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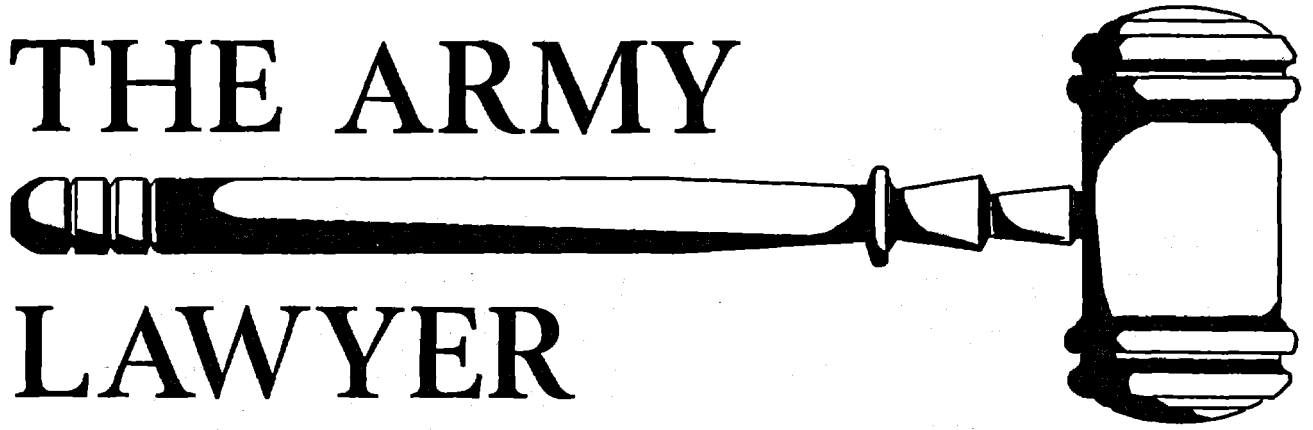

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Rape Trauma Syndrome: Modifying the Rules in Rape Prosecution Cases[1]

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I. Introduction

In 1974, the term "rape trauma syndrome"[2] emerged to describe the recurring pattern of post-rape symptoms. Although there are many

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[1]Judge Jerome Frank purportedly stated that:

> [T]he lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.

N. Gager & C. Schurr, Sexual Assault: Confronting Rape in America 129 (1976). As a result of the perception that lawyers want to win according to the rules of the American legal system, rape victims perceive themselves as being on trial; having to prove in public their innocence beyond a reasonable doubt by avoiding the implications of wrongdoing, such as seduction, lying, mistaken identification, or wanton behavior. *See* J. Frank, Courts on Trial (1973), M. Franklin, Criminal Sentences: Law Without Order (1973), S. Rosenblatt, Justice Denied (1971), W. Ryan, Blaming the Victim (1970).

Military Rule of Evidence [hereinafter cited as MRE] 412, the "rape-shield" rule, is a beginning to protect victims from unnecessary abuse by precluding reputation or opinion evidence of the victim's past sexual behavior. *See* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977), Gale, *Military*

different emotional reactions to rape, the following is a typical account of the post-rape trauma:

> I experienced so much during the first two months: hurt, anxiety, anger, frustration, humiliation, and worst of all, the sense that I was having a nervous breakdown. I thought that my feelings were not normal. I couldn't even sleep with my husband, a man to whom I had been married for nine years. I couldn't understand what was happening. Would I ever be able to put the ordeal behind me?[3]

As a result of cataloging the myriad emotional reactions, psychiatrists were able to develop methods to help the victims cope with their emotions.[4] Prosecuting attorneys began to use evidence of rape trauma syndrome as a tool to demonstrate that the complainant was indeed a rape victim. Typically, a prosecuting attorney would call as a witness a doctor or victim assistance counselor qualified as an expert in the field of rape trauma syndrome. The prosecutor would establish that rape trauma syndrome was "a medical term for disorientation and shock experienced by rape victims following a rape assault"[5] to rebut the defendant's testimony that the sexual act was consensual.

During 1982, appellate courts wrestled with the issue of the admissibility of evidence of rape trauma syndrome. The Kansas Supreme Court quietly upheld the admissibility of such evi-

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Rule of Evidence 412: The Paper Shield, 14 The Advocate 146 (1982), Wood, *Applying MRE 412: Should It Be Used At Article 32 Hearings?* The Army Lawyer, July 1982, at 13; United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983), United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Dorsey, 16 M.J. 1 (C.M.A. 1983).

[2]Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974). Rape trauma syndrome is a chronic or delayed post-traumatic stress disorder. Its essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience. Diagnostic and Statistical Manual of Mental Disorders § 309.81 (American Psychiatric Association, 3d ed. 1980). Characteristic symptoms of rape trauma syndrome include fear of offender retaliation, fear of being raped again, fear of being home alone, fear of men, sleep disturbance, change of eating habits and a sense of shame. State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982).

[3]Matter of Pittsburgh Action Against Rape, 428 A.2d 126, 138 (Pa. 1981). *See* N. Gager & C. Schurr, *supra* note 1, at 257-259.

[4]*See* Burgess and Holmstrom, Rape: Crisis and Recovery 34-47 (1979); Brownmiller, Against Our Will: Men Women and Rape chs. 10, 11 (1975).

[5]State v. Mackie, 622 P.2d 673, 675 (Mont. 1981).

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dence. The Minnesota Supreme Court, in opinions receiving notoriety,[6] declared rape trauma syndrome evidence inadmissible. This article will examine the conflicting opinions by Kansas in *State v. Marks*[7] and by Minnesota in *State v. Saldano*[8] and *State v. McGee*.[9] Comparisons will then be made using the Military Rules of Evidence and caselaw to outline suggested arguments to be made during courts-martial.

II. The Kansas and Minnesota Opinions

The facts in *State v. Marks* are as follows.[10] On the 4th of July 1980, the twenty-one-year-old victim went to a club near Emporia State University. She met the defendant, Elmore Marks, who fabricated a story that he was conducting research to write an analytical book about people. Continuing the charade, Marks took the victim to his house so he could arrange a trip to Nassau to renumerate her for assisting with the book. At the house, after giving the victim pills, Marks began questioning her about her sex life. Although the victim was becoming dizzy and lightheaded, she refused to answer the questions. Marks then became angry and started taking off her clothing while choking and attempting to smother her. Marks then threatened to kill her. After a long struggle, Marks forced the victim to have sexual intercourse and oral sodomy. He than showered and massaged her before driving her home. The victim immediately told her roomate about the episode; the police were called and the victim was taken to the hospital. The examining physician found a lacerated area near the vaginal opening, but no other tell-tale signs of sexual assault.

During the trial, the prosecutor called Dr. Herbert Modlin as an expert witness. Dr. Modlin was a board-certified psychiatrist and neurologist who practiced psychiatry and taught at the Menninger Foundation. Dr. Modlin examined the victim two weeks after the rape. Based upon his psychiatric evaluation and expertise, he opined that the complainant was a victim of a "frightening assault" and that she was suffering from the post-traumatic stress disorder known as rape trauma syndrome.[11] As a result of Dr. Modlin's testimony and the other evidence presented, Marks was convicted of rape and aggravated sodomy, contrary to his assertions that the acts were consensual.

On appeal, Marks did not challenge the qualifications of Dr. Modlin as an expert witness; this determination is generally left to the sound discretion of the trial judge.[12] Instead, he argued that expert testimony regarding rape trauma syndrome is per se inadmissible in a case where consent is the defense because it invades the province of the jury.[13] The Kansas Supreme Court rejected the appellant's contention. After reviewing the Kansas rule of evidence governing the admissability of expert testimony,[14] the court stated that:

> The identification of rape trauma syndrome is a relatively new psychiatric development. Even so, if the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault did take place, it is relevant when a defendant argues that the victim consented. As such an expert's opinion does not invade the province of the jury. *It is merely offered as any other evidence, with the expert subject to cross-examination and the jury left to determine the weight.*[15]

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[6] *What's New*, A.B.A.J., Jan. 1983, at 96-97; 5 A.T.L.A. Crim.R. 39 (1982); The National Law Journal, Oct. 4, 1982, at 5, col. 1.

[7] 231 Kan. 645, 647 P.2d 1292 (1982).

[8] 324 N.W.2d 227 (Minn. 1982).

[9] 324 N.W.2d 232 (Minn. 1982).

[10] 231 Kan. at 646, 647 P.2d at 1294-1295.

[11] *Id.* at 648, *Id.* at 1299.

[12] *See* State v. LeBrun, 587 P.2d 1044, 1047 (1977), where the court stated that "[w]hether a witness possesses sufficient skill, knowledge or experience to qualify as an expert as to any particular matters rests primarily in the trial court's discretion." *See also* United States v. Lopez, 543 F.2d 1156 (5th Cir. 1976); United States v. Moore, 15 M.J. 354, 364 (C.M.A. 1983); United States v. Hagelberger, 3 C.M.A. 259, 12 C.M.R. 15 (1953); United States v. Maher, 46 C.M.R. 535 (N.C.M.R. 1972).

[13] 647 P.2d at 1292.

[14] K.S.A. § 60-456(b),(d) (1964).

[15] 647 P.2d at 1299 [emphasis added].

The court examined two issues. First, is the basis of the opinion generally acceptable within the expert's particular scientific field? Second, can the expert's opinion be based upon hearsay information? The court found by reviewing literature in the psychiatric community that rape trauma syndrome is generally accepted as a common reaction to sexual assault.[16] The court stated that "qualified expert psychiatric testimony regarding the existence of rape trauma syndrome is relevant and admissible"[17] where there is a defense of consent.

Marks also raised a hearsay objection to Dr. Modlin's testimony. Although case facts and histories supplied during the psychiatric evaluation were hearsay and therefore inadmissible, Kansas has an exception to the hearsay rule which applied in this case. Where facts have been independently admitted into evidence at trial, the expert can give an opinion based upon the facts made known at the trial.[18] In *Marks*, the case history was admitted during the testimony of the victim, her roomate, and the examining physician. In addition to using the case history independently admitted during trial, Dr. Modlin also properly based his testimony on the symptoms he noted during his psychiatric evaluation of the victim, *i.e.*, on data personally perceived by him.

Forty-six days after the Kansas opinion in *Marks*, the Minnesota Supreme Court determined in two cases of first impression that evidence of rape trauma syndrome was inadmissible.[19] In *State v. Saldano*, the defendant had known the victim through a mutual friend. As a result, there was sexual intercourse between Saldano and the victim. Ten days after the intercourse, the victim went to the Victim's Assistance Program in Mankato and met Lynn Dryer, the program director, who counseled victims of sexual assault. Ms. Dryer counseled the victim for ten weeks.

During the trial, the prosecutor called Ms. Dryer as a witness to rebut Saldano's testimony that the sexual intercourse was consensual. Ms. Dryer explained the typical stages a rape victim goes through and described her observations of the victim. She then opined that the complainant had been the victim of an "acquaintance rape" and that she had not fantasized the incident.[20] Ms. Dryer's testimony was admitted over defense objection. The Minnesota Supreme Court reversed Saldano's conviction holding that evidence of rape trauma syndrome will not be admissible until further evidence of the scientific accuracy and reliability of syndrome/profile diagnoses can be established.[21]

The majority opinion, written by Justice Scott, states that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred since the characteristic symptoms may follow *any* psychologically traumatic event."[22] Therefore, the "testimony is no help to the jury and produces an extreme danger of unfair prejudice."[23] They found rape trauma syndrome to be merely a therapeutic tool, useful in counseling. The court was concerned that the jury would improperly decide the case based upon how most people react to rape, or on whether the victim's reactions were the typical reactions of a person who has been the victim of a rape, rather than decide the case based upon the facts.

The court also held that, even if evidence of rape trauma syndrome was generally admissible, the testimony by Ms. Dryer that the complainant was a victim of rape and had not

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[16] *Id.*

[17] *Id.*

[18] K.S.A. § 60-456(b) (1964). *See* MRE 703; S. Saltzberg, L. Schinasi & D. Schleuter, Military Rules of Evidence Manual 327 (1981) [hereinafter cited as Saltzberg]; R. Lempert & S. Saltzman, A Modern Approach to Evidence 935-41 (1977); *See also* United States v. Sims, 514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975); United States v. Allen, 7 M.J. 345 (C.M.A. 1979); United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979); United States v. Robinson, 2 M.J. 1241 (A.F.C.M.R. 1976).

[19] State v. Saldano, 324 N.W.2d 227 (Minn. 1982); State v. McGee, 324 N.W.2d 232 (Minn. 1982).

[20] 324 N.W.2d at 230-31 nn. 4, 7.

[21] *Id.* at 229 (quoting State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981).

[22] *Id.*

[23] *Id.*

fantasized the incident was absolute error and required reversal of the conviction.[24] In essence, the purpose of Ms. Dryer's expert testimony was to bolster the complainant's credibility. The court concluded that Ms. Dryer was not sufficiently qualified to render such an opinion because she was not a physician, had not physically examined the victim and did not even meet the victim until ten days after the alleged rape.[25] Also, the court stated that credibility is the sole province of the jury and an expert opinion on the veracity of a witness invaded the jury's province and unfairly prejudiced the defendant because the expert's testimony would have an aura of special trust.[26]

In the companion case, *State v. McGee*, the prosecutor used the expert testimony of a doctor to rebut McGee's testimony that the sexual intercourse had been consensual. Unlike Ms. Dryer in *Saldano*, the doctor did not opine whether the victim was a victim of rape. He merely testified that the reactions of the victim were consistent with rape trauma syndrome. The defense did not object to the doctor's testimony. The Minnesota Supreme Court reversed McGee's conviction in a short, four-paragraph opinion, citing *Saldano* as the basis for the reversal.[27]

The two-justice dissent in *McGee* stated, "in the context of this case, expert testimony identifying complainant's behavior after the alleged sexual assault as consistent with 'rape trauma syndrome' was properly admitted into evidence."[28] Research by Justice Wahl led her to believe that there was a substantial database supporting the existence of rape trauma syndrome.[29] In this case, the doctor did not testify as to whether he thought the rape occurred. Rather, he discussed some of the victim's psychological symptoms after the alleged rape and stated that he found those symptoms to be consistent with rape trauma syndrome. The dissent found such evidence probative on the issue of consent and thus helpful to the jury in resolving the conflicting facts of the case concerning that issue.[30] They believed that rape trauma syndrome is a medical diagnosis and generally accepted as reliable in the medical community.[31] Testimony on rape trauma syndrome would help the jury decide whether consensual sexual intercourse would cause the complainant to undergo psychological and emotional problems.

Both *Saldano* and *McGee* used the test established in *Frye v. United States*[32] to determine whether evidence of rape trauma syndrome is admissible. The *Frye* court held that expert testimony is not admissible in every case where the witness purports to base his or her testimony on an ostensibly scientific principle. A necessary predicate to the admissibility of scientific evidence is that the principle upon which it is based "must be sufficiently established to have gained general acceptance in the particular field to which it belongs."[33]

The Minnesota Supreme Court did not rely solely on the *Frye* test knowing that Minnesota Rule of Evidence 702 does not require absolute

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[24] *Id.* at 228.

[25] *Id.*

[26] *Id.* at 230.

[27] 324 N.W.2d at 232.

[28] *Id.* at 233 (Peterson, Wahl, JJ., dissenting).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] 293 F. 1013 (D.C. Cir. 1923). *See* State v. Mack, 292 N.W.2d 764, 767 (Minn. 1980) (expert testimony admissible if the thing from which the deduction is made [is] sufficiently established to have gained general acceptance in the particular field in which it belongs). In spite of the fact that rape trauma syndrome is recognized and used for therapeutic counseling, the majority failed to accept it as relevant and probative as to whether the intercourse was consensual.

[33] 293 F. at 1014. It is not clear whether MRE 702 and MRE 703 were intended to codify the *Frye* test in military jurisprudence, or whether they establish a less demanding standard for scientific evidence. It is, however, generally believed that MRE 702 is a permissive rule which only requires that the evidence will assist the finder of fact to understand the evidence or determine a fact in issue. *See* Saltzberg, *supra* note 18, at 324. For a useful analysis of scientific evidence and problems associated with it, *see* Giannelli, *The Admissibility of Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 Colum. L. Rev. 1197 (1980). Any doubt about the vitality of the *Frye* test or whether the Court of Military Appeals will examine the issue was vitiated in United States v. Moore, 15 M.J. 354, 372 (C.M.A. 1983) (Everett C.J., dissenting).

certainly or unanimity of scientific opinion. Instead, expert testimony is admissible if conclusions drawn by experts are based generally on accepted and reliable principles, and will aid the trier of fact. The court balanced the competing interests and pronounced that scientific evaluation of rape trauma syndrome is not reliable enough to go to the jury.[34] The court had a persuasive argument in *Saldano* because the victim did not seek counseling until ten days after the incident. In *McGee*, however, the doctor examined the complainant immediately after the incident, and on two subsequent occasions.[35] He testified based upon his observations and examinations of the complainant, as well as facts relayed to him. The majority, however, stuck by its premise that evidence of rape trauma syndrome is not capable of scientific accuracy and reliability.

Why did the Minnesota Supreme Court, which stated that symptoms of rape trauma syndrome can be caused by any psychologically-traumatic event, preclude testimony by experts which would demonstrate that there had been a traumatic event? Is the answer found in the oft-cited argument that the crime of rape is easy to allege but difficult to refute?[36] The answer appears in *Saldano* when Justice Scott wrote that "[p]ermitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices [an accused]."[37] The majority was concerned throughout the decision that an expert's opinion, real or perceived, would unduly prejudice a jury. The perceived prejudice caused by a hindsight analysis was addressed in the initial part of its decision. The court then addressed what it considered the real prejudice of having an expert testify that the complainant was raped. It was recognized that an expert witness can give opinion testimony which embraces an ultimate issue of fact.[38] That statement was limited by noting that opinions on legal questions or mixed questions of law and fact are of no benefit to the trier of fact and therefore inadmissible.[39] To buttress the limitation, case law from other jurisdictions was utilized to show that expert testimony opining that a complainant was raped was reversible error. For example, in *Commonwealth v. Gardner*,[40] the Supreme Judicial Court of Massachusetts held that it was reversible error to allow the examining physician, a gynecologist, to opine that the complainant was raped based upon his examination of the victim, her emotional state and her historical statement. That court stated that they were "not persuaded that a gynecologist, or other expert, possesses skills or special expertise which might enable him to determine, from factors such as these, that acts of intercourse amounted to rape."[41]

Similarly, in *State v. Castore*,[42] the Rhode Island Supreme Court stated that there are criteria to determine when expert testimony "will be enlightening rather than merely entertaining."[43] In that case, the expert was a prominent doctor in obstetrics and gynecology and had vast experience in examining women and children alleged to have been victims of sexual assault. The doctor testified that he examined the complainant after reviewing her history and conducted tests that were negative. He than stated that, based upon his experience of treating sexual abuse victims and upon the history that the patient had given, there was sufficient reason to believe she may, in fact, have been a victim. The court, in holding that the doctor's testimony and opinion were inadmissible, stated that, because the opinion was "based on

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[34]324 N.W.2d at 229-30.

[35]324 N.W.2d at 233.

[36]United States v. Telfaire, 496 F.2d 552 (D.C. Cir. 1972).

[37]324 N.W.2d at 230.

[38]*Id.* *See* MRE 704. Commentators have noted that military jurisprudence precludes opinion testimony as to the innocence or guilt of an accused or to state legal opinions. *See also* Saltzberg, *supra* note 18, at 329.

[39]324 N.W.2d at 230.

[40]216 N.E.2d 558 (Mass. 1966).

[41]*Id.* at 560.

[42]435 A.2d 321 (R.I. 1981).

[43]*Id.* at 326.

evidence that was not within the realm of his medical capabilities or expertise [, it] amounted to nothing more than his assessment of the credibility of [the victim's] testimony."[44]

Without articulating the reasoning of the Rhode Island Supreme Court, Justice Scott and his brethren relied on its proposition. That is, whether the expert witness is a social worker, doctor, or Indian Chief, an opinion that the symptoms exhibited are rape trauma syndrome is nothing more than an assessment that the complainant is truthful. It is not a medical or scientific evaluation which can be measured like the stages of pregnancy or the force of atomic explosions. As such, a jury is as capable of assessing the credibility of the complainant and determining whether a rape occurred.[45] Such testimony is, therefore, not relevant.

After reversing the lower court regarding the admission of the testimony in *Saldano* and *McGee*, the Minnesota Supreme Court remanded for new trials. In so doing, the Court articulated the rationale for its decisions—"to ensure accuracy on the truth-seeking process and to guarantee fairness to the accused."[46]

After reviewing these cases, it is easier to accept the straightforward and practical Kansas decision than the labyrinthine Minnesota decisions. The most difficult aspect of the Minnesota decisions is that the court wanted to use an overly-exacting test for defining what is scientific, technical or other specialized knowledge.

III. The Military Experience and Rape Trauma Syndrome

In courts-martial, the issue of rape trauma syndrome would arise as it does in civilian cases. During the discovery phase, the defense counsel would ascertain that the complainant was or is being counseled, or government counsel would ask a social worker, doctor or psychiatrist to examine the complainant for symptoms of rape trauma syndrome. During the trial, the accused would testify that the intercourse was consensual, and an expert witness would be called to rebut such testimony. The witness, if declared an expert, would state that the complainant had been examined, and then opine whether the symptoms found are consistent with rape trauma syndrome.

Both trial and defense counsel have to be prepared for roadblocks to the admission of such evidence. Both must be aggressive during the discovery phase to locate an expert if the complainant is being or was counseled; learn as much as they can about the field and the expert; and learn as much about the victim as they can. The victim will supply the necessary facts to show that a psychological traumatic event occurred prior to or after the alleged act of intercourse.

The first hurdle counsel must approach is Military Rule of Evidence (MRE) 702. It simply states that testimony by experts is admissible:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, [and] a witness [is] qualified as an expert by knowledge, skill, experience, training, or education. . .

Although military jurisprudence also utilizes the *Frye* test,[47] the standard for determining admissibility under MRE 702 is whether the expert can be helpful. Nothing in MRE 702 requires that expert testimony be based on scientific principles that are generally accepted in the scientific community. Instead, courts are to evaluate expert evidence in light of current

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[44] *Id.* at 325. Both state cases are distinguishable because the expert stated that the person examined was raped or was a victim. The introduction of rape trauma syndrome evidence should be limited to rebut an accused raising the defense of consent. The expert would opine that the complainant demonstrated a post-traumatic stress disorder known as rape trauma syndrome. The expert would then be subject to cross-examination and the jury would have to determine the weight of the evidence offered. *Marks*, 647 P.2d at 1299.

[45] 324 N.W.2d at 230.

[46] 324 N.W.2d at 232.

[47] *E.g.*, Williams, *Admissibility of Polygraph Results Under the Military Rules of Evidence*, The Army Lawyer, June 1980, at 1; United States v. Ford, 4 C.M.A. 611, 16 C.M.R. 185 (1954); United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1981); United States v. Martin, 9 M.J. 731 (N.C.M.R. 1980), *affirmed*, 13 M.J. 66 (C.M.A. 1982).

evidence that is available when the expert is called to testify and in light of problems that are associated with certain forms of evidence.[48]

Evidence of rape trauma syndrome should be admissible in courts-martial given the low threshold of relevance in MRE 401[49] and the presumption in MRE 402[50] that relevant evidence is admissible. Rape trauma syndrome has a tendency to prove a consequential fact in issue in a rape case, namely that the complainant experienced a psychologically traumatic event. The government must still show by other evidence that the accused caused the event. Moreover, the evidence is not prohibited by the Constitution, the Uniform Code of Military Justice, the other Military Rules of Evidence, the Manual for Courts-Martial, or statute.[51] Finally, the probative value of such evidence outweighs any prejudice to the accused and the military judge can give a cautionary instruction to the panel to prevent prejudice to the accused.[52]

In *United States v. Moore*,[53] a divided Court of Military Appeals affirmed a successful rape prosecution, and examined the relevance of expert testimony in such case. In *Moore*, the victim was historically a victim of sexual abuse. On the evening of 22 May 1979, the accused persuaded the victim and two soldiers to hold a party in his barracks room. He began to force himself on the victim by pulling her onto the bed, kissing her and unbuttoning her pants. His attentions were resisted physically and verbally; the victim told the accused she had VD. She later succumbed to threats and force by the accused. During the court-martial the government called three experts: a psychiatrist, a psychologist and an expert on sexual assault who worked with confined sex offenders. The psychiatrist testified that the victim was free of mental illness but probably would unknowingly place herself in sexually compromising situations.[54] The psychologist testified that the victim was looking for a father figure, could unknowingly place herself in a sexually compromising position, and, based upon her prior history, would submit to sexual intercourse if struck and threatened with death.[55] The expert on sexual assault testified on the psychology of rape and answered hypothetical questions. He opined that the victim had a tendency to be obedient to aggressors and her apparent cooperativeness could be misread as consenting to sexual relations.[56] Defense counsel objected to the testimony of the experts.

The majority opinion, consisting of separate opinions by Judge Cook and Judge Fletcher, accepted the conclusion by the trial judge that the expert testimony met the standards of MRE 702. First, the defense did not raise an objection challenging the testimony as not being scientific, technical or other specialized knowledge. The objections to the testimony were that it was not relevant, would inflame the jury, and that it became cumulative. Second, while impliedly accepting the psychiatric testimony, Judge Cook examined the psychological testimony and did not find that such testimony was not based on scientific, technical or other specialized knowledge, or that the military judge abused his discretion by accepting such.

In dissent, Chief Judge Everett states that the expert testimony was inadmissible and should have been excluded because it did not meet the *Frye* standard.[57] The difficulty with his conclu-

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[48]Saltzberg, *supra* note 18, at 324; *The Military Rules of Evidence: A Survey of Problem Areas in Sections IV, VI, VII, VIII, and X*, 12 The Advocate 137, 150-152 (1980).

[49]MRE 401 states:

> "Relevant evidence" means evidence having *any tendency to make the existence of any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence. [Emphasis added].

[50]MRE 402, in pertinent part, states: "All relevant evidence is admissible."

[51]*See* Salzburg, *supra* note 18, at 174.

[52]*Id. See also* Walinsky, *Applying Military Rule of Evidence 403: A Defense Counsel's Guide*, 14 The Advocate 1 (1982).

[53]15 M.J. 354 (C.M.A. 1983).

[54]*Id.* at 360.

[55]*Id.*

[56]*Id.*

[57]*Id.* at 373.

sion is twofold. First, defense counsel did not object for that reason, thereby invoking the doctrine of waiver.[58] Second, the arguments made to demonstrate that the *Frye* standards were not met are in fact arguments objecting to the relevancy of the testimony. Those arguments were effectively parried by Judge Fletcher's concurring opinion which itemized the relevance of the experts' testimony.

The argument for the defense follows from the Minnesota decisions. Namely, rape trauma syndrome connot be measured with accuracy; an expert witness can only state that based upon literature, the symptoms exhibited by the victim are typical of some persons alleging to be sexual assault victims. Such typicality, however, does not prove that the complainant was raped. Thus, not only is the expert testimony not substantially verifiable by generally accepted methods of proof, the expert cannot demonstrate that scientific procedures were used to form the opinion. The argument has credence in that the Kansas Supreme Court relied on the fact that Dr. Modlin, as a certified forensic psychiatrist, discovered and measured the symptoms during the psychiatric evaluation of the victim. At a minimum, defense counsel may be able to limit testimony to only psychiatrists who performed psychiatric evaluations prior to attempting to treat a victim.

The other defense argument presupposes misidentification or the false accusation of an accused. The administration of justice and the ascertainment of truth will not be attained if the victim misidentifies an accused, and if the expert corroborates and enhances her testimony, the wrong person will be convicted. Or, if there was an assault but no rape or attempted rape, and the victim insists that she was raped, an accused may be improperly convicted with the assistance of an expert.

Assuming that rape trauma syndrome is generally accepted as specialized knowledge, and the expert, in the discretion of the military judge, is qualified,[59] the hearsay issue of what was told to the expert must be resolved. The hearsay aspects of rape trauma syndrome evidence have been examined in civilian cases. Two arguments are generally made in an attempt to preclude such testimony based upon the hearsay rule. First, because of a delay of hours or weeks between the alleged sexual assault and counseling, the information told to the expert is not within the excited utterance exception to the hearsay rule.[60] Second, the matters told to the expert which formed the bases of the opinion are hearsay and should not be considered.[61] In rebuttal, government counsel states that the statements are offered for matters other than for the truth of the matters asserted and are not hearsay.[62]

The first objection fails because MRE 803 provides two exceptions to the hearsay rule. First, the complainant can tell the expert about her existing state of mind, emotion, sensation or physical condition to relate how she feels about the incident.[63] The expert could note that the complainant felt a sense of shame, fear of men, that she is tired and has not slept well, and other factors that are consistent with rape trauma syndrome. Second, statements the complainant makes during the course of medical diagnosis and treatment, to include past or present symptoms, pain and sensations about her emotional reactions to the assault are admissible.[64] For example, if the victim has a physical reaction to the assault, the reaction can be a basis for the expert to opine that rape trauma syndrome is present. The same standard would apply when

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[58] *See* MRE 103; United States v. Joseph, 11 M.J. 333 (C.M.A. 1981); United States v. Wade, 1 M.J. 600 (A.C.M.R. 1975), *vacated*, 5 M.J. 961 (C.M.A. 1976); United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981). *See also* United States v. Brady, 595 F.2d 359 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979) (objection to inconclusiveness of scientific test does not preserve for appeal failure to establish general acceptance within scientific community since error in laying foundation for expert testimony must be objected to specifically); United States v. Martin, 587 F.2d 31 (9th Cir. 1978).

[59] *See* State v. LeBrun, 587 P.2d 1044 (1977).

[60] *See* State v. Mackie, 622 P.2d 673, 675-76 (Mont. 1981).

[61] *See Marks*, 231 Kan. at 650, 647 P.2d at 1299-1300.

[62] MRE 801(c).

[63] MRE 803(3).

[64] MRE 803(4). *See* United States v. Hill, 13 M.J. 882, 884 (A.C.M.R. 1982).

the victim sought medical treatment for her emotional reactions to the assault. The expert, however, could not testify as to the identity of the assailant.[65]

Additionally, under MRE 703, an expert may base an opinion upon facts or data that he or she has perceived or that he or she has been told about, either before or during the trial. The only condition is that the facts or data upon which the expert relies are those which are reasonably relied upon by experts in that particular field, regardless of whether the underlying facts or data would otherwise be admissible.[66] Thus, an expert in rape trauma syndrome who has examined the complainant and listened to her, can testify about the presence of rape trauma syndrome. The defense is left to undermine the facts relied on by the expert or call their own expert in rebuttal.

IV. Conclusion

The admission of expert opinion testimony stating that a complainant has undergone traumatic post-rape symptoms known as rape trauma syndrome demonstrates that the judicial process is as sensitive to the rape victim as health professionals are.[67] It is an attempt to prove that a violent abusive act occurred which should not be cast aside months later when the physical signs of the act have eroded. It is an attempt to find truth and demonstrate that the administration of justice has a heart for victims.

Rape trauma syndrome has its detractors and its weaknesses. It is, however, strong circumstantial evidence of rape. Judges and juries should not underestimate the ability of a jury to avoid being misled by either the prosecutor or defense counsel. It can and should be used by both trial and defense counsel.[68] It should not be said that military jurisprudence forces the victim to prove her innocence beyond a reasonable doubt.

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[65]*E.g.*, *Hill*, 13 M.J. at 884.

[66]Saltzberg, *supra* note 18, at 324.

[67]The Arizona Daily Star, March 6, 1983, at K-4, Col. 2.

[68]*See* State v. Jackson, 97 N.M. 467, 641 P.2d 498 (1982).

The Right to Financial Privacy Act: Tool to Investigate Fraud and Discover Fruits of Wrongdoing

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Consider the following scenarios:

A service member with a responsible position is frequently sent on TDY trips. His commander suspects he is claiming reimbursement for expenses not actually incurred. He suspects the service member's banking and credit-card records would demonstrate what the actual TDY expenses were, and that they would reveal the extent of the fraud perpetrated on the government.

A service member of low grade and with no apparent outside income drives a Mercedes, lives in an expensive apartment and is known as a man with ready cash for loans. The service member is intelligent, has good military bearing and duty performance, but also is a reputed drug dealer. The military police have been able to make only one small controlled purchase of drugs from the service member. Efforts to negotiate a larger transaction have failed. The commander knows the service member's paycheck is deposited directly into the bank downtown and suspects the profits from the drug trade are also kept there. He believes the bank's records of the service member's account would

provide circumstantial evidence of the extent of the drug operation.

Can the commander obtain the service member's financial records in either case?

Right to Financial Privacy Act

A little known federal statute, the Right to Financial Privacy Act,[1] can assist the commander in the above situations since, if certain prerequisites are met, it gives government authorities access to an individual's financial records[2] held by a financial institution.[3] As would be expected, the Act is particularly useful in investigations of fraud and other activities involving financial transactions.[4] It is not limited to these areas, however, and can be used effectively in many types of investigations. For example, to develop evidence of drug activity, as described above, financial records could be invaluable corroboration in the case of a suspected drug dealer who has deposited thousands of dollars in excess of his rate of pay. In addition, the evidence could be used to rebut specific defenses, such as entrapment or agency, or to rebut a claim of "one-time offense" made in extenuation and mitigation.

Means of Acquiring Records

Although the Right to Financial Privacy Act establishes as a matter of policy that a customer's financial records held by a financial institution are confidential,[5] it provides a detailed scheme to enable government authorities to obtain them. The first option is to gain the records release with the consent of the customer.[6] If he or she refuses, the government may be able to acquire them through an administrative subpoena or summons.[7] A third alternative is to obtain a search warrant. Another is to procure a judicial subpoena.[9] Finally, the government may secure the records release through use of formal written request procedures.[10]

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[1] 12 U.S.C. § 3401 (1978). The Right to Financial Privacy Act was enacted in response to the decision in *United States v. Miller*, 425 U.S. 435 (1976) which held that a depositor has no expectation of privacy in, and therefore no Fourth Amendment protection of, his or her financial records which are in the possession of a financial institution, because these records belong to the institution. The Right to Financial Privacy Act establishes the depositor's privacy interest in such records and permits disclosure to government authorities only when the prescribed procedures are followed. *See generally* Note, *The Right to Financial Privacy Act of 1978*, 28 DePaul L. Rev. 1059 (1978).

The military practitioner should be aware that several state supreme courts have ruled that their state constitutions create a privacy interest in financial records. Charnes v. DiGiacomo, 612 P.2d 1117 (Colo. 1980) (Colo. Const., art. II, § 7 creates expectation of privacy in bank records); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032 (1980) (Pa. Const., art. I § 8 creates privacy interest in bank records); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974) (Cal. Const., art. I § 13 creates privacy interest in bank records). In subsequent decisions, Burrows v. Superior court was extended to credit cards, People v. Blair, 25 Cal.3d 640, P.2d 738, 159 Cal. Rptr. 818 (1979) and telephone records, People v. Mejia, 95 Cal. App. 3d 828, 157 Cal. Rptr. 233 (1979). In these states a conflict may develop when a federal prosecutor seeks financial records in accordance with the Act. *See In Re* East National Bank of Denver, 517 F. Supp. 1061 (D. Colo. 1981) (Act did not require notice to customer of service of federal grand jury subpoena on bank, but state constitution did). Despite these conflicts, the government's invocation of the Supremacy Clause, U.S. Const. art. VI, § 2 will enable it to prevail and apply the Act's standards in federal litigation.

[2] 12 U.S.C. § 3401(2) defines a financial record as "an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution."

[3] 12 U.S.C. § 3401(1) includes as a financial institution "any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or Territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands."

[4] *See* Kauffman v. Dep't of Army, No. 83-SJ-03 (W.D. Mo. Aug. 5, 1983) (investigation of travel fraud); Hunt v. SEC, 520 F. Supp. 580 (N.D. Tex. 1981) (investigation of violation of federal securities laws).

[5] 12 U.S.C. § 3403.

[6] *Id.* § 3404.

[7] *Id.* § 3405.

[8] *Id.* § 3406.

[9] *Id.* § 3407.

[10] *Id.* § 3408.

With each of these approaches, the customer is given notice[11] and, if applicable, the right to challenge the government's actions.[12] Although the government has the burden of proving the records are reasonable,[13] the standard which must be met is minimal[14] and customer challenges are upheld infrequently.[15] As a result, the government will usually obtain the sought-after records.

Customer Consent

In response to a government authority's request for financial records, a customer may authorize the financial institution to release them.[16] In accordance with the Act, the customer would sign and date a written consent which may authorize disclosure for up to three months.[17] The consent must identify the records to be released, specify the purpose for which and to whom they are released, state that the customer may revoke the consent prior to release of the records, and list the customer's rights under the Right to Financial Privacy Act.[18]

Undoubtedly, many customers will not consent to release of their financial records to the government.[19] That need not deter government agents, however, for the alternatives available under the Act provide an effective means to obtain the records with little chance for the customer to prevent their release.

Administrative Summons and Subpoena

Certain federal agencies[20] have subpoena power which they may employ to obtain financial records pursuant to the Right to Financial

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[11]The notices in sections 3405, 3407, and 3408 are almost identical. Each notifies the customer that records are being sought from the named institution, states the reason and instructs the customer to complete the motion and sworn statement enclosed with the notice if he or she desires to challenge the action. Filing and service instructions also are enclosed. The customer is advised that if he or she does not challenge the action within the stated time, the records will be made available. The notice also informs the customer that an attorney is not required but may be retained and that the customer should be prepared to present his or her position in court. The notice concludes with a caution that records which are released may be transferred to other government authorities for legitimate law enforcement inquiries. *See* Infra Appendix for the text of the notice required by § 3408. Exceptions to the notice requirement are found at 12 U.S.C. § 3409.

[12]Pre-release challenges are authorized by 12 U.S.C. §§ U.S.C. 3405, 3407, 3408. The procedures the customer must follow are at 12 U.S.C. § 3410.

[13]Hunt v. Sec, 520 F. Sup. 580, 603 (N.D. Tex. 1981).

[14]*Id.* where the court commented:

> Ultimately, however, the burden is on the government authority to show that it has a demonstrable reason to believe the records sought contain information which will aid in a legitimate investigation of violations of law within its jurisdiction. H.R. Rep. No. 1383 at 51. The House Report also indicates that the phrase 'reason to believe' does not mean any reason, no matter how theoretical or remote, while the phrase 'legitimate law enforcement purpose' is intended to impose a standard lower than 'probable cause.'

[15]*See* Kauffman v. Dep't of Army No. 83-SJ-03 (W.D. Mo. Aug. 5, 1983); Grafstrom v. SEC, 532 F. Supp. 1023 (S.D.N.Y. 1982); Hancock v. Marshall, 86 F.R.D. 209 (D.D.C. 1980); McGloshen v. Dep't of Agriculture, 480 F. Supp. 247 (W.D. Ky. 1979).

[16]12 U.S.C. § 3404.

[17]*Id.*

[18]*Id.*

[19]Resourceful law enforcement personnel usually are not discouraged by the prospect of a suspect refusing consent. The large number of confessions, admissions and consent searches in the reported cases indecate that an individual may consent to the release of records even though there is no obligation to do so. A well-planned interview with a subject whose records will be sought should include a request for consent to release financial records pursuant to 12 U.S.C. § 3404 and the required consent forms should be executed immediately.

[20]The Administrative Procedure Act, 5 U.S.C. § 556(c) (1976) includes a general authorization for administrative subpoenas. However, a particular agency does not have subpoena power unless there is a specific statutory grant. *See e.g.*, 42 U.S.C. § 2000e-9 (subpoena power of Equal Employment Opportunity Commission); 29 U.S.C. § 161 (subpoena power of National Labor Relations Board). The military departments do not have subpoena power per se. 32 C.F.R. § 955.23 (1982) (Air Force has no authority to issue an administrative summons or subpoena); U.S. Dep't of Army, Reg. No. 190-6, Obtaining Information from Financial Institutions, (Jan. 15, 1982) (Army has no authority to issue administrative summons or subpeona) [hereinafter referred to as AR 190-6]. Navy and Coast Guard regulations do not address the question; without a specific grant they, too, lack subpoena power.

Privacy Act.[21] To employ its subpoena power, the agency must have a reasonable belief that the records sought are relevant to a legitimate law enforcement inquiry and must certify that the customer has been served with a copy of the summons or subpoena along with the standard notice of customer rights prescribed by the Act.[22] The records will be released by the financial institution if there has not been a customer challenge within the specified period[23] and the government certifies that the requirements of the Act have been met.[24]

Search Warrants

The government may acquire the financial records in question if it obtains a search warrant in accordance with the Federal Rules of Criminal Procedure.[25] Within ninety days after serving the search warrant on the financial institution, the government must notify the customer that financial records were obtained, name the agency which received them and state the purpose for which acquired.[26]

Two of the military services have implemented this provision through regulations.[27] Pursuant to these regulations, search warrants may only be obtained from civilian magistrates.[28] Since that restricts the applicability of this section of the Right to Financial Privacy Act, military investigators and commanders should be advised not to seek records with a search warrant but to use the formal written request procedures discussed below.

Judicial Subpoena

The Act authorizes government authorities to obtain financial records pursuant to a judicial subpoena if such a subpoena is authorized by law.[29] In addition, the government must have reason to believe the records are relevant to a legitimate law enforcement inquiry and must include the appropriate notice of rights to the customer.[30]

Two of the military services have implemented this section of the Act by regulations.[31] Since this section applies only to pending judicial proceedings, its efficacy is limited. Alternative provisions of the Act, such as the formal written request, are more useful in the investigative process.

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[21] 12 U.S.C. § 3405.

[22] *Id. See supra* note 11.

[23] 12 U.S.C. §§ 3405, 3410(a). The customer has ten days from the date of service or fourteen days from the date of mailing to fila a motion to quash in the appropriate United States District Court.

[24] 12 U.S.C. § 3403(b).

[25] *Id.* § 3406(a).

[26] *Id.* § 3406(b). Delays in notifying the customer may be granted by the district court upon application by the government. 12 U.S.C. § 3406(c).

[27] Authority for Air Force personnel to obtain financial records through search warrants is 32 C.F.R. § 955.24 (1982). The regulation cautions that search warrants issued by military commanders or military judges may not be used within the territorial United States.

Authority for Army personnel to obtain financial records with search warrants is AR 190-6, para 2-4. The same caution against use of warrants issued by military commanders and judges inside the territorial United States is included. For cases where access to financial records in an overseas area is desired, the regulation directs Army personnel to attempt to obtain them through customer consent. If it is inappropriate or impossible to do so, a search authorization may be obtained from a military commander or judge in accordance with U.S. Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice (Sept. 1, 1982) [hereinafter referred to as AR 27-10].

The Navy and Coast Guard have not promulgated regulations to implement this section of the Act.

[28] 32 C.F.R. § 955.24 (1982) (Air Force); AR 190-6, para. 2-4 (Army).

[29] 12 U.S.C. § 3407.

[30] *Id.* The subpoena will issue if the customer has not filed a motion to quash or customer challenge within ten days of service of notice or fourteen days of mailing.

[31] 32 C.F.R. § 955.23 (1982) (Air Force) notes that a judicial subpoena would be issued only in connection with a pending judicial proceeding and, therefore, could not be issued by AFOSI.

AR 190-6, para. 2-5, echoes this definition of a judicial subpoena but acknowledges that a subpoena issued pursuant to the Manual for Courts-Martial, para. 115, and the Uniform Code of Military Justice, art. 46, would qualify as a judicial subpoena for purposes of the Right to Financial Privacy Act. The regulation advises that if a judicial subpoena is issued under the Act and AR 190-6, para. 2-5, the notice and challenged provisions of 12 U.S.C. §§ 3407, 3410 must be followed.

The Navy and Coast Guard have not promulgated regulations for obtaining judicial subpoenas under this section.

Formal Written Request

This section of the Right to Financial Privacy Act affords government authorities a great deal of flexibility in obtaining financial records. It is the most useful tool in the Act for military authorities to acquire service members' financial records. The formal written request procedures[32] may be used if the agency does not have administrative summons or subpoena power reasonably available,[33] if the request is authorized by regulations promulgated by the head of the agency or department,[34] and if there is reason to believe the records sought are relevant to a legitimate law enforcement inquiry.[35] The formal written request must be served on the customer and accompanied by an appropriate customer notice.[36] If the customer has not filed an application to enjoin release within the specified time,[37] the financial institution will relinquish the records.

The formal written request procedures are a boon to government authorities. Once a request is initiated and the government meets the threshold requirements of section 3408 of the Act, the records ordinarily will be released. Rarely will a customer be able to establish a prima facia case that the records are irrelevant or that the law enforcement inquiry is not legitimate.[38]

Customer Challenge

A customer served with a subpoena, summons or formal written request pursuant to the Right to Financial Privacy Act may file a motion to quash an administrative summons or judicial subpoena, or an application to enjoin the government from obtaining financial records through a formal written request.[39] The motion or application must be filed in the appropriate U.S. District Court within the

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[32] 12 U.S.C. § 3408.

[33] *Id.* § 3408(1). Whether the military service has subpoena power reasonably available is a matter of interpretation. The military departments do not have subpoena power per se. *See supra* note 20. However, currently an agreement exists between the Department of Justice and the Department of Defense which permits the transfer to the Department of Justice of investigative authority over offenses where the two agencies have concurrent jurisdiction. AR 27-10, para. 2-7. A transfer of authority to the Department of Justice would allow the use of subpoena power and arguably would preclude use of the formal written request procedure. At least one district court has rejected this argument and declined to require transfer of an investigation from the Department of the Army to the Department of Justice to enable the government to employ its subpoena power. Kauffman v. Dep't of Army, No. 83-SJ-03 (W.D. Mo. Aug. 5, 1983). The court thereby permitted the agency to take advantage of the less restrictive formal written request procedures. The rationale was that processing a request though normal Department of Justice procedures, *i.e.*, a grand jury proceeding, would not be appropriate since the Right to Financial Privacy Act restricts the transmission of materials obtained for grand jury use. 12 U.S.C. § 3420. Further, since the Department of Defense-Department of Justice agreement permits, but does not require, transfer of an investigation under concurrent jurisdiction, the court would not require a transfer if the departments did not desire it.

This ruling supports the military prosecutor who wishes to avoid relinquishing a case to the Deparment of Justice. If, however, the military prosecutor has had occasion to use Department of Justice assistance in the past and routinely has transferred investigations, the court may be unwilling to rule that the practice should not be followed in a case arising under this Act.

[34] 12 U.S.C. § 3408(2). *See* 32 C.F.R. § 955.19 (1982) (authorization for Air Force); AR 190-6, (authorization for Army). The Navy and Coast Guard have not promulgated the necessary regulations.

[35] 12 U.S.C. § 3408(3).

[36] *Id.* § 3408(4). The notice which must accompany the formal written request for records appears at the Appendix.

[37] Although 12 U.S.C. § 3408 specifies a period of ten days from the date of service or fourteen days from the date of mailing, the Air Force and Army have extended the period to fourteen days from the date of personal service and eighteen days from the date of mailing. 32 C.F.R. § 955.25 (1982); AR 190-6, para. 2-6c.

[38] *See* Hunt v. SEC, 520 F. Supp. at 603 where the customer's burden was described by the court as follows:

> The initial burden of production, however, is on the customer to offer proof of facts which show that either the documents requested have no connection with the subject matter of the investigation, that he has not committed any offense related to the investigation, or that he is the subject of harassment by the requests. (quoting H.R. Rep. No. 1383 at 53).

It is noteworthy that the customer may not stand on his presumption of innocence, but instead, must come forward with evidence in his behalf.

[39] 12 U.S.C. § 3410(a).

designated time period[40] and copies must be served on the government.[41] The motion or application must contain a sworn statement that the applicant is a customer of the financial institution in question[42] and state the applicant's reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry expressed by the government or that the government has not substantially complied with the requirements of the Right to Financial Privacy Act.[43]

If the customer complies with these requirements,[44] the court must order the government to file a sworn response.[45] If the motion and response are insufficient for the court to rule, it may order such additional proceedings as it deems necessary.[46]

Throughout the proceedings, a customer may be represented by counsel,[47] although the notice to the customer informs him he does not need an attorney.[48] Customer challenges pursuant to section 3410 of the Act have been singularly unsuccessful. Lack of specificity in the affidavit filed with the motion to quash[49] and failure to show irrelevance or an improper law enforcement inquiry[50] have been the most common bases for rejection. Customer protestations of innocence have been equally unavailing.[51] On the other hand, government misconduct in failing to comply with the requirements of the Right to Financial Privacy Act have been a basis for limited relief.[52]

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[40]*Id.* Air Force and Army regulations extend the time period.

[41]12 U.S.C. § 3410(a).

[42]*Id.* § 3410(a)(1).

[43]*Id.* § 3410(a)(2).

[44]*Id.* § 3410(b). *See* Hancock v. Marshall, 86 F.R.D. 209, 211 (D.D.C. 1980) (Government need not respond if applicant fails to establish prima facie case of impropriety).

[45]12 U.S.C. 3410(b). The government's sworn response may be filed in camera if the response includes the reasons why that is appropriate.

[46]12 U.S.C. § 3410(b).

[47]Military trial and defense counsel should consult with their superiors on the propriety of appearing in federal court proceedings. Dep't of Army, Reg. No. 27-40, strictly limits who may appear in federal court. An exception to permit representation of a customer in a case arising under this Act would have to be granted.

[48]12 U.S.C. §§ 3405, 3407, 3408. In addition, the agency is not required by 12 U.S.C. § 3404 (customer authorization) to inform the customer that he may consult with an attorney prior to giving consent to release of the records. *See also* Hancock v. Marshall for an example of the unfortunate results for a customer not represented by counsel.

[49]In Hancock v. Marshall, the customer filed a motion to quash an administrative subpoena issued by the Department of Labor. His accompanying affidavit stated that the records were not relevant because the Department had gone through the local union's files and made copies of material matters. The court ruled the affidavit was insufficient to require a response from the agency. The rationale was that the customer had failed to show a factual basis for believing the government's request was irrelevant or improper. Thus, an inartfully drawn or non-specific affidavit by the customer can result in dismissal.

[50]In Grafstrom v. SEC, 532 F. Supp. 1023 (S.D.N.Y. 1982) the customer filed a motion to quash an administrative subpoena issued by the SEC, alleging violation of the attorney-client privilege and harassment. The SEC responded that it was conducting an investigation of alleged violations of federal securities laws by the customer in his sales of stock and other transactions. It hoped to use the records to determine who received the proceeds of the sales, since that might identify the real sellers. The court ruled there was no reason to doubt the legitimacy of the SEC inquiry, and the response filed by the SEC demonstrated the agency's reasonable belief the records sought were relevant.

See also McGloshen v. Dep't of Agriculture, 480 F. Supp. 247 (W.D. Ky. 1979) where the customer attacked the government's reply to his motion stating it contained insufficient information to enable him to defend the action. The court pointed out this was merely an investigation and since the customer had not yet been charged with an offense, he need not be informed of the specific details about offenses which may have occurred. Since the records might be relevant in developing this information, the court ordered their release.

[51]*See* Sworn Statement of Movant, Kauffman v. Dep't of Army, No. 83-SJ-03 (W.D. Mo. Aug. 5, 1983).

[52]Hunt v. SEC, 520 F. Supp. 580 (N.D. Tex. 1981) revolved around an SEC investigation into plaintiff's activities in the silver market. In the course of its investigations, the SEC issued subpoenas to several financial institutions requesting the financial records of plaintiffs, members of their families and certain businesses owned or controlled by them. Among other errors, the SEC failed to comply with the customer notice provisions of the Right to Financial Privacy Act by requesting detailed records from the financial institutions and either excising sections of the copies

A recent case involving a military member illustrates these points.[53] Pursuant to an investigation of possible TDY fraud, Army investigators sought the service member's bank records and American Express credit card records under the formal written request procedure. He filed a motion to quash with an affidavit alleging improper use of the procedure and irrelevance of the records to any legitimate law enforcement inquiry.[54] The court ruled the records must be released since the Department of the Army had demonstrated that subpoena power was not reasonably available[55] and that the records might be relevant to the inquiry.[56] The court presumed a good faith investigation by the agency.[57]

The decided cases illustrate the futility of a customer challenge to a request for financial records. If the government authority complies with the procedural requirements of the Right to Financial Privacy Act, its access to records desired for a law enforcement investigation is virtually assured.

Appeals

If the customer's motion or application is denied, that ruling is not deemed a final order and an interlocutory appeal may not be taken.[58] An appeal may be initiated once a final order is issued against the customer as part of the legal proceeding based on the financial documents in question,[59] or, if there was no legal proceeding initiated, within thirty days after notice by the government that no such proceeding is contemplated.[60]

Miscellaneous Provisions

Although the scope of the Act is broad, there are exceptions to its applicability. It does not apply to Secret Service investigations,[61] intelligence activities,[62] or in cases where a delay in obtaining records would create an imminent danger of physical injury to any person, serious property damage or flight to avoid prosecution.[63] Certain routine releases of records also are exempted.[64]

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sent to plaintiffs, or failing to notify plaintiffs at all. The court found that the SEC attorneys had violated plaintiffs' rights under the Act since they were aware of the Act and either ignored its requirements or failed to seek advice on how to comply with its notice provisions. The court further found that these violations were egregious enough to warrant an injunction to prevent the SEC from further violations of plaintiffs' rights. The injuction did not prevent SEC access to plaintiffs' records, however, since the sole matter before the court was whether to enjoin the SEC's violations of the Act's procedural requirements. Plaintiffs had not requested civil damages under 12 U.S.C. § 3417, so that issue was not addressed by the court.

[53]Kauffman v. Dep't of Army, No. 83-SJ-03 (W.D. Mo. Aug. 5, 1983).

[54]*See id.*, Sworn Statement of Movant. *Army.*

[55]12 U.S.C. § 3404.

[56]The court acknowledged that the request for records was "somewhat excessive" and that it was not "entirely clear how the materials sought would tend to establish movant's guilt or innocence." But it declined to find the records were irrelevant for the purposes of the Act. *Kauffman*, No. 83-SJ-03, slip op. at 3.

[57]The court commented:

> The court finds it unnecessary in this case, however, to rule or to comment on the apparent strength or weakness of the potential claim, or whether the pursuit of movant may be somewhat vindictive. The court accepts the presumption of a good faith investigation, and does not find the exhibits or testimony so favorable to movant as to require close and critical scrutiny.

Kauffman, No. 83-SJ-03, slip op. at 2.

[58]12 U.S.C. § 3410(d).

[59]*Id.*

[60]*Id.* This section requires the government to notify a customer who has lost the challenge "promptly" when a decision has been made not to initiate legal proceedings against him or her. If 180 days elapses without such a determination having been made, the agency must certify to the court that there has been no determination. The court may require periodic certifications after that until either a decision has been made not to take action or a legal proceeding is initiated.

[61]12 U.S.C. § 3414(a)(1)(B).

[62]*Id.* § 3414(a)(1)(A).

[63]*Id.* § 3414(b)(1). If the latter exceptions are invoked, the government must file a sworn statement with the court to justify emergency access.

[64]12 U.S.C. § 3413 lists eight routine release exceptions. Examples of these include: release of records or information which cannot be identified as being derived from a particular person, release in accordance with procedures authorized by the Internal Revenue Code, and release in connection with a customer's application for a government loan.

The notice provisions of the Act may be dispensed with under certain circumstances.[65] Permission to delay notifying the customer may be secured from the court if there is reason to believe such notice will result in endangering the life or physical safety of any person, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or delaying a trial or other proceeding.[66]

If a government agency obtains records under the Right to Financial Privacy Act, it may not transfer them to another agency or department unless it certifies in writing that there is reason to believe the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the receiving agency.[67] If records are transferred, the transferring agency must notify the customer of the transfer within fourteen days.[68]

On an annual basis, any government authority which requests records through the Right to Financial Privacy Act must notify the appropriate Congressional committee of the number of requests and other relevant information.[69]

Conclusion

The implications of the Right to Financial Privacy Act for military personnel are far-reaching. Service members, like civilians, will have little success in preventing release of their financial records held by financial institutions. Military law enforcement agents in the services which have promulgated the necessary regulations have acquired an invaluable tool to assist in the investigation of fraud and other criminal activity.

[65] 12 U.S.C. § 3409.

[66] *Id.* § 3409(a).

[67] *Id.* § 3412(a).

[68] *Id.* § 3412(b).

[69] *Id.* § 3421.

Appendix

The following notice, which appears in 12 U.S.C. § 3408, must accompany a formal written request for records:

Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose: _____.

If you desire that such records or information not be made available, you must:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.
2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:

_____.

3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

_____.

4. Be prepared to come to court and present your position in further detail.
5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested may be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

Updating the Geneva Conventions: The 1977 Protocols

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The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts succeeded in adopting, on 10 June 1977, two protocols[1] additional to the Geneva Conventions of 12 August 1949.[2] Protocol I is intended to update and refine the laws of war relating to international conflicts, while Protocol II covers conflicts "not of an international character."[3] The Protocols have been signed by the United States by have not yet been submitted to the U.S. Senate for consent. They are now being studied by an inter-agency working group chaired by a representative of the U.S. Department of State. The group is expected to recommend that the agreements be submitted to the U.S. Senate for advice and consent in early 1984, along with suggested reservations or understandings. The length of time required by the review has been dictated by the complexity of the Protocols, a desire to coordinate with U.S. allies and manpower shortages. It is possible that slowness in the ratification process may also be attributed, in part, to unstated fears that the Protocols may weaken the traditional rules of warfare because of language dealing with the legality of certain conflicts, that they may give international status to liberation movements or even terrorist groups, and that they present the possibility that groups or individuals might benefit from coverage of the Geneva Conventions without the burden of reciprocal duties. However, the most significant contributions of the agreements are relatively noncontroversial and may be useful additions to the modern law of war.

The primary initiative for completion of the Protocols came from the International Committee of the Red Cross.[4] The participants in the conference approached the agreement with a wide range of goals, standards and viewpoints.[5] The Diplomatic Conference provided what has been described as an "opportunity to seek diplomatic and political advantages through manipulation of the process" in a game of "humanitarian politics."[6] Nevertheless, the political dimension of the treaty process and the cynical uses to which the treaty will be put should be expected and weighed against the possible diplomatic benefits. The United States delegation entered the debates with a number of goals, albeit minor ones, which had been based on long-held opinions regarding the inadequacies of the established rules of war and on recent

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[1]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), U.N. Doc. A/32/44, Anns. I & II (1977), *reprinted in* 72 Am. J. Int'l L., April 1978, at 457-509; 42 Law & Contemp. Prob., Spring 1978, at 203; U.S. Dep't of Army, Pamphlet 27-1-1, Protocols to the Geneva Conventions of 12 August 1949 (1979); and in 16 International Legal Materials 1391, 1442 (1977).

[2]CDDH (Conference Diplomatique du Droit Humanitaire), ICRC (International Committee of the Red Cross), Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, Geneva 1974-1977 (1978).

[3]On Sept. 8, 1977, George H. Aldrich, Deputy Legal Advisor, U.S. Department of State, submitted to the Secretary of State the official report of the U.S. Delegation to the Conference. Portions of the conclusion of the report are reprinted in Digest of United States Practice in International Law; Govt. Docs. 57.12/3:977 (1977).

[4]Mallison, *The Judicial Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 Law & Contemp. Prob. 3, at 7 (Spring 1978).

[5]For a brief discussion of the opposing viewpoints and ultimate conciliations during the series of diplomatic conferences see Cantrel, *Humanitarian Law in Armed Conflict: The Third Diplomatic Conference*, 61 Marquette Law Review 253 (1977).

[6]Baxter, *Modernizing the Law of War*, 78 Military Law Review 165, at 166 (Fall 1977).

experiences with the North Vietnamese.[7] The United States goals were achieved in an atmosphere of compromise which did not result in the sacrifice of major United States positions.[8] Still, the development of the new agreements did not proceed without some perceived political cost to the United States. In an open effort to gain the perspective of liberation movements and to better draft international codes intended partly to deal with insurgencies and guerrilla-type conflicts, several liberation movements were invited to send delegations to the conference.[9] This participation lent an international status to the insurgent movements, including the Palestine Liberation Organization. However, while the Protocols are linked to the diplomatic process by the written history of understandings and reservations, the documents may now be considered independently of the controversies surrounding the conference itself.

Jus In Bello V. Jus Ad Bellum

There is some concern that the concept of *jus ad bellum* (law against war) may undermine the established *jus in bello* (law of war.)[10] The theoretical danger to the traditional *jus in bello* is the possible denial of applicability of the Conventions in war situations labeled "unjust." Protocol I was intended to develop the law applicable in international armed conflict. However, article I, paragraph 4 of the first Protocol include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self determination," (CAR conflicts).[11] A number of delegations to the diplomatic conference asserted that these CAR conflicts were international in status because of the "just" causes pursued.[12] Corollary to this assertion was the rejection of the traditional definition of "international" which was based on the actions of states and the crossing of international boundaries.[13] Against this argumentative background, some delegations may have inferred that the Protocols included a judgement as to what constituted a "just" war and that the Protocols changed the established definition of "international" war. However, the preamble to Protocol I reiterates the duty of states to refrain from armed conflict and expresses the conviction that nothing in the Protocol or the 1949 Conventions can be construed as authorizing or legitimizing any act of aggression not consistent with the Charter of the United Nations. The preamble goes on to state that the provisions of both the Protocols and the Conventions are to be fully applied in all circumstances to all protected persons without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict. This is the clearest possible statement that the obligation to apply the codified rules of war cannot be legally avoided by labelling a war "unjust" or "aggressive." The obvious expressed intent of the Protocol is to be as inclusive as possible in the applicability of humanitarian principles in all types of conflict.

Article 1 (4), dealing with the inclusion of CAR conflicts, is worded to reaffirm the provi-

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[7]Digest of United States Practice in International Law, 1977, at 918.

[8]*But see* Baxter, *supra* note 6, at 173, "[t]he United States was concerned that a provision on wars of national liberation (ultimately Article 1, paragraph 4) might introduce a subjective and judgmental element into the law of war which had hitherto rested on a foundation of neutrality and equality of application to all belligerents, without regard to their resort to hostilities. However, the pressure in favor of the application of the whole of the law of war to wars of national liberation was such that it could not be resisted, and the United States and its NATO allies simply accepted the provision in silence."

[9]Mallison, *supra* note 4, at 8. Ten liberation movements were invited to attend the conference, including the Palestine Liberation Organization. However, only states were allowed to vote.

[10]Forsythe, Support for a Humanitarian Jus in Bello, 11 International Lawyer 723 (Fall 1977). Forsythe uses an alternate term, *Jus contra Bellum*, for *Jus ad Bellum*.

[11]The shorthand "CAR" for "colonial domination and alien occupation and against racist regimes" comes from Mallison, *supra* note 4, at 13.

[12]Forsythe, *supra* note 13, at 725.

[13]*Id.*

sions of the U.N. Charter.[14] To the extent that a given conflict or the causes espoused by or attributable to a party to a conflict are just and legal under the provisions of the U.N. Charter, they are not made unjust or given a different legal status by the new Protocol. Furthermore, article 1 (2) states that in cases not covered by the Protocol, the protection of international law is still derived from established custom as well as the principles of humanity and conscience. While this provision may be viewed as a weak expression of diplomatic hope, it provides additional legal footing for application of the 1949 Conventions in that the Geneva Conventions, due to their age and widespread acceptance, are arguably part of the "established custom" of international law. Common article 2 of the Conventions applies them to "all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[15] Although liberation movements are included in the Protocol's CAR language, the Protocol is very explicit that, in itself, it offers no recognition, status, or legality to any type of conflict. Any international legal argument attempting to claim legality or illegality of a particular conflict or party thereto would have to base itself on the provisions of the U.N. Charter and other documents of the Charter regime. Such arguments could not be properly based on the Geneva Conventions of 12 August 1949 or on the 1977 Protocols. Indeed, the North Vietnamese claimed, during armed conflict with the United States, that captured United States military personnel were not entitled to prisoner-or-war (PW) treatment under the Geneva Conventions because the United States was engaged in a war of aggression.[16] Nevertheless, the Protocol's design is not such that it encourages avoidance of international law. Obviously, the Conventions of 12 August 1949 alone were not specific enough to prevent denial by the North Vietnamese, and no agreement will be written which can withstand a resolve to confound it.

The problem of weakening the laws of was through misapplication of just-war doctrine should be considered from an historical perspective as well. The earliest developments of international law concerned the rules of warfare. Hugo Grotius, regarded as the father of modern international law, collected early law of war writings and published the first major work on international law.[17] Grotius restated the law of war up to that time and established the foundation for its later development. He described the customs of the law of nations as springing from natural law and the dictates of right reason. Much of this perspective was derived from the earlier writings of St. Ambrose and St. Augustine in the fourth century, and St. Thomas Aquinas in the thirteenth century, who developed just-war concepts based on Christian theology and the principles of early Christian ethics.[18] Until the rules for the conduct of combat were first codified in the nineteenth century, the principles and vocabulary of just-war doctrine and the customary rules governing the conduct of warfare were not separate.[19] The theoretical separation of *jus in bello* from *jus ad bellum* is a modern one, tracea-

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[14]Article 1, paragraph 4, of Protocol I reads as follows: "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

[15]Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 6 UST 3114 Tias No. 3362, 75 UNTS 31, *reprinted in* Friednan, The Law of War, A Documentary History 525 (1972).

[16]Digest of U.S. Practice in International Law. 1977, at 918.

[17]H. Grotius, De Jure Belli ac Pacis (On the Law of War and Peace) (1625).

[18]Bailey, Prohibitions and Restraints in War, chapter 1 (1972).

[19]The law of war and rules governing conduct of warfare are not confined to Christian antiquity. The *Book of Manu* from Hindu civilization and *The Art of War* written by Sun Tzu are noted for early regulations on the conduct or warfare. Friedman, The Law or War 3 (1971).

ble to perhaps only the Lieber code of 1863.[20] In recent decades, the language of humanitarian law and the vocabulary of human rights has no doubt re-merged with language concerning the conduct of warfare.[21] This is obvious from the very title of the diplomatic mission dealing with the current changes in the law of war.[22] Today, as in 1863, the possibility that the rules of war will be avoided by abuse of the just-war doctrine is slowed by clear announcements within the codification that application of the code has no relationship to the legal or moral status of any conflict.[23]

Status for Liberation Movements

Related closely to the *jus in bello-jus ad bellum* issue is whether or not the first Protocol might give international status to liberation movements. As already noted, participation in the Diplomatic Conference may have lent some status to certain liberation movements. However, article 4 specifically denies the achievement of status through application of the Protocol:

> *Legal status of the Parties to the conflict.* The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

This explicit statement is further supported by paragraph 5 of article 5:

> *Appointment of Protecting Powers and of their substitute.*
>
> ....
>
> 5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

As mentioned above, the preamble to Protocol I explicity reaffirms the provisions of Geneva Conventions of 1949. The four Conventions of 1949 have in common their first three articles. Common article 3 outlines the basic rules applicable in cases of armed conflict not of an international character. The final paragraph of common article 3 states that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict." However, this explicit denial of the effect on legal status relates only to common article 3 and therefore only to armed conflict not of an international character. Article 4 of Protocol I, on the other hand, is applicable as a denial of effect on status for the entire set of Conventions and Protocols. In other words, Protocol I strengthens the prohibition against the use of codified laws to achieve status and extends the specific denial of status achievement to all articles of the Conventions.

Article 96 (3) provides a mechanism by which a party to conflict like that described in article 1 (4) may apply the Protocol by means of a unilateral declaration addressed to the depository in Geneva. The legal effects of such a declaration are described in the article as follows:

> (a) the Conventions and this Protocol are brought into force for the said authority (the Liberation movement)

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[20]The Lieber Code, or Lieber Instructions, prepared by Francis Lieber, were promulgated as General Order No. 100 by President Lincoln on 24 April, 1863. They represent the first attempt to codify the laws of war and the adoption of similar regulations by other states. Schindler & Toman, The Laws of Armed Conflicts (1973). The entire text of the code is in The Laws of Armed Conflicts, and in Friedman, *supra* note 16, at 15; It is significant to the discussion of the 1977 Protocols that the code was developed in response to a non-international conflict. Articles 152 and 153 denied the adoption of the principles of the code as a means for recognition of status as an independent power.

[21]Draper, *The Ethical and Juridicial Status of Constraint in War*, 55 Military Law Review 169 (Winter 1972). Draper concludes that the body of rules which constitute the laws of war are moving to fuse with the regime of human rights.

[22]*Supra* note 2.

[23]The Lieber code also included specific articles drafted to insure that the code would not be successfully used as a vehicle for status recognition. *Supra* note 20.

> as a Party to the conflict with immediate effect;
>
> (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
>
> (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 96 (3) raises the same question of status recognition and descriminatory application as does article 1 (4) to which it relates. The same counter-arguments apply to support the contention that the preamble, articles 4 and 5, and the provisions of the 1949 Conventions deny use of the procedures outlined in article 96 (3) as a legal tool for status achievement. It should be noted, however, that the very existence of the second Protocol, which deals with non-international conflicts, when combined with the fact that liberation movements are included in Protocol I, provides an argument that the Protocols do give international legal status to such movements.

Prisoner-of-War Status

The next noteworthy difficulty involves PW status for combatants captured in conflicts covered by the Agreements. Classification of an individual as a combatant signifies the right to participate directly in hostilities.[24] The advantage to an individual in being so classified revolves around avoidnace of criminal prosecution by the civilian authorities of the capturing party and the right to be treated in accordance with the Geneva Conventions. The problem dovetails that of the classification of the conflict as being "just" or "unjust." For instance, the North Vietnamese refused to acknowledge PW status for American aviators either because they claimed that the United States was pursuing a war of aggression or, in the alternative, that the aviators were war criminals. The new Protocols state that:

> While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided by paragraphs 3 and 4.[25]

This article, together with the provisions regarding coverage of conflict-types, are enough to counter the kinds of arguments used by the North Vietnamese.

On the other hand, the language of the Protocols may be overly cautious in protecting the availability of PW status to the individual combatant. The question arises whether or not a government must grant PW status to any individual claiming membership in a politically-motivated organization who otherwise meets the requirements of the Protocols. In order to achieve combatant status and therefore the right to be treated as a PW, an individual need only:

> (1) be a member of an armed force subject to an internal disciplinary system, and (2) carry his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military development preceding the launching of an attack in which he is to participate.[26]

As worded, the Protocols seem to give apprehended terrorists from questionable groups such as the Symbionese Liberation Army or the Fuerzas Armadas de Liberacion Nacional (F.A.L.N.) an opportunity to claim PW status, thereby avoiding criminal prosecution under civil law. However, even if PW status were an option, it might not be a popular choice for the apprehended terrorist considering the conse-

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[24] Article 43, Armed forces, para 2, states, "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."

[25] Article 44, Combatants and Prisoners-of-War, para 2.

[26] Article 44, Combatants and Prisoners-of-War, para 3.

quences. An individual held as a PW would presumably have no right to bail and could be kept confined without trial until the conclusion of hostilities. Who knows how long that might be if the stated goal of the combatant is to defeat capitalist-imperialism? There also exists the possibility of trial as a war criminal if innocent civilians had been intentionally attacked.

Still, some situations may offer apparent political advantages to a claim for PW status.[27] There amy also be a countering political or practical advantage in the government's being able to deny PW status. The situations described in article 44, which bestow the right to claim PW status, may be interpreted to exist only in occupied territory. This strict reading of the Protocol allows the government to successfully quash any attempt by terrorists or just plain criminals to prevail in an unwarranted political gambit. When the Protocols are sent to the U.S. Senate for consent, the suggested understandings are likely to include a strict reading of article 44.[28]

Obviously, there is an incompatibility between the desire that governments not be able to avoid granting PW status, thereby denying the humanitarian treatment owed under the Geneva Conventions, and the desire that unworthy groups or individuals not be able to successfully press a claim for PW status. This issue is most clearly presented in relation to the second Protocol. Article 1, paragraph 2 states:

> This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Any government can selectively claim nonapplicability of Protocol II based on article 1 (2).

Nuclear Policy

The United States made its signature of Protocol I subject to the following understanding: "It is the understanding of the United States of America that the rules established by the protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."[29] This understanding may have been prompted in part by article 55 which deals with the protection of the natural environment.[30] Additionally, article 51, *Protection of the civilian population*, prohibits indiscriminate attacks and defines "indiscriminate attacks" to include:

> An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian objects.

The difficulty with both articles 55 and 51 lies in their possible undermining of United States nuclear deterrent strategies. The understanding stated by the United States is sufficient to answer any legal argument suggesting that the Protocols limit the United States' nuclear options.[31] The United States delegation to the convention, along with those of the French and British, repeatedly voiced an understanding that the new rules established by the conference

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[27] See "Convicted Killer Defends 'Revolutionary' Acts at U.S. Brink's Trial," *The New York Times*, Tuesday, August 16, 1983; "10 F.A.L.N. Suspects Won't Attend Trial," *The New York Times*, Wednesday, February 4, 1981; *see also Facts on File*, 1976 at 149, column 3.

[28] The United Kingdom expressed a strict interpretation of Article 44, including at the time of signature the understanding that the situations described in the article can only exist in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. Department of the Army Pamphlet 27-1-1, *supra* note 1 at 140. Presumably, the British declined to allow the Irish Republican Army to carry out ambushes on government troops and, when captured, use the Protocols as support for a claim to PW status.

[29] U.S. Dep't of Army, Pamphlet No. 27-1-1, Protocols to the Geneva Conventions of 12 Aug. 1949, pg 138, Sept. 1979.

[30] Article 35, para 3, also states, "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." For a duscussion on the United States delegation's approach to interpretations of these provisions, *see* Aldrich, *New Life for the Laws of War* 75 Am. J. Int'l L. 764, at 280.

[31] Dep't of Army Pamphlet 27-1-1, *supra* note 29, at 138.

were not intended to, and do not, regulate or prohibit the use of nuclear weapons.[32] The report of the United States delegation indicated that there were no contradictions to this understanding by any of the other delegations.[33] At the same time, these articles may provide a debating focus for anti-nuclear opinion when the agreements are submitted to the U.S. Senate for advice and consent.

Other Aspects

Part II of Protocol I, beginning with article 8 and ending with article 34, contains updated provisions for care of the wounded, sick, and shipwrecked. Part II of the new Protocol reflects the success of the U.S. delegation to the Diplomatic Conference. Some primary concerns of the United States can be seen in the articles of Part II. Articles 12-17 deal with increased protection for medical units, civilian medical organizations, aid societies, and general medical duties. Religious personnel are also covered. Article 18 reaffirms and developing proper identification of medical units and transports. Articles 21-31 deal with protection of medical transports including aircraft. In an age when medical evacuation by air can be so important for saving lives, these provisions alone may make the Protocol worthwhile. Articles 31-34 deal with missing and dead persons. The unfortunate U.S. experience in Vietnam regarding PWs and soldiers missing-in-action gives these articles of the Protocol special significance. These provisions may herald a new human right in international law.[34] Annex 1 of the Protocol, regarded as a technical annex, lends support to the medical provisions of Part II by codifying radio communications and personal identification methods. There is a real question regarding whether or not the well-intended provisions of this section will be confounded by the overriding concerns for electronic security in modern combat.

Article 11 of Part II may raise a lesser theoretical problem. Article 11 deals with specific prohibitions on the medical treatment of persons who are in the control of an adverse party to the conflict. The provisions of article 11 constitute an international malpractice statute applicable in time of war.[35] Paragraph 4 of article 11 makes violation of the article a "grave breach," meaning in effect that an individual offender stands more likely to be tried as a war criminal. Confidence in our own laws, regulations, and ethical standards, combined with the uncomfortable prospect of a vindicitive enemy captor abusing article 11 in a summary judicial proceeding, may make article 11 difficult to accept. Of course, failure to accept the provisions would not protect against the feared eventuality. Mutuality of treatment is the only hoped-for effect of any of the Agreements. It may be, however, that individualized crimes in such a high risk area as military medicine should be left out of international codes until more confidence can be placed in the procedural safeguards afforded to alleged violators.

Overall, the provisions of Part II can be praised as real and useful additions to the Conventions. These additions satisfy some special concerns of the military as well as advancing the general development of international humanitarian law.

Part III, section I, of the first Protocol deals with the methods and means of warfare. Weap-

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[32] Digest, *supra* note 17, at 919.

[33] *Id.*; According to the International Affairs Division of the Office of the Judge Advocate General, the report is only partially true. India did indicate its disagreement with the U.S. statement.

[34] Article 32, *General principle*, states:

> In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right if families to know the fate of their relatives. *See* Cantrel *supra* note 5, at 269.

[35] Article 11, paragraph 4, states:

> Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraph 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

ons are only briefly considered in a very general manner. The conference omitted specific weapons regulations which might have quickly fallen prey to technological advances and could have caused great delay in adopting the entire agreement. Article 35 prohibits the employment of weapons, projectiles, materials, and methods of warfare of a nature that would cause superfluous injury or unnecessary suffering. Article 36, *New Weapons*, obliges the parties to determine whether the acquisition or development of new weapons would be prohibited by the Protocols or other international law. The difficult nature of weapons regulation and specific regulation agreements is reflected by the brief attention given weapons in the Protocol. However, as a result of a resolution by the Diplomatic Conference, the U.N. convened a conference in Geneva on conventional weapons from 1978 to 1980 which negotiated the 1980 Convention on Certain Conventional Weapons.[36]

Many of the articles of Part III of the first Protocol, such as those dealing with perfidy, recognized medical emblems, or the safeguarding of an enemy "hors de combat," restate customs of international law which have been accepted by the United States and can be identified in U.S. military training doctrine.[37]

Article 46 defines "spies" and arguably denies PW status to them. The article reaffirms the customary approach to spying in the laws of war. While not a controversial issue as to ratification of the Protocols, the question of spy status in international law may warrant closer attention.[38] Article 47, dealing with mercenaries, is more controversial because of the fear that the label of "mercenary" could easily be used to deny rightful combatants PW status.[39] The clear wording of article 47 should be enough to avoid abuse. The report of the U.S. delegation to the convention expressed satisfaction that article 47 was not an abusable flaw.[40] Articles 48 through 58 endeavor to update the law relating to the use of force on the battlefield, now contained in Hague Convention IV of 1907.[41] These articles were not intended to create new rules, but to codify the customary practice of nations in combat. Articles 52 and 53 address protection for civilian objects, particularly cultural objects and places of worship.

Another problem which must be noted in any overview of the Protocols involves the concept of the "protecting power."[42] Under the Geneva Convention system, a neutral state or organization is supposed to observe compliance with the Conventions in international conflicts. As George Aldrich notes, however, it is sobering to realize that no protecting power has ever been accepted or permitted to function by countries in conflict.[43] The International Committee of the Red Cross has been allowed to perform some humanitarian functions, and for many foreseeable conflicts the Red Cross is the most likely candidate for use as a protecting power. In accordance with article 5 or the first Protocol, it is the duty of the parties to a conflict to designate and accept a protecting power.[44] Article 5 (3) of Protocol I allows the Red Cross to ask

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[36]*See* "Restrictions on Use of Injurious Conventional Weapons Agreed," *U.N. Monthly Chronicle* Vol 17, No. 10, p 16.

[37]Training Circular No. 27-1-1, Selected Problems in the Law of War, Headquarters, Department of the Army, Washington, DC, June 1979.

[38]*See* Mallison, *supra* note 4, at 26; Aldridge, *supra* note 30, at 775; Training Circular No. 27-10-1, *supra* note 37, at 25.

[39]Mallison, *supra* note 4, at 26.

[40]Digest of U.S. Practice in International Law, *supra*, note 16, at 918.

[41]Convention Respecting the Laws and Customs of War on Land, signed at the Hague, October 18, 1907. Entered into force for the United States on January 26, 1910. 36 Stat. 2277; *T.I.A.S. #559.*

[42]For a discussion of the concept of the "Protecting Power," see Aldrich, *supra* note 30, at 765.

[43]*Id.* at 766.

[44]Article 5, *Appointment of Protecting Powers and of their substitute*, paragraph 1, reads:

> It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

states in conflict to create a list of at least five other states which would be acceptable as protecting powers. The Red Cross is then obliged to approach any state appearing on both lists and request that it act as a protecting power. Perhaps the provisions of the Protocol will increase the likelihood that a protecting power will be employed. However, the International Committee of the Red Cross has itself not had a history of universal trust.[45] Foreseeably, the proposed system of protecting powers is not likely to be used.

Conclusion

"It was said by the late Sir Hersch Lauterpacht that if International Law is the weakest point of all law then the Law of War is virtually its vanishing point."[46] The modern rules of warfare have had a mixed record of adherence. But domestic criminal law has also had a mixed record of adherence. The codification of the laws of war provides a common base of expectations and reaffirms humanitarian principles by which leaders can measure their own decisions. The laws of war provide guidance regarding moral boundaries to the exercise of power in situations which most easily breed excess. The Additional Protocols advance the laws of war and may help to relieve unnecessary suffering and waste in future combat. As such, many military leaders will welcome the improvements, even while being rightfully skeptical about the adherence which the Protocols may command. When the Protocols come before the U.S. Senate, they will be qualified by reservations or understandings. Protocol II may be rejected as without sufficient probability of being used, or it may be rejected with the hope of further guarding against status attainment by liberation movements. It is more likely, however, that both the Protocols will be ratified.

[45]See Aldrich, *supra* note 30, at 766.

[46]Draper, *supra* note 21, at 177.

Informal Resolution of Unfair Labor Practice Complaints

Major William C. Jones
Instructor, Administrative and Civil Law Division, TJAGSA

Effective June 20, 1983, the Federal Labor Relations Authority (the Authority) and the General Counsel of the federal Labor Relations Authority revised Part 2423 of Title 5, Code of Federal Regulations regarding informal resolution of unfair labor practice (ULP) complaints. The purpose of this revision of the rules and regulations of the Authority and the General Counsel is to strengthen their existing policy of encouraging informal resolution of ULP allegations, both prior to and subsequent to the filing of a ULP charge. To further this purpose, regional directors of the Authority will now wait a period of fifteen days after the charge is filed before commencing investigation of ULP charges.[1] The following briefly explores the basis for the change, its terms, and its likely application.

Labor-management relations in the federal sector are currently governed by Title VII of the Civil Service Reform Act of 1978 (CSRA).[2] Regulations promulgated pursuant to Executive Order 11491[3], the predecessor to the CSRA *mandated* that the parties involved in a ULP

[1]5 C.F.R. § 2423.7(a) (1983) (investigation of charges).

[2]5 U.S.C. §§ 7101-7120 (Supp.V 1982).

[3]Exec. Order No. 11491 (Jan. 1, 1970) as amended by Exec. Orders 11616, 11636 and 11838.

complaint attempt to informally resolve the matter *prior* to filing a complaint.[4] A report compiled by the Federal Labor Relations Council, predecessor to the Authority, strongly recommended retention of these procedures.[5]

Regulations promulgated by the Authority after passage of the CSRA did not continue this policy of mandating informal resolution prior to filing a complaint. This occurred despite the language of section 7118(a)(5): "The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to issuance of the complaint."[6]

The General Counsel created regulations that made *encouragement* of informal resolution prior to filing an ULP charge,[7] or even after filing but before issuance of a complaint by the regional director the policy of the Authority and the General Counsel.[8] This non-binding policy led to numerous complaints, particularly from federal agencies who argued that the policy resulted in wasted resources, especially those of the regional offices of the Authority.[9] Because the charging party had the discretion whether to attempt to resolve the problem with the charged party, this informal resolution step prior to filing was often ignored.

The lack of any genuine efforts to informally resolve disputes created problems that could have been solved internally if management had been informed. Many times, no one beyond the level of a first or second line supervisor even know the problem existed. In some cases, after brief investigation, the regional director would recommend a compromise solution to a charge that was readily accepted by the parties.

While such a compromise is laudable, it has occurred only after money had been spent to send an investigator to the installation and after employees had been taken from their duty stations for interviews. Much of this could have been avoided if the parties had gotten together and attempted to resolve the problem. This situation violates the central and overall purpose of Title VII of the CSRA: to facilitate and encourage the amicable settlement of disputes between employees of the federal government and their employees.[10] Clearly, this goal can best be accomplished by encouraging the two sides to resolve their differences, not by litigating every dispute before ULP Administrative Law Judge in a adversarial proceeding.

The new rules adopted by the Authority and the General Counsel seek to address these and other complaints about the informal resolution procedures without unduly delaying an investigation in cases that cannot be resolved without a hearing. A new subsection (c) has been added to section 2423.2 of Title 5, Code of Federal Regulations, entitled "Informal Proceedings":

> (c) In order to afford the parties an opportunity to implement the policy referred to in paragraphs (a) and (b) of this section, the investigation of an unfair labor practice charge by the Regional Director will normally not commence until the parties have been afforded a reasonable amount of time, not to exceed fifteen (15) days from the filing of the charge, during which period the parties are urged to attempt to resolve the unfair labor practice allegation.

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[4]29 C.F.R. § 203.2(a)(4) (1975). Subsection (b)(4) of this section allowed management to file a ULP complaint alleging violation of section 19(b)(4) of the Executive Order without recourse to informal resolution procedures. Section 19(b)(4) complaints alleged union violations of a no-strike provision in the Order.

[5]Report and Recommendations of the Federal Labor Relations Council on Amendment of Executive Order 11491, as amended (Jan. 1975).

[6]5 U.S.C. § 7118(a)(5) (Supp.V 1982).

[7]5 C.F.R. § 2423.2(a)(1983).

[8]*Id.* § 2423.2(b).

[9]Statistics bear out these arguments. A study released by the General Accounting Office in December 1982 showed a dramatic increase in the number of ULPs filed per month in the federal agencies from 261 per month in 1979, to 537 per month in 1981. The average cost of a nonmeritorious ULP charge (one dismissed by the Authority) is $2,062.00. The cost of meritorious ULP charges ranges from $2,589.00 to $21,276.00, depending on the stage at which it is resolved. The total cost of processing the 6,448 ULPs filed in 1981 was $25.9 million.

[10]5 U.S.C. § 7101(a)(1)(C) (Supp.V 1982).

This language is a compromise between the positions of labor organizations and agency management on this issue and adopts the version of rule initially proposed by the Authority.

The agencies had generally wanted a regulation that would *require* the parties to attempt to settle alleged unfair labor practice charges *prior* to the filing of a charge or commencement of an investigation. Management felt that a rule of this nature would dispose of frivolous charges and create a favorable atmosphere for settling meritorious cases. Labor organizations generally took the position that revision of the old rule was unwarranted, and the this policy would only delay the investigation of ULP charges.[11]

The Authority determined that a strict regulation requiring the parties to attempt to settle alleged ULP charges prior to filing or the commencement of an investigation would only create additional grounds for confrontation and controversy, thus raising issues collateral to the unfair labor practice dispute and further complicating its resolution. The Authority, however, still strongly encourages settlement efforts at all stages of the processing of a charge.[12]

The Authority also responded to the labor organization's concern about the delay in the processing of ULP charges that they felt could result from adopting the proposed amendments. It determined that a fifteen day time period gives the parties ample opportunity to explore, settlement, but would not unduly delay investigation. As a matter of practice, Regional Directors rarely commence investigation before fifteen days have elapsed, so this is not a burdensome requirement. In any case, the new regulation only states that investigation *normally* will not commence for fifteen days after filing. Regional Directors still have discretion to begin investigating earlier if necessary. Quicker action could occur if the Authority had sought a restraining order or other temporary relief in a United States District Court or where a pending representation election is blocked by an ULP charge.[13]

These regulation changes encouraging informal resolution will result in a greater percentage of cases being resolved by the parties themselves without using the resources of the Regional Offices of the Authority. This in turn will lead to a lower caseload for the Authority, composed only of meritorious cases. Settlement also promotes the policies and purposes of the CSRA of 1978. Staff judge advocates and labor counselors should be aware of these new procedures, advertise their existence, and use them whenever possible.

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[11]It should be noted that management as well as unions can file unfair labor practice complaints. This has been done by the command at Fort Bragg, Fort Hood, Fort Sam Houston and Fort Bliss. A seminar on this precise topic will be given at the 1983 Worldwide JAG Conference.

[12]48 Fed. Reg. 27,531 (1983).

[13]*Id.*

HQDA Message—Change in Dual Office Act Restrictions

P 031847Z OCT 83
FM HQ DA WASHDC //DAJA-LT//
FOR SJA/LA/LEGAL COUNSEL
SUBJECT: CHANGE IN DUAL OFFICE ACT RESTRICTIONS
A. DAJA-LT MSG 141743Z JUN 83.
1. On 24 Sep 83, President Reagan signed into law the 1984 DOD Authorization Act (P.L. No. 98-84). Section 1002 of that Act amends 10 U.S.C. 973(B) to allow Regular [Army] JAGC officers to serve as Special Assistant U.S. Attorneys.

2. Thus, the problem that was addressed in the referenced msg no longer exists. Each addressee may continue its program for having Regular [Army] JAGC officers (as well as non-Regular [Army] JAGC officers) appointed as Special Assistant U.S. Attorneys. Further, there is no need to reappoint those Regular [Army] JAGC officers with prior appointments. We learned that the Justice Department, because of the pending legislative amendment to 973(B), did not terminate any prior appointments.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Standards of Conduct) **Participation In Fund-Raising Project.** DAJA-AL 1983/1936 (20 May 1983).

An Army officer was asked to serve on a state university's committee to raise money for an endowed chair in military history. The Judge Advocate General noted that participation by DA personnel in the activities of private organizations in an official capacity is regulated by AR 1-210 and DOD Directive 5500.2. The latter requires that such participation avoid the following: the favoring of one organization over another; the use of the Government's name by a private organization, implying sponsorship without authorization by Congress; and the participation in the management and control of such organizations without congressional assent. These restrictions would prohibit the requested officer from accepting a position on the fund-raising committee in his official capacity.

However, there is no legal objection to the requested officer's accepting a position on the committee and participating in the fund-raising project in his individual capacity. Because of the state university's tax-exempt, nonprofit status in this regard, the requested officer may use his rank in fund-raising matters. However, the requested officer is prohibited from occupying a position on the committee in his individual capacity and allowing his official position to be used in committee activities. Such use of his official position would imply official endorsement.

(Military Installations—Legislative Jurisdiction, Real Property) **Army Personnel Can Enter Private Lands To Protect Federal Property.** DAJA-AL 1982/3084 (7 December 1982).

In the event of a military aircraft crash, an authorized military commander may establish a National Defense Area around the crash site pursuant to para. 6f, AR 380-20. The regulation implements DOD Dir. 5200.8, which implements the Internal Security Act, 50 U.S.C. § 797 (1976); this statute permits the Secretary of Defense and persons designated by him or her to

make rules to protect property of the United States. The authority of DA personnel to control access to the crash site, and to take actions necessary to maintain security, also springs from the inherent authority to protect federal property and perform federal functions.Guards may be posted at federal crash sites and they may take all reasonable and necessary actions to safeguard military property and personnel consistent with applicable regulations (such as AR 190-28, governing use of force). Although the property owner's consent to entry is not required, every effort should be made to obtain it and the cooperation of local law enforcement officials.

(Military Aid to Law Enforcement—Posse Comitatus Act). **Use of Soldiers or DA Civilians to Direct Traffic Off Installation.** DAJA-AL 1982/3216 (27 December 1982).

It is not a violation of the Posse Comitatus Act, 18 U.S.C. § 1385, for a soldier or a DA civilian to direct traffic outside the main gate of an installation during rush hours where civil authorities have refused either to install a traffic control device or to direct traffic, provided that the primary purpose of such action is to further the military function or insuring the safe and timely exit of personnel from the installation. The opinion cautions, however, that the proposed action be evaluated to insure that such use of an individual to direct traffic, with no authority to enforce his or her orders, does not cause an increased safety risk, a decreased respect for law enforcement personnel, or a confrontation with local or state authorities.

(Military Aid to Law Enforcement—*Posse Comitatus* Act) **Loan of Drug Detection and Military Dog Handlers to Civilian Law Enforcement Agencies.** DAJA-AL 1983/1502 (29 March 1983).

Drug detection dogs and their military handlers cannot lawfully be made available to civilian law enforcement agencies for use in a purely civilian law enforcement setting. 10 U.S.C. § 372 permits the loan of military equipment to civilian law enforcement officers. While drug detection dogs may or may not be considered as military equipment, they are useless without their trained military handlers, because a dog and its handler are a functionally inseparable team. Since the purpose of a drug detection dog is to search for hidden drugs, the dog's military handler must necessarily be involved in a search. Such direct participation in a search by a servicemember is prohibited by 10 U.S.C. § 375 where such participation is not otherwise authorized by law or where there is no other military purpose for such participation in a search.

(Standards of Conduct; NAFI's) **Lottery Authorized as Exception To Policy).** DAJA-AL 1983/1310 (17 March 1983).

An exception to para. 2-7, AR 600-50, authorizing the Morale Support Activities Division (Information, Tour and Travel Office) at the requesting installation to conduct a lottery was granted, subject to the provisions below:

a. The lottery must be conducted in an area under exclusive Federal jurisdiction or an area where approved by the installation commander and not prohibited by the laws of the surrounding state.

b. Prizes will be procured pursuant to the guidance in para. 1-19, AR 230-1, and DA Pam 27-154 (pertaining to procurement through competitive means).

c. The post commander should certify that the lottery will be especially beneficial to DA.

d. The value of the prize should not be excessive considering similarly approved activities.

e. No lottery tickets, prizes, or promotional material should be forwarded through US mail nor should reference be made to the lottery in documents sent through the mail.

f. The lottery should not conflict with authorized solicitations for recognized local and national health and welfare agencies (para. 8, AR 600-29).

The action should be coordinated with the installation SJA to prevent inadvertent noncompliance with local regulations and directives.

(Information And Records—Filing Of Information) **Letters Of Reprimand May Be Issued By Any Supervisor Of An Enlisted Member But Must Be Referred To The Member And Forwarded To The Appropriate Authority For A Filing Determination.** DAJA-AL 1983/1143 (4 Feb 1983).

The Office of the Deputy Chief of Staff for Personnel advised The Judge Advocate General that, as a matter of policy, paragraph 2-4a(1), AR 600-37, is to be interpreted to allow any supervisor of an enlisted servicemember to issue an administrative letter of reprimand, admonition or censure, *i.e.*, a letter not imposed as punishment under Article 15, UCMJ to that servicemember. The issuing supervisor, however, must refer the letter to the servicemember concerned in accordance with paragraph 2-6a, AR 600-37, and then forward the letter to a commander, general officer, or general court-martial convening authority, authorized to direct filing in the servicemember's personal file (MPRJ or OMPF).

The requirements of referral to the member concerned and forwarding to the filing authority for a filing determination are mandatory. Thus, AR 600-37 implicitly restricts the practice of issuing a so-called "desk drawer" letter of reprimand without referring it to the member and forwarding it for a filing determination.

The Army Lawyer Note: This interpretation allows any supervisor, not just a commander, to issue letters of reprimand, admonition or censure. This interpretation is broader than the language of paragraph 2-4a(1), AR 600-37, which states that the authority to "issue and direct filing of such letters in the MPRJ of enlisted personnel is restricted to the person's immediate commander or a higher commander in his chain of command." [*The Army Lawyer* Notes are explanatory material not included in the TJAG opinion.]

(Standards of Conduct) **Confidential Statements Of Affiliations And Financial Interests (DD Form 1555) Relating To Civilian Employees Below The Grade Of GS-13.** DAJA-AL 1982/3406, 21 December 1982; DAJA-AL 1982/2337, 23 December 1982; DAJA-AL 1983/1497, 15 April 1983.

The Office of Government Ethics has delegated to The Judge Advocate General, through the Army General Counsel, the authority to grant requests for authority to require civilian employees classified below GS-13 to submit DD Form 1555 (Confidential Statement of Affiliations and Financial Interests). However, before such personnel may be required to file the form, they must meet the criteria of paragraph 3-1a(2), AR 600-50, that is, "the responsibilities of such personnel require tham to exercise judgment in making a Government decision or in taking Government action in regard to activities in which the final decision or action may have a significant economic impact on the interests of any non-Federal entity."

Using the above delegation, The Judge Advocate General granted authority to a requesting commander and an agency director to allow each to require his civilian employees in grades below GS-13 to submit DD Form 1555, provided such employees meet the criteria of paragraph 3-1a(2), AR 600-50 (quoted above).

It is contemplated that a forthcoming change to Chapter 3, AR 600-50, will subdelegate TJAC's authority to require filing of DD Form 1555 to an appropriate subordinate level.

Judiciary Notes

US Army Judiciary

Preparation of transcripts of proceedings. *(The following is reprinted from the May 1979 The Army Lawyer due to recurring problems of this nature.)*

If charges are referred to a court-martial for trial, and proceedings take place but are permanently terminated either before arraignment or findings for any reason, the following action should be taken to complete the disposition of the case:

a. A record of proceedings held should be transcribed and authenticated.

b. A copy of the transcript should be furnished to the accused.

c. If a general court-martial, a review limited to the question of jurisdiction should be prepared by the staff judge advocate.

d. An initial special or general court-martial order should be promulgated in accordance with Appendix 15, Manual for Courts-Martial, United States, 1969 (Revised edition), reflecting the proceedings, the disposition of the charges, the usual recitals up to point where the pleas are shown, and the fact that the accused "appeared" rather than "was arraigned and tried" in the initial recital, if the proceedings were terminated prior to arraignment. Following the recitation of the charges and specifications, a statement should be included in the order reflecting the reason for the termination of the proceedings at an intermediate stage. A sample statement is as follows:

> The accused having (appeared) (been arraigned), the proceedings were terminated by (a declaration of a mistrial) (other _____) by the military judge. Due to the subsequent administrative discharge of the accused from the service under the provisions of Chapter 13, Army Regulation 635-200, the charges and specifications are dismissed. All rights, privileges, and property of which the accused may have been deprived by virtue of these proceedings are hereby restored.

e. The transcript of proceedings with the allied papers specified in Appendix 9e of the Manual should be transmitted in general court-martial cases to JALS-CC, Nassif Building, Falls Church, Virginia 22041.

f. Court reporter notes or recordings should be retained until completion of appellate review (GCM and BCD SPCM).

If an accused is administratively separated or discharged from the Army subsequent to the findings and sentence of a court-martial but prior to the convening authority's action, jurisdiction will continue until the appellate process is complete. This means that a transcript of proceedings should be prepared; that, in the case of general courts-martial, a review should be prepared by the staff judge advocate; and that the transcript and allied papers should be forwarded to the US Army Judiciary in general courts-martial cases. Other records should be reviewed for jurisdiction and filed as in the case of a complete summary or special court-martial cases. Other records should be reviewed for jurisdiction and filed as in the case of a complete summary or special court-martial. A sample action of a general court-martial case in which an accused is discharged pursuant to Chapter 10, Army Regulation 635-200, after the sentence and findings but before the convening authority's action, is as follows:

> In the foregoing case of _____, the findings of guilty are approved. Only so much of the sentence as provides for confinement at hard labor for (insert the actual time served) is approved and ordered executed. The accused having requested discharge for the good of the service pursuant to the provisions of Chapter 10, Army Regulation 635-200, which was approved, was discharged from the service on _____, with (a) (an) _____ discharge. The record of trial is forwarded for action under Article 69.

Legal Assistance Items

Major John F. Joyce, Major William C. Jones,
Major Harlan M. Heffelfinger,
and Major Charles W. Hemingway
Administrative and Civil Law Division,
TJAGSA

Former Spouses' Act Legislation

A change in Survivir Benefit Plan (SBP) protection for former spouses under the Uniformed Services Former Spouses' Protection Act took effect October 1, 1983. Under the Former Spouses' Act, a servicemember was given the option at the time of becoming eligible to participate in the SBP and name his or her former spouse as the SBP beneficiary. A change was necessary because the Former Spouses' Act failed to take into account existing SBP legislation. Thus, if a servicemember or retiree who had made a previous election of an SBP beneficiary was subsequently divorced, the servicemember/retiree could not *change* the SBP beneficiary election to the former spouse.

The remedy, enacted as part of Public Law 98-94, the Department of Defense Authorization Act, now permits a servicemember/retiree to change the SBP election upon divorce to designate a former spouse as beneficiary.

New Bankruptcy Rules Take Effect

The new Bankruptcy Rules and Official Forms took effect on August 1, 1983 since Congress did not take any action to postpone their effective date. The new rules will govern practice and procedure of all bankruptcy cases under Title 11, United States Code. The new rules were published in Volume 2A of the May 1983 edition of U.S. Code Congressional and Administrative News, and were also published at 51 U.S.L.W. 4461, April 26, 1983.

Tax Information Provided to Retirees

In connection with providing legal assistance on a tax question, a legal assistance officer in the field recently noticed an error on a standard form routinely used by the U.S. Army Finance and Accounting Center to provide tax information on retired pay. The form contained a block which advised retirees that if they were receiving retired pay and thereafter were awarded retroactive Veteran's Administration disability benefits, no portion of the regular retired pay previously received by the retiree would be excludable from gross income. That advice was based on a 1962 IRS Revenue Ruling. However, that 1962 Revenue Ruling had been revoked by Rev. Rul. 78-161, which determined that a retiree would be entitled to exclude from gross income that part of the payments previously received as retired pay which correspond to the retroactive disability payments. As most VA disability awards are made retroactive because of VA processing delays, it is not uncommon for retirees in these situations to have tax overpayments. In the case involved, reliance on the USAFACS form resulted in a tax overpayment in excess of $1,000 by the legal assistance client.

The USAFACS form has been revised to reflect the correct advice. This is but one example of the impact an individual military attorney can have in rendering legal assistance. We encourage you to advise us of other legal assistance success stories and to advise us of programs or systems you may be using at your installation which would be helpful to legal assistance offices at other installations.

North Carolina Legislative Action

Major Mark Sullivan, a Reserve judge advocate and a member of the American Bar Association's Legal Assistance to Military Personnel (LAMP) Committee, has advised the Legal Assistance Branch of several changes in North Carolina legislation that will be of interest to legal assistance attorneys with clients domiciled in that state:

Divorce - A new change in the law makes separation for one year the sole ground for absolute divorce in North Carolina.

Child Support - As of October 1, 1983, a court in North Carolina may, in its discretion, award child support to continue through a child's graduation from high school if the child is not yet twenty-years-old. The previous statutory limit of eighteen years of age, in the absence of a contract or consent order to the contrary, is thus modified. Also, as of October 1, 1983, the Clerk of Superior Court is responsible for the enforcement and monitoring of child support judgements in North Carolina. An account in arrears must be made current within three weeks. If no corrective action is taken, the Clerk will initiate collection action through the attorney of record or a court-appointed attorney.

Child Custody - The General Assembly has made the resources of the Parent Locator Service of the North Carolina Department of Human Resources available in custody cases for the location of an absent parent or child. Upon payment of the applicable fee, a parent may request that department to forward a request to the Federal Parent Locator Service at the U.S. Department of Health and Human Services. It is expected that this will be of substantial assistance to parents in child custody enforcement cases.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Retirement Points

The Reserve Affairs Department, TJAGSA, continues to receive inquiries from Reservists and active duty Staff Judge Advocates concerning the various ways retirement points can be earned. The most common means of earning points for Reserve judge advocates are participation in unit drills, annual training, and correspondence work leading to completion of the Advanced Course or Command and General Staff College. When combined with the 15 points each officer receives for membership in the Reserves, it is usually not difficult for the unit Reservist to obtain the 50 points necessary for a good retirement year.

For control group officers, however, obtaining a good retirement year is more difficult. The following table illustrates additional ways points may be earned:

Activity	Points Awarded
1. Attachment to a Troop Program Unit for training.	1 point for each 4-hour period of scheduled IDT. Maximum - 2 points per day.
2. Participation in a Reserve Training Unit (AR 140-1 and AR 140-145).	1 point for each scheduled 2-hour or greater training period. Maximum - 1 point per day.
3. Serve on an additional (counterpart) tour (POC: MAJ Gentry, RCPAC).	1 point per day.
4. Correspondence course work at TJAGSA, The Army or Air Force War Colleges, or the Industrial College of the Armed Forces.	1 point for each 3-credit hours satisfactorily completed.
5. Attend resident short courses at TJAGSA.	1 point per day.
6. Attend authorized professional conferences or conventions in a non-pay status (POC: MAJ Gentry, RCPAC.	1 point for each 2-hour or greater period. Maximum - 1 point per day.
7. Attend on-site instruction.	1 point for each 2-hour or greater period. Maximum - 1 point per day.

Activity	Points Awarded
8. Act as a Special Legal Assistance Officer (POC: CPT McShane, Reserve Affairs, TJAGSA).	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).
9. Act as a Claims Assistance Officer.	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).
10. Act as a Law School Liaison Officer (POC: CPT McShane, Reserve Affairs, TJAGSA).	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).
11. Participate in the Reserve Judge Advocate Legal Assistance Advisory Committee (POC: CPT McShane, Reserve Affairs, TJAGSA).	1 point for each 2-hour or greater period. Maximum - 2 points per day. (8-hour day minimum).
12. Provide instruction to a training assembly or USAR School.	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).
13. Prepare instruction for training assembly or USAR School.	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).
14. Research related to IMA activities.	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).
15. Submit written work (under JA 150 Subcourse).	1 point for each 2-hour or greater period. Maximum - 2 points per day (8-hour day minimum).

More information concerning retirement points can be found in AR 140-185. Individuals interested in the above programs should contact either the Reserve Affairs Department, TJAGSA (804-293-6121) or Major William Gentry, Personnel Management Officer, RCPAC (800-325-4916).

Revised Component Technical (On-Site) Training Schedule Academic Year 1984

The schedule for Reserve Component Technical (On-Site Training for academic year 1984 was printed in the September 1983 issue of *The Army Lawyer*. The schedule has been revised as follows:

REVISED SCHEDULE FOR RESERVE COMPONENT TECHNICAL (ON-SITE) TRAINING PROGRAM, MAY 84

Trip	Date	City, Host Unit And Training Site	Subjects	Instructors/ Reserve Affairs Rep	Action Officers Address & Phone Nos.
1.	22-23 Oct 83	Boston, MA 94th ARCOM ESD HQ, Room CMC BLDG 1606 Hanscom AFB, MA 01731	Admin & Civil Law Criminal Law	MAJ Calvin M. Lederer MAJ Patrick Finnegan COL Richard K. Smith	MSG Robert F. Ryan HQ, 94th ARCOM Armed Forces Reserve Center Hanscom AFB, MA 01731 Autov. 478-3000 (Ext. 4565) (617) 451-3000 (Ext. 4565)
2.	29 Oct 83	St. Paul, MN 214th MLC Thunderbird Motel 2201 East 78th St Bloomington, MN 55420	Admin & Civil Law International Law	MAJ David W. Wagner MAJ James F. Gravelle CPT John P. Ley, Jr.	MAJ Fred Lambrecht 214th Military Law Center BLDG 201, Ft Snelling St. Paul, MN 55111 (612) 725-4677
3.	29-30 Oct 83	Philadelphia, PA 79th ARCOM Willow Grove NAS Willow Grove, PA 19090	Contract Law International Law	MAJ Julius Rothlein MAJ John H. O'Dowd, Jr. CPT Thomas W. McShane	MAJ Stewart Weintraub 79th ARCOM Willow Grove NAS Willow Grove, PA 19090 (215) 985-0800
4.	19 Nov 83	Detroit, MI 123d ARCOM USAR Center 26402 West 11 Mile Rd Southfield, MI 48034	Administrative Law Criminal Law	MAJ Charles W. Hemingway MAJ Michael C. Chapman CPT Thomas W. McShane	LTC John F. Potvin 106th JA Det 26402 West 11 Mile Rd Southfield, MI 48034 (313) 465-7000

Trip	Date	City, Host Unit And Training Site	Subjects	Instructors/ Reserve Affairs Rep	Action Officers Address & Phone Nos.
	20 Nov 83	Indianapolis, IN 123d ARCOM Gates-Lord Hall BLDG 400 Ft. Benjamin Harrison, IN 46216	Administrative Law Criminal Law	MAJ Charles W. Hemingway MAJ Michael C. Chapman CPT Thomas W. McShane	MAJ James Gatzke Rm 238, Federal Office Bldg. 575 North Pennsylvania Indianapolis, IN 46204 (317) 269-7388
5.	3-4 Dec 83	New York, NY 77th ARCOM U.S. Court Complex Foley Square New York, NY 10007	Criminal Law Administrative Law	CPT (P) Lawrence A. Gaydos MAJ Calvin M. Lederer COL Richard K. Smith	COL Charles E. Padgett 216 Dernott Avenue Rockville Centre, NY 11570 (212) 264-8582
6.	10 Dec 83	Houston, TX 90th ARCOM South Texas College of Law 1303 San Jacinto Houston, TX	Criminal Law International Law	MAJ David W. Boucher LTC Daniel E. Taylor COL Harry C. Beans	MAJ William E. Taylor III 11802 Advance Houston, TX 77065 (713) 221-5840
	11 Dec 83	Dallas, TX 90th ARCOM USAR Center, Rm 8A24 10031 East Northwest Hwy. Dallas, TX 75238	Criminal Law International Law	MAJ David W. Boucher LTC Daniel E. Taylor COL Harry C. Beans	MAJ Glyn Cook 819 Taylor Ft. Worth, TX 76102 (817) 334-2942
7.	21-22 Jan 84	Seattle, WA 124th ARCOM University of Washington School of Law Seattle, WA	Contract Law International Law	MAJ Paul C. Smith MAJ James F. Gravelle CPT Thomas W. McShane	LTC Charles A. Kimbrough 1111 Third Avenue, Ste 2500 Seattle, WA 98101 (206) 223-1313
8.	4 Feb 84	Kansas City, MO 89th ARCOM Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law International Law	MAJ Mark A. Steinbeck MAJ David W. Boucher MAJ John H. O'Dowd, Jr. CPT John P. Ley, Jr.	1LT James M. Tobin 4240 Blueridge Blvd, Ste 825 Kansas City, MO 64133 (816) 737-1555
9.	4-5 Feb 84	Jackson, MS 121st ARCOM Mississippi College School of Law Jackson, MS	Contract Law International Law	MAJ Roger W. Cornelius LTC Daniel E. Taylor CPT Thomas W. McShane	MAJ Woodrow Golden Box 427 Jackson, MS 30205 (601) 354-3456
10.	11-12 Feb 84	Los Angeles, CA 63rd ARCOM Antes Restaurant 729 South Palo Verdes San Pedro, CA 90731	Contract Law International Law	MAJ Julius Rothlein MAJ Sanford W. Faulkner COL Harry C. Beans	LTC John C. Spence 1535 Bellwood Road San Marino, CA 91108 Ofs: (213) 974-3763 Hm: (213) 285-4107
	13-14 Feb 84	Honolulu, HI IX Corps (Aug) Bruyeres Quadrangle Ft DeRussy, HI	Contract Law International Law	MAJ Julius Rothlein MAJ Sanford W. Faulkner COL Harry C. Beans	MAJ Russell Geoffrey OSJA, Westcom Ft. Shafter, HI 96858 (808) 438-2676
11.	25-26 Feb 84	Denver, CO 96th ARCOM Quade Hall Fitzsimons AMC Denver, CO 80240	Admin & Civil Law Criminal Law	MAJ Ward D. King MAJ Craig S. Schwender CPT Thomas W. McShane	COL Charles B. Howe 4605 Talbot Boulder, CO 80302 Ofc: (303) 866-3611 Hm: (303) 499-8280
12.	3-4 Mar 84	Columbia, SC 120th ARCOM USC School of Law Columbia, SC	Admin & Civil Law International Law	MAJ Mark A. Steinbeck MAJ John H. O'Dowd, Jr. COL Richard K. Smith	LTC William W. Wilkins, Jr. 20 Craigwood Road Greenville, SC 29607 Ofc: (803) 233-7081 Hm: (803) 277-7600

Trip	Date	City, Host Unit And Training Site	Subjects	Instructors/ Reserve Affairs Rep	Action Officers Address & Phone Nos.
13.	10-11 Mar 84	Orlando, FL 81st ARCOM Orlando Hyatt Hotel Orlando, FL	Criminal Law Admin & Civil Law	LTC William P. Greene LTC John C. Cruden COL Harry C. Beans	LTC Bruce C. Starling 200 E. Robinson St., Ste 1475 Orlando, FL 32801 (305) 841-7000
	13-14 Mar 84	Puerto Rico PR ARNG HQ PR ARNG Conference Room San Juan, PR	Criminal Law Admin & Civil Law	LTC William P. Greene LTC John C. Cruden COL Harry C. Beans	CPT Walter Perales P.O. Box 1701 San Juan, PR 00907 FTS 753-9454
14.	17-18 Mar 84	San Francisco, CA 5th MLC 6th US Army Conference Room Presidio of San Francisco, CA 94129	Contract Law International Law	MAJ James O. Murrell MAJ Sanford W. Faulkner CPT Thomas W. McShane	CoL Joseph W. Cotchett 4 West Fourth Ave. San Mateo, CA 94402 Ofc: (415) 342-9000 Hm: (415) 348-5328
15.	24-25 Mar 84	St. Louis, MO 102d ARCOM Site TBD	Criminal Law Contract Law	CPT (P) Lawrence A. Gaydos LTC Joseph L. Graves, Jr. CPT John P. Ley, Jr.	LTC Robert L. Hartzog 211 South Central Clayton, MO 63105 (314) 863-2000
16.	31 Mar-1 Apr 84	Columbus, OH 83d ARCOM Conference Room, Bldg. 306 Defense Construction Supply Center Columbus, OH	Contract Law International Law	MAJ Roger W. Cornelius MAJ James F. Gravelle CPT Thomas W. McShane	COL Nicholas B. Wilson P.O. Box 16515, DCSC Columbus, OH 43216 (614) 236-3702
17.	14 Apr 84	San Antonio, TX 90th ARCOM HQs, 90th ARCOM 1920 Harry Wurzbach Hwy San Antonio, TX 78289	Criminal Law International Law	MAJ Stephen D. Smith MAJ Sanford W. Faulkner COL Harry C. Beans	MAJ Michael D. Bowles 7303 Blanco Road San Antonio, TX 78216 (512) 656-2602
18.	15 Apr 84	Pittsburgh, PA 99th ARCOM Malcolm Hay USAR Center 950 Saw Mill/Run Blvd Pittsburgh, PA 15226	Criminal Law Contract Law	MAJ Patrick Finnegan MAJ James O. Murrell CPT John P. Ley, Jr.	CPT Ernest Orsatti 219 Fort Pitt Blvd Pittsburgh, PA 15222 (412) 281-3850
19.	28-29 Apr 84	Chicago, ILL 86th ARCOM SJA Conference Room Fort Sheridan, ILL	Admin & Civil Law Criminal Law	MAJ John F. Joyce MAJ Alan K. Hahn CPT John P. Ley, Jr.	LTC William Raysa 1011 Lake Street, Suite 332 Oak Park, ILL 60301 (312) 386-7273
20.	5 May 84	Washington, D.C. 97th ARCOM First US Army Conference Center Fort Meade, MD	Admin & Civil Law Criminal Law	MAJ Michael E. Schneider MAJ Kenneth H. Clevenger COL Richard K. Smith	LTC Charles E. Brookhart 4218 Shannon Hill Road Alexandria, VA 22310 Ofc: (202) 633-3564 Hm: (703) 960-6344
21.	12-13 May 84	New Orleans, LA 2d MLC USAR Center 5010 Leroy Johnson Dr. New Orleans, LA 70146	Admin & Civil Law Criminal Law International Law	MAJ William C. Jones MAJ Michael C. Chapman LTC Daniel E. Taylor COL Harry C. Beans	MAJ H. Bruce Shreves One Shell Square, Ste 4300 New Orleans, LA 70139 (504) 522-3030

ENLISTED UPDATE

Sergeant Major Walt Cybart

Change to SQT Test Period

The SQT test period for MOS 71D and 71E for FY 1984 has been changed to the April-June 1984 time frame. This change was necessary to avoid possible conflicts between the SQT material and the anticipated publication of the revised MCM. This change may be found in DA Cir 350-83-2, 1 Oct 83.

Promotions

As most of you know, we had five soldiers selected for advancement to sergeant major from the last promotion board.

The new E8 list is due to be released 22 November 1983. Hopefully we will continue to increase our percentage of selectees.

I have taken the opportunity to review the promotion packets for our service members and quite frankly I am appalled at what I found and amazed that we continue to do so well in the number of individuals selected. The problem is that 25 percent of our service members do not have *Current* photographs in their files. It is a safe bet that without those photographs you will not be selected. If you don't look after yourself, no one else will.

Attention Holders of DA Pam 27-7, Military Justice Handbook - Guide for Summary Court-Martial Trial Procedure

Holders of DA Pamphlet 27-7, Military Justice Handbook - Guide for Summary Court-Martial Trial Procedure (May 1982) should note a printing error on page 18. In section III(c), paragraph 21, line 1, the pamphlet currently reads: "I will *not* advise you more particularly..." (emphasis added). It should read: "I will *now* advise you more particularly..." (emphasis added).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually

Jurisdiction	*Reporting Month*
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Minnesota	1 March every third anniversary of admission
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February every third year
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1983 issue of The Army Lawyer.

3. TJAGSA CLE Course Schedule

November 7-9: 5th Legal Aspects of Terrorism (5F-F43).

November 14-18: 1st Advanced Federal Litigation (5F-F29).

November 14-18: 17th Fiscal Law (5F-F12).

November 28-December 2: 6th Administrative Law for Military Installations (5F-F24).

December 5-9: 24th Law of War Workshop (5F-42).

December 5-16: 97th Contract Attorneys (5F-F10).

January 9-13: 1984 Government Contract Law Symposium (5F-F11).

January 16-20: 73d Senior Officer Legal Orientation (5F-F1).

January 23-27: 24th Federal Labor Relations (5F-F22).

January 23-March 30: 103d Basic Course (5-27-C20).

February 6-10: 11th Criminal Trial Advocacy (5F-F32).

February 27-March 9: 98th Contract Attorneys (5F-F10).

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Contract Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

May 22-25: Chief Legal Clerks/Court Reporter Refresher Training

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training

June 18-29: JOAC: Phase IV.

July 9-13: 13th Law Office Management (7A-713A).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-20: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-22: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference

October 15-December 14: 105th Basic Course (5-27-C20).

4. Civilian Sponsored CLE Courses

February

2-3: PLI, EEO Litigation, Los Angeles, CA.

2-3: PLI, Income Taxation on Estates & Trusts, New York, NY.

3: KCLE, Domestic Relations, Ft. Mitchell, KY.

3-4: PLI, Negotiating Settlements in Personal Injury Cases, New York, NY.

9: ABICLE, Marital Law, Mobile, AL.

9-10: PLI, Preparation of Annual Disclosure Documents, San Francisco, CA.

9-10: PLI, Real Estate Workouts, New York, NY.

10: ABICLE, Marital Law, Montgomery, AL.

10-11: PLI, Advanced Medical Malpractice, New York, NY.

16: ABICLE, Marital Law, Huntsville, AL.

16-17: PLI, Computer Litigation, New York, NY.

17: ABICLE, Marital Law, Birmingham, AL.

17-18: KCLE, Securities Law, Lexington, KY,

19-23: ATLA, Litigation Techniques in the 80's, Orlando, FL.

22-24: FJC, Workshop for Judges of the Ninth Circuit, Tempe, AZ.

24: ABICLE, Law Office Automation, Birmingham, AL.

24-25: UMLC, Mental Health Law: Developments in the 1980's, Miami Beach, FL.

24-25: PLI, Spinal Injury Cases: Modern Trial Techniques, San Francisco, CA.

5. Eighth Criminal Law New Developments Course

The Eighth Criminal Law New Developments Course (5F-F35) previously scheduled for 20-22 August 1984, will be extended to 4-1/2 days rather than 3 days as originally announced. The new dates for the course will be 20-24 August 1984. The course will end at 1200 hours on 24 August 1984, and attendees should make departure plans accordingly.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials, or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many

requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another sense of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative indices are provided users. Commencing in 1983, however, these indices have been classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B071083	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-81-1
AD B071084	Criminal Law, Procedure, Trial/JAGS-ADC-83-2
AD B071085	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-3
AD B071086	Criminal Law, Crimes & Defenses/JAGS-ADC-83-4
AD B071087	Criminal Law, Evidence/JAGS-ADC-83-5
AD B071088	Criminal Law, Constitutional Evidence/JAGS-ADC-83-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

2. Articles

Alces, *The Efficacy of Government Contracts in Sophisticated Commercial Transactions*, 61 N.C.L. Rev. 655 (1983).

Alexander, *The Hearsay Exception for Public Records in Federal Criminal Trials*, 45 Ala. L. Rev. 699 (1983).

Barblett, *Custody of Children in Divorce, Separation, and Similar Disputes: The Australian Experiment*, 4 Fam. L. Rev. 11 (1981).

Bradley, *The Exclusionary Rule in Germany*, 96 Harv. L. Rev. 1032 (1983).

Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 Duq. L. Rev. 579 (1983).

Fox, *Boards for Correction of Military Records*, 88 Case & Comment, Sep.-Oct. 1983, at 42.

Fyfe, *Enforcement Workshop: The N.I.J. Study of the Exclusionary Rule*, 19 Crim. L. Bull 253 (1983).

Gamble, Howard & McElroy, *The Turncoat or Chamelonic Witness: Use of His Prior Inconsistent Statement*, 34 Ala. L. Rev. 1 (1983).

Gasbarro, *A Guide to Contract Negotiations*, 29 Prac. Law., Apr. 15, 1983, at 83.

German, Merin & Rolfe, *Videotape Evidence at Trial*, 6 Am. J. Trial Advoc. 209 (1982).

Graham, *Evidence and Trial Advocacy Workshop: Evidence as to Character; Circumstantial Use*, 19 Crim. L. Bull. 234 (1983).

Green, *International Law & the Control of Terrorism*, 7 Dalhousie L.J. 236 (1983).

Greenfield, *Credit Advertising Under Truth in Lending Simplification and Revised Regulation Z*, 100 Banking L.J. 388 (1983).

Hochstedler, *The Compelled Psychiatric Examination: Search, Seizure & Interrogation*, 10 J. Psychiatry & L. 265 (1982).

Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empiracle Position"?* 16 Creighton L. Rev. 565 (1983).

Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 Harv. L. Rev. 1828 (1983).

Kimmelman, *"Let There Be Light"? The Pitfalls and Possibilities Under the Bankruptcy Code*, 57 Am. Bankr. L.J. 155 (1983).

Kutak, *Model Rules of Professional Conduct: Why Do We Need Them?* 36 Okla. L. Rev. 311 (1983).

Lanzarone, *Professional Discipline: Unfairness & Inefficiency in the Administrative Process*, 51 Fordham L. Rev. 818 (1983).

Lenow, *The Fetus as a Patient: Emerging Rights as a Person?* 9 Am. J. L. & Med. 1 (1983).

Meador, *German Appellate Judges: Career Patterns & American - English Comparison*, 67 Judicature, Jun.-July 1983, at 16.

Neapolitan, *Support for and Opposition to Capital Punishment*, 10 Crim. Just. & Behav., Jun. 1983.

Tettenborn, *Breach of Confidence, Secrecy and the Public Domain*, 11 Anglo-Am. L. Rev. 273 (1982).

Comment, *Division of Military Retirement Pay Upon Divorce*, 12 U. Balt. L. Rev. 73 (1982).

Comment, *Parole Rescission: Is Parole A Constitutionally Protectable Expectation of an Inmate?* 5 Geo. Mason U.L. Rev. 303 (1982).

Comment, *The Rights of Probationary Federal Employee Whistleblowers Since the Enactment of the Civil Service Reform Act of 1978*, 11 Fordham Urb. L.J. 567 (1983).

Note, *European Community Resistance to the Enforcement of GATT Panel Decisions on Sugar Export Subsidies*, 15 Cornell Int'l L.J. 397 (1982).

Note, *Evidence Seizure in Foreign Searches: When Does the Fourth Amendment Exclusionary Rule Apply?* 25 Wm. & Mary L. Rev. 131 (1983).

Note, *Immediate Appeal From Counsel Disqualification in Criminal Cases*, 25 Wm. & Mary L. Rev. 131 (1983).

Note, *The Constitutionality of Anti-Drug Paraphernalia Laws—The Smoke Clears*, 58 Notre Dame L. Rev. 833 (1983).

Recent Developments, *Comparison of Handwriting by Jury Without the Aid of Competent Lay or Expert Testimony*, 6 Am. J. Trial Advoc. 349 (1982).

Recent Developments, *Federal Tort Claims Act—Court Distinguishes Discretionary & Proprietary Functions in Tort Action Against the United States*, 6 Am. J. Trial Advoc. 365 (1982).

Comparative Criminal Justice Issues in the United States, West Germany, England & France, 42 Md. L. Rev. 1 (1983).

Military Law Issue, Federal Bar News & J., Mar. 1983.

1982 California Courts of Appeals Survey, 5 Whittier L. Rev. (1983).

Persons for Free Speech at SAV v. United States Air Force: Military Installations as a Public Form, 16 Creighton L. Rev. 960 (1982).

Provocation, *Attempted Murder and Wounding with Intent to Commit Murder*, 7 Crim. L.J., Feb. 1983, at 44.

3. Regulations and Pamphlets

Number	*Title*	*Change*	*Date*
AR 135-5	Army Reserve Forces Policy Committee		29 Sep 83
AR 135-215	Officer Periods of Service on Active Duty		15 Sep 83
AR 190-5	Military Vehicle Traffic Supervision	I04	27 Jul 83
AR 230-65	Nonappropriated Funds: Accounting and Budgeting Procedures	I01	29 Sep 83
AR 310-1	Publications, Blank Forms & Printing Management	I02	13 Jul 83
AR 415-35	Minor Construction		29 Sep 83
AR 600-25	Salutes, Honors & Visits of Courtesy	C9	1 Sep 83
AR 600-29	Fundraising Within the Dept. of the Army	I02	11 Oct 83
AR 600-85	Alcohol & Drug Abuse Prevention & Control Program	I05	11 Aug 83
AR 600-200	Personnel Separations: Enlisted Separations	I06	9 Sep 83
AR 601-100	Appointment of Commissioned & Warrant Officers in the Regular Army	I03	15 Aug 83
AR 608-9	The Survivor Benefit Plan		1 Aug 83
AR 608-61	Application for Permission to Marry Alien Outside of CONUS		6 Oct 83
AR 612-2	Preparing Individual Replacements for Division Movement (DOR)		6 Oct 83
AR 635-40	Physical Evaluation for Retention Retirement or Separation	I03	7 Sep 83
DA Pam 310-1	Consolidated Index of Army Publications & Blank forms		1 Sep 83
DA Pam 550-43	Area Handbook for Egypt		29 Sep 83
DA Pam 550-154	Area Handbook for the Indian Ocean		29 Sep 83

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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