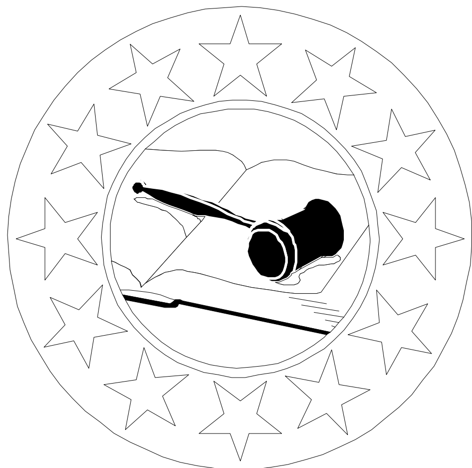

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50th Anniversary of the UCMJ Series

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Rear Admiral William O. Miller

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Major Francis P. King

International Criminal Jurisdiction Issues for the United States Military
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Military Justice Supervision—TJAG or COMA[1]?

Rear Admiral William O. Miller
United States Navy, Retired

Editor's Note: The following address was written in 1977, when the author was The Judge Advocate General of the Navy. It was delivered to the American Bar Association, General Practice Section: Committee on Military Law, in Seattle, Washington, on 11 February 1977. The Army Lawyer is pleased to present this article in its continuing series commemorating the Fiftieth Anniversary of the Uniform Code of Military Justice.

During the last twenty-five years, the responsibility for the supervision of the military's criminal justice system has been shared by the Judge Advocates General and the Court of Military Appeals.[2] Under this statutory system, the Judge Advocates General have had the responsibility for the general supervision of the administration of military justice, and the Court of Military Appeals has exercised it s supervisory role through its review responsibilities.

By ruling on questions of law in specific court-martial cases, the court's rationale for decisions has led to alterations—and in most case, improvements—in the operation of the military justice system. Recent actions by the Court of Military Appeals, however, such as the decisions in *McPhail*[3] and *Ledbetter*,[4] have put in question the court's view of the traditional roles of the Judge Advocates General and the court in their respective supervisory responsibilities. I have taken—and now take—serious exception, and express my view, both personally and professionally, that the *statutory* division of responsibility is mandated by the Uniform Code of Military Justice (UCMJ or Code), and by the circumstances of the military society as well, and I believe that that division of responsibility *must* remain a part of the military's criminal code, at least until changed by legislative action.

Military criminal justice is a unique and distinct system. Civilian systems only impose sanctions for violating "thou shalt not" rules, but the military system must be able to impose sanctions, too, for violation of "thou shalt" rules. Military criminal justice is designed to serve the need for discipline in a structured, ordered military force. Its distinctiveness is as basic as the Constitution. Article I, Section 8, empowers Congress "to make Rules for the Government and Regulation of the land and naval forces," and Article II, Section 2, makes the President commander in chief of the Armed Forces. [I]t is pursuant to these provisions that we have the Uniform Code of Military Justice. [T]his Code is just like every other code: it places the results of past legal development, which are founded upon the needs and experiences of the society which the Code serves, in a better and more authoritative form.

Pronouncements by the Court of Military Appeals on the scope of *its* powers are not new. In such cases as *United States v. Frischholz*,[5] decided in 1966, *Gale v. United States*,[6] decided in 1967, and *United States v. Bevilacqua*,[7] decided in 1968, the court commented upon its supervisory functions under the Uniform Code of Military Justice. Each of these cases discussed the court's supervisory responsibilities in the context of the court's statutory jurisdiction.

It is my view that the Code, in Article 67, limits the power of the Court of Military Appeals to act [in] only specified types of court-martial cases. My belief is based on the simple reality that the UCMJ is not a constitution; it is a statute. It is true, as the court has remarked, that the All Writs Act does provide a source of power to the court to grant ancillary relief, but the extent of that relief is—or at least should be—tied to the statutory description of the court's jurisdiction. The decision of the court on [27 August 1977], in *McPhail v. United States*,[8] however, purportedly expands the scope of its supervisory powers to include areas beyond the language of Article 67's jurisdictional grants.

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1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) renamed the United States Court of Military Appeals (COMA) the United States Court of Appeals for the Armed Forces (CAAF).

2. *See id.*

3. McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).

4. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

5. United States v. Frischholz, 36 C.M.R. 306 (C.M.A. 1966).

6. Gale v. United States, 37 C.M.R. 304 (C.M.A. 1967).

7. United States v. Bevilacqua, 39 C.M.R. 10 (C.M.A. 1968).

8. *McPhail*, 1 M.J. 457 (C.M.A. 1976).

In papers entitled petition for writ of certiorari or *error coram nobis*, Sergeant McPhail asked the Court of Military Appeals to vacate his conviction by special court-martial on the ground that the court-martial lacked jurisdiction over the offense charged. At Sergeant McPhails's trial, the military judge granted his motion to dismiss the charges for lack of jurisdiction. The convening authority disagreed with the military judge and ordered him to reconsider his ruling. In accordance with the then prevailing law, the military judge reversed his ruling and McPhail was tried, convicted, and sentenced to a punishment which did not qualify for review under the jurisdictional language of Article 67.

Sergeant McPhail, upon completion of the required reviews, sought relief under Article 69. The Judge Advocate General of the Air Force denied relief, despite the pendency before the Court of Military Appeals of *United States v. Ware*,[9] in which the court was later to hold that a military judge is not required to reverse his ruling when a convening authority orders him to reconsider it. In *McPhail*, the Court of Military Appeals assumed jurisdiction *after* the denial of relief under Article 69, and ordered the Judge Advocate General to vacate Sergeant McPhail's conviction. In so doing, the court cited its supervisory powers and rejected the government's contention that the jurisdiction of the court was limited by the language of Article 67. It is significant to note, again, that Sergeant McPhail's sentence did not include a bad conduct discharge or confinement at hard labor of one year—and hence did not reach the lower jurisdiction levels of the Court of Military Appeals.

In spite of a prior decision directly to the contrary, *United States v. Snyder*,[10] the court, in *McPhail*, justified its expanded view of its supervisory power by drawing an analogy to the general supervisory authority exercised by the Supreme Court under the Constitution over the lower federal courts.

It seems clear to me, however, that courts-martial are not the same as the lower federal courts. Courts-martial spring from Article I and Article II of the Constitution as mechanisms for the maintenance of the discipline necessary for the successful performance of the military mission.

The Court of Military Appeals is not a constitutional supreme court and is not an Article III court, and its proper relationship to the military judicial system cannot be deduced from the model of the judicial relations in our constitutional system. All of us agree, I think, that the role of the Court of Military Appeals, or even its very existence, is not *constitutionally* mandated. Hence, the proper relationship between the Court of Military Appeals and the military justice system must be derived from the Code itself. It is the Code—and not the Constitution—which provides that part of the structure of the military society within which the court must function.

Under the numerous statutes which create a separate and distinct military society, including the Uniform Code of Military Justice, the scope of executive authority is considerably broader than that afforded the executive in the civilian environment. In the area of military justice administration, this was necessitated by the critical requirement for a disciplined force, which would be and will be responsive to military demands—which, frequently, call for personal sacrifices of the highest order. Hence, the military commander was assigned important and significant functions in the management of the military justice system, and its supervision was specifically and purposely assigned—in Article 6—to a military official, the Judge Advocate General.

This, of course, would be inconceivable in the framework of relations between Article II courts and the executive in civilian life—but we are not dealing with civilian life. The Chief of Naval Operation has frequently said—and its is true—that sailors and marines are not *civilians* in uniform. They are sailors and marines—with all the rights, responsibilities, and constraints which obtain to that status. Both the Court of Military Appeals and the Supreme Court recognize this and both recognize that the military is a society different and separate—and one which has different and separate needs, and, hence, different and separate requirements.

It seems clear to me, therefore, that, in evaluating its role and its authority, the court must do so in the context of the Code itself, and not by analogy to the far different role of the Supreme Court. [I]t is my view that the court owes this type of evaluation to the society which it is designed to serve.

I sincerely hope that I do not read in the court's opinion in *United States v. Ledbetter*[11] an indication to the contrary. I hope this case does not suggest that, in its efforts to develop its supervisory powers, the court will not consider itself constrained by codal provisions vesting responsibilities in the Judge Advocates General. In the issues dispositive of the case, the court in *Ledbetter* developed a test for the determination of the availability of military witnesses at Article 32 hearings. In another part of the court's opinion, however, it addressed a problem perceived by it as a threat to the independence of the military judges. It is this part of the opinion that raises my deepest concerns.

The military judge who tried Ledbetter alleged in post-trial statements that he had been asked by The Judge Advocate of the Air Force, as well as two of his trial judiciary assistants, to justify the sentences imposed by him on Ledbetter and two other accused. General Vague responded to these allegations in

9. United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

10. United States v. Snyder, 40 C.M.R. 192 (C.M.A. 1969).

11. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

a sworn statement by acknowledging that he *had* talked to the military judge about the sentences, but that he had told the military judge that an appropriate sentence was a subject matter best left to those who heard the evidence and that he was just trying to determine the facts which led to the sentences so that he could respond intelligently to any queries by the Air Force Chief of Staff.

On the basis of these statements, the court announced, in language which I consider *dicta*, the following:

> In the absence of congressional action to alleviate recurrence of events such as were alleged to have occurred here, we deem it appropriate to bar official inquiries outside the adversary process which question or seek justification for a judge's decision unless such inquiries are made by an independent judicial commission established in strict accordance with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge . . . [12]

It is my view that this language is the result of the court's [confusing] the Article 26 responsibilities of the Judge Advocates General [to ensure] the independence of the military trial judiciary with Article 37(a)'s prohibition against unauthorized command influence.

Let me assure you that I fully support the principle of the independence of military judges and as Judge Advocate General of the Navy I have not and will not tolerate any interference in their judicial decisions. But as Judge Advocate General I am charged with the specific statutory obligations with respect to military judges, not only as their commanding officer, but also as their chief protector.

The congressional history of Article 26 indicates that its purpose was to "provide for the establishment within each service of an independent judiciary composed of military judges . . . who are assigned directly to the Judge Advocate General . . . and [who] are responsible *only* to him or his designees for direction and fitness ratings." Article 26 charges me to certify military judges and I believe that such responsibility implicitly includes a *de*certification for disciplinary purposes. In this scheme it is clear that Congress did not intend military judges to be islands unto themselves, totally without direction or guidance from the Judge Advocate General within the military society. By equating *any* inquiry by the Judge Advocate General to unauthorized command influence, the court's language in *Ledbetter* would prevent me from obtaining any information from a military judge in the exercise of my supervisory functions over him. In addition, the prohibition would prevent me from defending my judges and ensuring their continued independence under the provisions of Article 26, because it would deny me the information I need for that purpose.

I believe that the failure of the Court of Military Appeals to properly evaluate its supervisory role in the context of the Code led to the *Ledbetter* language.

The court's language would prevent questions concerning a judge's decision by officials outside of the adversary process "unless such inquiries are made by an independent judicial commission established in *strict accordance* with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge . . . ."[13]

The critical language in section 9.1(a) is that part which empowers the highest court of the jurisdiction "to remove any judge found by it and the commission to be guilty of gross misconduct or incompetence in the performance of his duties."[14]

I hope the court's language, here, is not intended to be read literally, because the authority for the direction, assignment and discipline of military judges is given unequivocally to the Judge Advocates General by Articles 6, 26, and 66 of the Code. Congress clearly designated the Judge Advocates General, not the Court of Military Appeals, as the authority to whom military judges are responsible.

For these reasons, I believe that *Ledbetter's* suggestion of a judicial commission, with its provision for the highest court of a jurisdiction exercising disciplinary powers over military judges, is contrary to the clearly expressed intent of Congress in establishing the independent military judiciary by its designating the Judge Advocates General as the officials responsible for its supervision.

This brings me to the point—the single point—I want to make. Effecting change in the basic structure of the military justice system is the province of Congress, not of the Judge Advocates General, *and not* of the Court of Military Appeals, and, it seems to me, that those of us who perceive a need for any changes in the system—whether such would relate to the responsibilities and authorities of its participants, or otherwise—should seek them through the normal mechanism provided for effecting legislative change.

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12. *Id.* at 43.

13. *Id.* (emphasis added).

14. *Id.*

Rules of Evidence 413 and 414: Where Do We Go from Here?

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U.S. Army Litigation Division

Introduction

On 13 September 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (Crime Control Act).[1] In addition to providing billions of dollars to put more law enforcement officers on the streets and at our nation's borders, it amended the Federal Rules of Evidence (FRE).[2] The FRE amendments added three new rules, Rules 413, 414, and 415. Rule 413 makes evidence of an accused's prior sexual offenses admissible in a later trial for unrelated sexual offenses.[3] Rule 414 makes evidence of prior acts of child molestation admissible in a later trial for unrelated acts of child molestation.[4] Rule 415 makes both Rules 413 and 414 applicable to civil trials where the plaintiff seeks damages for either a sexual offense or child molestation.[5] Since Congress passed the Crime Control Act, these new rules have generated substantial criticism from scholars and practitioners.[6]

The controversial history of these rules of evidence has been well documented.[7] This article addresses the highlights of that history, and reviews some of the trends in how the federal and military courts have interpreted and applied these rules. This article also details the particular issues that are the focus of litigation in the courts. Specifically, it analyzes Rules 413 and 414 in context with Rule 404(b),[8] and its strict prohibition against admitting character evidence to show propensity. It also analyzes the applicability of Rule 403[9] to evidence offered under either Rule 413 or Rule 414.[10] Finally, the article pro-

1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

2. *Id.*

3. Fed. R. Evid. 413. Rule 413(a) provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

4. Fed. R. Evid. 414. Rule 414(a) provides: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

5. Fed. R. Evid. 415. Rule 415(a) provides:

> In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of the party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

Rule 415 has no applicability to military cases.

6. *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 Fordham Urb. L.J. 285 (1995) [hereinafter Imwinkelried, *Undertaking the Task*]; David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 Fordham Urb. L.J. 305 (1995); Edward J. Imwinkelried, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 Chi.-Kent L. Rev. 37 (1994); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 Santa Clara L. Rev. 961 (1998); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 Clev. St. L. Rev. 169 (1996).

7. *See* David J. Karp, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 Chi.-Kent L. Rev. 15 (1994); Anne Elsberry Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 Ariz. L. Rev. 659 (1995); Erik D. Ojala, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 Wash. U. L.Q. 947 (1999).

8. Fed. R. Evid. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

9. Fed. R. Evid. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

10. This article will not argue either for or against the constitutionality of these rules, because that topic has received ample coverage in other articles. *See* Livnah, *supra* note 6; Department of Justice, Office of Legal Policy, '*Truth in Criminal Justice' Series Office of Legal Policy: The Admission of Criminal Histories at Trial*, 22 U. Mich. J.L. Reform 707 (1989); Ojala, *supra* note 7. It does, however, discuss the pertinent cases addressing the constitutionality of the rules.

vides practical tips to assist the military practitioner with these rules of evidence at trial.

Rules 413 and 414 undermine years of evidence law that strictly limited the introduction of propensity and character evidence against the accused.[11] The FRE effectively codified this traditional view in Rule 404(b).[12] However, the new rules lower the threshold of admissibility created by Rule 404(b), and permit evidence offered under Rules 413 and 414 "for its bearing on any matter to which it is relevant."[13] This minimal threshold for admitting evidence of prior acts eliminates the traditional protections afforded the accused by Rule 404(b), and will substantially increase use of this potentially misleading evidence. Thus, to protect the accused from unfair consideration of such evidence by the fact finder, greater scrutiny must be applied to evidence offered under Rules 413 and 414.

The Rules and Historical Highlights

The Crime Control Act experienced several delays during the legislative process.[14] In a last minute effort to gain bipartisan support for the Act, the legislative committee agreed to add the FRE amendments, including Rules 413, 414, and 415, as proposed by Representative Susan Molinari.[15] However, the hasty addition of these amendments allowed Congress to bypass the normal six-phase process for proposing and passing new rules of evidence.[16] In doing so, Congress skirted the Rules Enabling Act.[17] After merely twenty minutes of debate on the FRE amendments, and without the benefit of critical analysis from the legal community, the Crime Control Act passed.[18]

While the amendments to the FRE accomplish the objectives of their proponents in Congress—mainly the liberal admission of propensity evidence in sexual assault and child molestation cases— they are a significant departure from centuries of evidence law.[19] From the earliest days of legal history, courts prohibited the use of character evidence to prove someone guilty of a particular crime by showing that he was a bad person or had demonstrated a propensity to behave in a particular manner. "A cardinal tenet of Anglo-Saxon criminal jurisprudence is that the prosecution must prove that the accused committed a specific crime, not merely that he is dangerous or wicked."[20] Rules 413 and 414 undermine this historical prohibition, which served as

11. *See* Imwinkelreid, *Undertaking the Task*, *supra* note 6.

12. *See generally* Ellis, *supra* note 6; Kyl, *supra* note 7.

13. Fed. R. Evid. 413 and 414. *See supra* notes 3-4 and accompanying text.

14. *See* Kyl, *supra* note 7, at 660 n.10. Senator Robert Dole and Representative Susan Molinari originally proposed these amendments as part of the Women's Equal Opportunity Act in February 1991. The amendments were later introduced in the Sexual Assault Prevention Act of the 102d and 103d Congresses. The amendments were also added to the Violent Crime Bill supported by President George Bush. These proposals were unsuccessful. Republican members of the House, attempting to have the amendments included in the Crime Control Act of 1994, prevented the entire Act from being brought to the floor for consideration. As a result, the Democratic leadership agreed to negotiate to add the proposed amendments. Ellis, *supra* note 6, at 969-71 and footnotes cited therein.

15. *See* Ellis, *supra* note 6; Joelle Anne Moreno, *Whoever Fights Monsters Should See to it That in the Process He Does Not Become a Monster: Hunting the Sexual Predator With Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart—Kansas v. Hendricks*, 49 Fla. L. Rev. 505 (1997); Livnah, *supra* note 6. Since its inception, the Crime Control Act was intended to be pervasive legislation to get tough on crime. However, the proposed amendments to the Rules of Evidence were not part of the original package; they were an afterthought. Livnah argues that Representative Molinari saw an opportunity to appeal to the perceived public outrage with sexual violence that resulted from two criminal cases that created a public perception that our legal system was fundamentally flawed. Livnah also argues that members of Congress relied upon their mistaken belief that sexual offenders have a higher rate of recidivism. Although Representative Molinari wanted to stop the cycle of repeat offenders and protect women and children, there is little evidence to support this belief. In 1989, the Department of Justice, Bureau of Justice Statistics, conducted a study of 100,000 released prisoners over a three year period to determine rates of recidivism. The study demonstrated that only 7.7% of rapists were rearrested for rape, and that rapists had one of the lowest recidivism rates of any crime, second lowest only to homicide. Consequently, carving out a specific exception that allows propensity evidence in this specific class of cases is without foundation. *Id.*

16. 140 Cong. Rec. H8968, H8990 (Aug. 21, 1994) (statement of Rep. William Hughes).

17. 28 U.S.C. §§ 2071-2077 (1994). The Rules Enabling Act provides that a Judicial Reviewing Conference can review legislation proposed by Congress to determine the possible effects of its enactment. It was designed to promote a cooperative effort between the judiciary and Congress. However, in this case, Congress specifically exempted the Crime Control Act from the strictures of the Rules Enabling Act. Instead, Congress stated it would reconsider the legislation if the Judicial Reviewing Conference made a timely objection. Congress requested that the Judicial Conference submit its report within 150 days of enactment of the Rules. If the Judicial Conference favored the Rules, then the Rules would become effective 30 days after Congress received the report. On the other hand, if the Judicial Conference opposed the Rules, they would nonetheless, become effective 150 days after Congress received the report. Notwithstanding the additional time to review the Conference Report prior to final enactment, Congress took no action to amend or repeal the Rules. *See* Ellis, *supra* note 6; Moreno, *supra* note 15; Livnah, *supra* note 6; Ojala, *supra* note 7, at 17, stating:

> The Act calls for an Advisory Committee made up of scholars, judges, and lawyers in the relevant field to draft a proposal for any amendment or addition to the existing rules. The proposal is then subjected to a period of public comment, reviewed by a subcommittee of the United States Judicial Conference (whose members are chosen by the Chief Justice of the Supreme Court), and finally subjected to Congressional review.

18. 140 Cong. Rec. H8968, H8990 (Aug. 21, 1994) (statement of Rep. William Hughes).

19. *See* Imwinkelreid, *Undertaking the Task*, *supra* note 6; Ojala, *supra* note 7.

the justification for enacting Rule 404(b). Under Rule 404(b), prior bad acts may be admissible for specific reasons, but they are never admissible to show propensity.[21]

The proponents of Rules 413 and 414 fully intended that evidence should be admitted and considered to determine the defendant's propensity to commit sexual assaults or engage in child molestation.[22] Both Representative Molinari and Senator Robert Dole repeatedly referred to the recidivism of sexual offenders as an indicator that such people were more likely to commit similar offenses in the future.[23] Rules 413 and 414 specifically state that such propensity evidence "may by considered for its bearing on any matter to which it is relevant."[24] The proponents of the rules intended them to be an exception to the general prohibition against admitting propensity evidence found in Rule 404(b),[25] and the courts have clearly upheld this congressional intent to supersede the restrictive aspects of Rule 404(b).[26]

In its review of the proposed rules, the Judicial Conference recognized ambiguities that resulted from creating a separate "exception" to Rule 404(b).[27] The conference found that Congress's concerns embodied in the proposed rules were already adequately addressed in the existing rules of evidence, particularly by Rule 404(b).[28] The conference also found that the new rules were not adequately integrated with the existing rules, and that the accepted standards pertaining to the existing rules would not be uniformly applied if the proposed rules were adopted.[29] Therefore, the Judicial Conference recommended that Congress pass amendments to existing Rule 404, rather than adopting the proposed rules.[30] Despite this recommendation, Congress took no action to amend Rule 404 or to repeal Rules 413 and 414.[31]

After Congress passed the Crime Control Act creating FRE 413 and 414, Military Rules of Evidence (MRE)[32] 413 and 414 were adopted on 6 January 1996.[33] Although MRE 1102[34] provided that the new FRE would be adopted by operation of law, the Department of Defense still published the proposed changes in the Federal Register and solicited comments from the public.[35] Nevertheless, there were few substantive changes between the FRE and the MRE. The period in which the government must give notice to the defense of its intent to use propensity evidence was reduced from fifteen days under the FRE to five days under the MRE.[36] The time was reduced because it "is better suited to military discovery practice."[37] In addition, references to FRE 415 were deleted because there is no analogous process in the military system.[38] These were the only significant differences between the FRE and the corresponding MRE.

The Cases

Since FRE 413 and 414 were adopted, several federal and military courts have decided cases interpreting these rules. Although it is extremely difficult to discern any trends in the courts' decisions, it is apparent that FRE 413 and 414, and the corresponding MRE 413 and MRE 414, are here to stay. Therefore, it is important for practitioners to examine carefully these

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20. David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529 (1994).

21. Fed. R. Evid. 404(b). *See supra* note 8 and accompanying text.

22.

> The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b). In contrast to rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing 'on any matter to which it is relevant.' This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

140 Cong. Rec. H8991 (Aug. 21, 1994) (statement of Rep. Susan Molinari); 140 Cong. Rec. S12990 (Sept. 20, 1994) (statement of Sen. Robert Dole)

23. 140 Cong. Rec. H8991 (statement of Rep. Susan Molinari); 140 Cong. Rec. S12990 (statement of Sen. Robert Dole).

24. Fed. R. Evid. 413, 414. *See supra* notes 3-4 and accompanying text.

25. 140 Cong. Rec. H8991 (statement of Rep. Susan Molinari); 140 Cong. Rec. S12990 (statement of Sen. Robert Dole).

26. United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1998) (stating that it was Congress's intent that the new rules supersede the restrictive aspects of Rule 404(b) in sex cases); United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998) (holding that Rule 413 supersedes Rule 404(b)'s restrictions allowing the government to offer evidence of the accused's prior conduct to show propensity to commit the charged offense); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (stating that Congress lowered the obstacle to admitting propensity evidence in a defined class of cases); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (holding that the new rules supersede the restrictive aspects of Rule 404(b)).

27. *See* Staff of the Judicial Conference of the United States, 103d Cong., Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases (Comm. Print 1995).

28. *Id*.

29. *Id*.

cases to understand these evidentiary rules that will likely see increased application in future courts-martial.

This section provides an overview of the issues that have emerged from cases addressing the admissibility of evidence under FRE 413 and FRE 414.[39] These issues can be grouped into four primary categories: the constitutionality of the rules, the admission of propensity evidence under the rules, the applicability of FRE 403 to the rules, and the burden of proof required by the rules to show prior offenses.

Constitutionality of the Rules

The central constitutional assertion that emerges from the federal cases is that FRE 413 and FRE 414 violate a defendant's rights to equal protection and due process.[40] In *United States v. Enjady*, the 10th Circuit Court of Appeals held that the defendant's constitutional rights to equal protection and due process were not violated by the district court's admission of testimony concerning a prior rape by the defendant.[41]

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30. The Report of the Judicial Conference recommended the following version of Rule 404:

> (4) Character in sexual misconduct cases. Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.
>
> (A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:
> (i) proximity in time to the charged or predicate misconduct;
> (ii) similarity to the charged or predicate misconduct;
> (iii) frequency of the other acts;
> (iv) surrounding circumstances;
> (v) relevant intervening events; and
> (vi) other relevant similarities or differences.
> (B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
> (C)For purposes of this subdivision,
> (i) "sexual assault" means conduct – or an attempt or conspiracy to engage in conduct – of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim – regardless of whether that conduct would have subjected the actor to federal jurisdiction.
> (ii) "child molestation" means conduct – or an attempt or conspiracy to engage in conduct – of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person – regardless of whether that conduct would have subjected the actor to federal jurisdiction.
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order show action in conformity therewith except as provided in subdivision (a) . . . .

31. *See* Ellis, *supra* note 6; Moreno, *supra* note 15; Livnah, *supra* note 6; Ojala, *supra* note 7.

32. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 22, at A22-1 (1998) [hereinafter MCM]. By Executive Order 12,198 of March 12, 1980, President Jimmy Carter prescribed a new evidentiary code for military practice. While the code substantially mirrored the Federal Rules of Evidence, it allowed for the necessities of a world-wide criminal practice. *See generally* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (4th ed. 1997) (discussing the origin of the Military Rules of Evidence).

33. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (1995) (explaining that, under the rules then in effect, amendments to the Federal Rules of Evidence were not applicable to the Military Rules of Evidence for 180 days).

34. MCM, *supra* note 32, MIL. R. EVID. 1102 (1998) (explaining that, under the present rules, amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President).

35. 60 Fed. Reg. 51,988 (1995).

36. MCM, *supra* note 32, MIL. R. EVID. 413, 414.

37. *Id.* MIL. R. EVID. 413 analysis, app. 22, at A22-36.

38. *Id*.

39. Although FRE 415 was passed at the same time as Rules 413 and 414, this article does not address Rule 415 because very few cases have applied that rule. Moreover, as Rule 415 simply applies Rules 413 and 414 to civil litigation, it has virtually no impact on courts-martial.

40. *See* United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998).

Enjady argued that admission of such testimony under FRE 413 denied him a fair trial, because it denied him due process.[42] Enjady asserted that the admission of propensity evidence under the rule "created the danger of convicting a defendant because he is a 'bad person,' thus denying him a fair opportunity to defend against the charged crime."[43] He further argued that admitting this type of evidence diminished the presumption of innocence and reduced the government's burden to prove the crimes beyond a reasonable doubt.[44]

The 10th Circuit Court of Appeals agreed "that Rule 413 raises a serious constitutional due process issue."[45] However, the court held that Rule 413 was neither unconstitutional on its face, nor did it violate the Due Process Clause. The court reasoned that, for Enjady to show a due process violation, he had to show that Rule 413 failed a fundamental fairness test and "violate[d] those fundamental conceptions of justice which lie at the base of our civil and political institutions."[46] Enjady responded that the historical prohibition on prior bad acts and propensity evidence satisfied this narrow definition of fundamental fairness.[47] The court, however, focused on the legislative history of Rule 413 to support its analysis. The court stated: "Congress believed it necessary to lower the obstacles to admission of propensity evidence in a defined class of cases."[48] The court further reviewed the application of Rule 403 to evidence offered under Rule 413, because the legislative history and prior court rulings indicated that the admissibility of evidence under Rule 413 was subject to the constraints of the Rule 403 balancing test.[49]

The court detailed several of the procedural safeguards inherent in using the Rule 403 balancing test to admit propensity evidence. The balancing test itself provided a safeguard, reasoned the court, because Rule 403 balancing, in the sexual assault context, required that a court consider:

> (1) how clearly the prior act has been proved; (2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material fact is; and (4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: (1) how likely is it such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct.[50]

Another Rule 403 procedural safeguard noted by the court was the threshold of evidence required to prove that a previous offense occurred. Relying on the work of Mr. David Karp, one of the original drafters of Rules 413 and 414,[51] the court determined that "the district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the 'other act' occurred."[52] An additional safeguard considered by the court was the basic notice requirement written into Rule 413, which "protects against surprise and allows

41. *Enjady*, 134 F.3d at 1427. The case arose from the District of New Mexico. After trial, a jury convicted Enjady of one count of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(a)(1), and 2245(2)(A). Enjady, his victim, A, and several others had been drinking at A's house during the late morning and early afternoon on the day of the incident. After drinking, A either passed out or fell asleep, at which time everyone left her home. However, Enjady returned later, and A awoke to find Enjady raping her. Enjady was later arrested on other charges, but questioned about the rape. He initially denied returning to A's home, but when confronted with DNA evidence, he admitted to having consensual sex with A. At trial, the government gave notice that it intended to admit testimony from witness B who alleged that Enjady had raped her about two years prior to the charged rape. The government offered B's testimony under Rule 413 "to show defendant's propensity to rape." *Id.* The court withheld ruling on the motion until the government introduced testimony from Investigator Mark Chino. Investigator Chino had initially taken Enjady's written statement, in which Enjady denied the act, stating that he "wouldn't ever do something like this to anyone." *Id.* The district court then applied a Rule 403 balancing test and concluded that B's testimony about the prior rape was relevant and admissible under Rule 413. Specifically, under the Rule 403 balancing test, the district court "considered the testimony's value both to show propensity and to rebut defendant's statement to Chino." *Id.*

42. *Id.* at 1430.

43. *Id*.

44. *Id*.

45. *Id*.

46. *Id*.

47. *Id.* at 1430.

48. *Id*. at 1431.

49. *Id*. (citing United States v. Sumner, 119 F.3d 658 (8th Cir. 1997); United States v. Larson, 112 F.3d 600 (2d Cir. 1997)).

50. *Id*. at 1433.

51. *Id*. *See* 140 Cong. Rec. H8991 (Aug. 21, 1994) (statement of Rep. Susan Molinari). Mr. Karp, Senior Counsel, Office of Policy Development, United States Department of Justice, was one of the original drafters of the proposed rules.

52. *Enjady*, 134 F.3d at 1433.

the defendant to investigate and prepare cross-examination. It permits the defendant to counter uncharged crimes evidence with rebuttal evidence and full assistance of counsel."[53] Finally, the court considered the specific use of the proffered Rule 413 evidence as a type of rebuttal evidence to the defense of consent. The court concluded that, when these procedural safeguards are taken together, admission of Rule 413 evidence was not unconstitutional.[54]

Enjady further argued that Rule 413 violated his right to equal protection, because it allowed "unequal treatment of similarly situated defendants concerning a fundamental right."[55] In a relatively brief section of its opinion that lacked in-depth analysis, the court applied the rational basis test to this equal protection question. The court reasoned that use of the rational basis test was appropriate, because Rule 413 "neither burdens a fundamental right nor targets a suspect class."[56] Therefore, the court held, "Congress's objective of enhancing effective prosecutions for sexual assaults is a legitimate interest" that satisfied the rational basis test.[57]

In *United States v. Castillo*, another 10th Circuit Court of Appeals case, the defendant raised similar constitutional arguments concerning propensity evidence admitted against him under Rule 414.[58] Like Enjady, Castillo was unsuccessful in challenging the admission of evidence on the constitutional bases of equal protection and due process. However, Castillo asserted a third constitutional argument, maintaining that Rule 414 violated his Eighth Amendment right to be free from cruel and unusual punishment. The court quickly dismissed this novel argument and found no such violation when it held: "[Rule 414] does not impose criminal punishment at all; it is merely an evidentiary rule."[59]

In *United States v. Wright*, the Air Force Court of Criminal Appeals first addressed the use of propensity evidence at courts-martial.[60] Senior Airman Wright alleged that admission of evidence under MRE 413 denied him a fair trial in violation of his constitutional rights to due process and equal protection. As to the due process argument, the Air Force court applied the rationale followed by the *Enjady* and *Castillo* courts, and held that the accused had failed to show an "overriding fundamental concept of justice"[61] that would limit the use of MRE 413 evidence. Concerning Wright's equal protection argument, the Air Force court again deferred to the 10th Circuit Court of Appeals, and applied the rational basis test to MRE 413. The Air Force court reasoned: "We again concur with that court's finding that the congressional intent to provide a means by which evidence of patterns of abuse and similar crimes could be admitted into evidence provides such a [rational] basis."[62] The court concluded: "[T]rial counsel may use evidence admitted under [MRE 413] to demonstrate an accused's propensity to commit the charged sexual assault."[63] Later cases decided by the Air

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*. at 1434.

58. United States v. Castillo, 140 F.3d 874 (10th Cir. 1998). A jury in the District of New Mexico convicted Castillo of four counts of sexual abuse in violation of 18 U.S.C. § 2242(1) and four counts of sexual abuse of a minor in violation of 18 U.S.C. § 2243(a). The offenses occurred on the Navajo Reservation at Crownpoint, New Mexico. The charges arose from three acts alleged by Castillo's daughter, N.C., and one act alleged by his daughter, C.C. Each allegation led to a separate count of sexual abuse and sexual abuse of a minor. At trial, the district court allowed N.C. to testify about a fourth uncharged incident, and allowed C.C. to testify about two additional uncharged incidents. Unlike *Enjady*, which decided the constitutionality of Rule 413, the court in *Castillo* analyzed the constitutionality of Rule 414. However, the analysis applied by the court was similar. The court specifically enumerated three reasons why the application of Rule 414 did not violate the Due Process Clause. First, the court looked to the historical practice regarding the general prohibition of propensity evidence in criminal trials. Notwithstanding the general prohibition, the court looked to the "ambiguous" history of the use of propensity evidence in sex offense cases when the defendant's sexual character is an issue. Second, the court also considered that other codified rules of evidence have been found constitutional even though they present the same risks that Rule 414 evidence presents. Third, the court analyzed the procedural safeguards of Rules 402 and 403. Since Rule 402 requires all evidence to be relevant, and the Rule 403 balancing test requires exclusion of unfairly prejudicial evidence even if it is relevant, the court reasoned that any overly prejudicial evidence would be excluded, thereby ensuring constitutional fairness. "Thus, application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414." *Id*. at 883. Like *Enjady*, Castillo's equal protection argument was quickly addressed. Using the same analysis employed in *Enjady*, the court concluded that "enhancing effective prosecution of sexual assaults is a legitimate interest." *Id*. "The government has a particular need for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child's testimony." *Id*.

59. *Id*. at 884.

60. United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

61. *Id*. at 900.

62. *Id*. at 901.

63. *Id*. at 900.

Force court have relied on *Wright* to summarily dismiss constitutional challenges to MRE 413 and MRE 414.[64]

In light of these three cases, it appears that constitutional attacks on FRE 413 and FRE 414, or on the corresponding MRE 413 and MRE 414, will fail. Thus far, defendants have been unsuccessful in showing that admitting evidence under either Rule 413 or 414 denies them due process or violates their right to equal protection. Moreover, both federal and military courts apparently regard the prerequisites to admitting Rule 413 or 414 evidence as adequate procedural safeguards to protect defendants' constitutional rights.

Admission of Propensity Evidence

There have been a number of cases, in both the federal and military courts, which have addressed the admissibility of evidence under Rules 413 and 414. The most perplexing issue facing the courts in relation to these rules is the circumstances under which a court will admit evidence of an accused's propensity to commit sexual offenses or child molestation. Rule 404(b) delineates specifically the reasons for which prior bad act evidence may be admitted, including to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[65] Rules 413 and 414 remove these limitations in sexual assault and child molestation cases. These rules state that such evidence is admissible "for its bearing on any matter to which it is relevant."[66] Contrary to Rule 404(b), a prosecutor now may use evidence of an accused's prior bad acts to show that the accused had a propensity to commit the crime charged. The prosecutor need not show any other purpose in offering the evidence.

Recent cases demonstrate that courts believe that Rules 413 and 414 supersede the stringent admissibility requirements of Rule 404(b).[67] It is less clear, however, exactly how courts read the new rules in conjunction with the admissibility standards of Rule 403. The initial question was whether the balancing test required by Rule 403 applied to Rules 413 and 414. The plain language of the rules suggested that such evidence was admissible without regard to Rule 403. However, a review of the legislative history of the rules reveals that Congress intended the new rules to be viewed in conjunction with existing rules.[68] Therefore, the courts applied the Rule 403 balancing test[69] to evidence offered under Rules 413 and 414.[70] This approach has evolved into a specialized balancing test for propensity evidence.

Analysis Under Rule 403

Federal courts have wrestled with the applicability of Rule 403 to the new rules. In their analyses, the federal courts have uniformly applied a balancing test under Rule 403[71] to determine the admissibility of evidence under either Rule 413 or 414. Generally, the courts have reasoned that, because the Rule 403 balancing test applies to all rules where admissibility of

64. *See* United States v. Bailey, 52 M.J. 786 (A.F. Ct. Crim. App. 1999); United States v. Dewrell, 52 M.J. 601 (A.F. Ct. Crim. App. 1999).

65. Fed. R. Evid. 404(b).

66. Fed. R. Evid. 413, 414. *See supra* notes 3-4 and accompanying text.

67. United States v. Mound, 149 F.3d 799, 802 (8th Cir. 1998) (stating that it was Congress's intent that the new rules supersede the restrictive aspects of Rule 404(b) in sex cases); United States v. Guardia, 135 F.3d 1326, 1329 (10th Cir. 1998) (holding that Rule 413 supersedes Rule 404(b)'s restrictions allowing the government to offer evidence of the accused's prior conduct to show propensity to commit the charged offense); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (holding that the new rules supersede the restrictive aspects of Rule 404(b)).

68. "In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 Cong. Rec. 8991 (statement of Rep. Susan Molinari).

69. Federal Rule of Evidence 403 requires the court to balance the probative value of the evidence against the harm likely to result from its admission.

70. *LeCompte*, 131 F.3d at 769 (stating that evidence offered under Rule 414 is still subject to the requirements of Rule 403). *See* United States v. Mann, 193 F.3d 1172, 1173 (10th Cir. 1999) (stating that courts cannot ignore the balancing requirement of Rule 403); United States v. Lawrence, 187 F.3d 638 (6th Cir. 1999) (holding that Rule 403 is applicable to Rule 414 evidence); United States v. Castillo, 140 F.3d 874, 882-83 (10th Cir. 1998) (applying the Rule 403 balancing test to evidence offered under Rule 414, and holding that such application protects the accused's constitutional right to due process); United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (stating that under both Rules 413 and 414, the court must conduct a Rule 403 balancing test); United States v. Guardia, 135 F.3d 1326, 1330 (10th Cir. 1998) (holding that the Rule 403 balancing test applies to Rule 413 evidence); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (applying the Rule 403 balancing test to evidence offered under Rule 413, and stating that the Rule 403 balancing test is necessary to ensure constitutionality of the rule); United States v. Peters, 133 F.3d 933 (10th Cir. 1998) (holding that the Rule 403 balancing test applies to Rule 413); United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997) (stating that a Rule 403 balancing test is still required for evidence offered under Rule 414); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997) (stating that Rule 403 balancing test is consistent with Congress's intent); United States v. Bailey, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (adopting *Dewrell* test for Rule 403 balancing); United States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999) (making definitive test for applying Rule 403 balancing to Rule 413 and Rule 414 evidence); United States v. Green, 50 M.J. 835, 839 (Army Ct. Crim. App. 1999) (holding that, in the Army, the military judge is required to conduct Rule 403 balancing test before admitting evidence under either Rule 413 or Rule 414); United States v. Wright, 48 M.J. 896, 899 (A.F. Ct. Crim. App. 1998) (finding that military judge properly balanced Rule 413 evidence using Rule 403); United States v. Henley, 48 M.J. 864, 871 (A.F. Ct. Crim. App 1998) (applying Rule 403 balancing test to Rule 414 evidence); United States v. Hughes, 48 M.J. 700, 717 (A.F. Ct. Crim. App. 1998) (holding that Rule 414 evidence must still comply with the Rule 403 balancing test).

evidence is discretionary, Rule 403 should also apply to Rules 413 and 414. These courts have noted that the Rule 403 balancing test should be applied to give the new rules their intended effect,[72] even though there is a preference in favor of admitting evidence under these rules.[73] Therefore, federal courts generally apply the Rule 403 balancing test with a view toward admitting the evidence under either Rule 413 or Rule 414.[74] Moreover, several federal courts have added requirements to the standard Rule 403 balancing test. For example, the 10th Circuit Curt of Appeals stated that "a court must perform the same 403 analysis that it does in any other context, but with careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413."[75] The court further stated that "the trial court must make a reasoned, recorded finding"[76] concerning its Rule 403 balancing test, after a full evaluation of the proffered evidence.

The military's response to these rules was not much different. Initially, the military courts struggled with whether any balancing test was required.[77] In *United States v. Hughes*, the Air Force court stated that, in examining the admissibility of evidence under MRE 414, the evidence must still withstand the MRE 403 balancing test.[78] The Air Force court reaffirmed this view in two later cases.[79]

The Army Court of Criminal Appeals also confronted the issue of whether the MRE 403 balancing test was required. In *United States v. Green*,[80] the military judge admitted evidence of a prior alleged sexual assault by the accused against a different victim. The alleged sexual assault occurred several months prior to the charged offenses, and the military judge stated that MRE 413's plain language made this type of evidence admissible.[81] The military judge therefore admitted the evidence without any balancing test. The Army court held that the military judge erred as a matter of law, because the MRE 403 balancing test was required prior to admission of evidence under either MRE 413 or MRE 414.[82]

Although the Air Force court in *Hughes* took an approach similar to the Army court in *Green*, the Air Force court has recently adopted a different standard for applying the MRE 403 balancing test to evidence offered under MRE 414.[83] In *United States v. Dewrell*, a general court-martial convicted the accused, an Air Force master sergeant, of committing an indecent act upon the body of a female less than sixteen years of age. The charges arose from an incident that occurred on 1 October 1995, when the accused fondled ADK's[84] chest under her shirt and placed her hands on his exposed penis. The trial counsel gave timely notice of the government's intent to offer the testimony of two witnesses, Specialist C[85] and Ms. P,[86] under MRE 404(b) and 414.

Specialist C testified about events that allegedly occurred between 1987 and 1989 when she was between eleven and thirteen years old. The first incident occurred while she was at the accused's home to babysit. The accused was wearing short

71. Fed. R. Evid. 403. *See supra* note 9 and accompanying text.

72. *Mound*, 149 F.3d at 800; *LeCompte*, 131 F.3d at 769; *Meacham*, 115 F.3d at 1492.

73. *Larson*, 112 F.3d at 604; *Mound*, 149 F.3d at 800; *Enjady*, 134 F.3d at 1431; *LeCompte*, 131 F.3d at 769; United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997); *Meacham*, 115 F.3d at 1492.

74. *Mound*, 149 F.3d at 800; *LeCompte*, 131 F.3d at 769; *Meacham*, 115 F.3d at 1492.

75. *Guardia*, 135 F.3d at 1330.

76. *Id*. at 1332.

77. *See* United States v. Green, 50 M.J. 835 (Army Ct. Crim. App. 1999); United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998); United States v. Henley, 48 M.J. 864 (A.F. Ct. Crim. App 1998); United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998).

78. *Hughes*, 48 M.J. at 716. The court analogized the admissibility of evidence under MRE 414 to the admissibility of evidence of prior misconduct under MRE 404(b). The court stated that evidence offered under MRE 404(b) must meet a three-pronged test. First, the evidence must tend to prove that the accused committed the uncharged misconduct. Second, the evidence must make some fact of consequence more or less probable. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice or confusion. The court applied a similar test to the evidence offered under MRE 414.

79. Unites States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999); *Henley*, 48 M.J. at 871.

80. 50 M.J. 835 (Army Ct. Crim. App. 1999).

81. *Green*, 50 M.J. at 837-8.

82. *Id*. at 839. The court relied heavily on legislative history and prior federal court cases, holding that the "constitutional concerns with Rules 413 and 414 are satisfied by a proper application of the Rule 403 balancing test by the trial judge." *Id*. The court specifically looked at the drafters' analysis provided in the *MCM* wherein it states that courts will apply the Rule 403 balancing test to evidence offered under Rules 413 and 414. *See* MCM, *supra* note 32, app. 22, at A22-36.

83. *Dewrell*, 52 M.J. at 609.

84. ADK is a pseudonym. It is unclear from the case what relationship, if any, ADK had with the accused.

pants and she observed that the accused had an erection. The accused then pulled his penis from his shorts, placed her hands on it, and made her masturbate him. The second incident allegedly occurred when the accused forced Specialist C into a bathroom, locked the door, cornered her, and made her rub his penis. She also testified that on this occasion, the accused put his hand in her vagina and roughly rubbed her until he ejaculated. Specialist C also testified that on a third occasion the accused showed her pornographic materials.[87]

The government also charged the accused with raping Ms. P when she was fifteen years old.[88] Ms. P testified that on several occasions prior to the charged rape, the accused forced her hand onto his penis, forced her to masturbate him, fondled her breasts, and digitally penetrated her vagina. All of these incidents occurred in the accused's automobile while he was driving Ms. P home after babysitting.[89]

The military judge admitted a portion of Specialist C's testimony concerning the accused grabbing her, putting her hand on his penis, and forcing her to masturbate him.[90] The judge admitted the evidence under MRE 404(b) and 414. However, the military judge excluded the testimony concerning the incidents in the bathroom, because they were too dissimilar to the charged offenses and, therefore, the prejudicial effect of the evidence would substantially outweigh its probative value.[91] The judge admitted Ms. P's testimony under MRE 413 because she was over the age of fourteen at the time of the prior rape.[92]

The accused appealed, arguing that the military judge improperly admitted Specialist C's and Ms. P's testimony and, in so doing, violated the Due Process and Equal Protection Clauses of the Constitution.[93] The first issue that the Air Force court discussed was the military judge's admission of the evidence under MRE 404(b), 413, and 414. The Air Force court found that, for three reasons, it was inappropriate to apply the MRE 404(b) analysis to evidence offered under MRE 413 and MRE 414. First, neither the trial counsel nor the military judge articulated a specific reason under MRE 404(b) as to why the evidence was admissible. Second, the MRE 403 balancing which the military judge performed "was not in accord with that normally done" for MRE 404(b) evidence.[94] Third, the limiting instruction[95] given by the military judge was not a MRE 404(b) instruction. As a result, the Air Force court found that the lower court erred in applying the MRE 404(b) analysis to evidence offered under MRE 414. Instead, the Air Force court found that applying a modified MRE 403 balancing test was appropriate in such cases.[96]

Chief Judge Snyder, writing for the Air Force court, focused on the applicability of the MRE 403 balancing test to evidence offered under either MRE 413 or MRE 414.[97] The court first considered the federal courts' views that Rule 403 should be

85. Specialist C was a family friend of the accused. She used to live across the street from the accused when both families were stationed in Oklahoma City, Oklahoma. Specialist C was a baby-sitter for the accused's children when they were neighbors. It is unclear from the case how the authorities became aware of any misconduct relating to Specialist C.

86. Ms. P was a second victim. Ms. P was a baby-sitter for the accused's children.

87. *Dewrell*, 52 M.J. at 605-06.

88. The panel found the accused not guilty of this offense. *Id*. at 606 n.1.

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*. at 607. The version of MRE 414 in effect at the time of the accused's trial, defined "child" as "any person below the age of fourteen." However, the 1998 amendments raised the age to sixteen. MCM, *supra* note 32, Mil. R. Evid. 414.

93. *Dewrell*, 52 M.J. at 608.

94. *Id*.

95. The military judge gave the following limiting instruction:

> Each offense must stand on its own and you must keep the evidence of each offense separate. The burden in on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of any other offense. However, you may consider any similarities in the testimony of Ms. [P, ADK], and Spec C concerning masturbation with regard to the Specification of Charge II.

Id. at 606.

96. *Id*.

97. *Id*.

applied "in a broad manner which favors admission."[98] Specifically, the Air Force court critiqued the 10th Circuit's application of the balancing test, stating that the 10th Circuit's approach was too restrictive.[99] Chief Judge Snyder stated that, if Rule 403 was applied to Rules 413 and 414 in the same manner as other rules, then the effects of Rules 413 and 414 "have been neutralized if not eviscerated."[100] Consequently, the Air Force court opted "for an approach which we believe accomplishes the purposes of the rules."[101] The court stated:

> We hold that when applying the Rule 403 balancing test to Rule 413 and 414 evidence, the military judge will test for whether the prior acts evidence will have a substantial tendency to cause the members to fail to hold the prosecution to its burden of proof beyond a reasonable doubt with respect to the charged offenses. It is only when the prior acts evidence is deemed to meet this test that its prejudicial value will be deemed to *substantially* outweigh the probative value of the prior acts evidence in issue and thereby render exclusion of the evidence appropriate.[102]

The court further elicited the primary factors for the military judge to consider:

> (1) whether the evidence will contribute to the members arriving at a verdict on an improper basis;
> (2) the potential for the prior acts evidence to cause the members to be distracted from the charged offenses; and,
> (3) how time consuming it will be to prove the prior acts.[103]

As a result, the Air Force court promulgated a rule that deviates from the norm established by the federal courts. Notwithstanding the different approaches of the 8th Circuit and the 10th Circuit,[104] it is clear that the federal courts required application of the Rule 403 balancing test to determine the admissibility of evidence under Rules 413 and 414.[105] As discussed above, Chief Judge Snyder critiqued the 10th Circuit *Guardia* holding that the Rule 403 balancing should be applied to Rule 413 evidence in the same manner it is applied to other types of evidence. However, Chief Judge Snyder's interpretation of the *Guardia* holding was flawed. Moreover, the analysis used by the 10th Circuit in *Guardia* demonstrated a superior understanding of the underlying evidentiary issues.[106]

The *Guardia* court stated: "Rule 413 marks a sea change in the federal rules' approach to character evidence, a fact which could lead to at least two different misapplications of the 403 balancing test."[107] First, a court might be tempted to exclude Rule 413 evidence because of the traditional view that such evidence is always too prejudicial.[108] Second, a court might liberally allow the evidence under "the belief that Rule 413 embodies a legislative judgment that propensity evidence regarding sexual assaults is never too prejudicial or confusing and generally should be admitted."[109]

The 10th Circuit found that both of these potential misapplications of the Rule 403 balancing test would be "illogical."[110] Under the first approach, such a strict interpretation would never allow admission of Rule 413 evidence.[111] Because Congress intended to partially repeal the admission limitations of

98. *Id*. at 609. The Air Force court termed the 8th Circuit's approach to this issue "broad," and accused the 10th Circuit of trying to "stake out a middle ground between a restrictive application and the Eighth Circuit's approach . . . ." *Id. See, e.g.*, United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997) (stating that Rule 403 must be applied to allow Rule 414 its intended effect); *accord* United States v. Mound, 149 F.3d 799, 800 (8th Cir. 1998) (stating that trial court must apply 413, 414, and 415 in a way sufficient to accomplish the effect intended by Congress); United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997).

99. *Dewrell*, 52 M.J. at 609 (citing United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998)). The Air Force court summarized the 10th Circuit approach by stating: "Rule 403 would be applied to Rule 413 and 414 evidence in the same fashion as evidence offered under other rules which favor admission." *Id*.

100. *Id*.

101. *Id*.

102. *Id*. (emphasis in original; citation omitted)

103. *Id*.

104. *See supra* note 70.

105. United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998); United States v. Larson, 112 F.3d 600 (2d Cir. 1997).

106. *See* United States v. Guardia, 135 F.3d 1326, 1328-32 (10th Cir. 1998).

107. *Id*. at 1330.

108. *Id*.

109. *Id*.

Rule 404(b), the 10th Circuit reasoned, "Rule 413 only has effect if we interpret it in a way that leaves open the possibility of admission."[112] With regard to the second approach, the 10th Circuit said simply that Rule 413 "contains no language that supports an especially lenient application of Rule 403."[113] Therefore, the 10th Circuit found that the Rule 403 balancing test should be applied to Rule 413 evidence in the same manner as it would be applied to any other type of evidence.[114]

Contrary to Chief Judge Snyder's comments in *Dewrell*, the 10th Circuit court recognized the extremely sensitive nature of the balancing required for Rule 413 evidence. However, the court also appreciated that "propensity evidence . . . has indisputable probative value."[115] Because the risk of prejudice would be present to varying degrees each time Rule 413 evidence was offered, the 10th Circuit concluded that courts must consistently apply the Rule 403 balancing test in the same manner as it is applied to other types of evidence.[116] Thus, the 10th Circuit's interpretation was not overly restrictive, as Chief Judge Snyder asserted in *Dewrell*, but was instead a reasoned application of current law, which ensured fairness to the accused, and the exclusion of evidence where its probative value would be substantially outweighed by its prejudicial effect.

For the military practitioner, a conflict now exists where the Air Force court asserts an analytical approach to MRE 403 that differs from the approach articulated by the Army court and the federal courts. This conflict will only be resolved when the Court of Appeals for the Armed Forces articulates the appropriate application of the MRE 403 balancing test to evidence offered under MRE 413 or MRE 414. Although the Air Force court offered a modified standard in *Dewrell*, it is not the standard that should be applied in courts-martial. While the decision in *Dewrell* purportedly "accomplishes the purpose of the rules,"[117] the 10th Circuit's approach to the issue is superior. The 10th Circuit's approach provides for the normal application of Rule 403 to Rules 413 and 414, in the same manner that Rule 403 would be applied to other rules of admissibility. This allows for a consistent evidentiary approach, regardless of the basis for admission.

Prior Offenses—What Are They and What is Needed to Prove Them?

In addition to the varying approaches to the Rule 403 balancing test, propensity evidence raises several other concerns. For example, what types of prior bad acts are admissible at trial against the defendant? Rules 413 and 414 allow admission of, respectively, evidence of prior offenses of sexual assault and offenses of child molestation. While the term "offense" is specifically defined in the rules,[118] there is no guidance as to the prosecutor's burden to demonstrate a prior offense. Moreover, there is little guidance concerning when a prior offense becomes inadmissible due to time limitations. This section discusses these issues.

110. *Id*.

111. *Id*.

112. *Guardia*, 135 F.3d at 1330.

113. *Id*. at 1331.

114. *Id*.

115. *Id*.

116. An example of the dangers of an especially lenient application of the Rule 403 balancing test may be found in *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999). In *Charley*, a jury convicted the defendant of seven counts of sexual abuse of a child and sentenced him to life imprisonment. *Id*. at 1255. One issue raised on appeal was the admission of a prior conviction for sexual molestation offered by the government under FRE 414. *Id*. at 1259-60. The defendant alleged that admitting the prior conviction under FRE 414 denied him his constitutional due process right to a fair trial. *Id*. at 1259. In evaluating this issue, the court determined that it must conduct a "case-specific inquiry" into the trial judge's decision to admit the Rule 414 evidence under Rule 403. *Id.* The following excerpt details the trial judge's decision.

> For the record, I have made a balancing test under 403 and 41[4], and I find the testimony of the previous sexual activity by the defendant to outweigh any harm to come to him under 403. Specifically, under relevancy, in the discussions under Rule 413 it says, the proposed reform is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases it will affect. In child molestation cases, for example, *a history of similar acts tends to be exceptionally probative* because it shows an unusual disposition of defendant - a sexual or sadosexual interest in children - that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked *in the absence of substantial corroboration*. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense. So I have conducted that balancing test. As I previously stated to you I found it was more probative than not under 4[0]3.

Id. at 1260 (emphasis provided) (citations omitted). The 10th Circuit found that "invoking the stated general reasons for the Rule's enactment" was a sufficient balancing test under Rule 403. *Id*. However, it is obvious that the trial judge did little more that read the legislative history of Rule 414 contained in the advisory committee's note to the rule.

117. *Dewrell*, 52 M.J. at 606.

Burden of Proof to Show a Prior Offense

Neither the FRE nor the MRE make any reference to the level of proof required to show a prior sexual or child molestation offense. They simply state: "evidence of the defendant's commission of one or more offense or offenses of sexual assault is admissible . . . ."[119] However, the legislative history behind FRE 413 and FRE 414 provides some assistance.

David Karp, one of the original drafters of the proposed evidentiary rules, outlined his opinions concerning the burden of proof issue in an address presented to the Evidence Section of the Association of American Law Schools on 9 January 1993.[120] Representative Molinari later incorporated Mr. Karp's address into her House speech on the Crime Control Act.[121] These remarks provide a starting point for exploring the standard of proof issue.

Mr. Karp stated, "the standard of proof with respect to uncharged offenses under the new rules would be governed by the Supreme Court's decision in *Huddleston v. United States*."[122] While *Huddleston* addressed proof requirements under Rule 404(b), Mr. Karp asserted that the same requirements would apply to evidence offered under Rules 413 and 414. In *Huddleston*, the Court listed four procedural safeguards to the admission of evidence under Rule 404(b).[123] The Court stated:

> We think, however, that the protection against such unfair prejudice emanates not

118. Fed. R. Evid. 413(d). In pertinent part: FRE 413(d) provides:

> For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved
> (1) any conduct proscribed by chapter 109A of title 18, United States Code;
> (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
> (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

MCM, *supra* note 32, Mil. R. Evid. 413. In pertinent part, MRE 413 provides:

> For purposes of this rule, "offense of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved
> (1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;
> (3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Fed. R. Evid. 414. In pertinent part, FRE 414 provides:

> For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved
> (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
> (2) any conduct proscribed by chapter 110 of title 18, United States Code;
> (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
> (4) contact between the genitals or anus of the defendant and any part of the body of a child;
> (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
> (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

MCM, *supra* note 32, Mil. R. Evid. 414. In pertinent part, MRE 414 provides:

> For purposes of this rule, "child" means a person below the age of sixteen, and "offense of child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved
> (1) any sexual act or sexual contact with a child, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (2) any sexually explicit conduct with child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (3) contact between any part of the accused's body, or an object controlled or held by the accused, and the genitals or anus of a child;
> (4) contact between the genitals or anus of the accused and any part of the body of a child;
> (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
> (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

119. Fed. R. Evid 413, 414. *See supra* notes 3-4 and accompanying text.

120. Karp, *supra* note 7, at 19.

121. 140 Cong. Rec. H8991 (Aug. 21, 1994) (statement of Rep. Susan Molinari).

122. Karp, *supra* note 7, at 19.

> from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirements of Rule 402 as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[124]

The Court in *Huddleston* concluded: "such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed that similar act."[125] Mr. Karp went on to say that the jury should be able to "reasonably conclude by a preponderance [of the evidence] that the offense occurred."[126]

While federal courts have uniformly applied the *Huddleston* criteria[127] as envisioned by Mr. Karp, the military courts have taken a slightly different approach. In *United States v. Hughes*,[128] the Air Force court departed from *Huddleston* and created a unique standard to determine the admissibility of prior offense evidence under MRE 404(b). First, the court found that the military judge was not required to make a finding that the government had proved the acts by a preponderance of the evidence.[129] Here, the court relied on the "sufficient to support a finding by the jury," language from *Huddleston*.[130] Even though this is the same standard applied in *Huddleston*, the court deviated from the *Huddleston* four-prong test and created its own three-part test to review the admissibility of prior offense evidence in courts-martial under MRE 404(b).[131] The test asks: "Does the evidence reasonably support a finding that the appellant committed the prior acts?; what fact of consequence is made more or less probable by the existence of this evidence?; and is the probative value substantially outweighed by the danger of unfair prejudice?"[132] Finally, the Air Force court added: "we conclude a similar framework may be used for evidence offered under [MRE] 414."[133]

Because of the differing approaches of the Air Force court and the Circuit Courts of Appeal, the standard of proof required for admitting evidence under Rules 413 and 414 remains unclear. While the *Huddleston* preponderance standard makes sense, the question remains whether it should be used in Rule 413 or Rule 414 cases. The preponderance standard comes from Rule 404(b), which allows admission of character evidence if it falls within one of the listed exceptions, but never to show propensity. Apparently, Congress intended to eliminate this obstacle to admit evidence of prior acts in sexual assault and child molestation cases. This implies that a lower burden should also be used. However, fairness to the accused is of paramount importance in the evidentiary rules. Such a lower burden would open the door to the dangers of punishing an accused because of prior bad acts, or because the panel believes that the accused is a bad person.

Despite the legislative history and the Supreme Court's holding in *Huddleston*, a higher standard of proof should be used in determining the admissibility of evidence under Rules 413 and 414. Because Rules 413 and 414 allow evidence to be admitted to show propensity and to be considered on any matter for which it is relevant, there is a greater need to protect the

123. Huddleston v. United States, 485 U.S. 681 (1988).

124. *Id.* at 691-92 (citations omitted).

125. *Id.* at 685.

126. Karp, *supra* note 7, at 19.

127. *See* United States v. Mann, 193 F.3d 1172 (10th Cir. 1999); United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998); United States v. Roberts, 88 F.3d 872 (10th Cir. 1996). *But see* United States v. Sumner, 119 F.3d 658 (8th Cir. 1997). The 8th Circuit in *Sumner* used a slightly different standard. "To be admissible as Rule 404(b) evidence, the evidence must be '(1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than in prejudicial effect; and (4) similar in kind and close in time to the crime charged.'" *Id.* at 660. Thus, the 8th Circuit added the requirements that the proffered evidence be similar to the charged offense and not too old.

128. United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998).

129. *Id.* at 715.

130. *Id.*

131. *See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

132. *Hughes*, 48 M.J. at 715.

133. *Id.* at 716.

accused from unfair consideration of the evidence by the fact finder. *Huddleston* reduced the threshold for admitting character evidence under Rule 404(b) from clear and convincing to a preponderance, because of the clear exceptions listed in Rule 404(b).[134] The Court in *Huddleston* found that the legislature had already balanced the probative value of this type of evidence against the danger of unfair prejudice. However, the Court was also careful to reiterate Rule 404(b)'s strict prohibition against the use of such evidence to show the accused's propensity to commit a particular offense.[135]

Like the federal courts, the burden of proof required to show a prior offense in the military courts is too low. While the Air Force court relied on the "sufficient to support a finding by the jury" language of *Huddleston*, it lowered this standard when it devised the three-part test in *Hughes*.[136] The first prong of the test simply asked: "Does the evidence reasonably support a finding that the appellant committed the prior act?"[137] Evidence sufficient to reasonably support a finding is well below a preponderance standard. The Air Force court further lowered the standard in *Dewrell*.[138] While the Air Force court did not specifically address the burden of proof required, its adoption of the MRE 403 balancing test had the practical effect of reducing the burden from the preponderance standard. The court, in *Dewrell*, focused on the government's burden of proving the charged offenses beyond a reasonable doubt. Essentially, under the *Dewrell* standard, any level of evidence that does not have a substantial tendency to detract from the government's burden to prove the charged offense will be admitted.

A clear and convincing standard should be applied to evidence offered under Rules 413 and 414. The broader use of evidence authorized under Rules 413 and 414 warrants a higher standard of proof to show prior acts. A higher standard would also establish a clearer nexus to the charged crimes. If there is more proof that the accused committed a prior act, then the government has better established the accused's propensity to engage in similar acts. Also, if the prior act is shown more clearly, then the court can better ensure fairness to the accused. Finally, the *Huddleston* case addressed evidence offered under Rule 404(b), not Rules 413 and 414. Rules 413 and 414 should be analyzed differently, and with greater scrutiny, because evidence admitted under either rule "may be considered for its bearing on any matter to which it is relevant."[139]

Time Limitation—How Old is Too Old?

As with the burden of proof to show a prior offense under Rules 413 and 414, the rules provide no guidance on when a prior offense becomes inadmissible due to time limitations. Senator Dole argued during debates on these rules that even very old evidence would still have great probative value when it comes to propensity to commit sexual assaults or child molestation.[140] "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses."[141] Therefore, the legislative history reveals that no time limit was intended to apply.

Although the courts have given great deference to the congressional intent in passing the rules, the courts have also critically examined the age of proffered evidence while conducting their Rule 403 balancing tests. Two federal cases illustrate this point: *United States v. Larson*[142] and *United States v. Meacham*.[143]

In *Larson*, a jury convicted the defendant, David A. Larson, of interstate transportation of a minor with intent to engage in criminal sexual conduct in violation of 18 U.S.C. § 2423(a).[144] Prior to trial, the government gave timely notice of its intent to offer the testimony of three witnesses who alleged that they had

134. *Huddleston*, 485 U.S. at 681, n.2.

135. *Id.* at 685.

136. *Hughes*, 48 M.J. at 715.

137. *Id.*

138. United States v. Dewrell, 52 M.J. 601, 609 (A.F. Ct. Crim. App. 1999).

139. Fed. R. Evid. 413, 414; MCM, *supra* note 32, Mil. R. Evid. 413, 414.

140. 140 Cong. Rec. S12990 (Sept. 20, 1994) (statement of Sen. Robert Dole).

141. *Id.*

142. United States v. Larson, 112 F.3d 600 (2d Cir. 1997).

143. United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997).

144. The indictment charged that Larson had transported a 13 year-old boy from Connecticut to Massachusetts to engage in sex. Larson had a cabin in Otis, Massachusetts, to which he took the boy under the pretense that the boy would work around the cabin, go water skiing, and go swimming. However, once there, Larson served the boy alcohol and then engaged in sexual acts with him. *Larson*, 112 F.3d at 602.

been sexually molested by Larson when they were minors. While the case does not state which provisions the government relied on, the district court analyzed the admissibility of the proffered evidence under both Rules 404(b) and 414.[145] The court considered testimony from two witnesses, Stevens and Walsh, concerning the defendant's prior crimes.[146] Stevens testified about acts that occurred sixteen to twenty years before trial and Walsh testified about acts that occurred twenty-one to twenty-three years before trial.[147] The district court allowed Stevens's testimony, but excluded Walsh's.[148]

On appeal to the Second Circuit Court of Appeals, Larson argued that it was prejudicial error for the trial judge to admit Stevens's testimony under Rules 414 and 404(b), because the acts about which he testified occurred years before trial.[149] The court agreed that the more remote a prior act is, the less reliable and less relevant it may become.[150] However, the court went on to say that there is no "bright-line rule as to how old is too old."[151] In finding that the district court had not abused its discretion in admitting Stevens's testimony, the Second Circuit stated that the similarity between Stevens's testimony and the charged offense made his testimony relevant.[152] Further, both the "traumatic nature of the events and their repetition over a span of four years," were strong indicators of Stevens's reliability as a witness.[153] The lower court was upheld.

In *Meacham*, a jury in the District of Utah convicted Henry Lee Meacham of one count of transporting a minor in interstate commerce with the intent that she engage in sexual activity in violation of 18 U.S.C. § 2423.[154] The victim, a twelve year-old, female relative of Meacham, alleged that on two occasions she accompanied Meacham hauling freight between Utah and California. On those occasions, Meacham engaged in criminal sexual activity with her.[155] Meacham testified and denied any sexual contact with the victim.[156] On cross-examination, he also denied fondling his stepdaughters when they were under the age of fourteen.[157] In rebuttal to this statement, the government called Meacham's two stepdaughters.[158] Each testified that Meacham had molested them more than thirty years prior to trial.[159] The court reviewed the legislative history of Rules 413 and 414, and determined that such testimony was admissible.[160]

These cases demonstrate that a clear time limit should be imposed on the admissibility of prior offenses. In other rules of evidence, clear time limits on admissibility ensure the reliability and relevance of the proffered evidence. For example, in

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145. *Id*. at 604.

146. *Id*. at 602. Stevens alleged that the defendant engaged in similar conduct with him occurring 16 to 20 years before trial. The court admitted his testimony. Walsh alleged also that the defendant had engaged in similar conduct with him occurring 21 to 23 years before trial. The court excluded his testimony. The third witness, Deland, was not discussed by the court, leaving it unclear whether the district court admitted or excluded his testimony.

147. *Id*.

148. *Id*. at 602-03. The court reasoned that the events to which Walsh would testify were too remote in time. Therefore, in applying the Rule 403 balancing test, the court concluded that the probative value of Walsh's testimony was substantially outweighed by the danger of unfair prejudice to the defendant. On the other hand, the court concluded that the events to which Stevens testified were "not so remote in time so as to constitute unfair prejudice to the defendant." *Id*. at 602. The court further found that Stevens's testimony "goes to the presence of a common scheme or plan on the part of the defendant and also is relevant to the defendant's intent and motive in the commission of the charged offense." *Id*. at 603.

149. *Id*. at 605.

150. *Larson*, 112 F.3d at 605.

151. *Id*.

152. *Id*.

153. *Id*.

154. United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997).

155. *Id*. at 1491.

156. *Id*.

157. *Id*.

158. *Id*.

159. *Id*.

160. *Id*. at 1495. The court reasoned that, since no time limit is imposed on the uncharged offenses that may be used under Rule 414, testimony concerning events which occurred 30 years ago would be admitted.

Rule 609, there is a 10-year limitation on the use of a prior conviction to impeach a witness. Without such limitation, the accused is exposed to the use of prior acts from his entire life. The older the act, the more difficult it would be for the accused to investigate or defend against the allegation. Moreover, prior bad acts from the distant past may cause the fact finder to lose focus from the charged offense. It is even possible that evidence of a prior crime could be offered after the statute of limitations for the crime has run. If evidence of this crime was admitted, an accused could be punished for an offense where the government has otherwise lost the ability to prosecute him due to the statue of limitations. Finally, time limits should be imposed because the reliability of the proffered evidence would decrease commensurate with the age of the prior offense**.**

A Practical Guide for Military Practitioners

The prohibition against admitting character evidence to show an accused's propensity to commit certain offenses is well entrenched in today's practice. This theory finds its origin in the earliest annals of English jurisprudence.[161] However, MRE 413 and MRE 414 have crumbled much of the historic wall between the panel and evidence of an accused's propensity to commit an offense. As a result, military practitioners must be prepared to deal with MRE 413 and MRE 414 evidentiary issues as admission of propensity evidence in courts-martial increases. This section offers practice tips for dealing with these rules at trial.

Trial Counsel

In most cases, trial counsel will like these rules because they permit the government to present evidence that the accused has committed similar offenses in the past. Therefore, the trial counsel can argue that the accused is more likely to have committed the offenses with which he is charged. To be effective, however, the trial counsel must remember the following predicate factors that open the door to admitting evidence under either MRE 413 or MRE 414.

First, there are strict notice requirements. Both MRE 413 and MRE 414 state that "the Government shall disclose the evidence to the accused . . . at least five days before the scheduled date of trial . . . ."[162] Trial counsel should not wait until the last minute to provide the required notice to the accused. The notice requirement is designed to promote fairness, eliminate surprise, and allow the defense sufficient time to investigate and prepare rebuttal or cross-examination. Timely notice preserves these concerns. Arguably, it may even press the accused closer to a plea agreement if he believes, after investigation, that the damaging evidence will be admitted.

Second, trial counsel must collect sufficient evidence to meet the burden of proving the prior offense. Obviously, this entails thorough investigation. Compiling evidence is not the trial counsel's only concern. He must also precisely articulate the government's burden under MRE 413 and MRE 414. Trial counsel will likely assert the diminished standard of proof used by the Air Force court in *Dewrell*. While *Dewrell* does not specifically address the burden of proof required, the court's ruling has the potential effect of lowering the "preponderance" standard followed by the federal courts and other military courts. Because the Court of Appeals for the Armed Forces has not ruled on this issue, however, trial counsel must be prepared to prove the prior offense by a preponderance of the evidence, as used in *Huddleston*. The greater the weight of the evidence presented concerning the offense, the more likely it is that the military judge will find the evidence probative, relevant, and reliable.

Third, trial counsel must be prepared to overcome the accused's inevitable objection under MRE 403. To overcome the MRE 403 objection, the trial counsel must articulate the significant probative value of the evidence. Trial counsel should discuss the similarities between the charged offense and the prior offense, including similarities between the victims. Trial counsel should also counter the age of the prior offense, when appropriate, by emphasizing the reliability of the prior victim, the presence of a sworn statement, and any other corroborating evidence. At the same time, the trial counsel must be prepared to explain why the danger of unfair prejudice to the accused does not significantly outweigh the probative value of the evidence.

Fourth, the trial counsel must be prepared to argue propensity evidence creatively during closing. The military judge may be uncomfortable with the new rules, due to the general prohibitions of MRE 404(b). However, the MRE 404(b) prohibitions should not apply to MRE 413 and MRE 414 admissibility issues. Rather, the new rules permit admission of propensity evidence "for any matter to which it is relevant."[163] Moreover, recent case law supports the use of MRE 413 or MRE 414 evidence to argue the propensity of the accused to commit a particular offense.[164] The trial counsel presents a compelling argument to the panel when he demonstrates that the accused has a propensity to commit the charged offenses because he committed similar offenses before.

Trial Defense Counsel

161. *See* Imwinkelreid, *Undertaking the Task*, *supra* note 6.

162. MCM, *supra* note 32, Mil. R. Evid. 413, 414.

163. *Id.*

164. United States v. Wright, 48 M.J. 896, 901 (A.F. Ct. Crim. App. 1998).

The trial defense counsel's job is formidable in cases where MRE 413 or MRE 414 evidence is offered. The defense counsel may believe that the most damaging evidence against his client is about to be admitted, and that the defense counsel is powerless to prevent that from happening. However, if the defense counsel has done his job, he will be well prepared at trial to protect his client from MRE 413 or MRE 414 evidence.

First, the defense counsel must begin investigation as soon as he receives notice of the government's intent to use propensity evidence. The more evidence gathered about the alleged uncharged offense, the better position the defense counsel will be in to defend his client. A thorough understanding of the facts will help the defense counsel to either rebut the allegations or to cross-examine the government's witness. If done properly, this may lay the foundation to later argue against admitting the evidence under MRE 403. The trial counsel has the burden to prove the prior offenses—defense counsel must hold the government to that burden. The defense counsel should assert the preponderance standard, as set out in *Huddleston*. Notwithstanding the *Huddleston* standard, the defense counsel could assert the position taken by this article, and argue that the court should apply a clear and convincing standard to evidence offered under MRE 413 and MRE 414. The defense counsel can argue that, because MRE 413 and MRE 414 allow evidence to "be considered for its bearing on any matter to which it is relevant," such evidence falls outside of the scope of the 404(b) standard articulated in *Huddleston*.

Second, the defense counsel must hold the trial counsel to the notice requirements in the rules. Although the military rules require only five days notice, the defense counsel can argue that he needs additional time to prepare, depending on the age of the prior offense. The defense counsel can further argue that he needs more than the five days provided in MRE 413 and MRE 414 to respond; after all, Congress allowed fifteen days under the federal rules. When appropriate, the defense counsel should give notice of MRE 412 evidence.[165] Arguably, if MRE 413 allows the government to offer evidence of prior alleged rapes, then the accused should be given wider latitude in offering evidence under MRE 412.

Third, the defense counsel must ask the military judge to determine the admissibility of propensity evidence in an Article 39a session of the court. This is the type of potentially inflammatory information that the defense counsel does not want to slip out in front of the panel. The prejudicial impact of such evidence, offered in an open session of the court, but not admitted, would be difficult to overcome.

Fourth, a thorough presentation of the evidence will help the defense counsel articulate a good MRE 403 objection. He must aggressively cross-examine the government's witnesses and should emphasize the prejudicial nature of the government's evidence. Oftentimes, evidence offered under MRE 413 or MRE 414 will be old and the defense counsel can challenge the reliability of that evidence. In addition, the defense counsel must distinguish between the prior act and the charged offense. The more differences shown by the defense counsel, the less reliable the government's evidence becomes. If the defense counsel is unable to distinguish the evidence, he should cautiously emphasize to the panel that the similarities between the prior act and the charged offense are confusing, and that the panel should take great care to try the accused only for the charged offense.

Fifth, the defense counsel must be prepared to ask for a limiting instruction to the panel concerning proper use of MRE 413 and MRE 414 evidence. Courts have looked to limiting instructions under MRE 404(b) for guidance. The trial counsel will likely argue that rules and relevant case law allow the government to offer evidence that shows the accused's propensity to commit the charged offense. The defense counsel should counter that propensity is only one factor to be considered.[166] Although the rules state that propensity evidence may be used for any matter to which it is relevant, courts frequently place limitations on the use of the such evidence by instructing the panel.[167] Moreover, a limiting instruction detracts from the trial

165. MCM, *supra* note 32, MIL. R. EVID. 412. In pertinent part, MRE 412 provides:

> (a) . . . The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c) of this rule:
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
> (b) Exceptions.
> (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
> (A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> (B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> (C) Evidence the exclusion of which would violate the constitutional rights of the accused.
> (c) Procedure to determine admissibility.
> (1) A party intending to offer evidence under subdivision (b) of this rule must:
> (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial;
> (B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

166. Unites States v. Dewrell, 52 M.J. 601, 610 (A.F. Ct. Crim. App. 1999).

counsel's arguments concerning propensity, and it may even diminish the trial counsel's ability to make such an argument. If the damaging evidence comes in, the defense counsel must be prepared to use every available tool to limit the damaging impact of the evidence to his client.

The Military Judge

The military judge may have the most difficult job when it comes to MRE 413 and MRE 414 evidence. That difficulty is compounded, because the Court of Appeals for the Armed Forces has not yet heard a case involving these evidentiary rules. However, the job of the military judge is made easier by the military and federal cases that have addressed the admissibility of propensity evidence under the new rules. The following guidance can be gleaned from those cases that interpreted MRE 413 and MRE 414.

First, the military judge must satisfy the predicate criteria listed by Judge Rolph in *United States v. Meyers*,[168] before admitting evidence under either MRE 413 or MRE 414. Implicit in this determination is applying a proper balancing test under MRE 403.[169] It is probably wiser to use the complete MRE 403 balancing test, instead of the modified version used by the Air Force court in *Dewrell*. For courts-martial in the Army, complete MRE 403 balancing is required.[170] In addition, the *Dewrell* court basically turned its brow at existing case law to further open the doors of admissibility. It is likely that the Court of Appeals of the Armed Forces will adhere to the higher standard when it addresses the issue. Finally, because MRE 413 and MRE 414 can be analogized to evidence offered under MRE 404(b), military judges should use the complete 403 balancing test, which was also the higher standard set forth by the Supreme Court in *Huddleston*.

Second, the military judge should ensure that the government satisfies its burden of proving any prior offense offered under the rules. To accomplish this, the military judge should conduct a pretrial hearing and require the government to put on its evidence. This allows the military judge to fully evaluate the evidence, and make an assessment of witness credibility. It also allows the military judge to make a first-hand assessment of the relevance and reliability of the evidence. Finally, this allows the military judge to make a reasoned record of the decision, articulating for the record the precise factors considered in conducting the MRE 403 balancing test.

Conclusion

The Crime Control Act was probably the most sweeping crime bill ever passed by Congress. The Act's amendments to the Rules of Evidence reflect a significant departure from the historical prohibition against using character evidence to show a person's propensity to commit a crime. Congress carved out these exceptions, encompassed by Rules 413 and 414, to specifically combat a perceived increase in sexual offenses against

167. *See id*. (stating that the military judge gave clear limiting instruction to members on how they were to use evidence admitted under MREs 413 and 414); United States v. Bailey, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (stating that the military judge gave limiting instruction to members on proper use of Rule 413 evidence); United States v. Henley, 48 M.J. 864, 872 (A.F. Ct. Crim. App. 1998) (stating that the military judge provided the members a limiting instruction on the proper use of evidence admitted under MRE 414); United States v. Hughes, 48 M.J. 700, 713 (A.F. Ct. Crim. App. 1998) (stating that the military judge gave limiting instruction that witness's testimony regarding prior allegation of sexual abuse could be considered only "for the limited purpose of its tendency, if any, to explain the state of mind of [the witness] . . . , [and that members should] not consider this evidence for any other purpose, [or] conclude from this evidence that the accused is a bad person or has criminal tendencies and that he therefore committed the offenses charged").

168. United States v. Myers, 51 M.J. 570, 580-81, n.20. (N.M. Ct. Crim. App. 1999). Judge Rolph opined:

> There now appears to be a number of predicate determinations that every military judge must make when facing the decision of whether or not to admit evidence under Mil. R. Evid. 413. These include:
>
> Determining that the accused is charged with "an offense of sexual assault." Mil. R. Evid. 413(a) and (d)(defining an "offense of sexual assault");
>
> Determining that the evidence offered is "evidence of the accused's commission of one or more offenses of sexual assault." Mil. R. Evid. 413(a);
>
> Determining that the evidence is relevant under Mil. R. Evid. 402 ("Evidence which is not relevant is not admissible."). In this regard, the military judge must conclude that the evidence shows the accused had a particular propensity bearing on the charged offense. Part of this relevance determination involves the military judge concluding that the members could reasonably find the conditional fact (i.e. that the accused committed the prior sexual assault) by a preponderance of the evidence;
>
> Determining and ruling that the prejudicial impact of the evidence is substantially outweighed by its probative value. Mil. R. Evid. 403;
>
> Determining that proper disclosure and notice, at least 5 days before trial, of the Government's intent to offer this evidence has been made. Mil. R. Evid. 413(b).

Id.

169. United States v. Green, 50 M.J. 835, 839 (Army Ct. Crim. App. 1999).

170. *Id*. at 839.

women and children. The call to adopt these rules was not from legal scholars and practitioners; instead, Congress acted in response to public opinion. As a result, our legal system now operates under ill-conceived evidentiary rules that are overly complex in application.

Although the accused faces tremendous risks from the admission of propensity evidence, military and federal courts have given great deference to the congressional intent underlying Rules 413 and 414. Moreover, the federal courts have overwhelmingly held that the rules are constitutional. The best solution requires Congress to make comprehensive amendments to the Federal Rules of Evidence, with the express purpose of effectively integrating Rules 413 and 414 into the existing rules. Because a major revision is unlikely, however, practitioners must struggle with the ambiguities inherent in Rules 413 and 414 until the courts provide more consistent guidance. In so doing, practitioners must ensure that fairness to the accused is maintained in the courtroom.

International Criminal Jurisdiction Issues for the United States Military

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Introduction

United States military forces are permanently, or relatively permanently, stationed on bases all over the world. In this era of "force projection" doctrine, American service members also find themselves temporarily deployed to foreign soil—Haiti, Somalia, Bosnia, and Kosovo are but a few recent examples. United States military personnel serving overseas are often accompanied by both family members and a civilian workforce.

The presence of American forces and accompanying civilians in foreign countries raises questions as to whether the sending nation or the receiving nation has criminal jurisdiction over American citizens who break the law. Where U.S. forces are involved, a status of forces agreement (SOFA) typically defines the legal status of American military personnel and accompanying family members and civilians. While most of the criminal jurisdictional issues are clearly spelled out by SOFAs, some jurisdictional gaps have developed over the years.

This article focuses on current criminal jurisdiction issues confronting the U.S. military overseas. These issues include the military's lack of jurisdiction over American family members and civilian workers, and the impact of changing attitudes among U.S. allies on SOFA criminal jurisdiction concerns like pre-trial custody, death penalty offenses, and environmental crimes. It does not propose to offer solutions to these problems; instead, this article seeks to make the military lawyer aware of the problem areas likely to be encountered overseas. Before delving into these issues, this article provides some background on SOFAs and their jurisdictional tenets.

Status of Forces Agreements

The end of World War II and the start of the Cold War ushered in a new era for the U.S. military. This new era saw for the first time large numbers of U.S. forces permanently forward-deployed around the globe to enforce a policy of Communism containment. Status of forces agreements were created between the United States and host nations "to define the rights, immunities, and duties of the force, its members, and family members."[1] While a major feature of a SOFA is apportioning criminal jurisdiction between the United States and the receiving nation, the SOFA also addresses civil jurisdiction, claims, taxes, duties, services provided by each party, and procuring supplies and local employees.[2] The United States, as the nation with the greatest number of overseas-deployed troops,[3] currently has 105 SOFAs with 101 foreign countries.[4] Status of forces agreements can be either bilateral or multilateral like the North Atlantic Treaty Organization (NATO) SOFA. Though SOFAs vary in their terms slightly from one nation to the next, all are very similar and are patterned after the original NATO SOFA, except in one important regard. The NATO SOFA is one of the few reciprocal SOFAs that the United States is a party to, most others are non-reciprocal.

Status of forces agreements divide criminal jurisdiction according to which nation's laws have been violated—U.S. law, host nation law, or both. Where the violation is strictly of U.S. law, the United States has sole criminal jurisdiction. Where the violation is strictly of host nation law, the host nation has sole criminal jurisdiction. Host nations never exercise exclusive jurisdiction over U.S. military personnel, however. By violating host nation law, the service member's conduct brings discredit upon the armed forces—a violation of General Article 134 of the Uniform Code of Military Justice (UCMJ).[5] When the violation is of both nations' laws, a concurrent criminal jurisdiction situation exists.

A formula exists to allocate jurisdiction in these concurrent cases. When the criminal act violates the laws of both states, the receiving state has primary jurisdiction, except in two situations: official duty cases and "inter se" cases. In official duty

1. Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 140 (1994).

2. J. Holmes Armstead, Jr., *Crossroads: Jurisdictional Problems for Armed Service Members Overseas, Present and Future*, 12 S.U. L. Rev. 1, 4 (1985).

3. Keith Highet et al., *Jurisdiction–NATO Status of Forces Agreement–U.S. Servicemen Charged with Criminal Offenses Overseas–European Convention on Human Rights*, 85 Am. J. Int'l L. 698, 702 (1991).

4. International & Operational Law Division, Office of The Judge Advocate General, U.S. Air Force, International Negotiation & Agreement Handbook, tab 18 (2000).

5. UCMJ art. 134 (LEXIS 2000).

cases (when the act occurs during the performance of official duties) the sending state has primary jurisdiction.[6] Article VII of the NATO SOFA, for example, states that the United States has primary criminal jurisdiction over a member of the force in relation to any offense arising out of any act or omission that occurred in the performance of an official duty *and* that is punishable according to the laws of both the sending and receiving state.[7] What is deemed an "official duty" is a unilateral decision made by the United States, though foreign nations can resort to diplomatic negotiations to resolve disputes. Regardless, the granting of official duty certification in dubious cases by U.S. officials undermines the cooperative nature of SOFAs and is viewed by host nations as a deprivation of their jurisdictional right. Inter se cases—those where the only victim is the sending state or a person from the sending state who is covered under the SOFA—also vest primary jurisdiction in the sending state.[8] Simply put, the nation with the greatest interest in the case has the primary right to exercise jurisdiction. But in keeping with an early Senate directive to maximize U.S. jurisdiction whenever possible, the United States has negotiated supplemental agreements with several host nations giving it primary jurisdiction even when the victim is from the host nation.[9]

Even in the absence of such agreements, it is standard U.S. policy to request that host nations waive their primary jurisdiction over U.S. service members, family members, and civilians employed by the military. The Judge Advocate General of the Army reported 13,128 concurrent jurisdiction offenses over which the foreign country had the primary right in 1990.[10] In 11,751 of these cases, U.S. military authorities obtained a waiver of foreign jurisdiction, for a worldwide waiver rate of eighty-nine percent.[11]

As comprehensive as the SOFA criminal jurisdiction provisions seem, post-SOFA decisions by the Supreme Court have left the U.S. military overseas incapable of prosecuting family members and civilians employed by the military for violations of U.S. law.

Jurisdiction over Civilians

While members of the military are subject to the UCMJ wherever deployed, the same is no longer true for family members and civilian workers that accompany the military abroad. Promulgated in 1951, the UCMJ preserved the military's traditional *wartime* jurisdiction over all "persons serving with or accompanying an armed force in the field."[12] Furthermore, because of the large number of family members and civilians accompanying U.S. forces stationed abroad to wage the Cold War, Article 2(a)(11) made the following persons subject to the UCMJ in *peacetime*: "persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."[13] Being "subject" to the UCMJ meant trial by courts-martial for these classes of civilians.

By the mid-1950s, Article 2(a)(11) was under heavy constitutional attack. Military jurisdiction over family members charged with capital crimes was the first to be struck down. In the 1957 case of *Reid v. Covert*,[14] which involved two habeas corpus petitions from wives convicted by courts-martial of the premeditated murders of their servicemen husbands, the Supreme Court held that Article 2(a)(11) could not be constitutionally applied in peacetime.[15] Peacetime for the Supreme Court is defined as a time other than during a congressionally declared war.[16] Three years later, in *Kinsella v. United States ex rel. Singleton*,[17] the Court extended its holding in *Reid* to family members charged with non-capital crimes.[18]

Meanwhile, the Court was coming to the same conclusions in regard to crimes committed by the military's civilian work-

6. International & Operational Law Dep't, The Judge Advocate General's School, U.S. Army, Status of Forces Agreements (SOFAs) 4 (1999) [hereinafter SOFAs].

7. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 7 U.S.T. 1792, T.I.A.S. No. 2845.

8. SOFAs, *supra* note 6.

9. Highet, *supra* note 3, at 699.

10. *Report of the Judge Advocate General of the Army October 1, 1990 to September 30, 1991*, 34 M.J. XCII, XCVI (1992).

11. *Id.*

12. UCMJ art. 2(a)(10) (LEXIS 2000).

13. UCMJ art. 2(a)(11).

14. 354 U.S. 1 (1957).

15. *Id.*

16. United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

17. 361 U.S. 234 (1960).

ers. In *Grisham v. Hagen*,[19] another habeas corpus petition in a premeditated murder case involving a civilian employee, the Court could find no appreciable distinction between family members and employees and thus ruled the military's jurisdiction unconstitutional. The same result was reached for a civilian employee in a non-capital crime in the companion case of *McElroy v. Guagliardo*.[20]

The *Reid–Kinsella* and *Grisham–McElroy* line of decisions, and Congress's subsequent failure to take remedial action, have many implications for the military overseas. When family members or civilian employees violate strictly U.S. law, they are immune from military prosecution. The local military commander can do nothing more than take administrative action against the offender. The most severe action entails sending the accused party back to the United States. Concurrent jurisdiction offenses where the host nation has primary jurisdiction, must be reported to the host nation and present military authorities with a difficult choice—permit, or request, that the host nation prosecute the offender, or request a waiver of jurisdiction from the host nation. If a waiver is granted, the most an offender could receive is administrative punishment. This choice becomes less difficult where the host nation's justice system assures a fair trial, but this is not the case everywhere. If a waiver is granted, once again, the military cannot prosecute. Thus, for the military, the choice is between local prosecution and no prosecution.[21] Sometimes, even local prosecution is foreclosed because host nations "often decline this authority for offenses committed by Americans against other Americans."[22]

In deployment scenarios where SOFAs tend not to exist, the military commander can turn civilians over to the host nation for prosecution, but typically must accept no prosecution by default. In Haiti and Rwanda, for example, these "host nations" did not have a functioning court system to conduct a trial.

The military's inability to prosecute takes on additional significance considering current trends in military strength and operations. Continual manpower cuts have left today's military significantly smaller than it was just a few years ago. As a result, the military has been forced to rely more heavily on civilian employees to perform support jobs—both at permanent overseas installations and on temporary force projection deployments. The danger for the military, which is built on order and discipline, is in becoming reliant upon civilian employees over whom it cannot exercise criminal jurisdiction.

Such criminal jurisdiction problems disappear, however, when U.S. forces engage in a declared war. During World War II, for example, U.S. courts consistently upheld the military's claims of jurisdiction over civilians as a constitutional war power that changed the reach of courts-martial jurisdiction.[23] However, this caveat seems to be of little current value because the United States has not declared war since World War II. Any future value is likewise diminished due to the military's focus on operations other than war. One author observed that "Operations other than war and the delicacies of politics and diplomacy, particularly under the [United Nations (UN)], preclude formal declarations of war and restrain the President in his ability to recognize a 'time of war.'"[24] Consequently, any jurisdictional provisions that apply only in "time of war" are obsolete.

When the United States becomes involved in UN operations, the UN's Model SOFA[25] dictates the criminal jurisdiction over civilians accompanying the force. Unfortunately, the UN's Model SOFA does not rectify the U.S. military's lack of jurisdiction over its civilian employees. Because U.S. law does not allow for military jurisdiction over civilians, under the terms of the UN Model SOFA the military is once again left with the choice of either local (host nation) prosecution or no prosecution. While this SOFA does provide for arbitration of jurisdictional disputes, the military has no bargaining power as it has nothing more to offer than immunity from prosecution.[26] In addition to these difficulties under the UN Model SOFA, the military may run afoul of such international agreements as the Geneva Conventions and Protocol I.

The Geneva Conventions require that all signatory nations, including the United States, "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" and to bring such offenders "before its own courts."[27] "Grave breaches" are crimes against persons protected by the Convention, including murder, torture, willful

18. *Id.*

19. 361 U.S. 278 (1960).

20. 361 U.S. 281 (1960).

21. Major Steven J. Lepper, *A Primer On Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 181 (1994).

22. Captain James K. Lovejoy, *USAREUR Regulation 27-9, "Misconduct By Civilians*,*"* ARMY LAW., June 1990, at 16, 18.

23. Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 126 (1995).

24. *Id.* at 134.

25. *Model Status of Forces Agreement for Peace-Keeping Operations*, UN GOAR, 45th Sess., Agenda item 76, UN Doc. A/45/594 (1990).

26. *Id*.

assault, depriving a prisoner of war or a civilian of a fair trial, and unlawful deportation or transfer of civilians. Furthermore, Protocol I to the Geneva Conventions requires military commanders to take action against those "under their command and other persons under their control" that violate either the Conventions or Protocol I.[28]

The Senate ratified the Geneva Conventions in 1955 with the understanding that the UCMJ criminalized many of the offenses found in the Conventions, and also provided for the courts-martial of civilians accompanying the force overseas.[29] As previously discussed, however, judicial decisions handed down between 1957 and 1960 barred the military from prosecuting civilians under the UCMJ, except during a time of congressionally declared war. Thus, the United States cannot technically fulfill its obligations under the Geneva Conventions, e.g. in cases where a civilian accompanying the force commits a war crime during circumstances where the Convention applies, but Congress has not declared war. Once again, the military must choose between prosecution by another signatory nation and no prosecution when one of its civilians violates a criminal law.

Congressional action is needed to remedy the jurisdictional gaps faced by the military overseas. Now, after nearly forty years, congressional action is taking shape. On 13 April 1999, Republican Senator Jeff Sessions of Alabama introduced Senate Bill 768. Titled the Military and Extraterritorial Jurisdiction Act of 1999, Senate Bill 768 is meant to "establish court-martial jurisdiction over civilians serving with the Armed Forces during contingency operations, and to establish Federal jurisdiction over crimes committed outside the United States by former members of the Armed Forces and civilians accompanying the Armed Forces outside the United States."[30] Part one of the bill would amend the UCMJ, while part two would extend federal criminal statutes overseas.[31] It passed the Senate with one amendment on 1 July 1999, and proceeded to the House of Representatives on 12 July 1999, where it was referred to both the Armed Services and Judiciary Committees.[32] The House version, House Bill 3380, which does not seek to amend the UCMJ, but only to extend federal criminal statutes overseas, was reported out of the Judiciary Committee on 27 June 2000.[33]

SOFA Jurisdiction and Changing International Attitudes

In recent years, several factors have contributed to changing attitudes among United States' allies and SOFA partners. This includes the end of the Cold War, an enhanced notion of sovereignty in other nations, and conflicting values and priorities among former Cold War partners. All of these factors have had an impact on SOFA criminal jurisdiction.

The end of the Cold War prompted both the United States and its SOFA allies to rethink their national security arrangements in light of the diminished threat of armed conflict and communist expansion from the former "Evil Empire." As previously mentioned, the U.S. military is much smaller now and maintains a greatly reduced permanent presence overseas. In Europe, for example, whole Army divisions have left Germany and returned to the United States.[34] Meanwhile, the United States' SOFA allies are now less likely to view the presence of large numbers of U.S. troops as a necessity, and are more likely to see them as infringing on sovereignty.

Status of forces agreements were originally negotiated in the aftermath of World War II. While they were negotiated agreements, it cannot be said that they were negotiated between nations with equal bargaining power. The United States emerged from World War II as the most powerful nation in the world, both militarily and economically. Many of the nations that became party to a SOFA were either liberated from Axis occupation by the United States, or were the actual Axis powers themselves, defeated and occupied by the U.S. military. The exercise of sovereignty, especially among this latter group of nations, was very much family members upon United States acquiescence.

Over fifty years later, this is no longer the case. Former Axis nations, Germany and Japan, for example, are world class economic powers in their own right. Both maintain defense forces that are well equipped and adequate to defend each nation's

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27. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, T.I.A.S. 3364.

28. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 87, 16 I.L.M. 1391, 1125 U.N.T.S. 3.

29. Gibson, *supra* note 23, at 142.

30. S. 768, 106th Cong. (1999).

31. Letter from Judith A. Miller, General Counsel, Department of Defense, to Senator John W. Warner, Chairman, Committee on the Armed Services, subject: Views of the Department of Defense on S. 768 (undated) (on file with author).

32. *See* Thomas–Legislative Information on the Internet, Bill Summary and Status for the 106th Congress (visited 20 July 2000) <http://thomas.loc.gov/>.

33. *Id.*

34. *See* Fort Stewart, *History of the 3d Infantry Division* (visited 21 July 2000) <http://www.stewart.army.mil/3dHistory/htm>.

interests in the diminished threat environment of the post-Cold War world. In light of such developments, the presence of U.S. troops in SOFA nations and the military's predominant exercise of criminal jurisdiction over its members are seen by some elements in these nations as an affront to their sovereignty.

This feeling is most prevalent in nations with a non-reciprocal SOFA. As previously mentioned, the NATO SOFA is one of the few reciprocal SOFAs to which the United States is a party. Commenting on non-reciprocal SOFAs and jurisdiction issues in the post-Cold War era, Adam B. Norman noted:

> When the threat of communism was high, many non-NATO allies accepted these non-reciprocal SOFAs because the American presence and protection were worthwhile to them. Protection from the communist threat was worth the cost of partial waiver of jurisdiction over American troops without reciprocal rights for their troops in the United States. However, "[w]ith the end of the Cold War, the need for United States military presence, . . . may not seem as obvious to [these] foreign [nations]." In the future, foreign politicians might not be so willing to acquiesce to U.S. demands on non-reciprocal SOFAs. The United States might have to offer reciprocity in exchange for the jurisdictional concessions it wants from the receiving state.[35]

While the United States views non-reciprocity as partial compensation for bearing the brunt and cost of protecting other nations, these nations see non-reciprocity as diminishing their notions of sovereignty. Over the past several years, sovereignty and criminal jurisdiction issues became particularly sensitive in such non-reciprocal Asian nations as Japan and the Philippines.

The SOFA with Japan

The problems in Japan came to a head in the fall of 1995 when three U.S. service members raped a twelve-year-old Japanese girl on the island of Okinawa. The crime caused an uproar on the island, which is a Japanese prefecture. Anti-American sentiment, which had been growing with each of the 4700 crimes committed by U.S. military personnel since the island's reversion to Japan in 1972, surged to new heights.[36] On 21 October 1995, 85,000 Japanese took part in the largest protest ever against U.S. military bases overseas.[37] The island's governor and many local assemblies called for a revision of the SOFA with the United States [38]

At the heart of the SOFA controversy is Article 17, paragraph 5(c) of the larger Treaty of Mutual Cooperation and Security. This paragraph states: "custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the Unites States until he is charged by Japan."[39] Thus, in keeping with this SOFA provision, U.S. military authorities would not turn over the suspected rapists to Japanese custody in 1995.

The Japanese felt dissatisfaction with this SOFA provision on two grounds, both related to their sovereignty. First, the Japanese saw the United States' refusal to turn over its criminal suspects, even in cases where the Japanese had the primary jurisdictional right to prosecute, as a means to impede their investigations and enable U.S. service members to escape justice. Perceiving that the United States was purposefully thwarting their law enforcement abilities, the Japanese believed that the United States was directly infringing on their rights as a sovereign nation.

Furthermore, the Japanese felt an additional slight to their status as an equal sovereign in the differences between the SOFA with Japan and the NATO SOFA. Not only is the Japanese SOFA non-reciprocal, but the NATO SOFA does not contain the impediments to host nation criminal custody found in the SOFA with Japan. Thus, there exists "a feeling that the United States is biased toward European governments, and biased against . . . Asian . . . people and governments."[40] Being subjected to less favorable terms than their European counterparts left the Japanese feeling less than equal and ran counter to the belief that "equal sovereign states should treat each other with mutual respect, even if one nation is more powerful than the other."[41]

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35. Adam B. Norman, *The Rape Controversy: Is a Revision of the Status of Forces Agreement with Japan Necessary?*, 6 IND. INT'L & COMP. L. REV. 717, 733 (1996).

36. *Id*. at 722 (citing Peter Landers, *Okinawa's Governor Steps Up Pressure Despite Handover of U.S. Suspects*, ASSOCIATED PRESS, Sept. 29, 1995).

37. David Elsner, *85,000 Okinawans Turn Out to Protest U.S. Presence*, CHI. TRIB., Oct 22, 1995, at C11.

38. Andrew Pollack, *Rape Case in Japan Turns Harsh Light on U.S. Military*, N.Y. TIMES, Sept. 20, 1995, at A3.

39. Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652.

40. Major Manuel E. F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW., May 1994, 3, 18-19.

41. Norman, *supra* note 35, at 734.

The United States' reasons for the provisions contained in Article 17, paragraph 5(c) were rooted in concerns over an accused service member's rights in the Japanese criminal justice system—concerns not present in Europe. Unlike Germany, for example, where the coupling of the German Code and the United States-German SOFA provides an accused U.S. service member most of the protections guaranteed by *Miranda*, the same cannot be said of Japan.[42]

In Japan, confession is considered good for the soul and plays an important part in the criminal justice system and in the rehabilitation of suspects.[43] Thus, confessions are highly "encouraged." The United States' refusal to turn accused service members over to the Japanese until they are formally charged probably stems, in large part, from the fact that suspects can be detained for a total of twenty-three days without being formally charged. Throughout this time, the suspect is isolated from both family and legal counsel and subject to unrestricted police interrogation. During interrogation, a suspect may have to barter with investigators for "privileges" such as food, water, or bathroom visits. The ultimate purpose of the interrogation is to demand and obtain a confession; Japanese police and prosecutors rely on confessions instead of extrinsic evidence gathered through investigative skill.[44]

Furthermore, jury trials are nonexistent and the whole Japanese criminal justice system is predicated on the assumption that the suspect is most likely guilty. Consequently, in cases where a confession cannot be obtained, the yearly acquittal rates for Japanese contested cases can be less than one percent.[45]

Despite the glaring differences in criminal justice system philosophy and practice that inspired the original SOFA protection of accused U.S. service members, the outcry over the rape case prompted the United States to action. Within days of the huge Japanese protest, the United States signed a new pact with Japan dealing with the custody of military criminal suspects. The new agreement allows Japanese officials to request early custody of U.S. military suspects in rape and murder cases, and the United States is to give such requests sympathetic consideration.[46] This is the same process found in the NATO SOFA, thus having the added benefit of easing some of the Japanese hostility over disparate treatment vis-à-vis the United States' European allies. While the United States was thus able to salvage a difficult situation in Japan, numerous issues, including sovereignty and criminal jurisdiction, could not be resolved to the satisfaction of the Philippine Senate when it came time to renegotiate the SOFA with the Philippines in 1991.

The SOFA with the Philippines

The United States' SOFA with the Philippines expired on 21 September 1991.[47] A year prior, formal renegotiation of the SOFA began.[48] Though many issues were in dispute, sovereignty and criminal jurisdiction figured prominently in the renegotiation. In regard to sovereignty, Filipino critics of the SOFA argued that

> because the Philippines was a colony of the United States—and therefore powerless at the time the Agreement was negotiated—it was not a "sovereign" and "independent" nation and therefore could not consent to "waive" part of its sovereignty voluntarily by agreeing to the presence of United States bases and troops in its territory.[49]

Thus, many Filipino politicians believed the original agreement was the product of United States coercion and they viewed the presence of U.S. troops and bases as a continuing infringement on their independence and sovereignty. In light of these opinions, Filipino SOFA negotiators sought a significant revision of the original SOFA, with terms much more favorable to the Philippines.

The United States saw no reason to renegotiate the criminal jurisdiction provisions of the SOFA because they were virtually identical to the provisions in the NATO SOFA. The Philippines disagreed and proposed four major revisions. The first proposed change would have required that Philippine courts, not U.S. military commanders, make the final determination on whether a military offender was acting within the scope of official duty when the crime was committed.[50] Perceived overuse of official duty certificates in dubious circumstances probably prompted this proposal.

42. James S. Fraser, *Some Thoughts on Status of Forces Agreements*, 3 Conn. L. Rev. 335, 347-48 (1971). *See* Miranda v. Arizona, 384 U.S. 436 (1966).

43. Christopher J. Neumann, *Arrest First, Ask Questions Later: The Japanese Police Detention System*, 7 Dick. J. Int'l L. 253, 257-58 (1989).

44. Norman, *supra* note 35, at 727-29.

45. Neumann, *supra* note 43.

46. Teresa Watanabe, *U.S., Japan OK Pact on Military Crime Suspects*, L.A. Times, Oct. 26, 1995, at A1.

47. Amendment to Bases Treaty, Sept. 16, 1966, U.S.-Phil., 17 U.S.T. 1212.

48. *Time for Taps in Manila*, Newsweek, Oct. 1, 1990, at 44.

49. Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 Mil. L. Rev. 67, 88 (1992).

The second proposed change would have required the United States to guarantee that civilian and military personnel subject to charges under Philippine law would not leave the country before final adjudication of their cases.[51] Under the original SOFA, the United States only guaranteed that military personnel would not leave the country and civilians would not leave on military aircraft.[52] Because the U.S. military cannot exercise criminal jurisdiction over its civilian employees and family members, it follows that the military cannot prevent them from leaving the country either. In regard to military personnel, the United States proposed to hold them for one year in an attempt to obviate the extreme length of time consumed by the average Philippine criminal case.[53]

The third proposed change would have given the Philippines open access to U.S. bases to execute process-serving activities.[54] The procedure in the original SOFA required clearance through military channels and all Filipino officials were escorted both on, and off the U.S. bases.[55] Security considerations alone should have counseled against acceptance of such a proposal.

Lastly, the Philippines argued that the original SOFA did not give primary jurisdiction to the United States in all cases involving only Americans. Strangely, the Philippines contended that cases involving "chastity and honor," even when all parties were American, fell under its primary jurisdiction.[56] The final renegotiated SOFA that went before the Philippine Senate was substantially the same as the original SOFA.[57] The Philippine Senate rejected the agreement on 9 September 1991.[58] While the interplay of numerous factors led to the United States' failure to secure a new SOFA and extended basing rights in the Philippines, one point remains clear. The Philippines sought to gain terms more favorable than those given to the European signatories of the NATO SOFA.

The Death Penalty in Europe

These same European nations possess notions and values at odds with those held by the United States and are presenting new NATO SOFA criminal jurisdiction problems. Of primary concern has been a clash over the possible imposition of the death penalty for U.S. military members convicted of capital crimes overseas. There is growing consensus among European nations against the death penalty. This opposition was voiced in the Sixth Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms.[59]

The European Convention, which entered into force in 1953, is a multilateral treaty under the Council of Europe that sets forth its aim to secure universal recognition and observance of human rights contained in the Universal Declaration of Human Rights.[60] The United States and Canada are the only parties to the NATO SOFA that have not ratified the European Convention.[61] The Sixth Protocol, which entered into force in 1985, states that the "death penalty shall be abolished. No one shall be condemned to such penalty or executed."[62] Several European members of NATO have also ratified the Sixth Protocol.[63]

European nations that are signatories to both the NATO SOFA and the Sixth Protocol to the European Convention

50. FRED GREENE, THE PHILIPPINE BASES: NEGOTIATING FOR THE FUTURE 44 (1988).

51. *Id.*

52. *Id.*

53. *Id.* at 45.

54. *Id.* at 44.

55. *Id.*

56. *Id.* at 45.

57. Telephone Interview with Commander Allan Kaufman, Assistant Staff Judge Advocate, U.S. Pacific Command (Dec. 2, 1999) [hereinafter Kaufman Telephone Interview].

58. *Philippine Panel: No U.S. Bases*, PHILA. INQUIRER, Sept. 10, 1991, at A3.

59. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1988, Eur. T.S. No. 114 [hereinafter Protocol].

60. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNT.S. 221 [hereinafter Convention].

61. John E. Parkerson, Jr. & Carolyn S. Stoehr, *The Military Death Penalty in Europe: Threats From Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 61 (1990).

62. Protocol, *supra* note 59.

63. Parkerson & Stoehr, *supra* note 61, at 61.

found themselves caught between conflicting obligations when it came to relinquishing custody of U.S. service members charged with capital crimes. The problem arises because:

> Under the Convention the contracting parties agree to secure to "everyone within their jurisdiction" the rights contained in the Convention. As a result, it would seem that all the members of NATO that have ratified the Convention are obliged to secure rights guaranteed under the Convention to everyone within their jurisdiction, including the forces of a sending state stationed in their territory, even if the sending state has not ratified the Convention.[64]

This situation is best illustrated by the 1990 case of *The Netherlands v. Short*.[65]

Staff Sergeant (SSG) Charles D. Short, a member of the U.S. Air Force, murdered his Turkish national wife while stationed at Soesterberg Air Base in the Netherlands—a party to the NATO SOFA. Staff Sergeant Short was arrested by Dutch military police as a suspect and, during his interrogation, he confessed to the murder.[66] Under the UCMJ, SSG Short could have been charged with capital murder.

The circumstances in SSG Short's case made it a concurrent criminal jurisdiction offense. The United States had the primary right to exercise jurisdiction in the case for two reasons. First, the United States had a stronger connection to the victim, a Turkish national, because she was married to an American service member. Second, even if the victim had been Dutch, the Netherlands is one of the NATO SOFA nations that signed a supplemental agreement giving the United States primary jurisdiction even when the victim is from the host nation.[67] Nevertheless, Dutch authorities would not turn SSG Short over to the U.S. military.

The Netherlands, as a signatory to both the European Convention and the Sixth Protocol, would not turn SSG Short over because to do so would likely subject him to the risk of capital punishment. Typically, the local police chief or prosecutor handles waiver of jurisdiction requests—courts are rarely involved.[68] However, in SSG Short's case, the first step taken by his appointed Dutch attorney was to secure a local court injunction preventing the surrender of SSG Short to U.S. authorities.[69] After a full hearing, the civil trial court at The Hague acknowledged that the NATO SOFA gave primary jurisdiction to the United States, but it nevertheless refused to allow the Netherlands to surrender SSG Short due to the provisions of the Sixth Protocol.[70] The court would only allow the surrender of SSG Short if the United States would guarantee that he would not receive the death penalty. The Commander in Chief, U.S. Air Force in Europe, refused to provide such a guarantee.[71]

With the civil trial court's decision on appeal, a Dutch criminal trial court found SSG Short guilty of manslaughter and sentenced him to six years' imprisonment. The civil appeals court in The Hague reversed the initial civil court decision, reasoning that because the NATO SOFA gave primary jurisdiction over SSG Short to the United States, he was therefore exempt from both Dutch and European Convention jurisdiction.[72]

This decision thus conflicted with the criminal trial court's prosecution of SSG Short and both decisions were appealed. The criminal decision was reversed because the United States should have had primary jurisdiction over SSG Short, while the civil appeals court decision was reversed because the Netherlands' obligations under the European Convention should have taken precedence over the conflicting SOFA jurisdictional provisions. These two reversals, wholly at odds with one another, would have left SSG Short a free man in the Netherlands had the United States not stepped in to rectify the situation.[73]

The United States chose not to seek the death penalty for SSG Short, ultimately deciding that, due to psychiatric reasons, he did not meet the criteria for capital punishment under the UCMJ. When this determination was conveyed to the Dutch

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64. *Id.* at 62 (quoting Convention, *supra* note 60, art. 1).

65. The Netherlands v. Short, 29 I.L.M. 1388 (HR 1990).

66. Parkerson & Stoehr, *supra* note 61, at 59.

67. *See* Agreement Relating to the Stationing of United States Armed Forces in the Netherlands, with Annex, Aug. 13, 1954, U.S.-Neth., annex, para. 3, 6 U.S.T. 103.

68. Highet et. al., *supra* note 3, at 700.

69. *Id.*

70. Protocol, *supra* note 59.

71. Highet et. al., *supra* note 3, at 700.

72. *Id.*

73. *Id.*

government, SSG Short was finally released into U.S. custody.[74] Thus, the United States did not waive its right to seek the death penalty, as the Dutch wanted, but the distinction is a narrow one.

John E. Parkerson, Jr. and Carolyn S. Stoehr observed how

> it appears likely that in cases arising in Europe in which complying with one treaty, such as the European Convention and Protocol No. 6, leads to the abrogation of another treaty, such as the NATO SOFA or an extradition treaty, the European courts will be faced with a construction decision where there is no clear principle of international law as guidance.[75]

The legal gymnastics fostered by *Short* showed the truth of that observation.

Ultimately, the United States' position is that military authorities are not authorized to carry out the death penalty within a host nation unless the host nation's laws provide for similar punishment.[76] Thus, it would seem that the U.S. military can impose the death penalty, but not actually carry out the execution, in host nations that are a party to the Sixth Protocol. This caveat may be of little help, however, for as *Short* demonstrated, the Dutch refused to surrender SSG Short where there was even the risk of the death penalty being imposed. In Europe, the potential for treaty and ideological conflict still exists in regard to jurisdiction in death penalty cases, but it is not limited to such. Conflicts over violations of environmental law are also emerging.

Environmental Offenses in Europe

The seeds of future environmental conflict were sown in Europe decades ago when the NATO SOFA and its supplements were drafted and signed. Most SOFAs and supplementary agreements were drafted in an era when environmental concerns were not considered and thus reflect an absence of specific provisions regarding compliance with environmental law. Further, excepting possible resort to the assimilative crime provisions of UCMJ Article 134, the UCMJ is silent on the issue of violations of environmental law. According to Major Mark R. Ruppert, "[t]he ability of the UCMJ to address environmental offenses fortunately has been largely untested and unquestioned by host nation authorities, but it desperately needs studied reinforcement to serve as the basis for U.S. military concurrent jurisdiction over environmental offenses."[77]

While the United States has a host of environmental protection laws, they are of no use overseas. The United States' major environmental statutes are designed to punish pollution occurring within the territory of the United States and do not have extraterritorial application.[78]

Thus, over the years, the United States has struggled over what environmental laws to apply overseas. Ultimately, the United States has adopted a country-specific policy of using the host nation's more restrictive environmental laws.[79] But even this policy has not been without its interpretation and enforcement problems.

Just as the European Convention and the Sixth Protocol have caused problems for the U.S. military in death penalty cases, so has European Union law caused confusion for the U.S. military in environmental cases. This is because European Union law is binding on its member nations and the European Union has been prolific in continuing to promulgate expansive environmental laws. Thus, United States adherence to the rigorous and comprehensive environmental laws in Germany, for example, could still run afoul of European Union law, which is binding on Germany.[80] The scope, complexity, and tempo of environmental legislation in Europe are outstripping the U.S. military's ability to keep pace.

Even when the military is able to keep pace in using the host nation's environmental laws, the basis for gaining jurisdiction can be problematic. Over the years, the military has adhered to the position that any act or omission occurring incidental to the performance of an official duty vests jurisdiction with the military. In regard to environmental offenses, U.S. forces fall under this official duty umbrella for offenses involving negligence. But, offenses involving intentional conduct are not as clear.[81]

74. *Id.* at 701.

75. Parkerson & Stoehr, *supra* note 61, at 71-72.

76. Erickson, *supra* note 1, at 149.

77. Major Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. Rev. 1, 31 (1996).

78. *Id.* at 14.

79. *Id.* at 26-27.

80. *Id.* at 13.

81. *Id.* at 30.

This is because intentional conduct can turn on whether the actor's motivation was official, or personal, in nature. However, in light of the Senate's mandate to maximize criminal jurisdiction, the military may be tempted to issue an official duty certificate even in dubious cases. Such a misuse of official duty certificates to thwart host nation criminal jurisdiction can only further chafe relations with host nations that are increasingly ready, willing, and able to punish environmental offenses.

While an official duty certificate provides military members a shield from host nation criminal prosecution, the same does not hold true for civilians accompanying the force. The military's civilian component is subject to a host nation's environmental law. To shield its civilian employees from local prosecution, the military has instituted policies that direct service members to sign environmental documentation, such as hazardous waste manifests, whenever possible.[82]

As previously mentioned, the military's basis for all prosecutions, the UCMJ, is silent as to environmental offenses. In the absence of a specific environmental crime article, military personnel that commit environmental offenses overseas are most likely to face charges for disobeying orders, dereliction of duty, destruction of property, or bringing discredit upon the armed forces.[83] The disparity between a host nation's environmental sanctions, that could involve several years in jail, and the military's punishment, which may only be administrative, has the potential of galvanizing anti-American sentiment, especially in environmentally conscious nations.

Conclusion

The UCMJ and the provisions of various SOFAs govern U.S. forces stationed around the world. Unfortunately, not all contingencies are covered by these documents. Court decisions have left the U.S. military incapable of exercising criminal jurisdiction over family members and civilian employees overseas during peacetime. Additionally, the military has no environmentally specific article in the UCMJ to prosecute its members for violations of a host nation's environmental laws.

Some of these problems have existed for more than forty years; others have presented themselves more recently. No matter when they originated, the end of the Cold War has exacerbated them all. The military is now smaller and more family members on civilian employees to accomplish its overseas mission. However, there is no effective means to prosecute these employees for crimes they commit overseas. Moreover, host nations no longer see the presence of U.S. forces as a necessity and are now much less willing to subvert their own sovereign interests regarding jurisdiction, the death penalty, and the environment.

Short of not abusing the official duty certification to keep jurisdiction over service members, the military itself can do little to rectify these various problems. Congressional action is required and long overdue to fix the various jurisdictional problems the military is facing. Fortunately, at least in the case of jurisdiction over civilians accompanying the force, help may finally be on its way in the form of Senate Bill 768 or House Bill 3380, now working their way through Congress.

As for sovereignty disputes with host nations over SOFA jurisdiction and reciprocity issues, here too, there are some new and encouraging developments in the Philippines and Eastern Europe. Albeit after the United States vacated its bases in the Philippines and removed its armed forces from the islands, the United States did ultimately negotiate a Visiting Forces Agreement that was ratified by the Philippine Senate in 1999.[84] In Eastern Europe, the Partnership for Peace (PFP) nations are enjoying reciprocal SOFAs with the United States. Perhaps recognizing the need for greater jurisdictional equality between nations, Congress enacted legislation permitting the President to grant reciprocal SOFA rights to the PFP nations by means of executive international agreements.[85]

Thus, while some international criminal jurisdiction issues are being addressed, others remain, and new ones emerge. The military lawyer overseas must be aware of the jurisdictional gaps and issues, discussed supra, to better balance competing jurisdictional interests, to reduce the risk of potential conflict between states, and to increase the chances of mission success.

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82. Lieutenant Colonel Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 75-76 (1996).

83. UCMJ arts. 92, 109, 134 (LEXIS 2000).

84. The Philippine Senate approved a lesser visiting forces agreement on May 25, 1999, that generally gave the United States jurisdiction over U.S. soldiers committing offenses while on duty, and the Philippines have jurisdiction for offenses committed while off duty. Jim Gomez, *Philippine Senators Approve Resolution Endorsing Approval of U.S.*, A.P. WIRE SERV., May 25, 1999.

85. Telephone Interview with Lieutenant Colonel Manuel E. F. Supervielle, Chair, International and Operational Law Department, The Judge Advocate General's School, Charlottesville, Va. (Dec. 2, 1999).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Note

Defense Attempts to Draw the Sting May Sting the Defense on Appeal

Introduction

Good trial advocates know that one of the fundamental rules of trial is to establish and maintain credibility with the trier of fact. In almost every case there is likely to be some unfavorable information about your client, the conduct of the investigation, or a key witness that could damage your case. To maintain credibility with the fact finder, good advocates often bring unfavorable information out about their case or client before the opposing party has a chance. By "drawing the sting" with these preemptive tactics, counsel has more control of the information, and he shows the fact finder that he has nothing to hide.

A recent Supreme Court holding[1] cautions defense counsel that there is a danger with these preemptive tactics. If the defense objected to the admissibility of the unfavorable evidence at trial and lost, and then introduced the unfavorable evidence preemptively, they likely waive any objection on appeal.

Facts

In *Ohler v. United States*,[2] the accused drove a van carrying approximately eighty-one pounds of marijuana from Mexico to California. A U.S. customs agent at the border searched the van and discovered the drugs. Maria Ohler was charged with importation of marijuana and possession of marijuana with the intent to distribute.[3] Before trial the government moved *in limine* to admit Ohler's 1993 felony conviction for possession of methamphetamine. The government wanted to admit this evidence under Federal Rule of Evidence (FRE) 404(b)[4] as character evidence, and under FRE 609 (a)(1)[5] as impeachment evidence.[6]

The trial judge did not allow this evidence under FRE 404(b), but ruled that if the accused testified, the government could impeach her with her prior conviction under FRE 609(a)(1).[7] In spite of this ruling, the accused testified in her own defense and denied any knowledge of the eighty-one pounds of marijuana found in the van she was driving. To lessen the anticipated impact of the government's cross-examination, the accused on direct examination also admitted to the previous felony conviction.[8] The accused was convicted and sentenced to thirty months in prison.[9]

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1. Ohler v. United States, 120 S. Ct. 1851 (2000).

2. *Id*.

3. *Id*. at 1852.

4. FED. R. EVID. 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This rule specifically prohibits the government from using uncharged misconduct or other bad acts to show the accused's character. *Id.*

5. FED. R. EVID. 609(a). Rule 609(a)(1) provides:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

Note that the balancing test for admitting a prior felony conviction against an accused is different and more stringent than the Rule 403 balancing test used for other witnesses. *Id.*

6. *Ohler*, 120 S. Ct. at 1852.

7. *Id*.

8. *Id.*

9. *Id.*

The defense appealed the conviction, claiming that the trial court's *in limine* ruling allowing the government to impeach her with the prior conviction was in error.[10] The Ninth Circuit did not address the substance of the accused's complaint. Instead the court ruled that because it was the defense that introduced the evidence of the prior conviction during direct examination, they waived the right to appeal the trial judge's *in limine* ruling.[11] The Supreme Court granted certiorari[12] to resolve a conflict among the circuits on this issue.[13]

Discussion

In a five to four decision, the Court affirmed the Ninth Circuit's ruling and held that a defendant who preemptively introduces evidence of a prior conviction on direct examination, may not claim on appeal that the admission of the evidence was erroneous.[14] The accused argued before the Court that FRE 103 and 609 create an exception to the general rule that a party who introduces evidence cannot complain on appeal that the evidence was erroneously admitted. The Court rejected this argument out of hand. The Court noted that FRE 103 simply requires the party to make a timely objection to an evidentiary ruling but is silent on when a party waives an objection.[15] Likewise, FRE 609 authorizes the defense to elicit the prior conviction on direct examination but makes no mention of waiver.[16]

The majority was equally unsympathetic to the accused's argument that it would be unfair to apply waiver in this situation. The accused contended that the waiver rule would force them to either forego the preemptive strike and appear to the jury to be less credible, or make a preemptive strike and lose the opportunity to appeal.[17] The Court responded by noting that this is just one of the many difficult tactical decisions that trial practitioners are faced with. The accused's decision to testify brings with it any number of potential risks. These risks include the possibility of impeachment with a prior conviction. The Court pointed out that the government must also balance the decision to cross-examine with a prior conviction against the danger that an appellate court will rule that such impeachment was reversible error.[18]

The Court was unwilling to let the accused "have her cake and eat it too" by short circuiting the normal trial process. According to the Court, such an outcome would deny the government its usual right to decide, after the accused testifies, whether to use her prior conviction.[19] This outcome would also run counter to the Court's earlier holding on a similar issue in *Luce v. United States*.[20]

Finally, the accused contended that the waiver rule unconstitutionally burdens her right to testify. The Court held that while the threat of the government's cross-examination may deter a defendant from testifying, it does not prevent her from taking the stand. "It is not inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify."[21]

Justice Souter led the four justice dissent. He wrote that the majority's reliance on *Luce* was misplaced. The holding in *Luce* was based on the practical realities of appellate review. Because the accused never testified, the appellate court could not know why. Further, the appellate court could never compare the actual trial with the one that might have occurred if the accused had taken the stand.[22] According to the dissent, *Ohler* is different because it was very clearly on the record that the only reason the defense impeached their own client was because of the judge's in limine ruling. An appellate court will

10. United States v. Ohler, 169 F.3d 1200, 1201 (9th Cir. 1999).

11. *Id*. at 1203.

12. Ohler v. United States, 120 S. Ct. 370 (1999).

13. The Eighth and Ninth Circuits follow the waiver rule. The Fifth Circuit held that appellate review was still available even after the preemptive questioning. *Ohler*, 120 S. Ct. at 1852-53.

14. *Id*. at 1855.

15. *Id*. at 1853

16. *Id*.

17. *Id.*

18. *Id*. at 1854.

19. *Id*.

20. 469 U.S. 38 (1984). In *Luce*, the Court held that a criminal defendant who did not take the stand could not appeal an *in limine* ruling to admit prior convictions under FRE 609(a).

21. *Ohler*, 120 S. Ct. at 1855 (citing McGautha v. California, 402 U.S. 183, 215 (1971)).

22. *Id*. at 1855 (Souter, J., dissenting).

have no difficulty in conducting a harmless error analysis based on this record.[23]

The dissent also attacked the majority's common sense rationale for their decision. According to the dissent, this is one exception to the general rule that a party cannot object to their own evidence.[24] In a rare reference to FRE 102,[25] Justice Souter said that allowing the accused to initiate preemptive questioning and still preserve the issue on appeal promotes the fairness of the trial while fully satisfying the purposes of FRE 609.

Advice

The majority opinion in *Ohler* is an important warning for defense counsel. It means that counsel will have to consider even more carefully the consequences of advising their clients whether to testify. Are the benefits of taking the stand outweighed by the risk of possible impeachment with prior convictions? If so, is it better for the defense to at least lessen the blow by eliciting the incriminating evidence on direct examination and forfeit the opportunity to appeal the judge's decision to allow the impeachment? These are difficult questions and the answer will obviously vary according to the particular circumstances of each case. The point for defense counsel is that he must fully appreciate what is at stake before deciding to "draw the sting."

While the opinion is limited to the context of impeachment with a prior conviction, the majority's rationale can apply to other forms of impeachment and other situations where the defense may want to engage in preemptive questioning of their own client or other defense witnesses to defuse potentially harmful evidence. Here again, defense counsel should be very cautious and make the decision only after fully considering all of the potential consequences. Major Hansen.

Legal Assistance Notes

Sometimes, It *Doesn't* Take a Village

The Supreme Court Knocks Down Washington Law Allowing Courts to Order Visitation Rights for Grandparents and "Others"

Arguably one good thing about having grandchildren is being able to visit them, spoil them, and then return them to their parents. However, returning them is no longer an option for a growing number of grandparents. Although many children are raised in traditional, two parent families, a growing number of children live in single parent families. Single parent families are more likely to depend on help from third parties. As a result, some grandparents play a larger and larger role in the lives and upbringing of their grandchildren. In recognition of this role, and in attempting to protect it, every state now has some form of grandparent visitation law.[26]

These laws typically allow grandparents visitation privileges with their grandchildren in the event of the parents' divorce, the death of one parent, or other similar happenings. However, Washington went further than most states and allowed any person, regardless of their relationship to the child, to petition for visitation rights. Although Washington's statute received much attention before being held unconstitutional by the Supreme Court in *Troxel v. Granville*,[27] its overly broad construction made it an aberration. Grandparent, and in some cases, third party, visitation (provided the third parties have a legitimate interest in the child) is here to stay, and legal assistance attorneys must advise their clients accordingly. One benefit of *Troxel* may be a renewed emphasis on parental determinations, while nonparents seeking visitation may face a taller hurdle to show that allowing visitation is in the best interests of the child.

At issue in *Troxel* was a Washington state statute[28] providing that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest whether or not there has been any change of circumstances."[29] Petitioners were the paternal grandparents of two children who petitioned the Washington Superior Court for the right to visit their grandchildren.[30]

The facts behind the petition are as follows: Petitioners' son, Brad Troxel, had a relationship with Tommie Granville (hereinafter respondent) that lasted several years and produced

23. *Id*. at 1855-56 (Souter, J., dissenting).

24. *Id*. at 1856 (Souter, J., dissenting).

25. Fed. R. Evid. 102. Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

26. Troxel v. Granville, 120 S. Ct. 2054 (2000).

27. *Id.*

28. Wash. Rev. Code Ann. § 26.10.160(3) (2000).

29. *Id.*

30. *Troxel*, 120 S. Ct. at 2054.

two children.[31] During that relationship and for several years after it ended in 1991, petitioners saw their grandchildren on a regular basis.[32] Brad Troxel committed suicide in May 1993.[33] Although the petitioners continued seeing their grandchildren regularly after their son's death, respondent told them in October 1993 that she wanted to limit their visitation with her children to one short visit each month.[34]

The grandparents petitioned for visitation in December 1993, seeking two weekends of overnight visitation each month as well as two weeks during the summer.[35] The respondent did not oppose visitation altogether, but asked the court to order one visitation day each month with no overnight stay.[36] The court issued a compromise ruling, ordering one weekend of visitation each month, one week during the summer, and four hours on each of the grandparents birthdays.[37]

Responent appealed, and the Washington Court of Appeals reversed, holding that nonparents lacked standing to seek visitation under the statute unless a custody action is pending.[38] Petitioners then appealed to the Washington Supreme Court, which affirmed the decision, but for different reasons.[39] The state supreme court based its decision on two grounds—that the statute was too broad and that the U.S. Constitution allows states to interfere with a parent's child rearing only to prevent harm or potential harm to the child. The court stated that "[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision."[40] The court also held that "parents have the right to limit visitation of their children with third persons," and that between parents and judges, "parents should be the ones to choose whether to expose their children to certain people or ideas."[41]

The United States Supreme Court granted certiorari to decide whether the Washington statute, as applied to the respondent and her family, violated the U.S. Constitution. The majority opinion discussed at length the parents' interest in raising their children, stating that "the liberty interest at issue in this case—the interests of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[42] The Court relied upon its extensive precedent in holding that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amend-

31. *Id*. at 2057. Brad Troxel and Tommie Granville never married, but did have two daughters, Natalie and Isabelle.

32. *Id*.

33. *Id*.

34. *Id*. (citing *In re Smith*, 969 P.2d 21, 23-24 (1998); *In re Troxel*, 940 P.2d 698, 698-99 (1997)).

35. *Id*.

36. *Id*. at 2058.

37. *Id*. The court initially issued an oral ruling . After the respondent appealed but before it would address the merits of the appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. On remand, the Superior Court found that visitation was in the children's best interests, stating:

> The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.
>
> . . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefited from spending quality time with the Petitioners, provided that that time is balanced with time with the children's [sic] nuclear family. The court finds that the childrens' [sic] best interests are served by spending time with their mother and stepfather's other six children." *Id.*

Moreover, following her appeal, respondent married Kelly Wynn, who formally adopted the two children approximately nine months after the Superior Court issued its order on remand. *Id.*

38. *Id*. Specifically, the court of appeals held that the limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents fundamental liberty interest in the care, custody, and management of their children." *Id.* (citing *In re Troxel*, 940 P.2d at 700).

39. *Id.* The Washington Supreme Court disagreed with the court of appeals decision on the statutory issue and found that the plain language of the statute gave the petitioners standing to seek visitation, regardless of whether a custody action was pending. However, the court agreed with the court of appeals ultimate conclusion, that the petitioners could not obtain visitation with the children pursuant to the statute. *Id.*

40. *Id.* at 2059 (citing *In re Smith*, 969 P.2d at 31).

41. *Id*.

42. *Id*. at 2060 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)).

ment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children."[43]

With that precedent in mind, the Court found that the Washington statute unconstitutionally infringed upon respondent's parental rights.[44] Although all fifty states have laws granting grandparents—and in some cases other third parties—visitation rights under varying circumstances, the Court found the Washington statute "breathtakingly broad."[45] In fact, it is astonishing that the Washington legislature passed a statute with such language in it, given that any person could petition for visitation without even a cursory showing of a relationship with the child. The Court was concerned that once a visitation petition is filed in court, a parent's decision that visitation is not in the child's best interest is given no deference.[46] The judge alone determines what is in the child's best interest. The Court also appeared troubled that the judge injected himself into this dispute without the presence of any special factors justifying the State's interference.

The Court addressed several factors that if present, could justify state interference. For example, petitioners never alleged that respondent was an unfit parent.[47] The Court also noted that respondent never sought to cutoff visitation entirely.[48] However, perhaps most significantly to the Court, the lower court gave no special weight to the respondent's determination of her children's best interests. It noted that "it appears that the Superior Court applied exactly the opposite presumption."[49] In fact, the Court cited the superior court judge's explanation at the conclusion of closing arguments:

> The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend some quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems wherein the grandparents, their lifestyles are going to impact adversely upon the children. This certainly isn't the case here from what I can tell.[50]

The Court found that the judge's comments suggested that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely."[51]

The Court disagreed, finding that the rationale employed by the superior court judge "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child,"[52] and failed to provide any protection for respondent's fundamental constitutional right to make decisions con-

43. *Id.*

44. *Id*. at 2063.

45. *Id*. at 2061.

46. *Id.* Section 26.10.160(3) of the Revised Code of Washington does not require a court accord a parent's decision any presumption of validity or any weight whatsoever. *Id*.

47. *Id*. At no time did the petitioners allege that respondent was an unfit parent. The Court found that important, because there is a presumption that fit parents act in the best interests of their children, citing *Parham*:

> [O]ur constitutional system long ago rejected any notion that a child is a mere creature of the State and, on the contrary asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. (citing Parham v. J.R., 442 U.S. 584, 602) (alteration in original) (internal quotation marks and citations omitted).

48. *Id*. at 2062. Significantly, many other states expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. *Id*. at 2063. *See, e.g.*, MISS. CODE ANN. § 93-16-3(2)(a) (1994) (stating that the court must find that "the parent or custodian of the child unreasonably denied the grandparent visitation with the child"); ORE. REV. STAT. § 109.121(1)(a)(B) (1997) (stating that the court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R.I. GEN. LAWS § 15-5-24.3(a)(2)(iii)-(iv) (Supp. 1999) (stating that the court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

49. *Troxel*, 120 S. Ct. at 2062.

50. *Id*. (citing Verbatim Report of Proceedings, *In re Troxel*, No. 93-3-00650-7, at 213 (Wash. Super. Ct., Dec. 14, 19, 1994)).

51. *Id*. The judge also stated: "I think [visitation with the petitioners] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.* at 214.

52. *Id*.

cerning the rearing of her children.[53] The Court found that, at the very least, if a fit parent's decision regarding who should visit with his children, and for how long that visit should be, becomes subject to judicial review, a court must accord some special weight to the parent's own determination.[54]

The Supreme Court found that this case boiled down to "nothing more than a simple disagreement between the Washington Superior Court and [respondent] concerning her children's best interests."[55] The Court rejected the lower court's involvement in the determination, stating that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made."[56] As the visitation statute required nothing more, the Court held that it was, as applied in this case, unconstitutional.[57]

Because the Supreme Court based its decision on the overbroad nature of the statute, it did not consider "the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[58] The Court's reluctance to venture into this area is one of the most important aspects of the decision. Given that most family law adjudications are made on a case-by-case basis, the Court was "reluctant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.[59] This point was also noticed by several of the lobbying groups following the case. Petitioners' attorney said that "it was important that the high court did not adopt the 'harm requirement' cited by the Washington Supreme Court but left intact the 'best interests of the child' standard that is part of the visitation law in forty-seven states."[60]

This is a valuable lesson for legal assistance attorneys. Although the *Troxel* decision generated a great deal of publicity for family visitation issues, its focus on the broad language of the statute doesn't appear likely to affect other, more narrow, state visitation laws. Courts may interpret this decision as allowing or ordering them to give more deference to parental decisions in the absence of a showing of unfitness. All this really does is create a higher burden of proof for third parties seeking visitation rights. And that may not be such a bad thing. Allowing any person to petition the court for visitation, regardless of their relationship to the child, and having their request be treated the same as the parent's opinion, is an unworkable idea. Major Boehman.

Can You Reduce Your Taxes while Having Fun?

Major Fete arrives at the installation tax center with a bulging shoebox of receipts and papers. He asks if he can deduct his costs of having "fun" at various military functions such as hail and farewells, dining-ins, and the like. Can service members deduct their costs for meals, transportation, and baby-sitters from their income for tax purposes? Yes, some of these costs qualify as business expenses and can be part of a taxpayer's itemized deductions. Service members frequently pose such questions to tax center personnel. Fortunately, various resources are available for attorneys to review before counseling clients about business deductions.[61]

The Law Supporting the Deductions

The Internal Revenue Code (IRC) allows a taxpayer to deduct ordinary, necessary, and reasonable expenses directly related to the taxpayer's trade or business.[62] For service mem-

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53. *Id*. (citing CAL. FAM. CODE ANN. § 3104(e) (West 1994) (stating that there is a rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted)); ME. REV. STAT. ANN., tit. 19A, § 1803(3) (1998) (stating that a court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with parent's rightful authority over the child"); MINN. STAT. § 257.022(2)(a)(2) (1998) (stating that the court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); NEB. REV. STAT. § 43–1802(2) (1998) (stating that the court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R.I. GEN LAWS § 15–5–24.3(a)(2)(v) (Supp. 1999) (stating that the grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse visitation was reasonable); UTAH CODE ANN. § 30–5–2(2)(e) (1998) (same); Hoff v. Berg, 595 N.W.2d 285, 291-92 (N.D. 1999) (holding the North Dakota grandparent visitation statute unconstitutional because the State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child").

54. *Id*.

55. *Id*. at 2063.

56. *Id*. at 2064.

57. *Id.*

58. *Id*.

59. *Id*.

60. *Court Limits Visitation Rights of Grandparents*, WASH. POST, June 6, 2000, at AO1.

bers, "ordinary" business expenses are the customary or usual expenses incurred in service or performance of duties.[63] The expense is "necessary" if it is appropriate or helpful to the member's service.[64] The IRC provides additional guidance for business expenses linked with entertainment. Entertainment expenses must be "directly related to" or "associated with" the service member's military activities.[65]

Practical Application

Whether a cost qualifies as a business deduction depends on the circumstances surrounding the expense. Did the service member incur the expense as part of a business activity or as part of a social activity? For example, a formal military dinner[66] can be a business activity; while a company or a unit baseball game is a social activity. Because a dinner is a business activity, the service member can deduct some of the associated costs. Other business activities may include lunches or after-duty drinks at the officers club. For example, if a superior intends to improve morale, or to develop subordinates, he can deduct the cost of paying for lunches or drinks at the end of the duty-day for subordinates.[67] Members can also deduct reasonable costs associated with a company picnic or outing.[68] However, when an activity's nature is more social than business, say a private party with many civilian guests, a service member cannot consider the expenses as business related. To illustrate this point, consider officer or non-commissioned officer club dues. Members cannot deduct club dues because club activities are not limited to official functions.[69] Service members can use the club for various social purposes and usually members who are not part of the club can participate in official functions.[70]

Limits

In addition to the "social nature" limitation, the IRC contains other restrictions on business deductions. Service members can deduct all business costs associated with transportation, but generally only fifty-percent of entertainment and meal expenses.[71] Baby-sitter costs are personal expenses and cannot be deducted as ordinary and necessary business expenses. However, childcare expenses could be taken as a nonrefundable tax credit in very limited circumstances.[72]

A two-percent threshold for business deductions creates an additional hurdle.[73] A taxpayer can only deduct expenses exceeding two percent of his adjusted gross income. The various limits are evident when filling out tax forms. First, business expenses are entered onto Internal Revenue Service (IRS) Form

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61. *See* Colonel Malcolm H. Squires, Jr. & Lieutenant Colonel Linda K. Webster, *Business Entertainment Expense Deductions by Service Members*, ARMY LAW., Dec. 1996, at 13 (presenting regulatory guidance, applicable tests, and examples of application of business deductions to entertainment expenses); Major Vance M. Forrester, *Deducting Employee Business Expenses*, 132 MIL. L. REV. 289 (1991) (discussing application of business deductions to travel expenses away from home, local transportation expenses, meal and entertainment expenses, and miscellaneous expenses). The Research Institute of America provides many informative articles on tax issues. Research Institute of America, Inc., *Entertainment Expenses—Overview*, RIA USTR INCOME TAXES P1624.054 (2000). Finally, the JAGCNet has various resources such as the Third Tax Law for Attorneys Deskbook available at <http://www.jagcnet.army.mil/jagcnet/lalaw1.nsf>.

62. I.R.C. § 162(a) (LEXIS 2000). If the member is reimbursed for a service-related cost, the cost is not an expense for the member.

63. *See* Forrester, *supra* note 61, at 290 (discussing "ordinary" expenses).

64. *See id.* (discussing "necessary" expenses).

65. I.R.C. § 274. *See* Squires & Webster, *supra* note 61, at 15; Forrester, *supra* note 61, at 298-99 (discussing satisfaction of the "directly related" test for I.R.C. § 274). *See* Squires & Webster, *supra* note 61, at 16; Forrester, *supra* note 61, at 299 (discussing satisfaction of the "associated with" test).

66. Formal military dinners include dining-ins, dining-outs, change-of-command dinners, hail and farewell dinners, and the like. *See generally* Squires & Webster, *supra* note 61.

67. *See id* at 16-20.

68. *Id.* at 16-17 (discussing these types of entertainment).

69. Rev. Rul. 55-250, 1955-1 C.B. 270.

70. Squires & Webster, *supra* note 61, at 17.

71. I.R.C. § 274 (LEXIS 2000). For a discussion of the 50% Limitation Rule, see CCH, 2000 U.S. MASTER TAX GUIDE 265-68 (1999).

72. I.R.C. § 21. The childcare expenses must be work related to qualify for the credit. Expenses are considered work related only if they allow the taxpayer (and spouse if married) to work and are for a qualifying person's care. *Id*. Expenses are not work related merely because a person incurred them while working. The expenses must have been necessary to enable the person to be gainfully employed. For example, a person is not gainfully employed if he provides free labor or volunteers to work for a nominal salary. I.R.C. § 21(b)(2). Whether childcare expenses allow the client to work depends on the facts. For example, the cost of a baby-sitter while a client goes out to eat is not normally work-related expense. I.R.S. Pub. 503, at 7.

73. I.R.C. § 67(a). Business expenses fall into the Internal Revenue Code's "miscellaneous deductions" category. *See* CCH, 2000 U.S. MASTER TAX GUIDE, *supra* note 71, at 297-98.

2106, which differentiates between transportation and entertainment/meal expenses. Figures from IRS Form 2106 are carried over to the "miscellaneous deduction" section of Schedule A (Itemized Deductions). Thus, only members who itemize their deductions can deduct business costs associated with having fun. For those members who do itemize, they must substantiate their business expenses. The few courts who addressed military business deductions clearly indicated a need for substantiating expenses and justifying the necessity or relationship of the activity to service participation.[74]

Conclusion

In summary, the attorney has good news for Major Fete. Major Fete can deduct some of his costs incurred during military activities. However, there is no free party. The IRC imposes restrictions on business deductions. Service members must incur business expenses for activities that were "necessary and ordinary" for military service or performance of duties. Only fifty-percent of the cost of meals and entertainment can be deducted. Major Fete probably cannot deduct his baby-sitter cost as a tax credit, depending on the facts. Finally, miscellaneous deductions are subject to a two-percent threshold. So unless Major Fete has numerous deductions, he may find the photos of the parties are the most worthwhile items in his shoebox of papers. MAJ Vivian Shafer.[75]

International and Operational Law Note

A Picture is Worth a Thousand Words, Especially When Time is of the Essence

Graphical Aides to Rules of Engagement Development and Briefing

During the planning of military operations, judge advocates (JAs) will invariably be called upon to analyze mission rules of engagement (ROE) and disseminate the essential aspects of that ROE to the battle staff. Because of the time sensitive nature of this process, and the critical need to ensure that all members of the battle staff share a common understanding of the ROE (sometimes referred to as "cross-walking" the ROE), developing a tool to graphically portray key elements is valuable. As a result, this note offers a graphical representation of ROE information to aid JAs in rapid ROE analysis and briefing during the mission planning process. A key part of that planning process is course of action (COA) creation and analysis; thus, a corresponding matrix for COA development is also included. Examples of these matrices are found at Annex A and B, respectively.

The U.S. military's contingency forces must be prepared to respond to emergency situations around the world on a moment's notice, and to execute a mission within hours of receipt from the National Command Authority (NCA) or a commander in chief (CINC). Consequently, the timing of the staff planning process for these organizations is substantially compressed. Each staff member must analyze and present critical information completely, yet concisely, in the most timely manner. This includes, of course, the JA, whose primary concern in the initial staff planning process will almost always include ROE analysis and development.

The proposed matrix—referred to in this note as the briefing matrix—is based on the premise that ROE understanding and analysis might be enhanced, or at least expedited, by focusing on major battlefield functions, and how ROE impacts those functions. As a result, the proposed briefing matrix lists functional areas of force application along the top, and ROE categories along the left side. During a rapid planning process brief, staff officers can locate their particular functional area and quickly read down the column. They can then understand where they are, where they might want to go, and how to get there. Note, however, that the existence of a "block" on the matrix does not require that the block be filled in. In practice, the mission ROE will likely include portions applicable to some force components, yet not others. However, the matrix does provide the JA and the staff the opportunity to identify what might be necessary additions or modifications to the ROE.

The second matrix is offered as a tool to aid JAs in evaluating proposed COA, an integral element to the mission planning process. This matrix—referred to in this note as the COA matrix—assists JAs in determining the ROE supportibility of the specified and implied tasks of major battlefield functions. It is an analytical tool for use in working with other staff members to develop and evaluate COA.

The matrices are intended as tools into which JAs, both Army and Marine Corps, can insert their judgements.[76] However, with modification, they are useful for any service. This note uses the Marine Corps Planning Process system as an example.

The first COA step is the mission analysis. Upon receipt of the mission order from higher headquarters, the commander

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74. *See generally* Forrester, *supra* note 61, at 302-03 (discussing the substantiation requirement established through case law); Squires & Webster, *supra* note 61, at 18.

75. Student, 48th Graduate Course.

76. The Marine Corps Planning Process and the Army Military Decision Making Process–both of which are the basis for rapid mission planning–are essentially the same. The Marine Corps Planning Process consists of the following six steps: (1) Mission Analysis; (2) COA Development; (3) COA War Game; (4) COA Comparison/Decision; (5) Orders Development; (6) Transition. The Army Military Decision Making Process consists of the following seven steps: (1) Receipt of Mission; (2) Mission Analysis; (3) COA Development; (4) COA Analysis (War Game); (5) COA Comparison; (6) COA Approval; (7) Orders Production. A detailed description of each of these planning models, and the applicability of ROE to each individual step, may be found in the Center for Law and Military Operations, *Rule of Engagement (ROE) Handbook for Judge Advocates* (1 May 2000).

and staff must analyze the mission requirements and parameters. The briefing matrix provides a convenient tool to organize the ROE related information in the mission order, and to communicate that information to the staff in one comprehensive snapshot during the three to five minutes normally allotted at the initial meeting.

Upon the commander's approval of a COA, the final mission plan must be developed and briefed. This takes place in the transition step for the Marine Corps, or for the Army in the orders production phase. Each staff member and subordinate commander must understand his part, as well as the parts of all others.

Between the first step, mission analysis, and the final step, transition (or orders production phase), are the various creative and analytical COA steps. The COA matrix is designed to enable the JA to evaluate proposed COA for ROE supportability. It is not intended as a briefing tool, but rather a graphical organization of the JA's analysis. It lists along the top, or X-axis, authorizations for various force applications, like indirect fire, close air support or riot control agents. Analysis of the COA would render specified and implied tasks for these force applications which would be designated along the left side, or Y-axis (refer to Annex B for a sample COA matrix).

A simple "go" or "no go" would be entered into the box to signify ROE supportibility. To illustrate, assume a specified task for a hypothetical mission is suppression of enemy air defense (SEAD). An implied task would then be use of artillery fires in support of this SEAD mission. If the existing ROE restricts the use of unobserved indirect fires, the JA would enter "no go" in the box corresponding to that implied task for indirect fire. The JA would then discuss this restriction with the battle staff and commander, who must ultimately decide whether the inability to employ unobserved indirect fires renders the SEAD mission impossible to execute. A "go" or "no go" would then be entered for the specified task.

This matrix provides the JA a tool to organize and display judgments as to the ROE supportability of each specified and implied task. A synthesis of the displayed information leads to final conclusions and recommendations as to the ROE supportibility of the COA as a whole. This in turn prompts the commander to either seek modification to the ROE, or modify the specified or implied task.

The briefing matrix consists of two axes. Along the top, or X-axis, are the force application functions. These functions are broadly grouped into general categories of force application, and further subdivided into more specific combat and staff functions. They are intended to cover the range of possible combat functions that might be impacted by ROE, and therefore include the following:

- Maneuver:
  - Infantry (IN)
  - Armor (AR)
  - Anti-Tank (AT)
- Fire Support:
  - Artillery (ART)
  - Mortars (MRT)
  - Naval Gunfire Support (NGS)
- Air:
  - Close Air Support (CAS)
  - Attack Aviation (rotary) (ATT)
  - Air Superiority (Battlefield Air Interdiction) (AS)
  - Air Defense (AD)
- Mobility/Counter-Mobility:
  - Engineer (EN)
  - Chemical (CHEM)
  - Civilian Population Control (CPC)
- Intelligence:
  - Electronic Warfare (EW)
  - Information Warfare (IW)

Along the left side, or Y-axis, is a spectrum of ROE categories applicable to the combat functions. The matrix is designed to be read from top to bottom, conveying to the operators their permission and restrictions, how to modify them, and what existing measures, in the judgment of the JA, are fundamentally inconsistent with the existing mission, and therefore jeopardize the ability of the force to accomplish the mission (such as the inability to conduct unobserved indirect fires in support of a SEAD mission, which might be an essential aspect of setting the conditions for an air assault operation). If the JA believed that this authority would not be granted from higher headquarters, this issue would be "red flagged" as a potential showstopper.

The first row shows existing permission, or what the operator can do, and always includes self-defense. Based on the explicitly permissive nature of the most recent version of the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement (SROE),[77] published in January 2000, commanders should presume that any authority not restricted is permitted. Nonetheless, this row might be useful to reiterate important permissions, or to identify explicitly granted permissions. Most importantly, this row always highlights the inherent right of self-defense. The second row shows existing restraints, or limitations on force application authority.

The next three rows along the Y-axis provide the operator with an easy view of how to "get more." Anticipated requirements would show weapons, targets or materials that would be necessary or useful to the mission, but are not presently permitted. Approval level indicates how high up the chain of command a request must go to for grant of such an authority.

77. Chairman, Joint Chiefs of Staff Instr. 3121.01A, Standing Rules of Engagement (15 Jan. 2000) [hereinafter CJCS Instr. 3121.01A].

Anticipated rationale would summarize why that anticipated requirement is needed.

The sixth row provides an opportunity for the task force commander to highlight any limitation on existing ROE he chooses to impose, placing limits on subordinate commanders, such as requiring approval of the task force commander before use of RCA, even though the authority for such use may have been granted unconditionally by the CINC. This should reemphasize that commanders at every level may always limit force application authority they have been granted by higher levels.

Finally, the seventh row, or red zone, identifies any ROE issue fundamentally inconsistent with the existing mission, and therefore placing the ability of the force to accomplish the mission in jeopardy.

In the blocks formed from the columns of force application and the rows of ROE categories, JAs would input their interpretation of the ROE. For instance, under existing restraints for electronic warfare (EW), cross border jamming might be listed if the mission from higher headquarters so dictated. The JAs might then list cross border jamming as an anticipated requirement, after discussing deep air targets with the air officers. The level to which this request would have to go would be listed, as well as the deep air targets as a rationale. The task force commander might choose to restrict the jamming of certain civilian frequencies without his express authorization. This would be shown in the sixth row. Finally, if JAs felt that jamming frequencies used by local emergency response and hospital teams would violate the rules of war, they might list that in the final, red zone row.

Upon completing the matrix for all force application areas, JAs can reproduce it and project it at the staff meeting, touching upon important points or highlights verbally. The bulk of the information is transferred to the audience graphically by the matrix. Additional planning and briefing will be required as the mission evolves. The information input into the matrix can be color-coded to indicate a change in status. For instance, changes might be printed in red, issues remaining the same in green and new issues in blue.

There are three distinct advantages to the briefing matrix. Foremost, it provides a snapshot telling the operators what they can and cannot do regarding the ROE. The graphical presentation of this information allows the operators to digest it more quickly and more thoroughly than an oral or written recitation. It also provides JAs a vehicle to cogently present the information.

Another advantage is that the briefing matrix allows staff members to understand the ROE issues of functional areas other than their own. This cross-functional awareness enables staff members to work symbiotically. By understanding not only their own capabilities and limitations, but also those of other functional areas, staff officers can incorporate their colleague's restrictions and permission into their own plans. For instance, the air defense officer must fully appreciate the limits on fire support regarding unobserved indirect fire, in order to plan suppression of enemy air defense (SEAD) missions. The air officers must understand the limits on SEAD without effective fire suppression, and the maneuver officers must understand the limitations of air without SEAD.

The final advantage is that the briefing matrix provides a clear, systematic, analytical planning tool for JAs. Simply by completing the matrix in preparation for briefing, JAs are forced to contemplate the myriad issues that arise for each functional group, and organize their thoughts accordingly.

The proposed matrices are, of course, only models. Judge advocates may want to change them to suit the needs of their task force or their mission, as well as their personal tastes. The key point is that a systematic approach to ROE analysis, and a graphical presentation of ROE issues, are excellent methods for JAs to analyze and brief ROE in the demanding atmosphere of the deployed unit. The proposed matrices can be important tools in these efforts. Major Corn and Major Harper, USMC.

Annex A

ROE Briefing Matrix

Force Application

	MANEUVRE			FIRE SPT			AIR			AD	M/CM			INTEL		
	IN	ARM	AT	ART	MRT	NGS	CAS	ATT	AS	AD	ENG	CHEM	CVOP	EW	IW	PC
Existing Permission	← Self Defense →															
Existing Restraint																
Anticipated Requirements																
Approval Level																
Anticipated Rationale																
Implementation Limitations																
Red Zone																

Annex B

COA Matrix

COA ___	Authority for Direct Fire	Authority for Indirect Fire	Authority for CAS	Authority for Deep Ops	Authority for RCA	Authority for EW	Authority for SEAD
Specified							
1. ___							
2. ___							
3. ___							
Implied							
1. ___							
2. ___							
3. ___							
4. ___							
5. ___							

Note from the Field

Tapping Reserve Manpower Through the Implementation of the Judge Advocate Training And Association Program (JATAP)

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During the past several years, the Office of the Staff Judge Advocate (OSJA), XVIII Airborne Corps and Fort Bragg, and the 12th Legal Support Organization (LSO), established a formal mutual support relationship, which contributed to accomplishing both the Active Army (AA) and Reserve Component (RC) missions. This note describes one aspect of that AA-RC training association, involving the Claims Division, OSJA, and Team 3, 12th LSO, and the benefits accruing to both from this mutual support relationship.[1] The note also proposes ways that other units may combine the strengths of AA and RC judge advocates, thereby enhancing the RC training program and improving AA legal services.

United States Army Forces Command and Army National Guard Regulation 27-1 establishes the Judge Advocate Training and Association Program (JATAP)[2] and provides guidance for establishing training associations between AA SJAs and RC judge advocate general service organizations. Pursuant to the regulation, the 12th LSO developed a mission essential task list (METL) and a training memorandum of understanding (MOU) with the OSJA. Each team leader within the 12th LSO implemented the training MOU with their AA counterparts.

Implementing the JATAP is often hindered by geographical limitations such as the distance between the AA and RC units, as well as scheduling constraints, which generally require RC judge advocates to perform their weekend drills at times when the majority of the AA judge advocates are not present for duty. These geographical and scheduling obstacles typically limit AA-RC training to the RC two-week annual training period. The Claims Division and Team 3, 12th LSO, which is located in Greensboro, North Carolina, approximately ninety-five miles from Fort Bragg, faced both of those problems in carrying out the training MOU.

Both the OSJA and the 12th LSO recognized that once-a-year training was not the best way to implement the JATAP. However, they realized that through creativity and coordination, their mutual support relationship could be expanded and incorporated into monthly training throughout the year. This monthly training could foreseeably enhance communication and ultimately benefit both organizations.

To implement this monthly training, the OSJA and the 12th LSO examined how reservists on weekend drill could assist in accomplishing of the AA mission in a way that promoted the RC training program.[3] The 12th LSO METL was examined, and it was determined that claims services incorporated a number of tasks suitable for development of a training association. For example, the METL included such tasks as the investigation, review, and disposition of claims, preparation of reports for the U.S. Army Claims Service, preparation of litigation reports for the U.S. Army Litigation Division, and processing of claims in favor of the United States under the Federal Medical Care Recovery Act (MCRA).[4] These METL tasks corresponded with a significant portion of the Claims Division's work-load under the Federal Tort Claims Act (FTCA)[5] and the Military Claims Act (MCA).[6] Of note, claims work under the

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1. The 12th LSO has teams located throughout North and South Carolina and has training associations with the OSJA, XVIII Airborne Corps and the OSJA, Fort Jackson. For example, teams at Fort Bragg and Fort Jackson provide legal assistance to AA soldiers and their families during drill weekends. This note focuses only on the training association between the OSJA, XVIII Airborne Corps and Team 3, which is located in Greensboro, North Carolina.

2. *See* U.S. Army Forces Command/Army National Guard Regulation 27-1, Judge Advocate Training Association Program (JATAP) (15 June 1998). *See also* Policy Memorandum 00-3, Office of The Judge Advocate General, United States Army, subject: Training and Mission Support Between Active, Guard, and Reserve Judge Advocates (7 Sept. 1999); Policy Memorandum 98-3, Office of The Judge Advocate General, United States Army, subject: Integrated Training and Deployment Relationships Between Active, Guard, and Reserve Judge Advocates (12 Sept. 1997).

3. *See* Colonel Benjamin A. Sims & Lieutenant Colonel William O. Gentry, *Tapping Reserve Manpower through Training Programs*, Army Law., Sept. 1988, at 64-67 (discussing how Reservists, to include Individual Mobilization Augmentees and Individual Ready Reservists can assist in the accomplishment of the active duty claims mission).

4. 42 U.S.C.S. §§ 2651-2653 (LEXIS 2000).

FTCA often required an analysis of state tort law, and, in many instances, the RC judge advocates were more familiar with state law developments than newly assigned AA judge advocates who typically were not licensed in North Carolina. In recognition of this, the Claims Division and Team 3, 12th LSO, focused on the training association involving the METL tasks of tort claims investigation, review, and disposition, to include the preparation of reports for the U.S. Army Claims Service and Litigation Division.

To implement this training association on a monthly basis, the Claims Division forwarded tort claims to Team 3, 12th LSO, by facsimile and electronic mail, on the Thursday before drill weekend. Typically, on the Monday following drill weekend, the 12th LSO completed the analysis and provided a memorandum of law or other suitable report by electronic mail and facsimile. Additionally, the 12th LSO assisted in preparing litigation reports and research and memoranda in support of affirmative claims under the MCRA.[7] A key to the success of this program was the willingness of the Claims Division Chief and the AA claims judge advocates to plan ahead to ensure that pending tort claims were available for the 12th LSO during drill weekends. Without exception, during the past several years, the Claims Division's planning and coordinating made this support relationship work.

The support relationship has benefited the OSJA, and ultimately soldiers and their families, by providing additional skilled attorneys to process tort claims. In particular, the RC judge advocates working on the tort claims included two insurance defense attorneys, attorneys in private practice skilled in tort litigation in North Carolina state courts, and three assistant U.S. attorneys. Staffed by local attorneys who are familiar with North Carolina tort law, the 12th LSO provided an indispensable work product that addressed the nuances of state tort law. This ensured that meritorious claims were recognized and unsubstantiated claims were rejected. The 12th LSO attorneys drafted memoranda on the intricacies of North Carolina law involving negligent infliction of emotional distress, negligent entrustment, contributory negligence, causation, and contribution among joint tort feasors. These memoranda contributed to the Claims Division's ability to administer the FTCA and MCA in a manner that conserved federal funds by paying only claims that were meritorious in fact and under the law.

Reserve Component judge advocates also made themselves available throughout the month for consultation in the event that a tort claims issue arose requiring insight into North Carolina law. This included valuing claims, such as predicting how much a particular type of case was worth in terms of jury verdict valuations in state court. Additionally, 12th LSO attorneys assisted in claims investigations throughout North Carolina. This is especially significant since the claims area jurisdiction for the OSJA covers the entire state. This support relationship is especially helpful when a U.S. Army Reserve driver is involved in an accident within North Carolina, but far from Fort Bragg. By making themselves available to assist in these investigations, the RC judge advocates have extended the OSJA's reach throughout the state, thereby ensuring that investigations are done in a more timely manner, and contributing to a more just adjudication of claims based on complete factual information.

The 12th LSO prepared a deskbook on North Carolina tort law, which provides a convenient reference for new claims judge advocates on key North Carolina tort issues. The 12th LSO also collected past legal memoranda and created a brief bank which should facilitate adjudication of recurring-type claims. The brief bank has been placed on computer diskettes so that, as it is updated, it can be shared with the OSJA.

The JATAP support relationship has benefited the 12th LSO by providing realistic training in claims adjudication essential to the performance of its wartime mission. Office of the Staff Judge Advocate claims judge advocates also benefit through participation in the 12th LSO's training program, for example, by giving instruction on claims procedures and the FTCA during weekend drills. The training has been continuous throughout the year and 12th LSO attorneys have received constructive feedback from the Claims Division using the RC Training Assessment Model (TAM),[8] thereby enhancing their abilities and support to the OSJA. This training is instrumental to the training readiness of the 12th LSO, and has ensured that, in the event of mobilization, 12th LSO judge advocates and enlisted soldiers are prepared to perform duties at the OSJA, XVIII Airborne Corps.[9]

A collateral but very important by-product of establishing a monthly training association, has been to educate the RC judge advocates regarding the challenges faced by AA judge advocates. This in turn has allowed the RC judge advocates to expand their working relationships to assist in other areas, such as administrative law, where RC judge advocates have reviewed hold harmless and indemnification agreements for compliance with state law. Additionally, increased contact

5. 28 U.S.C.S. §§ 2671-2680 (LEXIS 2000).

6. 10 U.S.C.S. § 2733 (LEXIS 2000).

7. *Id.* §§ 2651-2653.

8. United States Army Forces Command, Reg. 220-3, Reserve Component Training Assessment (7 Apr. 2000). Unit training is evaluated by the AA SJA using FORSCOM Form 1049-R, Training Assessment Model (TAM). This regulation may be accessed at <http://www.forscom.army.mil/pubs/Pubs/Reg/020220-3.doc>.

9. Presumably, this training also prepares the 12th LSO to deploy and establish a claims office in support of a division or corps.

between AA and RC judge advocates has facilitated closer working relationships in criminal law and other areas.

The 12th LSO and the OSJA look forward to building on their mutual support relationship during the upcoming years, and are prepared to share their ideas with other judge advocates interested in developing similar relationships. Building a mutual support relationship is a "win-win" proposition that only requires creativity and coordination between AA and RC judge advocates. The benefits for both Active and Reserve judge advocates are well worth the effort.

USALSA Report

United States Army Legal Services Agency

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 7, number 5, is reproduced in part below.

Army Issues Interim Guidance on CERCLA Five-Year Reviews

On 5 April 2000, the Army issued interim guidance[1] on how to conduct five-year reviews in accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[2] Both CERCLA and its implementing regulations, the National Contingency Plan (NCP), require a periodic review of cleanup remedies that limit a property's use or access.[3] Because the Department of Defense is the lead agent in cleanup of its sites,[4] each of the services is required to conduct five-year reviews when appropriate. The Army has compiled interim guidance to assist with this process. This guidance would come into play at sites where the remedial action specified in the Record of Decision (ROD) or applicable CERCLA decision document would allow hazardous substances, pollutants or contaminants to remain in place above levels that would allow for unlimited use or unrestricted exposure. The Army's interim guidance is applicable to active Army installations and Base Realignment and Closure (BRAC) installations, as well as National Priorities List (NPL) and non-NPL sites.[5] The guidance ensures that five-year reviews are conducted in a timely, consistent manner. The new guidance also provides explicit instructions regarding the programming of funds to provide for the expenses of five-year reviews.

Why Do Five-Year Reviews?

The purpose of a CERCLA five-year review is to ensure the protection of human health and the environment.[6] Such a review provides the Army with the information it needs to confirm that its CERCLA remedy is functioning as planned. Generally, the review focuses on the adequacy of active treatment remedies, long-term monitoring, and the imposition of land use controls. One of the main objectives of this process is to evaluate whether cleanup levels remain protective. If the remedy is not protective or fully functional, the Army, as lead agent, is empowered to take steps to deal with the situation.[7] The Army may also choose to stop doing five-year reviews when they are no longer needed, so the requirements for termination are set forth in the new policy.

What Triggers a Five-Year Review?

Under CERCLA, the five-year review requirement is set into motion when a decision maker selects a remedial action that "results in any hazardous substances, pollutants, or contaminants remaining at the site . . . ."[8] The NCP is more specific. It states that a five-year review is triggered if the selected remedial action will allow hazardous substances, pollutants, or contaminants to remain at the site "above levels that allow for unlimited use and unrestricted exposure . . . ."[9] This conclusion would be incorporated into the site's ROD or applicable decision document and the date upon which it was finalized will become the starting time for projecting a five-year review.

Focus of the Five-Year Review

Though complex remedies may require specific approaches, the reviewer will generally try to answer the following questions:

1. Memorandum, Assistant Chief of Staff for Installation Management, SFIM-AEC-ERO, to All MACOMs, subject: Interim Army Guidance for Conducting Five-year Reviews, encl. (5 Apr. 2000). This Army interim guidance sometimes tracks the Environmental Protection Agency's (EPA) interim policy on five-year reviews. *See* Environmental Protection Agency, Office of Solide Waste and Emergency Response (OSWER), Comprehensive Five-Year Review Guidance (Oct. 1999).

2. 42 U.S.C.S. § 9601 (LEXIS 2000).

3. *Id.* § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii) (1999).

4. 42 U.S.C.S. § 9604(a), (b); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

5. Note that five-year reviews on active and BRAC sites will involve different funding sources.

6. 42 U.S.C.S. § 9621(c).

7. *See generally id.* §§ 9604(a), (b), (e), 9606(a), 9620.

8. *Id.* § 9621(c).

(1) Is the remedy functioning as intended?[10]

(2) Are the assumptions used to select the remedy still valid?

(3) Has new information arisen that would cause the reviewer to question the protectiveness of the remedy?

(4) Does the remedy remain cost-effective?[11]

What Data Should be in the Five-Year Review?

In a nutshell, the five-year review report should summarize technical data, laws and regulations (applicable and relevant and appropriate requirements), site-visit observations, reports on treatment-systems operations and determinations on the effectiveness of land use controls. The review should conclude with a determination stating whether or not the remedy is protective of human health and the environment. Should the reviewer determine that modifications are needed to improve remedy operation, the report should outline the proposed changes and work schedules.

Regulator Review and Comment

An important element of the Army interim guidance is its procedure allowing for review and comment by the Environmental Protection Agency (EPA) and state regulators. This provision is intended to resolve confusion over the role played by regulators in the course of a five-year review at an Army site. One source of this confusion is that the EPA at NPL sites may be granted a concurrence role, via a Federal Facilities Agreement (FFA), over remedies and subsequent remedy modifications. If such concurrence authority is granted by an FFA (an interagency agreement), the EPA could possess a greater level of authority to accept or decline the conclusions stated in a five-year review. Note, though, that FFA terms may differ, so this extension of EPA authority is not automatically granted. Also, FFAs are limited to NPL sites–at non-NPL sites, the EPA lacks the authority to concur in five-year reviews.[12] Likewise, state regulators are not granted concurrence authority over a lead agent's remedy determination.[13] However, information provided by both the EPA and state regulators can be very beneficial when compiling a five-year review, so the Army's interim policy provides for such input.

Making the Procedure Regular

The new guidance sets forth specific provisions on the funding and staffing of five-year reviews, while outlining the scope of the document. This will provide for greater regularity among reports. The interim guidance states a preference for having active installations prepare their own five-year reviews, while the major command (MACOM) would determine the executor for BRAC sites. The U.S. Army Corps of Engineers is a good resource to consider when selecting an executor to conduct the reviews. Once the draft report is complete, the U.S. Army Environmental Center (USAEC) may be called upon to review the document. The USAEC will review the findings of five-year reviews conducted at sites where the remedy's operation and maintenance requirements or long-term monitoring costs exceed $250,000 a year. When any required USAEC's concurrence is received, the installation commander (or the MACOM designee, in the case of BRAC facilities) will forward the report to the EPA and state regulators for their review and comment. In cases where the EPA or state regulators object to the report's findings, the five-year review executor will work with USAEC and the MACOM to prepare a coordinated response.

Community Involvement

The installation or MACOM designee will place a copy of the final five-year review in the administrative record and information repository. If a site has a Restoration Advisory Board (RAB) or Technical Review Committee, these groups should be advised of plans for a five-year review. Once the review is complete, these groups should be informed of the scope of data considered and the conclusions reached. For sites where there is no active RAB, public notification can be made by newspaper publication. Also, if the five-year review requires a modi-

9. 40 C.F.R. § 300.430(f)(4)(ii) (2000).

10. Here, the ROD or other decision document would be used as the primary source for determining the scope and intent of the remedy.

11. This requirement is intended to ensure that the Army's environmental funds are being spent appropriately.

12. The EPA has claimed that CERCLA § 9620(e)(4)(A) (as amended by Superfund Amendment and Reauthorization Act (SARA)) gives them the right to select a remedial action at NPL sites when the EPA administrator and the lead agent are unable to agree upon the appropriate remedial action. 42 U.S.C.S. § 9601-9675 (LEXIS 2000). However, CERCLA § 9621 states that it is the President who decides cleanup remedies. The President's decision-making authority was delegated to DOD and, subsequently, to the Army. *See* Exec. Order 12,580, 52 Fed. Reg. 2923 (1987). Accordingly, the EPA does not possess a unilateral right to determine the outcome of a five-year review, unless an installation's FFA specifically provides for such concurrence. *See also* OSWER DIR. 9355.7-03B-P, COMPREHENSIVE FIVE-YEAR REVIEW GUIDANCE, sec. 2.5.4 (Oct. 1999).

13. 40 C.F.R. § 9620(a)(4). This CERCLA provision distinguishes between NPL and non-NPL sites. The EPA has authority to deal with NPL sites. On NPL sites, the FFA may grant the EPA "concurrence authority" over five-year review findings. However, state regulators deal with non-NPL sites. These cleanups do not involve FFAs, so there would be no standard agreement to provide state regulators with a concurrence role.

fication to the ROD, the NCP's community participation requirements would come into play.[14] Copies of the Army interim guidance will be posted on the Web in the near future. Ms. Barfield.

The Superfund Recycling Equity Act of 1999

As part of the appropriations bill for Fiscal Year 2000, the Congress passed legislation providing a potential defense to arranger liability under the CERCLA. This legislation, entitled the Superfund Recycling Equity Act of 1999,[15] seeks to exempt from the CERCLA liability those who can demonstrate that they arranged for *recycling* of certain materials, as opposed to arranging for disposal of hazardous substances. While federal agencies may be able to avail themselves of the protection of this law, they will certainly will have to expand their investigation of Superfund cases to include new areas of inquiry.

The new law provides that a person who arranges for the recycling of a recyclable material is not liable under sections 107(a)(3) or (a)(4), as long as certain requirements are met. "Recyclable material" is defined as scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, scrap batteries (including lead-acid and spent nickel-cadmium batteries). The definition of recyclable material also includes "minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap . . . ."[16]

For the exemption from liability to apply, the person seeking to claim the recycling exemption must establish *all* of the following requirements by a preponderance of the evidence:

> (1) The recyclable material met a commercial specification grade.
>
> (2) A market existed for the recyclable material.
>
> (3) A substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new salable product.
>
> (4) The recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.
>
> (5) For transactions occurring ninety days or more after the date of enactment of this section, the person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter in this section referred to as a "consuming facility") was in compliance with substantive (not procedural or administrative) provisions of any federal, state, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.[17]

For purposes of subsection (5), "reasonable care" includes (but is not limited to) the following criteria:

> (A) the price paid in the recycling transaction;
>
> (B) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material; and
>
> (C) the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive provision.[18]

14. 40 C.F.R. § 300.435(c)(2)(ii).

15. Act of Nov. 29, 1999, Pub. L. No. 106-113 (codified at 42 U.S.C.S. § 9627 (LEXIS 2000)).

16. 42 U.S.C.S. § 9627(b).

17. *Id.* § 9627(c).

For the scrap metal and scrap batteries categories of recyclable materials, there are additional requirements that must be met.[19]

The new law also contains a provision that excludes some transactions from the exemption for recycling. The law states that the exemption does not apply if:

> (A) the person had an objectively reasonable basis to believe at the time of the recycling transaction—
>
> (i) that the recyclable material would not be recycled;
>
> (ii) that the recyclable material would be burned as fuel, or for energy recovery or incineration; or
>
> (iii) for transactions occurring before ninety days after the date of the enactment of this section [enacted 29 November 1999], that the consuming facility was not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the recyclable material;
>
> (B) the person had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing for recycling; or
>
> (C) the person failed to exercise reasonable care with respect to the management and handling of the recyclable material (including adhering to customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances).[20]

The provision then discusses what is an "objectively reasonable basis for belief," including, but not limited to, the size of the person's business, customary industry practices at the time the transaction occurred, the price paid for the material, and the ability of the person to determine the handling activities of the facility to whom it sold the material.[21]

The new law does not apply to concluded administrative or judicial actions, or to "any pending action initiated by the United States prior to enactment of this section."[22] Interestingly, the law also provides that if a PRP attempts to bring a contribution action against a person, but the person against whom the action is brought successfully uses this exemption, the PRP bringing the action will be liable for the successful party's attorney's fees.[23]

This new law raises a whole host of new issues. It creates another layer of factual disputes, allowing the parties to argue about each requirement for the application of the exemption, such as "reasonable care" in § 9627(c)(6), and each element of the exclusions from the exemption, such as "objectively reasonable belief" and "reasonable care" for purposes of (f). Indeed, it is not difficult to conceive of a situation where the parties would argue whether a certain substance constitutes "minor amounts of material incident to or adhering to the scrap material as a result of is normal and customary use prior to becoming scrap" therefore calling into question whether the definition of "recyclable material" has been met in the first place.

Complicating the resolution of these issues is the fairly cursory legislative history associated with this Act. There have been no congressional hearings concerning this provision, and no congressional reports. The legislative history consists mostly of a statement from Senators Daschle and Lott concerning the provision that was inserted into the congressional record.[24]

Because the legislative history is relatively sparse, practitioners will be looking to the courts for assistance in interpreting the provisions of the Act. One such decision has been handed down addressing the section of the law concerning pending and concluded actions. As indicated above, 42 U.S.C. § 9627(i) of the new law by its terms specifically does not apply to completed judicial or administrative actions, and to judicial actions commenced by the United States. In *United States v. Atlas Lederer Co.*,[25] the district court had the opportunity to interpret this

18. *Id.* § 9627(c)(6).

19. *See id.* § 9627(d), (e).

20. *Id.* § 9627(f)(1).

21. *Id.* § 9627(f)(2).

22. *Id.* § 9627(i).

23. *Id.* § 9627(j).

24. 145 Cong. Rec. S15048 (daily ed. Nov. 19, 1999) (statement of Senators Lott and Daschle).

25. 97 F. Supp. 2d 830 (S.D. Ohio 2000).

provision. In that case, the United States had commenced an action against a number of parties, including Livingston & Co. (Livingston). Livingston was also named in a third party complaint brought by a group of settling PRPs.[26] Livingston, which had previously lost a summary judgment motion, asked the court to reconsider its ruling in light of the Superfund Recycling Equity Act of 1999.[27] Livingston argued that the new Act should allow judgment in its favor both in the original action filed by the United States, and in the third party action filed by the settling PRPs. Livingston admitted that the plain language of 42 U.S.C. § 9627(i) would not allow judgment in its favor with regard to the action filed by the United States, but argued that the "spirit and intent" of the legislation called for such a result.[28] The court disagreed, finding that the plain language of the new statute "precludes its applicability." The court acknowledged that while the new law may affect the viability of exisitng case law concerning the useful product defense, the previous decision overruling Livingston's motion for summary judgment was properly based on legal precedent in effect at the time the ruling was made, eight years before the new law was enacted.[29]

The second issue the court addressed was the application of the new law to the third party action. Livingston argued that the third party claim was a separate action, not initiated by the United States, and therefore the new law would apply.[30]

The court noted the Senators' remarks in the Congressional Record that seemed to support Livingston's argument: "[f]or purposes of this section, Congress intends that any third party action or joinder of defendants, brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States."[31] The court, however, did not find these remarks to be persuasive. The court noted that these remarks were simply read into the record without an indication of their source, and stated that it "has found not true legislative history with respect to [42 U.S.C.S. § 9627(i)] which would support [the Senators'] interpretation of the provision." The court found that the remarks in the Congressional Record, and Livingston's argument, failed to make the proper distinction between a "claim" and an "action." An "action" can be made up of numerous "claims," including the complaint, cross-claims, counterclaims, and third-party claims. Since all of the claims are part of the same judicial action, and that action was originally brought by the United States, the provisions of the Act do not apply.[32]

The court held that the ongoing case "as a whole" was a judicial action initiated by the United States and therefore fell outside the new law.[33] To hold otherwise would allow the United States to pursue the settling PRPs while prohibiting that group from pusuing third party claims against other PRPs. The court believed that allowing this result would punish the settling PRPs for accepting responsibility and settling with the government.[34]

This issue and many others associated with the new law will be the subject of many court decisions in the coming years. At a minimum, the law creates another area of inquiry for federal agencies as they investigate their potential liability for clean-up costs at sites around the country. Major Romans.

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26. *Id.* at 831, n.2.

27. *Id.* at 831.

28. *Id.*

29. *Id.* at 832.

30. *Id.*

31. 145 Cong. Rec. S15050 (daily ed. Nov. 19, 1999) (statement of Senators Lott and Daschle).

32. *Atlas Ledered Co.*, 97 F. Supp. 2d at 833.

33. *Id.*

34. *Id.*

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

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	1st Court Reporting Symposium (512-71DC6).
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).
18-22 September	47th Legal Assistance Course (5F-F23).
19 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
25-26 September	31st Methods of Instruction Course (Phase II) (5F-F70).

October 2000

2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
2 October-21 November	3d Court Reporter Course (512-71DC5).
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).
27 November-1 December	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).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January- 27 February	4th Court Reporter Course (512-71DC5).
9 January- 2 February	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9 January- 2 February	2001 PACOM Tax CLE (5F-F28P).
16-19 January	2001 Hawaii Tax CLE (5F-F28H).
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January- 2 February	2001 JOAC (Phase II) (5F-F55).
29 January- 2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

2 February- 6 April	154th Basic Officer Course (Phase II, Fort Lee) (5-27-C20).
5-9 February	75th Law of War Workshop (5F-F42).
12-16 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26 February- 2 March	59th Fiscal Law Course (5F-F12).
26 February- 9 March	35th Operational Law Seminar (5F-F47).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
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).
30 April- 11 May	146th Contract Attorneys Course (5F-F10).

April 2001

1-5 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
2-6 April	25th Admin Law for Military Installations Course (5F-F24).
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).

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
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).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Professional Recruiting Training Seminar
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.
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2001

2-4 July	Professional Recruiting Training Seminar.
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course.
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

5-7 September	2d Court Reporting Symposium (512-71DC6).
5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Basic Officer Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annaul CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
12 October-21 December	156th Basic Officer Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22).

26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Basic Officer Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16 -18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Basic Officer Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Advanced Contract Law Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-24 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Basic Officer Course (Phase I, Fort Lee) (5-27-C20).

10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Basic Officer Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course.
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 -16 August	172d Senior Officers Legal Orientation Course (5F-F1).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F-34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

8 Sept. ICLE	U.S. Supreme Court Update Sheraton Colony Square Hotel Atlanta, Georgia
8 Sept. ICLE	Medicine for Lawyers Marriott Gwinnett Place Hotel Atlanta, Georgia
22 Sept. ICLE	Administrative Law Cobb Galleria Centre Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually

State	Deadline
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the March 2000 issue of *The Army Lawyer.*

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

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***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. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRAINING SITE AND HOST UNIT	AC GO/RC GO	SUBJECT	ACTION OFFICER
9-10 Sep	Pittsburgh, PA 99th RSC		Administrative Law; Contract Law; Community Support Activities; Updates in Legal Assistance and demonstration of DL Wills; DOD Fraternization	POC: 1LT Ivor Jorgensen (724) 693-2151, 99th RSC ALT: LTC Don Taylor (724) 693-2152 Donald.Taylor2@usarc-emh2.army.mil
16-17 Sep	Park City, UT UTARNG		Western States JAGC Senior Leadership Workshop	POC: COL Mike Christensen (801) 366-6861
28-29 Oct	West Point, NY NYARNG		Eastern States JAGC Senior Leadership Workshop	POC: COL Randall Eng (718) 520-2846
11-12 Nov	Bloomington, MN 214th LSO (88th RSC)		Administrative Law; Contract Law	POC: Todd Corbo (612) 596-4753 todd.corbo@us.pwcglobal.com
18-19 Nov	Kings Point, NY 77th RSC/4th LSO		Criminal Law; Operational Law	POC: MAJ Terri O'Brien and CPT Sietz, 77th RSC ObrienT@usarc-emh2.army.mil POC: LTC Ralph M.C. Sabatino (718) 222-2301, 4th LSO
20-21 Nov	San Diego, CA 78th LSO		LSO Commander's Workshop	POC: COL Daniel Allemeier drallemeier@hrl.com
6-7 Jan	Long Beach, CA 63rd RSC, 78th LSO		Criminal Law; International Law	POC: CPT Paul McBride (714) 229-3700 Sandiegolaw@worldnet.att.net
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU		Civil/Military Operations; Administrative Law; Contract Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO		Criminal Law; International Law	POC: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com ALT: MAJ James Schaefer (513) 946-3018 jschaefe@prosecutor.hamilton-co.org
10-11 Jan	Seattle, WA 70th RSC, 6th MSO		Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG		Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Franscisco, CA 63rd RSC, 75th LSO		RC JAG Readiness (SRP, SSCRA, Operations Law	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com

17-18 Mar	Chicago, IL 91st LSO		Criminal Law; Administrative and Civil Law	POC: MAJ TomGauza Gauzatom@aol.com (312) 886-0480
24-25 Mar	Charleston, SC 12th LSO		Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; 1-hour Professional Responsiblity	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	
28-29 Apr	Newport, RI 94th RSC		Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL		Administrative and Civil Law; Environmental Law; Contract Law	POC: CPT Lance W. VonAh (205) 795-1511 Lance.VonAh@usarc-emh2.army.mil ALT: MAJ John Gavin (205) 795-1512 John.Gavin@usarc-emh2.army.mil
19-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO		Legal Assistance; Military Justice	POC: MAJ J. T. Parker (800) 892-7266, ext. 1397

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available Through DTIC, see the March 2000 issue of *The Army Lawyer*.

3. Regulations and Pamphlets

For detailed information, see the March 2000 issue of *The Army Lawyer*.

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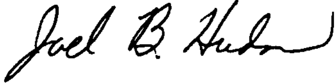

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