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Military Justice and the Uniform Code of Military Justice

Brigadier General (Ret.) John S. Cooke

Editor's Note: Brigadier General (Retired) John S. Cooke made these remarks at the 1999 Judge Advocate General's Worldwide Continuing Legal Education program on October 8, 1999 at The Judge Advocate General's School in Charlottesville, Virginia. General Cooke's incisive observations about the genesis of the Uniform Code of Military Justice, its present role in military justice, and its future, begin our series of articles celebrating the 50th Anniversary of the Uniform Code of Military Justice.

Given the theme of the conference, "Proud Traditions, Unlimited Future," it is appropriate to devote this penultimate session to military justice. It is sort of like having the last dance with the date you came with. Military justice is our historical reason for being–it is why William Tudor was appointed the first Judge Advocate on July 29, 1775, and from Tudor to Major General Huffman it has been our core mission. For most of the time it is been our predominant mission and, even today, with so many other missions and tasks for judge advocates, none is more important than military justice. That is because military justice is vital to morale and discipline in the armed forces and to public confidence in the armed forces, and these are essential to winning in war and to success in any mission. And that is not going to change.

Today, I would like to do a couple of things. First, I will discuss some of the history of military justice and why we have the Uniform Code of Military Justice (UCMJ), and how the UCMJ has developed. Then I will talk about some of the issues and challenges ahead.

As we look at the past, it is worth remembering the important role judge advocates have played in the evolution of the system. While Congress, the President, civilians in the executive branch, and others have played pivotal roles, judge advocates can be proud of the role we have played in the development of the system. Judge advocates have sometimes been the identifiers and initiators of needed change. At other times they have resisted suggested changes. More often they have refined and revised proposed changes and made them more workable. But always, they have been the implementers of change, whatever the source, and the faithful stewards of the system prescribed by the people's representatives. With rare exceptions, they have served that role with distinction.

The 225-year history of military justice can be divided into two parts. For the first 175-plus years, from June 30, 1775, when they were adopted by the Second Continental Congress, until May 31, 1951, when the UCMJ went into effect, the system operated under the Articles of War. The Navy, during this period, operated under the Articles for the Government of the Navy. For the last fifty years, almost, the system has operated under the UCMJ.

For the first 175 years, under the Articles of War military justice was a command-dominated system. The system was designed to secure obedience to the commander, and to serve the commander's will. Courts-martial were not viewed as independent, but as tools to serve the commander. They did a for of justice, but it was a different justice than that afforded in civilian criminal trials. Military justice had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system.[1] Although some changes were made through the years, adding limited forms of review and some rules analogous to those in civilian proceedings, even as we entered World War II, the system remained a command-dominated one. Up until that time, few seemed particularly concerned about these differences, but that would soon change.

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1. *See* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 87-8. Quoting General William T. Sherman:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.
>
> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.
>
> These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital princi ple, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.

Id. See also WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920).

Over sixteen million men and women served in the armed forces during World War II–nearly one in eight Americans. There were over two million courts-martial,[2] so many people were exposed to the military justice system, and many did not like what they saw. The system appeared harsh, arbitrary, with too few protections for the individual and too much power for the commander. To Americans who were drafted or who enlisted to defend their own freedoms and protect those of others around the world, this was unacceptable and complaints and criticisms became widespread. Even before the war was over, the Secretary of War and the Secretary of the Navy each commissioned studies of the system, and those studies recommended significant, if not fundamental change.[3]

After the war, interest in reforming the system continued, and Congress became involved. In 1948, it passed Elston Act,[4] amending the Articles of War. These amendments were based on studies and recommendations made by the Army and foreshadowed some of the changes that would be contained in the UCMJ, including an increased role for lawyers in courts-martial. However, other dynamics led immediately to efforts for further change.

By 1948, it was clear the United States would have to play the role as guardian of freedom in the world, and that the peacetime size and roles of the armed forces would be unprecedented. The defense infrastructure itself had just been reorganized, with the creation of a separate Air Force, and the establishment of the Department of Defense. This led to a perceived need for greater protections for men and women who would serve in the armed forces, and to a desire for a common system for all the services.

Thus, no sooner had the Elston Act been enacted than Secretary of Defense Forrestal appointed a committee, in the summer of 1948, to draft a uniform code of military justice. As chair of the committee, Secretary Forrestal appointed Harvard Law professor, Edmund Morgan. Professor Morgan had served as a major in the Army's Judge Advocate General's Corps in World War I. He served on the staff of the Assistant Judge Advocate General, Major General Samuel Ansell. Major General Ansell saw many of the problems that would resurface in World War II and recommended major changes in the military justice system. Unfortunately for Ansell, his boss, The Judge Advocate General, Major General Enoch Crowder, did not agree with him and most of Ansell's proposals were shelved. Now, in 1948,Major General Ansell's protégé, Professor Morgan, would dust off many of those proposals.

The other three members of the committee were the Under or Assistant Secretaries of the three services. They were assisted by a working group of military and civilian attorneys in the Office of the Secretary of Defense. This group considered the various reports that had been prepared by the services and other groups as it worked. It is interesting, however, in light of modern-day discussions about how open the process of proposing changes should be, that the Morgan committee worked in almost complete secrecy. Its drafts were not circulated outside the Defense Department (with the exception of some consultation with key congressional staff) before the final package was presented to Congress in early 1949. There were, of course disagreements during the drafting process, and not all the services, or all the Judge Advocates General, supporte every provision in the final package. Secretary of Defense Forrestal resolved disputes.[5]

The House of Representatives held about three weeks of hearings in the spring of 1949. These included an article by article review of the proposed code. The Senate held a more perfunctory three days of hearings a few weeks later. These hearings form the basis for one of the best and most informative pieces of legislative history anywhere. Congress ultimately passed the proposal with relatively few changes, and President Truman signed it on May 5, 1950.[6] It was to take effect on May 31, 1951. No one knew it when the President signed it, of course, but that meant that the sweeping changes made by the new code would be implemented during the height of the Korean War–a formidable task for the judge advocates of the day.

The UCMJ marked a distinct break with the past–most significantly in its acceptance of the idea that discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures. The new syste retained many features of the old, including considerable authority for the commander, but attempted to balance the commander's authority with a system of somewhat independent courts and expanded rights for service members. The creation of the Court of Military Appeals was designed to protect the independence of the courts and the rights of individuals. Judge advocates were to play a bigger part in the process. The role of The Judge Advocate General was expanded, including broader responsibility to oversee the system under Article 6. The staff judge advocate had increased responsibilities in advising convening authorities and assisting in the review of cases. The position of law officer–the forerunner to the military judge–was established to act in general courts-martial. The accused was afforded the right to be represented by a qualified attorney–a

2. Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future,* 55 MIL. L. REV. 39 (1972).

3. *See* JONATHAN LURIE, ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS 1775-1950 130-149 (1992).

4. Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948).

5. *See id.* at 150-192.

6. Pub. L. No. 81-506, 64 Stat. 108 (1950).

judge advocate–in general courts-martial. A parallel right would not be recognized in civilian criminal trials until the Supreme Court decide *Gideon v. Wainwright*[7] some twelve years later. Similarly, the new code provided protections against self-incrimination that predated the Supreme Court's decision in *Miranda v. Arizona*[8] by over fifteen years. Thus, the new code was a distinct break with the past, combining features of the old system with concepts and rules from the civilian justice model.

The history of military justice under the UCMJ can be divided into three periods. In the first, from 1950 to 1969, the system went through a period of "feeling out" and early growth. During this period, the Court of Military Appeals grafted some civilian principles of justice onto the system, it restricted some of the commander's powers, and it labored to enhance the independence of courts-martial. It was somewhat hampered in this by the limitations of the Code itself. Nevertheless, by the early 1960s the Judge Advocates General were sufficiently dissatisfied with the court that they declined to collaborate on the annual report that is required by the code, and there were even some calls from the services to abolish or radically alter the court.[9]

The services were not always resistant to change, however. In November 1958, The Judge Advocate General of the Army, Major General Hickman, secured approval to create the U.S. Army Field Judiciary. Under this order, Army law officers, judges, were assigned directly to The Judge Advocate General, rather than to local commanders as had been the case. This major step toward increased judicial independence occurred more than ten years before Congress required such independence in Article 26.

Although military justice under the UCMJ seemed much improved during this period, it remained significantly different from civilian criminal justice, and was still seen as vastly different–and inferior. This was nowhere better highlighted than in the Supreme Court's decision in *O'Callahan v. Parker*[10] in 1969. There the Court limited the jurisdiction of courts-martial over service members by requiring that offenses be "service connected" to be subject to court-martial jurisdiction. Moreover, the Court roundly criticized courts-martial, saying "courts-martial are singularly inept in dealing with the nice subtleties of constitutional law."[11] *O'Callahan* reflected that, despite many advances, military justice still had far to go if it was to be perceived as a true system of justice.

O'Callahan was decided on June 2, 1969, and brings to a close this first period under the UCMJ. Ironically, the military justice system was already primed to undergo major changes that would do much to dispel such criticisms. The Military Justice Act of 1968,[12] was scheduled to go into effect on August 1, 1969. This began the second period I have identified, fro 1969 to 1987. This period was a period of turbulence a growth, culminating in the coming of age of the system.

The Military Justice Act of 1968 was even more sweeping in many respects than the UCMJ itself, and no one was more responsible for securing Department of Defense backing and Congress' approval of the Act than Army The Judge Advocate General Major General Kenneth Hodson. The act provided the foundation for the system of relatively independent courts that we take for granted today. Among other things, the Act made the boards of review "courts" of review and gave them powers to act like true appellate courts. It changed the name of the law officer to military judge and extended more judicial authority to the position. It provided for military judges to preside in special as well as general courts-martial. It provided for trial by military judge alone on request by the accused. And it provided for the Article 39(a) session at which the judge could hear an decide issues outside the presence of the members. Finally, it required that all judges be assigned and directly responsible to the Judge Advocate General or a designee. Thus, the Act provided the framework for judicial authority and independence that we take for granted today.

It is worth noting that the Military Justice Act of 1968 and the new *Manual for Courts-Martial* that accompanied it became effective while the war in Vietnam was intense. Once again, judge advocates faced and met great challenges in implementing new procedures in a combat environment.

In the 1970s, the services and the military justice syste went through a difficult period. The war in Vietnam ended unsuccessfully, the services were drawn down, the draft was terminated, and reductions in force implemented. Morale suffered and the quality of the force was poor; court-martial rates were astronomical by today's standards. As you know, in the late 1970s and early 1980s, the services initiated a number of efforts to improve recruiting, quality of life, morale, and disci-

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7. 372 U.S. 335 (1963).

8. 384 U.S. 436 (1966).

9. *See* JONATHAN LURIE, PURSUING MILITARY JUSTICE, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980, 154-156 (1998) [hereinafter LURIE].

10. 395 U.S. 258 (1969).

11. *Id.* at 265.

12. Pub. L. No. 90-632, 53 Stat. 1335 (1968).

pline–the success of these was demonstrated in Operations Desert Shield and Desert Storm in 1990-91. Military justice went through a parallel development as it coped with these broader problems and addressed issues of its own.

From 1975 to 1978, the Court of Military Appeals engaged in what was sometimes called the "COMA revolution." It issued a number of controversial and often criticized decisions that limited the jurisdiction of courts-martial, limited the powers of commanders, expanded individual rights, extended the court's own authority, and broadened the authority and responsibility of the military judge. Some of the more problematic of the court's initiatives were later reversed, either by Congress or by the court itself.[13] Nevertheless, the court left two lasting legacies. First, its decisions enhancing judicial powers have remained effective and have ensured that the goals of judicial authority and independence in the Military Justice Act of 1968 would be realized. Second, the court helped serve as the catalyst for judge advocates and others to examine critically the system and to consider ways to improve it. This led to several important steps.

In 1977, the services began a process that culminated i 1980 in the adoption of the Military Rules of Evidence–a slightly modified version of the Federal Rules of Evidence. This was largely the initiative of Army Colonel Wayne Alley at the time the Chief of the Criminal Law Division in the Office of The Judge Advocate General. In 1979-81, The Judge Advocate Generals Wilton Persons and Alton Harvey tested a adopted an independent defense organization, the Trial Defense Service (TDS). This was quite controversial at the time, but for twenty years TDS has done vital work, serving soldiers and the credibility of the military system superbly. The Military Justice Act of 1983[14] streamlined pretrial and post-trial processing, among other changes. Most importantly, it extended the jurisdiction to the Supreme Court to direct review of Court of Military Appeals decisions on certiorari. The *Manual for Courts-Martial, 1984*, tied much of this together and still today provides the rules the system operates under.

This period concludes with the Supreme Court's decision in 1987 in *Solorio v. United States*.[15] There the Court overturned *O'Callahan* and held that courts-martial may exercise jurisdiction over service members without the service connection test. The majority opinion did not rely on the many changes in military justice under the UCMJ as a basis for the decision, citing rather to history and Congress' constitutional powers. Nevertheless, it is likely that the changes in military justice under the UCMJ made it easier for the majority to reach its result, and they surely made it easier for Congress and the public to accept the result in *Solorio*.

From 1987 to the present, the military justice system has enjoyed a period of stability and incremental change. This is good because the armed forces have undergone their own turbulence during this period following the end of the Cold War. Congress has engaged only in minor changes–requiring the imposition of forfeitures in most instances[16] and the cosmetic changes of the names of our appellate courts.[17] The Court of Appeals for the Armed Forces has not undertaken radical redefinition, but has rather engaged in error-correction and in dealing with novel questions facing many courts, such as issues of scientific evidence. One significant change occurred in 1998, when, almost exactly forty years after Major General Hickman established the U.S. Army Field Judiciary, Major General Huffman took the important step of recognizing tenure for Army trial and appellate judges under *Army Regulation 27-10*.

In sum, the forty-nine plus years under the UCMJ have marked a continuation of balancing the role of the commander with an increasingly independent and sophisticated judicial system.

What is next? I do not think we are likely to see radical change any time soon–the system is working reasonably well. That is not to say that there are not issues that warrant examination. Indeed, a "bad" case or two in the press could generate interest in broader changes. Absent that, I think the system will continue the course it has followed under the UCMJ: maintaining certain core responsibilities for the commander, while continuing trend to closer adherence to civilian principles and practices that make courts-martial independent and effective judicial bodies.

Rather than suggest my own prescriptions for change, I want to address with you where I think some of the biggest problems or concerns may lie. These are areas that I think are more likely to be the subject of attention and criticism and in which close scrutiny may give rise to proposals for greater change. It behooves those who care about the system to consider these issues carefully so that changes are made wisely.

The first area is one that is well known to you. The large reduction in the numbers of courts-martial in recent years has resulted in fewer opportunities for judge advocates to be exposed to and learn about the system. This is often discussed in terms of the lack of advocacy skills young judge advocates are able to develop. This is a problem, but underlying it is a

13. *See generally* LURIE, *supra* note 9, at 230-271.

14. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

15. 483 U.S. 435 (1987).

16. Pub. L. No. 104-106, Div. A, Title XI, §1121(a), 110 Stat. 462, 463 (1996).

17. Pub. L. No. 103-337, Div. A, Title IX, §924(c), 108 Stat. 2831, 2832 (1994).

more serious problem. The shortcomings in advocacy skills reflect a lack of attention by the staff judge advocate (SJA) and other supervisors of these counsel.

When I was Chief Judge, I reviewed many records. Usually the advocacy on both sides was good, in some cases very good. But, too often, there were problems, and almost always on the government side. Regional defense counsel and military judges have responsibilities here too, but my remarks are aimed primarily at SJAs. When I saw weakness in the trial counsel's performance, invariably that weakness could be traced to the chain of supervision. Poorly drafted charges, overcharging, or mischarging, having no clear theory of the case, not knowing which issues are important and which are not–and therefore which to contest and which to concede–all these things start with the SJA. I submit that there are five things every SJA should do. None of these will be huge revelations to most of you, but problems arise when they are not done.

First, you must be a mentor and trainer. Ensure that counsel not only know the mechanics and techniques of trying cases, but that they understand the history and purpose of the system.

Second, you must be sufficiently familiar with each case to ensure that the charges make sense and can be proved, and that the disposition level is appropriate; this is not a task you can delegate.

Third, you must ensure that trial counsel is properly prepared–that he has a theory of the case, knows and understands the evidence he will present, and knows what issues are important and what are not.

Fourth, treat the defense with fairness and respect and make sure it is given what it is entitled to. This includes both general administrative support for TDS and making sure it receives proper notice and discovery and reasonable access to witnesses and commanders. Remember, no one wins when a soldier is not well represented in a court-martial.

Fifth, always remember that you represent the system and that no one case is bigger than the system. Set the example and act with fairness and integrity. Always take the high road Sometimes it is harder and takes a little longer, but it usually gets you where you need to be, and you can look yourself in the mirror–and not have to clean up as much–when you arrive.

I know most of you know and do these things, but even an infrequent lapse is costly to individuals–accused, victim, or otherwise–and to the credibility of the system. If we fail to manage the system well, and to train those who follow, we risk losing the confidence of the public, commanders, and soldiers. This could lead to significant change in our own role in the process.

The role of the commander as convening authority is another area subject to examination. It is probably the part of the system most different from civilian criminal justice systems, and therefore the least understood by the public. In most of the high-profile cases of the 1990s, the commander's powers, in other words, prosecutorial discretion, have been the focus of attention even if that has not been clearly articulated. Fro Tailhook to the Italian cable car tragedy, from Lieutenant Flinn to Sergeant Major McKinney, and in several other cases, attention has not focussed on whether someone can get a fair trial in a court-martial. Rather, it has been on whether someone was being tried when others in similar circumstances were not. We need to look closely at who makes these decisions and how they are made it to see if the system still makes sense, and, if so, how to defend it or, if not, how it should be changed. Your role in advising commanders is very important in this process, but it is the structure that defines who makes the decision that may be at issue.

Our system lends itself to different treatment of apparently similar offenders, because prosecutorial discretion is exercised at the lowest levels of command, and prohibitions on unlawful command influence preclude limits on that discretion. Th rationale for command discretion is that the commander is responsible for performance of the unit and therefore discipline in the unit, so therefore the commander must exercise this authority. That is a very strong argument that most of us would agree with, but we must recognize that there are some cogent counter-arguments.

First, given the nature of today's caseloads, many offenses have impact far beyond the unit or even the Army. Child molestation is but one of many examples. A civilian may reasonably ask whether a commander whose focus is on the unit–and, incidentally, whose budget for training and unit welfare is affected by the expense of prosecutions–adequately considers the impact on the public when deciding whether or not to prosecute. I think most commanders do consider these things, and it is incumbent on you SJAs to ensure they do, but that remains a legitimate question for civilians to ask.

Second, more often than we like to think, authority to convene courts and refer cases to them is divorced from the operational commander. This occurs with installation comma jurisdiction over tenant units, and with area jurisdiction overseas. Also, on occasion, we have assigned jurisdiction to a specific commander, such as in the Tailhook cases where the Navy and Marines assigned all the cases to a particular commander in each service. Moreover, in today's world of operations conducted by ad hoc organizations consisting of units from multiple parent commands, we frequently leave UCMJ jurisdiction with the original commanders, not the operational commander. This is especially true in joint operations, where court-martial jurisdiction typically runs along service lines and not to the joint commander.

There are very good reasons why we do all these things, but we need to recognize that they run counter to the fundamental rationale for giving commanders the power to convene courts and refer cases to them.

This raises some questions: should we more rigorously follow operational lines in determining court-martial jurisdiction. Should we abandon such lines in favor of (presumably fewer) court-martial commands–which might have the benefit of increased "detachment" from the problem, especially in high profile cases, and also of increased uniformity. Should we leave referral decisions to lawyers? Are there ways to guide prosecutorial discretion without running afoul of rules against unlawful command influence or the policies they stand for? These are things that should be studied now.

Another area warranting examination is judicial independence. This is an issue in our society now. This year the American Bar Association has made a point of expressing its concern about judicial independence and has sponsored several studies and symposia about judicial independence and public trust and confidence in the judiciary. Despite the tremendous strides the military justice system has taken, including the huge step Major General Huffman recently took in adopting tenure for Army judges under *AR 27-10*, we should not take this area for granted. It is important not only that the system provides assurance to judges that they can decide cases without apprehension of adverse personal consequences, but that they be perceived as so acting. It is also important that the judiciary be so structured as to attract the very best to the bench. Given the diminishing pool of judge advocates with extensive military justice experience, this will be even more important in the years to come.

The lack of criminal jurisdiction over civilians accompanying the armed forces overseas is another problem. We have lived with this issue for many years, but today it is potentially more serious because of our increasing reliance on civilia employees and contractors to perform critical missions in combat and other contingencies. This is a disaster waiting to happen. Before long, a civilian employee or contractor in a key overseas operation is going to commit, or be credibly accused of committing, a serious offense against a local national or a member of an allied force, and we will be powerless to try the individual. Our inability to prosecute someone may not be a benefit to the suspect or accused, as he then may fall prey to the justice system of a foreign government or possibly even some international tribunal. Moreover, this jurisdictional void might result in more than an injustice in a single case; it could seriously damage the prospects for success in the mission and the United States' security interests. Legislation has been introduced that would extend the jurisdiction of U.S. federal courts to try such cases and which would also provide for court-martial jurisdiction in limited circumstances. I hope Congress will have the foresight to fix this problem.

In conclusion, George Washington said: "Discipline is the soul of an Army."[18] You have heard Major General Huffman say it and some of you have heard me say it: by discipline, we do not mean simply fear of punishment for doing something wrong, but faith in the value of doing something right. True discipline is doing the right thing even when the right thing is very hard to do and no one else is looking. That discipline is the product of a military system of training and education, standards and customs, ethics and values. Military justice is central to that system. Military justice inculcates and reinforces morale and discipline. It does so by consistent adherence to two principles: each person, regardless of rank, is responsible and accountable for his actions; and, each person, regardless of circumstance, is entitled to be treated fairly and with dignity and respect.

You have a serious responsibility and a glorious opportunity. You inherit a proud tradition of service in the cause of freedo and justice. You inherit a fine system built and cared for by your predecessors. And you now have responsibility to carry the military justice system into a new century and the UCMJ into its second fifty years. Beyond those artificial milestones, you have the responsibility to manage and to mold the syste so that it serves the needs and expectations of the American people and their sons and daughters in the armed forces.

I urge you to understand and appreciate the system's past, to administer it in the present with fairness and integrity, and to consider its future with wisdom and an open mind.

I would like to close on a personal note. Each of you joined the army and the Judge Advocate General's Corps for your own reasons, and there are many different ones. But I know, fro my own experience, that you all stayed not just so you could make a living, but so you could make a difference. That is why it is such a privilege for me to be with you today.

18. D. S. FREEMAN, WASHINGTON 116 (1968).

Passage of Amended Protocol II

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Introduction

On 24 May 1999, following action by the Senate, President Clinton signed the instruments of ratification for the Amended Mines Protocol II to the Convention on Conventional Weapons (Amended Protocol II).[1] The Senate offered its advice and consent to the United States' ratification, subject to one reservation and several statements of understanding and conditions. Amended Protocol II was promulgated on 3 May 1996 at the Review Conference of the State Parties to the United Nations (UN) Certain Conventional Weapons Convention (UNCCW).[2] The United States, as a party to UNCCW, participated in the negotiations for Amended Protocol II and was instrumental in ensuring the treaty served the dual purpose of protecting civilians from landmines while providing that U.S. armed forces have the capabilities they need for protection.[3] In addition, passage of Amended Protocol II ensured the United States had an active voice in the first annual meeting regarding Amended Protocol II, held 15-17 December 1999.

This article provides a quick reference to practitioners in the field when dealing with mine issues and the impact of Amended Protocol II. It is not intended to provide a comprehensive, article by article analysis of the Protocol, but rather to summarize the key points that the treaty addresses. Current United States policy on the use of anti-personnel mines is also addressed in Presidential Decision Directives 48, 54, and 64, and from a statement made by President Clinton on 16 May 1996.[4]

Amended Protocol II of the UNCCW

Article 1

Article 1 contains six paragraphs that describe the scope of Amended Protocol II and contains the following significant points

> This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of August 1949.[5]

This paragraph extends the scope of Amended Protocol II to internal armed conflict. The original 1980 Protocol was limited to international armed conflict and certain wars of national liberation.[6]

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1. Statement by the Press Secretary, Amended Mines Protocol to the Convention on Conventional Weapons, May 25, 1999, *available at* <www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/5/26/2.text.1>. The Amended Mines Protocol II to the Convention on Conventional Weapons is commonly referred to as Amended Protocol II, the Amended Mines Protocol, or the Amended Protocol. This article refers to it as Amended Protocol II.

2. Memorandum, W. Hays Parks, Special Assistant to The Judge Advocate General, Office of the Judge Advocate General, to The Judge Advocate General, subject: Revised Landmine Protocol (6 May 1996).

3. A state is considered a party to the UNCCW if it has ratified two or more of the Protocols at the time it deposits its instruments of ratification. The United States ratified Protocol I (prohibiting nondetectable fragments) and Protocol II (mines). The United States ratified the UNCCW on 24 March 1995, with a reservation to Article 7, paragraph 4. That article applies the UNCCW in wars of self-determination as described in Article 1, para 4 of Protocol I Additional to the Geneva Convention of 1949. Geneva Protocol I expands the definition of international armed conflict to include so called wars against "colonial domination," "alien occupation," and "racist regimes." Protocol I Additional to the Geneva Convention of 1949, Dec. 12 1977, 16 I.L.M. 1391 [hereinafter 1949 Geneva Convention]. The United States objects to expanding the scope of what constitutes international conflict under the UNCCW. The United States believes this expansion politicizes the law of war by injecting a political cause consideration. *See generally* Michael J. Matheson, Address at the Workshop on International Humanitarian Law (Jan. 22, 1987) (describing the position of the United States on the relation of customary international law to the 1977 additional protocols) (on file with author).

4. Statement by President Clinton at the White House (May 16, 1996) *available at* LEXIS, News Library, ARCNWS File); Fact Sheet, The White House, Office of the Press Secretary, subject: U.S. Announces Anti-Personnel Landmine Policy (May 16, 1996) *available at* <http://www.pub.whitehouse.gov/uri-res/12R?:pdi://oma.eop.gov.us/1996/5/16/7.text.1>. The essence of the policy is that the United States will no longer employ non-self-destructing anti-personnel mines, except for training purposes and on the Korean Peninsula to defend against an armed attack across the de-militarized zone.

5. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *amended* May 3, 1996, U.S. TREATY DOC. 105-1, at 37, 35 I.L.M. 1206 [hereinafter Amended Protocol II]. Although Amended Protocol II expressly excludes from its scope of applications situations of internal disturbances, such as riots, it does not permit the armed forces of a state or of an insurgent group–to ignore its requirements in an armed conflict.

6. Protocol on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 19 I.L.M. 1529, art. I, para. 2 [hereinafter Protocol II]. A highly political and limited list of "Wars of National Liberation" can be found in Article 1(4) of Protocol I Additional to the 1949 Geneva Convention, *supra* note 3.

The change in this obligation is significant for governments and others that might use mines in internal conflicts. It has been in internal armed conflicts (such as Cambodia and Angola) that the greatest number of civilian casualties from mines hav occurred.[7] Extending the coverage of the protections contained in Amended Protocol II to internal armed conflicts was a major objective of the United States in the hope that Amended Protocol II will significantly reduce civilian deaths and injuries fro land mines and booby-traps.

Article 2

Article 2 contains fifteen paragraphs, which define the key terms used throughout the protocol. Some of the key terms are: mine, remotely-delivered mine, anti-personnel mine, other devices, and booby-trap.

> "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.[8]

The definition includes both anti-personnel and anti-tank mines. Thus, where reference is made throughout the treaty to "mines" it is understood that such reference applies to both anti-personnel and anti-vehicle mines.[9]

> "Remotely-delivered mine" means a mine not directly placed but delivered by artillery missile, rocket, mortar or similar means, or dropped from an aircraft. Mines delivered from a land based system from less than 500 meters are not considered to be "remotely delivered," provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.[10]

Given the reliance by the U.S. Army on remotely-delivered mines (RDM) (for example the family of scatterable mines (FASCAM)) this definition is of particular importance. Amended Protocol II continued, but improved, the existi framework for RDMs. Amended Protocol II recognized their emerging importance and the potential risk these temporary but unmarked minefields may pose to civilians and advancing friendly forces units and personnel.

A significant United States-induced improvement from the original Amended Protocol II is the requirement in Article 6, paragraph 2 of the Amended Protocol II, that all RDMs contain reliable self-destruction or self-deactivation mechanisms, the specifications of which are set forth in paragraph 3 of the Technical Annex. When the original Protocol II was drafted (1978-1980), RDMs were an emerging technology, and governments were unsure whether a self-destructing or self-neutralizing mechanism was preferred. The original Protocol II permitted either. The U.S. experience determined that self-destruction was better (a self-neutralizing mine cannot be distinguished from a live mine, and must be treated and cleared as if it were a live mine). The U.S. RDMs have a highly reliable (99.9%) self-destruction mechanism; should a mine fail to self-destruct, it becomes a non-hazardous dud due to a deactivation mechanism. The U.S. delegation was able to convince other participants that this was the appropriate standard. A similar self-destruction capability is being considered for other U.S. conventional munitions to reduce the risk to civilians and friendly forces from unexploded ordinance.[11]

Excluded from the definition of RDMs are mines delivered by a ground-based system from less than 500 meters. This exception was developed primarily for the now-discarded British Ranger system, but includes the U.S. Volcano anti-personnel mine system. The Volcano system projects its mines a substantially shorter distance (thirty to fifty meters).[12] These mines were excluded from the definition because they can be delivered in a controlled manner and the resulting field can be marked to warn civilians.[13]

Article 2 also contains the definition of what constitutes an anti-personnel mine.

> "Anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will

7. EXEC. REP. NO. 106-2, at 34 (1999).

8. Amended Protocol II, *supra* note 5, art. 2, para. 1.

9. *See* EXEC. REP. NO. 106-2, at 36.

10. Amended Protocol II, *supra* note 5, art. 2, para. 2.

11. Electronic Mail from W. Hays Parks, Special Assistant to The Judge Advocate General, Office of The Judge Advocate General, to Major Michael Lacey, subject: Passage of Amended Protocol II (19 Nov. 1999) [hereinafter Parks Correspondence]. Mr. Parks was a member of the U.S. delegation and participated in the negotiations which led to the adoption of Amended Protocol II.

12. The Ranger vehicular mine dispersal system was withdrawn from service except for training purposes when Great Britain became a party to the Ottawa Convention on the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on Their Destruction. *Id.*

13. *See* EXEC. REP. NO. 106-2, at 37.

> incapacitate, injure or kill one or more persons.[14]

Notice the key words *primarily designed* in the first line of the definition. This element was added to ensure that anti-tank mines that are equipped with anti-handling devices are no included under the definition of anti-personnel mines.[15] This distinction was crucial to the decision by the Senate in its advice and consent to the treaty.[16] Before the proliferation of anti-personnel landmine movements, U.S. Army doctrine was to lay anti-personnel and anti-tank mine fields concurrently so as to thwart any attempt by personnel to clear the anti-tank minefield. The alternative, after the recent anti-personnel landmine backlash, is to equip anti-tank mines with anti-handling devices.[17]

The definition of "other devices," with minor amendment, is a carry-over from the original Mines Protocol:

> "Other devices" means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure, or damage and which are actuated manually, by remote control or automatically after a lapse of time.[18]

The intent of this definition is to serve as a "catch-all" for munitions that might not fall under the definitions of "mine," "anti-personnel mine," or "booby-trap" to ensure that all such munitions with capabilities similar to anti-personnel mines fall within the rules set forth in Amended Protocol II.[19] An example of an "other munition" is the United States' M18A1 Claymore mine when used in the command-detonated mode, discussed *infra*.

The 1980 Protocol II maintains the definition of "booby-trap":

> "Booby-trap" means any device or material which is designed, construed, or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs a otherwise safe act.[20]

Article 7 of the Amended Protocol II contains a detailed list of prohibitions on the employment of booby-traps.

Article 3

Article 3 contains eleven paragraphs containing general restrictions on the use of mines, booby-traps, and other devices. It also consists of a number of specific provisions regarding mines, booby-traps, and other devices.

> Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.[21]

This paragraph clearly places the responsibility to recover all deployed mines on the party that placed them. Article 10 of the Amended Protocol II goes into further detail and establishes a comprehensive set of procedures for fulfilling this responsibility both during and after armed conflict.[22]

> It is prohibited to use mines, booby-traps, or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.[23]

> It is prohibited to use a self-deactivating mine with an anti-handling device that is

14. Amended Protocol II, *supra* note 5, art. 2, para. 3.

15. *See* EXEC. REP. NO. 106-2, at 37.

16. *Id.*

17. *Id.*

18. Amended Protocol II, *supra* note 5, art. 2, para. 5.

19. *See* Parks Correspondence, *supra* note 11.

20. *See* Amended Protocol II, *supra* note 5, art. 2, para. 4.

21. *Id.* art. 3, para. 2.

22. *See* EXEC. REP. NO. 106-2, at 41.

23. Amended Protocol II, *supra* note 5, art. 3, para. 5.

> designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.[24]

Both paragraphs five and six contain specific provisions designed to ensure the quick, safe removal of minefields after hostilities cease. Paragraph five prohibits the use of any mine designed to detonate by the mere presence of a mine detector that is operated in its designed mode. Currently, no state has admitted to using such a mine, but the ramifications are obvious

The intent of paragraph six is to avoid situations where a self-deactivating mine, which normally goes "dead" after its battery is exhausted, continues to remain dangerous indefinitely as a result of a long-lived anti-handling device. This would defeat the purpose of the self-deactivation function.[25]

Other paragraphs in Article 3 of the Amended Protocol II repeat classic law of war legal maxims. Paragraph three prohibits mines or booby-traps which are designed to cause unnecessary suffering.[26] This provision is significant because it establishes unequivocally that the delegations to the first review conference did not conclude that mines, booby-traps, and other devices are not, per se, of a nature to cause unnecessary suffering.

Paragraph eight prohibits the indiscriminate use of mines or booby-traps.[27] Paragraph nine prohibits treating clearly separated and distinct objectives in a populated area as one single military objective when employing mines or booby-traps.[28] Paragraph ten caveats the commander to take all feasible precautions to protect civilians from the effects of mines and booby-traps. Paragraph eleven requires the commander to provide effective warnings to the civilian population about th emplacement of mines, booby-traps, and other devices. Significantly however, paragraph eleven contains the caveat that the warning is only required if circumstances permit.[29]

Article 4

Article 4 contains only one paragraph entirely devoted to prohibiting the use of anti-personnel mines that are not detectable as specified in the Technical Annex.[30] The 1980 Protocol II did not prohibit the use of non-detectable mines. As a result, many states have produced, and continue to produce and deploy, large numbers of anti-personnel mines encased in plastic, which prevented their detection by technical means. These mines present a serious threat not only to innocent civilians, but to relief missions and mine-clearing personnel.[31]

The Technical Annex requires that all mines produced after 1 January 1997 have eight grams or more of iron in a single coherent mass.[32] Eight grams was determined as the minimum amount of iron necessary to produce a sufficiently strong metallic signature that would enable a mine-detector operator to separate a mine's signature from that of background noise from soil with high-metallic content.[33]

Because of the huge stockpiles of mines that do not meet the criteria set out in the Technical Annex, it was necessary to provide parties an option to defer compliance with Article 4 for up to nine years. Amended Protocol II requires any state tha defers compliance to declare its intention and, to the extent feasible, minimize the use of anti-personnel mines that do not comply.[34]

Article 5

Article 5 contains six paragraphs all dealing with the use of anti-personnel mines *other than* remotely-delivered mines. Along with Article 6 (dealing with the restrictions on RDMs), Article 5 represents the very heart of Amended Protocol II Paragraph two of Article 5 clearly spells out the restrictions:

> It is prohibited to use weapons to which this Article applies which are not in compliance

24. *Id.* para. 6

25. *See* EXEC. REP. NO. 106-2, at 42.

26. *See* Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, T.S. 539, art 23(e) [hereinafter Hague IV].

27. 1949 Geneva Convention, *supra* note 3, art. 51, para. 4.

28. *Id.* art. 51(5)(a).

29. Amended Protocol II, *supra* note 5, art. 3, para. 11.

30. *Id.* art. 4.

31. EXEC. REP. NO. 106-2, at 29 (1999).

32. Amended Protocol II, *supra* note 5, technical annex, para. 2(a).

33. EXEC. REP. NO. 106-2, at 30.

34. *Id.* at 30.

> with the provisions on self-destruction in the Technical Annex, unless:
>
> (a) such weapons are placed within the perimeter-marked area which is monitored by military personnel and protected by fencing or other means to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must be at least be visible to a person who is about to enter the perimeter-marked area.
>
> (b) such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another state which accept(s) responsibility or the maintenance of the protection required by this article and the subsequent clearance of those weapons.[35]

The specifications for the markings of such a perimeter are spelled out in paragraph four of the Technical Annex and are quite detailed and exact. They include such criteria as size and shape, color, appropriate symbol, language, and spacing between the markers.[36] The central theme of this article is that the mine-laying party has the responsibility to take positive measures to warn the civilian population and keep them out of such minefields.

The second paragraph deals with the difficult subject of accountability and removal of such mines. Minefields must be recovered before the area is abandoned, unless the area is turned over to a state that accepts responsibility for the required protections and subsequent clearance.[37] There was some concern during negotiations over Amended Protocol II that such language could impede any agreements concluded between the parties to a conflict. The record of the negotiations clearly demonstrates that the paragraph does not preclude agreements between the parties to a conflict that adhere to the essential spirit and purpose of the article.[38]

Paragraph 3 provides a narrow exception to the above requirements:

> A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2(a) and 2(b) of this article only if such compliance is not feasible due to forcible loss of control of the area as a result of military action, including situations wher direct military action makes it impossible to comply. If a party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2(a) and 2(b) of this article.[39]

The exception in the paragraph is spelled out in clear and unequivocal language. Note that military necessity alone is not enough to invoke the exception, but rather the "loss of control of the area as a result of military action." Paragraph 4 requires a party that has gained control of terrain in which landmines are already laid to implement the protections provided in paragraphs two (a) and (b). Paragraph 5 requires the parties to take all feasible measures to prevent the unauthorized removal, defacement, destruction or concealment of the markings of the perimeter.

Paragraph six is of special significance to operational law practitioners:

> Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2(a) of this Article for a maximum period of 72 hours if:
>
> (a) they are located in immediate proximity to the military unit that emplaced them; and
>
> (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.[40]

This is the Claymore exception to the Amended Protocol II. The U.S. M18A1 Claymore mine is a directional fixed fragmentation mine primarily for anti-personnel use, and is also effective against thin-skinned vehicles. Detonation of the high explosive charge causes fragmentation outward of the plastic matrix and projection of the spherical fragments outward in a fan-shaped pattern. The M18A1 mine delivers 700 highly effective steel fragments in a fan-shaped pattern approximately two meters high and sixty degrees wide at a range of fifty

35. Amended Protocol II, *supra* note 5, art. 5, para. 2.

36. *Id.* technical annex, para. 4.

37. EXEC. REP. NO. 106-2, at 31.

38. *Id.*

39. Amended Protocol II, *supra* note 5, art. 5, para. 4

40. *Id.* para 6.

meters. These fragments are effective up to a range of 100 meters forward of the mine.[41]

The paragraph effectively exempts out the M18A1 Claymore, in tripwire mode, from the onerous marking requirements in paragraph two (a), provided the following criteria are met:

> (1) The mine is emplaced for no longer then 72 hours.
> (2) The mine is located in the immediate proximity to the military unit that emplaced it.
> (3) The area the mine is located in is monitored by military personnel to ensure the effective exclusion of civilians.[42]

If any of the above criteria are not met, the marking, fencing, and monitoring requirements of paragraph two (a) of Article 5 are invoked.

The term "effective exclusion of civilians" should not be construed as placing impractical burdens upon the unit tha emplaced the mine. This requirement is satisfied if the unit keeps overview of the various avenues of approach into the kill zone of the Claymore.[43]

It is important to note that the command detonated Claymore *does not* fall into the definition of "anti-personnel mines" and is therefore not covered under Article 5.

Article 6

Article 6 contains four paragraphs that deal with restrictions on the use of RDMs.

> It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph 1(b) of the Technical Annex.[44]

The requirements for marking RDMs in the Technical Annex are not overly burdensome.

> The estimated location and area of remotely-delivered mines shall be specified by the coordinates of reference points (normally corner points) and shall be ascertained and when feasible marked on the ground at the earliest opportunity. The total number and type of mines laid, the date and time of laying and the self-destruction time periods shal also be recorded.[45]

In most circumstances, an eight-digit grid coordinate marking the four corners of the projected minefield, should meet the recording requirements of Amended Protocol II. Article 6 also requires that copies of the above data be held at a level of command sufficient to guarantee their safety [46]

As previously noted, paragraph two bans the use of remotely-delivered *anti-personnel mines* that do not possess the self-destruction and self-deactivation parameters of the Technical Annex. This is the compliment to the Article 5 provision concerning "dumb" non-remotely delivered anti-personnel mines. Together the two, in effect, prohibit the use of all long-lived (non-self-destructing or self-deactivating) anti-personnel mines outside of marked, monitored, and protected areas.[47]

Paragraph 3 of Article 6 seeks to extend the prohibition to include "dumb" anti-tank mines. The paragraph prohibits the use of such mines, "unless to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature . . . ."[48] Interestingly, during the negotiations for the Amended Protocol II, the United States was in favor of requiring that all remotely-delivered anti-tank mines have the self-destruct mechanisms. However, many other delegates were opposed to any regulation of anti-tank mines–hence the language *to the extent feasible*.

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41. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 23-23, ANTIPERSONNEL MINE M18A1 AND M18 (CLAYMORE) (6 Jan. 1966). The Amended Mines Protocol's acknowledgement of the legality of the Claymore also served to reconfirm the legality of the combat shotgun. *See* W. Hays Parks, *Joint Service Combat Shotgun Program*, ARMY LAW., Oct. 1997, at 16-24.

42. Amended Protocol II, *supra* note 5, art. 5, para 6

43. EXEC. REP. NO. 106-2, at 33.

44. Amended Protocol II, *supra* note 5, art. 6, para. 1.

45. *Id.* technical annex, para. 1(b).

46. *Id.* technical annex, para. 1(c).

47. EXEC. REP. NO. 106-2, at 33.

48. Amended Protocol II, *supra* note 5, art. 6, para. 3.

Paragraph 4 requires effective advance warning to the civilian population of any delivery or dropping of remotely-delivered mines–unless circumstances do not permit.[49]

The warning is similar in nature to the requirements to warn stated in Hague IV, Article 26[50] and Protocol I, Article 57(2)(c).[51] One would presume that a similar analysis would result when the practitioner was considering the employment of remotely-delivered mines. Namely, if the mines have the potential to affect the civilian population (such as delivery into a heavily populated area), a warning should be issued, unless surprise or other military necessities make the warning impractical.

Article 7

Article 7 repeats restrictions contained in the original mines protocol for the emplacement or use of booby-traps, extending them to other devices.

> Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which in any way attached or associated with:
>
> (a) internationally recognized protective emblems, signs or signals;
>
> (b) sick, wounded or dead persons;
>
> (c) burial or cremation sites or graves;
>
> (d) medical facilities, medical equipment medical supplies or transportation;
>
> (e) children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing, or education of children;
>
> (f) food or drink;
>
> (g) kitchen utensils or appliances except in military establishments;
>
> (h) objects clearly of a religious nature;
>
> (i) historic monuments, works or art or places of worship which constitute the cultural or spiritual heritage of peoples;
>
> (j) animals or their carcasse .[52]

The above list is a "laundry list" for the operational la attorney to use when analyzing the legality of the use of a booby-trap or other device. There is one important caveat to the above list. Sub-paragraph 1(f) of Article 7 prohibits the use of booby-traps against "food or drink." Food and drink are not defined under the protocol, and if interpreted broadly, could include such viable military targets as supply depots and logistical caches.[53] Consequently, it was imperative to implement a reservation to Amended Protocol II that recognized that such legitimate military targets as supply depots and logistical caches were permissible targets against which to employ booby-traps. The reservation clarifies that stocks of food and drink, if judged by the United States to be of potential military utility, will not be accorded special or protected status.[54]

Paragraph 2 prohibits the mass production of an apparently harmless object that is specifically designed to be a booby-trap. This does not prohibit the expedient adaptation of objects for use as booby-traps to slow an enemy advance.[55]

Paragraph 3 prohibits the use of booby-traps in any concentration of civilians, where combat between ground forces is not taking place or does not appear imminent. There are two exceptions given to the general rule: (1) booby-traps may still be placed on or in the close vicinity of a military objective, (2) measures are taken to protect civilians from the effects of the booby-trap.[56]

Articles 8

Article 8 addresses the transfer of mines–a higher echelon issue that the operational law practitioner is unlikely to encoun-

49. *Id.* para. 4.

50. HagueIV, *supra* note 26.

51. 1949 Geneva Convention, *supra* note 3, art. 57, para. 2(c).

52. Amended Protocol II, *supra* note 5, art. 7, para. 1.

53. EXEC. REP. NO. 106-2, at 35 (1999).

54. *Id.*

55. *Id.* at 36.

56. Amended Protocol II, *supra* note 5, art. 7, para. 3.

ter. The article prohibits the transfer of all mines the use of which is prohibited by Amended Protocol II; for example, anti-personnel mines that do not meet the detectability standards of the Technical Annex, remotely-delivered anti-personnel mines that do not have a self-destruct or self-neutralization feature in accordance with the Technical Annex, and all mines that are specifically designed to be detonated by the presence of common mine detectors.[57]

Article 9

Article 9 consists of three paragraphs and addresses the crucial issue of the recording and subsequent use of information on minefields, mined areas, mines, booby-traps, and other devices. Paragraph 1 lays the foundation:

> All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.[58]

The Technical Annex provides comprehensive treatment on recording requirements for both other than remotely-delivered mines and for remotely-delivered mines.

> Recording of the location of *mines other than remotely-delivered mines*, minefields, mined areas, booby-traps, and other devices shall be carried out in accordance with the following provisions:
>
> (i) the location of the minefields, mined area, and areas of booby traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points;
>
> (ii) maps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas, booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent; and
>
> (iii) for purposes of detection and clearance of mines, booby-traps, and other devices, maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all these weapons laid. Whenever feasible the minefield record shall show the exact location of every mine, except in row minefields where the row location is sufficient. The precise location and operati mechanism of each booby-trap laid shall be individually recorded.[59]

The requirements for marking remotely-delivered minefields are found in paragraph one (b) of the Technical Annex and were discussed above under Article 7.

Paragraph two of Article 9 requires the parties to the conflict to retain all records concerning such minefields and to take all necessary measures to protect civilians from the effects of such areas after the cessation of hostilities.[60] The same paragraph requires the parties to share such information with the other parties to the conflict as well as with the Secretary-General of the UN–but only after cessation of hostilities.[61]

Articles 10

Article 10 consists of four paragraphs and describes th responsibilities of the parties to a conflict for removal of mines and clearance of minefields. The first paragraph lays the groundwork:

> Without delay after the cessation of activ hostilities, all minefields, mined areas, booby-traps, and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.[62]

Other paragraphs in the article describe aspirational goals of international cooperation between the belligerent parties and international organizations on technical and material assistance concerning the clearance of active minefields.

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57. EXEC. REP. NO. 106-2, at 37.

58. Amended Protocol II, *supra* note 5, art. 9, para. 1.

59. *Id.* technical annex, para. 1(a).

60. *Id.* art. 9, para. 2.

61. *Id.* para. 2

62. *Id.* art. 10, para. 1.

Articles 11-14

Articles 11 through 14 describe higher echelon mine issues that, although important, the operational law practitioner is unlikely to encounter. Article 11 describes technological cooperation and assistance each nation shall endeavor to furnish to each high contracting party and to the UN database on mine clearance systems.[63] Article 12 requires each high contracting party to the conflict to provide extensive information concerning minefields to (1) any UN force performing peace-keeping, observation or similar function in accordance with the Charter of the UN; (2) any humanitarian and fact-finding mission of the UN system; (3) missions of the International Committee of the Red Cross; and (4) other humanitarian missions and missions of enquiry.[64] Article 13 discusses consultation of the high parties and mechanisms, such as annual conferences, to ensure the continual updating of Amended Protocol II.[65] Article 14 discusses the compliance of the parties and requires each high contracting party to take appropriate steps to prevent and suppress violations of Amended Protocol II.[66]

Non-Lethal Weapons

Non-lethal weapons were an emerging concept at the time Amended Protocol II was negotiated, and were not a topic of discussion during the review conference. The crucial issue addressed by Amended Protocol II was the indiscriminate effect of irresponsible use of conventional anti-personnel mines. However, non-lethal weapons are designed specifically for the purpose of minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment.[67] Therefore, the United States' ratification of Amended Protocol II contained a statement of understanding that it does not consider Amended Protocol II to be relevant to non-lethal devices designed to temporarily incapacitate or otherwise affect a person, but not to cause permanent incapacity.[68] Recent reviews by the International and Operational Law Division of the Office of The Judge Advocate General of non-lethal weapons incorporate this understanding.[69]

Conclusion

The Amended Mines Protocol II to the Certain Conventional Weapons Convention represents a significant improvemen over the original Protocol II, particularly in the areas of recording and marking of minefields, the scope of application of the treaty, and the new restrictions on the use of remotely-delivered mines. Although the practitioner must remember that current U.S. policy concerning non-self-destructing anti-personnel mines renders some articles of Amended Protocol II moot many of the articles still have full application. Amended Protocol II is also a valuable resource for use in defining such terms of art as anti-personnel mine, booby-trap, military objective, and remotely-delivered mine. Given the continuing international effort to ban all anti-personnel landmines, it is important that judge advocates can clearly articulate the many positive steps the United States has taken to lessen the impact of landmines. Amended Protocol II is one of the most significant of these steps. The treaty also stands as a clear rebuttal to those in the international community who accuse the United States of inactivity on the issue of landmines.

63. *See id*. art. 11.

64. *See id*. art. 12.

65. *See id*. art. 13.

66. *See id*. art. 14.

67. U.S. DEP'T OF DEFENSE, DIR. 3000.3, POLICY FOR NON-LETHAL WEAPONS, para. C (9 July 1996).

68. EXEC. REP. NO. 106-2 (1999).

69. *See* Memorandum, International and Operational Law Division, Office of The Judge Advocate General to The Judge Advocate General, subject: Cannister Launched Area Denial System (CLADS) (6 July 1999)

Forfeitures, Recommendations, and Actions; Discretion to Insure Justice and Clemency Warranted by the Circumstances and Appropriate for the Accused

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Introduction

Numerous records of trial reveal that judge advocates in the field confuse forfeitures adjudged by a court-martial and forfeitures resulting only by operation of law. Further, they confuse traditional methods of granting clemency (all still available) with deferment and waiver of forfeitures required by operation of law. These misunderstandings lead to ultra vires actions by convening authorities. When appellate courts return these cases to convening authorities due to improper actions, some staff judge advocates (SJAs) may be tempted to advise convening authorities to refrain from granting warranted and appropriate clemency. The distinctions between types of forfeitures and methods of clemency available to convening authorities are set forth below. Congress vested the discretion to grant warranted clemency in convening authorities.[1] However, Congress also required that convening authorities obtain and consider th advice of their SJAs prior to exercising this discretion.[2]

This article highlights the types of clemency available to convening authorities–"deferments," "waivers," and "disapprovals, commutations, and suspensions." The applicability and limitations of each type of action available, considerations in determining what type of relief the convening authority wishes to grant, when the convening authority may act, what directions if any must be included in the action, and what must be included in the convening authority's action under Rule for Courts-Martial (R.C.M.) 1107(f)(4)(E) will be examined for each.

Types of Clemency

A convening authority has the authority to affect forfeitures adjudged by a court-martial or resulting only by operation of law (and not adjudged by the court-martial) in three ways. First, the convening authority may defer both (1) forfeitures adjudged by the court-martial, and (2) forfeitures required by operation of law, until the date that action on the sentence is taken.[3] Second, the convening authority may waive forfeitures required by operation of law.[4] Finally, the convening authority may disapprove, commute, or suspend forfeitures adjudged by the court-martial in whole or in part.[5]

Deferments

A deferment leaves money that would otherwise be forfeited, in the hands of the accused. Deferments apply to both adjudged forfeitures and forfeitures required by operation of law.[6] However, any deferment should specify whether it is meant for adjudged forfeitures, forfeitures required by operation of law, or both. Depending on the adjudged sentence deferment of one type of forfeiture, without the deferment of the other, may have little or no effect.[7]

In 1996, Congress amended Article 57(a) of the Unifor Code of Military Justice (UCMJ) to make forfeitures effective either fourteen days after the sentence is adjudged by a court-martial or when the convening authority takes action in th case, whichever occurs earlier. Until this change, forfeitures did not take effect until the convening authority took action, which meant the accused often retained the privilege of his pay for up to several months. The intent of the amendment to Article 57(a) was to change this situation so that the desired punitive and rehabilitative impact on the accused occurred more quickly. Congress desired, however, that a deserving accused be permitted to request a deferment of any adjudged forfeitures, and that a convening authority might mitigate the effect of Article 57(a).[8]

1. *See* UCMJ art. 60(c) (West 1998); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(2) (1998) [hereinafter MCM] (convening authorities shall approve the sentence warranted by the circumstances and appropriate for the accused) R.C.M. 1107(b)(1) discussion.

2. *See* UCMJ art. 60(d); MCM, *supra* note 1, R.C.M. 1106(a), (d)(1), (3)(F).

3. UCMJ arts. 57(a)(2), 58b(a).

4. *Id.* art. 58b(b).

5. *Id.* art. 60(c); MCM, *supra* note 1, R.C.M. 1107(d)(1).

6. Two-thirds of pay in the case of a special court-martial and total pay and allowances at a general court-martial.

7. *See Disapproval* section, *infra.*

Like adjudged forfeitures, forfeitures required by operation of law may be deferred. Any deferment of forfeitures required by operation of law follows the same rules as those for adjudged forfeitures.[9]

Article 57 does not, however, create a permanent statutory authority within the convening authority that allows him t defer forfeitures. The authority to defer forfeitures only accrues to the convening authority upon application by an accused.[10] Therefore, a convening authority may only defer forfeitures if the accused specifically requests .Further, deferral of forfeitures is meant for a deserving accus ed.Therefore, upon the granting of a deferral, the accused continues to draw the pay that would have otherwise been forfeit ed.Upon the granting of a deferral request, whether of adjudged forfeitures, forfeitures required by operation of law, or both, the convening authority has no authority to direct that the payment be paid to the dependents.[11]

Once the convening authority takes action, any deferment is automatically canceled.[12] In all other cases, the deferment continues until it expires by its own terms, or it is rescinded. Unlike waivers, there is no six-month limitation on deferments.

On deferral requests acted on after 27 May 1998, the decision of the convening authority acting on the request shall be subject to judicial review, but only for abuse of discretion.[13] Therefore, if a deferment request is denied, a written basis should be attached to the record of trial.[14] The granting of a deferment should be reported in the convening authority's action under R.C.M. 1107(f)(4)(E), if it occurred prior to 27 May 1998. If it occurred on or after 27 May 1998, it must be included.[15] Adjudged forfeitures cannot be deferred and suspended at the same time.[16]

Waivers

A waiver leaves money, that would otherwise be forfeited, in the hands of the accused's dependen ts.Waivers apply only to forfeitures required by operation of law.Adjudged forfeitures cannot be waived; they must be disapproved, commuted or suspended, or deferred prior to act ion.If forfeitures are adjudged and the other punishment adjudged brings the sentence within the parameters of Article 58b(a)(2) of the UCMJ, a waiver of forfeitures required by law will have no effect on the adjudged forfeitures.[17]

Article 58b permits the convening authority to waive any and all forfeitures required by operation of law[18] for a period not to exceed six months. T he purpose of such waiver is to provide support to some or all of the accused's dependents[19] when circumstances warrant. The convening authority directs the waiver and identifies those dependents who shall receive the payments. The direction should identify the dependents by name, and state the amount and number of months for which the waiver and payment shall apply.

No request for waiver need be made. Article 58b(b) gives the convening authority, the authority to waive forfeitures required by Article 58b(a) upon motion of the accused, th accused's dependents, any other party, or upon his own initiative.[20] However, the convening authority does not have the authority to waive forfeitures unless the accused has dependents. The maximum period of any waiver is six months, and

8. A request for deferment of forfeitures may be granted or denied at any time between adjournment of the court-martial and approval of the sentence by the action of the convening authority. UCMJ arts. 57(a)(2), 58b(a); MCM, *supra* note 1, R.C.M. 1101(c)(2), (6).

9. UCMJ art. 58b(a)(1).

10. *Id.* art. 57.

11. Thus, if the desired result is to provide for an accused's dependents as soon as possible after the sentence is adjudged; in most cases, if the accused requests deferment of forfeitures, the adjudged forfeitures may be deferred and the forfeitures required by operation of law may be waived. *See Waiver* section, *infra.*

12. UCMJ art. 57(a)(2). Thus, if continued support to dependents is desired, at least a portion of the adjudged forfeitures must be disapproved, commuted, or suspended. *See Waiver* section, *infra.*

13. MCM, *supra* note 1, R.C.M. 1101(c)(3).

14. *Id.* discussion.

15. *Id.* R.C.M. 1101(c)(4).

16. *Id.* R.C.M. 1101(c)(6) discussion.

17. *But see supra* notes 11 and 12.Addi tionally, one panel of the Army Court of Criminal Appeals has stated in dicta that when adjudged forfeiture s are approved at action a waiver is generally unavailable because there are no forfeitures required by operation of law to waive.*See United States v. Kolodjay*, __M.J.__, No. ARMY 9700389, 1999 CCA LEXIS 313, at *13 (29 Dec. 1999). (B ut consider the concept of a springing executive interest.).

18. UCMJ art. 58b(a).

19. *See* 37 U.S.C.A. § 401 (West 2000) (defining dependents).

the convening authority must direct which dependents are to receive the pay. This direction cannot, however, be accomplished until fourteen days after the sentence is adjudged.[21]

All such waivers must be included in the action.[22] The directions normally should not be included in the action.[23]

Disapprovals, Commutations, and Suspensions

Disapprovals, commutations, and suspensions apply only to the adjudged sentence and have no direct effect on forfeitures required by operation of law. Thus, if a sentence described in Article 58b(a)(2)[24] of the UCMJ is adjudged and also includes total forfeitures, disapproval, commutation, or suspension of the forfeitures will have no real effect. If any of these actions are taken, the adjudged forfeitures will not be imposed, but they will simply be replaced by forfeitures required by operation of law.[25] If the disapproval or commutation moves the punishment outside the parameters of Article 58b(a)(2), however, forfeitures will no longer be required by operation of law.[26] A suspension, however, cannot directly move the sentence outside the parameters of Article 58b(a)(2).[27] However, if a suspension becomes a remission, prior to promulgation, the sentence can be moved outside the parameters of Article 58b(a)(2).[28]

Disapprovals, commutations, suspensions, and remissions must be noted in the action, or in the promulgating order if done after the initial action.[29]

Recommendations and Conclusions

Convening authorities have broad discretion to grant or deny clemency, and to ensure discipline and justice for the command, the military community, the accused soldier, and that soldier's dependents. The UCMJ and Rules for Courts-Martial provide numerous and diverse mechanisms that allow convening authorities to achieve almost any goal desired. Staff judg advocates have the duty of ensuring that convening authorities are properly and fully advised on all of these methods, and specifically advised as to which method the SJA believes is appropriate in an individual case. It is the responsibility of SJAs to fully advise convening authorities on the just and proper–not the easy–course of action. Likewise, a convening authority should never deny an accused subordinate or a subordinate's dependents warranted clemency support solely out of fear of creating error. The broad discretion to grant clemency a financial relief was placed with the convening authority because Congress believed that these senior military leaders, with their broad experience and advice of experienced SJAs, would insure justice by granting warranted clemency in appropriate circumstances. Staff judge advocates simply need t understand the different methods, purposes, limitations, and procedures for each type of relief. Respect for the military justice system, and thus, good order and discipline, morale, and respect for the military, depends on such understanding and sound advice.

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20. UCMJ art. 58b(b).

21. MCM, *supra* note 1, R.C.M. 1101(d)(1).

22. Neither statute nor rule specifically requires that waivers be included in an action. A waiver does, however, change the total amount of forfeitures. Since the United States Court of Appeals for the Armed Forces has ruled that forfeitures required by operation of law are punishment (*United States v. Gorski*, 47 M.J. 370, 373 (1997)), and all punishments changed by the convening authority must be included in his action, s*ee* R.C.M. 1107(f) waivers.

23. The directions do nothing to change the punishment, and therefore, add nothing to the action. They may, as the beneficiary othe waiver is often a victim, violate important privacy interests or even disclose a victim's location to the accused unnecessarily.

24. Confinement for over six months, a punitive discharge combined with confinement, or death.

25. For example, if the adjudged sentence is ten months confinement, a bad conduct discharge, and total forfeitures, disapproval of adjudged forfeitures, with no other action, will have no real effect because forfeitures by operation of law will remain in effect.

26. Again, with the same adjudged sentence of ten months confinement, a bad conduct discharge and total forfeitures, disapproval of the bad conduct discharge and approval of only four months of the adjudged confinement will bring the sentence outside the parameters that impose forfeitures by operation of law.

27. Thus, in the example in note 26, if the convening authority suspended, rather than disapproved, the punitive discharge and confinement beyond four months, the suspension would have no direct effect, and forfeitures required by operation of law would still occur.

28. Thus, looking to the example in note 27, while the initial action would have no direct effect on the forfeitures required by o peration of law, if the period of suspension is successfully completed and becomes a remission (*see* MCM, *supra* note 1, R.C.M. 1108), the sentence is then moved outside the parameters of Article 58b(a)(2). The accused is then due the pay and allowances he would have been paid, but for the forfeitures required by operation of law, for the period which such forfeitures were in effect. UCMJ art. 58b(c).

29. MCM, *supra* note 1, R.C.M. 1107(f), 1114.

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
Purpose	To permit a convening authority to mitigate the effect of Article 57(a) UCMJ, upon request of a deserving accused.	To provide support to some or all of the accused's dependents when circumstances warrant.	To approve only that sentence which the convening authority in his sole discretion, after considering all relevant factors (including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency), determines is warranted by the circumstances of the offense and appropriate for the accused.	To change one form of punishment to a less severe punishment of a different nature.	To grant the accused a probationary period during which the suspended part of an approved sentence is not executed.

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
Limitations	1. The convening authority has no authority to grant a deferment unless the accused requests the deferment. 2. Any grant should specify whether it applies to adjudged forfeitures, forfeitures required by operation of law, or both. 3. Cannot be directed to dependents. 4. Adjudged forfeitures cannot be deferred and suspended at the same time. 5. Can only be granted until action and action automatically cancels any deferment of forfeitures. 6. Subject to judicial review and when a request is denied a written basis must be attached to the record of trial.	1. Applies only to forfeitures by operation of law (adjudged forfeitures cannot be waived). 2. Must be directed to dependents. (If an accused does not have dependents, forfeitures cannot be waived. 4. Cannot be accomplished until fourteen days after the sentence is adjudged. 5. Can only be granted for a period of six months.	1. Cannot be accomplished until action. 2. Acts as a withholding unless combined with a deferment. 3. Cannot directly affect forfeitures required by operation of law. 4. No statutory or regulatory means to ensure that the pay is going to the dependents.	1. Cannot be accomplished until action. 2. Acts as a withholding unless combined with a deferment. 3. Cannot directly affect forfeitures required by operation of law. 4. No statutory or regulatory means to ensure that the pay is going to dependents. 5. Less severe punishments of forfeitures are usually restricted to restriction, hard labor without confinement and reprimand.	1. Cannot be accomplished until action. 2. Acts as withholding unless combined with a deferment. 3. Cannot directly affect forfeitures required by operation of law. 4. No statutory or regulatory means to ensure that the pay is going to dependents.

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
Common Pitfalls	1. Convening authority does not specify which forfeitures (adjudged or those required by operation of law) he intends to defer. Specify one, the other or both. 2. Deferments do not live past action, if a convening authority wishes the accused to retain any or of all of his pay after action, traditional clemency must be granted at the time of action. 3. Convening authority wants to direct that pay goes to dependents. This cannot be accomplished with a deferment. Deferred forfeitures go to the accused. If forfeitures are adjudged, no pay can be directed to the dependents unless, there are also forfeitures required by operation of law and: a. The accused requests deferment of forfeitures, deferment of adjudged forfeitures is granted, and a waiver of forfeitures required by operation of law is granted; or b. Action is taken, granting traditional clemency and waiving forfeitures required by operation of law. 4. No written basis is given for a denial.	1. Convening authority grants a waiver prior to fourteen days after the sentence. 2. Convening authority refers to a request for waiver or the granting of a waiver as a deferment. 3. Convening authority attempts to waive adjudged forfeitures. 4. Convening authority attempts to grant a waiver when an accused does not have dependents per 37 U.S.C. § 401. 5. Convening authority waives forfeitures required by operation of law without taking any action as to adjudged forfeitures. 6. Convening authority attempts to waive forfeitures required by operation of law and defer adjudged forfeitures without a request from the accused. 7. Convening authority grants a waiver without directions as to which dependents are to receive the pay, amounts, and duration.	1. Convening authority does not disapprove adjudged forfeitures in conjunction with a waiver of forfeitures requried by operation of law.	Convening authority does not commute adjudged forfeitures in conjunction with a waiver of forfeitures required by operation of law.	

Considerations	Types of Clemency				
	Deferment	Waiver	Traditional		
			Disapproval	Commutation	Suspension
When a convening authority may act	Upon request of the accused.	At any time between fourteen days after the sentence is adjudged until action.	At action.	At action.	At action.
Include in action	Yes.	Yes, but not the directions.	Yes.	Yes.	Yes.

Labor and Employment Law Note

To Talk or Not to Talk: How Do You Know Whether an Issue is Negotiable?

Introduction

Title VII of the Civil Service Reform Act of 1978,[1] also known as the Federal Service Labor-Management Relations Statute (Statute), requires federal agencies to negotiate in good faith with labor unions recognized as exclusive bargaining representatives for agency employees.[2] Generally, this duty to negotiate includes bargaining with the union about issues that affect the day-to-day working conditions of bargaining unit employees.[3] While the duty to bargain is very broad, it is not without limitation. This note reminds labor counselors that agencies are not required to negotiate over any matters that excessively interfere with their management rights or that conflict with federal statutes. It also explains the rules surrounding the duty to bargain over issues that conflict with government- and agency-wide regulations.[4] Finally, because agencies and labor counselors may still have questions on whether a specific policy or provision is negotiable, this note briefly explains the new procedures for obtaining a negotiability determinati from the Federal Labor Relations Authority (Authority).

Management Rights

In enacting the Statute, Congress recognized that not every issue affecting conditions of employment should be negotiable.[5] Some issues are so inherent to an agency's right to maintain control over its organization, that Congress specifically excluded them from the negotiation process. These rights have become known as "management rights," and agencies do not have a duty to negotiate over issues that interfere with them. For example, agencies have the right to determine their mission, budget, organization, number of employees, and internal security practices.[6] Agencies also have the right to hire, assign, direct, layoff, and retain employees in their agencies,[7] and to make decisions with respect to contracting out[8] and filling positions.[9]

1. 5 U.S.C.A. §§ 7101–7135 (West 2000).

2. Specifically, 5 U.S.C.A. § 7114(a)(4) states that "[a]ny agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement . . . ."

An "appropriate unit" is a "grouping of employees found to be appropriate for purposes of exclusive recognition." 5 C.F.R. § 2421.14 (2000). The Federal Labor Relations Authority (Authority) determines the appropriateness of any unit. 5 U.S.C.A. § 7112(a). In making this determination , the Authority generally considers whether there is a clear and identifiable community of interest among the employees in the unit, whether the unit would promote the effective dealings with the agency involved, and whether the unit promotes the efficiency of operations of the agency involved. *Id. See* Department of Trans. and AFGE Local 3313, 5 F.L.R.A. 646 (1981) (finding that certain headquarters employees and field office employees within the same agency did not constitute an appropriate bargaining unit under the three criteria in § 7112(a)).

3. The duty to negotiate in good faith includes the obligation to negotiate on any condition of employment. 5 U.S.C.A. § 7114(b)(2). Condition of employment means "personnel policies, practices, and matters . . . affecting working conditions." *Id*. § 7103(a)(14). The term does not include policies, practices, and matters related to political activities, position classifications, or matters specifically provided for by federal statute. *Id.* § 7103(a)(14)(A)-(C).

In determining what conditions of employment to discuss with exclusive representatives, labor counselors should focus on those conditions that affect the specific bargaining unit represented by a specific union representative. Agencies should not negotiate with exclusive representatives over conditions of employment concerning individuals not in the relevant bargaining unit. *See* AFGE v. FLRA, 110 F.3d 810 (D.C. Cir. 1997) (determining that a proposal trying to regulate the conditions of employment of supervisors by redefining reduction in force competitive areas was outside the duty to bargain). Similarly, agencies may refuse to bargain over issues that affect only activities occurring after duty hours. *See, e.g.,* Antilles Consol. Educ. Ass'n and Antilles Consol. School Sys., 22 F.L.R.A. 235 (1986) (holding that a proposal for access to base facilities during non-duty hours did not affect conditions of employment).

Even if a matter meets the definition of condition of employment, an agency does not have a duty to bargain over proposed changes that will have a *de minimis* effect on bargaining unit employees. *See, e.g.,* GSA Region 9 and NFFE Local 81, 52 F.L.R.A. 1107 (1997) (deciding that an agency is not required to bargain over temporarily relocating a bargaining unit employee from one building to another because the effect was *de minimis*); Department of Health and Human Servs. and AFGE, 24 F.L.R.A. 403 (1986) (changing an employee's title, but not her duties, did not create a duty to bargain).

4. This note does not address permissive topics that an agency may elect to negotiate pursuant to 5 U.S.C.A. § 7106(b)(1) or the impact of President Clinton's eExecutive order called "Labor-Management Partnerships" on the election to bargain. Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (1993).

5. Congress recognized that a powerful union could abuse the federal government to the detriment of the public interest if it did not provide agencies with the discretion they needed on issues like agency operations, contracting out, and management rights. Major Michael R. McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL. L. REV. 169, 199 (1990).

6. 5 U.S.C.A. § 7106(a)(1).

The last management right listed in the Statute gives agencies the right "to take whatever actions may be necessary to carry out the agency mission during emergencies."[10] In the past, union attempts to define the term "emergency" failed because the Authority determined that they interfered with the rights of the agencies in this area.[11] Recently, the Authority stated it would no longer follow this precedent. Instead it will determine whether the provision is contrary to the management right at issue.[12] If it is, then the issue will not be negotiable.

Agencies should not agree to union proposals that interfere with the exercise of their management rights.[13] If an agency makes a management rights decision, however, it must negotiate the procedures that management officials will use when executing its decision and any appropriate arrangements needed for employees who are adversely affected by it.[14] This process is commonly known as impact and implementation bargaining.[15] A recent example demonstrating an agency's duty to negotiate the impact and implementation of a management right involves the Army's new mandatory drug-testing policy for certain civilian employees.[16]

As part of its right to establish internal security procedures, the Army designated certain civilian positions as subject to mandatory drug testing because they have critical safety or security responsibilities.[17] Under the Statute, the Army has no duty to bargain with unions about whether to have such testing.[18] Because the drug-testing policy changes the conditions of employment for some bargaining unit employees, Army activities must give the relevant union representatives notice of any locally-developed procedures to implement the drug-testing policy and afford the union a reasonable opportunity t review the new procedures and to request bargaining.[19] If a union asks to bargain, the activity must meet and negotiat implementation procedures with the exclusive representative. During the course of the negotiations, the activity may no implement the proposed changes for bargaining unit employees.[20] If a union does not request bargaining within a reasonable period, the activity may implement the proposed changes.

Conflicts with Federal Statutes

Not only are management rights excluded from the duty to bargain, but so are any matters that conflict with federal laws.[21] For example, in *AFGE Local 1547 and Luke Air Force Base*, the Authority examined the negotiability of a union proposal that would require the agency to buy or reimburse bargaining

7. *Id*. § 7106(a)(2)(A). The Statute also affords agencies the right to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees. *Id*.

8. *See id*. § 7106(a)(2)(B). Agencies can also assign work and determine the personnel who will perform agency operations. *Id*. *See also* Office of Personnel Management, *Contracting Out* (visited Jan. 5, 2000) <http://www.opm.gov/cplmr/html/CONTR.htm> (listing negotiability cases involving the contracting out process).

9. 5 U.S.C.A. § 7106(a)(2)(C). Selections for appointments may be made from among properly ranked and certified candidates for promotion or from any other appropriate source. *Id.* While union attempts to limit the pool of eligible employees will usually fail, the Authority may find a proposal to expand the applicant pool negotiable. *See* AFGE Locals 222 and 2910 and Department of Hous. and Urban Dev., 54 F.L.R.A. 171 (1998) (finding that a proposal requiring an agency to consider applications from field office employees expands the applicant pool and does not interfere with an agency's right to select).

10. 5 U.S.C.A. § 7106(a)(2)(D).

11. *See* NFFE Local 1655 and Department of Defense Nat'l Guard Bureau, 49 F.L.R.A. 874 (1994) (holding that a provision that defines "emergency situation" affects management's right to take action during an emergency by limiting its authority to assess whether an emergency exists); Tidewater Virginia Fed. Employees Metal Trades Council and Norfolk Naval Shipyard, 31 F.L.R.A. 131 (1988) (determining that by defining "emergency," a provision would preclude the agency from independently assessing whether an emergency exists and therefore interfere with management's rights); AFGE Locals 696 and 2010 and Naval Supply Center, 29 F.L.R.A. 1174 (1987) (finding the term "emergency" nonnegotiable because it limits management's right to independently assess whether an emergency exists).

12. IBEW Local 350 and Department of the Army Corps of Eng'rs, 55 F.L.R.A. 243, 245 (1999) (finding that not all definitions of "emergency" affect management's rights and directing the agency to rescind its disapproval of a definition that allows it to act in all emergencies).

13. In the partnership situation, labor counselors may find that agencies and exclusive representatives are discussing issues involving all areas, including management rights. However, any agreements reached must still not affect the exercise of management rights.

14. 5 U.S.C.A. § 7106(b)(2)-(3). Essentially, the agency gives the exclusive representative notice of any arrangements or procedures it wants to use and affords the exclusive representative the opportunity to bargain. If the exclusive representative does not ask to bargain within a reasonable time, the agency can implement the proposed changes.

15. McMillion, *supra* note 5, at 199.

16. U.S. DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, para. 5-14b (C3, 26 Apr. 1999).

17. *Id.* These positions stem from those identified in section 7 of President Reagan's executive order on a Drug-Free Federal Workforce. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

18. An agency's decision to implement a drug-testing program is an exercise of the agency's right under 5 U.S.C.A. § 7106(a)(1) to establish internal security practices. AFGE and Department of Educ., 38 F.L.R.A. 1068, 1076 (1990).

unit employees for motorcycle safety equipment that the agency required beyond state law requirements.[22] The agency asserted that federal law prohibited it from buying the requested equipment unless the United States government, and not the employee, received the primary benefit of it.[23] The union responded that since it was an agency requirement to have the extra equipment, not based on any law, rule, or regulation, the use of the additional items was for the agency's sole benefit.[24] Ultimately, the Authority found that the proposal was outside the agency's duty to bargain because it was contrary to the federal law.[25] If the union had shown how the equipment would have been used in the performance of agency work or how the equipment was essential to the transaction of official government business, then the Authority may have ruled in its favor.[26]

Conflicts with Government- and Agency-wide Regulations

Government-wide rules and regulations also bar negotiation over union proposals that conflict with them.[27] If the government-wide rule or regulation is prescribed after the negotiation of a collective bargaining agreement (CBA), however, the CBA will override any conflicting provision in the government-wide rule or regulation for the term of the agreement.[28] When the

19. While the substance of the drug-testing policy is not negotiable, the Authority has found negotiable several issues related to such policies. Examples of issues the Authority has found to be negotiable include whether a union representative can be present at the testing, whether employees will be granted administrative leave to participate in the testing or related counseling, whether employees will be told what drugs are being tested for, whether employees can grieve the inclusion of their positions as testing designated positions, and whether an agency will help an employee get to a testing site. *See* AFGE Local 1661 and Department of Justice Fed. Bureau of Prisons, 31 F.L.R.A. 95 (1988) (addressing a proposal that requires employees being tested to "be told exactly what dug(s) or class of drugs they are being tested for"); NTEU and Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms, 41 F.L.R.A. 1106 (1991) (discussing proposals requiring the presence of a union representative and granting administrative leave); AFGE Local 446 and Department of Interior Nat'l Park Service, 43 .L.R.A. 836 (1991) (discussing proposals that allow employees to grieve the designation of their positions as sensitive for drug-testing purposes and require the agency to transport employees to an off-site testing facility).

20. *See* International Fed'n of Prof'l and Technical Eng'rs Local 128 and Department of Interior Bureau of Reclamation, 39 F.L.R.A. 1500 (1991) (stating that a proposal that delays implementation of a drug-testing program until after a satisfactory resolution of the negotiations is negotiable because it merely restates an agency's duty to bargain and essentially maintains the status quo under the Statute); International Ass'n of Machinists and Aerospace Workers and Department of the Army, Aberdeen Proving Ground, 31 FLR.A. 205 (1988), *remanded as to other matters sub no* ., Department of the Army, Aberdeen Proving Ground v. FLRA, No. 88-1311 (D.C. Cir. July 18, 1988), decision on remand, 33 F.L.R.A. 512 (1988) (finding negotiable a proposal that delayed implementation of the Agency's drug-testing program until negotiations were finished with available impasse services).

The duty to maintain the status quo continues through negotiations and impasse if no agreement can be reached. If an agency fails to maintain the status quo, it will violate its duty to bargain in good faith under 5 U.S.C.A. § 7116(a)(5). However, the Authority recently decided that a failure to maintain the status quo will not automatically violate the duty to cooperate in impasse procedures under *id.* § 7116(a)(6). Now, agencies must actually fail to cooperate with an impasse procedure or decision before this violation will be found. *See* Department of Justice Immigration and Naturalization Serv. and National Border Patrol Council, 55 F.L.R.A. 69 (1999) (remanding the case to the administrative law judge to apply this new standard of review to the alleged impasse violation at issue).

An exception to the obligation to maintain the status quo exists for exigencies of agency operations. To prevail on this defense, an agency must offer affirmative proof that an "overriding exigency" existed that required immediate implementation. Department of Justice Immigration and Naturalization Serv. and AFGE Nat'l Border Patrol Council, 55 F.L.R.A. 93 (1999) (finding that the agency committed an unfair labor practice when it unilaterally implemented a change that allowed use of side handle batons and it could not show that the change was necessary for the agency to perform its function).

21. 5 U.S.C.A. § 7117(a).

22. AFGE Local 1547 and Department of the Air Force, Luke Air Force Base, 55 F.L.R.A. 684 (1999).

23. *Id.* at 685. The first statute governing safety-related equipment relied on by the agency was 29 U.S.C.A. § 668(a) (West 2000) which requires agencies to:

> establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6 [29 U.S.C.A. § 655]. The head of each agency shall (after consultation with representatives of the employees thereof) (1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6 [29 U.S.C.A. § 655]; (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees . . . .

The agency also relied on 5 U.S.C.A. § 7903, Protective Clothing and Equipment, which states: "Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks . . . ."

24. *Luke Air Force Base*, 55 F.L.R.A. at 685. In reaching its decision, the Authority relied on the statutes cited by the agency and on Comptroller General opinions that authorized agencies to spend government funds for equipment only if "(1) the Government, rather than the employee, receives the primary benefit of the equipment; and (2) the equipment is not a personal item that should be furnished by the employee." *Id.* (citing AFGE Council 214 and Department of the Air Force, Wright Patterson Air Force Base, 53 F.L.R.A. 131 (1997); 63 Comp. Gen. 278 (1984)).

25. *Luke Air Force Base*, 55 F.L.R.A. at 686.

26. The union would also have had to show that the agency required unit employees to ride motorcycles on the agency's facilities or otherwise use them in the performance of their work. *Id.* at 685.

CBA expires, the government-wide regulation will usually become enforceable "by operation of law."[29] A government-wide regulation may not become enforceable if a CBA requires the agency to tell the union it wants to reopen the contrac before it expires and the agency fails to do so.[30] Labor counselors should keep these rules in mind when advising their agencies on how to implement recently issued government-wide regulations involving the use of government credit cards,[31] smoking in federal buildings,[32] conference planning,[33] and travel reimbursements.[34] Labor counselors should also remember that while the substance of new government-wide rules or regulations may not be negotiable, the impact and implementation of them at the local level may be.

Agency-wide rules and regulations are not afforded as much deference as government-wide regulations in the negotiation process.[35] While government-wide regulations are immediately enforceable unless they conflict with a current CBA, agencies must negotiate changes made by agency-wide rules and regulations unless the agency establishes a "compelling need" for them.[36] To prove a compelling need,[37] an agency must demonstrate one or more of the following criteria:

> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency . . . .
>
> (b) The rule or regulation is necessary t ensure the maintenance of basic merit principles.
>
> (c) The rule or regulation implements a mandate to the agency . . . under law or other outside authority, which implementation is essentially nondiscretionary in nature.[38]

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27. 5 U.S.C.A. § 7117(a). Government-wide regulations are those regulations and official declarations of policy that apply to the federal civilian workforce as a whole and are binding on the federal agencies and officials to which they apply. Defense Contract Audit Agency and AFGE, 47 F.L .R.A. 512, 521 (1993).

28. 5 U.S.C.A. § 7116(a)(7). *See* Department of the Army, III Corps and Fort Hood, and AFGE Local 1920, 40 F.L.R.A. 636, 641 (1991).

29. *III Corps and Fort Hood*, 40 F.L.R.A. at 641 (citing Department of Defense, Defense Contract Audit Agency, and AFGE Local 3529, 37 F.L.R.A. 1218 (1990))

30. *See id.* at 641-42.

31. 65 Fed. Reg. 3054 (2000) (to be codified at 41 C.F.R. pts. 301-51, 301-52, 301-54, 301-70, 301-71, 301-76). The final Government Services Administration rule mandates the use of a government contractor-issued travel charge card for all official travel expenses unless you have an exemption. *Id.* at 3055 (to be codified at 41 C.F.R. § 301.51.1). These rules apply to official travel performed after 29 February 2000, or upon issuance of agency implementing regulations, whichever comes first. *Id.* at 3054.

32. 41 C.F.R. §§ 101.20.1-101.20.3, 63 Fed. Reg. 35,846 (1998). Effective 1 July 1998, this rule prohibits the smoking of tobacco in all interior space owned, rented, or leased by the executive branch of the federal government, and in any outdoor areas under executive branch control in front of air intake ducts.

33. 65 Fed. Reg. 1326 (2000) (to be codified at 41 C.F.R. pts. 301-11, 301-74). Effective 14 January 2000, these rules give specific guidance to minimize overall government expenses associated with conferences. One item of particular interest is the section authorizing agencies to provide light refreshments at official conferences. *Id.* at 1328 (to be codified at 41 C.F.R. § 301.74.11). Light refreshments for morning, afternoon, or evening breaks are defined to include, but not be limited to, coffee, tea, milk, juice, soft drinks, donuts, bagels, fruit, pretzels, cookies, chips, or muffins. *Id.*

34. *See* 65 Fed. Reg. 1268 (2000) (to be codified at 41 C.F.R. pt. 301-10) (increasing the mileage reimbursement rate for use of privately-owned automobiles on official travel from 31 to 32.5 cents per mile effective 14 January 2000); 65 Fed. Reg. 67,670 (2000) (to be codified at 41 C.FR. pts 301-3, 301-10) (updating per diem rates and incidental expenses for official travel performed on or after 1 January 2000); and 64 Fed. Reg. 45,890 (1999) (to be codified at 41 C.F.R. pt. 303-70) (authorizing agencies to pay certain expenses related to the death of certain employees while performing official travel and the transportation of the remains of certain family members).

35. Major command (MACOM), installation, and local rules and regulations are afforded no deference. If an agency wants to institute a local policy that affects the conditions of employment of bargaining unit employees, it must give the union notice of the proposed change and an opportunity to bargain.

36. 5 U.S.C.A. § 7117(b) (West 2000). Initially, there will be a presumption that the agency has a compelling need for the agency rule or regulation until the Authority determines there is no such need. *See id.* § 7117(a)(2). However, agencies that act based on that presumption do so at their own peril because the Authority usually finds that there is no compelling need and that the agency has a duty to bargain.

37. Agencies relying on an agency-wide rule or regulation to argue they do not have a duty to bargain over a specific issue may have to prove a compelling need for the rule or regulation relied upon during a negotiability proceeding or at an unfair labor practice hearing. During a negotiability proceeding, the primary focus of the Authority will be on determining whether there is a statutory duty to bargain over a specific matter. *See infra* text accompanying notes 40-52. If the agency contends there is no duty to bargain because the issue is controlled by an agency-wide rule or regulation for which there is a compelling need, the agency will usually need to build a paper case supporting its position.

At an unfair labor practice hearing, the Authority will focus on whether a party violated its statutory duty to bargain. If the agency relies on an agency-wide regulation to justify its refusal to bargain, then it may need to present documentary evidence and witness testimony proving a compelling need at a hearing before an administrative law judge.

38. 5 C.F.R. § 2424.50 (2000).

If an agency can meet this compelling need standard, it will be exempt from the duty to bargain. Generalized and conclusory reasoning is not enough to support a finding of compelling need.[39] Unless the agency provides the Authority with facts and arguments bearing on those issues, it cannot judge the validity of the agency contentions.[40] If an agency cannot demonstrate a compelling need, it must give the exclusive representative notice of any proposed changes in conditions of employment for bargaining unit employees based on an agency-wide rule or regulation and afford the union the opportunity to bargain.

Negotiability Proceeding

Since its inception in 1979, the Authority has issued over 2000 negotiability decisions.[41] Researching these decisions is one of the best ways to determine whether a topic is negotiable.[42] If a proposal is negotiable, the agency has a duty to bargain with the exclusive bargaining representative until an agreement or impasse is reached. If an agency decides that a proposal is not negotiable, it can refuse to bargain.[43] A union that disagrees with an agency determination that a proposal is not negotiable may ask the Authority for a negotiability determination.[44] Only unions (not agencies or individuals) may file a petition for review of a negotiability issue with the Authority.[45]

Last year, the Authority published negotiability procedures that agencies and unions must follow for petitions filed after 1 April 1999.[46] These procedures significantly expand the amount of information the Authority and the parties will receive during the proceedings and ensure that all participants have a complete understanding of the issue or issues in dispute. For example, once an exclusive representative files a petition for review, the Authority will now schedule a post-petition conference before the agency files its statement of position.[47]

> The purpose of the conference, which may be held in person or telephonically, is to ensure that the parties have a common understanding of the meaning and impact of the proposal or provision at issue; to determine whether there are any factual disputes concerning the proposal or provision; and to discuss other relevant matters, including whether the parties wish to explore alternative dispute resolution.[48]

After the agency files its statement of petition,[49] the union may respond to it.[50] The new rules then allow the agency to file a reply to the exclusive representative's response.[51] Either side may ask to file another submission, but the Authority is not required to grant that request.[52] Once the parties have filed all their submissions, the Authority will have a complete record on which to issue its final decision.

From the time a petition is filed until the Authority issues a decision, either party may request assistance from the Collabo-

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39. PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE 502 (12th ed. 1999).

40. *Id.* (citing AFGE Local 3804 and FDIC, Madison Region, 21 F.L.R.A. 870, 887 (1986)). This limit on the duty to bargain recognizes that within every agency there exists a governmental mission that cannot be compromised or negotiated away, in whole or in part, at the bargaining table. AFGE Local 2953 v. FLRA, 730 F.2d 1534, 1539 (D.C. Cir. 1984).

41. Memorandum from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, subject: Guidance in Determining Whether Union Bargaining Proposals are Within the Scope of Bargaining Under the Federal Service Labor-Management Relations Statute pt. II.C (10 Sept. 1998), *available at* <http:\\www.flra.gov/gc/b_scop_m.html>. *See* U.S. Office of Personnel Management, *Negotiability Determinations by the Federal Labor Relations Authority* (visited Feb. 14, 2000) <http://www.opm.gov/cplmr/html/FLRA7997.html-ssi> (listing summaries of negotiability determinations issued by the Authority from 11 January 1979 through 31 December 1998).

42. While Authority decisions provide agencies with guidance on what is and is not negotiable, labor counselors should remember thatthese are administrative decisions. The Authority may continue to follow its previous decisions on specific issues, but there is nothing that prohibits the Authority from changing its position, as demonstrated by its recent opinion involving the term "emergency" in relation to management rights. *See supra* notes 10-12 and accompanying text.

43. Agencies should notify their MACOM, Field Advisory Services, or Headquarters, Department of the Army, before declaring an issue nonnegotiable to insure agreement with this conclusion.

44. 5 C.F.R. § 2424.20. The union makes this request by filing a petition for review with the Authority. *Id*. The purpose of the petition for review is to initiate a negotiability proceeding and provide the agency with notice that the exclusive representative requests a decision from the Authority that a proposal or provision is within the duty to bargain or not contrary to law. *Id*. § 2424.22.

45. See *id. See also* FLRA, *The "Who, What, Where and How" of Negotiation Issues* (visited Aug. 9, 1999) <http://www.access.gpo.gov/flra/17.html>.

46. 5 C.F.R. § 2424.1. *See also* Memorandum from Elizabeth B. Throckmorton, Acting Director for Civilian Personnel Management and Operations, to Labor Relations Specialists, subject: Revised Negotiability Regulation—Labor Relations Bulletin #409 (8 Feb. 1999) *available at* <http://www.cpol.army.mil/library/bulletins/lrb/lrb-409.html>.

47. *Id.* § 2424.23. All reasonable efforts will be made to schedule the conference within ten days of filing the petition. *Id*. § 2424.23(a).

48. 63 Fed. Reg. 66,405 (1998) (discussing the significant changes made by the final rule).

ration and Alternative Dispute Resolution Program (CADR).[53] The Authority launched this program in January 1996 to provide overall coordination and support for the Authority's labor-management cooperation and alternative dispute resolution efforts.[54] Prior to the 1999 change, the CADR program was not a specific part of the negotiability process. Specific CADR procedures will depend on the case and at what juncture the parties ask for assistance. If the parties agree during the CADR process that an issue is negotiable, or the Authority issues a final decision to that effect, both sides will have the duty to bargain in good faith over the issue. Any refusal to bargain may result in the filing of an unfair labor practice by the aggrieved party.

Conclusion

The rules governing what issues agencies and exclusive representatives must negotiate are well established in the Statute and twenty years of Authority decisions. While even the most seasoned labor counselors may understand that agencies do not have to bargain over management rights or certain rules and regulations, questions may still arise. If they do, labor counselors must help the agency decide whether to negotiate. The exclusive representative may not always agree with the decision reached and, ultimately, the Authority may have to decide the issue. Under the 1999 negotiability procedures, at least the agency can rest assured it will have an opportunity to thoroughly present its case. Major Holly Cook.

Legal Assistance Note

You Mean I Can Go To Jail Too? The Deadbeat Parents Punishment Act: Another Reason Soldiers Need To Take Family Support Obligations Seriously

Commanders and family members have many options to ensure soldiers fulfill their support obligations. *Army Regulation 608-99, Family Support, Child Custody and Paternity*, is in part a punitive regulation[55] requiring soldiers to comply with a valid court order[56] or separation agreement.[57] In the absence of either of these documents, the regulation sets out the soldier's support requirements.[58] Commanders are authorized to exercise any of the administrative, non-judicial, or judicial remedies at their disposal[59] should a soldier fail to fulfill their obligations.

Legal assistance attorneys routinely advise clients on the soldier's support obligations. They help family members deal with the command and the soldier to ensure that they receive

49. The purpose of the agency's statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law. 5 C.F.R. § 2424.24(a). Field Advisory Services or Headquarters, Department of the Army, will file all statements of position for Army activities in negotiability proceedings. U.S. DEP'T OF DEFENSE, DIR. 1400.25-M, DOD CIVILIAN PERSONNEL MANAGEMENT SYSTEM, subch. 711, para. F.6.c(1) (25 NOV. 1996).

50. *Id.* § 2424.25. The purpose of the exclusive representative's response is to inform the Authority and the agency why, despite the agency's arguments in its statement of position, the proposal or provision is within the duty to bargain or not contrary to law, and whether the union disagrees with any facts or arguments in the agency's statement of position. *Id.*

51. *Id.* § 2424.26. The purpose of the agency's reply is to inform the Authority and the exclusive representative whether and why it disagrees with any facts or arguments made for the first time in the exclusive representative's response. *Id.* § 2424.26(a).

52. *Id.* § 2424.27.

53. *Id.* § 2424.10. *See* FLRA (last modified Feb. 8, 2000) <www.flra.gov> (providing further information about the CADR program).

54. FEDERAL LABOR RELATIONS AUTHORITY, ALTERNATIVE DISPUTE RESOLUTION IN THE FLRA AND THE COLLABORATION AND ALTERNATIVE DISPUTE RESOLUTION PROGRAM (CADR) (1999) (on file with author).

55. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994) [hereinafter AR 608-99]. Paragraphs 2-5 (provisions regarding financial support) and 2-9 (provisions regarding child custody) are punitive. *Id.* Additionally, provisions of *AR 608-99* regarding compliance with court orders on financial support, child custody and visitation, paternity, and related matters apply to family members who are command sponsored and reside outside the United States. Noncompliance with such orders may adversely affect their continued entitlement to command sponsorship during their sponsor's military assignment outside the United States. *Id.* at i.

56. *Id.* paras. 2-4a, 2-4e.

57. *Id.* para. 2-3. The Army will not involve itself in disputes over the terms or enforcement of oral financial support agreements. *Id.* para. 2-3a. Where an oral agreement exists and is being followed, the Army will not interfere. *Id.* If a dispute arises concerning an oral agreement, the Army will only require compliance with the provisions of the regulation. *Id.* From a practical perspective, oral agreements are difficult to enforce because of the inherent difficulty in determining the accuracy of their terms. However, if the parties have a written financial support agreement, the amount of financial support specified in the agreement controls. *Id.* para. 2-3b.

58. *Id.* para. 2-6 (setting forth the support amounts a soldier must provide to his family members in the absence of a court order or separation agreement).

59. *See id.* para.1-6. Personnel subject to the Uniform Code of Military Justice (UCMJ) who fail to comply with paragraphs 2-5 or 2-9 are subject to punishment under the UCMJ, as well as to adverse administrative action and other adverse action authorized by applicable sections of the United States Code or federal regulations. *Id.*

their share of financial support. However, the Army regulation is merely an interim measure,[60] and should not be viewed by family members as the solution to their support problems.[61] Family members are encouraged to rely on the Army requirements only until a court order is entered or a separation agreement is established.

Once a court order or separation agreement is in place, the soldier is required to comply with its terms. Should the soldier fail to do so, not only does the commander have the options discussed above[62] available to him, but, in the case of a court order, the family member has additional options as well. If the soldier is at least two months in arrears,[63] the family member can request, through either the court that entered the order or the state child support enforcement agency, that the Defense Finance and Accounting Service (DFAS) initiate an involuntary allotment[64] or a garnishment[65] against the soldier's pay.

Both a garnishment and involuntary allotment are positive steps in the right direction. However, for soldiers who ar intent upon dodging their responsibilities, there are more severe penalties as well. In June 1998, President Clinton signed The Deadbeat Parents Punishment Act[66] to stiffen the penalties imposed on those who fail to take their child support responsibilities seriously. This Act amends the criminal statute for failure to pay child support[67] by increasing the maximum jail sentence[68] and providing for mandatory restitution equal to the total support obligation.[69]

The Act focuses on three categories of deadbeats, and sets forth differing potential punishment ranges for each. The first category is for persons willfully more than one year behind in their child support obligations for a child living in another state, or, if less than one year in arrears, who owe more than $5000.[70] If found guilty, they may be sentenced to a fine and up to six months imprisonment.[71] The second category is for persons travelling to another state, or another country, intending to avoid their child support obligation, and who are more than one year in arrears or owe at least $5000.[72] The third category is for persons more than two years behind on support payments for a child living in another state, or who owe more than $10,000.[73] If found guilty, those persons in the second and third categories, or a person from the first category with a subsequent conviction under this Act, can be fined and imprisoned for not more than two years.[74] In all cases, whenever there is a conviction under this section, the court will order restitution in an amount equal to the support obligation.[75]

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60. *Id.* para. 1-5f.

61. *Id.* There are several reasons for this. First, the Army regulation is effective only against soldiers while they remain in the service; once a soldier leaves military service, the regulation is of no consequence. Family members who have relied on *AR 608-99* as their enforcement mechanism may suddenly find themselves with no means of ensuring that the support continues. Moreover, the amounts required under *AR 608-99* often pale in comparison with amounts ordered by civilian courts, which often use more sophisticated calculations to arrive at circumstance-specific support amounts.

62. *See supra*, note 59.

63. The soldier must be at least two months in arrears for the involuntary allotment or garnishment mechanism to apply. The arrearage must be an amount equal to two months' payment, not a support payment that is an amount less than that required for a two month period. For example, a soldier with a $500 per month support obligation would be considered two months in arrears when the unpaid amount equaled $1000. A soldier with a $500 per month support obligation would not be two months' in arrears if the amount paid each month was slightly less than the full amount, until the total amount of arrearages equaled two months' obligation. *See* AR 608-99, *supra* note 55, para. 1-8a (2); 42 U.S.C.A. § 665 (West 2000).

64. AR 608-99, *supra* note 55, para. 1-8a(1)

65. *Id.* para. 1-8a(2).

66. The Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998) (codified as amended at 18 U.S.C.A. § 228 (West 2000)).

67. 18 U.S.C.A. § 228(c).

68. *Id.*

69. *Id.* § 228(d).

70. *Id.* § 228(a)(1).

71. *Id.* § 228(c)(1).

72. *Id.* § 228(a)(2).

73. *Id.* § 228(a)(3).

74. *Id.* § 228(c)(2).

75. *Id.* § 228(d). The amount of restitution ordered shall be equal to the total unpaid support obligation at the time of sentencing. *Id.*

The Act also presumes that the obligor had the ability to pay the amount of support ordered by the court.[76] This is a rebuttable presumption,[77] with the burden on the soldier to show that the amount ordered was unreasonable and that he was not financially able to pay the ordered amount. From a practical standpoint, any legal assistance client with a child support order that is believed to be unfair, impractical, or difficult to comply with should take immediate action to challenge or modify the order rather than wait until the punitive provisions of the Act come into force.

Family members and soldiers must be counseled on the provisions of The Deadbeat Parents Punishment Act. Family members need to know that there is another level of enforcement available in certain circumstances, and soldiers must be made aware of this additional, and very serious, consequence of avoiding their child support obligations. Major Boehman.

76. *Id.* § 228(b).

77. *Id.*

Note From the Field

Civilian Confinement and R.C.M. 707

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Oh, the life of a trial counsel. Endless hours of boring preparation punctuated by brief moments of pure courtroom exhilaration. But even the best laid plans of the prosecutor can be destroyed in a single Article 39(a) session by a cunning defense counsel who relies on the speedy trial clock to sound its alarm. Quite often, trials are delayed by unforeseen circumstances beyond the government's control. One such situation is the case of the errant accused arrested by civilian authorities after charges have been preferred. The issue the government faces is whether this time in civilian confinement counts as non-excludable delay for R.C.M. 707 purposes. With good accounting procedures and a basic understanding of the law, the government can overcome a motion to dismiss and proceed forward with its case-in-chief.

In the recent case of *United States v. Brown*,[1] an Army officer accused of assaulting a civilian in New Castle, Delaware, deserted his unit and went into hiding for six months in Dover, Delaware. The state police arrested Major Brown on 19 May 1999. During his hiatus, he committed several other criminal acts around the Dover, Delaware, area. Army prosecutors spent several months negotiating with Delaware county and state prosecutors attempting to persuade them to release jurisdiction over these offenses and to release the accused to the custody of the military. Major Brown was released to military control on 16 July 1999. The amount of time spent in civilian confinement totaled fifty-nine days. In an Article 39(a) session, the accused's defense counsel moved to dismiss the assaul charge and its specifications for violating the rule requiring the government to bring an accused to trial within 120 days after preferring charges.[2] The time between preferral and arraignment, including time spent in civilian confinement, totaled 159 days.

According to Rule for Courts-Martial 707, accused shall be brought to trial within 120 days after preferral of charges.[3] All periods of time covered by pretrial delays approved by a military judge shall be excluded when determining whether th period has run.[4] A military judge's decision to grant a delay may be for the purpose of allowing time to secure the availability of an accused to stand trial.[5] An accused makes himself "unavailable" for trial by court-martial if he is held in a state confinement facility pending trial on civilian charges.[6] The military is not responsible for confinement by civilian authorities on civilian charges.[7] This rule applies even in situations where "the accused is initially confined by military authorities for military offenses but released by the military to civilian authorities for civilian offenses."[8]

An accused should not receive a windfall for his own misconduct. The decision to grant a delay after charges have been referred rests solely in the discretion of the military judge; however, the United States Court of Appeals for the Armed Forces (CAAF) now directs military judges to consider both legal and equitable grounds in deciding how to categorize delays.[9] Diligent trial counsel should initiate a dialogue with civilian juris-

1. United States v. Brown, No. 9901186 (Army Ct. Crim. App. filed Feb. 1, 2000).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(a) (1998) [hereinafter MCM].

3. *Id.*

4. *Id.* R.C.M. 707(c).

5. *Id.* R.C.M. 707, discussion.

6. United States v. Bramer, 43 M.J. 538, 545 (N.M. Ct. Crim. App. 1995); *aff'd* 45 M.J. 296 (1996). In *Bramer*, a civilian judge refused to release the appellant on bail prior to the state's prosecution, thus, the court logically reasoned, the appellant could not be available for trial until the state court issues were resolved.

7. *See, e.g.*, United States v. Garner, 39 M.J. 721 (N.M.C.M.R. 1993); United States v. Bragg, 30 M.J. 1147 (A.F.C.M.R. 1990); United States v. Cummings, 21 M.J. 987 (N.M.C.M.R. 1986).

8. *Bramer*, 43 M.J. at 547.

9. United States v. Thompson, 46 M.J. 472 (1997). The CAAF in *Thompson* went so far as to allow for the possibility of after-the-fact excludable delays, but frowned upon this as a general rule. The factors the court considered in denying an R.C.M. 707 motion were based upon equitable considerations. The court concluded that, had the judge granted the motion, the remedy would have been a dismissal without prejudice. In essence, the judge simply avoided another delay in moving the case to trial.

dictions in negotiating the release of service members upon learning of an arrest. State courts may be willing to dismiss charges when military prosecutors show an interest in incorporating smaller civilian offenses into a larger court-martial, such as in the case of Major Brown.[10] Given the state of the law, a military judge will undoubtedly grant a reasonable delay in a case in order to secure the accused's presence at trial.

The most important thing to remember is that it is essential to get all delays approved in writing by the either the convening authority or the military judge, depending on what stage the charges are at when the accused absents himself. It is the prosecutor's responsibility to sustain the initiative and move the case. Any delay not excused by the convening authority before referral or by the military judge post-referral is counted against the R.C.M. 707 120-day timeline. In light of this, a diligent trial counsel must exert his best efforts to secure the presence of an accused at trial, and ensure that all delays are well documented.

10. Consolidating various state charges into a court-martial has both benefits and detriments. Consolidating charges allows the military to exercise jurisdiction over all offenses, promotes judicial economy, and allows all offenses to be considered in sentencing concurrently. Consolidation, ho wever, also includes economic costs to the government that would not otherwise exist–such as the cost of transporting and housing a variety of civilian witnesses for potentially minor offenses. These factors need to be considered in the decision making process used to determine whether to seek jurisdiction over nonmilitary offenses of the accused.

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U. S Army

Timing is Everything: Identifying Prior Consistent Statements

Introduction

You are sitting in the courtroom watching a fairly routine drug distribution case. One of the government's main witnesses, Private First Class (PFC) Jordan, is testifying. Th direct examination seems uneventful, but towards the end of PFC Jordan's testimony you observe the following:

Q: PFC Jordan, where did you obtain the hit of LSD?

A: From Staff Sergeant (SSG) Lacey.

Q: Do you see the person who gave you the hit of LSD in the courtroom?

A: Yes, sir.

Q: Please point to him. [pause]

TC: The witness pointed at the accused, SSG Lacey. No further questions, your honor.

Cross Examination by the Defense Counsel

Q: PFC Jordan, isn't it true that SSG Lacey is your squad leader?

A: Yes, sir.

Q: And he was your squad leader on 15 July 1999?

A: Yes, sir.

Q: Isn't it true that you expected to be promoted to E4 on 1 August 1999?

A: Yes, sir.

Q: But you weren't promoted, were you?

A: No, sir.

Q: In early July, SSG Lacey recommended you for promotion, didn't he?

A: Yes, sir.

Q: On 15 July, he changed his recommendation?

A: Yes, sir.

Q: And he told you that he was going to change his recommendation to the First Sergeant, didn't he?

A: Yes, sir.

Q: He changed his recommendation because you showed up to work drunk on 14 July?

A: Yes, sir.

Q: You were mad at SSG Lacey, weren't you?

A: Yes, sir.

Q: Now, on 15 August 1999, you submitted a urine sample?

A: Yes, sir.

Q: It was part of a company-wide urinalysis test?

A: Yes, sir.

Q: And your urine sample tested positive for LSD?

A: Yes, sir.

Q: On 21 September you spoke with Special Agent (SA) Corn?

A: Yes, sir.

Q: SA Corn is on the drug suppression team?

A: Yes, sir.

Q: SA Corn asked you where you got the LSD, didn't he?

A: Yes, sir.

Q: He tried to get you to cooperate, didn't he?

A: Yes, sir.

Q: He told you that he wasn't interested in seeing a drug *user* fry, right?

A: Yes, sir.

Q: He told you he wanted to bust the drug *dealer*?

A: Yes, sir.

Q: He told you that you were in a lot of trouble, didn't he?

A: Yes, sir, he did.

Q: But he told you that the dealer would be in even more trouble?

A: Yes, sir.

Q: He told you that if you would tell hi where you got the LSD, he would tell your commander that you cooperated with him?

A: Yes, sir.

Q: And he told you that, in the past, commanders were lenient on soldiers who had cooperated with the drug suppression team, didn't he?

A: Yes, sir.

DC: No further questions, your honor.

Redirect Examination by the Trial counsel

Q: When did you submit the urine sample that came up positive for LSD?

A: On 15 August 1999, sir.

Q: On which day did you actually use LSD?

A: 14 August 1999, sir.

Q: Did you use LSD with anyone else on 14 August?

A: Yes, sir.

Q: Who?

A: PFC Smidt, sir.

TC: No further questions, your honor.

Next, the government calls PFC Smidt. At an Article 39(a)[1] session, the defense objects to PFC Smidt's testimony. The defense asserts PFC Smidt has no relevant or competent evidence to offer .The military judge asks the trial counsel for an offer of proof .The trial counsel proffers that PFC Smidt will testify that he used LSD with PFC Jordan on 14 August 1999; that prior to ingesting the drug PFC Smidt asked PFC Jordan where PFC Jordan got the LSD; and that PFC Jordan stated he obtained the LSD from SSG Lacey . T he trial counsel adds that PFC Jordan's statement is not hearsay because it is a prior consistent statement.[2] The defense contends PFC Jordan's statement is not a prior consistent statement because the statement was made after PFC Jordan's improper motive for fabrication arose. Who's right?

The Law of Prior Consistent Statements

This example demonstrates the importance of timing when rehabilitating a witness using a prior consistent statement. Prior consistent statements are specifically excluded from the definition of hearsay.[3] However, not all prior statements by a witness that are consistent with the witness's in-court testimony are "prior consistent statements" within the meaning of Military Rule of Evidence (MRE) 801(d).[4] Only prior statements that rebut a charge of recent fabrication, improper motive, or improper influence are prior consistent statements.[5] This limitation is important.

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1. Article 39(a) authorizes the military judge to call the court into session without the presence of the members to rule on motions or objections. UCMJ art. 39(a) (LEXIS 2000).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d) (1998) [hereinafter MCM].

3. Military Rule of Evidence (MRE) 802 generally prohibits the introduction of hearsay. *Id.* MIL. R. EVID. 802. Military Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted ."Military Rule of Evidence 801(d) describes eight categories of statements that are not hearsay. Under MRE 801(d)(1)(B), a prior consistent st atement of a witness is not hearsay when offered to rebut an express or implied charge of recent fabrication or improper influence or motive. *Id.* MIL. R. EVID. 801.

4. *See infra* note 7 and accompanying text.

5. This article will refer to "a charge of recent fabrication, improper motive, or improper influence" as "a charge of recent fabrication" or "motive to fabricate."

In *United States v. McCaske*,[6] the Court of Military Appeals (forerunner of the Court of Appeals for the Armed Forces (CAAF)) held that the timing of a prior consistent statement affects the statement's admissibility.

> [T]o be logically relevant to rebut such a charge, the prior statement typically must have been made *before* the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, does nothing to 'rebut' the charge [of recent fabrication]. Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true.[7]

In the example above, suppose PFC Jordan returned and made a statement to SA Corn on 1 October 1999. In this statement PFC Jordan identified SSG Lacey as the person fro whom PFC Jordan received LSD on 14 August. To determine if this statement is a prior consistent statement the proponent must determine when the motive to fabricate arose.[8] The defense counsel charged PFC Jordan with two improper motives: bias against SSG Lacey beginning on 15 July, and improper influence beginning on 21 September. Therefore, the prior statement made on 1 October is not a prior consistent statement because the statement was made after the motives to fabricate arose.

What about PFC Jordan's statement to PFC Smidt? The defense counsel charged PFC Jordan with improper influences beginning on 15 July and 21 Sept ember.Private First Class Jordan made this statement to PFC Smidt before 21 September (the offer of leniency by SA Corn), but after 15 July (PFC Jordan's bias against SSG Lacey).

The CAAF recently decided a prior consistent statement case involving multiple assertions of improper influence, improper motive, and recent fabrication. In *United States v. Allison*,[9] the CAAF noted a prior consistent statement under MRE 801(d) must precede the motive to fabricate or improper influence that the statement is offered to rebut. However "[w]here multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut."[10]

Returning to our example, PFC Jordan's 14 August statement to PFC Smidt is not admissible to rebut the charge of bias that arose on 15 July. However, the statement is admissible to rebut the charge of improper influence that arose on 21 September.

Tactical Considerations

This example illustrates how the law of prior consistent statements can impact on tactical decisions. Counsel must know of all prior statements made by all witnesses who testify in the case.[11] When preparing a witness to testify, counsel must prepare the witness for cross-examination. This will cause counsel to anticipate likely attacks on the witness. If the opponent is likely to attack the witness based on a motive to fabricate, determine the point in time this motive arose. Compare this point in time with the witness's prior statements.[12] If the opponent is likely to raise more than one motive to fabricate, compare each prior statement against each motive to fabricate. If the attacked witness (the declarant) made a consistent statement prior to the time any of the motives to fabricate arose, the proponent should have the appropriate document or witness ready to rehabilitate the declarant.

In our example, the trial counsel chose to prove the prior consistent statement by calling the person who heard the statement, PFC Smidt. The trial counsel could have used the declarant, PFC Jordan, to prove the prior consistent statement

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6. 30 M.J. 188 (C.M.A. 1990).

7. *Id.* at 192. *See* Tome v. United States, 513 U.S. 150 (1995) (holding that Federal Rule of Evidence 801(d)(1)(B) requires a prior consistent statement be made before the motive to fabricate arose); *See also* United States v. Cardreon, 52 M.J. 213 (1999).

8. The foundation for a prior consistent statement has four parts. The proponent of the statement must establish: (1) the witnessis on the stand and is subject to cross examination; (2) the testifying witness has been impeached through evidence of an express or implied charge of recent fabricatio n or improper influence or motive; (3) the witness made a prior consistent statement; (4) and the prior consistent statement was made before the alleged fabricatio n, influence, or motive arose. DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS 283 (1994).

9. 49 M.J. 54 (1998). *See* United States v. Faison, 49 M.J. 59 (1998); United States v. Hood, 48 M.J. 928 (Army Ct. Crim. App. 1998).

10. *Allison*, 49 M.J. at 57.

11. The Rules for Courts-Martial require the trial counsel to provide to the defense all sworn or signed statements relating to an offense charged in the case which is in the possession of the trial counsel. MCM, *supra* note 2, R.C.M. 701(a)(1)(C). The Rules also require defense counsel to provide to the trial counsel all sworn or signed statements by defense witnesses which are known by the defense and relate to the case. *Id.* R.C.M. 701(b)(1)(A). Note that a prior consistent statement can be oral or written, and need not have been made under oath. SCHLUETER ET AL., *supra* note 8, at 283. Counsel can do several things to discover prior statements by witnesses, including scrubbing police reports and asking each witness about his or her prior statements during witness interview s.

12. A timeline is a simple way to visualize the temporal relationships between a witness's prior statements and motives to fabricate your opponent may raise.

during his redirect examination. In this case, PFC Jordan's prior statement was not written. In cases where the prior consistent statement is in writing, the proponent could prove the prior consistent statement by offering the document.[13]

Each method has advantages. Proving the prior consistent statement using the declarant rehabilitates the witness while the attack on the declarant is fresh in the fact-finder's mind. Proving the prior consistent statement with another witness can bolster the declarant's credibility. This is especially important if the opponent has significantly damaged the declarant's credibility. A badly wounded witness may have a hard time rehabilitating himself. Proving the prior consistent statement with a document eliminates questions about exactly what the declarant said. The circumstances surrounding the making statement may increase the rehabilitative effect (for example, if the document was made under oath to a commander). Chose the method that helps your case the most. Anticipate and prepare your witness so your trial presentation is smooth.

When preparing to cross-examine the opponent's witnesses, anticipate how the opponent is likely to react if you attack the witness's credibility. If you plan to attack a witness's credibility with a charge of recent fabrication, determine the point in time the motive to fabricate arose. The cross-examining counsel will attempt to frame the charge of recent fabrication as arising as early as possible to increase the likelihood that the witness's prior statements were made after the motive to fabricate arose. Next, check to see if the witness made a consistent statement prior to the motive to fabricate arose. If the witness has made a prior consistent statement, reconsider your cross-examination.[14]

In cases with multiple possible charges of recent fabrication, analyze each prior statement to see if it rebuts any of the motives to fabricate. If, for example, a prior statement rebuts (that is, was made before) two of three possible charges of recent fabrication, consider cross-examining the witness only about the earliest motive. This will prevent the opponent fro successfully offering the prior consistent statement. In our example, if the defense counsel asked PFC Jordan about his bias against SSG Lacey but not the offer of leniency made by SA Corn, PFC Jordan's statement to PFC Smidt would not be a prior consistent statement.

Conclusion

Case preparation is essential to success as an advocate. Discovering prior statements by witnesses is an important part of case preparation. Introducing a prior consistent statement is a powerful way to rehabilitate a witness and to neutralize an otherwise effective cross-examination. Denying your opponent the opportunity to introduce a prior consistent statement is equally important. Major O'Brien.

13. The proponent must be sure to satisfy all of the foundational requirements for the document. The acronym BARPH may help. BARP stands for Best Evidence, Authentication, Relevance, Privilege, Hearsay. *See* Major Grammel, *The Art of Trial of Advocacy: Worried About Objecting to a Document? Just BARPH*, ARMY LAW., Feb. 2000, at 28. In this situation, the document is not hearsay because it is a prior consistent statement.

14. "Ignoring bad facts or hoping that the members will be asleep when the damaging evidence comes out are not approaches grounded in reality." Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The latest issue, volume 6, number 12, is reproduced in part below.

Compiling an Administrative Record

If an Army decision in the environmental arena has been challenged in litigation, the Army installation involved will normally be required to compile an administrative record. A n administrative record is the paper trail that documents the decision-making process, the basis for the decision, and the final decision .The local environmental law specialist (ELS) will be called upon to assist and provide legal advice while the administrative record is being compiled. Last year, the Department of Justice (DOJ) released a memorandum providing guidance to federal agencies on how to compile an administrative record of agency decisions.[1] This article summarizes DOJ's guidance.

Generally, the Administrative Procedures Act (APA)[2] governs judicial review of a challenged agency decision. A court will review the Army's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.[3] The court will evaluate the entire administrative record in making this determination. It is important to note that several other statutes and regulations may specify what documents and materials constitute the administrative record.[4] Therefore, before the installation begins compiling the administrative record, the ELS should determine whether the APA is the only statute or regulation that applies in the case.

One installation employee should be designated as the "certifying officer" in charge of compiling the administrative record.[5] This individual should keep a record of where he searched for documents and materials and who was consulted in the process. He should be very meticulous when conducting the search and compiling the administrative record, otherwise, the court will be limited in their review of the Army's decision, and the defense of that decision will be much more difficult. Ultimately, this individual may be required to prepare an affidavit certifying the contents of the administrative record to the court.

Before the certifying officer begins his search, the ELS should discuss with him what type of documents and materials should be included in the administrative record, where to look for those documents and materials, how to organize the administrative record, how to handle privileged documents and materials, and the importance of a complete administrative record.

First, the administrative record should consist of all documents and materials directly or indirectly considered by the Army in making the challenged decision. It should include all documents and materials that were considered or relied upon by the Army both at the time the decision was made and those from the time of the challenged decision, even if they were not specifically considered by the final decision-maker. If a document or material fits into one of the these categories but does not "support" the Army's final decision, it should still be included in the administrative record. The bottom line is that all documents and materials that are *relevant to the Army's decision-making process* should be included in the administrative record.

The certifying officer may ask what "type" of documents and materials should be included in the administrative record. Documents and materials should not be limited to paper documents but should include other means of communicating, storing, or presenting information: e-mail, computer tapes a discs, microfilm and microfiche, data files, graphs, and charts. These documents and materials may include the following policies, guidelines, directives, manuals, articles, books, technical information, sampling results, survey information, engineering reports, studies, decision documents, minutes of meetings, transcripts of meetings, notes, and memorandums of telephone conversations and meetings.

The certifying officer may also ask what types of documents and materials should be excluded from the record. Clearly, doc-

1. Memorandum from Department of Justice to Federal Agencies, subject: Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999) (unpublished memorandum on file with author).

2. *See* 5 U.S.C.A. § 701 (West 2000).

3. *Id.* § 706(2)(A).

4. *See* 42 U.S.C.A. §§ 7607(d)(7)(A), 9613(j), (k) (West 2000); 40 C.F.R. §§ 300.800-300.825, pt. 24 (2000).

5. The "certifying officer" is normally the individual assigned to the installation environmental office who is most familiar with the environmental documentation leading to the Army decision. The certifying officer is selected on a case–by–case basis. Some examples of possible certifying officers are: NEPA Project Officer, NEPA Coordinator, Environmental Engineer, Physical Scientist, Biologist.

uments that were not in existence at the time of the Army decision should not be included in the record. Additionally, as a general rule, the administrative record should not include *internal* "working drafts" of documents. Draft documents, however, that were circulated outside the Army for comment and reflect significant changes in the Army decision-making process in their final version should be included in the administrativ record.

Second, the certifying officer should conduct a thorough search for the purpose of compiling the administrative record, listing where files are located. His search should include public document rooms and archives. Additionally, the certifyi officer should contact all Army personnel, including those at the installation level and higher headquarters, involved in the decision and ask them to search their files for documents and materials related to the final decision. The certifying officer should also contact former employees involved in the decision and ask for guidance on where to search. If another agency was involved in the Army decision, the officer should contact the other agency and insure that any of their documents that were considered or relied upon by the Army in making the decision are included in the record.

Third, the certifying officer should organize the documents in a logical and accessible way, such as chronologically, topically, categorically, or otherwise. The certifying officer should also prepare an index of the administrative record that includes, at a minimum, the date, title, and brief description of the document. Once the certifying officer has completed the administrative record, he should consult the installation ELS for review of privileged documents. When the record is finalized, the certifying officer may be required to prepare and sign an affidavit, which attests that he has personal knowledge of the assembly and authenticity of the record.

Fourth, after the certifying officer finishes compiling the record, he should submit it to the ELS for review of privileged documents. T he ELS should review the record and be sensitive to privileges and prohibitions against disclosure. These include the attorney-client privilege, attorney work produc privilege, the Privacy Act,[6] deliberative or mental processes, executive privilege, and confidential ity.The ELS should consult with the assigned ELD and DOJ attorneys for guidance on how to annotate the privileged documents in the administrative record index or a separate privilege log. The index or log should include, at a minimum, the date, title, and brief description of the document as well as the privilege asserte d.The privileged documents themselves should be redacted or removed from the administrative record.

Finally, the ELS should stress the importance of a complete administrative record. By compiling a complete administrative record, the certifying officer will provide the court with evidence that supports the Army's decision and details the Army's compliance with the relevant statutory and regulatory requirements .If the administrative record fails to explain the Army's reasoning and final decision and frustrates judicial review, the court may remand the record to the Army. The court may allow the Army to supplement the record with affidavits or testimony .Once the Army supplements the record, however, the court may allow additional discovery if the opposing party proffers sufficient evidence to show bad faith, improper influence on the decision-maker, or agency reliance on substantial materials not included in the record. An initially incomplete record raises questions as the completeness of the ultimately final record. An incomplete record also raises the possibility of additional unnecessary litigation. For these reasons, the ELS and certifying officer should do all they can to avoid an incomplete administrative record. Major Shields.

Can States Squirm Out of Liability?: The 11th Amendment and CERCLA

The Court of Appeals for the Second Circuit recently upheld the dismissal of a clean up suit against a state, holding that the action was barred by the Eleventh Amendment to the Constitution.[7] In *Burnette v. Carothers*,[8] homeowners (the Burnettes) claimed that a nearby Connecticut prison was contaminating their wells. They sued the state for environmental response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[9] The district court granted Connecticut's motion to dismiss for lack of subject matter jurisdiction, finding the suit was barred by the Eleventh Amendment to the Constitution.[10]

While case law generally holds that a state is immune fro suits brought in federal courts by its citizens, the Supreme Court has held that Congress may abrogate states' sovereign immunity if :(1) Congress unequivocally expresses its intent to do so, and (2) Congress acts pursuant to a valid exercise of power[11]

6. 5 U.S.C.A. § 552a.

7. U.S. CONST. amend. XI. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

8. 192 F.3d 52 (2d Cir. 1999).

9. 42 U.S.C.A. § 9601. Plaintiffs also brought claims under the Clean Water Act (33 U.S.C.A. §§ 1251-1387 (West 2000)) and the Resource Conservation and Recovery Act (42 U.S.C.A. §§ 6901-6991(h)), whose sovereign immunity provisions are substantially similar.

10. *Burnette*, 192 F.3d at 56.

Although Congress did intend unequivocally to abrogate states' immunity in CERCLA, it was acting pursuant to the Commerce Clause.[12] According to the Supreme Court, only congressional action taken under the authority of the Fourteenth Amendment would be sufficient to overcome states' Eleventh Amendment immunity.[13]

The Court of Appeals for the Second Circuit rejected the idea that Congress, by creating a recovery claim, was establishing a property right pursuant to the Fourteenth Amendment.[14] It also rejected the claim that Connecticut consented to federal jurisdiction by accepting federal funds to run its prison system.[15]

Plaintiffs next claimed that they were suing state officials rather than the state itself and that this did not violate the Eleventh Amendment according to *Ex Parte Young*.[16] The court of appeals found that this claim had been waived by the plaintiffs in earlier proceedings.[17] In any event, it is not clear that individual Connecticut officials would have been responsible parties under CERCLA § 107.[18]

In addition to maintaining the vitality of a two hundred-year-old amendment, this case forces advocates in CERCLA litigation to consider whether state agencies can be properly joined as CERCLA responsible parties. This decision also adds new importance to the question of whether a state National Guard organization is a federal or state actor for purposes of its waste disposal actions. Lieutenant Colonel Howlett.

Litigation Division Note

Shake, Rattle, and Roll: Artillery Noise Litigation

Introduction

Noise claims, which historically have made up a small share of all lawsuits filed against the United States, are becoming more common. The most prevalent type of noise claims are based on overflights by aircraft and usually deal with damage to livestock. Several articles on this particular type of noise claim have appeared in previous editions of *The Army Lawye* .[19] This article discusses *Gold Turkey Farm v. United States*,[20] a case involving another type of noise claim: a clai for damages based on noise produced by weapons training.[21] This type of claim will likely become more common due to the ever-increasing commercial and residential development surrounding military installation s.Claims attorneys can apply the lessons learned to future similar cases to help avoid any adverse impact on an installation's training mission.

Facts of the Case

Plaintiffs own and operate a turkey breeder farm that is located approximately seven miles from Camp Ripley, Minnesota.[22] Although plaintiffs have been raising turkeys since 1959, they did not start their turkey egg-laying operation until 1972 .Camp Ripley, founded in 1931, operates two artillery ranges as a part of its training mission and serves as a location for training active duty, National Guard, and Army Reserve units.

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11. Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996).

12. U.S. CONST. art. I, § 8, cl. 3.

13. *Seminole Tribe*, 517 U.S. at 59, 65-66.

14. U.S. CONST. amend. XIV

15. *Burnette*, 192 F3d 60.

16. 209 U.S. 123 (1908).

17. *Burnette*, 192 F3d 57.

18. 42 U.S.C.A. § 9607 (West 2000) (determining liability under the CERCLA provisions).

19. *See, e.g.*, Captain Brian H. Nomi, *Of Ostriches and Other Ratites–A Claims Saga*, ARMY LAW., Apr. 1996, at 43; Mr. Rouse, *Overflight Claims*, ARMY LAW., Aug. 1996, at 32.

20. Gold Turkey Farm v. United States, No. 5-96-22 (D. Minn. Dec. 28, 1998).

21. Typically artillery or tanks.

22. *Gold Turkey Farm*, No. 5-96-22, slip op. at 2.

In 1993, plaintiffs filed a Federal Tort Claims Act (FTCA)[23] claim alleging that the noise from artillery firing exercises conducted at Camp Ripley disrupted their turkeys' egg-laying capabilities.[24] After investigating the claim on its merits, the U.S. Army Claims Service (USARCS) denied plaintiffs' claim.[25] In 1996, less than six months after their administrative claim was denied, plaintiffs filed suit. The complaint alleged that the United States conducted military exercises at Camp Ripley that included the negligent firing of large caliber artillery weapons[26] in such a way that the noise and concussion therefrom disrupted the plaintiffs' production of turkey eggs.

Initial discovery conducted on the case established that all of the artillery exercises subject to the complaint were conducted in accordance with regulation and all rounds fired landed within the appropriate impact areas .After this information was produced, the plaintiffs shifted the theory of their case. In answers to interrogatories propounded by the United States, plaintiffs contended that the alleged negligence did not rest with the firing of the weapons, but with the failure to process and investigate plaintiffs' reports of excessive noise and by failing to institute remedial measures.[27] The United States filed a motion to dismiss for lack of subject matter jurisdiction[28] pursuant to the Discretionary Function Exception to the FTCA.[29] Specifically, the United States contended that th selection of the situs of Camp Ripley, as well as the location of the firing positions and impact areas, are discretionary, and thus the United States was immune from tort liability.[30] The United States also argued that the decision to conduct military activities (such as firing artillery) was within the Discretionary Function Exception.[31]

With respect to plaintiffs' allegations that Camp Ripley had failed to properly investigate their complaints and institute remedial measures, the United States argued that Camp Ripley had followed all statutes and regulations governing noise control. Although Congress passed the Noise Control Act of 1972[32] to decrease noise pollution, the Noise Control Act specifically exempts "any military weapons or equipment designed for combat use."[33] Nevertheless, the Army implemented a regulation to comply with the federal statutes and regulations dealing with noise.[34] The goal of the Army's Environmental Noise Abatement Program is to minimize noise to the greatest extent practicable and in a manner consistent with missi accomplishment.[35] The United States argued that Camp Ripley's decision not to reduce its noise output was well-grounded in policy, and therefore protected by the Discretionary Function Exception.[36] On 28 December 1998, the *Gold* court agreed that the suit was barred by the Discretionary Function Exception and dismissed plaintiffs' complaint.[37]

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23. 28 U.S.C.A. § 1346 (West 2000).

24. *Gold Turkey Farm*, No. 5-96-22, slip op. at 2. Specifically, the 12 September 1993, claim alleged that their turkeys experienced a dramatic drop in egg production due to severely heavy shelling at Camp Ripley. *Id.* at 1. Plaintiffs alleged that the value of their lost egg production amounted to over $84,000. From 1993 through the dismissal of their suit, plaintiffs annually filed claims making similar allegations.

25. *Id.* at 2. Plaintiffs' claim, which was initially construed as a tort claim under chapter four of *Army Regulation 27-20, Claims*, was denied on August 9, 1995. *See* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (31 Dec. 1997) [hereinafter AR 27-20]. Plaintiffs' claim was subsequently denied on 10 November 1997, pursuant to *AR 27-20*, Chapter 3 (Military Claims Act (10 U.S.C.A. § 2733 (West 2000)).

26. During the time in question, Camp Ripley supported live-fire training exercises for 105mm, 155mm, and 8-inch howitzers.

27. *Gold Turkey Farm*, No. 5-96-22, slip. op. at 8.

28. FED. R. CIV. P. 12(b)(1).

29. 28 U.S.C.A. § 2680(a) (West 2000). The purpose of the exception is to prevent "judicial second-guessing of legislative and admi nistrative decisions grounded in social, economic, and political policy through the medium of an act ion in tort."United States v. S.A. Empressa de Viacao Aerea Rio Grandense, 467 U.S. 797, 807-08 (1984).

30. *See* Barroll v. United States, 135 F. Supp. 441, 449 (D. Md. 1955) (holding location of an artillery testing range and the location of the firing positions are within the discretionary function exception); *see also* Leavell v. United States, 234 F. Supp. 734 (E.D. S.C. 1964); Nichols v. United States, 236 F. Supp. 241 (S.D. Cal. 1964); Schubert v. United States, 246 F. Supp. 179 (S.D. Tex. 1965).

31. *Barroll*, 135 F. Supp. at 449. Furthermore, the types of weapons and other equipment issued to soldiers, as well as the types of training they are required to undergo is non-justiciable. *See* Gilligan v. Morgan, 413 U.S. 1, 6-8 (1973).

32. 42 U.S.C.A. § 4901 (West 2000).

33. *Id.* § 4902(3)(B)(i).

34. U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, ch. 7 (23 Apr. 1990) [hereinafter AR 200-1] (implementing the provisions of the Noise Control Act and 32 C.F.R. § 650.161 (2000)).

35. *See* 32 C.F.R. § 650.162(a-d); AR 200-1, *supra* note 34, para. 7-2. It must be noted that these regulations do not prescribe specific amounts of noise that can be generated at Army installations.

Lessons Learned

Claims attorneys can learn several lessons from this long and arduous case. The holding of the case emphasizes the following three points:

(1) *Understand the plaintiff's theory of negligence and basis for recovery.* In *Gold*, the specific negligent acts or omissions on which plaintiffs based their suit were not established until after written discovery began. As a result, the plaintiffs' changed their theory of negligence several times. Therefore, it is critical to "lock-in" a plaintiff soon after litigation has been initiated by using carefully drafted interrogatories and requests for admissions.[38]

(2) *Ensure the claim is investigated and final action is taken under all potential avenues of redress.* In *Gold*, the FTCA[39] and the Military Claims Act[40] (MCA) provided potential causes of action. However, USARCS initially only considered and denied the claim as a tort claim. If the plaintiffs could have proven they were injured from the artillery noise, they could have recovered under the MCA even in the absence of negligence because the firing of artillery for training purposes is a non-combat activity covered by the MCA. Because the clai had only undergone an FTCA review, the court initially denied the United States' motion to dismiss and stayed the case to allow USARCS to consider the claim under the MCA. It was not until after the claim had been investigated and denied under both the FTCA and MCA that the court dismissed plaintiffs' claim pursuant to the Discretionary Function Exception.[41]

(3) Ensure the installation is complying with the Army's Environmental Noise Abatement Program. To prevail under the Discretionary Function Exception in noise litigation cases, the installation must first establish its compliance with all mandatory provisions of the Environmental Noise Abatement Program.[42] The claims office should gather, analyze, and preserve relevant documentation early in the investigation. Claims attorneys at installations that produce a great deal of noise should also work closely with their installation's environmental office. This accomplishes two things: first, the claims attorney will benefit by being educated on the installation's noise abatement program, and second, the claims office will be in a better position to be notified of future potential noise claims.

Conclusion

As civilian communities continue to expand near military installations, claims for damages based on noise produced by weapons training will likely become more prevalent. Even one successful claim can have enormous ramifications on an installation because of the adverse impact it may have on the ability to conduct live-fire weapons training. Therefore, claims attorneys must ensure that their installation is compliant with the Army's Environmental Noise Abatement Program and they must be prepared to vigorously investigate and defend noise claims. Captain Elkin.

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36. During oral argument on its motion to dismiss, the United States noted that there were two policies at issue in the case: the p olicy to effectively and efficiently train soldiers and the policy to control environmental noise. The United States argued that these policies were not competing,but instead, the training policy preempts the noise control policy based on the fact that the regulation requires that noise be minimized only to the extent that it is co nsistent with mission accomplishment.

37. *Gold Turkey Farm*, No. 5-96-22, slip op. at 13.

38. For an excellent note on interrogatories, see Major Corey Bradley, *Interrogatories-to Answer or not to Answer, That is the Question: A Practical Guide to Federal Rule of Civil Procedure 33*, ARMY LAW., Aug. 1997, at 38.

39. *See* 28 U.S.C.A. § 1346(b) (West 2000); AR 27-20, *supra* note 25, ch. 4.

40. *See* 10 U.S.C.A. § 2733 (West 2000); AR 27-20, *supra* note 25, ch. 3. Paragraph 3-2(a)(2) of AR 27-20 provides that claims may be paid for damage to property "incident to non-combat activities of the armed services."

41. Investigation of the claim, which included the employment of several experts, concluded that there was no correlation between Camp Ripley's firing activities and the plaintiffs' turkeys' egg production.

42. *See* AR 200-1, *supra* note 34, paras. 7-2, 7-3.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) began processing all applications for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by GRA, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837

(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1999-2000 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Dr. Foley, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6382 or (800) 552-3978, ext. 382. You may also contact Dr. Foley on the Internet at Mark.Foley@hqda.army.mil. Dr. Foley.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1999-2000 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
11-12 Mar	Washington, DC 10th MSO	AC GO BG Barnes RC GO BG DePue Criminal Law Int'l & Op Law GRA Rep TBD	Criminal Law Administrative & Civil Law	MAJ Gerry P. Kohns kohnsg@hq.navfac.nav.mil Host: COL Jan Horbaly (202) 633-9615
11-12 Mar	San Francisco, CA 75th LSO	AG CO BG Romig RC GO BG O'Meara GRA Rep TBD	Contract Law Administrative & Civil Law: POR—How to get ready to deploy	MAJ Douglas Gneiser (415) 673-2347 Host: COL Charles O'Connor (415) 436-7180
18-19 Mar	Chicago, IL 91st LSO	AC GO BG Marchand RC GO BG DePue GRA Rep TBD	Contract Law International & Operational Law	MAJ Tom Gauza (312) 443-1600 Host: COL Johnny Thomas (210) 226-5888
25-16 Mar	Charleston, SC 12th LSO	AC GO MG Altenburg RC GO BG DePue Int'l & Op Law Criminal Law GRA Rep TBD	International & Operational Law Criminal Law: Fraternization	COL Robert P. Johnston (704) 347-7800 Host: COL Dave Brunjes (912) 267-2441
1-2 Apr	Orlando, FL FLARNG	AC GO BG Romig RC GO BG O'Meara Criminal Law Int'l & Op Law GRA Rep TBD	Administrative & Civil Law Contract Law	Ms. Cathy Tringali (904) 823-0132 Host: COL Henry Swann (904) 823-0132
16-20 Apr	Spring Workshop GRA			
29-30 Apr	Newport, RI 94th RSC	AC GO MG Huffman RC GO BG O'Meara GRA Rep TBD	International & Operational Law: ROE Criminal Law: New Developments requested. (But a possible substitution by CLAMO was discussed with a focus on Domestic Operations)	MAJ Jerry Hunter (978) 796-2140 1-800-554-7813

5-7 May	Omaha, NE 89th RSC	AC GO BG Romig RC GO COL (P) Walker	Contract Law Administrative & Civil Law	LTC Jim Rupper (316) 681-1759, ext. 1397 Host: COL Mark Ellis (402) 231-8744
6-7 May	Gulf Shores, AL 81st RSC/ALARNG	AC GO BG Barnes RC GO BG DePue GRA Rep TBD	Criminal Law Administrative & Civil Law	CPT Lance W. Von Ah (205) 795-1511 fax (205) 795-1505 lance.vonah@usarc-emh2.army.mil

*Topics and attendees listed are subject to change without notice.

Please notify Dr. Foley if any changes are required, telephone (804) 972-6382.

Reserve Promotion Update

Promotions

Army Regulation 135-155[1] contains policy and procedures about Reserve Component promotions. The current Reserve Component promotion system does not differ significantly from the active component promotion system. Both boards use the *best qualified*[2] standard for evaluating officers before the boards. There are two types of Reserve Component promotion boards: mandatory selection boards and position or unit vacancy selection boards.

To be eligible for promotion, officers must have minimum time in grade, and meet the educational requirements shown below:

Time in Grade			
Promotion to	**Education**	**Mandatory Board**	**Unit Vacancy Board**
Captain	Basic Course	5	2
Major	Advance Course	7	4
Lieutenant Colonel	Phase II, CGSC	7	4
Colonel	Phase IV, CGSC	**	3

** Announced annually by Headquarters, Department of the Army, usually five years.

There are exceptions to the educational requirements. Officers leaving active duty are considered to be educationally qualified for promotion for three years after the date of their separation, unless they were non-selected for promotion for the next higher grade while on active duty.[3] Officers who received conditional appointments requiring completion of educational courses within a specified time are considered to be educationally qualified for promotion if making satisfactory progress with the course.[4]

An officer is first considered for promotion by a mandatory board in advance of the date in which the officer meets time in grade requirements. Therefore, officers must ensure that they are prepared to be considered for promotion about one year before they reach eligibility. As this may change in the future, officers should pay close attention to promotion zone announcements.

Promotion Consideration File (PCF)

Total Army Personnel Command Promotions Directorate prepares the PCF for use by the Reserve Component selection boards. It should contain the following:

(1) All academic and performance evaluation reports.
(2) An Officer Record Brief (Individual Mobilization Augmentee (IMA)/Individual Ready Reserve (IRR) judge advocate officers) or Department of the Army Form 2-1[5] (United States Army Reserve Troop Program Unit (TPU) judge advocate officers). These documents have necessary entries pertaining to personal data, military and civilian education, and duty assignment history.

1. U.S. Dep't of Army, Reg. 135-155, Promotion of Commissioned Officers and Warrant Officers Other Than General Officers (1 Oct. 1994) [hereinafter AR 135-155].

2. *See Promotion Boards* section, *infra.*

3. AR 135-155, *supra* note 1, para. 2-6.

4. Contact the Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6381 or (800) 552-3978, ext. 381 or via Internet at Mark.Foley@hqda.army.mil concerning a certificate of satisfactory progress.

5. U.S. Dep't of Army, DA Form 2-1, Personnel Qualification Record (Jan. 1973).

(3) A color photograph taken within the past three years, which reflects insignia authorized at the time the promotion packet is submitted to the board. Height and weight data, and a signature must be entered on the reverse side of the photograph.[6] Refer to *Army Regulation 670-1* for correct wear and appearance of Army uniforms and insignia.[7]
(4) A one page letter to the board is strongly encouraged.

Promotion Consideration File					
	IRR/IMA	**AGR**	**TPU**	**NG**	****Remarks**
OMPF-P-Fiche	X	X	X	X	1
DA Form 2-1			X	X	2
ORB	X	X		X	3
Photograph	X	X	X	X	4
Letter to Board President	X	X	X	X	5
Loose Papers	X	X	X	X	6

** Remarks

1. Provided by the U.s. Army Reserve Personnel Command (AR-PERSCOM)/NGB ARNG Readiness Center as appropriate.

2. Provided by the officer's servicing personnel administration section.

3. To be provided by the officer for the board's use or by the personnel management officer if a current copy is available in the career management file. The photo must be current within three years.

4. Opitional, but encouraged.

5. Includes Official Military Personnel File (OMP) documents received too late to be microfiched on the OMPF (Performance-fiche).

6. OMPF performance documents required to be included in the PCF include (listed in order of precedence):

Academic Evaluation Reports
Officer Evaluation Reports
Letter Reports
Resident and nonresident course completion certificates
Any record of adverse action
Award orders
Letters of appreciation or commendation

Officers in the zone of promotion are responsible for the following:

(1) Reviewing their OMPF and providing the state adjutant general or the Chief, Office of Promotions, Reserve Components, with copies of any documents missing from the file.
(2) Auditing their DA Form 2-1, when requested by the unit personnel clerk.
(3) Ensuring they have a current photograph on file at Army Reserve, Personnel Command (AR-PERSCOM) or National Guard Bureau (NGB) Army Reserve National Guard Readiness Center.

6. AR 135-155, *supra* note 1, para. 3-3a(4).

7. U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Oct. 1992).

(4) Taking a military physical every five years in accordance with *Army Regulation 40-501*.[8] If overweight, ensuring their status in the weight control program is reported to United States Army Reserve Personnel Command (AR-PERSCOM) in accordance with *Army Regulation 600-9*.[9] An officer whose physical is out of date or who is overweight will not be issued promotion orders.[10]
(5) Following up with unit support personnel to ensure that evaluation reports, the DA Form 2-1, and other relevant information is submitted to AR-PERSCOM in time to be presented to the board.

Officer's Letter to the Board

Letters to the board are optional, but strongly encouraged. In some cases, letters detract from the file because of poor grammar, spelling errors, superfluous enclosures, and inadequate preparation. Communications to the board that contain criticism or reflect adversely on the character, conduct, or motives of any officer will not be given to the board. Also, the selection board will not be given any third party communications.

Any letter should be no more than one page, provide relevant information not contained in the OMPF, and be signed and dated. The letter should be a professional document in appearance, style, and content.

The following examples are good enclosures to letters: Officer Evaluation Reports (OERs) missing from OMPF; letters of appreciation or commendation not in OMPF; and newly acquired diplomas, degrees and documents about professional qualifications. The letter should reference all enclosures.

Promotion Boards

The promotion board uses the "whole person concept" when rating officers.[11] The list below indicates some items that are considered by the board (on the left) and where the board looks to find information about that characteristic (on the right).

Job performance	OERs
Leadership	Command/Staff Assignments
Breath of Experience	Where/What/When (Assignments)
Job Responsibility	Scope of Assignment and Risk
Professional Military Education	Level and Utilization of Military Education
Academic Education	Level and Utilization of Civilian Education
Specific Achievements	Awards
Military Bearing	Photograph/OER/Height-Weight data

Scoring Criteria

All promotion boards will be convened under a *best qualified* criteria and will give each file a numerical rating from one to six (+ or -). When all files have been voted, an average score will be calculated for each individual before the board. The officers will be rank ordered (highest to lowest). The board will be told how many can be selected and they will count down the list until they reach

8. U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (27 Feb. 1998).

9. U.S. DEP'T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986).

10. *Id.* para. 20d(1).

11. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS (30 Nov. 1994).

that number. If the last person selected is a 4+, then the board will revote all 4+ files and again rank order the files–creating the final list. The scoring criteria is listed below:

6+/-	Top Few—Must Select
5+/-	Above Contemporaries—Clearly Select
4+/-	Solid Performer—Deserves Selection
3+/-	Qualified—Select if There is Room
2+/-	Not Qualified—Too Many Weaknesses
1+/-	Absolutely Not Qualified—Show Cause Board

Best Qualified officers have demonstrated a strong performance, steady participation, possess good military bearing, have succeeded at a variety of jobs (especially those which exposed them to risk of failure), and have completed the required military education. Dr. Foley.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations

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

2. TJAGSA CLE Course Schedule

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
7-12 May	1st JA Warrant Officer Advanced Course (Phase II, Active Duty) (7A-550A-A2).
8-12 May	57th Fiscal Law Course (5F-F12).
31 May-2 June	4th Procurement Fraud Course (5F-F101).

June 2000

5-9 June	3rd National Security Crime & Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	4th Chief Legal NCO Course (512-71D-CLNCO).
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).

19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Career Services Directors Conference.
26 June-14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

5-7 July	Professional Recruiting Training Seminar
10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July-	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
14 July-22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July-1 September	2d Court Reporter Course (512-71DC5).
31 July-11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August-24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August-1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
25 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

2 October-21 November	3d Court Reporter Course (512-71DC5).
2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
23-27 October	47th Legal Assistance Cours (5F-F23).
13 October-22 December	153d Officer Basic Course (Phase II, (TJAGSA) (5-27-C20).
30 October-3 November	58th Fiscal Law Course (5F-F12).
30 October-3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
13-17 November	54th Federal Labor Relations Course (5F-F22).
27 November-1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November-1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).

7-19 January	2001 JAOAC (Phase II) (5F-F55).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8-26 January	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8 January-27 February	4th Court Reporter Course (512-71DC5).
16-19 January	2001 Hawaii Tax Course (5F-F28H).
24-26 January	7th RC General Officers Legal Orientation Course (5F-F3).
26 January-6 April	154th Basic Course (Phase II, TJAGSA) (5-27-C20).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
12-16 February	25th Admin Law for Military Installations Course (5F-F24).
26 February-9 March	35th Operational Law Seminar (5F-F47).
26 February-9 March	146th Contract Attorneys Course (5F-F10).

March 2001

12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-4 May	59th Fiscal Law Course (5F-F12).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

7-11 May	60th Fiscal Law Course (5F-F12).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June - 13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.

July 2001

2-4 July	Professional Recruiting Training Seminar
2-20 July	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase II) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
20 July-28 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

3. Civilian-Sponsored CLE Courses

23 March ICLE	Jury Selection and Jury Persuasion Marriott Gwinnett Place Hotel Atlanta, Georgia
24 March ICLE	Mediation Advocacy Marriott Gwinnett Place Hotel Atlanta, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Progra
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Michigan Institute of Continuing Legal
Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers'
Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of
Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Date

State	Local Official	CLE Requirements
Alabama**	Administrative Assistant for Programs AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.

Arizona	Administrator State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Director of Professional Programs Supreme Court of AR Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://www.calbar/org/pub250/mcclerr1.htm	-Thirty-six hours over three year period, eight hours must be in legal ethics or law practice management, at least four hours of which must be in legal ethics, one hour must be on prevention, detection and treatment of substance abuse/emotional distress, one hour on elimination of bias in the legal profession. -Full-time U.S. Government employees are exempt from compliance. -Reporting date: 1 February.
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http://www.courts.state.co.us/cle/cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/rules.htm	-Thirty hours over a two-year period, three hours must be in ethics, and a minimum of two hours, and a maximum of six hours, in professionalism. -Reporting date: 31 July.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/newflabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710 http://www.gabar.org/ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: Every third year determined by year of admission.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076 No web site available	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (913) 357-6510 http://www.kscourts.org/ctruls/cleruls.htm	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program.

Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/rule_xxx.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Maine	Asst. Bar Counsel Bar of Overseers of the Bar P.O. Box 1820 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-At leat one hour in the area of professional responsiblity is recommended but not required. -Report date: July
Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (612) 297-7100 http://www./minncle.org/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years, two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.mslawyer2.com/mssc/index021.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/mobarcle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana-bar.org/	-Fifteen hours per year. -Reporting date: 1 March
Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. 2 Reno, NV 89502 (702) 329-4443 http://www.nvbar.org/	Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampphire**	Registrar NH MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942 http://www.nhbar.org/?area/10.html	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.
New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Room 888 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http://www.courts.state.ny.us/mcle.htm	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys :Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) within biennial registration period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.

North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/MCLE.html	-Twelve hours per year, two hours must be in legal ethics, special three hours (minimum) ethics course every three years, nine of twelve hours per year in practical skills during first three years of admission. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. Second Floor Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma**	MCLE Administrator OK State Bar P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 368 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http://www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http://www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt. -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Ste. 312 Salt Lake City, UT 84111-3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -non-residents if not practicing in state. -Reporting date: 31 January.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/courts/	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 30 June.

Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, including six hours ehtics. -Reporting date: 31 January.
West Virginia	Mandatory CLE Coordinator MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Suite 715, Tenney Bldg. 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http:// www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.
Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 http:// www.courts.state.wy.us/	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 January.

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

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials i ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. LTC Goetzke.

Current Materials of Interest

1. TJAGSA Materials Available through the Defens Technical Information Center (DTIC)

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

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

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

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at (703) 767-9052, (DSN) 427-9052 or <www.dtic.mil/dtic/current.html>.

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

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

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

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

Contract Law

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

Legal Assistance

AD A345826	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98.
AD A333321	Real Property Guide—Legal Assistance, JA-261-97.
AD A326002	Wills Guide, JA-262-97.
AD A346757	Family Law Guide, JA 263-98.
AD A366526	Consumer Law Guide, JA 265-99.
AD A372624	Uniformed Services Worldwide Legal Assistance Directory, JA-267-99.
AD A360700	Tax Information Series, JA 269-99.
AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I, June 1998.
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AD A350514	The Uniformed Services Employment and Reemployment Rights

	Act (USAERRA), JA 270, Vol. II, June 1998.
AD A329216	Legal Assistance Office Administration Guide, JA 271-97.
AD A276984	Deployment Guide, JA-272-94.
AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274-99.
AD A326316	Model Income Tax Assistance Guide, JA 275-97.
AD A282033	Preventive Law, JA-276-94.

Administrative and Civil Law

AD A351829	Defensive Federal Litigation, JA-200-98.
AD A327379	Military Personnel Law, JA 215-97.
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92.
AD A347157	Environmental Law Deskbook, JA-234-98.
AD A338817	Government Information Practices, JA-235-98.
*AD A362338	Federal Tort Claims Act, JA 241-99.
AD A332865	AR 15-6 Investigations, JA-281-97.

Labor Law

AD A360707	The Law of Federal Employment, JA-210-99.
AD A360707	The Law of Federal Labor-Management Relations, JA-211-99.

Legal Research and Communications

AD A332958	Military Citation, Sixth Edition, JAGS-DD-97.

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301-95.
AD A303842	Trial Counsel and Defense Counsel Handbook, JA-310-95.
AD A302445 ..	Nonjudicial Punishment, JA-330-95
AD A302674	Crimes and Defenses Deskbook, JA-337-94.
AD A274413	United States Attorney Prosecutions, JA-338-93.

International and Operational Law

AD A352284	Operational Law Handbook, JA-422-98.

Reserve Affairs

AD A345797	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-98.

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8.

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and

National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA For 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC,ATTN: ASQZ-LM, Alexandria,VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33.*

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), or the World Wide Web (WWW).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. Articles

The following information may be useful to judge advocates:

Margaret Chandler, *Media Access to Court Document* , 17 U. TASMANIA L. REV. 186 (1998).

Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. FLA. L. REV. 315 (January 1999).

4. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty andstaff. We have installed new projectors in the primary classrooms and Pentiu PCs in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We have migrated to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel

are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extensio n 378.Mr. Al Costa.

5. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, Unite States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.