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Charging War Crimes: A Primer for the Practitioner

Major Martin N. White[*]

Introduction

This primer provides the practitioner with a framework for determining the proper method for charging an American servicemember accused of committing war crimes. Compared to charging traditional offenses, charging war crimes offers more options and potential pitfalls to the trial counsel drafting the charge sheet. Using a hypothetical situation involving a Soldier who commits several acts of misconduct while deployed, this primer outlines the advantages and disadvantages of charging war crimes as an enumerated offense under the Uniform Code of Military Justice (UCMJ)[1]—as conduct prejudicial to the good order and discipline of the armed forces under clause 1 of Article 134,[2] as a service discrediting act under clause 2 of Article 134,[3] or as a violation of a federal law by assimilation under Article 134, UCMJ.[4] This primer discusses why, in drafting a charge sheet, the prosecutor should begin with offenses enumerated in the UCMJ. As discussed below, the enumerated offenses can be properly applied to a broad spectrum of misconduct, including offenses considered war crimes. Due to the nature of the misconduct, however, a prosecutor should also consider the possibility of charging the servicemember with violation of war crimes[5] by assimilating federal law in addition to the enumerated offenses. This primer outlines various offenses that the prosecutor could potentially charge as war crimes. It concludes that only in the rarest of circumstances should a prosecutor charge a war crime by assimilating federal laws governing the prosecution of violations of the laws of war.

Hypothetical Fact Pattern[6]

First Lieutenant Smith (*1LT Smith*), a reserve military intelligence officer, was activated to serve in a hostile fire zone where the United States was engaged in armed conflict within a sovereign nation's borders. While stationed at a confinement facility that housed civilian and military detainees collected as a result of coalition operations, *1LT Smith* interrogated several detainees. During the course of these interrogations, he slapped and hit several of them. On one occasion, *1LT Smith* struck a senior foreign officer in the temple with a closed fist hard enough to knock the detainee unconscious. On two separate occasions, he slapped a detainee who was falling asleep during an extended interrogation. Several of the interrogators discussed various methods to effectively break down detainees' resistance to questioning, and *1LT Smith* suggested sleep deprivation as a form of punishment for refusing to answer questions and for violating camp rules.

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[1] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 1 - 113 (2005) [hereinafter MCM].

[2] UCMJ art. 134 (2005).

[3] *Id.*

[4] *Id.*

[5] There are several definitions of "war crimes." *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (July 1956) ("The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.") [hereinafter FM 27-10]. In addition, the *Department of Defense Law of War Program* defines law of war as the following:

> [t]hat part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 3.1 (9 Dec. 1998). For purposes of this primer, a "war crime" is considered to be a criminal act committed during international armed conflict against an individual who is protected from such acts by codified and/or traditional laws of war.

[6] The facts in the hypothetical are loosely based on an *Army Regulation* (AR) *15-6* investigation into abuses allegedly committed by American servicemembers and civilians against Iraqi detainees at the Abu Ghraib prison in Iraq. During the course of his investigation, the Investigating Officer, Major General Fay, detailed forty-four alleged instances of detainee abuse ranging from murdering and raping to humiliating and photographing detainees. *See* LTG Anthony R. Jones & MG George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (Aug. 23, 2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf [hereinafter Fay Report]. During the remainder of this article, the author uses the Abu Ghraib investigation and findings to provide real world background to the theory presented in this primer.

On several occasions, *1LT Smith* observed dog handlers abuse detainees, although he did not order them to do so. He did, however, instruct subordinate Soldiers to strip several detainees naked. In a photograph of a group of naked detainees, *1LT Smith* is distinctly visible smirking at the camera. An investigation into this incident revealed that he instructed a specialist (SPC) to take the photograph. On another occasion, *1LT Smith* used his personal camera to take a picture of two Soldiers who had removed a detainee's corpse from a body bag. In the picture, the two Soldiers are grinning wildly, and one is flashing a "thumbs up." During an investigation, *1LT Smith* admitted that he took the photo as a personal memento.

Perhaps the most egregious offenses committed by *1LT Smith* were his involvement in two rapes. On one occasion, he raped a female detainee while another servicemember stood guard in the hallway. Two nights later, *1LT Smith* repaid the favor by watching the entranceway to a cell to ensure that the other servicemember was not observed while he committed rape.

During an investigation into these matters, several servicemembers, including *1LT Smith*, made credible statements that the highest levels of command had given them both implicit and explicit orders to mistreat detainees.[7] You are the trial counsel for the much maligned 23d Fictional Brigade, which has court-martial jurisdiction over *1LT Smith*. After a lengthy and highly-publicized investigation, you are preparing to prefer charges against him. How do you proceed?[8]

Application

Enumerated Offenses Overview

The first step in analyzing how to charge the servicemember is to look for any offenses specifically enumerated in UCMJ Articles 80 through 132. The trial counsel should begin with this analysis due to the preemption doctrine. The preemption doctrine "prohibits application of Article 134 to conduct covered in Articles 80 through 132."[9] In *1LT Smith*'s case, several enumerated offenses are readily apparent. The prosecutor should also look for evidence that the accused aided or abetted another in violation of UCMJ Article 77.

Rape and Assault[10]

Rape, assault, and all other traditional offenses should be charged under the article that best characterizes the offense rather than charged under the General Article—Article 134. In the hypothetical situation, *1LT Smith* should be charged with a violation of Article 120, Rape, and numerous violations of Article 128, Assault.

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[7] Several of the Soldiers charged with mistreating prisoners at Abu Ghraib stated that they were only following orders. *See 8 Years for Abu Ghraib Soldier*, CNN.COM, Oct. 21, 2004, http://www.cnn.com/2004/WORLD/meast/10/21/iraq/abuse/index.html (stating that "an e-mail from the U.S. command in Baghdad," told a warrant officer "to order his interrogators to be tough on prisoners." The e-mail further stated that "[t]he gloves are coming off, gentlemen, regarding these detainees . . . the command 'wants the detainees broken.'"). Although the facts in the hypothetical suggest the possibility that individuals higher in the chain of command may be held criminally liable for acts committed by *1LT Smith*, this primer will not discuss the issue of command responsibility. For a thorough discussion of command responsibility, see Major Michael L. Smidt, Yamashita, Medina, *and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL L. REV. 155 (2000).

[8] The importance of a properly drafted charge sheet cannot be overemphasized. *See, e.g.*, Practice Note, *The Art of Advocacy: Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. , 2002, at 54, 54 [hereinafter *Tactical Charging*].

> From the government's standpoint, trial advocacy begins with the charging decision. Equating a court-martial to a battlefield, the art of advocacy is like the art of war. In war, commanders attempt to shape the battlefield to their advantage by electing to fight on terrain of their own choosing. In trial practice, the government possesses the initial advantage because trial counsel have the ability to shape the battlefield through the charging decision. Effective trial counsel recognize the tactical importance of selecting the most advantageous terrain through the charging process. They realize that trial advocacy does not begin with opening statements or even voir dire. Trial advocacy begins when counsel draft charges against an accused.

Id.

[9] MCM, *supra* note 1, pt. IV, ¶ 60c(5)(a).

[10] The charges are discussed in order of severity based upon maximum punishment available under the UCMJ. Although Rule for Courts-Martial (RCM) 307(c) gives a broad overview of requirements for the proper preferral of charges, it neither suggests nor requires that the charges be placed in a certain order. The prosecutor should find a logically consistent method that applies to the particular fact pattern. In this case, the offense of rape, which carries a potential life sentence, should probably be charged first. One advantage of doing so is that, in a trial by panel members, the first charge that the members will read will be the one that carries the greatest punishment. Depending on the facts, however, the prosecutor may determine that the charge sheet is more logical and clear if it is ordered by victim, by date, or by numerical order of the punitive articles.

Some of the hits or slaps, such as those committed with an open fist, will most likely satisfy the elements of assault, which the UCMJ defines as "an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated."[11] The act of striking the foreign senior officer in the temple with a closed fist hard enough to render him unconscious should be charged as aggravated assault, assuming that the evidence is sufficient to satisfy the elements.[12]

Under these facts, the victim's status as a superior commissioned officer in the enemy's armed forces would not apply as an aggravation to the offense. The greater punishment associated with assault on an officer under Article 128 only applies to assault "committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power."[13]

Conspiracy

As the Abu Ghraib incidents illustrate, systemic problems can cause or at least allow several Soldiers to commit offenses together. Therefore, the prosecutor should look for evidence that the accused conspired with another to commit the offense(s). In order to do so, the prosecutor must state with whom the accused conspired, what offenses were agreed upon, and what some of the overt acts were.[14]

In the hypothetical, *1LT Smith* appears to have conspired with other Soldiers in several of his actions, including stripping detainees naked, depriving detainees of sleep, and mistreating the corpse of one of the detainees. Additionally, the facts suggest that *1LT Smith* "entered into an agreement with"[15] another servicemember to assist him in the commission of rape by keeping watch to prevent the crime from being detected. Assuming that each of these acts constitute an offense, *1LT Smith* has also committed the offense of conspiracy in that he "entered into an agreement . . . to commit an offense," and "at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy."[16] The prosecutor may charge the underlying offenses separately from the conspiracy, since the accused can be guilty of both.[17]

Failure to Obey a Lawful Order or Regulation

The abuse described in the hypothetical scenario violates several requirements of the Army regulation (AR) dealing with treatment of prisoners of war, *AR 190-8*, including paragraph 1-5(b), which, for example, prohibits murder, sensory deprivation, and all cruel and degrading treatment. [18] *Army Regulation 190-8*, however, is not punitive, so the violations

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[11] MCM, *supra* note 1, pt. IV, ¶ 54a.

[12] The elements of Article 128, Aggravated Assault, are: "(i) That the accused assaulted a certain person; (ii) That grievous bodily harm was thereby inflicted upon such person; (iii) That the grievous bodily harm was done with unlawful force or violence; and (iv) That the accused, at the time, had the specific intent to inflict grievous bodily harm." *Id*. pt. IV, ¶ 54b(4)(a).

[13] *Id.* pt. IV, ¶ 54c(3)(a).

[14] *See id.* pt. IV, ¶ 5b. The elements of conspiracy are:

> (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
>
> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Id.

Article 81 of the UCMJ states that "[a]ny person subject to this chapter who conspires with any other person to commit an offense . . . shall, if one or more conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." *See id*. pt. IV, ¶ 5a. Additionally,

> A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

See id. pt. IV, ¶ 5c(8).

[15] *Id*. ¶ 5b.

[16] *Id*.

[17] *Id*. ¶ 5c(8).

[18] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-5(b) (1 Oct. 1997) [hereinafter AR 190-8].

cannot be charged as disobeying a lawful general order.[19] The prosecutor must look for any local general orders or evidence that a senior official gave the accused a lawful order not to commit the acts in question. Under Article 92(2), failure to obey other lawful order, the accused "must have had actual knowledge of the order or regulation,"[20] although such knowledge can be "proved by circumstantial evidence."[21]

The prosecutor should look for any punitive regulations that may have been enacted in the wake of Abu Ghraib for a violation of UCMJ Article 92(1), disobeying a lawful general order, as well as determine whether the servicemember's actions violated any "other lawful order issued by a member of the armed forces" that the servicemember had a "duty to obey" under Article 92(2).

Cruelty and Maltreatment

First Lieutenant Smith can be charged with cruelty and maltreatment under Article 93, UCMJ. Article 93 applies to "cruelty toward, or oppression or maltreatment of, any person subject to his orders."[22] There are two critical issues regarding a decision to charge under Article 93.

First, Article 93 defines a "victim" of oppression or maltreatment as "all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless of whether the accused is in the direct chain of command of the person."[23] The Geneva Convention Relative to the Treatment of Prisoners of War states that "[a] prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power."[24] Similarly, if a detainee does not warrant the status of prisoner of war as an "internee" under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the force that interned that individual will apply "the laws in force in the territory in which they are detained" and may apply additional restrictions. [25] Under the Convention, "[r]egulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand."[26] This is important when considering whether to charge Article 93, since failure to prove proper status as a victim is failure to prove the offense. If the individual who is maltreated is not subject to the orders of the individual who maltreats him, there is not a proper victim, and the offense does not apply.[27] Therefore, the prosecutor must allege and prove that the individual was subject to his orders.

The second consideration under Article 93 is the accused's actions. The "nature of the act" of oppression or maltreatment is "measured by an objective standard,"[28] and "[a]ssault, improper punishment, and sexual harassment may constitute this offense."[29] Many of *1LT Smith*'s acts committed against the detainees appear to meet the objective standard of maltreatment.

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[19] The regulation only states that "[a]ny act or allegation of inhumane treatment or other violations of this regulation will be reported to [Headquarters Department of the Army] . . . as a Serious Incident Report." *Id.* para. 6-9(e). *See* MCM, *supra* note 1, pt. IV, ¶ 16.

[20] *See* MCM, *supra* note 1, pt. IV, ¶ 16c(2)(b). Note that a large focus of the Fay Report describes the uncertainty that Soldiers and commanders had regarding the proper treatment of Soldiers, so it would be difficult if not impossible to prove that these individuals disobeyed a lawful order. None of the Soldiers who have presently been charged with crimes arising from Abu Ghraib have been charged with violation of an order relating to the proper treatment of detainees. *See* Fay Report, *supra* note 6.

[21] *See* MCM, *supra* note 1, pt. IV, ¶ 16c(2)(b).

[22] *Id.* pt. IV, ¶ 17a.

[23] *Id.* pt. IV, ¶ 17c (1).

[24] Geneva Convention Relative to the Treatment of Prisoners of War art. 82, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[25] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, sec. IV, ch. 9, art. 117, *opened for signature* Aug. 12, 1949, 6 U.S. T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] describes "Penal and Disciplinary Sanctions" against internees.

[26] *Id*. art. 99.

[27] The first element of the offense is that the victim "was subject to the orders of the accused." *See* MCM, *supra* note 1, pt. IV, ¶ 17b(1).

[28] *Id*. art. 17c(2); *see also* United States v. Springer, 58 M.J. 164, 172 (2003) (quoting United States v. Carson, 57 M.J. 410, 415 (2002). "It is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's action reasonably could have caused physical or mental harm or suffering." In *Springer*, the Court of Appeals for the Armed Forces applied the standard to the objective victim, finding that a female Airman could objectively feel maltreated by a male non-commissioned officer improperly groping her under the guise of training the proper method of conducting an EPW search. *See Springer*, 58 M.J. at 172.

[29] MCM, *supra* note 1, pt. IV, ¶ 17c(2).

Dereliction of Duty

Dereliction of duty is another specifically enumerated offense that applies under the hypothetical fact pattern. This offense applies to a broad range of conduct.[30] Article 92, UCMJ lists three separate types of dereliction of duty—willful dereliction, or through neglect or culpable inefficiency.[31]

For willful dereliction, the accused must have actual knowledge of the duty.[32] "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."[33] The duty to treat prisoners properly may be found in a number of sources. *Field Manual 27-10, The Law of Land Warfare*, for example, describes the duty for servicemembers to treat prisoners of war properly.[34]

Under certain circumstances, an observer who fails to act to prevent harm to a detainee could be derelict in the duty to protect the prisoner, provided that the observer was able to prevent the acts or at least report them. In the hypothetical, *1LT Smith* was present several times while dog handlers threatened the detainees with dogs.[35] Therefore, he could be charged with dereliction of duty for failing to safeguard the detainees from the dog handlers and the dogs. As an officer, he should have issued a lawful order to the dog handlers to prevent their misconduct.

Additionally, he could be charged with dereliction of duty for instructing the Soldiers to remove detainees' clothing. Although there are situations in which a guard would have a legitimate purpose in removing a detainee's clothing, the facts of the hypothetical indicate that the practice was improperly used as punishment.[36] Therefore, *1LT Smith* was derelict in his duty to safeguard the detainees' well-being by instructing his Soldiers to remove the detainees' clothing. Given *LT Smith's* duty to safeguard the prisoners, much of his alleged misconduct, either through a willful and deliberate act or through his purposeful or negligent inaction, could be charged as a violation of Article 92. The incident in which *1LT Smith* photographed the Soldiers as they mistreated the corpse is one of the few acts he committed that did not violate a specific duty.[37]

The maximum punishments for dereliction of duty are very low, despite the gravity of the offenses listed above. Even for willful dereliction, the maximum sentence is a "[b]ad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months."[38] One of the benefits of a dereliction of duty charge, however, is that the offense can be applied to a broad variety of offenses that would otherwise not be easily charged.[39]

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[30] *See* Practice Note, *Dereliction of Duty and Weather Reports*, ARMY LAW., Oct. 1990, at 41 ("[T]he potential sources of the duty that can serve as the basis for a conviction under article 92(3) are almost boundless.").

[31] MCM, *supra* note 1, pt. IV, ¶¶ 16f(3)(A), 16f(3)(B).

[32] United States v. Ferguson, 40 M.J. 823, 828 (1994).

[33] MCM, *supra* note 1, pt. IV, 16c(3)(A).

[34] *See* FM 27-10, *supra* note 5, para. 89 ("Prisoners of war must at all times be humanely treated . . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."). Additionally, *FM 27-10*, *supra* note 5, para. 90 states that "Prisoners of war are entitled in all circumstances to respect for their persons and their honor." Although *FM 27-10* is neither a regulation nor punitive, its contents "are of evidentiary value insofar as they bear on questions of custom and practice." *Id*. para 1; *see also* Smidt, *supra* note 7, at 185. According to Major General Fay, many of the Soldiers that were the subject of the investigation failed to safeguard detainees. The Fay Report states that the "duty to protect imposes an obligation on an individual who witnesses an abusive act to intervene and stop the abuse." *See* Fay Report, *supra* note 6, at 14. The Fay Report also cites *AR 190-8*, which prohibits cruel and degrading treatment. *Id*. para. 1-5(b).

[35] The Fay Report states that the military working dogs were routinely misused. On at least one occasion, there was "an alleged contest between the two Army dog handlers to see who could make the internees urinate or defecate in the presence of the dogs." Fay Report, *supra* note 6, at 68.

[36] The Fay Report describes how "[m]any of the Soldiers who witnessed [the guards frequent removal of detainees' clothing] were told that this was an accepted practice. Under the circumstances, however, the nakedness was clearly degrading and humiliating." *Id*.

[37] Arguably, the corpse had a right to be treated humanely; however, this act is better charged under UCMJ art. 133 or art. 134, discussed below.

[38] MCM, *supra* note 1, pt. IV, ¶ 16e(3)(B).

[39] *See, e.g.*, United States v. Bivins, 49 M.J. 328, 333 (appellant had a duty "to not engage in underage drinking"); *see also Marine Dismissed from Corps in Death of Iraqi Inmate*, CNN.COM, Nov. 11, 2004, http://edition.cnn.com/2004/LAW/11/11/prisoner.abuse.ap/ (reporting that two of the Marine officers involved in mistreatment of detainees in Iraq were charged with dereliction of duty). A Marine major was "convicted of dereliction of duty and maltreatment of an Iraqi who died at the prison he commanded." The officer was "accused of ordering a subordinate to drag [an Iraqi detainee] by the neck out of a holding cell." The detainee was "stripped naked and left outside for seven hours before he was found dead." *Id*.

Principals (Article 77)

While drafting a charge sheet, a prosecutor should examine whether, in addition to conspiring with others, the servicemember assisted another in the commission of any of the offenses, even if he did not commit the offense himself. Article 77, UCMJ "eliminates the common law distinctions between"[40] the perpetrator (the one who actually commits the offense)[41] the "aider and abettor" (the "one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime")[42] and the "accessory before the fact," ("one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime")[43] making all of these individuals "principals."[44] The effect of the elimination of such distinctions is that an individual is equally punishable whether he personally commits an offense or whether he acts as an aider and abettor or "causes an act to be done which if performed by him would be punishable by this chapter."[45]

Under the facts of the hypothetical situation, *1LT Smith* can be charged with the rape that he committed. He also assisted another servicemember in committing rape. Under Article 77, *1LT Smith* can be charged with both rapes as if he committed them both himself. The prosecutor should also consider whether *1LT Smith*'s actions would make him liable for other offenses committed. If his presence encouraged other Soldiers to commit offenses, he is liable for those offenses. For instance, *1LT Smith* suggested that interrogators use sleep deprivation to break down detainees' resistance to questioning. Although he did not deprive any detainees of sleep, his statements were most likely an encouragement to others to commit an offense.[46]

Enumerated Offenses Summary

As discussed, the enumerated offenses cover a broad array of misconduct. In the hypothetical, *1LT Smith* committed several separate offenses, almost all of which can and should be prosecuted under the enumerated offenses in the UCMJ.[47] The *Manual for Courts-Martial* (MCM) states that "ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war."[48] *First Lieutenant Smith* also committed several acts that may not fit neatly into any of the enumerated offenses. For these acts, the prosecutor must consider charging the offenses under Article 133 or Article 134, or both.

Conduct Unbecoming

Article 133, conduct unbecoming an officer and a gentleman,[49] applies to certain acts performed by the accused that "under the circumstances . . . constitute[s] conduct unbecoming an officer and gentleman."[50] The nature of the acts that fall

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[40] MCM, *supra* note 1, pt. IV, ¶ 1b(1).

[41] *Id.* ¶ 1b(2)(a).

[42] *Id.* ¶ 1b(1).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] The offense of wrongfully depriving detainees of sleep would most likely be charged as cruelty and maltreatment or dereliction of duty. *See id.* pt. IV, ¶ 17 and 16.

[47] As an example, of the servicemembers who have been prosecuted for offenses arising out of their misconduct at Abu Ghraib, Specialist Charles Graner was charged with the most serious acts of misconduct and faced the highest maximum punishment. Specialist Graner was initially charged with two specifications of conspiracy to maltreat subordinates, one charge of dereliction of duty for failing to protect the detainees from maltreatment, four specifications for maltreatment, four specifications for assault, and three specifications for violation of Article 134. Each of the Article 134 offenses was specifically enumerated (i.e. adultery, indecent acts, and wrongful interference with an administrative proceeding). *See* Preferred Charges Against Spc. Charles Graner (May 14, 2004), http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html. "Prosecutors dropped two assault charges, one count of adultery, and one count of obstruction of justice on January 6, 2005. On 14 January 2005, a jury found Graner guilty of nine out of ten counts stemming from his abuse of prisoners at *Abu Ghraib* prison in Iraq." *Id*.

[48] MCM, *supra* note 1, R.C.M. 307(c)(2); *see also* Smidt, *supra* note 7, at 194.

[49] MCM, *supra* note 1, pt. IV, ¶ 59.

[50] *Id*. pt. IV, ¶ 59b.

under Article 133 are those that "in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or . . . seriously compromises the person's standing as an officer."[51]

The broad definition of Article 133 allows for a huge array of misconduct to fall under it. Unlike Article 134, Article 133 is not subject to the preemption doctrine.[52] As a commissioned officer, every act that *1LT Smith* committed that seriously compromised his standing as an officer or his character as a gentleman is punishable under Article 133. Since most acts of misconduct committed by officers violate Article 133, courts have drawn strict requirements to prevent multiplication of charges.

Although most of *1LT Smith*'s acts could properly be characterized as conduct unbecoming an officer, he cannot be punished for both the substantive offense and the underlying misconduct.[53] One advantage of charging under Article 133 is that a dismissal is authorized for an officer convicted of conduct unbecoming.[54] Unlike a conviction for conduct unbecoming, if *1LT Smith* were found guilty of only the offense of dereliction of duty, and if the fact-finder determined that the dereliction was not willful, he would not be eligible for a punitive discharge.[55] In drawing up the charge sheet for *1LT Smith*, the prosecutor may choose to charge both the underlying misconduct and the charge of conduct unbecoming, cognizant of the fact that one of the charges will be dismissed for multiplicity.[56] One disadvantage to charging under Article 133 is that the prosecutor has to prove that the misconduct caused the requisite dishonor to the officer.

The General Article

The *MCM* allows the government to charge servicemembers with violations of the general article, Article 134, provided that the misconduct cannot be prosecuted under one of the enumerated offenses.[57] The general article

> makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law . . . If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article.[58]

Under the preemption doctrine, a prosecutor cannot charge Articles 80 through 132 under any clause of Article 134.[59] For preemption to apply, it must be shown that Congress intended the other punitive article to completely cover a class of offenses.[60]

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[51] *Id*.

[52] *Id*. pt. IV, ¶ 60c(5)(a).

[53] *See* United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984). In Timberlake, an officer was charged with forgery and conduct unbecoming for the exact same offense. The court held that forgery should be considered a lesser included offense of conduct unbecoming under these circumstances since the elements are identical for the two charges except for Article 133's discredit requirement. Therefore charging both offenses would be multiplicious. *Id; see also* Major David D. Velloney, *Recent Developments in Substantive Criminal Law: A Continuing Education*, ARMY LAW., Apr./May 2003 1990, at 64, 80. Although Article 133's note of explanation states that an officer can be charged with both the underlying offense and conduct unbecoming for the same offense, case law holds that he cannot be convicted of both. *See* United States v. Frelix-Vann, 55 M.J. 329 (2001) (holding conduct unbecoming charge to be multiplicious for charge of larceny arising from the same conduct); United States v. Cherukuri, 53 M.J. 68 (2000) (holding conduct unbecoming charges to be multiplicious for charges of indecent assault arising from the same conduct).

[54] MCM, *supra* note 1, pt. IV, ¶ 59e (stating that the maximum punishment for conduct unbecoming is "[d]ismissal, forfeiture of all pay and allowances, and confinement . . . ").

[55] *Id*. pt. IV, ¶ 16e(3)(A). The maximum punishment for dereliction through neglect or culpable inefficiency is "[f]orfeiture of two-thirds pay per month for 3 months and confinement for 3 months." *Id*.

[56] *See Timberlake*, 18 M.J. 371.

[57] MCM, *supra* note 1, pt. IV, ¶ 60a.

[58] *Id*. pt. IV, ¶ 60c(1).

[59] *Id*. pt. IV, ¶ 60c(5)(a); *see also* United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[60] *See* United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979) (stating that "preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element").

The incident in which *1LT Smith* took a photograph of the Soldiers mistreating the detainee's corpse can most likely be successfully charged under Clause 1 or 2 of the general article. Such conduct is not specifically enumerated—made punishable—by another article of the UCMJ. Given the gravity of the other offenses allegedly committed by *1LT Smith*, however, the prosecutor may choose not to enter into the uncertainty inherent in charging outside of the enumerated articles in the UCMJ.[61] Unlike specifically enumerated offenses, the *MCM* does not have model specifications or a list of well-established elements for offenses assimilated under Article 134.[62] If an offense is properly charged under a model specification, and not under Article 134, there can be no valid motion to dismiss for failure to state an offense. Additionally, a seasoned prosecutor should always consider whether he should charge an accused with every offense for which he may be found guilty.[63]

Clause 1

To prove an offense under Clause 1, the government must prove beyond a reasonable doubt "[t]hat, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces . . . "[64] As with Article 133, most of *1LT Smith*'s misconduct is a violation of Clause 1 of Article 134, as long as his acts were "to the prejudice of good order and discipline in the armed forces."[65] Applying the preemption doctrine, however, these acts are punishable under other specifically enumerated charges and cannot be charged under Clause 1.[66]

For example, under the circumstances, striking unarmed, unthreatening detainees under his control was most likely prejudicial to "good order and discipline,"[67] and could be charged under Clause 1. The act of striking these individuals, however, is specifically enumerated under the offense of assault, and therefore cannot be charged under Article 134.

Clause 2

Under Clause 2, the government must prove "[t]hat the accused did or failed to do certain acts" and "[t]hat, under the circumstances, the accused's conduct was . . . of a nature to bring discredit upon the armed forces."[68] Unlike Clause 1, which requires actual prejudice to good order and discipline, Clause 2 must simply be "of a nature that tends to"[69] cause discredit.

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[61] *See* Interview with Major Michael Holley, Instructor, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Mar. 15, 2005). Major Holley, who prosecuted Specialist Graner and other individuals accused of committing offenses at Abu Ghraib, stated that "[t]he decision to charge [the guards] was made on a number of factors, one of which was the desirability of remaining within the known boundaries of the UCMJ." *Id.* A benefit of doing so was that the prosecution "remained with something that we would understand, the judges would understand, and that panel members will understand," and to prosecute in such a manner that the "defense will know the right and left limits of the law . . . . Don't reach beyond the Manual unless you need to, because you may find yourself unnecessarily adding uncertainty to the prosecution in crossing legal ground previously covered only lightly or not at all." *Id.* Major Holley stated that despite the different types of misconduct committed at Abu Ghraib, prosecutors were able to cover the gravaman of the offenses without assimilating Federal or state law. *Id.*

[62]

> [I]n modern practice, [we follow] the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

See United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953).

[63] *See, e.g.*, *Tactical Charging*, *supra* note 8, at 54. "Tactical charging focuses on preferring only those charges that are consistent with the government's theory or provide a particular tactical advantage for the prosecution. Unfortunately, many trial counsel complete their charging analysis after determining 'what' they can charge [as opposed to considering whether they should be charging it in the first place]." *Id.*

[64] *See* Lewis v. United States, 523 U.S. 155 (1998).

[65] MCM, *supra* note 1, pt. IV, ¶ 60b(1), (2).

[66] *See id.* pt. IV, ¶ 60c(1). "If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article." *Id.*

[67] *Id.* pt. IV, ¶ 60b(1), (2).

[68] *Id.*

[69] *Id.* ¶ 60c(2)(b).

As with Clause 1 of Article 134, most of *1LT Smith*'s misconduct violates Clause 2 in that the acts were of a nature to be "likely to cause discredit upon the armed forces."[70] These acts also constitute conduct that is punishable under specifically enumerated UCMJ offenses and cannot be charged under Clause 2. For example, raping a detainee is clearly a "[b]reach of a custom of the service"[71] as well as being of a "tendency to bring the service into disrepute or … lower it in public esteem;"[72] however, the offense is specifically enumerated and is therefore preempted by UCMJ Article 120.

One advantage of charging under Article 134 Clause 1 or 2 is that the prosecutor can use service-discrediting evidence and evidence prejudicial to good order and discipline in the merits of the case rather than save the evidence for sentencing.[73] Such evidence, which would ordinarily be considered irrelevant or prejudicial, is necessary to prove an element of the offense—the accused's conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the service.

Clause 3

Clause 3 allows the prosecutor to prosecute a servicemember under federal or state law for offenses not contained within the UCMJ. Article 134 cannot be used to charge capital offenses.[74] Under Clause 3, the government "must establish every element of the crime or offense as required by the applicable law."[75]

Under the Constitution, "all treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."[76] Theoretically, servicemembers could assimilate the Protocols of the Geneva Conventions that the United States has ratified. The servicemember, however, must have had fair notice that his conduct was illegal.[77]

In the hypothetical, some of the detainees abused by *1LT Smith* were civilians. The rights of these individuals are described in Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).[78] Article 27 of GC IV states that "[p]rotected persons shall at all times be protected against all acts of violence or threats thereof and against insults and public curiosity."[79]

Although a reading of Article 134 by itself would allow a prosecutor to assimilate federal law to charge *1LT Smith's* misconduct as war crimes, Rule for Courts-Martial 307(c) states that "ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war."[80] Unfortunately, the *MCM* does not provide further guidance on when an exception to the general rule may apply. Several federal laws adequately address the misconduct committed by *1LT Smith*.

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[70] *Id*.

[71] *Id.*

[72] *Id*. ¶ 60c(3).

[73] One of the elements of an Article 134 offense is that that act "was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." *Id*. ¶ 60(b).

[74] *See* UCMJ art. 134 (2005); United States v. French 27 C.M.R. 245 (C.M.A. 1959).

[75] MCM, *supra* note 1, pt. IV, ¶ 60b.

> If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, then the following proof is required:
>
> (1) That the accused did or failed to do certain acts; and
>
> (2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[76] U.S. CONST. art. VI, cl. 2.

[77] *See* United States v. Vaughn, 58 M.J. 29, 31-32 (2003). Federal law, state law, military case law, military custom and usage, and military regulations have been found to provide general notice that certain conduct is proscribed. *See id*. at 31.

[78] *See* GC IV, *supra* note 25.

[79] *Id*. art. 27; *see also* Fay Report, *supra* note 6, at 13.

[80] MCM, *supra* note 1, R.C.M. 307(c)(2); *see also Smidt*, *supra* note 7, at 194.

Jordan Paust, former International Law professor at the Army Judge Advocate General's Legal Center and School states that:

> War crimes, including "grave breaches" of the Geneva Conventions, can be prosecuted either under 10 U.S.C. § 818 (which incorporates the laws of war as offenses against the laws of the United States) coupled with 18 U.S.C. § 3231 (which provides federal district courts with original, and at least concurrent, jurisdiction over any offense against the laws of the United States) or under 18 U.S.C. § 2441 (for "grave breaches" and violations of article 3 of the Geneva Conventions committed by U.S. nationals).[81]

Prosecutors could also assimilate 18 U.S.C. § 2340A, which states that "torture committed by public officials under color of law against persons within the public official's custody or control" is prohibited.[82] "Torture is defined to include acts specifically intended to inflict severe physical or mental pain or suffering."[83] Several of the acts committed by *1LT Smith* would constitute torture under this definition; however, these acts should be charged under the enumerated offenses discussed above.

Defense of Following Orders

The MCM states that "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[84] For a patently unlawful order, this defense does not apply. In *United States v. Calley*, the United States Court of Military Appeals stated the following:

> A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a Soldier is not the obedience of an automaton. A Soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.[85]

In the hypothetical, despite evidence that the chain of command implicitly or explicitly ordered Soldiers to commit the offenses described, the defense of "merely following orders" will not apply if "the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.[86]

Conclusion

As discussed with the hypothetical fact scenario, a huge array of conduct may be prosecuted under the UCMJ's enumerated offenses without using the general article to assimilate federal or state law. Accordingly, all possibilities for charging under the enumerated offenses should be considered before charging an unenumerated offense.

The decision to charge a servicemember with violations of the law of war by assimilating federal law is rife with political repercussions. As previously discussed, a prosecutor could charge *1LT Smith* with a violation of international law prohibiting law of war violations, effectively treating him as a war criminal for his violation of the Geneva Conventions and other international agreements that have been ratified by the United States. Doing so would be an admission that an American

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[81] Jordan J. Paust, *Will Prosecution and Cashiering of a Few Soldiers and Resignations Comply with International Law?*, *available at* http://www.nimj.com/documents/AbuGhraib.doc. (last visited Feb. 6, 2006).

[82] 18 U.S.C. § 2340A (2000) (torture).

[83] *Id*.

[84] MCM, *supra* note 1, R.C.M. 916(d).

[85] United States v. Calley, 48 C.M.R. 19, 26-27 (C.M.A. 1973).

[86] MCM, *supra* note 1, R.C.M. 916(d).

servicemember violated international law. "The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy state."[87]

Prosecuting U.S. servicemembers for war crimes committed under violations of treaties is uncharted territory. In My Lai, perhaps the most publicized American war crime, American Soldiers killed between 150 and 400 noncombatants, "[h]owever, there was only one conviction, that of Lieutenant Calley."[88] First Lieutenant William Calley was "convicted of the premeditated murder of twenty-two infants, children, women, and old men, and of assault with intent to murder a child of about two years of age."[89] Each of these offenses was charged under the UCMJ.

In subsequent armed conflicts, servicemembers have been prosecuted for a variety of offenses; however, American servicemembers have not been charged with violations of war crimes. The more visible the prosecution, the less likely a prosecutor should want to stick to the tried and true. Therefore, the enumerated offenses under the UCMJ should be the primary tool for prosecuting servicemembers suspected of violating the laws of war.

[87] *See* FM 27-10, *supra* note 5, para. 507(b); *see also Ex parte* Quirin, 63 S. Ct. 2 (1942) (involving German soldiers who, wearing uniforms and carrying explosives, landed from German submarines, buried their uniforms, and attempted to sabotage war facilities.)

[88] Smidt, *supra* note 7, at 191 (citing LT. GEN. W.R. PEERS (U.S. Army Ret.), THE MY LAI INQUIRY 24, 165 (1979)).

[89] *Calley*, 48 C.M.R. at 21.

Bragdon v. Abbott: Current and Future Ramifications for Federal Employment Discrimination Law

Major Baucum Fulk[*]

Introduction

In *Bragdon v. Abbott*,[1] the Supreme Court, for the first time, held that human reproduction is a "major life activity" for purposes of the Americans with Disabilities Act (ADA).[2] This article analyzes *Bragdon*'s effect on administrative level, federal sector employment discrimination law[3] through the Rehabilitation Act of 1973 (Rehabilitation Act).[4] Specifically, this article will assist an installation level labor counselor, who represents the Army in administrative, not judicial, proceedings.[5] This article focuses on when an "individualized assessment" of a complaining party's alleged disability is required in a federal sector administrative level case.

This article first provides the basic foundation of the ADA and the Rehabilitation Act and explains why *Bragdon* is significant for federal sector employment discrimination law. Next, this article analyzes the *Bragdon* decision after examining the Plaintiff-Appellee's position on appeal, which is critical to understanding the Court's opinion. The following section examines Equal Employment Opportunity Commission (EEOC) federal sector decisions that cite *Bragdon* and draws conclusions about the EEOC's interpretations of *Bragdon*. Finally, this article explains *Bragdon's* effect on federal sector, administrative level employment discrimination law, in light of two subsequent Supreme Court employment discrimination decisions.

Two legal conclusions can be drawn from EEOC *Bragdon* related precedent. First, with one exception, *Bragdon*, as interpreted by the EEOC, stands for the proposition that decisions regarding disability-based discrimination claims require an individualized assessment of the complaining party's alleged disability. Second, no individualized assessment is necessary for complainants infected with the human immunodeficiency virus (HIV).[6] The EEOC conclusively presumes that all HIV infected persons have a physical impairment that substantially limits at least one major life activity.

In terms of practical advice, labor counselors should vigorously litigate how the allegedly disabling condition personally affects the complainant. Two complainants may share the same condition, yet differ greatly in how the condition affects their daily lives. Labor Counselors should not, however, vigorously pursue how an HIV infection personally affects a complainant, since HIV is presumed to substantially limit at least one major life activity. In these cases, a labor counselor should ensure the complainant is required to prove the HIV infection exists, but if the complainant satisfies this threshold showing, the labor counselor should then focus on other aspects of the case and not devote resources to litigating how the HIV infection currently affects the complainant's life.

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[1] 524 U.S. 624 (1998).

[2] 42 U.S.C. §§ 12101 - 213 (2000).

[3] "Administrative level federal sector employment law" translates to Equal Employment Opportunity Commission (EEOC) adversarial administrative cases involving federal government agencies and their employees. Federal civil servants, and occasionally applicants for federal civil service jobs, bring these cases against the agencies that employ the civil servants, or do not hire the civil service applicants. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1614.105 (2004). An EEOC case is the end of the administrative process. *See id*. § 1614.402(a). It may be the final adjudication of the matter, or it may be the final administrative step preceding a civil servant's filing suit in federal court. *See id*. § 1614.407(a).

[4] 29 U.S.C. §§ 701 - 796*l* (2000).

[5] *See* U.S. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION para. 1-5a (19 Sept. 1994) [hereinafter AR 27-40].

[6] For a brief discussion of HIV, see *infra* note 44.

Rehabilitation Act and ADA Basics

The Macro View: The Purpose and Scope of the Rehabilitation Act and the ADA

Congress enacted the Rehabilitation Act of 1973 to increase employment opportunities for individuals with disabilities.[7] The Rehabilitation Act defines and prohibits unlawful, disability-based employment discrimination in the federal workplace, by federal contractors, and by other federally funded entities.[8] The Rehabilitation Act, however, was not intended to regulate employment practices in the non-federally funded workplace.[9]

Congress enacted the ADA in 1990 to protect persons with physical or mental disabilities from discrimination.[10] The ADA is to the non-federal workplace what the Rehabilitation Act is to the federal workplace.[11] The ADA also extends far beyond private sector employment discrimination. Pursuant to Congress's power under the Fourteenth Amendment and the Commerce Clause,[12] the ADA decrees: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation."[13] The ADA broadly defines "public accommodation";[14] it includes, for example, "the professional office of a health care provider."[15]

Although the ADA was enacted to eliminate private sector discrimination, it is also important to public sector employment discrimination law. In 1992, the Rehabilitation Act was amended to apply the ADA's standards to disability based discrimination claims filed by federal civil servants or applicants for federal civil service.[16] Thus, despite *Bragdon* arising from an ADA discrimination claim, not a Rehabilitation Act claim, and despite *Bragdon* involving a complaint filed by a patient against a dentist, not an employee or applicant for employment against an employer, the case's holdings apply to federal employment discrimination.

The Micro View: Disability Definitions and Standards

Understanding *Bragdon* requires familiarity with some basic definitions from the ADA. An important definition to start with is "disability," which the ADA defines as: "A physical or mental impairment that substantially limits one or more of the major life activities of such individual."[17] There are two additional ways an individual may be defined as having a disability, irrespective of the individual's physical or mental condition. An individual also meets the ADA's disability definition if he has a "record of" or is "regarded as having" a physical or mental impairment that substantially limits one or more major life activities, even if the individual does not actually have such an impairment.[18]

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[7] *See* 29 U.S.C. § 701(a)(4).

[8] *See id.* § 791; *see also* Prewitt v. United States Postal Serv., 662 F.2d 292, 301 (5th Cir. 1981).

[9] *See* 29 U.S.C. § 791.

[10] *See, e.g.*, 42 U.S.C. § 12101; 134 CONG. REC. S5972 (May 16, 1988) (statement of Sen. Riegle).

[11] 42 U.S.C. §§ 12111 - 213 (2000).

[12] U.S. CONST. amend. XIV, § 2; *id.* art. I, § 8, cl. 3; 42 U.S.C. § 12101(b)(4) (2000). Supreme Court decisions enforcing civil rights in the pre-civil rights era often were premised on the Commerce Clause, rather than the Fourteenth Amendment. *See, e.g.*, Morgan v. Virginia, 328 U.S. 373, 385-386 (1946) (reversing conviction for violation of a state segregation statute regarding bus transportation based on the Commerce Clause).

[13] 42 U.S.C. § 12182(a).

[14] *Id.* § 12181(7).

[15] *Id.* § 12181(7)(F).

[16] Pub. L. No. 102-569 § 503(b), 106 Stat. 4344, 4424 (1992) (codified as amended at 29 U.S.C. § 791(g) (2000)).

[17] 29 C.F.R. § 1630.2(g)(1) (2004).

[18] *Id.* Persons who meet either of these two additional criteria are defined as having a disability, irrespective of their physical or mental condition. This expansive definition is intended to ensure persons within these two additional categories receive ADA protection, since negative consequences, based on prejudices and stereotypes, may not be based on facts. *See, e.g.*, Harrison v. Ashcroft, No. 01A03948, 2003 EEOPUB LEXIS 4333, *13 and *17 (EEOC July 30, 2003) (finding the complainant had not shown that his diabetes limited a major life activity, but nonetheless finding him disabled because "the agency regarded complainant as being substantially limited in the major life activity of eating." Explaining, the EEOC noted, "We find that the reviewing physicians, . . . both engaged in generalized assumptions about complainant's condition, and preconceived notions about how the condition will impact his health currently and what the future consequences could be.").

As might be expected, the words that compose the definition of "disability" have particular meanings, and to fully understand the definition of "disability" it is necessary to understand three key components of "disability." The first component is the phrase "physical or mental impairment," which means:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[19]

Some examples of particular disorders or conditions listed in the definition of "physical or mental impairment" include: Multiple Sclerosis, which affects the neurological system;[20] back injuries, which affects the musculoskeletal system;[21] asthma, which affects the respiratory system;[22] infertility, which affects the reproductive system;[23] and diabetes, which affects the digestive and hemic systems.[24] Post traumatic stress disorder is an example of an emotional or mental illness that constitutes a mental or psychological disorder.[25]

The second component of the definition of disability is the phrase "substantially limits." It is, however, helpful to understand the third component of the definition of disability—"major life activity"—before discussing "substantially limits." "Major life activity" is defined as: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[26] Generalizing, the EEOC or a court is more likely to recognize an activity as being a "major life activity" if the activity is particularly important to life (breathing, for example) or if the activity encompasses a wide range of activities. For example, an impairment that prevents an individual from performing a particular job or a narrow class of jobs does not affect a major life activity,[27] but an impairment that prevents an individual from performing a wide range of jobs may affect a major life activity.[28]

Returning to the second component of the definition of disability, "substantially limits," this phrase is defined as:

> Unable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[29]

It is also important to know that there are three factors that assist in determining whether a given major life activity is substantially limited. These three factors are: "The nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[30]

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[19] 29 C.F.R. § 1630.2(h).

[20] *See* Masteller v. Potter, No. 01994458, 2004 EEOPUB LEXIS 577 (EEOC Feb. 12, 2004).

[21] *See* Cookman v. Potter, No. 01996505, 2002 EEOPUB LEXIS 8007 (EEOC Dec. 19, 2002).

[22] *See* Smith v. Potter, No. 01A00660, 2003 EEOPUB LEXIS 2222 (EEOC Apr. 17, 2003).

[23] *See* Cummings v. James, No. 01A22203, 2004 EEOPUB LEXIS 2648 (EEOC May 13, 2004).

[24] *See* Lewis v. Rumsfeld, No. 01A24894, 2004 EEOPUB LEXIS 4349 (EEOC Aug. 10, 2004).

[25] *See* Capil v. Potter, No. 01983461, 2001 EEOPUB LEXIS 5337 (EEOC July 13, 2001); Arnold v. Summers, No. 03A00091, 2000 EEOPUB LEXIS 6077 (EEOC Sept. 18, 2000).

[26] 29 C.F.R. § 1630.2(i) (2004).

[27] *Id*. § 1630.2(j)(3)(i).

[28] *See* Sutton v. United Airlines, 527 U.S. 471, 491 (1999). The Supreme Court expressed some doubt whether "working" is a major life activity. *Id*. at 492. However, if "working" is a major life activity, then it "requires at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Id*. at 491.

[29] 29 C.F.R. § 1630.2(j).

[30] *Id*. § 1630.2(j)(2).

Regarding the nature and severity of the impairment, the standard "restricted . . . as compared to . . . the average person in the general population"[31] is potentially amorphous. For common activities, however, the EEOC has created relatively precise standards. For example, the EEOC has held that lifting is a major life activity, and a permanent twenty pound lifting restriction may be sufficient to establish a substantial limitation.[32] On the other hand, a person who has the ability to lift twenty-five pounds, even occasionally, is not substantially limited in the major life activity of lifting.[33]

Orthopedic injuries provide a good illustration of how the duration of an injury may determine whether the injury is substantially limiting. The EEOC held that an ankle fusion that healed without medical complications, allowing the individual to return to light duty work within six weeks and to full duty work within seven months, was of such a short duration that it is was not substantially limiting.[34] On the other hand, the EEOC has held that a thirty month medical restriction for a condition that was not improving was sufficient to constitute a long term impairment.[35]

There are three other definitions in the ADA that are necessary to understand *Bragdon*. These three important definitions are: "qualified individual with a disability," "essential functions," and "reasonable accommodation."

"Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[36] For example, the EEOC found that a tractor-trailer driver who was diagnosed with Multiple Sclerosis was a qualified individual with a disability.[37] The complainant was qualified because he had successfully and safely driven a tractor-trailer for five years, and the only reason he was removed from driving was because his employer voluntarily began following regulations that precluded persons such as complainant from driving, absent a waiver.[38] The EEOC found that complainant was an individual with a disability because the regulations "significantly restricted him from working as a driver of commercial motor vehicles . . . ."[39]

Turning to the next definition, "Essential functions . . . [i]n general . . . means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position."[40] For example, consider a postal automation clerk whose job primarily involved activities other than lifting, but who periodically had to lift mail trays weighing fifteen pounds.[41] If lifting the trays were sufficiently infrequent, the lifting activity might be a marginal function, rather than an essential function. Thus, if the postal clerk were disabled—if she possessed a physical impairment that substantially limited her in the major life activity of lifting—because she was unable to lift over ten pounds, her employer would be required to provide a "reasonable accommodation" that allowed her to perform her job despite her inability to lift the fifteen pound mail trays.[42]

The definition of "reasonable accommodation" has three parts. The second part is the most important for the issues *Bragdon* raises. "Reasonable accommodation" includes: "Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified

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[31] *Id*. § 1630.2(j).

[32] *See* Peebles v. Potter, No. 01984745, 2002 EEOPUB LEXIS 1454, at *10-*11 (EEOC Mar. 7, 2002).

[33] *See* Cookman v. Potter, No. 01996505, 2002 EEOPUB LEXIS 8007, at *4 and *8 (EEOC Dec. 19, 2002).

[34] *See* McIntyre v. Principi, No. 01A31380, 2004 EEOPUB LEXIS 2980 (EEOC May 26, 2004).

[35] *See* Chau-Pham v. Potter, No. 01985730, 2001 EEOPUB LEXIS 5327, at *8-*10 (EEOC July 13, 2001).

[36] 29 C.F.R. § 1630.2(m).

[37] Masteller v. Potter, No. 01994458, 2004 EEOPUB LEXIS 577 (EEOC Feb. 12, 2004).

[38] *Id*. at *11. Complainant's employer, the U.S. Postal Service, was not bound by the Department of Transportation regulations, which by their terms did not apply to transportation performed by the federal government. *Id*. at *3-*4.

[39] *Id*. at *10. Significantly, the EEOC found that the Postal Service failed to meet its burden of proving that complainant's driving a tractor-trailer would present a "direct threat," that is "'a significant risk of substantial harm' which cannot be eliminated or reduced by reasonable accommodation." *Id*. at *11 (citing 29 C.F.R. 1630.2(r)). Complainant would not have been qualified if the EEOC had been satisfied with the agency's direct threat evidence.

[40] 29 C.F.R. § 1630.2(n).

[41] *See* Chau-Pham v. Potter, No. 01985730, 2001 EEOPUB LEXIS 5327 (EEOC July 13, 2001).

[42] *Id*. at *3 and *12.

individual with a disability to perform the essential functions of that position . . . ."[43] Returning to the example of the postal automation clerk who could lift only ten pounds, and for whom lifting fifteen pound mail trays was a marginal function, a reasonable accommodation might have been to have had a nearby coworker lift the mail trays as needed.

As might be expected, there are additional exceptions, explanations, and factors pratitioners should consider regarding the definitions of "qualified individual with a disability," "essential functions," and "reasonable accommodation," as well as a considerable volume of case law regarding all the definitions in this section. The information contained in this section, however, provides an adequate foundation to explore and understand *Bragdon* and related subsequent Supreme Court precedent.

The Supreme Court's *Bragdon* Decision

Bragdon arose from limitations that a dentist placed on treating a patient who was infected with the human immunodeficiency virus (HIV).[44] Ms. Abbott, the patient, was infected with HIV in 1986.[45] In 1994, before Ms. Abbott manifested serious symptoms from the HIV infection, she sought treatment from Dr. Bragdon.[46] Ms. Abbott disclosed on a patient registration form that she was HIV positive.[47] Dr. Bragdon then examined Ms. Abbott's teeth and found a cavity.[48] Dr. Bragdon told Ms. Abbott that he did not fill cavities for HIV positive patients at his office, but he offered to fill the cavity at a local hospital.[49] Dr. Bragdon told Ms. Abbott the charge for his services would be the same at either location, but Ms. Abbott would have to pay the hospital's charge for using its facility.[50]

Ms. Abbott declined Dr. Bragdon's offer to fill her cavity at the local hospital and filed suit in federal district court, alleging that Dr. Bragdon's refusal to fill her cavity at his office violated the ADA.[51] The district court granted summary judgment in favor of Ms. Abbott, and the circuit court of appeals affirmed.[52] The Supreme Court granted certiorari to determine whether an HIV infection in the asymptomatic stage is a disability under the ADA.[53] The Supreme Court's decision also resolved a circuit split regarding the answer to this question.[54]

For Dr. Bragdon to have violated the ADA, Ms. Abbott had to be within the group of individuals the ADA protects. Thus, the Supreme Court began its analysis by determining whether Ms. Abbott was disabled under the ADA—whether her HIV infection constituted "'a physical or mental impairment that substantially limits one or more of the major life activities . . . .'"[55] The Court held that HIV infection is an "impairment," as that term is defined in the ADA.[56] Significantly, the Court held HIV is "an impairment from the moment of infection" because of "the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease . . . ."[57]

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[43] 29 C.F.R. § 1630.2(o)(ii).

[44] Human immunodeficiency virus, commonly referred to as "HIV," invades and inactivates cells central to the immune system. The HIV causes acquired immune deficiency syndrome, commonly referred to as "AIDS." As HIV progresses to AIDS, the body becomes increasingly susceptible to opportunistic infections, cancers, and neurological disorders. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 42, 908 (Sol Steinmetz ed., 2d ed. 1998).

[45] Bragdon v. Abbott, 524 U.S. 624, 629 (1998).

[46] *Id*. at 629-630.

[47] *Id*.

[48] *Id*. at 630.

[49] *Id*.

[50] *Id*. at 629.

[51] Bragdon v. Abbott, 912 F. Supp. 580, 583-84 (D. Me 1995), *affirmed*, 107 F.3d 934 (1st Cir. 1997), *vacated and remanded*, 524 U.S. 624 (1998).

[52] *Bragdon*, 524 U.S. at 629.

[53] *Id*.

[54] The First Circuit Court of Appeals concluded that an asymptomatic HIV infection is a disability under the ADA. Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997). The Fourth Circuit Court of Appeals concluded that asymptomatic HIV infection is not a disability under the ADA. Runnebaum v. NationsBank of Maryland, N.A., 123 F.3d 156 (4th Cir. 1997).

[55] *Bragdon*, 524 U.S. at 631 (quoting 42 U.S.C. § 12102(2) (2000)).

[56] *Id*. at 638.

[57] *Id*.

Next, the Supreme Court turned to the question of whether HIV impairs a major life activity. The Court limited its inquiry to determining whether reproduction constitutes a major life activity and whether an HIV infection substantially limits reproduction.[58] The Court noted that its narrow focus on HIV's effect on reproduction alone "may seem legalistic," but was appropriate in light of Ms. Abbott's having argued to the court of appeals that this was the major life activity at issue.[59] The Supreme Court concluded that reproduction is a major life activity because it "could not be regarded as any less important than working or learning," and according to implementing regulations for the Rehabilitation Act, which apply to the ADA, working and learning constitute major life activities.[60]

Finally, the Supreme Court analyzed whether HIV infection substantially limits the major life activity of reproduction. The Court found that HIV infection substantially limits reproduction in two ways.[61] First, the Court asserted that an HIV positive female's attempt to conceive imposes a significant risk of transmitting HIV to her male partner.[62] The Court ignored the possibility of artificial insemination, either with or without medical assistance.[63] Second, the Court noted a significant risk of infecting the child during gestation and birth, finding that this, too, constituted a substantial limitation to an HIV positive female's ability to reproduce.[64] The Court asserted that medical information it considered showed an untreated risk of HIV transmission from mother to baby of about twenty-five to thirty percent with this risk falling to about eight percent if the mother received antiretroviral therapy.[65] The Court found an eight percent risk of HIV transmission from mother to child to constitute a substantial limitation on reproduction.[66]

The Supreme Court's decision also contains an interesting statement regarding what *Bragdon*'s holding does not encompass. Specifically, the Supreme Court stated that *Bragdon* does "not address . . . whether HIV infection is a *per se* disability under the ADA."[67]

Equal Employment Opportunity Commission Decisions Applying *Bragdon*

The *Bragdon* General Rule

The EEOC has cited *Bragdon* forty-three times in its published, public sector decisions.[68] The EEOC has cited *Bragdon* a majority of the time, a total of twenty-six times, for the proposition that determining whether a complainant

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[58] *Id*. at 638-39.

[59] *Id*.

[60] *Id*. at 639-40.

[61] *Id*. at 640-41.

[62] *Id*. at 640.

[63] Even if the Court had considered artificial insemination as an alternative means of conception, it appears that the Court might have rejected this alternative based on the Court's discussion of the second impediment where the Court noted that the ADA requires only "substantial limitations on major life activities, not utter inabilities." *Id*. at 642. In its discussion of the second impediment to conception for an HIV positive female, the Court suggested that "economic and legal consequences" might be sufficient to constitute a substantial limitation to reproduction. *Id*. Consequently, the cost of medically assisted artificial insemination might itself qualify as a substantial limitation to reproduction, and more facts would be needed about unassisted artificial insemination to know whether such a procedure is reliable enough not to pose a substantial limitation.

[64] *Id*. at 641.

[65] *Id*.

[66] *Id*. at 642. Interestingly, the Court's exact statement is: "It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction." *Id*. This statement appears to be backwards; that is, because the Supreme Court decision holds that Ms. Abbott's HIV infection constituted a substantial limitation on her reproducing, due to the risk that she could transmit the infection during gestation or birth, the Court needed to find that an eight percent HIV transmission rate represented a substantial limitation on reproduction as a matter of law, not the converse.

[67] *Id*. at 642-43 (italics in original). The Supreme Court ultimately remanded the case for a reassessment of whether Dr. Bragdon established a genuine issue of fact. Specifically, the Court directed the court of appeals to reconsider whether Dr. Bragdon was justified in offering to fill Ms. Abbott's cavity only at a hospital, because providing this treatment in his office, "posed 'a significant risk of communicating an infectious disease to others,'" quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

[68] LEXIS search, Mar. 16, 2005, for "Bragdon w/3 Abbott" in the EEOC public sector data base. This search actually produces forty-four decisions, but two are the same decision in the same case, with different LEXIS numbers. *See* Long v. Potter, No. 01A02616, 2002 EEOPUB LEXIS 6665 (EEOC Sept. 26, 2002) and Long v. Potter, No. 01A02616, 2002 EEOPUB LEXIS 6718 (EEOC Sept. 26, 2002).

has an impairment that substantially limits a major life activity requires an individualized inquiry, based upon the particular circumstances in each case.[69]

To emphasize the importance of making an individualized inquiry, the EEOC occasionally follows its admonition for an individualized inquiry with the statement that a complainant is not, per se, an individual with a disability because he has been diagnosed with a particular condition.[70] The requirement for an individualized inquiry is critical when there are significant disparities among individuals who have a particular physical or mental condition.[71] Diabetes, muscular conditions, and skeletal conditions present the most common instances when two individuals may suffer from the same condition, yet differ greatly in terms of their limitations related to major life activities, and thus, differ in terms of whether they are disabled under the Rehabilitation Act or ADA.[72]

With two notable exceptions, discussed in detail in the following two sub-sections, the remainder of the EEOC's other public sector citations to *Bragdon* are insignificant. In nine of the EEOC's citations to *Bragdon*, the reference is simply the last case in a string cite, and each of these string cites simply serves notice that the EEOC considered the complainant's claim "in light of" various recent Supreme Court decisions, including *Bragdon*.[73] Similarly, two cases cite to *Bragdon* at the end of a "see also" string cite regarding the elements for a disability discrimination case.[74] One

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[69] These twenty-six cases can be grouped by type. Five of these cases involve individuals whose claimed disability was diabetes. *See* Lewis v. Rumsfeld, No. 01A24894, 2004 EEOPUB LEXIS 4349, at *9 (EEOC Aug. 10, 2004); Gamelin v. Potter, No. 01A22307, 2004 EEOPUB LEXIS 116, at *5 (EEOC Jan. 5, 2004); Harrison v. Ashcroft, No. 01A03948, 2003 EEOPUB LEXIS 4333, at *9 (EEOC July 30, 2003); Walker v. Potter, No. 01A12366, 2002 EEOPUB LEXIS 4414, at *7 (EEOC July 3, 2002); Surprenant v. Potter, No. 01996186 2001 EEOPUB LEXIS 5680, at *10 (EEOC July 26, 2001). Six of these cases involve individuals whose claimed disability derived from back or neck conditions. *See*, Williams v. Potter, No. 01A01379, 2003 EEOPUB LEXIS 1227, at *10-*11 (EEOC Mar. 6, 2003); Cookman v. Potter, No. 01996505, 2002 EEOPUB LEXIS 8007, at *7 (EEOC Dec. 19, 2002); Stevens v. Veneman, No. 01997032, 2002 EEOPUB LEXIS 3404, at *5 (EEOC June 3, 2002); Cadle v. Veneman, No. 01997044, 2002 EEOPUB LEXIS 3402, at *5 (EEOC June 3, 2002); Collins v. McCullough, No. 01992977, 2002 EEOPUB LEXIS 815, at *5 (EEOC Feb. 15, 2002); Chau-Pham v. Potter, No. 01985730, 2001 EEOPUB LEXIS 5327, at *7 (EEOC July 13, 2001). Seven of these cases involve individuals whose claimed disability was based on non-spinal muscular or skeletal conditions. *See* McIntyre v. Principi, No. 01A31380, 2004 EEOPUB LEXIS 2980, at *5-*6 (EEOC May 26, 2004); Perez v. Potter, No. 07A20117, 2003 EEOPUB LEXIS 4176, at *12 (EEOC July 23, 2003); Long v. Potter, No. 01A02616, 2002 EEOPUB LEXIS 6665 and 2002 EEOPUB LEXIS 6718, at *11 (EEOC Sept. 26, 2002); Brown v. Potter, No. 01996312, 2002 EEOPUB LEXIS 1221, at *6 (EEOC Mar. 1, 2002); Brown v. Potter, No. 01990686, 2002 EEOPUB LEXIS 812, at *5 (Feb. 15, 2002); Boyle v. Potter, No. 01980819, 2001 EEOPUB LEXIS 6174, at *5 (EEOC Aug. 16, 2001). Four of these cases involve individuals whose claimed disability was based on mental rather than physical conditions. *See* Kice v. England, No. 03A20013, 2002 EEOPUB LEXIS 2458, at *5 (EEOC Apr. 18, 2002) (depression); Capil v. Potter, No. 01983461, 2001 EEOPUB LEXIS 5337, at *4 (EEOC July 13, 2001) (post traumatic stress disorder); Olivares v. Henderson, No. 01980712, 2001 EEOPUB LEXIS 794, at *4 (EEOC Feb. 8, 2001) (disturbed thinking); Arnold v. Summers, No. 03A00091, 2000 EEOPUB LEXIS 6077, at *6 (EEOC Sept. 18, 2000) (adjustment disorder, depressed mood, and post traumatic stress disorder). Seven of these cases involve individuals whose claimed disabilities are unique or defy categorization. *See* Masteller v. Potter, No. 01994458, 2004 EEOPUB LEXIS 577, at *8 (EEOC Feb. 12, 2004) (multiple sclerosis); Smith v. Potter, No. 01A00660, 2003 EEOPUB LEXIS 2222, at *5 (EEOC Apr. 17, 2003) (asthma, carpal tunnel, and foot inflammation and tenderness); Simms v. England, No. 01992195, 2002 EEOPUB LEXIS 3074, at *6 (EEOC May 16, 2002) (sinusitis and a daughter who had cerebral palsy, which constituted a "disability by association" under 29 C.F.R. § 1630.8); Strutynski v. Norton, No. 01980837, 2001 EEOPUB LEXIS 6788, at *4 (EEOC Sept. 26, 2001) (heart pain and wrist fusion); Palmer v. Potter, No. 01980753, 2001 EEOPUB LEXIS 5343, at *10 (EEOC July 13, 2001) (anxiety and wrist injury); Hudson v. Henderson, No. 03A00115, 2000 EEOPUB LEXIS 7424, at *5 (EEOC Dec. 19, 2000) (back condition and stress); Yacher v. Shalala, No. 03A00077, 2000 EEOPUB LEXIS 6187, at *8 (EEOC Sept. 25, 2000) (multiple chemical sensitivities).

[70] *See, e.g.*, *Lewis*, No. 01A24984, 2004 EEOPUB LEXIS 4349 at *9; *Long*, No. 01A02616, 2002 EEOPUB LEXIS 6665, at *10.

[71] Toyota Motor Mfg., of Ky., Inc. v. Williams, 534 U.S. 184, 198-99 (2002).

[72] Regarding diabetes, see, e.g., *Harrison*, No. 01A03948, 2003 EEOPUB LEXIS 4333, at *11 ("Commission precedent has found that some individuals with diabetes mellitus are individuals with disabilities within the meaning of the Rehabilitation Act, while others are not."); regarding carpal tunnel syndrome, a muscular condition affecting the hands and forearms, see, e.g., *Toyota*, 534 U.S. at 199 (noting that carpal tunnel syndrome is a condition "whose symptoms vary widely from person to person").

[73] *See* Ledesma v. Henderson, No. 01985925, 2000 EEOPUB LEXIS 6672, at *8-*9 n.5 (EEOC Sept. 13, 2000); Turner v. Gober, No. 01976372, 2000 EEOPUB LEXIS 6042, at *7, n.4 (EEOC Sept. 13, 2000); Gatie v. Danzig, No. 01970689, 2000 EEOPUB LEXIS 6040, at *12 n.6 (EEOC Sept. 13, 2000); Klimek v. Henderson, No. 01973926, 2000 EEOPUB LEXIS 1492, at *8 (EEOC March 16, 2000); Hill v. Henderson, No. 01985754, 2000 EEOPUB LEXIS 1488, at *6-*7 n.3 (EEOC Mar. 16, 2000); Chouteau v. Henderson, No. 01973853, 2000 EEOPUB LEXIS 1332, at *8-*9 (EEOC Mar. 10, 2000); Garcia v. Henderson, No. 01976370, 2000 EEOPUB LEXIS 1331, at *9-*10 (EEOC Mar. 10, 2000); Ayers v. Henderson, No. 01975550, 2000 EEOPUB LEXIS 1146, at *10 n.3 (EEOC Feb. 25, 2000); Lewis v. Reno, No. 03990043, 2000 EEOPUB LEXIS 665, at *16 n.4 (EEOC Feb. 17, 2000). The phrasing is nearly identical in all nine cases. Six of the nine cases state: "In reaching the above determination, we have examined complainant's disability claim in light of the Supreme Court's recent decisions in . . . *Bragdon* . . . ." (citations omitted). *See* Gatie, 2000 EEOPUB LEXIS 6040, at *12 n.6; Klimek, 2000 EEOPUB LEXIS 1492, at *8; Hill, 2000 EEOPUB LEXIS 1488, at *6-*7 n.3; Chouteau, 2000 EEOPUB LEXIS 1332, at *8-*9; Garcia, 2000 EEOPUB LEXIS 1331, at *9-*10; Ayers, 2000 EEOPUB LEXIS 1146, at *10 n.3. One case describes the disability issue instead of using the words, "In reaching this decision . . . ." *See* Lewis, 2000 EEOPUB LEXIS 665, at *16 n.4. Two cases substitute the words "also considered" for "examined." *See*, Ledesma, 2000 EEOPUB LEXIS 6672, at *8-*9 n.5; Turner, 2000 EEOPUB LEXIS 6042, at *7, n.4.

[74] *See* Adkins v. Caldera, No. 01975602, 2000 EEOPUB LEXIS 5378 at *10-*11 (EEOC Aug. 3, 2000); Smith v. Caldera, No. 03980066, 2000 EEOPUB LEXIS 2307 (EEOC Apr. 19, 2000).

case's citation to *Bragdon* is actually a description of the basis for the administrative judge's decision, rather than the EEOC citing to *Bragdon*.[75]

The Exception to *Bragdon*'s General Rule: The HIV Positive Disability Cases

In contrast to the EEOC's often repeated rule that a complainant is not, per se, an individual with a disability merely because he has been diagnosed with a particular condition, the EEOC has published two public sector decisions since *Bragdon* that appear to adopt a per se rule regarding at least one physical condition: HIV infection. Both cases appear to hold that any disability-based discrimination claim arising from HIV positive status presumptively demonstrates a physical impairment that substantially limits at least one major life activity, making the complainant an individual with a disability.[76] Neither case includes an individualized assessment of the complainant's condition, and neither case discusses reproduction.[77]

Doe v. Rubin[78] is the first published public sector EEOC decision involving alleged HIV positive discrimination after *Bragdon*. The following comprises the EEOC's analysis of the particular circumstances of Mr. Doe's case. First, the EEOC states: "Petitioner has alleged disability discrimination. The threshold question is whether petitioner is an individual with a disability within the meaning of the regulations."[79] Next, the EEOC quotes two definitions: "disability" and "major life activity."[80] After the two definitions, the EEOC states: "The physician's letter indicated that petitioner was diagnosed as being HIV+. The Commission finds that this evidence is sufficient to establish that petitioner had a physical impairment which substantially limited one or more major life activities and that he therefore was an individual with a disability under the regulations."[81]

It is difficult to conceptualize how the EEOC's analysis in *Doe* constitutes an individualized inquiry based upon Mr. Doe's particular circumstances. The only words in this analysis unique to Mr. Doe are "[T]he physician's letter"[82] Discerning how these three words constitute a person specific analysis, different from the analysis the EEOC would conduct for any other HIV positive complainant who alleged disability discrimination, is a challenge. The EEOC's analysis regarding whether Mr. Doe is a disabled individual is unrelated to his particular physiological state, symptoms, lack of symptoms, desire to have children, ability to procreate if he were not HIV positive, or ability to have a partner with whom to have children.[83]

The EEOC's analysis in *Smith v. Powell*,[84] the more recent of the two published public sector decisions involving an HIV positive complainant alleging disability discrimination, demonstrates even less of an individualized inquiry, based on Smith's particular circumstances, than is present in *Doe*. The EEOC analyzed the individual circumstances of Mr. Smith's case in one sentence: "Turning to complainant's claim of disability discrimination, the Commission finds that complainant has a physical impairment which substantially limited one or more major life activities and that he was,

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[75] *See* Mohamed v. Potter, No. 01A33869, 2004 EEOPUB LEXIS 6975, at *4-*5 (EEOC Dec. 16, 2004) (citing *Bragdon* for the proposition that reasonable accommodation cases are not generally amenable to class certification because the need for an individualized inquiry in each case prevents the commonality and typicality prerequisites).

[76] Doe v. Rubin, No. 03990024, 1999 EEOPUB LEXIS 2692, at *10-*11 (EEOC May 20, 1999); Smith v. Powell, No. 01995547, 2002 EEOPUB LEXIS 4036, at *3-*4 (EEOC June 20, 2002).

[77] *Doe*, 1999 EEOPUB LEXIS 2692, at *10-*11; *Smith*, 2002 EEOPUB LEXIS 4036, at *3-*4. Both complainants were male. The two decisions appear to establish that the EEOC applies *Bragdon* equally to males and females.

[78] *Doe*, 1999 EEOPUB LEXIS 2692.

[79] *Id.* at *10. The EEOC refers to Doe as "Petitioner" instead of "Complainant" because his case reached the EEOC after being heard as a "mixed" case by the Merit Systems Protection Board (MSPB). Rather than filing initially with EEOC, Doe filed with the MSPB, alleging that he lost his civil service position for reasons including discrimination. *Id.* at *1-2. After the MSPB decided the case, Doe was able to appeal the portion of the MSPB's decision regarding his discrimination allegations to the EEOC. *Id.*

[80] *Id.* at *10.

[81] *Id.* at *10-*11 (citing Bragdon v. Abbott, 524 U.S. 624 (1998)).

[82] *Id.*

[83] These questions are stated or suggested by Chief Justice Rehnquist's dissent in *Bragdon*. *See Bragdon*, 524 U.S. at 658-59 (Rehnquist, C.J., dissenting).

[84] No. 01995547, 2002 EEOPUB LEXIS 4036 (EEOC June 20, 2002).

therefore, an individual with a disability under the regulations."[85] Consistent with its analysis in *Doe*, the EEOC did not analyze Mr. Smith's physiological state, his symptoms from his HIV positive condition, his desire to have children, his ability to procreate if he were not HIV positive, or his ability find a partner with whom to have children.[86]

The EEOC's statements about *Bragdon* contradict the EEOC's holdings in its two HIV public sector decisions. There is some justification for the contradiction. *Bragdon* can be read to require that finding a complainant has a disability necessitates an individualized inquiry based on particular circumstances.[87] Similarly, *Bragdon* can be read in a way that justifies the EEOC in employing a rule that any HIV positive complainant is per se an individual with a disability, based upon a substantial limitation to the person's ability to reproduce, which is a major life activity. After all, *Bragdon* conducted no individualized assessment regarding Ms. Abbott's physiological state, ruling that HIV was a physical impairment from the moment of infection.[88] Moreover, *Bragdon* never addressed the question of whether Ms. Abbott desired to have children or if she was able to procreate if she were not HIV positive. Nor did the case address questions such as whether Ms. Abbott had a male partner, a sperm donor, or a willingness to procreate via a sperm bank or stranger.[89]

Insurance Coverage for Fertility Therapy

Cummings v. James[90] presented the EEOC with its first public sector case asserting reproductive rights discrimination under *Bragdon*. Ms. Cummings, a Department of Defense, Defense Finance and Accounting Service attorney, filed a complaint against the Office of Personnel Management (OPM) asserting that she was discriminated against on the basis of disability, infertility, when OPM provided Ms. Cummings with "incomplete" insurance coverage for her infertility.[91] Specifically, Ms. Cummings alleged that OPM, which administers the Federal Employee Health Benefits (FEHB) Act, discriminated against her by not requiring health plans in the FEHB program to cover what she termed "artificial reproductive technology."[92] Included in OPM's duties as the FEBH administrator is negotiating and approving the terms of all insurance plans offered under the program.[93]

Initially, OPM dismissed Ms. Cummings's complaint for failing to state a claim.[94] The initial dismissal seems surprising given that Ms. Cummings filed her complaint over a year after the Supreme Court decided *Bragdon*[95] and the ADA places an "agent, or entity that administers benefit plans, or similar organizations" in the same category as a health insurer that offers a plan.[96] Not surprisingly, the EEOC reversed OPM's initial decision that Ms. Cummings's complaint failed to state a claim.[97] Thereafter, OPM investigated Ms. Cummings's complaint, and well after OPM completed the investigation, Ms. Cummings moved for class certification of her complaint.[98]

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[85] *Id*. at *3-*4 (citing *Bragdon*, 524 U.S. 624 (1998)); *Doe*, 1999 EEOPUB LEXIS 2692. The EEOC also added, parenthetically, after the *Bragdon* citation: "HIV infection, even during so-called asymptomatic phase, is a physical impairment that substantially limits the major life activity of reproduction." *Smith*, 2002 EEOPUB LEXIS 4036, at *4 (quoting *Bragdon*, 524 U.S. 624 (1998)).

[86] *Smith*, 2002 EEOPUB LEXIS 4036, at *3-*4. These questions are stated or suggested by Chief Justice Rehnquist's dissent in *Bragdon*. *See Bragdon*, 524 U.S. at 658-59 (Rehnquist, C.J., dissenting).

[87] *Bragdon*, 524 U.S. at 633, 638 (asserting, "The first step in the inquiry under subsection (A) requires us to determine whether respondent's condition constituted a physical impairment," and thereafter focusing exclusively on reproduction as a major life activity, because Ms. Abbott asserted this was the condition at issue for her.).

[88] *Id*. at 638. See also the critique that *Bragdon* failed to conduct an individualized assessment of whether, before she was infected with HIV, Ms. Bragdon's major life activities included reproduction. *Bragdon*, 524 U.S. at 658-59 (Rehnquist, C.J., dissenting).

[89] *Id*. at 658-59 (Rehnquist, C.J., dissenting).

[90] No. 01A22203, 2004 EEOPUB LEXIS 2648 (EEOC May 13, 2004).

[91] *Id*. at *2.

[92] *Id*. at *2-*4.

[93] *Id*. at *2.

[94] *Id*. at *3.

[95] Ms. Cummings filed her formal complaint on 4 Nov. 1999. *Id*. at *2. The Supreme Court decided *Bragdon* on 25 June 1998. Bragdon v. Abbott, 524 U.S. 624 (1998).

[96] 42 U.S.C. § 12201(c)(1) (2000).

[97] *Cummings*, 2004 EEOPUB LEXIS 2648, at *3.

[98] *Id*. at *3-*5.

In its final decision, OPM first concluded that Ms. Cummings filed her complaint late, and her motion for class certification was also untimely.[99] Second, OPM decided that even if Ms. Cummings's complaint and motion were timely, Ms. Cummings provided no evidence to support her claim that OPM discriminated against her when her fertility drugs and treatments were covered at less than full cost or that OPM discriminated against her by not requiring health plans in the FEHB program to cover artificial reproductive technology.[100] In its analysis, OPM asserted that "the fact that a [health] plan did not cover the full range of services sought by an enrollee is not evidence of discrimination."[101]

The EEOC reversed OPM's decision on the first issue, finding that Ms. Cummings had timely asserted an individual discrimination claim. The EEOC agreed with Ms. Cummings's argument that she timely appealed a present harm because when she filed her complaint, she was still limited in coverage for artificial reproductive therapy coverage under the FEHB plan and, thus, asserted a "present violation."[102] The EEOC, however, agreed with OPM that Ms. Cummings filed her motion for class certification unreasonably late since she knew early in the process that a majority of federal employees have health insurance through the FEHB program and were subject to the same limitations.[103]

Turning to the substantive merits of Ms. Cummings's complaint, the EEOC determined that it could not properly review OPM's decision because the record lacked sufficient information to determine whether the FEHB program violated the ADA.[104] As the EEOC analyzed the issue, the first question to be answered was whether the FEHB's limitation on coverage for artificial reproductive technology was a "disability-based distinction."[105]

In defining what constitutes a disability-based distinction, the EEOC referred to a 1993 EEOC notice that explained the application of the ADA to health insurance.[106] A disability based distinction is one which "'singles out a particular disability (e.g. deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g. cancers, muscular dystrophies, kidney disease), or disability in general (e.g. non-coverage of all conditions that substantially limit a major life activity).'"[107]

The EEOC noted that "insurance distinctions that are not based upon a disability and are applied equally to all insured employees are not discriminatory."[108] Broad, equally applied distinctions that do not "single out a particular disability, a discrete group of disabilities, or disability in general" are not disability-based.[109] The EEOC noted that a blanket exclusion from coverage for pre-existing conditions would not violate the ADA.[110] Similarly, "coverage limits that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability [or] distinctions based upon a disability" are not discriminatory.[111]

The record contained insufficient information for the EEOC to answer key questions necessary to determine whether the FEHB's limitations on artificial reproductive technology were disability-based distinctions. The EEOC could not determine from the record whether:

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[99] *Id*. at *3.

[100] *Id*. at *3-*4.

[101] *Id*. at *4.

[102] *Id*. at *5; *see also* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112-13 (2002). If Ms. Cummings ultimately won her case, presumably she would not recover the costs of past, uncovered fertility treatments, but would recover for treatments that occurred within forty-five days before filing her case and all uncovered treatments thereafter. *See* 29 C.F.R. § 1614.105(a) (2004).

[103] *Cummings*, 2004 EEOPUB LEXIS 2648, at *5-*6.

[104] *Id*. at *6.

[105] *Id*. at *7.

[106] *Id*. at *4 (referring to EEOC Interim Enforcement Guidance on Application of Americans with Disabilities Act to Health Insurance (Guidance), EEOC Notice No. 915.002 (June 9, 1993)) [hereinafter EEOC Health Insurance Guidance]. The EEOC Health Insurance Guidance is available at http://www.eeoc.gov/policy/docs/health.html. The document posted at the EEOC website, however, is actually dated 8 June 1993. Although the EEOC labeled the EEOC Health Insurance Guidance "interim" at the time of publication in 1993, paragraph 4 provides that "this Notice will remain in effect until rescinded or superseded." *Id*. at 1.

[107] *Cummings*, 2004 EEOPUB LEXIS 2648, at *8 (quoting EEOC Health Insurance Guidance, *supra* note 106, at 3 & n.1).

[108] *Cummings*, 2004 EEOPUB LEXIS 2648, at *8.

[109] *Id*.

[110] *Id*. at *8-*9.

[111] *Id*. at *9.

> the excluded fertility treatments are used only to treat those who are infertile due to a substantially limiting impairment or if they are also used to treat women who do not have an impairment but are nonetheless unable to have children. If the procedures are used to assist both individuals with disabilities (i.e., women who are unable to bear children due to an impairment) and individuals without disabilities (i.e. women who are unable to bear children for some other reason, such as age) then the exclusion of such procedures is not a disability-based distinction.[112]

Under the EEOC's analysis, if the FEHB program's lack of coverage for artificial reproductive technology was not a disability-based distinction, the program would not violate the ADA.[113] Even if the FEHB program's lack of coverage for artificial reproductive technology were disability-based, however, this would not necessarily mean that the program violated the ADA since the ADA permits disability-based distinctions if they are within listed exceptions.[114]

Disability-based distinctions in the FEHB program are permissible if "(1) the health insurance plan is a bona fide plan which is not inconsistent with state law; and (2) that disability-based distinction is not being used as a subterfuge."[115] The EEOC defines "bona fide" as requiring that "the plan exists, it pays benefits, and its terms have been accurately communicated to employees."[116] Consistency with state law requires determining which state's law applies and then determining which laws of the given state are relevant to the determination.[117] "Subterfuge" is determined on a case by case basis, under the totality of the circumstances, considering whether the given disability based disparate treatment is justified by the risks of or costs associated with the disability.[118]

The EEOC concluded that the record in Ms. Cummings's case lacked sufficient evidence to determine whether the FEHB plan was within the ADA's statutory exceptions if its limitations on artificial reproductive technology were disability-based.[119] Remanding the case for additional investigation, the EEOC directed OPM to supplement the record with information regarding whether the FEHB's limitations on artificial reproductive technology were disability-based and whether the limitations were within the ADA's exceptions.[120]

Interestingly, the EEOC offered Ms. Cummings an opportunity to provide additional information regarding her medical condition that, she alleged, substantially limited her ability to reproduce.[121] The EEOC found that Ms. Cummings was clearly a "qualified individual" since there was no dispute about her ability to perform her duties as an attorney, but "because . . . we are remanding the case for a supplemental investigation, we decline to determine herein whether complainant established that she is a qualified individual with a disability."[122]

The EEOC's refusal to accept that Ms. Cummings was disabled, as defined by the Rehabilitation Act and ADA, is inconsistent with the EEOC's holdings in the *Doe* and *Smith* HIV positive cases. Nothing in *Cummings* suggested that OPM disputed Ms. Cummings's assertion that she was infertile. However, where Doe and Smith needed only to show that they were HIV positive to be conclusively presumed disabled under the Rehabilitation Act and ADA, the EEOC was not satisfied that Ms. Cummings met the disability definition based on "a brief statement which suggests that [Ms. Cummings's] infertility is caused by the inability of eggs to reach the uterus . . . ."[123]

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[112] *Id*. at *9-*10.

[113] *Id*. at *7-*8.

[114] 42 U.S.C. § 12201(c) (2000).

[115] *Cummings*, 2004 EEOPUB LEXIS 2648, at *11 (citing 29 C.F.R. § 1614.16(f) (2004)).

[116] *Cummings*, 2004 EEOPUB LEXIS 2648, at *11.

[117] EEOC Health Ins. Guidance, *supra* note 106, at 11 n.13.

[118] *Id*. at 6.

[119] *Cummings*, 2004 EEOPUB LEXIS 2648, at *12.

[120] *Id*.

[121] *Id*. at *12-*13.

[122] *Id*. at *7.

[123] *Id*. at *12-*13.

Conclusion: *Bragdon*'s Meaning, Today and in the Future

The conclusion to be drawn from *Doe*, *Smith*, and *Cummings* is that the EEOC reads *Bragdon* as announcing a bright line disability rule for individuals infected with HIV. The EEOC does not read *Bragdon* as being a case about reproduction. The EEOC sees *Bragdon* as a case about an individual who was infected with and disabled by HIV, and who was discriminated against because of her HIV positive condition. The EEOC reads portions of *Bragdon* regarding physical disability related to reproduction as mere dicta.

The clear conclusion from an analysis of the EEOC's published, public sector decisions is that an individualized assessment of a complainant's condition is essential for analyzing all disability discrimination claims, except for claims based on HIV positive status. Despite *Bragdon*'s stated focus on reproduction, not HIV infection status, the EEOC reads *Bragdon* to require an individualized assessment of claimants who allege that they are substantially limited in the major life activity of reproduction. No such individualized assessment is required for an individual infected with HIV.

The EEOC's interpretation of *Bragdon* is unlikely to change, absent an equally unlikely radical change in future Supreme Court disability discrimination jurisprudence.[124] Post *Bragdon* Supreme Court decisions have reinvented *Bragdon*, making it into the "individualized inquiry" talisman that it has become for the EEOC. Although *Bragdon* was decided 25 June 1998,[125] the first EEOC public sector decision citing *Bragdon* for the proposition that it required an individualized inquiry was on September 18, 2000. The EEOC has cited *Bragdon* only twice since 18 September 2000 in its public sector decisions without invoking the individualized inquiry requirement: once on 9 November 2000, noting, "we have also considered the complainant's claim in light of the Supreme Court's recent decisions in . . . Bragdon . . ."[126] and once in the *Smith* HIV positive case in 2002.[127]

The over two-year delay between *Bragdon*'s publication and the EEOC's first citing *Bragdon* as requiring an individualized inquiry is not happenstance. In 1999, the Supreme Court decided *Sutton v. United Airlines*.[128] *Sutton*, a seven-to-two decision, addressed whether mitigating measures[129] can prevent a disability. *Sutton* cites *Bragdon* for the proposition that "whether a person has a disability under the ADA is an individualized inquiry."[130] *Bragdon* does not contain the words "individualized inquiry," and as noted above, the *Bragdon* dissent focused on the majority's failure to address whether HIV infection changed Ms. Abbott's reproductive desires.[131] *Sutton* also holds that a disability cannot be potential or hypothetical,[132] whereas, Ms. Abbott's asymptomatic condition was a part of *Bragdon*'s holding.[133] Yet *Sutton* never criticizes *Bragdon*, instead redefining *Bragdon* by a greater margin than that which decided *Bragdon*.[134]

Toyota Motor Manufacturing v. Williams,[135] a unanimous 2002 Supreme Court decision, approves and continues *Sutton*'s reinvention of *Bragdon*. *Toyota* states that the *Bragdon* dissent's principle complaint did not exist.[136] Where *Bragdon*'s dissent focuses on the lack of an individualized inquiry, based on Ms. Abbott's failure to present any evidence that HIV infection changed her reproduction plans,[137] *Toyota* asserts, contrary to *Bragdon*'s facts, that *Bragdon* was

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[124] A radical change in Supreme Court precedent appears unlikely, based upon the holdings in *Sutton v. United Airlines*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) as discussed in the remainder of this section.

[125] Bragdon v. Abbott, 524 U.S. 624 (1998).

[126] Ledesma v. Henderson, No. 01985925, 2000 EEOPUB LEXIS 6672, at *8-*9 n.5 (EEOC Sept. 13, 2000).

[127] Smith v. Powell, No. 01995547, 2002 EEOPUB LEXIS 4036, at *4-*5 (EEOC June 20, 2002).

[128] 527 U.S. 471 (1999).

[129] A "mitigating measure" is a means of lessening a disability. The mitigating measure could be a medicine or a simple device such as eye glasses or contact lenses to correct a vision impairment. *See id*. at 475 & 482-83.

[130] *Id*. at 483.

[131] *See* Bragdon v. Abbott, 524 U.S. 624, 658-59 (1998) (Rehnquist, C.J., dissenting) and *supra* notes 83, 86, 88-89, and accompanying text.

[132] *Sutton*, 527 U.S. at 482.

[133] *Bragdon*, 524 U.S. at 637 (holding HIV "is an impairment from the moment of infection.").

[134] *Bragdon* was a five to four decision. *Id*. at 624.

[135] 534 U.S. 184 (2002).

[136] *Id*. at 198.

[137] *See Bragdon*, 524 U.S. at 658.

decided based on its "relying on unchallenged testimony that respondent's HIV infection controlled her decision not to have a child . . . ."[138]

Thus, *Bragdon* remains an uncriticized[139] precedent and has progressed from a five to four decision to a decision embraced by every member of the Court. Similarly, *Bragdon*'s holding has morphed into the general rule for which the EEOC cites it. Moreover, no Supreme Court precedent has reversed *Bragdon*'s holding that HIV infection "is an impairment from the moment of infection,"[140] or that conception imposes "a significant risk of becoming infected" on the infected individual's sexual partner.[141] Unless and until the Supreme Court specifically overrules these aspects of *Bragdon*, which appears increasingly unlikely in light of *Sutton* and *Toyota*, there is no basis to expect the EEOC will change its published understanding of *Bragdon*.

Any EEOC case that reaches a judicial forum is tried de novo.[142] Thus, there is no post-EEOC harm from a labor counselor failing to litigate whether an HIV infection substantially impairs a complainant and failing to litigate which major life activity allegedly is impaired. If an Army HIV positive discrimination case continues beyond the EEOC, the Justice Department and Army Litigation Division take over the case;[143] if the Justice Department and Army Litigation Division desire to litigate the individualized inquiry issue, the labor counselor's failure to litigate this issue at the administrative level will not limit a subsequent judicial inquiry.[144] The installation labor counselor should not expend limited resources on a long, uphill battle to reverse EEOC precedent that almost certainly will fail.

> [T]here is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction. . . . Indeed, when asked during her deposition whether her HIV infection had in any way impaired her ability to carry out any of *her* life functions, respondent answered "No."

Id. (Rehnquist, C.J., dissenting).

[138] *Toyota*, 534 U.S. at 198.

[139] That is, uncriticized by subsequent Supreme Court decisions.

[140] *Bragdon*, 524 U.S. at 637.

[141] *Id*. at 639.

[142] *See* 42 U.S.C. § 2000e-16(c) (2000); Farrell v. Principi, 366 F.3d 1066 (9th Cir. 2004); 29 C.F.R. 1614.407(a) (2004).

[143] AR 27-40, *supra* note 5, para. 1-4a – 1-4d.

[144] *See* 42 U.S.C. § 2000e-16(c); Farrell v. Principi, 366 F.3d 1066 (9th Cir. 2004); 29 C.F.R. 1614.407(a).

TJAGLCS Practice Notes

Legal Assistance Notes

Person Authorized to Designate Disposition (PADD) Update

Major Dana Chase[*]

This note explains recent policy changes affecting the designation of servicemembers' remains. It is important for legal assistance attorneys to understand these changes so that they may properly advise their servicemember clients on the mortuary planning aspect of estate planning.

United States Code, title 10, section 1482, provides an order of precedence for persons authorized to designate disposition of a servicemember's remains.[1] Paragraph 4-4, *Army Regulation 638-2, Care and Disposition of Remains and Disposition of Personal Effects*, further delineates, in order of precedence, who can receive a servicemember's remains for disposition.[2] Neither the statute nor the regulation, however, requires servicemembers to designate the person as to whom their remains are to be given.[3] This oversight has posed several recent dilemmas between surviving family members of servicemembers.[4]

Pursuant to the Under Secretary of Defense and a military personnel (MILPER) policy message, servicemembers must now designate someone to direct disposition of their remains.[5] Servicemembers can designate someone by using Department of Defense (DOD) Form 93, Record of Emergency Data.[6] Servicemembers are, however, limited as to whom they can select as their designee. Servicemembers may only designate a blood relative or spouse, if married.[7] In the event the person designated by the servicemember declines to be the PADD or predeceases the servicemember, an order of precedence as described in MILPER message number 06-020 will control who is designated the PADD.[8]

The Army will incorporate these changes into the next revision of *Army Regulation 600-8-1*, *Army Casualty Operation/Assistance/Insurance* and DD Form 93, Record of Emergency Data.[9] Until then, legal assistance attorneys should assist servicemembers and personnel offices by making sure that servicemembers use DD Form 93, block 13 to designate the PADD, including, the person's name, relationship, address and telephone number.[10]

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[1] 10 U.S.C. § 1482 (2000).

[2] U.S. DEP'T OF ARMY, REG. 638-2, CARE AND DISPOSITION OF REMIANS AND DISPOSITION OF PERSONAL EFFECTS para. 4-4 (22 Dec. 2000).

[3] 10 U.S.C. § 1482; AR 638-2, *supra* note 2, para. 4-4.

[4] *See Divorced Father Wins Case Over Son's Remains*, N.Y. TIMES, Nov. 2, 2005; *Parents End Burial Dispute, Pick Spot Soldier Loved*, LANSING ST. J. (Lansing, MI), Feb. 10, 2006.

[5] Memorandum, Office of the Under Secretary of Defense, to Deputy Assistant Secretary of the Army (Human Resource), Deputy Assistance Secretary of the Navy (Military Personnel Policy), Deputy Assistant Secretary of the Air Force (Force Management Integration), subject: Service Member Designation of a Person Authorized to Direct Disposition (14 July 2005) [hereinafter Servicemember Designation Memo]; Message, Army Human Resources Command, MILPER Message Number 06-020, subject: Implementing Guidance for Service Member Designation of a Person Authorized to Direct Disposition (PADD) (19 Jan. 2006) [hereinafter Implementing Guidance Message].

[6] Servicemember Designation Memo, *supra* note 5; U.S. Dep't of Defense, DD Form 93, Record of Emergency Data (Aug. 1998) (inserting the designee's name in block 13, remarks).

[7] Implementing Guidance Message, *supra* note 5, para. 4A.

[8] *Id*. para. 4B. The order of precedence is as follows: (1) surviving spouse, even if he or she is a minor; (2) sons or daughters who have reached the age of majority with the oldest being the PADD; (3) parents, not including step parents, in order of age, unless one parent was granted custody by court order or statute; (4) blood or adoptive relative of the service member if they were granted legal custody by court order or statute; (5) oldest sibling that has reached the age of majority; (6) grandparents in order of age; (7) other adult blood relative in order of relationship to the service member under the laws of the state of domicile; (8) remarried surviving spouse; (9) person in loco parentis; (10) legal representative of the estate; (11) personal friend of the deceased service member; and (12) CDR HRC. *Id.*

[9] *Id*.

[10] *Id*.

Survivor Benefits Update

Major Dana Chase[*]

Recent significant changes in survivor benefits have resulted in the increase of benefits for eligible surviving beneficiaries of servicemembers. This note highlights those changes so that legal assistance attorneys can help clients create an overall estate plan as well as assist surviving spouses and family members of deceased Soldiers in understanding how these changes affect them.

Survivor benefits include several different allowances that surviving spouses, children, and other dependents are eligible to receive due to the death of their servicemember provider. These allowances include Dependent Indemnity Compensation (DIC),[1] Service Member's Group Life Insurance (SGLI),[2] Survivor Benefit Program (SBP),[3] Dependent Education Assistance (DEA),[4] Social Security, death gratuity,[5] and other benefits[6].

2004 Changes

After the tragic events of 11 September 2001, the National Defense Authorization Act for Fiscal Year 2002 authorized survivor benefits to surviving family members of any servicemember who dies on active duty while in the line of duty.[7] In the event the servicemember had a surviving spouse and surviving children, this change only allowed the surviving spouse to receive SBP payments that were offset by DIC, rather than allowing the SBP to pass to the children.[8] The National Defense Authorization Act for Fiscal Year 2004 rectified this issue by authorizing the "Secretary concerned in consultation with the surviving spouse" to determine whether the servicemember's surviving children should receive SBP instead of the surviving spouse.[9] After this change, the Department of Defense eliminated imminent death retirement as the need to retire servicemembers in order to obtain SBP for the surviving spouse and children was no longer necessary.[10]

2005 Changes

The year 2005 saw even more changes to survivor benefits. Prior to the National Defense Authorization Act for Fiscal Year 2005, survivor benefit annuity payments decreased from fifty-five percent to thirty-five percent of the base amount selected by the retiree once the surviving beneficiary reached age 62.[11] The National Defense Authorization Act for Fiscal Year 2005 created a phase-out of the benefit decrease and allowed retirees to increase the percentage of the base amount of the annuity back to fifty-five percent.[12] To enroll in the phase-out program, retirees must pay back premiums with interest to

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[1] 38 U.S.C.S. §§ 1301-23 (LEXIS 2006).

[2] 38 U.S.C.S. §§ 1965-80.

[3] 10 U.S.C.S. §§ 1447-60B.

[4] 38 U.S.C.S. §§ 3501-67.

[5] 10 U.S.C.S. §§ 1475-80.

[6] Other benefits include, death gratuity, 10 U.S.C.S. § 1475 (unpaid pay and allowances), 37 U.S.C.S. § 501 (burial benefits), 10 U.S.C.S. § 1482; 38 U.S.C.S. §§ 2301-08; and 2402 (relocation); 37 U.S.C.S. § 403 and 406 (medical care, emergency money, and exchange and commissary privileges); U.S. DEP'T OF ARMY, DA PAM. 608-4, A GUIDE FOR THE SURVIVORS OF DECEASED ARMY MEMBERS (23 Feb. 1999).

[7] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001) (codified at 10 U.S.C. § 1448(d)).

[8] 10 U.S.C.S. § 1450 (c).

[9] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003) (amending 10 U.S.C. § 1448(d) (2000)).

[10] Memorandum, Office of the Under Secretary of Defense, to Assistant Secretary of Defense (Reserve Affairs), Assistant Secretary of the Army (Manpower and Reserve Affairs), Assistant Secretary of the Navy (Manpower and Reserve Affairs), and Assistant Secretary of the Air Force (Manpower and Reserve Affairs), subject: Change to Imminent Death Processing Policy in DoD Instruction 1332.38 (23 Dec. 2003).

[11] 10 U.S.C. § 1451(a)(1)(B)(i).

[12] National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004). With this phase-out program, survivor benefits will increase each year at the following rate: forty percent on 1 October 2005, forty-five percent on 1 April 2006, fifty percent on 1 April 2007, and fifty-five percent on 1 April 2008. *Id.*

the date of retirement.[13] The open enrollment period for the phase-out program, however, expires 30 September 2006 and if the retiree dies within two years of making the election, the election becomes void.[14]

Service Member's Group Life Insurance increased to $400,000 effective 1 September 2005.[15] This change was due to expire 30 September 2005, however, the Servicemember's Group Life Insurance Enhancement Act of 2005 made the increase in benefit to $400,000 permanent.[16] In addition to the increase in benefits, servicemembers must notify their spouse if the servicemember selects other than full coverage for the spouse or if the spouse is not a beneficiary of the SGLI.[17]

Also added in 2005 as a rider to SGLI coverage, was the Traumatic Injury Protection Insurance Program (T-SGLI).[18] Coverage for all servicemembers under T-SGLI began on 1 December 2005 at a cost of one dollar per month.[19] This program provides payments ranging from $25,000 to $100,000 for servicemembers who suffer a traumatic injury such as loss of sight, hearing, speech, or limb.[20] The T-SGLI includes a provision that is retroactive for servicemembers who suffered a traumatic injury as a direct result of injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom between 7 October 2001 and 11 May 2005.[21]

The death gratuity was also changed in 2005. Previously, the designated beneficiary of a servicemember who died on active duty would receive a lump sum payment of $12,420.[22] The death gratuity was increased to $100,000 for any servicemember who died on or after 7 October 2001 as a result of wounds, injuries, or illness incurred in Operation Iraqi Freedom, Operation Enduring Freedom, or as a "direct result of armed conflict; while engaged in hazardous service; in the performance of duty under conditions simulating war; or through and instrumentality of war."[23]

2006 Changes

The death gratuity was further modified by the National Defense Authorization Act for Fiscal Year 2006.[24] Signed by President Bush on 6 January 2006, section 664 of the Act increases the amount of the death gratuity to $100,000 for all servicemembers who died on active duty or after 7 October 2001.[25] The Act effectively changes the language of 10 U.S.C. § 1478(a), by striking $12,000 and inserting $100,000 and eliminates the previous conditions requiring death as a result of wounds, illness, or injury occurring in Operation Iraqi Freedom, Operation Enduring Freedom, or other armed conflicts.[26]

Section 611 of the National Defense Authorization Act for Fiscal Year 2006 increases the amount of time dependent family members can receive housing allowances or occupy government quarters to 365 days following the death of their servicemember sponsor.[27] Previously, dependent family members could only receive housing allowances or occupy government quarters for 180 days after the death of the servicemember.[28]

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[13] *Id.*

[14] *Id.*

[15] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

[16] Servicemember's Group Life Insurance Enhancement Act of 2005, Pub. L. No. 109-80, 119 Stat. 2045 (2005).

[17] *Id.*

[18] 10 U.S.C.S. § 1980A (LEXIS 2006).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] 10 U.S.C. § 1478(a) (2000).

[23] Pub. L. No. 109-13, 119 Stat. 231 (2005).

[24] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] 37 U.S.C. § 403(1) (2000).

For more information on survivor benefits, visit the Department of Veterans Affairs website at http://www.vba.va.gov/Survivors.

Book Reviews

THREE NIGHTS IN AUGUST: STRATEGY, HEARTBREAK, AND JOY INSIDE THE MIND OF A MANAGER[1]

REVIEWED BY MAJOR ROSEANNE BLEAM[2]

The complexities are dizzying, the effort to prevent something perhaps encouraging the very thing you want to prevent, the system of pulleys and levers vengeful and sadistic, damned if you do and . . . damned if you do anyway. They are small choices, tiny ripples in the game, but they can also save a win.[3]

Baseball's casual observers may find the game uninteresting, to say the least. To them, baseball is a simple game where pitchers pitch, batters bat, and fielders field the ball. Author Buzz Bissinger dispels this notion in *Three Nights in August*. Written in collaboration with Tony La Russa[4]—the St. Louis Cardinals manager and five-time manager of the year—Bissinger crafted an entertaining book that will educate not only the casual observer, but also the most dedicated baseball fan, on the complexities and intricacies of the game. Despite Bissinger's off-putting propensity for extravagant and over-the-top prose, those who read *Three Nights in August* to better appreciate the sport of baseball will not be disappointed.

During the 2003 baseball season, the Cardinals gave Bissinger "virtually unlimited access to [their] clubhouse and the coaches and players and personnel who populate it—not simply for the three-game series that forms the spine of the book but also for the virtual entirety of the 2003 season . . . ."[5] This access provided Bissinger with great insight into the game of baseball from La Russa's perspective—an insight shared with the reader and unfettered by the usual rules of collaboration which would have allowed La Russa more editorial control of the book.[6]

Despite having ultimate control over the book's contents, Bissinger's admiration of La Russa clearly impacts *Three Nights in August*, which provides a mostly one-sided and very positive view of La Russa and his management style.[7] Some reviewers find this a basis for criticism.[8] One critic stated: "Bissinger never once argues with La Russa's choices, nor does he do much even to weigh them. Instead, he simply assumes that Tony La Russa is always right because, well, he's Tony La Russa."[9] This criticism is unwarranted. The subtitle of the book—*Strategy, Heartbreak, and Joy Inside the Mind of a Manager*—puts the reader on notice that the book will be from the manager's perspective. In fact, the very value of *Three Nights in August* is that it is written from a manager's perspective. While some readers might want a more unbiased approach towards La Russa and his management style, those who read *Three Nights in August* to better understand the intricacies of baseball and the strategy involved will find it well worth reading.

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[1] BUZZ BISSINGER, THREE NIGHTS IN AUGUST: STRATEGY, HEARTBREAK, AND JOY INSIDE THE MIND OF A MANAGER (2005).

[2] U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] BISSINGER, *supra* note 1, at 153-54.

[4] La Russa states that his motivation to collaborate on this book "came from the many conversations I've had with fans who wanted to dig deeply into the layers. They would light up when we talked about the complexities of situational at-bats, defensive positioning, and pitching changes, or when we discussed the psychological nuances of the game . . . . I saw that for fans, too, deeper knowledge could mean greater pleasure." Tony La Russa, *Foreword* to BUZZ, *supra* note 1, at xix.

[5] *Id*. at xiii.

[6] Prior to writing the book, La Russa agreed that Bissinger would be allowed "wide latitude to report and observe and draw [his] own conclusion. . . . La Russa did not waver from the latitude that he promised . . . La Russa has read what [Bissinger has] written [and] has clarified, but in no place has he asked that anything be removed, no matter how candid." *Id.* at xiii - xiv.

[7] Bissinger openly admits in the preface of the book "I came into this book as an admirer of La Russa. I leave with even more admiration not simply because of the intellectual complexity with which he reaches his decisions but also because of the place that I believe he occupies in the changing world of baseball." *Id.* at xiv.

[8] "Bissinger . . . is clearly enamored with the Cards' skipper. A little too enamored, frankly, which is precisely the problem with the book." Brian Gunn, *Three Nights in August: A Review*, HardballTimes.com, Apr. 1, 2005, http://www.hardballtimes.com/main/printarticles/three-nights-in-august-a-review. "This isn't the first time Bissinger has fallen hard for a subject. A contributing editor to Vanity Fair, his previous crushes include former Philadelphia Mayor Ed Rendell, in 'A Prayer for the City,' and the main football coach in 'Friday Nights Lights.'" David Kipen, *Eccentric Book on a Baseball One-of-a-Kind*, S.F. CHRON., Apr. 7, 2005.

[9] Gunn, *supra* note 8.

The "Complex and Layered Game"[10] of Baseball

In order to explore fully the strategy and the gamesmanship involved in the game of baseball, Bissinger and La Russa agreed that the focus of the book would be a three-game series; specifically, a three-game series between the St. Louis Cardinals and the Chicago Cubs in August 2003.[11] Within this framework, Bissinger does an excellent job of examining the "complex and layered game"[12] of baseball.

Bissinger's pitch-by-pitch analysis offers readers the opportunity to appreciate the strategy, thought, and preparation that La Russa puts into almost every play. Prior to a game, La Russa seemingly spends endless hours studying not only the typical baseball stats,[13] but also the individual match-ups between the teams.[14] During the game, La Russa is constantly strategizing, trying to decide: where to play the infield with a runner on first,[15] whether to pinch hit for the pitcher in the bottom of the seventh,[16] or whether to use the hit-and-run.[17] While some of the pitch-by-pitch analysis is excruciatingly detailed, it is this detail that helps the reader truly appreciate the intricacies of the game.

Three Nights in August is not simply a pitch-by-pitch analysis of every at-bat during the three-game series—something that all but the most ardent baseball fan would likely find intolerable. Instead, Bissinger weaves stories and discussions on a myriad of baseball topics into the pitch-by-pitch analysis. Bissinger explores topics as varied as La Russa's response to one of his players being intentionally hit by a pitcher,[18] Darryl Kiles' death in 2002 and its effect on the team,[19] La Russa's personal sacrifices,[20] players and coaches stealing signs from other teams,[21] and the evolution of the closing pitcher.[22] These passages provide the reader with a broader and better understanding of not only the game of baseball, but also, La Russa and his role as manager.

Questionable Leadership

The central figure in *Three Nights in August* is, of course, Tony La Russa. There is no question to Bissinger that La Russa is one of baseball's great managers[23] and he sets out to prove that to the reader. *Three Nights in August* clearly shows that La Russa is a great tactical manager[24] and some might argue that La Russa's record[25] speaks for itself. Despite this, *Three Nights in August* raises concerns about La Russa's leadership style, specifically his interaction with the players and his attitude towards the use of steroids.

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[10] BISSINGER, *supra* note 1, at xvi.

[11] *Id.* at xiii.

[12] *Id.* at xvi.

[13] "[A]t-bats and hits and extra-base hits and walks and strikeouts and average for hitters, wins and losses, and innings pitched and runs allowed and hits allowed and home runs allowed by pitchers." *Id.* at 18.

[14] "[H]ow each of [La Russa's] hitters has done against Cubs pitchers and how his pitchers have done against Cubs hitters, as well as the flip side: the individual performances of Cubs hitters against Cardinals pitchers and Cubs pitchers against Cardinals hitters." *Id.*

[15] *Id.* at 152-53.

[16] *Id.* at 172.

[17] *Id.* at 130-35.

[18] *Id.* at 111-20.

[19] *Id.* at 199-215.

[20] Arguably, the biggest personal sacrifice made by La Russa is time with his family. Since 1996 when La Russa became the manager of the Cardinals, he is separated from his family eight months of every year. His wife stayed behind in California with the children "to lead their lives while he led his. Id. at 100. On the wall of his office, La Russa had a plaque that read "We interrupt this marriage to bring you the baseball season." *Id.* at 96.

[21] *Id.* at 226-29.

[22] *Id.* at 177-80.

[23] "La Russa represents, to my mind, the best that baseball offers . . . ." *Id.* at xv.

[24] La Russa's ability to strategize and gameplan each play is evident throughout *Three Nights in August*. A great example of this ability is La Russa's analysis of how to play the infield with a runner on third in the top of the sixth inning in Game 2. *Id.* at 152-54.

[25] "No one in the modern history of the game had managed for twenty-four *consecutive* years . . . – an amazing feat of security in a job that had no security. No one else had won the Manager of the Year *five* times, . . . , with each of the three teams he had managed . . . ." *Id.* at 3.

According to Bissinger, "La Russa believes that in virtually all situations, human nature dictates results and that his role as a manager is to recognize the impact of human nature and take the best advantage of it."[26] From this statement, the reader would expect *Three Nights in August* to reveal La Russa as a leader who understood his players, a manager who over the years learned "how to manage the space between a player's ears."[27] But, "[i]f anything, La Russa comes across as brooding and lonely, unable to reach 'difficult' players like Garrett Stephenson and J.D. Drew."[28]

Throughout the book, La Russa denigrates the majority of today's baseball players.[29] While La Russa s quick to point out the exceptions—most notably Albert Pujols,[30] his overall attitude towards today's baseball players appears to be that "for today's players, winning is 'third or fourth on their list behind making money and having security and all that other BS.'"[31] La Russa seemingly ties the problem with today's players to the fact that players are so well-compensated that they have little reason to put forth extra effort in most situation because they already earn an excessive amount of money.[32] La Russa, who puts such store in human nature, fails to understand that his complaints about young baseball players are surprisingly parallel to the complaints about the younger generation that many managers have in workplaces where excessive salaries are not at issue.[33] A general stereotype about the younger generation as a whole, or Gen Y[34] as they are often called, is that they are "an overindulged, spoiled, and disengaged group that looks at the world through a prism of self interest."[35] La Russa's belief that the root of the problems with the young players stems solely from excessive compensation limits his effectiveness as a leader. In order to be a more effective leader, La Russa needs to look beyond his own personal beliefs to determine what other factors may be motivating his young players.

La Russa's limitation as a leader of young baseball players is illustrated by his attitude towards J.D. Drew. Drew is a talented baseball player whose attitude and seeming unwillingness to play to his full potential is a source of constant consternation for La Russa during the 2003 season.[36] La Russa decides that the reason Drew does not play to his full potential is that he is so well compensated that there is no reason for him to put forth a full effort.[37] "[Players] settle for some percent under their max. If you have the chance to be a two-million-dollar-a-year player, they might settle for 75 percent of that. In the case of J.D., if you have the chance to be a twelve-million-to-fifteen-million-dollar-a-year player, you settle for 75 percent of that."[38] From what is written in *Three Nights in August*, La Russa never considers that there might be other factors at play, factors he might be able to manipulate to get Drew to play to his full potential. Ironically, La Russa acknowledges his own limitations when "he wonders whether it would be better for someone else to open [Drew] up to the seduction of his limitless talent . . . ."[39] In 2004, the Cardinals traded Drew to the Atlanta Braves where he seemed to thrive under the management of Bobby Cox.[40]

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[26] *Id.* at 19.

[27] *Id.* at 23 (describing the Cubs' manager, Dusty Baker).

[28] Gunn, *supra* note 8.

[29] *Three Nights in August* is filled with negative generalizations about today's players that Bissinger attributes to La Russa, including: "Few things infuriate La Russa more than the modern player's steadfast refusal to play the game right." BISSINGER, *supra* note 1, at 238. "There are a lot of players that don't really want to dig deep enough to try to win." Id. at 181 (quoting La Russa). "Most seasons, players do what they have to do and plug along because when you have talent, you can plug along. During the *free-agency* year, their intensity picks up, and they're like hungry rookies again, eager to prove themselves and to avoid injury." *Id.* at 159.

[30] "[T]here was nothing quite like Pujols. Players like that don't come along once in a lifetime; they never come along. Yet Pujols had another quality that La Russa treasured even more, maybe because he himself had come of age in the game during the 1960s. It was selflessness in this ultimate age of selfishness, a joy in others' accomplishments that exceeded whatever joy Pujols took in his own accomplishments." *Id.* at 150-51.

[31] *Id.* at 160 (quoting La Russa).

[32] La Russa, *supra* note 4, at xx.

[33] In a 2004 presentation to the prison corrections community, one of the professors at the FBI Academy highlighted some of the most common complaints by correction managers, including: "They're not willing to pay their due." "They [are] materialistic. . . ." "[They're not] willing to go that extra mile. . . ." Nick Nicholson, Ph.D., Professor, FBI Academy, Promoting the Next Generation, 5th Annual Innovative Technologies for Community Corrections Conference, June 15, 2004 (on file with author).

[34] Generation or "Gen" Y typically includes those individuals who were born between 1977 and 1997. BusinessWeek Online, *Welcome to the Gen Y Workplace*, May 4, 2005, http://www.businessweek.com/bwdaily/dnflash/may2005/nf 200504_4640_db_083.htm.

[35] *Id.*

[36] BISSINGER, *supra* note 1, at 32.

[37] *Id.*

[38] *Id.* (quoting La Russa).

[39] *Id.* at 33.

[40] "Drew had over 500 at-bats for the first time in h is career, hitting .305 with thirty-one home runs and ninety-five RBIs. "*Id.* at 264.

La Russa also demonstrates questionable leadership when it comes to the use of steroids in baseball. La Russa acknowledges the use of steroids by his own players, but tries to rationalize it by saying that the steroid use by his club was "'not excessive' when compared to other teams."[41] This same type of rationalization can be seen in La Russa's response to the question of whether Mark McGwire used steroids. While La Russa was willing to acknowledge that McGwire used a steroid precursor, La Russa continued to believe that McGwire never used steroids.[42] After McGwire's testimony before Congress,[43] many believe that "the only conclusion you could draw was that [McGwire] had obviously taken some sort of substance."[44] According to Bissinger, La Russa "approached various minor-league players in hopes of discouraging their steroid use"[45] and made some effort to educate his own players.[46] However, La Russa sidesteps any responsibility for dealing with the steroid problem, saying that only the owners and the players' union were in a position to deal with the problem.[47] One is left to wonder what would have happened had a manager with La Russa's record publicly denounced the use of steroids five or ten years ago.

Over-the-Top Prose

For the most part, *Three Nights in August* is well-written. However, the extravagant and over-the-top prose used by Bissinger, while entertaining at times, is detracting.[48] In one passage he writes, "He was Rasputin in red Banlon, the angel of death in a Polo shirt with little red birds on the front."[49] This passage refers to Barry Weinberg, the Cardinals trainer, who was calling La Russa to report a player's injury.[50] In another passage, Bissinger writes, "He is Kline's eternal nemesis, the psychotic ex-girlfriend who sends you creepy notes through the mail to remind you she's still around."[51] Here he refers to Kenny Lofton, a batter, who is facing the Cardinals pitcher Steve Kline.[52] These are just two of the shorter examples of the extravagant prose that can be found throughout *Three Nights in August*. These sections are very distracting and add little, if any, value to the book.

Conclusion

La Russa and Bissinger collaborated on *Three Nights in August* in order to increase the baseball fan's understanding and enjoyment of the game.[53] Despite the over-the-top prose, *Three Nights in August* succeeds in giving the reader a true understanding and appreciation of the game of baseball. While some readers may still find baseball less than interesting even after reading this book, it is hard to imagine a reader of this book watching a baseball game and not being able to at least appreciate the intricacies involved in the game.

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[41] *Id.* at 161.

[42] *Id.* at 163.

[43] When questioned about whether he used steroids during congressional hearings, McGwire refused to answer saying that he was "not [at the hearings to] talk about [the] past" and that his attorney advised him that he "[could not] answer the questions without jeopardizing . . . [himself]." CNN.com, *McGwire Mum on Steroids in Hearing*, Mar. 17, 2005, http://www.cnn.com/2005/ALLPOLITICS/03/17/steroids.baseball.

[44] Dermot McEvoy, *Lights to Nights*, PUBLISHERS WKLY., May 2, 2005 (quoting Bissinger).

[45] BISSINGER, *supra* note 1, at 162.

[46] *Id.*

[47] *Id.* at 161-62.

[48] "What I like best about Bissinger isn't his reporting skills, which are solid, or his stories -- like the one about Tom Seaver predicting an entire pitch-by-pitch at-bat as surely as Babe Ruth ever called a home run shot -- but rather his erratic, sometimes overheated but often quite enjoyable prose. He writes as if he has a random word generator in his head, which spits out perfect left-field metaphors and Yogi-worthy malapropisms with equal ease." Kipen, supra note 8.

[49] BISSINGER, *supra* note 1, at 199.

[50] *Id.*

[51] *Id.* at 246.

[52] *Id.*

[53] BISSINGER, *supra* note 1, at xvi; La Russa, *supra* note 4, at xix.

FIRST IN: AN INSIDER'S ACCOUNT OF HOW THE CIA SPEARHEADED THE WAR ON TERROR IN AFGHANISTAN[1]

MAJOR HOWARD H. HOEGE III[2]

I don't want bin Ladin and his thugs captured, I want them dead. Alive and in prison here in the United States, they'll become a symbol, a rallying point for other terrorists. They have planned and carried out the murder of thousands of our citizens. They must be killed. I want to see photos of their heads on pikes. I want bin Ladin's head shipped back in a box filled with dry ice. I want to be able to show bin Ladin's head to the president.[3]

Cofer Black's Capone-like directive to Central Intelligence Agency (CIA) operative Gary Schroen promises the reader an intense look at the virtually unparalleled manhunt for one of the central figures in the U.S. War on Terror. Thus Schroen embarks on a dual-level account of the United States' earliest operations in Afghanistan following 11 September 2001. On one level, Schroen conveys an intimate narrative of the very personal experience of a small team of warriors in battle. On another level, Schroen attempts a critical analysis of contemporaneous national policy decisions and the strategic implications of those decisions. Because Schroen fails to commit to either a micro or a macro accounting of the CIA's early operations in Afghanistan, *First In* fails to contribute much to our understanding of either the warrior's life in battle or the complex strategic issues involved in prosecuting a war.

Schroen is eminently qualified to write a book on the CIA's role in the U.S. War on Terror.[4] During his thirty-two year career with the CIA, Schroen served in a host of assignments either in or dealing with Afghanistan.[5] Throughout those assignments, Schroen established relationships with Afghani military officers and political leaders that facilitated his team's initial success in Afghanistan in 2001.[6] Those relationships also provide the *First In* reader with a unique perspective on early U.S. operations in Afghanistan.

While Schroen's prior CIA experience provides valuable background information, his participation in the CIA's first mission into Afghanistan after 11 September 2001 establishes Schroen as the appropriate person to write this book. When then-CIA director George Tenet selected Schroen in mid-September 2001 to lead a team into Afghanistan,[7] Schroen was in the process of retiring from his position as the Deputy Chief of the Near East and South Asia Division of the Directorate of Operations.[8] Schroen rapidly assembled his seven-man team, "JAWBREAKER,"[9] and deployed with them to Afghanistan in late September 2001.[10] *First In* chronicles JAWBREAKER's efforts to reach Afghanistan, to quickly establish itself with Afghanistan's Northern Alliance, and to make the first U.S. strikes in America's War on Terror.

A Warrior's Tale

Schroen tells the reader that by writing about JAWBREAKER, he hopes to capture "in an honest and accurate manner the events and actions of the brave officers involved."[11] In doing so, Schroen intimates that he intends for *First In* to

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[1] GARY C. SCHROEN, FIRST IN: AN INSIDER'S ACCOUNT OF HOW THE CIA SPEARHEADED THE WAR ON TERROR IN AFGHANISTAN (2005).

[2] U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] SCHROEN, *supra* note 1, at 38 (statement of Cofer Black, Chief CIA Counter-Terrorist Center).

[4] *See* Jon Sawyer, *Book Details Derring-Do and Miscues*, ST. LOUIS POST-DISPATCH, June 12, 2005, at B1, *available at* LEXIS, News & Business.

[5] Schroen was stationed in Islamabad, Pakistan in the late 1970's with the CIA's Near East Division. SCHROEN, *supra* note 1, at 43. He participated in the CIA's support of the Mujahedin in Afghanistan following the Soviet invasion of 1979. *Id.* at 45. Schroen was the CIA station chief in Kabul in the 1980's, serving in Kabul when the United States closed its embassy there in 1988. *Id.* at 46-47. He again served as the senior case officer responsible for coordinating support to the Mujahedin in Afghanistan in Islamabad during the late 1980's. *Id.* Schroen was the chief of the Islamabad office in the mid-1990's. *Id.* at 53.

[6] *Id.* at 63.

[7] *Id.* at 16.

[8] *Id.* at 12.

[9] *Id.* at 22.

[10] *Id.* at 78.

[11] *Id.* at xiii.

memorialize the personal tale of warriors in battle. Schroen reportedly wrote *First In* after sharing many of the details of JAWBREAKER's mission with journalists writing about the CIA involvement in Afghanistan, bolstering Schroen's conclusion that he seeks to "set the record straight."[12]

Much of Schroen's account paints a very human and intriguing picture of various aspects of CIA operations. Schroen almost immediately connects with the reader by invoking the memory of the 11 September 2001 terrorist attacks on the United States.[13] Details about his personal reaction to the terrorist attacks invite the reader to reflect on the reader's memories of that day. Schroen's explanation of his decision to accept the mission to Afghanistan[14] reflects the very fundamental emotions stirred by the call to service. Schroen honestly portrays the profound moment of saying good-bye to loved ones,[15] drawing the reader further into JAWBREAKER.

Schroen also reveals the unexpected whimsical moments in an otherwise dangerous mission. To start, Schroen and his team rely not on the awesome ingenuity and wealth of the nation's industrial-military complex for their initial logistical support, but on a shopping trip to REI.[16] One team member's flatulence problem receives substantial attention from Schroen in the book, as it surely did from the other team members in Afghanistan.[17] Finally, Schroen confesses that JAWBREAKER found the mid-tour arrival of Starbucks coffee as a most valued re-supply item.[18]

Readers in the military or government service will benefit from Schroen's discussion of building relationships with the commanders of the Northern Alliance. In describing JAWBREAKER's mission, as conveyed to him by the chief of the Counterterrorist Center in the CIA, Schroen states:

> Gary, I want you to take a small team of CIA officers into Afghanistan. You will link up with the Northern Alliance in the Panjshir Valley, and your job is to convince them to cooperate fully with the CIA and the U.S. military as we go after bin Ladin and the Al-Qa'ida. You will also evaluate their military capabilities and recommend steps we can take to bring the Northern Alliance forces to a state of readiness so they can effectively take on the Taliban forces, opening the way for our efforts against UBL.[19]

Although Schroen's mission seems to neatly divide all players into four groups—the United States, the Northern Alliance, the Taliban, and Usama bin Ladin's associates—Schroen draws on his years of regional experience to demonstrate the nuanced and delicate relationships between those players in Afghanistan. Schroen, for example, describes his meeting with Professor Abdul Rasoul Sayyaf, a commander loosely allied with the Northern Alliance.[20] Although Sayyaf pledged general support for U.S. operations against bin Ladin and Al Qa'ida during his meeting with Schroen, Schroen remained wary as Sayyaf had ten years earlier accepted financial support from bin Ladin and had previously been vehemently anti-American.[21]

Likewise, Schroen exposes fractures in the Northern Alliance, as evidenced by his meetings with General Mohammad Fahim Kahn, a senior Northern Alliance military commander,[22] Dr. Abdullah Abdullah, the Northern Alliance foreign minister,[23] and engineer Aref Sarwari, the head of the Northern Alliance intelligence service.[24] In one such meeting, Dr.

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[12] *See* Faye Bowers, *Life in the CIA: Once Clandestine, Now Read All About It*, CHRISTIAN SCI. MONITOR, May 20, 2005, at 01, *available at* LEXIS, News & Business (citing examples from the book in which Schroen attempts to set the record straight).. "Schroen, for his part, says he wrote his book because he had been directed to tell most of his story already to two Washington Post reporters who were writing books about the war on terror." *Id.*

[13] SCHROEN, *supra* note 1, at 11-15.

[14] *Id.* at 31-32.

[15] *Id.* at 35-36.

[16] *Id.* at 23-24. Recreational Equipment, Inc. (REI) is a well known supplier of specialty outdoor gear and clothing with seventy-eight retail stores in the United States and a busy Internet, telephone, and mail-order business. *See* www.REI.com (last visited Nov. 22, 2005).

[17] SCHROEN, *supra* note 1, at 109, 129, & 156.

[18] *Id.* at 210.

[19] *Id.* at 15-16.

[20] *Id.* at 116.

[21] *Id.*

[22] *Id.* at 95.

[23] *Id.* at 96.

[24] *Id.* at 87.

Abdullah and engineer Aref exploited General Fahim's inability to speak English by saying one thing to Schroen in English and then intentionally mistranslating their comments to General Fahim.[25] Through his description of these and other meetings with Sayyaf, Fahim, Abdullah, and Aref, Schroen demonstrates that alliances are not simple relationships and that the individuals within those alliances may often act to further their own interests.

On a number of points, however, Schroen's account of the warrior in battle leaves the reader with more questions than answers. While he addresses Starbucks and flatulence at length, Schroen's account of intelligence matters falls short. At one point, Schroen reports that JAWBREAKER filed four hundred intelligence reports in one month.[26] What information did those reports contain? Schroen hints that the reports may have contained information pertaining to Taliban troop movements,[27] but little, if anything, else is mentioned. In fairness, Schroen informs the reader early on that the CIA scrubbed *First In* for classified data.[28] While the reader should expect and, in fact, appreciate the exclusion of sensitive material, a book on the CIA that is largely devoid of the intelligence-gathering process or the substance of intelligence is contrary to its readers' expectations.

More specifically, Schroen thoroughly disappoints the reader by almost completely excluding any discussion of Usama bin Ladin. A quick check of the index shows that only nineteen pages even mention bin Ladin.[29] To put that page count in context, Schroen dedicates ten rather graphic pages to his own intestinal problems.[30] Again, the requirement for operational security may, and probably did, prevent Schroen from incorporating a greater focus on Usama bin Ladin. One, however, questions the relevance of the opening quote of this article calling for bin Ladin's head on ice if Schroen intended on largely ignoring bin Ladin throughout his book. Similarly, Schroen includes the very direct mission statement he received,[31] but never develops how toppling the Taliban works in concert with the aim of capturing bin Ladin.

As an abstraction, the two aims are reconcilable, but Schroen leaves the reader with no "inside account" of the actual measures he took to lay the groundwork for capturing bin Ladin. Schroen comes close to discussing plans for bin Ladin's demise when he informs the reader, "Chris was still trying to win Sayyaf's agreement to work on luring one of bin Ladin's lieutenants to a location where he could be captured or killed. I was convinced it was a hopeless mission, but I admired Chris's dedication."[32] The dismissive tone of Schroen's passage evinces a surprising disregard for what would seem to be an important component of JAWBREAKER's mission.

A Critique of National Strategy

Schroen's failure to address JAWBREAKER's efforts to capture bin Ladin points to the larger problem with Schroen's book: Schroen attempts at once both to tell a warrior's tale and to critique the strategic decisions at play in JAWBREAKER's mission. By splitting his purpose, Schroen dilutes his message and leads the reader through a disappointing account of the CIA's involvement in the early stages of the War on Terror.

The most prominent of Schroen's strategic criticisms is that Washington policymakers did not initially bomb Taliban troop positions in front of the Northern Alliance forces that Schroen supported.[33] Contrary to some voices in Washington, Schroen argues that the degree of unity and discipline possessed by Northern Alliance forces made them far superior allies than the Pashtun fighters in southern Afghanistan.[34] According to Schroen:

> The key to victory was in the north, and that victory rested on the shoulders of the Northern Alliance forces under Fahim's command. I wanted to avoid any shift in focus away from that strategic fact. I thought the

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[25] *Id.* at 101.

[26] *Id.* at 112.

[27] *Id.*

[28] *Id.* at xi.

[29] *Id.* at 367.

[30] *Id.* at 371.

[31] *See supra* note 19 and accompanying text.

[32] *Id.* at 265.

[33] *Id.* at 99-100.

[34] *Id.* at 99.

> situation was so clear that everyone involved in the war planning under way back in Washington would see things as I did. I did not realize what a fight lay ahead to convince Washington and senior military planners to focus efforts in the north.[35]

In the preceding passage, Schroen takes a decisive step away from the tale of the warrior in battle and undertakes a strategic analysis that he subsequently fails to develop. As Schroen maneuvers into a strategic discussion, he utterly fails to define any parameters of that discussion for the reader. Consider, for example, noted military strategist B.H. Liddell Hart:

> In discussing the subject of "the objective" in war it is essential to be clear about, and to keep clear in our minds, the distinction between the political and the military objective. The two are different but not separate. For nations do not wage war for war's sake, but in pursuance of policy. The military objective is only the means to a political end. Hence the military objective should be governed by the political objective . . . . Thus any study of the problem ought to begin and end with the question of policy.[36]

Most students of military affairs will also recognize military strategist Carl von Clausewitz's maxim, "War is simply a continuation of political intercourse, with the addition of other means."[37] Clausewitz further defines this principle by explaining, "The main lines along which military events progress, and to which they are restricted, are political lines that continue throughout the war into the subsequent peace. . . . If that is so, then war cannot be divorced from political life."[38]

When Schroen enters the strategic debate, he thoroughly neglects to account for the policy questions that accompany his position that the United States should bomb in northern Afghanistan. He neglects these policy questions even though he tangentially raises a number of them in the text of his book. For example, Schroen identifies the concern among policymakers over the role that Northern Alliance forces would play in governing Afghanistan after the fall of Kabul.[39] Specifically, Schroen highlights an anti-Northern Alliance lobby in Washington that believed General Fahim was relying on U.S. air strikes simply, "To preserve his military strength for the post-Taliban political struggle."[40] Schroen also introduces the reader to a Pashtun commander with extensive ties to the National Security Council and the State Department.[41] Schroen's tone suggests that the United States improperly favored this Pashtun commander over the Tajik-dominated Northern Alliance.[42]

After unwittingly setting up the policy question that should govern his strategic focus—Pashtun versus Northern Alliance governance of post-war Afghanistan—Schroen leaps directly to siding with the Northern Alliance and ignores a number of important questions. Why did Washington policymakers favor the Pashtun? How did a Pashtun commander become connected with the National Security Council and the State Department? What should Afghanistan look like after the fall of Kabul? If the Northern Alliance should govern Afghanistan, then who within the Northern Alliance should seize the helm? The governance of post-war Afghanistan looms as an unresolved, yet important, policy question informing Schroen's particular military question about whether or not the United States should support the Pashtun or the Northern Alliance.

The reader should not mistake this particular criticism of *First In* as a commentary on whether or not Schroen advocates the *right* strategic positions. Instead, the reader should know that Schroen provides little evidence or logical discussion to support his conclusions on U.S. strategy. Because he fails to develop his strategic criticisms, they are inherently less persuasive than they could be.

Schroen's potentially excusable failure to address the policy underpinnings of the strategic issues he raises is unfortunately compounded by internal inconsistencies between his strategic conclusions and his assessment of actual conditions in Afghanistan. In the Afterword, Schroen makes several observations about post-war Afghanistan. For example,

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[35] *Id.* at 100.

[36] B.H. LIDDELL HART, STRATEGY 338 (Penguin Books 1991) (1954).

[37] CARL VON CLAUSEWITZ, ON WAR 605 (Michael Howard & Peter Paret, eds. & trans., Princeton U. Press 1984) (1832).

[38] *Id.*

[39] SCHROEN, *supra* note 1, at 185.

[40] *Id.* at 327.

[41] *Id.* at 187.

[42] *Id.*

Schroen says of General Dostum, a former Northern Alliance commander, "Dostum, who is probably the most devious political figure among the regional leaders, is also a serious potential threat to the Karzai government."[43] Additionally, Schroen identifies his earlier strategic champion, General Fahim, as, "The most serious potential threat to stability."[44] Of Engineer Aref, Schroen concludes, "Aref was stuck in the past, using the [National Directorate of Security] for the benefit of his own ethnic and personal interests, often working behind the scenes against Karzai and the government."[45]

Each of Schroen's cautionary observations about former Northern Alliance leaders in post-war Afghanistan appear to contradict his earlier assertion that the United States should throw its military might behind Northern Alliance fighters. On the one hand, Schroen argues strongly that the United States should provide the full weight of its military support to the Northern Alliance. On the other hand, Schroen identifies the Northern Alliance leadership as the greatest threat to the success of the fledgling Afghan government. Schroen does not reconcile or explain these apparent and important inconsistencies.

By failing to reconcile these inconsistencies, Schroen forces the reader to overanalyze his unsupported strategic position at the expense of a potentially compelling warrior's tale. The reader impulsively wonders whether or not Schroen erred in his early support of the Northern Alliance. Did he also, then, err in focusing so little on bin Ladin? Did Schroen's dedication of limited resources to building a case for bombing in the north[46] hamper JAWBREAKER's ability to collect intelligence on bin Ladin and his associates? Again, Schroen leaves the reader to ponder questions that have little to do with the stated purpose of his book—to capture the actions of the brave men with whom he served.

Conclusion

First In deals with a timely and relevant topic. A quick read, Schroen's book certainly contains moments of strong human emotion and nuanced human relationships. Additionally, the reader will close the cover of *First In* with a better appreciation for the sacrifice CIA operatives make in support of our nation. *First In* provides a previously unattainable glimpse into this unique CIA operation.

Unfortunately, Schroen blurs that glimpse by stealing space and substance from his account of JAWBREAKER's actions to inadequately critique strategic decisions of America's War on Terror. The reader looking for insight into the strategic issues surrounding U.S. policy in Afghanistan will find little in Schroen's account. Instead, the reader will find a book filled with promise that stumbles to mediocrity as each page is turned.

[43] *Id.* at 357.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 146-47.

Announcements

Invitation to the 2006 Basic Intelligence Law Course 5F-F41

The Judge Advocate General's Legal Center and School

July 17-18, 2006

This two day course is for practitioners who are new to the field of intelligence law and is designed to achieve the following objectives:

a. Introduce new practitioners to the field of intelligence law; provide a historical context with which to view, understand, and apply existing laws, regulations and policies; and provide an overview of the organization, roles, and functions of the intelligence community.

b. Provide a basic understanding of the legal framework in which the intelligence community operates, to include the principle sources of intelligence law, with a focus on Executive Order 12333, Department of Defense Directive 5240.1, Department of Defense Directive 5240.1-R, and the service regulations which implement these authorities.

c. Introduce practitioners to principles and mechanisms involved in conducting intelligence oversight.

d. Provide an introduction to the intelligence disciplines of counterintelligence, human intelligence, and signals intelligence with discussion focused on the unique legal issues and concerns which arise in each field.

e. Provide practical experience which will enable new practitioners to identify, research, and address basic intelligence related legal issues.

This course, which is co-sponsored by The Judge Advocate General's Legal Center and School and the United States Army Intelligence Command, will be a unique opportunity for new practitioners in the intelligence and operational field to gain exposure to the growing field of intelligence law. The course will provide the basic tools and lay the groundwork necessary for new practitioners to identify and address intelligence related legal issues. Additionally, since the course will be open to representatives from each of the components of the intelligence community, the course will provide an opportunity to interact with representatives from across the intelligence community.

The course is open to military or civilian attorneys employed by the U.S. Government assigned or pending assignment to an intelligence unit or organization, or special operations/mission unit and military attorneys who provide operational law advice to commanders. Attendance is also open to U.S. government employees assigned or pending assignment to positions requiring an understanding of intelligence law as it relates to the investigation of national security cases. This course will be limited to those individuals who have fewer than two years of experience in the intelligence community or in support of intelligence operations. Security clearance required: Secret. This course is classified "SECRET."

The Points of Contact for this course are Ms. Vicki Taylor and Sergeant First Class Michelle Norvell. Ms. Taylor can be contacted by email at vicki.taylor@mi.army.mil. Sergeant First Class Norvell can be contacted by email at michelle.norvell@mi.army.mil. Both Ms. Taylor and Sergeant First Class Norvell can be contacted telephonically at (703) 706-2555.

Attendance is by invitation only. Individuals wishing to attend this course must request an application from Ms. Taylor at the email address above. Failure to adequately address the justification portion of the application form may result in non-selection. **All attendees wishing to participate in the Basic Intelligence Law Course must also enroll in and attend the Advanced Intelligence Law Course from July 19-21, 2006.**

Invitation to the 2006 Advanced Intelligence Law Course 5F-F43

The Judge Advocate General's Legal Center and School

July 19-21, 2006

This course is designed to bring practitioners who are new to the field of intelligence law together with more experienced members of the community to achieve the following objectives:

a. Provide an opportunity to engage in-depth discussions of emerging issues and specialized areas of intelligence law to include issues surrounding collection of intelligence in the cyber age;

b. Provide an opportunity to examine intelligence issues which are the object of current national and international debate such as domestic surveillance and domestic collection activities; and

c. Provide a forum to discuss intelligence reform and the intelligence oversight process.

This course, which is co-sponsored by The Judge Advocate General's Legal Center and School and the United States Army Intelligence Command, will be a unique opportunity for new practitioners in the intelligence and operational fields to interface with more seasoned intelligence law practitioners. It will provide all participants an opportunity to gain exposure to current and anticipated intelligence law issues relevant to the future of the intelligence community. Since the course will be open to representatives from each of the components of the intelligence community, the course will provide an opportunity to interact with representatives from across the intelligence community.

The course is open to military or civilian attorneys employed by the U.S. Government assigned or pending assignment to an intelligence unit or organization, or special operations/mission unit and military attorneys who provide operational law advice to commanders. Attendance is also open to U.S. government employees assigned or pending assignment to positions requiring an understanding of intelligence law as it relates to the investigation of national security cases. Priority of selection will be for those individuals selected to attend the Basic Intelligence Law Course. Security clearance required: Secret. This course is classified "SECRET."

The Points of Contact for this course are Ms. Vicki Taylor and Sergeant First Class Michelle Norvell. Ms. Taylor can be contacted by email at vicki.taylor@mi.army.mil. Sergeant First Class Norvell can be contacted by email at michelle.norvell@mi.army.mil. Both Ms. Taylor and Sergeant First Class Norvell can be contacted telephonically at (703) 706-2555.

Attendance is by invitation only. Individuals wishing to attend this course must request an application from Ms. Taylor at the email address above. Failure to adequately address the justification portion of the application form may result in non-selection.

In order to provide the maximum flexibility and the opportunity to address the most current issues, individual attendees seeking CLE credits will be required to coordinate and process CLE requests directly with their state Bar Associations. The Staff Judge Advocate, US Army INSCOM will provide course outlines, instructor biographies and, if necessary, certify attendance. CLE requests for the Advanced Intelligence Law Course will not be processed by The Judge Advocate General's Legal Center and School.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visisble.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (June 2005 - September 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

> Due to implementation of the Basic Officer Leadership Course (BOLC), the dates of all courses scheduled after October 2006 are subject to change. Please check the School web site and the most recent *The Army Lawyer* for the most up-to-date schedule.

ATTRS No.	Course Title	Dates
GENERAL		
5-27-C22	54th Graduate Course	15 Aug 05 – thru 25 May 06
5-27-C22	55th Graduate Course	14 Aug 06 – thru 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – thru 23 May 08
5-27-C20	169th Basic Course	3 Jan – 27 Jan 06 (Phase I – Ft. Lee)
		27 Jan – 7 Apr 06 (Phase II – TJAGSA)
5-27-C20	170th Basic Course	30 May – 23 Jun 06 (Phase I – Ft. Lee)
		23 Jun – 31 Aug 06 (Phase II – TJAGSA)
*5-27-C20	171st Basic Course	22 Oct – 3 Nov 06 (Phase I – Ft. Lee)
		3 Nov – 31 Jan 06 (Phase II – TJAGSA)
5-27-C20	172d Basic Course	4 Feb – 16 Feb 07 (Phase I – Ft. Lee)
		16 Feb – 2 May 07 (Phase II – TJAGSA)
5F-F70	37th Methods of Instruction Course	20 – 21 Jul 06
5F-F70	38th Methods of Instruction Course	19 – 1 Jul 07

5F-F1	190th Senior Officers Legal Orientation Course	30 Jan – 3 Feb 06
5F-F1	191st Senior Officers Legal Orientation Course	27 – 31 Mar 06
5F-F1	192d Senior Officers Legal Orientation Course	12 – 16 Jun 06
5F-F1	193d Senior Officers Legal Orientation Course	11 – 15 Sep 06
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	5 – 9 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	13th RC General Officers Legal Orientation Course	24 – 26 Jan 07
5F-F52	36th Staff Judge Advocate Course	5 – 9 Jun 06
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	9th Staff Judge Advocate Team Leadership Course	5 – 7 Jun 06
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2006 JAG Annual CLE Workshop	2 – 6 Oct 06
JARC-181	2006 JA Professional Recruiting Seminar	11 – 14 Jul 06
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	5th Advanced Law of Federal Employment Course	25 – 27 Oct 06
5F-F22	60th Law of Federal Employment Course	23 – 27 Oct 06
5F-F23	58th Legal Assistance Course	15 – 19 May 06
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	14 – 18 May 07
5F-F24	30th Admin Law for Military Installations Course	13 – 17 Mar 06
5F-F24	31st Admin Law for Military Installations Course	26 Feb – 2 Mar 07
5F-F28	Tax Year 2006 Basic Income Tax CLE	11 – 15 Dec 06
5F-F29	24th Federal Litigation Course	31 Jul – 4 Aug 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	4th Ethics Counselors Course	17 – 21 Apr 06
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F24E	2006 USAREUR Administrative Law CLE	11 – 14 Sep 06
5F-F24E	2007 USAREUR Administrative Law CLE	10 – 13 Sep 07
5F-F26E	2006 USAREUR Claims Course	27 Nov – 1 Dec 06
5F-F28E	Tax Year 2006 USAREUR Basic Income Tax CLE	4 – 8 Dec 06
5F-F28P	Tax Year 2006 PACOM Basic Income Tax CLE	8 – 12 Jan 07

CONTRACT AND FISCAL LAW		
5F-F10	156th Contract Attorneys Course	17 – 28 Jul 06
5F-F10	157th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	74th Fiscal Law Course	1 – 5 May 06
5F-F12	75th Fiscal Law Course	30 Oct – 3 Nov 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	2d Operational Contracting Course	10 – 14 Apr 06
5F-F13	3d Operational Contracting Course	12 – 16 Mar 07
5F-F14	18th Comptrollers Accreditation Course (Ft. Bragg)	21 – 24 Feb 06
5F-F101	7th Procurement Fraud Course	31 May – 2 Jun 06
5F-F102	6th Contract Litigation Course	16 – 20 Apr 07
5F-F103	7th Advanced Contract Law	12 – 14 Apr 06
5F-F15E	2006 USAREUR Contract & Fiscal Law CLE	28 – 31 Mar 06
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	27 – 30 Mar 07
N/A	2006 Maxwell AFB Fiscal Law Course	6 – 9 Feb 06
N/A	2007 Maxwell AFB Fiscal Law Course	5 – 8 Feb 07
CRIMINAL LAW		
5F-F31	12th Military Justice Managers Course	21 – 25 Aug 06
5F-F31	13th Military Justice Managers Course	20 – 24 Aug 07
5F-F33	49th Military Judge Course	24 Apr – 12 May 06
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	25th Criminal Law Advocacy Course	13 – 24 Mar 06
5F-F34	26th Criminal Law Advocacy Course	11 – 22 Sep 06
5F-F34	27th Criminal Law Advocacy Course	12 – 23 Mar 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	29th Criminal Law New Developments Course	29 Nov – 2 Dec 05
5F-F35	30th Criminal Law New Developments Course	14 – 17 Nov 06
5F-301	9th Advanced Advocacy Training	16 – 19 May 06
5F-301	10th Advanced Advocacy Training	15 – 18 May 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	85th Law of War Course	30 Jan – 3 Feb 06
5F-F42	86th Law of War Course	10 Jul – 14 Jul 06
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	16 – 20 Jul 07
5F-F44	1st Legal Aspects of Information Operations Course	26 – 30 Jun 06
5F-F44	2d Legal Aspects of Information Operations Course	25 – 29 Jun 07

5F-F45	6th Domestic Operational Law Course	30 Oct – 3 Nov 06
5F-F47	45th Operational Law Course	27 Feb – 10 Mar 06
5F-F47	46th Operational Law Course	31 Jul – 11 Aug 06
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07
LEGAL ADMINISTRATORS COURSES		
7A-270A1	17th Legal Administrators Course	19 – 23 Jun 06
7A-270A1	18th Legal Administrators Course	18 – 22 Jun 07
7A-270A2	7th JA Warrant Officer Advanced Course	10 Jul – 4 Aug 06
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A0	13th JA Warrant Officer Basic Course	30 May – 23 Jun 06
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
PARALEGAL AND COURT REPORTING COURSES		
512-27DC4	11th Speech Recognition Training	23 Oct – 3 Nov 06
512-27DC5	19th Court Reporter Course	30 Jan – 31 Mar 06
512-27DC5	20th Court Reporter Course	24 Apr – 23 Jun 06
512-27DC5	21st Court Reporter Course	31 Jul – 29 Sep 06
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	7th Court Reporting Symposium	30 Oct – 3 Nov 06
512-27D/20/30	17th Law for Paralegal NCOs Course	27 – 31 Mar 06
512-27D/20/30	18th Law for Paralegal NCOs Course	26 Mar – 6 Apr 07
512-27DCSP	2d Combined Sr. Paralegal NCO Course	12 – 16 Jun 06
512-27DCSP	3d Combined Sr. Paralegal NCO Course	11 – 15 Jun 07

3. Naval Justice School and FY 2006 Course Schedule

Please contact Monique E. L. Cover, Other Services Quota Manager/Analyst, SRA International, Inc., Naval Personnel Development Command, Code N72, NOB, 9549 Bainbridge Ave., N-19, Room 121, at (757) 444-2996, extension 3610 or DSN 564-2996, extension 3610, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020)	17 Jan – 17 Mar 06
0257	Lawyer Course (030)	5 Jun – 4 Aug 06
0257	Lawyer Course (040)	7 Aug – 6 Oct 06
NA	Brigade Oriented Legal Team (010)	20 – 24 Mar 06 (USMC)
NA	Brigade Oriented Legal Team (030)	7 – 11 Aug 06 (NJS)
0259	Legal Officer Course (010)	6 -24 Feb 06
0259	Legal Officer Course (202)	12 – 30 Jun 06

900B	Reserve Lawyer Course (010)	1 – 5 May 06
900B	Reserve Lawyer Course (020)	11 – 15 Sep 06
914L	Law of Naval Operations (010)	8 – 12 May 06
914L	Law of Naval Operations (020)	18 – 22 Sep 06
850T	SJA/E-Law Course (010)	30 May – 9 Jun 06
850T	SJA/E-Law Course (020)	24 Jul – 4 Aug 06
786R	Advanced SJA/Ethics (010)	27 – 31 Mar 06 (San Diego)
786R	Advanced SJA/Ethics (020)	24 – 28 Apr 06 (Norfolk)
850V	Law of Military Operations (010)	12 – 23 Jun 06
961D	Military Law Update Workshop (Officer) (010)	20 – 21 May 06 (East)
961D	Military Law Update Workshop (Officer) (020)	17 – 18 Jun 06 (West)
961M	Effective Courtroom Communications	27 – 31 Mar 06 (San Diego)
961J	Defending Complex Cases (010)	17 – 21 Jul 06
525N	Prosecuting Complex Cases (010)	10 – 14 Jul 06
4048	Estate Planning (010)	14 – 18 Aug 06
7487	Family Law/Consumer Law (010)	22 – 26 May 06
7485	Litigation National Security (010)	6 – 8 Mar 06 (Washington, DC)
748K	National Institute of Trial Advocacy (010)	24 – 28 Oct 06 (Camp Lejeune)
748K	National Institute of Trial Advocacy (020)	30 Jan – 3 Feb 06 (San Diego)
748K	National Institute of Trial Advocacy (030)	22 – 26 May 06 (Hawaii)
748B	Naval Legal Service Command Senior Officer Leadership (010)	21 – 25 Aug 06
3938	Computer Crimes (010)	3 – 7 Apr 06
0258	Senior Officer (NewPort) (030)	13 – 17 Mar 06
0258	Senior Officer (NewPort) (040)	8 – 12 May 06
0258	Senior Officer (NewPort) (050)	10 – 14 Jun 06
0258	Senior Officer (NewPort) (060)	14 – 18 Aug 06
0258	Senior Officer (NewPort) (070)	25 – 29 Sep 06
2622	Senior Officer (Fleet) (040)	13 – 17 Feb 06 (Pensacola)
2622	Senior Officer (Fleet) (050)	27 – 31 Mar 06 (Camp Lejeune)
2622	Senior Officer (Fleet) (060)	3 – 7 Apr 06 (Quantico)
2622	Senior Officer (Fleet) (070)	17 – 21 Apr 06 (Pensacola)
2622	Senior Officer (Fleet) (080)	8 – 12 May 06 (Pensacola)
2622	Senior Officer (Fleet) (090)	10 – 14 Jul 06 (Pensacola)
2622	Senior Officer (Fleet) (100)	28 Aug – 1 Sep 06 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	22 – 26 May 06
3090	Legalman Course (010)	17 Jan – 17 Mar 06

932V	Coast Guard Legal Technician Course (010)	11 – 22 Sep 06
846L	Senior Legalman Leadership Course (010)	24 – 28 Jul 06
049N	Reserve Legalman Course (Phase I) (010)	10 – 21 Apr 06
056L	Reserve Legalman Course (Phase II) (010)	24 Apr – 5 May 06
846M	Reserve Legalman Course (Phase III) (010)	8 – 19 May 06
5764	LN/Legal Specialist Mid-Career Course (020)	24 Apr – 5 May 06
961G	Military Law Update Workshop (Enlisted) (010)	TBD
961G	Military Law Update Workshop (Enlisted (020)	TBD
4040	Paralegal Research & Writing (010)	20 – 31 Mar 06 (Newport)
4040	Paralegal Research & Writing (020)	24 Apr – 5 May 06 (Norfolk)
4040	Paralegal Research & Writing (030)	17 – 28 Jul 06 (San Diego)
4046	SJA Legalman (020)	30 May – 9 Jun 06 (Newport)
627S	Senior Enlisted Leadership Course (070)	21 – 23 Feb 06 (San Diego)
627S	Senior Enlisted Leadership Course (080)	22 – 24 Feb 06 (Norfolk)
627S	Senior Enlisted Leadership Course (090)	21 – 23 Mar 06 (Hawaii)
627S	Senior Enlisted Leadership Course (100)	4 – 6 Apr 06 (Bremerton)
627S	Senior Enlisted Leadership Course (110)	12 – 14 Apri 06 (Naples)
627S	Senior Enlisted Leadership Course (120)	2 – 4 May 06 (San Diego)
627S	Senior Enlisted Leadership Course (130)	22 – 24 May 06 (Norfolk)
627S	Senior Enlisted Leadership Course (140)	19 -21 Jul 06 (Millington)
627S	Senior Enlisted Leadership Course (150)	1 – 3 Aug 06 (San Diego)
627S	Senior Enlisted Leadership Course (160)	16 – 18 Aug 06 (Norfolk)
627S	Senior Enlisted Leadership Course (170)	12 – 14 Sep 06 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (030)	6 – 24 Mar 06
0376	Legal Officer Course (040)	24 Apr – 12 May 06
0376	Legal Officer Course (050)	5 – 23 Jun 06
0376	Legal Officer Course (060)	24 Jul – 11 Aug 06
0376	Legal Officer Course (070)	11 – 29 Sep 06
0379	Legal Clerk Course (030)	23 Jan – 3 Feb 06
0379	Legal Clerk Course (040)	6 –17 Mar 06
0379	Legal Clerk Course (050)	3 – 14 Apr 06
0379	Legal Clerk Course (060)	5 – 16 Jun 06
0379	Legal Clerk Course (070)	31 Jul – 11 Aug 06
0379	Legal Clerk Course (080)	11 – 22 Sep 06
3760	Senior Officer Course (040)	27 Feb – 3 Mar 06
3760	Senior Officer Course (050)	15 –19 May 06
3760	Senior Officer Course (060)	26 – 30 Jun 06
3760	Senior Officer Course (070)	17 – 21 Jul 06 (Millington)
3760	Senior Officer Course (080)	28 Aug – 1 Sep 06
4046	Military Justice Course for SKA/Convening Authority/Shipboard Legalman (030)	10 – 21 Jul 06

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040)	27 Feb – 17 Mar 06
947H	Legal Officer Course (050)	8 – 26 May 06
947H	Legal Officer Course (060)	12 – 30 Jun 06
947H	Legal Officer Course (070)	14 Aug – 1 Sep 06
947J	Legal Clerk Course (030)	6 – 17 Feb 06
947J	Legal Clerk Course (040)	27 Feb – 10 Mar 06
947J	Legal Clerk Course (050)	17 – 28 Apr 06
947J	Legal Clerk Course (060)	8 – 19 May 06
947J	Legal Clerk Course (070)	12 – 23 Jun 06
947J	Legal Clerk Course (080)	14 – 25 Aug 06
3759	Senior Officer Course (040)	13 – 17 Feb 06 (San Diego)
3759	Senior Officer Course (050)	3 – 7 Apr 06 (Bremerton)
3759	Senior Officer Course (060)	24 – 28 Apr 06 (San Diego)
3759	Senior Officer Course (070)	5 – 9 Jun 06 (San Diego)
3759	Senior Officer Course (080)	24 – 28 Jul 06 (San Diego)
3759	Senior Officer Course (090)	11 – 15 Sep 06 (Pendleton)
2205	CA Legal Assistance Course (010)	6 – 10 Feb 06 (San Diego)

4. Air Force Judge Advocate General School Fiscal Year 2006 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445) for information about attending the listed courses.

Air Force Judge Advocate General School Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 06-B	9 Jan – 22 Feb 06
Claims & Tort Litigation Course, Class 06-A	30 Jan – 3 Feb 06
Reserve Forces Judge Advocate Course, Class 06-A	6 – 10 Feb 06
Legal Aspects of Sexual Assault Workshop, Class 06-A	8 – 10 Feb 06
Fiscal Law Course (DL) , Class 06-A	6 – 9 Feb 06
Judge Advocate Staff Officer Course, Class 06-A	13 Feb – 14 Apr 06
Paralegal Craftsman Course, Class 06-B	22 Feb – 28 Mar 06
Paralegal Apprentice Course, Class 06-C	3 Mar – 14 Apr 06
Accident Investigation Board Legal Advisors' Course, Class 06-A	19 – 21 Apr 06
Advanced Trial Advocacy Course, Class 06-A	24 – 28 Apr 06

Military Judges' Seminar, Class 06-A	28 – 31 Mar 06
Paralegal Apprentice Course, Class 06-D	24 Apr – 6 Jun 06
Military Justice Administration Course, Class 06-A	1 – 5 May 06

Reserve Forces Judge Advocate Course, Class 06-B	8 – 12 May 06
Advanced Labor & Employment Law Course, Class 06-A	8 – 10 May 06
Operations Law Course, Class 06-A	15 – 25 May 06
Negotiation & Appropriate Dispute Resolution Course, Class 06-A	22 – 26 May 06
Air National Guard Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Air Force Reserve Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Staff Judge Advocate Course, Class 06-A	12 – 23 Jun 06
Law Office Management Course, Class 06-A	12 – 23 Jun 06
Paralegal Apprentice Course, Class 06-E	19 Jun – 1 Aug 06
Environmental Law Update Course, Class 06-A	28 – 30 Jun 06
Computer Legal Issues Course, Class 06-A	10 – 14 Jul 06
Legal Aspects of Information Operations Law Course, Class 06-A	12 – 14 Jul 06
Reserve Forces Paralegal Course, Class 06-A	17 – 28 Jul 06
Judge Advocate Staff Officer Course, Class 06-C	17 Jul – 15 Sep 06
Paralegal Craftsman Course, Class 06-C	1 Aug – 8 Sep 06
Paralegal Apprentice Course, Class 06-F	14 Aug – 26 Sep 06
Trial & Defense Advocacy Course, Class 06-B	18 – 29 Sep 06

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2005 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2007

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2006***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2007. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2007 JAOAC will be held in January 2007, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1

November 2006). If the student receives notice of the need to re-do any examination or exercise after 1 October 2006, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2006 will not be cleared to attend the 2007 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Illinois Supreme Court Press Release

September 29, 2005

Supreme Court Establishes Continuing Legal Education for Attorneys and Commission on Professionalism

The Illinois Supreme Court announced Thursday new programs aimed at ensuring the quality of legal services in Illinois as well as promoting civility among lawyers within the profession and with their clients.

In two separate but related actions, the Court promulgated new and amended rules establishing a program which requires attorneys to take a minimum number of hours of continuing legal education, and establishing a permanent Supreme Court Commission on Professionalism.

"Under the new rules, attorneys are required to study both substantive legal matters as well as matters relating to professional civility," Chief Justice Robert R. Thomas said. "This dual focus will help to ensure that the public is served by capable professionals who are fully informed of the latest developments in the law. The Commission will play a key role in the new continuing legal education program, working closely with both the bar and the law schools to ensure that professionalism and civility instruction is a part of every lawyer's education."

Illinois now becomes one of only 13 states with a permanent commission to promote an awareness of professionalism by all members of the Illinois bar and bench. Its creation is the outgrowth of an initiative first recommended by Chief Justice Thomas who publicly deplored lawyer conduct which degenerates "into a Rambo-style, win-at-all cost attitude by attorneys."

Both actions were under study by the Court for some time. The Court gave its approval when it met during its first term under new Chief Justice Thomas, who assumed the Court's leadership role on September 6. The new rules are effective immediately.

Minimum Continuing Legal Education:

The Supreme Court rules establishing minimum continuing legal education requirements (MCLE) are designed "to assure that those attorneys licensed to practice law in Illinois remain current regarding the requisite knowledge and skills necessary to fulfill the professional responsibilities and obligations of their respective practices and thereby improve the standards of the profession in general," a preamble to the new rules says. It states the public contemplates nothing less from attorneys.

The rules establish a board consisting of nine members appointed by the Court plus an executive director to administer the program. Individuals seeking appointment to the Board are invited to submit a resume and a brief personal statement to the Administrative Office of Illinois Courts. (See Special Announcement - MCLE Appointees 9/29/05)

The MCLE program will be funded from fees charged Continuing Legal Education (CLE) providers, and from late fees and reinstatement fees assessed to individual attorneys.

A key component of the program requires every new Illinois attorney admitted to practice after December 31, 2005 to complete a Basic Skills Course, totaling at least 15 hours of instruction. The course will cover local court practice and rules, filing requirements for various government agencies, the drafting of pleadings and other documents, practice techniques and procedures under the Illinois Rules of Professional Conduct, client communications, the use of trust accounts, required record keeping and other rudimentary elements of practice.

"Law school teaches us how to think like lawyers, but not always how to practice law," said Chief Justice Thomas. "The basic skills course will ensure that every new attorney enters the profession with a firm understanding of the tools that are essential to the day-to-day practice of law."

CLE requirements for Illinois attorneys will increase incrementally. Every Illinois attorney subject to the Rules will be required to complete 20 hours of CLE activity during their initial two-year reporting period, 24 hours of CLE activities during their second two-year reporting period and 30 hours of CLE activity during all subsequent two-year reporting periods.

The first two-year reporting period for lawyers whose last names begin with the letters A through M begins July 1, 2006 and runs through June 30, 2008; and subsequent two-year reporting periods for these lawyers begin on July 1 of all even-numbered years. The first two year reporting requirement for lawyers whose last names begin with the letters N through Z begin on July 1, 2007 and runs through June 30, 2009; and subsequent two-year reporting periods for these lawyers begin on July 1 of all odd-numbered years.

To integrate the program with the goals of the Commission on Professionalism, a minimum of four of the total hours required for any two-year period must be in the area of professionalism; issues involving diversity; mental illness and addiction issues; civility or legal ethics. Courses and activities in these areas must be approved by the Commission on Professionalism and forwarded to the MCLE Board for accreditation. Without the Commission's approval, courses in these areas will not be eligible for accreditation and will not satisfy the CLE requirement.

Attorneys must report their compliance with MCLE requirements on a certification form that will be mailed by the MCLE Director. It must be completed and submitted by the attorney within 31 days after the attorney's reporting period (no later than July 31). An attorney may be given one, 60-day grace period. Failure to comply or failure to report compliance will result in the removal of the attorney's name from the master roll of attorneys maintained by the Attorney Registration and Disciplinary Commission, rendering the attorney ineligible to practice law in Illinois. An attorney may be reinstated only upon recommendation of the Board after certified full compliance and payment of additional late fees.

The rules also require attorneys to maintain certificates of attendance at CLE courses for a period of three years. The rules set up record keeping and audit procedures; and require CLE providers to make available a financial hardship policy for attorneys who might find it difficult to pay the cost of the courses.

Among its myriad duties, the nine-member administrative Board will recommend additional rules and regulations for MCLE, including fees sufficient to ensure that it will be financially self-supporting. It also is charged with accrediting commercial and non-commercial legal education courses and activities, and determining the number of hours to be awarded for attending such courses.

At least one member of the nine-member administrative Board will be a non-attorney and at least one will be a Circuit Court judge. Eligible attorneys for the board must have actively practiced law in Illinois for a minimum of 10 years. Board members will receive no compensation but will be reimbursed for reasonable, including necessary travel. Eligible attorneys are invited to seek appointment to the Board by submitting a resume and a brief statement in support of their candidacy to: Cynthia Y. Cobbs, Director, Administrative Office of Illinois Courts, 222 N. LaSalle Street, 13th Floor, Chicago 60601. The deadline for application is October 31, 2005.

Attorneys and potential applicants are strongly encouraged to view the complete rules in their entirety on the Supreme Court website: www.state.il.us/court.

Supreme Court Commission on Professionalism

The purpose behind the Supreme Court Commission on Professionalism is "to promote among the lawyers and judges of Illinois principles of integrity, professionalism and civility; to foster commitment to the elimination of bias and divisiveness within the legal and judicial systems: and to ensure that those systems provide equitable, effective and efficient resolution of problems and disputes for the people of Illinois."

It is a direct outgrowth of the Supreme Court Committee on Professionalism, which was recommended to the Court, before he was Chief, by Justice Thomas and approved by the Court in November 2001.

"You hear a lot about how the practice of law is different now than in days past when a lawyer's handshake meant something and a lawyer's word was his bond," Justice Thomas said when recommending the Committee. "That may be an

oversimplification, but in this day and age with competition in the profession for dollars and clients, activities sometimes degenerate into a Rambo-style, win-at-all cost attitude by attorneys."

The Committee, under the chairmanship of Wheaton attorney David Rolewick, held a total of 12 Town Hall meetings in various locations around the state to consider characteristics of both professional and unprofessional lawyer behavior and to identify professionalism-related issues of concern to members of the bar and bench in each of the geographic locations.

Upon the Committee's recommendation, the Court, under former Chief Justice Mary Ann. G. McMorrow, approved Committee-sponsored orientation programs on professionalism for incoming first-year law students in each of the Illinois law schools; and at these sessions, a justice of the Supreme Court administered a Pledge of Professionalism to the incoming law students, in an attempt to inculcate early a respect for professional behavior.

"With the establishment of a permanent Commission on Professionalism, Illinois today joins only 12 other states," said Chief Justice Thomas. "The Commission's creation reflects the Illinois Supreme Court's commitment to elevating the overall level of professionalism within the Illinois legal community, as well as to identifying and addressing the sources of incivility and acrimony within the profession."

The Commission will consist of a Chair and 13 additional members appointed by the Court, plus an Executive Director with sufficient staff. It will be funded by a $10 increase in the annual registration fee paid by attorneys, raising the fee to $239.

"These new rules signal a change in how attorneys are expected to deliver their services to the citizens of Illinois, raising the bar to require improved competency, effectiveness and civility in our legal system," said committee chairman Rolewick. "The Court has also identified divisiveness and bias as characteristics that must be eliminated from the legal system of the state, providing our profession with an opportunity to be an example to the larger society rather than a reflection of it."
The Commission will include three full time faculty members at accredited Illinois law schools; two active trial court judges; one appellate court judge; six practicing lawyers and two non-lawyers."

In addition to developing and approving professionalism and related courses certified under the MCLE program, the Commission is charged generally with "creating and promoting an awareness of professionalism by all members of the Illinois bar and bench."

It will serve as a resource for information on professionalism, develop statements on principles of ethical and professional responsibility to encourage, guide and assist lawyers on the ethical and professional tenets of the profession; collaborate with law schools in the development and presentation of professionalism programs for law student orientation; and recommend to the Court means and methods of improving the profession.

The Commission will have no authority to impose discipline upon any member of the bar or bench.

8. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.

Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually

South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
****Must declare exemption.**

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005)

Note: Due to funding constraints, there have been significant changes to this on-site schedule. This list is current as of 2 February 2006. Please confirm the course date with the listed-POCs before traveling to the on-site.

ATRRS No.	Dates	Location/Unit	Departments Assigned	POC
004	11-12 Feb 06	Miami, FL 174th LSO/12th LSO	Administrative & Civil Law; Criminal Law	MSG Timothy Stewart (305) 779-4022 tim.stewart@usar.army.mil
005	25-26 Feb 06	Draper, UT 115th En Grp UTARNG/ 87th LSO	Administrative & Civil Law; Criminal Law	CPT Daniel K. Dygert (115th En Grp) (435) 787-9700 (435) 787-2455 (fax) daniel.k.dygert@us.army.mil SFC Matthew Neumann (87th LSO) (801) 656-3600 (801) 656-3603 (fax) matthew.neumann@us.army.mil
006	4-5 Mar 06	Fort Belvoir, VA 10th LSO	Administrative & Civil Law; Criminal Law	CPT Eric Gallun (202) 514-7566 frederic.gallun@usdog.gov
007	11-12 Mar 06	San Francisco, CA 75th LSO	TCAP	LTC Burke Large (213) 452-3954 burke.s.large@us.army.mil
010	22-23 Apr 06	Indianapolis, IN INARNG	International & Operational Law; Contract & Fiscal Law	COL George Thompson (DSN) 369-2491 george.thompson@in.ngb.army.mil
011	22-23 Apr 06	Boston, MA 94th RRC	International & Operational Law; Contract & Fiscal Law	MAJ Angela Horne (978) 784-3940 angela.horne@usar.army.mil
012	6-7 May 05	Oakbrook, IL 91st LSO	International & Operational Law; Contract & Fiscal Law	MAJ Douglas Lee (312) 338-2244 (offiice) (630) 728-8504 (cell) (630) 375-1285 (home Douglas.lee1@us.army.mil
013	6-7 May 06	Columbia, SC 12th LSO	International & Operational Law; Contract & Fiscal	MAJ Lake Summers (803)413-2094 lake.summers@us.army.mil
014	19-21 May 06	Kansas City, MO 8th LSO/89th RRC	Criminal Law; Contract & Fiscal Law	COL Meg McDevitt SFC Larry Barker (402) 554-4400, ext. 227 mmcdevitt@bqlaw.com larry.r.barker@us.army.mil
015	20-21 May 06	Nashville, TN 139th LSO	Criminal Law; International & Operational Law	COL Gerald Wuetcher (502) 564-3940, ext. 259

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available through the Defense Technical Information Center (DTIC)

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, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time.Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

**AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
**AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
**AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

AD A384333	Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998).
AD A350514	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

**AD A360704 Uniformed Services Former Spouses' Protection Act, JA 274 (2002).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231 (2004).

**AD A347157 Environmental Law Deskbook, JA-234 (2002).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1997).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (1999).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (1994).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:

http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the September 2005 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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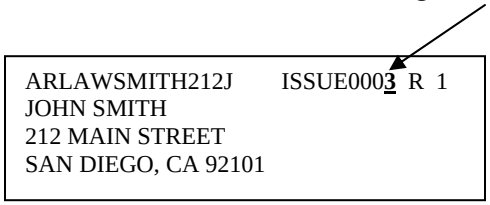

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Secretary of the Army
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