armistice Agreement and Its Aftermath*, 41 *NAV. L. REV.* 115 (1993); *North Korea at a Glance*, UPI, Nov. 16, 1986, available in LEXIS, Nexis Library, ALLNWS file.

<sup>4</sup> The significance of Korea was best stated by a former United States Ambassador to Korea, Richard Walker. He called Korea an "epicenter . . . where the three largest nuclear powers of the world meet, where the three largest industrial giants meet, where four of the most populous countries meet." USFK/EUSA ANNUAL HISTORICAL REPORT 1982, at i.

<sup>5</sup> See S.C. Res. 1588, U.N. SCOR, 5th Sess., 476 mtg., U.N. Doc. S/1588 (1950).

<sup>6</sup> DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II, 93 (23 Oct. 1962) [hereinafter DA PAM. 27-161-2].

After three bloody years of war on the peninsula, the U.N. and North Korea signed an armistice agreement on 27 July 1953.<sup>7</sup> Much of the delay in reaching an agreement concerned prisoner of war (POW) issues.<sup>8</sup>

The relationship between the United States and North Korea since the armistice "has been marked by almost continuous confrontation and mistrust."<sup>9</sup> Numerous incidents along the DMZ, accidental and intentional, strained the effective use of peaceful dispute resolution procedures in the Korean Armistice Agreement.<sup>10</sup> For example, since 1953, North Korea has on at least four occasions shot down United States helicopters that inadvertently crossed the DMZ.<sup>11</sup> Actions such as these contributed to the international community isolating North Korea culturally, diplomatically, and economically.

Concurrent with the fall of the Soviet Union, the United States began to encourage North Korea to rejoin the international community. North Korea responded to these gestures and expressed interest in the normalization of relations.<sup>12</sup> Economics drove North Korea to be more cordial with the United States. The Soviet Union was North Korea's largest source of foreign aid,<sup>13</sup> and when Soviet aid stopped, North Korea's huge military arsenal became an even greater financial burden. If North Korea could reduce tensions on the peninsula, a reduction in their military would spur economic development.<sup>14</sup> In 1991, in response to the thawing in relations, the United States "supported the simultaneous admission of both Koreas into the U.N."<sup>15</sup> The U.N. formally recognized North Korea in September 1991.<sup>16</sup>

<sup>7</sup> United States General Mark Clark represented the United Nations forces. Kim Il Sung represented North Korea. See Agreement Between the Commander-in-Chief, United Nations Command (CINCUNC), on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, concerning a Military Armistice in Korea, 27 July 1953, T.I.A.S. 2782, U.N. Doc. A/Res/711 (1953) [hereinafter Korean Armistice Agreement], reprinted in DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE 197 (1956) [hereinafter DA PAM. 27-1] (for ease of reference, this article will cite to the version of the Korean Armistice Agreement contained in DA PAM. 27-1). Negotiations for a peaceful settlement began in July 1951. When the agreement finally occurred, South Korea refused to sign the armistice and South Korea gave serious consideration to continuing the fight alone. See Levie, *supra* note 3, at 129, n. 51.

<sup>8</sup> From April 1952 until the signing of the Korean Armistice Agreement, the only issue the parties disagreed on was repatriation. The key issue was whether forced repatriation of POWs should occur. Ultimately, the parties to the armistice agreement allowed individual POWs to make the decision. To ensure no coercion occurred by a detaining power, the Committee for Repatriation of Prisoners and the respective national Red Cross societies of contributing nations forces monitored the repatriation process. See Korean Armistice Agreement, *supra* note 7, at para. 56; Timm letter, *infra* note 26, at 4. See generally, Harry P. Ball, *Prisoner and War Negotiations: The Korean Experience and Lesson*, 62 INT'L LAW STUD. 292 (1980). Ultimately, twenty-one United States POWs voluntarily remained with the North Koreans. However, all but three "refuseniks" eventually returned to the United States. See P.O.W.: AMERICANS IN ENEMY HANDS (Arnold Shapiro Productions, Inc. 1986).

<sup>9</sup> DEP'T OF ARMY, PAMPHLET 550-81, NORTH KOREA: A COUNTRY STUDY 204 (1994) [hereinafter DA PAM. 550-81]. Other noted examples of confrontation were the seizure of the U.S.S. *Pueblo* in 1968, the shutdown of several reconnaissance aircraft, and the ax murders of two United States soldiers attempting to trim a tree inside the DMZ in August 1976. In all, at least eleven military confrontations have occurred between United States and North Korea since 1953. See *Chronology of US-North Korean Military Brushfires*, AFP, Dec. 19, 1994, available in LEXIS, Nexis Library, CURNWS File [hereinafter *Chronology*]. See also BOLGER, *infra* note 108.

Additionally, countless confrontations occurred between North and South Korean forces during this period. The most famous confrontation occurred when North Korea sent thirty-one commandos into South Korea who, on 18 January 1968, made an unsuccessful attempt to assassinate South Korean President Park. See Ernest A. Simon, *The Operations of the Korean Armistice Agreement*, 47 MIL. L. REV. 105, 129 (1970). "It is estimated that the North Koreans have dispatched more than a thousand specially trained saboteurs, assassins, and terrorists across the DMZ and the MDL [Military Demarcation Line] since the armistice became effective." Levie, *supra* note 3, at 132 n. 60.

<sup>10</sup> See generally, Simon, *supra* note 9.

<sup>11</sup> On 17 May 1963, an OH-23 helicopter was shot down and the crew was detained for over one year. On 17 August 1969, an OH-23 was shot down, and its crew was detained for 109 days. On 9 May 1974, North Korea shot at two American helicopters flying along the DMZ. On 13 July 1977, a CH-47 was shot down killing three of its crew. The remaining crew member, a warrant officer, was returned after 57 hours. See *Chronology*, *supra* note 9; "We're Heading Back Now"—Last Words of Downed Pilots: Report, AGENCÉ FRANCE PRESSE, Dec. 19, 1994, available in LEXIS, Nexis Library, CURNWS File [hereinafter *We're Heading Back Now*]. See also *Last Time Chopper Shot Down, Release Took Two Days With: BC-Korea-US Helicop*, AP WORLDSTREAM, Dec. 30, 1994, available in LEXIS, Nexis Library, AP File; Steve Komarow, *Another Brush with N. Korea/U.S. Pilots No Stranger to Border*, USA TODAY, Dec. 19, 1994, at 5A. The facts concerning the 13 July 1977 incident come from the Timm letter, *infra* note 26, at 5 (facts corroborated by the USFK/Eighth U.S. Army Historian).

<sup>12</sup> The first significant step actually occurred in 1986 when North Korea proposed three-way military talks to ease tension on the peninsula. However, the North Koreans continued to object to the Military Armistice Commission as the proper forum for negotiations. See *North Koreans Propose Three-Way Military Talks*, DEP'T OF STATE BULL., Sept. 1986, at 51.

<sup>13</sup> See Clayton Jones, *Younger Kim Behind N. Korean Challenge*, CHRISTIAN SCI. MONITOR, Mar. 23, 1993, at 6.

<sup>14</sup> Russell Watson, John Barry, and Tony Clifton, *Home for New Year's Eve*, NEWSWEEK, Jan. 9, 1995, at 49.

<sup>15</sup> DA PAM. 550-81, *supra* note 9, at 205.

<sup>16</sup> See *Admission of the Democratic People's Republic of Korea and the Republic of Korea to Membership in the United Nations*, G.A. Res. 1, U.N. GAOR 46th Sess., Supp. No. 49, U.N. Doc. A/46/L.1 (1991).

North Korea signed the nonproliferation treaty (NPT) in 1985, but delayed signing the enforcement agreement until January 1992 that included inspection of their nuclear facilities.<sup>17</sup> In 1993, however, the International Atomic Energy Agency suspected that North Korea was not complying with these agreements and requested special inspections. North Korea balked and announced its intent to withdraw from the treaty, again raising tensions within the region.<sup>18</sup> North Korea attempted to use the NPT dispute as a device to normalize diplomatic relations with the United States. "The nuclear issue is a perfect battering ram to pound on the American door until the United States agrees to drop its political and legal barriers to trade, investment, and aid."<sup>19</sup> A major obstacle to the North Korean tactic was the Military Armistice Commission (MAC).

"For several years now, the DPRK [North Korea] has been attempting unilaterally to destroy the armistice mechanism set up in the armistice agreement which ended the Korean War."<sup>20</sup> North Korea used the inspection issue to achieve direct dialogue with United States diplomatic officials and to drive a wedge between United States and South Korean relations.<sup>21</sup> The United

States policy makers countered by linking inspection access to high-level discussions directly with the United States.<sup>22</sup>

A change in MAC operations caused North Korea to seek greater direct access to United States policy makers. In 1991, the United States and South Korea began to restructure the U.N. side of the MAC. Traditionally, a United States general officer was its senior U.N. representative. On 25 March 1991, a South Korean general officer assumed this position. Additionally, the U.N. transferred primary responsibility for the DMZ to South Korea. Finally, the parties planned "to transfer Armistice operational control of the Korean armed forces to the ROK [Republic of Korea] military not later than 31 December 1994."<sup>23</sup>

North Korea responded by accusing the United States of violating the Armistice Agreement and called for formal peace agreement talks.<sup>24</sup> On 28 April 1994, North Korean leaders notified the U.N. Command that they were formally withdrawing from the MAC.<sup>25</sup> The tactic worked. With little access to North Korean officials through military armistice channels, low-level contacts between United States and North Korean diplomats began

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<sup>17</sup> DA PAM. 550-81, *supra* note 9, at 205-6. The agreement signed in 1992 provided an enforcement mechanism to the Nuclear Proliferation Treaty through inspections of nuclear facilities. *Id.* at 256; *North Korean Military and Nuclear Proliferation Threat: Hearing of the Asia and the Pacific Subcommittee of the House International Relations Committee*, 104th Cong., 1st Sess. (Feb. 23, 1995) [hereinafter *Subcommittee Hearing*] (statement of Thomas Hubbard, Deputy Assistant Secretary of State for East Asian and Pacific Affairs), available in LEXIS, Nexis Library, SCRIPT File. See also Steve Coll and David B. Ottaway, *New Threats Create Doubt in U.S. Policy*, WASH. POST, Apr. 23, 1995, at A1, A26.

<sup>18</sup> Peter Hayes, *What North Korea Wants: Political Aspects of Confrontation over Nuclear Inspection*, BULL. OF THE ATOM. SCIENTISTS, Dec. 1993, at 8, available in LEXIS, Nexis Library, ASAPII File.

<sup>19</sup> *Id.* See Mark Newcomb, *Non-Proliferations, Self-Defense, and the Korean Crisis*, 27 VAND. J. TRANSNAT'L L. 603, 609-17 (1994) for a good summary of the events surrounding North Korea's nonproliferation treaty compliance between 1985 and June 1994.

<sup>20</sup> *Subcommittee Hearing*, *supra* note 17. See also Nicholas D. Kristof, *North Korea's New Target: The Armistice*, N.Y. TIMES, Aug. 31, 1995, at A10.

<sup>21</sup> *Subcommittee Hearing*, *supra* note 17 (statement of Edwin J. Feulner Jr., President, The Heritage Foundation).

<sup>22</sup> *North Korea: Off Again*, THE ECONOMIST, Mar. 19, 1994, at 39.

<sup>23</sup> *Posture Hearing Before the Senate Armed Services Committee*, 103th Cong., 2d Sess. (Mar. 2, 1994) (Statement of Admiral Charles R. Larson, Commander-in-Chief, United States Pacific Command), available in LEXIS, Nexis Library, SCRIPT File. See Timm letter, *infra* note 26, at 1. During the Korean War, President Truman appointed General MacArthur, per the U.N. resolution, as the first Commander-in-Chief, U.N. forces in Korea. In subsequent correspondence between General MacArthur and South Korean President Rhee, President Rhee offered General MacArthur "[operational] command authority over all land, sea and air forces of the Republic of Korea." Donald A. Timm, *Dangerous game of words*, THE KOREAN HERALD, Mar. 16, 1994 (quoting President Rhee's 14 July 1950 letter to General MacArthur). See Murray Gray, *The Legal Position of the United States Forces*, AIR FORCE JAG BULL., Mar. 1960, at 12. General MacArthur accepted. Through 1978, no subsequent commander-in-chief had relinquished this operational control. In 1978, the United States and the Republic of Korea established the Combined Forces Command (CFC). Once this occurred, CINCUNC relinquished operational control of most South Korean forces. See Office of the Judge Advocate, Headquarters, UNC/CFC/USFK, International Affairs Division, Command Relationship Briefing Slides (with notes), slide 10, (on file with the author and provided by Mr. Donald A. Timm, USFK, Office of the Staff Judge Advocate on 27 Aug. 96).

<sup>24</sup> In April 1994, concurrent with the negotiations over inspecting North Korean nuclear facilities, the North Koreans demanded that the Armistice Agreement be replaced with a United States—North Korean peace treaty, intentionally excluding South Korea. *Foreign Ministry Says Armistice Accord Should Be Replaced by Peace Agreement*, (BBC radio broadcast, Apr. 29, 1994), available in LEXIS, Nexis Library, CURNWS File; *DPRK Urges U.S. to Help Establish New Peace Mechanism*, XINHUA NEWS AGENCY, June 10, 1994, available in LEXIS, Nexis Library, CURNWS File. The North Korean position is not without merit. In 1975, the U.N. General Assembly "adopted a resolution, calling for the dissolution of the U.N. Command and replacement of the existing armistice with a new peace agreement." *DPRK Urges to Disband U.N. Command in S. Korea*, XINHUA NEWS AGENCY, June 3, 1994, available in LEXIS, Nexis Library, CURNWS File [hereinafter *DPRK Urges to Disband U.N. Command*]. In fact, the U.N. General Assembly adopted two resolutions: U.N.G.A. Res. 3390A and 3390B.

<sup>25</sup> See *U.N. Command Seek Talks with North Korea*, UPI, June 5, 1994, available in LEXIS, Nexis Library, WIRE File.

to take place in May 1994.<sup>26</sup> As the U.N. MAC representatives continued attempts to bring the North Koreans back to the military bargaining table for armistice compliance reasons, the United States State Department continued its NPT obligation discussions with North Korea.<sup>27</sup> This bifurcated approach undercut efforts to refocus all negotiations through the MAC.

On 21 October 1994, North Korea finally signed an agreement allowing the inspection and dismantling of its reactors and plutonium reprocessing facilities.<sup>28</sup> In exchange, the United States "agreed to give North Korea diplomatic recognition."<sup>29</sup> This recognition, however, hinged on renewed dialogue with South Korea. Before December 1994, North Korea was reluctant to pursue discussions with South Korea. Consequently, diplomatic contacts with the United States remained limited to the nuclear inspection accord and through the MAC. However, the MAC's senior representative was now a South Korean general. Thus, North Korea needed some mechanism to bypass the MAC and acquire continued direct diplomatic intercourse with the United States.<sup>30</sup> The Warrant Officer Hall incident proved a political pawn for North Korea.

## Factual Background to the Shoot Down

At 1002, Saturday, 17 December 1994, Warrant Officers (WO) David Hilemon and Bobby Hall left Camp Page, South Korea, in an unarmed OH-58 two-seater helicopter on a routine familiarization flight along the mountainous Korean DMZ.<sup>31</sup> Warrant Officer Hall carried his wallet with his military identification card, a driver's license, dog-tags, and a personal flight log. He was wearing his flight suit and jacket on which his unit and combat patches were sewn. His aviation life support equipment included, among other things, a knife and flares.<sup>32</sup>

The purpose of the flight was to orient WO Hilemon to the terrain along the no-fly zone that parallels the DMZ. Both pilots arrived in-country on 4 November 1994. Both were experienced pilots—WO Hall had over 1000 flight hours and both were veterans of the Persian Gulf War.<sup>33</sup> However, only WO Hall had flown along the DMZ no-fly zone<sup>34</sup> and he had only flown along it twice, logging in just 4.9 hours flight time.<sup>35</sup> Additionally, their helicopter was an older OH-58 and lacked advanced navigation equipment such as a global positioning system.<sup>36</sup> Consequently, they oriented themselves in flight in the customary fashion by comparing terrain features to a map.<sup>37</sup>

<sup>26</sup> *State Department Regular Briefing*, FEDERAL NEWS SERVICE, May 2, 1994, available in LEXIS, Nexis Library, SCRIPT File; *State Department Regular Briefing*, FEDERAL NEWS SERVICE, Apr. 28, 1994, available in LEXIS, Nexis Library, SCRIPT File. I use the term little access because, while North Korea refused to convene the commission itself, they still provided Joint Duty Officers at Panmunjon. These low-level North Korean military officers continued to meet with their U.N. counterparts. Letter to author from Mr. Donald A. Timm, HQ-USFK-JAJ, dated 27 Aug. 96 [hereinafter Timm letter].

<sup>27</sup> *N. Korea Ignores U.N. Command Call*, UPI, June 7, 1994, available in LEXIS, Nexis Library, WIRE File.

<sup>28</sup> Steven Butler, *Korean Breakthrough*, U.S. NEWS & WORLD RPT., Oct. 31, 1994, at 28.

<sup>29</sup> *Id.*

<sup>30</sup> See John Burton, *US Faces Key Decision Over Korean Links*, FIN. TIMES, Feb. 2, 1995, at 3.

<sup>31</sup> John F. Harris and T.R. Reid, *Helicopter Downed in North Korea was 10 Miles Off Course, U.S. Says; President Clinton Presses for Return of Both Survivor and Body*, WASH. POST, Dec. 20, 1994, at A31. The aircraft's call sign was Razorback 19.

<sup>32</sup> HALL DEBRIEFING SUMMARY, *supra* note 2, para. 3C. One patch he was wearing was a pair of AH-64 Apache attack helicopters ablazing. This is probably not the best patch to be wearing when captured. When WO Hall was finally repatriated, he received most of his personal property back. However, the North Koreans retained his flight log, shot records, flight orders, maps, the operator level maintenance manual to the OH-58, his identification card, driver's license, unit coin, and flight plan. *Id.*, para. 24C.

<sup>33</sup> Kathy Sawyer, *For Pilots' Families, Joy and Grief Mark the Day; Army Aviator, 29, Had Won Air Medal for Combat Service in Persian Gulf*, WASH. POST, Dec. 19, 1994, at A21; *CNN News: Pilot Says Army Trying to Avoid Future Incidents* (CNN television broadcast, 7:11 A.M., Jan. 5, 1995) (transcript #972-6 on LEXIS, Nexis Library, CURNWS File) [hereinafter CNN Interview]; *One Pilot Survives, Other Killed in Chopper Downed Over North Korea*, AP, Dec. 19, 1994, available in LEXIS, Nexis Library, AP File.

<sup>34</sup> *What U.S. Agreed to in Return for Pilot's Return With Korea-US-Helicopter*, AP WORLDSTREAM, Dec. 29, 1994, available in LEXIS, Nexis Library [hereinafter *What U.S. Agreed*].

<sup>35</sup> Bobby Hall 15-6, *supra* note 1, at § IV, para. D3c(1)(a). *What U.S. Agreed*, *supra* note 34, states WO Hall had 10.7 hours of flight time along the no fly zone. See also CNN interview, *supra* note 33; *Captured Army Officer Bobby Hall Discusses Ordeal* (ABC World News Tonight television broadcast, 6:30 p.m. ET, Jan. 5, 1995) (transcript #5004-5 on LEXIS) [hereinafter ABC interview]. The no-fly zone is different than the DMZ. The no-fly zone is set back five to fifteen kilometers from the actual DMZ as a safety measure to reduce the incidence of overflight violations. See Harris and Reid, *supra* note 31.

<sup>36</sup> Jon Anderson, *Korea Pilots Curse Kiowa's Faults*, ARMY TIMES, Jan. 16, 1995, at 8.

<sup>37</sup> Paulette Walker, *Copter Downing in N. Korea Leaves One Dead*, ARMY TIMES, Jan. 2, 1995, at 2; Paulette Walker, *Hall Got Lost Over N. Korea . . . But How?*, ARMY TIMES, Jan. 16, 1995, at 8-9.

At 1038, South Korean border guards observed a United States military helicopter heading north toward the DMZ. Standard operating procedures required the guards to signal the helicopter with flares indicating impending danger. Unfortunately, the duo was flying too quickly for the guards to accomplish this before the helicopter had flown out of sight.<sup>38</sup> Five minutes later, the OH-58 crew "radioed to a flight control center that they were above Checkpoint 84 . . . [t]he last words overheard by the control center were: 'We're heading back now.'"<sup>39</sup> About this time, WO Hilemon realized that the helicopter was off-course, so they started to turn the aircraft around.<sup>40</sup> Unbeknown to them, they were far north of Checkpoint 84, over four miles into North Korean airspace.<sup>41</sup>

At 1045, North Korean antiaircraft forces engaged the helicopter.<sup>42</sup> WO Hall denied receiving any warning before being shot down.<sup>43</sup> However, the North Korean government alleged that the helicopter ignored two warning signals, lowered its altitude, and continued north.<sup>44</sup>

The North Korean gunners hit their target.<sup>45</sup> The explosion rocked the helicopter, causing the windshield to implode on its crew and the engine to fail.<sup>46</sup> As WO Hall attempted an auto-

rotation landing, WO Hilemon turned and said, "I've been hit."<sup>47</sup> WO Hilemon's injuries were fatal; shrapnel had pierced his heart and throat.<sup>48</sup>

It took less than a minute from the time that the helicopter was hit until it slammed to the ground, slid down the slope of a small hill, and stopped in the middle of a frozen creek bed near the village of Ipori.<sup>49</sup> The impact threw WO Hilemon from the helicopter. The helicopter began to burn shortly after the crash landing.<sup>50</sup> Warrant Officer Hall freed himself from the burning wreckage and attempted to pull his wounded comrade down the creek bed to safety. He heard Korean voices, and thinking that he was in South Korea, WO Hall called out for help. It was when North Korean soldiers approached and surrounded them that WO Hall first realized that he must be north of the DMZ.<sup>51</sup>

After one of the soldiers helped him move WO Hilemon to safety, WO Hall observed that his copilot was dead.<sup>52</sup> North Korean soldiers searched WO Hall and moved him up the hill away from the site where they tied him to a tree. A couple of the soldiers proceeded to kick his legs and torso from behind while other soldiers threw rocks, hitting him in the head. Fortunately, the rocks were not thrown hard enough to cause much injury,

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<sup>38</sup> See Harris and Reid, *supra* note 31. One newswire reported that, at the time the helicopter overflew the South Korean border guards, the guards were working on generators. Because of the noise from the generators, they did not hear the approaching craft. *We're Heading Back Now*, *supra* note 11.

<sup>39</sup> *We're Heading Back Now*, *supra* note 11.

<sup>40</sup> CNN interview, *supra* note 33.

<sup>41</sup> See Harris and Reid, *supra* note 31; Paul Alexander, *Christmas Arrives with No Sign of Impending Release*, AP WORLDSTREAM, Dec. 25, 1994, available in Lexis-Nexis library AP file.

<sup>42</sup> Paul Alexander, *North Korea Accuses U.S. of Espionage*, AP, Dec. 27, 1994, available in LEXIS, Nexis Library, AP File.

<sup>43</sup> CNN interview, *supra* note 33.

<sup>44</sup> Guy Gugliotta and T.R. Reid, *U.S. Diplomat to Negotiate for Army Pilot; North Korean Power Struggle Could Complicate the Release*, WASH. POST, Dec. 27, 1994, at A17 [hereinafter Gugliotta and Reid]; Alexander, *supra* note 42; David Brunnstrom, *U.S. Envoy Heads to Korea, North Repeats Spy Claim*, REUTERS, Dec. 27, 1994, available in LEXIS, Nexis Library, REUTERS File [hereinafter *Envoy Heads to Korea*].

<sup>45</sup> The North Korean People's Army promoted the sergeant who shot down WO Hall's helicopter to first lieutenant and honored him with the title of "Hero of the Republic." *N. Korean Honored for Downing US Chopper*, UPI, Jan. 28, 1995, available in LEXIS, Nexis Library, CURNWS File.

<sup>46</sup> ABC interview, *supra* note 35.

<sup>47</sup> *Id.*; CNN interview, *supra* note 33.

<sup>48</sup> ABC interview, *supra* note 35.

<sup>49</sup> CNN interview, *supra* note 33. The helicopter landed "in the Ipho-ri area of the eastern province of Kangwon." Brunnstrom, *supra* note 44. See HALL DEBRIEFING SUMMARY, *supra* note 2, para. 4E.

<sup>50</sup> ABC interview, *supra* note 35.

<sup>51</sup> HALL DEBRIEFING SUMMARY, *supra* note 2, para. 4F.

<sup>52</sup> CNN interview, *supra* note 33; ABC interview, *supra* note 35. After the North Korean's released WO Hilemon's remains, a military pathologist examined the body and found injuries consistent with a "hard, sudden impact." See Ann Devroy, *N. Korea Is Said Ready to Free U.S. Pilot; Pentagon Questions Report*, WASH. POST, Dec. 24, 1994, at A10.

just anger. This was the only time that WO Hall was physically abused during his captivity.<sup>53</sup> Later that day, soldiers returned him to the crash site to take his picture with his hands raised in the air.<sup>54</sup>

That evening, WO Hall was moved to Pyongyang and was blindfolded in transit. En route, his captors encouraged him to be at ease and eat, but his nervous stomach precluded him from doing either.<sup>55</sup> The next day, a North Korean officer began interrogating him. Using an interpreter, his questions focused on identification and his mission's purpose. During this first interrogation, the North Korean officer informed WO Hall that North Korea considered him a POW.<sup>56</sup> However, during interrogations on 19 December 1994, the same officer informed WO Hall that North Korea no longer viewed him as a POW, but that he was to now be treated as an "illegal intruder." During this meeting, the interrogator lectured WO Hall about the U.S.S. *Pueblo* incident and how its crew was not released until they made a written statement after a year in captivity. Prior to this, WO Hall had never heard of the U.S.S. *Pueblo* incident.<sup>57</sup>

During WO Hall's captivity in Pyongyang, food, water, and toilet facilities always were available, and he had ample opportunities for physical exercise. During the majority of his capture, his room had a window. After four days in Pyongyang, he was given a clean change of clothing.<sup>58</sup>

Warrant Officer Hall's interrogators focused on specific information about his aviation brigade, his Desert Storm experiences, attack helicopter training at Fort Hood, Texas, and the electronics equipment on his aircraft. The final phase of the interrogations began on 23 December 1994 and centered around producing a written statement. Warrant Officer Hall was told what to write in his statement. His interrogators demanded several rewrites because WO Hall intentionally excluded significant facts about his military training and experience and he included misleading information. During the 26 December 1994 interrogation, WO Hall's captors insisted on adding the word "confession." Finally, on 27 December 1994, his captors demanded that the document be rewritten to include the word "confession." The North Koreans videotaped this version, but directed WO Hall to backdate his statement to 25 December 1994. This videotape has never been shown to the free press.

Between 17 December 1994 and his release on 30 December 1994, WO Hall was North Korea's prisoner. During this period, the North Koreans refused him visitors and all other forms of correspondence with the outside world. Initially, the United States asked the North Koreans about the shootdown through low-level military channels within the MAC.<sup>59</sup> At the initial thirty-five minute meeting in Panmunjom, United States military representatives requested that the parties meet every day until North Korea returned the pilots.<sup>60</sup> Coincidentally, House Representative

<sup>53</sup> HALL DEBRIEFING SUMMARY, *supra* note 2, para. 7A.

<sup>54</sup> CNN interview, *supra* note 33.

<sup>55</sup> HALL DEBRIEFING SUMMARY, *supra* note 2, para. 11A.

<sup>56</sup> *Id.* para. 13A.

<sup>57</sup> *Id.* para. 13C. The U.S.S. *Pueblo* was an intelligence vessel captured by North Korea in international waters. During the crews' captivity, the commander was tortured into giving a confession, which was later used for propaganda purposes. The rest of the crew was also subjected to physical and mental abuse. They were ultimately released eleven months after capture.

<sup>58</sup> His daily routine was generally as follows:

0600—0630:	Wake up and dress. 45 minutes of outside exercise and walking. Cold water bucket bath and shave. Breakfast (1-2 boiled eggs, bread, apple and pickles).
1030—1100:	Morning interrogation began, usually 60 to 90 minutes, sometimes postponed until after lunch.
1200—1300:	Lunch (rice, broth with pork, serving of beef or fried fish, boiled or fried potatoes). Afternoon interrogation on two or three occasions. Read North Korean provided books and magazines and watch television.
1830—1900:	Dinner (same as lunch).
1900—1930:	Outside exercise and walking.

Most of the time in his room was spent being subjected to political indoctrination efforts. He was required to watch television programs on how great North Korea was as a country and the near sacred status given Kim Il Sung and Kim Jong Il.

HALL DEBRIEFING SUMMARY, *supra* note 2, paras. 16A, 21.

<sup>59</sup> *N. Korean Military Continues Stonewall*, UPI, Dec. 20, 1994, available in LEXIS, Nexis Library, UPI File.

<sup>60</sup> During this meeting, the United States up front admitted that its aircraft had inadvertently crossed the DMZ. *Id.*



Bill Richardson<sup>61</sup> was in North Korea for discussions relating to the nuclear facilities inspection agreement with North Korea. With his presence, matters soon moved from military to political hands.

Representative Richardson first learned of the downing incident after arriving in North Korea on the evening of 17 December 1994. A Beijing reporter asked him "to comment on the downing of a United States military helicopter."<sup>62</sup> He immediately inquired about the incident. A North Korean Vice Foreign Minister informed him that indeed North Korea had shot down a United States helicopter, that one crew member was killed, and that the military was investigating the matter.<sup>63</sup> Representative Richardson telephoned Washington about the incident. After talking the matter over with Secretary of State Warren Christopher, Representative Richardson's mission changed to gathering more information about the mishap and getting the service members returned to United States control.<sup>64</sup> Over the next two days, the North Koreans stonewalled Representative Richardson's inquiries and refused him access to the surviving pilot.<sup>65</sup>

On Tuesday, 20 December 1994, Representative Richardson met with North Korean Foreign Ministry officials. He described, through an aide, that the meeting was "a very intense negotiating

session."<sup>66</sup> More negotiations over the pilot's release occurred the following day.<sup>67</sup> During negotiations, Representative Richardson again attempted to see WO Hall. However, the North Koreans continued to deny him access by citing their military's ongoing investigation.<sup>68</sup> Representative Richardson directly attributed these tactics to infighting between the North Korean military and the Foreign Minister's Office.<sup>69</sup> Representative Richardson and North Korean Vice Minister Song finally reached a compromise. North Korea would release WO Hilemon's body to Representative Richardson at the DMZ and then release WO Hall "very soon" after Representative Richardson's departure from the country.<sup>70</sup> Representative Richardson agreed.

On Thursday, 22 December 1994, Representative Richardson accompanied WO Hilemon's body across the DMZ. During the news briefing that followed, Representative Richardson informed the media that North Korea would release WO Hall "very soon."<sup>71</sup> He "predicted that a round of military-to-military discussions would produce an agreement for release by Christmas."<sup>72</sup> His optimism was short-lived.

Christmas 1994 came and passed without WO Hall's release.<sup>73</sup> Several U.N. military officials met with their North Korean counterparts on Christmas to continue low-level meetings over WO

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<sup>61</sup> Representative Richardson is a New Mexico congressman on the House Intelligence Committee.

<sup>62</sup> Bill Richardson, *Diary of a Reluctant Diplomat: When the American Military Helicopter Was Shot Down in North Korea, I Was Pressed Into Duty*, WASH. POST, Jan. 15, 1995, at C1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *US Rejects North Korea Explanation, Warns Pact May Be at Stake*, AP WORLDSTREAM, Dec. 20, 1994, available in LEXIS, Nexis Library, AP File.

<sup>67</sup> See Sid Balman, Jr., *N. Korean Military Continues Stonewall*, UPI, Dec. 20, 1994, available in LEXIS, Nexis Library, CURNWS File.

<sup>68</sup> Devroy, *supra* note 52. See also T.R. Reid, *N. Korea Call Pilots "Criminals;" Pyongyang Says U.S. Must Admit Espionage to Gain Flier's Release*, WASH. POST, Dec. 28, 1994, at A1: The day WO Hall was repatriated his interrogators gave him a letter from Congressman Richardson dated 22 December 1994 in addition to a small bag of Christmas cookies, candy, and gum from Mrs. Luck, the CINCUNC's wife, and the wife of the United States Ambassador to South Korea.

<sup>69</sup> Richardson, *supra* note 62.

<sup>70</sup> *Id.*

<sup>71</sup> *In Seoul, Yonhap News Agency Reported that Richardson Brought Hilmon's Remains (sic)*, AFP, Dec. 22, 1994, available in LEXIS, Nexis Library, CURNWS File.

<sup>72</sup> Devroy, *supra* note 52. See also *Panmunjom, Korea, Dec 22*, AGENCE FRANCE PRESSE, Dec. 22, 1994, available in LEXIS, Nexis Library, Newswire File. This article, as well as several during the last weeks of December, speculate that the breakthroughs which occurred during this incident were directly related to warnings from the United States State Department. Secretary of State Warren Christopher, on more than one occasion, iterated that North Korea's conduct in this incident threatened the \$4 billion nuclear reactor pact agreed to on 21 October and which was about to go before Congress.

<sup>73</sup> See Alexander, *supra* note 42.

Hall's return.<sup>74</sup> In assenting to a North Korean demand, Commander-in-Chief, United Nations Command (CINCUNC), General Gary Luck, sent "an official letter of regret" to North Korea.<sup>75</sup>

After Christmas, opposing general officers met daily at Panmunjom to discuss the release of WO Hall.<sup>76</sup> These meetings failed to produce WO Hall's release. However, the North Korean general informed the American general of North Korea's terms for releasing WO Hall.<sup>77</sup> Shortly after this meeting, the State Department received a request from North Korea, through its U.N. mission, to send an envoy.<sup>78</sup> Simultaneously, Pyongyang's official news agency broadcast a statement that North Korea wanted to negotiate a formal peace treaty with the United States.<sup>79</sup> President Clinton responded to the North Korean-U.N. mission's request by dispatching Deputy Assistant Secretary of State Thomas Hubbard to Pyongyang.<sup>80</sup> Mr.

Hubbard, the highest ranking United States official to ever visit North Korea, arrived in South Korea and crossed the DMZ the following day.<sup>81</sup>

On 27 December 1994, North Korea accused WO Hall of conducting a spy mission in its territory and alleged that "[a]ll facts clearly proved that the intrusion of the United States helicopter into the territorial airspace of the DPRK [North Korea] is a grave violation of the sovereignty of the DPRK and a deliberate act of espionage."<sup>82</sup> The North Koreans also released the picture of WO Hall taken the day of his capture and blamed the delay of release on WO Hall's failure to cooperate with their investigation.<sup>83</sup>

In Washington, United States officials vigorously denied the allegations.<sup>84</sup> About the same time, United States and North

<sup>74</sup> *Id.*; Paul Blustein, *U.S. Regrets Conveyed To N. Korea; Letter on Incident Aimed at Release of American Pilot*, WASH. POST, Dec. 25, 1994, at A1.

<sup>75</sup> Letter, Commander in Chief, United Nations Command, to The Supreme Commander Korean People's Army (24 Dec. 94), on file with the author. See Alexander, *supra* note 42; Sid Balman Jr., *U.S. Rejects N. Korea Spy Claim*, UPI, Dec. 27, 1994, available in LEXIS, Nexis Library, CURNWS File. Of note, General Luck, as the Commander-in-Chief, United Nations Command, he possessed the residual powers contained in the Korean Armistice Agreement.

<sup>76</sup> Gugliotta and Reid, *supra* note 44. American Major General R.L. Smith, representing the United Nations Command, sat down directly with his North Korea counterpart Lieutenant General Ri Chan-bok to conduct these discussions. *U.S. Helicopter Pilot Returned to Freedom*, UPI, Dec. 30, 1994, available in LEXIS, Nexis Library, CURNWS File; Elaine Sciolino, *Both Sides Can Claim a Victory in Release*, N.Y. TIMES, Dec. 30, 1994, at A8.

While the negotiations were under military control, General Luck "personally went to the government of the Republic of [South] Korea and talked to the minister of National Defense, as well as their chairman of the Joint Chiefs . . . [about] pursu[ing] the initiative that came through Panmunjom" to negotiate WO Hall's return. "They agreed." General Luck surmised that South Korea was upset over "the discussions that occurred in New York City that led to the dispatch of Mr. Hubbard to negotiate on the ground in Pyongyang." *Security Implications of the Nuclear Agreement with Korea: Hearings Before the Senate Armed Services Committee*, 104th Cong., 1st Sess. (Jan. 26, 1995) (statement by General Gary Luck, Commander-in-Chief, U.N. Forces South Korea), available in LEXIS, Nexis Library, FEDNEW File.

The South Korean government's concern was subversion of the Korean Armistice Agreement and normalization of diplomatic relations between the United States and North Korea as a direct result of this incident.

<sup>77</sup> Russell Watson, *et al.*, *Washington Ends Another Hostage Crisis, But Did It Pay the North Too High a Price?*, NEWSWEEK, Jan. 9, 1995, at 49.

<sup>78</sup> Gugliotta and Reid, *supra* note 44.

<sup>79</sup> Willis Witter, *Events Reveal Pyongyang Power Plays*, WASH. TIMES, Dec. 30, 1994, at A1. The North Koreans wanted a formal peace treaty with the United States that excluded South Korea. *Envoy Heads to Korea*, *supra* note 44. A diplomatic envoy would circumvent the MAC which North Korea had abandoned in April 1994. The broadcast was an obvious cast to United States policy makers fishing for discourse on replacing the Korean Military Armistice Commission. The United States took the bait. For background information on North Korean's walkout from the MAC, see *DPRK Urges U.S. to Help Establish New Peace Mechanism*, XINHUA NEWS AGENCY, June 10, 1994; *N. Korea Ignores U.N. Command Call*, UPI, June 7, 1994; *U.N. Command Seeks Talk with North Korea*, UPI, June 5, 1994; *DPRK Urges to Disband U.N. Command*, *supra* note 24, and *Foreign Ministry Says Armistice Accord Should Be Replaced by Peace Agreement* (BBC transcript, Apr. 29, 1994), all available in LEXIS, Nexis Library, CURNWS File.

<sup>80</sup> Balman, *supra* note 75. While the State Department emphasized that the issue of releasing WO Hall and the impending sale of two nuclear reactor facilities worth \$4 billion should remain separate, one can hardly overlook the fact that Mr. Hubbard, the number two man in the nuclear reactor negotiations, was sent to negotiate the release of WO Hall. See Alexander, *supra* note 42. Also, one can argue President Clinton played right into the strategy of North Korea. Their objective was to circumvent the MAC and get direct diplomatic intercourse with the United States. The President's action arguably undermined the authority and effectiveness of the MAC, not only during this incident but for all future discourse with North Korea. See Andrew Pollack, *In South Korea, Uneasiness Over U.S. Dealing with North*, N.Y. TIMES, Dec. 31, 1994, at 3. By sending Mr. Hubbard, the President handed the North Koreans the wedge it would use to begin to split the long-standing ties between the United States and South Korea.

<sup>81</sup> *Envoy Heads to Korea*, *supra* note 44; *Lawmakers Ready to Link Pilot to Korea Nuclear Deal*, CHICAGO TRIB., Dec. 29, 1994, available in LEXIS, Nexis Library, CURNWS File [hereinafter *Lawmakers Ready to Link Pilot*].

<sup>82</sup> *N. Korea Says U.S. Helicopter Was Spying*, UPI, Dec. 26, 1994, available in LEXIS, Nexis Library, CURNWS File, quoting an official North Korean radio broadcast.

<sup>83</sup> *North Korea Issues Picture of Captured U.S. Pilot*, REUTERS, Dec. 27, 1994, available in LEXIS, Nexis Library, CURNWS File; Lee Su-wan, *U.S. Envoy in North Korea to Seek Pilot's Release*, REUTERS, Dec. 28, 1994, available in LEXIS, Nexis Library, CURNWS File; Alexander, *supra* note 42.

<sup>84</sup> Alexander, *supra* note 42; Balman, *supra* note 75.

Korean generals met again at Panmunjom. This was significant because the talks excluded South Korea.<sup>85</sup> Mr. Hubbard's first day of negotiations were fruitless. United States diplomats reportedly created a ploy to compensate for North Korea's tough stance. During a telephone conversation that United States diplomats assumed North Korea was monitoring, a United States "deputy national security advisor complained to Hubbard about North Korea's 'unacceptable treatment of a presidential envoy' . . . [t]he next day, North Korea closed the deal."<sup>86</sup>

On 29 December 1994, the day before WO Hall's release, North Korean officials released a photograph of a six-page statement signed by WO Hall entitled "CONFESSION" dated 25 December 1994.<sup>87</sup> A North Korean radio broadcast, allegedly reading from WO Hall's statement, reported that WO Hall asked forgiveness for his "illegal intrusion" into North Korean airspace and admitted that his conduct was "a flagrant violation of international law."<sup>88</sup> However, other than the photograph of the state-

ment, no copies have been released. Further, the photograph of WO Hall's written statement only allows the reader to view the first and last pages of the six-page document.

Mr. Hubbard succeeded in obtaining WO Hall's release by agreeing to two stipulations.<sup>89</sup> First, the United States would express "sincere regret for this incident."<sup>90</sup> Second, the United States agreed "to contacts in an appropriate forum designed to prevent such incidents in the future."<sup>91</sup> This provision addressed North Korea's stated objective of dismantling the now South Korean controlled MAC.<sup>92</sup>

Besides the release of WO Hall, North Korea agreed in writing that WO Hall's helicopter "accidentally strayed into North Korea."<sup>93</sup> Pragmatically, North Korea had to realize that any further delays in WO Hall's release jeopardized forthcoming United States economic aid. The American public was growing impatient with the continued detention of WO Hall. By late 1994,

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<sup>85</sup> Recall that on 28 April 1994 North Korea withdrew from the Armistice Commission when the United Nations appointed a South Korean Major General as the senior member of the UNC side of the (MAC). *U.S. Helicopter Pilot Returned to Freedom*, UPI, Dec. 30, 1994, available in LEXIS, Nexis Library, CURNWS File; *Envoy Heads to Korea*, supra note 44. Additionally, Major General Smith did originally go to meet with the North Korean general officer representing the United Nations Command (UNC MAC), not solely the United States. Therefore, South Korea was represented. However, North Korea refused to accept his UNC MAC credentials which rendered the United Nations-North Korean negotiations mythical. Timm letter, supra note 26, at 3, 6.

<sup>86</sup> Watson, et al., supra note 77.

<sup>87</sup> Alexander, supra note 42; T.R. Reid, *North Korea Releases U.S. Helicopter Pilot; Washington Expresses 'Sincere Regret'*, WASH. POST, Dec. 30, 1994, at A2 (this article is particularly important because it includes a picture of the alleged confession). From the picture, one can compare the later broadcasts of what was allegedly contained in the statement with portions of the actual statement itself.

<sup>88</sup> Paul Alexander, *North Korea Releases Statement from Captive Pilot*, AP WORLDSTREAM, Dec. 29, 1994, available in LEXIS, Nexis Library, CURNWS File.

<sup>89</sup> Secretary of Defense William Perry, Chairman of the Joint Chiefs of Staff John Shalikashvili, National Security Advisor Anthony Lake, and Assistant Secretary of State for East Asian and Pacific Affairs Winston Lord, all reviewed the stipulation's terms. Ultimately, President Clinton personally approved these two terms. Rowan Scarborough, *U.S. "Regret" Wins Release of Army Pilot*, WASH. TIMES, Dec. 30, 1994, at A1.

North Korea wanted two other concessions which were not acceptable. They wanted the United States to apologize for conducting spy operations against them. Next, they wanted more formal language that would open bilateral military talks leading to a peace treaty. Sciolino, supra note 76; *N. Korea Releases U.S. Pilot; Americans Refuse to Admit to Espionage*, ST. LOUIS POST-DISPATCH, Dec. 30, 1994, at 1A [hereinafter *N. Korea Releases U.S. Pilot*]. The United States rejected the latter demand because it excluded South Korea from the process.

The North Koreans also asked Mr. Hubbard to discuss with South Korea the repatriation of North Korean POW's allegedly still held by South Korea. Mr. Hubbard agreed to this request, and did relay the comment to South Korean officials, but he did not include this provision in the written understanding between the two nations. Andrew Pollack, *In South Korea, Uneasiness Over U.S. Dealings with North*, N.Y. TIMES, Dec. 31, 1994, at 3.

South Korea responded to Mr. Hubbard's comment by telling the United States not to interfere in the domestic matters of South Korea. *S. Korea Comments on Pilot Deal*, AP ONLINE, Dec. 31, 1994, available in LEXIS Nexis Library, CURNWS File. The issue of POWs held by both North and South Korea is a sensitive one on the peninsula. Each nation claims that the other side still holds POWs from the 1950s. *Id.* See also Don Kirk, "Dead Man" Returns: *S. Korean Thought Killed in War Escapes After 43 Years*, NEWSDAY, Oct. 25, 1994, at A4 and Thomas Wagner, *International News*, AP WORLDSTREAM, Oct. 24, 1994, available in LEXIS Nexis Library, CURNWS File. A South Korean soldier who was captured by Chinese troops during the Korean War in 1951 and held as a POW became the first POW to escape in forty-one years.

<sup>90</sup> *What U.S. Agreed*, supra note 34.

<sup>91</sup> *Id.*

<sup>92</sup> *Lawmakers Ready to Link Pilot*, supra note 81 (North Korean senior officers stated that dismantling the South Korean controlled MAC was an objective during their meetings with United States military officers on 26 and 27 December). This position was documented by at least one other reporter, Willis Witter. *Events Reveal Pyongyang Power Plays*, WASH. TIMES, Dec. 30, 1994, at A1.

<sup>93</sup> *N. Korea Releases U.S. Pilot*, supra note 89.

substantial congressional bipartisan support opposed funding the interim measures of the 21 October North Korean nuclear facilities inspection agreement.<sup>94</sup> The United States had agreed to provide North Korea with heating oil until new nuclear reactors were built. This bipartisan coalition threatened to link any aid to WO Hall's immediate release. Receipt of North Korea's first oil shipment, valued at \$5 million, was due to arrive within days. The total value of that deal was approximately \$4 billion in aid to North Korea.<sup>95</sup>

At 1116, 30 December 1994, with a salute from General Luck, WO Hall crossed the border at Panmunjom. That same day, WO Hall boarded a military plane bound for MacDill Air Force Base, Florida. Shortly after his arrival, WO Hall provided details of his imprisonment. He said that "he was well fed and allowed plenty of rest" during his captivity.<sup>96</sup> While he admitted to not being under any type of physical duress, he felt fearful for his life if he did not sign the "confession."<sup>97</sup> He said that he attempted over several days of questioning to temper the language of his written statement before signing it.<sup>98</sup>

Several days later, the Army announced that WO Hall would return to South Korea to continue his military duties as he re-

quested.<sup>99</sup> He returned to his unit in South Korea for duty on 27 January 1995 and resumed flying helicopters.<sup>100</sup> In closing the incident, the Pentagon reported that the military would take no adverse action against WO Hall for his actions.<sup>101</sup> On 28 March 1995, the Army Deputy Chief of Staff for Personnel recommended that WO Hall be compensated under the Victims of Terrorism Compensation Act for his thirteen days of captivity.<sup>102</sup> This request was approved on 2 May 1995.<sup>103</sup> In addition to his normal pay, WO Hall received \$1859 (\$143 per day of captivity). Of equal interest is that WO Hall was awarded the Purple Heart and the Prisoner of War/Missing in Action medals.<sup>104</sup>

### The International Legal Status Between the United States and North Korea

Within twelve hours of the signing of the Armistice Agreement at 1000, 27 July 1953, hostilities on the Korean peninsula were supposed to cease. However, that did not mean that the state of war on the peninsula ceased.<sup>105</sup>

"War may be defined as a legal condition of armed hostility between states."<sup>106</sup> Little dispute exists that from 1950 through 1953 the Korean conflict was a war by international and domes-

<sup>94</sup> See, e.g., Barry Schweid, *Lawmakers Challenging Clinton on Pact with North Korea*, AP, Dec. 29, 1994, available in LEXIS, Nexis Library, CURNWS File; *Lawmakers Ready to Link Pilot*, supra note 73; Peter Mackler, *US-N. Korean accord on airman a delicate compromise*, AFP, Dec. 30, 1994, available in LEXIS, Nexis Library, CURNWS File; Ben Barber, *Dole Threatens Accord in Bid to Free Airman*, WASH. TIMES, Dec. 28, 1994, at A1.

<sup>95</sup> See *CNN News: Hubbard Discusses Negotiations with North Korea* (CNN television broadcast, Jan. 5, 1995) (transcript #751-5 available in LEXIS, Nexis Library, SCRIPT File) [hereinafter Hubbard Interview].

<sup>96</sup> His hygiene facilities included a bed, bathtub and toilet. "He ate rice, meats, pickles and a bread that resembled sponge cake." Leanora Minai, *A Soldier's Story*, ST. PETERSBURG TIMES, Jan. 5, 1995, at 1A, and Robert Burns, *Pilot Says Explosion Rocked Chopper; Copilot Gravely Wounded*, AP, Dec. 30, 1994, both available in LEXIS, Nexis Library, CURNWS File.

<sup>97</sup> *Helicopter Pilot Feared North Koreans Would Kill Him*, AP, Jan. 5, 1995; *Pilot Unsure What Caused Helicopter to Go Down in North Korea*, AP, Jan. 4, 1995; and *Pilot Held in N. Korea Feared for His Life; Bobby Hall Says He Wasn't Beaten, But "Confession" Coerced*, SAN FRANCISCO EXAMINER, Jan. 5, 1995, at A2, all available in LEXIS, Nexis Library, CURNWS File.

<sup>98</sup> Burns, supra note 96.

<sup>99</sup> Dana Priest, *Army Pilot Returning to Korea Duty; Clearance Seen Likely in Shootdown Incident*, WASH. POST, Jan. 20, 1995, at A25.

<sup>100</sup> *U.S. Pilot Returns to Duty in S. Korea*, REUTERS, Jan. 27, 1995, available in LEXIS, Nexis Library, CURNWS File; *Human Error in Downing*, N.Y. TIMES, June 23, 1995, at A3.

<sup>101</sup> Priest, supra note 99; Michael Sznajderman, *Report Clears Pilot Downed in N. Korea*, TAMPA TRIB., June 16, 1995, at 10.

<sup>102</sup> Memorandum, Dep't of Army, Office of the Deputy Chief of Staff for Personnel, DAPE-MBB-C, to the Secretary of the Army, subject: Compensation Under the Victims of Terrorism Act (28 Mar. 1995).

<sup>103</sup> Message, Headquarters, Dep't of Army, DAPE-PRR-C, subject: Payment Under Victims of Terrorism Act (021600Z May 95).

<sup>104</sup> Author's 6 September 1996 telephonic interview with Ms. Shari Lawrence, Media Relations Officer, U.S. Total Army Personnel Command. Ms. Lawrence told the author that approval of the award occurred on 22 December 1994. This was the same day that WO Hilemon's remains returned to U.S. control.

<sup>105</sup> DA PAM. 27-1, supra note 7, at 199 (Korean Armistice Agreement, para. 12).

<sup>106</sup> *Commencement, Duration, and Termination of Hostilities*, in M. WHITEMAN, DIG. OF INT'L LAW 66 (1968); DA PAM 27-161-2, supra note 6, at 1-4. See WHITEMAN, supra, at 75-7, for a short discussion of North Korea's failure to comply with their legal obligations prior to commencement of hostilities.

tic standards.<sup>107</sup> Considering all of the border incidents throughout the years, one could argue that the war continued to rage even after the armistice.<sup>108</sup> Assuming a state of war existed in Korea from 1950 through 1953, what impact did the armistice have on the war's legal status? To answer this question, one must review the legal consequences of war and how belligerent nations legally terminate hostilities.

International law defines how a state of war affects the legal rights of belligerents from the moment this status exists. Several examples are illustrative.<sup>109</sup> Diplomatic relations are broken and treaties regulating hostilities become effective.<sup>110</sup> Political treaties (*i.e.*, alliances) between belligerents become void, but non-political treaties are merely suspended. Enemy public property is subject to confiscation. Legal and commercial transactions between the nations are severed. Enemy aliens are entitled to a

reasonable time to leave a belligerent's territory. Belligerent warships are entitled to visit and search vessels of any flag on the high seas.

Belligerents may end a war in several ways.<sup>111</sup> Hostilities may end with a treaty of peace. A treaty of peace formally ends the legal state of war between the belligerents and initiates normalization of relations.<sup>112</sup> Once the parties sign the treaty, normal peacetime rights and obligations return between the parties. Lawful warlike acts during times of hostilities become unlawful when committed while a treaty is in effect.<sup>113</sup>

Another way to end hostilities is by an armistice.<sup>114</sup> An armistice is a temporary peace.<sup>115</sup> While an armistice suspends *acts* of war, it does not end the *state* of war.<sup>116</sup> An armistice may be general or local.<sup>117</sup> The Korean Armistice Agreement is a gen-

<sup>107</sup> See, *e.g.*, *United States v. Ayers*, 15 C.M.R. 220 (C.M.A. 1954); *Cariva v. New York Life Ins., Co.*, 124 F. Supp. 388 (S.D. Ill. 1954). See generally, DA PAM. 27-161-2, *supra* note 6. See *Pye, The Legal Status of the Korean Hostilities*, 45 GEO. L.J. 45 (1956), for a view of the Korean Conflict's legal status.

<sup>108</sup> For example, from 1966 to 1969, over 550 incidents of gun fire across the DMZ occurred, including 450 firefights. Casualties on both sides of the DMZ totaled more than 4,000. DANIEL P. BOLGER, *SCENES FROM AN UNFINISHED WAR: LOW-INTENSITY CONFLICT IN KOREA, 1966-1969*, at 111-114 (1991).

<sup>109</sup> This list of examples was compiled from three sources. GERHARD VON GLAHN, *LAW AMONG NATIONS* 715-722 (1992); DA PAM. 27-161-2, *supra* note 6, at 38-39 (footnotes omitted); and, L. OPPENHEIM, 2 *INT'L LAW* 300, 335-335 (7th ed., by H. Lauterpacht, 1952).

<sup>110</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, T.I.A.S. No. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, T.I.A.S. No. 3364 [hereinafter GPW]; and, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, T.I.A.S. No. 3365 [hereinafter GCC], all reprinted in DA PAM. 27-1, *supra* note 7 (for ease of reference, the above conventions will hereinafter be cited as contained in DA PAM. 27-1). Common Article 2 to these treaties provides:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Arguably, because North Korea did not ratify the 1949 Conventions until 1957, they were not bound by them during the conflict. See generally Claude Pilloud, *Reservations to the Geneva Conventions of 1949*, *INT'L REV. OF THE RED CROSS* (Mar./Apr. 1976), at 5 (date North Korea ratified the Conventions).

<sup>111</sup> See generally, VON GLAHN, *supra* note 109, at 722. There are four generally recognized means to end war: a treaty of peace, subjugation, capitulation, and simple cessation of hostilities. A treaty of peace and simple cessation of hostilities are addressed in the text which follows.

Subjugation occurs when one belligerent exterminates another belligerent through conquest and then annexation. OPPENHEIM, *supra* note 109, at 600; DEP'T OF ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE*, para. 353 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]; VON GLAHN, *supra* note 109, at 723. In essence, one sovereign engulfs the other such that the former nation no longer exists.

Capitulation is another way to end hostilities. "A capitulation is an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress, or other defended locality, or of a district of the theater of operations. A surrender may be effected without resort to a capitulation." FM 27-10, *supra*, para. 470. "An unconditional surrender is one in which a body of troops gives itself up to its enemy without condition." *Id.* para. 478. See also DA PAM. 27-161-2, *supra* note 6, at 204-5. In laymen's terms, a capitulation is a surrender with conditions. Once belligerents agree to a surrender, it must be scrupulously honored. Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 35, 36 Stat. 2277, T.I.A.S. No. 539 [hereinafter Hague Regulations], reprinted in DA PAM. 27-1, *supra* note 7, at 14 (for ease of reference, the above regulation will hereinafter be cited as in DA PAM. 27-1).

<sup>112</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 37-38 (1988).

<sup>113</sup> VON GLAHN, *supra* note 109, at 727-28.

<sup>114</sup> Truce and cease-fire are other less technical terms connoting an armistice.

<sup>115</sup> However, some have argued that the Korean Armistice Agreement ended the state of war. See DINSTEIN, *supra* note 111, at 42-46. *Contra*, VON GLAHN, *supra* note 109, at 726.

<sup>116</sup> H.W. HALLECK, *INTERNATIONAL LAW AND LAWS OF WAR* 653-54 (1861) (General Halleck was the Union Chief of Staff who assigned Professor Lieber to write his famous "Lieber Code," the genesis of the modern laws of war); VON GLAHN, *supra* note 109, at 725-6; Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 A.J.I.L. 880, 884 (1956) ("it may be stated as a positive rule that an armistice does not terminate the state of war existing between the belligerents, either *de jure* or *de facto*, and that the state of war continues to exist and control the actions of neutrals as well as belligerents").

<sup>117</sup> DA PAM. 27-1, *supra* note 7, at 15 (Hague Regulations, art. 37). "The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius." *Id.*

eral armistice,<sup>118</sup> but it contains language consistent with localizing its effect. Its terms specifically limit it to actions "in Korea."<sup>119</sup> This language is inconsistent with the traditional concept of a general armistice.<sup>120</sup> Thus, United States and North Korean forces could conduct warlike acts outside the geographical limits established in the armistice; for example, the U.S.S. *Pueblo* incident. However, Article 2(4) of the U.N. Charter significantly limits the threat or use of force in the settlement of international disputes.<sup>121</sup>

In sum, the armistice in effect on the Korean peninsula has not ended the *state* of war between North Korea and the nations under the United Nations/United States command and their respective allies. Because a state of war exists, the laws of armed conflict continue to apply between the belligerent forces.

### The Legal Bases for United States Forces in Korea

Two legal bases support United States forces in South Korea—United Nations authorization and South Korean consent. South Korean President Syngman Rhee requested U.N. intervention after the initial invasion.<sup>122</sup> The U.N. responded to his request with U.N. Security Council Resolution 83.<sup>123</sup> This resolution recommended that nations furnish forces necessary to re-

pel the North Korean armed attack and restore international peace. The United States acted on this resolution by immediately sending troops.<sup>124</sup> The U.N. subsequently passed Security Council Resolution 84, which recommended placing command of all U.N. forces under the control of the United States.<sup>125</sup> Since then, the Commander-in-Chief, United Nations Command, has always been a United States general officer. Therefore, by U.N. resolution, the United States has the legal authority to station its soldiers on the Korean peninsula until the belligerents consummate a peace treaty.

The second basis for a United States presence is South Korean consent. After the armistice, the United States and South Korea negotiated a mutual defense treaty<sup>126</sup> and a status of forces agreement.<sup>127</sup> These agreements specifically authorized the stationing of United States forces in South Korea.

### Law of Air Issues

No matter what type of relationship exists between nations, each sovereign has the right of "complete and exclusive sovereignty over the airspace above its territory."<sup>128</sup> Commensurate with this right is a state's authority to protect its airspace from

<sup>118</sup> JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 644, n. 42a (2nd rev. ed. w/suppl., 1959).

<sup>119</sup> DA PAM. 27-1, *supra* note 7, at 197; 199 (Korean Armistice Agreement, preamble and art. II). The Korean Armistice Agreement's boundary of application is later defined as the land controlled by either side in Korea, its airspace, and the waters contiguous to controlled land masses. *Id.* at 202 (Korean Armistice Agreement, paras. 14-16).

<sup>120</sup> HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT*, vol. 2, 914-15 (1986).

<sup>121</sup> U.N. Charter, *reprinted* in DEP'T OF ARMY, PAMPHLET 27-24, *SELECTED INTERNATIONAL AGREEMENTS VOLUME*, vol. II, para. 3-1 (1 Dec. 1976) [hereinafter DA PAM. 27-24].

<sup>122</sup> Gray, *supra* note 22, at 9.

<sup>123</sup> S.C. Res. 83, U.N. SCOR, 5th Sess., 474th Mtg., at 5, U.N. Doc. S/INF/5/Rev.1 (1950).

<sup>124</sup> Actually, President Truman committed United States forces one day before the U.N. passed this resolution. However, his initial actions complied with Article 51, United Nations Charter. See Charles E. Edgar, *United States Use of Armed Forces Under the United Nations . . . Who's in Charge?*, 10 J. L. & Pol. 299 (1994).

<sup>125</sup> S.C. Res. 84, U.N. SCOR, 5th Sess., 476th Mtg., U.N. Doc. S/INF/5/Rev.1 (1950).

<sup>126</sup> Mutual Defense Treaty Between the United States of America and the Republic of Korea, 1 October 1953. 5 U.S.T. 2368; T.I.A.S. No. 3097; 238 U.N.T.S. 199, *reprinted* in DA PAM. 27-24, *supra* note 121, at 1-16.

<sup>127</sup> Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 9 July 1966. 17 U.S.T. 1677; T.I.A.S. No. 6127; 674 U.N.T.S. 163, *reprinted* in DA PAM. 27-24, *supra* note 121, at 2-109.

<sup>128</sup> Convention on International Civil Aviation (Chicago Convention), December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, *reprinted* in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS AND NEW DEVELOPMENTS* 653 (1994) [hereinafter Chicago Convention]. The United States and both Koreas are signatories to this treaty. *Status of Certain International Air Law Instruments*, ICAO J. (Sept. 1994), at 63.

"Under international law, airspace is classified under two headings: national airspace (airspace over the land, internal waters, archipelagic waters, and territorial sea of a nation) and international airspace (airspace over a contiguous zone, an exclusive economic zone, and the high seas, and over unoccupied territory (i.e., territory not subject to the sovereignty of any nation such as Antarctica))." DEP'T OF NAVY, *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, NWP 9 (Rev. A)/FMFM 1-10, ¶2.5.1, n. 72 (1989).

intruders.<sup>129</sup> The Chicago Convention of 1944 codifies this right. This Convention was designed to regulate civilian aircraft. However, it specifically provides: "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."<sup>130</sup> This is especially true when a country is at a state of war.<sup>131</sup> The Korean Armistice Agreement provisions reinforce these principles.<sup>132</sup> Furthermore, the prior incidents of North Korea shooting down military helicopters over its territorial airspace clearly provided notice of its practice in this regard. Given the limitation of military aircraft rights, the threshold for use of force against military aircraft is lower than against civil aircraft.<sup>133</sup>

In this incident, WO Hall and WO Hilemon flew into North Korean air space without authorization. By crossing the DMZ, WO Hall and WO Hilemon violated both the Chicago Convention and the Korean Armistice Agreement. Because a military helicopter penetrated its sovereign air space, North Korea had the right to invoke self-defense.<sup>134</sup> A military aircraft is a lawful target between belligerents. While not required, the North Koreans asserted that they attempted to order the aircraft to land but the aircraft failed to do so.<sup>135</sup> This comports with peacetime intrusion practices. Even in peacetime, if WO Hall received a warning to land and did not heed North Korea's demand, following the United States practice, North Korea had the right to attack and destroy WO Hall's helicopter.<sup>136</sup> But the Korean

<sup>129</sup> See Charter of the United Nations, art. 51, 59 Stat. 1931, reprinted in DA PAM. 27-24, *supra* note 120, at 3-7 to 3-8.

<sup>130</sup> Chicago Convention, art. 3(c), *supra* note 128. This article is consistent with early airspace conventions and the practice of nations. Prior to 1944, the Paris Convention for the Regulation of Air Navigation (1919), 11 L.N.T.S. 173, reflected the protections afforded military aircraft over foreign airspace. It forbids military aircraft from entering another nation's airspace without express permission. Unlike the Chicago Convention, if the foreign nation granted permission, the aircraft received rights similar to those of visiting warships. If no permission was sought or granted the aircraft, the foreign nation had the right to prevent entry into its airspace. This extended to the use of force if necessary. *Id.*, art. 32. See John T. Phelps II, *Aerial Intrusions By Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 269 - 70 (1985)[hereinafter Phelps]; Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559, 561 (1953).

The most noted incident of U.S. compliance with this article is the El Dorado Canyon Operation. This was the operation against Libya on 15 April 1986 responding to the La Belle Disco Bombing in Berlin. France denied a U.S. request for U.S. military aircraft to overfly its territory. This refusal forced U.S. bombers to fly several thousand additional miles to accomplish their mission. See BRIAN DAVIS, QADDAFI, TERRORISM AND THE ORIGINS OF THE U.S. ATTACK ON LIBYA (1990). See generally, Thomas A. Geraci, *Overflight, Landing Rights, Customs, and Clearance*, 37 A.F. L. REV. 155 (1994).

<sup>131</sup> See Hague Rules of Air Warfare, art. 12, reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 147, 149 (Dietrich Schindler & Jiri Toman eds., 2d rev. ed. 1981).

<sup>132</sup> The Armistice provides: "[A]ir forces shall respect the air space over the Demilitarized Zone and over the area of Korea under the military control of the opposing side . . ." DA PAM. 27-1, *supra* note 7, at 202 (Korean Armistice Agreement, para. 16). It also requires both parties to avoid hostile acts within the DMZ and to prevent military personnel from entering "the territory under the military control of either side unless specifically authorized to do so" by the other side. *Id.* at 198 (Korean Agreement, paras. 6, 7, and 8).

<sup>133</sup> The efforts of the international community relating to shoot down incidents are limited to situations involving civilian aircraft. Thus, a tacit recognition exists that, under international law, the downing of a state aircraft over sovereign air space is justified absent strict compliance with Chicago Convention. See ICAO Rules, *Interception of Civil Aircraft*, RULES OF THE AIR (9th ed., 1990), and Article 3 bis, Protocol relating to an amendment to the Convention on International Civil Aviation, Chicago Convention, *supra* note 128.

<sup>134</sup> *Contra* Simon, *supra* note 9, at 136 (no legal justification exists for shooting down aircraft not engaged in hostile acts, and unrestrained firing upon military aircraft is not in keeping with the spirit of the armistice). This position ignores the practice of engagements along the DMZ. A hostile act must be viewed from the potential victim of the act, and a violation of the armistice by military aircraft is in itself a hostile act.

<sup>135</sup> Gugliotta and Reid, *supra* note 44.

<sup>136</sup> "An intruding military aircraft must obey orders to leave or land, and failing a proper and prompt response, can be attacked and destroyed, even in hot pursuit in international space." DEP'T OF AIR FORCE, PAMPHLET 11-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, ¶ 2-5d (19 Nov. 1976). This statement is tempered somewhat in the pamphlet's next paragraph:

The use of force against an intruding military aircraft, however, is subject to the general rule of international law that the employment of measures of force to protect territorial sovereignty is subject to the duty to "take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat."

*Id.* (footnote omitted)(citing 9 MARJORIE WHITMAN, DIGEST OF INTERNATIONAL LAW 328 (1965)).

peninsula is still in a state of war; therefore, even assuming warnings did not occur, customary rules of air warfare would allow North Korea to engage a military helicopter in a hostile zone without warning.<sup>137</sup> North Korean forces lawfully engaged the helicopter as a legitimate target. The United States had no legally defensible excuse for violating North Korean air space and wisely conceded this.

Both of these agreements obligate the United States to initiate disciplinary proceedings against WO Hall. The Korean Armistice Agreement calls for "respective commands" to "insure that personnel . . . who violate any of the provisions of this [Korean] Armistice Agreement are adequately punished."<sup>138</sup> One of the provisions requires respect for the sovereign airspace of each party. As stated earlier, except for article 3(c), the Chicago Convention regulates civilian aircraft and does not otherwise apply to military aircraft. However, this Convention can be used as a guide in determining the seriousness under international law of a violation of a sovereign's airspace. In short, it reinforces the principle that operation of aircraft, be it civilian or military, over another sovereign state's air space is a privilege and not a right. The Chicago Convention requires the following: "Each con-

tracting State undertakes to insure the prosecution of all persons violating the regulations applicable."<sup>139</sup> Although the Chicago Convention does not apply to state aircraft, it does provide evidence of the seriousness of air space violations. If the Chicago Convention requires prosecution of civil aircraft pilots in peacetime for violating the territorial airspace of a sovereign, surely this suggests at least a moral obligation to punish military pilots who violate the territorial airspace protected by an armistice.

The seriousness of the offense also is reflected in the conduct during peacetime between communist countries and U.S. military aircraft in the 1950s. In one incident, an unarmed military transport strayed into Hungary. Soviet fighters forced it to land in Hungary. The crew were detained, tried for crossing into Hungary without permission, and fined \$30,000 (or alternatively serve three months confinement). The Hungarian official released the four member crew after the United States paid the fine under protest.<sup>140</sup> There are also several documented cases of United Nations personnel in Korea receiving disciplinary punishment "even where investigation (sic) has revealed accidental violations [of the Korean Armistice], such as navigational errors by pilots of aircraft."<sup>141</sup> When one combines the intent of

<sup>137</sup> See *id.* ch. 4. See also Hague Rules of Air Warfare, art. 50, reprinted in JAMES M. SPRAIGHT, AIR POWER AND WAR RIGHTS (3rd ed., 1949). "Although these rules were never adopted in legally binding form they are of importance as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war." OPPENHEIM, *supra* note 109, at 519. Furthermore, assuming evasion did occur, international law might even support North Korea firing upon a civil aircraft. See Bernard E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 A.F.L. REV. 49 (1987), for an excellent discussion of the law in this situation. See also ICAO Interception Procedures, Chicago Convention, Attachment A, Annex 2, *supra* note 128. Finally, United States practice recognizes a state's right to use force against an intruding foreign military aircraft conducting military operations during peacetime. For example, the United States did not protest the use of force against the U-2 reconnaissance aircraft shot down by the Soviet Union in 1960. Phelps, *supra* note 130, at 287.

<sup>138</sup> DA PAM. 27-1, *supra* note 7, at 201 (Korean Armistice Agreement, para. 13(e)). The text is as follows:

c. Insure that personnel of their respective commands who violate any of the provisions of this Armistice Agreement are adequately punished.

<sup>139</sup> Chicago Convention, art. 12, *supra* note 128.

<sup>140</sup> Lissitzyn, *supra* note 130, at 581. Professor Lissitzyn supports the proposition that persons who commit airspace violations due to mistake or distress "may not be subjected to penalties or to unnecessary detention." *Id.* at 588. However, he goes on to say that this privilege may not extend to those persons whose violation occurred "due to negligence chargeable to the person in control of the aircraft." *Id.* at 588-89, n. 106.

<sup>141</sup> Simon, *supra* note 9, at 130-31 (citing various Minutes of the Military Armistice Committee meetings from 1953 to 1958).



the Chicago Convention, the provisions of the Korean Armistice Agreement, and the earlier practice of punishing military pilots for violating another nation's sovereign airspace, they provide a compelling argument that the United States (by the responsible commanders) should have initiated a "punishment"<sup>142</sup> action against WO Hall.

### Do the Laws of War Apply to This Incident?

No reasonable argument can claim that the Korean War was something other than an international armed conflict subject to the laws of war. However, an armistice is now in effect. Recall, an armistice is a *temporary* cessation of hostilities for an agreed period. Once an armistice exists, the laws of war continue to apply until a treaty of peace occurs.<sup>143</sup> There has not been a general close of military operations, merely a suspension of active hostilities. The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter Third Convention) is

part of the laws of war and continues in effect. The Third Convention's commentary supports this argument:

It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. *Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.*<sup>144</sup>

### What Was WO Hall's Legal Status on His Capture?

Technically, WO Hall was a POW after his capture by the North Koreans.<sup>145</sup> The Third Convention defines who qualifies as POWs. One category is "members of the armed forces of a

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<sup>142</sup> Because the Korean Armistice Agreement uses the term "punish" (see *supra* note 138), I will use that term in the remainder of the article to collectively refer to the range of disciplinary proceedings under United States military regulations, law, and custom; although, as discussed below, "punishment" in the United States military is a term of art referring only to judicial and nonjudicial actions under Article 15 of the Uniform Code of Military Justice. For an overview and discussion of the formal options and forums available to the commander to impose discipline, see DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*, § 1-8 (The Commander's Options: Prosecutorial Discretion) (3d ed. 1992), in which Professor Schlueter introduces the topic by describing the range of options in the following manner:

The commander who discovers an offense, upon investigation, may take no action, or he may use nonpunitive measures or nonjudicial punishment. In the alternative, he may prefer court-martial charges and forward them up the chain of command with recommendations for disposition at a court-martial. The *Manual for Courts-Martial* requires only that in exercising his prosecutorial discretion, the commander should seek resolution of the case at the lowest level consistent with the seriousness of the offense.

*Id.* § 1-8(A) (citing at n.3 *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(b)* (1995 ed.)). Professor Schlueter also outlines the range of the traditional "nonpunitive measures" available to a commander in dealing with an offense, which include transfer in assignments, administrative discharges, administrative reductions in rank, extra training, written or oral reprimands, and withdrawal of privileges or passes. *Id.* § 1-8(B). For a soldier against whom a commander administers nonpunitive measures, the social stigma and disruption of a career may seem like punishment. However, punitive actions are limited to nonjudicial punishment under Article 15 of the Uniform Code of Military Justice or judicial action by court-martial. *Id.* §§ 1-8(C) to (D). It is debatable whether taking no adverse administrative or punitive action against WO Hall for the air space violation complies with the "adequately punished" requirement of the Korean Armistice Agreement. *Supra* note 138.

<sup>143</sup> OPPENHEIM, *supra* note 109, at 610; VON GLAHN, *supra* note 109, at 726. *Contra*, DINSTEIN, *supra* note 112, at 43. See generally, NATHAN FEINBERG, *THE LEGALITY OF A "STATE OF WAR" AFTER THE CESSATION OF HOSTILITIES, UNDER THE CHARTER OF THE UNITED NATIONS AND THE COVENANT OF THE LEAGUE OF NATIONS* (1961). Professor Dinstein argues that an armistice of the nature in effect in Korea "puts an end to the war, and does not merely suspend combat." DINSTEIN, *supra* note 112, at 42. However, this argument seems to contradict his other writings addressing the application of the Geneva Conventions to the situation on the Gaza Strip. In these articles, he argues that the status of belligerent occupation is dependent upon the continued existence of a state of war. Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 *ISR. Y.B. HUM. RTS.* 105 (1978). The Israeli Supreme Court agreed with this position. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 *A.J.I.L.* 44, 65 (1990). Yet, Israel continues to argue that Fourth Geneva Conventions still apply to the occupied territories despite the Israeli-Egyptian Peace treaty of March 26, 1979. *Id.*, citing Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 18 *ISR. Y.B. HUM. RTS.* 173, 173-74 (1988). The length of time that an armistice is in effect has no bearing on the continuing state of war during the suspension of hostilities. If the armistice lasted a hundred years, it would not effect its legal status. HUGO GROTIUS, *THE LAW OF WAR AND PEACE (DE JURE BELLI AC PACIS LIBRI TRES)*, ch. XXI, §1, ¶ 3, at 833 (Francis W. Kelsey trans. & ed., 1925).

<sup>144</sup> PICTET, *infra* note 167, at 23 (emphasis added).

<sup>145</sup> The United States never publicly announced that WO Hall was a POW. During interagency meetings on the matter in December 1994, the question arose as to what was WO Hall's legal status. The attorneys in the Office of the Legal Counsel to the Chairman, Joint Chiefs of Staff, the Department of State (LJPM), and the Department of the Army, International and Operational Law Division all agreed that WO Hall was, in fact, entitled to POW status and therefore entitled to all the protections of the Geneva Conventions. See Memorandum, Chairman, Joint Chiefs of Staff, Office of the Legal Counsel to the CJCS, subject: Status of US Army Warrant Officers Held in North Korea (20 Dec. 94) (unclassified version). See also HALL DEBRIEFING SUMMARY, *supra* note 2, at ¶ 14.

Party to the conflict" who have fallen into the power of the enemy.<sup>146</sup> "As long as members of the regular armed forces are in uniform there should be no problem with respect to their entitlement to prisoner-of-war status."<sup>147</sup> Conversely, members, of the regular armed forces wearing civilian clothes when captured in enemy territory while engaging in espionage or sabotage are treated as civilians and may not be entitled to POW protections.<sup>148</sup>

Despite North Korea's claims of espionage,<sup>149</sup> as a member of the regular armed forces wearing an authorized uniform, WO Hall squarely met the POW criteria. However, considering North Korea's espionage claims, mere membership in the regular armed forces does not *automatically* confer POW status upon capture if the individual's activities prior to and at the time of capture have not met four customary requirements.<sup>150</sup> Therefore, out of an abundance of caution, one must examine the customary criteria for a person to be entitled POW status—The Third Convention articulates four traditional criteria for entitlement to POW status as persons who:

- (a) are commanded by a person responsible for his subordinates;
- (b) have a fixed distinctive sign recognizable at a distance;
- (c) carry arms openly; and

- (d) conduct their operations in accordance with the laws and customs of war.<sup>151</sup>

Indeed, WO Hall was a United States soldier under the command of General Luck. He was wearing his military flight suit that contained distinctive insignia. He was armed with a survival knife<sup>152</sup> and was flying a marked United States military helicopter. The United States forces train and fight in accordance with the laws of war. These facts silence the debate whether WO Hall qualified for POW status. Further, under the Third Convention, POW protections apply "from the time they [members of the regular armed forces] fall into the power of the enemy and until their final release and repatriation."<sup>153</sup>

#### Based on WO Hall's Status, Did the North Koreans Have an Obligation Under International Law to Promptly Return Him?

Article 118 of the Third Convention provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."<sup>154</sup> The Korean Armistice Agreement's purpose was to "insure a complete cessation of hostilities and of all acts of armed force in Korea."<sup>155</sup> An armistice, *per se*, causes active hostilities to stop.<sup>156</sup> Therefore, WO Hall's POW status required the North Koreans to repatriate him without delay, but what does "without delay" mean under the Korean Armistice Agreement?

<sup>146</sup> DA PAM. 27-1, *supra* note 7, at 68 (GPW, art. 4A(1)).

<sup>147</sup> 59 HOWARD S. LEVIE, INTERNATIONAL LAW STUDIES—PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 37, n.145 (U.S. Naval War College ed., 1978) (n.145: "The *Swiss Manual* para. 55 correctly states: 'In case of capture, the uniform creates a presumption that the individual wearing it belongs to the armed forces.' (Trans. mine.) See also Article 40 of the 1973 Draft Additional Protocol. Article 46(2) of the 1977 Protocol I specifically provides that a member of the armed forces gathering information in enemy territory 'shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces'").

<sup>148</sup> *Id.* at 37.

<sup>149</sup> See *supra* note 82 and accompanying text.

<sup>150</sup> LEVIE, *supra* note 147, at 36-37, n.142 (n.142: "The official ICRC [International Committee of the Red Cross] discussion of the [Third] Convention refers only to the need for members of the regular armed forces to comply with the requirement for a fixed distinctive sign, a requirement which is, of course, normally met by the wearing of the uniform. PICTET, *infra* note 167. This is logical because it can be assumed that in the regular armed forces there will always be a responsible commander; that the uniformed individual may carry arms in any manner that he desires; and that if he violates the laws and customs of war he is still entitled to prisoner-of-war status even though he may be tried for war crimes. [citation omitted] While the Delegate of the Soviet Union at the 1949 Diplomatic Conference appeared to argue that none of the four requirements was applicable to members of the armed forces [citation omitted], it is believed that the interpretation here given is more appropriate and much more widely accepted.").

<sup>151</sup> *Id.* at 68-69 (GPW, art. 4A(2)).

<sup>152</sup> Someone may argue that carrying a knife does not qualify as carrying arms openly. One must remember that the intent of the criteria was to ensure combatants could readily identify other lawful combatants, whatever their weapons may be. See PICTET, *infra* note 167, at 61. Warrant Officer Hall's primary weapon was his helicopter, even though it was unarmed, and one could hardly argue that that was not displayed openly.

<sup>153</sup> DA PAM. 27-1, *supra* note 7, at 68-69 (GPW, art. 4). One might ask, does not the Third Convention apply to international armed conflict? If we are not at war with North Korea, why should the Third Convention apply? Again, as discussed above, the state of suspended hostilities between North Korea and the United Nations Command continues to exist. The Korean Armistice is merely a suspension of open hostilities. As such, the Geneva Convention applies to this armed conflict.

<sup>154</sup> DA PAM. 27-1, *supra* note 7, at 74 (GPW, art. 18). Prior to 1949, no obligation to repatriate POWs prior to signing a treaty of peace existed. OPPENHEIM, *supra* note 109, at 613. The commentary clarifies the phrase "without delay after the cessation of active hostilities." The term was used specifically to counter any argument that repatriation need not occur until a peace treaty was signed. See PICTET, *infra* note 167, at 541-42.

<sup>155</sup> DA PAM. 27-1, *supra* note 7, at 197 (Korean Armistice Agreement, preamble). Paragraph 12 of the Korean Armistice Agreement also provides: "Commanders of the opposing sides shall order and enforce a complete cessation of all hostilities in Korea by all armed forces under their control." *Id.*

<sup>156</sup> LEVIE, *supra* note 116, at 889; 59 HOWARD S. LEVIE, INTERNATIONAL LAW STUDIES—PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 420, 420-21 (U.S. Naval War College ed. 1978).

The Korean Armistice Agreement goes into great detail about POW processing.<sup>157</sup> However, most of its POW provisions self-extinguished after the mass repatriations of 1953.<sup>158</sup> Further, the Korean Armistice Agreement's terms and conditions relate only to "prisoners of war held in custody of each side *at the time this Armistice Agreement becomes effective.*"<sup>159</sup> Of those provisions still in effect, some guidance is available either directly or by analogy. Panmunjom remains "the place where prisoners of war will be delivered and received by both sides."<sup>160</sup> The original Armistice terms established sixty days as a reasonably expedient time for repatriation.<sup>161</sup>

The existing Korean Armistice Agreement and the general laws of armistice complicate the analysis. Under the law of armistice, "[a] violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand punishment of the offenders."<sup>162</sup> The Korean Armistice Agreement contains similar language. "[T]he Commanders of the opposing sides shall: (e) Insure that personnel of their respective commands who violate any of the provisions of this Armistice Agreement are adequately punished."<sup>163</sup> The United States interprets the term "private person" contained in Article 41 of the Hague Regulations to mean "any person, *including a member of the armed forces*, who acts on his own responsibility."<sup>164</sup> The Korean Armistice Agreement does not distinguish between the acts of private persons and soldiers under the control of an opposing command.<sup>165</sup>

Further, no distinction is made between intentional and unintentional violations.<sup>166</sup> The terms of the Korean Armistice Agreement require no analysis of culpability. To complicate matters further, general United States policy considers a violation of an armistice term a war crime.<sup>167</sup> Fortunately, United States military legal tradition requires consideration of the state of mind of the offender.

Given WO Hall's violation, although it appears to be unintentional and at most the result of simple negligence, the Chicago Convention, the Korean Armistice Agreement, and the United States policy raise questions whether WO Hall should have been "punished"<sup>168</sup> for his conduct.<sup>169</sup> As explained later in greater detail later in this article, I conclude that WO Hall's violation of the Korean Armistice Agreement was not a war crime under customary international law.<sup>170</sup> Yet, the Korean Armistice Agreement strictly requires "adequate punishment" for a violation. Under the United States system of military justice, adequate punishment is left to the discretion of the offender's command. The adequate punishment requirement implies, in its broadest sense, some sort of corrective or disciplinary action, which could range from an administrative oral reprimand to judicial action by general court-martial.<sup>171</sup> Normally, the seriousness of the offense weighs heavily on a commander's determination of appropriate action. In some cases, no action may be appropriate. Administrative actions, such as oral reprimands, reassignment, or separation from service, are not considered punitive actions.

<sup>157</sup> See DA PAM. 27-1, *supra* note 7, at 210-13, 216-23 (Korean Armistice Agreement, paras. 51-58 (the Annex, and the Temporary Agreement Supplementary to the Korean Armistice Agreement)).

<sup>158</sup> *Id.* at 211, 212, 214, and 219 (Korean Armistice Agreement, paras. 56(c), 57(d), 59(d), and Annex para. 11).

<sup>159</sup> *Id.* at 209 (Korean Armistice Agreement, para. 51) (emphasis added). There is, of course, the argument that the Korean Armistice Agreement did not become effective in the WO Hall incident until his capture. This argument is unpersuasive.

<sup>160</sup> *Id.* at 210 (Korean Armistice Agreement, para. 55).

<sup>161</sup> *Id.* at 211 (Korean Armistice Agreement, paras. 51(a) and 54) (however, paragraph 54 goes on to state: "Within this time limit each side undertakes to complete the repatriation of the above-mentioned prisoners of war in its custody *at the earliest practicable time*" (emphasis added)).

<sup>162</sup> *Id.* at 15 (Hague Regulations, art. 41).

<sup>163</sup> *Id.* at 201 (Korean Armistice Agreement, para. 13).

<sup>164</sup> FM 27-10, *supra* note 111, para. 494b.

<sup>165</sup> Simon, *supra* note 9, at 128.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* para. 494c. This is the position of most international law of war treatises. See, e.g., COMMENTARY TO THE III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 421 (Jean S. Pictet, Editor 1960) [hereinafter PICTET]; OPPENHEIM, *supra* note 109, at 412. Also, see discussion, *infra*.

<sup>168</sup> See *supra* note 138 and accompanying text.

<sup>169</sup> It is unclear whether WO Hall or WO Hilemon was at fault for violating Korean air space, but, as the pilot in control of the air craft, it is proper to presume that WO Hall was responsible. Denial of responsibility might be one of WO Hall's defenses to "punishment."

<sup>170</sup> See *infra* note 247 and accompanying text.

<sup>171</sup> See *supra* note 142 and accompanying text.

Traditionally, a punitive action in the United States military is limited to nonjudicial actions under Article 15 of the Uniform Code of Military Justice (UCMJ) or courts-martial.<sup>172</sup> Further, in considering appropriate punitive action, United States military commanders have the discretion to take no action.<sup>173</sup> No adverse administrative nor punitive action was ever taken against WO Hall.<sup>174</sup> One might question this decision given the seriousness of the incident.<sup>175</sup>

Regarding "adequate punishment" in WO Hall's case, consider that North Korea could still have attempted to try him for the pre-capture offense of violating the armistice agreement.<sup>176</sup> To aggravate matters, when North Korea ratified the Third Convention, they made a reservation to Article 85.<sup>177</sup> This article addresses prosecution of POWs under the laws of the detaining power for acts committed prior to their capture. Normally, if a detaining power opts to prosecute a POW for deeds committed before capture, the POW retains all of the Third Convention protections. However, North Korea's reservation to Article 85 provides that a POW convicted by a tribunal of a war crime loses the protections afforded them in the Geneva Conventions.<sup>178</sup> Therefore, if convicted he would be subject solely to the domestic laws of North Korea. Further, Article 119 of the Third Convention authorized North Korea to detain WO Hall for any indictable offense for which it could have charged one of its own

soldiers. This article also allows a detaining power to hold a POW until completion of any trial and punishment.<sup>179</sup>

Had North Korea followed through with their threat to try WO Hall, support for their actions would depend upon the following argument.<sup>180</sup> Under Article 119 of the Third Convention and following United States policy, WO Hall's violation of the Korean Armistice Agreement was a war crime.<sup>181</sup> Persons accused of war crimes can be detained pending completion of their trials. Convicted war criminals lose their protections under North Korea's reservation to Article 85. If a conviction resulted, North Korean civilian law would apply. Even this tenuous argument must rely upon an armistice violation and not the espionage allegation publicly asserted by North Korea. I find this argument unpersuasive for the reasons below.

First, the North Korean reservation refers to individuals who commit war crimes. Not all violations of the laws of war are war crimes.<sup>182</sup> As stated earlier, WO Hall's armistice violation was inadvertent. For an armistice violation to rise to the level of a war crime, the act must be intentional. No evidence exists to support a charge that WO Hall intended to violate the armistice agreement or, for that matter, even knew he was intruding upon North Korean air space prior to his helicopter being shot down. Therefore, WO Hall's actions do not rise to the level of a war crime.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> No adverse action taken against WO Hall was confirmed during a telephone interview with DOD Spokesperson Lieutenant Colonel Steffanie Hoehne, Office of the Assistant to the Secretary of Defense (Public Affairs) (Sept. 7, 1995).

<sup>175</sup> See David Dahl, *Punishment for Pilot Not Ruled Out*, ST. PETERSBURG TIMES, June 23, 1995, at A1, available in LEXIS, Nexis Library, CURNWS File.

<sup>176</sup> See generally, PICTET, *supra* note 167, at 413-27.

<sup>177</sup> PICTET, *supra* note 167, at 423; Pilloud, *supra* note 110, at 27. GPW, art. 85, provides "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

<sup>178</sup> PICTET, *supra* note 167, at 424. Some authors seem to support the argument that "personnel captured in the act of breaking the armistice are no longer entitled to treatment as prisoners of war." Simon, *supra* note 9, at 130, citing JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 644-45 (2d rev. ed. 1959).

<sup>179</sup> DA PAM. 27-1, *supra* note 7, at 110.

<sup>180</sup> Earlier in this article I referred to the trial of a U.S. air crew who were tried under Hungarian domestic law in Hungary for violating Hungary's airspace. See note 140 and accompanying text. Recall, the Hungary incident occurred during peacetime. The WO Hall incident occurred while a state of war still exists. Therefore, WO Hall still possesses a combatant privilege and is not subject to the domestic law of North Korea unless he lost that privilege by his conduct (i.e., a war crime). It would be specious for North Korea to argue that an enemy combatant must abide by its domestic law during their military operations. For this reason, I will not further address the domestic law of North Korea for violating its airspace.

<sup>181</sup> One weakness to using United States policy would have been the phrase "who acts on his own responsibility." Another is the actual case law for armistice violations as war crimes. However, at least two recognized international legal scholars do not so limit the definition of war crime. STONE, *supra* note 118, at 644-45; and MANFRED LACHS, WAR CRIMES: AN ATTEMPT TO DEFINE THE ISSUES 39-40 (1945). See also Simon, *supra* note 9, at 130. Simon goes so far as to say that "personnel captured in the act of breaking the armistice are no longer entitled to treatment as prisoners of war." He cites Stone in support of this position. However, Stone's book does not support this proposition. Stone agrees that persons who violate armistice terms are subject to war crimes prosecutions. However, that does not automatically mean that a captured person loses his POW protected status. Even under the communist countries' reservations to Article 85, one cannot support such a position. Loss of POW status would only occur after a trial. The trial must comply with the provisions of Articles 99-108, GPW. If the tribunal finds the prisoner guilty of the war crime, only then does his POW status become an issue. In sum, North Korea had some basis to argue that they had the authority under the law of armistice to punish WO Hall for violating the agreement.

<sup>182</sup> See *supra* note 247 and accompanying text.

Assuming *arguendo* that North Korea could establish that WO Hall intentionally violated the armistice, he would still be entitled to all the protections of the Third Convention. North Korea's Article 85 reservation would not apply to this incident. I base this assertion upon North Korea's use of the phrase "war crime" in the context of their Article 85 reservation to the Third Convention. None of the Third Convention articles contain the words "war crimes." Instead, the Conventions describe two levels of law of war offenses, grave and other than grave.<sup>183</sup> Yet, North Korea, following the Soviet Union's lead, made a reservation to Article 85. In fact, most of the former and present communist nations of the cold war era made nearly the same reservation as the Soviet Union to Article 85 by referring to war crimes.<sup>184</sup> The answer lies in the meaning of "war crimes" to these nations.

Because the Soviet Union led the communist block reservation to Article 85, one should find evidence of the reservation's meaning from the Soviet Union's participation in the Convention's development. The Soviet Union's delegation advocated use of the phrases "serious crimes" or "war crimes" to identify those offenses stated in Article 130, the grave breaches.<sup>185</sup> They did not express the same concern for the terminology used to describe other than grave breaches. Therefore, one can infer that the phrase "war crime" in the context of the Soviet-style reservation means grave breaches. An armistice violation is not an enumerated grave breach in Article 130. Therefore, it is not a war crime within the meaning of the North Korean Article 85 reservation and thus North Korea's potential argument is without merit. Without a war crime basis to try WO Hall, the Korean Armistice Agreement squarely places responsibility to punish those who violate any of the Armistice Agreement provisions upon the offender's command. In this case, that is the United Nations Command.

While the United States did not approve of the delay in repatriating WO Hall, the North Koreans committed no violation of the Korean Armistice Agreement or international law. Repatriation at Panmunjom within thirteen days of capture complied with the spirit of the Korean Armistice Agreement, especially considering the argument that North Korea had the authority to detain him up to sixty days. Any North Korean argument that they could try him for this offense is spurious at best. The problem that arises in this case is the argument that the United States is not fulfilling its Armistice Agreement obligation to "adequately" punish WO Hall. If the United States does not meet its obligation to adequately punish armistice provision violators, it increases the risk that North Korea will impose what it considers to be "adequate punishment" in lieu of United States non-compliance.

### Did North Korea Have Any Duty Toward WO Hilemon's Remains?

With one exception, North Korea complied with its obligation toward WO Hilemon's remains<sup>186</sup> by notifying the United States immediately of his death.<sup>187</sup> Regardless of whether or not WO Hilemon died before or after capture, the North Koreans had an obligation to promptly make available WO Hilemon's remains for "transportation to the home country."<sup>188</sup> The Korean Armistice Agreement provides that the procedures and time limit to accomplish this rests with the MAC.<sup>189</sup> North Korea returned the remains within five days which appears to have been a reasonable response to the incident.

### Did Use of the Photograph Violate the Convention?

No *per se* prohibition against photographing a POW exists. Detaining powers must treat prisoners humanely and protect them against insults and public curiosity.<sup>190</sup> North Korea did not vio-

<sup>183</sup> See DA PAM 27-1, *supra* note 7, at 115 (GPW, arts. 129 & 130).

<sup>184</sup> See PICTET, *supra* note 167, at 423-25. The North Korean reservation to Article 85 is as follows:

The Government of the Democratic People's Republic of Korea will not be bound by Article 85, in regard to the treatment of the prisoners of war convicted under the laws of the Detaining Power of prisoners of war for having committed war crimes or inhumane offenses, based on the principles of Nuremberg and the Tokyo Far East International Military Tribunal.

INTERNATIONAL COMMITTEE OF THE RED CROSS, CD-ROM - INTERNATIONAL HUMANITARIAN LAW (ver. 2, 1993).

<sup>185</sup> PICTET, *supra* note 167, at 626.

<sup>186</sup> If WO Hilemon was dead prior to coming under the control of the North Koreans, the Geneva Convention for the amelioration of the condition of the wounded and sick of the Armed Forces in the field, 12 Aug. 1949, TIAS No. 3362 [hereinafter GWS] applies. DA PAM. 27-1, *supra* note 7, at 30-31 (GWS, arts. 16 & 17). If, however, he died after coming in the control of the enemy, the Third Geneva Convention applies. *Id.*, at 110-11 (GPW, arts. 120-22). In either case, North Korea substantially complied with both conventions' articles.

<sup>187</sup> DA PAM. 27-1, *supra* note 7, at 111 (GPW, art. 122), 29-30 (GWS, art. 16).

<sup>188</sup> *Id.* at 30-31 (GWS, art. 17).

<sup>189</sup> *Id.* at 201 (Korean Armistice Agreement, para. 13(f)).

<sup>190</sup> *Id.* at 72-73 (GPW, art. 13).

Representative Richardson's efforts are the only published references of anyone attempting to talk with WO Hall. Unfortunately, under the Third Convention, he had no legal right to see WO Hall. In short, North Korea acted lawfully by refusing to grant him or any other United States representative access.

The Third Convention provides a "substitute" for the Protecting Power when the parties cannot agree upon one: The International Committee of the Red Cross (ICRC).<sup>211</sup> The ICRC also has the right to visit any POW camp.<sup>212</sup> However, no public record suggests that the United States asked the ICRC to become involved in this matter.<sup>213</sup>

Despite this omission, another problem exists. North Korea made a reservation to Article 10 when it ratified the Third Con-

vention. Their reservation is ambiguous and could limit the use of the ICRC.<sup>214</sup> Under their reservation, North Korea might be able to argue that the ICRC's right to intervene only begins if North Korea alone requests assistance from the ICRC. Even assuming it does not, North Korea has historically ignored this article's binding obligation.<sup>215</sup> In sum, no mechanism under the Korean Armistice Agreement required North Korea to allow access to WO Hall nor did the United States attempt to use the Third Convention in a way that would support an allegation of a violation. Consequently, North Korea legally denied access to WO Hall.

#### Did WO Hall Violate the Code of Conduct?<sup>216</sup>

The official United States position is that WO Hall did not violate the Code of Conduct.<sup>217</sup> From the facts available to the

<sup>211</sup> DA PAM. 27-1, *supra* note 7, at 71 (GPW, art. 10(3)).

<sup>212</sup> *Id.*, at 87, 114 (GPW arts. 56(3); 126(4)).

<sup>213</sup> The only Red Cross involvement was to notify WO Hall's family of the capture. Telephonic interview with Mr. Daniel Augstburger, ICRC Delegation representative, New York, N.Y. (30 June 1995).

<sup>214</sup> See generally Pilloud, *supra* note 110, at 13; PICTET, *supra* note 167, at 117-20. North Korea's reservation to Article 10 reads:

In the event of a Power detaining prisoners of war requesting a neutral State, or a humanitarian organization, to undertake the functions incumbent on a Protecting Power, the Government of the Democratic People's Republic of Korea will not consider it a legal request unless an approval is obtained from the Government of the State on which the prisoners of war concerned depend.

ICRC, INTERNATIONAL HUMANITARIAN LAW CD-ROM (2d version, 31 December 1993).

<sup>215</sup> For example, during the war, North Korea demonstrated their general rebuke of the ICRC. See DA PAM. 27-161-2, *supra* note 6, at 93-4.

<sup>216</sup> The Code of Conduct is a moral code first established in 1955 by President Eisenhower through Executive Order 10631. Since its inception, the Code of Conduct has been modified twice. See E.O. 12017 and E.O. 12633. The six articles in the Code of Conduct provide guidelines that an American is expected to follow while in captivity. See generally, DEP'T OF DEF., DIRECTIVE 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT (2 Dec. 1988) (C1, 23 Oct. 1989) (includes the six articles cited below) [hereinafter DOD DIR. 1300.7].

The six articles to the Code of Conduct are:

ARTICLE I. I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

ARTICLE II. I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

ARTICLE III. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

ARTICLE IV. If I become a prisoner of war, I will keep the faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

ARTICLE V. When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

ARTICLE VI. I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

<sup>217</sup> Pentagon: *Copter Pilot Not Disloyal*, CHICAGO TRIB., Jan. 8, 1995, at 4 [hereinafter *Pilot Not Disloyal*]; Erich Schmitt, *Helicopter Pilot Unlikely to Be Punished for Statement*, N.Y. TIMES, Jan. 7, 1995, at 11.

public prior to this article, credible commentators have disagreed with this position.<sup>218</sup> The following first presents a critic's argument about WO Hall's conduct and then challenges the reader to reevaluate the criticism in light of additional facts.

### *Criticism of WO Hall's Conduct*

WO Hall readily admits that he was "very-well treated" by his captors.<sup>219</sup> He stated that he was "well fed and allowed plenty of rest."<sup>220</sup> He admits that he was not under any physical duress to sign the North Korean statement, that he stayed in a room with a bed, bathtub and toilet, and that he ate rice, meats, pickles, and a bread that resembled sponge cake.<sup>221</sup> His captors even gave him a television to watch what he called "heroic North Korean movies."<sup>222</sup>

What is WO Hall's reasoning for providing his six-page statement? He stated: "The whole time I was there I felt uncomfortable and nervous about everything they wanted me to do."<sup>223</sup> When questioned by Cable News Network reporter Jamie

McIntyre about what he told his North Korean interrogators, he stated: "Different things. I mean, I really—at that time I was confused. I didn't know really exactly what I was going to be allowed to tell them and what I wasn't going to be allowed to tell them."<sup>224</sup> He later stated: "I was scared all the time, yes. I thought that any minute they may come in and that would be all it was for me."<sup>225</sup> After four days of "arguing" with his captors he finally signed the "confession."<sup>226</sup>

In supporting the position that WO Hall did not violate the Code of Conduct, military officials cite that he "was under *some* 'mental duress', as would be natural."<sup>227</sup> Secondly, the statement is justified because, in general, it reflects the events as they occurred.

Anyone captured by a hostile force is bound to experience mental stress. However, the Code of Conduct was not designed to be cast away because of the *natural* stresses of capture. The Department of Defense provides specific Code of Conduct training guidance: "The POW may never willingly give the captor

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<sup>218</sup> David H. Hackworth, *Neglect of Code Insults Real Heroes*, FORT LAUDERDALE SUN-SENTINEL, Jan. 19, 1995, at 23A, available in LEXIS, Nexis Library, CURNWS File. See also William Keppler, *Give Hall Court-Martial, Not Accolades*, THE PALM BEACH POST, Jan. 17, 1995, at 19A (editorial), available in LEXIS, Nexis Library, CURNWS File; Editorial Comments, *Hero Questions and Code is a Joke*, STARS & STRIPES (PACIFIC), Jan. 25, 1995 (copies on file at JSSA, Fort Belvoir, VA.) (authors were soldiers assigned to South Korea who chose to withhold their names). See Elliot Gruner, *What Code? Or, No Great Escapes: The Code of Conduct and Other Dreams of Resistance*, 19 ARMED FORCES & SOCIETY 599 (1993), for a general indictment of the Code of Conduct.

Colonel Hackworth attacks both the code itself and the neglect in its training. I only criticize the neglect in teaching the Code of Conduct. However, I fully agree with Colonel Hackworth concerning the lack of enforcement against those who violate the Code of Conduct. While the Code of Conduct is a moral code, certain POW misconduct can be criminal. See, e.g., Article 105, UCMJ. Colonel Hackworth asserts that there was a softening of Article V of the Code of Conduct when the word "bound" was replaced with the word "required." The current version of Article V reads:

When questioned, should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their causes.

DOD DIR. 1300.7, *supra* note 216, at 2-9. See also DEP'T OF ARMY, REG. 350-30, TRAINING: CODE OF CONDUCT/SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING (10 Dec. 1985).

Colonel Hackworth's comments about the wording of Article V directly contradicts the reason why the Code of Conduct Review Committee made the change in its language. After Vietnam, the military had concerns about the effectiveness of the Code of Conduct. In 1976, the Deputy Secretary of Defense created the Defense Review Committee for the Code of Conduct consisting of eleven distinguished members of the military and civilian defense leadership. The committee consisted of four prior POWs and one Medal of Honor recipient. See REPORT SUPPLEMENT OF DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT, vol. II, § III, at 7-25 (1976). Almost to every man, POWs interviewed by the Committee considered it impractical to limit information provided after capture to name, rank, serial number, and date of birth. *Id.* at § IV, at 49. While recognizing that Article 17, GPW uses the word "bound," the experiences of POWs indicated that the word was archaic and subject to interpretation. Ultimately, the word "required" replaced "bound" to make the Code of Conduct clear and simple. REPORT OF DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT, vol. I, at 25-27 (1976).

<sup>219</sup> Pilot: *Chopper Hit in N. Korea*, AP ONLINE, Dec. 31, 1994, available in LEXIS, Nexis Library, CURNWS File.

<sup>220</sup> Burns, *supra* note 96.

<sup>221</sup> *A Soldier's Story*, ST. PETERSBURG TIMES, Jan. 5, 1995, at 1A, available in LEXIS, Nexis Library, CURNWS File.

<sup>222</sup> ABC interview, *supra* note 35.

<sup>223</sup> *Pilot Unsure What Caused Helicopter to Go Down in North Korea*, AP, Jan. 4, 1995, available in LEXIS, Nexis Library, AP File.

<sup>224</sup> CNN interview, *supra* note 33.

<sup>225</sup> ABC interview, *supra* note 35.

<sup>226</sup> Schmitt, *supra* note 217.

<sup>227</sup> *Pilot Not Disloyal*, *supra* note 217 (emphasis added).

additional information [beyond name, rank, serial number, and date of birth], but *must* resist doing so even if it involves withstanding mental *and* physical duress."<sup>228</sup> No publicly available evidence suggests that WO Hall experienced physical duress.

The Department of Defense justified WO Hall's statements as permissible by saying that they were true. However, the truth of a confession or admission is not a justification for violating the Code of Conduct. Suppose he truthfully provided the North Koreans with top secret information, would our government justify his statements based upon them being true?

Warrant Officer Hall attempts to mitigate his statements to the North Koreans by claiming, "I didn't know really exactly what I was going to be allowed to tell them and what I wasn't going to be allowed to tell them." How could a warrant officer in the United States Army, who flew combat missions in the Persian Gulf, not know that the Code of Conduct does not allow him to give the enemy a six-page statement, entitled "CONFESSION," once captured?

Most soldiers could understand WO Hall's "CONFESSION" if the North Koreans had physically abused him, but he was never subjected to any type of physical abuse. Undeniably, other POWs have made statements similar to WO Hall's. A recent example was the televised broadcast of Navy Lieutenant Jeffrey Zaun after his capture in the Persian Gulf War. American POWs in Vietnam also made written admissions, but they were subjected to physical abuse before they gave their statements. After their release, the Department of Defense reported that prisoners who made statements had been physically abused. No such disclosure occurred in this case, which corroborates WO Hall's public statements that none occurred. To say "I felt pressured" is not consistent with the moral obligation to resist to the "utmost of my ability."<sup>229</sup> At best, WO Hall's explanation for his conduct is unpersuasive.

From the facts made public prior to this article, it would seem at first blush to be a mockery of the Code of Conduct, given the quality of treatment received, to say that WO Hall did not violate the Code of Conduct.

#### *Reasons Why WO Hall Did Not Violate the Code of Conduct*

What is a soldier's mission once he is captured? Minimizing the disclosure of important information, surviving the ordeal, and returning home with honor is the objective of any American POW. Warrant Officer Hall did all of the above.

First, many may assume that WO Hall made a horrendous confession, but North Korea has never released a complete copy of WO Hall's written statement. Newspaper articles thus far published only recount what the *North Koreans* indicate WO Hall said in the statement. WO Hall adamantly denies the veracity of North Korea's version of his statement. To accept their version of events is to forget their propaganda practices. For example, prior to the 21 October 1994 nuclear accord, we know that North Korea lied about their nuclear capabilities. It seems shortsighted for one to embrace North Korean statements published through its government-controlled airwaves and immediately conclude that an American fighting man committed such grave misconduct.

Furthermore, it should not be ignored that North Korea has failed to provide hard copies of WO Hall's statement; they simply provided photographed portions of it. The only physical proof North Korea has provided thus far is a picture of WO Hall's statement, which obscures all but the first and last pages of the six-pages depicted. North Korea certainly could have provided the public copies of the December 27th videotape recording of the creation of the written statement—which WO Hall asserts that he was required to backdate two days.

Additionally, having WO Hall backdate his confession to December 25th, the holiest day in Christian culture, may have been done to exploit western sympathies. The combination of North Korea's persistent use of skewed propaganda and the lack of answers to the questions above should make one suspicious of their version of the facts.

When one compares the photographed copy of WO Hall's statement with the North Korean radio broadcast, several things immediately jump out. The radio broadcast has WO Hall describing himself as a "pilot of the reconnaissance helicopter OH-58A/C of the 501-4 Flight Wing, 17th Combat Flight Brigade."<sup>230</sup> WO Hall's unit does not go by this name. His unit was 4th battalion, 501st Aviation, 17th Aviation Brigade. The correct unit citation is on the photographed statement provided by the North Koreans, the one which is mostly obscured. Also, nowhere on the first page of the statement does he say he was flying a reconnaissance helicopter.

Next, WO Hall actually disclosed to the North Koreans no information that they could not otherwise acquire themselves. They already possessed the items captured at the crash site. They had access to information already publicly available over the news wires. Most of the factual information provided in this article comes from the newswires and North Korea had access to

<sup>228</sup> DOD DIR. 1300.7, *supra* note 215, at 2-10.

<sup>229</sup> *Id.* at 2-9 (Code of Conduct, art. V).

<sup>230</sup> The radio broadcast can be found in *DPRK Radio Reports Hall's "Confession"* (Pyongyang Korean Central Broadcasting Network in Korean 2114 GMT, Dec. 28, 1994) (FBIS translated text). A copy of this broadcast is located in the JSSA WO Hall file. The photocopied text of WO Hall's alleged statement is available in T.R. Reid, *North Korea Releases U.S. Helicopter Pilot; Washington Expresses "Sincere Regret,"* WASH. POST, Dec. 30, 1994, at A2.



the same information. Conversely, what information did he possess that might be critical to keep from North Korea? We will never totally know, but logic can lead to some inferences with just two examples.

The radio broadcast reported that WO Hall admitted entering the Army in 1984, but that he did not finish a one-year flight program until 1990. What did WO Hall do in the Army from 1984 until he entered flight school? He worked as a military intelligence specialist! On 17 December 1994, WO Hall's family was interviewed by the *St. Petersburg Times*, a local newspaper. During the interview, Mrs. Hall told reporters that her husband "worked for about five years in military intelligence."<sup>231</sup> Other reports indicated that he had "three years of being schooled in military intelligence in Germany."<sup>232</sup> Most military intelligence personnel require high level security clearances because of the sensitivity of the equipment, techniques, and documents they use in their work. It would be a fair inference to say that WO Hall possessed and denied North Korea access to classified information of a highly sensitive nature.

The radio broadcast states that he flew reconnaissance helicopters. WO Hall was not just a pilot, he was also a maintenance test pilot attached to a unit with attack helicopters.<sup>233</sup> Therefore, he had access to information about classified technology in our most advanced attack helicopter weapons system. It appears that WO Hall provided harmless unclassified information of a verifiable nature to prevent the possible intense interrogation that could have led to the disclosure of highly sensitive information. He complied with the Code of Conduct by continuing to fight after capture in a refined, intelligent, and passive fashion. He told the truth in a manner which *prevented* the disclosure of classified information.

Some might think that WO Hall violated the Code of Conduct simply by giving a written statement. The Code is not that unforgiving. Article V provides in part: "I will make no oral or written statements disloyal to my country and its allies or harmful to their cause."<sup>234</sup> Warrant Officer Hall's generic statement was not disloyal or harmful. The Code requires resistance to one's utmost ability. To sustain this ability, it may require that they make a written statement, which they may do so long as it is not disloyal nor harmful to the cause. Was his recount of the events of his flight and his remorse for his intrusion any worse than General Luck's Christmas letter to North Korea expressing sincere regret for the intrusion? Probably not.

What survival training had WO Hall been provided in the event of capture? The Department of Defense has an elaborate training framework for exactly this type of high-risk pilot, a pilot who flew combat missions in the Persian Gulf War and was now flying along a demilitarized zone; surely his training was extensive.<sup>235</sup> The opposite is true. WO Hall had *no* formal survival, evasion, resistance or escape (SERE) training prior to his capture, and he knew little of Korean history or culture before his assignment.<sup>236</sup> His prior Code of Conduct training was limited to a few cursory classroom discussions, seeing the Code of Conduct posters, and viewing a 1970s vintage Code of Conduct training video. He received no SERE refresher training prior to arrival in South Korea nor did he receive any SERE related in-briefing once he arrived in South Korea<sup>237</sup> in spite of the existence of a *SERE Contingency Guide* for Korea. It appears that he was flying combat-like missions without the proper training on how to conduct himself if shot down in North Korea. Considering his lack of formal training concerning Korea and what he could have potentially disclosed to the North Koreans, versus how well and honorably he conducted himself under those conditions, adverse criticism of his actions should vanish.

<sup>231</sup> Kit Troyer, *Brooksville Family Awaits Word on Airman*, ST. PETERSBURG TIMES, Dec. 18, 1994, at 1A, available in LEXIS, Nexis Library, CURNWS File.

<sup>232</sup> *Helicopter Incident Another Twist in Rocky US-North Korean Relations*, AP WORLDSTREAM, Dec. 17, 1994, available in LEXIS, Nexis Library, CURNWS File; James Martinez, *Families Awaits Word on Airmen Held in North Korea*, AP, Dec. 17, 1994, available in LEXIS, Nexis Library, CURNWS File.

<sup>233</sup> HALL DEBRIEFING SUMMARY, *supra* note 2, para. 1.

<sup>234</sup> See *supra* note 216 and accompanying text.

<sup>235</sup> See DOD DIR. 1300.7, *supra* note 216. This DOD Directive breaks down the level of training a given soldier should receive depending on the risk of capture. WO Hall's duties would qualify him for "Level C" training, the most extensive provided. The DOD Directive provides that Level C training "shall be conducted for those Service members as soon as" when they are given assignments that "entail significant or high risk of capture and whose position, rank, or seniority make them vulnerable to greater-than-average exploitation efforts by a captor. Examples include aircrews . . ." *Id.* at 2-2.

<sup>236</sup> HALL DEBRIEFING SUMMARY, *supra* note 2, para. 2.

<sup>237</sup> *Id.*

<sup>238</sup> DA PAM. 27-1, *supra* note 7, at 109 (GPW, art. 17).

## After Repatriation, May WO Hall Legally Return to His Unit in Korea?

The Third Convention provides: "No repatriated person may be employed on active military service."<sup>238</sup> From the plain language of this article it seems that WO Hall could no longer remain on active federal service; this is not so. This article only applies to those POWs repatriated due to serious injuries and illness.<sup>239</sup> However, the analysis must again turn to the Korean Armistice terms. It provides that "[e]ach side insures that it will not employ in *acts of war* in the Korean conflict any POW released and repatriated to the coming into effect of this Armistice Agreement."<sup>240</sup> Arguably WO Hall's return to flying duties in South Korea does not violate this provision because he will not be committing "acts of war."<sup>241</sup>

One must question returning a former POW to the same theater of operations. In World War II, United States policy was not to return to the same theater POWs who successfully escaped. Current United States policy allows repatriated persons to return to the area of operations, but limits their activities to medical or

administrative duties.<sup>242</sup> This policy assumes an opposing force interprets Article 117 the same way. In WO Hall's case, it assumes North Korea also will agree with the liberal interpretation of the Armistice provision. It is unlikely that the North Koreans would treat an unpunished WO Hall so well if he again crosses the DMZ by accident.

## Is WO Hall Entitled to Compensation Under the Victim of Terrorism Compensation Act?

On 2 May 1995, citing the Victim of Terrorism Compensation Act (VTCA),<sup>243</sup> the Department of the Army approved paying Warrant Officer Hall \$143 for each day of his thirteen days of captivity. One might question his entitlement to these funds. Because he was not subjected to terrorism, how can he be compensated for an act of terrorism? The answer lies in the VTCA's purpose, which was "to put into place a permanent compensation level for any future hostages, individuals who work for the United States that become hostages because of their capacity and position with the United States Government."<sup>244</sup> Its scope includes both domestic and foreign hostage situations.<sup>245</sup> The

<sup>239</sup> *Id.* at 106-7 (GPW, arts. 109; 110); PICTET, *supra* note 167, at 537-39.

<sup>240</sup> DA PAM. 27-1, *supra* note 7, at 210 (Korean Armistice Agreement, para. 52) (emphasis added).

<sup>241</sup> It becomes a question only if hostilities on the peninsula recommenced. Clearly, WO Hall could not be held accountable for the actions of the United States in reassigning him into a combat theater of operations. See generally, PICTET, *supra* note 167, at 539 (discussing the situation if a POW repatriated under Article 117 were recaptured during hostilities). To comply with the Korean Armistice Agreement provision, WO Hall could not engage in combat activities. However, would it be a violation to have him fly combat service support aircraft or medical aircraft?

<sup>242</sup> FM 27-10, *supra* note 111, para. 196.

<sup>243</sup> Message, Headquarters, Dep't of Army, DAPE-PRR-C, subject: Payment under Victims of Terrorism Act (VTCA) (021600Z May 1995) [hereinafter VTCA Message]. Congress enacted the VTCA as part of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. 99-399, tit. VIII, 100 Stat. 853, 879-901 (1986), reprinted in 1986 U.S.C.C.A.N., vol. 1 (100 Stat.) at 853.

<sup>244</sup> *Victims of Terrorism Compensation Act: Markup on H.R. 2851 Before the Subcomm. on International Operations of the Comm. on Foreign Relations, 99th Cong., 1st Sess. 59 (1985)* (statement of Subcomm. Member Rep. John McClain on 29 Oct. 1985) [hereinafter Statement by Rep. McClain].

In its original form, the proposed bill did not include compensation for members of the armed forces. It was not until Representative McClain, a former POW in Vietnam, mentioned this omission that this Act was amended in committee to include members of the armed forces. *Id.* at 61. This bill was in response to the Iranian hostage crisis where fifty-two United States citizens were held hostage in Tehran for 444 days. Originally, Congress passed the Hostage Relief Act of 1980, Pub. L. 96-446, to compensate the hostages for their suffering. However, this act expired in 1982. This temporary relief followed congressional practice. During World War II, American POWs received \$2.50 for each day held as a POW. See 50 U.S.C. app. § 2005 (1994). This same rate was later used to compensate Korean POWs and members of the captured U.S.S. *Pueblo*. See 50 U.S.C. app. § 2005(e). Vietnam War POWs received \$5.00 per day under the War Claims Act. See 50 U.S.C. app. § 2005(f); H.R. REP. 201, 99th Cong., 1st Sess., pt. 2, at 37 (Nov. 18, 1985). Some may question, under my argument, whether WO Hall was a Korean POW under the War Claims Act. He was not because the law defines Korean POWs as those held captive prior to 1954 or assigned to duty to the U.S.S. *Pueblo* and captured by North Korea in 1968. See 50 U.S.C. app. § 2005(e)(1). Finally, 50 U.S.C. app. § 2005(a) provides the generic definition of POWs within the War Claims Act. The act limits compensation to those POWs held by another government "with which the United States has been at war." This definition is more restrictive than international law requires. The United States never formally declared war during the Korean Conflict. Therefore, WO Hall was not a POW as defined in the War Claims Act.

<sup>245</sup> *Victims of Terrorism Compensation Act: Markup on H.R. 2851 Before the Subcomm. on International Operations of the Comm. on Foreign Relations, 99th Cong., 1st Sess. 59 (1985)*. See also 133 CONG. REC. H10790 (Dec. 2, 1987) (letter sent by Representative Patricia Schroeder to President Ronald Reagan). Representative Schroeder was arguing for VTCA benefits to prison guards held hostage in Atlanta by Cuban prisoners. She was a member of the Subcommittee of International Operations to the Foreign Relations Committee which was instrumental in drafting the VTCA.

VTCA was intended to include POWs. In short, the VTCA's name is misleading, and Warrant Officer Hall is entitled to this compensation.<sup>246</sup> However, this entitlement rests upon domestic law and not our international legal obligations under the Korean Armistice. It is highly unlikely that the VTCA drafter's envisioned a Korean Armistice violation when determining eligible beneficiaries.

### Does the United States Have an Obligation to North Korea Following the Incident?

This question hinges on what type of, if any, law of war violation WO Hall committed by breaching the terms of the Korean

Armistice Agreement. The answer to this question determines what obligations the United States has to the international community. Not every violation of the laws of war are war crimes.<sup>247</sup> The gravity of a war crime is divided into two types of breaches, grave and "other than grave breaches."<sup>248</sup> The Geneva Conventions list the grave breaches that mandate specific action when they occur.<sup>249</sup> Violation of an armistice provision does not qualify as a grave breach. Although violating an armistice provision does not violate the Geneva Conventions, it violates either the Hague Regulations or customary international law, depending on the offense.<sup>250</sup> Thus, one must look to the practice and case law to determine if a war crime occurred.

<sup>246</sup> Congress codified the VTCA's military pay provision at 37 U.S.C. § 559 (1988). A key decision is the determination of "captive status." Congress defined "captive status" as:

a missing status of a member of the uniformed services which . . . arises because of a hostile action and is a result of membership in the uniformed services, but does not include a period of captivity of a member as a prisoner of war, if Congress provides to such member, in an Act enacted after August 27, 1986, monetary payment in respect of such period of captivity.

37 U.S.C. § 559(a)(1) (suppl. 1995) (emphasis added).

Based on this definition, the Secretary of the Army must conduct a two-part analysis to determine if WO Hall, a POW, qualifies for "captive status." First, does he qualify for "missing status?" Second, did Congress enact, or intend to enact, any special legislation providing him monetary payment for his captivity? If the answer to question one is "yes" and the answer to question two is "no," WO Hall must be compensated under the VTCA, absent conviction for a captivity related offense. 37 U.S.C. § 559(c)(3).

"Missing status" includes those captured by a hostile force. 5 U.S.C. § 5561(5)(D) (1994). North Korea clearly qualifies as a hostile force. As a member of a uniformed service, WO Hall was captured by the North Koreans, a hostile force, and held against his will for thirteen days. Therefore, he meets the definition of "missing status."

Under the second prong, WO Hall, as a POW, is entitled to compensation under the VTCA unless Congress enacts specific legislation to monetarily compensate him for his time in captivity. A historic example of specific legislation as contemplated by the VTCA was when Congress amended the War Claims Act in 1970 to extend its coverage to the U.S.S. *Pueblo* crew members. See Pub. L. 91-289, § 2(1), 84 Stat. 323 (1970), reprinted in 1970 U.S.C.C.A.N., vol. 1 (84 Stat.), at 383, 385 (amending § (e)(1) of 50 U.S.C. app. § 2005). Congress has not, nor is it contemplating, enacting any such legislation.

Once this determination is made, payment becomes mandatory. The President delegated this determination authority to the Secretary of Defense. See Exec. Order No. 12598, 52 Fed. Reg. 23421 (June 27, 1987), reprinted in 5 U.S.C.A. § 5569 (1995) (historical and statutory notes). The Secretary of Defense in turn has delegated this authority to the service secretaries. (This author was unable to find a formal written delegation of section 559 authority from the Secretary of Defense to the Secretary of the Army. However, in the memorandum seeking approval of WO Hall's compensation under VTCA, a stamp is affixed to the document from the Military Assistant to the Secretary of the Army stating "approved by Secretary of the Army." Memorandum, Dep't of Army, Deputy Chief of Staff for Personnel, DAPE-MBB-C, to Secretary of the Army, subject: Compensation Under the Victims of Terrorism Act (sic), (28 Mar. 1995)). If a person was in a "captive status," section 559(c) requires the President to make payments to former captives within one year of the service member's release. The President, or his delegate alone, decides whether a service member attained "captive status" within that statute's meaning. His determination is "final and not subject to judicial review." 37 U.S.C. § 559(d). Compensation under the VTCA "shall not be less than one-half the world-wide average per diem rate." See 37 U.S.C. § 559(c)(2) and 5 U.S.C. § 5569(d)(2) (1988).

Warrant Officer Hall also meets the "captive status" definition. Therefore, he qualifies for, and is entitled to, compensation under the VTCA.

<sup>247</sup> Accord J.G. STARKE, INTRODUCTION TO INT'L L. 556 (10th ed., 1989) and Yoram Dinstein, *War Crimes and Crimes Against Peace*, 24 ISR. Y.B. HUM. RTS. 1, 3 (1994). *Contra*, FM 27-10, *supra* note 111, para. 499 ("Every violation of the law of war is a war crime."). The discrepancy between military and civilian sources has not gone unnoticed. Professor Lauterpacht agrees that not all violations of the laws of war are war crimes, but goes on to explain this discrepancy. He explains this difference in the military manual occurred because the authors, who erred on the side of comprehensive coverage, did not attempt to distinguish between violations of the laws of war and war crimes. See H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 77-78 (1944).

<sup>248</sup> See PICTET, *supra* note 167, at 620-30; DA PAM. 27-1, *supra* note 7, at 115 (GPW, arts. 129-31).

<sup>249</sup> *Id.*

<sup>250</sup> See *The Scuttled U-Boats Case*, I UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 5, at 55-70 (1947). See also *Trial of Lothar Eisenstrager and Others*, XIV UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 84, at 8-22, especially 16-22 (1949) (discusses the law of armistice violations). Cf. *Trial of Kapitaneutnant Ehrenrich Stever*, XV UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS at 131 (1949) (summary of British military commission trial held on 17-18 July 1946, where the accused was found guilty and sentenced to five years confinement for scuttling a U-boat after the armistice was in effect, in violation of the laws of war); and *Trial of Mizuo Katsumo*, XV UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 132 (1949) (found guilty and sentenced to eighteen years for continuing hostilities "contrary to the terms of the armistice").

Warrant Officer Hall did *not* commit a war crime. Article 41 of the Hague Regulations refers to punishment of "private persons acting on their own initiative."<sup>251</sup> Warrant Officer Hall was a member of the force acting within his official capacity as an agent of the United States. The facts establish that his actions were within the scope of his duties and not those of an individual acting on his own. Further, the war crime of violating an armistice provision requires criminal intent or *mens rea*.<sup>252</sup> All evidence suggests that WO Hall's crossing the DMZ was unintentional, and that he had no intention of violating the Korean Armistice Agreement. What occurred was, at worst, an international delinquency by an agent of the United States.<sup>253</sup> Assuming that WO Hall's act rose to the level of an international delinquency, the United States is obligated to take corrective action to prevent further occurrences and to pay reparations.<sup>254</sup>

North Korea's decision not to punish WO Hall themselves does not absolve the United States from its obligation to prevent WO Hall's misconduct from recurring. The United States has an affirmative obligation to take corrective measures to prevent a similar violation. On 20 December 1994, Lieutenant General Richard F. Timmons, Commander, Eighth United States Army, ordered Brigadier General Robert B. Flowers to conduct a formal investigation into the incident.<sup>255</sup> General Flowers made sixteen specific recommendations on how to prevent a similar incident from recurring.<sup>256</sup> His recommendations included installing global positioning systems on all helicopters flying along

the no-fly line, improved training procedures, a comprehensive flight following system, and no adverse "action be taken against any individual as a result of this incident."<sup>257</sup> General Timmons approved General Flower's recommendations on 23 January 1995.<sup>258</sup>

The changes were tested on 30 May 1995 when two United States military helicopters nearly flew into North Korean airspace. Unlike the events when WO Hall crossed the DMZ, South Korean border guards were able to fire warning shots towards the aircraft to avoid another armistice violation.<sup>259</sup> While the procedural changes along the DMZ seem to reduce the risk of future air space violations by military aircraft, the United States still had an international legal obligation to "adequately punish" WO Hall in some fashion for his armistice violation.

For innocent armistice violations, it is the customary practice of belligerents "to return the prisoner to the other side."<sup>260</sup> This practice is codified in the Korean Armistice Agreement. Paragraph 13e provides that the *respective commanders* shall "insure that personnel of their respective commands who violate any of the provisions of this Armistice Agreement are adequately punished."<sup>261</sup> Ultimately, North Korea complied with customary practice by returning WO Hall to the United States without punishing him. The United States failure to punish WO Hall in some fashion could be a dangerous practice.

<sup>251</sup> DA PAM. 27-1, *supra* note 7, at 15.

<sup>252</sup> See *The Scuttled U-Boats Case*, *supra* note 250. This case involved the trial of Oberleutnant Gerhard Grumplet. A British military commission convicted him of scuttling two German U-boats after Germany had formally capitulated to the Allies. After signing the surrender, but before the document came into effect, the German High Command issued a predetermined code which instructed naval officers to scuttle their vessels. The terms of the surrender included surrendering all naval vessels. Later, someone in the German High Command revoked this order. The facts in the case raised the issue of whether Grumplet had knowledge of the order rescinding the earlier scuttling order. The question of whether or not Grumplet's actions constituted a war crime hinged on his *mens rea*. This question of fact was left for the three member military court to decide. The court found Grumplet guilty of this war crime and sentenced him to seven years confinement.

<sup>253</sup> OPPENHEIM, *supra* note 109, at 555. "An international delinquency is any injury to another State committed by the . . . Government of a State in violation of an international legal duty." L. Oppenheim, 1 INT'L LAW 338 (8th ed., by H. Lauterpacht ed., 1955). The gravity of an international delinquency can range from ordinary breaches of treaty obligations to criminal violations under international law. *Id.* at 339. For an act to qualify as an international delinquency it must be committed willfully and maliciously or with culpable negligence. *Id.* at 343. I don't think the facts in this case substantiate either of these requirements.

<sup>254</sup> *Id.* at 352-57.

<sup>255</sup> Bobby Hall 15-6, *supra* note 1. The full report of investigation was not released by the Army to the public for security and Privacy Act reasons. The extract of the report of investigation was finally released to the public on 23 June 1995, five months after its completion.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at § IV, attached Investigation Report, para. C. United States forces in Korea have attempted to discuss with North Korea ways to prevent future mishaps like this one. However, North Korea has to date rejected all United States proposals. Carol Giacomo, *N. Korean Assault on Armistice Faulted*, REUTERS, July 21, 1995, available in LEXIS, Nexis Library, CURNWS File. North Korea may be hoping to exploit another such incident to demonstrate that the Korean Armistice Agreement does not work.

<sup>258</sup> Bobby Hall 15-6, *supra* note 1, at § VIII.

<sup>259</sup> U.S. 'Copters Almost Fly into North Korea, THE FRESNO BEE, May 30, 1995, at F6, available in LEXIS, Nexis Library, CURNWS File; *Warning Shots Turn Away Two U.S. Choppers Flying Close to Border*, AP, May 29, 1995, available in LEXIS, Nexis Library, CURNWS File.

<sup>260</sup> MORRIS GREENSPAN, THE LAW OF LAND WARFARE 392 (1959) (footnote omitted).

<sup>261</sup> DA PAM. 27-1, *supra* note 7, at 201 (emphasis added).

The United States follows the generally recognized practice that not every violation is a ground to suspend an armistice.<sup>262</sup> Declining to punish helicopter pilots who violate North Korea airspace could adversely affect future pilots in North Korean custody. In this case, the United States provided WO Hall over \$1800 in additional pay and awarded him two medals: (the purple heart and the POW/MIA medal), which could be seen as tacit approval of his misconduct. Arguably, this practice is inconsistent with customary international law and violates the Korean Armistice Agreement provisions of punishing soldiers who violate its terms. A narrow interpretation of "adequate punishment" requires judicial action. A broad interpretation of "adequate punishment" includes all corrective and disciplinary options traditionally available to a commander. The responsible commanders have taken the latter approach.

I broadly interpret the "adequate punishment" provision of the Armistice Agreement, but disagree with the disposition given the seriousness of this case. Consider the serious nature of this case: a pilot crosses the most heavily defended border in the world without permission, gets shot down, his co-pilot is killed, his helicopter is destroyed, and he causes an international crisis. These facts, in my opinion, support probable cause to believe that a UCMJ offense of dereliction of duty was committed. They do not support the award of \$1800 in additional pay and receipt of two medals. If the United States continues to not enforce the armistice punishment provisions, it risks a North Korean argument that these violations are not innocent and are at the behest of U.N. forces. International law supports such an inference because "consent may be inferred in the event of a persistent failure to punish such offenders."<sup>263</sup>

Although WO Hall did not commit a war crime, the language in *Field Manual 27-10* provides a guide for the appropriate disposition in this case. "The punishment imposed for a violation of the [armistice] must be proportionate to the gravity of the offense."<sup>264</sup> The violation here was unintentional and relatively minor. "Some minor violations are dealt with by administrative measure or are merely punished by disciplinary penalties."<sup>265</sup> The United States customary and Korean Armistice Agreement obligations should be to punish WO Hall for his violation in some fashion. While Secretary of Defense William Perry stated publicly on 22 June 1995 that "the door is still open for administrative action, by all means," no adverse action was taken against WO Hall.<sup>266</sup>

Although the American people may not have liked North Korea detaining WO Hall for thirteen days, the North Koreans complied with the spirit, if not the terms, of the Korean Armistice Agreement and did not violate the law of war by detaining him. Even if the POW Korean Armistice Agreement provisions themselves were in full effect, its provisions provided North Korea with up to sixty days to repatriate WO Hall. From all accounts, North Korea treated him humanely. No colorable argument exists that WO Hall's conduct in violating the Korean Armistice Agreement was a war crime and, therefore, North Korea did not have the lawful authority to punish WO Hall. Having said this, North Korea still could have made the political decision to prosecute WO Hall. Fortunately for WO Hall, he was a political pawn used by North Korea for more important matters—economic aid.

North Korea did violate the laws of war by retaining the personal items of WO Hilemon and WO Hall. It also violated the laws of war by improperly using the photographic image of WO Hall with WO Hilemon's corpse for propaganda purposes.

Given the quality of treatment, as described by WO Hall, and comparing that to the protections afforded under Articles 13 to 17 of the Geneva Convention, it appears that North Korea did not unlawfully coerce WO Hall to render his six-page statement. Warrant Officer Hall admits that his captors provided him with adequate sleep, shelter, entertainment, food, and hygiene facilities. Article V of the Code of Conduct required WO Hall to resist to the "utmost" of his ability. His generic statement comports with the Code of Conduct's spirit of bending without breaking. Although he provided a statement, he preserved information that would have been harmful to the United States if disclosed. Given his lack of SERE training, he conducted himself appropriately.

The Geneva Conventions and the Korean Armistice Agreement provisions require the parties to take steps to prevent future violations. The United States Forces in Korea adopted Brigadier General Flowers's recommendations, which included certain changes to flight procedures along the no-fly zone. These steps included fitting all aircraft flying along the DMZ with glo-

<sup>262</sup> FM 27-10, *supra* note 111, para. 494; OPPENHEIM, *supra* note 109, at 556.

<sup>263</sup> FM 27-10, *supra* note 111, para. 494c; GROTIUS, *supra* note 143, ch. XXI, § XIII, at 839.

<sup>264</sup> GROTIUS, *supra* note 143, ch. XXI, § XIII, at 508. I substituted the word "armistice" for the "law of war" to avoid confusion. Again, WO Hall did not commit a war crime but the citation is useful to determine the appropriate disposition for his conduct.

<sup>265</sup> PICTET, *supra* note 167, at 421.

<sup>266</sup> See David Dahl, *Punishment for Pilot Not Ruled Out*, ST. PETERSBURG TIMES, June 23, 1995, at A1, available in LEXIS, Nexis Library, CURNWS File. No adverse action taken against WO Hall was confirmed during a telephone interview with a DOD Spokesperson Lieutenant Colonel Steffanie Hoehne, Office of the Assistant to the Secretary of Defense (Public Affairs) (Sept. 7, 1995).

bal positioning systems and developing a flight following system enabling South Korean border observers sufficient time to respond to potential border violations.<sup>267</sup> As the 30 May 1995 incident demonstrates, while the system is still not perfect, the new procedures seem to work.

The Korean Armistice Agreement, the tenets of the Chicago Convention, and United States policy as stated in *Field Manual 27-10*, require that WO Hall receive "adequate punishment" for his violation of North Korean air space. The Army, however, concluded that no adverse "legal or administrative actions would be taken in the case."<sup>268</sup> Secretary of Defense William Perry seems to have accepted this position.<sup>269</sup>

An objective analysis of the "adequate punishment" requirement depends on whether WO Hall was, in some way, derelict in his duties. I commend WO Hall for his post-capture conduct, but conclude his pre-capture conduct to have been derelict. Here you had two combat veterans with each over 1000 hours of flight time. WO Hall was a test pilot. These were experienced pilots. Yet, only WO Hall had flown along the DMZ twice. This was a familiarization flight, not a combat mission. They were supposed to fly along a no fly zone, an air space buffer before one even enters the demilitarized zone, one of the most heavily defended places on the planet. These pilots were also flying without a global positioning system. If they became misoriented, the easy solution would have been to point the helicopter South. At a minimum, a reasonably prudent pilot would have created an additional safety buffer to prevent crossing into North Korea. Yet these pilots ventured across the no-fly zone, across the DMZ

and ventured into North Korea at least five miles. Given these facts, I conclude that a reasonably prudent pilot with the same level of experience and under similar circumstances would not have ventured into North Korean airspace. WO Hall's dereliction warranted some form of administrative or disciplinary punishment.

While I embrace the American military justice concept that the administration of justice is within the discretion of commanders, I conclude that the awarding of \$1800 in additional pay and the issuance of two medals is inconsistent with our international law obligations in this case. Under a pure domestic analysis, WO Hall is entitled to these benefits. However, at a minimum, the appearance is that the United States has rewarded WO Hall for his ill-advised conduct. No one can seriously argue that the award of the purple heart and POW/MIA medal will not be favorably considered as WO Hall progresses through his military career. Inconsistent actions such as this will only make it more difficult for the United States to achieve the quick return of future pilots who find themselves in North Korean hands.

### Epilogue

Since the WO Hall incident, North Korea has asked the United States to establish a separate United States military liaison mission in Panmunjom from the MAC as a condition to accepting replacement nuclear reactors from South Korea as part of the 21 October accord.<sup>270</sup> Both countries have agreed to establish offices in one another's capitals to address "consular and other technical issues."<sup>271</sup> This appears to be one of the preliminary steps necessary to establish normal diplomatic relations.

<sup>267</sup> Bobby Hall 15-6, *supra* note 1, § V, paras. C(10); (12). See also Sznajderman, *supra* note 101.

<sup>268</sup> Robert Burns, *Army Cites Mistakes in Fatal Shootdown Over Korea, But Punishes No One*, AP WORLDSTREAM, June 23, 1995, available in LEXIS, Nexis Library, CURNWS File.

<sup>269</sup> See *supra* note 266 and accompanying text.

<sup>270</sup> *Foreign Relations: US Rejects North Korean Offer to Replace MAC with Liaison Officers*, BBC SUMMARY OF WORLD BROADCASTS, Feb. 10, 1995, available in LEXIS, Nexis Library, WIRE File. Preliminary peace treaty discussions is the purpose for the liaison mission. These discussions are occurring in Berlin, Germany. Steve Pagani, *N. Korean Mission a Cold War Relic Handy for U.S.*, REUTERS, Mar. 29, 1995; Steve Pagani, *New Proposals Cut Short U.S.: N. Korea Atomic Talks*, REUTERS, Mar. 28, 1995; R. Jeffrey Smith, *N. Korean Talks End Without Agreement; South's Role in Supply Reactors at Issue*, WASH. POST, Mar. 28, 1995, at A11, all available in LEXIS, Nexis Library, CURNWS File. The Korean Armistice Agreement provides that it shall remain in effect until the parties reach a peaceful settlement "at a political level." DA PAM. 27-1, *supra* note 7, at 215 (Korean Armistice Agreement, para. 61). North Korea used WO Hall as a pawn to get high-level political involvement. Normalization of relations with the United States was a stated North Korean objective.

<sup>271</sup> Hubbard Interview, *supra* note 95. As early as 1992, United States diplomats told North Korea of preconditions needed to normalize the United States and North Korea relationship. DA PAM. 550-81, *supra* note 9, at 205. Those preconditions were as follows:

- (a) North Korean facilitation of North-South Korea dialogue;
- (b) termination of North Korean missile exports and related technology;
- (c) assistance in a full accounting of U.S. Korean War missing in action;
- (d) renouncing terrorism;
- (e) demonstrating increased respect for human rights; and,
- (f) concluding a workable nuclear inspection program monitored by the International Atomic Energy Agency.

North Korea has increased diplomatic pressure on the United States by expelling the Korean Armistice Agreement mandated neutral observers and closing the armistice facilities within its border.<sup>272</sup> North Korea has also increased military pressure by initiating covert military operations across the DMZ.<sup>273</sup> All of these actions are aimed at forcing the United States into a peace treaty. President Clinton's response to this pressure has been to

deflect North Korean-United States peace talks "until the [North and South] Korean people themselves reach an agreement for a permanent peace."<sup>274</sup> However the diplomatic intercourse between the United States and North Korea ebbs towards normalization, it seems that North Korea used the WO Hall political pawn well.

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<sup>272</sup> Ju Yeon-Kim, *Clinton Reportedly Rejects North Korean Call for Peace Talks*, AP WORLDSTREAM, July 27, 1995, available in LEXIS, Nexis Library, CURNWS File. The armistice designates Poland and Czechoslovakia as the neutral observers in North Korea and Sweden and Switzerland for the United Nations forces. DA PAM. 27-1, *supra* note 7, at 205 (Armistice Agreement, para. 37). Despite North Korea's actions, the neutral observers for the United Nations continue to monitor whether North Korea's position towards the armistice changes.

<sup>273</sup> See *South Kills N. Korean Intruder*, AP ONLINE, Oct. 17, 1995, available in LEXIS Nexis Library, CURNWS File.

<sup>274</sup> Paul Bedard, *Remembering 'the Forgotten War': Clinton Vows to Protect S. Korea as He Dedicates Veterans Memorial*, WASH. TIMES, July 28, 1995, at A1. See also Jim Mann, *U.S. Reassures South Korea on Ties to North*, L.A. TIMES, July 28, 1995, at A17.

## Contract Law Notes

### New Rules of Procedure Announced Just in Time for Bid Protest Season

With all of the attention given to streamlining and reforming the federal procurement process, it should come as no surprise that the rules of procedure for handling bid protests also have been the subject of considerable change. Late last July, the rule-makers for agency and General Accounting Office (GAO) bid protests published new rules of procedure.<sup>1</sup> This note highlights some of the more significant changes and offers a few tips to agency counsel on how to use these rules to their advantage.

#### The New Agency Protest Rules of Procedure

In October 1995, President Clinton signed an executive order directing all agencies to establish formal procedures for resolving protests at the agency level.<sup>2</sup> Specifically, the President wanted federal agencies to encourage greater use of the alternative dispute resolution process to avoid the disruption and costs that frequently accompany protests filed with the GAO or the federal judiciary.<sup>3</sup> The new interim rules developed in response to this executive order have made important changes to the way agency protests are processed.

Perhaps the most significant feature of these new rules is what did *not* change—"the 14-day rule" for filing protests. This rule generally requires that protests involving issues other than pre-award challenges to the solicitation be filed within 14 days of when the protester discovered the bases for the protest.<sup>4</sup> His-

torically, both agency and GAO timelines have mirrored each other in this regard. This uniformity has made the protest process more "user-friendly" for both agency officials as well as those within the contractor community who frequently deal with protest issues. Indeed, a strong argument can be made that it is this quality of "sameness" that encourages greater use of the agency protest process. Unfortunately, under the new rules, the agency protest timeline no longer tracks with the new GAO protest rules. As noted below, the latest version of the GAO rules of procedure reduced the protest filing deadline from 14 days to 10 days.<sup>5</sup> Hence, under the current set of rules for agency protests, an offeror may file a protest with the agency more than 10 (but no later than 14) days after it learned of the basis for protest and still be considered timely; whereas, such action would clearly be untimely if it were filed with the GAO.<sup>6</sup>

Another key feature of the new agency protest rules also involves the timing of protests; specifically, it involves the requirement to suspend further action on the procurement. The new rules now *require* the contracting officer to suspend contract performance if the protest is filed within 10 days of award or 5 days of the date offered for any required debriefing,<sup>7</sup> whichever is later.<sup>8</sup> Like previous *Federal Acquisition Regulation (FAR)* guidance on agency pre-award protests, the new rules also direct the agency to refrain from making a contract award if a protest challenging the propriety of the solicitation is filed prior to bid opening or the date set for receipt of proposals.<sup>9</sup>

The agency may override a pre-award or post-award suspension if a determination is made in writing at "a level above the contracting officer, or by another official pursuant to agency procedures," that such action is justified in light of "urgent and com-

<sup>1</sup> The new agency protest rules, identified as "interim rules," were published by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council as a revision to *Federal Acquisition Regulation* 33.103 with an effective date of 26 July 1996. 61 Fed. Reg. 39219 (1996). The GAO published its new rules of procedure the same day as a revision to 4 C.F.R. Part 21 with an effective date of 8 August 1996. 61 Fed. Reg. 39039 (1996).

<sup>2</sup> See Exec. Order No. 12979, Oct. 25, 1995, 60 Fed. Reg. 55,171 (1995).

<sup>3</sup> Both the Court of Federal Claims and the federal district courts can hear protests involving federal procurements. See 28 U.S.C. § 1491 (1996); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>4</sup> GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 33.103(e) (April 1, 1984) [hereinafter FAR].

<sup>5</sup> See *infra* note 15.

<sup>6</sup> Note, however, for a protester to protest an adverse action of its agency-level protest to GAO, the protester must have initially filed the agency protest *within 10 days* of when it knew or should have known of the bases for the protest. See 4 C.F.R. § 21.2(a)(3) (1996) *citing* § 21.2(a)(2).

<sup>7</sup> Debriefings are "required" no later than 3 days after it receives notice of contract award when an offeror submits a written request to the agency seeking to be debriefed on the rationale underlying the agency's actions. See FAR, *supra* note 4, at 15.1004(a). See also *id.* at 15.1004(d) (for guidance on the minimum content of such debriefs).

<sup>8</sup> *Id.* See also *id.* at 33.103(f). The "old" agency protest rules provided that the contracting officer "need not" suspend contract performance unless it appeared the award would be invalidated and the delay associated with the protest would not be "prejudicial to the best interests of the Government."

<sup>9</sup> *Id.* at 33.103(e).



elling" reasons or that continuing with the procurement is "in the best interests of the government."<sup>10</sup> Note that in cases involving pre-award stays, the contracting officer must inform all interested parties of the suspension and seek, if appropriate, extensions of the bid/proposal acceptance times from the offerors.<sup>11</sup> The FAR guidance specifically advises the agency that if the contracting officer cannot obtain such extensions, then he should consider overriding the stay and continuing with contract award.<sup>12</sup>

Finally, the new rules establish a recommended deadline by which an agency must render a decision on the protest. Agencies are now required to "make their best efforts" to render a "well reasoned" written decision on the protest within 35 days of the date the protest is filed.<sup>13</sup> The rules also require the agency to transmit the written decision by a means that provides "evidence of receipt."<sup>14</sup>

### *The New GAO Bid Protest Rules of Procedure*

The new GAO rules of procedure are, for the most part, the result of two key changes to the protest timetable made by the Information Technology Management Reform Act of 1996 (ITMRA).<sup>15</sup> The ITMRA mandates that the GAO render its decision on the protest within 100 days of the protest filing date.<sup>16</sup> Additionally, agency reports, which should contain virtually all documents relevant to the procurement and the protest, must be submitted no later than 30 days of when the agency received notice of the protest.<sup>17</sup> These two changes have resulted in a "ripple effect" throughout the entire procedural framework for GAO protests.

As discussed above, perhaps the most talked-about change to the GAO rules is the new "10-day rule." To meet the shorter time period allowed for processing protests, the GAO reduced the protest filing period from 14 days to 10 days.<sup>18</sup> This now means that protesters must file within 10 days of when they knew or should have known (whichever is earlier) of the bases for protest.<sup>19</sup> With certain limitations, this rule also applies to negotiated procurements which involve the conduct of a required debriefing.

In negotiated procurements where a debriefing is timely requested, the disappointed offeror may not file its protest prior to the debriefing date offered by the agency. The reasoning behind this restriction is that most, if not all, of the offeror's concerns should be answered by the agency during the debrief. If the offeror is not satisfied with the information obtained from the agency debrief, the offeror has 10 days following the debrief to protest. Again, note that this rule applies only in those situations where the debriefing is required.<sup>20</sup>

In light of its importance to the timing of protests, the contracting officer should provide the offeror written notice of when the debriefing is complete. Such notice will greatly reduce any doubt about when the debrief is finished and will assist in resolving any controversy regarding when the protester should have filed the protest. Further, because the protest clock is triggered by "knowledge" of protest grounds, the contracting officer should memorialize in writing what issues and topics were covered during the debrief. Documenting the debriefing agenda contemporaneously with the conduct of the debrief provides powerful evidence of exactly what was covered and when.<sup>21</sup>

<sup>10</sup> *Id.* at 33.103(f). See also Saviano, *Overriding a Competition in Contracting Act Stay: A Trap for the Wary*, ARMY LAW., June 1995, at 22, for an excellent overview of these two standards.

<sup>11</sup> FAR, *supra* note 4, at 33.103(f)(2).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 33.103(g), (h).

<sup>14</sup> *Id.* at 33.103(h). This requirement is no doubt aimed at ensuring that the agency establishes clear procedures for providing solid evidence of when the protester learned of any adverse agency action. Such evidence is important to ascertain the timeliness of any follow-on protest filed with the GAO. See 4 C.F.R. § 21.2(3) (1996).

<sup>15</sup> Pub. L. No. 104-106, §§ 5001-5703, 110 Stat. 186, 679-703.

<sup>16</sup> *Id.* § 5501 (amending 31 U.S.C. § 3554 (1996)).

<sup>17</sup> *Id.* (amending 31 U.S.C. § 3553(b)(2)(A) (1996)).

<sup>18</sup> 4 C.F.R. § 21.2(b), (c) (1996). For purposes of both agency and GAO protests, "days" are defined as calendar days. Where the last day of a protest period falls on a holiday or weekend, the "last day" of that time period is the next day the agency is open. *Id.* § 21.0(f).

<sup>19</sup> See *id.* § 21.2(2). The "known or should have known" standard applies to both agency and GAO protest filings. See also FAR, *supra* note 4, at 33.103(e).

<sup>20</sup> If the debriefing is not "required" (e.g., the offeror fails to timely make its request for a debrief), then the protester must file its protest within 10 days of when it knew or should have known of the grounds for protest. Further, under these circumstances, it is not prevented from protesting prior to the offered debrief date. See 4 C.F.R. § 21.2(2) (1996).

<sup>21</sup> See also FAR, *supra* note 4, at 15.1004(f) (requiring the contracting officer to include an "official summary" of the debriefing in the contract file).

Another key concern about protest timing involves the requirement to stay or suspend procurement activity. In this regard, the rules with respect to suspension of the procurement (that is, a "CICA stay") did not change.<sup>22</sup> However, so long as we are discussing the timing of protests, a quick review of the requirement for a post-award stay of negotiated procurements is appropriate. It is important to keep in mind that the "stay clock" is different from the "protest clock." To secure a post-award stay of a contract awarded using negotiated procedures, the protester must file its protest within 5 days of the date *offered* for the debrief or 10 days of *contract award*—whichever is later.<sup>23</sup> If no debriefing is required, the protester must file within 10 days of contract award. Again, remember that for *the protest* to be timely, a protester need only file its protest within 10 days of the date the debrief is held or 10 days of when it learned of the grounds for protest if there is no requirement for a debrief. The rule-makers have imposed more restrictive time limits for obtaining a CICA stay because of the disruptive impact a suspension can have on the procurement process. Therefore, agency counsel must have a working familiarity with the nuances of this important aspect of bid protests.

The key to successfully challenging the timeliness of a protest is the agency's ability to establish who knew what and when. Here are a couple of tips to keep in mind for this objective. First, always gameplan exactly how your contracting officer is going to notify all interested parties of a contract award. To keep the "protest window" as narrow as possible, the contracting activity should always notify the disappointed offerors the same day as the award. Perhaps the easiest way to accomplish this task is to telefax the notice of the award to all offerors and then follow the notice up with a telephonic confirmation that the fax was received. The contracting activity should document this follow-up telephone call with the time of the call and the identity of individuals involved. Do *not* rely only on the telefax transmittal receipt to demonstrate when the notice of the award was transmitted. Telefax transmittal receipts do not rebut a counter argument that the recipient did not receive a legible transmission (because of faulty equipment or because the notice was improperly transmitted).<sup>24</sup> Second, offer to conduct the debrief as quickly as possible. This simple step limits the ability of a protester to secure a suspension of the procurement to the mandatory minimum time frames. Lastly, and this is case-specific, encourage, if possible, the disappointed offeror to agree to the debriefing date. Although the agency can agree to a requested postponement of the debriefing, remember that under the current rules such a de-

lay may extend the protest window well after contract award. Obviously, the shorter the time allowed for filing a protest, the quicker the agency can devote its full attention to actual performance of the newly awarded contract.

The other noteworthy change to the GAO bid protest rules has to do with the timing for the submission of the agency report. The new rules now require the agency to submit its report within 30 days of receiving notice of protest from the GAO.<sup>25</sup> The agency must also provide the GAO and the protester a list of all documents that it will provide with the agency report no later than 5 days before the due date of the actual report.<sup>26</sup>

The agency report should contain all information relevant to the procurement and the protest to include the contracting officer's statement of facts and a legal memorandum drafted by agency counsel.<sup>27</sup> The report generally provides the contracting activity its first opportunity not only to educate the GAO about the procurement but also to persuasively lay out the agency's position regarding the protest allegations. In high visibility or complex procurements, this report can be lengthy. Clearly, any change in the time allotted to package and review this report can have a tremendous impact on those responsible for compiling the agency report—the contracting officer and his staff.

Consequently, prior planning by the contracting activity and its legal counsel will help keep the agency ahead of the "protest power curve." The contracting activity should not only carefully plan the award notification and debriefing itinerary but it should also identify early on all documents required for the agency report in the event a protest is filed. This early identification and review of documents will not only expedite the process of compiling the agency report, but many of those documents will be essential to conducting a thorough and comprehensive debriefing, which may well avoid a protest in the first place.

### Conclusion

The recent changes in the protest rules of procedure are the latest attempt to expedite the effective resolution of bid protests while still maintaining a process that builds confidence in the overall federal procurement system. Although the revised rules appear to meet both goals, further refinement of the protest process will occur as the new procedures are employed by both agencies and contractors. One of the regulatory revisions lurking on

<sup>22</sup> 31 U.S.C. § 3553(c), (d) (1995).

<sup>23</sup> Note that contract award triggers the "stay clock" while the notice of award triggers the "protest clock."

<sup>24</sup> See, e.g., *Laptops Falls Church, Inc.*, GSBGA No. 11322-P, 91-3 BCA ¶ 24,252 (discussing the "dangers" of relying on telefax transmission receipts).

<sup>25</sup> 4 C.F.R. § 21.3(c) (1996).

<sup>26</sup> *Id.* This notification requirement allows the protester to challenge the completeness of the agency report early in the protest process.

<sup>27</sup> *Id.* § 21.3(d).

the horizon will be to adjust the protest filing deadline for agency protests so that it comports with the new GAO 10-day rule. Other revisions will no doubt come from future case law as the protest parties and GAO wrestle with each other in an effort to better define the appropriate use of these new rules.

As agency counsel, your awareness of these new procedures can go a long way towards ensuring that your client's interests are protected. A working familiarity with a few key rules, such as the protest filing time requirements, may result in your filing successful jurisdictional motions earlier and more often in future protests. Likewise, a firm grasp of the protest rules as they relate to the agency report will assist you in establishing a timetable that maximizes the productivity of the agency procurement team as they work to defend against a protest. As agency counsel, our job is to bring organization and focus to what otherwise can be a chaotic situation. A solid understanding of the new protest rules will help you achieve this goal. Lieutenant Colonel Karl Ellcessor.

**Forewarned Is Forearmed:  
DCAA Held Liable for \$25 Million in Damages for  
Accounting Malpractice**

*The Impact Area*

Had the public contracts bar not anxiously followed this high-profile litigation for the last twelve years, the recent decision in *General Dynamics Corporation v. United States*<sup>28</sup> would have shocked the procurement community. Unfortunately, like an angry storm cloud darkening the horizon, the surprise accompanying this decision arose not from its approach but from the stark reality of its arrival. In *General Dynamics*, a federal district court in California found that the Defense Contract Audit Agency (DCAA) committed professional negligence in conducting an audit, that the DCAA injured a government contractor through a breach of professional care, and that, as a result, the contractor was entitled to more than \$25 million in monetary damages.

Although an award against the government exceeding \$25 million alone merits our attention, the sum pales in comparison to the potential for increased litigation and government liability when alleged professional malpractice in auditing is deemed *tortious conduct*. The *General Dynamics* decision likely represents the first successful effort by a government contractor to sue the DCAA for professional malpractice pursuant to the Federal Torts Claims Act (FTCA).<sup>29</sup> This decision can only be perceived as a devastating blow to the DCAA specifically and to the government generally.

*A Long and Tortuous History*<sup>30</sup>

Few government contract cases garner the level of interest sustained by the DCAA program and the subsequent litigation. In 1978, *General Dynamics* received a firm fixed-price (level of effort) contract to develop a prototype divisional air defense (DIVAD) gun system.<sup>31</sup> Although the contract's options were not funded, *General Dynamics* chose to work on those options to meet the schedule for the follow-on procurement.<sup>32</sup> *General Dynamics* charged its work on these options to its Bid and Proposal (B&P) account. Once *General Dynamics* expended the available development contract funds, it continued work on the prototype "using non-contract discretionary funds such as IR&D [Independent Research and Development] and B&P."<sup>33</sup> *General Dynamics* also commenced work on its response to the request for proposals (RFP) for the follow-on production contract, which it never received.<sup>34</sup>

The DCAA conducted various audits of *General Dynamics* and the DIVAD procurement. These audits investigated, among other things, possible mischarging on the DIVAD contract.<sup>35</sup> In 1984, based upon the DCAA audit reports, the Department of Justice (DOJ) served a grand jury subpoena on *General Dynamics*. In 1985, the grand jury returned an indictment charging *General Dynamics* and four of its senior officials with conspiracy and making false statements. After an extensive and highly scrutinized investigation, the DOJ dismissed the indictments in

<sup>28</sup> No. CV 89-6762JGD, 1996 WL 20025 (C.D. Cal. Apr. 5, 1996).

<sup>29</sup> 28 U.S.C. §§ 1346(b), 2671-80 (1995). More broadly, this may be the first successful use of the FTCA by a government contractor to pursue a professional malpractice claim against any government agency.

<sup>30</sup> The factual recitation in this note aggressively abbreviates the history of the program and the litigation history. The court's extensive findings of fact should be consulted by those requiring additional detail.

<sup>31</sup> A similar contract was awarded to *General Dynamics'* competitor, Ford.

<sup>32</sup> See generally GENERAL SERVS. ADMIN. ET AL. FEDERAL ACQUISITION REG. 34, 35 (Apr. 1, 1984) (respectively addressing major systems acquisition and research and development contracting).

<sup>33</sup> *General Dynamics*, 1996 WL 200255 at 4; see also FAR 31.205-18. The IR&D refers to independent research and development costs, which generally are the costs of effort not required by a contract and which consist of research, development, or concept formulation studies.

<sup>34</sup> The Army tested the prototypes in a "shoot-off" competition at Fort Bliss, Texas. After the shoot-off, the Army awarded the DIVAD production contract, in 1981, to *General Dynamics'* competitor, Ford. The Army later canceled the DIVAD program in its entirety.

<sup>35</sup> Extensive findings of fact regarding the audits, and the individual auditors, can be found at *General Dynamics*, 1996 WL 200255 at 7-31.

1987.<sup>36</sup> During the course of defending against the criminal indictment, General Dynamics spent \$25,880,752 on legal fees and other expenses.<sup>37</sup>

### A Novel Legal Theory

General Dynamics sued the government in federal district court in California seeking recovery of the costs it expended in defending against the fraud action. General Dynamics plead its case under the FTCA,<sup>38</sup> alleging that the DCAA committed professional malpractice in performing audit work related to the DIVAD contract.<sup>39</sup> Such an approach highlighted the difference between the FTCA and conventional remedies available to government contractors pursuant to the Contract Disputes Act of 1978 (CDA).<sup>40</sup> For example, seeking an unconventional remedy was required to the extent that, as a large business, General Dynamics could not recover its attorney's fees under the Equal Access to Justice Act (EAJA).<sup>41</sup>

The court determined that California law controlled the action because the DCAA's negligence occurred in California.<sup>42</sup> The court applied the four-element test that California requires for a claim for professional malpractice. General Dynamics was required to show (1) the existence of a duty of the professional to use skill, prudence, and diligence appropriate to the profession;<sup>43</sup> (2) a breach of that duty; (3) a proximate causal connection between the negligent professional conduct and the resultant injury; and (4) an actual loss resulting from the professional's negligence.<sup>44</sup>

After years of litigation, the court found that General Dynamics met each of the four enumerated elements. This conclusion was not surprising given that the court found numerous examples of negligence in DCAA's audit efforts including: (1) failure to comply with standards and procedures applicable to the DCAA audits;<sup>45</sup> (2) failure to meet the "umbrella standard of due professional care;"<sup>46</sup> (3) failure to employ procedures and to achieve standards;<sup>47</sup> (4) a lack of proper audit planning; (5) insufficient reviewing and briefing of the contract;<sup>48</sup> (6) lack of, and im-

<sup>36</sup> In 1988, Attorney General Edwin Meese sent letters to the individual defendants apologizing for bringing the wrongful indictment. *Id.* at 32.

<sup>37</sup> The court found these legal fees reasonable, explaining that General Dynamics would be expected to retain top-flight counsel for such a high stakes matter. General Dynamics described this matter as a "bet your company" case. *Id.*

<sup>38</sup> Previously, the court denied a government motion to dismiss the complaint based upon the FTCA's statute of limitations.

<sup>39</sup> Generally, the FTCA waives the government's sovereign immunity regarding claims against it for money damages (or injury or property loss) caused by negligent or wrongful acts or omissions of government employees acting within the scope of their employment where the government, if it was a private person, would be liable under the law of the state where the tort occurred. See generally 28 U.S.C. §§ 1346(b), 2401-02, 2671-72, 2674-80 (1995).

<sup>40</sup> 41 U.S.C. §§ 601-13 (1995). For example, CDA actions are tried before boards of contract appeals (BCAs) or at the Court of Federal Claims (CFC), while FTCA actions, which provide a right to a jury trial, are tried in federal district courts. While CDA actions are governed by a well-defined body of federal law, FTCA actions are governed by state tort law. See, e.g., Steven D. Gordon, *et al.*, *The DIVAD Decision: Another Scanwell Sea Change or Merely a Torncello Ripple?*, 66 FED. CONT. REP. 77, 78 (BNA July 22, 1996).

<sup>41</sup> To recover attorney's fees under the Equal Access to Justice Act (EAJA), the prevailing party must meet certain statutory size eligibility requirements—only small businesses are eligible. 5 U.S.C. § 504 (1995) (remedy available at boards of contract appeals); 28 U.S.C. § 2412 (1995) (remedy available in federal court proceedings). Generally, the EAJA reverses the "American rule," which dictates that parties bear their own litigation expenses.

<sup>42</sup> Some commentators have noted that, although there are some significant variations between the tort laws of the states, the court's analysis would be transferable to the law of most other states. Apparently, one of the most significant differences between the states arises between identifying the parties who are owed a duty of professional care by the auditor. Gordon, *supra* note 40, at 78.

<sup>43</sup> The court did not seem concerned that General Dynamics was not the DCAA's "client." Arguably, the contracting officer (or the Government) is the DCAA's client. Obviously, the DCAA's relationship with a government contractor (influenced by an inherently adversarial nature) differs dramatically from the relationship between a contractor and its private auditor (where the auditor typically enjoys willing cooperation and unfettered access to contractor books and personnel). Nonetheless, the court found that a duty had been established (1) because the DCAA's actions were intended to affect General Dynamics and it was reasonably foreseeable that General Dynamics could be harmed by the DCAA's negligent conduct and (2) by privity of contract between General Dynamics and the DCAA. *General Dynamics Corporation v. United States*, No. CV 89-6762JGD, 1996 WL 20025 at 33-34 (C.D. Cal. Apr. 5, 1996). See generally Gordon, *supra* note 40, at 84 (authors reasonably suggest that the DCAA could not be held liable for malpractice where a contractor withheld relevant documents or information).

<sup>44</sup> *General Dynamics*, 1996 WL 200255 at 32.

<sup>45</sup> Specifically, the court held that DCAA failed to comply with the Generally Accepted Auditing Standards, the Defense Contract Audit Manual (DCAM), and the GAO's Generally Accepted Government Auditing Standards. *Id.* Among other things, the court rejected the government's argument that the DCAM's procedures were mere guidance particularly because many of the DCAM's directions were written in the imperative. See generally DCAM ch. 2, Auditing Standards, DCAA MANUAL 7640.1.

<sup>46</sup> The court criticized the DCAA's failure to meet the field work standard in performing the audit work or the reporting standards in producing the audit report. *General Dynamics*, 1996 WL 200255 at 22.

<sup>47</sup> "The result was an audit report whose findings, conclusions, and recommendations were not supported by evidence in the work paper . . ." *Id.* at 23.

<sup>48</sup> "The DIVAD audit began with the false and wholly unsupported assumption that the DIVAD prototype contract was an ordinary Firm Fixed Price contract instead of a Firm Fixed Price (Best Efforts) contract." *Id.* at 25.

proper, preparation of the audit program;<sup>49</sup> (7) failure to conduct entrance conferences;<sup>50</sup> (8) woefully inadequate preparation of work papers; (9) failure to obtain technical assistance; (10) failure to resolve conflicts in the evidence; (11) failure to draft the audit report based upon the work papers;<sup>51</sup> and (12) failure to discuss conclusions with the contractor at the exit conference and failure to include the contractor's reaction in the report.<sup>52</sup> The court awarded General Dynamics full recovery for its costs of defending against the fraud actions—a total of more than \$25 million.<sup>53</sup> The DOJ has filed a notice of appeal in the Ninth Circuit.<sup>54</sup>

### *Dancing in the Streets?*

Private industry quickly reacted to the *General Dynamics* decision. Some likened the potential impact of this case to *Scanwell Laboratories Inc. v. Shaffer*,<sup>55</sup> which redefined the nature (and accordingly increased the amount) of litigation of disappointed offeror suits in federal courts. Herb Fenster, who is credited with the original theory upon which General Dynamics'

complaint was based, applauded the court's ruling as a vindication of General Dynamics. Fenster cautioned, however, that the facts were "relatively unusual" and that the FTCA action for professional malpractice arose from a "relatively rare instance."<sup>56</sup> Professor Ralph C. Nash, Jr. also applauded the end to "one of the saddest incidents in the history of Government contracting," but expressed hope that "this precedent will never be used."<sup>57</sup> Professor Nash focused his criticism upon the DCAA's course of conduct,<sup>58</sup> but refrained from predictions regarding the impact of the decision.

### *A Chilling Effect?*

Only time will tell whether other courts will apply the *General Dynamics* case to permit FTCA malpractice actions against the DCAA.<sup>59</sup> The court went to great lengths to explain that it considered the DCAA's conduct in this case particularly egregious—violating virtually every enumerated standard and requirement imaginable in conducting the DIVAD audit. As a result, it is difficult to predict the precedential weight of the case.<sup>60</sup> How-

<sup>49</sup> "In assuming at the outset of his audit without supporting evidence that General Dynamics had potentially engaged in fraud, [one of the] auditor[s] violated the independence standard by adopting a prosecutorial approach where he was required to exhibit judicial impartiality[.]" and another "failed to prepare a written audit program . . . [which] led to ad hoc auditing." *Id.* at 25.

<sup>50</sup> "Here . . . [the] DCAA never held an entrance conference as required by the DCAM. Worse yet, in the first meeting that the DCAA held with General Dynamics regarding the DIVAD audit, the DCAA auditor deliberately misled General Dynamics as to the purpose of the audit." *Id.* at 25-26 (citations omitted).

<sup>51</sup> "[C]ritical findings and conclusions in the audit report have no support in the work papers." *Id.* at 28-29. See generally DCAM, *supra* note 45, ch. 10, Preparation and Distribution of Audit Reports; para. 10-102, Importance of Audit Report Quality ("The importance of the DCAA audit report cannot be overemphasized."); and para. 10-003, Characteristics of a Quality Audit Report ("Report findings and conclusions must be . . . supported by sufficient objective evidential matter.").

<sup>52</sup> "These procedures, which are mandated by DCAA policy, serve as the final quality check on the audit and, by identifying any disagreements, gives the report the balance required for fairness and objectivity." *General Dynamics*, 1996 WL 200255 at 30.

<sup>53</sup> Also in its decision, the court rejected the government's arguments based upon the following: (1) the FTCA's discretionary function exception (because DCAA auditors were acting as auditors, not prosecutors or investigators); the FTCA's malicious prosecution exception (General Dynamics' claim was for professional malpractice, not malicious prosecution); the FTCA's misrepresentation exception (General Dynamics asserted that the audit was negligent, not that DCAA communicated erroneous information); and the FTCA's interference with contract rights exception (General Dynamics did not allege that DCAA intended to induce a breach of contract). *Id.* at 35-37.

<sup>54</sup> The Ninth Circuit Court of Appeals docketed the case as Number 96-55821. An order dated 29 July 1996 referred the case to the conference attorneys. The briefing schedule is pending.

<sup>55</sup> 424 F.2d 859 (D.C. Cir. 1970). "The 1970 decision in *Scanwell* . . . vastly altered the government contracts landscape by finding that government procurement officials owed an implied duty of fairness to potential bidders. This holding laid the groundwork for contractors to contest government procurement decisions through bid protest suits in federal courts. The subsequent stream of such protest actions confirms the seminal nature of *Scanwell*." Gordon, *supra* note 40, at 85.

<sup>56</sup> *General Dynamics Wins \$25.9-Million Malpractice Suit Against DCAA*, 96-3 COST, PRICING & ACCOUNTING REP. 19, 22 (March 1996); *General Dynamics Wins \$25.9 Million Malpractice Suit Against DCAA*, 38 GOVERNMENT CONTRACTOR ¶ 164 at 6-7 (Apr. 10, 1996). See also *General Dynamics Awarded \$26M in DIVAD Case, Court Finds DCAA Negligently Conducted Audit*, 65 FEDERAL CONTRACTS REPORTS 392 (Apr. 15, 1996) (for additional information on DIVAD litigation).

<sup>57</sup> Ralph C. Nash, Jr., *Negligent Auditing: The Pits*, 10 NASH & CIBINIC REP. ¶ 41 (Aug. 1996).

<sup>58</sup> Although, in 1987, Professors Nash and Cibinic castigated DOJ for bringing the indictment prior to thorough investigation of the facts, Professor Nash now directed his ire at DCAA. "This is a deplorable example of what can happen when Government employees lose sight of the fact that they owe a duty to the Government, contractors, and themselves to be scrupulously fair in their dealings." *Id.*

<sup>59</sup> Only true cynics will ask whether contractors can sue DCAA and recover damages. Can professional malpractice suits against government counsel be far behind? Conversely, in such a case a court could not so easily overlook the FTCA's malicious prosecution exception.

<sup>60</sup> For example, the court's decision not to publish its opinion may indicate its perception of the case's lack of contribution to the body of law.

ever, even a cursory reading of the decision leads one to conclude that a strong auditing malpractice case could be made from facts far less extreme than those found in the DIVAD audit.<sup>61</sup>

Regardless, the DCAA auditors may not soon forget that this court, in providing detailed findings of fact, specifically named each of the DCAA auditors and identified their negligent actions, omissions, and decisions. Nor should the DCAA auditors ignore the court's extensive recitation of each auditing standard and procedure that the DIVAD auditors ignored or overlooked. The *General Dynamics* decision may, as a result, raise the level of diligence among some auditors. If, for example, enhanced efforts are undertaken by the DCAA to create and maintain quality audit workpapers, no harm will come from such a result.

Conversely, the court's decision may stifle the independence and creativity of individual auditors. Widespread auditor fear of repercussion, or even an increased timidity in audit activities, could prove disastrous. Such a result could have a profound impact upon the government's pre and post-award negotiations with its contractors, contractor claim evaluations, and preparation for CDA and fraud litigation.

Whether the *General Dynamics* case proves to be an anomaly or whether it opens the floodgates for large contractor suits against the government for the recovery of attorney's fees remains to be seen. While it is safe to assume that the DCAA cannot ignore this decision as an important "lesson learned," contracts counsel should also take note. The DCAA plays a vital role throughout the contracting process. The DCAA auditors rarely work in a vacuum nor did they do so in the development of the DIVAD case. Contract attorneys providing advice at the installation level, developing cases at litigation divisions, or acting as liaison with DOJ, have opportunities to bring their knowledge and experience to bear upon the DCAA's activities. Let us not let those opportunities go to waste. Major Steve Schooner, Individual Mobilization Augmentee, Contract Law Department, The Judge Advocate General's School, United States Army.

## Criminal Law Notes

### I've Got a Secret. *Jaffee v. Redmond* Recognizes Psychotherapist-Patient Privilege. Are Courts-Martial Far Behind?

In *Jaffee v. Redmond*,<sup>62</sup> the United States Supreme Court recently held that confidential communications between patients and their psychotherapists made during the course of diagnosis or treatment are now protected from compelled disclosure in federal litigation.<sup>63</sup> The decision brings federal practice into line with those states already recognizing some form of psychotherapist-patient privilege.<sup>64</sup> However, this significant ruling is unlikely to result in immediate recognition of a similar psychotherapist-patient privilege in military practice absent a legislative or executive mandate.<sup>65</sup> This note addresses *Jaffee v. Redmond* and its potential impact on the use of such confidential communications in courts-martial.

#### Facts

Mary Lu Redmond, a police officer on patrol duty in an Illinois apartment complex, shot and killed Ricky Allen to prevent him from stabbing a man he was chasing.<sup>66</sup> Allen's estate filed suit in federal district court alleging that Redmond violated Allen's constitutional rights by using excessive force during the encounter.<sup>67</sup> During pretrial discovery, the estate's administrator sought access to notes taken during some fifty counseling sessions between Redmond and Karen Beyer, a clinical social worker. Redmond and Beyer resisted the discovery request asserting that conversations and notes were privileged communications and protected against involuntary disclosure. The District Court rejected this claim and ordered production.<sup>68</sup> Neither Redmond nor Beyer complied with the order and the trial judge ultimately instructed the jury that the refusal to hand over the notes had no legal justification and they [the jury] could presume that the contents of the notes would have been unfavorable to Redmond.<sup>69</sup>

<sup>61</sup> "In concept, a malpractice claim could be established with respect to an audit report that is flawed only in part but is otherwise accurate, providing that the flaw is attributable to professional negligence." Gordon, *supra* note 40, at 82 (July 22, 1996).

<sup>62</sup> 116 S. Ct. 1923 (1996).

<sup>63</sup> *Id.* at 1927-32.

<sup>64</sup> See Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 AM. J. TRIAL ADVOC. 721, 723-25 (1995) (asserting all fifty states and the District of Columbia recognize some form of psychotherapist-patient privilege).

<sup>65</sup> See *infra* notes 80-91 and accompanying text.

<sup>66</sup> *Jaffee v. Redmond*, 51 F.3d 1346, 1349-50 (7th Cir. 1995).

<sup>67</sup> *Id.* at 1348.

<sup>68</sup> The trial judge reasoned that the psychotherapist-patient privilege recognized in other circuits did not extend to licensed clinical social workers. *Id.* at 1350.

<sup>69</sup> *Id.* at 1351.

The jury returned a verdict against Redmond.<sup>70</sup> On appeal, the United States Court of Appeals for the Seventh Circuit reversed and found that the trial court erred by refusing to protect confidential communications between Redmond and Beyer.<sup>71</sup> The United States Supreme Court affirmed.<sup>72</sup>

### *The Supreme Court's Analysis*

Justice Stevens, writing for the majority,<sup>73</sup> first noted that *Federal Rule of Evidence (FRE) 501* grants federal courts the discretion to define new evidentiary privileges by interpreting "common law principles . . . in the light of reason and experience."<sup>74</sup> Justice Stevens declared that reason and experience justified a privilege protecting confidential communications between a psychotherapist and his patient because it would promote sufficiently important interests outweighing the need for any probative evidence from that source.<sup>75</sup> Stevens indicated that the "mental health of our citizenry, no less that its physical health, is a public good of transcendental importance"<sup>76</sup> and that the possibility of exposing intimate discussions of this nature could "impede development of the confidential relationship nec-

essary for successful treatment."<sup>77</sup> Justice Stevens also had no difficulty in expanding this psychotherapist-patient privilege to communications made to licensed social workers in the course of psychotherapy. He concluded that the rationale for recognizing a psychiatrist or psychotherapist-patient privilege applies equally to communications made to licensed social workers engaged in mental health counseling.<sup>78</sup> Stevens noted that social workers today "provide a significant amount of mental health treatment," and service the large segment of our population that cannot afford a psychiatrist or psychologist.<sup>79</sup>

### *Effect on Courts-Martial Practice*

The Supreme Court's recognition of a new privilege protecting confidential communications made not only to psychiatrists and psychotherapists but also to licensed social workers engaged in psychotherapy is grounded in a logical interpretation of *FRE 501*. This does not necessarily mean that such communications are now automatically protected from compelled disclosure in courts-martial.<sup>80</sup> The law of the particular forum in which the case is litigated determines applicability of privileges.<sup>81</sup> As such,

<sup>70</sup> *Id.* at 1352.

<sup>71</sup> *Id.* at 1358.

<sup>72</sup> *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996).

<sup>73</sup> Justice Stevens delivered the opinion of the court in which Justices O'Connor, Kennedy, Souter, Thomas, Ginsberg and Breyer joined. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist joined in part. *Id.* at 1925.

<sup>74</sup> *Id.* at 1927. *Federal Rule of Evidence 501* provides in part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

<sup>75</sup> The Court noted that the likely evidentiary benefit in denial of a privilege would be modest. If rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances giving rise to the need for treatment would probably result in prosecution. Without a privilege, much of the desirable evidence that the proponent seeks would unlikely be in existence anyway as such admissions would probably not be made in the first place. *Jaffee*, 116 S. Ct. at 1929.

<sup>76</sup> *Id.* Justice Scalia, in a scathing dissent, chided the majority for, in part, extending a privilege to psychotherapists without first providing adequate justification. He states the following:

When is it, one must wonder, that the *psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders—none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet, there is no mother-child privilege.

*Id.* at 1934.

<sup>77</sup> *Id.* at 1928.

<sup>78</sup> *Id.* at 1931.

<sup>79</sup> The Court agreed with the Seventh Circuit that "[d]rawing a distinction between counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose," especially when the latter provide a significant part of the mental health counseling for the poor and those of modest means. *Id.* at 1932.

<sup>80</sup> In the military, a quasi-psychotherapist-patient privilege already exists under limited circumstances where a psychiatrist or psychotherapist is detailed to assist the defense team. *United States v. Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993). Communications made to a psychiatrist or psychotherapist who is part of the defense team are protected by the attorney-client privilege under MRE 502. A second limited privilege may apply to communications made by an accused as part of a sanity inquiry under MRE 302. *United States v. Toledo*, 26 M.J. 104 (C.M.A. 1988).

<sup>81</sup> *United States v. Johnson*, 47 C.M.R. 402, 406 (C.M.A. 1973). "It should be noted that the law of the forum determines the application of privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege, for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 501(d), Drafters Analysis, app. 22, A22-36 to A22-37 (1995 ed.) [hereinafter MCM].

the nature and scope of evidentiary privileges in military practice<sup>82</sup> are set forth, not in *FRE* 501, but in Military Rules of Evidence (MRE) 101(b)<sup>83</sup> and 501.<sup>84</sup>

Although MRE 101(b)(1) and MRE 501(a)(4) seem to provide authority to adopt testimonial and evidentiary privileges recognized in federal district courts, a substantial impediment exists in MRE 501(d), which provides that "notwithstanding any other provision of these rules, information not otherwise privileged<sup>85</sup> does not become privileged on the basis that it was acquired by medical officer or civilian physician in a professional capacity."<sup>86</sup> Can *Jaffee* and MRE 501(d) be reconciled? Is there room for a strict judicial interpretation of the words "medical officer"?

Trial and defense counsel advocating recognition of a psychotherapist-patient privilege<sup>87</sup> should argue the phrase "medical officer or civilian physician," as used in MRE 501(d), is limited in scope to military and civilian *physicians*. Psychologists, psychiatric social workers, behavioral science specialists, and other individuals engaged in mental health counseling should be excluded.<sup>88</sup>

Trial and defense counsel opposing the existence of psychotherapist privilege should respond that, although *Jaffee* recognized such a difference,<sup>89</sup> military courts have not, as yet, distinguished between the therapeutic practices of a physician who treats a person's physical ailments and complaints and a

<sup>82</sup> For an excellent historical review of the law of privileges under military practice, see Captain Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5 (1981).

<sup>83</sup> Military Rule of Evidence 101 declares the following:

(b) *Secondary Sources.* If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:

(1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

MCM, *supra* note 81, MIL. R. EVID. 101. Scope.

<sup>84</sup> Military Rule of Evidence 501 provides, in pertinent part, as follows:

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

\* \* \* \* \*

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

*Id.* MIL. R. EVID. 501. General Rule.

<sup>85</sup> For example, MRE 502 (Lawyer-Client Privilege) or MRE 504 (Husband-Wife Privilege) may protect communications between parties even though one may be a physician.

<sup>86</sup> *United States v. Brown*, 38 M.J. 696 (A.F.C.M.R. 1993). The military does not recognize the physician-patient privilege and in *Brown* the Air Force Court of Criminal Appeals refused to create one concluding that it was outside its authority. Congress entrusted the President with the power to adopt rules of evidence—including privileges.

<sup>87</sup> For example, a trial counsel would likely want to protect a sexual assault victim's confidential communications revealed to a rape counselor during the course of therapy. Alternatively, a defense counsel may want to limit the government's access to admissions made by a client during psychological interviews and subsequent treatment.

<sup>88</sup> This interpretation could lead to anomalous results where the psychotherapist is also a physician. For example, consider the situation where a soldier makes identical admissions to both a psychologist and a psychiatrist. The statements made to the psychologist would be privileged because a psychologist is not a physician. However, the same statements made to the psychiatrist would not be privileged because a psychiatrist, although engaged in mental health counseling, is by training and branch of assignment a medical officer. A possible resolution of this potential conflict would be to interpret "medical officer and civilian physician" as excluding any individual employed in the mental health professions, including psychiatrists; focusing instead on the nature of the relationship rather than the identity of the counselor. See Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. R. 249, 264 (1996).

<sup>89</sup> As Justice Stevens acknowledged, treatment by a physician for physical ailments often may proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996).



psychotherapist who treats his largely unmanifested mental health needs.<sup>90</sup> Counsel should argue that *Jaffee* has limited precedential value for military practice because it was based on an interpretation of FRE 501, which does not include the specific disqualifying language set forth in MRE 501(d).<sup>91</sup>

### *There Is a Better Way*

The questions raised by *Jaffee* are not limited to whether there should be an evidentiary privilege in military practice for communications made to individuals providing therapeutic services and the notes taken therein. Arguably, such a rule is justified because a psychotherapist-patient privilege protects the privacy of confidential communications and serves the public good by helping to insure the mental well-being of our soldiers and their dependents.<sup>92</sup> However, a larger issue before the military courts is whether something more is required to recognize a privilege than simply interpreting the rules of evidence to permit a psychotherapist-patient privilege in contravention of MRE 501(d) and existing case law. While such a privilege is now recognized in federal litigation, it was accomplished because of the Supreme Court's direction to construe federal rules in a way that permits the development of a common law of federal privileges.<sup>93</sup> The military rules have no such mandate and *Jaffee* should not be construed to permit military courts to "craft [a psychotherapist privilege] in common-law fashion"<sup>94</sup> as a consequence of judicial (mis)interpretation of MRE 501(d).<sup>95</sup>

Notwithstanding the Court's ruling, military evidentiary practice should remain consistent with those rules "generally recognized in the trial of criminal cases in the United States district courts,"<sup>96</sup> and there is no logical or practical reason not to amend the Military Rules of Evidence. The military justice system is now virtually the only jurisdiction not recognizing some form of psychotherapist-patient privilege. A legislative or executive cre-

ation must quickly ensue to allow recognition of such a privilege in courts-martial.<sup>97</sup> The Joint Service Committee on Military Justice should recommend that the President amend the Military Rules of Evidence by specifically adopting a psychotherapist-patient privilege.

### *Conclusion*

In *Jaffee v. Redmond*, the United States Supreme Court recognized a new federal common law psychotherapist privilege. Confidential communications between patients and their psychotherapists, including licensed social workers, and notes taken during their counseling sessions, now are protected from compelled disclosure. The effect of this decision on military practice is uncertain and will require trial and defense counsel litigating, and the appellate courts determining, the parameters of MRE 501(d). The President can circumvent this exacting exercise by specifically recognizing a new psychotherapist-patient privilege in the Military Rules of Evidence. Until that time, however, practitioners may expect a series of judicial disagreements concerning *Jaffee's* precedential value in military jurisdictions.<sup>98</sup> Major Henley.

### *Legal Assistance Items*

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

<sup>90</sup> See *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993) (no physician-patient or psychotherapist-patient privilege in federal law, including military law).

<sup>91</sup> However, if we are to follow the rules as applicable in federal district court, then there should be few, if any, exceptions. Consequently, given its increasingly widespread acceptance as a useful and reliable scientific tool, a number of federal courts now will at least consider the admissibility of exculpatory polygraph testimony offered by a defendant. See, e.g., *United States v. Pulido*, 69 F.3d 192 (7th Cir. 1995); *United States v. Kwong*, 69 F.3d 663 (2d Cir. 1995); *United States v. Sherlin*, 67 F.3d 1208 (6th Cir. 1995); *United States v. Santiago-Gonzalez*, 66 F.3d 3 (1st Cir. 1995); *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995); and *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995). However, MRE 707 still explicitly prohibits the introduction of polygraph evidence in courts-martial for any purpose. The propriety of such a rule should be reconsidered in light of *Jaffee* and deleted from the operative Military Rules of Evidence. See Major John J. Canham, Jr., *Military Rule of Evidence 707: A Bright Line Rule That Needs to be Dimmed*, 140 MIL L. REV. 65 (1993).

<sup>92</sup> "Confidentiality is the *sine qua non* for successful psychiatric treatment." Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972).

<sup>93</sup> Winick, *supra* note 121, at 251.

<sup>94</sup> *Jaffee v. Redmond*, 116 S. Ct. 1923, 1940 (1996).

<sup>95</sup> Testimonial privileges "are not lightly created nor expansively construed for they are in derogation of the search for truth." *Jaffee*, 51 F.3d at 1357 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

<sup>96</sup> UCMJ art. 36 (1988) (codified at 10 U.S.C. § 936 (1995)).

<sup>97</sup> Major David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 MIL L. REV. 31, 81 (1989).

<sup>98</sup> At least one military judge recently cited *Jaffee* as persuasive authority in recognizing a psychotherapist privilege in a court-martial while another has declined to recognize such a privilege. Telephone interviews with Major Howard J. Revis, Chief of Justice, 3d Infantry Division, Fort Stewart, Georgia (Aug. 21, 1996) and Captain Margaret Eckrote, Defense Counsel, Fort Myer, Virginia (Aug. 19, 1996).

*Colorado Court Considers Government Provided Quarters as Gross Income for Support*<sup>99</sup>

In a case of first impression, a Colorado appeals court held that government provided quarters constitute income for purposes of determining an appropriate amount of child support. The soldier resided on post and, therefore, did not receive the \$513 monthly Basic Allowance for Quarters (BAQ) entitlement. The wife sought an increase in child support and the trial court denied the increase. However, on appeal, the Colorado Court of Appeals held that use of the barracks was BAQ "in-kind." Thus, the use of the barracks constituted income under Colorado's Child Support statute. Colorado's support statute specifically provides that "in-kind payments received by a parent in the course of employment shall be counted as income if they are significant and reduce personal living expenses."<sup>100</sup> The court held that the legislature intended to treat such in-kind payments as additions to the parent's cash income. The appellate court directed the trial court to reassess whether the additional \$513 monthly income met the change in circumstances standard necessary to order an increase in support.

Legal assistance attorneys advising clients on child support should look closely at the relevant state statutes regarding what is considered income. Military entitlements, such as BAQ, may qualify as income even if the soldier resides in quarters and does not actually receive the payment. Major Fenton.

*Texas Court Awards Former Spouse Portion of SSB*<sup>101</sup>

A divorce decree entered in 1989 awarded the wife 29% of any retirement the service member received. In 1992, the service member elected voluntary separation under the Special Separation Benefits (SSB) incentive program. As a result, he received a lump sum payment of \$86,892.16. He continued to serve in the Reserves and, in the event of retirement, his pension would be offset by the SSB amount.

The ex-wife sought to enforce the divorce decree and the trial court awarded her \$21,606.29 from the net SSB payment received by the service member. The trial court held that SSB is equivalent to retirement pay. The service member argued that SSB is a gratuitous severance pay awarded to compensate for lost earnings. The court characterized SSB as a "buy-out of the service member's investment in military retirement."<sup>102</sup> The court went on to analogize SSB to retirement, indicating that if a service member retired from the Reserves after receiving SSB, the retirement pay is offset based on the "prepayment" of retirement benefits.

Whether voluntary incentive program payments to service members under the SSB and Voluntary Separation Incentive programs are divisible in divorce proceedings can be important information to the service member making that election. Many states have yet to rule in this area. However, there is a growing number that divide these payments. In a case of first impression, at least one court in Texas now joins that group of states dividing SSB payments. Major Fenton.

Consumer Law Notes

*Supreme Court Issues Bad News to Credit Card Users*

On 3 June 1996, the United States Supreme Court issued some bad news for consumers, particularly those using credit cards. In *Smiley v. Citibank (South Dakota)*,<sup>103</sup> the Court held that late payment charges for credit cards were "interest" under the National Bank Act of 1864.<sup>104</sup> As such, these charges are governed by the state where the bank is located, rather than where the consumer is located.

Barbara Smiley is a California resident. She was a holder of two Citibank credit cards from Citibank (South Dakota).<sup>105</sup> Under the provisions of the credit card agreements, late fees were charged if the cardholder failed to make the minimum payment on the card within a certain number of days of the due date.<sup>106</sup> Ms. Smiley was eventually charged late fees under the agree-

<sup>99</sup> *In re Long*, 921 P.2d 67 (Colo. Ct. App. 1995).

<sup>100</sup> C.R.S. § 14-10-115(7)(a)(III) (1995 Cum. Supp.).

<sup>101</sup> *Marsh v. Wallace*, No. 924 S.W. 2d. 423 (Tex. Ct. App. 1996).

<sup>102</sup> *Id.*

<sup>103</sup> *Smiley v. Citibank (South Dakota)*, N.A., 116 S.Ct. 1730 (1996).

<sup>104</sup> Codified as amended at 12 U.S.C.A. § 85 (1996).

<sup>105</sup> *Smiley*, 116 S. Ct. at 1732.

<sup>106</sup> The court describes the late charge scheme this way:

The Classic Card agreement provided that respondent would charge petitioner a late fee of \$15 for each monthly period in which she failed to make her minimum monthly payment within 25 days of the due date. Under the Preferred Card agreement, respondent would impose a late fee of \$6 if the minimum monthly payment was not received within 15 days of its due date; and an additional charge of \$15 or 0.65% of the outstanding balance on the Preferred Card, whichever was greater, if the minimum payment was not received by the next minimum monthly payment due date.

*Id.*

ments. She viewed these charges as contrary to California law and brought a class action on behalf of herself and other California holders of Citibank's (South Dakota) cards.<sup>107</sup>

Citibank (South Dakota) moved for judgment on the pleadings based on the National Bank Act. That Act provides in pertinent part that credit customers of national banks may be charged "interest at the rate allowed by the laws of the State . . . where the bank is located."<sup>108</sup> Thus, the thrust of Citibank's motion was that the charges were simply "interest" and were governed, therefore, by the laws of South Dakota. South Dakota allowed such charges. Citibank's motion was eventually granted by the trial court and that decision was upheld by the California appellate court.

A similar case in New Jersey was decided against Citibank<sup>109</sup> and the Supreme Court granted certiorari to resolve the split over this issue. There also were two other courts that had decided the issue the same as California.<sup>110</sup> Subsequent to the California decision, the Comptroller of Currency promulgated a proposed regulation including late charges within the definition of "interest" under the National Banking Act.<sup>111</sup> This regulation was adopted in February 1996.

The Comptroller's regulation made the Supreme Court's job easy. It is the Court's "practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."<sup>112</sup> Once the Court gives this deference, the issue becomes simply whether the decision of the agency was reasonable. In this case, the Court found that the Comptroller's definition was reasonable.

For the legal assistance attorney, this area has several ramifications. First, our soldiers constantly get solicitations from credit

card companies all over the country. If a soldier is not careful, he may sign an agreement that allows fees not charged by local banks. Second, our soldiers are sometimes late with payments. They need to understand their card agreement and the protections provided by the state where the bank is located to know what the allowed fees actually are. Therefore, legal assistance attorneys must look to the state where the bank is located to advise their clients properly about which fees they may be obligated to pay. Major Lescault.

## Tax Law Notes

### Taxpayer Bill of Rights 2

On 30 July 1996, the President signed the Taxpayer Bill of Rights 2.<sup>113</sup> As the title of the bill implies, the legislation is designed to help taxpayers. Although the bill provides a wide range of relief to all taxpayers, several provisions are particularly noteworthy.

Phone numbers for a contact person will be on service members' 1099s this year.<sup>114</sup> Thus, taxpayers who disagree with the information on these documents should find it easier to contact the appropriate agency to get the forms corrected.

Married couples filing separately will be able to amend their returns and file married filing jointly.<sup>115</sup> Unfortunately, this provision will only apply to tax returns for 1997 and later. Currently, married couples who file separate returns and pay taxes due cannot amend those returns by subsequently filing a joint return. Fortunately, this rule will change for 1997 and later years.

Taxpayers will be able to use delivery services other than the United States Postal Service to have their timely mailed tax re-

<sup>107</sup> *Id.*

<sup>108</sup> 12 U.S.C.A. § 85 (1996).

<sup>109</sup> *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036 (1995).

<sup>110</sup> *Smiley*, 116 S. Ct. at 1732 n.2.

<sup>111</sup> The regulation provides:

The term "interest" as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

12 C.F.R. § 7.4001(a) (1996).

<sup>112</sup> *Smiley*, 116 S. Ct. at 1732 (*citing* *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

<sup>113</sup> Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C. §§ 1-7811 (1996)).

<sup>114</sup> 26 U.S.C. §§ 6041-50N (1996).

<sup>115</sup> *Id.* at § 6013.

turns and other documents treated as timely filed.<sup>116</sup> The timely mailed rule provides that so long as a tax return or other document is mailed before the due date of the return it will be considered to be received by the Internal Revenue Service (IRS) on the due date even though it is not actually received by the IRS until after the due date.<sup>117</sup> Thus, taxpayers whose returns are due on 15 April can mail their returns on this date. The returns will not be considered late even though the IRS does not receive them until after 15 April. Prior to the Taxpayer Bill of Rights 2, the timely mailed rule only applied if the taxpayer sent the tax return or other document by United States Mail. Now taxpayers will be able to use private delivery services when mailing returns on or near the due date of the return. Because private delivery services must be designated by the Secretary of Treasury to qualify for the timely mailed rule, it is not currently clear which private delivery services the taxpayer can use. Since the legislation was only recently enacted, the Secretary of Treasury has not yet designated any private delivery services, but should do so in the near future.

A taxpayer who wishes to authorize disclosure of taxpayer information will no longer have to do so in writing.<sup>118</sup> Thus, a client could authorize the IRS to send information to a legal assistance attorney or anyone else by telephone.

The legislation also contains broad changes that will benefit all taxpayers, but have less of a direct impact on individual taxpayers and the filing of their returns. An Office of the Taxpayer Advocate has been created within the IRS.<sup>119</sup> Its primary function is to assist taxpayers in resolving problems in dealings with the IRS. The IRS can no longer terminate installment agreements without giving the taxpayer notice of such termination and the reasons for the termination.<sup>120</sup> Finally, the IRS will have greater authority to abate interest.<sup>121</sup> Major Henderson.

#### *Rollover of Gain on Sale of Principal Residence*

In a private letter ruling, the IRS has decided that a taxpayer may roll over the gain from the sale of his principal residence by

building and occupying an addition to rental property that the taxpayer already owns.<sup>122</sup> The taxpayer sold his principal residence in 1994 and then built a 1500 square foot addition to some rental property that he owned. The addition included a bedroom, family room, two bathrooms, a kitchen, a garage, and a driveway. The taxpayer intended to reside in this addition and did not intend to reside in any other part of the structure other than the addition. The existing structure would continue to be rented to unrelated tenants.

Based on these facts, the IRS concluded that the taxpayer could roll over the gain from the sale of the taxpayer's principal residence into this addition to his rental property. Thus, the taxpayer will not have to pay any taxes on the gain from the sale of his principal residence.

Because this is a private letter ruling, it is directed only to the taxpayer who requested it. Therefore, it may not be used as precedent.<sup>123</sup> Nonetheless, it is a good indication of how the IRS would view similar transactions. Legal assistance attorneys should be aware of this potential option in cases where their clients are looking for ways to roll over the gain from the sale of their principal residence. Major Henderson.

#### *Treatment of Rollover Following Divorce*

What is the result when a married couple sell their principal residence, file a joint income tax return, subsequently divorce, and only one of them buys and occupies a replacement home during the replacement period?

In *Murphy v. Commissioner*,<sup>124</sup> the Tax Court determined that only one-half of the gain from the sale of the principal residence could be treated as having been rolled over. Thus, one-half of the gain from the sale of the house would still be taxable. Because the taxpayers had filed a joint return, the IRS could collect the tax due on this gain from either party, to include the party who had purchased a replacement home.<sup>125</sup>

<sup>116</sup> *Id.* at § 7505.

<sup>117</sup> I.R.C. § 7502 (RIA 1995).

<sup>118</sup> 26 U.S.C. § 6103 (1996).

<sup>119</sup> *Id.* at 7802.

<sup>120</sup> *Id.* § 6159.

<sup>121</sup> *Id.* § 6404.

<sup>122</sup> Priv. Ltr. Rul. 96-26-020 (June 28, 1996).

<sup>123</sup> I.R.C. § 6110(j)(3) (RIA 1996).

<sup>124</sup> 103 T.C. 111 (1994).

<sup>125</sup> *Id.* at 117; I.R.C. § 6013(d)(3) (RIA 1996).

In *Murphy*, the IRS took the position that since both of the parties had not rolled over the gain on the sale of their house the entire gain on the sale of the house was taxable.<sup>126</sup> The IRS has now reversed its position and agrees with the Tax Court that only one-half of the gain is taxable under these circumstances.<sup>127</sup>

<sup>126</sup> 103 T.C. 111, 113 (1994).

<sup>127</sup> AOD 1996-007 (July 15, 1996).

Thus, when a married couple sells their house, files a joint return, subsequently divorces, and only one of them purchases a replacement home, they are jointly and severally liable for one-half of the gain on the sale of their principal residence. Legal assistance attorneys should consider the impact on their clients when advising them whether to file a joint return if they are selling a home and seeking a divorce. Major Henderson.

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## Notes from the Field

### *A Special Forces Human Rights Policy*

#### *The Initiative*

The use of the United States military to promote human rights values in foreign militaries has taken on a much added significance in the post Cold War era. Emerging democracies often look to American soldiers to assist them in establishing a law-based military whose policies, rules, and practices are rooted in respect for human rights.<sup>1</sup>

Although the term "human rights" does not immediately bring to mind images of Special Forces soldiers in action, the decade of the '90s has witnessed the use of "Green Berets" in missions that reflect America's desire to inculcate human rights values in the militaries of our friends and allies. Special Forces soldiers have proved themselves as premier ambassadors in this regard. Indeed, promoting human rights in the militaries of the nascent democracies is clearly a priority mission for the Special Forces, an organization uniquely qualified for such a task.

Shortly after assuming command of the United States Army Special Forces Command (Airborne) (USASFC(A)) in May 1996,<sup>2</sup> Major General Kenneth Bowra took swift action to ensure that all Special Forces soldiers thoroughly understood their rights and responsibilities regarding human rights *vis a vis* the host nation military. A first ever Special Forces Human Rights Policy Memorandum<sup>3</sup> issued by General Bowra addressed four areas of concern.

First, all military personnel assigned to USASFC(A) or subordinate units deployed outside the continental United States, either in permanent or temporary status, will receive human rights awareness training. This training will be conducted by their respective legal advisors prior to deployment.

Second, deployed personnel will report all instances of suspected gross violations of internationally recognized human rights immediately through the chain of command. All such reports will be included in after action reports (AARs).

Third, so far as practicable, Special Forces commanders will plan for and include human rights training as part of all training provided to host nation military forces. Furthermore, command-

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<sup>1</sup> Specifically, a state violates international human rights law if, as a matter of state policy, it practices, encourages, or condones seven types of actions that have gained universal recognition as "gross violations" of internationally recognized human rights. Set out at *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 702, Customary International Law of Human Rights, those seven gross violations consist of: (1) genocide; (2) slavery or slave trade; (3) the murder or causing the disappearance of individuals; (4) torture or other cruel, inhuman, or degrading treatment or punishment; (5) prolonged arbitrary detention; (6) systematic racial discrimination; or (7) a consistent pattern of gross violations of internationally recognized human rights.

<sup>2</sup> Headquarters, United States Army Special Forces Command (Airborne), is located at Fort Bragg, North Carolina. The command consists of five active duty Special Forces groups and two reserve groups. The active duty groups are located as follows: 1st Group, Fort Lewis, Washington; 3d Group, Fort Bragg, North Carolina; 5th Group, Fort Campbell, Kentucky; 7th Group, Fort Bragg, North Carolina; and 10th Group, Fort Carson, Colorado.

<sup>3</sup> Memorandum, Commander, United States Army Special Forces Command (Airborne), to subordinate commands, subject: USASFC(A) Human Rights Policy (18 Aug. 96).

ers are required to review exercise and deployment AARs to evaluate the effect of human rights training initiatives on host nation military forces and then make recommendations to the USASFC(A) Commanding General for improvement.

Finally, the four page memorandum requires the USASFC(A) Staff Judge Advocate to:

(1) ensure that all Special Forces group judge advocates (GJA) undergo a human rights training program tailored to their area of responsibility (AOR), which is given to deployed soldiers;

(2) assist each Special Forces Group to develop appropriate human rights training programs that can be delivered to host nation military forces; and

(3) as opportunities arise, coordinate with host nation legal counterparts to assess host nation military human rights training programs and, as appropriate, recommend improvements to those programs.

Major General Bowra issued the human rights policy because he believes that an effective and efficient method of meeting the challenges of "regional crisis" and "threats to democracy" is to reduce the chance of such activities arising in the first place.<sup>4</sup> One way to achieve this is to install in the host nation militaries a healthy respect for human rights.

The sweeping requirements mandated by the USASFC(A) policy memorandum, particularly as they apply to training host nation forces, are not as difficult as they might first appear. In large part, the militaries of many emerging democracies already look to Army Special Forces as a model to assist them in defining how human rights concerns should properly function in their respective military establishments and how that military itself should fit into a more democratic form of government. Foreign militaries instinctively turn to the United States Army Special Forces for the following reasons.

First, the Special Forces are uniquely positioned to influence the attitudes and, in some cases, even the structure and function of the host nation military because they go where no other element of the United States military can. As noted by Lieutenant General (retired) William P. Yarborough, "Other than Special Forces, there is no element of the [United States] armed forces that is capable of performing across the entire spectrum of what is labeled, for want of a better term, *low intensity conflict*."<sup>5</sup>

Special Forces soldiers perform hundreds of missions each year in support of the warfighting commanders in chief and other government agencies. These operations span the entire spectrum of conflict, to include direct action, foreign internal defense, special reconnaissance, unconventional warfare, security assistance training, humanitarian assistance, counternarcotics, demining, and combating terrorism. Simply put, when it comes to operating with host nation forces, Green Berets are everywhere doing everything. The deployment figures tell the tale. In Fiscal Year 1995, for example, Special Forces soldiers deployed on 1593 missions to 184 countries around the world.

Second, because Special Forces soldiers are extensively trained in the language, culture, religion, and politics of the countries in which they operate, they are best able to foster genuine military-to-military relationships. This applies to individual host nations as well as to geographic regions. Thus, because of their ability to perceive cultural nuances, Special Forces can tailor each particular mission to make the maximum impression on their military counterparts regarding the importance of human rights concerns.

Third, more than any other arm of the United States military, Special Forces exemplify to foreign militaries the success story of a professional military force that can maintain a superb operational record while functioning in accord with human rights concerns. Almost without exception, foreign soldiers are deeply impressed with how human rights and military efficiency can go hand-in-hand. Foreign forces know that, to the Green Berets, concern for human rights has always been the *sine quo non* in United States military operations.

Indeed, the promotion of international human rights and democratic behavior have long been critical themes of the United States Army's Special Forces, regardless of the mission that they happen to be performing. President Kennedy routinely praised this unique quality, and no one who has followed the accomplishments of Special Forces soldiers in operations Provide Comfort (Iraq and Turkey), Restore Hope (Somalia), Just Cause (Panama), Desert Storm (Middle East), Uphold Democracy (Haiti), and the Implementation Force (Bosnia) can doubt their value in this regard.

In short, United States Army Special Forces soldiers are universally recognized and respected as efficient, professional, and humanitarian in their conduct. Lieutenant General (retired) James T. Scott, the former Commander of United States Army Special Operations Command, stressed this truism during a speech in the summer of 1996. He stated, "I can tell you that Special Forces

<sup>4</sup> The 1996 Defense Planning Guidance lists four primary challenges to United States security: (1) proliferation of nuclear weapons, (2) regional crisis, (3) threats to democracy, and (4) threats to economy.

<sup>5</sup> Lt. Gen. (ret.) William P. Yarborough, *Emerging SOF Rules and Missions: A Different Perspective*, Special Warfare, July 1995, at 10.

soldiers will . . . continue to serve as the *conscience and the example of lesser developed nations regarding human rights.*"<sup>6</sup>

Finally, the "*De Oppresso Liber*" motto of Special Forces reflects a profound concern for the inherent dignity of those who are denied international human rights. Crossing all cultural and social boundaries, this mentality makes Special Forces soldiers an ideal models as they train host nation forces and assist in alleviating many of the conditions that breed human rights abuses.

By word and deed, Special Forces promote the message that commitment to preserving human rights is the hallmark of a professional military serving the interests of a democratic nation. This message is not lost on the host nation. For example, in Haiti (which now officially has no standing military force), Special Forces worked closely with local citizens, political leaders, and foreign forces on a daily basis. Without question, the red thread that underlined every action taken in Haiti was the emphasis on respecting human rights. In the end, human rights concerns took root, in large part, because of the professionalism of United States Army Special Forces.

The most common opportunity for Special Forces to influence the human rights practices of the soldiers of fledgling democracies, however, occurs during joint and combined exercises for training. Green Berets often are quizzed by their counterparts concerning how one should respond to human rights abuses committed by service members. Realizing that it is better to draw on American history (to avoid unnecessary controversy), Special Forces soldiers invariably rely on various American illustrations, such as the lessons learned from My Lai,<sup>7</sup> to explain the practical necessity for abiding by the law of war and internationally recognized human rights law.

Invariably, the four basic points stressed to host nation soldiers are: (1) human rights abuses are never tolerated by a democratic populace (*e.g.*, the American public); (2) such violations do not shorten the conflict, be it internal or external in nature, but usually have the opposite effect; (3) the soldiers guilty of human rights violations must be punished, or similar abuses will surely follow; and (4) to maintain discipline and *esprit de corps*, the chain of command must constantly train soldiers to respect internationally recognized human rights and the law of war.

#### *Group Judge Advocates*

The old adage that "you can't teach what you don't know" particularly applies to explaining and promoting human rights

concerns to host nation military personnel. In preparing for operational missions in developing democracies, Special Forces soldiers and their commanders must plan to specifically address this challenge. Even the team level predeployment briefings should anticipate human rights issues unique to the host nation.

Requiring a great deal of sensitivity, human rights training packages that are specifically tailored to the wants and desires of the host nation military should be available at planning conferences. Clearly, host nation forces are receptive to human rights discussions only when they are presented in a nonthreatening, nondemanding environment of instruction. In many cases, if the host nation is adverse to the idea of discussing human rights issues, a very informal approach will reap the greatest dividends. In other instances, host nation forces ask for more formal instruction about how the United States military approaches human rights issues.

To address the human rights concerns of individual nations, Special Forces soldiers and their commanders have many resources available to them. The most important resource, other than a soldier's solid moral compass, is the GJA assigned to each Special Forces Group (there are five active duty Group legal offices). Each GJA is thoroughly trained in human rights law and has compiled an extensive collection of information dealing with human rights issues related to the Group's AOR.<sup>8</sup> Apart from providing the mandatory predeployment legal briefings to all deploying soldiers, these specialized military attorneys stay abreast of current doctrine involving international agreements, changes in human rights doctrine, and political and social changes in the regions.

The USASFC(A) Staff Judge Advocate requires all GJAs to maintain close contact with their military legal counterparts in as many host nations as possible. Group judge advocates engage in human rights training initiatives targeted at institutionalizing human rights training in foreign militaries. This approach has been extremely successful. Support from GJAs has ranged from assisting the Thai military in establishing a human rights training program for their junior military attorneys at the Royal Thai Military Law School in Bangkok to developing human rights training handbooks for military coalition forces in Haiti.<sup>9</sup> Special Forces GJAs have also worked closely with United Nations personnel in Haiti and Bosnia.

#### *Conclusion*

The post Cold War world presents new challenges to United States Army Special Forces. A window of opportunity now ex-

<sup>6</sup> Lt. Gen. (ret.) James T. Scott, Address at USASFC(A) Change of Command Ceremony (May 21, 1996) (transcript on file with Office of the Staff Judge Advocate, USASFC(A)).

<sup>7</sup> See, *e.g.*, Jeffrey F. Addicott & William A. Hudson, *25th Anniversary of My Lai: Time to Inculcate the Lessons*, 139 Mil. L. Rev. 153 (1993).

<sup>8</sup> See USASFC(A) Human Rights Handbook (on file with the Office of the Staff Judge Advocate, USASFC(A), Fort Bragg, North Carolina).

<sup>9</sup> Many of these initiatives have been conducted through the Center for Law and Military Operations located at The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

ists for Special Forces to make substantial contributions toward building and strengthening human rights concerns in the militaries of the emerging democracies.

Just ten years ago hundreds of countries functioned under some form of nondemocratic rule (in Latin America alone, over ninety percent were nondemocratic). Today, the vast majority of these nations operate under properly elected civilian governments, but great nations are neither created nor sustained by accident. United States assistance is often required to help solidify and, in many cases, to create a true commitment to promoting and preserving human rights.

Major General Bowra has made the promotion of human rights in the militaries of the emerging democracies a top priority for United States Army Special Forces. Recognizing that this new mission cannot be accomplished without the proactive support of his legal advisors, he has given judge advocates a critical role in the process of promoting human rights. We will not disappoint. Lieutenant Colonel Jeffrey F. Addicott, Staff Judge Advocate, United States Army Special Forces Command (Airborne), Fort Bragg, North Carolina.

### ***To Read or Not to Read . . . The Defense Counsel's Dilemma Provided by Article 31(b), UCMJ<sup>10</sup>***

#### *The Dilemma*

Military defense counsel seldom have the luxury of appointed investigators. They are generally left to their own skills in accomplishing both the pretrial investigation and preparation of the case for trial. Accordingly, their ability to obtain information is of paramount importance to the adequate representation of their clients. Their ability to obtain information, however,

may be clouded by concerns about the literal dictates of Article 31(b), Uniform Code of Military Justice (UCMJ).<sup>11</sup> Article 31(b) provides:

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.<sup>12</sup>

Thus, military defense counsels ("person[s] subject to this chapter") face an unusual choice when interviewing a military witness that they suspect may have committed offenses. They must decide whether to advise the witness (suspect) of his Article 31(b) rights, and possibly lose the witness's testimony, or proceed by interviewing the witness without advising him and potentially violate Article 31(b). In the only decision on point, the United States Court of Military Appeals<sup>13</sup> (COMA) held that military defense counsel should read Article 31(b) rights when questioning suspects.<sup>14</sup>

The author believes that recent case law indicates that the United States Court of Appeals for the Armed Forces<sup>15</sup> (CAAF) has eliminated this requirement. According to this view of case law, the CAAF has established new guidelines for Article 31(b) rights warning requirements that do not require a literal interpretation of UCMJ Article 31(b) and do not require military defense counsel to read potential witnesses their rights when preparing to defend a case.<sup>16</sup>

<sup>10</sup> This note updates the article written by then Major John B. McDaniel entitled "Article 31(b) and the Defense Counsel Interview," which appeared in the May 1990 issue of *The Army Lawyer*. See John B. McDaniel, *Article 31(b) and the Defense Counsel Interview*, *ARMY LAW.*, May 1990, at 9. The opinions expressed in this note are the author's alone and do not necessarily reflect the policy of The Trial Defense Service, The Judge Advocate General, or the Army.

<sup>11</sup> 10 U.S.C. § 831(b) (1988) [hereinafter Article 31(b)].

<sup>12</sup> *Id.*

<sup>13</sup> On 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purposes of this note, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. See *United States v. Sanders*, 41 M.J. 485, n.1 (1995).

<sup>14</sup> *United States v. Milburn*, 8 M.J. 110 (C.M.A. 1979).

<sup>15</sup> See *supra* note 13.

<sup>16</sup> For an excellent discussion of the historical background of this subject and case law prior to 1990, see John B. McDaniel, *Article 31(b) and the Defense Counsel Interview*, *ARMY LAW.*, May 1990, at 9.



### *The Courts Have Never Literally Applied Article 31(b)*

Article 31(b) has never been literally applied to require all persons subject to the UCMJ to read Article 31(b) rights when interviewing military suspects in criminal cases.<sup>17</sup> The courts have consistently found that a literal interpretation of Article 31(b) is an overbroad and impractical interpretation of the codal provision.<sup>18</sup> Even in *United States v. Milburn*,<sup>19</sup> where the COMA recited the requirement that military defense counsel should read military suspects their Article 31(b) rights based on military due process and fundamental fairness concepts, the COMA did not place a similar affirmative responsibility on military judges. Thus, even in *Milburn*, the COMA did not literally apply Article 31(b).<sup>20</sup> The question then becomes what is the standard requiring Article 31(b) rights warning.

#### *The Duga Standard*

The COMA provided the foundation test requiring Article 31(b) rights warning in *United States v. Duga*.<sup>21</sup> *Duga* provides:

Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation . . . Unless both prerequisites are met, Article 31(b) does not apply.<sup>22</sup>

Today, however, the test enunciated by the COMA in *Duga* is only the first step. Recent case law redefines *Duga* and further limits the requirement for Article 31(b) warning.

#### *Duga Restricted*

In addition to the *Duga* standard, the courts now focus on the following: (1) whether the questioner was acting in a law enforcement capacity or whether the soldier was subject to the questioner's disciplinary powers, (2) whether the purpose of the questioning was for a law enforcement or disciplinary purpose, and (3) whether the questioner had an independent duty to gather information? Each of these considerations has consistently led the courts to find no rights warning requirement for defense counsel, but each case requires a careful examination of the facts in

applying the *Duga* standard. The following outlines a number of recent cases where the courts did not require Article 31(b) rights warnings despite the military member's status as a suspect of a crime.

#### *The Defining Cases*

##### *Independent Duty to Question*

- \* No rights warning requirement when doctor looked into possible child abuse because doctor's purpose was medical diagnosis. *United States v. Bowerman*, 39 M.J. 319 (C.M.A. 1994).
- \* No rights warning requirement when psychiatric social worker examined soldier because she was a health care professional engaged in treatment. *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993).
- \* No rights warning requirement when military pay officials looked into Basic Allowance for Quarters entitlement because it was an administrative matter within their official duties. *United States v. Guron*, 37 M.J. 942 (AFCMR 1993).
- \* No rights warning requirement for civilian intelligence agents because they had an independent duty to investigate. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992).
- \* No rights warning requirement for a government nurse because she responded to a soldier's request for emergency medical treatment. *United States v. Moore*, 32 M.J. 56 (C.M.A. 1991).

##### *No Law Enforcement Purpose*

- \* No rights warning requirement for a psychiatrist (O-4) because he had no law enforcement purpose. *United States v. Dudley*, 42 M.J. 528 (N.M.C.C.A. 1995).

##### *Personal Curiosity*

- \* No rights warning requirement for a soldier's escort because noncommissioned officer's questioning was motivated by personal curiosity. *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).

<sup>17</sup> A doctor's questioning when providing medical treatment was one of the first areas in which the COMA found a literal reading of Article 31(b) impractical. See *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954).

<sup>18</sup> See *United States v. Kirby*, 8 M.J. 8 (C.M.A. 1979); *United States v. Seay*, 1 M.J. 201 (C.M.A. 1975); *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954).

<sup>19</sup> 8 M.J. 110 (C.M.A. 1979).

<sup>20</sup> *Id.* at 114.

<sup>21</sup> 10 M.J. 206 (C.M.A. 1981).

<sup>22</sup> *Id.* at 210.

\* No rights warning requirement for a supervisor because section leader's questioning was motivated by personal curiosity. *United States v. Pittman*, 36 M.J. 404 (C.M.A. 1993).

### Operational Responsibility

\* No rights warning requirement for aircraft crew chief because crew chief's questioning was not for disciplinary purpose but to fulfill operational responsibilities for his aircraft. *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990).

### Military Defense Counsel—A Special Role?

With the CAAF's clear reluctance to extend Article 31(b) beyond personnel intimately involved in the prosecution and enforcement of criminal law, the question becomes, "What special role do defense counsel play that should require their inclusion in this group?" At least two possible reasons support including military defense counsel in Article 31(b)'s requirements: (1) their duty position and authority and (2) their status as military officers performing law enforcement when questioning soldiers.<sup>23</sup> Neither rationale is persuasive.

Most military defense counsel are captains or majors and, therefore, are senior in rank to the majority of military personnel they interview. This disparity could arguably evoke a response from a witness based on the officer's position of authority or rank. However, as a reason to require Article 31(b) rights advisements, superiority in rank or position unrelated to law enforcement purposes has consistently been rejected by recent court decisions as a reason to require Article 31(b) rights advisements.<sup>24</sup> Even members of a soldier's chain of command have not been found to be the alter egos of law enforcement personnel. Thus, mere status—position and rank—does not trigger the requirement to provide Article 31(b) rights warnings when questioning.<sup>25</sup>

Arguably, a military defense counsel's questioning, in terms of the subtle pressures to respond to military authority, is less coercive than questioning by many duty supervisors. A comparable situation is questioning by a military health professional, who, like the military defense counsel, will usually be senior in rank to the soldier. The questioner's rank, however, is secondary to the function that he or she is performing. Accordingly, from a standpoint of fundamental fairness or military due process, there appears to be little added justification to place an affirmative duty on military defense counsel to read Article 31(b) rights.<sup>26</sup>

As noted in *United States v. Milburn*,<sup>27</sup> the second arguable reason for requiring military defense counsel to advise suspects of Article 31(b) rights is that they are performing their military duties when questioning potential witnesses (suspects). This rationale has not been favorably accepted in the cases cited above where the interviewer was questioning based on an independent duty, other than law enforcement, which did not trigger Article 31(b) rights advisement. Indeed, because a military defense counsel has an independent duty to investigate the case and zealously represent the client, completely separate of the prosecutorial function, the better argument is that a defense counsel should not be required to advise interviewees of their Article 31(b) rights.

### Independent Purpose or Subterfuge

A strong and continuing criticism of the *Milburn* decision is that a civilian attorney is clearly not bound by Article 31(b) requirements<sup>28</sup> and Congress could not have desired to prescribe different standards for military and civilian counsel.<sup>29</sup> In every case involving a civilian, the first determination should be whether the civilian's function is so merged with the military that they are, in reality, part of the military law enforcement investigation. For example, in *United States v. Quillen*,<sup>30</sup> the COMA held that a civilian post exchange detective was required to issue Article 31(b) rights advisement to a military suspect before questioning

<sup>23</sup> See *Milburn*, 8 M.J. at 110.

<sup>24</sup> *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990) (Crew chief (sergeant) not required to read subordinate rights); *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994) (Escort (Staff Sergeant), assigned to the same unit, not required to read rights); *United States v. Bowerman*, 39 M.J. 319 (C.M.A. 1994) (physician (Major) not required to read rights). *United States v. Dudley*, 42 M.J. 528 (N.M.C.C.A. 1995) (Psychiatrist (Lieutenant Commander) not required to read rights).

<sup>25</sup> See e.g., *United States v. Pittman*, 36 M.J. 404 (C.M.A. 1993) (Section Leader (Sergeant) not required to read rights).

<sup>26</sup> A related argument for requiring military defense counsel to read Article 31(b) rights is that any military officer, interrogating a witness and trying to obtain incriminating statements should be required to advise the soldier of his rights. *United States v. Kershaw*, 26 M.J. 723 (A.C.M.R. 1988) citing *United States v. Milburn*, 8 M.J. 110 (C.M.A. 1979) (emphasis added). However, defense counsel's primary purpose is to find evidence that exculpates his client, not prosecute the witness.

<sup>27</sup> 8 M.J. 110 (C.M.A. 1979).

<sup>28</sup> See *United States v. Howard*, 17 C.M.R. 186 (C.M.A. 1954).

<sup>29</sup> *Id.* At 192.

<sup>30</sup> 27 M.J. 312 (C.M.A. 1988).

him. The courts, however, have been generally reticent to find a merger of law enforcement and other valid questioning purposes. If there is no agency relationship or merger of functions, no Article 31(b) rights warning requirement arises for civilians.

*United States v. Moreno*,<sup>31</sup> a child sex abuse case, is an example of one of the most common factual scenarios involving multiple possible suspects. In *Moreno*, the COMA held that a civilian social worker employed by the State of Texas was not an agent of the military nor involved in the criminal investigation; thus, there was no requirement for her to read potential suspects Article 31(b) rights.<sup>32</sup> In *United States v. Raymond*,<sup>33</sup> the COMA broadened that holding to seemingly include all "health care professionals." Finally, in perhaps the furthest extension of the no merger rule, the COMA in *United States v. Lonetree*<sup>34</sup> extended that rule to civilian intelligence agents investigating the potential loss of classified materials by a United States military embassy guard in the Soviet Union. Accordingly, the merger of functions or agency determination for Article 31(b) purposes will only be found where the questioner's function is almost fully integrated with a law enforcement purpose. The significance is that the courts desire to narrowly limit the application of Article 31(b) to those performing law enforcement duties while questioning.

## Conclusion

A requirement that military defense counsels advise military suspects of their Article 31(b) rights when investigating a case is in error. Although military defense counsel should be acutely aware of the problems and ethical considerations of dealing with unrepresented individuals,<sup>35</sup> case preparation should not involve military defense counsel advising potential suspects of their Article 31(b) rights. *United States v. Milburn*<sup>36</sup> cites important principles in terms of military due process, fundamental fairness, and duties that military defense counsel have as officers of the court. However, requiring military defense counsels to advise witnesses of Article 31(b) rights, injures the fundamental standards of defense practice of strict allegiance to, and zealous representation of, a single client. In the representation role, military defense counsel may rely on the decisions like *Moreno*, *Raymond*, and *Lonetree*, in not advising a military member of their Article 31(b) rights during questioning even if the defense counsel suspects the military member of committing an offense. Further aid in deciding whether to read Article 31(b) warnings, may be obtained from senior defense counsel and regional defense counsel.<sup>37</sup> Lieutenant Colonel H.L. Williams.

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<sup>31</sup> 36 M.J. 107 (C.M.A. 1992).

<sup>32</sup> *Id.* Too many defense practitioners, since the *Moreno* decision, fail to examine the facts of their individual case to see if there is a merger between the law enforcement agents and social services. This is still an issue in need of litigation. For assistance, see *United States v. Raymond*, 38 M.J. 136, 140 (C.M.A. 1993) (Wiss, J. Concurring in the result). See also, *United States v. Moreno*, 36 M.J. 107, 120 (C.M.A. 1992) (Sullivan, C.J. dissenting).

<sup>33</sup> 38 M.J. 136 (C.M.A. 1993).

<sup>34</sup> 35 M.J. 396 (C.M.A. 1992).

<sup>35</sup> DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992), Rule 4.3. If the witness is represented by counsel, then you must generally seek the consent of the other lawyer. *Id.* Rule 4.2.

<sup>36</sup> 8 M.J. 110 (C.M.A. 1979).

<sup>37</sup> The opinions expressed in this note are the author's alone and do not necessarily reflect the policy of The Trial Defense Service, The Judge Advocate General's Corps, or the Army.

## Litigation Division Notes

### Army National Guard and United States Army Reserve Cases

#### Introduction

The Military Personnel Law Branch of the United States Army's Litigation Division defends the United States and its officials in lawsuits that challenge military personnel decisions. Often, this defense extends to challenges brought by United States Army Reserve (USAR) and Army National Guard (ARNG) soldiers. These soldiers may seek judicial review of Army personnel decisions in all federal district courts and in the United States Court of Federal Claims. Appeals of those decisions go to the appropriate federal circuit courts.

This note briefly analyzes four recent appellate decisions. Although most of the cases analyzed are not published and, therefore, are of limited precedential value, they provide an insight into how courts treat military personnel suits. More importantly, a review of these cases will enable practitioners to better evaluate potential litigation risk and exposure.

#### *Ange v. West*<sup>1</sup>

##### The Facts and District Court Decision

The plaintiff, Michael Ange, a member of the North Carolina Army National Guard (NCARNG), was called to active duty for Desert Storm in 1990. While serving in Saudi Arabia, Mr. Ange injured his back, his knee, and sustained other illnesses and injuries. After Desert Storm, Mr. Ange left active service and returned to the NCARNG. In March, 1992, he was involuntarily transferred to inactive status and subsequently discharged.

Mr. Ange filed suit in district court alleging a violation of his Fourteenth Amendment rights to due process. Specifically, he claimed that he should have received a medical examination before being transferred to the inactive reserves. Further, he demanded copies of his medical records to file a disability claim.

The district court found Mr. Ange abandoned his claim for a medical examination by failing to timely request an examination. The district court also found Mr. Ange had an unqualified right to his medical records as a former service member. However, because the Army, after an exhaustive search, was unable to locate any of Mr. Ange's medical treatment records, the district court dismissed the case as moot.

##### Circuit Court Decision<sup>2</sup>

Mr. Ange appealed the decision of the district court dismissing his suit as moot. The United States Court of Appeals for the Fourth Circuit affirmed the reasoning of the district court in a *Per Curiam* decision, finding no reversible error.

##### Analysis

Although the courts ruled in favor of the government in this case, two points warrant mention. First, the district court found soldiers have an "unqualified right to their medical records," particularly when attempting to file disability claims. The lost medical records weakened the government's litigation position. Second, even though the Army erred in losing or misplacing Mr. Ange's records, the court found no prejudice because the Army showed good faith in attempting to locate the records. As a practical matter, courts will review cases to ensure soldiers are not unduly prejudiced by institutional errors. If an error has occurred, attorneys or their clients should take extra care to document efforts made to correct the error.

#### *Bunch v. United States*<sup>3</sup>

##### The Facts and Court of Federal Claims Decision

On 3 February 1989, Mr. Robert Bunch, a retired colonel in the USAR, filed suit in the United States Court of Federal Claims requesting promotion to brigadier general, corresponding back pay, and reinstatement. Mr. Bunch alleged racial discrimination in violation of Title VII<sup>4</sup> in that he was passed over for promotion in favor of less qualified nonminorities. He requested that the court order the Department of the Army to correct his mili-

<sup>1</sup> No. CA-94-38-H3 (E.D.N.C. Mar. 24, 1995).

<sup>2</sup> *Ange v. West*, 81 F.3d 148, 1996 WL 155996 (4th Cir. (N.C.)) (Unpublished).

<sup>3</sup> *Bunch v. United States*, 33 Fed. Cl. 337 (1995).

<sup>4</sup> See generally Title VII Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988) as amended by the Civil Rights Act of 1991 Pub. L. No. 102-166 (1991) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

ary records to reflect promotion to brigadier general, void his retirement, and reinstate him to an active reserve status as a general officer.

In response to the government's motion to dismiss, Mr. Bunch filed a motion for a suspension of the proceedings while he pursued his action before the Army Board for the Correction of Military Records (ABCMR). The Court of Federal Claims granted his motion. The ABCMR subsequently denied Mr. Bunch relief.

On 2 May 1995, the Court of Federal Claims ruled that the Mr. Bunch's challenge to the promotion system presented a nonjusticiable claim and, therefore, granted the government's motion to dismiss because courts lack the expertise and authority to make promotion determinations.<sup>5</sup> Further, the court found that the alleged violation of Title VII was beyond the jurisdiction of the Court of Federal Claims. The court held that jurisdiction rested exclusively with a federal district court.

#### Circuit Court Decision<sup>6</sup>

Mr. Bunch appealed the findings of the Court of Federal Claims on two grounds. First, he claimed the issue regarding promotion to brigadier general was justiciable. Second, Mr. Bunch asserted that the Court of Federal Claims erroneously dismissed his racial discrimination claim instead of transferring it to an appropriate federal district court.

The United States Court of Appeals for the Federal Circuit rejected Mr. Bunch's contentions and affirmed the Court of Federal Claims. The Federal Circuit court agreed that "the promotion of officers in the armed services is a matter of military judgment which the courts have neither the expertise nor authority to supervise." Therefore, the Court of Federal Claims was correct to find the issue nonjusticiable.

The Federal Circuit court also held that the Court of Federal Claims was correct in not transferring Mr. Bunch's racial discrimination claim to a federal district court. The Federal Circuit reasoned that transfer of the case to district court would be futile because "[t]here is widespread agreement among the circuits that Title VII protections do not apply to uniformed military personnel."

#### Analysis

The Court of Appeals for the Federal Circuit reaffirmed the principle that judicial review of military promotions is beyond the expertise of the courts and such suits should be dismissed as nonjusticiable. Further, the Federal Circuit court recognized that district courts have exclusive jurisdiction for racial discrimination claims under Title VII. The Federal Circuit court reaffirmed the "widespread agreement" among the courts that soldiers may not make racial discrimination claims under Title VII.

#### *Laviano v. West*<sup>7</sup>

#### The Facts and the District Court Decision

Mr. Laviano was an enlisted member of the Tennessee Army National Guard (TNARNG) selected to attend Officer Candidate School at the Tennessee Military Academy (TMA). Prior to graduation, Mr. Laviano was eliminated for leadership deficiencies.

Claiming error, Mr. Laviano petitioned the ABCMR for his diploma from the TMA and appointment as either a commissioned officer in the TNARNG or for a commission as an officer in the USAR. The ABCMR informed Mr. Laviano that they had no authority over the TNARNG but considered his request for a USAR commission. The ABCMR denied his requested relief for a USAR commission.

Mr. Laviano filed suit in the Federal District Court for the District of Columbia seeking judicial review under the Administrative Procedure Act<sup>8</sup> of a final agency action of the ABCMR. He alleged that his dismissal from TMA violated his Fourteenth Amendment due process rights. He sought a declaratory judgment that the ABCMR's action was arbitrary and capricious and he sought an order granting him a diploma from TMA and either a commission as an officer in the TNARNG or a commission in the USAR.

The district court found that the ABCMR was correct in asserting that it had no authority over the TNARNG, a state entity. The district court reasoned that the United States Constitution and federal statutes provide that a state controls the commissioning of officers in its National Guard. The district court found that "there is no expectation that the ABCMR or the federal judiciary have a role to play in the appointment of State National Guard officers." The district court granted summary judgment for the government.

<sup>5</sup> The court based its reasoning on *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993) and *Adkins v. United States*, 30 Fed. Cl. 158, 162 (1993). *But cf. Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (court may review a procedural defect, such as a violation of a statute or regulation).

<sup>6</sup> *Bunch v. United States*, 78 F.3d 605, 1996 WL 75278 (Fed. Cir.) (Unpublished).

<sup>7</sup> *Laviano v. West*, Civil Action No. 94-0103 (D.C. Dist. Ct. April 11, 1995).

<sup>8</sup> See generally 5 U.S.C. § 701 (1995).

## Circuit Court Decision<sup>9</sup>

Mr. Laviano appealed to the United States Court of Appeals for the District of Columbia contending that the district court erred by finding that the ABCMR did not have the authority to appoint Mr. Laviano as an officer in the TNARNG or in the USAR. The District of Columbia court denied Mr. Laviano relief and found that the ABCMR did consider Mr. Laviano's request for a USAR commission and was not arbitrary and capricious in denying relief.

### Analysis

*Laviano* is important because it confirms the ABCMR's limited role when reviewing the actions of a State National Guard. Though the ABCMR may change Army records in the case of an error or injustice, it may not correct state personnel records and decisions of state National Guards. The ABCMR may only correct USAR records and any remedy the ABCMR proposes, such as reinstatement, extends only to the USAR and not to the State National Guard.

### *Tracy v. Chief, National Guard Bureau*<sup>10</sup>

#### The Facts and District Court Decision

In 1989, Mr. Tracy enlisted in the Rhode Island Army National Guard (RIARNG). Mr. Tracy failed to note on his enlistment contract his incarceration for civilian drug related offenses. After discovering the offenses during a routine security clearance check in September 1991, the RIARNG separated Mr. Tracy with an Other Than Honorable (OTH) discharge.

Subsequently, Mr. Tracy wrote a letter to the Adjutant General of the RIARNG complaining that he had received an OTH discharge without a hearing, in violation of Army regulations and his constitutional rights. He requested that his discharge be voided and changed to "honorable."

In response, the RIARNG revoked Mr. Tracy's discharge and held an administrative discharge board. Mr. Tracy refused to attend the hearing claiming that the board lacked jurisdiction over him as he had already been discharged. On 27 June 1992, the administrative separation board found that Mr. Tracy had engaged in misconduct including making false statements on his personnel security questionnaire and that he had fraudulently enlisted in the RIARNG. The board's recommendation of an

OTH discharge was adopted by the Adjutant General. On 21 July 1992, the RIARNG reduced Mr. Tracy from sergeant to private and discharged him.

In March 1993, Mr. Tracy applied to the Army Discharge Review Board (ADRB) requesting that his discharge be upgraded to honorable and that he be restored to the rank of sergeant. On 23 August 1993, Mr. Tracy filed a civil action in federal district court alleging constitutional violations as well as discrimination. Mr. Tracy sought an upgrade of his OTH discharge and five million dollars in unspecified damages. The district court stayed the proceedings pending a determination by the ADRB. The ADRB ruled for Mr. Tracy and ordered his discharge upgraded to honorable.

Pursuant to the government's motion for summary judgment, the district court found that Mr. Tracy's request for injunctive relief was moot and his request for damages nonjusticiable. In granting the government's motion, the district court found Mr. Tracy's alleged damages stemmed from his discharge and were service-connected. Therefore, any claim for money damages arising from his discharge were "incident to service" and barred by the *Feres* doctrine.<sup>11</sup>

#### Circuit Court Decision<sup>12</sup>

Mr. Tracy appealed the district court's decision. He claimed that he had a justiciable claim against the RIARNG for money damages because he was a civilian, not a service member, when subsequent action was taken on his discharge.

The United States Court of Appeals for the Sixth Circuit rejected Mr. Tracy's arguments and affirmed the district court's reasoning. Specifically, the Sixth Circuit found that the "*Feres* doctrine . . . encompasses . . . all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military . . ." Although Mr. Tracy argued that he was a civilian after the RIARNG discharged him the first time, the discharge itself was "service-connected," so Mr. Tracy could not maintain a suit for money damages.

### Analysis

Courts will scrutinize discharges, particularly when they are stigmatizing in nature and regulatory violations are alleged. Judge advocates and commanders must ensure regulatory compliance, especially when discharges are characterized as less than honor-

<sup>9</sup> *Laviano v. West*, 80 F.3d 558, 1996 WL 135719 (D.C. Cir.) (Unpublished).

<sup>10</sup> *Tracy v. National Guard Chief*, No. C2-93-819 (S.D. Ohio Mar. 23, 1995).

<sup>11</sup> The court relied on *Feres v. United States*, 340 U.S. 135, 146 (1950), to bar recovery for tort money damages, and on *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), that bars suits by service members or former service members against military superiors for alleged constitutional violations.

<sup>12</sup> *Tracy v. Chief of Natl. Guard Bureau*, 76 F.3d 380, 1996 WL 50627 (6th Cir. (Ohio)) (Unpublished), cert. denied 1996 WL 138083 (U.S. 1995).

able. Although money damages are typically not available to soldiers for service connected injuries, courts can order corrections to records if regulatory violations occur.

### Conclusion

Historically, courts defer to the military on personnel decisions. Although statutes and precedent limit judicial review, courts will review cases to ensure statutory and regulatory compliance. Typically, courts will avoid reviewing discretionary military decisions. To minimize litigation exposure, judge advocates reviewing adverse personnel actions must take the time to research and review applicable statutes and regulations to ensure that these actions are properly processed. Captain Matthew L. Dana.

## Environmental Law Division Notes

### Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 3, number 11, dated August 1996, is reproduced below.

### Editor's Note

Major Mike Corbin of the Restoration and Natural Resources Branch of the Environmental Law Division (ELD) has transferred to the Litigation Branch. Major Corbin's replacement is Major Allison Polchek who is coming to ELD after finishing the environmental law LL.M. program at the George Washington University. Major Polchek will be responsible for base realignment and closure actions and issues involving the National Environmental Policy Act.

### Clean Air Act

In a case that may have major implications on how the United States Environmental Protection Agency (USEPA) approves Title V programs, a court ordered the USEPA to give final approval to the state of Washington's Title V program.<sup>13</sup>

The USEPA had granted Washington's Title V program interim status and conditioned final approval on the repeal of the part of Washington's program that exempted "insignificant emission units" (IEUs) from any monitoring, reporting, and record-keeping requirements. The USEPA had approved proposals similar to Washington's in at least eight other states.

This decision forces the USEPA to ensure that its policies are consistently applied across the country or risk facing similar challenges from affected parties. In the past, the onerous task of approving or disapproving the Title V programs was delegated to the USEPA Regions. If the USEPA has to ensure consistency among programs, it may slow down the USEPA's approval process for all air programs. This case not only underscores the differences between state Title V programs, but the USEPA's inconsistent treatment of Title V programs as well. Lieutenant Colonel Olmscheid.

### New Lead-Based Paint Abatement Regulations Proposed

On 7 June 1996, the United States Department of Housing and Urban Development (HUD) issued a proposed rule for lead-based paint (LBP) abatement.<sup>14</sup> The rule will consolidate LBP regulations from various HUD programs at a single *Code of Federal Regulations* location. The rule will address notification, evaluation, and reduction of LBP in all federally owned housing to be transferred outside of the federal government.

Those Environmental Law Specialists (ELS's) at installations that will be transferring housing units should be aware of proposed Subpart C, Disposition of Residential Property Owned by a Federal Agency other than HUD. Proposed Part 37 sets forth the particular requirements for testing and abatement of LBP hazards.

The HUD anticipates that a final LBP rule will be published by September 1996, and will become effective one year after the date of publication of the final rule. The ELD will inform ELS's of the effective date of the regulations once it is determined. Ms. Fedel.

### *Citizens for a Better Environment v. Union Oil, Co.*<sup>15</sup>

Settlements entered into for the purpose of circumventing the stigma of a "penalty" can have unintended consequences. What follows is an illuminating example of how consenting to a "non-punitive" penalty can subject a corporation to a citizen suit.

<sup>13</sup> *Western States Petroleum Association v. Environmental Protection Agency*, No. 95-70034, 1996 U.S. App. LEXIS 14612 (9th Cir. June 17, 1996).

<sup>14</sup> Office of Lead-Based Paint Abatement and Poisoning Prevention; Requirements for Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 61 Fed. Reg. 29170 (1996) (proposed June 7, 1996).

<sup>15</sup> 42 ERC 1737, No. 95-15139, 1996 U.S. App. LEXIS 17437 (9th Cir. 1996).

Union Oil Company (UNOCAL) was involved in a dispute with the California Regional Water Quality Control Board, San Francisco, (the Board) regarding its National Pollution Discharge Elimination System (NPDES) permit limits. As part of a settlement, the Board issued more lenient interim limits on selenium. The parties agreed upon the issuing of a cease and desist order (CDO) directing that UNOCAL pay \$780,000 and relieving UNOCAL from meeting the final selenium limits until 1998.

Citizens for a Better Environment (CBE) filed suit pursuant to the citizen suit provisions of the Clean Water Act (CWA)<sup>16</sup> in federal district court. At pretrial, UNOCAL lost a motion to dismiss and then filed an appeal on two grounds. First, UNOCAL argued that the suit was barred by § 1319(g)(6)(iii), which makes § 1365 of the Clean Water Act inapplicable when a penalty has been paid and a state has issued a final order, not subject to judicial review. The second argument advanced by UNOCAL was that the CDO, in effect, changed the permit limits to the interim standard.<sup>17</sup>

Regarding the \$780,000 payment, the court held that it was not a penalty but a settlement. The court relied upon the wording of the CDO, which described the sum not as a penalty, but as a "payment." Additionally, the court noted that the CDO was not issued under the authority for CDOs nor under the authority to impose a civil penalty. The CBE pointed out that UNOCAL sought to have the sum described as a payment and not a penalty for publicity reasons. The CBE also argued that the payment did not adhere to the formal procedures required to assess a fine and, therefore, imposed a benefit on UNOCAL—an economic benefit of non-compliance that was never scrutinized. The district court had held that the section of the CWA, under which the CDO was issued, was not comparable to the section on imposing civil penalties. The Ninth Circuit agreed with the district court's determinations and expressly declined to apply a contrary holding from the First Circuit decision in *North and South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991).

The UNOCAL case is important because it illustrates that how one chooses to characterize the settlement of a dispute with a regulatory agency can have unforeseen impacts. While it appears that UNOCAL knew what was being negotiated, one can see where a word change here or a phrase change there might have acted to both bar a citizen suit and allow UNOCAL to avoid a "penalty." Lieutenant Colonel Lewis.

Did you know . . . ? The earth supports 30 million species.

### Administrative Stay of Used Oil Regulatory Provisions

On 30 October 1995, the United States Environmental Protection Agency (USEPA) announced an administrative stay of certain provisions of the Used Oil Management Standards pending issuance of a rulemaking to amend the standards.<sup>18</sup>

The standards, originally issued in September 1992, allowed mixtures of used oil and characteristic hazardous waste to be managed as used oil if the hazardous characteristic was removed. In accordance with these standards, the decharacterized mixture was subject to the land disposal restrictions of Part 279 and not as hazardous waste under the definition of hazardous waste.<sup>19</sup> Therefore, the land disposal restrictions of Part 268, disposal prohibitions for characteristic waste, did not apply to disposal of the decharacterized mixture.

Only two weeks after the 1992 used oil standards were promulgated, the United States Court of Appeals for the District of Columbia in the case of *Chemical Waste Management, Inc. v. Environmental Protection Agency*,<sup>20</sup> invalidated dilution of characteristic hazardous waste as a form of treatment. Citing *Chemical Waste Management*, Safety Kleen then challenged the EPA and asserted that the used oil rules allowed wastes that were decharacterized by their mixture with used oil to be land disposed despite the presence of hazardous constituents.

The stay of the mixture provisions of § 279.10(b)(2) recognizes the need to modify the used oil mixture rules to comply with the *Chemical Waste Management* decision. The remainder of the used oil regulations will be effective. The stay of § 279.10(b)(2) means that hazardous waste and land disposal regulations will apply to mixtures of used oil and characteristic hazardous waste even if the characteristic is no longer exhibited. The practical effect of the stay is that mixing will be discouraged and the USEPA believes that the segregated waste streams will be more likely to be recycled. Major Anderson-Lloyd.

### New Developments in Natural Resource Damages

On 7 May 1996, the Department of Interior (DOI) published a final rule to amend the regulations for assessing natural re-

<sup>16</sup> 33 U.S.C. § 1365 (1987).

<sup>17</sup> See *Citizens for a Better Environment, v. Union Oil Co.*, 1996 U.S. App. LEXIS at 17437.

<sup>18</sup> Standards for the Management of Used Oil, 40 C.F.R. Part 279 (1995).

<sup>19</sup> *Id.* at 261.3 (1995).

<sup>20</sup> 976 F.2d (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1961 (1993). Safety Kleen Corporation challenged the used oil management standards as violative of the statutory land disposal requirements of the Resource Conservation and Recovery Act.



source damages (NRDs) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>21</sup> This final rule only affects the *Type A Regulations*, which were promulgated separately from the *Type B Regulations*. Both the *Type A* and *Type B Regulations* have been judicially challenged and subsequently revised by DOI.

The DOI issued its original *Type A Regulations* on 20 March 1987. The *Type A Regulation* procedures are a standard methodology for assessments that require minimum field observation in cases of minor discharges or releases in coastal and marine environments and the Great Lakes environments. The final rule, published on 7 May 1996, amends the *Type A Regulation* procedures to reflect two decisions by the United States Court of Appeals for the District of Columbia issued on 14 July 1989.<sup>22</sup>

The DOI published its original *Type B Regulations* on 1 August 1986. The *Type B Regulation* procedures are "alternative protocols for conducting assessments in individual cases."<sup>23</sup> The United States Court of Appeals for the District of Columbia invalidated portions of the *Type B Regulations* in the *State of Ohio* case cited above. In response to this decision, the DOI published a revised regulation in 1994. Kennecott Utah Copper Corporation challenged the 1994 revisions to the *Type B Regulation* procedures, and the United States Court of Appeals for the District of Columbia issued a decision on 16 July 1996 that upheld some of the 1994 revisions while invalidating others.<sup>24</sup>

The court rejected the DOI's claim that the statute of limitations provided in CERCLA § 9613(g)(1) began to run when the revised regulations were promulgated in 1994, rather than the date that the original regulations were promulgated. This statute of limitations provision establishes that no action may be brought following the later of (1) the date of discovery of the loss, or (2) the date on which regulations are promulgated under § 9651(c).

The court also held that the challenge to the DOI's interpretation of the term "services" for measuring the level of restoration of an injured resource, to include biological resources as well as human resources, was time-barred. The court did, however, invalidate the 1994 regulations to the extent that they expand the concept of services from the 1986 regulations to include measuring the physical and biological characteristics of the resource in addition to the resource itself. As stated by the court, "our invalidation of the 'resources and services' provisions of the 1994

regulations has the effect of reinstating the 'services' approach under the 1986 Regulations."<sup>25</sup> The court upheld the DOI's regulatory decisions on a series of other issues, including cost effectiveness, coordination between restoration remedies and response actions, and the acquisition of Federal lands. It is uncertain at this time whether DOI will again revise the *Type B Regulations* in a rulemaking procedure.

In a related matter, the DOI has published an advance notice of proposed rulemaking to solicit comment on potential revisions to the *Type B Regulation* procedures to incorporate the National Oceanic and Atmospheric Administration's recently promulgated NRD assessment regulations for oil discharges.<sup>26</sup> Ms. Fedel.

**Did you know . . . ? Each of us breathes  
21,000 quarts of air each day.**

### Safe Drinking Water Act

Before Congress adjourned until Labor Day, it passed long-awaited amendments to the Safe Drinking Water Act (SDWA). President Clinton signed the amendments into law on 6 August 1996. A more in-depth review of the amendments will be provided next month, but here are some provisions of which all practitioners should be aware.

As expected, the amendments included a waiver of sovereign immunity that mirrors that of the Resource Conservation and Recovery Act (RCRA). Consequently, federal liability for violations of drinking water provisions now includes injunctive relief, civil and administrative fines and penalties, administrative orders, and reasonable service charges assessed in connection with permits, plans, inspections, or monitoring of drinking water facilities, as well as any other nondiscriminatory charges respecting the protection of wellhead areas or public water systems or underground injection. The 1996 amendments also broaden criminal liability under the SDWA so that agents, employees, or officers of the United States may be prosecuted for any criminal sanction (including, but not limited to, any fine or imprisonment) under any federal or state requirement.

Another addition was a change enabling the EPA to issue penalties against federal agencies for violations of the SDWA. These

<sup>21</sup> Natural Resource Damage Assessments—Type A Procedures, 61 Fed. Reg. 20,560 (May 7, 1996).

<sup>22</sup> See *State of Ohio v. United States Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989), and *State of Colorado v. United States Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989).

<sup>23</sup> 42 U.S.C. § 9651(c)(2)(B) (1986).

<sup>24</sup> *Kennecott Utah Copper Corporation v. United States Dep't of the Interior*, No. 93-1700, 1996 U.S. App. LEXIS 17,418 (D.C. Cir. July 16, 1996).

<sup>25</sup> *Id.* at \*79.

<sup>26</sup> Natural Resource Damages Assessments—Type B Procedures, 61 Fed. Reg. 37,031 (1996).

can range as high as \$25,000 per day per violation, and, perhaps more importantly, citizens will be able to seek review of administrative penalty orders against federal agencies and will also be able to sue to enforce whatever penalties may be imposed. Finally, the President was given the authority to waive compliance by a federal agency of the executive branch if it is in the paramount interest of the United States to do so. The SDWA provisions that apply to federal agencies are available as an attachment to message 97970 in the Environmental Law Forum on the Legal Automation Army-Wide System Bulletin Board Service. Captain DeRoma.

### EPA Releases Fiscal Year 1995 Enforcement Report

Debate begins over interpretation of the United States Environmental Protection Agency's (USEPA) long-awaited Enforcement Accomplishments Report for Fiscal Year 1995 (FY 1995 Report). The FY 1995 Report, due 1 June 1996, was released the week of 5 August 1996 by the United States Environmental Protection Agency's Office of Enforcement and Compliance Assurance (OECA). According to one source in the OECA, the delay was due in large part to USEPA efforts to resolve reporting policies and statistical discrepancies between divergent media and Regional offices.

The USEPA was faced with significant "bean counting" issues such as how to count acts resulting in violation of several statutes, when to implicate a parent company when one of its facilities receives a complaint, how to count a violation of one statute that is discovered during an inspection in another media, and who is credited when the USEPA and a state conduct a joint inspection. This note examines some of the issues surfacing in the Report regarding the USEPA's overall enforcement policies and strategy. Next month's Bulletin will analyze some of the conclusions suggested in the Report regarding the compliance posture of the regulated community.

The FY 1995 Report has been eagerly awaited by industry and environmental groups, as well as public officials on both sides of the political fence, seeking to defend or condemn the efficacy of the USEPA's enforcement program. The USEPA spokespersons hailed the EPA's successful enforcement efforts, citing the record number of criminal enforcement actions filed with the United States Department of Justice (DOJ) in FY 1995 as "reflecting EPA's stepped up targeting of the worst polluter and the most significant threats to the public health and the environment."<sup>27</sup> The USEPA referred 256 criminal enforcement cases to DOJ during FY 1995, up from 220 in FY 1994.

However, the USEPA's FY 1995 enforcement numbers have dropped dramatically from FY 1994 in nearly every other category. The number of administrative penalties assessed by the USEPA dropped from 1476 to 1105, compliance orders dropped from 2016 to 1864, inspections dropped from 7526 to 7309, and administrative civil referrals to DOJ plummeted from 430 to 214. Further, one source indicated that the criminal enforcement assets were left untouched by a 1990 agency reorganization effort, and in fact have increased in staff and resources. "The criminal program is basically a separate agency," the source says. "It runs by itself. The parts that the USEPA actually runs are falling apart."<sup>28</sup>

Agency spokespersons assert that low numbers do not necessarily reflect inactivity; rather, they demonstrate the USEPA's new enforcement strategy. According to USEPA Administrator Carol Browner, "We are in a different kind of enforcement mode than we were historically. It is no longer about how many cases are filed, it is about the quality of the cases . . . the baseline should be: What were the reductions in air pollution achieved for these cases? What were the reductions in water pollution achieved for these cases? How many more people are in compliance today because of the Office of Enforcement and Compliance Assurance than were in compliance a year ago or two years ago?"<sup>29</sup> But according to Bruce M. Diamond, a former USEPA enforcement official of eleven years, these professed visions of changed strategies do not affect the basic tenet that enforcers are only as good as their statistical booty. "There is an old and rather cynical expression among USEPA enforcers that 'a bean is a bean is a bean' . . . An USEPA enforcement official who wants to look good and receive recognition, promotion, and other rewards has traditionally needed to make sure that enforcement targets are met. The resulting end-of-fiscal-year scramble to meet targets is not a pretty sight."<sup>30</sup>

Enforcement officials of the USEPA, including Enforcement Chief Steven Herman, blame the decreased numbers on a prolonged budget standoff and the winter's resultant four-day government shutdown, as well as a Republican-slashed agency enforcement budget.<sup>31</sup> But one former USEPA enforcement official points out that rather than a decrease in enforcement resources the reorganization of previously disjointed sections into one consolidated office has consolidated resources as well, yielding a significant increase in the enforcement office budget. Reports such as these prompted Republican supporters to vigorously defend Grand Old Party budget cuts. Commerce Committee Chairman Thomas Bliley (R-VA) declared, "All this Fall, USEPA Administrator Carol Browner claimed that Congress had taken the USEPA's enforcement cop off the beat, but now we learn that the cop was asleep at his post." Captain Anders.

<sup>27</sup> 17 *INSIDE EPA* 30, at 8 (July 26, 1996).

<sup>28</sup> *Id.*

<sup>29</sup> *Exclusive: Inside EPA Interview with EPA Administrator Carol Browner*, 17 *INSIDE EPA* 6, at 8 (Feb. 9, 1996).

<sup>30</sup> *Confessions of an Environmental Enforcer*, 26 *ELR* 10252 (May 1996).

<sup>31</sup> *INSIDE EPA*, at 10 (July 26, 1996).

# Claims Report

United States Army Claims Service

## Personnel Claims Note

### Turn-in of IRV Shipment Items with Salvage Value

The following information supplements the guidance given in *Department of the Army Pamphlet 27-162, Legal Services: Claims*, paragraphs 2-44, 2-55a(8), 3-8d(4), and Section I of Appendix E.<sup>1</sup>

On Increased Released Valuation (IRV) shipments, carriers have a right to pick up "destroyed" items—those items for which the claimant was paid the depreciated replacement value, rather than a loss of value or repair cost. The carrier will pick up those items directly from the claimant and may do so whether or not the carrier ever fully pays for the item.

In most cases, claimants will *not* be directed to turn in destroyed items from IRV shipments to the Defense Reutilization and Marketing Office (DRMO). The carrier is entitled to those items. If the claimant wishes to keep them, a reasonable salvage value will be deducted from the amount otherwise payable at the time the claim is adjudicated. The carrier has no right to pick up items for which salvage value has been deducted.

When claims are made on high value items, such as Lladro figurines and *schranks*, and the carrier has stated that it does not intend to exercise its salvage rights, it would be appropriate to direct the claimant to turn the item in to the DRMO if the field claims office determines that the item has some salvage value. Otherwise, the claimant may be unjustly enriched by receiving payment for items and keeping them. Chronology sheets should be annotated to indicate the action taken.

The claims instruction packets given to the claimants should advise them to retain all property for at least ninety days after final settlement unless the claims office determines it to be hazardous. After ninety days, claimants should be advised to call the field claims office for authorization to dispose of the items. Additionally, the final settlement letter to the claimant should identify the items that the carrier would be entitled to keep if it elects to exercise its salvage rights within the prescribed time period.

Claims offices must identify files in which the carrier is entitled to salvage and must process these claims for recovery action within twenty days so that the claimant does not dispose of salvageable items before the end of the period allotted for carrier pickup.<sup>2</sup> Ms. Holderness.

<sup>1</sup> DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989).

<sup>2</sup> *Id.* para. 3-8d(4)(a).

## Claims for Russian Boxes

Several types of small decorative Russian art objects are widely available for purchase by Americans serving in Europe and elsewhere. Among the items available are fine hand-painted Russian lacquer boxes that exhibit images painted in painstaking detail on carefully created papier-mâché surfaces. The entire process can be quite sophisticated and take several months to complete. As a result, the finished product is often quite valuable. Many of the products on the market, however, are less elaborate and are, therefore, significantly less expensive. In addition, the increase in the number of Russian boxes available in recent years has resulted in a substantial reduction in the price of many of the boxes.

Field offices presented with a high-dollar claim for a Russian box may have difficulty determining an appropriate replacement cost. Apart from the material used, the value of a Russian box largely depends on the detail of its painted image. Unless the claimed item readily matches a line of items offered in a store or catalogue, its unique characteristics cannot be discerned by casual observation. The determination will require an expert to examine the item under a magnifying glass. If an expert is not available, claimants should in your area, contact the Personnel Claims Branch for a list and fee schedule of available appraisers. Captain Metrey.

## Depreciation on Compact Discs

The depreciation rate on compact discs (CDs) has long been a contentious issue between the military services and the carrier industry. The last revision of the *Joint Military Industry Depreciation Guide (JMIDG)* did not address depreciation of compact discs. The *JMIDG* did provide, however, a flat depreciation rate of fifty percent for phonograph records and recorded tapes. Carriers consistently argue that the fifty percent rate should also apply to compact discs because phonograph records and recorded tapes are closely related to compact discs. Although the *JMIDG* is not frequently revised, the *Allowance-List Depreciation Guide* is updated frequently. The military claims services agreed that a flat depreciation rate of ten percent was appropriate for compact discs.

Carriers requested that this issue be sent to the Comptroller General for resolution. The United States Army Claims Service (USARCS) argued that the fifty percent rate applied to records was not appropriate for compact discs. In support of this position, USARCS asserted that records warp, the needle passing

over the record can cause scratching and distortion, and records are subject to normal wear and tear. Similarly, USARCS contended that prerecorded audio cassette tapes had many problems. The tapes, which wind between the feeder and take-up reel, may jam and unravel leading to malfunction, and the constant pressure of the tape against the recording heads wears out the tape.

The technology for compact discs is completely different from records and recorded tapes. Compact discs are read by a laser beam; therefore, nothing actually touches the compact disc. Compact discs are made of a metal and plastic alloy stamped into a small flat disc. Because the audio signals are read by a beam of light, compact discs do not suffer from wear or tear from a needle like phonograph records. Moreover, unlike recorded tapes, compact discs do not unravel and there are no moving parts to break. Thus, except for scratches in the plastic because of careless handling, normal wear and tear of a compact disc is virtually nonexistent.

In two cases, *Resource Protection*<sup>3</sup> and *Move U.S.A.*,<sup>4</sup> the

Comptroller General agreed that a flat rate of ten percent depreciation was appropriate for compact discs. The Comptroller General noted, "This rate, the service reports, was established in recognition of CDs unique characteristics which make them far less subject to deterioration and give them a far longer life span than phonograph records or cassette tapes."<sup>5</sup> The Comptroller General also noted, "The service states that CDs are read by a laser beam with no friction points, unlike records, which are read by a needle resting on them, or tapes, which are read by the tape passing over a head. Thus, CDs are not prone to the scratching and steady deterioration through use which affects the quality and value of records and tapes."<sup>6</sup> The Comptroller General concluded, "In such circumstances, the carrier has not shown that the service has acted unreasonably in applying the ten percent depreciation rate."<sup>7</sup>

Claims officers and/or claimants should cite these cases the next time a carrier attempts to assert a fifty percent rate of depreciation for compact discs. Ms. Schmalz.

<sup>3</sup> *Resource Protection*, Comp. Gen. B-266114, slip op. at 3 (Apr. 12, 1996) [hereinafter *Resource Protection*].

<sup>4</sup> *Move U.S.A.*, Comp. Gen. B-266112, slip op. at 1 (May 12, 1996).

<sup>5</sup> *Resource Protection*, *supra* note 3, at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.*

## Guard and Reserve Affairs Items

### Guard and Reserve Affairs Division, OTJAG

#### Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 46th Judge Advocate Officer Graduate Course have been set aside for Reserve Component Judge Advocate General's Corps (JAGC) officers. The forty-two week graduate level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia from 28 July 1997 to 8 May 1998. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. Any Reserve Component JAGC captain or major who will have at least four years JAGC experience by 28 July 1997 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may not apply to attend the resident course. Each application packet must include the following materials:

**Personal data:** Full name (including preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, home, and E-Mail).

**Military experience:** Chronological list of reserve and active duty assignments; include all OERs and AERs.

**Awards and decorations:** List of all awards and decorations.

**Military and civilian education:** Schools attended; degrees obtained, dates of completion, and any honors awarded. Law school transcript.

**Civilian experience:** Resume of legal experience.

**Statement of purpose:** A concise statement (one or two paragraphs) of why you want to attend the resident graduate course.

**Letter of Recommendation:** Include a letter of recommendation from one of the judge advocate leaders listed below:

United States Army reserve (USAR) TPU:  
Legal Support Organization (LSO) Commander  
Command or Staff Judge Advocate

Army National Guard (ARNG): Staff Judge Advocate.

DA Form 1058 (USAR) or NGB Form 64 (ARNG): The DA Form 1058 or NGB Form 64 must be filled out and be included in the application packet.

Routing of application packets: Each packet shall be forwarded through appropriate channels (indicated below) and must be received at GRA no later than 31 December 1996.

ARNG: Forward the packet through the state chain of command to Office of The Chief Counsel, National Guard Bureau, 2500 Army, Pentagon, Washington, DC 20310-2500.

USAR CONUS TROOP PROGRAM UNIT (TPU): Forward the packet through chain of command, to Commander, ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200.

Dr. Mark Foley, Ed.D, (804)972-6382/Fax (804)972-6386 (E-Mail: foleymar@otjag.army.mil).

### Personnel Changes

Major Eric Storey has moved on to a new assignment and his replacement as Chief, Unit Training and Liaison, is Major Juan Rivera. If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380.

### GRA On-Line!

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

COL Tom Tromeo, ..... tromeyto@otjag.army.mil  
Director

COL Keith Hamack, ..... hamackke@otjag.army.mil  
USAR Advisor

LTC Peter Menk, ..... menkpete@otjag.army.mil  
ARNG Advisor

Dr. Mark Foley, ..... foleymar@otjag.army.mil  
Personnel Actions

MAJ Juan Rivera, ..... riveraju@otjag.army.mil  
Unit Liaison Officer

Mrs. Debra Parker, ..... parkerde@otjag.army.mil  
Automation Assistant

Ms. Sandra Foster, ..... fostersa@otjag.army.mil  
IMA Assistant

Mrs. Margaret Grogan, ..... groganma@otjag.army.mil  
Secretary

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

*Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session.

### On-Site Program for 1996-1997 Academic Year

The mission for the Army Judge Advocate General's Corps (JAG Corps) is becoming more challenging each year. The On-Site Program is designed to bring to you the information you need to perform your part of the mission. Each On-Site Program includes ample opportunity for you to meet and discuss topics of interest with representatives from the senior leadership of the JAG Corps. Training and continuing legal education are provided by two professors from The Judge Advocate General's School. Career advice and information is presented by representatives from Guard & Reserve Affairs, of Forces Command, United States Army Reserve Command, and Army Personnel Center. Most On-Site locations also feature local instructors and many programs feature distinguished guests. On-Site instruction also provides an excellent opportunity for practitioners to obtain continuing legal education credit while receiving instruction in a variety of military legal topics.

Several On-Sites are locally sponsored by the Army National Guard. A high percentage of Army National Guard judge advocates attend every On-Site. Judge advocates from the Individual Mobilization Augmentees, Individual Ready Reserve, and Active Army are strongly encouraged to attend. State Defense Force, Department of Defense civilians, and in some locations, civilian attorneys interested in military law, are welcome.

If you have any questions regarding a specific On-Site, contact the local action officer listed for each On-Site. Information regarding the On-Site program is also available from Guard & Reserve Affairs at (800) 552-3978, extension 380. Lieutenant Colonel Menk.

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT  
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE,  
1996-1997 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>AC GO/RC GO</u>	<u>SUBJECT/INSTRUCTOR/GRA REP</u>	<u>ACTION OFFICER</u>
16-17 Nov	New York, NY 4th LSO/77th RSC Fordham University School of Law 160 West 62d Street New York, NY 10023	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	MG Nardotti COLs Eres, DePue & O'Meara MAJ M. Henderson MAJ M. Newton COL T. Tromey	LTC Myron J. Berman 77th RSC, Building 637 Fort Totten, NY 11359 (718) 352-5703
4-5 Jan 97	Long Beach, CA 78th MSO	AC GO RC GO Contract Law Criminal Law GRA Rep	MG K. Gray COL J. DePue MAJ T. Pendolino MAJ S. Henley COL K. Hamack	LTC Andrew Bettwy 10541 Calle Lee, Ste 101 Los Alamitos, CA 90720 (714) 229-3700
1-2 Feb	Seattle, WA 6th MSO	AC GO RC GO Criminal Law Int'l-Ops Law GRA Rep	MG W. Huffman COL R. O'Meara LTC L. Morris MAJ S. Morris LTC P. Menk	MAJ Frank Chmelik Chmelik & Associates 1500 Railroad Avenue Bellingham, WA 98225 (360) 671-1796
8-9 Feb	Columbus, OH 9th MSO Clarion Hotel 7007 N High Street Columbus, OH 43085 (614) 436-0700	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG K. Gray COL J. DePue MAJ J. Fenton MAJ N. Allen COL T. Tromey	LTC Timothy J. Donnelly 9th MSO 765 Taylor Station Road Blacklick, OH 43004 (419) 625-8373
22-23 Feb	Salt Lake City, UT 87th MSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG M. Nardotti COL R. O'Meara LTC J. Frisk MAJ A. Frisk Dr. M. Foley	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
22-23 Feb	Denver, CO 87th MSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	None COL J. DePue MAJ S. Castlen MAJ W. Barto COL T. Tromey	LTC David L. Shakes 3255 Wade Circle Colorado Springs, CO 80917 (719) 596-3326
22-23 Feb	Indianapolis, IN IN ARNG Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG W. Huffman COL T. Eres MAJ S. Parke MAJ R. Barfield COL K. Hamack	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
1-2 Mar	Charleston, SC 12th LSO	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	BG J. Altenburg COL T. Eres MAJ C. Garcia LTC K. Ellcessor COL K. Hamack	COL Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 727-4523

**THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT  
(ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE,  
1996-1997 ACADEMIC YEAR**

<u>DATE</u>	<u>CITY, HOST UNIT AND TRAINING SITE</u>	<u>AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP</u>	<u>ACTION OFFICER</u>	
8-9 Mar	Washington, DC 10th MSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Int'l-Ops Law Criminal Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ M. Newton MAJ C. Pede Dr. M. Foley	CPT Robert J. Moore 10th MSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
15-16 Mar	San Francisco, CA 75th LSO	AC GO RC GO  Criminal Law Contract Law GRA Rep	MG M. Nardotti COLs O'Meara, Eres, & DePue MAJ R. Kohlmann LTC J. Krump COL T. Tromey	LTC Allan D. Hardcastle Babin, Seeger & Hardcastle P.O. Box 11626 Santa Rosa, CA 95406 (707) 526-7370
22-23 Mar	Rolling Meadows, IL 91st LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	AC GO RC GO Ad & Civ Law Int'l-Ops Law GRA Rep	BG J. Cooke COL R. O'Meara MAJ P. Conrad MAJ M. Mills LTC P. Menk	MAJ Ronald C. Riley 18525 Poplar Avenue Homewood, IL 60430 (312) 443-4550
4-6 Apr	Jacksonville, FL 174th MSO/FL ARNG	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Altenburg COL R. O'Meara LCDR M. Newcombe MAJ T. Pendolino LTC P. Menk	LTC Henry T. Swann P.O. Box 1008 St. Augustine, FL 32085 (904) 823-0131
26-27 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Tng Ctr 360 Elliott Street Newport, RI 02841	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	BG J. Cooke COL J. DePue MAJ M. Mills MAJ K. Sommerkamp LTC P. Menk	MAJ Katherine Bigler HQ, 94th RSC ATTN: AFRC-AMA-JA 695 Sherman Avenue Fort Devens, MA 01433 (508) 796-6332, FAX 2018
3-4 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf St Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36542 (334) 948-4853	AC GO RC GO Criminal Law Contract Law GRA Rep	BG W. Huffman COL T. Eres MAJ D. Wright MAJ W. Meadows Dr. M. Foley	LTC Cary Herin 81st RSC 255 West Oxmoor Road Birmingham, AL 35209-6383 (205) 940-9304
TBD	Des Moines, IA 19th TAACOM The Embassy Suites 101 E Locust Des Moines, IA 50309 (515) 244-1700	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	TBD COL R. O'Meara MAJ J. Little LTC J. Krump LTC P. Menk	MAJ Patrick J. Reinert P.O. Box 74950 Cedar Rapids, IA 52407 (319) 363-6333

## 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 non-unit reservists, through 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 5F-F10

Class Number—133d Contract Attorneys' 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.

### 2. TJAGSA CLE Course Schedule

#### 1996

#### November 1996

18-22 November: 20th Criminal Law New Developments Course (5F-F35).

18-22 November: 64th Law of War Workshop (5F-F42).

#### December 1996

2-6 December: 139th Senior Officers Legal Orientation Course (5F-F1).

9-13 December: Government Contract Law Symposium (5F-F11).

#### 1997

#### January 1997

7-10 January: USAREUR Tax CLE (5F-F28E).

13-17 January: USAREUR Contract Law CLE (5F-F18E).

19 January-11 April:

142d Basic Course (5-27-C20).

21-24 January:

PACOM Tax CLE (5F-F28P).

22-24 January:

3rd RC General Officers Legal Orientation Course (5F-F3).

27-31 January:

26th Operational Law Seminar (5F-F47).

#### February 1997

3-7 February:

USAREUR Operational Law CLE (5F-F47).

3-7 February:

140th Senior Officers Legal Orientation Course (5F-F1).

10-14 February:

Maxwell AFB Fiscal Law Course (5F-F12A).

10-14 February:

65th Law of War Workshop (5F-F42).

18-21 February:

1st National Security Crimes Course (5F-F30).

24-28 February:

40th Legal Assistance Course (5F-F23).

#### March 1997

3-14 March:

138th Contract Attorneys Course (5F-F10).

17-21 March:

21st Admin. Law for Military Installations Course (5F-F24).

24-28 March:

1st Advanced Contract Law Course (5F-F103).

31 March-

4 April:

141st Senior Officers Legal Orientation Course (5F-F1).

#### April 1997

7-18 April:

7th Criminal Law Advocacy Course (5F-F34).

14-17 April:

1997 Reserve Component Judge Advocate Workshop (5F-F56).

21-25 April:

27th Operational Law Seminar (5F-F47).

28 April-2 May:

8th Law for Legal NCOs Course (512-71D/20/30).



28 April- 2 May:	47th Fiscal Law Course (5F-F12).	29 July- August:	3d Military Justice Managers Course 1 (5F-F31).
<b>May 1997</b>		<b>August 1997</b>	
12-16 May:	48th Fiscal Law Course (5F-F12).	4-8 August:	1st Chief Legal NCO Course (512-71D-CLNCO).
12-30 May:	40th Military Judge Course(5F-F33).	11-15 August:	8th Senior Legal NCO Management Course (512-71D/40/50).
19-23 May:	50th Federal Labor Relations Course (5F-F22).	11-15 August:	15th Federal Litigation Course (5F-F29).
<b>June 1997</b>		18-22 August:	66th Law of War Workshop (5F-F42).
2-6 June:	3d Intelligence Law Workshop (5F-F41).	18-22 August:	143d Senior Officers Legal Orientation Course (5F-F1).
2-6 June:	142d Senior Officers Legal Orientation Course (5F-F1).	25-29 August:	28th Operational Law Seminar (5F-F47).
2 June- 11 July:	4th JA Warrant Officer Basic Course (7A-550A0).	<b>September 1997</b>	
2-13 June:	2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).	3-5 September:	USAREUR Legal Assistance CLE (5F-F23E).
9-13 June:	27th Staff Judge Advocate Course (5F-F52).	8-10 September:	3d Procurement Fraud Course (5F-F101).
16-27 June:	JAOAC (Phase II) (5F-F55).	8-12 September:	USAREUR Administrative Law CLE (5F-F24E).
16-27 June:	JATT Team Training (5F-F57).	15-26 September:	8th Criminal Law Advocacy Course (5F-F34).
16-27 June:	2d RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).	<b>3. Civilian Sponsored CLE Courses</b>	
22 June- 12 September:	143d Basic Course (5-27).	<b>1996</b>	
30 June- 2 July:	28th Methods of Instruction Course (5F-F70).	<b>November 1996</b>	
<b>July 1997</b>		16-21, AAJE:	Domestic Relations: Philosophical Ethics and Decision Making, San Juan, PR
1-3 July:	Professional Recruiting Training Seminar	16-21, AAJE:	No Reversals—Correct Rulings: Evidence in Action, San Juan, PR
7-11 July:	8th Legal Administrators Course (7A-550A1).	17-22, NJC:	Drug Courts: The Judicial Response, Reno, NV
23-25 July:	Career Services Directors Conference	20-22, NJC:	Ethics for Judges, Reno, NV
28 July- 8 May 1998:	46th Graduate Course (5-27-C22). (5-27-C22).		
28 July- 8 August:	139th Contract Attorneys Course (5F-F10).		

For further information on civilian courses in your area,  
please contact one of the institutions listed below:

- AAJE:** American Academy of Judicial Education  
1613 15th Street, Suite C  
Tuscaloosa, AL 35404  
(205) 391-9055
- ABA:** American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- ALIABA:** American Law Institute-  
American Bar Association  
Committee on Continuing  
Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS (215) 243-1600
- ASLM:** American Society of Law  
and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990
- CCEB:** Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973
- CLA:** Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747
- CLESN:** CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744 (800) 521-8662.
- ESI:** Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3203  
(703) 379-2900
- FBA:** Federal Bar Association  
1815 H Street, NW., Suite 408  
Washington, D.C. 20006-3697  
(202) 638-0252
- FB:** Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(904) 222-5286
- GICLE:** The Institute of Continuing  
Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664
- GII:** Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250
- GWU:** Government Contracts Program  
The George Washington University  
National Law Center  
2020 K Street, N.W., Room 2107  
Washington, D.C. 20052  
(202) 994-5272
- IICLE:** Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080
- LRP:** LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510 (800) 727-1227.
- LSU:** Louisiana State University  
Center of Continuing  
Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837
- MICLE:** Institute of Continuing  
Legal Education  
1020 Greene Street  
Ann Arbor, MI 48109-1444  
(313) 764-0533 (800) 922-6516.
- MLI:** Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100
- NCDA:** National College of District Attorneys  
University of Houston Law Center  
4800 Calhoun Street  
Houston, TX 77204-6380  
(713) 747-NCDA
- NITA:** National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(800) 225-6482 (612) 644-0323  
in (MN and AK).
- NJC:** National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557  
(702) 784-6747
- NMTLA:** New Mexico Trial Lawyers'  
Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

**PBI:** Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(800) 932-4637 (717) 233-5774

**PLI:** Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

**TBA:** Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

**TLS:** Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

**UMLC:** University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

**UT:** The University of Texas  
School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

<u>Jurisdiction</u>	<u>Reporting Month</u>
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 1 April annually
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	30 days after program
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	31 December annually
Utah	End of two year compliance period
Vermont	15 July biennially
Virginia	30 June annually

#### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Washington	31 January triennially
West Virginia	31 July annually
Wisconsin*	1 February annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Wyoming	30 January annually
* Military Exempt	
** Military Must Declare Exemption	

For addresses and detailed information, see the February 1996 issue of *The Army Lawyer*.

## Current Materials of Interest

### 1. TJAGSA Materials Available Through the Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms for registration as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly with cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The

following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. These publications are for government use only.

#### Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
- AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
- AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

#### Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).
- AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).
- AD A305239 Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).
- AD B164534 Notarial Guide, JA-268-92 (136 pgs).
- AD A282033 Preventive Law, JA-276-94 (221 pgs).
- AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).
- AD A297426 Wills Guide, JA-262-95 (517 pgs).
- \*AD A308640 Family Law Guide, JA 263-96 (544 pgs).
- AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A289411 Tax Information Series, JA 269-95 (134 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A275507 Air Force All States Income Tax Guide, April 1995.

#### Administrative and Civil Law

\* AD A310157 Federal Tort Claims Act, JA 241-96 (118 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A298443 Defensive Federal Litigation, JA-200-95 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A298059 Government Information Practices, JA-235-95 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-92 (45 pgs).

#### Labor Law

AD A308341 The Law of Federal Employment, JA-210-96 (330 pgs).

AD A291106 The Law of Federal Labor-Management Relations, JA-211-96 (330 pgs).

#### Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

#### Criminal Law

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD 302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

#### International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

#### Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

\* Indicates new publication or revised edition.

#### 2. Regulations and Pamphlets

a. *The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander  
U.S. Army Publications  
Distribution Center  
1655 Woodson Road  
St. Louis, MO 63114-6181

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establish-

ment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *ROTC Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above may also be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

**If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.**

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

### 3. The Legal Automation Army-Wide Systems Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

#### b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 134.11.74.3 or Domain Names laawsbbs@otjag.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA; Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office  
ATTN: OIS Sysop  
9016 Black Rd., Ste. 102  
Fort Belvoir, VA 22060-6208

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud  
(9600 or more recommended)

Novelle LAN setup: Server = LAAWSBBS  
(Available in NCR only)

TELNET setup: Host = 134.11.74.3  
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 134.11.74.3  
Host Name = laawsbbs@otjag.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(L) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

#### 4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date **UPLOADED** is the month and year the file was made available on the BBS; publication date is available within each publication):

<b>FILENAME</b>	<b>UPLOADED</b>	<b>DESCRIPTION</b>
RESOURCE.ZIP	May 1996	A Listing of Legal Assistance Resources, May 1996.
ALLSTATE.ZIP	January 1996	1995 AF All States Income Tax Guide for use with 1994 state income tax returns, January 1995.

<b>FILENAME</b>	<b>UPLOADED</b>	<b>DESCRIPTION</b>
ALAW.ZIP	June 1990	<i>The Army Lawyer/Military Law Review Database ENABLE 2.15. Updated through the 1989 The Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.</i>
BULLETIN.ZIP	January 1996	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CHILDSPT.ASC	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
CHILDSPT.WP5	February 1996	A Guide to Child Support Enforcement Against Military Personnel, February 1996.
DEPLOY.EXE	March 1995	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FTCA.ZIP	January 1996	Federal Tort Claims Act, August 1994.
FOIA1.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FOIA2.ZIP	January 1996	Freedom of Information Act Guide and Privacy Act Overview, September 1995.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INST-ALLA or B:INSTALLB.
JA200.ZIP	January 1996	Defensive Federal Litigation, August 1995.
JA210DOC.ZIP	May 1996	Law of Federal Employment, May 1996.
JA211DOC.ZIP	May 1996	Law of Federal Labor-Management Relations, May 1996.



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JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.	JA281.ZIP	January 1996	15-6 Investigations, November 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, Volumes I and II, September 1995.	JA301.ZIP	January 1996	Unauthorized Absences Programmed Text, August 1995.
JA235.ZIP	January 1996	Government Information Practices Federal Tort Claims Act, August 1995.	JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1995.
JA241.ZIP	January 1996	Federal Tort Claims Act, August 1994.	JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA260.ZIP	January 1996	Soldiers' & Sailors' Civil Relief Act, January 1996.	JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, March 1993.	JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA262.ZIP	January 1996	Legal Assistance Wills Guide, June 1995.	JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.	JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.	JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 2, March 1996.
JA267.ZIP	January 1996	Uniform Services Worldwide Legal Assistance Office Directory, February 1996.	JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA268.ZIP	January 1996	Legal Assistance Notarial Guide, April 1994.	JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA271.ZIP	January 1996	Legal Assistance Office Administration Guide, May 1994.	JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 5, March 1996.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.	JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA274.ZIP	March 1992	Uniformed Services Former Spouses Protection Act Outline and References, November 1992.	JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.
JA275.ZIP	August 1993	Model Tax Assistance Program, August 1993.	JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA276.ZIP	January 1996	Preventive Law Series, December 1992.	JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.	JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.	JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JA5082.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.	JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.	OPLAW95	January 1996	Operational Law Deskbook 1995.
1JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.	YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.	YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.	YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.	YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.	YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text; 1994 Symposium.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.	YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.	YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
JA509-1.ZIP	January 1996	Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993.	YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.	YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.	YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.			

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office  
ATTN: LAAWS BBS SYSOPS  
9016 Black Rd, Ste 102  
Fort Belvoir, VA 22060-6208

### 5. *The Army Lawyer* on the LAAWS BBS

*The Army Lawyer* is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

- (1) Access the LAAWS BBS "Main System Menu" window.
- (2) Double click on "Files" button.
- (3) At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).
- (4) At the "Find Files" window, click on "Clear," then highlight "Army\_Law" (an "X" appears in the box next to

"Army\_Law"). To see the files in the "Army\_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE  
PKZIP110.EXE  
PKZIP.EXE  
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\\" prompt.

For example: c:\wp60\wpdocs

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP APR96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Above in paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

## 6. Articles

The following information may be useful to judge advocates:

Karen S. Kassebaum, *The Siblings of Abused Children: Must They Suffer Harm Before Removal from the Home?* 29 CREIGHTON L. REV. 1547 (1996).

Arthur A. Murphy, Leslie M. MacRae and William A. Woodruff, *Gays in the Military: What About Morality, Ethics, Character and Honor?* 99 DICK. L. REV. 331 (1995).

Donald A. Weinstein, *I Want a Lawyer . . . Now! When Does an Interrogation Have to Stop?*, POLYGRAPH 25 (1996).

## 7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at [tjagsa@otjag.army.mil](mailto:tjagsa@otjag.army.mil).

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978 [Lieutenant Colonel Godwin (ext. 435)].

## 8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials 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.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road,

Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

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

Office of the Staff Judge Advocate  
U.S. Army Corps of Engineers and  
Fort Leonard Wood  
Fort Leonard Wood, Missouri 65473-5000  
POC CW2 Lorraine E. Ortiz  
COM (573) 596-0625

\* Military Justice Reporters  
Volumes 1-38 and additional volumes of 34-38

U.S. Army Reserve Personnel Center  
ATTN: ARPC-ZJA  
9700 Page Avenue  
St. Louis, Missouri 63132-5200  
POC Anita Washington-Harding  
COM (314) 538-5438  
DSN 892-5438

- \* Missouri Digest 1821 to Date (contains no pocket parts)
- \* Digest of Opinions, The Judge Advocates General of the Armed Forces 1951-1961
- \* Court-Martial Reports, The Judge Advocates General of the Armed Forces and the United States Court of Military Appeals (Lawyers Co-Op)

U.S. Army Central Command-Kuwait  
ATTN: AFRD-KU-JA, SGT Eric L. Coggins  
APO AE 09889-9900  
COM (011) 965-487-8822/8853/8843, ext.  
5244/5266  
DSN 318-438-5244/5266

\* Corpus Juris Secundum (one set)

U.S. Army Legal Services Agency  
Law Library, Room 203  
Nassif Building  
5611 Columbia Pike  
Falls Church, Virginia 22041-5013  
POC Melissa Knowles  
COM (703) 681-9608

- \* West's Federal Practice Digest, 4th Volume 35, Criminal Law 1171 to 1221 Volume 35A, Criminal Law 1222 to End
- \* District of Columbia Code Annotated, 1981 edition Volume 4, 1995 Replacement, Title 6-Health and Safety Volume 4A, 1995 Replacement, Titles 7-15

\* District of Columbia Code Annotated, 1981 edition Volumes 1 and 2

\* District of Columbia Code Annotated, 1981 edition 1995 Cumulative Supplement (Pocket Parts) for Volumes 1-11

U.S. Army Missile Command  
ATTN: AMSMI-GC-PO  
Redstone Arsenal, Alabama 35898  
POC Doris Lilliard  
COM (205) 876-2252  
DSN 746-2252  
FAX (205) 876-9438

\* Code of Alabama 1975, Volume 1 thru 24 (31 vols.)

\* Shepard's Military Justice Citations, 1985

\* Shepard's Southern Reporter Citations Volumes 1, 2, 2A, 3, 4, 5, 5A, 6, 6A, 7, 7A, 8, 8A, 9, 9A, 10, 11, 11A, 12, 12A, 13, 14, 15, 15A, 16, 16A, 17, 18, 19, 20, Index (2 sets) (62 vols.)

\* United States Law Week, looseleaf, 1 July 58 thru 30 June 89 (58 vols.)

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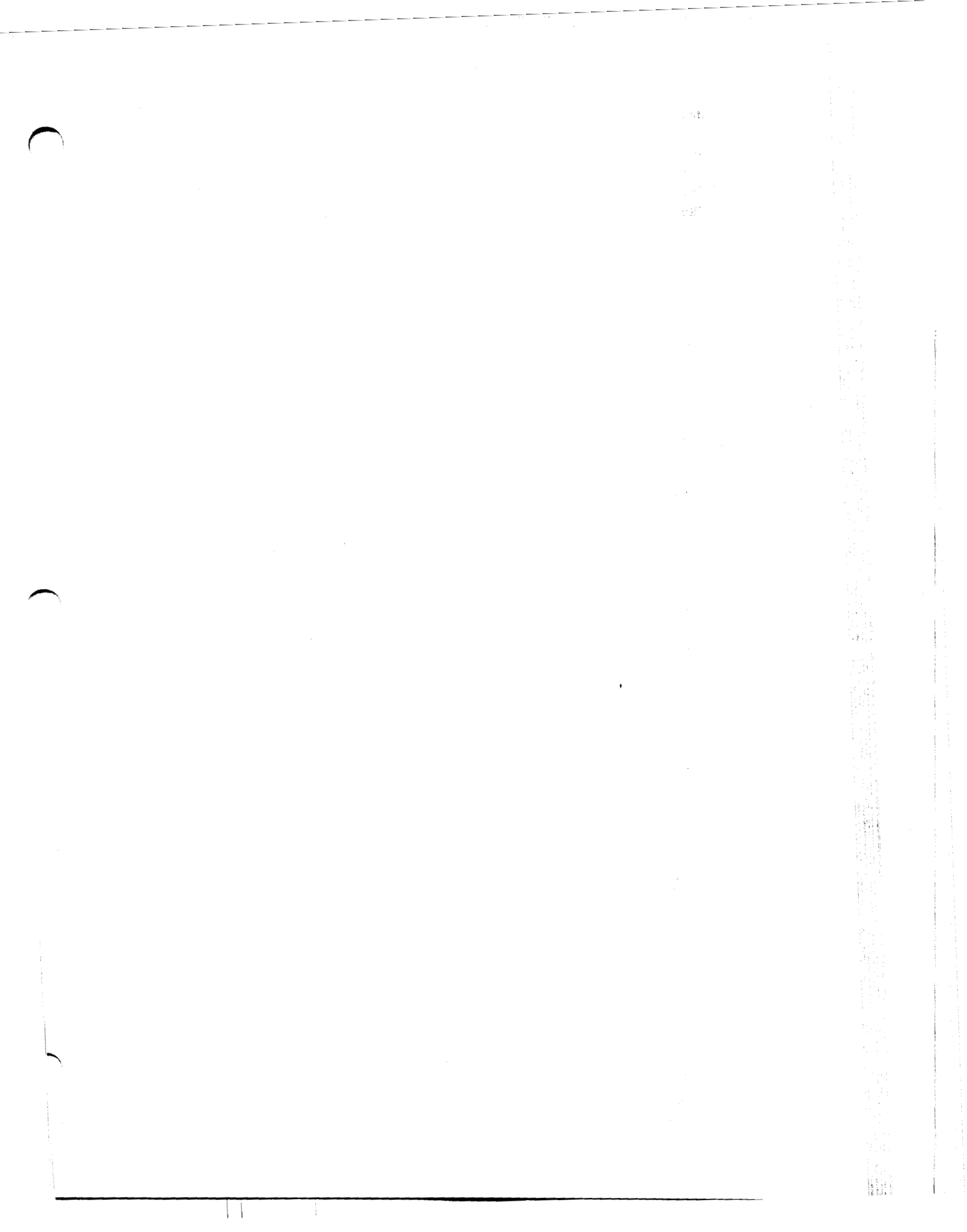
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